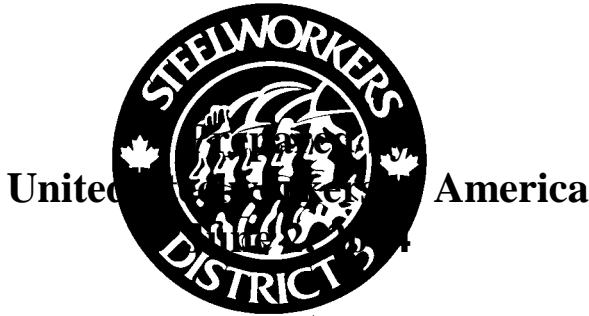


**Submission to the Workers Compensation
Act Review Committee**



Introduction

The United Steelworkers of America welcomes this opportunity to present to the Workers Compensation Review Committee our concerns and recommendations regarding compensation for injured, ill, and disabled workers¹ in Manitoba.

The Committee has already heard from local union representatives of our union, and this submission builds on those comments and remarks. We also have reviewed and adopt the comments and recommendations made by the Manitoba Federation of Labour.

Over the last 30 years or more, workers compensation has been subject to considerable public and political comment. Through the 1970s and 1980s there was wide spread recognition that injured workers, especially those with permanent disabilities, were being poorly served by the system and many steps were taken to improve adjudication, rates of compensation, cost of living, recognition of occupational diseases, rehabilitation, and adequacy of benefits. In the 1990s, due to political and economic changes, government focused on the financial circumstances of the Board, cutting or restricting benefit entitlements, limiting recognition of occupational diseases, stress, and chronic pain, reducing employer premiums, and emphasizing early return to work by injured workers. As is reflected in the recent Annual Reports of the WCB, emphasis has been placed on the fiscal performance of administration over adequacy of compensation to injured workers. New developments have also included emphasis on prevention and service delivery, important and welcome additions. Lost in these changes has been an evaluation of the adequacy of the system in helping the most vulnerable.

In our view, it is now time to consider what the impact of these changes has been on the lives of injured workers, whether or not they are able to get the financial, rehabilitation, and other supports that they need to recover from injury and illness, to return to work, and adequate ongoing financial support when re-employment is not possible. If, as we believe, many of the financial changes of the administration of workers compensation have come at the expense of adequate treatment and compensation of injured workers, it is important that immediate steps be taken to correct these injustices.

¹ Throughout this document we will use “injured workers” generally to mean any worker who suffers an injury, illness or permanent disability due to work.

Our union has always been very active in workers compensation and occupational health and safety. Our local unions have active workers compensation committees which provide assistance to our members with their claims and with return to work. We have bargained return to work procedures and committees in collective agreements, and hold educationals for union representatives to learn how to effectively advocate on behalf of their injured members. Our union has for many years promoted the “duty to accommodate” among our locals and take seriously our obligation under human rights legislation to assist disabled members who require accommodations from our employers. As a result we have a network of knowledgeable activists who are involved day to day in assisting our members with the impact of injury, illness, and disability. It is their experiences, and those of the members that they represent, that we draw on for our comments and recommendations in this submission. We also draw on the experience of our staff who provide assistance to local union activists and on our national and district co-ordinators who have specific responsibilities in the area of occupational health and safety and workers compensation.

Occupational Disease and Musculoskeletal Injuries

One of the clearest developments in occupational health and safety over the last three decades has been the growing awareness of the extent to which work affects our health. In addition to more traditional occupational diseases such as silicosis, asbestos, dermatitis, and hearing loss, there is now considerable evidence linking worker related exposures to cancer in a variety of sites, cardiovascular disease, respiratory disease, a wide range of musculoskeletal disorders, and vibration related disorders for example. Stress at work, due to poor work organization, for example, is now clearly identified as a factor in the onset of cardiovascular disease as significant and substantial as the contribution work makes to the onset of low back pain and repetitive strain injuries.

Despite this development, the Workers Compensation system has lagged far behind in effectively recognizing when these conditions are work related and therefore has failed to provide compensation and other needed services to those who suffer from these conditions. Indeed our experience has been that even with occupational diseases about which there can be no doubt that they are work related – diseases like silicosis and asbestosis – injured workers

experience considerable difficulty getting their compensation claims recognized.

