



Workers Compensation Act Review

February, 13th 2016

Healthy Workplaces Healthy Workers Healthy Communities

The Occupational Health Centre (OHC) is an accredited Community Health Centre (CHC) that focuses on workers occupational health and safety. CHC are community built and governed to support and provide services for vulnerable groups within a community. Workers who suffer injury, illness and other barriers are our focus at the OHC. We are a WRHA facility that provides medical assessments and occupational health and safety training for workers throughout the province.

Created in 1981 through a resolution at the annual Manitoba Federation of Labour Convention, the OHC were established to respond to workers need to address injuries and promote and raise the level of education and training in occupational health and safety. Today we continue to be at the forefront of occupational health, focusing on best practices and by approaching health and safety from the perspective of workers, joint health and safety committees, and newcomer workers who face daily hazards on the frontline.

Our interaction with WCB is two-fold. A majority of the clients we see are claimants of WCB often with long term, musculoskeletal or respiratory illness or injuries and many who are seeking appeals to WCB decisions. We are active members in Manitoba's Health and safety industry and are frequent grant recipients of the Research Workplace Innovation Program (RWIP). We spent much of our time working with those who have contracted an illness or suffered injuries while working, many who have been cut off from benefits, newcomers who are just learning about work in Manitoba or workplaces who have seen too many injuries and need assessment and training.

1. Can the WCA amended to better reflect the system's foundation (Meredith) Principles in a modern context?

Sir Meredith's "Historic Compromise" sought to create a balance where workers and employers bought into a system where each sought protection from the other. As a public institution the job of the WCB is to monitor and adjust so that the balance of the historic compromise brings fairness where it is needed.

At the OHC we often hear and see stories and claims where that fairness has been skewed, mis managed or completely left aside. If the WCB were to amend its foundational principles, achieving actual fairness through rebuilding a true collective liability, no fault and secure benefit system as envisioned by Sir Meredith should be the main objective.

Currently too many of the WCB models and practices are adversarial. The experience model, and thus employer claim suppression, the practice of discounting treating medical opinions, and the aggressive return to work policies have created a culture of fear and uncertainty around WCB's interest when reporting and or managing complex claims.

Although some changes in compliance and enforcement are beginning to address some unfair practices by employers, this larger ingrained culture puts WCB on a tenuous track for the future. Workers need to be protected. As occupational health continues to progress workers will expect the WCB to transform and change as quickly as the occupational hazards and injuries they are facing.

Shedding the adversarial practices, transforming its culture as well as considering its approach in how it will serve workers in an era where mental health issues, myofascial and other types of pain, as well alternative treatments will be part of the forefront of worker health, are all areas where the WCB has an opportunity to build fairness back into its system.

Recommendations

- **That the WCB turn to a true collective liability, no fault and secure benefit system and amend the WCA to reflect this change by eliminating the experience rating model;**
- **That penalties for claim suppression and aggressive return to work practices in *The WCA* be further strengthened and enforced**
- **That the WCA be amended to require public reporting on employers guilty of claim suppression and aggressive return to work activities;**
- **The WCA be amended to include and consider new illnesses and injuries, and innovative holistic treatments when treating claims;**

2. How can the WCA be amended to fulfill the Five-Year plan for Workplace Injury and Illness Prevention and reinforce its Prevention Mandate?

Manitoba's economy continues to rely heavily on immigration. In 2014, provincial government statistics report that 16,222 immigrants came to Manitoba with an addition of 1,102 migrant workers through the Temporary Foreign Worker Program (TFW). In order to properly support these newcomers successfully integrate into our workplaces and communities, Manitoba laws, government agencies and programs must be prepared to respond to their needs.

Since 2000, the Occupational Health Centre has been working with newcomer workers in the area of workplace health and safety. OHC is in a unique position to be able to share the experience and the knowledge we have gained from newcomers dealing with workplace health and safety and with workers compensation in our province.

