

Submission #90

**FOR SUBMISSION TO
THE WORKERS COMPENSATION ACT
REVIEW COMMITTEE**

BY

THE CITY OF WINNIPEG



June 2, 2004

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Introduction

My name is Craig Cormack and I appear on behalf of the City of Winnipeg. I would like to begin by extending our appreciation for this opportunity to present our recommendations with respect to some of the amendments that have been proposed as well as a few that we, as an employer, would like to see given consideration.

As you will note from our recommendations, we could find little fault with the existing legislation. For that reason, our presentation is more reactive than proactive.

In our opinion, it matters not whether a proposed amendment is submitted by an employer, a union, a worker or any party with an interest. What matters is that the merits of each proposal be given fair consideration and that this process include juxtaposing each proposal with similar provisions from the other Canadian jurisdictions. If, when reviewing benefit related proposals, Manitoba is found to be out of step with a significant majority of these jurisdictions then, and only then, should remedial action be considered. In reviewing the Acts from the various jurisdictions throughout Canada we believe it to be evident that the benefits and coverage provided in the Province of Manitoba are better than the average. That notwithstanding, the very fact that eighteen years have passed since the last review of the Workers Compensation Act is sufficient for the City of Winnipeg to support this undertaking. For your consideration, we offer the following recommendations:

(1) Survivor Benefits

We recommend that the existing legislation relative to survivor benefits remain unchanged.

During our review of the Acts from the various jurisdictions we find a degree of uniformity when comparing their provisions to those found in the Manitoba Act. There are a variety of formulas used in determining entitlement throughout the Provincial jurisdictions; however, the Provinces of Manitoba, Saskatchewan and Alberta possess a degree of similarity in that a five-year limit for survivor benefits is imposed. It should be noted that Section 29(9) of the Manitoba Workers Compensation Act provides for the extension of monthly payments to age 65 where the limitation to five years of benefits would cause financial hardship. It should also be noted that regardless of the formula employed, the monthly pension, in the majority of jurisdictions, would be discontinued at age 65. In this regard, we believe that survivor benefits in Manitoba are better than average when taking into consideration all ten jurisdictions.

(2) Self-Insured Status

We would recommend that The City of Winnipeg's self-insured status remain unchanged.

We are of the opinion that the Meredith principles have clearly not been breached by the longstanding practice of allowing employers such as the Province of Manitoba and

The City of Winnipeg to operate on a self-insured basis. Had this been the case we believe the legislators would have taken steps to end this practice that has been ongoing for at least the last forty years. In addition to paying all costs associated with its claims, the City also, through the assignment of transaction fees, reimburses the Board for our fair share of costs associated with both the administration of the Board and also programs such as the Worker Advisor Program and Workplace Safety and Health.

We also believe there to be no financial risk to the Workers Compensation system in granting The City of Winnipeg its self-insured status. Specifically, there is, in our opinion, no fear that The City of Winnipeg would cease to operate or to leave the Province of Manitoba. As well, the City's self-insured status does not constitute a competitive advantage, in our opinion, as we are not in competition with any other employer in the Province of Manitoba.

(3) Late Filing Penalty

We would recommend that the penalty for late filing of the Employers Report of Injury continue to be discretionary rather than automatic and that it be progressive only where an employer has demonstrated wanton disregard for filing reports within the time allotted by legislation.

We are in agreement that the late reporting of an accident to the Workers Compensation Board constitutes a real problem and one that must be addressed. However, despite our best efforts, there are occasions where specific circumstances result in the employers report not being transmitted to the Workers Compensation Board within the five day period allowed under current legislation. The circumstances surrounding the late reporting can be classified as both culpable and non-culpable. Where there is no valid reason for not having met the legislative threshold of five days, the City has no qualms about being assessed a reasonable penalty for late filing. However, where the explanation is reasonable, given the ubiquitous nature of the City's operations, we would ask that the appropriate personnel be allowed to use his/her discretion when considering the assessment of a penalty.

