

In the Matter of Public Consultations on an Independent Review of the
Workplace Health, Safety and Compensation Commission (WHSCC)

Submitted to

The Independent Review Panel

**Brief on the Independent Review of the Workplace Health, Safety and
Compensation Commission (WHSCC)**

Submitted by

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Brief on the *Independent Review of the Workplace Health, Safety and Compensation Commission (WHSCC)*

Submitted to

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Summary of Recommendations

The New Brunswick Nurses Union (NBNU) is a labor organization representing over 6200 registered nurses in the province of New Brunswick.

Its mandate is:

- to influence legislation to safeguard its members and the public at large;
- to promote high professional standards of practice and appropriate working conditions with a view to achieving the best attainable patient care; and
- to advance the social, economic and general welfare of members and potential members.

As such, workers' compensation is a major issue for New Brunswick nurses.

The NBNU would like to thank the Independent Review Panel for the opportunity to make this submission.

The following is a summary of our recommendations to the Independent Review Panel contained throughout the NBNU submission where detailed comments precede each recommendation.

1. Entitlement

Recommendation 1

The NBNU recommends the *Workers' Compensation Act* be amended to repeal those discriminatory sections which deny compensation entitlement for work related mental stress.

2. Entitlement rules

Recommendation 2

The NBNU recommends that the *Workers' Compensation Act* be amended to restore the pre-1993 definition of accident and standard of proof whereby it will be presumed that an accident or illness arose out

of and in the course of employment and to reinforce the injured worker shall receive the benefit of the doubt at all times.

3. Benefits

Recommendation 3

The NBNU recommends the *Workers' Compensation Act* be amended to ensure that wage loss benefits shall be payable in an amount equal to 90% of the worker's loss of earnings after the date of the accident.

4. Waiting period

Recommendation 4

The NBNU therefore recommends that the *Workers' Compensation Act* be amended to provide for removal of the waiting period for wage loss benefits.

Recommendation 5

NBNU further recommends that the *Workers' Compensation Act* be amended to require the "employer" to compensate an injured worker at the regular rate of pay for the day of an injury, provided the worker reports the injury.

5. Top-up and collateral benefits

Recommendation 6

The NBNU recommends that the *Workers' Compensation Act* be amended to remove all restrictions on salary top-ups, including severance pay, and to allow individual employers and workers to determine the payments, if any, in excess of legislated benefits levels.

Recommendation 7

The NBNU further recommends that the *Workers' Compensation Act* also be amended to ensure that workers receiving compensation benefits are not obligated to apply for CPP disability benefits and, if in receipt of such benefits, shall have their worker' compensation benefits reduced.

6. Minimum benefits

Recommendation 8

The NBNU recommends that the *Workers' Compensation Act* be amended to ensure all workers totally disabled beyond two years

receive weekly compensation benefits to at least 50% of New Brunswick's average weekly earnings.

7. Maximum insurable earnings

Recommendation 9

The NBNU recommends that the *Workers' Compensation Act* be amended to eliminate any limit on insurable earning to reflect the workers actual pre-injury salary.

8. Annuity at age 65

Recommendation 10

The NBNU recommends that the pension benefits provided to long-term claimants under section 38.22 of the *Workers' Compensation Act* be based on 8% of the compensation paid the injured worker; also that the amount set aside not be left fully in the Pension Fund but that there be a minimum payout of 5 years to the estate of the worker should he/she die without surviving dependants.

9. Deeming

Recommendation 11

The NBNU therefore recommends that the *Workers' Compensation Act* be amended to remove the deeming process by deleting the "net average amount the Board determines the worker is capable of earning" and substitutes the words "the earnings that the worker is receiving from employment."

10. Alternate employment

Recommendation 12

The NBNU therefore recommends that the *Workers Compensation Act's* return to work provisions be improved to increase monetary penalties for non-compliance by employers and to obligate the WHSCC to actively pursue alternate employment options for injured workers.

11. Case management

Recommendation 13

The NBNU recommends that the case management system be examined with the objective of meeting the needs of injured workers by ensuring:

- 1) that case management staffing teams are adequate and are assigned reasonable caseloads;
- 2) that the safe return to work, not cost benefit analysis, become the primary consideration in claims administration;
- 3) that stronger weight be given to the report of medical specialists concerning the medical conditions of injured workers and their work capacities; and
- 4) that in the event of a serious and continuing personality conflict between an injured worker and the case manager, a new case manager be assigned to the claim.

12. Policy issue

Recommendation 14

The NBNU recommends that the WHSCC immediately undertake to ensure interested stakeholders have the opportunity to participate in the policy renewal process through the development of an open and timely consultation mechanism, preferable allowing for a 60 day response period.

