

**Presentation to the WCA Review Committee
by the
CANADIAN UNION of POSTAL WORKERS
Winnipeg Local**

The Winnipeg Local of the Canadian Union of Postal Workers (CUPW) appreciates the opportunity to present to the Review Committee concerning changes to the Workers' Compensation Act of Manitoba. The Winnipeg Local represents approximately 1400 postal workers who are employed in full time, part time and temporary positions and work as letter carriers, mail service couriers, postal clerks, dock workers, maintenance workers, electricians and mechanics. In 2003 the union achieved voluntary recognition from Canada Post for rural and suburban mail carriers. Their workers had been restricted by section 13(5) of the Canada Post Act from organizing into a union and negotiating a collective agreement with the post office. The union negotiated a first collective agreement for these workers and they are now recognized as employees rather than self-employed contract workers.

Postal workers are employed by a federal crown corporation and consequently are covered by both the Government Employees Compensation Act (GECA) and the Workers Compensation Act of Manitoba (WCA). WCB policy 44.05.10 provided clarification of how the Manitoba WCB will define accident and decide GECA claims.

The last major change to the WCA took affect January 1, 1992. The changes to the Act significantly altered and eroded benefits to injured workers. The WCB reaped huge surpluses in succeeding years at the expense benefits that were taken from workers. An alleged \$224 million unfunded liability was reduced to zero and by 1999 employers were enjoying assessments that were reduced by 34% and an \$8 million cash pay back.

It is time for the Workers' Compensation Act to be reviewed. Change is needed to recognize the losses workers have experienced since 1992 and advances that have been made by society such as the right of injured and disabled workers to re-employment. It is time to construct an Act that is balanced and demonstrates fairness to both employers and workers.

This presentation will focus on the following issues:

Definition of Occupational Disease – Section 1(1) of the WCA contains definitions. Section (d) of the occupational disease definition excludes coverage for stress other than an acute reaction to a traumatic event. This exclusionary language should be removed from the Act. Workers do experience stressful events and situations work that are non-traumatic in nature and do require medial aid and at times are disabling. Language of this nature opens the door to tort action.

Workers' Compensation Boards in other jurisdictions have accepted stress claims in the past that were not an acute reaction to a traumatic event. There have been claims accepted based on changes in employment like promotion, transfer and demotion. It is interesting to note that the current legislations contains a definition identified as *Restriction on Definition of "Accident"* that specifically restricts the definition of accident to include factors like any change in respect of employment, including promotion, transfer, demotion, lay-off or termination. In other jurisdictions claims for stress have been accepted based on these factors.

The definition of Occupational Disease should be changed to remove (d) that excludes coverage for stress injuries other than an acute reaction to a traumatic event.

Restriction on Definition of "Accident" – Section 1(1.1) contains a definition that specifically restricts the definition of accident to include factors like any change in respect of employment, including promotion, transfer, demotion, lay-off or termination. In other jurisdictions claims for stress injuries have been accepted based on these factors. This restrictive language should be removed from the WCA.

Injury claims should be adjudicated on their own merits and if it found that factors at work that are not an acute reaction to a traumatic event have caused the injury the claims should be accepted.

Dominant Cause – Section 4(4) of the WCA deals with the cause of occupational diseases. This section of the legislation calls for a person to demonstrate that work factors were the dominant cause of the injury before and occupational disease injury will be accepted. The use of dominant cause has created significant barriers to the acceptance of occupational disease claims. Evidence has to be provided demonstrating that workplace factors are over 50% responsible for the injury. Many injuries diagnosed as occupational diseases, such as cancers, are multi-factoral in terms of causation. This could be further complicated if a pre-existing medical condition is present and an exposure at work has enhanced the pre-existing condition. Demonstrating dominant cause places an excessive burden on workers with these complex types of injuries.

Occupational disease claims should be adjudicated the same way accidents are adjudicated, using significance as the adjudication criteria. Demonstrating that there is a significant contributing work factor or factors is a fairer approach to the acceptance of these complex disease claims.

