



February 10, 2017

**Manitoba
Government
and General
Employees'
Union**

Mr. Michael Werier
Chairperson
2016 WCB Legislative Review Committee
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**Submission to *The Workers Compensation Act*
Legislative Review Committee 2016**

ANY QUESTIONS?

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Dear Mr. Werier:

The Manitoba Government and General Employees' Union (MGEU) is pleased to offer this submission, which outlines our recommendations on how to improve and modernize *The Workers Compensation Act* (the "Act") of Manitoba.

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The MGEU represents over 40,000 Manitobans who live and work throughout the province in a wide variety of workplaces — roughly 14,000 are employed directly by the Province of Manitoba and others work in crown corporations, universities and colleges, health care facilities, and social service agencies. Each and every day MGEU members deliver valuable public services that all of our families depend on. We are proud of the work we do and know the importance of these services to Manitobans.

Unfortunately, far too many MGEU members still suffer physical or psychological injuries as a result of their work. Thankfully, the WCB and its dedicated employees routinely provide the necessary supports to enable these individuals to quickly return to health and safely return to work. While most workers are satisfied with the benefits and services provided by the WCB, members have voiced their concerns about important issues, which need to be addressed.

The MGEU made recommendations on how to improve the Act through the public consultation process that took place in 2004, some of which were accepted by the Legislative Review Committee and included in their report to the government. The result was Bill 25, *The Workers Compensation Amendment Act*, which was unanimously endorsed by members of the provincial legislative assembly. We believe the resultant legislative changes provided improved benefits, and a more fair system, which reset the balance between the interests of business and labour.

As its largest affiliate member, the MGEU worked in collaboration with the Manitoba Federation of Labour (MFL) in developing its submission and fully supports all of the recommendations outlined in its December 19, 2016 submission to the Committee.

The MGEU endorses the vision of a progressive WCB that respects the Meredith principles including true collective liability, embraces prevention as a core purpose, acknowledges and actively works to prevent claim suppression, and provides fair, compassionate and timely benefits and services to injured workers.

While there is still significant room for improvement in the current Act, the MGEU recommends that any legislative provision not addressed in this submission remain unaffected. If additional changes, not contemplated in the discussion paper, are to be considered by the Legislative Review Committee (LRC), we request that there is an opportunity to provide further comment on other emerging issues.

The MGEU greatly appreciates the opportunity to provide our recommendations on how to improve this important legislation. If further clarification on any of the MGEU's recommendations is required, I would be happy to do so at the Committee's request.

