# PUBLIC SERVICE ALLIANCE OF CANADA

## Submission to the New Brunswick Workplace Heath, Safety and Compensation Commission Independent Review Panel

November 2007

## 1.0 INTRODUCTION

The Public Service Alliance of Canada welcomes the opportunity to present to the Workplace Health, Safety and Compensation Commission Review Panel PSAC's views on the New Brunswick's workplace health, safety and compensation system.

This is the first independent review of the province's health, safety and compensation system in over a quarter of a century. The last review was undertaken by the Boudreau Study Committee and completed in 1979. All subsequent reviews have involved members of the board of directors of the Workplace Health, Safety and Compensation Commission (WHSCC) and were limited in scope. Needless to say, we support the current review and are pleased to provide input on behalf of the PSAC's members who work in the Province of New Brunswick.

The Public Service Alliance of Canada represents workers employed by the Federal Government, Federal Agencies and Crown Corporations in New Brunswick, as well workers who work in the private and community services areas.

All members of PSAC have a stake in the New Brunswick Workers' Compensation Act. Many of our members are covered by the Government Employment Compensation Act which ensures that Federal workers will receive compensation at the same rate and under the same conditions as are provided under the law of the province where the worker is employed. The New Brunswick WHSCC has a Memorandum with the Federal Government to administer the GECA in the province of New Brunswick.

And some of the other members of PSAC are directly covered by the New Brunswick Workers' Compensation Act.

Workers' compensation, it should be remembered, evolved from an historic compromise based on the Meredith principles

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

The primary purpose of compensation laws, however, is to help workers injured on the job. Workers gave up a very fundamental right – the right to sue – in exchange for a workers' compensation system founded on fairness, respect and equitable treatment of injured workers.

Workers, not employers, 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. For many employers it is little more than a book entry. 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.

The WHSCC is responsible for the administration of three separate statutes: the *Workplace Health, Safety and Compensation Commission Act*, the *Workers' Compensation Act* and the *Occupational Health and Safety Act*. Our submission addresses concerns labour has with each of these Acts, as well as related regulatory and policy issues. Recommendations for improvements to the province's health, safety and compensation system are included as well.

## 2.0 FOR THE RECORD

Since the early nineties, workers in New Brunswick and in other Canadian jurisdictions have witnessed the elimination of the historical balance between worker and employer interests in workers' compensation laws. Responding to employer pressures, governments across Canada dramatically changed the workers' compensation system in favour of employers. Nowhere is this more evident than in New Brunswick, which severely eroded workers' rights, and benefits under the Workers' Compensation Act with the implementation of Bill 55 in 1993.

The cuts endured by workers were severe, painful and lasting. They included:

- a 3-day waiting period,
- a reduction in benefits from 90% to 80% of net insurable earnings (85% after 39 weeks),
- new provisions effectively ending top-up benefits,
- removal of the minimum benefits guarantee for totally disabled workers,
- elimination of the 8% annuity payable at age 65.

Compounding the hurt for injured workers were other negative legislative and administrative changes. Bill 55 changed the definition of **accident** to place a greater onus on injured workers to prove, beyond a balance of probabilities, that an injury or illness is work related. It also made cumulative mental stress a **non-compensable** condition. The WHSCC, moreover, immediately implemented numerous restrictive policy changes impacting entitlement to benefits and also adopted more aggressive deeming measures.

Bill 55 left New Brunswick workers with the country's worst compensation system. And notwithstanding **partial** restoration of some of the 1993 cuts, there still is **NO BALANCE** between worker and employer interests. The fact is that the 3-day

waiting period still exists; benefits are still only 85% of net pre-accident earnings, the age 65 annuity is only 5% and, totally disabled claimants are still **not** guaranteed a minimum level of benefits. Furthermore, restrictions still exist on salary top-ups and there still remains a strict "preponderance of evidence" legal test which claimants must meet to receive benefits.

Contrary to the Meredith Principles of workers' compensation, New Brunswick workers injured while doing their jobs are **not** being provided with proper protection against loss of income. Employers, on the other hand, continue to enjoy low premiums and the advantages of a fully funded compensation system.

Labour's efforts to correct this imbalance in the province's workers' compensation system have been largely unsuccessful. For the most part our submissions to the WHSCC have fallen on deaf ears and on those few occasions where the Commission board of directors have recommended benefit improvements opposed by employers, the New Brunswick government refused to enact the necessary legislative changes.

## 3.0 PREVENTING WORKPLACE ACCIDENTS AND ILLNESSES

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.

