



Alberta Federation of Labour
Health and Safety/WCB Working Group

Workers' Compensation Review
Submission

Introduction

Workers' compensation represents a compromise between workers and employers: workers receive immediate, stable and predictable compensation for workplace injuries (funded by employer premiums) in exchange for giving up their right to sue their employer. The compromise was struck at the beginning of the 20th century in order to quell growing public unrest about the plight of injured workers.

The primary purpose of workers' compensation is providing compensation to workers for injuries sustained as a consequence of employment. Consistent with this purpose, many injured workers receive quick access to compensation and medical aid. Over time, though, it has become harder for injured workers to receive compensation—an outcome that is inconsistent with the basic purpose of workers' compensation.

The difficulties injured workers face gaining access to compensation reflects the former Conservative government's policy of seeking to minimize employers' workers' compensation premiums. The resulting amalgam of legislation, policies and practices has meant increasing levels of claim suppression, claim denial, and benefit reductions. It bears repeating that these practices are inconsistent with the purpose of workers' compensation, employers' obligation to fund the system, and the historic trade-off that underlies it.

This paper considers and offers possible recommendations regarding the following issues:

Issue	Recommendation
1 Preamble	Add clear guidance based upon fundamental principles of WCB
2 Excluded industries	Include all industries via elimination of Schedule A of the Regulation
3 Experience-rating and other premium adjustments	Discontinue premium adjustments via policy change
4 WCB employee corporate incentives	Eliminate incentives for WCB employees and contractors to reduce claim costs
5 Return to work obligations	Clarify and expand employers' obligations via change in the Act
6 Compensation for protective leave to pregnant and breast-feeding women	Clarify employer's obligations and permit compensation via change in the Act
7 Presumptive status for occupational diseases	Provide for periodic tripartite review process
8 Psychological injuries	Expand eligibility via policy change
9 Maximum insurable earnings	Eliminate cap on maximum insurable injuries via policy change
10 Compensation rate and coverage	Increase wage-loss compensation rate of 100% and ensure full benefits during appeals
11 Pension and extended health-care benefits as a wage-loss	Include the value of employer-paid pension and extended health-care benefits in the calculation of gross income via change in the Regulation

12	Evidence of deemed wages	Reduce WCB's power to deem via policy change.
13	WCB blocking worker access to occupational health specialists	Eliminate contract clause prohibiting specialists from offering medical opinions to workers
14	WCB participation on appeal hearings	Eliminate WCB participation in appeals hearings via legislative change
15	Contracting out work to evade premiums	WCB be required to periodically review industries with high percentages of independent contractors and deem them as workers where appropriate
16	Financial hardship during a Medical Review Panel	Worker should be entitled to full benefits where the WCB or Appeals Commission has directed a Medical Review Panel

While this paper addresses workers' compensation and not occupational health and safety, it is important to note the connections between the two. Of particular concern to workers is how workers' compensation (through experience-rating and the premium adjustments) has been repurposed towards injury reduction in order to compensate for inadequate government enforcement activity. This re-purposing has compromised the primary purpose of workers' compensation (compensating injured workers) by incentivizing employers to engage in illegitimate claims management behaviours.

A further important element is to address and re-commit to the real purpose of WCB and its objectives. Over time, WCB has adopted a corporate culture, designed to maximize profits, drive down costs for employers, and to operate like an insurance company as opposed to a public service for injured workers. WCB is there to protect workers at times when they are vulnerable, not to protect the bottom line of employers.

An environment of claims suppression and mismanagement has been allowed to proliferate and many injured workers now face barriers to accessing rights, benefits, programs, supports, compensation, and other entitlements. The culture of worker's compensation, inside WCB, amongst employers and at society at large, must shift back to its original purpose, helping vulnerable and injured workers to heal, to obtain compensation and financial support during periods of income loss, and to eventually return to meaningful and satisfying work.

Definitions

Definitions should be as consistent as possible across occupational health and safety legislation and worker's compensation legislation (as well as other employment and labour legislation). In particular, the definition of "employee" or "worker" must be comprehensive, with no industries exempted by blanket exclusions.

Issue 1: Preamble

Alberta's WCB Act does not include either a preamble or a purposes section. Many of the current problems experienced by injured workers and their advocates arise from a gradual distortion of the purposes of WCB and the principles upon which our current system is based.

Recommendation

Alberta reaffirm its commitment to a fair and balanced WCB scheme that accords to the Meredith Principles through a preamble that guides and informs the interpretation of the Act and its purposes.

