

**Submission to the Workers Compensation Act 2016 Legislative Review Committee
from the Workers Compensation Board of Manitoba**

February 2017

**Possible Technical and Administrative Amendments to
*The Workers Compensation Act***

Modernization and Plain Language Drafting

The WCB supports amendments that will modernize *The Workers Compensation Act* (the Act), including use of plain language principles.

The Act should be drafted in a way that is accessible to all participants in the system. Many of the Act's provisions date from 1916, a time at which plain language drafting was not a consideration. Others have been added piecemeal over time. The provisions do not always follow a logical order, and the Act is often difficult to understand and apply.

In addition, the WCB currently administers more than one version of the Act: the Acts as they existed up to December 31, 1991 (commonly referred to as the "old Act"); the Act in place from January 1, 1992 to December 31, 2005; and the current version of the Act which was substantially amended by Bill 25, effective January 1, 2006. The date of accident determines the type of compensation benefit entitlement.

This legislative scheme creates ambiguity for participants and we suggest that any amendments resulting from this legislative review should create as harmonious a system as possible. Our clients should be able to understand clearly how the Acts apply to workers, employers and service providers. It should be clear when provisions begin and end, and which provisions apply to whom.

The complexity of the current Act engages access to justice principles. It is a fundamental principle that participants are entitled to know their rights and obligations under the Act, and how and whether it applies to them.

The 2005 Legislative Review Committee recommended that the Act should be rewritten in plain, consistent language and reorganized in a logical, sequential, and grouped manner (Recommendation 66).

Definition of Accident (Section 1)

The 1916 Act defined "accident" as meaning "a fortuitous event occasioned by a physical or natural cause and includes a wilful and intentional act not being the act of the injured workman."

This definition remained unaltered in the Act until 1959. The principal amendment in 1959 was to add to the definition "any event arising out of and in the course of employment" and "a thing that is done and the doing of which arises out of, and in the course of, employment". The 1959 amendment also

introduced the concept of industrial disease by including in the definition of accident "conditions in a place where an industrial process, trade, or occupation is carried on, that occasion a disease."

There were significant additions in 1992, when the Act was amended to refer to and define occupational disease, and to exclude from the definition of accident any change in respect of the employment of a worker.

The definition of accident poses problems for all users of the workers compensation system including WCB staff, the Appeal Commission and, most importantly, workers and employers. The current text creates confusion because the opening stem of the definition provides that an accident is a chance event occasioned by a physical or natural cause. The remaining clauses, however, describe events and conditions that are not occasioned by physical or natural causes. This textual inconsistency is enhanced by the fact that the definition is exhaustive.

The part of the definition that refers to "a thing that is done and the doing of which" is difficult to interpret and is arguably redundant. The inclusion of "acute reaction to a traumatic event" in the definition of occupational disease often leads to a convoluted decision-making process, and has been criticized by the Appeal Commission in recent decisions concerning psychological injuries. A corollary to this is the characterization of PTSD and other psychological injuries as occupational diseases under the definition of accident, resulting in the application of the more stringent "dominant cause" standard to these types of injuries.

Most workers compensation legislation in Canada includes a definition of accident. These definitions generally contain elements similar to Manitoba's definition, but are expressed in plainer language. The majority of statutory definitions of accident in Canada also use open-ended language ("includes" instead of "means"), allowing the WCB more flexibility to find that an accident occurred in novel or unforeseen circumstances.

The 2005 Legislative Review Committee recommended that definitions throughout the Act should be updated and clarified as necessary (Recommendation 67). This would presumably include the definition of accident as well as the definitions of "employer" and "worker" referenced in the next section of this submission.

Definitions of Employer and Worker (Subsection 1(1))

The Act's definitions should be reviewed to ensure that they have kept up with Manitoba's changing workforce. The recent growth of the "gig" or "on-demand" economy has caused policy-makers to consider the appropriate balance between entrepreneurship and workplace protections. Recent legal actions in Canada and the US have brought the challenge of defining "worker", "employer" and "independent contractor" into relief. People are increasingly entering into non-traditional arrangements for the provision of services, challenging the legal framework of workers compensation coverage developed more than a century ago.

Accidents Outside Province (Section 5)

Section 5 provides the rules regarding accidents occurring outside of Manitoba. It has been in the Act since 1972 with very few amendments since that time. The provisions concerning accidents outside of Manitoba are convoluted and difficult to interpret. Questions arise concerning the extent to which workers should be connected to the province in order to receive workers compensation coverage.

Amendments would help to clarify the text and establish the appropriate coverage for distance workers in the modern economy.