There has also been a suggestion that a late filing penalty ought to be progressive and, given the structure of The City of Winnipeg, there exists the possibility of an unfair application of the late filing penalty. Specifically, each department within The City of Winnipeg has their own workers compensation budget and all costs associated with specific incidents are charged back to that particular departmental budget. Hypothetically, three different departments could conceivably be assessed fines for late reporting on or about the same date with the third being assessed the highest amount based on the proposed progressive formula.

For your information, The City of Winnipeg has introduced a Risk Management Information System that will allow the various departments to electronically transmit the report of a compensable accident directly to the Workers Compensation Section and this should enhance the City's ability to satisfy the legislative requirements associated with the reporting of accidents.

We believe that the Workers Compensation Board possess the ability to delineate those employers that are consistently delinquent in the reporting of injuries to the Workers Compensation Board. Having said that, we believe that the initiative of introducing automatic and progressive penalties ought to focus on those employers. We would quickly add that we do not, for a moment, suggest that The City of Winnipeg be exempt from this initiative but that the assessment of penalties be limited to those situations where a valid explanation for late reporting is not forthcoming.

(4) Expedited Treatment for Injured Workers

We recommend that the Act be amended to allow the Workers Compensation Board to contract, purchase or arrange for expedited medical treatment and/or diagnostic testing for injured workers.

There is a generally accepted belief held by all stakeholders that an early recovery from injury and an early return to work is critically important to the injured worker and his/her family. Studies demonstrate that the longer a worker is out of the workforce, the less likely it is that he/she will successfully return to work. However, in many cases, the disability period is often prolonged due to delays in accessing necessary diagnostic tests or timely medical treatment. These delays often add months or years to the recovery process. It would be our sincere desire that organized labour fully support this recommendation as it has the potential to reduce the amount of time an injured worker must suffer while awaiting diagnostic testing, specialized medical treatment and/or referral to a specialist.

The clear intent of this recommendation is to ensure injured workers receive expedited service and **not** to subsidize the provincial healthcare system.

(5) Independent Medical Examinations

We recommend that the Act be amended to allow the employers of Manitoba the right to have an injured worker examined by a physician selected by the employer.

This recommendation is consistent with legislation already in place in other jurisdictions; for example Alberta, Ontario and Nova Scotia. The employer would make known their desire to the Workers Compensation Board and they would arrange for the independent assessment by a physician identified by the employer. The employer would provide the Workers Compensation Board with specific questions to be posed to the examiner. The employer would not be entitled to a copy of the examination results unless accessed through the appeal process. The costs associated with this assessment would be processed no differently than if the Workers Compensation Board had arranged for the assessment without input from the employer. We believe that the primary need for such assessments would be those situations where the disability period is both prolonged and inconsistent with the perceived severity of injury. Such an amendment would, in our

opinion, provide both a “fresh” assessment of the clinical findings as well as allay or validate the concerns of the employer.

(6) Expansion of Coverage under Firefighters Presumptive Legislation

We would recommend that the presumptive legislation covering firefighters be expanded only where there is incontrovertible evidence to warrant such an amendment.

At the present time there is, to our knowledge, no other jurisdiction within Canada that provides coverage, on a presumptive basis, for lung cancer and heart disease in firefighters. The British Columbia Board’s schedule of occupational diseases provided for a presumptive relationship between heart injury or disease and firefighting which dated back to 1954. However, this was repealed on June 5, 2000 and further research, over a five to ten year time frame, was ordered. We are of the opinion that the preponderance of current medical literature would not, at first glance, warrant expansion of the presumptive list. In 1985 the Ontario legislature established the Industrial Disease Standards Panel to investigate and identify diseases related to work. This panel is independent of both the Ministry of Labour and the Workers Compensation Board. In March of 1988 this panel received a brief from the Provincial Federation of Ontario Firefighters which asked the panel to conclude that a relationship exists between heart and lung disease and working as a firefighter, and to recommend that a legal presumption be enacted in favour of compensation for such claims from firefighters. Following receipt of the firefighters brief, the panel directed its staff to conduct a review of the world literature on the health effects of firefighting. Following this, the firefighters representatives and the Toronto Area Fire Chiefs were invited to participate in the process of selecting medical specialists to review the studies findings and the updated literature review. One expert from each medical specialty, cardiovascular disease and cancer, were chosen by the firefighters, the fire chiefs and the panel. Their report was completed and released in September 1994. Their conclusion, with respect to cardiovascular disease was as follows:

“The Panel reviewed the criteria used in the past for deciding whether a disease should be added to one of the Schedules, then applied the same principles to the evidence about cardiovascular disease among firefighters. Although there are some impressive findings of excess cardiovascular disease, they are not consistently found. Furthermore, the majority of studies surveyed, which report an excess, do not establish a statistically significant excess. Finally, the identified contributors to heart disease, carbon monoxide and chronic stress, have been experimentally but not conclusively identified as causes of chronic heart disease. This body of evidence has caused the panel not to recommend that cardiovascular disease be added to either Schedule 3 or 4. The Panel does recommend, however, that firefighting be recognized as a risk factor in the development of cardiovascular disease.”

With respect to lung cancer the report concluded as follows:

“Neither the Industrial Disease Standards Panel literature review nor that conducted for the British Columbia Workers Compensation Board concluded that there is an increased risk of lung cancer among firefighters. Although statistically significant increases in lung cancer mortality occur in two sub-groups, none of the studies identified an overall increase which reached statistical significance. One author identified a statistically significant decrease in lung cancer deaths.”

With respect to colon cancer the panel responded as follows:

“A probable connection exists between colon cancer and the occupation of firefighting. Because a probable connection has been established, guidelines developed and approved by the Panel should be used to assist adjudicators in assessing the merits of each claim for colon cancer from firefighters.”

Unlike other cancers and/or diseases the Panel did not recommend the addition of colon cancer to Schedule 3 of the Ontario Workers Compensation Act. This, we suggest, is consistent with the March 2002 report of Drs. Guidotti and Goldsmith to the Workers Compensation Board of Manitoba and Dr. Guidotti’s report of March 2003 to the British Columbia Professional Firefighters Association. Specifically Drs. Guidotti and Goldsmith suggested that **“there is beginning to be sufficient evidence to consider adding colon cancer to the presumption list in the future for claims related to firefighting”**. From this we must assume that the evidence, relative to cause and effect, is not incontrovertible and, thus, claims for colon cancer would continue to be adjudicated on their individual merits, rather than on a presumptive basis.

(7) Cost Analysis of all Recommended Amendments

We recommend that any changes to the Workers Compensation Act be accompanied by a comprehensive cost analysis and that this be included in the Review Committee’s report.

We would further recommend that reviews of the cost analysis be carried out at one, three and five year intervals to assess the accuracy of the initial forecast.

The employer community believes that financial accountability is a crucial element for managing the affairs of the Workers Compensation Board. The employer community supports the position that any changes that occur as a result of this review be cost analyzed and cost justified. Effective cost management must always be a primary concern of the Workers Compensation Board. We believe that the one, three and five year reviews constitute a sound business practice that will enable those with an interest to compare the forecasted costs to the actual costs.

(8) Permanent Impairment Awards

We recommend that the basic methodology associated with the Dual Pension system, remain unchanged as it is not only fair, but consistent with most other jurisdictions in Canada. We do, however, recognize the inequality associated with the compensating of workers over the age of 45 as well as the monetary levels of the impairment awards. For this reason, we further recommend that workers have their impairment awards increased by 2% for every year they are under the age of 45 to a maximum of 40% and that the monetary aspect of the impairment awards be amended to reflect a schedule similar to that which is currently in place in the Province of Saskatchewan.

The "*Dual Pension*" method is employed by most other Workers Compensation Boards in Canada. This method compensates all workers equally for their impairment regardless of earnings or profession. For example, a minimum wage earner who loses a finger would receive an amount identical to that of a plumber earning \$60,000.00 per annum. After addressing the physical loss, the focus would then turn to the effect, if any, the impairment had on the worker's ability to earn the same as they had prior to the accident. If the worker's earning capacity has been negatively affected by reason of a permanent impairment, they will receive wage loss benefits until retirement or until the loss of wages no longer exists. We cannot fathom a more equitable process that would recognize work related impairment and/or the financial results of same.

