



THE WORKERS COMPENSATION ACT
LEGISLATIVE REVIEW COMMITTEE 2016-2017
REPORT TO GOVERNMENT

The Workers Compensation Act Legislative Review Committee 2016

PAST, PRESENT AND FUTURE

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Honourable Blaine Pedersen
Minister of Growth, Enterprise and Trade
Room 358 Legislative Building
Winnipeg, Manitoba R3C 0V8

Dear Minister:

In January 2016, the Government of Manitoba announced its intention to review *The Workers Compensation Act* (the "Act"), in accordance with section 115 of the Act. This section requires that a comprehensive review of the Act be undertaken at least once every 10 years. Shortly thereafter, our Committee was appointed and charged with conducting this review. The Minister of Labour and Immigration under the previous government set the Committee's terms of reference, which were later expanded by the Honourable Cliff Cullen, former Minister of Growth, Enterprise and Trade.

It is my privilege to provide you with our report and recommendations. I am pleased to advise that the Committee has reached consensus on all issues under consideration and is making 64 unanimous recommendations.

We have been honoured to conduct this review of the Act at its century mark. The workers compensation system has changed considerably since the Act first came into force, reflecting changes to the Canadian labour market, work arrangements, understanding of workplace injury and illness and societal values. This report reflects and comments on the current system and its responsiveness, acknowledging what is functioning well and making recommendations for improvement where necessary.

During the course of our review, we heard from a wide range of individuals and organizations, including injured workers and their families, employers, unions, employers' associations, and health care providers. The Committee would like to thank the stakeholders and concerned Manitobans for their comments and insights during our review process. Without the participation of all who provided submissions to the Committee, this review would not have been possible. We would also like to thank the support staff for their dedication and hard work during the course of this review.

Respectfully submitted,



Michael Werier, Chairperson

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ACKNOWLEDGEMENTS

In accordance with section 115(2) of *The Workers Compensation Act*, the legislative review committee must be composed of persons representing the public interest, workers and employers. *The Workers Compensation Act* Legislative Review Committee 2016-2017 is comprised of four members, appointed by the Lieutenant Governor in Council:

- Michael Werier, Chairperson - Mr. Werier is a lawyer/arbitrator and the Chairperson of The Workers Compensation Board's Board of Directors;
- Ken Sutherland, representing the public interest - Mr. Sutherland is a retired businessman and retired Chartered Professional Accountant;
- Anna Rothney, representing workers - Ms. Rothney is the Executive Director of the Manitoba Federation of Labour; and
- Chris Lorenc, representing employers - Mr. Lorenc is a member of The Workers Compensation Board's Board of Directors and President of the Manitoba Heavy Construction Association.

The Committee is grateful to all those who contributed to this legislative review. Their comments and insights have been invaluable. We also extend our sincere thanks to support staff who assisted us in this process.

INTRODUCTION

Section 115 of *The Workers Compensation Act* (the "Act")¹ requires that a comprehensive review of the legislation be undertaken at least once every 10 years. The last review of the Act was completed in 2005. In January 2016, the Government of Manitoba announced it was launching a review of the Act. Our Committee was appointed to conduct this review.

In addition to any other issues identified during the course of this review, the Government of Manitoba asked that the Committee specifically:

- review the alignment of the Act with its founding principles (the Meredith Principles);
- align the Act with workplace illness and injury prevention initiatives outlined in *Manitoba's Five-Year Plan for Workplace Injury and Illness Prevention* (the "Manitoba Prevention Plan");²
- examine provisions in the Act respecting the approach to addressing mental health in the workplace;
- ensure that The Workers Compensation Board (the "WCB" or the "Board") is current with emerging trends in injury and illness, the most up-to-date health and safety knowledge, and medical practices;
- examine *Working for Manitoba: Workers Compensation for the Twenty-First Century*, (the "2005 Legislative Review Committee Report")³ to consider which of the recommendations have been implemented and with what effect;
- review the WCB's existing funding model, in particular with respect to comparing the Board's funded value with boards in other Canadian jurisdictions;
- consider the establishment of a maximum assessable earnings level (or a cap) for workers; and

Relevant Statutory Provisions

Review of this Act

115(1) At least once every 10 years, a comprehensive review must be undertaken of this Act by a review committee appointed by the Lieutenant Governor in Council.

Review committee

115(2) The review committee must be composed of one or more persons representative of

- (a) the public interest;
- (b) workers; and
- (c) employers.

Report to minister

115(3) The review committee must report its findings and recommendations to the minister.

The Workers Compensation Act, CCSM c W200

¹ C.C.S.M. c. W200, available online at: <http://web2.gov.mb.ca/laws/statutes/ccsm/w200e.php>.

² The *Manitoba Prevention Plan* was released in 2013 and is available online at: http://www.gov.mb.ca/labour/safety/pdf/workplace_injury_illness_prevention_web.pdf.

³ The *2005 Legislative Review Committee Report* was released in February 2005, and is available online at: https://wcbactreview.com/sites/default/files/files/Working_for_Manitoba.pdf.

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- consider the creation of an Employer Advocate Office.

This report represents the Committee's efforts to fulfil both its statutory mandate and the government's instructions. Building on the experience of Manitoba's Legislative Review Committee on *The Workers Compensation Act* (the "2005 Legislative Review Committee"), we have, throughout this report, considered its recommendations, the manner in which those recommendations were implemented and how their implementation has affected the workers compensation system in Manitoba.

Background and History

Workers compensation is a system of no-fault insurance for workplace injuries and illnesses. Most participating employers (also known as covered employers) assume collective liability for workplace injuries and illnesses sustained by their workers by paying premiums. These premiums are pooled to create a fund out of which injured workers receive compensation. In exchange for paying premiums, covered employers are immune from civil suits from workers in covered employment who sustain workplace injuries or illnesses. In exchange for giving up their right to sue, workers who work for covered employers are entitled to compensation for workplace injuries regardless of fault, provided the necessary criteria are met.

In Canada, the workers compensation system has its origins in the *Meredith Report*. In 1910, Ontario Chief Justice Sir William Meredith was appointed by Ontario's Lieutenant Governor in Council to research workers compensation laws around the world and adapt them to a Canadian context. In 1913, Sir William Meredith submitted to the Ontario legislature a draft workers compensation bill and a report setting out the fundamental features of the proposed system. These remain the key principles of workers compensation systems throughout Canada today. Known as the Meredith Principles, they include:

- **collective liability** - covered employers share responsibility for the costs of the workers compensation system, paying premiums to cover the costs of compensation;
- **security of benefits** - a fund, the primary source of which is the pooled premiums collected from covered employers, is established to guarantee payment of benefits, regardless of the number or severity of claims in any given year;
- **no-fault compensation** - benefits are paid to injured workers and their dependants regardless of fault;
- **exclusive jurisdiction** - only workers compensation agencies provide workers compensation insurance, and all compensation claims must be directed solely to the compensation board or commission that administers the compensation system. The board or commission is the decision-maker and final authority for all claims, and there is limited ability to appeal or seek review of the board or commission's decisions in court; and

- **administration by independent boards** - the board or commission that administers the workers compensation system must be separate from government.

All Canadian provinces and territories have enacted workers compensation legislation based on these concepts, as has the federal government. Unlike most jurisdictions, however, Manitoba has codified these principles in the preamble to the Act (see parts (a), (b), (d) and (g) of the preamble).

As other priorities have emerged, Manitoba has added to these core foundational principles. In addition to the Meredith Principles, Manitoba has recognized the following as key features underpinning its Act:

- **income replacement** – injured workers are entitled to receive benefits on the basis of loss of earning capacity due to work-related injury or illness (part (c) of the preamble);
- **prevention of workplace injuries and diseases** – while not initially considered a foundational principle, prevention is a key component of the modern workers compensation system. This principle recognizes that workplace injuries and illnesses are preventable and that prevention efforts must necessarily be part of the mandate (part (e) of the preamble); and
- **timely and safe return to health and work** – this principle has come to be viewed as foundational. Fulfillment of the return to work principle means ensuring that injured workers receive prompt and effective healthcare treatment, as well as the necessary tools to return to work in a timely and safe manner (part (f) of the preamble).

First enacted in 1916, the Act has been amended many times. This is not surprising, since the nature of work, workplaces, and workplace injuries and illnesses have changed significantly in the past century.

Preamble

WHEREAS Manitobans recognize that the workers compensation system benefits workers and employers in Manitoba;

AND WHEREAS Manitobans recognize that the historic principles of workers compensation should be maintained, namely

- (a) collective liability of employers for workplace injuries and diseases;
- (b) compensation for injured workers and their dependants, regardless of fault;
- (c) income replacement benefits based upon loss of earning capacity;
- (d) immunity of employers and workers from civil suits;
- (e) prevention of workplace injuries and diseases;
- (f) timely and safe return to health and work; and
- (g) independent administration by an arm's-length agency of government;

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows

The Workers Compensation Act, CCSM c W200

The Act has also been the subject of two recent legislative reviews. The first of these took place between 1985 and 1987 and resulted in the publication of the 1987 *Report of the Workers Compensation Review Committee*, more commonly known as the *King Report*.⁴ The second review took place in 2004/2005, resulting in the *2005 Legislative Review Committee Report*.

During the course of prior legislative reviews, the review committees heard from a wide array of WCB stakeholders who made diverse suggestions for improvements to the Act and to the WCB's policies and practices. After integrating the feedback received from these stakeholders, the committees themselves made numerous recommendations for change. In both cases, the governments of the day tabled amending legislation designed to give statutory voice to many of the review committees' recommendations.⁵

This Committee is encouraged by the responsiveness of both the WCB and successive governments to the recommendations made by previous review committees. Change has been effected by legislative amendment and, importantly, by policy, process and operational initiatives as well. For example, the WCB has made strides in areas such as claim suppression, the rate-setting model and prevention services following a series of reviews and reports, including the 2013 *Manitoba Prevention Plan*.

The WCB's response to the 2013 report titled *A Review of the Impact of the Manitoba WCB Assessment Rate Model on Fair Compensation for Workers and Equitable Assessments for Employers*, also known as the *Petrie Report*⁶ is just one example of its ability and willingness to address stakeholder concerns. The *Petrie Report* reviewed the WCB's rate model, considered prevention incentives, and examined the possibility of a connection between the use of experience rating in the rate model and claim suppression.

The *Petrie Report* recommended three main initiatives to remedy the potential impact of experience rating on claim suppression: changes to the rate-setting model; the creation of a province-wide safety certification program; and prevention rebates for employers who meet the certification standards. As we discuss in this report, the WCB has taken important steps to effect change in all three of these areas. As a Committee, we look forward to seeing the impacts of these new initiatives.

⁴ In 1985, a three-person Legislative Review Committee, led by Chairperson Brian King, was formed and given the mandate to review the Act in its entirety. The *King Report* was tabled in the Manitoba Legislature in 1987. It contained 178 recommendations for change to the Act and the policies made under it.

⁵ The government introduced two bills in response to the *King Report*. The first of these was Bill 56, *The Workers Compensation Amendment Act (2)*, S.M. 1989-90, c. 47. This statute is available online at: <http://web2.gov.mb.ca/laws/statutes/1989-90/c04789-90e.php>. The second was Bill 59, *The Workers Compensation Amendment and Consequential Amendments Act*, S.M. 1991-92, c. 36. This statute is available online at: <http://web2.gov.mb.ca/laws/statutes/1991-92/c03691-92e.php#>.

In 2006, following the release of the 2005 Legislative Review Committee Report, the government introduced Bill 25, *The Workers Compensation Amendment Act*, S.M. 2005, c. 17. This statute is available online at: <http://web2.gov.mb.ca/laws/statutes/2005/c01705e.php>.

⁶ The *Petrie Report* is available online at: https://www.gov.mb.ca/labour/safety/pdf/2013_fair_compensation_review_report.pdf

To accompany these various policy changes, the Government of Manitoba introduced Bill 65, *The Workers Compensation Amendment Act*.⁷ Enacted by the Legislature in 2014, Bill 65 gave the WCB a clear statutory mandate regarding prevention activities, established a Prevention Committee of the WCB Board of Directors and introduced stronger compliance measures.

As a Committee, we are honoured to review Manitoba's *Workers Compensation Act* at its century mark. In the main, we believe Manitoba's workers compensation system is functioning well. As discussed in this report, however, certain changes to the Act may be required to make this important piece of legislation even more responsive to a changing economy and workforce.

The Committee's Review Process

The Committee began its review process by releasing a discussion paper online on November 15, 2016. In it, we provided a summary of the issues that the Government of Manitoba asked us to consider during our review, along with some background information. We invited stakeholders to address these issues by making written submissions to the Committee. We also asked stakeholders to provide input on any other legislative changes they thought would improve Manitoba's workers compensation system overall. The deadline for submissions was February 15, 2017.

The Committee received 85 written submissions in response to its invitation. Those making submissions represented the full range of WCB stakeholders, including individual workers and employers, family members of workers, interested citizens, labour organizations, employer organizations, health care associations and government agencies. The stakeholder submissions addressed the issues outlined in the discussion paper, along with several other topics of interest.

All of the written submissions were made public on the Committee's website on April 21, 2017. Following the publication of the submissions, the Committee invited all stakeholders who had provided written submissions to make a further submission to the Committee. We wanted to give stakeholders an opportunity to review each other's submissions and respond to them, if they felt a response was warranted. The deadline for further submissions was May 1, 2017. The Committee received four additional submissions from stakeholders in response to this second invitation.

This report is organized around eight chapters: *Coverage, Prevention, Assessments, Compliance, Adjudication of Claims, Compensation/Benefits, Administration of the Act, and Technical Amendments*. We have made recommendations for change in each category, with a view to enhancing the fairness, effectiveness and transparency of Manitoba's workers compensation system.

⁷ S.M. 2014, c. 31, available online at: <http://web2.gov.mb.ca/laws/statutes/2014/c03114e.php>.

CHAPTER 1 - COVERAGE

Coverage is a fundamental issue in the workers compensation system. It determines which workers are entitled to receive compensation and which employers are required to contribute to the system. In all Canadian jurisdictions, the employer, or the industry in which the employer operates, is generally the source of coverage. If a worker suffers an accident during the course of employment with a covered employer, he or she will be eligible to receive benefits from The Workers Compensation Board (the "WCB" or the "Board") provided all the necessary statutory criteria under *The Workers Compensation Act* (the "Act") are met.

In Manitoba, coverage may be mandatory, optional or personal. This chapter focuses on questions relating to mandatory or compulsory coverage, including who is required to purchase coverage, and how Manitoba's level of WCB coverage compares to those of other Canadian jurisdictions.

A. Background

1. The Coverage Model Before 2005

Before 2005, employers (other than self-insured employers) were required to purchase WCB coverage if they, or the industry they were part of, were listed in a schedule to the Act (the "Inclusion Schedule"). The law required the employer or industry to purchase coverage only if it was listed in the Inclusion Schedule. While the Lieutenant Governor in Council had the power to add industries to the schedule, this occurred infrequently in practice.

2. 2005 Legislative Review Committee Recommendations

The 2005 Legislative Review Committee examined the inclusionary coverage model and determined that a change was needed. The committee noted that new industries continually develop, and unless those industries are routinely added to the list of compulsory industries, their injured workers would not be eligible for benefits. The committee also highlighted unexpected outcomes of the inclusionary model whereby workers performing the same job for different employers were treated differently in respect of coverage. The committee viewed these two factors as the main reasons why coverage for Manitoba workers had plateaued at 70%, a level it described as "one of the lowest percentages of covered workers in Canada" (*2005 Legislative Review Committee Report*, page 17).

To expand the level of compulsory coverage, the committee recommended that:

- there be a gradual extension of WCB coverage over a three to five year period, and that any extension begin with inclusion of high risk workplaces not already covered (see Recommendation 6, page 17 of the *2005 Legislative Review Committee Report*);
- the WCB consult with employers and workers in non-covered industries prior to making coverage compulsory in those industries (see Recommendation 7, page 17 of the *2005*

Legislative Review Committee Report);

- the WCB develop a vigorous program encouraging low risk employers to opt in to WCB coverage (see Recommendation 8, page 17 of the *2005 Legislative Review Committee Report*); and
- all aspects of coverage be reviewed in five years (see Recommendation 9, page 17 of the *2005 Legislative Review Committee Report*).

In making these recommendations, the 2005 Legislative Review Committee had two goals. The first was to extend coverage to more employers and workers. The second was to ensure that stakeholders within groups and industries not identified in the Inclusion Schedule were consulted before being voluntarily added to the list of covered employers.

3. Implementation of 2005 Legislative Review Committee Recommendations and the Exclusionary Model

With the enactment of Bill 25, several coverage-related amendments came into force.

One of the principal legislative changes was to abandon the inclusionary approach to coverage and replace it with an exclusionary coverage model. Accordingly, under the amended Act, all employers and industries in Manitoba are covered except those explicitly excluded by regulation. The Lieutenant Governor in

Council is specifically empowered to exclude industries, employers or workers by regulation, and to include certain types of artisans and mechanics as covered workers under the Act.

The Act also requires the WCB to consult with affected industries, employers and workers before changes are made to the list of excluded employers or industries.

Relevant Statutory Provisions

PART 1: COMPENSATION

Application of Part I

2 This Part applies to

- (a) all employers and all workers in all industries in Manitoba except those excluded by regulation under section 2.1 (exclusion), [...]

Exclusion of industries, employers or workers

2.1(1) The Lieutenant Governor in Council may, by regulation, exclude an industry, an employer or workers from being within the scope of this Part and, in doing so, may

- (a) provide that the regulation applies to only part of the province or the whole of the province;
- (b) permit the inclusion of artisans and mechanics employed full-time at their trade in the excluded industry.

Board to consult industries, employers and workers

2.1(2) Before a regulation is made under subsection (1), the board must provide an opportunity for consultation with affected industries, employers and workers, and report the results of the consultation to the minister.

The Workers Compensation Act, CCSM c W200

Following the enactment of these new statutory provisions, the *Excluded Industries, Employers and Workers Regulation* (the "Regulation") came into force.

Schedule A of the Regulation lists all industry sectors, employers and professions excluded from mandatory coverage under the Act. There are approximately 34 groups of industries or professions excluded under the Regulation, including those providing accounting, financial, legal and healthcare services, farmers and family members of farmers, and primary and secondary school teachers. Workers employed in these industries are not eligible for coverage unless the employer has purchased optional coverage under the Act. Personal coverage is also available for those who do not fall within the definition of "worker" under the Act such as the self-employed, directors and independent contractors.

The exclusionary model eliminates the need to continually add new employers or industries to the Regulation. As new industries develop, employers in these industries are required to purchase coverage under the Act unless they are already identified in the Regulation or the Regulation is amended to exclude them.

4. Consultations to Expand Coverage

Following the 2005 Legislative Review Committee's recommendations, the Board held three rounds of consultation with industries, employers and workers.

The first of these occurred in 2006 when the Board focused on extending coverage to "related industries," which are industries and employers closely associated with covered workplaces where the risk of workplace injury or illness is relatively high.

As a result of this first round of consultations, coverage was extended to 10 industries, 850 employers and 6,400 workers. However, as approximately two-thirds of the affected workers were already covered through purchase of optional coverage, this extension of coverage did little to increase the percentage of covered workers in Manitoba from its level of 70%.

The second round of consultations took place in early 2008 with employers and workers in all Manitoba industries, particularly those who were not already covered under the Act. As a result, mandatory coverage was extended to 30 new industries, approximately 2,000 employers, and approximately 10,000 workers on January 1, 2009. This led to an increase in the percentage of covered workers from 70% to its current level of approximately 76%.

The WCB held a third round of consultations in 2010 with potentially affected industries, employers and workers to discuss the possibility of further expansion of coverage. Most stakeholders at that time did not express an interest in expanding coverage.

5. Other Jurisdictions

With a rate of approximately 76% based on 2015 figures, Manitoba ranks 9th out of 12 Canadian jurisdictions in respect of coverage.

As in Manitoba, most jurisdictions in Canada use an exclusionary model to regulate mandatory coverage. Employers and workers in all industries are covered, unless explicitly excluded. The only exceptions appear to be Nova Scotia and Ontario, where regulations operate to both expressly include certain industries and employers and expressly exclude others.

Many factors may account for differences in levels of coverage from jurisdiction to jurisdiction, including the number and type of industries identified in the exclusion schedules, the statutory definitions of worker and employer, and the levels of optional and personal coverage.

B. What the Committee Heard

Several stakeholders recommended extending coverage to as many industries and employers as possible, with the goal of creating a mandatory, universal coverage scheme for all workers under the Act.

Those in favour of mandatory coverage for all workers see this as consistent with the Meredith Principles of collective liability and exclusive jurisdiction. Some also suggested that mandatory universal coverage would increase efficiencies within the workers compensation system and potentially lead to lower employer assessments.

Other stakeholders believe in maintaining the status quo on coverage under the Act. These stakeholders suggest that industries currently excluded under the Act and regulations should be

Percentage of Workforce Covered in Canadian Jurisdictions

Percentage of Workforce Covered (%) - 2015 Figures	
AB	89.94
BC	98.01
MB	76.44
NB	91.38
NL	97.63
NS	72.87
NT/NU	97.80
ON	75.93
PEI	97.48
QC	93.11
SK	73.71
YT	94.88

Data Extracted on 22 November 2017

Source: Association of Workers' Compensation Boards of Canada website

able to remain so. Employers and industries should not be forced to purchase coverage, particularly when the industry or employer in question engages in low risk activities and provides its workers with comprehensive private disability benefits.

Other stakeholders advocated for more specific types of coverage expansion, such as coverage for primary and secondary school teachers and volunteers in for-profit industries.

C. Recommendations

The 2005 Legislative Review Committee recommended that the WCB engage in active efforts to promote extension of coverage to non-covered industries, employers and workers, and to consult with the affected parties before making any decisions about coverage. This approach was intended to encourage, rather than require, non-covered industries, employers and workers to opt into the system. We agree with this approach.

We do not consider it necessary to amend the Act or Regulation at this time to extend mandatory coverage to a larger segment of the employer population. Employers in excluded industries should be at liberty to sign on to the workers compensation program voluntarily. We prefer a consultative approach to the extension of coverage, allowing for consideration of the specific needs and circumstances of affected industries, employers and workers.

Recognizing the benefits of workers compensation coverage, we do encourage the WCB to engage in vigorous efforts to extend coverage to those employers and industries that do not currently fall within the system.

Stakeholder Comments

Expanding coverage will also make the system more efficient, by increasing the base of employers to share costs, making the costs of the WCB a true collective liability. Through economies of scale, we would expect to see lower average premium costs if coverage were expanded.

- Manitoba Federation of Labour (MFL)

Legislative changes need to be made to make WCB coverage mandatory for all sectors in Manitoba. Far too often injured workers and their families [are] left behind and fall through the cracks in the system.

- United Steelworkers Local 6166

WCB coverage should be expanded to cover all sectors. Doing so would add resources to the system, improve efficiency, likely lower premiums for employers, and most importantly, make the system fair for all workers.

- Canadian Union of Public Employees (CUPE)
Manitoba

The determination of the ...[2005 Legislative Review Committee's] Consensus Report regarding non-compulsory industries being able to remain so should be maintained.

- Manitoba Employers Council (MEC)

KAP asks that farm families remain exempt from mandatory coverage but still retain access to optional coverage.

- Keystone Agricultural Producers (KAP)

RECOMMENDATION 1

The Workers Compensation Board should engage in further consultations with the industries and employers identified in the *Excluded Industries, Employers and Workers Regulation* and encourage them to opt into the mandatory coverage scheme. Consultation efforts should be focused on industries and occupations that pose the highest risk of workplace injury or illness, as well as on those industries and occupations that represent the highest percentage of non-covered workers.

RECOMMENDATION 2

The Workers Compensation Board should vigorously promote the benefits of optional and personal coverage to excluded industries and employers, targeting promotion to those industries and occupations that pose the highest risk of workplace injury or illness.

CHAPTER 2 - PREVENTION

Prevention of workplace injuries and illnesses has been a key focus of The Workers Compensation Board (the "WCB" or the "Board") since the 2005 Legislative Review Committee Report addressed this issue in its report. Changes to *The Workers Compensation Act* (the "Act") in 2014 gave the WCB primary responsibility for carrying out prevention activities and established the Prevention Committee, granting it a broad policy and planning mandate. WCB policies and programs have also been implemented in accordance with the *Manitoba Prevention Plan*. With these recent legislative and policy changes, the WCB's involvement in prevention initiatives has arguably never been more robust.

In light of the numerous changes made since the 2005 Legislative Review, this chapter will first provide an overview of how the WCB's prevention role has evolved since that time. It will also address specific stakeholder recommendations in relation to prevention; namely whether the Act should be amended to provide for targeted prevention efforts aimed at vulnerable workers, and whether the Act should be amended to require publication of a prevention plan every five years. Finally, we will examine whether the WCB should continue to provide the Government of Manitoba with funding to defray the costs of administering *The Workplace Safety and Health Act* (the "WSHA").

Section 1: The WCB's Prevention Mandate and Initiatives

A. Background

1. The Evolution of the WCB's Prevention Role

Before addressing specific issues related to prevention, we believe it is important to review the evolution of the WCB's prevention role in Manitoba and highlight the progress that has been made in this area.

(a) 2005 Legislative Review Committee Recommendations

During its legislative review of the Act, the 2005 Legislative Review Committee made the following three key prevention-related recommendations:

- *The Workers Compensation Act* should be amended to make prevention the primary responsibility of the WCB, rather than a joint responsibility of the WCB and the Workplace Safety and Health Division (the "WSHD") of the then Department of Labour (see Recommendation 2, page 13 of the *2005 Legislative Review Committee Report*);
- the WSHD should be reorganized to be a highly effective enforcement agency (see Recommendation 3, page 13 of the *2005 Legislative Review Committee Report*); and

-
- rate-structure incentives should be provided to employers who have implemented successful prevention and return to work initiatives, including those developed through accreditation programs (see Recommendation 3, page 13 of the *2005 Legislative Review Committee Report*).

These recommendations have all been implemented through legislative amendment and/or policy and programming initiatives. The 2005 Legislative Review Committee made a fourth recommendation concerning the funding of the WSHD, which is discussed at the end of this chapter.

(b) Prevention Reviews and Reports

In 2012, the then Minister of Family Services and Labour ordered a series of reviews to evaluate Manitoba's approach to workplace health and safety, including the prevention of workplace injuries and illnesses. These reviews involved extensive stakeholder consultations and resulted in the publication of the following reports:

- **the 2012 Minister's Advisory Council on Workplace Safety and Health Report on *The Workplace Safety and Health Act***⁸ - this report's recommendations include adding specific references to workers' rights in the WSHA; strengthening provisions on unsafe work; requiring safety and health representatives in smaller workplaces; and allowing for province-wide stop work orders.
- **the 2013 *Petrie Report*** - this report recommended, among other things, that the WCB develop a process recognizing more industry-based safety programs, and expedite the development of a prevention incentive program as part of its assessment system. The incentive program would provide a prevention rebate on their annual assessment to those employers who complete a recognized occupational health and safety certification program.
- **the Chief Prevention Officer's**⁹ **2013 Stakeholder Feedback Report, titled, *Review of Prevention Services***:¹⁰ - this report did not make recommendations for change, but noted a variety of concerns raised by stakeholders in relation to prevention. Stakeholders identified such issues as: the need to clarify the mandates of the WCB and WSHD with respect to prevention and enforcement; a greater need for additional training on worker rights and responsibilities; the need for more performance measurement and evidence-based planning; and the need for greater messaging on prevention targeted to vulnerable workers.

⁸ A summary of the recommendations made in 2012 Report of the Minister's Advisory Council on Workplace Health and Safety is available online at:

https://www.gov.mb.ca/labour/safety/pdf/2012_minister_advisory_council_on_workplace_safety_and_health_report.pdf.

⁹ The Chief Prevention Officer's position was first created in 2012. The Chief Prevention Officer received a statutory mandate in 2014, when Bill 31, *The Workplace Safety and Health Amendments Act*, SM 2013, c 9 came into force.

¹⁰ The Chief Prevention Officer's 2013 Stakeholder Feedback Report is available online at:

https://www.gov.mb.ca/labour/safety/pdf/2013_report_of_the_chief_prevention_officer.pdf.

In 2012-2013, the WCB also commissioned a comprehensive review directly related to prevention, leading to the production of an additional report:

- **MNP LLP's April 2013 Report entitled, *Future State Model for Industry-Focused Prevention of Workplace Injury and Illness***¹¹ - using various methodologies, MNP proposed a future state model for delivery of prevention services, outlining the different roles to be played by the WCB, SAFE Work Manitoba, the Chief Prevention Officer, WSHD, industry associations, labour organizations, safety service providers and professional safety programs. The report suggested three possible governance structures for the prevention system and outlined different funding options.

(c) The Manitoba Prevention Plan

In 2013, the Government of Manitoba released the *Manitoba Prevention Plan*, committing to take action in the following 10 areas:

1. Dedicated prevention services;
2. Nation-leading safety and health laws;
3. New tools to strengthen accountability, transparency and reporting;
4. A renewed role for business as a safety partner;
5. Focus on Manitoba's most vulnerable workers;
6. New training programs, containing training standards;
7. Stronger incentives for real prevention;
8. Improved supports for small business;
9. Addressing workplace mental health;
10. Measuring success.

The government proposed several changes, many building on the recommendations of the 2005 Legislative Review Committee and the prevention-related reviews that took place in 2012 and 2013. The *Manitoba Prevention Plan* includes the following recommendations:

- improve service delivery and access by creating a single point of contact for prevention programs;
- keep prevention separate and distinct from compensation, with dedicated budgeting and reporting channels for prevention services;
- ensure greater oversight of prevention activities via a representative stakeholder body to guide operational and budgetary decisions;

¹¹ The April 2013 report of MNP is available online at:

https://www.wcb.mb.ca/sites/default/files/files/Future%20State%20Model%20Final%20Report%20%2023%20Apr%202013_1_1.pdf.

- directly support the development of more industry-based safety programs;
- provide defined rewards for employer-driven efforts that promote injury prevention and positive return to work practices; and
- ensure that the WCB experience rating model translates into a greater incentive to invest in safe work.

In response to the *Manitoba Prevention Plan*, SAFE Work Manitoba began operating as a separate division of the WCB, led by the Chief Operating Officer of SAFE Work Manitoba who reports to the WCB President and Chief Executive Officer.

(d) Legislative Amendments

The Manitoba Legislative Assembly enacted Bill 65 in 2014, giving the WCB a clear and extensive prevention mandate. Bill 65 established the Prevention Committee, composed of WCB Board members, the Deputy Minister of Growth, Enterprise and Trade or designate, the Chief Prevention Officer, and member representatives of employers and workers. The Prevention Committee's role is to develop prevention policies, develop operating and capital budgets for prevention activities, update the Board on prevention activities, and review and evaluate strategic plans for prevention activities.

(e) Policy and Programming Changes

In addition to these legislative amendments, SAFE Work Manitoba has implemented three other significant changes to WCB prevention-related policies and programs:

- **the expansion of industry-based safety programs into new sectors** - industry-based safety programs are effective channels for delivering workplace safety and health education and training programs. The WCB currently funds eight industry-based safety

Relevant Statutory Provisions

Prevention activities

54.1(2) In order to promote safety and health in workplaces and to prevent and reduce the occurrence of workplace injury and illness, the board must, in co-operation with the department and the branch,

(a) promote public awareness of workplace safety and health and injury and illness prevention;

(b) promote an understanding of and compliance with this Act and *The Workplace Safety and Health Act*;

(c) foster commitment to workplace safety and health and to injury and illness prevention among employers, workers and other persons;

(d) work with organizations engaged in workplace injury and illness prevention to promote workplace safety and health;

(e) provide training and education about preventing workplace injury and illness;

(f) develop standards for workplace safety and health and training programs, including certification processes for providers; and

(g) publish reports, studies or recommendations about workplace safety and health and injury and illness prevention.

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programs under section 97.1 of the Act. SAFE Work Manitoba is actively working to expand the number of industry-based safety programs in new sectors.

- **development of a province-wide safety certification program** - the SAFE Work Certified program is operational with five industry-based safety associations authorized to provide safety certification programming. The WCB plans to expand the SAFE Work Certified program.
- **offering a rebate to employers on their annual rate assessment for meeting the SAFE Work Certified standard** - the prevention rebate will be the greater of 15% of the employer's assessment premium or \$3,000, up to a maximum of 75% of the employer's assessment premium. The WCB will start paying these rebates in 2018.

These various initiatives operate together to ensure that an increasing number of employers receive training in workplace injury and illness prevention, that stakeholders are involved in both developing and delivering the training, and that employers are rewarded for completing safety certification programs.

These new prevention-related policy changes are also designed to address, at least in part, the relationship between claim suppression and the use of experience rating in calculating an employer's assessment amount. This topic is discussed in further detail in the *Compliance* chapter of this report.

In addition, in keeping with the *Manitoba Prevention Plan's* focus on vulnerable workers, the WCB has also recently introduced prevention campaigns aimed at specific worker populations, such as:

- **Safety is a Language We Can All Speak** - this campaign offers information in 18 different languages to workers on topics such as the right to refuse unsafe work and how to resolve safety concerns.
- **Worked Up** - this campaign encourages parents to talk to their children about safe

Relevant Statutory Provisions (con't)

Functions of the prevention committee

51.1(9) The prevention committee must

- (a) develop policy for the prevention of workplace injury and illness, including incentive programs, for the consideration of the Board of Directors;
- (b) develop operating and capital budgets for prevention activities;
- (c) regularly review and advise the Board of Directors about prevention activities under section 54.1;
- (d) ensure that the board has in place reasonable processes for coordinating its activities with those of the department and branch (as "department" and "branch" are defined in *The Workplace Safety and Health Act*) and the chief prevention officer; and
- (e) review and evaluate strategic plans for prevention initiatives and make recommendations to the Board of Directors.

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working environments, and provides resources to assist parents in doing so.

- **SAFE Work on Wheels** - in this campaign, a mobile unit travels across the province and offers safety demonstrations on topics such as lifting, fall protection, eye protection, and hand safety to Manitoba schools and employers.
- **Young Worker Injury Prevention Strategy** - this strategy involves identifying and reaching out to the 25 employers with the highest rate of injury for young workers in Manitoba and providing them with prevention services and resources; increasing the number of Safe Workers of Tomorrow presentations offered to high school students by 10% every year; creating an online, interactive SAFE Work course; and delivering safety information in visual, interactive formats.

2. Other Jurisdictions

Like Manitoba, most Canadian workers compensation agencies have put greater emphasis on prevention-related initiatives in recent years.

At least seven Canadian jurisdictions, including Manitoba, offer a form of financial incentive or rebate to some employers on their annual assessment rates, provided they meet the necessary qualifying criteria. These incentive programs differ in their requirements, features and amount of rebate offered. Completion of a health and safety certification program is a qualifying factor in all jurisdictions.

At least nine Canadian jurisdictions, including Manitoba, offer a health and safety certification program to employers. These programs are either offered by the public agency responsible for workplace injury and prevention or by industry-specific providers approved by the public agency. In some jurisdictions, these certification programs are offered to all covered employers, and in others they are only offered to employers who meet established criteria. Completion of these health and safety programs will often assist employers in obtaining a rebate on their annual assessment rates.

Mindful of the stakeholders' submissions on prevention issues outlined below, the Committee notes that no provincial or territorial jurisdiction in Canada currently provides for a statutorily mandated five-year prevention plan. In some jurisdictions, the workers compensation authority is required to produce a more general service plan at regular intervals.

Likewise, no provincial or territorial workers compensation statute expressly contemplates targeted prevention efforts aimed at vulnerable workers. As in Manitoba, other Canadian jurisdictions deliver these types of initiatives pursuant to their more general statutory prevention mandate.

Jurisdictions across Canada display a wide variety of prevention governance structures, often depending on whether the workers compensation agency is responsible for workplace safety and health enforcement, prevention, or both.

Manitoba's is the only system in Canada where the workers compensation statute specifically provides for a committee of the board of directors dedicated to prevention. Ontario has a statutory mandate for a Chief Prevention Officer and Prevention Council under its workplace health and safety legislation.

B. What the Committee Heard

While most stakeholders approved of the progress that has been made, several suggested additional changes in law and policy which they believe would improve the delivery of prevention services in Manitoba.

Some suggested that the Act be amended to provide for targeted prevention efforts aimed at vulnerable workers. These stakeholders approved the recommendations made in the *Manitoba Prevention Plan* placing specific emphasis on prevention initiatives targeting young workers, new workers, and workers who are newcomers to Canada.

Because the *Manitoba Prevention Plan* resulted in many positive prevention initiatives, several stakeholders also suggested that the Act be amended to require publication of a prevention plan every five years. These plans would incorporate both prevention and enforcement initiatives, and recommend changes to the legislative and regulatory framework as necessary.

The Committee also heard recommendations for a review of both the Prevention Committee's composition and structure, and the Chief Prevention Officer's role in prevention-related matters. The purpose of this review would be to ensure the Prevention Committee is best equipped to fulfill its statutory functions. While we have no mandate to consider the Chief Prevention Officer's role in general, as this is prescribed in the WSHA, our review can extend to the composition and structure of the Prevention Committee.