The only real incentive which employers have to take steps to reduce work exposures that cause occupational disease is when they have to pay compensation for the victims of their failure to take action and when government is prepared to rigorously enforce exposure limits. By failing to adequately compensate occupational disease, the workers compensation system forces the costs of suffering, health care, and family disruption onto individuals and society contributing to increased health care and welfare costs.

There are four areas in particular that we believe that changes should be made to improve the adequacy of compensation in this area:

1. Where a worker makes a claim for certain well known occupational diseases, the claim should be accepted presumptively when the worker is employed in an occupation known to cause the disease or when he is exposed to known work causes. For example,

- ◆ silicosis claims of foundry workers and miners, and of workers employed in jobs where silica is used;
- ◆ asbestosis and mesothelioma claims of workers exposed to asbestos;
- ◆ lung cancer of workers exposed to asbestos and hard rock miners.

These are just a few examples. Manitoba has adopted this approach when addressing certain occupational disease claims of firefighters. Both Ontario and British Columbia use schedules as a vehicle to improve compensation for occupational disease. It is critical that policies set out general criteria as well as provide guidance for individual adjudication of claims that do not fit the criteria.

2. Predominant cause should be removed from the legislation as a requirement for entitlement for occupational disease as contrary to Canadian law.

No other jurisdiction has adopted such restrictive rules for adjudication of occupational disease, rules which are contrary to principles of entitlement which apply to all other compensable conditions and contrary to those applied by the Supreme Court of Canada to claims of other persons for

similar conditions. The test of entitlement to occupational disease supported by the Supreme Court of Canada and adopted by other Workers Compensation systems is “significant” or “material” contributing cause.

3. Bias and prejudice should be removed from the adjudication of musculoskeletal disorders, and replaced with guidelines informed by research and experience.

Despite the huge amount of scientific evidence showing how work causes musculoskeletal disorders – through repetition, vibration, exertion, posture etc. at what some see as relatively light weights – we continue to see claims of workers for repetitive strain injuries rejected on the basis of “personal characteristics.” Most notorious of these are claims of women workers which are rejected because of the age of the person and her gender. It is not an isolated incident to have an adjudicator, who has very limited understanding of the work that the person does, attribute the onset of carpal tunnel syndrome to the onset of menopause. This type of spurious decision making has no place in the workers compensation system, and calls for an internal review to both identify the prevalence of these prejudices among adjudicators and to support appropriate policy and training efforts, advised by human rights experts, to eliminate them.

4. The decision of the Supreme Court of Canada in Martin and Lasseur should be applied to claims in Manitoba.

There are two areas where the case of Martin and Lasseur should apply to claims in Manitoba. Obviously, the first is with respect to those workers who suffer from chronic pain. More generally, however, the SCC decision stands for the proposition that all workers who have work related injuries and disabilities should be treated equally, and that it is contrary to the Charter to either a) exclude entitlement for those injured workers because of the type of disability or work related cause or to b) apply a policy or guideline rigidly without considering the individual circumstances of the case.

The exclusion of injuries and illness caused by chronic stress at work is a clear violation of the principles described in the Martin and Lasseur case and should be addressed by this Review Committee.

The argument advanced by many consultants on behalf of employers, is that to include coverage would be contrary to the founding principles of workers compensation and that it would make the compensation system financially unsustainable. Both arguments are false and misleading. Occupational disease has always been included in workers compensation systems in Canada. Indeed, such arguments were presented to Judge Meredith in the first Committee on Workers Compensation in Canada and he rejected it for the obvious unfairness, especially the difficulty which workers would face trying to protect themselves from unseen hazards that cause occupational disease. The second argument is even more misleading. The opposite is the case. It is by providing entitlement to occupational disease claims that there is an incentive on employers to protect their employees.

This incentive has now become even more important with the advent of Bill C-45, amendments to the Criminal Code. Section 217.1 which imposes a duty of care on those who direct work draws no distinction between safety and health hazards that cause death or bodily harm.