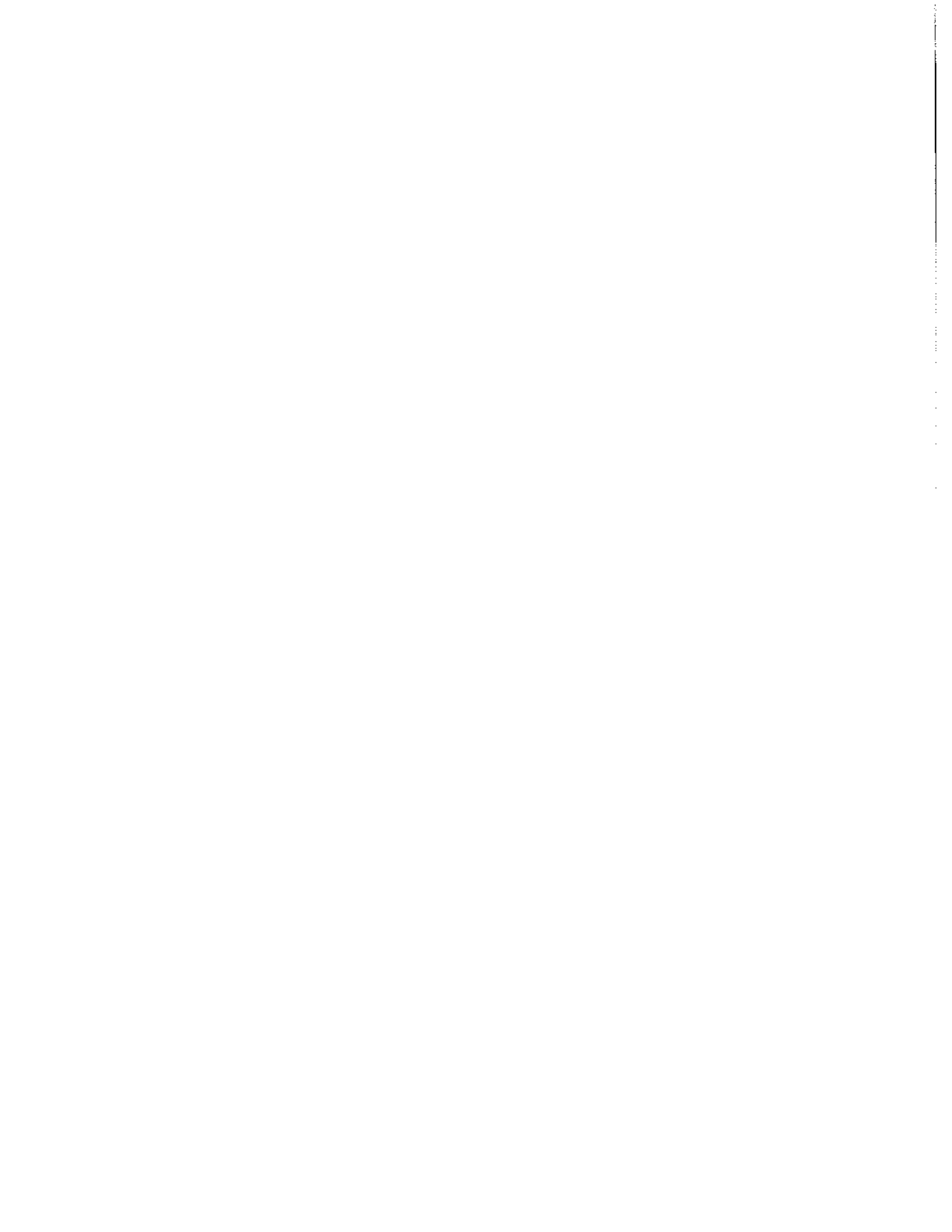
In Solidarity,



Michelle Gawronsky
President

MG/do

Encl.





Workers Compensation Act Legislative Review - MGEU Recommendations

February 2017



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ISSUE 1: Adjudication of Psychological Injuries

The government of Manitoba has made progressive changes to legislation that recognize the importance of mental health in the workplace. Since 1976, the objective and purpose of *The Workplace Safety and Health Act* have included *"the promotion and maintenance of the highest degree of physical, mental and social well-being of workers."* In 2007, this legislation was updated to *"ensure that every worker is protected from workplace-related harassment."*

In January 2016, *The Workers Compensation Act* was amended to require the WCB to presume that a worker who develops Post-Traumatic Stress Disorder (PTSD) did so as a result of their employment. Despite these changes, workers who develop psychological injuries as a result of their work are routinely denied compensation because their individual circumstances are not seen to fit the WCB's narrow interpretation of the definition of an accident.

The current definition of an "accident" in the Act includes any *"(i) event arising out of, and in the course of, employment, or (ii) thing that is done and the doing of which arises out of, and in the course of, employment,"* which results in an injury.

By policy 44.05.30, *Adjudication of Psychological Injuries*, the WCB has made an arbitrary and unfounded distinction, barring the consideration of psychological injury claims under subsection (ii) of this definition, stipulating that *"claims for psychological injuries cannot arise under the part of the definition of accident."*

The MGEU does not see a valid basis to justify the adjudication of physical and psychological injuries in different ways. In instances where there is an identifiable traumatic event that caused a worker's injury — whether physical or psychological — the WCB generally does not alter its adjudication process. While the WCB readily accepts responsibility for physical injuries that develop over time, strict criteria are used when considering psychological injuries that occur without a single identifiable triggering event. We submit that, in the very same way that a worker can develop a physical injury by repeated strenuous movements, a worker can develop a psychological injury by being exposed to mental trauma over time.