Employer to Report Accident – Section 18(1) of the Workers' Compensation Act allows employers 5 business days to report an accident and the injury to the WCB. This was increased from 3 days under the previous legislation. Technology changes allow employers to report much faster. There is no excuse for late reporting or lengthy reporting periods.

The WCA should be changed to require employers to report all accidents and injuries within three business days.

Inducing worker not to make application section 19.1(1) – This section prohibits employers from compelling or inducing a worker by intimidation, coercion, promise the imposition of a pecuniary or other penalty, threat, including threat of dismissal or any other means not to file a claim for compensation.

This section needs to be strengthened. Complaints filed and investigated by the WCB Special Investigation Unit (SIU) has shown that workers who experience employer inducement and coercion, but have the fortitude to file a claim for compensation, have no redress through section 19.1(1). The SIU reports that action can only be taken if employer intimidation and coercion results in a worker not filing a claim for compensation. The SIU refuses to prosecute employers involved in these types of activities if the worker files a claim for compensation.

It is highly unlikely that workers who are coerced and induced not to file a claim for compensation will not come forward with a complaint to the WCB SIU.

Section 19.1(1) should be clarified to ensure that WCB will take action when there is evidence to support that an employer is coercing and intimidating workers not to file claims for compensation, regardless of whether the worker had the courage to ignore the employer action and file a claim for compensation.

Limit on further claim 27.1. Section 27.1 allows the board to limit or deny a claim for medical aid, impairment benefits or wage loss benefits. This can happen when a worker has previously made a claim for an injury of the same nature; when a worker has a medical condition that, in the opinion of the board, requires being removed temporarily or permanently from work because the medical condition could result in an injury of the same nature; a claim is submitted after the worker is requested to discontinue a certain type of employment in an effort to avoid further injury; academic, vocational or rehabilitative assistance has been offered and the worker returns to particular employment without the approval of the board.

The WCA act should not contain language that limits or denies a claim if a worker sustained an injury while working in a covered workplace. The WCA should be changed to ensure workers have re-employment rights to suitable meaningful work with the accident employer. Barring a return to work the injured worker should have the right to vocational rehabilitation and retraining that provides employment skills to obtain employment elsewhere.

Section 27.1 of the WCA should be removed.

Compensation Payable to Dependents – Section 29 addresses the issue of compensation payable to dependents. Sections 29(2) reduces the lump sum payable to the spouse of a deceased worker under the terms of section 29(1)(a)(i) by 2% for each year of age the worker is over 45 at the time of death up to a maximum 40% reduction.

The WCA should be amended to remove section 29(2) which reduces the lump sum payment paid to the spouse of a deceased worker.

Section 29(3) of the WCA further reduces the lump sum payable to the spouse of a deceased worker under the terms of section 29(1)(a)(i) by reducing the lump sum by any amount the worker receives as an impairment award under section 38 of the WCA.

The WCA should be amended to remove section 29(3) which reduces the lump sum payment paid to the spouse of a deceased worker.

Section 29(4) of the WCA establishes the indexing factor that applies to the monthly benefits paid to the spouse of an deceased worker under section 29(1)(a)(ii) (90% of net). Under the current legislation monthly benefits are adjusted, by applying the indexing factor contained in section 47 of the Act, on the first day of the month following the second anniversary of the accident and annually thereafter.

The WCA should be changed to adjust the benefits payable to the spouse of a deceased worker by applying the indexing factor contained in section 47 of the Act on the first day of the month following the second anniversary of the accident and annually thereafter.

Section 29(5) limits the payment of benefits to the spouse of a deceased worker to 60 months after the worker's death. This section should be changed to ensure that benefits are payable to the spouse of a deceased worker until age 65.

PPI Awards – Section 38(2) of the WCA contains the calculation base used for determining Impairment Award lump sum payments. The current level of Impairment Awards is embarrassingly inadequate and must be changed to a fairer system.

The legislation should be changed to eliminate the one percent or greater but less than five percent category range and the five percent or greater but less than ten percent category range. An example of how miserly the current Impairment awards are was demonstrated in a document entitled "*Strategic Overview-Proposed Legislative Amendments to the WCA*". An impairment award of \$6,000 would be paid for the loss of a foot at the ankle; \$500 would be paid for the loss of the tip of the index finger; \$7,000 would be paid for the loss of sight in one eye; the loss of the tips of all four fingers would get you the grand total of \$5000.