Recommendation 15

The NBNU recommends that all new or revised policies become effective only when available to all interested parties and that the necessary resources be put in place to ensure timely translation of all WHSCC policies.

13. Time limits

Recommendation 16

The NBNU therefore recommends that Section 21(1.1) of the *Workers' Compensation Act* be amended to provide that the time limit for filing appeals with the Appeals Tribunal shall be indefinite.

14. Decision time frames

Recommendation 17

The NBNU recommends that the *Workplace Health, Safety and Compensation Commission Act* be amended to require that all workers' compensation appeals be heard, and written decisions rendered, within 60 days of the date of the appeal being submitted.

15. Interim benefits

Recommendation 18

The NBNU recommends that an injured worker who officially appeals a workers' compensation claim decision, if unable to work, be provided full loss of earnings benefits pending the outcome of their appeal.

Recommendation 19

The NBNU further recommends that New Brunswick follows the lead of the 2005 Manitoba Review Panel proposal, as well as Quebec, and require employers to continue the injured worker on the payroll for the first two weeks of any compensation claim involving loss of earnings subject to later reimbursement.

16. Implementing decisions

Recommendation 20

The NBNU recommends that the Independent Review Panel direct the WHSCC to adopt appropriate measures to ensure Appeals Tribunal decisions are quickly implemented and, also, respected in the adjudication of future claims.

Introduction

The New Brunswick Nurses Union (NBNU) is a labour organization representing over 6200 registered nurses in the province of New Brunswick. Its mandate is:

- to influence legislation to safeguard its members and the public at large;
- to promote high professional standards of practice and appropriate working conditions with a view to achieving the best attainable patient care; and
- to advance the social, economic and general welfare of members and potential members.

The nurses NBNU represents practice in acute care facilities, long-term care facilities, correctional facilities and the community. As an organization, it acknowledges the direction the government is taking on this very important matter and thanks the Independent Review Panel for this opportunity to participate in this consultation process and provide our views from the perspective of injured workers and public health policy. NBNU is pleased that this review will allow input and discussion relating to all provisions of the program. It looks forward to playing an active role in the ongoing process of reviewing the *Workers Compensation Act*.

The NBNU is also very pleased with the government's initiative to bring about this review of the Workplace Health, Safety and Compensation Commission (WHSCC) as part of its *Charter for Change*.

The mandate of the Worker's Compensation Board of New Brunswick is to administer the province's workers' compensation system as defined by the *Worker's Compensation Act*, as well as the health and safety programs required by the *Occupational Health and Safety Act*. The WCB exists to promote safe workplaces and to protect employers and injured workers through a sustainable accident insurance program. It is, therefore, only logical that this and future legislative reviews allow interested parties to address all aspects of our workplace health, safety and compensation system.

Since the early nineties workers have been penalized as governments in this province and across Canada responded to employer pressures and modified workers' compensation laws, destroying the historic balance between worker and employer interests. Be it compensation or workplace health and safety, most of the legislative measures enacted over the past decade or more have benefited employers not workers. The review needs to redress this imbalance.

It is the workers that pay the heaviest price for workplace accidents and illnesses that often are the result of inadequate training, poor employer safety practices, hazardous equipment, infrequent workplace inspections and weak or poorly enforced safety laws. For workers injured on the job, the pain, suffering and financial loss is all too real. It is imperative therefore that our health, safety and compensation laws, programs and services do in fact effectively protect workers and their families and, also, treat injured workers fairly and with the utmost respect.¹

¹ *New Brunswick Federation of Labor, 2007*

Cuts impacted workers

The workers' compensation legislation is based upon the historic Meredith principles:

- no fault insurance;
- collective liability for employers;
- employer responsibility for the costs of workers' compensation as a cost of doing business;
- a prohibition against legal action by an employee against the employer;
- adjudication and administration by an independent commission; and
- prevention of accidents and promotion of safety.

Put in place to help workers injured at work, workers compensation programs are supposed to protect workers and their families from the adverse consequences of workplace injuries and diseases. Over time, the workers' compensation system evolved to cover ever changing workplaces and new technologies, work processes and dangers found in them. No matter how slowly, progress was achieved in the ongoing struggle to protect workers.

However, all this changed in the nineties as governments across the country reacted to employer demands that their assessment rates be reduced and to find ways to deal with an alleged unfunded liability crisis. Consequently, numerous restrictions on benefits were introduced which seriously impacted workers.