The MGEU believes that the Act needs to clearly confirm a worker's right to benefits for a work-related psychological injury. Mental illness was, in all likelihood, not even a consideration for Sir Meredith while preparing the bill that established the first workers compensation system in Canada. There is, however, no legitimate grounds on which to draw a distinction between a physical injury and a mental illness when the evidence supports that it was caused by work. Workers gave up the right to sue their employers as part of the historical compromise that guaranteed benefits for disablement arising from the job. Yet, claims for compensation relating to psychological injuries are frequently unjustly denied. While we acknowledge mental illness can develop due to a multitude of organic and environmental causes, psychological injuries caused by employment-related factors is the most pressing issue our members have with the WCB.

To ensure physical and psychological injuries are treated equally by the WCB, the MGEU recommends that:

- **the act be amended to ensure physical and psychological injuries are adjudicated and managed in a fair and consistent manner;**

- the definition of an *"accident"* under subsection 1(1) of the Act be amended to include any *"disablement"* that arises out of, and in the course of a worker's employment;
- *"stress"* as an exclusion from the definition of an occupational disease under subsection 1(1) of the Act be removed;
- WCB Policy 44.05.30, *Adjudication of Psychological Injuries*, be rescinded given its clear disagreement with the current Act.

ISSUE 2: The Role of the WCB Healthcare Services Department

The MGEU believes the WCB's use of in-house medical consultants can assist to ensure injured workers receive appropriate and timely medical care to facilitate recovery from their injuries.

While WCB policy 42.10, *Role of Healthcare Services*, outlines a general mandate, when and why the WCB uses an internal medical consultant instead of relying on the information from a worker's treatment provider remains a controversial matter.

Subsection 21(1) of the Act provides that an injured worker shall submit to medical examination by the WCB or face suspension of their benefits. The Act provides nothing to assure that an injured worker has any rights in this situation.

Subsection 49.3(7) outlines how disagreement over a worker's medical fitness to return to work is resolved by the Board. It seems the WCB will, more often than not, prefer the opinion of their own medical consultant over that of a worker's treatment provider. Injured workers are then left to decide whether they follow the advice of their doctor, or the direction of their WCB case manager, who purports to have the backing of a consultant who they've often never seen.

An even greater issue for our membership is the apparent difference between the doctrine adopted by the WCB's Healthcare Services Department and the generally-held views of medical treatment providers in the community. Although not forming part of its policy manual, WCB medical consultants abide by position statements, which dictate how various conditions are to be considered. For instance, the MGEU has seen a number of claims where benefits have been denied based on the opinion of a WCB medical consultant that the circumstances do not meet the diagnostic criteria for concussion. These opinions are rendered with remarkable uniformity and are consistently in clear opposition to the opinions provided by the treating specialists in the field.

To address these concerns, the MGEU believes the Act needs to be amended to:

- **clarify the role and responsibilities of the WCB Healthcare Services Department;**
- **establish a "Medical Advisory Committee" comprised of members of the Board, WCB medical staff, and community physicians, with the responsibility of providing Board oversight in medical issues, to give transparency to the process and to give voice to the broader medical community.**

ISSUE 3: Medical Review Panels

Section 67 of the Act establishes a worker's right to a Medical Review Panel, which is intended to resolve a difference in opinion between a WCB medical consultant and the worker's own treating physician.

While reasonable in theory, the Medical Review Panel process has become cumbersome and ineffective, which has resulted in its infrequent use; only a dozen times in the last five years. This is due in part to the overly-strict criteria that must be met to request a panel, the difficulty getting suitable medical specialists to take part on the panel, and the length of time required to work through the process.

