Report of the
Legislative Review Advisory Committee

On the

Workers Compensation Act

December, 2007

December 3, 2007

Mr. George MacDonald, Chair
Workers Compensation Board
14 Weymouth Street
Charlottetown PE C1A 7L7

Dear Mr. MacDonald:

On behalf of the members of the 2007 Legislative Review Advisory Committee, I am pleased to forward the final report outlining our recommendations for the Board's consideration.

The Committee commenced deliberations on March 9, 2007 and met bi-weekly throughout the spring, summer and fall. Significant input was sought and received through formal briefs, focus group sessions and presentations to the Committee. This input was of invaluable assistance in ensuring that the major issues of stakeholders were identified and addressed.

The Committee will be pleased to meet at the Board's convenience to provide further elaboration or comment on the report.

Respectfully submitted,

Eugene Murphy, Chair
2007 Legislative Review Advisory Committee

Mike Annear
Employer Representative

John McKenna
Employer Representative

George Cantelo
Member at Large

Carl Pursey
Worker Representative

Joyce MacLean
Worker Representative

ACKNOWLEDGEMENTS

The Workers Compensation Legislative Review Advisory Committee wishes to acknowledge the widespread participation and contribution which enabled the Committee to successfully complete its mandate. The formal submissions and presentations identified many of the important areas requiring consideration and review. The contributions of individual worker and employer stakeholders in the focus group sessions helped to personalize many claim issues. Their contributions were invaluable. Throughout our deliberations, the Meredith Principles were kept before us as a constant reference to the foundations of workers compensation.

The Committee wishes to thank the Workers Compensation Board and its staff for the preparatory work in establishing terms of reference, in the selection of Committee members and in establishing the infrastructure in support of the Committee's work. This preparatory work was instrumental in establishing a positive and effective process. The identification of "housekeeping items" by the professional staff ensured many sections of the Act were modernized and aligned with provisions of the Charter.

Throughout our deliberations the Committee was provided an exceptional level of professional support from the project team. Project Director, Bonnie Blakney brought a comprehensive understanding of the workings of a complex bureaucracy and meeting after meeting helped Committee members understand the nuances of legislation, regulation, policy and practice and the interplay of all those levels. She was ably assisted by researcher Larry Phelan whose patience and extensive, varied background with workers compensation further informed the process. A special thank you to administrative assistant, Wilma Lewis for the positive energy and prompt, highly professional support for all aspects of the Committee's deliberations. Although non-signatories to the final report, the insight and commitment of the Employer Advisor, Keith Mullins and Worker Advisor, Shawn Shea contributed greatly to the process.

In our orientation meeting on March 9, 2007 the Board Chair, George MacDonald recognized the interests of the various stakeholders represented by Committee members. He referred to the often competing interests inherent in such a review process. He challenged us to disagree without being disagreeable. As Committee Chair, I want to sincerely thank all members for their commitment to this review, their willingness to respectfully consider opposing points of view and their steadfast desire to complete a fair and balanced report. I am confident that workers and employers of Prince Edward Island, as the ultimate owners of workers compensation, will be well served by these efforts.

Table of Contents

History of Workers Compensation

Before a workers compensation system was established, injured workers had to use the courts and legal system to access financial support from their employer. Most workers could not afford legal counsel. Those who could still had to face the law of the time whereby an employer was not held responsible for a worker's accident if either the worker or a co-worker had contributed to the accident in any way. Conversely, if a worker or group of workers were successful in suing their employer, this could sometimes result in an employer being forced into bankruptcy.

In 1897, Britain passed legislation that replaced the law with one based on no fault principles. The responsibility for compensation of injured workers became the responsibility of the individual employers although the employers were not required to insure themselves against the risk and the worker had no remedy if the employer could not pay. As a result, many workers were not covered and many employers were financially stressed caring for workers involved in serious accidents.

In 1910, the Province of Ontario appointed Sir William Meredith to head a Royal Commission to review workers compensation legislation. Meredith proposed the "historic trade off" where workers gave up the right to sue their employers for a guaranteed protection from loss of income regardless of fault. Meredith believed the amount of compensation should have a relationship with the earning power of the injured worker. In other words, he envisioned a wage loss system.

Meredith's report led to the first Workers Compensation Act in Canada. On January 1, 1915 Ontario's Workers Compensation Act was proclaimed.

There are five Meredith Principles:

1. **No-fault compensation**: Workplace injuries are compensated regardless of fault. The worker and employer waive the right to sue. There is no argument over responsibility or liability for an injury. Fault becomes irrelevant, and providing compensation becomes the focus.

2. **Collective liability**: The total cost of the compensation system is shared by all employers. All employers contribute to a common fund. Financial liability becomes their collective responsibility.

3. **Security of payment**: A fund is established to guarantee that compensation monies will be available. Injured workers are assured of prompt compensation and future benefits.

4. **Exclusive jurisdiction**: All compensation claims are directed solely to the compensation board. The board is the decision-maker and final authority for all claims. The board is not bound by legal precedent; it has the power and authority to judge each case on its individual merits.

5. **Independent board**: The governing board is both autonomous and non-political. The board is financially independent of government or any special interest group. The administration of the system is focused on the needs of its employer and worker clients, providing service with efficiency and impartiality.

On March 24, 1949, P.E.I. became the ninth province to enact workers compensation legislation when it passed “An Act Respecting Workmen’s Compensation”. Prince Edward Island employers with three or more employees (except those excluded by Regulation) were required by legislation to register and participate in the workers compensation system. The funds remitted by employers comprised the entire accident fund – totally independent of any government funding. A seven day waiting period was required before workers were eligible to receive benefits.

When the workers compensation system began on P.E.I., the Workers Compensation Board, like other Boards across Canada, established a benefit payment system that recognized long term loss of earnings based on the permanent impairment of the worker. This system, more commonly known as the “pension system” was based on a clinical rating (physical impairment) which presumed wage loss based on the nature and degree of the injury, regardless of the impact that the impairment might have on the worker’s earning power.

In the 1970’s some Boards in Canada began to move away from using the physical impairment (pension) system. Over the next 20 years, the majority of the Boards moved to a “wage loss system” with an additional award for the non-economic impact of the permanent impairment, an impairment for loss of enjoyment of life. This is referred to as a “dual award system”.

Under a wage loss system, determining a worker’s entitlement to benefits became more complex. Rather than simply applying an impairment rating to the worker’s pre-injury earnings to arrive at a pension award, the Board had to compare a worker’s pre-injury earnings to what the worker was capable of earning after the injury. This process was subject to ongoing periodic review which required more frequent medical monitoring. The Board was required to consider what effect, if any, events such as subsequent diseases, subsequent trauma, and natural aging would have on the worker’s compensable injury. To assist in the determination of wage loss, the Board began to use functional assessments to assist with identifying a worker’s functional abilities. This information was used in determining what type of work a worker could safely do after he or she reached a plateau in medical recovery. This continues to be the system that is used today by the P.E.I. Workers Compensation Board.

Since 1995 there have been shifting priorities, new initiatives and ever evolving work places. The impact of prevention initiatives on reducing workplace accidents has been recognized. The responsibility for administration of the Occupational Health and Safety Act, which was established in 1987, was transferred to the Workers Compensation Board of P.E.I. in 1996.

There are twelve jurisdictions in Canada with separate Acts and separate governing bodies. They are independent bodies established by provincial governments and territories to administer workers compensation legislation and in some cases, occupational health and safety legislation. It is almost a hundred years since the principles of Sir William Meredith were adopted in Ontario, yet the years have not altered the foundation on which workers compensation boards operate today.

Background of the Legislative Review

In 2002 a review of the Workers Compensation Act was undertaken for the first time since the new Act was proclaimed in 1995. Because of the Board's critical financial position at the time, the scope of the 2002 review was limited to nine areas of concern, however stakeholders would have liked a more complete review.

As a result of the 2002 review, an amendment was made with the addition of Section 85.1 which provided a legislative requirement for the Workers Compensation Act to be reviewed every five years by a Board appointed advisory committee. The first review mandated from this legislation commenced in February 2007. This review was comprehensive and included a Committee discussion of every section of the Act.

The Committee was established by the Board of Directors in February 2007 after reviewing input from stakeholder groups and the general public. The members were provided with the following terms of reference as approved by the Workers Compensation Board of Directors:

- Identify and finalize the scope of the review.
- Acquire knowledge and understanding of the Workers Compensation Act.
- Review materials and information as provided to the Committee.
- Consider implications and impacts of proposed amendments.
- Provide advice on proposed amendments and where required, to suggest alternatives.
- Advise where additional information or consultation is required.
- Submit a report of recommendations for the amendment of the Act by December 31, 2007.

