

Submission to the Workers Compensation Act Legislative Review Committee

The Workers Compensation Act
February 15, 2017

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Michael Werier
Chairperson
The WCA Legislative Review Committee 2016
PO Box 1296, Winnipeg Main PO
Winnipeg, MB R3C 2Z1

Dear Mr. Werier,

The Manitoba Nurses Union (MNU) is pleased to present our legislative submission for the 2016/17 review of *The Workers Compensation Act (WCA)*. The WCA is an integral piece of legislation intended to protect and support injured workers in Manitoba. A review of this legislation is timely given the progressions we have seen with respect to nurses becoming ill and injured at work.

In representing over 12,000 nurses across the province, MNU is committed to protecting the health and safety of nurses in every workplace. We believe that a safe, healthy work environment is an undeniable right of every nurse in our province and is the foundation of safe, quality patient care. MNU has a longstanding history of executing robust lobbying efforts to improve our workers' compensation system and to ensure it is one that works with and for Manitoba's nurses. This has included strengthening key pieces of legislation, such as the 2016 enactment of presumptive post-traumatic stress disorder coverage under the WCA and in 2011, our workplace violence campaign successfully led to the development of mandatory workplace violence prevention policies and practices stipulated under the *Workplace Safety and Health Act and Regulation*.

The healthcare sector is a complex working environment, one which encapsulates very rewarding outcomes yet inherent risks for those who provide care. Manitoba's nurses are dedicated to providing the most optimal care and improving the health of their patients, which at times is at the risk of their own health and safety. Nurses continuously endure exposure to numerous physical and psychological workplace hazards unique to the profession including: violence, trauma, secondary traumatic stress, and compassion fatigue - all of which greatly impact nurses' susceptibility of acquiring both physical and psychological injuries. In addition to these risks, MNU's independent research illustrates a similar picture in which we have found that in Manitoba, over half (52%) of our nurses have been assaulted, 17% have dealt with an individual with a weapon, 76% have been verbally abused at work. Furthermore, one in four nurses commonly experience one or more PTSD symptoms.

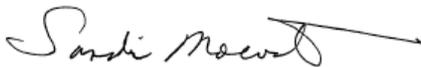
While it is irrefutable to state that it takes courage to be a nurse, this courage often comes at a price. Nurses continue to be identified as one of the sickest professions, exceeding average injury and absenteeism rates. In 2014, the absenteeism rate due to illness for public sector nurses in Manitoba (8.5%) exceeded the national average for nurses (7.9%) and the average rate for all other occupations (4.7%). Since 2001, the time loss injury rate for Manitoba's healthcare sector continues to outpace the overall average for all occupations¹. In 2016, the healthcare sector experienced an average of 32 days paid for time loss injury claims, and 23 days for nurses, both exceeding the overall provincial average of 21 days². In addition, the healthcare sector was ranked third with respect to those who submit the most claims, comprising 16% of all claims in Manitoba. It is important for our workers' compensation system and the guiding legislative framework to recognize that nurses, similar to other frontline emergency occupations, face prolonged, cumulative exposure to unique workplace hazards and stressors which further compound the risk and occurrence of physical and psychological hazards.

The health of all Manitobans is dependent upon the health and wellbeing of our nurses and health professionals who provide patient care. Our workers' compensation system can no longer afford to increase the already heightened risk our nurses face each and every day. In order for nurses to continue to provide optimal patient care, we have a responsibility to ensure that they have safe practice environments, coverage that relates to and aligns with prevalent workplace hazards, and adequate access to benefits they rightfully deserve.

MNU appreciates the opportunity to address the challenges and areas of concern our members have experienced, and on behalf of our members, put forward recommendations that will ensure our province promotes a workers' compensation system that works for nurses, not against them. In recognition of the challenges experienced by Manitoba's overall workforce, MNU supports the recommendations put forth by the Manitoba Federation of Labour in its respective submission.

MNU thanks the review committee in advance for its consideration of our submission.

Sincerely,



Sandi Mowat
President, Manitoba Nurses Union

¹ Manitoba Workplace Injury and Illness Statistics, 2000 – 2014.

² Information provided by Workers Compensation Board of Manitoba. Claims Database, January 23, 2017.

1. Alignment of the Act with Meredith Principles

The foundation of our workers' compensation system emanates from the "Meredith Principles" which include: no fault compensation, collective liability, guaranteed benefits, independent administration and exclusive jurisdiction. Workers relinquish their rights to sue employers should they become injured or sick at work in exchange for these principles. Unfortunately, specific procedures and practises used to implement these principles, as governed by the Workers Compensation Board (WCB) of Manitoba, have jeopardized the integrity of the Meredith Principles, failing to honour the Act. This includes experience rating and its influence on claim suppression, along with inadequate administration of processes stipulated under the Act.

