
2017 02 14

2016 WCB Legislative Review Committee
PO Box 1296
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LEGISLATION REVIEW COMMENTS

Dear Members of the 2016 WCB Legislative Review Committee:

Thank you for the opportunity to provide comments on *The Manitoba Worker's Compensation Act* (W200). Manitoba Hydro supports the intent of the principles of the legislation and policies to address the equitable treatment of an injured worker thereby minimizing hardship to these individuals due to a work related injury. Comments provided below are to address *The Workers Compensation Act* Legislative Review Committee 2016 discussion paper and comments to improve and enhance how *The Act* can be applied in the future. There are 11 issues related to legislation and policy implementation that Manitoba Hydro is requesting that the Review Committee consider. They are:

1. Absence of reimbursement of costs for Self-Insured Employers
2. Worker(sic) must file within one year
3. Collateral Benefits (Group Insurance Benefits) Sections 41(2) and 43(5) of *The Act*
4. Establishing a Maximum Assessable Earnings Level (Policy 44.80.10.40 – Net Average Earnings)
5. Calculation of Average Earnings (Policy 44.80.10.10 Average Earnings)
6. Time Period Limitations for Filing Claims / Appeals
7. Employer's Premises (Section 111(1) of *The Act*)
8. Relief from Administrative Fees for Prevention Programs (Sections 54.1(1), 54.1(2) , 54.1(2.1), and 54.1(3) of *The Act*)
9. WCB Manitoba's Existing Funding Model (Section 76.2(3) of *The Act*)
10. Provision of medical aid (Section 27 of *The Act*)
11. Duration of Wage Loss Benefits- Retirement Age of a Worker (Section 39(2) of *The Act*)

1. Reimbursement of Costs for Self-Insured Employers:

Per Sections 39 and 109 of *The Act* and WCB Policy 35.40.50 (*Overpayment of Benefits*), it has been noted that "overpayments are included as a claims cost". Overpayment recoveries are credited to the claims costs of the applicable employer. However, any overpayments not pursued by the Board for recovery are written off (bad debt). The list of written off items includes, but is not limited to,

adjudicative reversals or reconsiderations by the WCB, decisions from the Appeals Commission, administrative errors by the WCB, overpayments occurring more than three years prior to discovery by WCB, medical costs (treatments, travel, etc.), and so forth. These costs are accrued and charged to the individual claims listed as overpayment. This administrative practice creates a disadvantage to employers in Manitoba, especially considering that in other Canadian Provinces, there are remedies and practices to remove overpayments from Self-Insured Employer accounts. In BC and Alberta, which represent both Deposit accounts and Assessment-based accounts (Alberta), medical and investigative costs that are incurred on claims that are ultimately not accepted are removed from an employer's account. There is also no penalty or relief for adjudicator error on claims suggesting that errors by the Board come with no accountability. In Ontario, reimbursement of costs is provided to self insured user groups as a part of their operational programming. To establish an equitable application of *The Act*, reimbursement of costs for Self-Insured Employers needs to be implemented.

2. Worker(sic) must file within one year

Under section 19 (2) of *The Act*, a worker within one year after the day upon which the injury occurred must file with WCB. Consideration should be given to shorten the worker injury report period from one year to 30 days, with the exception being occupational diseases due to their latency periods. If the employer under 18 (1) has five business days to complete a report, then similar guidelines should be applied to a worker. One could argue that a worker would not require a full year to determine if a physical injury occurred. The worker reporting period should be shortened to match technology advances, intake health care availability, and the variety of options a worker has to access health care in 2017.