The Committee was comprised of five(5) voting members; two(2) worker representatives, two(2) employer representatives and a member at large. The Committee was led by a Chair who voted only in the case of a tie. The Director of the Legislative Review, the Worker Advisor and Employer Advisor were non-voting, full participating members of the Committee.

Consultation

A consultation process for the review was established to allow Committee members to hear input from the public and Workers Compensation stakeholder groups.

Public input was sought through the use of focus groups facilitated by a professional research company. The groups were comprised of workers and employers who had direct experience with the workers compensation system. There were four employer focus groups and four worker focus groups; one each in Prince and Kings Counties and two of each in Queens County.

Sessions were run by a neutral facilitator who encouraged participants to focus on amendments to the Workers Compensation Act and avoid discussions of operational issues. The research company provided a report to the Legislative Review Advisory Committee.

An advertisement was posted in the local newspapers and on the Workers Compensation Board website. The ad asked interested individuals or groups to submit suggestions regarding amendments to the Act. There were sixteen written submissions. Groups were provided the opportunity to present to the Committee – there were ten presentations.

A link on the Workers Compensation website was created to allow individual suggestions for change. It was provided for interested parties who wished to contribute to the process and were not interested in submitting a complete proposal.

The Act was divided into ninety-three general areas, each an agenda item at a meeting of the Legislative Review Advisory Committee. Throughout the process, stakeholders and Committee members identified areas of concern which were not considered legislative issues. These items are documented and provided for information purposes in an appendix of this report.

Unanimous Recommendation – Amend the Legislation

This section represents the decisions of the Legislative Review Advisory Committee where the decision was UNANIMOUS to amend the Workers Compensation Act and/or associated Regulations. Where a specific topic is not addressed, the Committee voted unanimously to leave the section of the legislation as written.

ACCESS TO INFORMATION

BACKGROUND:

The introduction of the Freedom of Information and Protection of Privacy Act (FOIPP) in November of 2002 provides a governing framework with important privacy provisions:

- Public bodies can collect and use personal information only for purposes authorized under an Act; for law enforcement purposes or for operating programs or activities.
- The Act requires that people be informed about the authorization for collecting information and how that information will be used at the time the information is collected.
- Generally, the Act states that information must be collected directly from the individual to whom it relates.
- The Act allows the use of information for a consistent purpose - that is, consistent with the purpose for which it was originally collected.
- An individual may be asked to give consent for his or her information to be used for other purposes.

In order to adjudicate claims, apply return to work principles and to administrate worker benefits, information is required. The information is gathered through documented conversations, medical reports, worker and employer forms, etc. which collectively form a worker's claim file.

There are various parties who are considered to have a direct interest in the claim. The level of access to claim file information is based on need. For example, an employer will require information regarding a worker's functional abilities during the return to work process. The employer does not need access to medical information to comply with the return to work obligation. However, if an employer disputes the worker's entitlement to benefits, the employer would likely need access to the medical information to proceed with an appeal. An employer should have access to the necessary information relevant to the issue in dispute.

Unlike the employer, a worker should have access to his or her claim file at any time and without the requirement of an issue. However, existing legislation requires that a worker have a bona fide issue in dispute to access his or her claim file.

A point of possible issue is the access to the worker's claim file in the case of the death of a worker. Current legislation provides to those entitled to benefits under the Act, as a survivor of the worker, the same access to the claim file as if the worker had lived. There are circumstances such as court ordered alimony whereby an individual may be entitled to survivor benefits under this Act but the individual would not be entitled to the worker's claim file information as it could infringe the worker's rights under FOIPP.

Care must be taken to protect an individual's privacy while allowing access to appropriate information at the appropriate time. Internal regulation of claim file material through policy and procedure should prevent documents from being added to the file of another worker, the addition of irrelevant medical information to the claim file and the distribution of claim file information to parties who are not actively involved in the claim.

The Workers Compensation Board is able by legislation to enter into agreements with other jurisdictions to avoid duplicate assessments for the same work and to aid the worker in claiming and receiving compensation when two or more jurisdictions are involved. In order to provide better service to the worker in administering compensation benefits, the same arrangement with Federal and Provincial Government entities should be permitted where compliant with Freedom of Information and Protection of Privacy.

COMMITTEE DECISION:

Unanimous

Recommendation

1. Amend the legislation so a worker need not have a bona fide issue in dispute to access his or her personal claim file.

2. Amend the legislation so survivors access claim files as determined by the Board.

3. Amend the legislation to allow access to claim file information for parties requiring information for claim administration purposes such as an employer during the return to work process.

4. Amend the legislation to change the term "claim" to "claim file" for clarification purposes.

5. Amend the legislation to allow agreements with Federal and Provincial Government entities for ease in claim administration.

6. Amend the legislation to allow for the exchange of information with third parties for purposes other than administering the claim (e.g. statistics, national reporting).

APPOINTMENT OF THE BOARD

BACKGROUND:

The WCB Board of Directors is responsible to administer the Workers Compensation Act. The Board is comprised of a chair and any number of members, with an equal number, of workers and employers. All members are appointed by Government. Each term is for three years and Government has the authority to remove a member for cause. Each member may also be reappointed to the Board.

The composition of the Board has not been an issue as there is really no question that workers and employers are the key stakeholders in the workers compensation system. The historical compromise on which the system was based means workers give up the right to sue employers in order to receive compensation benefits for which employers pay.

The Boards of most jurisdictions have equal numbers of worker and employer representatives. Where members at large are appointed to workers compensation boards, they are less than or equal in number to the employer and worker representatives. British Columbia is the one jurisdiction where worker and employer representatives form the minority. The following is an excerpt from their 2002 review ; "In effect, the previous Board of Governors structure more closely represented a negotiating table, with both labour and business lobbying the remaining "public interest" representatives for their support" and "Accordingly, it is my recommendation that the new Board of Directors should include worker and employer representatives, but that the combined number of Directors from these two constituencies must be a minority of the overall number of Directors appointed to the governing structure."

As in the past, both worker and employer groups have concerns with the manner in which the Board appointments are made. It is often requested that the political interference should be removed from the appointment process although there has not been any suggestion as to how this would be accomplished. It is consistent in all Canadian jurisdictions that appointments are made by Government.

During the 2002 review of the Workers Compensation Act, stakeholders requested they have more input in Board member appointments. In response, an amendment was made so Government must consider membership submissions from workers and employers before appointments are made. Discussion was held regarding limiting the appointments to only recognized bodies or associations but it was felt this would create a new area of conflict in determining which groups fit the qualification. P.E.I. is one of five jurisdictions presently with a legislative requirement for a consultation process of some kind.

The term of a Board member's appointment must be a sufficient length to allow the member to become knowledgeable in the legislation, policy and operation of the workers compensation system. The existing legislation allows for three year terms, is consistent with other jurisdictions and is satisfactory to stakeholder groups.

In order to ensure fresh perspectives are brought to the Board, it was suggested the reappointment of Board members be limited.

COMMITTEE DECISION:

Unanimous

Recommendation

7. Amend the legislation so Board members may be reappointed for only one term.

APPORTIONMENT

BACKGROUND:

Assigning part costs of a claim to an employer and part costs of a claim to a rate group is referred to as apportioning. All employers are separated into groups related to the type of work performed by the business. Each group has a different assessment rate based on the accident experience of the group. Employers who have paid assessments of $3000 or more over the previous three years are experience rated meaning their assessment rate is based on the actual accident experience in relation to the remaining employers in the group (better or worse).

Existing legislation allows costs that are not directly attributable to an accident with an individual employer to be shared across the rate group. For example, an injury may be partially attributable to the workplace accident and partially attributable to a condition a worker had prior to his or her employment.

Workers compensation legislation is based on the principles of Sir William Meredith in his report to the Royal Commission in 1913. One of these five principles is collective liability. The total cost of the compensation system is shared by all employers. All employers contribute to a common fund and the financial liability becomes their collective responsibility.

COMMITTEE DECISION:

Unanimous

Recommendation

8. Amend the legislation so the portion of an injury that is attributable to a cause other than the accident is borne by all employers, not by the rate group.

9. Amend section 6(11)(a) to change from impairment to impairment **award** for clarification purposes.

ASSESSMENTS BASED ON ACTUALS

BACKGROUND:

The legislation regarding an employer's obligation to furnish the Board with payroll information is found in various sections of the Act, primarily in Section 72. The language speaks specifically about "an estimate of probable payroll" but it does not speak about "actual payroll".

