



FETCO submission

RELATING TO

Manitoba WCB Review

TO

Workers' Compensation Act Legislative Review Committee

February 17, 2017

INTRODUCTION

FETCO is pleased to provide a response to the Workers Compensation Act Legislative Review Committee related to the upcoming review of the *Workers' Compensation Act* of Manitoba.

Our members read the mandates of the Review Committee outlined in your November 2016 Report and appreciate the opportunity to provide input to the Committee on five key issues:

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(5) 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 the guidance of WCB Policy 35.40.50, overpayments which are not pursued for recovery, are written off. The list of written off items do include 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. Despite being considered written off by the Board and not collectable from the worker, these costs remain chargeable to individual employer accounts.

This policy and administrative process is unique to Manitoba. In all other provincial jurisdictions, remedies are in place to remove any charges non compensable from a legislation standpoint from the employers account and charged back to the Accident Fund or Employer's class.

WCB Policy 35.40.50 as written allows for no accountability in the adjudication time and decision making process. An Employer can wait a significant amount of time (up to 60 days) for a decision to be reviewed at the Review Office and Appeal Commission while workers continue to receive benefits. If a decision is overturned, the Employer is at a disadvantage as they will responsible for the financial burden of an injury that should have never been accepted.

We therefore request that the Review Committee recommend that WCB Legislation be updated to allow for reimbursements/refunds of claims costs to Self-Insured Employers.

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 jurisdiction without a salary cap on workers’ earnings covered by WCB. Historically, WCB Manitoba did have a salary cap in place and we are requesting that the policy be amended to reflect a cap in the disability benefit legislation and policy.

The Workers’ Compensation system is intended to benefit all workers who are injured regardless of fault. The levels of benefits and services are different than what might be obtained through tort action recognizing the no fault system. In *Medwig v. Ontario (Minister of Labour)* (1988), Mr. Justice Montgomery states:

Participating employers, however, also have legitimate interests that deserve recognition within the scheme. Because the Act exposes employers to compensation cost in a wider range of cases than the law before had done, it sets the level of compensation payable on this no fault basis somewhat lower than the maximum that an employer might owe if sued successfully in tort.

Paying workers salary replacement benefits without a cap goes against the tenets of the no fault system outlined in the Meredith Principles.

Furthermore, the absence of a cap removes incentives for workers to return to work and in many cases places workers in a position where they are earning more money on WCB due to the tax free status of WCB salary replacement benefits.

We ask that a Maximum Assessable Earnings Level be established.

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%. The actual funding level is currently 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%.¹ A funding level above the already high target level is unnecessary and puts an undue financial burden on employers.

In addition to our concern regarding the management of 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.

¹ *Workers’ Compensation Board of Manitoba 2015 Annual Report*, Historical Trends, pg. 25.

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. While 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., such an increase appears quite excessive, especially considering employers' results.

From 2011 to 2015, overall Employer's transactions have decreased by 7% but the average cost per transaction for all Employers rose by 47%. Overall, these results indicate that WCB's operating costs are rising at a rate that is placing greater pressures on Employers to fund a system where, despite efforts being made by Employers to reduce transactions and claims costs, they are unable to see any tangible cost savings due to rising WCB administration costs, which they are unable to control.

We ask that the Committee review the Funding Model, with specific attention given to the operating expenses, and in turn, the administration rates charged to Employers.

4. Time Period Limitations for Filing Claims / Appeals

Under the *Workers' Compensation Act*, Section 17(1), Notice of Accident must be given to the Employer "not later than 30 days after the happening of the accident. Furthermore, Section 19(2), states that no compensation in respect of any injury is payable unless the application for 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".

While these time limits are clear, they are rarely applied. 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 timely, full, fair and objective investigation. WCB Manitoba should apply the current time limits

WCB Manitoba should also adopt time limits for appeals, to match the standards set by most jurisdictions in Canada². As with the delayed reporting of claims, an unlimited time frame for filing appeals often places the Employer in the difficult situation to collect information and investigate claims which deal with issues which occurred years into the past, which is an obstacle to due process.

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

² *External Appeal Body*, Time Limits. AWCBC.org.

http://awcbc.org/wpcontent/uploads/2014/02/External_Appeal_Body.pdf (Accessed Jan 27/17).

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.

5. Calculation of Average Earnings

The current Average Earnings Policy allows Workers to be over-compensated especially when displaying an irregular earning capacity due to 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".

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, when the claims are initially adjudicated, the last pay stub prior to the injury date is used to set the rate 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 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 sometimes not an accurate reflection of average earnings. Workers can end up with benefits 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.

The rate of compensation paid to workers should be set based on taxable earnings for a period or periods of time prior to the accident that most fairly and justly represent the worker's earnings at the time of accident.

CONCLUSION

FETCO appreciates the opportunity to provide a submission for the Review Committee's consideration and hope that it leads to positive changes to the Workers' Compensation system

in Manitoba while striking the right balance between workers and employers to ensure fair compensation and a sustainable and affordable workers' compensation system.

If you have any questions concerning this submission, please feel free to contact Carole Cousineau, Chair, FETCO Workers' Compensation Committee at [REDACTED] or [REDACTED]