The following issues identified through our work directly affect the effectiveness of Manitoba's workers compensation system for newcomer workers:

a. Injury Under Reporting Under Suppression and Fear

Resettlement in Canada is very costly. Newcomers have to pay immigration fees and for travel to Canada. Setting up a new household also requires substantial financial resources. Many newcomers assume financial responsibility for other family members in their country of origin, often for indefinite periods. This makes losing a job particularly devastating, combined with the added difficulty newcomers face trying to find a job without existing professional networks or previous Canadian work experience. Above and beyond these issues, migrant workers who come to Canada under the Temporary Foreign Worker Program are on a work permit that is tied to one employer and face the very real risk of deportation if they lose their job.

For all of these reasons, newcomer workers are extremely reluctant to make complaints and report injuries if they have any reason to expect that it might put their job at risk.

The Workers Compensation Board of Manitoba needs to strengthen its protection of workers when they report a claim and are discouraged, penalized or even dismissed by their employer. These very practices by employers reinforce the perception of newcomer workers that injury reporting will put their job at risk.

Two of the Workers Compensation Board of Manitoba's own reports in 2013 recognized the existence of claim suppression. The WCB committed to increasing resources to investigate claim suppression and established a Compliance Unit. However, three years later workers continue to be negatively affected by this practice which affects all injured workers, but is particularly difficult for newcomer workers due to their lack of awareness of Canadian laws, practices in their workplaces, and their often precarious employment. In addition, newcomer workers are largely unaware of the Compliance Unit of WCB.

Our recent work with newcomer workers, many migrant workers, in the food processing industry revealed the many forms claim suppression can take:

- offering the worker lighter work instead of reporting an injury
- offering the worker to take a break instead of reporting an injury
- going to worker's house if she or he is off work due to a work-related injury
- sending a taxi to pick up a worker from home if they are unable to come to work due to a work related illness or injury

- discouraging workers from reporting an injury or illness to WCB because the system is “too difficult to navigate” and instead encouraging workers to report it as non-work-related and apply to Employment Insurance.
- employers refusing to acknowledge that a worker informed them of a work-related injury which neither reported to WCB.
- punishment of workers with humiliating jobs if they report work-related injuries, such as standing in the middle of a production line without doing anything, or sitting in the nurses station for an entire day.
- employers tell workers they cannot see their family doctor until the employer authorizes it.
- employers tell workers that they can only see the doctor or physiotherapist that the employer selects for them.

Recommendations

- **The Workers Compensation Board of Manitoba’s Compliance Unit should develop methods to investigate reports of claims suppression and workers being penalized and/or dismissed due to injury claims that do not involve the need for workers to make complaints. The Compliance Unit of the Workers Compensation Board could model its investigations after the Manitoba Employment Standard’s Proactive Special Investigations Unit that identifies industries and workplaces at risk of non-compliance and conducts detailed investigations that do not rely primarily on worker complaints.**
- **Intake Claim Information Representatives, Adjudicators, and Case Managers should have a duty to report suspected cases of claims suppression to the Compliance Unit and inform workers of this Unit.**
- **The WCB should strengthen awareness campaigns to inform workers of their right to report injuries, what to do if they are penalized, the role of the Compliance Unit and how to contact it. This campaign and its materials should be delivered in multiple languages.**

a. Premature Return to Work After Injury

Many injured newcomer workers return to work prematurely after an injury. One reason for this is the concern about loss of income and the fear of potential loss of job if the worker stays off work too long. For low wage earners, the reduction in earnings while on workers compensation can be significant.

Another significant reason for a premature return to work is the aggressive RTW practices of employers and the Workers Compensation Board.

In the food processing industry, OHC has helped workers with back injuries who are then required to stand to do their job, or if a hand or arm is injured the worker has been given duties to do with one arm. In many cases this runs counter to the best practice for rest in the early stage of injury recovery and results in pain and further strain on adjacent muscles.