3. Collateral Benefits (Group Insurance Benefits) Sections 41(2) and 43(5) of *The Act*

The Group Life Insurance Regulation 187/2005 and Permanent Partial Impairment Awards was signed into force on November 30, 2005, but had not been regularly/consistently applied. In 2013, WCB informed employers that a project was implemented which provided for claims dating back to 1992 to be reviewed for a 100% PPI award in cases of a terminal injury. Firms which have had claims identified as potentially being eligible for the PPI award were notified via letter. Letters on individual claims were sent to employers when a PPI award was determined to be payable. At that time, a request by Self Insured Users was sent on August 30, 2013 asking the Board to review the practice of stacking benefits and clause wording. The Self Insured Users received a response on November 19, 2014 stating that "with respect to situations where both WCB fatality/death benefits and WCB group life benefits are payable, the Board noted that the potential to provide both these types of benefits is specifically contemplated in the regulations clause stating that the group life benefit applies in all fatalities 'however caused'." With all due respect, there is no cross-reference to section 29 of the *Act*. Clearly, the Group Life Insurance Plan section was created to fill a perceived void where, under specified circumstances, financial hardship may fall upon certain individuals and/or their families who are not in receipt of employer-worker shared benefits. This enabling regulation is inconsistent with the Board's stance on collateral benefits.

WCB had agreed with this position in a letter dated November 19, 2014 that the current provision creates a disparity in benefit entitlement but suggest that subsection 43(5) of the *Act*, which enabled the creation of Manitoba Regulation 187/2005 supports the two tiered system currently in place. Manitoba Regulation 187/2005 creates the very real possibility of inconsistent compensation benefits being provided to the families of fatally injured workers. It is our intent to have equality in

the benefits being granted by the Board and the current wording, does not allow for same. Where there is a worker-employer benefit plan this section should not be applied to companies who offer this benefit.

4. Establishing a Maximum Assessable Earnings Level (Sections 46 (1) & (2) and Policy 44.80.10.40 – Net Average Earnings)

At present Manitoba is the only Province without a maximum assessable earning level on Workers' earnings covered by WCB. In some cases the lack of a cap removes the incentive for focus on returning to work by a worker or in other cases places an injured worker in a better financial position than an uninjured worker due to the tax free status of WCB salary monies. WCB Manitoba should be compensating Workers in an equitable fashion and be consistent with maximum assessable earnings levels across Canada. The table below outlines the maximum assessable/insurance earnings and one can clearly see Manitoba outpaces all other jurisdictions. The Review Committee should recommend setting a salary cap in order to fairly maintain the Workers' Compensation system for both workers and employers in Manitoba.

Maximum Assessable / Insurable Earnings¹

The table below lists the maximum assessable / insurable earnings for each province and territory for the latest 3 years available. Some values are preliminary and subject to change.

	2015	2016	2017 (announced)
Newfoundland and Labrador	\$61,615	\$62,540	\$63,420
Prince Edward Island	\$52,100	\$52,200	\$52,800
Nova Scotia	\$56,800	\$58,200	\$59,300
New Brunswick	\$60,900	\$61,800	NA
Québec	\$70,000	\$71,500	\$72,500
Ontario	\$85,200	\$88,000	\$88,500
Manitoba	\$121,000	\$125,000	\$127,000*Note
Saskatchewan	\$65,130	\$69,242	\$76,086
Alberta	\$95,300	\$98,700	\$98,700
British Columbia	\$78,600	\$80,600	NA
Yukon	\$84,837	\$84,837	\$85,601
Northwest Territories and Nunavut	\$86,000	\$88,600	\$90,600

¹ *Maximum Assessable / Insurable Earnings*, AWCBC.org. http://awcbc.org/?page_id=599 (Accessed February 6/17). Note* The amount that employers report, per worker, is subject to a cap or maximum assessable earnings level. Employers are not charged a premium on the portion of a worker's earnings that exceeds the maximum assessable earnings level. NOTE: Wage loss benefits payable to injured workers are not limited by the maximum assessable earnings level. <https://www.wcb.mb.ca/maximum-assessable-payroll> (accessed Feb. 14/17)