Right of Action against Person other than Employer (Section 9)

This sections gives workers, and their dependants in the case of fatalities, a right of election between claiming compensation and bringing a third party action. Workers may have multiple dependants, including spouses, common-law partners and children. The Act could be amended to clarify whether the Legislature intends for there to be multiple claims in different systems arising from the same accident. For example, under the current system, a child could claim with the WCB, the spouse could claim with Manitoba Public Insurance and the estate could take a third party action.

No Deduction from Wages by Employer or Contribution by Workers (Section 15)

A fundamental principle of the workers compensation system is that workers do not pay for their compensation benefits. This principle is reflected in section 15, which has been in the Act without substantive amendment since 1916. Section 15 disallows deduction from a worker's wages any sum that represents the employer's liability for assessments or otherwise under the Act. Contravention of Section 15 is an offence and subject to an administrative penalty.

Section 15 uses the word "wages" which is not defined in the Act or in *The Interpretation Act*. The ambiguity around the meaning of "wages" has created interpretive problems for the WCB and the Appeal Commission. Does the term refer solely to the worker's pay cheque, or does it include additional forms of remuneration such as vacation and sick time? Does it refer solely to traditional employer-employee situations, or can it also apply where a sub-contractor is deemed to be a worker or any number of other arrangements in the modern workforce?

The Appeal Commission has considered the meaning and effect of section 15 in two recent decisions, both of which raise additional questions about the meaning of the term "wages". An amendment would provide greater clarity to this important section and enhance enforcement of our Act within the WCB's compliance framework.

Offence and Administrative Penalty (Section 16)

Section 16 gives the WCB authority to impose penalties on an employer who breaches the section 15 prohibition on a worker paying for benefits. It also provides that an employer in breach of section 15

must repay to the worker any amounts wrongfully withheld or required to be paid. In some circumstances, the worker may experience delays in reimbursement. An amendment authorizing the WCB to pay the worker the amounts owing and charge the employer could help to make this process more efficient and fair. It would also bring Manitoba into line with other Canadian jurisdictions with similar authority.

Remedy for Discriminatory Action or Failure to Comply with Re-employment Obligation (Section 19.1 and Section 49.3)

An employer breach of the re-employment obligation may result in a penalty equal to the worker's earnings in the year preceding the accident. Discriminatory action or claim suppression may also result in an employer penalty. The Act does not provide affected workers with a remedy in these circumstances. The Appeal Commission recently commented on this situation in Decision 11/17. The Act could be amended to give the WCB jurisdiction to pay a portion of the penalty to the worker.

Payments of Benefits (No current section)

Subsection 24(3.1) provides for payment of benefits to a committee or substitute decision maker of an injured worker. However, in many cases of sudden catastrophic injury, the worker will not have a committee or substitute decision maker in place. The Act does not make clear how benefits should be paid in such instances.

The issue also arises in the context of fatalities. The Act does not offer direction on the extent to which the WCB will require formal execution or administration of an estate. In some cases, the expense of a formal probate would exceed the amounts of compensation owing. In such cases, the WCB should be authorized to spare an injured worker's family the expense of formal legal proceedings as a requirement to receive benefits.

The Act does not provide the WCB with a general authority to determine the most convenient and appropriate manner in which to pay compensation. Several other Canadian jurisdictions allow for this in their legislation. An amendment giving the WCB such authority would enhance efficiency and fairness in the payment of compensation.

Medical Aid (Section 27)

Section 27 of the Act allows the WCB to provide workers with such medical aid as the WCB considers necessary to cure and provide relief from an injury resulting from an accident. Section 27 and its many subsections address diverse areas including the payment of emergency expenditures for family members, the limitation period for submitting medical aid invoices, requiring an autopsy and providing for a full range of academic, vocational and rehabilitation services. This important section would benefit from modernization and clarification in several areas. For example, is it still appropriate to limit emergency expenditures to only one family member? Should the Act allow for respite or psychological

care for workers' families in appropriate circumstances? Does the provision on autopsies engage human rights considerations?

The Act should give the WCB maximum flexibility to manage the provision and payment of medical aid, and respond to workers' needs within the context of a modern healthcare and rehabilitation environment.

Compensation on Death of Worker (Sections 28 and 29)

Sections 28 and 29 could be reviewed and modernized to ensure fair compensation to the survivors of fatally injured workers. The amount payable under the Act to dependent children, for example, is lower than the current child support requirements. The Act also limits payment of benefits to spouses and dependants. In contrast, some other agencies provide lump sum payments to surviving relatives who are not dependants (e.g. section 123 of *The Manitoba Public Insurance Corporation Act*). These sections of the Act should be reviewed and revised to ensure that the compensation system is keeping up with developments in the law of survivor benefits in general.