Accordingly, this province's workers' compensation laws were amended to bring in reduced wage loss benefits, estimated capable earnings and deeming, as well as the elimination of life-long pensions, a more restrictive definition of accident, and, the three-day waiting period. This severely impacted the injured workers and their families. In addition to coping with the personal and family pressures associated with workplace injuries and illnesses, they also had to make do with less income protection, inadequate rehabilitation and return to work assistance, and, the injustices associated with deeming.

At the same time, worker calls for more aggressive enforcement of health and safety laws and better workplace safety training were largely ignored. The focus instead shifted to addressing employer demands for lower assessment rates, so much that union-negotiated top-up benefits were legislatively restricted.

The inequities still remain today, leaving NBNU to strongly disapprove the current application of worker's compensation in New Brunswick's workplace health, safety and compensation system. We subsequently believe improvements in benefits and services for workers are seriously considered necessary.

A balanced program

The WHSCC is responsible for the administration of three separate statutes: the *Workplace Health, Safety and Compensation Act*, the *Workers' Compensation Act*, and the *Occupational Health and Safety Act*.

As previously stated, workers not employers have suffered the consequences of political decisions made to reduce WCB costs. There appear to be no plans in place to restore pre 1990 compensation and benefits to the New Brunswick workplace health, safety and compensation system.

Victims of workplace accidents and diseases are offered absolutely no hope of future improvements in key areas such as entitlement to benefits, benefit level and deeming. NBNU does not believe this is fair to New Brunswick workers.

The NBNU also firmly believes that legislative improvements helpful to workers are justified and affordable. Through this submission, we intend to inform the Independent Review Panel of the many weaknesses in our workers' compensation laws and to propose specific amendments to the *Workers' Compensation Act*, which if enacted would help rectify current injustices facing workers.

Prevention of workplace accidents and illness

Workplace injuries and illnesses are a very serious matter. The costs associated with job accidents and occupational diseases are enormous in human and social terms, as well as economically. But despite some progress being made in protecting workers on the job, workplace hazards persist and workers are being injured at an alarming rate.²

The statistics are still disturbing and, even worse, they do not expose unreported accidents, near misses or the pain and suffering of injured workers. Furthermore, they do not account for the indirect costs of workplace accidents and illness – absenteeism, increased use of sick leave, lost of production, equipment damage, replacement wages, etc. which cost hundreds of millions annually.

Despite the fact workplace accidents are seriously underreported in New Brunswick, the "official" statistics still show that there has been some, but little, improvements on the prevention of lost-time injuries. This is something the Independent Review Panel should closely examine and report on.

The NBNU firmly believes that true progress in the prevention of workplace injuries and illness will benefit both workers and employers. Workers will avoid the pain and suffering associated with accidents. Employers will gain through lower assessment rates, reduced operating costs and enhanced production. However, for this to happen all employers must be made to recognize and fully account for all the costs of workplace accidents and illnesses and to also understand that investing in workplace health and safety pays dividends for all concerned.

² *New Brunswick Federation of Labor, 2007*

Entitlement

Over the years, the WCB has been reluctant to adopt a progressive approach to the interpretation of the definition of accident. In this regard, our Board is not alone. But it is important to recognize that workers pay dearly, as do their families, whenever workers' compensation laws are crafted to deny benefits to workers who suffer work related injuries or illness.

Chronic Stress – NBNU does not agree with earlier changes to the *Act* whereby the definition of "accident" does not include stress, other than an acute reaction to a traumatic event.

Today's workplaces are increasingly complex and work induced stress is commonplace and, we might add, very real and disabling. Work related stress is all too real because of understaffing and greater productivity demands on workers by their employers. To refuse to recognize as much and to deny related claims for workers' compensation is not in keeping with the purpose of workers' compensation.³

Denial of benefits to workers suffering from disabling chronic mental stress arising out of and in the course of their work, in our view, is every bit as discriminatory as was the earlier exclusion of chronic pain as a compensable condition. All injured workers deserve to be treated equally and fairly regardless of the nature of their workplace injury. Quebec and Saskatchewan have moved to recognize stress claims where the worker is able to show a relationship between the illness and the work. N.B. should do the same and not limit stress claims to an "acute reaction to a traumatic event."⁴

Recommendation 1

The NBNU recommends that the *Workers' Compensation Act* be amended to repeal those discriminatory sections which deny compensation entitlement for work related mental stress.