As an example, Manitoba's legislation contains the following preamble:

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

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

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

Background

The workers' compensation system we rely on today is the result of a historical compromise arising from the recommendations of an inquiry by Ontario Chief Justice William Meredith in 1913. The basic compromise built into the system is that workers relinquish the right to sue their employers for workplace injuries in exchange for the security and efficiency of a compensation board funded by the shared responsibility of employers. The five "Meredith Principles" are:

- I. **No fault compensation** - There is no argument over responsibility or liability for an injury and injuries are treated equally no matter how they arose. The worker and employer waive the right to sue. This shifts the focus to providing compensation and healing the worker.
- II. **Collective liability** - The total cost of the compensation system is shared by all employers who contribute to a common fund. Financial liability becomes their collective responsibility.
- III. **Guaranteed benefits** - A fund is established to guarantee that compensation monies will be available for all injured workers.
- IV. **Independent administration** - The governing board is separate from government and both autonomous and non-political. The administration of the system is focused on the needs of its employer and worker clients, providing service with efficiency and impartiality.
- V. **Exclusive jurisdiction** - All compensation claims are directed solely to the compensation board. The board is the decision-maker and final authority for all claims.

However, as the WCB in Alberta continues to shift its operations and practices to mirror those of corporate, profit-driven insurance schemes, many of these principles have been weakened or lost. By focusing on keeping premiums for employers low and generating surpluses, our WCB system encourages claims suppression or other behaviours that are not geared toward

assisting workers to heal and safely return to work. Increasingly, workers themselves are becoming the true funders of WCB as costs relating to undercompensated or uncompensated injuries are downloaded onto individual workers or to other shared public services like the healthcare system. The compromise that is inherent in a system that upholds the Meredith Principles has been lost and the focus skewed away from the worker.

Rationale

A preamble can inform and guide the interpretation of the statute, but can also signal important policy choices and priorities of the legislature. As described, the WCB system in Alberta has strayed from its core principles and purposes. We can return a better balance to the operation of the system by reaffirming, through a preamble, that the underlying purpose of workers' compensation is to assist workers when they are injured and not to reduce employer obligations through surpluses and lowered premiums.

Issue 2: Excluded Industries

Approximately 8% of Alberta workers have no access to workers' compensation benefits because they work in industries excluded from the ambit of the Act by Schedule A of the Workers' Compensation Regulation.

Recommendation

Alberta eliminate Schedule A and associated provisions from the Workers' Compensation Regulation.

Background

Section 153(1)(b) of the Act allows cabinet to make regulations exempting certain industries from the Act. Schedule A of the Regulation exempts approximately 200 industries from mandatory coverage. Workers in these industries have no access to workers' compensation benefits. Employers in excluded industries can purchase voluntary coverage from the WCB but uptake rates are unclear.

Alberta has the longest list of exempted industries in Canada. Despite the number of exempted industries, approximately 92.1% of Alberta workers had WCB coverage in 2013 (Alberta ranked 6th nationally). A table of included and excluded occupations across Canada can be found here: http://awcbc.org/wp-content/uploads/2013/12/Industries_Occupations_Covered.pdf.

Rationale

Workers' compensation was enacted to provide injured workers with predictable, stable and immediate compensation. In exchange, workers gave up the right to sue their employer. There is no compelling explanation for the exclusion of workers in particular industries. Eliminating all exclusions from Schedule A would extend workers' compensation benefits to approximately 195,000 additional Alberta workers.

In contemporary Canada, exclusion from workers' compensation shifts the cost of workplace injury (primarily wage-loss and medical costs) from employers to injured workers, their families, and government health-care and income-support programs. It is difficult to estimate these costs but the medical costs associated with the historical exclusion of 92.5% of farm workers in Alberta, for example, costs taxpayers at least \$4.5 million (and likely closer to \$7m) per year in medical costs. This cost-transfer is contrary to the principle of workers' compensation, wherein employers are responsible for covering the costs of workplace injury.

Issue 3: Experience-Rating and Premium Adjustments

Alberta operates a number of programs that increase or decrease employers' workers' compensation premiums. There is little evidence that these programs make workplace safer. They do, however, incentivize illegitimate claims management behaviour by employers that negatively affect injured workers.

Recommendation

Alberta discontinue offering employer premium discounts and surcharges via experience-rating, industry custom pricing, and the Partners in Injury Reduction programs.

The cost-savings associated with discontinuing these programs (approximately \$175m) should be used to fund:

1. Additional injury prevention activity directed at small enterprises (<100 employees) by the government.
2. Education of and assistance to workers (particularly vulnerable workers) seeking to file and/or appeal workers' compensation claims or claim decisions, including expanding the role of worker advisors.
3. Additional OHS enforcement activity by the government.