The statistics are still disturbing. One in every 21 workers can expect to be injured at work each year. In 2006, the WHSCC recorded 25,203 workplace accidents. Of this total 6,026 represented lost time claims. Eight fatalities occurred and claim costs incurred were a staggering $160 million.

As alarming as they are, these statistics say nothing about unreported accidents, near misses or, the pain and suffering of injured workers. Nor do they account for the indirect costs of workplace accidents and illnesses – absenteeism, increased use of sick leave, lost production, equipment damage, replacement wages, etc… which, using a conservative multiplier of 4, totals in excess of $640 million annually.

The WHSCC and other commissions across Canada closely track provincial lost-time accident frequency rates - the number of lost-time workplace accidents for insured employers per estimated 100 full-time employees. New Brunswick's lost-time accident frequency rate for 2005 was 1.42, according to statistics provided by both the Commission and the Association of Workers' Compensation Boards of Canada (AWCBC). The national average in 2005 was 2.56.

While the WHSCC is quick to report on its low accident frequency rate, it never tells stakeholders and the public about factors which result in New Brunswick's workplace accident stats being seriously **understated**.

This province is the only jurisdiction in Canada with a 3-day waiting period for workers' compensation benefits reinforced by legislative restrictions preventing the negotiation of top-up income. Not surprisingly, workers often do **not** bother to report job injuries but instead opt for sick leave or, group insurance benefits. Consequently**, New Brunswick's workplace accidents are understated by at least 20 percent** for this reason alone.

But there are also other reasons to question the accuracy of this province's accident statistics. These include our tougher claims adjudication rules, the push by employers to have injured workers remain on the job performing light duties, the fact about 21,000 workers employed in workplaces with less than three employees are not covered by the Workers' Compensation Act, the difficulty workers face in establishing occupational disease claims in this province, as well as New Brunswick's large underground economy. If all of these factors were properly accounted for, no doubt our accident frequency rate would be higher than the national average.

Furthermore, despite the fact workplace accidents are seriously underreported in New Brunswick – something this Review Panel should closely examine and report on - the "official" statistics still show that there has been no real improvement in the prevention of lost-time injuries.

In 1998, lost-time injuries were at a 6-year high of 6,099. For the year 2006 the total was 6,026. Over the 9-year period cited, the makeup of the province's economy has changed dramatically. We have shifted towards a knowledge based economy with a growth in call centers, retail work, service industry employment and high tech jobs. At the same time, our traditional resource based economy built around mines, mills and fish processing, which obviously involve more hazardous work and greater potential for injuries, has declined appreciably. Yet lost-time job injuries remain virtually unchanged.

**We can and must do better!** Labour firmly believes that true progress in the prevention of workplace injuries and illnesses 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.

The WHSCC's poor enforcement track record cannot be allowed to continue. We believe the Commission's failure to implement effective deterrence policies is nothing short of **shameful**. Other jurisdictions like Ontario are far more aggressive when it comes to prosecutions for OHS violations.

**The Public Service Alliance of Canada endorses the New Brunswick Federation of Labour's recommendation that the Review Panel call for the WHSCC to become more vigilant and aggressive in the prosecution of OHS violations.**

**The PSAC also endorses the Federation's further recommendation that the WHSCC be directed to develop and fully implement a workplace health and safety action plan incorporating**

- **a substantially larger budget for health and safety activities,**
- **increased compliance staff,**
- **an increase in the number and thoroughness of workplace inspections,**
- **more use of stop work orders and an end to the use of written suggestions for improvement in place of written orders,**
- **more prosecutions and higher fines for serious OHS violations with a new maximum fine of $500,000,**
- **better tracking and reporting on workplace safety issues including accidents, near misses, training and JHSC activities,**
- **accident reduction targets, including lost-time accidents,**
- **a more effective protocol for workplace visits by compliance staff, and**
- **stronger enforcement of employer workplace training obligations, and**

## 3.2 Strengthening Workers Participation

The PSAC has consistently argued, in all jurisdictions in Canada, that a stronger approach to enforcement must be complemented by effective workplace health and safety education, training programs and services to better prevent job accidents and workplace illnesses. We say this because we are of the view that **the best vehicle for addressing safety issues in the workplace is the Joint Health and Safety Committee supported by an effective regulatory and enforcement system.**

As much as the PSAC focuses on the need for stronger and more effective enforcement of legislated health and safety protections, we still realize that the Commission alone cannot prevent workplace accidents. That is why **PSAC supports the establishment of strong and effective Joint Health and Safety Committee structures, which guarantee workers meaningful and equal participation in decisions, which affect their health, safety and well-being.**