The framework behind experience rating is to incentivize employers to create safe, healthy workplaces in order to reduce workplace injuries and illnesses. As an employer's premium is tied to the amount of submitted and accepted claims, this jeopardizes the principle of collective liability, posing an influence for employers to minimize costs by reducing the number and duration of claims, or attempting to negate the actuality of workplace injuries and illnesses. This eventually leads to the erosion of the principle of guaranteed benefits as employers have what they believe as reasonable incent to oppose, appeal and delay compensation claims. Such examples MNU has been witness to include:

- Employers aggressively appealing WCB claims despite the fact there was a clear accident that led to a legitimate workplace injury, followed by limited treatment and a brief return to work plan.
- Employers failing to abide by the process outlined in the WCB's *Reconsideration Policy*, by appealing claims before dealing directly with the claim manager to address concerns. This results in a release of the claim file to the employer which includes the worker's personal health information, resulting in what appears to be claim suppression.
- Aggressive and unsafe return to work plans being arranged as the WCB failed to gather all necessary medical information.
- Nurses are voicing concerns that they feel they have to defend themselves and prove their compensable injury and limitations to claim managers in order to receive and continue to receive benefits they are entitled to. This contradicts the "no fault compensation" principle and the intention for the WCB to be a non-adversarial entity. The fear of losing their entitlement often also distracts the worker from a full recovery and creates an environment of mistrust and stress.
- Nurses have expressed a desire not to proceed with a claim or work with claims management staff due to being treated like a "criminal" rather than an injured worker who has a right to benefits under the Act. Many nurses have confirmed they will often choose to not contact

the WCB when a flare up or aggravation occurs to their injury and would rather take sick leave time to avoid being treated with such disrespect. This treatment by claims managers contradicts the fundamental values held by the WCB which consists of integrity, compassion, innovation, accountability and collaboration.

Manitoba's adoption of experience rating as an assessment model ignites claim suppression and aggressive return to work practices, pushing our WCB system further away from the principles of which it is based. This fosters distrust between workers and their dependency on a structure that is supposed to protect and uphold their rights. Experience rating encourages employers to bypass the system through forms of claim suppression as opposed to investing in prevention efforts to create safer, healthier workplaces.

MNU is of the opinion that employers should have good reason to appeal claims and not challenge cases for the purposes of reducing costs or accessing employees' personal health information. We have seen and continue to see many employers requesting WCB files on the basis that they wish to appeal however, fail to progress forward to an appeal nor notify the nurse or union of their intentions. For example, between 2013 and 2016, there were 119 file access requests for nurses' claims. Of this amount, approximately 35% led to an appeal submission, concluding that a higher than appropriate number of files are being accessed for review only, leading an employer to access private health information for reasons apart from an appeal. This statistic is also consistent with the findings for all Manitoba employers³. This has caused significant, unwarranted distress for our members who are engaged in the process of defending a claim as it remains unclear if the employer is intending to proceed with an appeal or if they are "fishing" for information. While we understand and respect an employer's right to appeal, the WCB lacks a stringent approach to ensure every appeal request abides by the WCB's *Reconsideration Policy* in its entirety. Furthermore, WCB staff should be taking necessary steps to facilitate a discussion with the employer to ensure they are abiding by the policy and to resolve any issues or concerns before personal information is released. This type of safeguard will ensure the Act and concomitant policies and practises limit the number of claim files inappropriately released.

Furthermore, the rate of claim suppression compliance does not accurately reflect the rate of claim suppression activities. In the past three years, only three penalties have been levied against employers under section 19.1 (1) of the Act. As such, there is a need to establish higher penalties and stronger enforcement for claim suppression, including a public report of employers penalized for claim suppression, aggressive and unsafe return to work practices, and misuse of information.

With respect to the principle of independent administration, it is crucial to ensure the internal operational policies created and authorized by the WCB Board align with language in the Act. MNU continues to encounter discrepancies between the grounds on which a claim is denied and what is permitted by the Act. A specific example includes the denial of a claim on the basis of

³ Information provided by Workers Compensation Board of Manitoba. FIPPA Request, January 30, 2017

late reporting however, the claim was submitted within the 30 day timeline as identified in s. 17(1) of the Act.

Lastly, the best way to fix the current rate model and restore respect for the Meredith Principles is to assess the opportunity to implement a new rating model. The rating model should reward genuine investment in workplace injury/illness prevention and not reward employers for blocking and interfering with injured workers' claims. One alternative model, the WCB could consider, is schedule rating in which the role of risk factors is emphasized. Schedule rating would identify evidence-based measures deemed imperative for adequate prevention of workplace injuries/illnesses and could offer premium discounts for employers who have invested and implemented such prevention measures. Schedules could be adopted for specific sectors, such as healthcare, which identify unique occupational health and safety hazards. The WCB could then specify the requirements of a prevention program and the discounts associated with each requirement.