The Workers Compensation Board of P.E.I. allows employers to submit and pay assessments in one of two ways; based on an estimated payroll for the year or based on an actual payroll for the month.

Section 64(2) states “Assessments may be made in such manner and form, and at such times, and by such procedure as the Board may consider adequate and expedient.” This section provides the Board with the authority to have varying methods for assessing employers.

In response to requests from employers to distribute compensation costs over a period of time, the Board introduced the monthly assessment payment option. As a result of the new program, premiums are based on actual payroll and payments are made monthly. With the traditional program, premiums are based on estimates and the payments are due in advance.

The legislation should clearly state that assessments can be collected through actual payroll as well as through payroll estimates.

COMMITTEE DECISION:

Unanimous

Recommendation

10. Amend the legislation so the Board may waive the requirement to furnish an estimate of payroll and where the Board has waived the requirement, the employer must provide the Board with a record of wages of the employer's actual payroll, for a period determined by the Board.

AUDITS AND REPORTING

BACKGROUND:

The Workers Compensation Act of P.E.I. requires that an auditor be appointed by the Board to perform an annual audit of the Board’s accounts and operations. The auditor’s report is then used to prepare a detailed report for the Minister explaining the financial expenditures for the previous year and outlining the new programs and policies introduced in the past year.

The report also includes a submission from the Board Chair and Chief Executive Officer and any other information requested by the Minister.

The current WCB legislation does not specifically allow for the Auditor General to perform an audit of the Workers Compensation Board of P.E.I.. However, the Financial Administration Act of P.E.I. states the Auditor General has the authority to audit the accounts and records of a reporting entity. For the purposes of the Financial Administration Act, a reporting entity means an organization that is accountable for the administration of its financial affairs and resources to a Minister or through a Minister to the Legislative Assembly and includes those listed in schedule B, C or D. The Workers Compensation Board of P.E.I. is listed in schedule B. Although WCB legislation does not reference the Auditor General as being able to audit its affairs, the Financial Administration Act of P.E.I. gives full auditing authority to the Auditor General.

In reviewing workers compensation legislation in other jurisdictions, it is noted the majority either specifically allow the Auditor General to perform an audit or appoint the Auditor General as the auditor.

COMMITTEE DECISION:

Unanimous

Recommendation

11. Amend the legislation so the Lieutenant Governor in Council may appoint the Auditor General to audit the Workers Compensation Board.

CONSUMER PRICE INDEX – INDEXING OF BENEFITS

BACKGROUND:

To have fairness in the Workers Compensation system and to ensure wage loss benefits are not reduced by inflation, cost of living adjustments are applied. Pensions, extended wage loss benefits and survivor benefits are adjusted using the Consumer Price Index (CPI) and the calculation specified in section 50(2) of the Workers Compensation Act.

The Act states benefits are adjusted on July 1st of each year and are equal to the lesser of 75% of the percentage change in the CPI for Charlottetown and Summerside for all items for the twelve month period ending on December 31st previous, as determined by the Board on the basis of monthly reports published in that respect by Statistics Canada for that period; or 4%.

There are three components to the determination of the amount of the index; region, cap and percentage. In reviewing the indexing methods of other Canadian workers compensation systems, nine jurisdictions were considered. Four of these, British Columbia, New Brunswick, Newfoundland and Labrador, and Ontario establish the cost of living increase using the Canadian average. Alberta, Manitoba, Nova Scotia, and Saskatchewan use regional averages in their determination which can be considered more reflective of the general economy of an area such as eastern Canada or a boom area such as Alberta.

The CPI index is capped at 4%. The only other jurisdiction with a legislative cap on cost of living increases is British Columbia. Capping the maximum amount of the adjustment allows the Workers Compensation Board to calculate the future liability associated with the adjustment with some degree of certainty.

COMMITTEE DECISION:

Unanimous

> ***Recommendation***
>
> 12. Amend the legislation from 75% of CPI to 100% of the change in CPI for Charlottetown and Summerside.

COURT OF APPEAL

BACKGROUND:

As in all Canadian jurisdictions, a successful litigant may be entitled to be reimbursed for some part of the expense of taking his or her position to court. Some portion of the costs would then be due from the unsuccessful party.

In Prince Edward Island, the Supreme Court Judge is given the full power from the Supreme Court Act to determine costs, however this power is subject to specific provisions in other legislation. The guidelines or rules followed by the Judge in ruling on costs are found in the Annotated Rules of Civil Procedure.

Court costs are intended to defray the legal expenses of the successful litigant and are not the same thing as legal fees and disbursements. Often there is a misconception the costs will cover the successful litigant's entire legal bill. There are a number of factors to be considered in awarding costs including the complexity of the matter, the steps that were involved, the amount of money in dispute and in some cases, the conduct of the parties.

The Prothonotary may be appointed pursuant to Section 20 of the Supreme Court Act and may perform an assessment of costs for the Court.

> "(5) The Prothonotary shall perform all such duties as may be imposed upon him under an Act or by a direction of the court, or as may be prescribed by the Rules and, without limiting the generality thereof, the Prothonotary, subject to the direction of the court, has power
>
> (a) to act as examiner in the court;
> **(b) to tax costs respecting proceedings in the court;**
> (c) to register orders for the sale, leasing or mortgaging of any lands in administration, partition, infant or mental incompetency proceedings;…."

The Workers Compensation Act does not speak to costs as a result of a successful litigation leaving the matter to the Supreme Court Act and Rules of Civil Litigation. Parties with a direct interest in a claim, who are successful in their complaint, should be ensured costs are awarded in their favor.

COMMITTEE DECISION:

Unanimous

> ***Recommendation***
>
> 13. Amend the legislation to specify reasonable costs are awarded to a worker or employer as a result of a successful appeal.

DEFINITION OF ACCIDENT

BACKGROUND:

The Merriam Webster dictionary defines an accident as “an unforeseen and unplanned event or circumstance”. The definition in the Workers Compensation Act was written at a time when the majority of accidents resulted from a single event which is reflective of the dictionary definition. As workplaces have changed, the nature of occupational incidents resulting in injury has evolved. Soft tissue injuries now comprise the majority of compensable workplace injuries and a significant number of these result from repetitive strain to the tissue.

It is necessary to understand that an accident or injury may result from doing work that is repetitive and the injury occurs from an accumulation of workplace events over time. Disablement from workplace accidents occurs for many reasons and some examples include sprains, strains, repetitive strains, cumulative trauma and other disablements resulting from motions and body movements. Given the changes in the types of work and the subsequent types of workplace injuries it is more appropriate to redefine accident to reflect this evolution.

In reviewing the legislation from other jurisdictions it is noted the majority of jurisdictions include disablement in their definition of accident.

COMMITTEE DECISION:

Unanimous

> ***Recommendation***
>
> 14. Amend the definition of accident to reflect disablement due to injuries resulting from cumulative events.

DEFINITION OF OCCUPATIONAL DISEASE

BACKGROUND:

An occupational disease normally occurs from exposure to a cause in a work environment, or one that manifests itself following a latent period after exposure. The existing legislation states:

> "occupational disease" means a disease arising out of and in the course of employment and resulting from causes and conditions
>
> (i) peculiar to or characteristic of a particular trade or occupation, or
> (ii) peculiar to the particular employment, but does not include
> (iii) an ordinary disease of life;"

However, all claims for compensation are decided in accordance with the real merits and justice of the case. The Board policy states, "A disease will not be considered to be an ordinary disease of life if the risk of contracting the disease through the employment can be shown to be greater than the risk associated with ordinary living experience."

Osteoarthritis is commonly considered an ordinary disease of life. For example, a worker is having left knee pain while at work and he files a claim for compensation benefits. The worker has had no work related accident to his left knee and it is medically confirmed his left knee pain is directly attributable to osteoarthritis. In considering the balance of probabilities, it is reasonable to conclude the worker's left knee pain is not caused by his work but is the result of the osteoarthritis, an ordinary disease of life, and is not compensable.

In another situation a worker twists her right knee at work, has an immediate onset of pain and she files a claim for compensation benefits. The worker seeks medical attention and is diagnosed with a torn meniscus in her right knee which requires surgical repair. The surgical repair is completed and the post operative diagnosis confirms the torn meniscus with no arthritis present at the time of surgery. Three years post surgery the worker has recurring right knee pain and seeks further medical investigation which confirms the worker now has osteoarthritis in her right knee. The worker is unable to work and subsequently files a claim for compensation benefits. In weighing the balance of probabilities it is reasonable to conclude the worker developed the osteoarthritis as a result of her right knee injury. In this case the worker's osteoarthritis is a compensable condition, secondary to the original right knee injury three years previous. This example illustrates where a worker may be compensated for an ordinary disease of life.