Background

Workers' compensation is funded by employer premiums. Premiums are determined based upon (1) the employer's payroll and (2) the premium rate for the industry sector in which the employer operates. Premium rates are expressed as a rate of \$X per \$100 of salary. In 2015, the average premium is \$0.97/\$100 (the lowest in Canada) and ranges from \$0.04/\$100 to \$5.51/\$100.

Sector-based premium rates reflect that different sectors have different patterns of injury and associated costs. Pooling risk across a sector means there is very little firm-level incentive to reduce injury rates or severity. Experience rating links individual employer's claims records and premiums to create firm-level incentives via premium discounts and surcharges.

Alberta's experience rating system provides discounts and surcharges of up to 40% (there are variations by employer size). Employers may be eligible for additional discounts of up to 20% under the Partners in Injury Reduction (PIR) program. Employers can also access industry custom pricing plans. Alberta Health Services, for example, uses industry custom pricing to receive a discounted premium without participating in experience rating or PIR, despite health-care having an injury rate three times the provincial average. Overall, these programs were budgeted to operate at a net loss of \$173.3 million in 2014.

There is no analysis available about whether these programs improve safety. Assertions that employers enrolled in these programs have fewer claims and/or lower claim costs should be viewed with caution: accepted claims is not a good indicator of overall injuries due to reporting error and employer claims management behaviours.

Rationale

The purpose of workers' compensation is to compensate injured workers, not improve workplace safety. There is good evidence that employers respond to experience rating by engaging in claims management behaviours.

Claims management behaviour can be legitimate (e.g., offering modified work) or illegitimate (e.g., suppressing claim reports, offering phony modified work, and appealing decisions). Illegitimate claims management negatively affects injured workers and undermines the primary purpose of workers' compensation.

Improving workplace safety is a laudable goal. There is some (but uncertain) evidence to support a relationship between experience-rating and safety. But, there is strong evidence that worksite inspections coupled with penalties reduces injuries. Overall, this evidence suggests improved workplace safety is better pursued through enforcement activity.

Providing injured workers (particularly vulnerable workers) with better information and access to advocates should result in fewer appeals as issues can be resolved within the WCB's process.

Issue 4: WCB Employee "Corporate" Incentives

The WCB incentivizes its employees (and possibly contractors) to minimize claim costs. This incentive is contrary to the basic purpose of workers' compensation and compounds the negative effects of experience rating and other premium adjustments.

Recommendation

Eliminate incentives (such as bonuses) to WCB staff and contractors conditioned upon minimizing claim costs (e.g., closing claims quickly, returning workers to work as fast as possible).

If it is felt that incentives are necessary for operational reasons, they must be based on factors and indicators relating to operational success. In other words, the rate of appeal and success on appeal of a staff person's files and levels of worker satisfaction, as the party for whom the system should be servicing, are better measures with which to gauge a staff member's performance and upon which to base incentives or bonuses.

Background

1. WCB employees (and possibly contractors) can receive incentives (such as bonuses) based upon statistical measures of performance (such as claim duration length and closure rates). For employees, these measures form part of a corporate scorecard.

Rationale

Incentivizing WCB employees and contractors to minimize claim costs negatively impacts the ability of injured workers to access the full range of compensation that they are due. This is contrary to the basic purpose of workers' compensation (i.e., compensating workers).

Such internal incentives compound the negative effects of external incentives (e.g., experience rating) by aligning the personal financial interests of WCB employees with the financial interests of employers.

Issue 5: Return to Work Obligations of Employers

Alberta places no obligation on employers to re-employ injured workers who are ready to return to work.

Recommendation

Alberta enact a statutory re-employment obligation for employers similar to ss. 41 and 86 of Ontario's *Workplace Safety and Insurance Act* that entails:

1. A requirement that employers re-employ injured workers who are deemed fit to return to work by the WCB.
2. A requirement that the re-employment be:
 - a. in the same position held prior to injury, or

- b. if the date-of-injury position is unavailable or the worker is unable to perform the essential duties of the date-of-injury position, in alternative employment of a nature and at earnings comparable to the worker's employment on the date of injury.
3. A requirement on the WCB to return the injured worker to full wage-loss benefits for a period of up to one year should the employer fail to meet its re-employment obligations and the costs of these benefits be charged to the employer's account.
4. A requirement on the WCB to annually publish the names of employers who fail to comply with their re-employment obligations.
5. A requirement on the WCB to levy a penalty on employers who fail to meet their re-employment obligations in the amount of the worker's net average earnings for the year preceding the date of injury.
6. A rebuttable presumption that the employer has failed to meet its re-employment obligations if an employee is terminated within six months of being returned to work.
7. For workers in industries characterized by more transient employment (e.g., construction workers), the re-employment obligation could be conditioned upon the availability of suitable work with the employer. The obligation to offer modified work in these industries would continue for a period of two years from the date of injury.