Recommendations:

- To amend the Act to increase penalties and ensure rigorous enforcement efforts for claim suppression, aggressive and unsafe return to work practices, and misuse of information.
- To amend the Act to require the WCB to publish annual reports of all fines levied against employers who fail to comply with the Act, in compliance with s. 109.7(5).
- For the WCB to conduct a comprehensive review of the assessment rate model to determine its ability to reduce claim suppression and increase prevention efforts amongst employers, along with determining if alternative rate models are feasible.
- For the WCB to publically report the number of file requests submitted by employers and the number of such requests that have proceeded to appeals submission, and publish these findings in the Annual General Report.
- For the WCB to tighten the parameters for employers to access employee claim files. This includes ensuring the *Reconsideration Policy* is enforced prior the release of a claim file to an employer, not after the fact.
- For the WCB to ensure claims are adjudicated in a way that respects and aligns with language in the Act.
- For the WCB to ensure all staff members abide by its *Quality Policy*, specifically ensuring that claimants are treated as a customer of service, and with compassion and fairness.

2. Alignment of the Act and workplace illness and injury prevention initiatives outlined in the Manitoba's Five Year Plan for Workplace Injury and Illness Prevention

From the perspective of MNU, the most important area where the Act does not align with the principles identified in *Manitoba's Five Year Plan for Workplace Injury and Illness Prevention* is with respect to workplace mental/psychological health. The *Plan* notes that steps will be taken to improve education and enforcement to prevent psychological harassment and violence in the workplace. As it currently stands, there is not a clear framework regarding which authorized entity, the WCB or Manitoba Workplace Safety and Health, will provide enforcement and ensure employers are exercising their due diligence in preventing and addressing workplace mental health. As per s. 54.1 (2) (b) of the WCA, there is a requirement to promote an understanding of and compliance with the WCA and the *Workplace Safety and Health Act* (WSHA). An integral component of the WSHA is prevention of workplace health and safety hazards however, the WCA does not pose any financial consequence related to an employer's failure to provide adequate prevention. Currently, fines are levied after an accident has occurred and more specifically, the WCB's compliance framework is focused heavily on administrative penalties rather than penalties for failure to comply with the prevention requirement as per the WCA and WSHA.

MNU has been a strong advocate in promoting that the best defense for reducing workplace injuries and illnesses is education and prevention, in which both the employer and nurses have a responsibility. With respect to workplace psychological health, MNU believes it is crucial for managers and nurses to receive education regarding health and safety hazards most prevalent in the profession, such as violence and workplace trauma. It is equally important for nurses to understand the WCB's processes such as reporting hazards and injuries, accommodation and return to work. While we recognize and appreciate the efforts Safe Work Manitoba has embarked on in the area of psychological health and safety, it is important to note that there has been a dearth amount of education and training in this area. In 2016, only one training course was offered, *Harassment and Violence Prevention*. As such, there needs to be strengthened efforts on the part of the WCB and Safe Work Manitoba to offer education that aligns with emerging trends for workplace mental health injuries and hazards.

It is important to appreciate and recognize the integral role the *Safe Workers of Tomorrow* program has on educating Manitoba's future workforce, specifically high school students. Due to the nature of work nurses encounter on a daily basis, it remains imperative for nursing students to be informed on the role of the WCB and their rights as an employee, should they become injured while at work. MNU anticipates that the delivery of the *Safe Workers of Tomorrow* program will be adequately resourced to be extended to post-secondary students in our province.

Lastly, many citizens do not understand the role of the WCB and its direct control over one's health, especially when there is inconsistent medical opinions between a claimant's medical provider and the WCB. MNU recommends for the WCB to adopt a legislative requirement similar to the *Saskatchewan Workers' Compensation Act* in which the board is required to hold

one or more public meetings for the purposes of reporting to all interested parties, including the general public and labour/employer stakeholders, on the administration of the Act and policies of the Board⁴.

Additionally, the WCB in conjunction with Safe Work Manitoba should consider developing a training session for the general public to become informed on medical processes and policies related to adjudication, treatment and return to work planning. This form of education should be facilitated by a medical practitioner.

Recommendations:

- To amend the Act to include a compliance framework and fines for failure to provide prevention efforts for workplace injuries and illnesses, including but not limited to workplace psychological/mental health.
- To amend the Act to expand the duties of the Board to have an obligation to hold one or more annual public meetings to educate the public on the administration of the Act and the role of the WCB.
- To ensure the *Safe Workers of Tomorrow* program is adequately resourced to provide a comprehensive curriculum and training delivery model for workplace health and safety, including psychological health and safety.
- To expand the delivery of *Safe Workers of Tomorrow* to post-secondary students.
- To enhance Safe Work Manitoba's education and training initiatives regarding workplace mental health specifically in relation to the following issues: identification of workplace psychological risk factors, psychological hazard prevention programs, and the emerging legal landscape for employers to create and maintain psychologically healthy workplaces.
- For the WCB, in conjunction with Safe Work Manitoba, to develop a training session facilitated by a medical practitioner that informs the general public on WCB medical processes and policies for adjudication, treatment, return to work planning and claim closure.