The present system **assumes** a common interest in health and safety. It ignores the fact that the employer's interest is in increasing profits while keeping costs low. Health and safety is not always profitable. Too many employers will voluntarily improve conditions only when they see that the direct and indirect costs of accidents and illnesses

exceed the costs of preventing them. Seeing financial benefits in investing in accident prevention is particularly difficult in cases of hazardous substances or processes where the costs of engineering controls are often large and immediate while the financial cost of not paying for controls (increased premiums) are years in the future, if ever. **Too few employers look at the human costs of not controlling hazards.**

Equality in OHS decision-making requires that the workplace parties, workers and employers, have access to and actually do receive effective health and safety training and that this training is supported by effective legislative rights for both joint occupational health and safety committees and individual workers.

However, health and safety training still needs to be improved in other ways including stronger rights for JHSC members and mandatory "prescribed" safety training for **all** workers. Sadly, far too many employees, especially younger workers, are **not** properly trained when they commence work or, change jobs.

*a) JHSC Rights*

New Brunswick's OHS Act provides for the establishment of JHSC's at any place of employment where an employer has twenty or more employees regularly employed. In addition, the legislation describes in detail the rights of committees. However, while the list of JHSC activities is quite extensive there is no legal obligation to carry out any of the functions identified since the Act only provides that a committee **may** perform these tasks.

This **discretionary approach to the role of the JHSCs** is a serious weakness in New Brunswick's workplace health and safety system and limits the effectiveness of committees under the internal responsibility system. The right of workers to participate in the resolution of health and safety issues, we feel, will continue to be compromised unless JHSCs are given specific duties and functions that the law mandates them to carry out after receiving the necessary training. Such is the case at the Federal level, as well as in many provinces including British Columbia, Manitoba, Saskatchewan, and Ontario.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that Section 15 of the OHS Act be changed by replacing the words "A committee may" with the wording "A committee shall" perform those functions spelled out in the legislation.**

Because this language is more **directive** and less open to debate, we believe it will better enable JHSCs to address workplace health and safety issues in a cooperative fashion and without involving a WHSCC officer in determining the scope of a committee's work.

Amendments to the OHS Act, Bill 18, proclaimed in June 2007, provide that workplaces shall now be inspected monthly using an inspection plan developed by the employer with the JHSC; results of each inspection are to be shared with JHSC members. Although a welcome improvement, these changes do not go far enough.

The PSAC agrees with the NBFL on the need to strengthen JHSCs by requiring, as in other jurisdictions, employers to respond in writing to the **recommendations of committees**. In New Brunswick employers are presently under no legal obligation to do so. This is a major concern to our members in that it allows the employer to avoid addressing JHSC decisions thereby eroding the internal responsibility system and the purpose of recommendations, which is to have the employer deal with workplace safety issues.

**The NBFL strongly recommends that the Act be amended to require the employer to respond in writing within 21 days upon receiving written recommendations from a committee and; that the response shall contain a time table for implementing the recommendations the employer agrees with and give reasons why the employer disagrees with any recommendations that the employer does not accept.**

**Access to information** by JHSCs is another area of concern. Where the employer and/or government opts to withhold relevant information including reports and tests relating to the workplace's health and safety, the JHSC is restricted in carrying out its duties and functions under the Act.

**The PSAC supports the NBFL's recommendation that the Act be amended to require the employer and/or the WHSCC to provide the JHSC a copy of all relevant health and safety documents including all OHS tests and reports, as a matter of course. At the request of the committee, the WHSCC should also be required to send an annual summary of data relating to the number of fatalities, lost workday cases, workdays lost, non-fatal cases requiring medical care but no lost workdays and incidences of occupational illnesses.**

As with other suggested changes, this proposal would serve to improve communications among the workplace parties on health and safety matters and allow the JHSC to better perform its functions by having full knowledge of all relevant information.

Improved access to information for JHSCs must also include allowing workers the time to research hazards and assess hazardous substances/processes and, if necessary, the right to bring in their own technical advisors. In addition, worker representatives should be entitled to take the time required to prepare for JHSC meetings and to be paid for same.