Entitlement Rules - Legislative cuts to the *Workers' Compensation Act* enacted in 1993 (Bill 55) resulted in a much more restrictive definition of what constitutes a work related accident. Consequently, where there is any evidence to the contrary the claimant must show that there is a "probable" relationship. In addition, other than for claims involving an acute reaction to a traumatic event, cumulative stress ceased to be a compensable accident.⁵

These changes, together with a new "preponderance of evidence" test placed an unfair burden on injured workers seeking compensation for job related injuries and illnesses. Because of this greater onus on workers to substantiate their claims, more claims are being denied and injured workers must resort to launching appeals. Many, however, simply give up and abandon their claims, especially those involving soft tissue injuries, industrial diseases and stress.⁶

³. *New Brunswick Federation of Labor, 2007*

⁴. *IBID*

⁵. *IBID*

⁶. *IBID*

Recommendation 2

The NBNU recommends that the *Workers' Compensation Act* be amended to restore the pre-1993 definition of accident and standard of proof whereby it will be presumed that an accident or illness arose out of and in the course of employment unless the opposite is proven, to make work related stress compensable, and to reinforce the injured worker shall receive the benefit of the doubt at all times.

Benefits

Wage loss benefits payable to injured workers in New Brunswick are among the worst in Canada. The waiting period for benefits, a low compensable earning ceiling, the two-tier wage loss benefits formula, and the legislated ban on collateral benefits, in combination, do not provide New Brunswickers with adequate financial protection from workplace injuries.⁷

a) **Wage loss benefits** – NBNU believes that restricting wage loss benefits payable to an injured worker to 80% of the worker's loss of earning capacity for the first 38 weeks and an amount equal to 85% thereafter is arbitrary and unfair. There is no rationale behind this formula other than to reduce WCB costs at the expense of injured workers.

Wage loss benefits should reflect the total financial losses and other hardships suffered by injured workers. Reducing benefits below 90% of net on the grounds that the after tax incomes of workers in receipt of benefits are supposedly not significantly impacted ignores other important considerations. These include the injured worker's possible loss of pension contributions and credits, vacation and E.I. coverage, as well as childcare and transportation obligations. There is no accounting for the personal hardship associated with workplace accidents such as pain and suffering and job impacts.⁸

Recommendation 3

The New Brunswick Nurses Union recommends the *Workers Compensation Act* be amended to ensure that wage loss benefits shall be payable in an amount equal to 90% of the worker's loss of earnings after the date of the accident.

b) **Waiting Period** – New Brunswick is one of only three jurisdictions in Canada with a waiting period for worker's compensation benefits. Also brought in at the request of the employer community, this amendment exists solely to lower WCB costs at the expense of the injured workers. It is safe to say though that the financial pain is greatest for low-income workers most of whom can ill-afford to lose three-fifths of their initial weekly wage loss cheque.⁹

⁷. PEI Federation of Labor, 2007

⁸. IBID

⁹. IBID

NBNU is very concerned that the WCB board of directors has made no recommendations for legislative change to remove the three-day waiting period for benefits and, it feels, demonstrates the board's insensitivity to the financial plight of injured workers and their families.

As in Nova Scotia and Prince Edward Island, the other provinces with a waiting period, injured workers in New Brunswick are being unfairly forced to work through injuries or to file for group insurance sick leave benefits rather than report lost-time compensation claims.¹⁰

Without question, this has seriously distorted lost-time accident statistics. Notwithstanding a decline in reported lost-time accidents, the reality is that New Brunswickers' workplaces are not safer. Accidents are still happening but, regrettably, are either not reported or shown as lost-time claims.

A 2001 review of workers compensation in Nova Scotia examined this issue at great length and noted that injured workers, according to WCB, lose an estimated \$308,851 to \$1,235,405 per year because of that province's two-day waiting period. A separate New Brunswick study estimated that 12% to 20% of all accidents were not reported owing to its three-day waiting period.¹¹

Workplace accidents are the financial responsibility of employers not workers. NBNU believes it is time the WCB and the Government of N.B. recognize as much and require all employers to fulfill their obligation to fairly compensate workers injured on the job by providing for payment of compensation benefits the day after the accident.

As it stands now, some employers are not affected by the waiting period provisions of the *Act* resulting in a double standard for N.B. workers. Some have their wage losses covered directly by their employer on a voluntary basis; in addition some unions have negotiated collective agreements covering payment of the waiting period.

However, leaving it to individual employers and workplaces to determine if the waiting period will be covered is not right. This only promotes inequities in the workers' compensation system to the point where workers with similar injuries are treated differently. Additionally, this practice also has the adverse consequences of workers not reporting job accidents which are not the purpose and intent of our workers' compensation laws.¹²

^{10.} *PEI Federation of Labor, 2007*

^{11.} *IBID*

^{12.} *IBID*

The New Brunswick Nurses Union is not alone in its thinking on this important issue. Nova Scotia's review committee in **unanimously** recommending elimination of that province's waiting period stated:

"Injured workers see the waiting period as an unfair penalty when the accident or illness was not their fault. It is contrary to the no-fault principle of public workers' compensation. Many workers have ongoing commitments they must meet during a waiting period, such as day care costs and monthly parking or transit fees.