⁴ Saskatchewan Workers' Compensation Act, 2013, s 19(4).

3. Provisions in the Act respecting approach to addressing mental health in the workplace

Workplace mental health can either enhance or injure a worker. The failure to adequately address workplace mental health poses a national labour issue, one that is costing the Canadian economy \$51 billion as a reported one in five Canadians (20%) will experience a mental illness at one point in their lives⁵. Workplace mental health has become the core of an emerging legal landscape that is placing more responsibility and liability on employers and provincial legislation to protect employees' psychological health. Mental health can no longer afford to be viewed as a personal issue; it is a societal issue that will either reap positive economic benefits if adequately addressed, or cause further detrimental consequences if ignored. Failure to adequately address and prevent psychological workplace hazards places a greater risk for employees to develop psychological/mental health injuries and illnesses. MNU presents the following subsections to discuss the ways in which efforts can be strengthened to address workplace mental health:

A. Disparity in adjudicating and treatment of psychological injury claims

In order for the Act to adequately address workplace mental health, the first challenge is in respect to the disparity between the ways in which psychological and physical injuries are adjudicated and treated, contributing to discriminatory processes and policies. Our workers' compensation system places a higher amount of standard of proof to meet the threshold of compensability for psychological injuries than physical injuries. Physical injuries must only demonstrate they arose out of the course of employment while psychological injuries have more stipulations, such as limiting compensation to acute reactions to a sudden or unexpected event. It has been found that the higher standard of proof in legislative provisions has been characterized as discrimination based on mental disability and has been the target of a successful *Charter of Rights and Freedoms* challenge in Canada^{6 7}.

In addition to unfair adjudication policies, there is also a wide disparity between the minimum amounts of treatment WCB authorizes for psychological injuries. Currently, claimants with physical injuries can be automatically entitled to up to 14 weeks of chiropractic treatment or 20 physiotherapy sessions. Comparatively, there is no equivalent minimum standard of treatment for psychological injuries. The WCB's decision to provide coverage for psychological treatments seems to be based on an arbitrary number of treatment sessions and it remains unclear how the WCB determines the appropriate amount of treatment minimally required for psychological injuries.

⁵ Mental Health Commission of Canada.

⁶ (2010). *The Shain Reports on Psychological Safety in the Workplace: A summary*. Prepared for the Mental Health Commission of Canada.

⁷ In reference to *Nova Scotia (Workers Compensation Board) v. Martin; Nova Scotia (Workers Compensation Board) v. Laseur*, October 2003.

This poses a significant impact to the wellbeing of our members as we have had nurses denied additional psychological treatment despite recommendations from treating psychologists or medical providers. As such, the WCB should develop best practice guidelines for psychological treatment for injured workers. It would also be in the best interest of the WCB to look to Safe Work British Columbia (BC) as an exemplary model for policies and directives specific to psychological conditions, including the most appropriate way to manage claims for psychologically fragile workers.⁸

B. Failure to acknowledge cumulative exposure to workplace stressors

The WCA and respective policies fail to recognize and acknowledge the impact of exposure to work-related stressors on psychological injuries. This is imperative for the nursing profession as there is no shortage of research confirming that nurses face a higher prevalence of workplace trauma and violence, increasing their risk of being physically and psychologically injured while at work. Furthermore, it has been verified that cumulative exposure and bearing witness to workplace trauma and violence can be just as detrimental to an individual's psychological health as experiencing an event or injury directly⁹; and as the length of exposure to suffering and trauma is prolonged, the intensity and breadth of stress increases for nurses, greatly impacting the risk of developing PTSD¹⁰.

Manitoba's legislation is in sharp contrast to one of the most progressive models in Canada. SafeWork BC expanded the coverage for mental disorder claims to include reactions to a significant work-related stressor or cumulative series of significant work-related stressors, including bullying and harassment. This change was to comply with the decision stemming from the *Plesner v. British Columbia Hydro and Power Authority* hearing. In addition, SafeWork BC does not restrict compensation for psychological claims for those who work in high stress occupations. Rather, compensation can still be provided to those who work in environments inundated with hazards and high amounts of stress even if it is determined that they were previously able to tolerate similar stressful and traumatic experiences. The Ontario Workplace Insurance Safety Board (WSIB) contains a similar practice with respect to its traumatic mental stress injury policy.

Furthermore, SafeWork BC stipulates that in order for a psychological condition to be compensable, the work injury has to have contributed to it in a meaningful way. It does not have to be the only cause or predominant cause of a worker's psychological condition but rather, the injury must have been caused by significant contributing factors in order for the psychological condition to be compensable. This replaces a dominant cause test with a causative significance test. As such, Manitoba's Act and respective adjudication policy should clearly identify and define workplace stressors. Furthermore, exposure should not be limited to direct experience but

⁸ Practice Directive #C12-8, Managing claims of psychologically fragile workers. Work Safe BC. March 29, 2010.