**The PSAC supports the NBFL's recommendation that the Act allow one hour of preparation time before each meeting or, if necessary, additional time subject to committee approval.**

Finally, if joint committees are to have credibility in the workplace it is important that the Act be amended to provide JHSCs with decision-making powers.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the OHS Act require the employer to obtain agreement from the JHSC prior to implementing safety decisions, including safety audit programs, which affect worker health and safety.**

*b) Worker Rights*

The core concept of health and safety legislation in Canada is to have the workplace parties work together to identify workplace hazards and to take appropriate action to prevent accidents and illnesses. Needless to say this necessitates cooperation between workers and employers in resolving workplace safety issues. It also requires recognition of and support for the three **fundamental rights of workers:**

- **the right to participate in workplace health and safety issues,**
- **the right to refuse unsafe work, and**
- **the right to be informed about workplace hazards.**

**Worker participation** in the resolving of workplace health and safety issues is assured in law by the Joint Health and Safety Committee system. Having offered recommendations intended to enhance the effectiveness of JHSCs, we now turn to an examination of the right to refuse, the right to know and their impact on the role of the joint committee.

The **right to refuse** provides workers a clearly defined right in law which is intended to ensure a worker is not forced to work in unsafe conditions. JHSCs are actively involved in the right to refuse process in various ways including the possible investigation of work refusals. The role of the joint committee in this regard although relatively clear cut, unfortunately, can be negatively impacted by unilateral action on the part of the employer. We refer here to the employer's right under **Section 21(2)** of the OHS Act to assign someone else to perform work that is subject to a work refusal.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that Section 21(2) be changed to prohibit the employer from assigning another employee to perform the work of an employee who has exercised the right to refuse unsafe work until a determination has been made by a compliance officer.**

That the employer cannot presently make such an assignment of work to another employee until that other worker has been advised by the employer of the initial work refusal and the reasons therefore and of his/her rights under the Act is not good enough. The potential for intimidating workers into performing unsafe work is all too real.

Closely related to the issue of work refusals is the matter of wage protection for all workers affected by health and safety work stoppages. Presently, the Act says an employee initiating a work refusal may be reassigned to equivalent work but shall be paid the same wages and benefits whether or not he/she is reassigned. The legislation makes no mention of other workers impacted by a work refusal.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the Act be changed to provide wage and benefits protection for all workers affected by health and safety work stoppages under the OHS Act.**

A similar provision to this recommendation is already enshrined in Federal health and safety legislation.

The proper functioning of JHSC's, we feel, is also jeopardized by the **inappropriate designation of joint committee members**. Under **Section 14(3)** of the Act the employer and employees are each to designate their respective representatives. However, this wording is inadequate and can lead to serious differences between the workplace parties. Federal legislation and the legislation of other provinces have provisions to ensure that managerial staff or non-workplace personnel will not represent workers on the JHSC, as well as dealing with the matter of representation in a workplace of non-organized workers.

**The PSAC supports the NBFL's recommendation that Section 14(3) be broadened to clearly spell out that**

- **in a unionized workplace, the worker JHSC members must be chosen by the trade union(s) representing employees, and**
- **worker members must be non-management employees at the workplace who are selected by the workers and who do not exercise managerial functions (the authority to discipline, hire, fire or recommend discipline, hiring or firing.)**

Turning to the **right to know**, there can be no question but that workers must be able to identify and understand workplace health and safety concerns if the joint committee is to successfully fulfill its mandate to ensure a healthy and safe workplace environment by reducing work-related accidents and deaths. But this means the worker must be provided sufficient information and **training** about workplace hazards, safety procedures and their rights and duties under the OHS Act.

It is unreasonable to expect workers to determine whether or not a hazard exists or how to properly protect themselves from hazards unless they receive the proper training and instructions. The Act makes it abundantly clear that the employer is responsible to provide the **necessary** training, supervision and protective equipment to ensure an employee's health and safety. If the WHSCC is serious about preventing accidents and strengthening the role of JHSCs, we believe the Commission must take concrete

measures to ensure workers are in fact properly informed and trained. A recent national study through Ontario's Institute for Work and Health revealed only one in five (20%) of new workers had received safety training. No doubt the situation is worse in New Brunswick and legislation to correct matters is overdue.