Stakeholder Comments

The five year plan was an excellent initiative that had specific targets and goals. By creating the five year plan the government has acknowledged areas in need of improvement. It also held the government to very specific commitments. This has created a lot of positives but only so much can be done at once... [We therefore recommend that] [t]he WCA be amended to require five years plans including all prevention, enforcement and compensation bodies.

- United Food and Commercial Workers (UFCW) Union Local 832

The existing Minister's Five-Year Workplace Injury and Illness Prevention Plan should be continued. The WCA should be amended to require future five-year plans which ensure that prevention, enforcement, and legislation/regulation are integrated.

- Canadian Union of Public Employees (CUPE) Manitoba

[We recommend] [t]hat The WCA be amended to require SAFE Work Manitoba to support targeted prevention efforts for vulnerable workers -- these should be advanced in partnership with existing community organizations.

- Manitoba Federation of Labour (MFL)

C. Recommendations

The Committee has considered the stakeholders' submissions and the extensive prevention-related work that has been done in recent years.

In respect of certain stakeholder submissions on this issue, we do not believe a statutory amendment is required to develop initiatives targeted at vulnerable workers. Section 54.1(2) of the Act gives the WCB a broad prevention mandate, which includes the ability to promote workplace safety and health through communication, education and other initiatives. The WCB is engaged in prevention efforts targeted to vulnerable workers, including its Safety is a Language We Can All Speak Campaign, and the Young Worker Injury Prevention Strategy. We encourage the WCB and SAFE Work Manitoba to continue reaching out to vulnerable workers through these types of initiatives.

We also do not consider it necessary to formalize in legislation the development of five-year prevention plans. As noted in the jurisdictional review in this chapter, no workers compensation legislation in Canada makes the development of such plans mandatory.

However, we do urge the WCB to continue developing regular and timely prevention plans and engaging with stakeholders during the development process. We believe the development of prevention plans at consistent intervals will allow the WCB, workers, employers and other stakeholders to come together, share information, and make progress on the foundational issue of injury prevention.

The Committee is encouraged by the WCB's responsiveness to stakeholder concerns and expert reports on prevention-related issues. Especially noteworthy are the WCB's efforts to expand industry-based safety programs, develop SAFE Work Certified as a province-wide program, and offer rebates to certified employers.

We urge the WCB to continue developing SAFE Work Certified to completion, consulting with stakeholders in developing prevention plans, and implementing the prevention rebate. Targeted efforts should be made to expand SAFE Work Certified into other sectors, particularly those with higher than average rates of injury and illness.

RECOMMENDATION 3

The Workers Compensation Board should continue its efforts to expand SAFE Work Certified into other industries, specifically targeting its expansion to sectors with higher than average rates of injury and illness; consult with stakeholders when developing prevention plans; and implement the prevention rebate.

Finally, we recommend that the composition and structure of the Prevention Committee be reviewed. The current structure of the Prevention Committee was developed when Bill 65 was enacted in 2014. Since then, SAFE Work Manitoba has taken the lead in the prevention arena. It

is timely to reconsider the structure and composition of the Prevention Committee, and its role in fulfilling the WCB's prevention mandate.

Membership of the Prevention Committee should include persons with the necessary expertise to provide meaningful and effective policy advice and direction on injury prevention. The Prevention Committee must be both flexible and stable, with the capacity to develop new prevention initiatives and ensure that long-term plans in this area are pursued.

RECOMMENDATION 4

The composition, structure, mandate and role of the Prevention Committee should be reviewed.

Section 2: WCB Funding for the Administration of *The Workplace Safety and Health Act*

A. Background

1. Legislative Requirement for the WCB to Defray the Costs Incurred by the Government of Manitoba in administering *The Workplace Safety and Health Act*.

Section 84.1(1) of the Act requires the Board to make a yearly grant to the Government of Manitoba to cover the costs of administering the WSHA and the costs of operating the Worker Adviser Office ("WAO"). This grant is paid from the accident fund under section 73(1) of the Act. The Lieutenant Governor in Council determines the amount of the grant, subject to statutory limits. Section 84.1(2) specifies that the grant shall not exceed the increase in the Board's total costs in the current year over the previous year, as these costs are outlined in the Board's annual report.

Both the WSHD, which administers WSHA, and the WAO are part of the Ministry of Growth, Enterprise and Trade of the Government of Manitoba.

According to the Government of Manitoba's 2017 Budget, the Ministry of Growth, Enterprise and Trade estimated it would spend approximately \$9.1 million in 2016/2017 and \$9.05 million in 2017/2018 to operate the WSHD.¹² The Ministry estimated approximate expenditures of \$778,000 in 2016/2017 and \$750,000 in 2017/2018 to operate the WAO.¹³ Budget 2017 further specifies that the Government of Manitoba anticipates recovering \$9.8 million in 2016/2017 and \$10 million in 2017/2018 from the WCB,¹⁴ presumably through the grant described in section 84.1 of

Relevant Statutory Provisions

Grant to government for expenses

84.1(1) Subject to subsection (2), the board shall make a grant from the accident fund to the Government of Manitoba in an amount determined by the Lieutenant Governor in Council to assist in defraying the reasonable expenses properly incurred by the Government of Manitoba in its administration of *The Workplace Safety and Health Act* and the reasonable expenses of worker advisers and employees appointed under subsection 108(1).

Annual increase in grant

84.1(2) The amount of the grant referred to in subsection (1) shall not be increased in any year by more than the increase in the board's total costs for the year over such costs for the previous year, as set out in the annual report of the board.

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¹² See Government of Manitoba, *Manitoba Budget 2017: Estimates of Expenditure and Revenue for the Fiscal Year Ending March 31, 2018*, at page 71. This document is available online at: http://www.gov.mb.ca/finance/budget17/papers/r_and_e.pdf.

¹³ *Ibid.* at p. 72.

¹⁴ *Ibid.* at p. 144.

the Act. According to these estimates, the WCB will be covering the entire cost of administering both the WAO and WSHA in both 2016/2017 and 2017/2018.

This Committee notes the gap between program coverage under *The Workers Compensation Act* and regulation of employers under the WSHA. As discussed in the chapter on coverage, 76% of the Manitoba workforce is currently covered under the Act, and not all employers pay into the accident fund. By contrast, the WSHA applies to all Manitoba employers, except for federally regulated industries. This in effect means that employers with WCB coverage are paying the costs of workplace health and safety enforcement initiatives for all Manitoba employers.

2. 2005 Legislative Review Committee Recommendations

Between 1965 and 1977, the WCB was responsible for both workers compensation matters and industrial accident prevention. Its mandate extended to all matters related to workplace inspection, enforcement, training and prevention during this period.

When the WSHA came into force in 1977, workplace inspection, enforcement and training became the responsibility of the WSHD. Prevention was considered a joint responsibility of the WSHD and the WCB. The WCB has provided most of the funding for workplace safety and health initiatives since that time.

The 2005 Legislative Review Committee recommended amending the Act to make prevention the primary responsibility of the WCB and enforcement the primary responsibility of WSHD. These recommendations were implemented through legislative and policy initiatives.

The 2005 Legislative Review Committee also recommended that the general revenues of the Province of Manitoba bear the costs of enforcement activities undertaken by WSHD. In support of this recommendation, the committee indicated that a clear division of mandates between the WCB and WSHD calls for a clear division of funding responsibility. The committee believed that the WCB should not be funding operations that are not part of its mandate.

This recommendation was not implemented.

2005 Legislative Review Committee

We believe prevention must be a primary focus of the WCB and be paid for by the WCB. Enforcement should be the responsibility of the WSHD and be paid for by the Government of Manitoba. Accountability must be part of all funding arrangements.

The mandate of the WCB should be funded by the WCB. The mandate of other agencies should be funded elsewhere.

Working for Manitoba: Workers Compensation for the Twenty-First Century: Report of the Legislative Review Committee on The Workers Compensation Act (February 2005) at p. 14

3. Other Jurisdictions

Not all Canadian jurisdictions divide the responsibility for prevention activities and enforcement activities between two agencies. In some provinces and territories, the workers compensation agency is responsible for both prevention and enforcement. In others, a government department is responsible for both functions.

Regardless of how these responsibilities are divided, all Canadian workers compensation agencies are responsible, in whole or in part, for funding both prevention and enforcement activities.

In Nova Scotia, the amount of funds provided is more closely tied to the percentage of employers covered by workers compensation legislation. Nova Scotia's board provides funding for workplace health safety based on the ratio of the number of workers working for covered employers in the province and the total number of workers who are subject to the requirements of occupational health and safety legislation.

B. What the Committee Heard

In the course of our consultations, some stakeholders agreed with the 2005 Legislative Review Committee that funds associated with workplace safety and health enforcement should come from the Province of Manitoba's general revenue, rather than from the WCB.

One stakeholder recommended that the WCB should continue funding workplace safety and health enforcement activities on the grounds that the general public should not have to bear these employment-related costs.

Other Jurisdictions

Annual assessment on employers

115(7) Notwithstanding anything contained in this Section, the amount paid out of the Accident Fund each year with respect to the costs of administering the *Occupational Health and Safety Act* shall be that proportion of the total costs of administering that Act that the number of employees employed by employers assessed pursuant to this Act bears to the total number of employees in the Province covered by the *Occupational Health and Safety Act*.

Workers' Compensation Act, SNS 1994-95, c 10

Stakeholder Comments

As recommended in the [2005 Legislative Review Committee] Report, Workplace Safety and Health should not be funded by the Workers Compensation Board

- Manitoba Employers Council (MEC)

We do not feel that the financial burden should be shirked directly onto the people of Manitoba when the mandate of the program is strictly limited to regulating the activities of employers.

-Manitoba Government and General Employees' Union (MGEU)

C. Recommendations

We agree with the 2005 Legislative Review Committee's view that the costs of administering the WSHA should be paid by the Government of Manitoba out of the general revenue. We believe that workplace safety constitutes a core service in the same manner as roads, health services or law enforcement. They are all essential to the preservation of public health and safety generally. It is therefore reasonable that the province should bear the costs of administering the WSHA.

RECOMMENDATION 5

Section 84.1(1) of *The Workers Compensation Act* should be amended so that The Workers Compensation Board is only required to provide a grant to the Government of Manitoba to assist with the reasonable expenses of worker advisers. As was recommended by the 2005 Legislative Review Committee, the costs of administering *The Workplace Safety and Health Act* should be paid by the Government of Manitoba out of the general revenue.

RECOMMENDATION 6

Should the Government of Manitoba choose not to accept Recommendation 5, the Committee respectfully suggests that The Workers Compensation Board's liability for the costs of administering *The Workplace Safety and Health Act* be limited to the percentage of the Manitoba workforce covered under *The Workers Compensation Act*, which at present is approximately 76%.

CHAPTER 3 - ASSESSMENTS

Since *The Workers Compensation Act* (the "Act") was first enacted in 1916, covered employers have been divided into two broad categories.

The first is made up collectively liable employers, or "Class E" employers as they are termed under the Act. These employers pay premiums, or assessments, into the accident fund. The Workers Compensation Board (the "WCB" or the "Board") sets assessment amounts for employers annually, using a number of factors to determine the applicable amounts. The funds collected from Class E employer assessments are used to pay the costs of claims made by their workers, regardless of fault.

The second category consists of employers who are self-insured and individually liable for the claim costs of their workers, plus their share of administration costs. These employers include certain large public bodies and private transportation firms.

During the course of our consultations, stakeholders raised two main issues regarding the methodology used by the WCB to calculate employer assessments. The first concerns the WCB's use of an employer's claim cost experience (also known as the employer's experience rate) as a factor in setting individual employer assessments. This topic will be discussed in the *Compliance* chapter of this report, as some stakeholders have identified a link between experience rate and claim suppression. The second is about how the WCB decides on the level of funding required to maintain the system and how it disposes of excess funds collected through assessments. This latter topic is the subject of this chapter.

A. Background

1. The WCB Funding Model

Under section 81(1) of the Act, the WCB determines the amount that covered employers must pay in assessments each year to maintain the accident fund. In determining this amount, the Board must ensure that the accident fund has sufficient money on hand to pay the estimated claims costs for the year, including administration and future costs. It must also ensure there are sufficient funds available to cover the costs of any extraordinary events that might arise.

The WCB has two main sources of revenue. Its primary source of revenue is collected from covered employers through assessments. The WCB also obtains investment revenue in its investment portfolio. While assessment revenue remains more or less constant from one year to the next, being within the control of the WCB, the revenue derived from investments can vary substantially over time.

The Board makes decisions on the level of required funding with reference to its funding policy. WCB Policy 31.05, *Funding Policy* (the "Policy") states that the WCB is committed to "operate on a fully funded basis to a level-funding standard." The Policy also provides, "Full funding requires that current employers pay for the current and future costs of existing compensable

earnings and their administration, rather than future generations of employers paying for those injuries." To achieve full funding, the WCB must ensure that its assets in any given year match or exceed its liabilities. In other words, a fully funded system requires a funding ratio target of at least 100%.

However, the Policy also acknowledges that a funding ratio target of 100% would be insufficient in the event of an unexpected or catastrophic occurrence. Accordingly, the Policy requires the WCB to set its funding ratio target above 100%, to "protect the workers compensation system from risks, uncertainties, catastrophic events, and to ensure that annual influences do not unduly distort the funding process."

The Board uses standard insurance principles and actuarial advice to determine the appropriate funding ratio target. Before 2004, the WCB's funding ratio target was roughly 115%. In 2004, a decision was made to increase the target to 122% in response to the impact of new investment revenue recognition accounting standards. In 2007, the funding ratio target was again increased to 130%, in response to increased levels of risk arising from contemplated changes to occupational disease liabilities and other benefit liability accounting standards. The WCB's funding ratio target has remained at 130% ever since.

The Board's policy of maintaining a target of 130% was demonstrated to be prudent during the 2008 financial crisis and market crash. During that period, the funding ratio dropped from 130% to 106.6%, at which level WCB was able to meet its claims costs for the year without seeking additional funds from other sources.

In 2014, the WCB engaged an external, independent consultant, Eckler Ltd., to review the Policy and funding ratio target of 130%. This consisted of an in-depth inter-jurisdictional review of workers compensation funding practices across Canada. It also included modelling of projected financial outcomes using funding ratio targets of 120%, 125% and 130%. The final report concluded that 130% was the funding ratio target that best ensured a stable and predictable assessment rate for covered employers.

Relevant Statutory Provisions

Annual assessment for accident fund

81(1) For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy upon and collect from the employers in each class by an assessment or by assessments made from time to time rated upon the payroll, or in such other manner as the board considers advisable or necessary, sufficient funds, according to an estimate to be made by the board in each year

(a) to meet the costs for the year, including administrative expenses, the future cost of claims, and changes in liabilities, so as to prevent employers in future years from being unduly burdened with the costs arising from accidents in previous years;

(b) to provide a stabilization fund to meet the costs arising from extraordinary events that would otherwise unfairly burden the employers in a class, sub-class, group, or sub-group in the year of the events.

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c W200*

When the target level is achieved for the accident fund in a given year, any amount of money received above the targeted funding ratio is considered excess reserve funds. Under the Policy, the Board may dispose of these excess funds in a number of ways, including direct rebates to employers, reduction in average assessment rates, increased benefits, or some combination of these. The Board may also, for a short period of time, take no action with respect to the disposition of excess reserves; however it must review its decision to take no action within one year or less.

Beginning in 2013, the WCB's funding ratio has exceeded the target of 130%, largely due to stronger than expected investment outcomes. Since 2014, the WCB has chosen to dispose of this excess surplus by decreasing the average assessment rate for employers. Below is a chart that shows the WCB's funding ratio, average actual assessment rates for employers and the investment rate of return from 2012 - 2016, as set out in the WCB's Annual Reports for those five years.

Year	Funding Ratio (Ratio of Assets to Liabilities)	Average Assessment Rate (per \$100 of Assessable Payroll)	Investment Rate of Return (gross)
2012	126.6%	\$1.51	9.70%
2013	134.0%	\$1.50	13.60%
2014	137.8%	\$1.50	9.90%
2015	143.3%	\$1.30	7.90%
2016	145.9%	\$1.25	3.50%

According to its 2017 to 2021 *Five Year Plan*,¹⁵ the WCB intends to gradually reduce the funding ratio from its current level of approximately 146% to approximately 135% by 2021. The WCB indicates it has used a steady rate of 6% for investment revenue throughout the plan, because it is difficult to predict fluctuating investment markets.

The WCB also intends to dispose of reserves in excess of 130% by continuing to reduce the average assessment rate. To illustrate this, the WCB's *Five Year Plan* uses an average provisional assessment rate of \$1.10 per \$100 of assessable payroll in 2017, and \$0.95 per \$100 of assessable payroll for the years 2018 - 2021. According to the WCB, "this rate change is financially sound and is intended to return surplus funds to employers."

2. Other Jurisdictions

The Legislative Review Committee 2016-2017 has been asked to review the WCB's existing funding model, particularly in comparison with workers compensation agencies in other Canadian jurisdictions.

¹⁵ The WCB's 2017 to 2021 *Five Year Plan* is available on-line at:
https://www.wcb.mb.ca/sites/default/files/resources/5503_WCB_Five_Year_Plan_Web.pdf.

Workers compensation agencies in Canada all adopt slightly different methods of establishing a targeted funding ratio. There are three main approaches:

- use a target funding ratio of 100%, recognizing that actual results will fluctuate around that figure;
- choose a fixed percentage target funding ratio (or a range of percentages) that is at a level above 100%, as is the policy in Manitoba; or
- define a series of specific reserves that are required in addition to liabilities.

The chart immediately below is a comparison of funding ratio targets for all Canadian jurisdictions, along with their actual funded position between 2009 and 2015. The information in this chart is derived from data reproduced on the website of the Association of Workers' Compensation Boards of Canada and from the annual reports of Canada's 13 provincial and territorial jurisdictions.

Province	Funding Target Ratio % and (Range)	Funded Position, 2009-2015						
		2009	2010	2011	2012	2013	2014	2015
AB	128% (114-128%)	128.4%	129.4%	128.3%	130.2%	134.3%	136.0%	134.3%
BC	138%	123.5%	130.5%	125.4%	121.7%	124.6%	129.7%	137.9%
MB	130% (110-130%)	114.9%	121.5%	121.3%	126.6%	134.0%	136.0%	143.3%
NB	110%	101.6%	111.5%	116.9%	126.7%	138.2%	137.3%	123.2%
NL	110% (100-120%)	88.0%	94.2%	91.8%	91.7%	106.6%	112.1%	118.0%
NS	100%	62.4%	64.0%	61.7%	66.4%	71.4%	76.9%	80.6%
NT/NU	125%	116.4%	116.0%	107.3%	106.8%	116.4%	115.9%	117.3%
ON*	100%	55.3%	54.7%	52.1%	56.5%	65.4%	71.60%	79.4%
PEI*	110% (100-110%)	103.8%	113.8%	113.7%	124.7%	135.3%	147.2%	141.4%
QC*	100%	73.6%	81.4%	81.9%	88.5%	95.3%	99.5%	105.8%
SK*	120% (105-120%)	114.9%	124.8%	124.0%	136.9%	148.8%	153.3%	144.7%
YT	125%	122.5%	134.3%	140.4%	145.8%	152.6%	160.4%	155.0%
<i>Canadian Average</i>		<i>100.4%</i>	<i>106.5%</i>	<i>105.4%</i>	<i>110.2%</i>	<i>118.6%</i>	<i>123.0%</i>	<i>123.4%</i>

Note* These jurisdictions use an alternate calculation to determine their actual funding ratio. For example, Saskatchewan and Prince Edward Island do not include the unrealized investment gains in its numerator. This means their actual funded ratio based on assets to liabilities has to be higher than the stated targeted funding ratio in order to reach the target.

As in Manitoba, most workers compensation agencies have several options available to them for the disposition of excess reserves. Some jurisdictions have the policy option of creating new, specified reserve funds allocated specifically to guard against particular risks (e.g. a disaster reserve fund, a second injury reserve fund). Most jurisdictions choose to dispose of their excess reserves by reducing employer assessments.

In some jurisdictions, however, board or commission policies mandate the issuance of rebates to employers. In Alberta, for example, the board will approve a rebate to eligible employers if the funded status is greater than 128%. The rebate amount is capped as a percentage of the current year's premiums. In Saskatchewan, if the funded status is above 122%, the board will issue a rebate over a period not to exceed five years until the fund reaches 120%. Accordingly, Alberta issued rebates in 2010 and in 2012 - 2016, while Saskatchewan issued rebates in 2014 - 2016.

B. What the Committee Heard

During the course of our consultations, some stakeholders suggested the WCB should revisit its funding ratio target. They believe it is too high, although there was no common position on what the appropriate target should be.

Other stakeholders approve of the WCB's funding ratio target of 130% and its approach to the disposition of excess reserves. They note that Manitoba currently has one of the lowest average assessment rates in the country, and that the current funding ratio will likely be reduced with the introduction of the prevention rebate incentive program in 2018.

These stakeholders were also concerned that depleting the WCB's reserves by providing additional rebates could expose the WCB to market volatility risk.

We also heard suggestions that the WCB should consider providing increased benefits to workers instead of lowering employer

Stakeholder Comments

Our members would support a similar funding model to that of the current funding model the Saskatchewan WCB has in place, i.e. the range of 105% - 120%. This model best protects against risk, provides benefits for workers, and provides value for employers.

- Canadian Association of Petroleum Producers (CAPP)

Our members believe being 130 per cent funded is being overfunded. CFIB therefore recommends a funding ratio of between 100 per cent and 110 per cent as a fair scenario, where the board is able to fulfil its responsibility to protect present and future worker benefits against unexpected events and minimize the volatility of premiums.

-Canadian Federation of Independent Business (CFIB)

We believe it's very important for the WCB to have a target funding ratio well above the 100% in order to protect against market fluctuations and protect against the risk of unfunded liabilities. A prudent funding ratio also provides greater stability in assessment rates.

It is our understanding that the Board's better than expected performance has been largely driven by strong returns from its investment portfolio. We note also that over the last five years, the WCB's funding ratio has averaged around 132%, very close to target. During the 2008 financial markets collapse, it dropped all the way to 107%, which speaks to the need for [a] prudent cushion of reserves.

- Manitoba Federation of Labour (MFL)

assessment rates when the funding ratio is above 130%, or investing surplus funds in initiatives that would benefit both employers and workers.

C. Recommendations

After review, we find the WCB's current funding policy and target should be maintained.

While jurisdictional research has indicated that Manitoba has one of the highest funding ratio targets in the country, we recognize the risks associated with a lower target.

We are mindful of the WCB's experience during the 2008 financial crash. The WCB's relatively high funding ratio target allowed the agency to absorb the financial losses of its investment portfolio, while continuing to ensure that its assets exceeded its liabilities for that year.

We are also persuaded by the findings of the 2014 independent review which recommended the current funding ratio target of 130%.

On the issue of disposal of excess reserves, we observe that the WCB's current *Five Year Plan* commits to reducing surplus reserves. This will be accomplished, in part, through further reductions in employers' average assessment rates in 2017 and 2018. This Committee concludes that the Board should continue to retain discretion over how it disposes of its excess reserves.

In summary, we make no recommendation to alter the WCB's funding model or the manner in which it disposes of excess reserves.

RECOMMENDATION 7

<p>We support the decision of the Workers Compensation Board to set its funding ratio target at 130%. The Workers Compensation Board should continue to retain discretion over its funding policy, including how it disposes of excess reserve funds.</p>

CHAPTER 4 - COMPLIANCE

The integrity of the workers compensation system depends on compliance with the rules and principles set out in *The Workers Compensation Act* (the "Act") and the policies of The Workers Compensation Board (the "WCB" or the "Board"). The WCB recognizes the importance of compliance in its Policy 22.20, *Program Abuse*:

The WCB has an obligation to its stakeholders - workers, employers and the accident fund - to prudently manage the human, technological and financial resources entrusted to it. As part of this stewardship obligation, the WCB has the responsibility to prevent, respond to and minimize the impact of program abuse.

The Bill 65 amendments came into force in 2014 and 2015, creating a significantly more robust compliance and enforcement framework.

Despite these recent legislative changes, several stakeholders commented on the need for better enforcement and stronger penalties for non-compliance, specifically in respect of claim suppression, discriminatory action and the re-employment obligation. In this chapter, we will discuss these and other more technical compliance-related issues.

Section 1: Claim Suppression and Discriminatory Action

A. Background

In this section, the Committee considers the treatment of claim suppression and discriminatory action within the legislative, policy and operational framework of Manitoba's workers compensation system.

We also examine the interaction between the WCB's rate model, specifically the use of experience rating in calculating an employer's assessment, and the incidence of claim suppression. This is a subject of great concern for many stakeholders. The Committee will consider the adequacy of the WCB's response to recent reports that pointed to a connection between experience rating and claim suppression.

1. The Legislative, Regulatory and Operational Framework Regarding Claim Suppression and Discriminatory Action

(a) The Current Act

Section 19.1 of the Act prohibits employers from engaging in claim suppression or discriminatory action in relation to workers who make claims for WCB benefits. There are three separate prohibitions under section 19.1:

- employers may not take action or attempt to take action to prevent or discourage a worker from making a claim, pursuing a claim or receiving compensation under the Act (section 19.1(1));
- employers may not take discriminatory action against those who report or attempt to report employers for taking steps to prevent or discourage workers from making a claim, pursuing a claim or receiving compensation under the Act (section 19.1(2)(a)); and
- employers may not take or threaten to take discriminatory action against a person who has made a claim, exercises a right or carries out a duty under the Act (section 19.1(2)(b)).

Section 19.1(5) defines "discriminatory action" to include "any act or omission by an employer or a person acting on behalf of an employer that adversely affects a worker's employment, including a transfer, demotion, layoff or termination."

Section 19.1(3) is a reverse onus provision. In cases where discriminatory action is alleged, the onus is on the employer to demonstrate that its actions were unrelated to the worker's compensation claim, the exercise of rights or the performance of duties under the Act, and were undertaken in good faith.

An employer who engages in claim suppression or discriminatory action may be prosecuted for an offence and fined up to \$50,000 if convicted.

The WCB may also impose an administrative penalty on the employer for contravening the claim suppression and discriminatory action

Relevant Statutory Provisions

Discouraging worker from claiming compensation

19.1(1) No employer or person acting on behalf of an employer shall take any action that prevents or discourages or attempts to prevent or discourage a worker from applying for compensation, pursuing an application that has been made or receiving compensation under this Part.

No discriminatory action

19.1(2) No employer or person acting on behalf of an employer shall take or threaten to take discriminatory action against a person for

- (a) reporting or attempting to report an alleged violation of subsection (1) to the board; or
- (b) exercising any right or carrying out any duty in accordance with this Act or the regulations.

Onus on employer

19.1(3) If, in a prosecution or other proceeding under this Act, it is established that discriminatory action was taken against a person after he or she

- (a) reported or attempted to report an alleged violation of subsection (1); or
- (b) exercised any right or carried out any duty in accordance with this Act or the regulations;

the employer is presumed to have taken the discriminatory action contrary to subsection (2). The employer may rebut the presumption by showing that the action taken was not related to the conduct described in clause (a) or (b).

The Workers Compensation Act, CCSM c W200

provisions. The *Interest, Penalties and Financial Matters Regulation* establishes an administrative penalty of \$4,000 for the first contravention, \$5,000 for a second contravention within a five-year period, and \$6,000 for a third or subsequent contravention within a five-year period.

The WCB publishes the names of those who have breached the claim suppression and discriminatory action provisions, along with the amount of administrative penalty imposed.

(b) History of the Claim Suppression and Discriminatory Action Provisions

The Act has contained a provision prohibiting claim suppression since 1992. In response to the 2005 Legislative Review Committee's recommendations, discriminatory action provisions were added when Bill 25 came into force in January 2006.

The 2005 committee considered the Act's provisions prohibiting claim suppression to be inadequate. While the Act prohibited employers from taking steps to compel workers not to claim compensation, many workers were equally concerned about retaliatory actions once their claims had been filed. The committee accordingly recommended that the Act be amended "so that the definition of claims suppression is broadened to include any action taken to prevent the filing of a claim or to interfere with a claim once filed" (see Recommendation 49, page 26 of the *2005 Legislative Review Committee Report*).

The Bill 25 amendments broadened the definition of claim suppression found in section 19.1(1) and increased the applicable penalty for employers who were convicted of claim suppression from \$5,000 to \$7,500. The 2006 Act also introduced a fine of \$7,500 on conviction of discriminatory action and an administrative penalty of \$450 for engaging in claim suppression or discriminatory action.

In January 2015, the Act was amended again to add a definition of "discriminatory action" and introduce the reverse onus provision.

The reverse onus provision was added in response to recommendations made in the *Petrie Report*), which is also discussed in the *Prevention* chapter of this report. The *Petrie Report* examined issues such as prevention incentives, claim suppression, and improvements to the rate model. It commented that allegations of claim suppression can be difficult to investigate and prove, as both the worker making the claim and other witnesses are often reluctant to come forward with evidence. In light of these challenges, the report recommended that the Act be amended to include a reverse onus provision for discriminatory action, similar to the one in *The Workplace Safety and Health Act* (see Recommendation 8, page 12 of the *Petrie Report*).

The 2015 amendments also broadened the definition of claim suppression in section 19.1(1), and increased the monetary penalties for the offences of claim suppression and discriminatory action from \$7,500 to \$50,000. Administrative monetary penalties for contravening the claim suppression and discriminatory action provisions were also increased by regulation. These

increased penalties were introduced as a direct result of recommendations made in the *Petrie Report* (see Recommendation 9, page 13 of the *Petrie Report*).

(c) Creation of a Compliance Services Department within the WCB

As an operational response to the problem of claim suppression and other breaches of the Act, the WCB created a Compliance Services Department in 2014. It is tasked with investigating violations of the Act and regulations, assisting both workers and employers in complying with their obligations, and, where appropriate, imposing administrative penalties on those found to be in breach.

The *Petrie Report* approved the WCB's decision to establish a Compliance Services Department, and recommended that "the new WCB Compliance unit be sufficiently staffed with experienced investigators and equipped with a robust policy to fully investigate all complaints of claims suppression" (see Recommendation 6, page 12 of the *Petrie Report*).

2. Experience Rating and Claim Suppression

Some stakeholders have suggested a direct link between experience rating and claim suppression. Because the WCB takes an employer's claims costs into account when calculating its assessment rate, employers arguably have a clear incentive to discourage workers from making claims.

The WCB has recently taken steps to address the interaction of experience rating and claim suppression through changes to its rate setting model, expansion of its SAFE Work Certified program into other industry sectors, and the introduction of a prevention rebate.

Before considering these changes and how they might help to reduce claim suppression and discriminatory action, it is important to understand how the WCB establishes employers' assessment rates.

(a) How Assessment Rates are Calculated

Section 81(1) of the Act gives the WCB authority to assess, levy and collect from employers annual premiums, known as assessments, to maintain the accident fund. The accident fund is used to cover the costs of claims made by workers and prevention initiatives in a given year, the future costs of claims, the administrative expenses associated with the WCB system and contingency funds.

The amount of assessment paid by an employer for the year is determined by the employer's assessment rate. For Class E employers (all covered employers except those that are individually liable) the WCB calculates assessment rates based on a number of factors, including:

- the type of industry the employer belongs to, and the types of risks associated with that industry;
- the size of the employer;

-
- the number of claims made by an employer's workers over a given period of time (the experience period); and
 - how the costs of claims made by an employer's workers over the experience period compare to the costs of claims made by other employers' workers over the same period (the experience rate).

Other factors also play a role in setting assessment rates for Class E employers. WCB Policy 31.05.05, *Rate-Setting Model for Class E Employers*, provides a more complete description of how assessments are calculated.

While the employer's experience rate is only one of the factors used to calculate employers' assessment rates, it is clear that higher assessment rates will be levied against employers with higher than average claims costs.

The connection between claims costs and premiums is also a feature of most insurance models outside of the workers compensation system.

(b) The Link between Experience Rating and Claim Suppression

Two recent reports have discussed this issue: the 2013 *Petrie Report* and the 2013 report, *Claim Suppression in the Manitoba Workers Compensation System: Research Report (the "PRISM Report")*.¹⁶ These reports came to different conclusions regarding the link between claim suppression and discriminatory action.

The Petrie Report

As discussed in the *Prevention* chapter, the *Petrie Report* reviewed the WCB's rate model, considered prevention incentives and examined the possibility of a connection between experience rating and claim suppression.

On the latter topic, the *Petrie Report* concluded that because "the Assessment Rate Model ... focuses primarily on claims costs, [it] provides a strong incentive to control those costs wherever possible." (*Petrie Report*, page 5). Anecdotal evidence indicated that some employers control costs by engaging in claim suppression, discriminatory action and/or encouraging workers to return to work before they have recovered from their injuries (*Petrie Report*, Appendix 2, pages 35 to 51).

To remedy the impact that experience rating may have on claim suppression, the *Petrie Report* made several recommendations for change in the fields of safety and prevention, some of which are discussed in the *Prevention* chapter of this report. These recommendations were aimed at developing a prevention incentive or rebate which would reward employers for engaging in

¹⁶ The *PRISM Report* is available online at:
<https://www.wcb.mb.ca/sites/default/files/Manitoba%20WCB%20Claim%20Suppression%20Report%20-%20Final-1.pdf>.

prevention and safety programs. The premise is that the prevention rebate might serve to counterbalance any effect of experience rating on claim suppression activities.

The PRISM Report

In 2012, the WCB commissioned an independent study of claim suppression, undertaken by PRISM Economics and Analysis. The *PRISM Report* sets out the results of this study.

Among other issues, the *PRISM Report* examined the impact that experience rating might have on claim suppression. It found a significant under-reporting of workers compensation claims in Manitoba. However, it concluded that "lack of knowledge of entitlement rights and workers' preference for readily available alternatives (e.g. Manitoba Health, sick leave, employer benefit plans) are the most significant factors behind under-claiming" (*PRISM Report*, page 2). Commenting that "claim suppression is a material and germane factor," the *PRISM Report* nevertheless concluded that it is not as significant a reason for under-reporting as these other two factors (*PRISM Report*, page 2).

(c) The Expansion of SAFE Work Certified, the Prevention Rebate and Changes to the Rate Setting Model

In response to findings in both the *Petrie Report* and the *PRISM Report*, the WCB has taken several steps to reduce the potential impact of experience rating on claim suppression. Several of these changes are identified in the *Prevention* chapter of this report, including:

- the expansion of industry-based safety programs into new sectors;
- the development of a province-wide safety certification program, SAFE Work Certified; and
- a rebate to employers on their annual rate assessment for meeting the SAFE Work Certified standard, beginning in 2018.

In addition to these measures, the WCB has made important changes to its rate-setting model by shortening the applicable experience period used to calculate the employer's experience rate; tying the experience of small and medium size employers more closely to the performance of other employers in their classification; and narrowing the classification rate ranges for employers.

These changes are intended to help reduce rate volatility, particularly for smaller employers. The WCB began transitioning to the new rate-setting model in 2016 and 2017, and will continue to introduce changes over the next few years. By 2020, the new rate-setting model should be fully operational.

3. Other Jurisdictions

Ten Canadian jurisdictions, including Manitoba, prohibit the suppression of workers compensation claims. Four also prohibit discriminatory action.

Employers who engage in claim suppression or discriminatory action face a range of penalties, which vary from province to province. In those jurisdictions that prohibit claim suppression and/or discriminatory action, it is an offence to engage in these activities. On conviction, an employer may face fines ranging from \$500 to \$697,625.60¹⁷ depending on the province or territory. Individual employers may also face imprisonment for a period of six months on conviction, instead of or in addition to a fine.

Administrative penalties are also available in some jurisdictions for breach of the prohibitions against claim suppression and/or discriminatory action. Depending on the jurisdiction, the administrative penalty may be levied against the employer instead of, or in addition to, any fine imposed by a court following conviction for the offence. Administrative penalties for these types of breach range from \$5,000 to \$637,415.60.

Manitoba is the only jurisdiction to include a reverse onus provision in its prohibition against discriminatory action in the workers compensation context.

All Canadian jurisdictions except Yukon take the employer's experience rate (or claims cost history) into account when calculating an employer's assessment rate.

Several jurisdictions provide rebates to employers if they achieve safety or prevention certification roughly equivalent to SAFE Work Certified, including British Columbia, Alberta, Ontario, Quebec, Nova Scotia, Newfoundland and Labrador, and Yukon.

B. What the Committee Heard

During the course of the consultation, this Committee heard reports of employers engaging in claim suppression and taking retaliatory action against workers who file claims. There were recommendations for stronger penalties against those who engage in these practices, and suggestions that the WCB

Stakeholder Comments

If a Claim suppression is suspected, then a sever fine must be imposed to prevent any Employer in this Province from coming after an injured worker who is already vulnerable. Without such a penalty, Employer's will continue to do this.

- Individual

[...] [T]he 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.

- Manitoba Nurses Union (MNU)

¹⁷ \$697,625.60 is the maximum fine for a first conviction under British Columbia's legislation, while \$637,415.60 is the maximum administrative penalty available under that statute. Although these maximum penalties are available in principle, penalties in British Columbia are based on payroll and on the presence of a number of aggravating factors. In practice, penalties for claim suppression and discriminatory action in British Columbia are more in the range of \$2,500 for a first offence or breach.

make greater efforts at investigation and enforcement in these areas.