⁹ Jacobowitz, William. (2013). PTSD in psychiatric nurses and other mental health providers: A review of the literature. *Issues in Mental Health Nursing* 34, 2013. 787-795. Pg.787

¹⁰ Meadors, P. and Lamson, A. (2008). Compassion fatigue and secondary traumatization: Provider self care on intensive care units for children. *Journal of Pediatric Health Care* 22(1), 24-34.

to cumulative exposure and witness to such workplace stressors such as assault, bullying and harassment.

C. Failure to recognize harassment, bullying and burnout as a compensable psychological injuries.

Despite the fact Manitoba's five year *Plan* references psychological harassment, this has yet to be acknowledged nor is it defined in the Act. Despite its absence in the WCA, harassment is defined in Manitoba's WSH Act and is referenced as a key component to addressing workplace mental health. As it presently stands, a claimant must prove a threat of physical harm in order for harassment claims to be accepted as psychological injuries. MNU is of the opinion that the sheer presence of harassment in the workplace is a hazard, and can be sufficient to cause injury to a nurse's psychological wellbeing.

The Act also fails to recognize burnout and bullying as compensable issues. This is in opposition to emerging trends and research that identifies these factors as contributors and grounds for workplace psychological injuries. For example, the Public Services Health & Safety Association published a handbook on workplace bullying in which this document defines bullying as "act or verbal comments that could 'mentally' hurt or isolate a person in the workplace." The document clarifies the difference between regular workplace conflicts and bullying in which, "bullying is defined as repeated, persistent, continuous behavior as opposed to a single negative act and is generally associated with a power imbalance between the victim and perpetrator, where the victim feels inferior¹¹." Any workplace environment or culture that cultivates this harmful behavior, if not corrected, can cause psychological injury to workers therefore bullying should be deemed a compensable issue. As workplace bullying and harassment can lead to injury, illness and death, it is important for the WCB to ensure employers comply with the duty to protect the safety of all workers, especially in this regard. Work Safe BC's employer policy places onus on employers to exercise due diligence to take reasonable steps to prevent where possible, or otherwise minimize, workplace bullying and harassment. This includes reporting and investigation procedures, training and education and organizational policies.¹² MNU recommends that Manitoba adopt a similar approach.

WCB's *Adjudication of Psychological Injuries* policy refuses to acknowledge burnout as a compensable injury, however, burnout is indeed a consequence of one's work environment and the work that is performed. This is especially relevant for nurses and other occupations providing essential services such as firefighters, paramedics, police officers and correctional officers. Specifically applied to the nursing profession, occupational burnout can also be recognized as compassion fatigue or secondary traumatic stress which refers to the emotional, psychological toll stemming from working with traumatized people and events¹³. Additionally, one research study found that 98% of nurses who participated in the study not only met the diagnostic criteria

¹¹ Bullying in the workplace: A handbook for the workplace. (2010). Public Services Health and Safety Association.

¹² Policy Item D3-115-2 RE: Employer Duties - Workplace Bullying and Harassment. WorkSafe BC. Effective November 1, 2013.

¹³ Hinderer, Katherine A. et al. (2014). Burnout, compassion fatigue, compassion satisfaction, and secondary traumatic stress in trauma nurses'. *Journal of Trauma Nursing* 21 (4), 160-169. Pg. 161.

for PTSD, but were also positive for at least one of the three types of burnout syndrome¹⁴. The WCB's current policy limits legitimate workplace injuries caused by hazards in the workplace environment and type of work performed on an ongoing basis. As such, burnout should be accepted as a compensable injury by the WCB and should be incorporated into prevention plans as well as incentives for employers to create a healthy work environment.

D. Lack of prevention and compliance framework for workplace mental health

In 2013, the Canadian Standards Association developed the *National Standard for Psychological Health and Safety in the Workplace* in which 13 evidence-based workplace psychosocial factors are identified as integral components to protect employees' workplace mental health. The Standard also provides employers the fluidity to scan their work environment to determine which factors are most at risk for causing psychological harm. The Standard represents a valuable opportunity for the WCB to strengthen its compliance efforts and determine whether employers are exercising due diligence in protecting the psychological health of employees and their respective concerns in advance of filing a claim.