The argument to improve compensation for those workers who contract occupational diseases because of their work can be justified on these grounds:

- ◆ Fairness and equity among injured workers by eliminating discriminatory practices that treat those injured by accident differently from those made ill or disabled by disease
- ◆ To provide an incentive to employers to take steps to address health as well as safety concerns of their employees
- ◆ To reduce the costs of work related disease being borne by public health care and social assistance.

Permanent Disability

Those workers who acquire a permanent disability because of their work suffer the greatest losses and discrimination under the workers compensation system. Amendments to the law in the 1990s drastically changed the entitlement to compensation which permanently disabled workers receive. Our experience has shown that this has had a profoundly negative effect on many permanently disabled workers.

Research both in Canada and the United States confirm that, over time, it is the permanently disabled who suffer the greatest financial losses and have the greatest likelihood to not retain employment. A study conducted in Ontario showed that, although 85% of permanently injured workers initially returned to work, within a relatively short period of time, 50% of them would become unemployed for extended periods of time.²

Unfortunately the WCB has not kept track of what has happened to permanently disabled workers. We believe, based on our experience and the research that does exist, that many of these workers end up unemployed or underemployed because of their disability and, because of deeming, without adequate benefits. Very recent statistics in Ontario show that of those workers who were unable to return to their pre-accident employer, over 50% were unable to obtain employment even after receiving support from the Workplace Safety and Insurance Board. While the programs are different between Ontario and Manitoba, we believe that similar results exist for Manitoba workers.

This problem requires a two pronged response. Firstly, injured workers should receive a permanent pension which more adequately represents the financial and other losses that they suffer. The second requires a mandatory requirement on employers to accommodate injured workers which we will address later in these submissions.

To insure that permanently disabled workers are adequately compensated, the WCB has to keep better track of what happens to them. The WCB must be required to regularly survey a representative sample of permanently disabled workers to evaluate the adequacy of benefits and other services included in the Board's mandate. The stories of injustice and suffering that are presented to this Committee need to be acted upon.

Return to Work

No issues cause us more concern and controversy at this time than those related to an injured worker's return to work. Only in workplaces where we have been able to bargain joint return to work programs with union participation have we been able to achieve the level of fairness and

² Butler RJ, Johnson WG, Baldwin ML. "Managing work disability: Why first return to work is not a measure of success." *Industrial Labour Relations Review*, 48: 452-469.

effectiveness needed. Unfortunately the incentive on employers to bargain such programs is very weak as they can achieve significant reductions in their costs by manipulating the system through diversion, harassment, misrepresentation, and aggressively challenging claims.

The problems that injured workers face are varied and many and we know that the Review Committee has received many complaints about this. What we have heard includes:

- ◆ Injured workers being forced back to work too quickly
- ◆ Injured workers pressured to go on short term insurance as a quicker alternative to WCB
- ◆ So-called job offers that turn out to be inappropriate and unrealistic or too short term
- ◆ Unsafe and unhealthy working conditions are not changed when the injured worker is required to go back to work
- ◆ Treating physician's concerns are ignored or rejected
- ◆ Work restrictions are accommodated for only brief periods, and then the worker is pushed to do his regular job

Despite now ten years of active support of return to work by WCB, these complaints have not diminished and situations have not improved. Research shows that less than 50% of employers have programs to accommodate injured workers, and the quality of those programs that do exist is uneven. Studies of experience rating programs confirm widespread abuse through claims management. And studies of the return to work experiences of permanently disabled workers show that 50% or more of those who initially return to work subsequently lose their job. If an injured worker is unionized, she or he does have access to the grievance procedure and may seek the assistance of the human rights authority, but this leaves non-unionized workers vulnerable and puts an extra burden on unions to enforce what should be a responsibility of the WCB.

To address the problems that injured workers face, our union makes four major proposals:

- 1) there should a legislative requirement on employers to accommodate injured workers in ongoing employment, based on Human Rights and international conventions such as the International Labour Organization

(ILO)³ Vocational Rehabilitation and Employment (Disabled Persons) Convention Number 159 and Recommendation Number 168 adopted in 1983, and the United Nations Standard Rules on the Equalization for People with Disabilities especially Rule 7 on Employment adopted in 1993.