A key concern ... is the impact of the waiting period on minimum wage workers who can least afford to be penalized for not working. For these workers, the waiting period is a definite incentive to continue to work regardless of the consequences for their health"¹³

The NBNU fully agrees with this statement.

Recommendation 4

The NBNU therefore recommends that the *Workers' Compensation Act* be amended to provide for removal of the waiting period for wage loss benefits.

Recommendation 5

NBNU further recommends that the *Workers' Compensation Act* be amended to require the "employer" to compensate an injured worker at the regular rate of pay for the day of an injury, provided the worker reports the injury.

Five jurisdictions in Canada (Alberta, Ontario, Quebec, Manitoba and Newfoundland) believe that in keeping with the fundamental principle that employers, not injured workers, should pay the full cost of workplace accidents, this change would ensure that all workers be treated the same under the province's workers compensation laws. Such is not the case today in New Brunswick since neither individual employers or the WCB are obligated to pay any wages lost the day of an injury. To the extent some employers cover an injured worker the day of the accident and others do not, workers are not treated equally.¹⁴

c) **Top-up and collateral benefits** – The *Act* makes it very clear that any top-up payments received by a worker pursuant to a collective agreement with an employer are to be treated as collateral benefits by the WCB. The *Act* further states that all collateral benefits are to be deducted from the wage loss benefits of the injured worker.

¹³. PEI Federation of Labor, 2007

¹⁴. *IBID*

NBNU believes that these provisions clearly demonstrate the punitive approach of the *Workers Compensation Act* insofar as worker rights and benefits are concerned. They contradict WCB's core value – to “treat people with fairness, care and respect.” More importantly, however, restrictions against top-up and collateral benefits generally constitute interference with the free collective agreement bargaining process and the right of workers to freely negotiate all terms and conditions of employment. The measures in question are unfair to injured workers and NBNU feels they should be removed.

Recommendation 6

The NBNU recommends that the *Workers Compensation Act* be amended to remove all restrictions on salary top-ups, including severance pay, and to allow individual employers and workers to determine the payments, if any, in excess of legislated benefit levels.

Recommendation 7

The NBNU further recommends that the *Workers Compensation Act* also be amended to ensure that workers receiving compensation benefits are not obligated to apply for CPP disability benefits and, if in receipt of such benefits, shall have their workers' compensation benefits reduced.

NBNU does not support the current legislation which allows WCB to determine an injured worker's entitlement under CPP disability benefits where the worker refuses or fails to apply and, to then deduct 50% of the projected benefits. Using CPP income to reduce compensation benefits is contrary to the intent of workers' compensation and that it be solely funded by employers through assessments.

d) **Minimum benefits** – Only the *Workers Compensation Acts* in Atlantic Canada have no minimum benefits provisions to protect workers totally and permanently disabled because of workplace accidents. In light of the failure of compensation boards in the Atlantic provinces to address this matter, it is incumbent upon government to act. The cost of guaranteeing a reasonable level of minimum benefits is minimal, we understand, and would help ensure those injured workers affected are not left financially destitute. Forcing these workers onto the welfare rolls is immoral and simply lets employers avoid paying the true costs of workplace accidents.¹⁵

Recommendation 8

The NBNU recommends that the *Workers Compensation Act* be amended to ensure all workers totally disabled beyond two years receive weekly compensation benefits equal to at least 50% of New Brunswick's average weekly earnings.

¹⁵ PEI Federation of Labour, 2007

e) **Maximum Insurable earning** - The *Workers Compensation Act* requires that the injured worker's earnings in excess of the maximum earnings ceiling are not to be considered in calculating compensable earning.

N.B. currently has the 9th lowest compensable earning ceiling in Canada. Because of this, more New Brunswickers stand to receive a lesser amount of workers' compensation benefits if injured on the job. It also means that N.B. employers pay less in assessments.¹⁶

NBNU believes that the maximum should be increased to reflect workers' salaries. The average salary of nurses today is \$61,000 and the maximum insured salary under WHSCC is \$48,400.

Recommendation 9

The NBNU recommends that the *Workers Compensation Act* be amended to eliminate any limit on insurable earnings and reflect the workers actual pre-injury salary.

f) **Annuity at age 65** – NBNU feels that the annuity at age 65 should be applicable to injured workers disabled beyond two years. Section 38.22 of the *Workers' Compensation Act* requires that the WHSCC set aside an amount equal to five (5) percent of their compensation benefits which, together with interest, shall be used to provide a pension at age 65. Prior to Bill 55, the amount set aside was eight (8) percent. In the event the worker dies without dependants, the pension remains with the WHSCC Pension Fund.¹⁷

It is important to remember that this pension benefit was created to offset the loss of lifelong disability awards in 1981. Cutting it to five (5) percent is indefensible and the additional cost to re-establish the contribution rate of eight (8) percent is, we understand, less than \$300,000 per year.