The fact that a person is disadvantaged for life with a loss of this type is not reflected in the current impairment awards.

A fairer system would provide for a significant increase for any measurable loss up to one percent and additional amount for each percentage or portion of thereafter up to one hundred percent.

Impairments - Impairment reduction for workers over the age of 45 – This reduction is located in section 38(3) and 38(7) of the WCA. Impairment awards are provided to workers who have been injured and as a result of the injury have experienced a permanent loss, loss of range of motion loss of function of any organ or disfigurement. The current legislation allows for a reduction in Impairment Awards by 2% to a maximum of a 40% loss based on age. This practice is nothing more than discrimination based on age. Both the Manitoba Human Right Act and the Canadian Human Right Act contain protected characteristics that prevent discrimination based on age.

The WCA should be changed to eliminate the reprehensible and discriminating practice of reducing impairment awards based on age.

Wage Loss Benefits - Wage loss benefits to begin from the date and time of injury – Section 39(1) of the WCA penalizes injured workers in Manitoba by not providing wage loss benefits on the date of accident. Benefits are paid only when an injury results in wage loss after the day of accident. This penalty can range from a full shift to a portion of a shift depending on when the disabling injury occurred during the shift. Manitoba employers can apply for a variance to alter the number of hours worked per day and number of days worked per week. Besides the normal 8 hour full time shifts, people are working 10 and 12 hour shifts as well. In these situations the penalty experienced by workers is greater. Penalizing workers financially for experiencing disabling injuries is contrary to the Meredith principles. Workers Compensation is built on the principles of providing no fault coverage and a system that is employer funded. Workers gave up their right to sue employers as part of the “historic compromise” when workers compensation was created. Workers are prevented from taking legal action to recover lost wages that are not paid for time lost on the date of accident.

The Workers’ Compensation legislation should be change to remove financial penalties from workers who are victims of workplace accidents and injuries.

Wage Loss Benefits - Removal of 80% after two years – the reduction of benefits from 90% of net to 80% of net after being on benefit for 24 months is contained in section 39(1)(b) and 39(5)(b) of the Workers’ Compensation Act (WCA). A reduction in benefits creates financial hardship for injured workers and their families. Workers that have sustained injuries serious enough to cause 24 months of time loss need support from the Workers’ Compensation Board, not a reduction of benefits. Reducing the benefits paid to seriously injured workers is nothing more than a penalty imposed on vulnerable workers who are the victims of hazardous and unsafe workplaces.

The change in benefit calculation in 1992 from 75% of Gross to 90% of net reduced benefits significantly for some workers. The reduction to 80% of net further reduces benefits to workers.

The Workers' Compensation Act (WCA) should be changed leave benefits at 90% on net for the duration of the claim.

The legislation should ensure benefits are paid to workers no later than two weeks after filing a claim for compensation.

Wage Loss Benefits - Removal of tax sheltering provision – This provision is located in section 39(5)(d) of the WCA. The current legislation allows for a reduction in benefits to reflect the tax-deductible status of WCB benefits. The amount reflecting the tax deductible status is considered to be a collateral benefit and the 90% of net benefits are reduced to reflect and claw back the tax advantage. Arguments that workers can recover the tax claw-back when a tax return is filed does nothing to address the need of the worker for full benefits during the period of disability. Most hourly workers live payday to pay day and cannot afford to absorb this loss.

The WCA should be changes to stop the practice of reducing workers benefits by reducing the 90% of net calculation further by the tax sheltering adjustment.

Calculation of net average earnings section 40(3) – The calculation of 90% of net benefits includes a probable deduction for Canada Pension Plan premiums [40(3)(b)] and Employment Insurance premiums [40(3)(c)]. WCB does not forward premiums to Canada Pension or Employment Insurance on behalf of injured workers even though benefits are reduced by a probable deduction for premiums paid. Legislation covering both the Canada Pension Plan and Employment Insurance does not allow for the payment of premiums during a period of approved compensable time loss.

