

Submission # 92



Submission to

Manitoba
Workers Compensation Act
Review Committee 2004-05-20

By CAW
June 2, 2004

Winnipeg, Manitoba

Introduction

We are pleased to be invited to address the Workers Compensation Act Review Committee 2004 here today. Manitoba has long had a special way of dealing with issues in a thoughtful manner seeking the input of all concerned. We wish more jurisdictions across the country had this approach.

We enjoyed having the opportunity to make a presentation before the Workers Compensation Act Review Committee in 1986 and we welcome the opportunity to be here again.

We know that a number of our CAW Local Unions have made presentations to your Committee and we commend them for this initiative. We would like to begin by endorsing the submission made by the Manitoba Federation of Labour.

Our union would like to deal with four important issues which require resolution through statutory changes:

- Coverage
- Experience rating
- Occupational diseases
- Stress
- Prevention: ergonomics and penalty assessments

Coverage

All workers in Manitoba deserve to receive workers' compensation coverage. At present, many workers are excluded from coverage due to the out-of-date Schedule. Among all Canadian provinces, Manitoba is vying for last place in the coverage issue and is well below the Canadian average. If the Northwest Territories and Nunavut, Canada's newest territory, provide 100% coverage, why should Manitoba provide only 70.6% coverage?

Because of the restrictions of the definition of worker found in Section (3) as it is restricted through the structure of the Accident Fund Sections (73) to (76) with its somewhat archaic Schedule, many workers, especially in new industries such as casinos, are not covered by workers' compensation. They should be. It is time Manitoba caught up with other Canadian provinces nearly all of which cover all workers and employers (with only a few exceptions). When British Columbia changed its system to include all employers, they were expecting perhaps some formerly excluded industries such as banks and insurance companies would complain. They industries did not. It only makes sense to us to ensure that those financial institutions like the banks that profit very handsomely from the productive work of the Scheduled industries described in the statute, should participate in the system.

This system can be solved very simply by ensuring that all employers in the Province of Manitoba or who have employees in the Province of Manitoba must pay assessments to

the Accident Fund. The phrase just needs to be something simple such as “This Act applies to all employers and all workers employed in, about or in conjunction with workplaces in Manitoba.”

Experience Rating

These same relevant sections of the statute that deal with the Accident Fund (Sections 73 to 76) should be amended to eliminate the various Classes of assessments. It makes no sense to treat employers differently, depending on whether they are public or private, federal or provincial. A worker who is hurt lifting a garbage can while working for the City of Winnipeg could just as easily have been hurt lifting a garbage can at the University of Manitoba or at New Flyer or at Air Canada. The injuries are not treated differently by the Board so why should the assessments be collected in a different manner?

What Is Experience Rating?

Experience rating is the system of charging the individual employer an additional assessment or giving the employer a rebate depending on the past claims costs of the employer. It works like this. Let’s say an employer was in an assessment rate group of 2.0% (\$2.00 per \$100 of payroll) but had a past claims cost experience which greatly exceeded the average for the group. The WCB would charge the employer an additional assessment (surcharge) of perhaps as much as an additional 50% over what the employer would otherwise pay. If an employer is successful in dramatically reducing costs, the employer can expect a hefty rebate.

Experience Rated Employers Use Claims Control Against Us

Employers like to claim that experience rating generates better health and safety but in fact that they learn very quickly that vigorous claims control activities have a much faster payoff in reduced WCB assessments.

Experience rated employers:

- Try to persuade workers not to report WCB claims.
- Try to persuade workers off on a WCB claim to come back to work early.
- Try to get workers to see company doctors who will use information gathered at the examination against the worker’s claim.
- Phone workers’ doctors to try to persuade them the injury was not work related or to try to get them to release the worker to return to work early.
- Phone or write the WCB to try to persuade them not to accept the worker’s claim.
- Appeal workers’ claims which have been accepted by the WCB.

- Appear at appeal hearings where workers are trying to have a decision overturned, and argue against the worker.
- Employ full time employer claims control staff as well as hiring consultants and lawyers to engage in claims control.