Federal Health and Safety legislation requires that employers establish a workplace hazard prevention program, with the participation of the JHSC and that worker education be part of such a program.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the OHS Act be amended to require employers to provide all employees a minimum of 8 hours of workplace hazard specific training annually, fully paid by the employer.**

**The PSAC also supports the NBFL's recommendation that the legal onus on employers be strengthened by adopting the same training of workers provisions found in Section 19 of Saskatchewan's health and safety legislation whereby**

**1) an employer shall ensure that a worker is trained in all matters that are necessary to protect the health and safety of the worker when the worker:**

- **a) begins work at a place of employment, or**
- **b) is moved from one work activity or worksite to another that differs with respect to hazards, facilities or procedures.**

**2) the training required by subsection (1) must include:**

- **a) procedures to be taken in the event of a fire or other emergency;**
- **b) the location of first aid facilities;**
- **c) identification of prohibited or restricted areas;**
- **d) precautions to be taken for the protection of the worker from physical, chemical or biological hazards;**
- **e) any procedures, plans, policies and programs that the employer is required to develop pursuant to the Act or any regulations made pursuant to the Act that apply to the worker's work at the place of employment; and**
- **f) any other matters that are necessary to ensure the health and safety of the worker while the worker is at work.**

**3) an employer shall ensure that the time spent by a worker in the training required by subsection (1) is credited to the worker as time at work, and that the worker does not lose pay or other benefits with respect to that time.**

**4) an employer shall ensure that no worker is permitted to perform work unless the worker:**

**a) has been trained, and has sufficient experience, to perform the work safely and in compliance with the Act and the regulations; or**
**b) is under close and competent supervision.**

Stronger **training of workers** legal requirements, we feel, will make the job of JHSCs much easier and, more importantly help reduce workplace accidents and illnesses with significant benefits to workers, especially younger employees, and employers alike. **Training works, it only remains to make it happen!**

## 3.3 Improving the Regulatory Process

Since the formation of the former Occupational Health and Safety Commission in 1981, a positive feature of workplace health and safety in New Brunswick has been the involvement and cooperation of the key stakeholders – the workplace parties, in the development of OHS rules and regulations. Operating by consensus and working with NBOHSC/WHSCC staff, employer and union nominees served on regulatory review committees which recommended to the Commission board of directors changes to improve the workplace environment in areas relating to safety and health. Everything from air quality to machine guarding and washroom facilities was periodically examined with a view to updating New Brunswick's standards.

The Public Service Alliance of Canada is concerned that this cooperative approach to regulatory change is being abandoned by the Commission in favour of a process that sees WHSCC staff review, research and propose directly to the board of directors appropriate changes in OHS regulations. If so, this is not acceptable and, in the long run, will be detrimental to the province's workplace health and safety environment. More, not less direct input and involvement by the people most impacted by health and safety rules – workers and employers – is what is needed and should be actively supported and promoted by the WHSCC.

Such a process is exactly what takes place at the Federal level. There is an established Regulatory Review Committee, which is a tripartite body, and all proposed Regulatory changes are developed through an established tripartite process.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that a provincial OHS Advisory Committee be established by the WHSCC following active consultation with the labour and employer communities.**

Once set up, this Committee should be directed to commence a comprehensive, ongoing review of all current regulations and the necessity for new regulations, including a regulation specifically addressing workplace ergonomics.

## 4.0 RESTORING THE BALANCE IN WORKERS' COMPENSATION

Just as workers are frustrated by the failure of the Workplace Health, Safety and Compensation Commission to bring about the necessary improvements to guarantee the right of all workers to a safe and healthy workplace so, too, we are very disturbed that there is still no willingness to address labour's concerns about inferior workers' compensation benefits and services.

Workers' compensation, we reiterate, must return to its original premise that every worker has the right to full and complete compensation for loss of income resulting from harm to health caused by work. This requires progressive legislative amendments and policy changes, along with immediate action on the part of the government and WHSCC to restore balance and fairness to the province's workers' compensation laws, programs and services.

### 4.1 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 between the accident and the injury. Prior to this, the Act called for a "possible" relationship. In addition, other than for claims involving an acute reaction to a traumatic event, cumulative stress ceased to be a compensable accident.

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.

Work related stress, it should be noted, is commonplace in workplaces today and all too real because of understaffing and greater productivity demands on workers by their employers. To refuse to recognize as much and to deny work related stress claims for compensation is wrong and not in keeping with the purpose of workers' compensation.

Denial of benefits to workers suffering from disabling chronic mental stress arising out of and in the course of their work, we feel, 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. New Brunswick, we suggest, should do the same and not limit stress claims to an acute reaction to a traumatic event.

**The PSAC supports the New Brunswick Federation of Labour's recommendation 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 that the injured worker shall receive the benefit of the doubt at all times.**

## 4.2 Benefits

The severity of cuts to the benefits of injured workers brought about by Bill 55 cannot be overstated. Despite partial restoration of some benefit reductions, workers still continue to lose millions of dollars each year. In fact, we estimate that at least $100 million has been taken out of the pockets of injured workers since 1993. Surely it is time to correct this injustice.