The calculation of benefits process contained in the WCA should be changed to eliminate illogical deduction for premiums to Canada Pension and Employment Insurance that are not submitted on behalf of injured workers.

Canada Pension Plan benefits paid to workers who remain on benefit for a significant period of time are significantly reduced, depending on the period of time premiums have not been submitted. This demonstrates a real loss experienced by workers that currently is not addressed in the WCA.

Collateral benefits payable to workers by collective agreement – Sections 41(5) and 41(6) reduce benefits to injured workers who are covered by collective agreement when benefits paid through provisions of the collective agreement have the effect of compensating a person in excess of the 90% of net loss of earning capacity. These

sections apply to provisions negotiated into collective agreements commonly referred to as “top up” provisions. Top up provisions are designed to reduce the negative financial impact experienced by injured workers during periods of total and partial disability. The inclusion of sections 41(5) and 41(6) into the WCA had a direct impact on the collective bargaining process and the ability of unions to protect the members they represent.

The workers compensation legislation should not be utilized to interfere in the collective bargaining process. Sections 41(5) & (6) should be removed from the WCA.

Maximum Annual Earnings - Removal of maximum annual earnings ceiling

contained in sections 46(1) & (2) – Benefits paid to workers should be based on 100% of their income. The current maximum benefit level for 2003 was set at \$55,620. Many workers in this province earn in excess of the maximum annual earnings ceiling set in the Adjustment in Compensation Regulation, and are not compensated for those earnings.

Currently workers who earn income in excess of the WCB benefits ceiling have to obtain additional private coverage at their own expense to be compensated based on their full earnings. Workers’ Compensation is based on the principles and recommendations of Judge William Meredith. One of the Meredith Principles called for a system based on collective employer liability so that costs are shared and paid fully by employers. The current practice of placing a ceiling on benefits and forcing workers to obtain and pay for private wage loss benefit protection is contrary to the Meredith principles.

If WCB is serious about expanding coverage into areas not currently covered, providing benefits based on full earnings will be viewed as a positive incentive for prospective clients.

The WCA should be changed to ensure that the calculation of benefits is based on 100% of a workers earnings. Section 68(1)(f) will need to be deleted as well.

Cost of frivolous appeal – Section 60.8(6) allows for costs of up to \$250 to be ordered paid, where the appeal commission is of the opinion that an appeal is frivolous. This section could be used to undermine the confidence of a worker to file an appeal of a WCB decision to the appeal commission. Penalties of this nature are minor inconveniences to employers, however the threat of a \$250 penalty to a worker who may have no or little income would be a major obstacle in deciding to go forward with an appeal especially if the evidence is not strong and the decision may hinge on credibility factors.

Medical Review Panels – Reference to panel on request – Section 67(4) of the WCA was changed in 1992 to include the wording, “*before a decision by the appeal commission under subsection 60.8(5)*”. The introduction of this wording removed a

workers right to request a Medical Review Panel once the appeal commission had rendered a decision. This change removed an opportunity from workers to obtain justice by requesting a MRP to address conflicting medical opinion between a medical officer of the board and the attending physician at the appeal commission level once a decision had been rendered.

Currently there is no access to a MRP when there are conflicting or differing medical opinions on file between WCB medical advisors. There have been cases where files have been reviewed by one medical advisor who offered an opinion supporting work-related causation, followed by an opinion of a second medical advisor who disagreed with work related causation. A request to schedule a MRP to resolve the conflicting medical opinions was denied because the differing opinions were between two WCB medical advisors, not between the attending physician and medical advisor.

The WCA should be changed to provide for unrestricted access to MRP to resolve conflicting or differing medical opinions. This access should extend to conflicting medical evidence between the attending physician and a WCB medical advisor; differing medical opinions that only becomes known following a decision rendered at the Appeal Commission; and to resolve conflicting and differing medical opinions between WCB medical advisors.