Since a young worker 100% disabled for life might require the WCB to set aside a capitalized reserve of about \$400,000 (in turn charged to the employer account), you can see that fighting even one serious injury claim leads to significant cost savings for the individual employer.

Experience rating has made the workers' compensation system much more adversarial than before. It has created an employer army of WCB consultants with a belligerent attitude on individual claims acting as a well paid lobby group to erode the system as a whole.

Why did employers lobby so hard for experience rating? To save them money. They claim experience rating creates a fairer system for employers. Since all employers in an assessment rate group used to pay the same assessment regardless of whether they had a lot of claims or few, they claimed that "good" employers were subsidizing "bad" employers. They claim that better health and safety would result from experience rating. Employers quickly learned, however, that vigorous efforts in claims control had a much faster payoff than prevention activities. As a result of many individual battles, experience rating has had a collective effect, a downward effect on the system as a whole as workers' claims are disallowed, they lose appeals, and by seeing others rejected they are often discouraged from making a claim in the first place.

Our union *rejects* experience rating as a system that promotes an adversarial approach to claims adjudication.

Prevention

The Board should be involved in prevention activities. It makes no sense for the Board to simply pay out claims and play no role in preventing their occurrence.

Penalty Assessments

A more sensible approach to using financial penalties on employers to persuade them to engage in prevention activities is the penalty assessment system. The Board should be involved in prevention activities. We believe that financial penalties should be imposed on employers who have unsafe or unhealthy workplaces. These financial penalties, however, should be applied when health and safety regulations are violated to *prevent* injuries and diseases from occurring in the first place.

The Workplace Safety and Health Division could simply file a request to the Board that a financial penalty be imposed on an employer and the Board could simply impose it. It sounds simple, doesn't it? It is.

If employers increase the risk of injury or occupational disease for workers, it is a simple insurance principle that assessments should increase. They should -- at the front end, when the risk exists, but before the injury or occupational disease occurs.

Manitoba has a rather high rate of injuries, relative to other provinces. We believe that one reason for that is the low level of enforcement of the *Workplace Safety and Health Act* and its regulations.

Ergonomics Regulations

A major area of concern in Manitoba is the relatively high rate of musculoskeletal injuries (MSIs). With 54.6% of all Manitoba time-loss claims being for musculoskeletal claims (2003 statistics), isn't it time we did something about it?

When BC noted their most common accident type was MSI at 34% (1989-1998) they did something about it. On April 15, 1998, the BC Ergonomics Regulation came into effect (following Saskatchewan's MSI prevention legislation in 1996). In health care in BC, MSIs were 54% for the years 1989-1998. Once the regulation was implemented (and after a one year grace period) more than 1,230 ergonomic orders were written on BC employers, up to April 15, 2000. In health care alone, the figure was 380 orders. MSIs decreased dramatically in industries as diverse as sales, manufacturing and construction. In health care alone, claims for back injuries were reduced from 17,870 in 1999 to 14,150 in 2003 and for other strains from 21,160 to 18,200. Tenosynovitis and bursitis claims were reduced from 2,300 to 1,450. At one hospital alone, St. Joseph's, the introduction of ceiling lifts resulted in a 40% reduction in WCB claims costs and an 82% reduction in lost time hours. (This information is included in graph form in the Appendix.)

If they can accomplish this in BC, why can't we in Manitoba?

Occupational Disease

Adjudication

It makes no sense for there to be a dominant cause requirement in order to accept an occupational disease claim in the statute. It is time to remove this stipulation.

Legal Principles

We would like to outline some basic legal principles for ensuring occupational diseases are fairly accepted as compensable in Manitoba. The definition of occupational disease should be inclusive. There should be no burden of proof on workers – the system should

be inquisitorial. The standard of proof must be the balance of probabilities with the benefit of the doubt to the worker.

Decisions must be made based on the available evidence. The principles of justice must mean that claims must be allowed without the interference of imported secondary standards. Causation is a practical matter of fact to be determined using common sense, taking a robust and pragmatic approach to the facts. Scientific certainty must not be required, and decision-makers must not be restricted to the use of scientific evidence. Circumstantial evidence must be allowed to establish a claim. Neither a diagnosis nor a specific causal agent need be precisely identified.