While returning to work as early as possible can be positive for some workers, a recent study conducted by the Institute for Work & Health on the *Role of Health Care Providers with Workers Compensation* highlighted the fact that early return to work can actually delay recovery for workers with complex injuries and serious mental health conditions.

The same study calls for a more flexible approach for dealing with complex and prolonged claims recognizing that recovery trajectories vary particularly when it comes to multi-causal, gradual onset, and “invisible” conditions.

Recommendations

- **Wage loss benefits for low wage earners should be set at 100% of their income.**
- **The Workers Compensation Act should explicitly state its primary commitment to the full recovery of injured workers and a safe return to work in place of an overarching commitment to the “timely”, early return to work, in recognition that early return to work is not the solution for all injured workers.**
- **The Workers Compensation Board should monitor more closely return to work programs to ensure they are being followed.**
- **Penalties for employers who alter return to work programs should be strengthened.**

b. Language Barriers

While the Workers Compensation Board has made considerable efforts in recent years to translate information into a variety of languages and improve interpretation for those workers using its services, language barriers remain a significant issue for newcomer workers. The impact of misunderstandings due to language can be severe for injured newcomer workers and can result in delays or denial of a claim. For this reason it is critical to ensure that interpretation services and translated information is consistently being provided to those who need it and is working effectively.

It is important that workers are able to understand information from the WCB. The Worker Incident Report form, a critical communication tool, has been translated but is only available in a few of the many languages spoken by newcomers in Manitoba and is not easily found on the WCB website.

Recommendations

- **The WCA should clearly state the responsibility of the WCB to communicate with workers in their preferred language. Written communication sent to workers should be in their preferred language.**
- **The WCB should evaluate its efforts to provide language support to newcomer workers and determine how frequently and effectively these services are offered and the satisfaction of the newcomer workers who use these services. The results of this evaluation should be shared with stakeholders from newcomer communities and service organizations. Areas for improvement should be identified and plans developed to address gaps in consultation with other stakeholders.**
- **The Workers Compensation Board’s translated informational materials and forms should be distributed well beyond the WCB website, in workplaces and community settings with large newcomer populations.**

c. No Newcomer Tracking Data

There is no one, including WCB, employers or community stakeholders who accurately understand the experience of new immigrants accessing the Workers Compensation system because the WCB does not collect data that identifies claimants as immigrants.

Recommendation

- **The WCB should collect data on immigration status and language of claimants to better understand and assess the rates of injury for newcomer workers, outcomes, and their distinct needs.**

3. What do you see as the main challenges of compensating injuries to mental health in the workplace, and how do you think they should be addressed.

It is estimated that 1 in 5 Canadians will experience some form of mental illness over the course of their lives and that in any given week, approximately 500,000 Canadians will stay home from work due to a mental illness. Mental illness is already the leading cause of disability nationwide.

In recognition of the prevalence of the mental health injuries and illnesses being caused in workplaces, in 2015 the OHC partnered with the Mental Health Commission of Canada to promote and implement organizational change in the form of the CSA Standards for Psychological Health and Safety.

In developing training and implementation tools there were fundamental changes that were seen to be necessary for WCB to properly address the prevalence of psychological health injuries and illness in today's workplaces.

a. Equality

The WCA currently treats physical and psychological injuries/illness very differently, which we believe is unfair, and may be unconstitutional. For example, occupational disease stemming from workplace stress is explicitly excluded from coverage, unless related to acute reaction to a traumatic event. As a result, there is no definition of workplace stressors that may cause psychological injury or illness.

This stands in sharp contrast to BC's *WCA*, which was amended to include an expanded definition of work related stress, following from the landmark *Plesner v. British Columbia Hydro and Power Authority* case, which struck down WorkSafeBC's narrow definition of a traumatic event. BC's *WCA* now recognizes: "A significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment." A BC worker can now claim compensation for a mental disorder if:

- The disorder is either a reaction to one or more traumatic events or caused by a single or series of significant workplace stressors;
- The condition is properly diagnosed by a licensed psychiatrist or psychologist;
- The condition is not caused by a decision related to the worker's usual employment.