Background

Alberta's *Workers' Compensation Act* does not require employers to re-employ workers who have been injured. Anecdotally, worker advocates report that some employers refuse to re-employ injured workers when they are ready to return to work. These workers may be able to pursue remedy through the human rights system, but this is a slow process and, in the interim, the WCB normally reduces or terminates their wage-loss benefits via deeming. One outcome of this situation can be that injured workers are left with little (or no) income and, thus, rely on family, friends and government income support.

In Ontario, employers are obligated to re-employ injured workers who are ready to return to work if (1) the worker worked for the employer for at least one year prior to the injury, and (2) if the employer employs more than 20 workers (slightly different rules apply in the construction industry). If an employer (who meets these tests) refuses to return a worker to work, the worker continues to collect wage-loss benefits and the cost of these benefits are charged to the employer.

Rationale

Employers have an obligation to accommodate injured workers but Alberta provides no effective way for workers to seek to remedy when employers fail to meet this obligation. These changes provide immediate and meaningful remedy.

Requiring employers to re-employ injured workers and, if an employer violates these requirements, providing the worker with wage-loss benefits charged against the employer, eliminates the incentive for employers to not accommodate injured workers. These changes also eliminate the situation where a worker's wage-loss compensation is cut off despite the employer violating the worker's human rights.

Issue 6: Protective Leave for Pregnant and Nursing Women

Pregnant and nursing workers face unique health hazards but may be reluctant to refuse unsafe work for fear of job loss. Protective leave (funded through WCB) would reduce an important barrier to workers protecting their unborn or breastfeeding children.

Recommendation

Alberta enact statutory protective leave for pregnant and breast-feeding women similar to ss. 40 and 48 of Quebec's *Occupational Health and Safety Act* that entails:

1. A requirement to immediately re-assign pregnant or breast-feeding workers to other duties when the worker provides a medical certificate that attests that the working conditions may be hazardous to her unborn or breastfeeding child, or to herself by reason of her pregnancy.
2. In the event that the employer does not provide the worker with appropriate re-assignment, a requirement
 - a. upon the employer to place the worker on protective leave, and
 - b. upon the WCB to provide wage-loss benefits for the worker until such time as the work is no longer hazardous to the worker or the child.
3. A prohibition on employers placing workers on short-term disability or other private benefit plans in lieu of providing modified duties or wage-loss benefits.
4. A requirement that, during the period of protective leave, the employer continue to provide all non-wage benefits to which the worker would otherwise be entitled.
5. A requirement that the employer return the worker to her regular employment and grant her the benefits she would otherwise have been entitled to upon the conclusion of a re-assignment or protective leave.

Background

There are approximately 50,000 pregnancies in Alberta each year. Pregnant and nursing women face unique physical, biological and chemical workplace health hazards. Alberta's *Occupational Health and Safety Act* requires workers to refuse unsafe work but, in practice, few workers refuse unsafe work for fear of job loss.

Alberta's *Human Rights Act* requires employers to accommodate pregnant and breastfeeding workers to the point of undue hardship. Workers who are not accommodated can complain, but such complaints take months and years to resolve. During this time, workers who are denied accommodation may be without financial support.

Quebec provides pregnant or breastfeeding women who work in conditions that threaten their health or the health of their unborn or breastfeeding children (and who can produce a medical certificate to substantiate these concerns) with access to (1) immediate re-assignment, or (2) protective leave funded by the La Commission de la santé et de la sécurité du travail (i.e., the WCB).

Rationale

Alberta's current health and safety protections for pregnant and breast-feeding women are inadequate. Providing pregnant and breast-feeding workers with wage-loss benefits should their employer refuse to address workplace hazards will make workplaces safer for this uniquely vulnerable group. The cost of any such leaves can be recouped from the employer via a special workers' compensation levy.

Issue 7: Presumptive Status and Occupational Disease

Alberta's list of injuries, illnesses, and disease processes which are deemed to be automatically compensable (i.e., are granted presumptive status unless rebutted) has several significant omissions and there is no regular and transparent process of reviewing this list.

Recommendation

Alberta appoint a three-person consensus-based review panel of occupational and environmental health physicians (specialists) to biennially review the injuries, diseases and disease processes considered “presumptive” in Schedule B of the Workers’ Compensation Regulations. These specialists should be licensed to practice medicine in the province of Alberta and should currently have a medical practice. The purpose of the panel is only to expand presumptive coverage for occupational diseases and injuries as medical and scientific knowledge and understanding grows. In no case should the panel have the authority or discretion to remove a condition from the list of presumptive diseases.