When addressing the physical impairment aspect of this award, the legislators would appear to have factored in the aging process and determined that the award should be reduced by 2% for every year that a worker's age exceeded 45 to a maximum of 40%. This would appear to have been predicated upon the workers life expectancy and the tenet that the older the worker, the shorter the period of time that he/she would have to suffer with their impairment. While we believe this to be well founded, we have some difficulty ignoring the opposite scenario. That is, that workers under the age of 45 would have longer to suffer with their impairment. For this reason, we would recommend the retention of the 2% principal but that it be amended to recognize the under age 45 recipients. Specifically, that for every year under 45 years of age, a worker's impairment award will increase by 2% to a maximum of 40%.

In reviewing a number of jurisdictions we find that the monetary aspect of the impairment awards has simply not kept pace with most. We believe that, from an economic standpoint, we compare quite favourably with the Province of Saskatchewan. For this reason we are recommending that this Province consider adopting a schedule similar to the one used in Saskatchewan.

(9) Employer Access to Medical Information

We recommend that the existing legislation, which provides for employer access to "relevant information", be retained as it is consistent with the majority of jurisdictions.

Both workers and employers have the right to appeal most decisions rendered by the Workers Compensation Board. Currently, the Workers Compensation Act provides for

employer access to all relevant information, including medical, when they are appealing specific issues relative to the claim. The worker has an opportunity to view and object to any information being disclosed to the employer. In addition, significant penalties are provided for under Workers Compensation Board legislation should the employer use file information for any reason other than the appeal of a Workers Compensation Board issue. This is consistent with most other jurisdictions.

In order to be consistent with the principles of natural justice, both parties must be allowed access to all information considered relevant to the decision under appeal. Full disclosure of relevant information will “not only provide for a level playing field”, but also allow for the transparency of process.

(10) **Stress**

We are of the opinion that the current definition of acceptable stress is consistent with the majority of jurisdictions throughout Canada. On this basis, we recommend that the existing legislation/practice remain unchanged.

Any amendment to the current definition of acceptable stress would, in our opinion, open the door to claims of stress relating to employer/employee decisions or actions that form part of the daily employment functions. For example, terminations, demotions, transfers, discipline, changes to work hours or conditions and changes to productivity expectations. As well there are those situations where employees are simply unable to cope with the duties of the position that they were hired for. It is also impossible for either the Workers Compensation Board or the employer to be cognizant of all stressors that might have precipitated the onset of stress. For example, job security, family illness, financial problems, domestic issues, gambling and/or substance abuse issues to name a few. It is, in our opinion, easily understood why the majority, if not all, of the other Canadian jurisdictions have limited acceptance of stress to only those situations that are a result of an "acute reaction to a traumatic event" arising out of and in the course of employment.

It is our opinion that broadening the interpretation of acceptable stress is not only inconsistent with the spirit and intent of the Workers Compensation Act but would place an unmanageable and unfair financial burden on the employers of Manitoba.

(11) **Wage Loss Benefits**

(A) We recommend that the *Maximum Annual Earnings* cap be retained given the fact that it is consistent with all other jurisdictions.

We are of the opinion that removal of the *Maximum Annual Earnings* cap is not only unwarranted but contrary to the practice of every other jurisdiction in Canada. As well, any worker whose employment pattern would be categorized as irregular should continue to be subject to the determination of *Average Earnings*. We also believe that

there is no sound basis for treating *Minimum Wage Earners* any different than those earning wages slightly greater than the Provincial Minimum Wage.