The legislative exclusion for an ordinary disease of life is unique to two Canadian jurisdictions, Manitoba and Prince Edward Island.

COMMITTEE DECISION:

Unanimous

Recommendation

15. Amend the legislation to remove the exclusion of ordinary disease of life from the definition of occupational disease.

DEFINITION OF WORKER

BACKGROUND:

The definition of worker includes “a member of a municipal volunteer fire brigade”. The intent of the legislation is to cover all volunteer fire fighters.

COMMITTEE DECISION:

Unanimous

Recommendation

16. Amend the legislation to remove the reference to “municipal” with respect to fire fighters under the definition of worker.

DIRECTOR DUTIES – SAFETY ASSOCIATIONS

BACKGROUND:

Safety associations are non-profit organizations established to promote workplace safety through means such as seminars, safety training courses, and regular meetings. The vast majority of Canadian jurisdictions support the formation of safety associations by collecting funds through the assessment process to disburse to the association for prevention programs.

In some jurisdictions, there is legislation specific to the collection and disbursement of these funds and in most cases, detailed policy. If at some time in the future, the Board would like to implement a similar program, the legislation should allow for the Board to approve relevant policy to administer it.

COMMITTEE DECISION:

Unanimous

Recommendation

17. Amend the legislation to allow the Board of Directors the authority to establish policy and programs in relation to injury prevention and safety.

18. Amend the legislation to allow the Board to collect a levy on behalf of safety associations to fund programs related to injury prevention and safety.

EXCLUSIONS FROM COVERAGE

BACKGROUND:

There have been minor changes in the industries excluded from mandatory coverage by the Workers Compensation Act of Prince Edward Island since its enactment in 1949. Although there are industries which are not required to have compensation coverage, approximately 96% of all P.E.I.'s workers are currently covered under the workers compensation program.

Employers engaged in an industry excluded by the Regulations from the application of the Workers Compensation Act are not required by law to register with the WCB and pay assessments. Employers in excluded industries which are not covered by the Act may *apply to* be covered by optional coverage. Currently in Canada, only the Northwest Territories and Nunavut do not have excluded industries.

The topic of universal coverage of workers is addressed in the legislative reviews of other jurisdictions. Specifically, Manitoba's Legislative Review Committee of 2005 recommended that a review be undertaken to determine how coverage could be extended to excluded industries over a gradual period of time. In Saskatchewan, the Legislative Review Committee recommended that a province wide consultation process be undertaken to review excluded operations.

As of January 1, 2007, the Occupational Health and Safety Act applied to farming operations. A Farm Safety Code of Practice was developed to help farmers manage health and safety and to meet their legal obligations. The Occupational Health and Safety enforcement and prevention initiatives are funded from the Workers Compensation accident fund. However, farming operations are excluded from the Workers Compensation Act and are not required to contribute to the financing of the fund.

COMMITTEE DECISION:

Unanimous

Recommendation

19. Amend the legislation to remove the exclusion of farming operations and fishing operations.

20. Amend the legislation to expand the volunteer coverage to include the provision of supervised volunteer emergency services.

EXPEDITING TREATMENT

BACKGROUND:

The Board is in control of the medical aid for all injured workers and must determine when medical treatment is appropriate including the cost for the treatment. In some cases, the Board may determine expedited treatment is appropriate. For example, a worker with a herniated disc may continue to work while waiting for surgery on the advice of a medical professional. He or she could be in pain while continuing to perform work functions. It is in the best interest of the worker to have the surgery expedited to relieve the pain. At the same time, it is in the best interest of the accident fund to expedite the surgery as the worker may leave work, unable to tolerate the pain and would require wage loss benefits while waiting for surgery.

Section 52 states, "Where in any case, in the opinion of the Board, it will conserve the accident fund to provide a special surgical operation or other special medical treatment for a worker, and the furnishing of the same by the Board is, in the opinion of the Board, the only means of avoiding heavy payment for a disability, the expense of such operation or treatment may be paid out of the accident fund."

The wording of this section may imply the Board's only concern is monetary savings without consideration for the welfare of the worker.

COMMITTEE DECISION:

Unanimous

Recommendation

21. Amend Section 52 to remove reference to the avoidance of heavy payments for disability.

IMPAIRMENT

BACKGROUND:

In some situations, a worker may not fully recover after a work related injury and the Workers Compensation Board must determine whether a permanent impairment has resulted. A definition of impairment was added to the Workers Compensation Act when the new Act was proclaimed in 1995. The definition clearly reflected the long term result of "traditional" injuries such as fractures, amputations and disfigurement. The definition addresses the structural makeup of an organism but does not speak to a disruption of the normal, healthy overall function of a person nor the cognitive function of the mind.

Where the accident date is 1995 or later and a worker has a permanent impairment from an injury arising out of and in the course of employment, the Board calculates a financial award and pays the worker a lump sum as set out in the regulations.

Workers who die due to a workplace accident before an impairment assessment has been completed are not eligible for an impairment award. The legislation should ensure that a worker or his or her estate will be paid if an impairment assessment has been completed even if the worker dies before the actual impairment award has been calculated by the Board.

COMMITTEE DECISION:

Unanimous

Recommendation

22. Amend the definition of impairment to that used by the World Health Organization (WHO), specifically "any loss or abnormality of psychological, physiological or anatomical structure or function, that results from the accident".

23. Amend the legislation to allow entitlement to an impairment award provided the impairment assessment has been completed.

INTERNAL RECONSIDERATION

BACKGROUND:

Internal reconsideration is an internal review process that is used when a worker or employer disagrees with a decision of the Workers Compensation Board. The overall intent of an internal review process is to provide a mechanism for workers and employers to dispute a decision in an uncomplicated and timely manner. The internal review process is a method of ensuring quality decision making and adherence to policy and legislation by the WCB decision makers.

After reconsidering the decision, the Board provides a written summary which will confirm, change or reverse the original decision. The existing legislation states, "Following reconsideration, the Board may confirm, vary or reverse its decision and shall, on the written request of a person with a direct interest in the matter, provide a written summary of its reasons."

The appeal structure in its present form is appropriate, however maneuvering through the procedure should be as easy as possible for the appellant.

COMMITTEE DECISION:

Unanimous

> ***Recommendation***
>
> 24. Amend the legislation to remove the requirement of a written request to receive the written decision of the Internal Reconsideration Officer.

MEDICAL REPORTING

BACKGROUND:

It is common place in workers compensation legislation to find that one section of the legislation connects with or refers to another section for varying reasons. Sections 18(9), 18(10) and 59(2) of the P.E.I. Workers Compensation Act speak to the medical reporting requirements of service providers to the Board. It is noted these sections refer to the same service providers but the language in the individual sections is not consistent.

To allow for changes in treatments and new medical services, a generic description of medical service providers is more appropriate.

COMMITTEE DECISION:

Unanimous

> ***Recommendation***
>
> 25. Amend the legislation to provide consistency between the sections and provide more generic terms to allow for the changing specialties of health care providers.

PENSION RECURRENCES AND NEW CLAIMS

BACKGROUND:

On January 1st, 1992 the Workers Compensation Board of P.E.I. ceased awarding impairment pensions and began compensating workers on a wage loss basis. When the New Act was proclaimed, section 50(3) was included to allow a worker in receipt of a permanent partial or total disability pension to be assessed for wage loss benefits if he or she sustained a new injury or a recurrence of a previous injury. When calculating the wage loss benefit, an amount equal to the worker's pension benefit is deducted from his or her wage loss benefits. However, the worker's pension is not considered an earning for purposes of determining earnings capacity.

Consider the following example:

A worker earns $20,000 per year in wages and $400 per month in pension benefits.

When the worker is working, he earns:

$612 (bi-weekly net of 20,000)
$185 (bi-weekly pension 400x12/26)
$ 797 take home

If the worker is injured, he earns:

$490 (bi-weekly wage loss = 80% of net of $20,000)
$185 (bi-weekly pension deduction)
$305 bi-weekly benefit

$305 bi-weekly wage loss
$185 bi-weekly pension
$490 take home

The Committee unanimously agreed the deduction of the pension benefit from a worker's wage loss is not appropriate and places unfair financial hardship on this group of workers.

COMMITTEE DECISION:

Unanimous

Recommendation

26. Amend the legislation so the permanent partial or total disability pension is not deducted from wage loss benefits for new claims or recurrences.

PENSION REVIEWS

BACKGROUND:

On March 24, 1949, P.E.I. became the ninth province to pass workers compensation legislation when it enacted "An Act Respecting Workmen's Compensation". From the inception of this Act up to 1992, the Board used the physical impairment system to compensate injured workers with permanent impairments. Boards across Canada used a clinical rating system which presumed wage loss based on the nature and degree of the injury regardless of the impact that the impairment might have on the worker's earning power.