The MGEU urges the Legislative Review Committee to recommend that the WCB undertake a comprehensive review of the Medical Review Panel process, and implement any necessary changes to ensure it is an accessible and effective way for injured workers to resolve a difference in medical opinion.

ISSUE 4: Medical Aid

The WCB supports a broad range of medical treatments and services, when required as a result of a workplace injury. Subsection 27(1) of the Act states that medical aid, which is "*necessary to cure and provide relief*" will be approved by the WCB. Policy 44.120.10, *Medical Aid*, however, provides a less stringent test, allowing the WCB to support medical aid that will minimize the impact of an injury or enhance a worker's recovery.

Although the WCB generally approves medical aid consistent with the policy, the MGEU has seen instances where our members have been denied benefits based on an overly-strict interpretation of the Act.

To ensure injured workers have access to the broadest of medical aid options, the MGEU recommends that subsection 27(1) of the Act be amended to include whatever medical services and supplies that are necessary to diagnose, provide relief, or cure a compensable injury.

ISSUE 5: Stakeholder Consultation in WCB Policy Development

The MGEU fully supports the mandate of the Legislative Review Committee and believes public and stakeholder consultation is an appropriate means to examine issues and consider changes to the Act. Given the comprehensive nature of such a review, it is understandable it only take place periodically.

The Act provides the framework for Manitoba's workers compensation system, but WCB policy defines its practical application. While stakeholder input must be sought prior to changing the Act, there is no formal means for individuals or groups to provide commentary on proposed changes to WCB policy.

Workers have the right to appeal how WCB policy has been interpreted or applied when they have been denied benefits in relation to their individual claim, however, there is no process to address systemic issues that arise as a consequence of changes to Board policy.

To ensure transparency and fairness, the MGEU recommends the Act be amended to require that the WCB develop a process to engage in dialogue with stakeholders prior to the adoption of any significant change in WCB policy.

ISSUE 6: Awareness of Workers' Rights to Compensation

The MGEU wholeheartedly supports the MFL recommendations that the WCB increase its efforts to build awareness of the claims suppression protections in the Act, more vigorously enforce these provisions, and continuously monitor employers' compliance.

The MGEU shares the MFL's concern about how experience ratings, as part of the assessment model, create a financial incentive for employers to suppress workers compensation claims and aggressively push employees to hastily return to work following injury. This effect appears to be even more pronounced with self-insured employers because they pay the full cost of the claim plus an administrative fee to the WCB.

Many employers hire external consultants to manage their WCB claims, which can be harmful to the employee-employer relationship and ultimately discourages workers from filing WCB claims in the future. Members have told us that their employers ask them about returning to work before the extent of their injuries are known. When they seek medical attention, workers are consequently more focused on having paperwork completed for their employer than getting their injury assessed. If the treatment provider recommends time off work, the WCB often threatens to deny wage loss benefits if the worker follows this medical advice. If the WCB supports the time off work, the employer's consultant may file an appeal to dispute the payment of benefits.

Injured workers are rightly concerned when a third party becomes involved in their claim and accesses their personal health information. Many workers do not understand why their employer would challenge their claim and understandably feel their integrity is being questioned. At a time when injured workers are already struggling with pain and disability, this additional concern adds unnecessary stress.

The MGEU knows claims suppression continues to occur, sometimes overtly, but often in subtle ways; we firmly believe that as long as there is direct association between employers' assessment rates and workers' claims, workers compensation in Manitoba will not be consistent with the collective liability envisioned by the historical compromise.