Employer Access to Information – Section 101(1.2) allows an employer, who is party to a reconsideration of a decision by the board or an appeal, access to copies of file information relevant to the issue under appeal. Employers obtained the right to access medical file information for the purpose of appeal January 1, 1992. Prior to that employers in Manitoba did not have access to file medical information.

Employers have abused access rights by using file information in other forms like arbitration.

Employers are requesting medical information from treating physicians parallel to reports being submitted to the WCB from the same physicians for the same injury. Employer demands for dual medical reporting has caused significant frustration with the treating physicians and workers and places an unnecessary demand on our health care providers and system.

Employer's request regular updates from physicians regarding the medical status of injured employees, their ability to perform modified duties and detailed information describing medical restrictions and details of prescribed medication. Specific information is requested asking for the diagnosis, treatment plans, objective and subjective medical information, referrals, reports from referrals, test and test results.

The WCA should be changed to remove employer access to medical file information.

As an alternative, the WCA could be changed to restrict employers from obtaining medical information from attending physicians related to any injury when a claim has been filed with the WCB. A change of this type would protect medical confidentiality and access to medical information until a decision has been made on a claim.

Board may delegate to agent section 109.5(1) through 109.5(5). This section allows the WCB to delegate its powers under the Act to an agent or a local representative for the purpose of receiving applications for compensation, reports of accidents, physician reports and other required proof of claim. Section 109.5(1) also allows the delegated agent or local representative to determine wage loss benefit entitlement, calculate loss of earnings capacity and payment of compensation to dependents. These are responsibilities and duties of the WCB and should not be contracted out or delegated to a third party. Issues of privacy and confidentiality have to be considered in relation to this section and the delegation of board authority to others.

Sections 109.5(1) through 109.5(5) should be removed from the WCA. Also remove reference to 109(5) contained on section 101(1) dealing with access to file information.

Recognize loss of vacation pay earnings during periods of approved compensable time loss in calculation of benefits – Workers should not be penalized for experiencing disabling injuries at work. Time loss injuries range from minor injuries to injuries involving significant periods of time loss. Workers who sustain injuries involving significant periods of time loss are not compensated for lost vacation leave earnings. For example a person could be injured and off work for a period of 6 months and then return to work. They may qualify for three weeks of vacation leave. When that leave is taken the employer will provide vacation pay for the 6 months the person was working, but not for the 6 months on WCB benefits. In this situation the worker is away from work for three weeks but only receiving 1.5 weeks pay from the employer. This creates financial hardship for the worker and his or her family and clearly demonstrates a financial loss that is a direct result of the work related injury that is not being compensated.

The WCA should include provisions to compensate workers for losses associated with vacation pay that is lost during periods of approved compensable time loss.

Compulsory coverage for all Manitoba workers – All workers in the province should be covered by workers compensation. To the best of our knowledge approximately 68% of workers in the province of Manitoba are covered by workers compensation. Employers pay assessments to the WCB to fund the system. Self Insured employers pay an administration fee to fund the system.

It is interesting to note that assessments paid into the WCB are used to fund the Workplace Safety and Health Division (WSHD). The mandate of the WSHD extends to

all workplaces in Manitoba. This includes employers who are not covered by the WCB, not paying assessments into the WCB and not funding the work and efforts of the WSHD. This creates an un-level playing field among employers, with some funding the work of the WSHD and others not. However the assistance provided from the WSHD is available to all employers, even those not funding the organization. This type of inequity leaves covered employers at a competitive disadvantage to those not paying into the WCB.

Aside from this glaring inequity that affects employers, workers in this province need to be protected and covered by workers compensation. If there are real and bona fide reasons why a workplace should not be covered by the WCB, those exceptions should be by exclusion, with a process available to employers to apply and be granted exclusion status.

Surveillance of workers – The practice of using private investigators to follow and videotape injured workers should stop. Injured workers have been frightened and called police to report vehicles parked outside their homes, or following them. Many of these workers have been single mothers who have experienced anxiety and stress over situations described as staking and concern for their children. Many investigations have been initiated based on anonymous phone calls or based on questionable employer tactics. Copies of video taped evidence reveal edited with spliced together tapes that have been to build to structure a case against a worker. Concerns have been raised that strong evidence that is supportive of the worker’s disability could have been edited out of the surveillance tapes leaving only evidence that could be used to support discontinuing or not accepting responsibility for a claim.