### *1) Wage Loss Benefits*

Restricting the wage loss benefits of an injured worker to 85% of the workers' loss of earnings capacity is arbitrary and unfair. There is no justifiable argument for this amount other than the Commission's determination to keep benefits below pre-1993 levels. Most jurisdictions outside Atlantic Canada pay 90% of net earnings.

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. Nor is there any accounting for the personal hardship associated with workplace accidents such as pain and suffering and job impacts.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the W.C. 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.**

*2) Waiting Period*

New Brunswick is one of only three jurisdictions in Canada with a waiting period for workers' compensation benefits. Brought in at the request of the employer community, this 1993 amendment exists solely to lower WHSCC costs at the expense of 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.

As in Prince Edward Island and Nova Scotia – 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 or sick leave benefits rather than report lost-time compensation claims. But at least injured workers in our neighbouring provinces have the option of trying to negotiate replacement wages through their employers. This is **not** the case in New Brunswick making our waiting period even harsher and far more punitive.

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

Labour maintains that workplace accidents are the financial responsibility of employers not workers. We believe it is time the WHSCC and NB government 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 beginning the day of the accident.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the W.C. Act be amended to provide for removal of the waiting period for wage loss benefits.**

**The PSAC also supports the New Brunswick Federation of Labour's recommendation that the W.C. 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.**

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*3) Top-up 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 deducted from the wage loss benefits of the injured worker if it means the worker is receiving more than 85% of his/her pre-accident net earnings.

This clearly demonstrates the punitive approach of the W.C. Act insofar as worker rights and benefits are concerned. Restrictions against top-up constitute outright interference with the free collective bargaining process and the right of workers to freely negotiate all terms and conditions of employment. The measure in question is unfair to injured workers and should be removed.

In 7 jurisdictions, there are no legislative restrictions against employers paying injured workers top-up benefits or, other collateral benefits. New Brunswick, we feel, should follow their example.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the W.C. Act be amended to remove all restrictions on salary top-ups, and to allow individual employers and workers to determine the payments, if any, in excess of legislated benefit levels.**

**The PSAC also supports the New Brunswick Federation of Labour's recommendation that the W.C. Act also be amended to ensure that workers receiving compensation benefits as well as CPP disability benefits, shall not have their workers' compensation benefits reduced.**

We object to the current legislation, which allows the WHSCC to deduct that portion of CPP benefits, which relate to the job injury. 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.

*4) Minimum Benefits*

Only the W.C. 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 morally wrong and simply lets employers avoid paying the true costs of workplace accidents.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the W.C. 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.**

*5) Maximum Insurable Earnings*

The W.C. Act (Section 38.1 (1)) requires that the injured worker's earnings in excess of the maximum earnings ceiling are not to be considered in calculating compensable earnings. For 2006 the maximum annual earnings was $51,900. It is adjusted annually to reflect the percentage increase in the Consumer Price Index.

New Brunswick has the ninth lowest compensable earnings ceiling in Canada – only the other Atlantic Provinces trail us. Because of this many NB workers stand to receive a lesser amount of workers' compensation benefits if injured on the job. It also means that NB employers pay less in assessments.

Effective 2006 the government of Manitoba removed that province's maximum compensable earnings ceiling. Of those jurisdictions with ceilings, the highest is the Yukon at $69,500 and the average ceiling for 2006 was $57,468. The level of coverage afforded injured NB workers therefore was well below the national average. We believe this difference in coverage is highly inequitable and must be rectified.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the W.C. Act be amended to eliminate any limit on insurable earnings.**

*6) Annuity at Age 65*

Applicable to injured workers disabled beyond two years, Section 38.22 of the W.C. Act requires that the WHSCC set aside an amount equal to 5% 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 8%. In the event the worker dies without dependents, the pension remains with the WHSCC Pension Fund.

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

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the pension benefits provided to long term claimants under Section 38.22 of the W.C. 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 dependents.**

## 4.3 Rehabilitation and Return to Work

Workers' compensation should never reduce an injured worker and the worker's family to poverty or make them a charge on society. This is the common conclusion of countless compensation reviews nationally over the years. But, as a result of DEEMING, the shift to wage loss based workers' compensation in place of the former meat chart system centred around total and partial life long disability pensions has in fact led to the impoverishment of all too many workers.

For us, re-establishing the worker in productive and suitable work best benefits the injured worker 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.

*1) Deeming*

The labour movement here and elsewhere in Canada has long opposed the deeming process. Our position remains unchanged. Failing legislative changes outlawing deeming, at the end of the day workers will still be deemed fit for phantom jobs and forced to resort to welfare for survival.