We strongly encourage the Legislative Review Committee to accept the MFL's recommendations regarding claims suppression, including:

- **enhanced education for both workers and employers about existing provisions in the Act against claim suppression and aggressive return to work practices;**
- **increased enforcement of these provisions, along with more significant penalties and public reporting of employers who continue to engage in claim suppression and aggressive return to work practices;**

- **Independent review of the new rate setting model, once fully implemented, to determine if changes were effective in eliminating claims suppression.**

ISSUE 7: Accident and Injury Prevention

The MGEU believes that prevention of workplace injuries and disease should continue to be a primary objective of the workers compensation system. While the WCB is a necessary and invaluable institution, the MGEU applauds the progress made by SAFE Work Manitoba in educating the public about injury prevention, in developing safety program certification, and in the prevention of workplace accidents and injuries.

The MGEU believes injury prevention efforts are most effective when workplace hazards are identified and either eliminated or reduced. The MGEU shares the MFL's opposition to behaviour based safety (BBS) approaches, which focus on training workers to be more careful around hazards instead of emphasizing the employer's responsibility to minimize risks in the workplace.

The MGEU supports MFL recommendations that seek to enhance injury prevention efforts in Manitoba, including continued strengthening and expansion of Industry-Based Safety Associations supported by SAFE Work Manitoba that provide prevention information to industry sectors.

The MGEU recommends that the Act be amended to ensure that any prevention incentive adopted by the WCB is based on effective health and safety practices and not behavior-based safety programs that shift the burden of prevention onto workers.

The MGEU also recommends that the Act be amended to guarantee continued support of the educational efforts of Safe Workers of Tomorrow, particularly for high risk groups such as young, new and vulnerable workers.

ISSUE 8: Workers Compensation Awareness

The MGEU is proud to support Safe Workers of Tomorrow, which provides free educational presentations to high school students about workplace health and safety, often before they get their first job.

The MGEU believes the WCB and SAFE Work Manitoba have a responsibility to promote understanding and to provide education about the workers compensation system.

Campaigns such as "Work Shouldn't Hurt" effectively promote prevention — however, many workers in Manitoba, especially young and part-time workers, as well as newcomers to Canada, have very little knowledge of the WCB.

We have heard repeatedly from members who had filed claims through other government or private insurance plans because they didn't know about the WCB, or because they didn't think they would qualify for benefits from the WCB. We suggest this lack of understanding externalizes the true costs of workplace injuries and diverts responsibility from the WCB.

The MGEU recommends that the Act mandate the WCB to make efforts to ensure all Manitobans, especially the most vulnerable in the workforce, know and understand their entitlement to the supports available through the WCB.

ISSUE 9: WCB Coverage

The MGEU supports the MFL's recommendation that WCB coverage be expanded to all workers in Manitoba. As noted by the MFL, only 75% of Manitoba workplaces have WCB coverage, which is the third lowest rate of all jurisdictions in Canada. The list of workplaces excluded from mandatory coverage is extensive and includes hair salons, golf and country clubs, shooting ranges and any business undertaken by First Nations on reserve land. Interestingly, the chiropractic and physiotherapy clinics, where workers are treated for their compensable injuries, are not required to have WCB coverage.

While MGEU members are covered by the WCB, we believe and recommend the Act and regulations be amended to ensure all working Manitobans, regardless of occupation, are protected in the event of a workplace accident.

ISSUE 10: Insurable Earnings

The MGEU is proud that Manitoba took the bold step to become the first province in Canada to eliminate the cap on the insurable earnings. In 2015, this action enabled the WCB to compensate nearly 150 workers for almost the entire loss of earnings experienced as a result of their workplace injury.

The MGEU believes reinstating a cap on insurable earnings would undermine the workers compensation system by discouraging higher income earners from filing claims with the WCB and instead being forced to continue working while injured to maintain their level of income.

The MGEU believes that reinstatement of a cap would also be contrary to the Meredith principle of exclusive jurisdiction. If entitlement to benefits is limited for higher-income earners, they are more likely to "opt-out" from their reliance on WCB coverage and instead choose to self-insure to fully protect their livelihood in the event of a workplace injury.