This requirement should be included in the Workers Compensation Act with responsibility given to the WCB to penalize an employer for failure to comply and to compel the employer to provide accommodations as required. This amendment should be co-ordinated with adoption of similar programs for people with disabilities that are discriminated against when seeking employment and whose disabilities are not work related.

2) the WCB should adopt by regulation a consensus based standard for disability management programs and require that employers adopt programs which comply with this standard. Compliance would be enforced through inspection and financial penalties for non-compliance, and joint labour management committees mandated to address workers' participation in the program. There are two examples of such programs available. The National Institute for Disability Management and Research (NIDMAR), based in British Columbia, publishes a consensus based Code of Practice on Disability Management.⁴ NIDMAR is a non-profit joint labour management initiative with support from major employers, unions, government, and providers. The other example is provided by the ILO, which adopted a Code of Practice on Managing Disability in the Workplace in 2002.

What is critical to such a standard is that it is based on a consensus drawn from the evidence of research, good practice, and experience.

3) The employer obligation to provide employment should be integrated with a proactive occupational health and safety program that identifies the hazards which caused the injury in the first place and which minimizes the risk of re-injury.

4) The WCB should routinely survey and provide to the Minister and the public information on the employment status of workers compensation claimants.

³ The ILO is a UN agency governed by consensus of national employer, government, and labour representatives.

⁴ <http://www.nidmar.ca/>

Employer Interference in the Claims Process

As indicated above, the failure to provide a clear regulatory framework within which return to work should take place has led to widespread abuses by employers. These circumstances have been exacerbated by experience rating which encourages adversarial practices against workers as a means of reducing costs and obtaining rebates.

The WCB has to stop taking a blind eye to these abuses and embark on an aggressive approach to prevent them from happening

Steps need to be taken by the WCB to reduce inappropriate employer interference in the claims process, such as encouraging use of private insurance as an “easy alternative” or by making spurious objections to a worker’s claim. Employer allegations need to be fully investigated before relied upon to deny or reduce a worker’s claim

WCB needs to enforce compliance with reporting requirements by employers, including accurate reporting of accident information and reporting on time, by investigating those employers who fail to comply and prosecuting those whose behaviour is consistently contrary to the legislated requirements. Where an investigation shows that the employer has given false or misleading information, penalties should be considered. Review of WCB policy 22.20 shows a clear bias on the part of the WCB to be concerned only with workers who make false and misleading claims, and totally ignores the activities of employers. Experience in other jurisdictions where employers have also been subject to investigations has demonstrated that the frequency and magnitude of employer abuses are much greater than those of workers.

Consideration should be given to developing appropriate financial incentives for employers to comply with recognized standards such as the Codes of Practice referred to above. Rebates and penalties should be based on performance in accordance with the standard and not claims controls. An example of a pilot project like this has recently been adopted by the BC Workers Compensation Board for a section of the forestry industry based on the NIDMAR Code of Practice and utilizing an independent audit.⁵

⁵ http://www.nidmar.ca/news/news_news/pressrelease-premiumpricin.pdf

Conclusions

Widely heralded at the turn of the century as a major step forward in protecting injured workers and reducing the adversarial relationship between employers and unions, workers compensation systems have become overwhelmed in recent years by financial restrictions and a bias against injured workers. Balance needs to be reintroduced into the system, recognizing the needs which injured workers have and by examining the adequacy of the assistance that they receive. Workers compensation needs to provide comprehensive coverage of workers' injuries and illnesses caused by work, and needs to provide effective income and return to work support. Injured workers should be treated fairly and protected against unfair manipulation, adversarial practices, and discrimination by employers.

In the broader scheme of things, we need to revisit some of the larger ideas which Canada has had to protect its most vulnerable members and look seriously at moving forward on ideas such as universal disability insurance. In the name of cost savings, compensation systems have introduced many practices similar to what are found in private insurance where problems of workers are not addressed and instead are defined not to exist. This is a wrong-headed approach as it reinforces the impoverishment rather than recovery and justice.

We encourage members of the Review Committee to give serious consideration to the concerns of injured workers and to make strong recommendations to improve the workers compensation system.