5. Calculation of Average Earnings (Policy 44.80.10.10 Average Earnings and Section 40(3) of *The Act*)

Average earnings should have a special provision put in place that would consider changes in economic circumstances to reflect actual earning capacity. It is not uncommon for people to work one year in an overtime situation, a location which has incentives i.e. northern Manitoba, etc. which make their average earnings in a previous year higher. Should they change their employment location or hours, the previous year should not be brought forward for consideration since that would not be a true reflection of their earnings. The reverse can also be true where they leave a lower paying position and may be making more in the current year. WCB over-compensates workers who have irregular earning capacity due to their employment circumstances i.e. location bonuses, overtime add-ons etc. Per Policy 44.80.10.10 *Average Earnings*, the calculation methodology to determine average earnings "will *always* be the one that best represents the Workers' actual loss of earnings". Further more "an average earnings review occurs whenever the WCB recalculates a Workers' average earnings", including instances where "a) the Employer or the Worker has indicated an irregular earnings pattern on his or her accident report form; or b) information provided to the WCB indicates an irregular earnings pattern. Adjustments arising from a) or b) are retroactive to the time of accident if they result in an increase and effective at 13 weeks if they result in a decrease in the Worker's average earnings."

WCB uses the worker's last pay stub prior to the injury date when a worker is not guaranteed a set amount of hours per week (with the exception of overtime). The amount is then reviewed at the 13 week point, and may be reduced, to reflect the worker's average earnings, based on the prior 12 months or calendar earnings (which may also be based on irregular earning capacity). This practice can over-compensate workers, especially when payroll records have been provided to WCB proving that they have not sustained a similar earning capacity over the last 12 months or calendar year. Using only one previous pay period is not an accurate reflection of average earnings. The most effective solution is to have documented average annual earnings used from the onset of the claim.

6. Time Period Limitations for Filing Claims / Appeals

Pursuant to sections 19.2, 60.1 (1), 60.1(2),60 (3),60.1(3), and 109 of *The Act*, for the Appeal (reporting) process, there is a need for a time limit to be set on rendering decisions and when appeals can be launched. Many provinces have a limited time period which varies from 30 days in BC, 6 months in Ontario and 1 year in Alberta for external reviews (e.g. Appeal Commission). Manitoba is the only province without a specified time limit for appeals per the Association of Workers' Compensation Boards of Canada (table below)². Similar time limits for internal review (Review Office) also need to be set.

² *External Appeal Body, Time Limits*. AWCBC.org.

http://awcbc.org/wp-content/uploads/2014/02/External_Appeal_Body.pdf (Accessed Feb. 10/17).

Time Limits

The following table outlines some of the time limits for appeals to external appeal bodies.

Time Limits (# of days)	NL	PE	NS	NB ¹	QC	ON	MB	SK ²	AB	BC	YT	NT/NU
Time limit for client to appeal previous decision?	30 days	30 days	30 days	'	10/45 ³⁰	Yes ³¹	No	N/A ¹⁰	1 year	30 days ³²	24 months	3 years
Time limit for panel to make decision? (days)	60 days	90 days	60 days	'	90/275 ³³	Yes ³⁴	60 days ³⁵	-	N/A	180 days	45 days	90 days

With no time limit on the current appeal process, and claims with long time lines, this does not permit anyone in the appeal process to be working with current relevant information since many of the health care providers and employer representatives may have changed with older claims. This leads to expensive adjudication and information collection on claims that are not only outside of the Workers' Compensation Act, but are also difficult to adjudicate based on time delays, and present an unfair disadvantage to the employer based on an inability to conduct a fair and objective investigation. In addition, employers should have file access for appeal purposes including requests for reconsideration to initial decision maker and any new information that comes into the Board until a final decision is made. When a worker appeals to the adjudicator, the employer is not entitled to the file unless the review is held at the Review Office level. As well, a formal appeal may be initiated by the worker but it is sent back to the adjudicator denying the employer file access in contravention of laws of natural justice. Any information that comes into the possession of the Review Office should be shared with all parties since the Board is to represent both parties objectively.