Northern Office – The WCB should be applauded for opening a northern office in Thompson to assist employers and workers in the north. This is the first time the WCB in Manitoba has set up an office outside the City of Winnipeg and was long over-due. The Thompson office was opened on a pilot project basis. There should be a legislated commitment in the WCA to keep and maintain an office in the north.

Implement a “duty to accommodate” clause into the WCA – Workers in Manitoba are still being released from employment because they have sustained an injury at work. The WCA needs to include provisions that respect the rights of workers to re-employment with the accident employer. Human Rights legislation both provincially and federally contains protections against discrimination based on characteristics that include mental and physical disability. The issue of employment discrimination based on human rights protected characteristics has been decided by arbitrators and various levels of courts up to the Supreme Court of Canada. The law supports the requirement of employers to accommodate disabled workers. The only employer defense to accommodation is to demonstrate undue hardship.

It's time the Workers' Compensation Act of Manitoba reflected the rights accorded workers through human rights legislation and decision of the Supreme Court of Canada on accommodation. A 1999 Royal Commission on the British Columbia Workers' Compensation Act recommended that workplaces with 20 or more employees be required to re-employ injured workers for a period of up to two years after the injury. At that time five other provincial jurisdictions included re-employment provisions based on the principles of duty to accommodate.

Role of WCB Medical Advisors – WCB medical advisors have too much power. Opinions can be rendered based on a review of file information that has an incredible influence on claim decisions both at short term claims and case management. Injured workers are called in for an examination and based on that one single examination the opinion of the medical advisor takes precedent over the opinions of the treating medical team which could include physiotherapists, general practitioners, chiropractors and specialists. It is no wonder that medical providers are frustrated with the WCB and the weight that is given to their opinions. Workers are regularly placed in an untenable position of adhering to the opinion of the treating physicians and risking termination of benefits or returning to work against the recommendation of the treating medical team to appease the deciders at the WCB.

WCB medical advisors should be used to assist adjudicators understanding reports, interpreting medical reports and providing clarification. They should not be used as an adjudicative tool to establish evidence used by adjudicators and case managers to override the opinions and recommendations of the treating medical providers. WCB medical advisors need to be held accountable to some outside body to assess the quality of their medical opinions.

The WCB medical advisors have vehemently opposed union representatives, lawyers or treating physicians attending medical examination with injured workers. This raises suspicions about the examination, the examination findings, the legitimacy of the WCB medical department and the adjudication process.

Attendance at WCB medical examinations - The WCB medical advisors oppose having injured workers bring a union representative, a lawyer or their treating physician with them to a WCB medical examination. This raises suspicions about the examination, the examination findings, the legitimacy of the WCB medical department and the adjudication process. If WCB medical examinations continue after the WCA is changed workers should have the right to bring whomever they chose to the medical examination. That could include a union representative, a lawyer or their treating physician

Cost of medical reports for appeal purposes – the WCA should be changed to address a significant barrier to appeal. That barrier is the cost of medical reports required at times

for appeal purposes. Physicians who are asked to provide additional medical information or medical clarification charge workers for appeal purposes charge workers for these reports. The costs can be significant and present a barrier to appeal if a worker cannot afford to pay hundreds of dollars for the report.

Currently WCB will pay for the cost of a medical report, if the report is used in reaching a favourable decision for the worker. However, if the report was not used to make the decision, or if the appeal was not favourable, a worker has no way to recover the costs of the medical report.

WCB can and regularly does utilize the opinions of its medical advisors in decision to terminate claims or refuse acceptance of claims. Not have a process and funding available to assist injured workers obtain medical reports to counter the negative opinions of the WCB medical advisors stacks the deck against workers. It is the typical David and Goliath scenario.

Not all claim decisions that are appealed hinge on medical evidence. WCB should ensure funding is available to injured workers to obtain medical evidence to support an appeal of a claim decision.

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