Recurrence of Loss of Earning Capacity (Subsection 40(5))

Subsection 40(5) provides a formula for the calculation of net average earnings in cases of recurrence of loss of earning capacity. It provides that the net average earnings of a worker suffering a recurrence are the greater of the net average earnings at the time of the original compensable injury and the net average earnings in the worker's most recent employment. This formula can produce anomalies when a worker voluntarily takes a lower paying job before suffering the recurrence. Such circumstances have required complex policy-based work-arounds to ensure that injured workers in these circumstances are compensated appropriately. The Act could be revised to account for a wider range of employment circumstances.

Collateral Benefits (Section 41)

The collateral benefits provisions in section 41 are difficult to interpret and could be both clarified and modernized. Several claims have raised questions about what types of policies of disability insurance are contemplated as collateral benefits; how to treat CPP that is received both because of a work injury and for other causes; and what constitutes a payment from an employer to a worker for the purpose of paragraph 41(1)(b). These issues continue to be raised by both workers and employers.

These provisions would benefit from review and revision in light of changing work structures, including concurrent non-covered employment. They could also be modernized to recognize the various types of insurance products now available, in addition to disability insurance.

Annual Adjustments in Compensation (Section 44)

Every year, the WCB adjusts certain amounts of compensation by applying a determined indexing factor. This is done by a Board regulation. Making these adjustments by policy up to a certain

threshold would be a more efficient and rational use of the Board's regulation making authority. If an increase exceeds certain thresholds as determined with reference to the indexing factor, it would be made by regulation.

Section 44 also refers only to indexing maximum annual earnings and does not refer to minimum annual earnings, which are also subject to indexing.

WCB Retirement Plan (Subsection 59(3))

The WCB's pension plan, (the Retirement Plan) is established under subsection 59(3), which was enacted in 1936. Since the Retirement Plan's creation, the WCB has been the administrator. The wording of this section could be modernized to clarify that the WCB is the Retirement Plan administrator as contemplated in *The Pension Benefits Act*. The PBA provides that a pension plan must be administered by a "board, agency or commission" where an Act of the Legislature makes the board, agency or commission responsible for the plan's administration.

External Members of Board Committees (Section 61 and 62)

The Act grants protection from liability to the Board of Directors, WCB employees and agents. It also prevents them from testifying or producing documents in proceedings to which the WCB is not a party. Several Board committees include external members who are not members of the Board of Directors, including Audit, Investment and Prevention. The rationale for protecting Directors, employees and agents applies equally to external Committee members. The 2005 Legislative Review Committee's recommendation to extend protection to WCB agents was implemented in 2006. It would now be useful to extend that protection to external Committee members.

Self-insured Employers (Section 78)

Subsection 73(2) of the Act establishes five classes of employers, including three classes of self-insured employers. Current self-insured employers in Manitoba fall within one of the following classes:

Class B- Self-insured employers set out in a schedule established by regulation. This class consists primarily of large private sector organizations in the transportation industry.

Class C-The Crown in right of Manitoba and those of agencies of the government not otherwise included under Class A, Class B or Class E.

Class D- The City of Winnipeg.

Class E - Employers are all those that are not self-insured.

Section 78 of the Act gives the WCB authority to move employers from one class to another and to create new classes. In 1999, the Board of Directors confirmed the principle of collective responsibility and exercised its authority to maintain existing employers in Class E and not grant self-insurance status to new applicants. This decision is specific to employers requesting a transfer from Class E to another

class without a change in corporate structure. The WCB determines whether an employer should be in the collective liability pool or individual liability pool when an employer is sold, purchased, or privatized.

The principle of collective liability of employers is a foundational principle of workers compensation. Collective liability supports another foundational principle: security of benefits. Collective liability provides protection and rate stability for employers while also ensuring sufficient funding to meet the current and future costs of claims.

Consistent with the principle of collective liability and the Board's current policy to not consider expansion of the self-insured classes, the Act should be amended to limit self-insurance to the current named self-insured employers. All other employers would be in the collective pool.

Assessments (Section 80)

The Act's provisions concerning assessments should be reviewed to ensure they accord with practice and are in keeping with the WCB's current rate system. One example of an obsolete provision which could be repealed is subsection 80(10), which requires a municipality to give the WCB notice of all building permits within three days of granting a permit. This has not been a practical requirement of the system for many years.

Disposition of Business Enterprises (Subsections 81.1(2) - 81.1(4))

When an employer disposes of its business enterprise, it is obligated to obtain a certificate from the WCB certifying that it has no claims against the employer. If no such certificate is obtained, the WCB may pursue any debt owed to it by the original employer as against the new proprietor of the business. These subsections could be clarified to confirm that they apply to all manner of disposition including transfer, exchange or gift.