Recommendations:

- To amend the Act to adjudicate physical and psychological injuries fairly and equitably.
- To ensure consistency and equity for treatment of psychological injuries, amend the Act to include a regulation that stipulates guidelines on the minimum treatment for injuries, including psychological injuries, with consultation from the wider medical community.
- For the WCB to strengthen its policies and procedures for psychological injuries, building upon the success as evident in other jurisdictions such as British Columbia and Ontario.
- To amend the Act to include harassment in the list of definitions, specifically in alignment with *The Workplace Safety and Health Act*.
- To remove current exemptions that inhibits coverage for psychological injuries by amending the Act and concomitant psychological injury policy to explicitly acknowledge and recognize burnout, bullying and harassment as compensable issues.
- To amend the Act to recognize, identify and define workplace stressors and expand coverage for diagnosed mental health disorders that result from exposure to workplace stressors.
- For the *National Standard for Psychological Health and Safety in the Workplace* to be recognized in the Act as a framework to assess workplace stressors.

¹⁴ Mealer, Meredith et al. (2012). The prevalence and impact of post-traumatic stress disorder and burnout syndrome in nurses. *Depression and Anxiety* 26(12), 1118-1126. Pg. 1122 -1124.

4. Ensuring WCB is current with emerging trends in injury and illness, with most up-to-date health and safety knowledge and medical practices

In order for Manitoba to continue to achieve innovative progress with respect to workplace safety and health, it is important to ensure the Act is responsive in strengthening protections and supports for injured workers. As such, MNU wishes to present the following concerns:

A. Occupational Disease

Currently, the definition of occupational disease fails to recognize cumulative exposure to psychological hazards as an occupational disease. As it currently stands in WCB's policy, any injuries stemming from psychological hazards can only be referred as an occupational disease when "a worker experiences a psychological injury after the last of many traumatic events which occurred over a long period of time. In that type of claim, the WCB may be satisfied that one or more of the events caused the psychological injury but it may not be able to determine the specific event or events that caused the injury." However, our observation is that the WCB is defining these types of situations as burnout and declining these claims. The nursing profession, along with firefighters, police officers, paramedics and correctional officers, contains an inordinate amount of exposure to pain, suffering and death combined with a high prevalence, occurrence and risk of workplace violence and trauma. Research has found nurses are at greater risk of experiencing secondary traumatic stress which originates from the cumulative exposure of witnessing individuals experience trauma¹⁵. Research also has confirmed that some of the most psychologically triggering events for nurses include witnessing abuse or death of a child, encountering abuse from patients or patients' families and witnessing the death of a patient as a consequence of a medical procedure¹⁶. It is an unfortunate reality to attest that these triggering events formulate common experiences of nurses' daily working lives.

Furthermore, the dominant cause test for occupational disease places a higher burden of proof to determine if the illness is in fact an occupational disease. MNU is of the opinion that the dominant cause test should be removed and replaced with the balance of probabilities test. This aligns closely with the causative significance test adopted by Work Safe BC. Specifically in the context of psychological injuries, compensation is payable when employment-related stressors are found to represent on a balance of probabilities, more than 50% casual significance leading to psychological impairment. While this test is used for adjudication and not necessarily determining an occupational disease, it accurately depicts the ways in which factors unique to specific occupations can influence occupational diseases and illnesses.

¹⁵ Beck, C. (2011) Secondary traumatic stress in nurses: A systemic review. *Archives of Psychiatric Nursing*, 25(1), p. 3.

¹⁶ Powell, P. (1996). The prevalence of post-traumatic stress disorder among registered nurses. University of Manitoba. Winnipeg, Manitoba, Canada.

MNU has repeatedly brought it to the attention of government that evolving research on the link between work and diseases is often overlooked due to a lack of knowledge regarding medical causes and origins of specific diseases. As such, there should be a dedicated panel of experts mandated to research and create a list of occupational diseases for each sector.

B. Role and Use of Medical Review Panels

Medical Review Panels (MRP) are intended to be used to clarify conflicting medical information for a WCB claim. According to s. 67(4) of the Act, if there is a difference or contradiction in opinion between a claimant's physician and the medical officer of the board with respect to medical matters affecting compensation, a worker is entitled to refer the matter forward to a MRP. Despite this right, it is the opinion of MNU that MRPs are severely underutilized by the WCB, considering between 2007 and 2015, only 36 MRPs were convened, representing an average of four per year. This poses a concern over the role, effectiveness and accessibility of this model.

Rather than proceeding to a MRP, MNU is currently witnessing more nurses being forced to return to work under the threat of mitigation, specifically under s. 22(1) of the Act, based on the fear that their compensation will be reduced or suspended if they are deemed uncooperative. Contradictory medical information is not a mitigation issue that should result in the threat of wage loss reduction or suspension but rather, it is an issue of differing medical opinions and should be regarded as such. The purpose of the MRP is to resolve conflicting medical opinions however, the model itself is not sufficiently used and the Act is not being abided by in these situations. This has led to nurses being financially and unfairly penalised.