The panel should be administered by a commissioner, an independent physician appointed by the Minister, who has no role in WCB claims and whose independence is subject to review by the Auditor General. The commissioner is responsible for the administration of the biennial review process.

The initial review should include the following injuries, diseases and disease processes:

- Asbestos-related diseases, including lung cancer in the absence of asbestosis
- Hearing loss
- Musculo-skeletal injuries associated with repetitive motion
- Occupational asthma
- Temperature-induced injury
- Operational stress injuries in first responders, correctional, health-care and social service workers
- Post-Traumatic Stress Disorder for all workers
- Plantar fasciitis on presumptive list for those who spend significant amounts of time standing or walking on hard surfaces/concrete.

The standard upon which decisions are made should be balance of probabilities and reflect the benefit of the doubt traditionally accorded to workers when the work-relatedness of injuries is determined.

Currently, some presumptive cancers for firefighters are specifically governed by a regulation applying to section (24.1(4)) in the *Workers’ Compensation Act*. As this regulation has been in place since 2003, it should continue to exist as a standalone regulation. The review period described in this regulation should be no less than 5 years (rather than the current 2 years), as established in a previous amendment to the regulation.

In addition, currently, firefighters are covered by a specific provision (24.1(7)) that creates a presumption that a heart attack that occurs within 24 hours of attendance at an emergency at work arose from employment. That presumptive coverage should be expanded to all frontline employees and similar rights for line of duty deaths should be extended.

Background

Some workers experience injury or develop an occupational disease caused by exposure to a hazardous workplace substance or process. Historically, the long latency period and murky causality associated with these forms of injury have made it difficult for workers to file successful claims for compensation.

Most Canadian WCBs have addressed this issue by granting certain forms of injury and illness or certain disease processes presumptive status, such as those set out in Schedule B of Alberta’s Workers’ Compensation Regulation.

Presumptive status means that, barring evidence to the contrary, the injury or illness is assumed to have arisen from and occurred in the course of employment and, therefore, is compensable. Injuries or illnesses without presumptive status can still be compensable, but must meet the normal arises-and-occurs test.

At present, there is no regular and transparent process by which Schedule B of the Regulation is reviewed. Consequently, Alberta's presumptive status list is narrower than in other jurisdictions.

Rationale

The purpose of workers' compensation is to compensate injured workers. It is widely recognized that meeting the arises-and-occurs test is challenging for some forms of injury. WCBs have dealt with this difficulty by granting presumptive status to injuries with a clear occupational cause.

The absence of a process by which to periodically review this list in light of new scientific evidence undermines the fair compensation of injury. Alberta can remedy this omission by creating a clear and transparent tripartite process by which Schedule B is periodically reviewed.

Furthermore, it is important to specify the requirement that the panel include physicians with specific experience in occupational and environmental health and safety. While a medical professional might have considerable expertise in their practice area or specialty, if they do not have extensive experience with occupational health and the realities of workplace health and safety, they may not have the most fulsome understanding of whether a particular condition should be deemed with presumptive status. There are often factors that a medical professional without occupational expertise will not understand or be aware of, leading to a condition being improperly excluded from the list.

Issue 8: Psychological Injuries

Chronic onset psychological injuries (i.e., "stress" claims) are not normally eligible for compensation despite these injuries arising (at least in part) from workplace factors.

Recommendation

The WCB's Policy 03-01, Part 2, Application 6 on psychological injuries should be modified as follows:

11. *When does WCB accept claims for chronic onset stress?*

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

- there is a confirmed psychological or psychiatric diagnosis as described in the DSM,
- **but for** the work-related events or stressors **the injury would not have occurred**—~~are the predominant cause of the injury; predominant cause means the prevailing, strongest, chief, or main cause of the chronic onset stress,~~
- ~~the work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation, and~~
- there is objective confirmation of the events.

~~In addition to the duties reasonably expected by the nature of the worker's occupation, normal pressures and tensions include, for example, interpersonal relations and conflicts, health and safety concerns, union issues, and routine labour relations actions taken by the employer, including workload and deadlines, work evaluation, performance management (discipline), transfers, changes in job duties, lay-offs, demotions, terminations, and reorganizations, to which all workers may be subject from time to time.~~

~~Ongoing compensability for chronic onset stress will be accepted when the medical evidence shows that the work or work-related injury is the predominant cause of the current symptoms.~~

The WCB should develop internal claims management processes appropriate for psychological injuries.