Other stakeholders were dissatisfied with the addition of discriminatory action provisions to the Act. They suggested that workers frequently use these provisions to safeguard themselves from legitimate employer discipline.

Some were also concerned that by adding discriminatory action provisions to the Act, the Legislature had created the possibility of proceedings being taken against an employer on the same facts in three different venues: under *The Human Rights Code*, *The Workplace Safety And Health Act* and *The Workers Compensation Act*.

These stakeholders argued that adjudicators at both the WCB and the Workplace Safety and Health Division (WHSD) lacked the necessary training or expertise to make decisions regarding discriminatory action. They recommended that allegations of discriminatory action under the Act or *The Workplace Safety and Health Act* be referred to the Manitoba Labour Board, which they consider to be better equipped to adjudicate this issue.

Regarding the link between experience rating and claim suppression, some stakeholders called for the outright elimination of an employer's experience rating as a factor in setting employer assessment rates.

Others recognized the WCB's recent efforts to address this issue and suggested monitoring their effectiveness before making a decision on the elimination of experience rating in the rate model.

Stakeholder Comments (con't)

Employees who present with performance issues or discipline problems use [the discriminatory action provisions and the re-employment obligation] in the legislation as a shield. Duplication of proceedings, particularly parallel complaints to Workplace Safety and Health and/or the Human Rights Commission can arise on the same set of facts. Representatives of the Workers Compensation Board or Workplace Safety and Health lack the training and expertise to make decisions regarding the validity of employer decisions which affect the employment status of an injured or aggrieved worker.

- Manitoba Employers Council (MEC)

[...][W]e have a concern that currently an employee can go to numerous boards on the same set of facts sometimes resulting in different decisions [...] Therefore, we are of the view that a streamlined process should be developed whereby complaints regarding failure to reinstate or alleged discriminatory action arising from The Workers Compensation Act or the Workplace Safety and Health Act should be referred directly to the Manitoba Labour Board for decision.

- Merit Contractors Association of Manitoba

It bears repeating that it has always been labour's strong preference that experience rating be eliminated altogether, as the most direct way to address claim suppression. We favour a true collective liability, no fault and secure benefit system. However, we are cautiously hopeful that announced changes to the rate model, combined with a new safety certification standard and a prevention incentive will -- taken together -- have positive effects.

- Manitoba Federation of Labour (MFL)

C. Recommendations

1. The Legislative, Regulatory and Operational Framework Regarding Claim Suppression and Discriminatory Action

We do not find it necessary to make changes to the legislative and regulatory framework around claim suppression and discriminatory action. The legislation makes clear that these activities are prohibited and provides penalties for those found to have engaged in them. There was a significant increase in the penalties associated with these offences in 2015, which are consistent with equivalent penalties in other Canadian jurisdictions.

We do wish to ensure that the WCB continues actively investigating allegations of claim suppression and discriminatory action. The WCB has adopted a new compliance framework and created a Compliance Services Department, which helps to ensure that such allegations are rigorously addressed. The Committee echoes the recommendation made in the *Petrie Report* that the WCB continue to allocate the necessary resources to investigations and penalize offenders appropriately.

RECOMMENDATION 8

The Workers Compensation Board should continue to allocate appropriate resources to investigating allegations of claim suppression and discriminatory action and penalizing those who engage in such activities.

As noted above, some stakeholders expressed concern that the WCB may not be the most appropriate administrative tribunal to make decisions on whether an employer has engaged in discriminatory action. We believe the WCB is well equipped to investigate claims that an employer has engaged in claim suppression or discriminatory action and should retain the capacity to levy administrative penalties against employers when the Act has been breached. However, we are aware of the risk of duplicative proceedings identified by some stakeholders in respect of discriminatory action. It may be appropriate that appeals related to such matters be heard by a single tribunal.

This important question merits further consideration. We do not consider it within our mandate to make recommendations affecting the jurisdiction of other provincial administrative tribunals. However, we note that several of our stakeholders have suggested the Manitoba Labour Board as an appropriate forum for the final resolution of these disputes. We therefore recommend that the Government of Manitoba examine this matter further to determine the appropriate venue for adjudication of appeals related to discriminatory action.

RECOMMENDATION 9

The Government of Manitoba should determine the appropriate venue for adjudicating appeals regarding discriminatory action and associated administrative penalties such as, for example, the Manitoba Labour Board.

2. Experience Rating and Claim Suppression

The Committee is encouraged by the WCB's initiative in addressing the connection between experience rating and claim suppression. It is especially encouraged by the implementation of a new rate-setting model, and the introduction of the SAFE Work Certified prevention rebate in January 2018. We urge the WCB to continue its implementation of these very important initiatives and to monitor their impact on employer assessment rates, employer behaviour, and complaints and allegations of claim suppression. These matters should be evaluated at an appropriate future time.

Section 2: Return to Work and the Re-employment Obligation

A. Background

1. WCB Return to Work Policies

Helping workers regain their health and return to work is a key aspect of the WCB's mandate. Part (f) of the preamble to the Act recognizes "timely and safe return to health and work" as one of the essential principles of workers compensation.

Many workers return to work after a few days or weeks, with the WCB having little or no involvement in return to work. In cases of long-term loss of earning capacity, however, the WCB often plays a significant role in the worker's return to work. In such circumstances, the WCB will often provide for academic, vocational or rehabilitative assistance under section 27(20) of the Act and WCB Policy 43.00, *Vocational Rehabilitation*.

Due to the short duration of most workplace illnesses and injuries, workers generally return to work with their pre-accident employers. The WCB encourages this result. In both its *Vocational Rehabilitation* policy and its return to work policies, such as WCB Policy 43.20.20, *Modified and Alternate Return to Work with the Accident Employer* and WCB Policy 43.20.25, *Return to Work with the Accident Employer*, the WCB makes it clear that a worker's return to work with the pre-accident employer, where possible, is the desired outcome.

To assist workers and employers in this regard, the WCB supports employers in their efforts to provide modified or alternate work to returning workers. To that end, it will often authorize expenditures including wage loss benefits, training subsidies, and job-site modifications.

The WCB has also advised this Committee of a number of return to work initiatives or programs currently underway, which will serve to supplement the legislation and policy in this area. These include:

- **Return to Work Program Services** - the WCB advised the Committee that it has developed a statistical model to identify employers who need assistance with their return to work programming. The WCB contacts employers identified through this model and offers assistance in creating or improving return to work programs.
- **Return to Work Best Practices** - the WCB has established guidelines or best practices for WCB case managers to follow when assisting workers and employers with return to work issues. It has also created criteria for what constitutes a good return to work plan. Applying these guidelines and criteria, the WCB monitors both the worker's needs and the employer's return to work program in a timely manner. By following best practices, the WCB should be able to intervene in potential return to work disputes and help to resolve them.

Some of the best practices include:

- ensuring the return to work plan is created with active participation from the WCB, the injured worker, the employer and the health care provider; and
- ensuring ongoing monitoring of the return to work plan by the WCB, employer and health care provider, to keep the plan on track.

The criteria identified as essential to a good return to work plan include: tailoring the plan to the individual worker's capabilities; offering a safe and gradual return to work; and providing meaningful work to the injured worker.

- **Compliance** - Compliance Services is now responsible for investigating alleged breaches of the re-employment obligation. This has allowed WCB case managers to focus on assisting workers and employers with return to work programs and initiatives.
- **Public Awareness** - in the fall of 2017, the WCB began a public awareness campaign on return to work. The WCB has found that the system's major participants are often uncertain about their role in an injured worker's successful return to work. The campaign's goals are to increase understanding about the benefits and importance of return to work, and to guide each participant on how to assist in this process.
- **Strategic Plan** - return to work issues and initiatives will be a key focus of the Board's next five-year strategic plan. Building on initiatives already in progress, the WCB will be looking at ways to improve outcomes in this area. In doing so, it will examine experiences in other jurisdictions. For example, the WCB advised that British Columbia has created a return to work certification rebate. Under this program, WorkSafeBC gives rebates to employers whose return to work programs are vetted through voluntary, audit based certification. The Committee endorses the idea of developing a return to work certification rebate, which may be integrated into the SAFE Work Certified program.

2. The Re-employment Obligation (sections 49.3(1) to 49.3(16) of the Act)

The 2005 Legislative Review Committee recommended the introduction of a re-employment obligation for certain employers. Section 49.3 of the Act came into force in January 2007, incorporating all of the conditions recommended by that committee.

Sections 49.3(1) to (16) set out the statutory re-employment scheme. Subject to several exceptions, there is a statutory duty on the employer to offer re-employment to an injured worker who had been employed with that employer for a period of 12 months before the accident.

The re-employment obligation does not apply to employers with fewer than 25 full-time or regular part-time workers. It also does not apply in respect of certain other categories of workers, including: casual emergency workers; learners; workers who receive coverage as volunteers; declared workers; workers employed in work experience programs; or employers, workers or industries excluded by regulation.

Section 49.3(4) imposes a duty on the employer to accommodate the work or workplace to the needs of the worker to the point of undue hardship. In determining if undue hardship exists for an employer, the WCB will refer to the Manitoba Human Rights Commission's policies and guidelines on undue hardship. The onus is on the employer to demonstrate undue hardship on a balance of probabilities.

Section 49.3(8) of the Act creates a presumption that the employer has not fulfilled the re-employment obligation if a worker is re-hired but then terminated within six months. The employer may rebut this presumption by showing that the worker's termination was unrelated to the accident.

The administrative penalty for a first breach of the re-employment obligation is \$5,000 or the amount of the worker's average earnings for three months before the accident, whichever is greater. For the second breach within the same five year period, the administrative penalty is \$10,000 or the amount of the worker's net average earnings for the six months before the accident, whichever is greater. For a third or subsequent breach within the same five year period, the administrative penalty is equivalent to the worker's net average earnings for the 12 months preceding the accident.

3. Other Jurisdictions

In addition to Manitoba, seven Canadian jurisdictions have imposed re-employment obligations on employers under their respective workers compensation statutes.

The obligation is subject to various conditions relating to the size of the employer, the length of the worker's pre-accident employment, and the duration of the re-employment obligation. Re-employment provisions generally impose a duty on employers to accommodate workers in their return to work up to the point of undue hardship. "Undue hardship" is typically defined in workers compensation policies with reference to provincial human rights statutes and jurisprudence. Most jurisdictions with a specific re-

Other Jurisdictions

Reinstatement or penalty

42.2(1) The provisions of section 42.1 shall be deemed to be provisions of Part III of the *Employment Standards Act* and shall be enforced in accordance with that Act as if they were provisions of that Act.

42.2(2) Any person who believes that an employer has violated or failed to comply with the provisions of section 42.1 may make a complaint in accordance with Part V of the *Employment Standards Act*.

42.2(3) A complaint made by a person in accordance with subsection (2) shall be disposed of in accordance with the provisions of the *Employment Standards Act* and, subject to subsection (4), the provisions of that Act apply with the necessary modifications with respect to any complaint so made.

Workers' Compensation Act, RSNB 1973, c W-13

employment obligation also have a reverse onus provision similar to Manitoba's.

A variety of penalties may be imposed on an employer who has breached the re-employment obligation, depending on the jurisdiction.

New Brunswick's *Workers' Compensation Act* is unique in providing that complaints regarding the re-employment obligation should be made under New Brunswick's *Employment Standards Act*. Such complaints are governed by the provisions and penalties set out in that statute.

Based on our review, there appears to be no requirement in other jurisdictions for formal return to work plans agreed between the worker, employer or the workers compensation agency.

B. What the Committee Heard

During the course of our consultations, we heard from stakeholders about employers who pressure injured or ill workers to return to work before they are fully recovered, or fail to provide appropriate accommodations to assist in the return to work.

To correct this problem, it was suggested that the Act require the development of formal, safe return to work plans. These would be developed jointly by the worker, treating physician and employer. Under this approach, the return to work plans might also be approved by the WCB.

Some stakeholders also recommended that stronger penalties be provided for failing to re-employ ill or injured workers, and

Stakeholder Comments

A system should reward genuine investment in recognized prevention programs and not reward Employers who are blocking and interfering with injured workers' claims. We would like to see a better return to work process, stronger enforcement and stiffer penalties around claim suppression!

- Canadian Union of Public Employees (CUPE) Local 737

[We recommend] [t]hat The WCA be amended to require the development of formal safe return to work plans, developed jointly by worker, doctor and employer, to guide the safe re-start of work after an injury/illness.

- Manitoba Federation of Labour (MFL)

The role of the WCB is not to implement Legislation from other Government bodies such as the Manitoba Human Rights code or the Manitoba Labour Board... What would happen if the WCB rendered a decision that the Employer was at fault for not accommodating an employee, yet, the Employer is successful at a Human Rights tribunal? Is the WCB going to ignore this potential outcome? [...]

- Maple Leaf Foods Inc.

Provisions regarding the obligation to reinstate injured workers ... should be revisited. While well-intended, these provisions are cumbersome and expensive. Employees who present with performance or discipline problems use the legislation as a shield. [...] A streamlined process should be developed whereby complaints regarding failure to reinstate ... should be referred directly to the Manitoba Labour Board for a decision, after a vetting process to screen out non-meritorious complaints.

- Manitoba Employers Council (MEC)

that the WCB expend more effort investigating and penalizing those who breach the re-employment obligation.

We also heard from parties who are not in favour of the Act's provisions on re-employment. They suggested that the re-employment obligation, and the WCB's role in enforcement, run counter to the non-adversarial nature of the workers compensation model. Some were also concerned that the reverse onus provision presumes employer wrongdoing and puts the employer in the position of having to justify legitimate business decisions.

Stakeholders also identified the possibility of multiple proceedings on the same set of facts. Proceedings could be taken in respect of re-employment issues under *The Labour Relations Act* pursuant to a collective agreement, *The Human Rights Code*, and *The Workers Compensation Act*. This raises the risk of conflicting decisions from these various administrative bodies.

These stakeholders argued that adjudicators at the WCB lack the necessary training or expertise to make decisions regarding the re-employment obligation. They recommended that complaints about the re-employment obligation be referred to the Manitoba Labour Board, which they consider better equipped to decide on these types of issues.

C. Recommendations

A timely and safe return of ill or injured workers to work benefits all participants in the workers compensation system. It is also a fundamental principle of workers compensation, specifically listed in part (f) of the preamble to the Act. It is essential that injured workers, employers, health care providers and the WCB work together to help achieve an active, safe and gradual return to work.

This Committee supports the recent developments occurring at the WCB with respect to return to work. In particular, we are encouraged to see the WCB proactively assisting employers, adopting best practices in return to work plans, and educating participants about their role in the process.

We also support the WCB in exploring new mechanisms to improve return to work outcomes, such as, for example, the introduction of a return to work rebate.

Given what we have heard from the WCB concerning new initiatives and programs, we do not believe the Act should be amended to require the development of formal return to work plans, as some stakeholders suggested. In our view, the WCB is already taking important steps to guide and monitor return to work practices through its Return to Work Program Services and best practices. We urge the WCB to continue pursuing return to work initiatives as a high priority issue in the coming years.

RECOMMENDATION 10

<p>The Workers Compensation Board should continue to pursue return to work initiatives as a high priority issue.</p>
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RECOMMENDATION 11

The Workers Compensation Board should support the development of safe return to work plans that are tailored to the individual capabilities of workers and created in consultation with injured workers, employers and health care providers.

RECOMMENDATION 12

The Workers Compensation Board should continue to explore and develop new mechanisms to assist ill or injured workers in a safe and timely return to work.

Regarding other issues raised by stakeholders in respect of return to work and the re-employment obligation, this Committee does not believe legislative changes are required. The Act sets out a comprehensive scheme in this regard, including penalties for employers who are found to have breached their obligations. In our view, the penalties associated with the re-employment obligation under the Act are consistent with equivalent penalties in most Canadian jurisdictions. We have also concluded that there is no need to repeal the reverse onus provision at section 49.3(8) of the Act. We note that most jurisdictions impose a reverse onus in the context of the statutory re-employment obligation.

RECOMMENDATION 13

Section 49.3 of *The Workers Compensation Act*, which imposes the re-employment obligation on employers in certain circumstances, should be retained in its current form.

Some stakeholders expressed concern that the WCB may not be the most appropriate administrative tribunal to make decisions on whether an employer has failed to fulfill its re-employment obligations under the Act, particularly in respect of the duty to accommodate. We believe the WCB is well equipped to investigate claims that an employer failed to meet its re-employment obligations under the Act and should retain the capacity to levy administrative penalties against employers when the Act is breached. However, we are aware of the risk of duplicative proceedings identified by some stakeholders. It may be appropriate that appeals related to the re-employment obligation be heard by a single tribunal.

This important question merits further consideration. We do not consider it within our mandate to make recommendations affecting the jurisdiction of other provincial administrative tribunals. We note that several of our stakeholders have suggested the Manitoba Labour Board as an appropriate forum for the final resolution of these disputes. We therefore recommend that the Government of

Manitoba examine this matter further to determine the appropriate venue for adjudication of appeals related to the re-employment obligation.

RECOMMENDATION 14

The Government of Manitoba should determine the appropriate venue for adjudicating appeals regarding the re-employment obligation and associated administrative penalties such as, for example, the Manitoba Labour Board.

Section 3: Miscellaneous Compliance - Related Issues

In its submission, the WCB Administration identified discrete compliance-related issues which, in its view, are important to the success of its compliance model. This section will discuss these items under three separate headings: Section 15 of the Act; Section 16 of the Act; and Penalties for False Statement.

1. Section 15 of the Act-Improper Deductions from Workers' Wages

A. Background

An important 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 prohibits employers from deducting sums from workers' wages to cover the costs of employers' liabilities under the Act. Contravention of section 15 is an offence under the Act, subject to an administrative penalty.

Section 15 uses the word "wages" which is not defined in the Act or in Manitoba's

Interpretation Act. The *Employment*

Standards Code (the "Code") in Manitoba defines wages as:

1(1) Definitions

"wage" means, except where otherwise provided in this Code or prescribed by regulation, compensation for work performed that is paid or payable to an employee by his or her employer, and includes

- (a) salary, commission or compensation in any other form whether measured by time, piece or otherwise, and
- (b) a payment to which an employee is entitled under this Code, including a vacation allowance and any other benefit to which an employee is entitled under this Code;
(« salaire »)

Significantly, this definition only captures payments to which a worker would be entitled under the Code and would not include sick leave entitlement.

Over the years, the term "wages" has been subject to multiple and varying interpretations in Manitoba's workers compensation system. Some employers, for example, have taken the position that the term should be narrowly interpreted to include only money paid for work performed.

Relevant Statutory Provisions

No deduction from wages by employer, or contribution by workers

15 Except as provided in this Act, an employer shall not, either directly or indirectly, deduct from the wages of his worker any part of any sum that the employer is or may become liable to pay into the accident fund or otherwise under this Part, or require or permit any of his workers to contribute in any manner towards indemnifying the employer against any liability that he has incurred or may incur under this Part.

The Workers Compensation Act, CCSM c W200

In several cases, the WCB has adopted a broader interpretation, extending "wages" to include other aspects of the worker's remuneration package including vacation leave and sick time. The improper use of accumulated sick leave in connection with compensable injuries, for example, would fall within the section 15 prohibition. The WCB considers its position to be consistent with the rule of liberal interpretation set out in section 6 of *The Interpretation Act*:

Rule of liberal interpretation

6 Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

In its public decision 158/2013, the Appeal Commission offered the following interpretation of section 15:

Section 15 is meant to apply to situations where employers take deductions from the wages of active employed workers, and essentially make the worker pay for their own WCB premiums. Section 15 is meant to address improper deductions which are taken in respect of premiums, well prior to any workplace injury.

This is arguably a more narrow interpretation than that adopted by the WCB. According to the WCB's interpretation, for example, section 15 would likely also capture docking sick pay or vacation pay from an injured worker.

In addition to these various interpretive problems, section 15 is not well-suited to non-traditional employer-employee relationships. It is not apparent, for example, that payments made to sub-contractors who are later deemed to be workers in the compensation system would constitute "wages" within the meaning of section 15. The modern workforce features a variety of arrangements that do not fit neatly within the language of section 15.

Section 15 serves an important purpose by prohibiting improper deductions from workers' pay. The lack of clarity around its meaning has the potential to create disputes among stakeholders and impede the WCB's compliance enforcement efforts.

B. Other Jurisdictions

All Canadian jurisdictions feature a prohibition on deducting amounts from a worker's wages to reimburse or indemnify an employer for workers compensation assessments or other compensation-related expenses. Most statutes express this prohibition in language very similar to Manitoba's section 15. And like Manitoba's Act, most Canadian workers compensation statutes do not define the term "wages."

One exception is Nova Scotia, where the *Workers' Compensation Act* provides a more detailed and comprehensive prohibition. Section 88 of Nova Scotia's act specifies that the prohibition extends to "earnings or employment benefits," and specifically addresses the deduction of accumulated sick leave.

C. What the Committee Heard

The WCB Administration made a submission on section 15, suggesting that the provision should be more clear about the meaning of the term "wages." No other stakeholder commented on section 15 in the course of our consultation.

D. Recommendation

After considering the interpretive difficulties caused by the term "wages" in section 15 of the Act, this Committee recommends that the section be amended to clarify its meaning. Such an amendment would assist both the WCB and the Appeal Commission in interpreting and applying section 15 more consistently and in enforcing compliance with the Act.

Other Jurisdictions

Prohibitions on employer conduct

- 88 No employer shall, directly or indirectly,
- (a) deduct from the earnings or employment benefits of any of the employer's workers any sum that the employer is or may become liable to pay into the Accident Fund;
 - (b) require or permit any of the employer's workers to contribute in any manner towards indemnifying the employer against any liability imposed on the employer pursuant to this Part;
 - (c) collect, receive or retain from any worker any contributions towards the expense of medical aid;
 - (d) deduct from any accumulated sick leave of an injured worker any amount respecting a period of time during which the worker is receiving an earnings-replacement benefit as a result of an injury;
 - (e) influence or attempt to influence a worker not to claim or receive compensation pursuant to this Part; or
 - (f) discipline or discriminate against a worker who reports an accident or makes a claim for or receives compensation pursuant to this Act. 1994-95, c. 10, s. 88.

Workers' Compensation Act, SNS 1994-95, c. 10

Stakeholder Comments

An amendment would provide greater clarity to this important section and enhance enforcement of our Act within the WCB's compliance framework.

-The Workers Compensation Board of Manitoba (WCB)

RECOMMENDATION 15

Section 15 of *The Workers Compensation Act* should be amended to provide a complete definition of the term "wages," following consultation with The Workers Compensation Board and stakeholders.

2. Section 16 of the Act - Remedy for Improper Deduction of Workers'

Wages

A. Background

Section 16 of *The Workers Compensation Act* gives the WCB authority to impose penalties on an employer who breaches section 15 by making improper deductions from a worker's wages. 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.

B. Other Jurisdictions

Most Canadian workers compensation statutes have a provision similar to Manitoba's section 16. And while most jurisdictions require the employer to repay the worker any amounts improperly deducted, Alberta's statute sets out a more proactive approach. Section 139 of Alberta's *Workers' Compensation Act* permits Alberta's board to collect amounts that the employer inappropriately deducted from a worker's wages and to subsequently use these funds to reimburse the worker.

C. What the Committee Heard

The WCB Administration is the only stakeholder to have made a submission on section 16 of the Act. It proposes that a remedial section similar to Alberta's could result in a more efficient and fair process for workers who might have difficulty collecting monies from the employers themselves. The WCB Administration suggests empowering the

Other Jurisdictions

Unauthorized deductions

139(1) Except as authorized by this Act, no employer shall, either directly or indirectly, deduct from the wages of the employer's workers any part of any sum that the employer is or might become liable to pay to the Board or require or permit any of the employer's workers to contribute in any manner toward indemnifying the employer against any liability that the employer has incurred or might incur under this Act.

139(2) Where the Board considers that an employer has contravened subsection (1), in addition to any other action that may be taken by the Board pursuant to this Act, the Board may

(a) collect from the employer the amount of any deduction prohibited by subsection (1) as if it were a premium payable under this Act, and

(b) pay the amount collected to the worker from whom it was deducted or who paid it.

Workers' Compensation Act, RSA 2000, c W-15

Board to reimburse the worker for amounts improperly deducted and subsequently recover those amounts from the employer. This would ensure the worker is reimbursed as promptly as possible.

D. Recommendation

The Committee recommends amending section 16 of the Act to allow the WCB to pay a worker any amount that an employer has improperly deducted from his or her wages under section 15, and to seek reimbursement from the employer for such amounts. We believe this amendment would help to ensure that workers receive reimbursement for improper deductions as quickly as possible. The WCB is also better positioned than workers to recover improperly deducted funds from employers, having more resources to dedicate to the task and a greater range of recovery mechanisms at its disposal.

RECOMMENDATION 16

Section 16 of *The Workers Compensation Act* should be amended to allow The Workers Compensation Board to pay a worker any amount that an employer has improperly deducted from the worker's wages contrary to section 15, and to seek reimbursement from the employer.

3. Penalties for False Statement

A. Background

Section 109.1(1) of the Act creates the offence of making a false statement to the WCB affecting a person's entitlement to compensation or the assessment of an employer. The offence provision applies equally to workers, employers, health care providers and other participants in the system.

While the Act gives the WCB broad powers of investigation and enforcement, it does not allow the Board to impose an administrative penalty or expressly provide for any other consequence in the event of a false or misleading statement.

B. Other Jurisdictions

Making a false statement in respect of a claim for compensation benefits or employer assessments is an offence in every Canadian jurisdiction. Section 152.1(1) Alberta's *Workers' Compensation Act* goes further and allows Alberta's board to impose an administrative penalty for making a false statement to the board. The penalty may not exceed \$25,000 for each contravention or for each day or part of a day on which the contravention occurs and continues.

The British Columbia and Quebec statutes also expressly provide for additional consequences in the event of fraud, false statement or misrepresentation of facts. Section 96(7) of British Columbia's *Workers Compensation Act* allows the board to "set aside any decision or order made

by it or by an officer or employee of the board if that decision or order resulted from fraud or misrepresentation of the facts or circumstances upon which the decision or order was based."

Section 142(1)(a) of Quebec's *Act Respecting Industrial Accidents and Occupational Diseases* permits Quebec's commission to reduce or suspend the payment of an indemnity if the recipient of that indemnity produces inaccurate information.

The Committee notes that other branches of Manitoba's administrative justice system expressly allow agencies to suspend, reduce or terminate benefits in the event of fraud or misrepresentation. Section 160 of *The Manitoba Public Insurance Corporation Act* is one example:

160 The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person
(a) knowingly provides false or inaccurate information to the corporation; ...

The WCB has broad authority to weigh evidence and make decisions on matters within its jurisdiction, and to reconsider its previous decisions. In practice, the discovery of a false or misleading statement will often affect a worker's entitlement to benefits because such a statement may cause the WCB to reconsider its original decision.

However, the Act does not provide the express authority to terminate, suspend or reduce benefits in the event of a false or misleading statement. A legislative provision in this regard would serve to reinforce the importance of compliance in the workers compensation system, reduce the possibility of disputes among stakeholders, and provide guidance to WCB decision-makers.

C. What the Committee Heard

The WCB Administration is the only stakeholder to have made a submission on the issue of penalties for false statement. It suggests that expressly allowing for an administrative penalty and other consequences in cases of false statement could improve its compliance framework.

Stakeholder Comments

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 make false statements...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.

- The Workers Compensation Board of Manitoba (WCB)

D. Recommendation

After reviewing the WCB Administration's submission and the experience in other jurisdictions, the Committee recommends that the Act be amended to give the WCB authority to levy an

administrative penalty on those who commit an offence under section 109.1(1) of the Act. The WCB is, itself, unable to prosecute individuals for the offence of making a false statement. It must rely on Manitoba Justice to do so. Prosecution can be subject to lengthy delays due to significant demands on the criminal justice system.

It is important for the WCB to have a wide array of tools at its disposal to deal with instances of false or misleading statements. Strong enforcement mechanisms are necessary to ensure the integrity of the system. We accordingly recommend that the Act be amended to allow for administrative penalties against those who make false statements to the WCB in connection with a claim for compensation or employer assessment.

RECOMMENDATION 17

The Workers Compensation Act should be amended to allow The Workers Compensation Board to impose an administrative penalty in cases where a worker, employer, health care provider or other participant in the system is determined to have made a false statement in connection with a claim for compensation or employer assessment.

We also recommend that the Act be amended to clarify the WCB's authority to terminate, suspend or reduce benefits when it is established that a worker has made a false or misleading statement to the Board affecting his or her entitlement to benefits. This amendment would reinforce the importance of compliance in the workers compensation system and enhance the WCB's enforcement powers. It is also consistent with other statutory benefit schemes in Manitoba and workers compensation statutes in other jurisdictions.

RECOMMENDATION 18

The Workers Compensation Act should be amended to clarify The Workers Compensation Board's authority to terminate, suspend or reduce benefits in cases when it is established that a worker has made a false or misleading statement to The Workers Compensation Board affecting his or her entitlement to benefits.

CHAPTER 5 - ADJUDICATION OF CLAIMS

For an ill or injured worker to receive compensation under *The Workers Compensation Act* (the "Act"), The Workers Compensation Board (the "WCB" or the "Board") must be satisfied that:

- the person claiming compensation is a worker within the meaning of the Act;
- the worker is employed in a covered industry;
- the worker has suffered an injury;
- there has been an accident, as the term is defined in the Act; and
- the accident arose out of and in the course of employment.

WCB adjudicators make determinations on these five points by weighing evidence and applying specific standards of proof and causation mandated by the Act and WCB policies. Adjudicating workers compensation claims can be a challenging and complex exercise, particularly for those workplace injuries or illness that have multiple contributing causes.

This chapter explores three specific issues in relation to the adjudication of WCB claims: the WCB's use of the "dominant cause" standard of causation to adjudicate occupational disease claims; the adequacy of current statutory and policy provisions regarding psychological injuries; and the practices and processes in place to resolve conflicting medical opinions.

Section 1: Dominant Cause

A. Background

1. Occupational Disease Claims

Occupational disease claims are in a unique category under the Act. They are distinct because there are often many contributing factors to an occupational disease, some employment-related and some not. While this may also be true of other types of injuries, occupational diseases are often by their nature multifactorial.

For this reason, the Act imposes a different standard of causation on occupational disease claims. Where the Board finds that an occupational disease is caused by both employment and non-employment related factors, it

Relevant Statutory Provisions

Definitions

1(1) In this Act,

"accident" means a chance event occasioned by a physical or natural cause; and includes

- (a) a wilful and intentional act that is not the act of the worker,
 - (b) any
 - (i) event arising out of, and in the course of, employment, or
 - (ii) thing that is done and the doing of which arises out of, and in the course of, employment, and
 - (c) an occupational disease,
- and as a result of which a worker is injured;

The Workers Compensation Act, CCSM c W200

must be satisfied that employment was the dominant cause of the worker's condition before it will accept the claim.

WCB Policy 44.20, *Disease/General*, defines "dominant cause" in the following terms: "If the combined effect of the employment causes exceeds the combined effect of the non-employment causes then the work will be deemed to be the dominant cause of the disease."

The WCB advises that, in 2016, occupational disease claims represented approximately 10% of the total number of claims for compensation. Of these occupational disease claims, approximately 52% were accepted by the Board while 48% were denied.

2. Burden of Proof/Standard of Proof/Standard of Causation

As stated above, the WCB uses a different standard of causation in adjudicating occupational disease claims than it does when adjudicating other claims for compensation made under the Act. However, it does not employ a different burden of proof or standard of proof when adjudicating occupational disease claims.

The term "burden of proof" is used in law to describe the duty of proving a fact or facts in dispute between parties. Because the WCB operates on an inquiry model, not an adversarial model, the burden of proof in all WCB claims lies with the WCB.

"Standard of proof," is a legal term that refers to the degree of certainty an adjudicator must have before he or she is satisfied that facts are proven to be true.

Under the workers compensation system, the standard of proof is the "balance of probabilities". This means the decision-maker must find that a fact is more likely than not to have occurred before relying on it. The same balance of probabilities test is applied to all claims, including those involving occupational disease.

Relevant Statutory Provisions (con't)

Definitions

1(1) "**occupational disease**" means a disease arising out of and in the course of employment and resulting from causes and conditions.

- (a) peculiar to or characteristic of a particular trade or occupation;
- (b) peculiar to the particular employment; or
- (b.1) that trigger post-traumatic stress disorder;

but does not include

- (c) an ordinary disease of life; and
- (d) stress, other than an acute reaction to a traumatic event;

Cause of occupational disease

4(4) Where an injury consists of an occupational disease that is, in the opinion of the board, due in part to the employment of the worker and in part to a cause or causes other than the employment, the board may determine that the injury is the result of an accident arising out of and in the course of employment only where, in its opinion, the employment is the dominant cause of the occupational disease.

The Workers Compensation Act, CCSM c W200

Where the adjudication of occupational disease claims differs from that of other claims is in the standard of causation. This is the standard used to determine the connection between the accident suffered by the injured worker and his or her employment.

For most claims, the WCB appears to apply a "material contribution" standard of causation. In other words, the WCB adjudicator must be satisfied that the worker's employment contributed in a non-trivial or substantial way to the accident.

"Dominant cause" is the standard of causation that applies to occupational disease claims. It is not enough for the WCB to be satisfied that the worker's employment contributed in a material way to the occupational disease. The WCB must be satisfied that the worker's employment was the dominant cause of the occupational disease. It is a more stringent test than the "material contribution" standard applicable to other claims.

There are reasonable arguments both for and against the application of the dominant cause standard to occupational disease claims. Some may argue that it would be unfair for the workers compensation system to bear the cost of a condition that cannot be linked to employment with an appropriate degree of certainty. On the other hand, the challenges inherent in establishing the dominant cause of an occupational disease may operate to discourage workers from filing these claims, and may unfairly result in higher rates of refusal.

The application of the dominant cause test to psychological injury claims is problematic. Because of the Act's convoluted definitions of "accident" and "occupational disease," it is possible for the same type injury to be subject to two different standards of causation, depending on how it arose. Under section 1(1) of the Act, "accident" is defined to include "occupational disease" and "occupational disease" is defined to include "an acute reaction to a traumatic event." However, a psychological injury can arise in circumstances other than as an acute reaction to a traumatic event.

If it is determined, for example, that a worker's psychological injury occurred as a result of a wilful and intentional event of another, the worker's claim will be adjudicated in accordance with part (a) of the definition of "accident" found at section 1(1) of the Act. The lower, "material contribution" standard of causation will apply. If, on the other hand, it is determined that a worker's psychological injury occurred as an "acute reaction to a traumatic event," the worker's claim will be adjudicated as an occupational disease. The dominant cause standard of causation will apply and the WCB adjudicator may only accept the claim if satisfied that employment was the dominant cause of the worker's psychological injury.

We discuss the classification of psychological injuries as occupational disease at greater length in Section 2 of this chapter.

3. 2005 Legislative Review Committee Recommendations Regarding Dominant Cause

The 2005 Legislative Review Committee considered the issue of "dominant cause." That committee rightly pointed out that while the dominant cause standard of causation appears to impose a higher standard of proof for occupational disease claims, it does not. As we stated above, all claims are adjudicated on the balance of probabilities standard of proof.

Due to the multifactorial nature of many occupational diseases, the 2005 Legislative Review Committee determined that dominant cause should remain the standard of causation for occupational disease claims. However, it was open to revisiting the dominant cause standard in the future, recommending that the WCB continue to monitor the science as it evolves to determine "when and if to broaden the coverage of occupational diseases" (Recommendation 17, page 22 of the *2005 Legislative Review Committee Report*).

2005 Legislative Review Committee

The dominant cause provision may appear to require a higher burden of proof than the balance of probabilities test used to adjudicate claims in workers compensation decisions. Dominant cause, however, is still adjudicated on the balance of probabilities.

Working for Manitoba: Workers Compensation for the Twenty-First Century: Report of the Legislative Review Committee on The Workers Compensation Act (February 2005), page 22.

4. Other Jurisdictions

The standard of causation for occupational disease claims is not consistent across Canada. It varies, in part, because there is a wide range of approaches to defining and adjudicating occupational disease.

In some jurisdictions, occupational diseases are defined solely in relation to exposure to particular chemicals or processes, or in relation to specific diseases and types of employment.

Other Jurisdictions

84.(1.2) Where an occupational disease is, in the opinion of the Board, due in part to the employment of the worker and in part to a cause other than the employment, the Board may determine that the occupational disease is the result of an accident arising out of and in the course of employment only where, in its opinion, the employment is the dominant cause of the occupational disease

Workers Compensation Act, RSPEI 1988, c 7.1

Other jurisdictions take a multipronged approach to occupational disease, sometimes defining it in relation to exposure to certain processes or chemicals during the course of employment, while also relying on a schedule of occupational disease. If a worker is diagnosed with a condition prescribed in the schedule and meets other criteria, he or she will be deemed to have a compensable occupational disease.

In still other jurisdictions, like Manitoba, occupational disease claims are determined on a case-by-case basis.