The MGEU believes reintroduction of a cap on insurable earnings would be a step backwards in the development of a modern workers compensation system and would strongly oppose this regressive move.

ISSUE 11: Wage Loss Benefits

The MGEU believes that workers should be fully compensated for the financial loss they suffer as a result of a workplace injury.

The 2005 report of the Legislative Review Committee included a number of recommendations regarding wage loss benefits, such as the removal of the cap on insurable earnings, and the elimination of the reduction in wage loss benefits after two years, which were both included in the subsequent revision of the Act.

This report included a number of other sound recommendations, which were not adopted by the government of the day, including ending the practice of deducting theoretical Canada Pension Plan (CPP) contributions from a worker's wage loss benefits and simplifying how wage loss benefits are calculated.

The MGEU is of the view that paying workers wage loss benefits at 90% of their net loss of earnings, less probable deductions, imposes a significant deductible on their entitlement, which is completely unjustifiable.

To reduce the economic burden of injury on workers, the MGEU recommends that the Committee endorse Recommendation Nos. 21 and 26 of the previous Legislative Review Committee, which were:

- 21** *"The Act should be amended so that a worker's CPP contributions are not deducted in determining net average earnings."*
- 26** *"The Act should be amended so that employers pay workers who experience a workplace injury or illness their regular net pay for up to one full pay period and then the employer will be reimbursed by the WCB for all but the day of accident."*

ISSUE 12: Notice When Wage Loss Benefits are Terminated

When the WCB makes a discretionary decision to end an injured worker's wage loss benefits, one week of *"advance notice"* is generally provided in accordance with policy 44.30.60, *Notice of Change in Benefits or Services*. Only in *"exceptional circumstances"* will the notice provided be greater than one week.

Injured workers are frequently denied further wage loss benefits when the WCB makes the decision that they have recovered from the effects of their workplace accident and that their ongoing disability is due to a pre-existing condition. In such cases, where the validity of the disability is not in question, one week of notice is not enough time for someone to access income from an alternate source, such as Employment Insurance, long term disability or, in some unfortunate cases, provincial Employment and Income Assistance.

Progressive notice is a cornerstone principle in labour relations, yet the advance notice regularly provided by the WCB is limited and wholly inadequate to ensure an injured worker has sufficient time to secure alternate support.

The MGEU recommends that the Act be amended to incorporate a progressive notice structure to ensure injured workers have adequate time to adjust and seek out an alternate source of income when their wage loss benefits are terminated.

ISSUE 13: Workers' Employment Benefit Premiums After Injury

The MGEU has successfully negotiated benefit packages that provide for physiotherapy, prescription drugs, disability insurance and more. These plans form an integral part of a worker's income, providing necessary protection for their entire family from expenses not covered by other programs including Manitoba Health.

While the WCB provides wage loss benefits, it provides no compensation for a worker's loss of employment benefits. Some employers will continue to pay a portion of premiums — many will not, however, leaving workers to pay premiums at a time when they can least afford it.

As noted in the MFL submission, workers compensation legislation in Ontario requires employers to continue their contributions to an injured worker's benefits plan for the first year after an accident. Manitoba's Act enables the WCB to establish a benefit program for injured workers who have been in receipt of wage loss benefits for more than 24 months. To our knowledge, however, this has never been implemented.

The MGEU recommends that the Act be amended to require employers to continue making contributions into employment benefit plans, for up to two years, while a worker is away from the workplace due to injury.

The MGEU recommends that subsection 43(1) of the Act be amended to require that the WCB establish benefit programs and group insurance for injured workers and their dependants who have lost access to valuable employment-based benefits.

ISSUE 14: Probable Earning Capacity

Injured workers are generally paid wage loss benefits based on an average of their pre-accident employment earnings. The Act, however, enables the WCB to pay greater wage loss benefits based on the probable earning capacity a worker would have achieved had they not been injured. This projection can only occur if the worker was young, or if they were in an apprenticeship program, at the time of their accident.

