Submission
to

Independent Review Panel

New Brunswick Workplace Health, Safety
and Compensation Commission

Submitted
by

Saint John Labour Community Services Inc.

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Saint John Labour Community Services Inc. (SJLCS) appreciates the opportunity to provide a submission to the Independent Review Panel of New Brunswick's Workplace Health, Safety and Compensation system.

SJLCS has been in existence for 20 years, providing advocacy services to injured workers throughout southern New Brunswick. Our agency is a member of the United Way of Greater Saint John. We assist workers with claims and appeals regarding Workers' Compensation (WHSCC) benefits, and to a lesser extent, Canada Pension Plan Disability (CPPD) and Employment Insurance (EI) benefits. Our clients include both union and non-union workers; however, the majority of our clients are non-union.

In our role representing injured workers in appeals of WHSCC decisions, we complement the role of the Office of the Workers' Advocate. To our knowledge, we are the only non-government agency of its kind in the province.

It is our intention to address herein both legislative and administrative issues within the WHSCC system. The issue which arises most often for us is the deeming process.

The Deeming Process

Each year many New Brunswick workers who have been permanently injured are unable to return to their former employment because their injuries prevent them from doing their pre-accident jobs and because their employers do not have suitable work available. As a result, these workers undergo the process of "deeming". Unless they are considered to be totally disabled, they are deemed capable of working "at a suitable occupation" and receive loss of earnings benefits in accordance with section 38.11 of the *Workers' Compensation Act* (WCA).

In section 38.1(1) of the WCA, "loss of earnings" is defined as:

> (a) average net earnings, less
>
> (b) the earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining the injury, less any income tax and premiums under the *Employment Insurance Act* and contributions under the *Canada Pension Plan* that would be payable by the worker based on those earnings;

The WCA defines "suitable employment" for the purpose of workers returning to work with the pre-accident employer [section 42.1(1)] but does not define "suitable occupation" for the purpose of the deeming process. There is no legal requirement that the occupation for which a worker has been deemed actually exists in the area in which the worker resides or to which he could reasonably commute.

The only provision regarding suitable employment for the purpose of deeming is found in Policy 21-417 entitled **Identifying Suitable Employment,** where section 4.0 refers to "suitable employment that may reasonably exist in the current labour market". There is

no requirement that employment for which a worker is deemed should "**actually**" exist, as opposed to "**reasonably**" exist. The consequence is that workers' loss of earnings benefits are reduced by the earnings that they are considered capable of earning in what may be, and often is, an imaginary job.

This practice has financially detrimental consequences to injured workers for matters that are outside of their control. Deeming should take into account the labour market conditions in the area in which the worker resides and workers should only be deemed for suitable occupations that actually exist in their local area and for which there are actual job openings.

This can easily be achieved by legislating a requirement that "suitable" employment also be "available" employment. This step was recently taken in Ontario, where in July, 2007 section 43(2) of the *Workplace, Safety and Insurance Act, 1997* was amended to require that the deeming process take into consideration not only the suitability, but also the availability, of employment. It is recommended that a comparable amendment to the WCA be undertaken.

Loss of Earnings Benefits

It is also a concern of SJLCS that the WCA does not guarantee any minimum level of compensation to injured workers although it does set a ceiling on maximum insurable earnings. This creates undue financial hardship for injured workers, especially those with permanent impairments who are unable to return to their former employment. It is recommended that there be a legislated minimum level of loss of earnings benefits for injured workers. This should be a specific dollar amount that is sufficient to allow for the basic necessities of life and not cause undue financial hardship for injured workers. In Ontario there is a legislated minimum level of loss of earnings benefits which is currently $15,312.51. It is recommended that New Brunswick introduce a comparable minimum level of compensation.