Different standards of causation may apply for different streams of occupational disease. Of the jurisdictions that take the case-by-case approach for some or all of their occupational disease claims, only two (Prince Edward Island and Manitoba) apply the dominant cause standard of causation.

In most other jurisdictions, workers compensation authorities use a version of the "material contribution" or "but for" test to all claims, including those involving occupational disease.

B. What the Committee Heard

During the course of our consultations, several stakeholders expressed concern with the dominant cause standard. They observed that the statute imposes more stringent criteria on the adjudication of occupational disease claims.

These stakeholders submitted that long latency periods prior to diagnosis already make it difficult to establish a nexus between a worker's occupational disease and his or her employment. Imposing the onerous dominant cause standard on these claims makes this nexus even more challenging to establish. These stakeholders advocated, in effect, for a lower standard of causation than dominant cause to be applied in respect of occupational diseases claims.

In addition to a lower standard of causation for occupational disease claims,

Other Jurisdictions (con't)

20(1) For the purpose of the Act and this Regulation, "occupational disease" means

- (a) A disease or condition listed in Column 1 of Schedule B that is caused by employment in the industry or process listed opposite it in Column 2 of Schedule B, and
- (b) Any other disease or condition that the Board is satisfied in a particular case is caused by employment in an industry to which the Act applies.

20(2) For the purpose of subsection (1)(a), employment in an industry or process

- (a) Listed in Column 2 of Schedule B, and
- (b) In the manner and circumstances set out in Column 2 of Schedule B

shall, unless the contrary is proven, be deemed to be the cause of the specified disease or condition listed opposite it in Column 1 of Schedule B.

Workers' Compensation Regulation, Alta Reg 325/2002

Stakeholder Comments

Presently for a worker to receive benefits they must prove that workplace exposure was the "dominant cause" of their occupational disease. This can prove very difficult for workers, given long latency periods and complications related to the reality that many workers may be potentially exposed in many different workplaces over a career. The result is that occupational diseases are underreported by workers, and even when it is, the bar is set so high that many workers with legitimate occupational disease end up without compensation.

- Canadian Union of Public Employees (CUPE)
Manitoba

some stakeholders advocated for a two-tiered approach to adjudication of occupational disease claims, as exists in several Canadian jurisdictions.

Under this approach, occupational diseases would be adjudicated with reference to a schedule of occupational diseases. The schedule would identify illnesses that are presumptively covered provided the worker had been exposed to certain chemicals or processes or been employed in specific occupations. If the worker's condition does not fall within the schedule, the claim would be adjudicated on a case-by-case basis.

C. Recommendations

As background to the related issues of dominant cause and occupational disease, the Committee asked the WCB for information regarding the relative refusal rate of occupational disease claims and non-occupational disease claims in Manitoba and other jurisdictions. We learned that, in Manitoba, claims for compensation based on occupational disease have been refused at approximately twice the rate of non-occupational disease claims in the past several years. This is roughly comparable to the rates elsewhere.

The Committee does not consider the higher rate of refusal for occupational disease claims problematic, in itself, except in the case of psychological injury occupational disease claims. We address the classification of psychological injuries as occupational disease in Section 2 of this chapter.

For other types of occupational disease, it is not unexpected that rates of refusal are higher considering the nature and causation of these conditions. As observed above, Manitoba refuses occupational disease claims at approximately the same rate as do other jurisdictions, most of which do not apply the dominant cause standard to occupational disease. In other words, the refusal rates are more likely attributable to the nature of occupational disease than to the "dominant cause" standard of causation.

With respect to types of occupational disease other than psychological injuries, the Committee is convinced that, in general, dominant cause should remain the standard of causation. A higher standard of causation for occupational disease claims is appropriate, given the complex nature of these types of illnesses.

We are nevertheless aware of some of the inherent difficulties in adjudicating occupational disease claims and the direct connection between certain exposures and processes and particular medical conditions. In light of these factors, we consider it advisable that the Act be amended to create a two-tiered approach to occupational disease claims, as exists in several other Canadian jurisdictions.

To that end, the Committee believes that a schedule of occupational diseases should be created under the Act. If a worker's circumstances meet the criteria set out in the schedule, an employment-related cause is presumed. If the occupational disease in question does not fall

within the schedule of occupational diseases, the claim should be adjudicated on a case-by-case basis and the dominant cause standard of causation should continue to apply.

We believe this system will allow for more straightforward adjudication of claims in which there is a strong scientific connection between employment and the worker's medical condition, while permitting the Board to consider the individual merits of all occupational disease claims.

RECOMMENDATION 19

A schedule of occupational diseases should be created under *The Workers Compensation Act*, in consultation with stakeholders. If a worker is diagnosed with one of the diseases on the schedule, and meets the other criteria established in the schedule, a link between the worker's employment and his or her occupational disease will be presumed.

RECOMMENDATION 20

Occupational disease claims that do not fall within the parameters of the schedule of occupational diseases created under *The Workers Compensation Act* should continue to be adjudicated on a case-by-case basis, and the dominant cause standard of causation should continue to apply to such claims.

Section 2: Psychological Injuries and Mental Health in the Workplace

A. Background

Mental health in the workplace is an issue of growing importance in Manitoba and throughout Canada. As the Mental Health Commission of Canada reports, mental illness among Canadian workers has a significant personal, societal and economic impact:

With most adults spending more of their waking hours at work than anywhere else, addressing issues of mental health at work is vitally important for all people in Canada. Seventy percent of Canadian employees are concerned about the psychological health and safety of their workplace, and 14 percent don't think theirs is healthy or safe at all. Such workplaces can take a detrimental personal toll as well as contributing to staggering economic costs.

About 30 percent of short- and long-term disability claims in Canada are attributed to mental health problems and illnesses. The total costs from mental health problems to the Canadian economy exceeds \$50 billion annually. In 2011, mental health problems and illnesses among working adults in Canada cost employers more than \$6 billion in lost productivity from absenteeism, presenteeism and turnover.¹⁸

The appropriate compensation of psychological injuries and the prevention of psychological harm in the workplace are among the most pressing challenges facing the workers compensation system today. The Committee has been asked to consider issues relating to psychological injuries and mental health in the workplace as part of this legislative review.

1. Adjudication and Compensation of Psychological Injury Claims under the Current Act and Policy

Awareness of psychological injuries and mental health in the workplace has evolved over time and is much greater in 2017 than in 1917, when the Act first came into force. Although psychological injuries have always been compensable under the Act, it was not until 1992 that the statute specifically contemplated some forms of psychological injury within the definition of "accident." The WCB has issued directives and policies relating to the adjudication of psychological injury claims since 1984.

This section describes Manitoba's statutory and policy scheme for the compensation and adjudication of psychological injuries under four headings: Criteria for Entitlement; Standard of Causation; Presumptive Legislation; and Appeal Commission Findings.

¹⁸ Canadian Mental Health Commission, <https://www.mentalhealthcommission.ca/English/focus-areas/workplace>, accessed October 26, 2017.

(a) Criteria for Entitlement

Under the current system, the adjudication and compensation of psychological injury claims are largely governed by the statutory definition of "accident" and by WCB Policy 44.05.30, *Adjudication of Psychological Injuries* (the "Policy").

To be compensable, a psychological injury must be caused by an accident as that term is defined in the Act. The accident must arise out of and in the course of employment.

The Policy helps to interpret the relevant statutory provisions, and sets out guidelines for the adjudication of psychological injury claims.

As the Policy explains, a psychological injury claim may fall under one or more parts of the definition of accident. A worker may, for example, suffer a psychological injury as a result of a chance event occasioned by a physical or natural cause, such as an explosion at the worksite.

A worker may also experience psychological harm stemming from a wilful and intentional act of another person. Physical or psychological harassment might constitute an accident under this part of the definition.

Psychological injury might also arise from an occupational disease such as an event that triggers Post-Traumatic Stress Disorder (PTSD) or an acute reaction to a traumatic event. The injury may result from a single traumatic incident or at the end of a series of traumatic workplace events.

Relevant Statutory Provisions

Definitions

1(1) In this Act,

"accident" means a chance event occasioned by a physical or natural cause and includes

- (a) A wilful and intentional act that is not the act of the worker;
- (b) Any
 - (i) Event arising out of and in the course of employment, or
 - (ii) Thing that is done and the doing of which arises out of and in the course of employment, and
 - (iii) An occupational disease,

And as a result of which a worker is injured.

"occupational disease" means a disease arising out of and in the course of employment and resulting from causes and conditions

- (a) Peculiar to or characteristic of a particular trade or occupation;
- (b) Peculiar to the particular employment; or
(b.1) that trigger post-traumatic stress disorder;

But does not include

- (c) an ordinary disease of life; and
- (d) Stress, other than an acute reaction to a traumatic event

Restriction on Definition of "accident"

1(1.1) The definition of "accident" in subsection (1) does not include any change in respect of the employment of a worker, including promotion, transfer, demotion, lay-off or termination.

The Workers Compensation Act, CCSM c W200

According to WCB Policy 44.20, *Disease/General*, a traumatic event "is an identifiable physical or psychological occurrence, occurs in an identifiable time frame that is normally of brief duration, is not a series of minor occurrences, and is capable of causing serious physical or psychological harm consistent with the acute reaction".

The Policy makes clear that a compensable claim for psychological injury can arise as an injury by itself or as a result of a physical injury.

The Act and the Policy both place restrictions on the compensation of psychological injury claims. The definition of occupational disease, for example, does not include stress unless it is an acute reaction to a traumatic event. Claims arising from chronic mental stress that is not related to a traumatic event or events are not compensable.

In addition, section 1(1.1) of the Act confirms that the definition of "accident" does not include employment-related matters such as demotions, transfers, lay-offs or terminations.

The Policy sets out two important limitations on the compensation of psychological injuries. First, it provides that a psychological injury cannot fall under the parts of the definition of accident that refer to any (i) event arising out of and in the course of employment or (ii) thing that is done and the doing of which arises out of and in the course of employment. The Policy explains that these parts of the definition of accident refer to physical injuries such as repetitive strain or carpal tunnel syndrome.

The Policy also clarifies that psychological injuries occurring as a result of burn-out or the daily pressures or stressors of work will not give rise to a compensable claim.

(b) Standard of Causation

The inclusion of some psychological injuries in the statutory definition of occupational disease has important consequences. As discussed in Section 1 of this chapter, occupational disease claims are frequently subject to the "dominant cause" standard of causation. Section 4(4) of the Act provides that if an injury consists of an occupational disease caused by both employment and

The Adjudication of Psychological Injuries Policy

Accident

Claims for psychological injuries cannot arise under the part of the definition of accident that refers to any (i) event arising out of and in the course of employment or (ii) thing that is done and the doing of which arises out of and in the course of employment. That part of the definition applies to repetitive strain injuries such as carpal tunnel syndrome, musculoskeletal injuries and so on.

Non-Compensable Psychological Injuries

Psychological injuries that occur as a result of burn-out or the daily pressures or stressors of work will not give rise to a compensable claim. The daily pressures or stressors of work do not fall within any part of the definition of accident because there is no chance event, no wilful and intentional act and no traumatic event.

WCB Policy 44.05.30, *Adjudication of Psychological Injuries*

non-employment related factors, the Board must be satisfied that employment is the dominant cause of the injury before it will accept the claim. This is a more stringent standard than the "material contribution" standard applied to psychological injuries adjudicated under other parts of the definition of accident and to most physical injuries.

(c) Presumptive Legislation

The Act was amended in 2015 to make it easier to establish a causal connection between a workplace incident and PTSD. The amendments create a rebuttable legislative presumption for claims arising from PTSD, which operates to the benefit of claimants.

Under section 4(5.8), PTSD must be presumed to be an occupational disease the dominant cause of which is employment if certain statutory criteria are met. One of these criteria is a diagnosis of PTSD from a physician or psychologist in accordance with the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association (the "DSM").

The presumption is rebuttable, meaning the WCB may find on the evidence that the workplace events are not the dominant cause of the worker's condition.

Manitoba's legislative PTSD presumption is not limited to specific occupations and applies to all workers.

Except in the context of the statutory PTSD presumption, neither the Act nor the Policy requires a diagnosis as a pre-condition of acceptance for psychological injury claims.

(d) Appeal Commission Findings

The Appeal Commission has expressed reservations about the current statutory and policy approach to psychological injuries. In its Decision 138/14, the Commission commented on the definition of accident and the inclusion of acute reaction to a traumatic event within the definition of occupational disease:

The definition is complex and its intention is not easily discerned. In our view, it is difficult to understand why the exception to the stress exclusion falls under the occupational disease portion of the definition.

In the same decision, the Appeal Commission found that the parts of the Policy excluding psychological conditions from consideration under parts (b)(i) and (ii) of the definition of "accident" (event arising out of or in the course of employment and a thing that is done and the doing of which arises out of or in the course of employment) are contrary to the Act.¹⁹

2. Prevention and Psychological Health in the Workplace

Workplace safety and health legislation and policies are increasingly focused on the prevention of psychological injury in the workplace. Manitoba's *Workplace Safety and Health Regulation*, made under *The Workplace Safety and Health Act*, has contained provisions for harassment and

¹⁹ Appeal Commission Decision 138/14 was set aside by the WCB Board of Directors under section 60.9 of the Act and the WCB Review Office reconsidered the claim.

violence prevention in the workplace for over a decade. Amendments made to the regulation in 2010 and 2011 broadened the definition of "harassment" and set out a more comprehensive violence assessment framework.

In 2013, the Canadian Standards Association published the first *National Standard on Psychological Health and Safety in the Workplace* (the "Standard"). The Standard describes 13 features of a psychologically unsafe workplace and makes tools and resources available to employers to enhance their prevention efforts. Although compliance with the Standard is voluntary, it is a useful framework for the promotion of mental health and prevention of psychological harm in the workplace.

SAFE Work Manitoba has been active in focusing prevention efforts on psychological health and safety and in championing the Standard in this province. In 2017, SAFE Work Manitoba launched its *Psychological Health & Safety in the Workplace Strategy* (the "Strategy"), developed in consultation with a stakeholder advisory group.

Using the Standard as a guide, the Strategy targets three key areas: raising awareness of workplace psychological health and safety; developing practical tools and resources for workplaces; and building the capacity of partners to provide services.

SAFE Work Manitoba has committed to reporting on progress made under the Strategy on an annual basis.

3. Other Jurisdictions

The Committee has considered the legislation and policies of other jurisdictions in respect of psychological injury and mental health under five general categories: (a) criteria for entitlement; (b) presumptive legislation; (c) compensation for chronic mental stress; (d) standard of causation; and (e) the CSA *National Standard on Psychological Health and Safety in the Workplace*.

(a) Criteria for Entitlement

All Canadian jurisdictions compensate for psychological injury, often described as stress resulting from an acute reaction to a traumatic event.

While each jurisdiction takes a slightly different approach to psychological injury claims, there are common elements. For example, the injury must always result from an accident arising out of

SAFE Work Manitoba Psychological Health & Safety in the Workplace Strategy

Efforts to prevent psychological illness and injury, and provide protection from psychological hazards, are just as important as measures related to physical health. This strategy will help employers recognize how psychologically health and safe workplaces improve the bottom line. And workers will appreciate the importance of working in an environment that protects and promotes psychological health.

Psychological Health and Safety in the Workplace Strategy, SAFE Work Manitoba

and in the course of employment. In addition, employer decisions or actions relating to the worker's employment status are generally excluded from the definition of accident. In nearly all cases, the detailed criteria for entitlement are set out in board or commission policy rather than legislation.

Diagnosis

In most Canadian jurisdictions, a diagnosis is a pre-condition to acceptance of a psychological injury claim. The diagnosis may be made by a physician, psychologist, psychiatrist or qualified healthcare practitioner, depending on the jurisdiction.

In Newfoundland and Labrador, the policy does not require a diagnosis in accordance with the DSM as a condition of claim acceptance. Medical evidence, however, must include the treating physician's confirmation that the worker suffers a mental stress condition resulting from a traumatic event. Newfoundland and Labrador's Workplace Health, Safety and Compensation Commission may also ask for a DSM diagnosis to substantiate ongoing entitlement.

As noted above, Manitoba takes a different approach. Its Policy expressly does not require a diagnosis as a pre-condition of claim acceptance for psychological injury claims, except for those adjudicated under the PTSD presumption.

Definition of Traumatic Event

There are also varying interpretations of the term "traumatic event" among Canadian jurisdictions. Several policies refer to an "event generally recognized as being horrific or having elements of actual or threatened violence or substantial harm to the worker or to other workers" (The Northwest Territories and Nunavut, Policy 03.09, *Psychiatric and Psychological Disorders*).

Others tie the definition of "traumatic event" more directly to DSM criteria. In New Brunswick, for example, the policy describes traumatic events as including death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence (New Brunswick, Policy 21.103, *Conditions for Entitlement -- Traumatic Mental Stress*).

Another nuance is the extent to which the nature of a worker's employment factors into the definition of "traumatic event." Some jurisdictions, for example, require that a traumatic event be unexpected in the normal or daily course of a worker's employment or work environment.

Other Jurisdictions

Traumatic event

For the purposes of this policy, a "traumatic" event is an emotionally shocking event, which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment. However, this does not preclude a worker who, due to the nature of his or her occupation, is exposed to traumatic events as part of their work (e.g., emergency workers).

WorkSafeBC, Rehabilitation Services and Claims Manual, Volume II, Policy Item #C3-13.00, Section 5.1 - Mental Disorders, page 3.

By contrast, British Columbia's policy expressly recognizes that a worker who is exposed to traumatic events as part of their work may still suffer from a compensable reaction to a traumatic event. Most policies are silent on this issue.

(b) Presumptive Legislation

Nearly half of Canadian jurisdictions have now enacted a legislative presumption in respect of PTSD. These statutory schemes vary in their scope. In most jurisdictions, the presumption applies only to first responders.

There are differences in the criteria for entitlement from jurisdiction to jurisdiction. In all jurisdictions, the presumption will only apply if there is a PTSD diagnosis under the DSM. In Saskatchewan, New Brunswick and Ontario, a psychiatrist or psychologist must provide the diagnosis. In Manitoba and Alberta, the diagnosis must come from a physician or psychologist.

Aside from Manitoba, no jurisdiction classifies PTSD or other psychological condition as an occupational disease or includes the presumptive legislation within the occupational disease sections of the legislation.

(c) Compensation for Chronic Mental Stress

As is currently the case in Manitoba, most Canadian jurisdictions compensate for psychological conditions arising from traumatic events, but do not compensate for chronic mental stress caused by non-traumatic stressors in the workplace.

However, there are important exceptions to this approach. Consistent with an increased focus on psychological injuries and mental health in the workplace, a growing number of jurisdictions have recently amended their legislation and policies to accept chronic mental stress claims under certain conditions.

One example is British Columbia, where the *Workers Compensation Act* expressly provides for compensation of a mental disorder if it is a reaction to one or more traumatic events arising out of and in the course of employment, or is predominantly caused by a significant work-related stressor or stressors arising out of and in the course of employment. Under British Columbia's Act, the disorder must be diagnosed by a psychiatrist or psychologist as

Other Jurisdictions (con't)

In all cases, the one or more events, stressors or cumulative series of stressors, must be identifiable. The Board verifies the events or stressors through information or knowledge of the events or stressors provided by co-workers, supervisory staff or others. An event is traumatic if it is emotionally shocking. A work-related stressor is considered significant when it is excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment. Interpersonal conflicts are not considered significant work-related stressors unless they become abusive or threatening.

WorkSafeBC, Rehabilitation Services and Claims Manual, Volume II, Policy Item #C3-13.00, Section 5.1 - Mental Disorders.

a mental or physical condition described in the DSM and it cannot be caused by an employer's decision relating to the worker's employment status.

In Saskatchewan, the *Workers Compensation Act* has recently been amended to provide presumptive coverage for all psychological injuries. Saskatchewan Policy 02/2017, *Injuries-Psychological* sets out several criteria that must be met for the presumption to apply, including the requirement that the worker be exposed to a traumatic event. The policy defines traumatic event to include "Workload or work-related interpersonal incidents that are excessive and unusual in comparison to pressures and tensions experienced in normal employment. These must be beyond the normal scope of maintaining employment from a public perspective."

Although Saskatchewan's Act and policy do not expressly refer to chronic mental stress, the definition of "traumatic event" clearly contemplates compensation for incidents that are not traumatic in the most conventional sense of that term.

Alberta's Policy 03-01-Part II, Application 6: *Psychiatric or Psychological Injury* explains when a chronic onset psychological injury or stress is compensable in that jurisdiction:

10. Chronic onset psychological injury or stress is compensable when it is an emotional reaction to:
 - a.) an accumulation, over time, of a number of work-related stressors that do not fit the definition of traumatic incident,
 - b.) a significant work-related stressor that has lasted for a long time and does not fit the definition of traumatic incident, or
 - c.) both a) and b) together,

and when all the criteria outlined in Question 11 below are met.

Question 11 of the Policy goes on to set out specific criteria to determine eligibility for compensable chronic psychological injury or mental stress.

Most recently, Ontario's legislation has been amended to provide compensation for both chronic and traumatic mental stress arising out of and in the course of employment. These amendments will come into force on January 1, 2018.

To be compensable under Ontario's Workplace Safety and Insurance Board (WSIB) Policy 15-03-14, *Chronic Mental Stress (Accidents on or After January 1, 2018)*, chronic mental stress must result from a substantial work-related stressor, which includes workplace harassment. Under Ontario's policy, consistent exposure to a high level of routine stress over time may qualify as a substantial work related stressor. A DSM diagnosis from a physician, psychologist, psychiatrist or nurse practitioner is required.

Among those jurisdictions that currently compensate for chronic mental stress, two common threads emerge from the legislative and policy schemes: the need for the non-traumatic events to be significant and excessive in comparison to ordinary workplace stressors; and the general requirement of a diagnosis in accordance with the DSM.

(d) Standard of Causation

Because some types of psychological injury are classified as occupational disease in Manitoba, this is the only Canadian jurisdiction to apply the "dominant cause" standard of causation to psychological injuries resulting from an acute reaction to a traumatic event.

In Alberta, for example, the "but for" test of causation is applied to psychological injuries resulting from traumatic events. In British Columbia, the traumatic workplace event must have causative significance, meaning that it must be more than a trivial or insubstantial cause of the injury.

The standard of causation is different for chronic mental stress claims. British Columbia's Act makes clear that the chronic stress injury must have been predominantly caused by a significant work-related stressor or stressors arising out of and in the course of employment.

The same is true in Alberta and Ontario, where the boards' policies provide that the work-related events or stressors must be the predominant cause of the injury, meaning the prevailing, strongest, chief or main cause of the chronic onset stress.

(e) CSA *National Standard on Psychological Health and Safety in the Workplace*

Manitoba is one of a small number of jurisdictions that are actively promoting the Standard in their prevention programming and education initiatives. No workers compensation legislation currently recognizes the Standard.

Other Jurisdictions (con't)

Standard of Causation

"As with other types of injuries, to be compensable the psychiatric or psychological injury must arise out of and occur in the course of employment. Unless elsewhere specified, WCB uses the "but for" test to determine causation."

"As with any other claim, the WCB investigates the causation to determine whether the claim is acceptable. Claims for this [chronic stress] type of injury are eligible for compensation only when all of the following criteria are met...

- The work-related events or stressors are the predominant cause of the injury; predominant cause means the prevailing, strongest, chief or main cause of the chronic onset stress."

Alberta Workers' Compensation Board,
Policies and Information Manual, Policy 03-01, Part II, Application 6 - Psychiatric or Psychological Injury

B. What the Committee Heard

During the course of our consultations, we heard many concerns about the compensation of psychological injuries in the workers compensation system.

One of the principal areas of dissatisfaction among labour organizations is the perceived systemic difference in the treatment of psychological and physical injuries.

These stakeholders generally identify three legislative and policy factors as contributing to this differential treatment:

- the exclusion of non-traumatic workplace stressors as a cause of compensable psychological injury;
- the policy provisions excluding psychological injuries from consideration under section (b)(ii) of the definition of "accident," which is the section referring to "an event arising out of and in the course of employment"; and
- the application of the "dominant cause" test to psychological injuries.

We also heard about the need for statutory definitions of key terms such as "traumatic mental stress", "harassment," and "bullying," and for more consistent treatment protocols in respect of psychological injuries.

Employers' organizations focused on the criteria for acceptance of psychological injury claims. They suggest that psychological injury claims, particularly those relating to PTSD, should only be accepted if there is a diagnosis from a psychologist or psychiatrist.

Stakeholder Comments

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

-MFL Occupational Health Centre

The current definition of an "accident" in the Act includes "(i) event arising out of and in the course of employment, or (ii) thing that is done and the doing of which arises out of, and in the course of employment" which results in an injury.

By policy 44.05.30, Adjudication of Psychological Injuries, the WCB has made an arbitrary and unfounded distinction, barring the consideration of psychological injury claims under subsection (ii) of this definition, stipulating that "claims for psychological injuries cannot arise under the part of the definition of "accident."

-Manitoba Government and General Employees' Union (MGEU)

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 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.

-Manitoba Nurses Union (MNU)

Some also suggested that the WCB develop a list of qualified mental health practitioners, approved by workers and employers, who must diagnose psychological conditions. In their view, this would add to the credibility of the practitioner's recommendations.

C. Recommendations

After reviewing the issues relating to compensation of work-related psychological injuries, and the stakeholders' comments, the Committee has limited its consideration to two of the most pressing issues in the current system: psychological injuries as occupational disease, and the compensation of conditions caused by exposure to non-traumatic stressors in the workplace. While stakeholders have raised several other significant points, addressing these two predominant issues will bring much needed clarity to the legislative and policy framework around psychological injuries.

On the first issue, this Committee recommends that the Act be amended so that psychological injuries are no longer classified as occupational disease. The application of the dominant cause test to psychological injury claims has important implications, not least of which is an apparent differential treatment of physical and psychological injuries. The Committee notes the troubling contradiction in a system that applies a "material contribution" standard to injuries caused by exposure to physical trauma and a "dominant cause" standard to those caused by exposure to psychologically traumatic events.

Statistics provided by the WCB seem to confirm that the application of the more stringent "dominant cause" standard has an effect on the rates of acceptance of psychological injury claims. The available data indicates that psychological injury claims classified as occupational disease are denied at a higher rate than other psychological injury claims. We believe the current approach may engage human rights considerations and should therefore be addressed.

Further, psychological injuries do not fit neatly within the definition of "occupational disease" in the Act, which refers to causes and conditions peculiar to or characteristic of a particular trade, occupation or employment. Psychological injuries are not unique to particular types of occupation, and it is illogical to classify them in this way. The Appeal Commission has expressed its concern about the current legislative structure, and we agree with the Commission in this regard.

Stakeholder Comments (con't)

Stress is a major issue. The Workers Compensation Board should continue to take a very careful approach with respect to allowing claims for stress and other mental health issues. This would include ensuring that only the diagnosis of qualified practitioners be accepted, which in cases involving mental health would mean a psychiatrist or PhD psychologist who is qualified in the particular area.

-Manitoba Employers Council (MEC)

The current practice of not compensating for stress that arises out of labour relations issues and performance management issues in the workplace should be maintained. We are also of the view that when adjudicating PTSD claims the WCB should ensure that the diagnosis should only be accepted from a qualified practitioner, namely a psychiatrist or PhD psychologist.

RECOMMENDATION 21

The *Workers Compensation Act* should be amended to ensure that psychological injuries, including Post-Traumatic Stress Disorder, are not categorized as occupational disease.

On the second issue, this Committee considers it premature to amend the Act to allow for compensation of psychological conditions caused by exposure to non-traumatic stressors in the workplace. While we recognize the importance of this issue, compensation for "chronic stress" claims would be a significant departure from the current system. Such a change merits careful consideration and monitoring of developments in other jurisdictions.

We have recommended a change in the classification of psychological injuries, and we consider it prudent to evaluate the effects of that change before undertaking any other significant amendments in this area.

Compensation for non-traumatic workplace stressors is a relatively new development in the context of workers compensation. Ontario, the country's largest provincial jurisdiction, has yet to establish claims experience in this area. In light of the rapidly changing legal landscape across Canada in respect of chronic onset psychological injuries, we recommend that the government and the WCB monitor developments in the law and reconsider this issue in two years. We believe that careful study over that two-year period will allow for the adoption of best practices and a made-in-Manitoba solution to this important issue.

RECOMMENDATION 22

The Government of Manitoba and the Workers Compensation Board should monitor developments in respect of compensation for injuries caused by non-traumatic workplace stressors and reconsider this issue in two years' time.

Section 3: Conflicting Medical Opinions and Medical Review

A. Background

Section 60(2) of Act grants the Board broad and exclusive jurisdiction to determine whether an injured worker is entitled to workers compensation benefits. To make rational, evidence-based decisions regarding compensation, the Board must have a good understanding of the injury suffered by the worker and its implications. Medical opinions and reports provide the Board with much of this important information.

1. Treating Physicians and Health Care Providers

WCB adjudicators are entitled by statute to obtain medical opinions from more than one source. At minimum, they will obtain medical opinions from the injured worker's treating physician. Treating physicians and any other health care providers who give care to an injured worker are required, by statute, to report their findings to the Board. The Board reserves the right to direct and supervise the medical assistance provided to an injured worker. However, in most circumstances, the worker is free to choose his or her own treating physician.

2. WCB Medical Advisers

In addition to receiving medical opinions and information from treating physicians and other health care providers chosen by the worker, WCB adjudicators may also consult WCB medical advisers for their opinions. WCB medical advisers are doctors and other health care providers who work for the WCB on a contract basis. They provide their

Relevant Statutory Provisions

Treating Physicians

Worker's personal physician

27(12) Without in any way limiting the power of the board under this section to supervise and provide medical aid in every case where the board is of the opinion that the exercise of that power is expedient, the board may permit medical aid to be administered, so far as the selection of a physician is concerned, by the physician who may be selected or employed by the injured worker or his employer, to the end that so far as possible any competent physician may be employed and be available to injured workers.

Medical Reports

Duty of those providing care to an injured worker

20 Every health care provider, hospital or health care facility that provides care to a worker who has been injured in an accident within the scope of this Part must

- (a) provide reports in respect of the injury in the form and manner required by the board; ...

Medical Examinations

Worker to submit to examination

21(1) If required by the board, a worker who applies for, or is receiving compensation shall submit to medical examination at a place reasonably convenient for the worker and fixed by the board.

The Workers Compensation Act, CCSM c W200

professional opinions and recommendations at the request of WCB adjudicative staff. Their opinions may be based on a review of an injured worker's file, or on the results of a clinical examination. Clinical examinations are not requested in all cases.

3. Independent Medical Examinations (IMEs)

In cases where the Board requests a clinical examination, the Board may refer the matter to a physician not affiliated with the WCB to conduct an independent medical examination (IME). Under WCB Policy 42.20.20.10, *Independent Medical Examinations*, the physician performing the IME will be chosen from a list of physicians particularly skilled in the medical matter at issue provided by the College of Physicians and Surgeons of Manitoba. More often than not, however, clinical examinations are performed by a WCB medical adviser.

4. Medical Review Panels (MRPs)

In circumstances where there is a difference of opinion between the treating physician and the WCB medical adviser or IME physician, a worker may request that a medical review panel (MRP) be convened to obtain its opinion on the matter. The conflict of opinions must concern an issue affecting entitlement to compensation or medical aid. In addition, the worker may only make the request before the Appeal Commission has rendered a decision on entitlement to compensation. Provided these statutory criteria are met, the Board must convene an MRP.

Employers may also request an MRP, provided the medical matter at issue is real and substantial and affects a worker's entitlement to compensation. Again, the request must be made before the

Relevant Statutory Provisions (con't)

Medical Review Panels

Reference by board in its discretion

67(3) Where in any claim or application by a worker for compensation a medical matter arises in which the board desires a further opinion, the board may refer the matter to a panel for its opinion in respect of the matter.

Reference to panel on request of worker

67(4) Where in any claim or application by a worker for compensation the opinion of the medical officer of the board in respect of a medical matter affecting entitlement to compensation differs from the opinion in respect of that matter of the physician selected by the worker, expressed in a certificate of the physician in writing, if the worker requests the board, in writing before a decision by the appeal commission under subsection 60.8(5), to refer the matter to a panel, the board shall refer the matter to a panel for its opinion in respect of the matter.

Reference to panel on request of employer

67(4.1) At the written request of an employer, the board may refer a medical matter to a panel for its opinion. The medical matter must be real and substantial and affect entitlement to compensation. The request must be received by the board before a decision by the appeal commission under subsection 60.8(5) is made.

*The Workers Compensation Act, CCSM c
W200*

Appeal Commission makes a decision. When the employer requests such a review, the decision to convene an MRP is at the Board's discretion.

At any time, the Board or Appeal Commission also has the authority to refer a matter to an MRP for a further medical opinion.

The provisions for the composition, powers and duties of MRPs are found at section 67 of the Act, and are supplemented by WCB Policy 42.10.70, *Medical Review Panels*.

MRPs are three member panels. All three panel members must be doctors and are selected by the Minister of Growth, Enterprise and Trade, the worker and the employer.

Physicians are ineligible to serve as members of an MRP if they have examined or treated the worker or acted as a consultant in the worker's treatment.

In coming to its opinion, the MRP must invite the treating physician to appear before it, and may invite other health care providers as well. The MRP may order any medical examination or test in relation to the worker, and consult with any health care worker the panel considers appropriate. Panel members may also examine the worker themselves.

Following the MRP's review of the worker's medical circumstances, the MRP must give a full report of its findings in writing to the Board, the worker and the worker's treating physician.

In case of a difference of opinion between panel members, the majority opinion will be considered the opinion of the panel. If the panelists cannot come to agreement at all, the chair's opinion will be considered the opinion of the panel.

The MRP's medical opinion is generally accepted as conclusive.

The *Medical Review Panels* Policy

A. POLICY

b. Workers reference to MRP

4. If the MRP is requested by a worker, the worker may follow the WCB's reconsideration and appeal processes in order to address a dispute, such as the WCB's failure to convene an MRP, the medical discipline of the panel, or the form and content of the questions.

5. A WCB employee or Appeal Commission panel will frame the questions to be asked of an MRP. These questions will be sent to the worker involved. If a dispute over the form or content of the questions arises, efforts will be made to resolve any concerns. Further dispute about the form and content of the questions will follow the WCB's reconsideration and appeal processes.

10. During an examination or meeting, an MRP involves a "patient-centred clinical method" in which the injured worker is repeatedly encouraged to present and clarify his or her medical history. Workers are given the opportunity to express opinions and to ask questions. It is important that the injured worker has the opportunity to say all that is necessary and that all of his or her opinions and questions regarding medical matters before the MRP have been acknowledged or answered.

WCB Policy 42.10.70, *Medical Review Panels*

5. Other Jurisdictions

All Canadian jurisdictions have similar provisions authorizing their workers compensation agencies to obtain medical opinions.

In most Canadian jurisdictions, workers are generally able to choose their own treating physicians. These physicians are required, by law, to submit medical reports to the workers compensation authority in the relevant jurisdiction.

In some jurisdictions, the worker's right to treatment by a physician of his or her choice is absolute. In others, such as Manitoba, the board has some discretion in this regard.

Some workers compensation statutes or policies place explicit limits on a worker's right to choose his or her own doctor. Under Alberta's policy, for example, the board may direct a different healthcare provider if it considers the worker's choice to be clinically unsound. Alberta's board may also direct a worker to use a health care provider in a particular health care provider network, in some circumstances.

In all Canadian workers compensation statutes, the board or commission may compel an injured worker to undergo a medical examination. If the worker does not comply, the board or commission may withhold or suspend compensation.

Legislation in Nova Scotia and Ontario also gives employers the right to compel a worker to undergo a medical examination by a physician of the employer's choosing. In both cases, the worker may object and obtain a ruling from the board.

Other Jurisdictions

Treating Physicians

Worker to submit to examination

192 Every worker is entitled to receive care from the health professional of his choice.

An Act Respecting Industrial Accidents and Occupational Diseases, CQLR c A-3.001

21(7) Without limiting the power of the Board under this section to supervise and provide for the furnishing of health care in every case where it considers the exercise of that power is expedient, the Board must permit health care to be administered, so far as the selection of a physician or qualified practitioner is concerned, by the physician or qualified practitioner who may be selected or employed by the injured worker.

Workers Compensation Act, RSBC 1996, c 492

Worker may select physician

84 If medical aid is to be provided to a worker under this Part, the Board may, if it considers it appropriate, permit the worker to select the physician of the worker's choice.

Workers' Compensation Act, RSA 2000, c W-15

If WCB is of the opinion the selection of a health care provider is clinically unsound or contrary to the worker's best interests, WCB may refuse to provide payment, and may direct the worker to another health care provider.

- Alberta Workers' Compensation Board Policies and Information Manual, Policy 04-06/ Part II, *Application 1 -- General*

Workers compensation statutes and policies across Canada exhibit a range of approaches for resolving conflicting medical opinions. Several jurisdictions rely on a mechanism similar to the medical review panel.

In the Northwest Territories and Nunavut, legislation expressly sets out a conflict resolution mechanism.