Investment of Excess Funds (Subsection 94(2))

Subsection 94(2) permits the WCB to invest any money in the accident fund that exceeds current requirements. A helpful clarification would specify that all income of the WCB, including income generated by such investments, is free from every form of taxation. A provision of this type would help to avoid protracted legal negotiations and proceedings relating to investment revenue, particularly outside of Canada. There are similar provisions in the workers compensation legislation of some other Canadian jurisdictions.

Definition of Employer (Section 99)

The WCB has jurisdiction to determine who is an employer. This determination is critical for the functioning of the system overall. In cases of partnerships and shell corporations, it is not always clear who is the employer of record. This has implications for the system, particularly in respect of the accident fund, compliance, the sharing of information and the engagement of the re-employment obligation. The WCB's mandate to determine the employer of record occasionally requires it to pierce

the corporate veil to establish the responsible employer. As part of the compliance framework, section 99 could be amended to grant the WCB this express authority.

Priority of Board's Charge (Subsection 104(3))

For the purposes of collection, subsection 104(3) of the Act grants priority to a lien or charge placed on an employer's property by the WCB. Under this section, the WCB's interest takes priority over nearly every other creditor's interest. This section should be reconciled with Subsection 104.1(2), which provides that the WCB's lien or charge on an employer's property is enforceable as if it were a certificate of judgment under *The Judgments Act*. Under subsection 104.1(2), the WCB's interest is enforceable as against another creditor's interest only if it was registered earlier in time. To enhance the WCB's collection efforts, it would be useful to clarify the Legislature's intention with respect to the priority of a charge registered by the WCB.

Right of Entry (Subsection 100(4))

Subsection 100(1) of the Act gives the WCB a right of entry for the purpose of examination and inquiry. Subsection 100(4) creates an offence for obstructing or hindering an inspection under subsection 100(1). Adding an administrative penalty for obstructing or hindering an inspection under subsection 100(1) would enhance the WCB compliance framework.

Employer's Access to Information (Subsection 101(1.4))

With respect to access to employer's information, the WCB is governed by provisions of *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act* and by subsection 101(1) of the Act. Subsection 101(1) is a general prohibition against WCB officers, agents and employees disclosing claim information except in the performance of their duties or under the WCB's authority.

An exception to this prohibition appears in subsection 101(1.2). This subsection provides for an employer's access to information from a worker's claim file in the context of a reconsideration or appeal of an adjudicative decision. The Act does not specifically address access to information gathered in the context of assessments, compliance or prevention. As the WCB continues to expand its role in these areas, greater clarity around participants' rights to information would be helpful.

False Statement (Subsection 109.1(1))

The Act creates an offence for, among other things, knowingly making a false statement to the WCB affecting a person's entitlement to compensation or the assessment of an employer. Recent experience suggests that Crown Prosecution Services is rarely prepared to pursue prosecution for these types of offences. The Supreme Court of Canada's recent ruling requiring timely prosecutions will likely result in even fewer WCB-related matters proceeding to court.

To enhance compliance with the Act, an administrative penalty should be available in cases of false statement. This would allow the WCB to directly penalize those participants in the system who knowingly making false statements and would bring the legislation into line with that of several other Canadian jurisdictions.

A provision allowing the WCB to suspend or terminate benefits in cases where the worker has knowingly made false statements or provided misleading information to the WCB would further enhance compliance. Section 160 of *The Manitoba Public Insurance Corporation Act* gives the corporation authority to suspend or terminate benefits in the event of a false statement.

Board may Delegate to Agent (Subsection 109.5(1))

Under subsection 109.5(1), the WCB may delegate its powers to an agent or local representative for various purposes. This section could be expanded to make clear that the WCB may delegate its powers not only in respect of compensation services, but also in connection with its prevention mandate.

Fines for Offences (Subsection 109.6)

The Act could be amended to provide that fines payable on conviction of an offence under the Act are paid into the accident fund. Legislation in several other Canadian jurisdictions includes this provision.

Administrative Penalties (Paragraph 109.7(1)(m))

Paragraph 109.7(1)(m) currently provides an administrative penalty for a breach of subsection 101(1) of the Act, which requires WCB employees to protect the confidentiality of information received in the course of their duties. Paragraph 109.7(1)(m) should refer instead to subsection 101(1.2) of the Act, which prohibits employers from improperly using claim information received from the WCB through the file access process.

Conflict with *The Freedom of Information and Protection of Privacy Act* (Section 116)

This section could be updated to also refer to *The Personal Health Information Act*.