There is a broad array of educational opportunities beyond the trades that exist for workers of any age. Unfortunately, older workers who are injured while engaged in an academic program at a university or any worker upgrading their skills at a community college in a trade without an apprenticeship program, are not compensated for the higher earning capacity they were working to achieve.

The MGEU recommends that the Act be amended so that WCB fairly compensates all injured workers who were engaged in any training or education program likely to increase their earning capacity for the probable earning capacity they would have achieved at the completion of their program had they not been injured.

ISSUE 15: Employer Advisor Office

The MGEU wishes to recognize the professionalism and compassion of the Worker Advisor Office staff, who provide free and independent services to injured workers unjustly denied entitlement to WCB benefits. Given the workers compensation appeal process involves complex medical and legal issues, the Worker Advisor Office provides invaluable support to hundreds of injured workers each year who would otherwise struggle to do so on their own.

As Manitoba's workers compensation system moves away from an inquiry model and towards a more litigious and adversarial process, the MGEU believes the demand for the services provided by the Worker Advisor Office will only grow. Contrary to the Meredith principles, workers are increasingly pitted against their employers having to fight for just compensation.

The MGEU opposes the establishment of an Employer Adviser Office on the basis that doing so would result in more appeals, lengthier adjudication and appeal processes, and an even more antagonistic workers compensation system.

ISSUE 16: Standard of Proof

Historically, the WCB has made adjudicative decisions based on the "balance of probabilities," yet use of this standard of proof is not mandated by the Act.

The MGEU recommends that the Act be amended to confirm that the "balance of probabilities" is the standard of proof used in the adjudication and management of all WCB claims.

ISSUE 17: Occupational Disease

Occupational disease claims are only accepted by the WCB when the evidence — on a balance of probabilities — supports that work-related exposures were the "dominant cause" of the condition. Given the latency of many occupational diseases, it is very difficult for aging workers to obtain evidence confirming workplace exposure to harmful substances in decades past. Even if this challenge can be met, it is even more difficult to obtain evidence establishing that work exposures surpassed any other cause. When there are both work and non-work-related exposures contributing to a disease, unless a medical specialist can conclusively determine the proportionate cause of each and confirm that the occupational factors exceed the others, the WCB will not accept responsibility for an occupational disease.

The WCB will, however, accept responsibility for an injury where it was caused by an accident, in concert with a pre-existing condition. In such cases, WCB Policy 44.10.20.10, *Pre-Existing Conditions*, provides that *"the Workers Compensation Board will accept responsibility for the full injurious result of the compensable injury."* The MGEU believes this philosophy reasonably acknowledges the interplay between causal factors and suggests a more consistent approach needs to be taken with respect to occupational diseases.

The MGEU recommends that the Act be amended to remove the requirement that occupational factors must be the dominant cause of a disease for it to be compensable.

Consistent with the adjudication of accidents involving a pre-existing condition, the MGEU recommends that the Act be amended to require the WCB to accept responsibility when a disease is made worse due to work-related factors.

ISSUE 18: WCB Funding Model

Manitoba's WCB currently has financial security as a result of returns on prior investments and accurate projections on future operational and claim costs.

The MGEU supports the Board's funding ratio target of 130% on the basis it protects both workers and employers from future uncertainty. While the WCB's surpluses have grown in recent years, we have seen the implications of underfunding in other provincial jurisdictions.

According to its *Five Year Plan 2015-2019*, the WCB undertook a review of the accident fund reserve target in 2014 and developed a modeling tool to enhance its financial planning ability. The projections noted in this plan indicate the WCB will be below its funding target ratio of 130% by 2018, and as such, the MGEU believes no changes in this area are advisable.

The MGEU recommends that the WCB adhere to its five-year plan and maintain its current funding target ratio to ensure that workers' entitlement to benefits are protected against future economic uncertainty.



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