C. Modernity of Diagnostic Criteria

There have been notable disparities between diagnostic criteria used by the WCB and criteria used by the wider medical community. Specifically, this has been apparent for concussion injuries in which the diagnostic criteria identified in WCB's internal policy appears to be significantly outdated and does not align with the current criteria used by the medical community such as the Pan Am Concussion Program. It would be in the best interest of our workers' compensation system to have a committee in which medical practitioners, specializing in the specific discipline under review, advise the board on medical matters relevant to administration of the Act, and the adoption of policies and guidelines internal to the WCB. This will ensure diagnostic criteria and any reference to medical matters are consistent with practices adopted by the greater medical community. Furthermore, the WCB should exercise transparency and make all internal policies related to diagnostic criteria and treatment publicly accessible as they have a direct impact on claims.

D. Responsive and Inclusive Policy Development

To ensure the WCB is responsive to emerging trends in workplace injuries and illnesses, it is important to have current, responsive policies. Other jurisdictions such as Ontario¹⁷ and New

¹⁷ Framework for Operational Policy Development and Renewal. WSIB Ontario, February 2016; WSIB Policy Agenda 2017, pg. 3.

Brunswick¹⁸ have a requirement to review policies at a maximum of every five years. Ontario and Alberta also produce public, annual policy development plans. Scheduled policy review, regular consultation and transparent communication is vital in ensuring receptive public policy and maintaining productive stakeholder relationships with labour, the health community and the public. In addition, Ontario's WSIB engages in an annual policy agenda setting process to determine which policies or issue areas will be reviewed, specifically through the forum of the WSIB's Chair's Advisory Committee. The Advisory Committee provides a forum for ongoing engagement with representatives from labour, industry, and worker groups to offer advice and insight regarding potential impacts of proposed policies and programs. In order to expand the depth and breadth of knowledge and influence responsive policy development, it is integral to include the medical community as a key stakeholder for policies, especially those related to medical matters.

Increasing the inclusion of the medical community is in direct relation to the WCB's current policy, *Role of Healthcare Services, 42.10* which identifies activities for which the healthcare services department is responsible for. This includes providing advice to the Board relating to appeals, policy development and healthcare trends. However, due to the noted discrepancies with respect to diagnostic frameworks and definitions, it seems apparent that the WCB does not develop formal policies related to medical matters and instead, internal guidelines are adopted which have not been vetted with medical practitioners or the wider medical community to the fullest extent.

Recommendations:

- To amend the Act to include cumulative exposure to psychological hazards under the definition of occupational disease.
- To remove the dominant cause as a burden of proof for compensability as an occupational disease, in favour of the balance of probabilities test.
- To establish an Occupational Disease Panel with authority to review existing and evolving research and evidence to create a schedule of occupational diseases, and to review the appropriateness of the dominant cause model.
- For the WCB Appeal Commission to review the role, effectiveness and ease of access to a MRP.
- For the Act to be amended to establish a Medical Advisory Committee that is granted the authority to review and advise the Board on medical matters relevant to the administration of the Act, including the adoption of guidelines and policies to ensure they are consistent with current best practices and represent the general opinion of the medical community.

¹⁸ Governance - Policy Development and Evaluation, Policy No.41-004. WorkSafe New Brunswick. January 6, 2015.

- To amend the Act to establish a mandatory policy review cycle of a maximum of five years and for the WCB to adopt an annual policy development plan and publish an annual policy agenda accessible to the public.

5. Workers' Compensation Board Funding Model

The WCB's current funding ratio target is established at 130%, aligning with other jurisdictions in Canada which also have a target rate above 100%. A ratio above 100% is intended to adequately fund the workers' compensation system and protect against unforeseen risk and circumstances. MNU strongly believes the WCB should maintain a funding target ratio above 100% in order to have sufficient protection against probable fluctuations in risk and unfunded liabilities. MNU recognizes that with recent annual surpluses exceeding 130%, employers are advocating for a review of the funding ratio however, we are of the opinion that it is equally important to review the ways in which surpluses are being used as there are opportunities to use the surplus to the advantage of the WCB system.

Effective 2017, the WCB will implement a 12% reduction in average assessment rates, and will soon be investing in a new prevention incentive to support employers in reducing workplace injuries and illnesses. While these activities will reduce the funding ratio closer to its target, it is important to note that opportunities exist for the WCB to invest its surplus in initiatives that would be of mutual benefit to employers and workers such as education, prevention initiatives and other innovative services for injured workers.

Recommendations

- To maintain the existing funding ratio target of 130%.
- In the event that the WCB exceeds its funding target, to invest its surplus in initiatives for which it is responsible for and provides a mutual benefit to both employers and workers such as prevention, compliance and enforcement.
- For all activities funded by the surplus to be reported in the WCB's annual report.

6. Consideration of a cap on the maximum insurable earnings (wage cap) within the workers compensation system

In recognition that the Minister requested consultation specifically seeking response to the question: "should Manitoba have a cap on maximum insurable earnings within the workers compensation system", it remains unclear based on the information from the review committee's consultation paper if the consultation question is for assessable payroll or insurable earnings, both of which have two different impacts to our workers' compensation system. For the purposes of clarity, MNU's response will address the question for the consideration of maximum insurable earnings.