The significant contributing factor test must apply, with 25% exceeding *the de minimis* standard. Work need not be the only or even the most important cause.

In summary, the question for adjudication must be, "given all the available evidence (direct, circumstantial, scientific, opinion, what the trier is entitled to presume) in this particular case, on the balance of probabilities with the benefit of the doubt going to the worker, was the workplace a significant contributing factor in the development of the disease?"

Evidentiary Criteria

The Board must not focus on epidemiological studies to the exclusion of toxicology, animal studies, human case studies, medical opinions, the testimony of workers and circumstantial evidence. The Bradford Hill criteria are a useful tool for analysing epidemiological data, but not a checklist for determining causation.

Inconclusive or non-existent evidence no more supports a negative conclusion regarding causation than a positive one.

The Board must improve its own investigative capacity. Adjudicators and investigators must receive basic information about industries, including historical conditions.

The Board should institute ongoing exposure reporting requirements for employers.

The Board must be even-handed in assessing evidence from workers and employers.

Claims must not be rejected simply because medical records have been destroyed.

Lack of written records from employers, government agencies and unions should lead to increased reliance on the direct evidence of workers, not to its dismissal out of hand and the rejection of the claim.

Adjudicative Channels

Policy instruments in occupational disease should be geared to assisting the adjudication of claims in accordance with proper legal principles and the best available general scientific evidence.

Case-by-case adjudication should involve thorough evidence collection, case conferencing across specialties and the preservation of general scientific evidence.

Adjudicative advice that summarises and analyses scientific evidence regarding general causation should replace simplistic exposure guidelines.

Board policy should be restricted to setting out broad legal principles and other factors to be considered in all cases.

Disease could be scheduled whenever a process (identified by substance, occupation or workplace) is a potentially significant cause of a disease.

A Schedule 4, like the Ontario statute, could be used to define cases where there is certainty of adjudicative outcome, not absolute certainty of causation. A Schedule 3, like the Ontario statute, could be used to define cases where there is a potentially significant workplace factor that may or may not be significant in any given individual case, in other words, where the adjudicative outcome is not certain. Such a Schedule 3 presumption would be rebuttable only if it is demonstrated based on clear and convincing evidence that non-work-related factors were so overwhelming that the worker's employment did not play a significant role in the development of the disease. The mere existence of another possible cause is not enough to rebut the presumption. Rebuttal matrices for Schedule 3 diseases should be used. These should be well-articulated and based on evidence which is available for adjudicators and others in a form similar to the adjudicative advice binders.

Stress

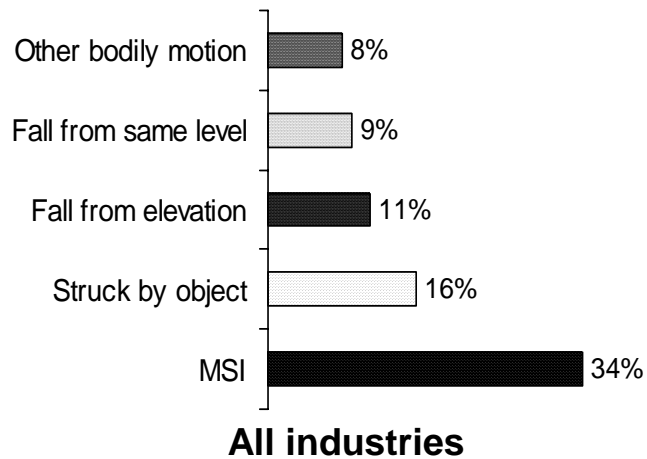
Manitoba became notorious for being the first province to explicitly exclude stress claims from the workers' compensation system. It made no sense when this exclusion was introduced and it makes no sense for it to be continued. Stress claims should be adjudicated in the same way any other occupational disease claims are adjudicated.