B. What the Committee Heard

The Committee heard from numerous stakeholders concerned about the ways in which the WCB obtains medical information and resolves differences of medical opinion.

Many commented that WCB claims adjudicators appear to prefer the opinion of the WCB medical adviser over that of the injured worker's treating physician. They are particularly concerned when the WCB medical adviser bases his or her opinion on a paper file review, rather than a physical examination.

Some stakeholders suggested there should be more guidance or training provided to WCB claims adjudicators, as well as to WCB medical advisers and medical review panels on medical matters.

Many suggested that a medical advisory committee should be established under the Act. The role of a medical advisory committee would be to review and advise the WCB on all medical matters relevant to the administration of the Act.

Other stakeholders felt there should be better statutory or policy guidance provided to persons charged with making decisions on medical matters.

Stakeholder Comments

It is ... unclear how the WCB makes claims decisions when faced with conflicting medical opinions from different sources. On what basis does the WCB concur with a doctor it contracts with directly, over a worker's own doctor?

- Manitoba Federation of Labour (MFL)

By reading their [the Appeal Commission's] decision, it seems they took the side of the WCB medical advisor even though I presented evidence that she missed ... and her opinion of the operation report differed from my neurologist's.

- Individual

Further medical education or consultation should be provided to the Workers Compensation Officers and the Review Office.

- Individual

Currently there is a growing concern in the medical field about WCB discounting medical opinions in favour of their internal providers. Medical providers are also becoming frustrated with navigating the compensation system when opinions and advice to workers hold no weight.

- United Food and Commercial Workers (UFCW) Union Local 832

We feel that ... the WCB, and Manitoba workers would be well served by the creation of a "Medical Advisory Committee" to advise the Board on all medical matters related to the administration of the WCA.

- Canadian Union of Public Employees (CUPE) Manitoba

Several stakeholders identified problems with the MRP process, suggesting that a review should be conducted of its role and effectiveness.

C. Recommendations

To better understand the issues of conflicting medical opinions and medical review in the compensation system, the Committee asked WCB Healthcare Services for additional information regarding its operations and practices in these areas.

The WCB advised the Committee that, over the past five years, an opinion from a WCB medical adviser has been sought in approximately 10 to 15 % of claims. It is very rare for the WCB to have recourse to an independent medical examiner. It therefore appears that, in most cases, the WCB relies on the opinion of the worker's treating physician when adjudicating claims.

We also learned that the WCB has been steadily working to improve its approach to resolving conflicting medical opinions over the last 10 years. It does so by making sure that WCB medical advisers' opinions are thorough, transparent and substantiated. The WCB is also making greater efforts to contact treating physicians and resolve conflicting medical opinions.

WCB Healthcare Services informed us that its three principal goals are to:

- ensure that injured workers continue to be able to choose their treating physicians, as provided in section 27(12) of the Act;
- facilitate workers' access to medical services under the care of their treating physicians by providing expedited access to diagnostic services, referrals to specialists, and surgery, where necessary; and,
- intervene by providing their own medical opinions, at the request of the WCB, in situations where it is determined that the information provided by the treating physician is inadequate or the course of treatment is not in line with the standard of care accepted by the medical community at large. This occurs after consultation with the worker's treating health care provider.

WCB Healthcare Services informed us that they often call the worker in for an in-person exam before rendering a medical opinion. This practice is encouraged, as it helps to ensure a thorough, complete and reliable assessment of the injured worker. WCB Healthcare Services further advised that there are no time limits on these exams, which allows WCB medical advisers to be as comprehensive as possible.

The WCB's current practice is to contact the external health care provider on any claim in which there is a conflict between internal and external medical opinions. In doing so, the WCB attempts to get additional information that may help resolve the conflict.

We learned about additional measures WCB Healthcare Services has adopted for improved communication with treating physicians, including:

-
- frequent dialogue with community health care practitioners;
 - enhanced community outreach;
 - enhanced working relationships with local leaders in psychiatry, concussions, and burn injuries; and
 - increased presence in medical school and residency training.

On the issue of medical review panels, WCB Healthcare Services explained that its improved processes for resolving conflicts have reduced the need for MRPs. As evidence of this, it pointed to the declining number of MRPs convened in recent years. The WCB's records indicate that 39 MRPs were convened in 2000, only eight occurred between 2012 and 2015, and none were convened in 2016 or 2017.

The Committee is encouraged by the WCB's approach to resolving conflicting medical opinions. We were reassured to learn that the WCB largely appears to rely on the opinion of worker's treating physicians when deciding on compensation claims, and that WCB medical advisers generally provide an opinion only after conducting an in-person examination.

In our view, these measures increase the transparency of the WCB system for the worker. They allow the worker to see that the WCB does not discount the opinion of his or her treating physician, with whom he or she has developed a relationship of trust. They also assist the worker to better understand any differences in medical opinion. Finally, they increase worker confidence in claim decisions. We encourage the WCB to continue its efforts in this regard, and are making no recommendations for statutory or policy change in this area.

RECOMMENDATION 23

The Workers Compensation Board should continue to pursue improvements in its methods for resolving conflicting medical opinions. Measures should include:

- contacting workers' health care providers in efforts to resolve conflicts between the medical opinions provided by workers' health care providers and those provided by The Workers Compensation Board's medical advisers;
- having The Workers Compensation Board's medical advisers conduct in-person examinations of injured workers before rendering medical opinions, where possible and advisable; and
- engaging in frequent dialogue with external health care providers so that they understand their role in assisting workers with their claims for compensation under *The Workers Compensation Act*.

We also agree that the WCB's measures to resolve conflicting medical opinions have likely reduced the need for recourse to the additional level of review performed by MRPs. We nevertheless believe it is important to preserve this statutory mechanism for the few cases in which it may be necessary.

The WCB advised that in the large majority of cases, the original adjudicative decision was altered following a medical review panel opinion. Although MRP opinions are not binding on the Board or Appeal Commission, they appear to have significant persuasive value. We accordingly believe MRPs should remain in the Act as a method for resolving conflicting medical opinions. The Committee is not recommending any statutory or policy changes with respect to MRPs.

RECOMMENDATION 24

<p>Section 67 of <i>The Workers Compensation Act</i>, which regulates the jurisdiction, composition powers and procedures of medical review panels, should remain unchanged.</p>
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CHAPTER 6 - COMPENSATION/BENEFITS

Section 37 of *The Workers Compensation Act* (the "Act") specifies three types of compensation payable to injured workers:

- **medical aid** - payment for prescription drugs, medical treatment, rehabilitation assistance and other services necessary to assist ill or injured workers in recovering from a workplace accident;
- **impairment awards** - lump sum compensation payable to workers who sustain a permanent physical abnormality or loss, including disfigurement, as a result of a workplace accident;
- **wage loss benefits** - income replacement benefits payable to ill or injured workers as compensation for loss of earning capacity as a result of a workplace accident.

In addition, the Act allows for the payment of other benefits to injured workers who have suffered a long-term loss of earning capacity, including retirement annuities and group life insurance benefits.

Injured workers are vitally concerned with the issue of entitlement to statutory benefits, as this directly affects their ability to care for themselves and their families following a workplace injury or illness. Other participants in the workers compensation system are equally concerned, as the type of benefits provided can have a significant impact on the health and wellbeing of workers.

It would be fair to call entitlement to benefits the integral issue of workers compensation and the core business of The Workers Compensation Board (the "WCB" or the "Board").

In this chapter, we examine various issues related to entitlement to compensation and benefits, including:

- whether a maximum insurable earnings cap should be re-imposed by statute;
- whether the WCB should continue to deduct probable amounts for Canada Pension Plan (CPP) or Quebec Pension Plan (QPP) premiums when calculating a worker's net average earnings;
- to what extent the WCB should be calculating wage loss benefits based on loss of probable future earning capacity;
- whether the Act should be amended to mandate worker access to employer-based benefit programs while in receipt of wage loss benefits;
- whether changes should be made to section 27 of the Act, which deals with the provision of medical aid;
- whether the WCB should pay fees for committees and the Public Guardian and Trustee in the context of providing medical aid to ill or injured workers who are unable to make decisions for themselves;

- whether the WCB should continue paying group life insurance benefits to workers who have sustained long-term workplace injuries or illnesses; and
- whether the Act should be amended to allow for assignment of wage loss benefits to creditors.

Section 1: Maximum Insurable Earnings Cap and Maximum Assessable Earnings Cap

A. Background

1. Maximum Insurable Earnings Cap

The preamble to the Act recognizes the importance of certain principles in the workers compensation system. One of these principles is income replacement - the idea that when a worker suffers a compensable workplace injury, he or she should receive benefits to replace a portion of the resulting loss of employment income. Part (c) of the preamble expresses the concept by stating that workers who are entitled to compensation under the Act should receive "income replacement benefits based upon loss of earning capacity."

The workers compensation system generally does not provide wage loss benefits in an amount equivalent to the worker's actual loss of earning capacity. Rather, the Board calculates the loss of earning capacity according to a statutory formula and pays a benefit equal to a certain percentage of that amount.

This limitation on the payment of wage loss benefits has been present in the workers compensation system from the outset. Sir William Meredith proposed that wage loss benefits be paid at 55% of gross earnings. The compensable percentage of loss of earning capacity has changed over time and, in Canadian jurisdictions, now ranges from 75% to 90% of net loss of earning capacity.

In Manitoba, most workers receive wage loss benefits equal to 90% of their net loss of earning capacity. If a worker's earnings fall below a certain amount, he or she will receive wage loss

Relevant Statutory Provisions

Wage loss benefits for loss of earning capacity

39(1) Subject to subsections (6) and (7), where an injury to a worker results in a loss of earning capacity after the day of the accident, wage loss benefits must be paid to the worker calculated in accordance with section 40 and equal to 90% of the loss of earning capacity.

Earnings at or below the minimum

39(6) Where the worker's average earnings before the accident, as determined by the board under section 45, are less than or equal to the minimum annual earnings, the wage loss benefits payable to the worker calculated in accordance with section 40 must be 100% of the loss of earning capacity.

The Workers Compensation Act, CCSM c W200

benefits equal to 100% of his or her net loss of earning capacity. Currently, the minimum annual earnings amount is \$23,192/year, pursuant to section 1(e) of the *Minimum Annual Earnings Regulation*.

In most Canadian jurisdictions, there is also a second limitation on compensation for wage loss benefits - a cap or ceiling on the amount used to calculate benefits. If a worker's average earnings in any given year exceed this cap, the excess amount is not taken into account when calculating wage loss benefits. The threshold amount is known as the maximum insurable earnings cap.

Until 2006, Manitoba had a cap on maximum insurable earnings. Following a recommendation of the 2005 Legislative Review Committee, Bill 25 removed the cap for accidents occurring on or after January 1, 2006. For accidents occurring after December 31, 1991 and before January 1, 2006, a maximum insurable earnings cap of \$45,500, indexed annually, continues to apply. In 2017, the cap on insurable earnings for 1992-2005 accidents is \$80,370, after indexing.

The Legislative Review Committee 2016 - 2017 has been asked to consider whether the maximum insurable earnings cap should be reinstated.

2. Maximum Assessable Earnings Cap

When calculating an employer's payroll for assessment purposes, the WCB uses a maximum amount of worker earnings. This is the maximum assessable earnings cap. Employers are not charged a premium on any portion of a worker's earnings that exceeds this cap.

Before the Bill 25 amendments in Manitoba, the maximum insurable earnings cap and the maximum assessable earnings cap were linked. In other words, workers would only receive wage loss replacement up to a certain ceiling, and employers would only have to report payroll to the WCB up to that same ceiling. This is how it continues to work in all other Canadian jurisdictions.

Bill 25 removed the link between maximum insurable earnings and maximum assessable earnings, but did not eliminate the maximum assessable earnings cap. Employers are not charged a premium on the portion of a worker's earnings that exceeds the maximum assessable earnings cap. The maximum assessable earnings cap has been set annually by the WCB Board of Directors when establishing assessment rates, and is adjusted for inflation. In 2017, the assessable earnings cap is \$127,000.

2005 Legislative Review Committee

[...] Many workers in many occupations earn more than the limit.

So that a worker who experiences a workplace accident is fully compensated for his or her lost earnings, the limit on insurable earnings should be removed.

We believe Manitoba should become the first jurisdiction in Canada to take this step.

Working for Manitoba: Workers Compensation for the Twenty-First Century; Report of the Legislative Review Committee on the Workers Compensation Act (February 2005), pages 27 and 28.

In light of the close connection between maximum insurable earnings and maximum assessable earnings, the Committee has decided to address the cap on maximum assessable earnings as part of this review.

3. 2005 Legislative Review Committee Recommendations

The 2005 Legislative Review Committee found that the maximum insurable earnings cap - \$58,260 in 2005 - resulted in too many workers not receiving adequate compensation for wage loss while recovering from their injuries. Based on the fundamental principle of income replacement, the 2005 Legislative Review Committee believed that all workers should receive wage loss benefits that more fully compensate for the loss of pre-accident income. It therefore recommended that Manitoba be the first jurisdiction to remove the cap on maximum insurable earnings (Recommendation 24, page 28 of the *2005 Legislative Review Committee Report*).

The 2005 Legislative Review Committee did not address the maximum assessable earnings cap.

4. The 2014 Stakeholder Consultation Report (the "*Stanley Report*")

In 2013-2014, the WCB commissioned Morneau Shepell and Douglas Stanley, Q.C. to undertake stakeholder consultations and prepare a report identifying the strengths and weaknesses of the WCB's rate model. In September 2014, Mr. Stanley produced the *Stakeholder Consultation Report*, also known as the *Stanley Report*.²⁰

According to the *Stanley Report*, some employers considered that the cap on maximum assessable earnings was too high. When Manitoba chose to remove the maximum insurable earnings cap, the maximum assessable earnings cap was increased. This was done, in part, to ensure there were sufficient funds in the accident fund to pay wage loss benefits to high income earners who were no longer subject to a cap on insurable earnings.

The *Stanley Report* observed that all covered employers with both high and more modest payrolls are subject to the cap on assessable earnings. It suggested that some employers

Stanley Report Commentary on the Maximum Assessable Earnings Cap

It is also important that all employers pay their fair share of system costs. All other jurisdictions have aligned the compensable and assessable earnings limit for a very good reason; the premium revenue paid is commensurate with the insurance coverage being purchased. We see no reason as to why this fairness principle would not apply to industries with high earners. A decision to only lower the maximum assessable earnings limit, without consideration of the maximum compensable earnings limit, would create subsidies in the system and possibly further erode the overall perception of fairness by all employers. Therefore, it is vital that these two limits be kept in sync.

2014 Stakeholder Consultation Report (the "*Stanley Report*"), page 26.

²⁰ The *Stanley Report* is available online at:

https://www.wcb.mb.ca/sites/default/files/files/4_1%20Attachment%20A%20Sept%2024%2C%202014%20-%20Stakeholder%20Consultation%20Report%20Doug%20Stanley%20final_1.pdf.

might therefore be paying higher premiums than their circumstances warrant to cover the shortfall between uncapped wage loss benefits and capped assessments.

According to the *Stanley Report*, this creates unfairness for those employers who do not employ high income earners. The report suggested two possible solutions to this problem: changing the rate assessment model so that those who employ high income earners also pay higher WCB assessments, or reinstate the maximum insurable earnings cap and link it to the maximum assessable earnings cap.

5. Other Jurisdictions

Manitoba is the first and only jurisdiction to have removed the cap on maximum insurable earnings. In all other Canadian jurisdictions, the caps on maximum insurable earnings and maximum assessable earnings are the same. The amount of these caps varies from jurisdiction to jurisdiction. The caps are automatically indexed annually by an adjustment factor that also varies by jurisdiction.

The following table sets out the limits on insurable and assessable earnings in all Canadian jurisdictions:

Maximum Insurable Earnings and Maximum Assessable Earnings Caps,
by Jurisdiction, for 2017

Jurisdiction	Maximum Insurable Earnings Cap (\$)	Maximum Assessable Earnings Cap (\$)	Adjustment Factor
BC	81,900	81,900	Change in IAW
AB	98,700	98,700	Formula sets ceiling to cover 90% of claimants
SK	76,086	76,086	165% IAW
MB	N/A	127,000	N/A
ON	88,500	88,500	175% IAW
QC	72,500	72,500	Change in IAW
NB	62,700	62,700	Change in CPI
NS	59,300	59,300	135.7% IAW
PEI	52,800	52,800	Change in CPI
NFLD & LAB.	63,420	63,420	Change in CPI
NWT/NU	90,600	90,600	Change in CPI
YK	85,601	85,601	Change in CPI

CPI = consumer price index

IAW = industrial average wage (provincial)

Source: Association of Workers' Compensation Boards of Canada website

Two other recent legislative reviews of workers compensation legislation considered the cap on maximum insurable earnings.

In its report, *Working Together - Safe, Accountable, Sustainable: Volume One: The Report of the 2013 Statutory Review Committee on Workplace Health, Safety and Compensation*²¹, the Newfoundland and Labrador committee made recommendations to increase the amount of the maximum insurable earnings cap, to achieve parity with the province in Atlantic Canada with the highest cap (page 68). The committee did not support removing or allowing exemptions from the maximum insurable earnings cap.

In its June 2017 report, *Working Together: Report and Recommendations of the Alberta Workers' Compensation Board Review Panel* (the "Alberta Review Panel Report")²² the Alberta Workers Compensation Review Panel ("Review Panel") considered whether to remove the maximum insurable earnings cap.

The Review Panel recognized good reasons for maintaining the cap, noting that some stakeholders felt it may provide an incentive for workers to return to work. However, the Review Panel also recognized that many workers earn in excess of the level of the cap in Alberta, and that they may be significantly undercompensated if injured on the job.

While the Review Panel recommended that the cap on maximum insurable earnings be maintained, it also proposed that workers who earn in excess of the cap be entitled to a special graduated benefit. Under this graduated system, a worker's average earnings would initially be based on his or her previous five years of earnings, but would be gradually stepped down evenly over a five year period to the maximum insurable earnings cap (see Recommendation 34, page 93 of the *Alberta Review Panel Report*).

Alberta's Review Panel also considered a possible change to the maximum assessable earnings cap in light of its recommendation on maximum insurable earnings. It declined to recommend this change, stating that the cost of the special graduated benefit should be borne by all employers. In its view, sharing the costs of providing this benefit "recognizes that there are workers in all sectors of the economy that exceed the maximum insurable earnings" (page 93).

B. What the Committee Heard

During the course of our consultations, we heard from several stakeholders on the issue of the maximum insurable earnings cap.

Workers' representatives were generally in favour of preserving the status quo, with no cap on maximum insurable earnings. In their view, removal of this cap in 2006 served to more fully align

²¹ Volume One of the 2013 Newfoundland and Labrador's Statutory Review Committee Report is available online at: <http://www.aesl.gov.nl.ca/labour/workingtogether/index.html>.

²² The 2017 Alberta Review Panel Report is available online at: <https://www.alberta.ca/assets/documents/WCB-Review-Final-Report.pdf>.

the Act with the Meredith Principles. It helped to ensure security of benefits by more fully compensating all injured workers, regardless of their level of income.

By contrast, employer representatives recommended reinstatement of the maximum insurable earnings cap. They noted that Manitoba is the only jurisdiction in Canada to have removed the cap on maximum insurable earnings. In their opinion, the cap should be reinstated to bring the system for wage loss replacement in line with those of other jurisdictions.

Some employers also suggested that removing the cap has created a disincentive for workers to return to work following an injury. Others pointed out that the no-fault/collective liability compensation system has always contemplated a lower level of wage loss recovery than might be available under the tort system. In their view, this is part of the trade-off inherent in the workers compensation system - workers receive a lower level of compensation in exchange for no-fault benefits and collective liability.

Few stakeholders expressed an opinion on the maximum assessable earnings cap.

C. Recommendations

After reviewing the background and stakeholder comments on this issue, the Committee asked the WCB for additional information on the effect of de-linking maximum insurable earnings and maximum assessable earnings. In particular, the Committee wished to learn whether the concerns expressed in the *Stanley Report* about subsidization among employers had been borne out.

The WCB advised the Committee that there had been no material cross subsidization between employers resulting from the decision to remove the cap on worker earnings but retain a cap on payroll. According to the WCB, employers who employ high wage earners do, in fact, pay higher

Stakeholder Comments

CUPE 737 strongly believes that all workers earnings should be insured/compensable. Wage loss benefits should reflect earning potential, not an arbitrary cap. Putting a cap would discourage higher earnings worker from filing WCB claims when hurt or made sick at work. The [maximum insurable earnings] cap existing prior to 2006 was eliminated based on a consensus recommendation of the last WCA Review with the unanimous support of all members of the legislature.

- Canadian Union of Public Employees (CUPE) Local 737

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.

- CN Rail

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.

- Federally Regulated Employees - Transportation and Communications (FETCO)

assessment rates and other employers have not been required to pay higher premiums to compensate.

The Committee also asked the WCB for information regarding the percentage of high income earners that form part of the WCB claims population. The WCB advised that between 2012 and 2016, approximately 2% of all workers in receipt of wage loss benefits had pre-accident annual earnings of \$100,000 or more. The average pre-accident earnings for this group were \$118,681/year over the five year period.

We recognize and appreciate the rationale for the 2005 Legislative Review Committee's recommendation to remove the cap on insurable earnings. We nevertheless believe the time has come to revisit this decision. Manitoba remains the only jurisdiction to have removed the maximum insurable earnings cap. Legislative review panels in other jurisdictions have consistently recommended retaining the cap and chosen not to follow Manitoba's example. A decade after the removal of the maximum insurable earnings cap, Manitoba remains an outlier in this area.

Although it appears the concerns expressed in the *Stanley Report* about cross-subsidization may lack foundation, the Committee believes that the absence of a cap could have other negative impacts on both the business environment in Manitoba and on the workers compensation system. In particular, the absence of a cap may negatively impact an employer's willingness to do business in Manitoba. Those who employ high wage earners may be deterred by the higher premiums they would be required to pay in the absence of a cap.

The absence of a cap may also be having an impact on some employers' decisions to remain outside of the WCB's coverage scheme. As noted in the *Coverage* chapter of this report, the level of coverage has remained relatively unchanged since 2009 despite the WCB's efforts encouraging industries to opt in to the system. While there may be many reasons for employers and industries to remain outside the mandatory coverage scheme, the prospect of paying higher premiums because they employ high wage earners likely factors into some employers' decisions.

For these reasons, the Committee is recommending that a maximum insurable earnings cap be reinstated in Manitoba. However, we are also supportive of the goal behind the 2005 Legislative Review Committee's recommendation for its removal: fair compensation for ill or injured workers. We believe that a cap of \$120,000 for both maximum insurable earnings and maximum assessable earnings would allow this goal to be achieved.

WCB data indicates that between 2012 and 2016, approximately 2% of claimants had pre-accident average earnings over \$100,000. Within that group, the average pre-accident earnings were \$118,681 over the five year period. A maximum insurable earnings cap of \$120,000 would ensure that over 98% of ill or injured Manitoba workers continue to receive wage loss benefits equivalent to 90% of their actual net loss of earning capacity.

For consistency with the practice in all other jurisdictions, the Committee also believes the maximum insurable earnings cap and the maximum assessable earnings cap should be linked. Accordingly, we recommend that the maximum assessable earnings cap be reduced from its current level of \$127,000 to \$120,000.

Finally, to account for those workers whose average earnings exceed \$120,000, we find merit in the approach endorsed by Alberta's Review Panel in its 2017 report. We therefore recommend that a version of the special graduated benefit described in Alberta's report be adopted. And in the spirit of our recommendation to re-institute a statutory maximum on insurable wages in general, we also believe the special graduated benefit should be subject to a cap. We consider \$150,000/year to be a reasonable figure for this ultimate maximum insurable earnings cap.

In other words, for workers earning more than \$120,000 before the accident, wage loss benefits will be payable based on an average of the worker's earnings over the previous five years up to a maximum of \$150,000. For those workers, the wage loss benefit will be stepped down incrementally over the first five years of the claim, ending at the regular maximum insurable earnings cap of \$120,000, subject to indexing.

RECOMMENDATION 25

Section 46 of *The Workers Compensation Act* should be amended to reinstate a cap for maximum insurable earnings. The amount of this cap should be \$120,000, subject to indexing.

RECOMMENDATION 26

The amount of the maximum assessable earnings cap should be the same as the amount of the maximum insurable earnings cap.

RECOMMENDATION 27

The Workers Compensation Act should be amended to create a special graduated benefit for workers earning more than \$120,000, subject to an ultimate maximum insurable earnings cap of \$150,000. Wage loss benefits will be payable to these workers based on an average of the worker's earnings over the previous five years up to a maximum of \$150,000. The wage loss benefit would be stepped down incrementally over the first five years of the claim, ending at the regular maximum insurable earnings cap of \$120,000, subject to indexing.

Section 2: Deduction of Probable Canada Pension Plan or Quebec Pension Plan Premiums When Calculating Net Average Earnings

A. Background

1. Calculating Net Average Earnings under *The Workers Compensation Act*

As described in Section 1 of this chapter, the Board calculates wage loss benefits based on a percentage of the worker's loss of earning capacity.

Section 40(1) of the Act states that loss of earning capacity is the difference between the worker's net average earnings before the accident and the net average amount the worker is determined to be capable of earning after the accident.

Section 40(3) sets out rules for calculating a worker's net average earnings. Net pre-accident average earnings consist of a worker's average earnings, less probable deductions for income tax, Canada Pension Plan (CPP) or Quebec Pension Plan (QPP) premiums payable by the worker, and employment insurance (EI) premiums payable by the worker.

Section 40(4) requires the Board to establish a schedule or procedure for determining the amount of these probable deductions for various income levels. WCB Policy 44.80.10.40, *Net Average Earnings*, provides guidance on how to determine the appropriate amounts that should be deducted for income tax, CPP/QPP premiums and EI premiums.

Relevant Statutory Provisions

Calculation of loss of earning capacity

40(1) The loss of earning capacity of a worker is the difference between

- (a) the worker's net average earnings before the accident; and
- (b) the net average amount that the board determines the worker is capable of earning after the accident;

which amount shall not be less than zero.

Calculation of net average earnings

40(3) For the purpose of this Act, the net average earnings of a worker are his or her average earnings calculated in accordance with section 45, less the probable deductions for the following: ...

- (b) Canada Pension Plan premiums or Quebec Pension Plan premiums payable by the worker;
- (c) Employment Insurance premiums payable by the worker; and
- (d) such other deductions as the board may establish by regulation.

Table of net average earnings

40(4) The board shall on January 1 in each year, or at such time as the board considers appropriate, establish a schedule or procedure for determining the probable deductions referred to in subsection (3) for various income levels which, for the purpose of that subsection, is final and conclusive.

The Workers Compensation Act, CCSM c W200

2. 2005 Legislative Review Committee Recommendations

During its review, the 2005 Legislative Review Committee made several recommendations on wage loss benefits and how they should be calculated. One of these dealt with the deduction of probable CPP premiums payable by the worker under section 40(3)(b) of the Act.

The 2005 Legislative Review Committee disapproved of deducting CPP premiums from a worker's average earnings because there was no mechanism under the *Canada Pension Plan* for these deductions to be remitted to the plan under federal law. This meant that, in effect, the worker was not contributing to the CPP retirement pension while in receipt of wage loss benefits.

The 2005 Legislative Review Committee reasoned that "because a worker's CPP deductions are not eligible for submission, they should not be deducted from his or her net average earnings," expressing the view that workers should be free to use this amount for their own investment and retirement planning. The committee recommended amending the Act so that a worker's CPP contributions would not be deducted when determining net average earnings (Recommendation 21, page 26 of the *2005 Legislative Review Committee Report*).

The government of the day did not adopt the 2005 Legislative Review Committee's recommendation in this regard.

3. Other Jurisdictions

Nearly all Canadian jurisdictions specify by statute or regulation that pre-accident income is calculated by deducting probable amounts payable for income tax, EI premiums and CPP and/or QPP premiums that would be payable by the worker.

Some Canadian jurisdictions provide for additional deductions. For example, section 63(4) of Quebec's *Act Respecting Industrial Accidents and Occupational Diseases* provides for the deduction of a probable amount payable as a premium under the *Act respecting parental insurance*.

B. What the Committee Heard

During the course of our consultations, the Committee heard from stakeholders arguing against the deduction of probable amounts payable by the worker as CPP premiums when calculating a worker's net average earnings.

These stakeholders noted that federal legislation does not currently allow these amounts to be remitted to the federal government in the form of CPP contributions. Accordingly, workers in

receipt of wage loss benefits are currently being deprived of money that would normally be invested in the CPP for their retirement.

Like the 2005 Legislative Review Committee, these stakeholders suggest that workers should have access to this deducted money and should be encouraged to invest it in their own personal retirement plans. They are in favour of amending the Act so that workers' CPP contributions are not deducted from average earnings in determining the amount of wage loss benefits payable to workers.

C. Recommendations

After review, this Committee believes the Act should continue providing for deduction of probable amounts for CPP or QPP premiums from a worker's average earnings when calculating net average earnings.

In our view, these deductions, like the probable deductions for EI premiums, are notional - they are made for the purpose of arriving at a figure that accurately represents a worker's loss of earning capacity due to a workplace injury or illness. In this sense, deduction of these amounts is consistent with the fundamental principle of paying income replacement benefits based on loss of earning capacity, as described in part (c) of the preamble to the Act.

We also note the uniform practice across Canada of deducting probable CPP and EI premiums when calculating a worker's pre-accident average earnings.

We recognize that deducting probable amounts for CPP or QPP premiums from a worker's average earnings may have the effect of depriving workers of income that would normally be invested in the CPP or QPP for their retirement. The *Canada Pension Plan* contains no mechanism to allow amounts deducted for CPP to be remitted to the federal government. Quebec's *Act Respecting the Quebec Pension Plan* likewise contains no such mechanism in respect of amounts deducted for QPP premiums. It is outside our mandate to recommend changes to federal legislation or the legislation of another province; however, we urge the Government of Manitoba to raise this issue at the appropriate inter-governmental level.

Stakeholder Comments

Ideally, federal legislation would be amended to avoid this situation and allow CPP contributions to continue when a sick or injured worker is receiving WCB wage-loss benefits. For workers suffering very serious injuries or illnesses that require long periods of recovery without work, long breaks in CPP contributions can have a very detrimental impact on future CPP retirement benefits.

[We therefore recommend] [t]hat The WCA be amended so that a worker's CPP contributions are not deducted in determining wage-loss benefits.

- Manitoba Federation of Labour (MFL)

In a perfect world the federal laws would change to allow remittance but unfortunately we are not there. Injured workers should not have a benefit calculated on money they will never receive.

WCB should put in an effort to encourage workers to use the contribution amounts for personal investments while they are on WCB benefits.

- United Food and Commercial Workers Union (UFCW) Local 832

RECOMMENDATION 28

Section 40(3)(b) of *The Workers Compensation Act*, which mandates the deduction of probable amounts for Canada Pension Plan or Quebec Pension Plan premiums when calculating a worker's net average earnings, should remain unchanged.

RECOMMENDATION 29

At the appropriate inter-governmental level, the Government of Manitoba should raise the issue of remitting to the Canada Pension Plan or Quebec Pension Plan probable amounts of premiums deducted from a worker's average earnings under section 40(3)(b) of *The Workers Compensation Act*.

Section 3: Calculating Wage Loss Benefits Based on Loss of Probable Future Earning Capacity

A. Background

Section 2 of this chapter described the method for calculating a worker's wage loss benefit. In almost all cases, these calculations are based on actual, verifiable pre-accident earnings.

In some circumstances, however, a worker's actual pre-accident earnings do not fairly represent his or her loss of future earning potential. In such cases, the Act allows the Board to make adjustments in its calculations to reflect the worker's true loss.

There are three categories of workers for whom adjustments can be made: apprentices, youthful workers, and individuals declared to be workers under sections 77 or 77.1 of the Act.

1. Apprentices and Youthful Workers

Section 45(3) of the Act states that where a worker was an apprentice in a trade at the time of the accident, the Board may adjust the amount of average earnings to reflect the worker's probable earning capacity in the trade or occupation in which he or she was apprenticing. The Board must be satisfied that the worker's actual earnings at the time of the injury do not fairly represent the worker's earning capacity.

Section 45(4) gives the Board similar discretion to adjust the earning capacity of youthful workers if satisfied the worker's average earnings do not fairly represent his or her earning capacity.

WCB Policy 44.80.30.30, *Prospective Earnings - Apprentices and Youthful Workers* (the "Policy") defines a youthful worker as someone who is under 28 years of age at the date of the accident. To be eligible for the adjustment, the youthful worker's wage loss benefits must be paid for a period of 24 months or longer. The wage adjustment cannot exceed the industrial average wage (the "IAW").

Relevant Statutory Provisions

Adjustment of earning capacity

45(3) Where the board is satisfied that a worker's average earnings before the accident do not fairly represent his or her earning capacity because the worker was an apprentice in a trade or occupation, the board may adjust wage loss benefits from time to time by deeming the worker's average earnings to be an amount that, in its opinion, reflects the probable earning capacity of the worker in the trade or occupation.

Adjustment of earning capacity based on age

45(4) Where a worker sustains a long-term loss of earning capacity, and the board is satisfied that because of the worker's age, his or her average earnings before the accident do not fairly represent the worker's earning capacity, the board may adjust wage loss benefits from time to time by deeming the worker's average earnings to be an amount that, in its opinion, reflects the probable earning capacity of the worker, which amount shall not exceed the average of the industrial average wage for each of the 12 months before July 1 in the preceding year.

The Workers Compensation Act, CCSM c W200

The Policy also provides further details on the adjustment of average earnings for both apprentices and youthful workers.

In the case of apprentices, average earnings will initially be calculated on the basis of the training wage/salary and hours the apprentice was earning on the date of the accident. However, the average earnings will be adjusted upward following the first anniversary of the accident, with additional increases for each level of the worker's apprenticeship program.

The Board will continue making this adjustment until it determines that the worker's earnings have reached the prevailing salary or wage of a starting journeyman in the trade or occupation in question. Once that point is reached, there are no further adjustments except for annual indexing under section 40(2) of the Act.

In the case of youthful workers, the adjustments in average earnings calculations are more complicated. Under the Policy, youthful workers are divided into four categories, depending on their age at the date of their accident and the amount they were earning at the time. Different adjustment formulas will apply, based on the worker's circumstances.

2. Declared Workers

Under sections 77 and 77.1 of the Act and the *Declaration of Workers in Government Employment Orders* regulation, certain other individuals are declared to be workers under the Act. These include students enrolled in specific training programs, volunteers, or persons enrolled in other work experience programs. If these individuals sustain workplace injuries or illnesses, they are entitled to wage loss benefits regardless of whether they were in paid employment.

For the purpose of determining the amount of wage loss benefits payable to these workers, average earnings are calculated differently than in the case of apprentices or youthful workers (see sections 77(3) and 77(3.1) of the Act and WCB Policy 44.80.30.35, *Declared Workers -- Long-Term Loss of Earning Capacity*). For declared workers, average earnings will be their actual earnings or 50% of the IAW, whichever is greater. After 24 months (or in the case of a fatality), average earnings for declared workers will be the worker's actual earnings or 100% of the IAW, whichever is greater.

3. Loss of Probable Earning Capacity under the Current Act

Sections 45(3), 45(4), 77 and 77.1 of the Act appear to be designed to assist individuals who are low income earners at the time of their accidents, enabling them to receive compensation that better reflects their employment path before they were injured.

WCB policies place limits on both the duration and amounts of adjustments under these sections of the Act. In order to benefit from these statutory wage adjustments, a worker must be an apprentice, a youthful worker, or be enrolled in a training or work experience program as part of their education. An injured worker who does not fall into one of these three categories will receive wage loss based on actual pre-accident earnings, regardless of whether they are engaged in retraining or further education at the time of the accident.

4. Other Jurisdictions

Workers compensation statutes in most Canadian jurisdictions specifically require adjustments in average earnings for apprentices when the board or commission is satisfied that the worker's actual average earnings do not fairly represent his or her future earning capacity. Adjustments are typically only made until the worker's average earnings represent those of a fully qualified member starting out in the trade in question.

Fewer jurisdictions specifically mandate adjustments in compensation for young workers. New Brunswick and British Columbia make such provisions; however, the age limits to qualify as young workers for this purpose are lower than in Manitoba (the age limit is 21 in New Brunswick and 25 in British Columbia).

In its recent review of Alberta's *Workers' Compensation Act*, the Alberta Review Panel recommended amending Alberta's Act to allow for compensation for workers under age 25 to be adjusted upward if they have an impairment rating of at least 50% after 24 months of temporary disability, or if they are permanently disabled. (see Recommendation 38, page 99 of the *Alberta Review Panel Report*).

Most jurisdictions allow for adjustments in compensation in respect of students or learners who are enrolled in a work experience program or on the job training. These workers generally receive wage loss benefits that are calculated in relation to the IAW or similar marker.

As is the case in Manitoba, most jurisdictions do not make special adjustments to a student's average earnings if he or she is not enrolled in an education-related work experience program or its equivalent at the time of the accident.

Three Canadian jurisdictions provide more generous compensation to students who are injured while working. Workers compensation legislation in Quebec, Ontario and British Columbia allows for adjustments in average earnings for students who are injured while working but are not necessarily enrolled in a work experience program.