In Manitoba, the combination of limited supports and treatment coverage for psychological injury/illness by Manitoba Health, persistently high levels of social stigma associated with mental illness, and discriminatory treatment under *The WCA* toward psychological illness/injury act together to create very challenging circumstance for workers suffering from mental health disorders.

The WCA should be amended to recognize and explicitly acknowledge that mental illness/injury can result from exposure to workplace hazards. A cross-jurisdictional review of the trends in workers compensation rulings reveals a dramatically different legal landscape since Manitoba's last review of *The WCA*. To date, these emerging legal precedents are redefining the definition for "traumatic injury" in at least one other provincial *WCA*. Research demonstrates that repetitive "workplace stressors" can directly cause or trigger both physical and psychological injuries in workers.

The 2013 CSA National Standard for Psychological Health & Safety in the Workplace describes thirteen such workplace psychosocial factors that employers have a high degree of control over. It is important to acknowledge that the Standard is a practical, evidence-based tool that is well-suited to determine whether employers have done their “due diligence” in addressing workers’ concerns well in advance of filing a claim.

Recommendations

- That the WCA be amended to treat physical and psychological injuries and illnesses in the same manner:
- Remove current exemptions preventing coverage of stress-based psychological injury or illness; and
- Add a clause that defines “workplace stressors” and expands compensation to cover diagnosed mental health disorders found to be caused by exposure to single or cumulative workplace stressors (*e.g. bullying/harassment*).
- That the National Standard for Workplace Psychological Health and Safety be acknowledged in *The WCA* as a means to assess the presence of workplace stressors known to cause psychological illness/injury.

- Revise Section 4(5.8) *Presumption RE: Post-traumatic stress disorder* to include a clear definition of “traumatic mental stress” similar to that found in Ontario’s WSIB policies. This definition should state that the dominant cause of a psychological injury may involve “cumulative effects” from an exposure to multiple, sudden or traumatic events (1). It is important to recognize current medical research demonstrating that workers may not exhibit symptoms for quite some time and that relatively minor events may trigger symptoms later. The *causative significance* of such an event or events should therefore be considered cumulative in nature. When assessing claims involving psychological injury it is important for WCB and the employer not to make or imply an *assumption of risk* that such events are an expected part of employment. Making an assumption of risk violates the No Fault provision of the Meredith Principles (3). The day-to-day traumatic stressors of some front-line professions in particular should not be normalized as “just part of the job”.

- Revise the definition of occupational disease found in Section 1(1)b for post-traumatic stress disorder. The current language states that the cause and condition for an occupational disease includes: “*triggers for PTSD...but does not include an ordinary disease of life [neither] stress, other than acute reaction to a traumatic event.*” Similar to item #1 above, we recommend that the cause and conditions described in Section

1(1) b.1 be reworded to include cumulative stressors that may or may not be acute in origin. This would be consistent with current DSM criteria and medical science.

4. Are there changes required to WCB's funding model? What model best protects against risk while also providing value for employers and retains benefits for workers?

It is our understanding that certain employers are questioning the WCB's current funding model as result of higher than expected surpluses. As the WCB's current ratio target is 130%, we are confident that this model will protect against market fluctuations and any unexpected costs.

With the WCB plan to launch their new employer prevention incentive, along with the Board's continuing to lower annual assessment rates we believe the current model provides the right balance at this time.

Recommendation

- **That current funded value targets be maintained, and no significant adjustments be made to assessment rates that could undermine the feasibility of the new 'prevention incentive' or expose the WCB to heightened risk.**

5. Should Manitoba adopt a cap on the maximum insurable earnings within the workers compensation system?

No, there should be no cap on insurable earnings. In the interest of fairness, wage loss benefits should reflect the earning potential not an arbitrary cap.