The typical case at the Board is a worker who was injured, received temporary total disability benefits (now referred to as wage loss benefits) and went back to work. If it appeared that the worker had a permanent medical impairment, the worker would be assessed using the American Medical Association (AMA) guidelines and rated a percentage of total body impairment. If the worker was found to have a permanent medical impairment, the worker would receive a monthly pension in recognition of the impairment. The pension award was not associated with the worker's loss of earnings. In other words, the worker could return to work

with no affect on his or her ability to earn wages and still receive the monthly pension. The pension could be reviewed and increased based on a change in the worker's medical condition.

In the early 1970's Boards began to move away from using a physical impairment system. The majority of the Boards moved to a wage loss system with an additional award for the non-economic impact of the permanent impairment. This was referred to as a "dual award system".

The change to a wage loss system in P.E.I. did not take place until after a worker appealed a decision of the Board to the Court of Appeal in 1991. The Board had determined that this worker was entitled to compensation in the form of a pension based on a permanent impairment. The worker argued that his disability should be based on his ability to earn income and how much his earning capacity was impaired as a result of his injuries and not on the percentage of physical impairment. On October 22, 1991 the Court agreed with this worker and made it clear that the Workers Compensation Act had always been a wage loss act. Up to this point, the Board had not functioned as a wage loss system.

On January 1, 1995 new workers compensation legislation was proclaimed. The new legislation included a revised Section 50 which allowed workers that were in receipt of an Old Act pension to continue to receive the benefit for life, indexed annually. However, the worker's impairment would not be reviewed.

When the Committee looked at this section of the legislation, they concluded a person receiving a pension for an impairment incurred from a work related injury should be allowed to have his or her impairment reassessed provided the worker's medical condition has deteriorated. Factored into this decision was the ability of pensioners to access a review under the prior Act and the ability of post 1995 workers to access a review under the new Act. The policy and procedure associated with a reassessment should be left up to the discretion of the Board.

COMMITTEE DECISION:

Unanimous

Recommendation

27. Amend the legislation to allow a worker in receipt of a pension to have the impairment reassessed with a change in medical condition.

RETURN TO WORK

BACKGROUND:

In 2002, amendments were introduced to provide legislative return to work provisions for employers and workers. Guidelines were written for the worker and employer to cooperate in return to work initiatives. The second component of the new return to work provision dealt with re-employment obligations (duty to accommodate). This obligation does not apply to an employer that in the opinion of the Workers Compensation Board, regularly employs fewer than twenty workers or the construction industry.

The amendments were introduced as a consensus decision of worker and employer groups during the 2002 review process. This review Committee also values these provisions. However, the use of the word "early" with respect to "early and safe return to work" may be perceived as returning the worker to work before he or she is medically able.

COMMITTEE DECISION:

Unanimous

Recommendation

28. Amend the legislation to replace the word "early" with "timely".

SAFETY OF PREMISES

BACKGROUND:

WCB staff may enter an employer's premises for the purposes of determining the employer's contribution to the accident fund and where the staff person is prevented from entering the employer's premises, the employer could be liable on summary conviction to a fine of not less than $1,000. Where an employer fails to follow the orders of a safety officer and a worker is injured as a result, the employer may be ordered to pay up to half of the costs of the claim which will be charged to their assessment. The existing legislation addresses the same result with respect to an order of the Board under the Workers Compensation Act, although the Board does not write safety related orders.

COMMITTEE DECISION:

Unanimous

Recommendation

29. Amend the legislation related to entering the employer's premises by moving this section to the "employer section" of the Act for clarification purposes.

30. Amend the legislation to remove references to the Board writing orders with respect to safety under the Workers Compensation Act.

SURVIVOR BENEFITS

BACKGROUND:

The September 12, 2007 edition of the Globe and Mail spoke to the changing family,

> "The redefinition of family continues apace in Canada, with the latest household figures from the 2006 census showing a significant increase in the number of same-sex couples and a first-ever count of same-sex marriages. At the same time, there are more common-law families, more childless couples, more people living alone and a greater number of single-parent households in Canada than ever before."

The nature of families is changing and is a significant social development in Canada in the past 25 years. The family structure has been transformed and now includes those which are blended, common-law, single-parent, two-parent, lesbian, gay, and parents living apart with joint custody. In July 2005, Canada became the fourth country in the world, after the Netherlands, Belgium, and Spain, to legalize same-sex marriages nationwide. P.E.I. began the process of updating its laws to recognize same-sex marriage after the passage in the House of Commons of Bill C-38, the Civil Marriage Act, the federal law recognizing same-sex marriage. Although the update process is not complete, like other Canadian jurisdictions, P.E.I. allowed same-sex marriage in response to the Federal Bill and the first marriage was held in August of 2005.

Four provinces have enacted laws relating to varying types of unions. Quebec (Bill 84 – An Act instituting civil unions), Manitoba (Common-Law Partners' Property and Related Amendments Act), Alberta (Adult Interdependent Relationships Act) and Nova Scotia have enacted legislation that allows gay and lesbian couples as well as opposite-sex couples to have most of the same benefits and obligations as married couples under provincial law, with some exceptions such as adoption. A domestic partnership is automatically dissolved if one of the partners marries another person; it can also be dissolved by a separation agreement, an executed statement of termination by both parties, or by a separation of more than one year, if one or both partners intend not to continue the relationship.

The age of majority varies but in Prince Edward Island the age is eighteen. This is the age that grown children are considered adults and are no longer considered minors. Support guidelines under other legislation takes into account the financial dependency of those over the age of majority where they are enrolled full time in school. Generally, the courts recognize the pursuit of post-secondary education as a valid continuation of support obligations.

Amendments to the survivor sections of the Legislation and Regulations is an attempt to correct certain outdated provisions and to clarify or simplify benefit qualifications.

COMMITTEE DECISION:

Unanimous

Recommendation

31. Amend the definition of spouse to reflect the legality of same sex marriage.

32. Amend the definition of spouse to require that the spouse is cohabiting with the worker at the time of death.

33. Amend the legislation so the spousal lump sum payment is payable only to the cohabiting spouse.

34. Amend the legislation to allow where there is no spouse, each child up to the age of 18 years is eligible to be paid an educational allowance of $10,000. For the children between the ages of 18 and 25 the lump sum is only payable if enrolled full time in school.

35. Amend the legislation to remove the Board administered education fund (replaced by amendment recommendation 34).

36. Repeal the legislation which states a surviving spouse can only receive benefits in respect of one deceased worker.

37. Repeal the legislation which states a child can only receive benefits in respect of one deceased worker.

38. Amend the legislation so when there are “other dependents”, those individuals are also eligible to be paid a benefit which is limited to a pecuniary portion of the children’s benefit.

39. Amend the legislation to allow for spousal benefits to be apportioned and paid to a person who was being paid by the worker because of a court order or separation agreement.

40. Amend the legislation to allow for compensation benefits owed to a worker at the time of his or her death are paid to the “estate” or “others” as determined by the Board.

41. Amend the legislation to include that benefits cease at age 25, if the child is enrolled full time in school.

42. Amend the legislation to change “monthly” to “periodic”.

43. Amend the regulations so 30% of the worker’s benefits are divided among the dependents where there is a surviving spouse.

44. Amend the regulations so 100% of the worker’s benefits are divided among the dependents where there is no surviving spouse.

TEMPORARY SUPPLEMENTS

BACKGROUND:

In 1995, when the current Act became law, the legislation required the Board to assess and determine a worker's average earnings from his or her pre-accident employment but those average earnings stayed in effect for two years after the date of the accident. So if a worker went back to work and incurred a recurrence of his or her original injury within two years from the original accident date, his or her wage loss was paid based on his or her wages at the time of the original opening of his or her claim. If the recurrence was past the two years of the original injury date, the wage loss could be calculated on the worker's wages at the time of the recurrence, as determined by the Board. This process was used for all recurrence claims whether temporary wage loss or extended wage loss.

In 2002 the legislation was amended to allow for different wage loss calculation processes for different types of time loss claims. Currently when calculating a worker's loss of earnings capacity, the calculation is based on the worker's earnings at the time of the accident. When a worker returns to work and later has a recurrence of the original workplace injury, there are two options on which to base the worker's average earnings; the worker's wages at the date of the accident or the worker's wages at the time of the recurrence, whichever one best represents the worker's loss of earnings capacity. However, current legislation specifies a worker who is in receipt of extended wage loss benefits may only have his or her benefits calculated on his or her wages at the date of the original accident.