To qualify for average earning adjustments, the board or commission must be satisfied that the workers' earnings at the time of the accident do not reflect their future probable earning capacity (see section 80 of Quebec's Act, section 53(4) of Ontario's Act and section 33.4 of British Columbia's Act). In these circumstances, the workers' average earnings are not calculated on the basis of verifiable pre-accident earnings, but instead on a notional amount for probable future earning capacity.

In Quebec, section 80 of the statute provides that where a worker is a full-time student at the time of his or her accident, he or she shall receive an income replacement indemnity equivalent to \$50 per week until 18 years of age. From ages 18 to 21, an income replacement indemnity is based on the minimum wage then in force. For students aged 21 or older, the indemnity is revised upwards if the Commission is satisfied the student could have earned more at the end of their studies were it not for the workplace injury.

Under section 53(4) of Ontario's Act and Workplace Safety and Insurance Board (WSIB) Policy 18-06-08, *Determining Average Earnings-Exceptional Cases*, if a student is unable to complete his or her education as a result of a workplace injury, average earnings are recalculated at the time the worker would have completed his or her education. In these circumstances, wage loss benefits are adjusted to reflect the earnings of the job in which the worker would likely have been employed if he or she had not been injured.

Ontario WSIB Policy 18-04-10, *Calculating FEL for Students, Learners and Apprentices* provides that if no clear career goal has been established, wage loss benefits will be based on the average industrial wage for Ontario for the year in which the injury occurred. That figure may be adjusted upward if the board is satisfied that the worker may have been likely to earn more than the average industrial wage when in regular full-time work.

Under WorkSafeBC's *Rehabilitation Services and Claims Manual, Volume II*, Policy Item #67.60, *Exceptional Circumstances*, the board may in some circumstances determine an injured student's long-term average earnings with reference to the class average of a qualified person in an occupation directly related to the worker's field of study.

D. What the Committee Heard

During the course of our consultations, the Committee heard suggestions that the WCB should be authorized to adjust the average earnings amount for any worker engaged in education or training upgrading at the time of the workplace injury, and who is prevented from completing his or her academic program. In their view, these workers' wage loss benefits should reflect their probable future earning capacity.

These stakeholders point to many situations in which an injured worker's actual earnings do not fairly represent their probable earning capacity. Adjustments in average earnings should therefore not be limited to apprentices, youthful workers and declared workers.

Some stakeholders assert that the current provisions unfairly discriminate against women, who are less likely to enter the

Stakeholder Comments

At present the WCB severely restricts the ability of the WCB to recognize the probable future earning potential for workers -- only where the worker is in a registered apprenticeship program, or when the worker is under 28 years old.

- Canadian Union of Provincial Employees (CUPE) Manitoba

We feel it is important to note that this practice may have a discriminatory impact on women in Manitoba. We note that at the University of Manitoba 59% of students age 28 and older are women. By comparison women make up just over 11% of active apprentices in Manitoba. Whether intended or not, the current practice of the WCB is designed to compensate workers who chose education/training that is male dominated (apprenticeship programs), while failing to compensate workers who choose education/training that is predominately female (university education). For the sake of basic fairness, and gender equity, this should be addressed.

- Canadian Union of Public Employees (CUPE) Manitoba

trades and therefore less likely to qualify for the adjustments in compensation available to apprentices. Some also suggest that the current system discriminates against older workers who are engaged in retraining because they do not fall within the category of "youthful worker."

E. Recommendations

The Committee recognizes the inequity in a system that appears to arbitrarily distinguish between different categories of workers based on their educational status. It is untenable to treat a worker engaged in retraining differently simply because he or she is not enrolled in a work placement or apprenticeship.

We also agree with some stakeholders that the Board's current practice of adjusting the average earnings for apprentices and youthful workers, while not discriminatory, may have a disproportionate impact on women and on older workers engaged in educational upgrading. This argument recognizes that a larger proportion of men than women pursue the trades and are therefore engaged as apprentices. It also reflects the growing trend of older workers seeking educational upgrades.

We acknowledge the difficulties inherent in attempting to predict an injured or ill worker's career trajectory. In some circumstances, the injured worker's career path will be clear based on his or her educational or training program. In many cases, however, the worker's career path will be much more speculative and difficult to determine, leading to challenges in the adjudication of claims and a larger number of appeals.

For these reasons, we believe this issue lends itself to a policy solution in which appropriate, well-defined, criteria are established to adjust wage loss benefits for certain workers who are not declared workers, apprentices or youthful workers under the Act. We encourage the WCB Board of Directors to review this issue promptly and develop an appropriate policy response.

RECOMMENDATION 30

The Workers Compensation Board should consider the appropriate policy response to allow payment of wage loss benefits based on probable future earning capacity to workers enrolled in education or retraining at the time of the workplace accident. This adjustment should be available only when The Workers Compensation Board is satisfied that the worker's pre-accident earnings do not represent his or her future earning potential.

Selected Comments from Stakeholders (con't)

Unfortunately, older workers who are injured while engaged in an academic program at a university or any worker upgrading their skills at a community college in a trade without an apprenticeship program, are not compensated for the higher earning capacity they were working to achieve.

- Manitoba Government and General Employees' Union (MGEU)

Section 4: Access to Workplace Benefit Programs While in Receipt of WCB Benefits

A. Background

Many workers have access to comprehensive benefits packages offered by their employers. These packages generally include pension, life insurance and extended health care benefits. Some employers pay all the premiums associated with these benefit plans. In other cases, both the employer and the worker contribute to the cost of the plans.

Some employment contracts or collective agreements allow injured workers continued access to these workplace benefit plans while in receipt of WCB benefits.

There is no statutory requirement in the Act compelling employers to provide workers with access to workplace benefits while in receipt of workers compensation or for employers to continue paying premiums associated with these benefits. There may therefore be circumstances in which workers lose access to their workplace benefits while in receipt of workers compensation.

In certain limited circumstances, the workers compensation system does provide for some aspects of a workplace benefit program.

Section 42 of the Act, for example, requires the WCB to establish a retirement annuity for workers in receipt of wage loss benefits for more than 24 months. Section 43(5) requires the WCB to establish a group life insurance plan for workers receiving wage loss benefits for more than 24 months.

The WCB retirement annuity and group life insurance plan may serve as substitutes for employer-based pension and life insurance benefits that are no longer available to injured workers.

However, they are only available to workers who experience a long term loss of earning capacity.

While section 43(2)(a) of the Act gives the Board authority to establish an extended health care

Relevant Statutory Provisions

Group benefit plans and programs

43(1) The board may by regulation establish benefit programs or enter into contracts of group insurance that are general in application or restricted to a specific group, as the board considers appropriate, for

- (a) workers who are in receipt of wage loss benefits under this Part for more than 24 months;
- (b) dependants of workers described in clause (a); or
- (c) dependants of deceased workers who are in receipt of monthly payments under section 29.

Types of benefit programs

43(2) A benefit program or group insurance plan established under subsection (1) may include

- (a) extended health care plans;
- (b) accidental death and dismemberment plans; or
- (c) such other benefit plans as the board considers advisable or necessary.

The Workers Compensation Act, CCSM c W200

plan for workers who have been in receipt of wage loss benefits for more than 24 months, the Board has not established such a plan.

Injured workers continue to be entitled to medical aid under section 27 of the Act, which could include prescription drugs, vision care or dental care when such care is related to the compensable injury. The WCB does not cover the costs of these items when they are not related to the workplace injury or illness.

1. Other Jurisdictions

Ontario and Quebec are the only Canadian jurisdictions where employers are required to continue providing workplace benefits to workers who are also in receipt of workers compensation wage loss benefits.

In both jurisdictions, two conditions must be met for this requirement to apply: 1) the employer must have been making contributions towards employer-based benefits for the worker when the injury occurred; 2) the worker must continue to make his or her contributions, if any, towards the employer-based benefit plan while away from work.

In other words, if the employer was not offering workplace benefits before the accident, it is not obligated to do so after the accident. Likewise, if the worker and the employer are both required to contribute to the cost of premiums, the worker must continue paying while absent from the workplace.

There is also a time restriction on the employer's obligation. Under section 25(1) of Ontario's Act, for example, employers are only required to make contributions towards workplace benefits for one year following the accident.

Other Jurisdictions

Employment benefits

25(1) Throughout the first year after a worker is injured, the employer shall make contributions for employment benefits in respect of the worker when the worker is absent from work because of the injury. However, the contributions are required only if,

- (a) the employer was making contributions for employment benefits in respect of the worker when the injury occurred; and
- (b) the worker continues to pay his or her contributions, if any, for the employment benefits while the worker is absent from work.

Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A

235 A worker who is absent from work as a result of an employment injury

- (1) continues to accumulate seniority within the meaning of the collective agreement that is applicable to him, and uninterrupted service within the meaning of the agreement and the Act respecting labour standards (chapter N-1.1);
- (2) continues to come under the retirement and insurance plans offered in the establishment, provided he pays his share of the eligible assessment, if any, in which case his employer shall assume his own share.

This section applies to the worker until the expiry of the time limit prescribed in subparagraph 1 or 2 of the first paragraph, as the case may be, of section 240.

An Act Respecting Industrial Accidents and Occupational Diseases, CQLR c A-3.001

If an Ontario employer fails to live up to these obligations, it becomes liable for any loss suffered by the worker as a result. Ontario's board may also levy an administrative penalty against the employer not exceeding the one year's worth of employer contributions.

In Quebec, failure to comply with these obligations is an offence punishable by a fine.

Ontario Workplace Safety and Insurance Board (WSIB) Policy 18-01-12, *Employer Contribution to Worker Benefits*, provides further details on the employer's obligation to contribute to benefit plans for injured workers.

According to this policy, employers may be obligated to contribute to extended health care benefits, life insurance and pension benefit plans. Employers are not required to contribute to employment insurance (EI) or Canada Pension Plan (CPP).

During its recent review of Alberta's *Workers' Compensation Act*, Alberta's Legislative Review Panel recommended that Alberta's Act be amended to impose a similar obligation on employers, but only in respect of workplace extended health care benefits. The Panel recommended that the employer's responsibility to continue contributing to extended health care benefits be subject to certain conditions and time limitations.

In no other Canadian jurisdiction are employers required by statute to contribute to employment-based benefit packages while a worker is receiving workers compensation.

Likewise, while most Canadian workers compensation statutes provide for a retirement annuity in some circumstances, none currently require the board or commission to establish extended health benefit plans for injured workers.

B. What the Committee Heard

During the course of our consultations, several stakeholders raised the problem of

Other Jurisdictions (con't)

240 The rights conferred by sections 236 to 239 may be exercised

(1) within one year following the beginning of the period of continuous absence of the worker as a result of an employment injury if he held employment in an establishment numbering twenty workers or fewer at the beginning of the period; or

(2) within two years following the beginning of the period of continuous absence of the worker as a result of an employment injury if he held employment in an establishment numbering more than 20 workers at the beginning of the period.

An Act Respecting Industrial Accidents and Occupational Diseases, CQLR c A-3.001

Stakeholder Comments

Generally when a workplace injury occurs that is the time employee benefits are the most needed. Without benefits this leaves the worker in an even more vulnerable position. The more negative factors that can be removed from the rehabilitation process the more likely the worker is to RTW [return to work].

- United Food and Commercial Workers Union (UFCW) Local 832

injured workers losing access to workplace benefits while in receipt of workers compensation wage loss. The loss of extended health care benefits was of particular concern.

Stakeholders noted that workers who lose access to such benefits must self-insure, paying extra premiums for coverage at a time when they can least afford it.

C. Recommendations

The Committee does not believe employers should be required by statute to continue providing workplace benefits to injured workers who are in receipt of WCB benefits. Nor do we recommend that the WCB make a regulation establishing extended health care or other workplace benefit plans for injured workers.

While mindful of the importance of workplace benefits as part of a worker's overall compensation package, we consider this to be an employment law issue best determined by employment contracts or collective agreements. In our view, any statutory requirement to pay workplace benefits while in receipt of workers compensation benefits would be an unreasonable interference with the parties' freedom of contract.

We also note that many collective agreements do, in fact, contain terms that require employers to provide their employees with access to workplace benefits while they are in receipt of WCB benefits.

RECOMMENDATION 31

The Workers Compensation Act should not be amended to compel employers to provide their workers with access to employer-based benefits, such as pension, life insurance or extended health care benefits, while their workers are in receipt of benefits under *The Workers Compensation Act*.

Stakeholder Comments (con't)

The continuation of workplace benefits must be added to the WCA. All injured workers should have their employers continue their premium contributions for workplace health benefit programs while receiving WCB benefits. Due to no fault of their own, injured workers should not be penalized and lose their workplace health insurance benefits while receiving WCB benefits.

- UNIFOR

... [Employer-based] benefits may not be available to workers when they're receiving WCB benefits and are most in need, as there is currently no requirement for employer to continue their premium contributions while a worker is off work due to illness or injury. In Ontario, WCB legislation mandates the continuation of premium payments by employers. There is provision in the WCB currently for the WCB to establish benefit programs for injured workers who have been receiving wage loss benefits for more than two years, but no protection exists for the majority of injured workers who receive WCB benefits for short periods of time.

- Manitoba Federation of Labour (MFL)

Section 5: Provision of Medical Aid

A. Background

1. Definition of Medical Aid and Provision of Medical Aid under Section 27 of *The Workers Compensation Act*

Section 27(1) of the Act authorizes the WCB to provide a worker with "such medical aid as the board considers necessary to cure and provide relief from an injury resulting from an accident." Under this section, the Board has broad jurisdiction to determine what medical aid may be necessary for an injured worker, who should provide medical aid and the best method(s) for doing so.

Section 1(1) of the Act defines medical aid to include:

- transportation to a hospital or other place where medical care can be given;
- services provided by a hospital or other health care facility;
- diagnostic services;
- drugs, medical supplies, orthotics and prosthetics; and
- any other goods and services authorized by the Board.

While the definition contains some specific examples, it is broad in scope.

Section 27 of the Act contains diverse subsections and can be challenging to interpret, as it has been subject to frequent amendments over the years to reflect changes in the health care and rehabilitation environment.

The subsections of section 27 serve a variety of purposes. These include specific provisions about the types of medical aid to be provided, the Board's supervisory authority over medical aid, and the mechanics of delivering medical aid.

2. WCB Policies in Relation to Medical Aid

In addition to the various subsections of section 27, the Board has several policies in place to guide WCB employees in the payment of medical aid benefits. WCB policies that provide guidance in this regard include: WCB Policy 44.120.10, *Medical Aid*; WCB Policy 44.120.30, *Support for Daily Living*; WCB Policy 44.120.30, *Opioid Medication*; and WCB Policy 43.00, *Vocational Rehabilitation*.

3. 2005 Legislative Review Committee Recommendations

In its report, the 2005 Legislative Review Committee made several recommendations in respect of the Act's medical aid provisions. In particular, it recommended that the language referring to specific health care providers, such as doctors, nurses, and physicians, be broadened to refer more generically to "health care providers" (See Recommendation 82, page 68 of the *2005 Legislative*

Review Committee Report). It also recommended the repeal of obsolete terms and the extension of the definition of physician to include all practising physicians in Canada, not only those licensed in Manitoba (See Recommendations 83 to 85, pages 68-69 of the *2005 Legislative Review Committee Report*).

The 2005 Legislative Review Committee's recommendations in respect of medical aid were implemented through the Bill 25 amendments to the Act.

4. Other Jurisdictions

All Canadian workers compensation statutes provide for the payment of medical aid benefits.

The medical aid provisions found in workers compensation statutes are similar across Canada. As in Manitoba, the statutory definitions in other jurisdictions provide specific examples of medical aid but are also broad enough to include unspecified treatments.

B. What the Committee Heard

This Committee heard from some stakeholders suggesting that section 27 of the Act provides the Board and treating physicians with too much leeway in determining the type of medical aid provided to workers.

These stakeholders identified several limitations that could be placed on the provision of medical aid. For example, some argued for a limited number of compensable health care appointments unless the treatment resulted in clear benefits and improvements.

Other stakeholders take a different view, expressing concern over the wording of section 27(1) of the Act, which allows the Board to provide a worker with such medical aid as it considers

Stakeholder Comments

...[T]he Board needs to prescribe what medical it will provide and limit treatments to ensure that treatments are working to cure or provide relief to a worker. ... The WCB adopts a one-size fits all approach in approving the payment of medical treatment.

- Manitoba Hydro

...[T]he MGEU has seen instances where our members have been denied benefits based on an overly-strict interpretation of the Act.

To ensure injured workers have access to the broadest of medical aid options, the MGEU recommends that subsection 27(1) of the Act be amended to include whatever medical services and supplies that are necessary to diagnose, provide relief, or cure a compensable injury.

- Manitoba Government and General Employees' Union (MGEU)

... This important section [section 27] 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

- The Workers Compensation Board of Manitoba (WCB)

necessary "to cure **and** provide relief from an injury resulting from an accident."(emphasis added)

These stakeholders acknowledge that the WCB has generally provided medical aid where such aid would provide "cure **or** relief" (emphasis added), and/or enhance a worker's recovery. But they assert that, in rare cases, the WCB has employed a more stringent standard, refusing to provide medical aid unless the treatment or services in question provide both cure and relief.

These stakeholders argue in favour of amending the wording of section 27(1) of the Act to ensure the WCB will continue to approve medical aid even if the treatment or assistance offered to the injured worker is not curative.

The WCB Administration also commented on section 27, suggesting it would benefit from modernization and reorganization. It also raised specific concerns about certain provisions such as subsection 27(6), which authorizes the denial of benefits if a deceased worker's dependants do not consent to an autopsy. The WCB Administration questions whether this section may contravene human rights legislation in certain circumstances.

C. Recommendations

After reviewing the Act's medical aid provisions and the stakeholder comments, the Committee concludes that section 27 of the Act should be amended to make it more intelligible, more transparent, and easier to apply.

In addition to a general review and re-drafting of section 27, we make two specific recommendations. First, we agree that section 27(1) of the Act does not clearly authorize the Board to provide medical aid as necessary to either cure or provide relief from a workplace injury. The current language could be interpreted as requiring treatment that both cures and provides relief, which in our view would be an unnecessarily restrictive application of the section. We recommend the wording of section 27(1) be amended to ensure that the Board will continue to provide medical aid to ill or injured workers in circumstances where it considers it necessary to **cure or provide relief** to such workers.

In addition, we concur with the WCB Administration that section 27(6) of the Act may raise human rights concerns in circumstances where, for example, dependants refuse consent to an autopsy for religious reasons. Section 27(6) of the Act should accordingly be repealed.

RECOMMENDATION 32

Section 27 of *The Workers Compensation Act*, the provision dealing with medical aid, should be amended to make it more intelligible, more transparent and easier to apply. More specifically, it should be amended to:

- give The Workers Compensation Board the necessary flexibility to respond to workers' needs within the context of a modern health care and rehabilitation framework; and
- clarify that The Workers Compensation Board has the authority to provide medical aid to ill or injured workers where it considers such aid necessary to cure or provide relief to such workers.

RECOMMENDATION 33

Section 27(6) of *The Workers Compensation Act*, which authorizes the denial of benefits if a deceased worker's dependants do not consent to an autopsy, should be repealed.

Section 6: Fees for Committeeship and the Public Trustee

A. Background

1. What Is Committeeship?

Workplace injuries may affect a worker's ability to make decisions regarding his or her own affairs. When an injured worker has not made prior arrangements regarding the management of affairs in the event of a loss of mental capacity (such as by executing an enduring power of attorney), the courts may appoint a committee for that purpose.

The Mental Health Act and the *Court of Queen's Bench Rules* provide for an application to the Manitoba Court of Queen's Bench to obtain an order of committeeship. This order gives the applicant the right to make decisions on behalf of an individual who no longer has the necessary capacity.

In most cases, the person applying for the order of committeeship will be a close family member or friend of the individual concerned. However, if there is no one willing or able to undertake the role of substitute decision maker on behalf the individual, or when a neutral party is preferable, the Public Guardian and Trustee may be appointed to make decisions on the individual's behalf. The order for committeeship may relate solely to the individual's financial affairs (a committee of property) or it may relate to both financial and personal affairs, including health care (a committee of property and personal care).

In the case of injured workers for whom a committee or substitute decision maker has already been appointed, section 24(3.1) of the Act clearly allows benefits to be paid to his or her committee or substitute decision maker as the case may be.

The Act is less clear on the reimbursement of legal and administrative fees associated with obtaining and maintaining an order of

What is a Committee?

A committee is a person (or persons) including The Public Guardian and Trustee (PGT) appointed by The Court of Queen's Bench or through the provisions of *The Mental Health Act* to make decisions for a person who has been found to be mentally incapable of making his/her own financial affairs. The PGT is appointed only as a last resort where there is no one else willing, able or suitable to act.

- The Public Guardian and Trustee,
Committeeship: A Guidebook for Court Appointed Committees (October 2014)

Relevant Statutory Provisions

Payments to committee or substitute decision maker

24(3.1) Where a worker or dependant who is entitled to benefits under this Part has a committee appointed under *The Mental Health Act* or has a substitute decision maker for property appointed under *The Vulnerable Persons Living with a Mental Disability Act* who has the power to receive payments on behalf of the person, the board shall pay the benefits to the committee or substitute decision maker, as the case may be.

The Workers Compensation Act, CCSM c W200

committeeship. Both applying for and continuing an order of committeeship can be legally complex and expensive, requiring the applicant to retain the services of legal counsel. Committees, for example, must prepare and file an inventory of the subject's assets and liabilities with the court when they initially apply. They must also periodically return to court to provide an accounting of how they have dealt with the subject's assets.

2. Section 27 of the Act and the WCB's *Support for Daily Living Policy*

The WCB has received requests to pay the legal fees and other expenses associated with applying for and maintaining an order of committeeship. It considers these requests under section 27 of the Act, which deals with medical aid. Section 27(1) gives the Board wide latitude in determining the circumstances in which it will provide such aid, stating that the Board may provide workers with "such medical aid as the board considers necessary to cure and provide relief from an injury resulting from an accident".

Under section 27(20) of the Act, the Board may provide the worker with assistance to reduce or remove the effect of a handicap resulting from an injury, or to perform the activities of daily living.

The Board also has a policy in place to help guide WCB employees when exercising discretion under the Act to pay for certain types of medical aid. WCB Policy 44.120.30, *Support for Daily Living* (the "Policy") outlines the general criteria applicable when the WCB is asked to decide on requests for assistance to help workers engage in their daily lives.

The Policy does not specifically identify the costs of committeeship as a reimbursable expense. However, the policy does state that decisions about the level and duration of assistance must be made on a case-by-case basis. It also explains that "in exceptional circumstances the WCB may provide assistance beyond what is outlined in this policy" and provides examples of such exceptional circumstances, including where a worker has suffered a "significant brain injury" or "serious mental health difficulties".

3. Interpretation of Section 27 of the Act and the WCB's *Support for Daily Living Policy*

The WCB's approach to this issue has not been consistent over the years, although it now takes the position that it will reimburse for legal fees associated with committeeship and for administrative fees charged by the Public Guardian and Trustee. The WCB considers that the current wording of the Act and Policy are sufficiently broad to allow for reimbursement of these costs.

The Appeal Commission had occasion to comment on this issue in Decision 96/16, dated June 23, 2016. It determined that the WCB should compensate a committee for legal fees associated with preparing and presenting annual statements of account to the court.

The Appeal Commission confirmed there is nothing in either section 27(1) or 27(20) of the Act or in the Policy to preclude the payment of such fees. It went on to state:

The panel recognizes that for the payment of legal fees to be authorized, legal fees must be incurred for a purpose consistent with the purpose of the Act. In this case the action, Passing of Accounts, is required so the family of a severely injured worker can legally access the wage loss benefits which the board is paying to his estate. In the panel's view, this is a legal hurdle with associated legal costs that the family must undertake that is specifically caused by the seriousness of the worker's cognitive disability that resulted from the compensable injury. The cost of this process would not typically be borne by other injured workers.

4. Other Jurisdictions

No other Canadian workers compensation statute explicitly permits the reimbursement of fees associated with committee work. However, some jurisdictions have addressed this issue in policy.

For example, Policy Item #49.30 of British Columbia's *Rehabilitation Services and Claims Manual, Volume II*, provides for the payment of fees charged to a worker by the Public Guardian and Trustee or committee for managing the worker's estate in some circumstances.

WorkSafe New Brunswick's Policy No. 25-014, entitled *Medical Aid Decisions*, states that "in cases where return to work is impossible or unlikely, medical aid may be appropriate to increase function related to the activities of daily living." Activities of daily living" are, in turn, defined to include "personal care, mobility in and around the home, communication, and management of personal affairs".

B. What the Committee Heard

Some stakeholders raised concerns about previous WCB decisions denying reimbursement for fees associated with committee work. They requested either that the Act be amended to specifically allow for the payment of such fees, or that the existing policies be interpreted consistently to allow for this.

C. Recommendations

The Committee considers it prudent to adjust the WCB's *Support for Daily Living* policy to clarify that the Board will pay the fees associated with committee work and administration by the Public Guardian and Trustee. We do not believe that a legislative amendment is required in this case, as the Board's powers under section

Stakeholder Comments

The court requires that the committee periodically demonstrate that the worker's affairs are well managed. This process is complex and requires legal representation, which can involve costs that are burdensome on the finances of the worker. In the past, the WCB covered the legal expenses incurred by a worker as a direct result of their compensable injuries, but now maintains that it has no legislative authority to do so.

- Manitoba Federation of Labour (MFL)

27(1) of the Act are sufficiently broad to permit reimbursement of such fees. We also recognize that, for the last two years, the Board has been paying these fees.

However, we are also aware that the Board's practice in this regard has been inconsistent over the years, and that the Policy is currently silent on this issue. In light of these factors, we believe it would be helpful to specify, in the Policy, that these fees should be paid in appropriate circumstances.

RECOMMENDATION 34

The Workers Compensation Board should adjust its *Support for Daily Living* policy to clarify that it will pay reasonable fees related to committee work and administration by the Public Guardian and Trustee in appropriate circumstances.

Section 7: The Group Life Insurance Benefit

A. Background

1. The Group Life Insurance Benefit and *Group Life Insurance Regulation*

Since 1992, section 43(5) of *The Workers Compensation Act* has mandated a group life insurance plan for workers receiving wage loss benefits for more than 24 months. Section 43(6) provides that the cost of the group life insurance plan cannot exceed 5% of future wage loss benefits payable to the workers in the group life insurance plan.

The *Group Life Insurance Regulation* sets out additional criteria of eligibility for the group life insurance benefit. To be eligible, a worker must:

- have been injured on or after January 1, 1992; and
- have received wage loss benefits for 24 months or more; and
- be receiving wage loss benefits on the date of death, or die within 90 days after receiving his or her last wage loss benefit.

The regulation prescribes the formula for calculating the benefit, which varies according to whether the deceased worker is survived by dependants. It also confirms that the benefit is payable to the estate of an eligible worker, regardless of the cause of death.

The WCB has reviewed the regulation twice since 1992, both times focusing on whether it was appropriate to permit benefit "stacking" of life insurance and other fatality benefits. Stacking occurs when an insured person or the person's estate recovers under multiple policies or plans for the same loss. In the case of a deceased worker, for example, the worker's estate may receive both lump sum fatality benefits and group life insurance benefits under the Act, CPP survivor benefits, and payments under an employer-sponsored or other private life insurance policy.

The law recognizes a general presumption against double recovery. The integration, or off-setting, of benefits is a routine administrative feature of insurance companies and federal and provincial insurance programs. The Act's treatment of collateral benefits is an example of integration of benefits. Section 41 of the Act specifies that any periodic benefit the worker is entitled to receive under the Canada Pension Plan, the Quebec Pension Plan, the *Employment Insurance Act*, and a policy of disability insurance shall be deducted from the WCB wage loss benefit where the combined amounts would provide compensation in excess of 100% of the worker's actual loss of earning capacity.

On past review, however, the WCB Administration has concluded that the drafters of the 1992 legislation intended the group life insurance benefit to be treated differently from other benefits and contemplated the possibility of stacking in this context.

2. Other Jurisdictions

Manitoba is the only Canadian jurisdiction to provide a life insurance benefit to the estate of injured workers.

Benefit integration, particularly in respect of CPP benefits, is a common feature of nearly all Canadian jurisdictions, although there is great variety in approach.

B. What the Committee Heard

During the course of our consultations, we heard from three self-insured employers suggesting modifications to the group life insurance benefit. In their view, stacking the life insurance benefit with employer-sponsored life insurance leads to double recovery and is inconsistent with the Act's general stance on the deduction of collateral benefits. These

stakeholders recognized the value of a group life insurance benefit for workers who do not have access to an employer-sponsored life insurance plan, but suggested that the provision be repealed for all others.

Stakeholder Comments

Manitoba Regulation 187/2005 potentially allows for the stacking of group life insurance benefits which we believe is inconsistent with the board's stance on collateral benefits.

- VIA Rail Canada

C. Recommendations

The Committee recommends that the Act and the *Group Life Insurance Regulation* be amended in respect of the group life insurance benefit. As some stakeholders commented, providing this benefit to workers who have access to employment-based life insurance plans can lead to double recovery. The Committee views such double recovery as inconsistent with the Meredith Principles and with the approach taken by the WCB towards collateral benefits under section 41 of the Act.

We recognize, however, that workers who do not have access to employment-based life insurance might be placed at a disadvantage if the statutory benefit were discontinued entirely. Due to the nature and severity of their injuries, these workers may be precluded from seeking future employment with employers who offer such benefits. Their injuries may also make the purchase of private life insurance cost prohibitive. For these reasons, it is appropriate for the WCB to continue providing life insurance benefits in respect of workers who do not have access to employment-based life insurance plans if the worker was in receipt of wage loss benefits for more than 24 months.

As a Committee, we also do not believe that any worker should be disadvantaged in respect of workers compensation simply because they are employed in a workplace that offers benefits such as group life insurance.

In consideration of all of these factors, we recommend the following approach:

- Eligibility for the full group life insurance benefit under the Act should be limited to workers who do not have access to an employment-based life insurance plan;
- The estates of workers with access to an employment-based life insurance plan should be entitled to a top-up from the WCB if the amount of insurance available through the employment-based plan is less than the amount that would be available under the Act in respect of that worker; and
- Workers with access to an employment-based life insurance plan should be eligible for a group life insurance benefit under the Act if they become eligible before the Act is amended to give effect to Recommendation 35.

RECOMMENDATION 35

Section 43(5) of *The Workers Compensation Act* and the *Group Life Insurance Regulation* should be amended to provide that:

- Eligibility for the full group life insurance benefit under the Act should be limited to workers who do not have access to an employment-based life insurance plan;
- A worker with access to an employment-based life insurance plan is not eligible for the full group life insurance benefit under the Act unless he or she becomes eligible before the Act is amended to give effect to this Recommendation; and
- If the amount available under the Act exceeds the amount available under an employment-sponsored plan, The Workers Compensation Board should top up the benefit to the amount that would have been available under the Act in respect of that worker.

Section 8: Assignment of WCB Benefits to Correct Overpayments

A. Background

1. Garnishment and Assignment of Workers Compensation Benefits under Sections 23(1) and 23(3) of the Act

Section 23 of the Act deals with both the garnishment and assignment of workers compensation benefits. Garnishment is a legal process by which a creditor (the garnishor) can collect money owed to him or her by a debtor through attachment of money owed to the debtor by a third party (the garnishee). Garnishment can only be accomplished by means of a court order and, in most circumstances, a creditor must have obtained a judgment against the debtor before a garnishment order will be issued. Wages that an employer owes to a debtor are the most usual source of garnished funds.

Assignment is slightly different. It is a legal process by which one party voluntarily transfers all or part of his or her property to another party. An example would be a situation in which a worker who owes money to a provincial government agency signs an agreement allowing his or her employer to directly transfer a portion of his or her wages to the government agency, without that money ever coming into the hands of the worker. Assignment essentially accomplishes the same thing as a garnishment order, except there is no need for a judgment or court order.

Section 23(1) provides that wage loss benefits payable to workers or their dependents under the Act are deemed to be wages under *The Garnishment Act* and are to be treated as such for the purpose of provincial garnishment orders. This means that a creditor may obtain a garnishment order against an injured worker allowing it to garnish the worker's wage loss benefits. The garnishment of wage loss benefits is subject to the same restrictions as apply to the garnishment of wages under *The Garnishment Act*.

With the exception of wage loss benefits, section 23(3) of the Act prohibits the garnishment of any other type of benefit or compensation payable under the Act except in specific circumstances arising under federal legislation. Section 23(3) further specifies that wage loss benefits and other compensation payable under the Act are exempt from seizure, attachment, execution or assignment.

In summary, under the current version of the Act, garnishment is allowed only in respect of wage loss benefits in accordance with rules outlined in *The Garnishment Act*, unless federal legislation applies. Assignment of benefits is not allowed under any circumstances.

2. The Purpose of Assignment of Benefits

Assignment of benefits may be useful in cases where an injured worker is receiving benefits from two sources at the same time, and those benefits are designed to be set-off against one another. To

illustrate, there are times when a private disability insurance plan will start paying an injured worker benefits before the WCB has accepted the worker's claim. If the WCB subsequently accepts the claim for wage loss, the private disability insurance provider may determine that it has overpaid the worker during the intervening time.

Under the current statutory framework, the private disability insurer in this example must attempt to get the overpayment back directly from the worker. This could involve obtaining a judgment and applying to court for a garnishment order of the worker's wage loss benefits. This is a much more expensive and time consuming process than would be necessary if the Act allowed for assignment of benefits.

3. Other Jurisdictions

Most Canadian workers compensation statutes allow for assignment of compensation payable, subject to approval of the board or commission that administers the program. The Northwest Territories and Nunavut's legislation further requires the written approval of their workers compensation commission. The authority to approve assignments is used very sparingly in all jurisdictions.

British Columbia is the only other Canadian jurisdiction to prohibit the assignment of benefits outright. In British Columbia, set-off of benefits is allowed but only in respect of the provincial and municipal governments and the board itself.

B. What the Committee Heard

During the course of our consultations, one stakeholder commented on the challenges private disability insurance providers face in attempting to recover overpayments made to injured workers. This stakeholder recognized that section 23(1) of the Act allows recovery of amounts owing through garnishment of the injured worker's wage loss benefits. However, it noted that garnishment efforts were restricted to wage loss benefits and were subject to the limits set out in *The Garnishment Act*. It also expressed concern that collection

Stakeholder Comments

HEB members are required to keep HEB informed of the status of their wage loss benefits, however, timely information is not always forthcoming. When HEB identifies an overpayment, it requests repayment from the member. Thirty percent of its members voluntarily provide repayment. Seventy percent require collection efforts. If a judgment is obtained, enforcement is often frustrated both by an absence of assets against which to enforce and the limited ability to recover against wage loss benefits which is presently limited by section 23 of the WC Act to the amounts permitted by the Garnishment Act.

In many circumstances, the member subject to collection efforts may have experienced financial hardship as a result of illness or injury and the added stress caused by repayment of funds and possible collection efforts is counter-productive to rehabilitation and creates a further burden on the injured or ill member.

- Healthcare Employee Benefit Plans (HEB)
Manitoba

proceedings represented yet another complication for injured workers to deal with at a time when they may be ill-equipped to do so.

C. Recommendations

The Committee believes that section 23 of the Act should be amended to allow for assignment of benefits. As noted above, most Canadian jurisdictions allow for assignment of compensation payable to ill or injured workers, subject to board or commission approval.

The WCB has advised us that it receives garnishment orders in only a small number of claims. For example, between 2012 and 2016, garnishment orders were registered on approximately 0.5% of all WCB claims.

Nevertheless, in situations where garnishment orders are required, they represent stress and complication for both creditors who are seeking such an order and workers whose wage loss benefits are garnished. Allowing for assignment of benefits provides a less adversarial option for ill or injured workers and their creditors.

Since the amendment would be providing an alternative to a formal court process, the Committee finds it appropriate to require the WCB's formal written authorization in each case before assignment of benefits can occur. In such cases, the Board would need to see proof of assignment before approval would be provided.

RECOMMENDATION 36

Section 23 of <i>The Workers Compensation Act</i> should be amended to allow for the voluntary assignment of benefits with written approval of The Workers Compensation Board.
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CHAPTER 7 - ADMINISTRATION OF THE ACT

In this report, we have discussed topics of critical importance to stakeholders on such substantive issues as prevention, compliance and compensation. During the course of the consultation, stakeholders also expressed more technical concerns about how *The Workers Compensation Act* (the "Act") is structured and how the Act is administered by The Workers Compensation Board (the "WCB" or the "Board"). They made suggestions aimed at ensuring that the system continues to reinforce the Meredith Principles in an efficient and effective manner. Stakeholders identified four main issues, which are the subject of this chapter:

- whether the Act should be amended to allow for the creation of an Employer Adviser Office to assist employers in navigating the workers compensation system;
- whether the powers granted to the Appeal Commission under the Act require amendment to allow this administrative tribunal to function more effectively;
- whether the existing limitation periods imposed on participants in the WCB system for performing certain actions should be amended, and whether new limitation periods should be imposed; and
- whether the Act should be amended to limit self-insurance to the self-insured employers currently named in the Act.

