



CN Legal Affairs
PO Box 1620
821 Lagimodiere Blvd
Winnipeg, MB R3C 2Z6

February 17, 2017

2016 WCB Legislative Review Committee
PO Box 1296 Winnipeg Main PO
Winnipeg, MB R3C 2Z1

Dear Committee Members,

This letter follows the request for input from the Workers Compensation Act Legislative Review Committee, subject to the upcoming review of the *Workers' Compensation Act of Manitoba*.

Canadian National Railways (CN) has met with other Self-Insured Employers in Manitoba, and our submission will comment on the key issues that our Company is requesting to be part of the Review Committee's subsequent report to the Government of Manitoba.

INTRODUCTION

There are five main issues that CN is requesting that the Review Committee consider:

1. Absence of reimbursements for Self-Insured Employers (Policy 35.40.50 – Overpayment of Benefits)
2. Establishing a Maximum Assessable Earnings Level (Policy 44.80.10.40 – Net Average Earnings)
3. WCB Manitoba's Existing Funding Model (Policy 31.05 – Funding Policy)
4. Time Period Limitations for Filing Claims / Appeals (WC Act Section 17(1) and 19(2))
5. Calculation of Average Earnings (Policy 44.80.10.10 Average Earnings)

PROPOSED POLICY/LEGISLATIVE CHANGES

1. Absence of reimbursements for Self-Insured Employers

Under WCB Policy 35.40.50 – *Overpayment of Benefits*, “overpayments are included as a claims cost”, and overpayment recoveries are credited to the claims costs of the applicable Employer. Any overpayments which are not pursued for recovery, are written off (including adjudicative reversals or reconsiderations by the WCB, decisions from the Appeals Commission, administrative errors by the WCB, overpayments occurring more than three years prior to discovery by WCB, etc.), and are therefore still charged to the individual claims.

CN recommends to the Review Committee that WCB Manitoba adopt a process to remove overpayments from Self-Insured Employer accounts, considering that in all other Canadian Provinces, there are such remedies available.

For example, after contacting the Operational Policy Branch of the Workplace Safety & Insurance Board (WSIB) in Ontario, CN was advised that Legislation and WSIB Policy do not authorize costs pertaining to a denied claim to be allocated to an Employer, including Schedule II (Self-Insured) Employers. These costs are removed from the Employer's firm experience to place the Employer in the position it would have been in had these costs not been charged.

In British Columbia and Alberta, which represent both Deposit accounts (BC) and Assessment-based accounts (Alberta), medical and investigative costs incurred on claims that are ultimately not accepted, are removed from an Employer's account. These costs appear in a pool of unfunded liabilities that are shared with all Employers either through rate increases (Alberta) or by end of year reconciliations (BC).

For example, in British Columbia:

*Costs may be incurred prior to making a decision on a claim in investigating the validity of the claim or in paying benefits pursuant to an interim adjudication. Where the decision is ultimately in the Worker's favour, these costs are charged to the Employer's class in the normal way. **Where the decision is unfavourable to the Worker, these costs will not be charged to the Employer's class, but will be spread across all classes.** They are treated in effect as an administration cost.*

The same rule also applies where:

- 1. A claim is accepted in error or benefits paid in error;*
- 2. A decision is reversed by the Review Division, Workers' Compensation Appeal Tribunal or Medical Review Panel;*
- 3. There is a reconsideration by a Board officer, Manager or Director.*

The Employer's class is relieved where the original decision was favourable to the Worker and benefits were paid pursuant to it. Conversely, the class will be charged with costs already incurred where the previous decision was unfavourable to the Worker¹.

Note: In BC, deposit classes consist of one major Employer (i.e. CN), which directly pays the costs of the claim. This does not, however, exclude a deposit class from being relieved of costs which are not acceptable under the Act.

CN therefore recommends that WCB Policy and Procedure be updated to allow for reimbursements/refunds of claims costs to Self-Insured Employers.

¹ WorkSafe BC, Rehabilitation Services and Claims Manual, Chapter 17 – Charging of Claims Costs; 113.10 – Investigation Costs.

2. Establishing a Maximum Assessable Earnings Level

As indicated in the “*Past, Present and Future: Workers Compensation in Manitoba Discussion Paper*”, Manitoba is the only Provincial WCB without a salary cap on Workers’ earnings.

Since there is no maximum earnings amount for injured Workers in Manitoba, many would be considered over-insured in comparison to their counterparts in other Provinces. This may, in some cases, contribute to extended claim durations, since a minimal income loss during disability reduces the incentive to return to work as soon as it is safe to do so.

In our opinion, WCB Manitoba should adopt a wage loss compensation model consistent with maximum assessable earnings levels set across Canada², in order to maintain an equitable and sustainable Workers’ Compensation system for both Workers and Employers in Manitoba.

3. WCB Manitoba’s Existing Funding Model

Workers’ Compensation Boards across Canada are funded at different levels, with Manitoba’s target funding level being 130%. However, it appears that in practice, the funding level is much higher than 130%, which was confirmed in the WCB’s *2015 Annual Report*, with 2014 Funded Ratio being 136% and 2015 being 143.3%³.