Reducing the benefits of permanently disabled workers deemed fit for non-existent jobs is grossly unfair and must be stopped. The W.C. 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, we believe he/she should remain on full compensation benefits.

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 WHSCC while providing injured workers with self-esteem and personal fulfillment. More importantly, it is what injured workers want most!

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the W.C. Act be amended to remove the deeming process by deleting in Section 38.1(1) the words "the earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining the injury" and substituting the words "the earnings that the worker is receiving from employment."**

*2) Vocational Rehabilitation*

The Federation is also concerned that the W.C. Act makes no specific reference to vocational rehabilitation (Section 43). The WHSCC "may" take such measures, as it may consider necessary or expedient to get injured workers back to work.

Although vocational services are offered by the WHSCC as part of the injured worker's overall rehabilitation program, it is critical that there be clear legal direction to the Board in this matter as is the case in other provinces. It cannot, in our view, be left solely to the Commission to arrive at solutions.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the W.C. Act (Section 43) be strengthened to require that the WHSCC "shall" undertake all necessary measures, including vocational rehabilitation services, to aid in getting injured workers back to work**.

*3) Return to Work*

A more positive alternative to deeming is enactment of the necessary measures to ensure bona fide return to work options are available for injured workers. Therefore it is imperative that workers be given not only full and comprehensive rehabilitation services but also, the strongest possible legal right to return to work as soon as they have reached maximum medical recovery.

The existing legislative provisions do not go far enough to ensure the right to return to work. Section 42.1 of the W.C. Act must be strengthened to address current weaknesses including length of service and early termination of re-employed workers and the application of the return to work legislative provisions.

Presently excluded are all employers who regularly employ fewer than 10 workers. An employer's obligation to re-employ is only for a maximum of two years after the date of the accident (one year for employers with 10 to 20 workers) and, there is no duty to accommodate onus placed on employers.

Human rights laws do not deny workers protection on the basis of workplace size, industry or, length of employment and with good reason. As a minimum the province's workers' compensation legislation should mirror the protection afforded workers through the Human Rights Act.

The same rationale, we believe, should apply to prohibit the unfair termination of workers re-employed under the return to work provisions of the W.C. Act. This requires offering job protection, which presently is non-existent.

Finally, it is imperative that in all unionized workplaces the bargaining agent for the injured worker be fully involved in the return to work process. Neither the legislation or Board policies currently make sufficient reference to the union's role which, considering the latter's legal obligations under other laws, is a serious shortcoming and needs to be addressed if return to work programs are to be successful. As is the case in Newfoundland and Labrador and, also strongly recommended by the National Institute

for Disability Management, we suggest that the W.C. Act provide for joint return to work committees to facilitate the involvement and cooperation of all the workplace parties.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the Return To Work provisions of the W.C. Act be strengthened as follows:**

1. **The legal obligation to re-employ injured workers (Section 42.1) apply equally to all employers covered by workers' compensation, regardless of size or, length of service.**

2. **Employers be obligated by law to accommodate the injured worker's medical restrictions including redesigning the job site where appropriate.**

3. **There be an onus on employers to provide alternate work if the injured worker cannot return to his or her pre-accident job.**

4. **To protect against unilateral accommodation by the employer, which does not respect the interests of the injured worker or the rest of the bargaining unit, including seniority rights, joint return to work committees be legislated at the workplace.**

5. **The WHSCC be given the power, reinforced by stronger penalty options, to order employers to re-instate injured workers where employers fail to meet a rigid test of "undue hardship".**

6. **There be special protection against unfair dismissal of re-employed injured workers.**

*4)* A*lternate 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 driven up by employers, who do not return injured workers to work. Obviously, a more level playing field is required.

To ensure more employers become proactive in implementing adjustment measures for the benefit of employees with reduced work capacity, we urge the WHSCC to strengthen the monetary penalties applicable to companies, which do not comply with Section 42.1. 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. Consequently, the pre-accident employer would have a higher accident cost experience and would receive a higher assessment rate. We are confident that this penalty provision, if adopted and, rigidly applied would have the desired effect and result in more employers re-employing injured workers.

Assisting injured workers with job market searches isn't sufficient. 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.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the W.C. Act return to work provisions (Section 42.1) 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.**

## 8.0 FUTURE REVIEWS

As pointed out at the outset of our submission, the last independent public review of New Brunswick's workplace health, safety and compensation system was completed in 1980. The importance of undertaking such reviews in a more timely fashion cannot be overemphasized and to ensure as much the W.C. Act should be amended to mandate future reviews.