Another concern related to loss of earnings benefits has to do with the administrative process of calculating loss of earnings benefits where there are "supplements to compensation". Where a worker is receiving remuneration in addition to loss of earnings benefits, the benefits are reduced in accordance with section 38.11(9) so that the total of the "combined earnings" does not exceed 85% of the pre-accident net earnings. The object of the provision, as outlined in that section, is to prevent overcompensation to injured workers who, in addition to their loss of earnings benefits, are receiving remuneration from an employer or an employment-related source, such that the "combined earnings" do not exceed 85% of the workers' pre-accident net earnings. This may, arguably, be reasonable where an injured worker is receiving other actual income or "remuneration" in addition to loss of earnings benefits.

However, it is the practice of WHSCC to treat deemed earnings as "remuneration" under section 38.11(9) of the *WCA.* What is happening, administratively, is that estimated capable earnings are treated as remuneration. The net estimated capable earnings, i.e. the deemed earnings, are first subtracted from net pre-accident earnings; then, the result is multiplied by 85% to determine the loss of earnings benefit rate. The process should end there but it does not. What happens next is that the estimated capable earnings are added to the loss of earnings benefit rate (from which the estimated capable earnings

were already deducted) to determine if these “combined earnings” exceed 85% of the pre-accident net earnings. Any amount in excess of 85% of the pre-accident net earnings is subtracted from the loss of earnings benefit rate. So what this means is that the deemed earnings are factored into the calculation of loss of earnings benefits twice with the result that there is a shaving off of the worker’s loss of earnings benefits.

The practice of treating deemed earnings as remuneration has the effect of reducing the loss of earnings benefits for many injured workers in New Brunswick with permanent impairments. It is our submission that this practice is contrary to the legislation. Although remuneration is not defined in the WCA, section 38.11(9) refers to remuneration as an amount **received** by the worker **from the employer or from an employment-related source**”. Deemed earnings are not “received” by the worker. And they do not come from the employer or an employment-related source. Moreover, estimated capable earnings are already factored into the calculation of loss of earnings benefits when they are subtracted from the pre-accident earnings.

Another concern related to the above is the WHSCC practice of treating Canada Pension Plan (CPP) retirement benefits as a supplement to compensation. If an individual commences receiving CPP retirement benefits after being injured, these benefits are also treated as remuneration and deducted from the benefit rate pursuant to section 38.11(9). However, if the worker is in receipt of CPP retirement benefits before the injury, then they are not considered to be remuneration for the purpose of determining average earnings. CPP disability benefits are treated differently. In that case, loss of earnings benefits are reduced only by the proportion of the amount, if any, of the CPP disability benefit that relates to the injury. This is addressed in section 38.91(1) of the WCA.

It is submitted that CPP retirement benefits should not be treated as remuneration under section 38.11(9). Workers pay into CPP all their working lives. CPP retirement benefits are not received from the employer or an employment–related source. They have no relation to the compensable injury and should not be factored into the calculation of loss of earnings benefits.

Policy 21-210 **Calculation of Benefits** does address the question of what constitutes remuneration. It defines “remuneration” as “all income, earnings, or money from an employment-related source’. In addition Directive 21-215.01 entitled **Supplements to Compensation** states that injured workers are allowed to **earn**, through the combination of compensation benefits and financial remuneration, a maximum of 85% of their pre-accident net earnings.

In conclusion, the WCA does not authorize the treatment of estimated capable earnings or CPP retirement benefits as remuneration in the calculation of combined earnings under section 38.11(9) of the WCA. Therefore, it is recommended that the WCA be amended to include a definition of remuneration for the purpose of all provisions in the Act and that the practice of treating deemed earnings and CPP retirement benefits as remuneration be discontinued.

Another issue regarding the determination of loss of earnings benefits under the WCA relates to the definition of “loss of earnings” in the Act. As previously noted, the definition of “loss of earnings”, as set out in section 38.1(1) of the Act, is “average net earnings, less the net earnings the worker is estimated to be capable of earning at a suitable

occupation after sustaining the injury…" This definition presumes that the worker is not employed after the injury.

In fact, many workers with permanent injuries do find work within their restrictions. It is submitted that the legislation should recognize this and that the definition of "loss of earnings" should reflect this reality. More specifically, it is recommended that the definition be amended to state that "loss of earnings" means "net average earnings, less the net average earnings that the worker earns or is capable of earning in suitable and available employment after the injury".