Asbestos and Mesothelioma

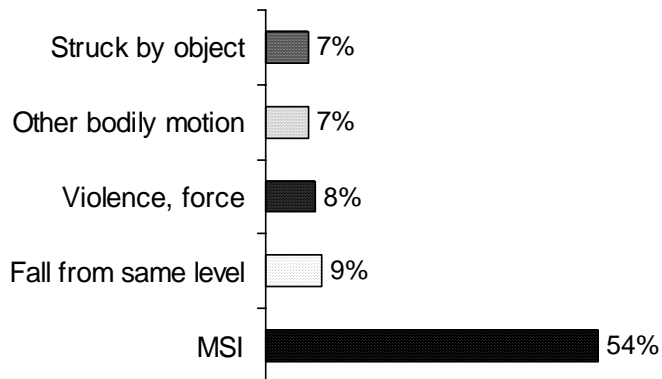
We believe the Board should actively help all victims of mesothelioma to establish workers' compensation claims. The Board should find out who these people are from the cancer treatment centres, interview them, find out where their asbestos has been and, if work-related, establish a claim for them.

APPENDIX

Five Most Common Accident Types in B.C. 1989 - 1998



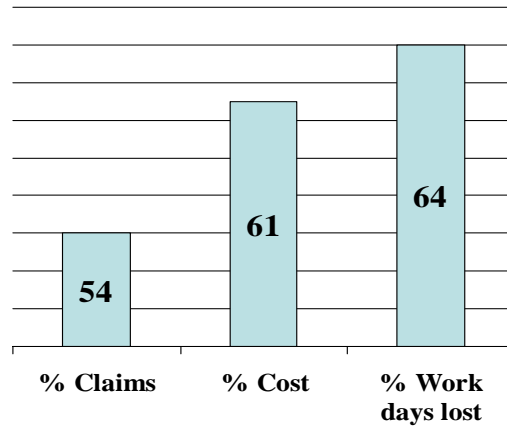
Five Most Common Accident Types in Health Care in B.C. 1989 - 1998



- The five most common accident types accounts for **85%** of all accidents in the BC health care industry

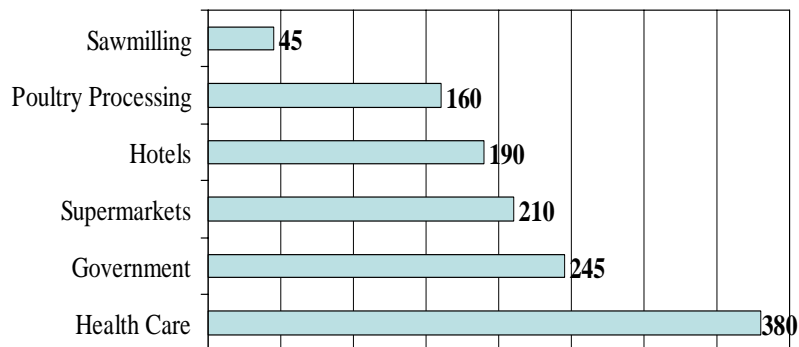
MSIs in Health Care Industry in B.C. 1989 - 1998

- MSIs account for more than **1 out of every 2 claims** in the health care industry in B.C.

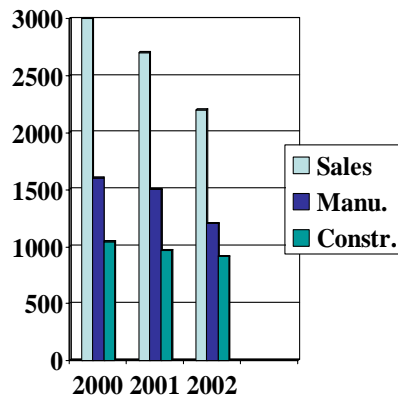


Ergonomic Orders, B.C.:

Selected Industries, April 15/98 - April 30/2000



MSIs in B.C. Decrease Dramatically



- The number of MSI claims accepted dropped dramatically in 2002
- WCB reports safer workplaces

Health Care, Lost time WCB Claims major improvement: BC stats: 1999 to 2003

- Back Injuries: 17,870 to 14,150
- Other Strain: 21,160 to 18,220
- Tenosynovitis and bursitis: 2,300 to 1,450



St. Joseph's Hospital in B.C.

- Ergonomics regulation effective
- Resulting in
- Ceiling lifts
- 40% reduction in WCB claims costs
- 82% reduction in lost hours



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