Other jurisdictions including Saskatchewan, Newfoundland and Labrador and Prince Edward Island currently provide for reviews by statute. Although each province differs in terms of the timing and scope of reviews, as well as who is to undertake them, all of these jurisdictions have legislated that comprehensive reviews occur at fixed intervals.

While the legislated responsibility of the WHSCC board of directors includes examining the policies and laws under its jurisdiction, there is still a need for outside reviews to ensure the views and concerns of interested parties are actively considered by an independent panel representing workers and employers. However, it is important that this panel be comprised of representatives nominated by the key stakeholder organizations.

In advocating regular outside reviews of the workplace health, safety and compensation system, we wish to point out to the Review Panel that as long as this brief is, there are still important matters which our submission hasn't addressed. Included would be

- rate setting and the merits of a pure collective liability system,
- experience rating concerns,
- Permanent Physical impairment awards (loss of opportunity )
- occupational illnesses including those related to firefighting and the importance of establishing a provincial occupational disease panel, as well as occupational health clinics,
- workplace ergonomics rules,

- delays relating to the receipt of the initial compensation cheque, and
- the excessive workload of workers' advocates.

More frequent reviews of the system, would help ensure these and other concerns are examined in a timely manner.

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the WHSCC Act be amended to require that a review committee with equal worker and employer representation nominated by the key stakeholder groups, business and labour, be constituted every four years for the purpose of undertaking a comprehensive, public review of the province's workplace health, safety and compensation system.**

## 9.0 FORGING A NEW RELATIONSHIP

Workers training workers, we believe, is a proven system for the successful development of OHS instructors but more importantly, for the efficient and effective delivery of health and safety training programs in an adult learning environment.

Once trained, union rank and file instructors become an integral part of the labour movement's ongoing efforts to secure hazard-free workplaces that prevent work-related injury, illness and death and promote the well-being of workers, their families and communities. They use their skills and passion for health and safety education to facilitate health and safety training sessions in the workplace and in the community helping JHSC members and individual workers to better understand their rights, responsibilities and roles in building healthier and safer workplaces.

As well as playing key roles in workplace health and safety, including their own workplaces, many of the same instructors also work tirelessly in our communities, including schools, further promoting actions aimed at securing healthier and safer environments overall, this helps labour to build on its capacity to deliver quality health and safety training effectively.

### 9.1 Expanding Worker OHS and RTW Training

In Ontario and Newfoundland and Labrador and to varying degrees in most other provinces, the agencies responsible for OHS and worker's compensation have joined with their provincial federations of labour to facilitate the delivery of province-wide worker health and safety training. Since 1985 the Workplace Safety and Insurance Board of Ontario has provided sustained funding for that province's Workers Centre which in 2006 amounted to $9.2 million. For the same year the Newfoundland and Labrador Federation of Labour received $606,000 in funding for education/training around accident prevention and RTW. Previously, funds were allocated to it for OHS training.

The Workers Health and Safety Centre (WHSC) has existed since 1979. Its immediate goal is to get quality health and safety training into as many Ontario workplaces as possible knowing that this will make a difference in the lives of workers. It achieves this by developing quality up-to-date training materials and highly skilled and motivated instructors. Through its extensive base of well-trained workplace rank and file instructors the WHSC annually trains thousands of workers, union and non-union, on legally mandated workplace training requirements and the specific needs of union OHS activists. The Workplace Safety and Insurance Board have designated the Worker Centre as Ontario's "training centre".

**The PSAC supports the New Brunswick Federation of Labour's recommendation that the WHSCC be strongly encouraged to enter into a partnership with the NBFL for the development and funding of a worker health and safety training project to be delivered under the umbrella of the NB Federation of Labour.**

**The PSAC also supports the New Brunswick Federation of Labour's recommendation that the WHSCC be requested to consider funding a worker's compensation resource centre operated by the Federation and focused on compensation awareness education for injured workers and return to work training.**

## 10.0 CONCLUSION

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

New Brunswick's workplace health, safety and compensation system is no longer balanced and hasn't been since 1993 and the enactment of Bill 55 which clearly, benefited 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. Surely, it's time government puts aside the employer agenda and restores the historic balance between worker and employer interests by acting on the longstanding concerns of New Brunswick workers.

In closing, we urge the Review Panel to seriously heed the input provided by the New Brunswick Federation of Labour on behalf of the province's workers and to produce a final report with recommendations which, if adopted by government, will make New Brunswick's workplace health, safety and compensation system fair for workers.