Appeal Process

Appeals from decisions of the WHSCC go to the WHSCC Appeals Tribunal. Our agency has found that the waiting period from the time of filing of an appeal to the hearing has increased over the past few years. So far in 2007 it has taken an average of more than 7 months from the time of filing of an appeal to the hearing date. After that it can take over 4 months for a decision to be released. In our opinion, these waiting periods are excessive. During all of this time that an injured worker is waiting for an appeal and decision he is often without income and experiencing severe financial hardship. There should be guidelines in place to establish maximum waiting periods for hearings and decisions. It is our submission that all appeals should be heard within 4 months of the filing of the appeal and that decisions should be issued within 3 months of the hearing.

In New Brunswick there is only one level of administrative appeal for workers' compensation decisions, i.e. to the WHSCC Appeals Tribunal. Appeals from the Appeals Tribunal go to the New Brunswick Court of Appeal. Practically speaking, this is not an option for injured workers whose benefits have been denied or terminated as they can ill afford the cost of pursuing such a course of action.

It is recommended that the appeals process be amended so that there are two levels of administrative appeal prior to going to the Court of Appeal. It is recommended that appeals be initially heard by one person, an appeals officer, as part of an internal appeals process. Appeals from decisions of an appeals officer would then go to the Appeals Tribunal.

A two-tiered system would be in keeping with that used for appeals of other benefit programs where there are two levels of administrative appeals, as is the case with Employment Insurance and Canada Pension Plan Disability benefits. It would provide the injured worker the opportunity for two levels of hearing at the administrative appeal level rather than only one, as is now the case with WHSCC. It is a more expeditious means of resolving appeals as fewer appeals should then be proceeding to the tribunal level. This process should also be less costly for the WHSCC as there would be one person hearing the initial appeal rather than the usual three person panel at the Appeals Tribunal, and fewer appeals would be proceeding to the Appeals Tribunal. Furthermore, with the administrative appeals, workers can be represented by a lay representative rather than a lawyer, whereas this is not possible in the Court of Appeal.

Three Day Waiting Period

Section 38.11(3) of the WCA prohibits payment of loss of earnings benefits until the injured worker has been without income for three days. Only after the injured worker has been absent from work for more than 20 working days is he entitled to the 3 days of lost benefits. This provision is in effect a penalty to injured workers who lose time from work because of their injuries and violates the Meredith principle of workers' compensation that states employers are to share the **total** cost of the compensation system.

This provision saves money to the WHSCC system and reduces employer costs at the expense of injured workers. For injured workers with lost time claims, it discourages a return to work prior to 20 working days in order to recoup the lost benefits. Moreover, it discourages injured workers from reporting injuries and instead encourages them to use sick time or to resort to employer-based insurance plans for income replacement. The effect of this is to skew the statistics for lost time claims to suggest that accident rates in New Brunswick are lower than they really are.

Legislation and Policies

The New Brunswick *Workers' Compensation Act,* as it currently reads, is a patchwork of provisions that is very difficult to navigate, apparently as a consequence of years of amendments. Definitions are scattered throughout the Act, rather than being contained in one section. Finding any provision without knowing the specific section is very difficult as the headings do not always reflect all of the content of the section. As an example, the provision relating to the treatment of Canada Pension Plan benefits is found in section 38.91 under the heading "Payment of Compensation or Benefits" together with a number of other unrelated provisions. For someone not intimately familiar with the WCA, such a provision can only be found by reading through the Act in its entirety. It is recommended that the WCA be redrafted so that it is organized in a more logical fashion and is more user- friendly.

WHSCC policies and some directives are available to the public through the WHSCC website. However, once a policy is rescinded it is removed from the website without being replaced immediately by the new revised policy. Apparently, this is because the policy is being translated. It is recommended that, pending their translation, policies be posted online in the language available. It is also recommended that obsolete policies continue to be available on the website as reference to them is necessary for the review and appeal of decisions made while the policies were in effect.