Adoption of a time limit for appeals standardized to other Canadian jurisdictions and access to current claim information would be creating an equitable system for all parties. As with the delayed reporting of claims, an unlimited time frame for filing appeals more often than not places the employer at a disadvantage compared to workers, as employers must attempt to collect information and investigate claims which can deal with issues occurring years into the past.

7. Employer's Premises (Section 111(1) of *The Act*)

Employer's premise has too broad a definition. Employer premises should be limited to areas under the direct care and control of employer or hazard caused by the employer. Specifically places like commercial airlines or on a plane, in a hotel room at night etc. remove a worker from direct care and control of an employer's premise and place the onus on an employer to police a worker who could be off site in various locations.

As an example, on an aircraft, a worker would be in the care and control of the pilot and crew since accountability for safety falls first and foremost to the airline and its flight and ground crews. This is outlined extensively in Canadian Aviation regulations 2012-1, wherein it discusses the responsibilities of all airline personnel — including but not limited to the Operations Manager, the Chief Pilot and the Pilot-in Command, and places both operational control and day-to-day conduct of flight operations on the airline staff. An employer would have no control of a worker's actions on the aircraft since the worker would be under the care and control of the air crew. It would be unreasonable to assess responsibility to the employer in this case if an incident happened aboard an aircraft while on the ground or in the air.

8. Relief from Administrative Fees for Prevention Programs (Sections 54.1(1), 54.1(2), 54.1(2.1), and 54.1(3) of *The Act*)

Manitoba Hydro has a well developed, implemented, proven, and audited Safety and Health programs. The application of charges for the services provided by SafeWork Manitoba for prevention activities seems inappropriate since Manitoba Hydro has contributed much of its own resources, programming, and consultative expertise to assist SafeWork Manitoba in program development. Employers with well developed safety and health systems should be exempt from payments to preventative efforts when they meet the Safe Work Certification. To pay administrative fees for Safe Work Certification is a duplication of costs for employers in their operational programs. Cost relief for companies who exhibit programs that meet the Safe Work Certification should be implemented by WCB.

9. WCB Manitoba's Existing Funding Model (Section 76.2(3) of *The Act*)

Manitoba's target funding level for the Workers' Compensation Board is 130%. Manitoba Hydro like other self insured users has noted that the funding level is much higher than 130%, which was confirmed in the WCB's *2015 Annual Report*, with 2014 Funded Ratio being 136% and 2015 being 143.3%³.

In addition to our concern regarding the WCB's Funding Ratio, we have also identified an alarming trend with respect to the administration rates charged to employers, which have been steadily rising due to ever-increasing WCB operating costs.

For example, WCB's administration charges, which are allocated to all Employers, have risen from approximately \$66 million in 2011, to over \$100 million in 2016, which represents a 52% increase in only 5 years. The WCB Finance Department has explained to the Self-Insured Employers that these increases are based on inflation, rising salaries, employee benefits, communications, amortization of capital assets, prevention programs, investments in technology, training, etc.

On the other hand, from 2011 to 2015, overall employers' transactions have decreased by 7% and Manitoba Hydro's own transactions have decreased by 5% 2016 year end. In terms of the average cost per transaction, the average for all employers rose by 47% and Hydro's average cost per transaction rose by 194% for 2016 year end. This is all occurring when Manitoba Hydro's overall claims costs have decreased by 19% between 2011 and 2016⁴.

Overall, these results tell us that WCB's operating costs are rising at a rate that is placing greater pressures on employers to fund a system where, despite efforts being made by employers to reduce the number of injuries experienced by employees, and subsequent transactions and claims costs, self insured employers are unable to see any tangible cost savings due to rising WCB administration costs, which they are unable to control. There needs to be transparency in accounting and administrative fees. Board costs are escalating when incident rates are reducing.

³ *Workers' Compensation Board of Manitoba 2015 Annual Report*, Historical Trends, pg. 25.