Recommendation 10

The NBNU recommends that the pension benefits provided to long-term claimants under Section 38.22 of the *Workers' Compensation Act* be based on eight (8) percent of the compensation paid the injured worker; also that the amount set aside not be left fully in the Pension Fund but that there be a minimum payout of five (5) years to the estate of the worker should he/she die without surviving dependents.

¹⁶. PEI Federation of Labour, 2007

¹⁷. *IBID*

Rehabilitation and return to work

a) **Deeming** – NBNU believes that workers' compensation should never reduce an injured worker and the worker's family to poverty or make them a charge of society. This is the common conclusion of countless compensation review committees over the year. But as a result of **DEEMING**, the shift to wage loss based on workers' compensation in place of the former system centered around total and partial life long disability pension has in fact led to the impoverishment of all too many workers.

For NBNU, re-establishing the worker in productive and suitable work best benefits the injured workers in the long run. This means that progressive rehabilitation, retraining and return to work legislation, programs and services, not deeming, must form the foundation of our workers' compensation system.

Reducing the benefits of permanently disabled workers deemed fit for non-existent jobs are exceptionally unfair and NBNU would like to see this practice abolished. The *Workers Compensation Act* should be changed to eliminate deeming other than in those special circumstances where an injured worker, without good reason, declines a "bona fide" offer of employment or retraining. Until a real job becomes available that the injured worker can perform safely, NBNU believes he/she should remain on full compensation benefits.¹⁸

Returning the injured worker to meaningful employment is a fairer and more just way to reduce the costs of paying wage loss benefits. It is beneficial to employers and the WCB while providing injured workers with self-esteem and personal fulfillment. More importantly, it is what the injured workers want most!¹⁹

Deeming has many concerns, but suffice it to say that NBNU remains convinced that of those workers deemed each year, many face a bleak future marked by poverty, misery and despair. Despite improvements to the WCB's deeming process, the complaints persist and more often than not confirm that deeming only serves to further penalize victims of workplace accidents.²⁰

Recommendation 11

The NBNU therefore recommends that the *Workers' Compensation Act* be amended to remove the deeming process by deleting "the net average amount the Board determines the worker is capable of earning" and substitutes the words "the earnings that the worker is receiving from employment."

^{18.} *PEI Federation of Labour, 2007*

^{19.} *IBID*

^{20.} *IBID*

b) Alternate Employment – Re-employment of injured workers benefits all employers by reducing future collective liability costs. Under the current system, however, employers with good re-employment programs are penalized since their costs are determined by employers who do not return injured workers to work. Obviously, a more level playing field is required.²¹

To ensure employers become proactive in implementing adjustment measures for the benefit of employees with reduced work capacity, NBNU respectfully urges the WCB to strengthen the monetary penalties applicable to organizations which do not comply. Pre-accident employers who do not re-employ the injured worker as required could be assigned the value of the ongoing reduction in benefits arising from the deeming process.²²

NBNU believes that the WHSCC itself must also become more proactive in developing alternate employment options for injured workers who do not return to their pre-injury place of employment. The current attitude that there is “no obligation” for the WHSCC to find employment for the worker is short-sighted and should be changed.²³

NBNU feels that assisting injured workers with job market searches is not sufficient. We believe that by working more closely with industry rate groups, the WHSCC can do more to develop and make available, where necessary, suitable employment opportunities with alternate employers.²⁴

Recommendation 12

The NBNU, therefore, recommends that the *Workers Compensation Act* return to work provisions be improved to increase monetary penalties for non-compliance by employers and to obligate the WHSCC to actively pursue alternate employment options for injured workers.

NBNU feels that injured workers should have all of their rights and responsibilities spelled out in the *Workers Compensation Act* as it relates to deeming and return to work and not be obligated to go elsewhere to have those rights effectively enforced.

Case management

The NBNU supports the case management approach to claims adjudication and administration. However, it feels it is imperative that case management more effectively responds to the needs of injured workers. Despite periodic improvements, problems persist and the case management system continues to fall short of the expectations of many injured workers and their representatives.