Background

Generally speaking, WCBs are reluctant to provide compensation for injuries caused by so-called chronic stress (Quebec is the exception). This reluctance is reflected in policies that subject chronic onset stress claims to more rigorous tests, including requiring the stressful event to be exceptional and disallowing many sources of stress (e.g., excessive workloads, interpersonal conflict) from being accepted.

These policies effectively bar claims caused by the organization or nature of the employment. In this way, they transfer cost (in the form of injury) from the workers' compensation system (and ultimately the employer) to the worker and the public health system. Precluding compensation for work-related injuries because the injury is psychological in nature is inconsistent with the purpose of workers' compensation.

The management of psychological injuries is different than the management of physical injuries. Specific claims management processes and staff training are necessary to recognize the unique process of recovery and avoid administrative processes that are inappropriate and/or harmful.

Rationale

The widespread limits on (or outright preclusion of) chronic onset claims likely are based on two contestable reasons.

1. Psychological injuries reflect (at least in part) factors inherent to the worker thus compensation should be severely restricted. This is inconsistent with the "but for" test (i.e., but for the work, the injury would not have occurred) used for other injuries (e.g., occupational disease).
2. Workers may file illegitimate psychological injury claims to resist managerial decisions. It is unclear whether this behaviour would occur or how the workers would fool diagnosticians

These contestable assumptions conflict with the purpose of workers' compensation, which is to compensate all work-related injuries. This recommendation better aligns Alberta's policy with the principles of workers' compensation

Issue 9: Maximum Insurable Earnings

Alberta's maximum insurable earnings cap denies full wage-loss benefits for injured Albertans whose income was over \$95,300 in 2015. These workers are, in effect, subsidizing employer premium costs.

Recommendation

Alberta should eliminate the maximum insurable earnings cap and calculate wage-loss benefits and employer premiums based upon workers' full gross income.

Background

Alberta limits the maximum insurable earnings of a worker. In 2015, this maximum was \$95,300. This maximum is adjusted annually. The maximum places a cap on wage-loss benefits (which are paid out at 90% of net earnings) and employer premiums (which are calculated based upon gross earnings up to the maximum insurable earnings cap).

There are approximately 500,000 Alberta workers with annual incomes over the maximum insurable earnings cap. If these workers were temporarily or totally disabled, they would not be eligible to have the entirety of their income considered in the wage-loss benefit calculation. The maximum insurable earnings cap also limits employer premiums.

The cap also creates perverse incentives around modified work. For example, there are cases of employers offering capped out workers modified work at a wage rate that coincides with the cap. Workers whose

income is normally higher than the cap and who accept the work receive no additional wage-loss benefits (as their income from the modified work hits the cap). This works a significant hardship on the worker who is now working full-time for appreciably lower wages than before the injury.

Alberta's maximum insurable earnings are the highest in Canada except for Manitoba. Manitoba places no limit on workers' earnings for the purposes of calculating wage-loss benefits. Manitoba does place a cap (presently at \$121,000) on workers' earnings for the purposes of calculating employer premiums.

Rationale

The purpose of workers' compensation is to compensate injured workers, including providing wage-loss benefits. There is no good public policy rationale for a maximum insurable earning cap. The cap disadvantages high-income earners who are injured by disproportionately reducing their rate of wage-loss replacement.

The most commonly advanced rationale for fractional wage replacement is that workers' compensation is designed to insure workers against catastrophic wage loss due to injury, not all wage loss. Less commonly voiced is the expectation that fractional wage-loss replacement motivates workers to return to work (rather than malingering). These contestable assertions sit uncomfortably with the basic purpose of workers' compensation.

Issue 10: Compensation Rate and Coverage

Alberta compensates wage-loss at 90% of net earnings. This policy means workers are, in effect, subsidizing employer premium costs. In addition, many injured workers are not paid full benefits if their case is being reviewed by a medical review panel.

Recommendation

Alberta compensate wage-loss at 100% of net earnings. Furthermore, remove discretion and make it mandatory that full benefits are paid during the time that a medical review panel is underway.

Background

All Canadian provinces reimburse workers for only a fraction of actual wages lost due to injury. Most commonly, wage-loss is compensated at 90% of net earnings, although some jurisdictions specify a lower percentage while others use a fraction of gross earnings or lost earnings.