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

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

On the other hand, from 2011 to 2015, overall Employer transactions have decreased from by 7%, and CN’s own transactions have decreased by 20%. In terms of the average cost per transaction, the average for all Employers rose by 47%, and CN’s average cost per transaction rose by 66%. These trends are occurring despite CN’s overall claims costs decreasing by 37% between 2011 and 2015⁴. These results suggest that WCB’s operating costs are rising at a rate that is placing greater pressures on Employers to fund a system in which, despite efforts being made by Employers to reduce transactions and claims costs, they are unable to achieve any tangible cost savings due to rising WCB administration costs.

CN therefore requests that the Committee review the Funding Model, with specific concern given to WCB’s operating expenses, and in turn, the administration rates charged to Employers.

² *Maximum Assessable / Insurable Earnings*, AWCBC.org. http://awcbc.org/?page_id=599 (Accessed Jan 27/17).

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

⁴ WCB Finance Department Email to CN Rail – April 20, 2016.

4. Time Period Limitations for Filing Claims / Appeals

Under the Workers' Compensation Act, Section 17(1), Notice of Accident, it is stated that:

In every case of injury to a Worker by accident in any industry within the scope of this Part, the Worker, or in the case of his death, a dependant, shall, as soon as practicable, but in any case not later than 30 days after the happening of the accident, give notice thereof to the Employer.

Furthermore, in Section 19(2), Must be filed within one year, it states:

Subject to section 109, unless application for the compensation is filed (a) within one year after the day upon which the injury occurred; or (b) in case the applicant is a dependant, within one year after the death of the Worker; no compensation in respect of any injury is payable under this Part.

It has been CN's experience through claims adjudication that these Sections of the Act are rarely, if ever, enacted. This leads to expensive adjudication and information collection on claims that are not only outside of the Workers' Compensation Act, but are also difficult to adjudicate based on time delays, and present an unfair disadvantage to the Employer based on an inability to conduct a fair and objective investigation.

As well, WCB Manitoba should adopt a time limit for appeals, consistent with other jurisdictions in Canada⁵. Much like the delayed reporting of claims, an unlimited time frame for filing appeals more often than not places the Employer at a disadvantage compared to Workers, since Employers must attempt to collect information and investigate claims which can deal with issues occurring years into the past.

Considering modern technology and accessibility to medical treatment, fixed timeframes for filing claims and appeals would create a more equitable system for Employers, while still providing Workers with fair access to their benefit entitlements under the *Workers' Compensation Act*.

As such, we ask the Committee to review these portions of the Legislation and ensure that WCB procedures, in regards to the time limits for filing claims, remain within the constructs of the Act, and consider the inclusion of time restrictions on filing appeals at all levels.

5. Calculation of Average Earnings

The current Average Earnings Policy allows for some Workers to be over-compensated, despite an irregular earning capacity as a result of their employment circumstances.

As stated in the policy (*44.80.10.10 Average Earnings*), the method to calculate average earnings "will *always* be the one that best represents the Workers' actual loss of earnings".

⁵ *External Appeal Body*, Time Limits. AWCBC.org.
http://awcbc.org/wpcontent/uploads/2014/02/External_Appeal_Body.pdf (Accessed Jan 27/17).

The Policy goes on to state that “an average earnings review occurs whenever the WCB recalculates a Workers’ average earnings”, including instances where “a) the Employer or the Worker has indicated an irregular earnings pattern on his or her accident report form; or b) information provided to the WCB indicates an irregular earnings pattern. Adjustments arising from a) or b) are retroactive to the time of accident if they result in an increase and effective at 13 weeks if they result in a decrease in the Worker's average earnings.”

In practice, the WCB can use the Worker’s last pay stub prior to the injury date when a Worker is not guaranteed a set amount of hours per week (with the exception of overtime). The amount is then reviewed at the 13 week point, and may be reduced, to reflect the Worker’s average earnings, based on the prior 12 months or calendar earnings.

This procedure is unfair and over-compensates Workers, especially when payroll records have been provided to WCB, proving that they have not been able to sustain a similar earning capacity over the last 12 months/calendar year, due to the piecework nature of their pay (with no guarantee of hours or trips) and/or periodic layoffs.

Using only one previous pay period is not an accurate reflection of average earnings, since only one period may include unique circumstances, compared to other periods. In these situations, Workers can be paid at a much higher rate, despite a documented inability to earn this amount on a sustained basis. This means that these Workers will be over-insured for up to 12 weeks, with little incentive to return to work.

Therefore, the documented average annual earnings should be used from the onset of the claim, rather than the arbitrary 13 week point, as the current Policy contradicts the principle to compensate Workers based on a fair representation of their actual loss of earnings.

CONCLUSION

CN appreciates the opportunity to provide a submission for the Review Committee’s consideration and hopes that it leads to positive changes to the Workers’ Compensation system in Manitoba.

Sincerely,



Daniel Kawaler, BA, CHRP
Officer, Workers' Compensation Claims



Gillian Gordon
Officer, Workers' Compensation Claims