^{21.} *PEI Federation of Labour, 2007*

^{22.} *IBID*

^{23.} *IBID*

^{24.} *IBID*

Criticisms vary but generally include the following:

- case managers lack medical expertise but still over-rule the recommendations of medical specialists concerning the condition or capacities of injured workers;
- commission medical staff reject the reports of claimants' doctors without ever examining the injured worker;
- too much emphasis is placed on the cost benefits analysis side of claims managements;
- case management is often adversarial and confrontational;
- case management personnel have excessive workloads resulting in inadequate communication with claimants and a poor quality of service; and
- case managers are too pro-employer respecting return to work decisions leading to premature return to work outcomes for injured workers.²⁵

Recommendation 13

The NBNU recommends that the case management system be examined with the objective of meeting the needs of injured workers by ensuring:

- 1) that case management staffing teams are adequate and are assigned reasonable caseloads;**
- 2) the safe return to work, not cost benefit analysis, become the primary consideration in claims administration;**
- 3) that stronger weight be given to the report of medical specialists concerning the medical condition of injured workers and their work capacities; and**
- 4) that in the event of a serious and continuing personality conflict between an injured worker and the case manager, a new case manager be assigned to the claim.**

Policy issue

While all policies are regularly reviewed in chronological order, unfortunately the review process is not an open one.

Policies recently developed or revised and implemented without stakeholder input concern important matters like return to work. These were changed without any public consultation. Likewise, stakeholders have no chance to review a new incentive program to encourage and assist injured workers to return to work or the introduction of an internal system for safety infections.²⁶

NBNU believes participation in policy development or revision would promote compliance and would allow a more democratic process. Furthermore, we believe that when policy development rests exclusively with WHSCC staff and the board of directors, it reduces the WHSCC's "transparency" in its operation.

²⁵ *PEI Federation of Labour, 2007*

²⁶ *IBID*

The Commission's lack of consultation process, we respectfully put forward, is further reinforced by its failure to make note on its website of this Independent Review of the Workplace Health, Safety and Compensation system.

Other jurisdictions, Prince Edward Island for example, do invite public input around policy issues. The Island's WCB automatically posts on its Web site all policies up for review and allows interested parties 30 days to respond.²⁷

Recommendation 14

The NBNU recommends that the WHSCC immediately undertake to ensure interested stakeholders have the opportunity to participate in the policy renewal process through the development of an open and timely consultation mechanism, preferable allowing for a 60 day response period.

Another concern relating to policy development relates to the fact that new or revised policies are not immediately available to all parties but still take effect once adopted by the board of directors. While the Commission cites translation delays as the reason for this situation, nevertheless, it places injured workers at a disadvantage since the new policy is immediately available for use by WHSCC staff but not all claimants and stakeholders.²⁸

Recommendation 15

The NBNU recommends that all new or revised policies become effective only when available to all interested parties and that the necessary resources be put in place to ensure timely translation of all WHSCC policies.

Appeals system

Appeal procedures relating to workers' compensation matters vary widely by jurisdiction. In New Brunswick, Section 21 of the *WHSCC Act* establishes the framework for appeals of the WHSCC decisions by persons with a direct interest.

From the perspective of injured workers it is critical that the appeals system be fair, impartial, user friendly and timely in holding hearings and rendering decisions. Upon examining the appeals system, NBNU would like to respectfully offer the following comments:

a) Time limits – The existing time limits for appeals – one year from the date of the decision being appealed – is far too short and, considering most WCBs have no time limits, the current rules are very unfair. Also, until altered in 2001, the previous indefinite time frame for appeals posed no problem and was more equitable for workers.²⁹

²⁷ *PEI Federation of Labour, 2007*

²⁸ *IBID*

²⁹ *IBID*

Many injured workers are unfamiliar with workers' compensation legislation and policies. For the most part, they are usually ill prepared to deal with unfavorable Board decisions concerning their claim for compensation. NBNU feels that this window of opportunity for the launching of appeals is very narrow and places undue pressure on workers. We further would like to submit that it also overlooks the time needed to consult and gather information in support of workers' compensation appeals, which often involve difficult medical issues.³⁰

Recommendation 16

The NBNU therefore recommends that Section 21(1.1) of the *Workers Compensation Act* be amended to provide that the time limit for filing appeals with the Appeals Tribunal shall be indefinite.

b) Decision time frames – Unlike some tribunals, the *Act* does not impose time limits on the Appeals Tribunal for holding hearings or, following completion of the hearing, to make available a written summary of its decision with reasons. It is in the best interests of all parties to render decisions sooner than later. For some time the Appeals Tribunal made every effort to expedite this process and actually came very close to its stated goal of hearing all appeals and sending out written decisions within 90 days of the date of the appeal being submitted. This is no longer the case, however, and lengthy delays are occurring in the hearing of appeals as well as the rendering of decisions despite improvements in the processing time for decisions in 2006.³¹

NBNU is concerned that the overall time frame for appeals, from start to finish, has grown. For injured workers and their families caught up in appeals system delays, justice delayed is justice denied. Legislated time frames, we feel, would serve to force all parties to expedite appeal hearings and the writing of Appeals Tribunal decisions; the hiring of the necessary resources to make this a reality could then be justified legally. Such is the case in Newfoundland and Labrador, which allows 60 days for the appeals process to be completed.