Section 1: Employer Adviser Office

A. Background

Section 108 of the Act provides for the appointment of worker advisers to advise, assist and represent injured workers and their families on WCB matters. With section 108, the Legislature has recognized that some workers may lack the necessary expertise to pursue a review or appeal of a claim decision, or might otherwise need help navigating the WCB claims system.

Worker advisers are not employees of the WCB; rather, they are civil servants who work for the Worker Adviser Office (WAO), a branch of the Department of Growth, Enterprise and Trade. Worker advisers operate independently from the WCB.

Funding for the WAO is provided in the form of a grant from the WCB's accident fund. Accordingly, covered employers pay 100% of the costs of the WAO. In Manitoba, the WAO helps approximately 3,000 workers annually at an annual cost of around \$800,000.

The workers compensation legislation of most Canadian provinces and territories provides for the appointment of some type of worker adviser to assist injured workers with their claims.

Some provinces and territories provide similar assistance to employers.

Canadian jurisdictions demonstrate a wide range of options in this regard.

Employer Adviser Offices ("EAO"s) are generally established by statute, policy or agreement.

In Alberta, there are no employer adviser offices but instead a department of "Employer Appeal Consulting Services" established within the WCB.

In its 2016 review of Saskatchewan's *Workers' Compensation Act, 2013*, Saskatchewan's *Workers' Compensation Act* Committee of Review considered the establishment of an EAO, but opted instead to recommend the creation of Employer Resource Centre coordinated through the Office of the Workers' Advocate in that jurisdiction. The Saskatchewan Committee was clear that the Employer Resource Centre was to serve solely as a resource centre and would not provide advocacy services.

In Ontario, the Office of the Employer Adviser is intended for employers with fewer than 100 workers.

In all cases, funding for the services of employer advisers is paid out of the accident funds established under workers compensation legislation.

During Manitoba's last legislative review, the 2005 Legislative Review Committee recommended expanding the mandate of the Worker Adviser Office to both workers and employers. This recommendation was not implemented.

Relevant Statutory Provisions

Appointment of worker adviser and staff

108(1) Worker advisers and other employees necessary to enable the worker advisers to carry out their duties effectively shall be appointed or employed as provided in *The Civil Service Act*.

Duties of worker advisers

108(2) The worker advisers may

- (a) give or cause to be given assistance to workers and dependants having claims under this Part;
- (b) on behalf of workers and dependants having claims under this Part, communicate with or appear before the board, or any boards of review, or any other tribunal established by or under this Act;
- (c) advise workers and dependants as to the interpretation and administration of this Act and any regulations made under this Act and of the effect and meaning of decisions made under this Act; and
- (d) perform such other duties and functions as the minister may require.

The Workers Compensation Act, CCSM c W200

Other Jurisdictions

...the Employer Resource Centre would not assist employers with appeals. This is not designed to be a parallel resource to the advocate services provided to injured workers, rather one to help employers navigate the compensation system.

- *2016 Report, Workers' Compensation Act* Committee of Review (Saskatchewan)

176 (2) The Office of the Employer Adviser is continued. Its functions are to educate, advise and represent primarily those employers that have fewer than 100 employees.

Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A

B. What the Committee Heard

During the course of our consultations, many stakeholders expressed views on the merits of an EAO.

Those in support of such an office pointed to employers' difficulties in dealing with complex WCB matters. They identified an EAO as an important resource, particularly for small employers.

Several stakeholders felt it was fair and reasonable for employers to have access to advisers, since workers have access to similar resources paid for out of the accident fund.

Several stakeholders spoke out against the establishment of an EAO, suggesting it would make the workers compensation process more adversarial and create appeals that are purely cost driven.

Some expressed the view that an EAO would run counter to the principles on which the workers compensation system is built. Others pointed to the power imbalance between employers and workers generally, submitting that an EAO could only serve to exacerbate problems in the current system.

Among those opposed to an EAO, some stakeholders acknowledged that employers may need additional resources to help them understand the compensation system and how it works. However, they suggested that the WCB could meet the educational needs of these employers within the current system.

C. Recommendations

The Committee agrees that additional resources and advice should be made available to employers to assist them in dealing with workers compensation matters. The workers compensation system is complex and can be difficult for employers to navigate. This is especially true for small employers with few resources or new employers with limited exposure to workers compensation issues. These employers, in particular, should have enhanced access to materials and advice to assist them in understanding the system.

Stakeholder Comments

...smaller employers may benefit from having an EAO as a resource."

- Winnipeg Police Service

By following the example of the numerous other Canadian jurisdictions that have an employer advocate office ... -- the WCB could ensure Manitoba Employers are better educated on their rights.

- Winnipeg Construction Association

The development of an Employer Advocates Office will do nothing but give employers a tool to further suppress claims. This goes against the principles our system is built on.

- United Food and Commercial Workers (UFCW) Union Local 832

If employers need more information ... they should be able to access this information from existing WCB customer service.

- Manitoba Federation of Labour (MFL)

Accordingly, the Committee believes that a separate EAO should be created. Like the Worker Adviser Office, it should be housed within the Government of Manitoba. Its purpose should be to provide guidance, assistance and resource material to employers, including advice and information about their rights and responsibilities under the Act. While the services of this new office should be available to all employers, they should be targeted to smaller employers.

In making its recommendation, the Committee is not suggesting that employer advisers play the same role as worker advisers. Under section 108(2)(b) of the Act, worker advisers are empowered to act as advocates for workers with respect to their claims before the Board, requests for reconsideration, and in appeals to the Appeal Commission. We do not recommend that employer advisers serve as advocates, as this may contribute to a more adversarial claims resolution process and add unnecessary complexity to the current system.

RECOMMENDATION 37

A separate Employer Adviser Office should be created and housed within the Government of Manitoba. The Employer Adviser Office's mandate should be restricted to providing information and advice to employers. It should not be authorized to provide advocacy services.

Section 2: Appeal Commission

A. Background

The Appeal Commission is an external appeal body established under the Act in 1990. It was created in response to the 1987 *King Report*, which recommended a more independent process for hearing and deciding appeals in Manitoba's workers compensation system. For most decisions made under the Act, the Appeal Commission represents the final level of appeal.

While the Appeal Commission is established under the Act, it functions independently from the WCB. Members of the Appeal Commission are appointed by the Lieutenant Governor in Council for two to five year terms, and are eligible for reappointment. Members of the Appeal Commission represent the interests of workers, employers and the public.

The Appeal Commission has a broad jurisdiction to hear appeals from decisions relating to compensation and other benefits, assessment decisions and the imposition of administrative penalties. It determines whether a party's right to sue an employer or another worker is removed by

Relevant Statutory Provisions

Composition of the Appeal Commission

Establishment of appeal commission

60.2(1) There is hereby established an appeal commission, to be known as the Appeal Commission, to be appointed by the Lieutenant Governor in Council, and consisting of

- (a) one or more appeal commissioners representative of the public interest, one of whom shall be designated as Chief Appeal Commissioner;
- (b) one or more appeal commissioners representative of workers;
- (c) one or more appeal commissioners representative of employers.

Jurisdiction of the Appeal Commission

Board to determine right of action

68(4) Where an action in respect of an injury is brought against an employer, a director of a corporation that is an employer or a worker of an employer, the board has jurisdiction, on the application of a party to the action, to adjudicate and determine whether the right of action is removed by this Act; and the adjudication and determination is final and conclusive, and if the board determines that the right of action is removed by this Act, the action shall be forever stayed.

Appeal to the appeal commission

109.7(1.3) Within 30 days after being served with a notice, the person required to pay the administrative penalty may appeal the matter to the appeal commission by sending a notice of appeal to the appeal commission, with a copy to the board, together with reasons for the appeal. The requirement to pay the penalty is stayed until the appeal commission decides the matter.

No jurisdiction over constitutional questions

60(2.2) The board and the appeal commission do not have jurisdiction over constitutional questions.

The Workers Compensation Act, CCSM c W200

the Act, and may also rule on any other matter referred to it by the Board.

Neither the Appeal Commission nor the Board are authorized to decide constitutional questions. The Act was amended in 2006 to remove this jurisdiction, following a recommendation of the 2005 Legislative Review Committee. The committee believed that questions of constitutionality were best left to the Government of Manitoba and the courts to decide.

1. Powers of the Appeal Commission

Proceedings before the Appeal Commission are intended to be non-adversarial. Like the Board, the Appeal Commission may compel the attendance of witnesses at its hearings, examine them under oath and require production of documents.

The Appeal Commission may also allow for the presentation of new or additional evidence during the course of a hearing. As specified in the definition of "hearing" found in section 1 of the *Appeal Commission Rules of Procedure*, a hearing before the Appeal Commission includes both oral and written proceedings.

At any time during the course of a hearing, the Chief Appeal Commissioner may refer a matter back to the Board for further investigation.

The Appeal Commission may confirm, reverse or vary the initial decision of the Board in respect of compensation and assessments, and may confirm, revoke or vary an administrative penalty.

The Appeal Commission may also reconsider its initial decision if there is new

Relevant Statutory Provisions (con't)

Powers of the Appeal Commission

Reconsideration by appeal commission

60.10(1) A person who is directly interested in a decision of the appeal commission may apply to the Chief Appeal Commissioner for an order directing reconsideration of the decision on the ground that new evidence has arisen or has been discovered since the hearing.

Nature of new evidence required

60.10(2) The Chief Appeal Commissioner may direct the appeal commission to reconsider its previous decision where the Chief Appeal Commissioner considers that the evidence referred to in subsection (1) is substantial and material to the decision, and

- (a) did not exist at the time of the previous hearing before the appeal commission, or
- (b) was not known to the applicant at the time of the previous hearing before the appeal commission and could not have been discovered through the exercise of due diligence.

Finality of decision

60.10(3) A decision of the Chief Appeal Commissioner under this section is final and conclusive.

No general power of reconsideration

60.10(4) Except as provided in this section, the appeal commission shall not reconsider any matter or rescind, alter or amend any decision or order previously made by it, or make any further or supplementary order.

The Workers Compensation Act, CCSM c W200

evidence that has arisen or been discovered since the initial hearing. This new evidence must have been unavailable at the time of the initial appeal, and must be material to the decision.

According to sections 60(1) and 60.8(2) of the Act, a decision of the Appeal Commission is "final and conclusive and is not open to question or review in any court."

The Manitoba Court of Queen's Bench may judicially review an Appeal Commission decision on questions of procedural fairness and compliance with rules of natural justice. In such cases, the court cannot substitute its opinion for that of the Appeal Commission. It must return the matter to the Appeal Commission for further consideration.

2. Limits on the Independence of the Appeal Commission

While the Appeal Commission was established as an independent and separate entity from the Board, there are provisions in the Act which operate to limit its independence.

The first of these is section 60.7 of the Act. This provision gives the Appeal Commission authority to "determine the practice and procedure" for the conduct of matters that come before it. However, the Appeal Commission's authority under section 60.7 is made "[s]ubject to any policies, by-laws or resolutions of the Board of Directors".

Most of the Appeal Commission's rules of procedure are set out in the *Appeal Commission Rules of Procedure*, a regulation made under the authority of the WCB Board of Directors. The Appeal Commission does not have statutory power to make or amend the regulations that govern its own procedure. If it wants to change one of its rules of procedure, it must ask the Board to change the regulations. The Board, by implication, may refuse to make such changes, since only it and the Lieutenant Governor in Council can make regulations under the Act.

Relevant Statutory Provision (con't)

Limits on the Independence of the Appeal Commission

Practice and procedure

60.7 Subject to any policies, by-laws or resolutions of the Board of Directors, the appeal commission may determine the practice and procedure for the conduct of matters before it.

Commission bound by board policies

60.8(6) The appeal commission is bound by the policies of the Board of Directors.

Regulations of Board of Directors

68(1) The Board of Directors may make regulations

[...]

68(1)(r.1) respecting administrative penalties under subsection 109.7(1), including

[...]

(ii) governing appeals from decisions to impose administrative penalties;

68(1)(s) respecting any matter it considers necessary or advisable to carry out the intent and purposes of this Act.

The Workers Compensation Act, CCSM c W200

In addition, section 60.9 of the Act permits the WCB Board of Directors to stay decisions of the Appeal Commission in limited circumstances. It can only do so when it "considers that the appeal commission has not properly applied the Act, regulations or a policy of the Board of Directors". In such cases, the Board can either send the matter back for rehearing by a new appeal panel or rehear the matter itself. WCB Policy 21.10.10, *Requests for Reconsideration under Section 60.9*, describes the limited circumstances in which the Board of Directors will consider exercising its powers of reconsideration under section 60.9.

The Act confirms that the Board's power to direct a rehearing, or to rehear the matter itself "does not establish a further level of appeal". However, section 60.9 clearly gives the Board some supervisory jurisdiction over the Appeal Commission.

3. Other Jurisdictions

Most Canadian jurisdictions have a form of independent, external appeal body charged with hearing appeals of workers compensation-related decisions. The composition and authority of these bodies is varied.

Some workers compensation statutes, like Manitoba's, contain strong privative clauses that prevent an appeal from the appeal body's decision. Others explicitly allow for an appeal to a superior court on questions of law or jurisdiction.

In most jurisdictions, external appeal bodies make rules or regulations to govern their own practice and procedure, with some restrictions. In Newfoundland and Labrador, and Nova Scotia, for example, the appeal body's regulations are subject to approval by the Lieutenant Governor in

Relevant Statutory Provision (con't)

Limits on the Independence of the Appeal Commission (con't)

Powers of Board of Directors

60.9(1) Where the Board of Directors considers that the appeal commission has not properly applied the Act, regulations or a policy of the Board of Directors, it may stay the decision of the appeal commission pending rehearing of the matter under this section and

- (a) in writing, direct a panel of three different commissioners of the appeal commission to rehear the matter; or
- (b) on written notice to all persons who have a direct interest in the matter, direct that the matter be reheard by the Board of Directors, or by a committee of the Board of Directors, in which case the Board of Directors or the committee has all the powers and authority of the appeal commission, and sections 60.4, 60.7 and 60.8 apply with such modifications as the circumstances require.

Not a further level of appeal

60.9(2) This section does not establish a further level of appeal.

Board may make policies re: review

60.9(3) The Board of Directors may make policies to define the circumstances under which it will review decisions of the appeal commission.

The Workers Compensation Act, CCSM c W200

Council. In Alberta and British Columbia, the appeal bodies are authorized to make their own rules of procedure, but these do not have the force of law of a regulation.

Manitoba, Yukon, the Northwest Territories and Nunavut are the only jurisdictions that allow the board or commission to order the external appeal body to re-hear a case.

In other jurisdictions such as Newfoundland and Labrador, Nova Scotia and New Brunswick, the board or commission is expressly authorized to state a question of law to the court for its opinion. In New Brunswick, Alberta and Yukon, the board or commission may appeal a decision of the appellate body to the superior court on questions of interpretation, law and jurisdiction.

B. What the Committee Heard

In its submission, the Appeal Commission made three requests for amendments to the Act that would reinforce its independence from the Board.

First, it requested that the Act be amended to allow the Appeal Commission to make its own rules of practice and procedure by regulation. This would bring the Appeal Commission in step with many other administrative tribunals in Manitoba, such as the Public Utilities Board, the Municipal Board, and the Manitoba Human Rights Commission. The Appeal Commission also pointed out that the Manitoba Labour Board is expressly empowered to make regulations.

The Appeal Commission also requested that the Committee consider recommending the repeal of section 60.9 of the Act, which allows the Board of Directors to direct a rehearing of an appeal by a different panel of the Appeal Commission or to rehear an appeal itself. In making this request, the Appeal Commission stated that section 60.9 of the Act is a unique provision and is not present in any other Canadian jurisdiction.

Finally, the Appeal Commission requested that section 60(2.2) of the Act be amended to give it jurisdiction to decide constitutional questions. While the Appeal Commission recognized that the Act had

Stakeholder Comments

The limitation on the Appeal Commission's ability to determine its own practice and procedure may be seen as inconsistent with a separate and independent Appeal Commission.

- The Appeal Commission

This is a challenging area in administrative law. It is understood that this process may expedite the repair of a defective decision and do so in a less costly and timelier manner than a judicial review in the Court of Queen's Bench. However, a WCB Board of Directors' right of review appears to challenge the notion of the true independence of the Appeal Commission and whether or not the Appeal Commission is indeed a final level of Appeal.

- The Appeal Commission

Most administrative tribunals in Manitoba currently have the authority to hear constitutional challenges. It is our understanding that the administrative processes for handling constitutional challenges are now well-established in Manitoba.

- The Appeal Commission

been amended to specifically remove this jurisdiction, it pointed out that most provincial administrative tribunals have the power to decide such questions.

C. Recommendations

1. Rules of Practice and Procedure

The Committee agrees that the Appeal Commission should be able to make its own rules of practice and procedure by regulation. This would put the Appeal Commission on similar footing with many other administrative tribunals in Manitoba. More importantly, it would resolve what appears to be an inherent contradiction in the Act. In our opinion, it makes no sense that the Appeal Commission should be empowered under section 60.7 of the Act to determine the practice and procedure for the conduct of matters that come before it, but also be dependent on the Board to effect changes to its rules of procedure.

Requiring the Board to make regulations regarding the Appeal Commission's practice and procedure may have been more appropriate when the Appeal Commission was a newly constituted entity. We do not believe this practice should continue.

RECOMMENDATION 38

The Workers Compensation Act should be amended to give the Appeal Commission the authority to make regulations regarding its own practice and procedure, subject to the approval of the Lieutenant Governor in Council.

As a corollary to Recommendation 40, two consequential changes must occur. First, the *Appeal Commission Rules of Procedure*, which currently govern practice and procedure before the Appeal Commission, will need to be repealed. In addition, section 68(1)(r.1)(ii) of the Act, which currently gives the Board the necessary jurisdiction to make regulations governing appeals from decisions to impose administrative penalties should likewise be repealed. The Committee therefore recommends that:

RECOMMENDATION 39

Once the Appeal Commission has made regulations regarding its own practice and procedure, the *Appeal Commission Rules of Procedure* should be repealed.

RECOMMENDATION 40

Section 68(1)(r.1)(ii) of *The Workers Compensation Act* should be repealed.

2. Section 60.9 of the Act

The Appeal Commission suggested that section 60.9 of the Act should be repealed in its entirety. Section 60.9 empowers the Board of Directors to stay Appeal Commission decisions, order an Appeal Commission hearing with a new panel, or re-hear appeals itself.

This Committee disagrees with the Appeal Commission's suggestion. While we recognize that section 60.9 gives the Board some supervisory jurisdiction over the Appeal Commission, we find it serves a useful purpose.

We understand that the Board has never used its jurisdiction under section 60.9 to rehear an appeal itself, and has only rarely directed the Appeal Commission to rehear a matter. This is in part because of the statutory restrictions placed on the Board's use of this power. Under section 60.9, the Board may only use this power when it considers that the Appeal Commission has not properly applied the Act, the regulations made under it, or Board policy. The Board has also imposed restrictions on itself in WCB Policy 21.10.10, *Requests for Reconsideration under Section 60.9*. The policy imposes time limits on requests under section 60.9 and also requires the requesting party to clearly identify an error on the part of the Appeal Commission.

More significantly, however, the Committee considers that section 60.9 provides an inexpensive, less litigious, and less time consuming method to rectify Appeal Commission errors than an application for judicial review to the Manitoba Court of Queen's Bench. Section 60.9 is also consistent with the strong privative clause contained in section 60(1) of the Act, which gives the Board, and not the courts, exclusive jurisdiction to examine into, hear and determine all matters and questions arising under the Act. It recognizes the finality of Board decisions and the special expertise that both the Board and the Appeal Commission have developed in workers compensation matters.

While the Committee is not recommending repeal of section 60.9 of the Act, we believe the section should be amended to eliminate the Board's ability to rehear appeals itself. The Committee considers that a new panel of the Appeal Commission is better equipped to rehear an appeal than a committee of the Board of Directors, which may have no particular adjudicative expertise.

RECOMMENDATION 41

<p>Section 60.9 of <i>The Workers Compensation Act</i> should be amended to remove the ability of the Board of Directors to rehear an appeal. The ability of the Board of Directors to direct a new panel of the Appeal Commission to rehear an appeal should be maintained.</p>
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3. Constitutional Questions

The Appeal Commission also raised the issue of section 60(2.2) of the Act, which removes the Commission's jurisdiction to decide on constitutional matters. We do not agree that section 60(2.2) should be amended to allow the Appeal Commission to hear and decide on constitutional questions. We agree with the 2005 Legislative Review Committee that questions of constitutionality are best left to the Government of Manitoba and the courts to decide. The Appeal Commission is an administrative tribunal that has developed significant expertise interpreting *The Workers Compensation Act*. It does not have similar experience or expertise with respect to interpreting Canada's constitution.

The Committee recognizes that many provincial administrative tribunals have the power to decide constitutional questions. But we are also mindful of the experiences in other Canadian jurisdictions, where two separate administrative tribunals have come to opposite conclusions regarding the constitutionality of the same statutory provision. Such conflicting administrative decisions leave the legality of the statute in limbo until the courts have opportunity to determine the matter. Accordingly, we believe that section 60(2.2) of the Act should remain unchanged.

RECOMMENDATION 42

Section 60(2.2) of *The Workers Compensation Act*, which states that neither The Workers Compensation Board nor the Appeal Commission have jurisdiction over constitutional questions, should remain unchanged.

Section 3: Limitation Periods

A. Background

Certain key activities under the Act are governed by time limits or limitation periods. Limitation periods serve multiple purposes in legal proceedings. Most importantly, they help to ensure that claims are resolved expeditiously and that the best possible evidence and witnesses are available.

1. Limitation Periods

Limitation periods under the Act include:

- the amount of time the worker has to report an accident to his or her employer (as soon as practicable and no later than 30 days after the accident);
- the amount of time the employer has to report a worker's accident to the Board (within five business days from the date that the worker reports the accident to the employer or the date that the employer otherwise learns of the accident, whichever is sooner);
- the amount of time within which a claim for compensation must be filed (within one year after the day on which the worker's injury or the worker's death occurred); and
- the amount of time a worker or employer has to appeal an administrative penalty levied against him or her under the Act (within 30 days after being served with a notice of administrative penalty).

Relevant Statutory Provisions

Worker Notice to Employer

Notice of Accident

17(1) 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.

Failure to give notice a bar to any claim

17(5) Failure to give the notice required by virtue of this section, unless excused by the board, on the ground

- (a) that notice for some sufficient reason could not have been given; or
- (b) that the employer or his superintendent or agent in charge of the work where the accident happened had knowledge of the injury; or
- (c) that the board is of opinion that the claim is a just one and ought to be allowed;

is a bar to any claim for compensation under this Part.

The Workers Compensation Act, CCSM c W200

Failure to comply with these limitation periods can have significant consequences. A worker may be barred from receiving compensation if he or she fails to notify the employer within 30 days or

files a claim more than one year after the injury. An employer who fails to report an accident within five business days after learning of it may be subject to an administrative penalty. Failure to appeal an administrative penalty within the applicable time period can result in the loss of appeal rights.

The Act does not include any limitation on the time in which a person may request a reconsideration of a decision relating to compensation or assessments. There is also no limitation period applicable to filing an appeal with the Appeal Commission.

Extension of Limitation Periods

The Board has the statutory authority to waive or extend limitation periods in appropriate circumstances. For example, section 17(5) gives the Board the ability to excuse the worker for failing to notify the employer within 30 days in certain circumstances. Specifically, the Board may waive the 30-day reporting requirement if it is satisfied the notice could not have been given in time, the employer had knowledge of the accident or injury, or the claim is just and ought to be allowed.

Section 109 also authorizes the Board to extend any limitation period in the Act or regulation where it considers that the failure to do so would result in an injustice. It may extend the limitation period either before or after the expiry of the prescribed time frame.

WCB Policy 22.70.30, *Employers' Responsibility for Reporting Claims*,

Relevant Statutory Provisions (con't)

Employer Notice to Board

Employer to report accident

18(1) In case of an accident giving rise to a claim for compensation, the employer of the worker shall, within five business days

- (a) from the day upon which the worker reports the occurrence to the employer; or
- (b) from the day the employer otherwise learns of it;

whichever day is earlier, report the accident and the injury resulting therefrom to the board, and also to any local representative of the board at the place where the accident occurred.

Worker Claim for Compensation

Must be filed within one year

19(2) 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.

Extension of Limitation Period

Enlargement of time limited for applications.

109 Where, in the opinion of the board, an injustice would result unless an enlargement of time prescribed by any section of this Act or by any regulation for the making of any application, the taking of any proceedings, or the doing of any other act is granted, the board may enlarge the time so prescribed; and the enlargement may be granted either before or after the expiration of the time prescribed in this Act or any regulation.

The Workers Compensation Act, CCSM c W200

provides some guidance about when the WCB might extend the period of time for employers to report accidents. The guidelines to this policy state that employers may be given a two-day grace period, and set out several scenarios in which the WCB may extend the time for filing an employer's report.

2. Other Jurisdictions

Interestingly, most Canadian workers compensation statutes do not provide a specific time in which workers must notify employers of an injury. Instead, they use more general terms, requiring workers to report injuries to their employers "within a reasonable time" or "as soon as practicable."

All Canadian jurisdictions have a defined limitation period during which the employer must report to the board. In most jurisdictions, the limitation period is within three days after the occurrence of the injury or after becoming aware of the injury.

While most Canadian jurisdictions impose a specific limitation period on filing a claim with the workers compensation authority, these periods range from three months (Newfoundland and Labrador) to 24 months (Alberta) in length. In some jurisdictions, such as the Northwest Territories, Nunavut, and New Brunswick, no specific time frame is identified. The relevant statutes merely state that the claim must be filed "forthwith" or "as soon as practicable."

Manitoba is unusual in not providing a limitation period for requests for

Other Jurisdictions

Worker Notice to Employer

59(1) Where any worker or dependant is entitled to compensation under this Act, he or she shall forthwith notify his or her employer and shall file with the Board an application for compensation, together with the certificate of the attending physician, if any, and such further proofs of his or her claim as may be required by the Board.

Workers Compensation Act, RSPEI 1988, c W-7.1

Employer Notice to Board

Notice by employer of accident

21(1) An employer shall notify the Board within three days after learning of an accident to a worker employed by him, her or it if the accident necessitates health care or results in the worker not being able to earn full wages.

Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A

Worker Claim for Compensation

Notice of injury

44(1) Subject to section 46, no compensation is payable to a worker or worker's dependant unless:

- (a) except in the case of the death of the worker, the worker gives notice of his or her injury to his or her employer and the board as soon as possible after sustaining that injury and before the worker has voluntarily left his or her employment; and
- (b) the claim for compensation is made within six months after:
 - (i) the date the worker sustained the injury; or
 - (ii) in the case of death, the date of death.

The Workers' Compensation Act, 2013, SS 2013, c W-17.11

reconsideration. Most other jurisdictions set out a time frame during which parties may request reconsideration. These range from 30 days (Nova Scotia, Newfoundland and Labrador, and Quebec) to three years (the Northwest Territories and Nunavut) in length.

A few jurisdictions also provide time limits within which internal review bodies must render decisions, ranging in length from 30 days after the hearing (Yukon) to 150 days after the hearing (British Columbia).

With the exception of Manitoba, all Canadian jurisdictions with external appeal bodies have enacted limitation periods for filing appeals. These range from 30 days (Newfoundland and Labrador, Prince Edward Island, Nova Scotia and British Columbia) to three years (the Northwest Territories and Nunavut) in duration.

In many jurisdictions, including Manitoba, there is also a time limit within which the external appeal body must render a decision on an appeal. These time limits range from 45 days to nine months in length. Section 12(1) of the *Appeal Commission Rules of Procedure* requires Manitoba's Appeal Commission to render its decision on an appeal within 60 days of the hearing.

Most Canadian workers compensation agencies have the authority to extend a limitation period where it would be just to do so or where it would not be prejudicial to the rights of parties involved. In Nova Scotia, there is a five year ultimate limitation period beyond which the board may no longer exercise its discretion to receive a claim.

B. What the Committee Heard

During the course of our consultations, some stakeholders expressed the view that both the 30-day limitation period for notifying the employer and the one year limitation period for filing a claim were too lengthy.

Other Jurisdictions (con't)

Restrictions on Ability to Waive or Extend Limitation Period for Making a Claim

Notice of accident or injury

83(5) Failure to give notice [of a claim to the Board] pursuant to this Section bars the right to compensation unless, upon the application of the worker, the Board determines that

- (a) any right of the worker's employer pursuant to this Part; and
- (b) the subrogated interest of the Board,

has not been prejudiced by the failure, in which case the Board may extend the time for filing a claim.

83(6) Subsection (5) does not apply where five years or more have elapsed from

- (a) the happening of the accident; or
- (b) the date when the worker learns that the worker suffers from an occupational disease, as the case may be.

Workers' Compensation Act SNS 1994-95, c 10

Several stakeholders suggested that the one year period for filing a claim be shortened to 30 days except in cases of long latency occupational disease. These stakeholders suggested the one year time frame made it difficult to collect the necessary information about an accident many months after the fact. They also submitted that the one year time frame prevents the employer from quickly investigating the accident with an eye to preventing future workplace injuries.

In addition, some stakeholders also asked that limitation periods under the Act be more rigorously enforced.

Several stakeholders suggested amendments to the Act to include limitation periods for requesting reconsideration and filing appeals. Some suggested a six month limitation period as appropriate for both processes.

Others were opposed both to shortening time frames and to enacting limitation periods for reconsiderations or appeals. In their view, a shorter time for filing could lead to the denial of many legitimate claims because some conditions do not manifest themselves until long after the accident. They also highlighted the length of time it can take to obtain the medical evaluations necessary to support a claim.

One stakeholder suggested that introducing limitation periods for appeals might make the system more cumbersome and complex, arguing that workers would file appeals regardless of their intention to follow through, merely to preserve their right to appeal. This would lead to expenditure of administrative resources on appeals that might never be pursued.

Stakeholder Comments

The employer must submit a WCB claim within five working days of notice of injury, yet under Section 17(1) Notice of Accident, the worker has up to 30 days to file a claim with the employer. Our policy is that workers must immediately advise us of a workplace injury. We would like to see this reflected in the Act.

- Maple Leaf Foods Inc.

Except in certain cases of occupational diseases . . . the time limit to file a claim with the WCB should be reduced to 30 days. When workers fail to report injuries promptly, investigation by both the employer and the adjudicator can be constricted. Opportunities to take steps to mitigate the effects of injury are also affected.

- VIA Rail Canada

We note that timeframes for filing claims . . . by the injured worker are delineated in the WCB Act in Sections 17(1) and 19(2), however, are aware that these are rarely, if ever, enforced by the board.

- Manitoba Liquor and Lotteries

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 in into the past.

- CN Rail

C. Recommendations

To assist us in making recommendations respecting limitation periods, the Committee requested additional information from the WCB. We wanted a better sense of how the current statutory limitation periods are working in practice. We also wanted to learn whether the absence of limitation periods for reconsideration and appeals is causing difficulty in adjudication.

We received statistical information on compliance with section 17(1) of the Act, which requires a worker to report an accident to his or her employer as soon as practicable, but in any case, within 30 days after the accident. The available data indicates that the large majority of workers notify their employers within the 30-day time frame. We were also informed that approximately two-thirds of workers notify their employers on the same day the accident occurred, and another 10 to 15% notify their employers the day after the accident.

For the small number of claims in which notification takes place after 30 days, statistical data demonstrated that these often involve injuries with long latency periods or conditions that are not obviously work related such as tendinitis, hernias, back pain or hearing loss.

We are also aware of several educational initiatives in place to encourage workers to report injuries to their employers as soon as possible.

We understand that the large majority of employers comply with the requirement in section 18(1) of the Act to notify the WCB no more than five business days after becoming aware of a workplace accident.

Similarly, there is a high level of compliance with section 19(2) of the Act, which requires injured workers to make a claim for compensation with the WCB no more than one year after sustaining a workplace injury. For example, WCB statistics indicate that only a small number of workers made their claims to the Board after the one-year deadline in 2016.

We did not hear any significant practical concerns with late requests for reconsideration or appeals. While a significant delay in filing an appeal can result in the loss of important evidence for all parties, most appeals appear to be filed in a timely manner. The Committee is also mindful

Stakeholder Comments (con't)

[Shortened time frames for filing a claim] contradicts the progressive and degenerative nature associated with many injuries such as hearing loss, psychological injury and repetitive strain injury claims. It is important to note that many symptoms associated with these types of injuries can take longer than six months to present themselves.

- Manitoba Nurses Union (MNU)

Securing medical evidence for an appeal is a notoriously long and challenging process. We urge the committee to refrain from recommending any timelines which could prevent workers from exercising their basic right to appeal.

- Manitoba Federation of Labour (MFL)

of the possibility that imposing a limitation period for reconsiderations and appeals could motivate parties to file an appeal merely to meet a statutory deadline, without necessarily intending to follow through. This could create administrative expenses and delays in hearing legitimate appeals.

In summary, the Committee learned that most workers and employers comply with the existing limitation periods and that the WCB actively promotes the prompt reporting of accidents through a variety of educational initiatives. Most parties file requests for reconsideration and appeals in a reasonable time, and we are not aware of significant prejudice caused by late requests.

While we do not consider it necessary to make major adjustments to a system that is functioning well for most stakeholders, it is important to reinforce the need for early notification under section 17(1). That section should make it clear that 30 days is not the standard acceptable notification period, but rather the outside limit. In our view, the term "as soon as practicable" does not adequately convey the imperative of early notification.

Accordingly, the Committee recommends that section 17(1) be amended by deleting the reference to "as soon as practicable" and replacing it with a requirement to notify employers of accidents "as expeditiously as possible, and no later than 30 days after the accident."

Sections 18(1) and 19(2) of the Act should be maintained and no limitation periods for requests for reconsideration or appeals should be enacted.

We are mindful of the benefits of early notification of accidents and injuries to workers, employers and to the WCB. Expeditious reporting aids in worker recovery, promotes health and safety in the workplace and makes all participants aware of their rights and obligations in the system. We therefore consider it beneficial for the WCB to continue to engage in educational campaigns to inform both workers and employers of the need for and importance of early notification and reporting of workplace accidents.

RECOMMENDATION 43

Section 17(1) of *The Workers Compensation Act* should be amended by repealing the term "as soon as practicable" and replacing it with a requirement to notify employers of accidents "as expeditiously as possible, and no later than 30 days after the accident".

RECOMMENDATION 44

The Workers Compensation Board should continue to engage in educational campaigns to inform both workers and employers of the need for and importance of early notification and reporting of workplace accidents.

Section 4: Classification of Employers - Self-Insured

A. Background

Classification of Covered Employers

There are two broad categories of WCB-covered employers in Manitoba: Class E employers and self-insured employers.²³

The large majority of covered employers are "Class E". Class E employers pay premiums (referred to under the Act as assessments) into the WCB's accident fund. Their annual assessments are determined by both their individual claim costs and the amount of funding required for costs not directly arising from their claims. The full costs of all claims made by workers of Class E employers are paid out of the accident fund. Class E employers essentially pool both their risk and their funding, which is why the Class E funding model is known as the "collective liability" model.

By contrast, employers in the "self-insured" category are individually liable for the claim costs of their workers, and also pay a portion of administration costs. They are exempt from collective liability. While Class E employers must fund the liability for the future cost of claims through their assessments, self-insured employers can provide financial security for future costs or are exempt from this requirement.

Section 73(2) of the Act establishes this classification system. Current self-insured employers fall within one of the following classes:

Relevant Statutory Provisions

Assignment classes established

73(2) Subject to section 79 (assignment of industry to class and group) and the regulations, the following classes are established for the purpose of assessment:

- (a) Class A - Provincially funded industries set out in a schedule established by the board in accordance with section 76.1;
- (b) Class B - Self-insured employers set out in a schedule established by the board in accordance with section 76.2;
- (c) Class C - the Crown in right of Manitoba and those agencies of the government described in section 76 and not otherwise included under Class A, Class B or Class E;
- (d) Class D - The City of Winnipeg;
- (e) Class E - Employers in all industries in Manitoba not included in the above classes and not excluded by regulation under section 2.1.

Schedule of self-insured employers

76.2(1) The board may by regulation establish a schedule of self-insured employers.

Schedule of self-insured employers

76.2(2) The board may by regulation transfer a self-insured employer to another class or to a new class, in which case the board shall make such adjustments and disposition of funds, reserves and accounts, and require payment of such funds as it considers necessary to ensure that no class is adversely affected.

The Workers Compensation Act, CCSM c W200

²³ The Act describes Class B employers as self-insured. Employers in Classes C and D are not described in the statute as self-insured, but they are individually liable for their claim and administrative costs. For ease of reference in this report, we use the term "self-insured" for employers in Classes, B, C and D.

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 agencies of the government not otherwise included under Class A, Class B or Class E.

Class D - the City of Winnipeg

Class E - as described above, Class E are all employers who are not self-insured.

Class A is designated for provincially-funded agencies but there are currently no employers in this classification.

The federal government and its agencies are self-insured employers, but are distinct from Manitoba-covered employers. The WCB administers the *Government Employees Compensation Act* ("GECA") for the federal government. Under GECA, the federal government and its agencies are individually responsible for the cost of benefits for their workers.