Workers Compensation is a wage loss system which bases a worker's benefits on his or her loss of earnings capacity. In the case of a worker in receipt of an extended wage loss who has a recurrence some time after the original injury, the earnings at the time of the accident often would not fairly compensate the worker for his or her loss of earnings. Circumstances change resulting in cost of living increases, job promotions etc. which could increase the pre-injury income which is not currently considered when reviewing the extended wage loss benefit.

COMMITTEE DECISION:

Unanimous

Recommendation

45. Amend the legislation to allow **all** workers' wages to be reviewed and calculated as of the date of the accident or the date of the subsequent loss of earnings capacity, whichever appears to the Board to best represent the loss of earnings capacity suffered by the worker.

46. Amend the legislation to reflect that prior Act EWL reviews should be based on gross earnings not net earnings for clarification purposes.

THIRD PARTY CLAIMS

BACKGROUND:

Workers Compensation legislation is a no fault accident insurance system based on what is referred to as the "historic compromise" outlined as a trade-off in which workers relinquish their right to sue in exchange for compensation benefits. Workers are not permitted to sue other employers or workers of their employers unless the work-related accident is from the use of a motor vehicle.

Where a person who is neither an employer nor a worker covered under the Workers Compensation Act, the person is referred to as a "third party". Where a third party contributes to the death or injury of a worker covered under the Act, the worker may elect to sue the third party or elect to collect compensation benefits and subrogate to the Workers Compensation Board the right to sue the third party. If the worker elects to accept compensation from the Workers Compensation Board, the Workers Compensation Board has the option to pursue action against the third party.

If the Workers Compensation Board takes action against a third party and receives a settlement that is greater than the compensation payable and costs associated with the action, the policy of the Board is to pay the balance of the settlement to the worker.

However, this is not reflected in the current legislation which may be interpreted to mean the Board is entitled to any excess. The legislation in British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia and Ontario provide where the Board recovers and collects more than the amount of compensation (and other costs as specified in the respective pieces of legislation) to which the worker would be entitled under the Act, the amount of the excess is paid to the worker.

Current legislation and policy does not speak to the costs of administering third party actions. Depending on the complexity of the case, the costs can be considerable. Alberta, British Columbia, Manitoba, New Brunswick and Newfoundland and Labrador provide for the collection of administration fees as a part of the third party action.

COMMITTEE DECISION:

Unanimous

Recommendation

47. Amend the legislation to specify funds (excess of the claim costs and fees) resulting from a third party claim are paid to the worker.

48. Amend the legislation to allow for the collection of an administration fee in a third party action.

UNLAWFUL EMPLOYMENT OF YOUTH

BACKGROUND:

Section 54 states, “The Board may withhold compensation payable to a parent with respect to the death of any young person as defined in the Youth Employment Act, where the employment of the young person was unlawful by virtue of any statute”. It allows the Board to withhold compensation death benefits payable to a parent where it is determined a youth was unlawfully employed. In the majority of circumstances, the parental entitlement to benefits would be limited to funeral expenses and it is expected by the Committee the accident fund will cover this cost. The Committee considers this section to be archaic and no longer relevant.

After reviewing other jurisdictions, Prince Edward Island, Nova Scotia and Newfoundland and Labrador are the only jurisdictions with this legislation.

COMMITTEE DECISION:

Unanimous

Recommendation

49. Repeal Section 54.

WORKERS COMPENSATION APPEAL TRIBUNAL

BACKGROUND:

The Workers Compensation Appeal Tribunal (WCAT) is a quasi-judicial body which conducts hearings as a result of appeals from parties with a direct interest in the decision; primarily workers and employers. WCAT is considered the second level of appeal and rules only on those decisions made by the Internal Reconsideration Officer or any matter referred to it by the Board. WCAT operates independently from the Workers Compensation Board under the legislative authority of the Workers Compensation Act. In WCAT’s submission to the Legislative Review Advisory Committee, WCAT states its purpose as, “The primary responsibility of the Appeal Tribunal is to provide timely, fair, consistent and impartial hearings and decisions on appeals filed in relation to decisions rendered by Workers Compensation Board.”

As was the case with the appointment of the Board of Directors, the Committee believes the term of a WCAT appointment must be of sufficient length to allow the member to become knowledgeable in the legislation, policy and operation of the workers compensation system. At the same time, the term should be limited in order to ensure a fresh perspective.

The length of the process is a concern to most stakeholders and was identified during the public consultation process in both the focus groups and submissions. There are time factors inherent in the process that cannot be avoided. There are also legislated time limits to certain steps in the process that must be followed to ensure timely decisions.

COMMITTEE DECISION:

Unanimous

Recommendation

50. Amend the legislation to specify those appointed to WCAT have knowledge and experience relating to the principles of Workers Compensation legislation.

51. Amend the legislation so a WCAT term of appointment is for three years.

52. Amend the legislation so WCAT members can be reappointed for only one additional term.

53. Amend the legislation so WCAT members can be removed for cause.

54. Amend the legislation so WCAT decisions are issued within 60 days of the hearing.

55. Amend the legislation to allow appeal parties to receive decisions without a written request.

56. Amend the regulation to remove the specific address for filing an appeal.

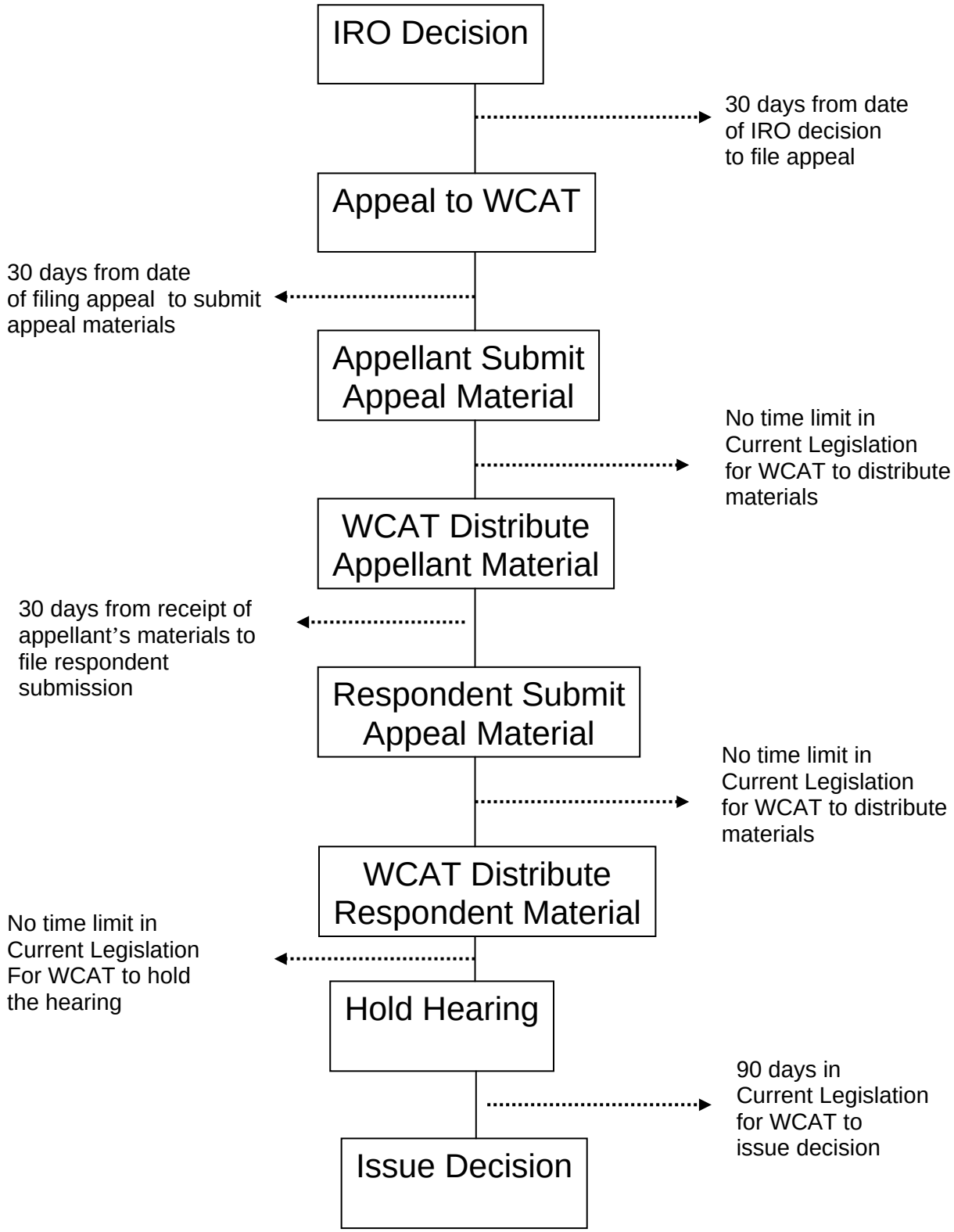
57. Amend the regulation to provide fifteen days from the date of receipt of the appellant's materials for WCAT to distribute the materials to the other parties to the appeal.