The last cap was eliminated in 2006 with support from all members of the legislature and full consensus of the Review committee. In view of being more accountable to the Meredith principles, it makes no sense to discourage workers from reporting or filing claims on the basis of a higher income when they are hurt or sick at work.

Recommendation

- **The WCB should not re-instate a cap on maximum insurable earnings.**

6. The WCA currently provides for a Worker Advisor Office to assist workers with a WCB matter. Should the WCA also provide for an employer advisor Office?

The OHC is not in support of the development of the employer advocate office. Currently there are at least two recently revamped departments who work towards the guiding and clarification of the process for employers, one being the Fair Practices Office and second, Return to Work Services. The use of WCB appeals is also mechanism for employers to have claims dismissed or benefits revoked. Creating yet another access point for employers continues to makes the WCB process adversarial and unbalanced.

On the other hand the Worker's Adviser Office has become one of the sole offices that claimants can receive advice and guidance on their claims and it has recently experienced a number of years without a full complement of staff.

Recommendation

- **The WCA recommit to provide workers with the proper resources needed and support claimants in the process managing their claims through a fully resourced Workers Adviser Office to assist workers get the benefits they are entitled to, benefits which are guaranteed to them in exchange for giving up their right to sue employers when they are hurt at work.**

7. What legislative changes do you think are required to ensure that the WCB remains a modern, responsive administrative tribunal?

a. Impairment awards.

A common concern for clients at the OHC is that monetary payouts for permanent impairments, which are one-time payments, are valued too low and are also limiting as minimal impairments are only considered when there is minimum of 1% of the body impaired up to a theoretical maximum of 100%. Each 1% is currently valued at \$1370.

In occupational cases this means that impairments lowers then 1% are not provided for while other small permanent impairments like finger or toe digits receive mere percentage but have possibly detrimental consequences on the ability to return to certain types of work and quality of life.

Recommendation

- **The WCB should use this review to reassess its permanent impairment policy and impairment awards.**

b. Determining Work-Relatedness: Causation of Injury/Illness

For many occupational diseases and injuries, the injury or illness has occurred as a result of multiple factors, but would not have arisen in the absence of work-related factors. It is our opinion that the current predominant cause test in Manitoba imposes too high an onus and results in a significant number of workers who have suffered disability in the course of their employment being denied compensation. This is inconsistent with the basic principle that industry should fund compensation for workers who have experienced disability due to their employment. According to Terence Ison in *A Historical Perspective on Contemporary Challenges – Meredith Memorial Lecture*:

“...where a disability has resulted from the interaction of two or more causative factors, and it would not have occurred in the absence of one of them, there is no scientific way in which any one of them can be classified as “predominant”. The classification can only be made by arbitrary choice or political judgement, and this is so, even if the decision is allowed to masquerade as a medical opinion.”

Instead of the dominant cause test, British Columbia employs the test of “causative significance.” This means that work was “more than a trivial or insignificant aspect” of the injury. Given it is impossible to classify one of a number of potential causes as “predominant”, the causative significance test represents a more reasonable test for workers compensation.

Recommendation

- **The Workers Compensation Act of Manitoba should eliminate the “dominant cause” test and adopt a causative significance test in place of the current predominant cause test to determine causation of an injury or illness.**

C. Benefit of the Doubt

The “balance of probabilities” standard of proof currently used in Manitoba should be strengthened by adding a “benefit of the doubt” provision which favours the worker in the event of evenly balanced possibilities. “Benefit of the doubt” provisions exist in other

jurisdictions such as British Columbia. This would ensure more consistent and fairer outcomes for those workers where possibilities are evenly balanced.

It is our view that in combination the causative significance test, the standard of proof on a balance of probabilities, and a benefit of the doubt provision which favours the worker, represents the best compromise between the competing interests of employers and workers, and best serves the goals and principles of the workers compensation system.