The current classification of employers in Manitoba has evolved over the decades, with most recent changes resulting from employers moving from the public to private sector, or vice versa.

The WCB's Authority over Classification

The Act gives the Board broad powers to arrange employers into either Class E or self-insured status.

The Board's current position, adopted in 1999, is that existing employers should be retained in Class E and self-insurance status should not be provided to new applicants. The WCB will only re-classify employers when their status changes through sale, purchase, privatization or when they are mis-classified.

The Board adopted this position to reinforce the principle of collective liability, as reflected in WCB Policy 35.20.50, *Requests for Self-Insured Status*.

Transition from Class E to self-insured status, and vice versa, has implications for the system overall. The goal of collective liability that underlies the Class E rate model is a defining principle of the workers compensation system. This principle is potentially eroded by moving employers out of the collective liability pool and granting them self-insured status.

Collective liability also promotes another Meredith Principle: security of benefits. Collective contributions ensure that funds are available to pay benefits, providing more security than would exist under a system where employers are solely responsible for their own costs.

The Requests for Self-Insured Status Policy

The Board confirms the principle of collective responsibility for the Accident Fund, with the result that effective January 1, 1999, the Board exercises its discretion to maintain existing employers in Class E and not to grant self-insurance status to new applicants.

WCB Policy 35.20.50, Requests for Self-Insured Status

1. Other Jurisdictions

Manitoba is similar to several other jurisdictions in having a mix of both private and public self-insured employers. Based on a review of the relevant legislation and regulations, the following table provides an overview of the types of self-insured employers in all Canadian jurisdictions:

Self-Insured Employers (Other Than Federal Government) in Provinces and Territories			
Jurisdiction	Province and its Agencies	Private Companies	Municipalities
BC	✓	✓	
AB			
SK			
MB	✓	✓	✓
ON	✓	✓	✓
QC		✓	
NB	✓	✓	
NS	✓		
PEI		✓	
NFLD & LAB.	✓	✓	
NWT			
NU			
YK			

In all jurisdictions the Government of Canada is considered a self-insured employer. Five jurisdictions have no self-insured employers apart from the federal government. In Nova Scotia, the only self-insured employers, other than the Government of Canada, are the province and its agencies. Five jurisdictions, including Manitoba, have both private and public self-insured firms. Quebec is an anomaly in having only private (transportation) firms self-insured, while Prince Edward Island grants self-insured status to some private transportation firms as well as to University of Prince Edward Island faculty. Some boards or commissions have also adopted policies or issued directives limiting transfers from the pool of employers who are collectively liable to self-insured status.

Ontario is unique in permitting self-insured municipal employers. In Manitoba, the City of Winnipeg is the only self-insured municipality.

B. What the Committee Heard

In its submission to the Committee, the WCB Administration proposed that the Act be amended to limit self-insurance to the current named self-insured employers. All other employers would remain in the collective, or Class E, pool. The WCB Administration suggests that this amendment would reinforce the Meredith Principles of collective liability and security of benefits.

No other stakeholder made submissions on this issue.

Stakeholder Comments

The principle of collective liability 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.

- The Workers Compensation Board of Manitoba (WCB)

C. Recommendation

After reviewing this issue and the WCB Administration's submission, the Committee recommends that the Act be amended to limit self-insurance to those who are currently named as self-insured employers under section 73(2) of the Act and the *Self-Insured Employers Regulation*.

We agree with the WCB Administration that this amendment would be consistent with the Meredith Principles of collective liability and security of benefits that are foundational to the system. It would also codify a long-standing WCB policy restricting the movement of employers from Class E to other classes.

In making this recommendation we note there are currently no self-insured employers falling under Class A. It would therefore make sense to repeal section 73(2)(a) of the Act, which creates Class A, and section 76.1 of the Act, which allows the Board to establish a schedule of provincially funded industries for the purpose of Class A. Doing so would foreclose the possibility of new self-insured employers being added to the Act under these provisions.

In making this recommendation, we are not suggesting that self-insured employers be prohibited or restricted from joining the collective pool of covered employers under Class E in appropriate circumstances.

RECOMMENDATION 45

*The Workers Compensation Act should be amended to limit self-insurance to the current employers identified in Classes B, C, and D under section 73(2) of the Act and the *Self-Insured Employers Regulation*, subject to the sale, purchase, privatization or mis-classification of employers.*

RECOMMENDATION 46

Section 73(2)(a) of *The Workers Compensation Act*, which creates Class A, a class of provincially funded industries set out in a schedule to *The Workers Compensation Act*, should be repealed.

RECOMMENDATION 47

Section 76.1 of *The Workers Compensation Act*, which allows The Workers Compensation Board to establish a schedule of provincially funded industries for the purposes of Class A, should be repealed.

CHAPTER 8 - TECHNICAL AMENDMENTS

This Committee heard from the full range of stakeholders during the course of its consultations, including The Workers Compensation Board (the "WCB" or the "Board") Administration. In its submission to the Committee, the WCB Administration generally left commentary on larger, substantive issues to other stakeholders. Where this was not the case, and the WCB Administration recommended a substantive change to *The Workers Compensation Act* (the "Act"), the WCB Administration's suggestions for change have been addressed in the preceding chapters of the report.

Most of the WCB Administration's submission focused on technical amendments to the Act. These are not intended to effect fundamental changes to the workers compensation system, but instead to clarify statutory language or fill gaps in the law.

Because these amendments are not designed to effect substantial changes to the Act, and because they deal with a host of disparate issues, the Committee has decided to group these items in a single chapter. We have considered all of the technical amendments proposed by the WCB Administration in its submission and endorse the following recommendations for technical amendments.

1. Modernization and Plain Language Drafting

The Committee endorses the WCB Administration's proposal to, where possible, modernize, simplify and clarify the Act, including through the use of plain language principles.

The Act should be drafted in a way that is accessible to all participants in the system. Several 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. Accordingly, any amendments resulting from this legislative review should create as harmonious a system as possible. Employers, workers and service providers should be able to understand clearly how the Acts apply to them.

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.

We agree with the 2005 Legislative Review Committee's recommendation that the Act be rewritten in plain, consistent language and reorganized in a logical, sequential, and grouped manner (see Recommendation 66, page 57 of the *2005 Legislative Review Committee Report*).

RECOMMENDATION 48

The Workers Compensation Act should be rewritten in plain, modern language and organized in a logical manner.

2. Definition of Accident (Section 1(1))

The definition of accident has evolved in piecemeal fashion over time.

To illustrate, 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 factors relating to a worker's employment status. As a result of these amendments, the definition of accident has evolved into an unwieldy term that is difficult to both understand and apply.

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. As discussed elsewhere in this report, the Appeal Commission has commented on the illogical structure of the definition of accident in respect of psychological 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 board or commission 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 (See Recommendation 67, page 58 of the *2005 Legislative Review Committee Report*). This would presumably include the definition of accident, which is central to the legislative scheme.

RECOMMENDATION 49

The definition of "accident" found at section 1(1) of *The Workers Compensation Act*, should be redrafted. Amendments should include: removal of psychological injuries from the definition of occupational disease; repeal of section 1(1)(b)(ii) that refers to "the thing that is done and the doing of which ..."; and replacement of the word "means" in the opening stem of the definition with the word "includes".

3. Payments of Benefits

The Act does not always clarify who is the proper recipient of benefits or the manner in which they should be paid. This is particularly true in situations where workers have been severely injured and are unable to make decisions for themselves. For example, section 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 specify how benefits should be paid in such instances.

The same issue 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 before benefits are paid to a worker's family. 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. The Committee believes the Act should be amended to give the WCB this authority. 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.

RECOMMENDATION 50

The Workers Compensation Act should be amended to provide The Workers Compensation Board with a general authority to determine the most convenient and appropriate manner in which to pay compensation.

4. Compensation on Death of Worker (Sections 28 and 29)

Sections 28 and 29 of the Act deal with the payment of compensation for deceased workers, including the amounts that dependants (usually the worker's spouse or common law partner and the worker's children) are entitled to receive and the duration of the compensation payments.

After considering these provisions, the Committee agrees they should be reviewed and amended 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*). It is important that sections 28 and 29 of the Act be reviewed to ensure that the compensation system is keeping up with developments in the law of survivor benefits in general.

RECOMMENDATION 51

Sections 28 and 29 of *The Workers Compensation Act* should be reviewed and amended. Changes to these sections should ensure that compensation received by survivors of fatally injured workers is commensurate with similar benefits available under other legislative schemes in Manitoba. The Government of Manitoba should also consider whether to allow for lump sum payments to surviving relatives who are not dependants of fatally injured workers.

5. WCB Retirement Plan (Section 59(3))

The WCB's pension plan for its employees, (the "Retirement Plan") is established under section 59(3), which was enacted in 1936. The WCB has been the administrator of the Retirement Plan since that time, although this is not specified in the Act. The WCB Administration proposes that the Act be clarified to state that the WCB is the Retirement Plan administrator as contemplated in *The Pension Benefits Act*.

The Committee agrees that such an amendment would be beneficial, both for the sake of clarity, and to ensure consistency with *The Pension Benefits Act*.

RECOMMENDATION 52

Section 59(3) of *The Workers Compensation Act* should be amended to clarify that The Workers Compensation Board is the Retirement Plan Administrator for The Workers Compensation Board's employee pension plan, as contemplated in *The Pension Benefits Act*.

6. External Members of Board Committees (Sections 61 and 62)

Section 61 of the Act grants protection from liability to the Board of Directors, WCB employees, and agents, preventing them from being sued for acts, omissions or negligence in performing their duties or exercising their powers under the Act. Section 62 exempts members of the Board, WCB employees, and agents from testifying or producing documents in proceedings to which the WCB is not a party.

The WCB Administration has pointed out that several Board committees include external members who are not members of the Board of Directors. These include the Audit, Investment and Prevention Committees. It suggests that the same rationale for protecting the Board Directors, WCB employees, and agents applies equally to external committee members. We agree.

The Committee also notes that the 2005 Legislative Review Committee recommended extending the protection from liability and the witness compellability provisions found at sections 61 and 62 of the Act to WCB agents, and the Act was amended accordingly. It would be appropriate to extend the same protections to external Board committee members.

RECOMMENDATION 53

Section 61 of *The Workers Compensation Act* should be amended to extend protection from liability to external members of The Workers Compensation Board's committees in the performance of their duties under the Act.

RECOMMENDATION 54

Section 62 of *The Workers Compensation Act* should be amended to ensure that external members of The Workers Compensation Board's committees cannot be compelled to appear as a witness or produce documents obtained, received or made under the Act or regulations in proceedings to which The Workers Compensation Board is not a party.

7. Disposition of Business Enterprises (Sections 81.1(2) - 81.1(4))

Section 81.1 of the Act deals with the disposition of business enterprises and the liability of new owners of businesses for amounts that the previous owners owed to the WCB. Sections 81.1(2) to 81.1(4) of the Act specify that an employer disposing of its business enterprise is obligated to obtain a certificate confirming that the WCB has no claims against that employer. If the employer does not obtain this certificate, the WCB may pursue the new proprietor of the business for any debt the original employer owes to the WCB.

However, section 81.1 of the Act does not specify the manner of disposition that triggers the obligation to obtain a certificate from the WCB. The WCB Administration has submitted that sections 81.1(2) to 81.1(4) could be clarified to confirm that these provisions apply to all manner

of disposition, including transfer, exchange or gift. The Committee agrees the Act would benefit from an amendment in this regard.

RECOMMENDATION 55

Sections 81.1(2) to 81.1(4) of *The Workers Compensation Act*, which deal with the disposition of business enterprises and the liability of new owners, should be amended to clarify that these provisions apply to all types of disposition, including transfer, exchange or gift.

8. Investment of Excess Funds (Section 94(2))

Section 94(2) of the Act permits the WCB to invest any money in the accident fund that exceeds current requirements. The WCB Administration suggests it would be helpful to amend this provision to specify that all income of the WCB, including income generated by such WCB investments, is free from every form of taxation. In the WCB Administration's opinion, a provision of this type would help to avoid protracted legal negotiations and proceedings relating to investment revenue, particularly outside of Canada.

The Committee agrees it would be helpful to clarify the tax-free status of WCB investments. The Committee notes that there are similar provisions in the workers compensation legislation of some other Canadian jurisdictions.

RECOMMENDATION 56

The Workers Compensation Act should be amended to specify that all income of The Workers Compensation Board is free from every form of taxation.

9. Definition of Employer (Section 99)

Section 99 of the Act gives the WCB jurisdiction to determine who is an employer. The WCB's authority to make 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. The WCB Administration has suggested that section 99 should be amended to grant the WCB this express authority. The Committee agrees that this amendment would help to resolve any ambiguities in the current Act.

RECOMMENDATION 57

Section 99 of *The Workers Compensation Act* should be amended to give The Workers Compensation Board express authority to pierce the corporate veil when determining the employer for the purpose of the Act.

10. Right of Entry (Section 100(4))

Section 100(1) of the Act gives the WCB a right of entry for the purpose of examination and inquiry. Section 100(4) creates an offence for obstructing or hindering an inspection under section 100(1). Pursuant to section 109.6(1) of the Act, this offence is a summary offence punishable upon conviction by a fine of not more than \$5,000 if the person is a worker and by a fine of not more than \$50,000 if the person is not a worker.

However, there is no administrative penalty available against those who commit this offence. The WCB Administration argues that adding an administrative penalty for obstructing or hindering an inspection under section 100(1) would enhance the WCB compliance framework. The Committee agrees. In our view, adding such a penalty to the Act would reinforce the WCB's capacity to ensure compliance with the Act.

RECOMMENDATION 58

The Workers Compensation Act should be amended to create an administrative penalty for obstructing or hindering an inspection under section 100(1) of the Act.

11. Employer's Access to Information (Section 101(1.2))

The WCB's processes around privacy and access are governed by provisions of *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act* and by section 101(1) of *The Workers Compensation Act*. Section 101(1) prohibits WCB officers, agents and employees from disclosing claim information except in the performance of their duties or under the WCB's authority.

An exception to this prohibition appears in section 101(1.2), which allows an employer access to relevant information from a worker's claim file in the context of a reconsideration or appeal of an adjudicative decision. Neither this provision, nor any other provision in the Act, addresses the rights of employers or others to access information gathered in the context of assessments, compliance or prevention. As the WCB continues to expand its role in these areas, the Committee considers that greater clarity around participants' rights to information would be helpful.

RECOMMENDATION 59

The Workers Compensation Act should clarify employers' rights to information in the context of The Workers Compensation Board's compliance, assessments and prevention mandates.

12. Priority of Board's Charge (Sections 104(3) and 104.1(2))

For the purpose of debt collection, section 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. However, this section appears to conflict with section 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*. Section 104.1(2) and the relevant provisions of *The Judgments Act*, when read together, indicate that the WCB's interest is enforceable as against another creditor's interest only if it was registered earlier in time.

The WCB Administration has submitted that it would be beneficial to reconcile the conflict between these two sections of the Act in order to clarify the the priority of a charge registered by the WCB. The Committee agrees that these two sections of the Act should be reviewed and reconciled.

RECOMMENDATION 60

The Workers Compensation Act should be amended to clarify the priority of The Workers Compensation Board's interest in respect of collection activities.

13. Board may Delegate to Agent (Section 109.5(1))

Under section 109.5(1) of the Act, the WCB may delegate its powers to an agent or local representative for various compensation-related purposes. The Committee believes this section should be expanded to include delegation of powers in connection with the WCB's prevention mandate.

RECOMMENDATION 61

Section 109.5(1) of *The Workers Compensation Act* should be amended to expressly recognize that The Workers Compensation Board may delegate its powers to an agent or local representative in fulfilling its prevention mandate.

14. Fines for Offences (Section 109.6)

Section 109.6 of the Act outlines the penalties that apply when a person is convicted of an offence under the Act. Offences under the Act are summary conviction offences punishable by fines. The

WCB Administration noted in its submission that section 109.6 does not specify what is to happen with the monies received in fines. In the Committee's view, the Act should be amended to provide that fines payable on conviction of an offence under the Act are paid into the accident fund. We note that workers compensation legislation in several other Canadian jurisdictions includes this provision.

RECOMMENDATION 62

The Workers Compensation Act should be amended to provide that fines payable on conviction of an offence under the Act are paid into the accident fund.

15. Administrative Penalties (Section 109.7(1)(m))

Section 109.7(1)(m) currently provides an administrative penalty for a breach of section 101(1) of the Act, which requires WCB employees to protect the confidentiality of information received in the course of their duties. The WCB Administration has identified this as a clerical error. It advises that section 109.7(1)(m) refers to the wrong section of the Act. Section 109.7(1)(m) should refer instead to section 101(1.2) of the Act, which prohibits employers from improperly using claim information received from the WCB through the file access process. The Committee is of the view that this should be corrected.

RECOMMENDATION 63

Section 109.7(1)(m) of *The Workers Compensation Act* should be amended to clearly provide an administrative penalty against employers who improperly use claim information.

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

Section 116 of the Act states that if a provision of *The Workers Compensation Act* is in conflict with a provision of *The Freedom of Information and Protection of Privacy Act*, the provisions of *The Workers Compensation Act* prevail. Section 116 of the Act predates the enactment of *The Personal Health Information Act*, which is the other key piece of privacy legislation in Manitoba. For consistency and clarity, the Committee recommends that section 116 of the Act should be amended to also refer to *The Personal Health Information Act*.

RECOMMENDATION 64

Section 116 of *The Workers Compensation Act*, which regulates conflicts between *The Workers Compensation Act* and *The Freedom of Information and Protection of Privacy Act*, should be amended to also refer to *The Personal Health Information Act*.

APPENDIX A:

LIST OF RECOMMENDATIONS

Chapter 1 - Coverage

1. The Workers Compensation Board should engage in further consultations with the industries and employers identified in the *Excluded Industries, Employers and Workers Regulation* and encourage them to opt into the mandatory coverage scheme. Consultation efforts should be focused on industries and occupations that pose the highest risk of workplace injury or illness, as well as on those industries and occupations that represent the highest percentage of non-covered workers. (Page 14)
2. The Workers Compensation Board should vigorously promote the benefits of optional and personal coverage to excluded industries and employers, targeting promotion to those industries and occupations that pose the highest risk of workplace injury or illness. (Page 14)

Chapter 2 - Prevention

3. The Workers Compensation Board should continue its efforts to expand SAFE Work Certified into other industries, specifically targeting its expansion to sectors with higher than average rates of injury and illness; consult with stakeholders when developing prevention plans; and implement the prevention rebate. (Page 22)
4. The composition, structure, mandate and role of the Prevention Committee should be reviewed. (Page 23)
5. Section 84.1(1) of *The Workers Compensation Act* should be amended so that The Workers Compensation Board is only required to provide a grant to the Government of Manitoba to assist with the reasonable expenses of worker advisers. As was recommended by the 2005 Legislative Review Committee, the costs of administering *The Workplace Safety and Health Act* should be paid by the Government of Manitoba out of the general revenue. (Page 27)
6. Should the Government of Manitoba choose not to accept Recommendation 5, the Committee respectfully suggests that The Workers Compensation Board's liability for the costs of administering *The Workplace Safety and Health Act* be limited to the percentage of the Manitoba workforce covered under *The Workers Compensation Act*, which at present is approximately 76%. (Page 27)

Chapter 3 - Assessments

7. We support the decision of the Workers Compensation Board to set its funding ratio target at 130%. The Workers Compensation Board should continue to retain discretion over its funding policy, including how it disposes of excess reserve funds. (Page 34)

Chapter 4 - Compliance

8. The Workers Compensation Board should continue to allocate appropriate resources to investigating allegations of claim suppression and discriminatory action and penalizing those who engage in such activities. *(Page 43)*
9. The Government of Manitoba should determine the appropriate venue for adjudicating appeals regarding discriminatory action and associated administrative penalties such as, for example, the Manitoba Labour Board. *(Page 44)*
10. The Workers Compensation Board should continue to pursue return to work initiatives as a high priority issue. *(Page 49)*
11. The Workers Compensation Board should support the development of safe return to work plans that are tailored to the individual capabilities of workers and created in consultation with injured workers, employers and health care providers. *(Page 50)*
12. The Workers Compensation Board should continue to explore and develop new mechanisms to assist ill or injured workers in a safe and timely return to work. *(Page 50)*
13. Section 49.3 of *The Workers Compensation Act*, which imposes the re-employment obligation on employers in certain circumstances, should be retained in its current form. *(Page 50)*
14. The Government of Manitoba should determine the appropriate venue for adjudicating appeals regarding the re-employment obligation and associated administrative penalties such as, for example, the Manitoba Labour Board. *(Page 51)*
15. Section 15 of *The Workers Compensation Act* should be amended to provide a complete definition of the term "wages," following consultation with The Workers Compensation Board and stakeholders. *(Page 55)*
16. Section 16 of *The Workers Compensation Act* should be amended to allow The Workers Compensation Board to pay a worker any amount that an employer has improperly deducted from the worker's wages contrary to section 15, and to seek reimbursement from the employer. *(Page 56)*
17. *The Workers Compensation Act* should be amended to allow The Workers Compensation Board to impose an administrative penalty in cases where a worker, employer, health care provider or other participant in the system is determined to have made a false statement in connection with a claim for compensation or employer assessment. *(Page 58)*
18. *The Workers Compensation Act* should be amended to clarify The Workers Compensation Board's authority to terminate, suspend or reduce benefits in cases when it is established that a worker has made a false or misleading statement to The Workers Compensation Board affecting his or her entitlement to benefits. *(Page 58)*

Chapter 5 - Adjudication of Claims

19. A schedule of occupational diseases should be created under *The Workers Compensation Act*, in consultation with stakeholders. If a worker is diagnosed with one of the diseases on the schedule, and meets the other criteria established in the schedule, a link between the worker's employment and his or her occupational disease will be presumed. (Page 65)
20. Occupational disease claims that do not fall within the parameters of the schedule of occupational diseases created under *The Workers Compensation Act* should continue to be adjudicated on a case-by-case basis, and the dominant cause standard of causation should continue to apply to such claims. (Page 65)
21. *The Workers Compensation Act* should be amended to ensure that psychological injuries, including Post-Traumatic Stress Disorder, are not categorized as occupational disease. (Page 77)
22. The Government of Manitoba and the Workers Compensation Board should monitor developments in respect of compensation for injuries caused by non-traumatic workplace stressors and reconsider this issue in two years' time. (Page 77)
23. The Workers Compensation Board should continue to pursue improvements in its methods for resolving conflicting medical opinions. Measures should include:
 - contacting workers' health care providers in efforts to resolve conflicts between the medical opinions provided by workers' health care providers and those provided by The Workers Compensation Board's medical advisers;
 - having The Workers Compensation Board's medical advisers conduct in-person examinations of injured workers before rendering medical opinions, where possible and advisable; and
 - engaging in frequent dialogue with external health care providers so that they understand their role in assisting workers with their claims for compensation under *The Workers Compensation Act*. (Page 84)
24. Section 67 of *The Workers Compensation Act*, which regulates the jurisdiction, composition powers and procedures of medical review panels, should remain unchanged. (Page 85)

Chapter 6 - Compensation / Benefits

25. Section 46 of *The Workers Compensation Act* should be amended to reinstate a cap for maximum insurable earnings. The amount of this cap should be \$120,000, subject to indexing. (Page 95)
26. The amount of the maximum assessable earnings cap should be the same as the amount of the maximum insurable earnings cap. (Page 95)

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27. *The Workers Compensation Act* should be amended to create a special graduated benefit for workers earning more than \$120,000, subject to an ultimate maximum insurable earnings cap of \$150,000. Wage loss benefits will be payable to these workers based on an average of the worker's earnings over the previous five years up to a maximum of \$150,000. The wage loss benefit would be stepped down incrementally over the first five years of the claim, ending at the regular maximum insurable earnings cap of \$120,000, subject to indexing. (Page 95)
 28. Section 40(3)(b) of *The Workers Compensation Act*, which mandates the deduction of probable amounts for Canada Pension Plan or Quebec Pension Plan premiums when calculating a worker's net average earnings, should remain unchanged. (Page 99)
 29. At the appropriate inter-governmental level, the Government of Manitoba should raise the issue of remitting to the Canada Pension Plan or Quebec Pension Plan probable amounts of premiums deducted from a worker's average earnings under section 40(3)(b) of *The Workers Compensation Act*. (Page 99)
 30. The Workers Compensation Board should consider the appropriate policy response to allow payment of wage loss benefits based on probable future earning capacity to workers enrolled in education or retraining at the time of the workplace accident. This adjustment should be available only when The Workers Compensation Board is satisfied that the worker's pre-accident earnings do not represent his or her future earning potential. (Page 104)
 31. *The Workers Compensation Act* should not be amended to compel employers to provide their workers with access to employer-based benefits, such as pension, life insurance or extended health care benefits, while their workers are in receipt of benefits under *The Workers Compensation Act*. (Page 108)
 32. Section 27 of *The Workers Compensation Act*, the provision dealing with medical aid, should be amended to make it more intelligible, more transparent and easier to apply. More specifically, it should be amended to:
 - give The Workers Compensation Board the necessary flexibility to respond to workers' needs within the context of a modern health care and rehabilitation framework; and
 - clarify that The Workers Compensation Board has the authority to provide medical aid to ill or injured workers where it considers such aid necessary to cure or provide relief to such workers. (Page 112)
 33. Section 27(6) of *The Workers Compensation Act*, which authorizes the denial of benefits if a deceased worker's dependants do not consent to an autopsy, should be repealed. (Page 112)
 34. The Workers Compensation Board should adjust its *Support for Daily Living* policy to clarify that it will pay reasonable fees related to committee membership and administration by the Public Guardian and Trustee in appropriate circumstances. (Page 116)
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35. Section 43(5) of *The Workers Compensation Act* and the *Group Life Insurance Regulation* should be amended to provide that:
- Eligibility for the full group life insurance benefit under the Act should be limited to workers who do not have access to an employment-based life insurance plan;
 - A worker with access to an employment-based life insurance plan is not eligible for the full group life insurance benefit under the Act unless he or she becomes eligible before the Act is amended to give effect to this Recommendation; and
 - If the amount available under the Act exceeds the amount available under an employment-sponsored plan, The Workers Compensation Board should top up the benefit to the amount that would have been available under the Act in respect of that worker. (Page 119)
36. Section 23 of *The Workers Compensation Act* should be amended to allow for the voluntary assignment of benefits with written approval of The Workers Compensation Board. (Page 122)

Chapter 7 - Administration of the Act

37. A separate Employer Adviser Office should be created and housed within the Government of Manitoba. The Employer Adviser Office's mandate should be restricted to providing information and advice to employers. It should not be authorized to provide advocacy services. (Page 126)
38. *The Workers Compensation Act* should be amended to give the Appeal Commission the authority to make regulations regarding its own practice and procedure, subject to the approval of the Lieutenant Governor in Council. (Page 132)
39. Once the Appeal Commission has made regulations regarding its own practice and procedure, the *Appeal Commission Rules of Procedure* should be repealed. (Page 132)
40. Section 68(1)(r.1)(ii) of *The Workers Compensation Act* should be repealed. (Page 132)
41. Section 60.9 of *The Workers Compensation Act* should be amended to remove the ability of the Board of Directors to rehear an appeal. The ability of the Board of Directors to direct a new panel of the Appeal Commission to rehear an appeal should be maintained. (Page 133)
42. Section 60(2.2) of *The Workers Compensation Act*, which states that neither The Workers Compensation Board nor the Appeal Commission have jurisdiction over constitutional questions, should remain unchanged. (Page 134)
43. Section 17(1) of the *The Workers Compensation Act* should be amended by repealing the term "as soon as practicable" and replacing it with a requirement to notify employers of accidents "as expeditiously as possible, and no later than 30 days after the accident". (Page 141)

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44. The Workers Compensation Board should continue to engage in educational campaigns to inform both workers and employers of the need for and importance of early notification and reporting of workplace accidents. (Page 141)
 45. *The Workers Compensation Act* should be amended to limit self-insurance to the current employers identified in Classes B, C, and D under section 73(2) of the Act and the *Self-Insured Employers Regulation*, subject to the sale, purchase, privatization or mis-classification of employers. (Page 145)
 46. Section 73(2)(a) of *The Workers Compensation Act*, which creates Class A, a class of provincially funded industries set out in a schedule to *The Workers Compensation Act*, should be repealed. (Page 146)
 47. Section 76.1 of *The Workers Compensation Act*, which allows The Workers Compensation Board to establish a schedule of provincially funded industries for the purposes of Class A, should be repealed. (Page 146)

Chapter 8 - Technical Amendments

48. *The Workers Compensation Act* should be rewritten in plain, modern language and organized in a logical manner. (Page 148)
49. The definition of "accident" found at section 1(1) of *The Workers Compensation Act*, should be redrafted. Amendments should include: removal of psychological injuries from the definition of occupational disease; repeal of section 1(1)(b)(ii) that refers to "the thing that is done and the doing of which . . ."; and replacement of the word "means" in the opening stem of the definition with the word "includes". (Page 149)
50. *The Workers Compensation Act* should be amended to provide The Workers Compensation Board with a general authority to determine the most convenient and appropriate manner in which to pay compensation. (Page 149)
51. Sections 28 and 29 of *The Workers Compensation Act* should be reviewed and amended. Changes to these sections should ensure that compensation received by survivors of fatally injured workers is commensurate with similar benefits available under other legislative schemes in Manitoba. The Government of Manitoba should also consider whether to allow for lump sum payments to surviving relatives who are not dependants of fatally injured workers. (Page 150)
52. Section 59(3) of *The Workers Compensation Act* should be amended to clarify that The Workers Compensation Board is the Retirement Plan Administrator for The Workers Compensation Board's employee pension plan, as contemplated in *The Pension Benefits Act*. (Page 150)

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53. Section 61 of *The Workers Compensation Act* should be amended to extend protection from liability to external members of The Workers Compensation Board's committees in the performance of their duties under the Act. (Page 151)
 54. Section 62 of *The Workers Compensation Act* should be amended to ensure that external members of The Workers Compensation Board's committees cannot be compelled to appear as a witness or produce documents obtained, received or made under the Act or regulations in proceedings to which The Workers Compensation Board is not a party. (Page 151)
 55. Sections 81.1(2) to 81.1(4) of *The Workers Compensation Act*, which deal with the disposition of business enterprises and the liability of new owners, should be amended to clarify that these provisions apply to all types of disposition, including transfer, exchange or gift. (Page 152)
 56. *The Workers Compensation Act* should be amended to specify that all income of The Workers Compensation Board is free from every form of taxation. (Page 152)
 57. Section 99 of *The Workers Compensation Act* should be amended to give The Workers Compensation Board express authority to pierce the corporate veil when determining the employer for the purpose of the Act. (Page 153)
 58. *The Workers Compensation Act* should be amended to create an administrative penalty for obstructing or hindering an inspection under section 100(1) of the Act. (Page 153)
 59. *The Workers Compensation Act* should clarify employers' rights to information in the context of The Workers Compensation Board's compliance, assessments and prevention mandates. (Page 154)
 60. *The Workers Compensation Act* should be amended to clarify the priority of The Workers Compensation Board's interest in respect of collection activities. (Page 154)
 61. Section 109.5(1) of *The Workers Compensation Act* should be amended to expressly recognize that The Workers Compensation Board may delegate its powers to an agent or local representative in fulfilling its prevention mandate. (Page 154)
 62. *The Workers Compensation Act* should be amended to provide that fines payable on conviction of an offence under the Act are paid into the accident fund. (Page 155)
 63. Section 109.7(1)(m) of *The Workers Compensation Act* should be amended to clearly provide an administrative penalty when employers improperly use claim information. (Page 155)
 64. Section 116 of *The Workers Compensation Act*, which regulates conflicts between *The Workers Compensation Act* and *The Freedom of Information and Protection of Privacy Act*, should be amended to also refer to *The Personal Health Information Act*. (Page 155)

APPENDIX B:

SUBMISSIONS TO THE COMMITTEE

As part of its consultation process, The Workers Compensation Act Legislative Review Committee 2016 asked for written submissions from Workers Compensation Board stakeholders. Between November 15, 2016 and February 15, 2017, the Committee received submissions from a wide variety of stakeholders, including 36 individuals and the following organizations:

- 5757275 Manitoba Corporation / 6881204
- American Industrial Hygiene Association (AIHA) Manitoba Section
- Bethania Group
- Canadian Association of Petroleum Producers (CAPP)
- Canadian Centre for Policy Alternatives / Errol Black Chair (EBC)
- Canadian Federation of Independent Business (CFIB)
- Canadian Union of Public Employees (CUPE) Local 737
- Canadian Union of Public Employees (CUPE) Manitoba
- CN Rail
- Construction Association of Rural Manitoba
- Federally Regulated Employers -Transportation and Communications (FETCO)
- Gerdau Inc.
- Healthcare Employee Pension and Benefit Plans (HEB Manitoba)
- Hedman Construction Ltd.
- Jayna Painting Renovations & Construction
- Kelsey Teachers' Association
- Keystone Agricultural Producers (KAP)
- Manitoba Chambers of Commerce
- Manitoba Chiropractors Association
- Manitoba Employers Council (MEC)
- Manitoba Federation of Labour (MFL)
- Manitoba Government and General Employees' Union (MGEU)
- Manitoba Hydro
- Manitoba Liquor and Lotteries
- Manitoba Ltd. / 7089466 Manitoba Ltd.
- Manitoba Nurses Union (MNU)
- Maple Leaf Foods Inc.
- Merit Contractors Association of Manitoba
- MFL Occupational Health Centre
- MFL Occupational Health Centre
- Norbert's Manufacturing Ltd.

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- Operating Engineers of Manitoba Local 987
 - Parkwest Projects Ltd.
 - Penno's Machining and Manufacturing Ltd.
 - Pollard Banknote
 - Public Service Alliance of Canada (PSAC)
 - Rohl Enterprises Ltd.
 - Tarr Construction Ltd.
 - The Appeal Commission
 - The Workers Compensation Board of Manitoba (WCB)
 - UNIFOR
 - United Food and Commercial Workers (UFCW) Union Local 832
 - United Steelworkers (USW) Local 6166
 - VIA Rail Canada
 - Western Bakeries
 - White Lotus Pet Spa
 - Winnipeg Chamber of Commerce
 - Winnipeg Construction Association
 - Winnipeg Police Association
 - Work Comp Tech Ltd.

The Committee thanks Manitobans for their input.

APPENDIX C: COSTING SUMMARY

The Workers Compensation Board has provided annual and, where applicable, one-time cost/savings estimates for nine recommendations of the Legislative Review Committee 2016. These estimates are documented in terms of impact to the Workers Compensation Board.

The Workers Compensation Board has not provided estimates for the remaining recommendations as they are not expected to have material cost or revenue consequences. The cost/savings estimates in this Costing Summary are based on reasonable assumptions and available data and are therefore subject to change.

All figures are in millions.

Recommendations	Cost to the System	Savings to the System
#5: The costs of administering <i>The Workplace Safety and Health Act</i> should no longer be borne by the Workers Compensation Board.*		\$8.8
#17: <i>The Workers Compensation Act</i> should be amended to ensure that psychological injuries, including Post-Traumatic Stress Disorder, are not categorized as occupational disease.**	\$0.1	
#19: Re-instate a cap on maximum insurable earnings.		\$0.3
#20: Reduce the cap on maximum assessable earnings.	\$0.4	
#21: The Workers Compensation Board of Directors should consider the appropriate policy response to allow payment of wage loss benefits based on probable future earning capacity to workers enrolled in education or retraining at the time of the workplace accident.	\$1.1	
#26: Section 43(5) of <i>The Workers Compensation Act</i> and the <i>Group Life Insurance Regulation</i> should be amended to limit eligibility for the full group life insurance benefit to workers who do not have access to employment-based life insurance plans. A top-up will be provided in cases where the amount available under an employment-based life insurance plan is less than the amount of life insurance benefit that would be available under the Act.		\$0.2

Recommendations	Cost to the System	Savings to the System
#29: A separate Employer Advisor Office should be created.	\$0.7	
#40: Sections 28 and 29 of <i>The Workers Compensation Act</i> should be amended to ensure that compensation received by survivors of fatally injured workers in Manitoba is commensurate with similar benefits available under other legislative schemes in Manitoba.	\$0.3	
Total	\$2.6	\$9.3
Total Net Savings to the System	\$9.3 - \$2.6 = \$6.7	

I agree that these projections are a reasonable estimate of costs and revenue based on the available data.



Winston Maharaj
 President and CEO
 Workers Compensation Board of Manitoba

* If the government does not implement Recommendation #5 and instead accepts and implements Recommendation #6, the savings to the system would be lower. With Recommendation #6, the Committee recommends that the WCB's liability for the costs of administering the WSHA should be limited to the percentage of employers subject to mandatory Workers Compensation Board coverage, which at present is 76%. The implementation of Recommendation #6 would result in savings to the system of approximately \$2.1 million, and the overall financial impact of the Committee's recommendations would be neutral.

**Recommendation #17 would also prompt a one-time retroactive increase to the benefit liability in the year of implementation, with a cost of \$0.7 million.