58. Amend the regulation to provide fifteen days from the date of receipt of the respondent's materials for WCAT to distribute the materials to the other parties to the appeal.

59. Amend the regulation to provide that all applications for extensions must be made within the time prescribed by the regulations.

60. Amend the regulation to provide the hearing must be held within 60 days of receipt of the respondent's filing of materials.

WCAT Time Lines



Non-Unanimous Recommendation – Amend the Legislation

The recommendations in this section represent the decisions of the Legislative Review Advisory Committee where the decision was NOT unanimous to amend the Workers Compensation Act and/or associated Regulations. Where a specific topic is not addressed, the Committee voted unanimously to leave the section of the Legislation as written.

COLLATERAL BENEFIT

BACKGROUND:

Prior to 2002, 100% of Canada Pension Plan Disability was treated as a collateral benefit and deducted from the worker's wage loss benefits. In 2002, the legislation was amended to recognize the contribution made by workers to the CPP disability program and only 50% of the CPP disability representing the employer's contribution was treated as a collateral benefit.

A collateral benefit is defined in the definitions section of the legislation and refers to benefits a worker is entitled to receive that are provided wholly or partly by the employer. Section 42 of the Act further states the benefit is a collateral benefit only when the worker is entitled to receive it as a result of the injury. For clarification purposes, the definition and application of the collateral benefit should be the same – only the portion related to the injury should be treated as collateral.

Under the Act, a worker is paid wage loss benefits equal to 80% of net loss of earnings for the first 38 weeks and 85% of the net loss of earnings thereafter. The benefits are paid only to a statutory maximum. For example, a worker who is injured in 2007 and is earning $60,000 per year would be paid benefits equal to 80% of the net of the statutory maximum of $44,700. However an employer (or through other means such as CPP disability) can pay top up benefits to the worker provided the total amount received by the worker does not exceed 80% of net of the worker's actual loss of earnings capacity which is 80% of net of $60,000.

COMMITTEE DECISION:

The Committee was unanimous in its decision to amend the definition of collateral benefit as noted in the amendment recommendation.

The Committee was not unanimous in its decision regarding the other provisions of the section. Those opposed believe a worker should be permitted to retain 100% of his or her actual earnings before the deduction of any collateral benefit.

Recommendation

61. Amend the definition of collateral benefit to indicate only the portion related to the injury is collateral.

MAXIMUM ANNUAL EARNINGS

BACKGROUND:

The maximum annual earnings is a statutory limit on which employer assessments are based and a statutory limit on which benefits are paid. Prior to 1995, the maximum annual earnings were established through regulation. In 1995 the maximum annual earnings were established for that year. For subsequent years, the prior year's maximum is adjusted using the consumer price index published by Statistics Canada to calculate the new maximum for the current year. All Canadian jurisdictions with the exception of Manitoba have a maximum.

To determine an equitable maximum, consideration was given to the average earnings as an indicator of the economic state of the region. An evaluation of the maximum annual earnings could not be based solely on a jurisdictional comparison due to variations in regional economies. This is demonstrated in the chart below by comparing average earnings to the maximum for each Province/Territory.

JURISDICTION	MAXIMUM 2007	AVERAGE EARNINGS 2006
Alberta	64,600	41,600
British Columbia	64,600	38,400
Manitoba	No maximum	35,100
New Brunswick	53,200	35,500
Newfoundland and Labrador	48,425	35,900
NWT and Nunavut	69,200	50,400
Nova Scotia	46,700	34,200
Ontario	71,800	40,600
Prince Edward Island	44,700	31,500
Saskatchewan	55,000	36,000
Yukon	72,300	44,300

COMMITTEE DECISION:

The Committee was unanimous in its decision to be specific in reference to the Statistics Canada table as noted in amendment recommendation 62.

The Committee was not unanimous in its decision regarding other provisions of the section. Those opposed believe the maximum should increase to $50,000 for 2008 and continue indexing as currently provided.

Recommendation

62. Amend the legislation to be specific in using the Statistics Canada table referring to the percentage change from June of one year to June of the next for clarification purposes.

OCCUPATIONAL DISEASE

BACKGROUND:

An occupational disease normally occurs from exposure to a cause in a work environment or one that manifests itself following a latent period after exposure to a cause. Where an occupational disease occurs, in the opinion of the Workers Compensation Board, due in part to the employment of the worker and in part to a cause or causes other than the employment, the employment must be the dominant cause of the occupational disease for it to be compensable.

Where there may be both work and non-work causes, the Board will assess the degree of exposure or effect on the disease by both and determine the contribution based on the medical evidence including the latency, progression, nature of the disease and the degree of exposure. Non-work causes such as hobbies, medical conditions, and industries or employment not covered under the Act may also contribute to a disease and must be considered in any adjudication.

Current legislation states the disease is to be treated as if it were a personal injury by accident and the contracting of the disease were the happening of the accident (date of accident). The date of the accident can have an affect on entitlement such as the start date for benefits, the value of an impairment award, the experience rating process, and filing limitations.

For example, where a worker was exposed to asbestos in the workplace, asbestosis would likely not present until 5-10 years after the exposure. If the date of accident is based on the date of exposure, the worker's benefits would be based on earnings at the time of the accident (i.e. the time of the exposure) some ten years earlier. His or her impairment award would be based on the maximum annual earnings at the time of the accident. Where the date of the accident for an occupational disease is related to a worker's need for benefits as represented by the date of disablement, the benefits calculated at the time of disablement would better reflect the worker's loss.

A jurisdictional scan indicates the majority of compensation boards use the date of disablement as the date of accident for occupational disease claims.

COMMITTEE DECISION:

Unanimous vote to move section 6(10) for clarification purposes.

The Committee was not unanimous in its decision regarding the other provisions of this section. Some members did not agree with changing the date of accident from the date of contracting the disease to the date of disablement.

Some Committee members believe the dominant cause test provides too high of a standard for the acceptance of a claim for occupational disease and offered that dominant cause should have been replaced with causative significance.

Recommendation

63. Move Section 6(10) to Section 84 for purposes of clarity.

64. Amend the legislation so the date of disablement is the date of accident for claims for occupational disease.

SEASONAL AND CASUAL WORKER WAGES

BACKGROUND:

"Average earnings" means the daily, weekly, monthly, or regular remuneration the worker was receiving at the time of the accident or any consecutive twelve month period during the two years preceding the date of accident, whichever, in the opinion of the Workers Compensation Board best represents the worker's loss of earnings capacity. This includes any remuneration the worker received as a result of his or her employment including Employment Insurance.

Where the Board determines it is not reasonable to calculate a worker's average earnings due to the shortness of time or the casual nature of the work, the Board may determine the worker's average earnings.

For example, a worker is a real estate agent. He sells five houses in the month of his injury but for the previous six months he sold on average, two houses per month. Wage loss benefits would not be based on selling five houses every month but rather on the average income for the prior twelve months.

Section 44 subsection (4) of the Act states:

44(4) Where, **in the opinion of the Board**, it is impracticable to calculate the average earnings of a worker because of the length of time the worker has been employed or the casual nature of the employment, the Board **may** determine the worker's average earnings in the way that, **in the opinion of the Board**, best represents the loss of earnings suffered by the worker by reason of the accident.

COMMITTEE DECISION:

This was not a unanimous decision of the Committee. Some Committee members believe the Board is the administrator of the fund and as such, is responsible to determine the average earnings that best represent the worker's wage loss.

Recommendation

65. Amend the legislation by removing the wording "in the opinion of the Board" and where it says "may" be replaced with "shall" with respect to determination of average earnings for seasonal and casual workers.

SIX MONTH LIMIT FOR INVOICES

BACKGROUND:

The current legislation stipulates the Board will not pay for accounts which are received beyond six months from the date of the original service. These accounts include travel submissions from workers, medical invoices and pharmacy bills.

When reviewing this section of the legislation, consideration was given to possible special circumstances where the Board could fail to meet this provision. The use of the term "shall" could limit the Board's ability to pay accounts received beyond six months, where warranted.