Recommendations

- **The Workers Compensation Act of Manitoba should add a “benefit of the doubt” provision which favours the worker in the event of evenly balanced probabilities.**

d. Making WCB Mandatory

Currently The WCA only covers 75% of Manitoba workers, the third lowest coverage rate in the country. This issue was first raised in 2004-05 WCA review as it was recognized that many industries were transforming and that in some of those industries the nature of hazards were also changing and were becoming more frequent.

This last review recommended that coverage be extended and we agree that it’s time to revisit and reactivate this recommendation. It’s important that all workers and all employers be afforded the protection of WCB insurance. Expanding coverage will make the system more efficient, by increasing the base of employers to share costs, making the cost of WCB a true collective liability. Through economies of scale, we would expect to see lower average premium costs if coverage were expanded.

Mandatory coverage for all industries is also more consistent with the Meredith principle of exclusive jurisdiction.

Recommendation

- **That The WCB Act be amended to make coverage compulsory for all Manitoba workplaces.**

d. Data, Data, Data

It is becoming incredibly important that new forms of data be collected regarding evaluations, claims, and their outcomes from WCB. The WCB needs to refocus how, when, and what data it collects regarding claims and outcomes of claims. Data, both quantitative and qualitative drives many of decisions and directions in areas of policies and practices, yet the WCB data continues to be lacking, incomplete, private, and often geared towards employer interests compared to other public institutions.

Where there is data sharing, such as RWIP projects, there is significant interest in working with WCB to clean, sort and analyse data as well as create provincial partnerships across institutions to help fill in and create new data sets, such as the social determinants of health, and services around complex clients. When WCB moves towards refocusing on the data it collects and facilitates the open sharing and analysis of that data we believe that WCB will be embraced more as partner in finding in depth long term solutions for Manitoba as envisioned by Sir Meredith back in 1916.

Recommendation

- **That the WCB consider committing to the collection of claim and claim outcome data as well as avenues for sharing that data in the WCA.**

Workers Compensation & the Health Care System

As a member of the healthcare system in Manitoba the OHC is part of a larger network of healthcare providers, physicians and facilities that see injured patients in a number of different faculties on a daily basis. The treating health care provider is often in the best position to understand and assess the factors that will complicate recovery and return to work. More and more recently there have been inquiries and questions regarding WCB practices in using independently contracted health care consultants, often without an in-person medical examination, and discounting the opinions and diagnosis of treating physicians on claims. There are many cases where the WCB is making claims decisions that are at odds with the medical opinions of workers' own doctors or other health care providers. According to the recently released study conducted by the Institute for Work & Health on the *Role of Health Care Providers with Workers Compensation*,

“For treating health care providers, this practice contributes to their further alienation from the workers compensation system. Administrative hurdles, disagreements about medical decisions and lack of role clarity impeded the meaningful engagement of health-care providers in RTW. In turn, this resulted in challenges for injured workers, as well as inefficiencies in the workers' compensation system.” (Kosny et al, 2016)

Recommendations

- **The Workers Compensation Board should ensure that health information about injured workers is obtained from their own health care providers. WCB should not turn to independently contracted health care consultants without the worker's consent and unless attempts to involve the treating health care provider are unsuccessful or if there is no treating health care provider available.**
- **That the WCB Appeal Commission be tasked with undertaking a review of the role and effectiveness of Medical Review Panels within the current WCB system; and**

- That the WCB adopts the practice of having a sick or injured worker's safe return to work plan be developed jointly by the worker, his or her employer, and the worker's doctor. And where there is disagreement, there should be a quick and easy way to engage the WCB to intervene and build consensus before a worker resumes his or her activities.
- That *The WCA* be amended to establish a 'Medical Advisory Committee', to review and advise the Board on all medical matters relevant to the administration of The WCA, including adoption of guidelines and policies, to ensure they are consistent with current best practice and the generally held opinion of the medical profession

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