Recommendation 17

The NBNU recommends that the *Workplace Health, Safety and Compensation Commission Act* be amended to require that all workers' compensation appeals be heard, and written decisions rendered, within 60 days of the date of the appeal being submitted.

c) Interim Benefits - Lengthy delays in the completion of the appeals process is much harder on injured workers than employers and WHSCC staff. Only the worker injured on the job, often because of employer negligence, is forced to go without income. Moreover, the family and social pressures that arise when a worker's regular source of income unexpectedly stops are considerable and escalate with time. All too often injured workers have completely exhausted E.I. sickness benefits and personal savings and turned to social assistance before receiving their appeal decision.³²

³⁰. PEI Federation of Labour, 2007

³¹. NB Federation of Labour, 2007

³². *IBID*

More and more, injured workers are foregoing their rights under the *Workers' Compensation Act* because of tougher adjudication and delays in the handling of appeals. Rather than report accidents, they continue working or opt for group insurance and appropriate solutions proposed in order to ensure workers apply for and receive the compensation benefits that are rightfully theirs.³³

Improving the adjudication process through the implementation of an internal WHSCC review of all adjudication decisions is not the answer, however. Experience shows this simply adds another layer of bureaucracy to the adjudication process and only serves to delay the final decision without appreciably impacting outcomes.³⁴

Recommendation 18

The NBNU recommends that an injured worker who officially appeals a workers' compensation claim decision, if unable to work, be provided full loss of earnings benefits pending the outcome of their appeal.

Recommendation 19

The NBNU further recommends that New Brunswick follows the lead of the 2005 Manitoba Review Panel proposal, as well as Quebec, and require employers to continue the injured worker on the payroll for the first two weeks of any compensation claim involving loss of earnings subject to later reimbursement.

d) Implementing Decisions – NBNU is also concerned that WHSCC staff delay implementing decisions of the Appeals Tribunal or only partially carrying out the direction given by the Tribunal. This, too, is frustrating for injured workers, as is the refusal of the Commission to adjudicate claims taking into account prior decisions of the Appeals Tribunal involving the same issues.

Hopefully, members of the Independent Review Panel will closely examine Appeals Tribunal results which on average show 60% of the appeals initiated fully favor the injured worker while another 7% partially support the worker. This tells us that the Commission is determined to ignore the findings of the Appeals Tribunal regardless of the impact of their actions on injured workers or the inefficiencies it creates in our workers' compensation system.³⁵

Recommendation 20

The NBNU recommends that the Independent Review Panel direct the WHSCC to adopt appropriate measures to ensure Appeals Tribunal decisions are quickly implemented and, also, respected in the adjudication of future claims.

³⁴ *NB Federation of Labour, 2007*

³⁵ *IBID*

Conclusion

It is important to remember that injured workers claim compensation as a result of being hurt in workplaces that all too often are unsafe and in blatant violation of the province's health and safety laws. To force these same workers to endure low benefits or loss of income because they were unfortunate enough to get hurt trying to make a living is unacceptable.

Workers' compensation is a no fault insurance program not social assistance. As long as workers are denied the right to sue their employers, injured workers and their families have every right to demand fair compensation protection. Employers, on the other hand, can best lower their costs by investing in occupational health and safety and aggressively promoting workplace safety training and compliance programs. This, we respectfully put forward, is the approach needed to restore fairness to the province's workplace health, safety and compensation system.

Workers, we believe, have the right to demand safe, healthy workplace and, if injured, to be treated respectfully and to be compensated fairly. Regretfully, all too often this is not happening.

The New Brunswick's workplace health, safety and compensation system is no longer in equilibrium and has not been since 1993 with the enactment of Bill 55 which clearly advantaged employers not workers. Workers have suffered enormously because of deep and lasting cuts to this province's workers' compensation laws and the failure to effectively police New Brunswick's health and safety legislation.

In closing, the New Brunswick Nurses Union respectfully urges the Independent Review Panel to heed the input provided herein on behalf of the province's workers and to report on the necessity of government to act quickly in re-establishing equality in New Brunswick's workplace health, safety and compensation system.

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