⁴ WCB Online Reports and Firm Experience Statements accessed February 13, 2016

Manitoba Hydro therefore requests that the Committee review the existing Funding Model, with specific concern given to the operating expenses, and in turn, the administration rates being charged to self insured employers.

10 Provision of medical aid (Section 27 of *The Act*)

It has been noted by Manitoba Hydro that as case managers the Board needs to prescribe what medical aid it will provide and limit treatments to ensure that treatments are working to cure or provide relief to a worker. There should be a limit on any approval of 6 appointments that show benefit before additional appointments are approved by case managers or adjudicators. It has become a trend where the Board approves 14 visits to one type of health care provider straight away. After these visits are completed (usually 4-6 weeks) and there is no improvement in a worker's abilities, the worker goes to another health care provider in a differing profession and the Board approves another 14 sessions (or more) for the worker. The WCB adopts a one-size fits all approach in approving payment of medical treatment. In times of burgeoning healthcare costs, the WCB should assess each claim on its own merits, consider the diagnosis and then approve a 6 appointment limit on treatment. In many cases, we see extended treatment for a minor strain/sprain injury, well beyond the normal recovery period. This is at great cost to employers especially at times of economic uncertainty.

Section 27(12) allows too much leeway to personal physicians who enable worker's time away from work. This is most notable in claims related to mental health. With all psychological claims, there is still the need to expedite treatment by qualified specialists i.e. a psychiatrist. To date, due to lack of health care resources, general practitioners are seeing individuals and misdiagnosing or enabling longer treatment times than necessary and WCB is accepting this. In addition, practitioners are sending workers to EAP rather than mental health professionals. The very nature of EAP does not permit WCB or the employer to know what the status of a worker is and again lengthens recovery time quite dramatically. A PTSD claim should not require a person to be absent from the work for a year before a diagnosis is made. Manitoba Hydro encourages the Committee to review this section to ensure treatment costs are being applied to proper treatment schemes.

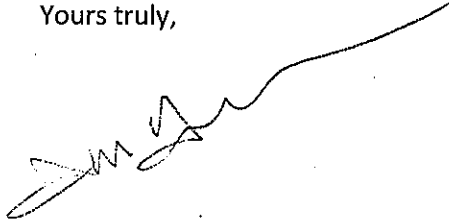
11 Retirement Age of a Worker

This section should be amended to allow retirement of workers prior to age 65 where the employing company has pension programs allowing retirement prior to 65. It is recommended that the appropriate age be equivalent to the average retirement age of employees at that employer. The current system permits a worker to benefit and maintain an economic advantage than their coworkers who choose to retire at the average company age. An injured worker on WCB should not be over-compensated. The Committee should review this section to create equity in compensation for those individuals who can retire.

The comments are offered by Manitoba Hydro to improve upon the application of *The Act* in the current economic climate and ensure fair treatment of all stakeholders. The intent of *The Act* and application of the Meredith Principles is at the core of these comments. The WCB and *The Act* that govern it, needs to promote and recognize safe and healthy workplaces; facilitate recovery and return to work, provide compassionate and supportive compensation services for workers and employers, and ensure responsible transparent financial stewardship in the equal treatment of

workers and employers in its application of *The Act*. Presently, Manitoba Hydro does believe certain aspects as noted create inequitable policies and procedures which place employers in an unfair position. Manitoba Hydro is optimistic that the Review Committee's consideration will look favourably upon these recommendations to assist the WCB to fulfill their Mission to provide all Manitobans with valued services for injury prevention, compensation, and return to health and work while maintaining system integrity. Thank you for the opportunity to provide comments and your consideration.

Yours truly,

A handwritten signature in black ink, appearing to read 'Dawn Turner', written in a cursive style. The signature is positioned above the typed name and extends to the right, ending in a long, sweeping horizontal stroke.

Dawn Turner
Health & Disability Management
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