Insurable earnings refers to the amount of a worker's total earnings eligible for compensation at the current rate of 90%. Prior to Bill 25, which was adopted unanimously by all members of the Manitoba Legislature in 2005, there had been a cap on insurable earnings, making it less feasible for those who earn more than the cap to file a claim should they become injured or ill at work. Wage caps are unfavourable for many of Manitoba's nurses as a portion of their salary would no longer be insured. Furthermore, there are many cases where nurses are mandated to work overtime in which they are compensated at least 1.5 times above their regular rate of pay. As such, reinstating a wage cap places a larger burden on nurses and other health professionals where overtime is an inherent factor in their employment.

Lastly, our provincial government made a public commitment that it would not jeopardize insurable earnings for workers, as quoted by the Honourable Cliff Cullen, "it's certainly not our intent to curtail any payments or reimbursements to injured workers. That's certainly not the intent."¹⁹

Recommendations:

- For all earnings to remain insurable earnings.

7. Creation of an Employer Advocate Office

Workers presently face more challenges within the WCB system and it is clear they are at a disadvantage in comparison to employers. The burden of proof is placed heavily on the worker to prove that they were injured at work and oftentimes are subject to frivolous appeal claims from employers regarding the degree to which they were injured. In order to determine if an Employer Advocate Office (EAO) is a beneficial entity to the workers' compensation system, one needs to examine the ways in which employers currently interact with the system and what resources are already available to service their needs.

Employers have a financial interest in WCB claims since claims directly impact their premium rate. This creates a financial incentive for employers to challenge or attempt to negate the extent of a workplace injury on predominantly frivolous grounds to save costs. The establishment of an EAO could be perceived as increasing the opportunity for employers to file appeals for workers' claims on the basis that the employer's interest in a WCB claim is to question the legitimacy of a claim, contributing to a form of claim suppression. The development of an EAO could jeopardize the scales of the workers' compensation system, tipping the balance in favour of the employer. It is also important to note that while this model was previously recommended in Saskatchewan, greater success was achieved when the WCB of Saskatchewan enhanced its customer service department.

Apart from the appeals process, employers interact with the WCB to confirm or receive information regarding filing requirements, financial details such as billing and premiums, the availability of new incentives, and administrative processes. All of these core activities are currently readily accessible through the WCB's existing structure therefore it remains unclear on

¹⁹ Honourable Cliff Cullen, Minister of Growth, Enterprise and Trade. (2016, July 19). Legislative Assembly of Manitoba. *Edited Hansard* 145(3). 41st Legislature, 1st session. Page 12 of 19.

the grounds to which it is feasible to create an EAO when this suite of services is currently offered. This leads to the assumption that a main intention of creating an EAO is to align with the mandate of the provincial Worker Advisor Office (WAO) which currently provides assistance navigating the policies and procedural processes within the WCB. However, it is important to note the WAO is severely under-resourced and it would be more fiscally responsible for our government to invest in adequate resources for injured workers. As such, an appropriate option to better service the needs of employers would be to invest in structures that presently exist such as strengthening the WCB customer service department.

Should government refuse to consider this recommendation and make the decision to establish an EAO, we hope government will ensure that this entity will be administered under the purview of the Government of Manitoba, similar to the WAO model. Furthermore, we expect our government to exercise appropriate fiscal judgment by ensuring there is equal funding and human resource allocations between the EAO and WAO. Additionally, the intention of the EAO should be to help identify legitimate appeals and cease the submission of illegitimate, frivolous appeals, and offer assistance and education to employers in recognizing the grounds for legitimate claim appeals.

Recommendations:

- To refrain from establishing an Employer Advocate Office in respectful consideration of claim suppression.
- To maintain the existing Worker Advisor Office and ensure it is sufficiently resourced to support workers in Manitoba.

8. Additional Recommendations

In addition to the consultation questions proposed by the Government of Manitoba, MNU would like to put forth the following additional recommendation for consideration:

To amend the Act to establish a union/labour committee for the purposes of creating a comprehensive consultation network.

It is imperative for the WCB to foster a network representative and inclusive of all stakeholders involved in improving workplace health and safety. We recognize that there are numerous working groups, specifically within Safe Work Manitoba, that have labour representation however, there has yet to be a committee or group comprised entirely of labour leaders and stakeholders to serve as a forum to articulate the ways in which specific processes, policies and health and safety practices impact some of the largest employee groups in our province. Similar to the current self-insured employer group constructed by the WCB, opportunities exist to construct a committee chaired by the WCB and comprised entirely of labour representatives. This committee would be responsible to meet on a quarterly basis each year to discuss relevant issues related to health and safety, WCB processes and policies, and would serve as an appropriate forum for education.