Rationale

The purpose of workers' compensation is to compensate injured workers, including providing wage-loss benefits. The most commonly advanced rationale for fractional wage replacement is that workers' compensation is designed to insure workers against catastrophic wage loss due to injury, not all wage loss. Less commonly voiced is the expectation that fractional wage-loss replacement motivates workers to return to work (rather than malingering). These contestable assertions sit uncomfortably with the basic purpose of workers' compensation: which to mitigate the effect of an injury through the provision of compensation. Furthermore, an injured worker depends on the benefits to which they are entitled under WCB during their convalescence. If WCB is able to evade paying them these benefits during medical reviews, injured workers face potentially catastrophic financial hardships that impede their ability to recover.

Issue 11: Pensions and Extended Health Benefits as a Wage-Loss

Workers whose compensation includes employer-paid pension and extended health benefits do not receive compensation for those benefits when they are unable to work.

Recommendation

The Workers' Compensation Regulation be amended to include employer-paid pension and extended health benefits in the calculation of net earnings.

Background

Section 56 of the *Workers' Compensation Act* requires wage-loss compensation is paid on net earnings. The calculation of net earnings is set out in the Workers' Compensation Regulation (s.1) and means the worker's gross wages less Employment Insurance, Canada Pension Plan and income tax deductions. WCB policy allows the WCB (in its discretion) to include regular over time and other forms of income.

Some workers receive employer-paid pension and extended health benefits as part of their overall compensation package. These benefits are not considered "earnings" under the Act and workers do not receive wage-loss compensation for these benefits. For workers who require wage-loss compensation for an extended period, the effect of not receiving compensation for lost pension or reduced health benefit coverage or entitlements can be profound.

The exclusion of employer-paid pension benefits operates across Canada. Notable exceptions may include Nova Scotia (which includes taxable benefits) and New Brunswick (which defines earnings broadly).

Rationale

The purpose of workers' compensation is to compensate injured workers, including providing wage-loss benefits. There is no good public policy rationale for excluding pension and health benefits from the calculation of earnings. Limiting wage-loss compensation to wages (exclusive of benefits) works an unfairness on workers whose compensation partly comprises employer-paid pension and health benefits.

Basing wage-loss compensation on net earnings is likely a historical artifact reflecting few workers would have had employer-paid benefits when workers' compensation legislation was first enacted. The continued exclusion of employer-paid pension and health benefits (which comprise part of some workers' overall compensation) disadvantages these workers (who are predominantly unionized workers).

Issue 12: Evidence for Deemed Earnings

Alberta's WCB uses inflated wage estimates when it reduces injured workers' wage-loss benefits, thereby depriving injured workers of income.

Recommendation

The WCB's Policy 04-02, Part 2, Application 1 on temporary benefits should be modified as follows:

8. When does WCB estimate the impairment of earning capacity in cases of temporary partial disability?

WCB may estimate the post-accident earning capacity **when the WCB can demonstrate a worker is intentionally reducing the income the worker could earn through suitable employment.**

- ~~• a worker is capable but unable to obtain modified employment, or~~
- ~~• a worker obtains employment which does not represent the worker's earning capacity, or~~

- ~~the worker is capable but chooses not to obtain employment.~~

Background

Section 56 of the *Workers' Compensation Act* allows the WCB to reduce wage-loss benefits via a process colloquially referred to as deeming. If a worker is capable of returning to work (with or without restrictions) but does not secure employment (e.g., the worker is unable to obtain appropriate work), the WCB's policy is to estimate the expected earnings of the worker and reduce the wage-loss benefit by this amount.

Workers report the WCB routinely over-estimates the potential wages a worker can earn. The labour market data used by the WCB routinely over-estimates the wages available to workers. For example, a worker with a grade 10 education and no computer skills was deemed capable of earning \$75,800 per year as a front desk clerk at a hotel. The worker's wage-loss compensation was then adjusted downwards by this amount. This is an unreasonable earnings estimate for this worker.

Workers' wages can be deemed even if the worker is unable to secure a job interview or even find a job opening. There is no consideration of the impact of economic factors or systemic discrimination in hiring.

The effect of deeming is to short-change injured workers through reductions in their wage-loss benefits. This practice advantages the employer (by reducing their claim costs) and the WCB (by reducing the duration of claims).

Rationale

Deeming wages is a controversial practice, stemming from the WCB's assertion that its responsibility is to return injured workers to employability, not employment. This controversy stems, in part, from the fact that workers with disabilities face systemic barriers to gaining employment. In most cases, the disability is a direct result of the workplace injury. The practice of deeming wages compounds labour market discrimination by denying injured workers compensation for wage-loss stemming from workplace injuries. Deeming should be reserved for cases where the WCB can clearly demonstrate a worker is malingering.

Issue 13: Blocking Worker Access to Occupational Health Specialists

The WCB is contractually prohibiting occupational health specialists (who are economically reliant on the WCB) from providing injured worker advocates with medical opinions necessary for workers to successfully appeal denials of occupational disease claims by the WCB.