All provincial jurisdiction's have an Annual Earnings cap which is adjusted annually to reflect that particular jurisdictions economic growth during the previous 12 month period. In Manitoba the adjustment is based upon the percentage increase in the *Manitoba Industrial Average Wage*. The percentage increase is measured as at June 30th and is applied effective Jan 1st of each year. The 2004 *Maximum Annual Earnings* cap for Manitoba was \$56,310.00 which, when based on a 40 hour week, equates to approximately \$27.00 per hour. We believe that the greater majority of injured workers fall under the aforementioned maximum. The average Maximum Annual Earnings cap of all provincial jurisdictions was \$55,434.00, therefore it is clear that Manitoba already exceeds the average. The caps ranged from \$41,200.00 in P.E.I to \$66,800.00 in Ontario.

(B) We recommend that the practice, relative to *Average Earnings*, remain unchanged.

Where a worker has an irregular working pattern we believe there to be a need to continue the longstanding practice of establishing *Average Earnings*. This process is, in essence, a "**dual edged sword**" in that it can result in an increase or decrease of a worker's weekly compensation rate. Where the assessment reveals that a workers average earnings, over a period of 12 or 24 months, were greater than that being earned at the time of an accident, his/her compensation rate is adjusted retroactively to the date of accident.

Where it is determined that the worker's average earnings over a 12 or 24 month period reflect an amount lesser than that earned at the time of an accident, his/her weekly compensation rate would be adjusted downward **but only** after 12 weeks of benefits. We believe that the greater majority of time loss claims registered with the Manitoba Workers Compensation Board is resolved long before they reach the 13 week point. It would be totally inappropriate not to adjust wage loss benefits at the 13 week point where the averaging of earnings, over a 12 or 24 month period, clearly demonstrates that the wages established at the time of accident do not reasonably reflect the workers loss of earning capacity.

(C) We recommend that the *Duration of Wage Loss Benefits* to age 65, or to a maximum of 2 years where injured beyond the age of 65, be maintained.

A review of the majority of other jurisdictions in Canada reveals that they all have identical or similar wording in their respective Acts. Specifically, wage loss benefits are limited to age 65 or to a maximum of 2 years if injured at age 65 or greater.

(12) Occupational Disease

We recommend that the "*Dominant Cause*" provision in Section 4(4) of the Act be retained as it is an integral part of determining the work relatedness of Occupational Diseases.

We would further recommend that the current case-by-case evaluation of Occupational Disease claims remain unchanged as, in our opinion, the "*Schedule of Occupational Diseases*" has the potential to supplant accountable adjudication.

The dominant cause provision prevents the employers from being held financially liable for diseases that are, for the most part, related to lifestyle or other risk factors unrelated to the work environment. The current legislation relies upon medical evidence and/or studies to ascertain whether the dominant cause of an occupational disease is related to the work environment which, we believe, is in keeping with the Meredith principle. Specifically, the worker's right to be compensated for the residual effects of an injury or disease arising out of and in the course of one's employment. The Ontario Board employs the wording "where work was a significant contributing factor" in place of "dominant cause" but the intent is unchanged. We are of a mind that a "Schedule of Occupational Diseases" could result in a worker's claim being inappropriately denied or, conversely, inappropriately accepted. For this reason, we would strongly suggest that the status quo be maintained. We are cognizant of the fact that a number of jurisdictions employ the "Schedule of Occupational Disease" but, nonetheless, believe that adjudication, on a case by case basis, to be far more effective.

(13) Workers Compensation Act

We recommend that the Act be reorganized to provide better logic to its order and help users locate/access information by including an index.

The current version of the Workers Compensation Act represents decades of legislative amendments with there being no recent efforts to re-organize or develop an orderly table of contents. We believe there should be a natural flow to the Act, which would start with "*Definitions*" and finish with "*General*" which would encompass the administrative aspects of compensation. In this regard, we would recommend the Committee look to the jurisdictions of Ontario and Alberta where their Acts reflect the type of organization we seek. It should also be noted that the last review of the Act chaired by Brian King recommended the following:

1. That the Workers Compensation Act be completely rewritten with special regard to accessibility to the constituents, workers and employers, in the simplest and most comprehensible language possible.
2. We recommend that at the time the Act is rewritten, special attention be paid to the removal or revision of outdated sections, such as the reference to specific diseases and conditions (hernia, dermatitis, neurosis and silicosis) and the "morality" clauses.