Recommendation

The WCB withdraw its contractual prohibition on occupational health specialists providing injured worker advocates with medical opinions.

Background

Workers' claims for compensation for occupational diseases are often rejected. Workers exercising their right of appeal often use medical opinions from occupational health specialists as evidence. For example, Steelworkers' representatives have had a number of occupational disease denials reversed using medical opinions.

The WCB has service contracts with all occupational health specialists in Alberta. WCB billings often comprise a significant proportion of these specialists' annual income. In 2015, the WCB introduced a new clause in these contracts that prohibits occupational health specialists from providing injured workers with medical opinions about occupational disease.

This new contractual term means workers who require medical opinions are now required to access

specialists in other jurisdictions. This poses a significant barrier for workers (who are usually without income) seeking to advance an appeal.

Rationale

The *Workers' Compensation Act* provides workers with an opportunity to appeal denials of claims. The WCB is using its economic power to interfere with workers' appeals. This interference results in an unfair appeals process and represents a conflict of interest on the part of the WCB. In the end, the WCB's behaviour is profoundly affecting the ability of workers to receive compensation that they are due.

Issue 14: WCB Participation in Appeals

The *Workers' Compensation Act* requires the Appeal Commission to hear representations from the WCB during appeals. Employers and the WCB often have a common interest in upholding the WCB's decision and the resulting "ganging up" on the claimant in appeals hearings disadvantages injured workers.

Recommendation

The requirement for the Appeal Commission to hear representations from the WCB during an appeal be struck from the Act.

Background

Decisions by the WCB can be appealed, with the final level of appeal being the Appeal Commission. Workers are the most frequent appellants. Section 13.2(6) of the *Workers' Compensation Act* requires the Appeal Commission to hear representations from the WCB regarding the proper application of policy, the Act or Regulations.

In a hearing, the worker (or the worker's representative) must often contend with representations made by the both employer and WCB representatives. Typically, employer and WCB representatives both seek to have the WCB's decision upheld. This creates a two-on-one dynamic. Further, both the employer and WCB representative are likely to have better resources and, therefore, better access to information and evidence.

Rationale

The ability of the WCB to participate in Appeal Commission hearings can imbalance appeal hearings, with two voices arguing in favour of upholding the WCB's decision. While the Appeal Commission is bound by the policies enacted by the WCB, there is no need for the WCB to make representations to the Appeal Commission during these hearings. If, in the view of the WCB, the Appeal Commission errs in its interpretation, the WCB can file of a judicial review of the decision.

Issue 15: Contracting out work to evade premiums

Employers sometimes disguise employment relationships (thereby evading workers' compensation obligations) by encouraging workers to become so-called independent contractors.

Recommendation

The WCB will conduct a biennial review of industries with high numbers of independent contractors, assess whether these workers are truly independent contractors, and, where appropriate, deem them as workers.

Background

Employers in some industries (e.g., cleaning services) often encourage workers to set up companies. The principal employer may then offload the responsibility for (and cost of) carrying workers' compensation

coverage to of these so-called independent contractors. The principal employer is obligated to provide coverage to these workers but, absent some sort of intervention, may be able to evade this obligation.

Section 14 of the *Workers' Compensation Act* allows the WCB to deem individuals or classes of workers as the workers of a principal. At present, the WCB does not appear to proactively address this issue. The effect is that so-called independent contractors may be paying premiums that rightfully belong to the principal employer or may be operating without coverage.

Rationale

The evasion of statutory obligations via disguising employment relationships is a long-standing and escalating employer tactic to transfer costs to workers. The *Workers' Compensation Act* provides remedy but the WCB does not appear to proactively enforce these provisions.

Issue #16: Financial hardship during of a Medical Review Panel

Recommendation

Where the WCB or Appeals Commission has directed a Medical Review Panel, the worker should be entitled to full benefits from the time the review panel was requested until such time that their opinion is received.

Background

In some cases, where there is a difference in medical opinion about the worker's status or medical condition, the WCB or the Appeals Commission can request that a claim be reviewed by a three person medical review panel, consisting of medical practitioners chosen on the basis of their expertise in dealing with the issues under review.

Rationale

Workers are often put in severe financial hardship, as this can be a lengthy process and often results in substantial delays (several months) in the adjudication of a worker's claim. The worker is usually not in receipt of benefits during this time. In cases where the medical review panel is directed by the Appeals Commission, the worker may already have waited several months for the Appeals Commission to hear his or her case, only to have resolution of their case delayed again pending receipt of the opinion of the panel.