COMMITTEE DECISION:

This was not a unanimous decision. Some Committee members believe accounts over six months should not be paid, therefore this section should not be amended.

Recommendation

66. Amend the legislation to use the term "may" rather than "shall" when determining payment for accounts.

VOCATIONAL REHABILITATION

BACKGROUND:

The WCB provides vocational rehabilitation to injured workers. Vocational Rehabilitation Programs (VR) are defined in Board policy as "Return to Work services provided to workers who have an impairment that prevents them from returning to their pre-injury job. These services include assessments, vocational rehabilitation planning, job search, work experience, formal training and self-employment".

Statutory direction is covered in Section 18(11) of the Act which states, "To aid in getting injured workers back to work, the Board may take such measures and make such expenditures as it may consider necessary or expedient, and the expense thereof shall be borne out of the accident fund" and Section 18(3) of the Act states, "All questions as to the necessity, character, and sufficiency of any medical aid furnished or any vocational or occupational rehabilitation shall be determined by the Board."

The direction of vocational rehabilitation initiatives has been changing over the past number of years with a focus on legislated return to work requirements in line with human rights initiatives. Four Canadian jurisdictions, of which P.E.I. is one, have implemented statutory requirements in areas such as duty to cooperate and duty to accommodate.

However, the Workers Compensation Act is very broad in its statutory direction for the provision of vocational rehabilitation services relegating the role of specifying detailed direction to policy. VR decisions are often controversial and the importance of vocational rehabilitation services in getting injured workers back to work is becoming more evident. The language in the legislation should reflect this movement at the same time respecting the appropriateness of the Board to determine the nature and extent of the services to be provided.

COMMITTEE DECISION:

This was not an unanimous decision. Some Committee members believe the Board as the administrator of the program, should not be required by legislation to provide services that should be discretionary.

Recommendation

67. Amend the legislation to state the Board shall take (rather than may) such measures and make such expenditures as it may consider necessary or expedient.

WAGE LOSS BENEFITS

BACKGROUND:

In 1949 when the Workers Compensation Act of P.E.I. was first enacted the compensation rate or wage loss was calculated based on 66 2/3% of a worker's gross earnings. In 1951 the legislation was amended and wage loss benefits were calculated at 75% of a worker's gross earnings which remained in place until a new Workers Compensation Act was proclaimed in 1995. The 1995 Act changed the wage loss calculation to 80% of the worker's net average weekly earnings for the first 39 weeks and in the fortieth week the benefit level was adjusted to 85% of net. A further review and amendment was introduced effective on April 1, 2002 wherein the net benefits were adjusted after a worker was on active claim for 38 weeks. Each of these calculation methods was and is subject to a maximum ceiling of coverage.

The Yukon is the only jurisdiction which bases its compensation rate on the gross average earnings of the worker. All other jurisdictions base their compensation rate on varying percentages of the net average earnings of the worker.

The first consideration in the review of the rate for wage loss benefits concerned the increase at 38 weeks. Only P.E.I. and Nova Scotia increase the wage loss benefits after the worker has been in receipt of benefits for a set number of weeks. Discussion regarding the change in benefits resulted in two concerns for Committee members:

- It is thought that the management of two benefit levels is more cumbersome administratively.
- A negative message is being delivered whereby an injured worker receives a higher benefit if he or she does not return to work in a specific time frame.

In determining a flat rate for benefits, the Committee considered the wage rates set in the other Canadian jurisdictions, in particular those paid in the Atlantic Provinces. The table below indicates the benefit level of P.E.I. is not the lowest nor the highest at 80%, in comparison to the other Atlantic Provinces.

Jurisdiction	Benefit Level
Prince Edward Island	**80% of Net Earnings (first 38 weeks)** **85% of Net Earnings thereafter**
Alberta	90% of Net Earnings
British Columbia	90% of Net Earnings
Manitoba	90% of Net Earnings
New Brunswick	**85% of Net Earnings**
Newfoundland and Labrador	**80% of Net Earnings**
North West Territories and Nunavut	90% of Net Earnings
Nova Scotia	**75% of Net Earnings (first 26 weeks)** **85% of Net Earnings thereafter**
Ontario	85% of Net Earnings
Quebec	90% of Net Earnings
Saskatchewan	90% of Net Earnings
Yukon	75% of Gross Earnings

Stakeholder submissions raised the issue of minimum benefits. As noted in the chart above, workers receive a percentage of actual earnings in wage loss benefits but never 100% of the actual earnings. In jurisdictions outside of the Atlantic region, a minimum benefit level has been established. Where a worker earns less than the minimum, his or her wage loss would be set at 100% of net earnings rather than 80% of net earnings.

COMMITTEE DECISION:

Committee members were in agreement there should be one rate which should not change at 38 weeks, however Committee members did not agree with the decision to set benefits at 80% for the entire duration of the claim. Some Committee members believe the majority of jurisdictions pay 90% of net earnings and P.E.I. should follow.

There was a discussion regarding the introduction of minimum benefits. Some Committee members believe minimum benefits assist those most in need at the time of loss of earnings due to a workplace injury. Other Committee members believe introducing minimum benefits establishes a system where workers are not treated equally. The final decision of the Committee was to not introduce minimum benefits.

Recommendation

68. Amend the legislation so the wage loss benefits are calculated at 80% of net for the duration of the claim.

WAIT PERIOD

BACKGROUND:

When the Workers Compensation Act of Prince Edward Island was initially enacted in 1949, it provided for a wait period for the first seven days of disability, during which time no compensation, other than medical aid, was provided to the injured worker. In 1951 the wait period was changed to four days and in 1962 the wait period was eliminated (benefits are not paid for the day of the accident). In 2001 there was a review of the Workers Compensation Act. Workers and employers participated in this review and there were a number of public meetings. Given the financial situation of the Board (approximately $30 million unfunded liability) at the time of the review, a three fifths wait period (approximately three days) was implemented effective April 1, 2002.

There are two other jurisdictions in Canada which have established wait periods beyond the day of the injury – New Brunswick (three fifths) and Nova Scotia (two fifths). All three jurisdictions have a retroactive period by which the wait period benefits will be reimbursed. In P.E.I. workers who are in receipt of compensation benefits for longer than four weeks will have the wait period reimbursed.

To those who support wait periods, a wait period is similar to a deductible in an insurance policy and is consistent with the principle of insurance that protects against large and not small losses. The cost-effectiveness of deductibles in the general insurance industry demonstrates that a policy is cheaper when there is a larger deductible.

Those against wait periods believe workers who face a financial penalty in the form of a wait period may not report the accident or may not take time away from work to recover or even seek proper medical attention. The injury may become aggravated and result in a more significant future absence. An injured worker who remains on the job may also put fellow workers at risk. Safety and prevention goals of the Workers Compensation system encourages reporting of all accidents regardless of the severity of the injury.

COMMITTEE DECISION

This was not a unanimous decision. Those opposed were concerned with the impact of removing the wait period on the filing of frivolous claims and the resulting costs. They believe the workers compensation system is an insurance system and is subject to a deductible and suggested the wait period be reduced to two fifths but not eliminated.

Recommendation

69. Amend the legislation to remove the wait period.

Non-Unanimous Recommendation – No Change

Section 3 recommendations represent the decisions of the Legislative Review Advisory Committee where the decision was made to leave the section as written and the decision to do so was NOT unanimous.

CALCULATING AVERAGE EARNINGS

BACKGROUND:

A worker's wage loss benefits are based on the worker's average earnings at the time of the accident up to an annual maximum set by the Board. The Board has the authority to determine the period of time over which earnings will be averaged and the inclusion or exclusion of employment insurance benefits

Average earnings cannot exceed the maximum annual earnings set by the Board, the ceiling for which employers pay insurance premiums.

Workers Compensation provides benefits to an injured worker based on the worker's reduced capacity to earn due to the injury. For workers earning above the maximum, benefits are not actually a replacement for lost income as the compensation is based on the Board established maximum not the worker's actual earnings. In the case of workers compensation, the cost of the insurance is calculated on the maximum not the worker's actual earnings for workers earning in excess of the maximum.

For example, an injured worker who earns $60,000 per year in 2007 would receive 80% of the net of $44,700 (maximum annual earnings for 2007) not 80% of net of $60,000 (worker's actual earnings). The employer of the worker would have paid an assessment for this worker's payroll based on the maximum of $44,700.

In comparison to other jurisdictions, Prince Edward Island is consistent in its use of a maximum. Manitoba, as a result of a legislative review, eliminated the maximum in 2006.

COMMITTEE DECISIONS:

Some Committee members believe the maximum should be removed as all workers are not being treating equally. Those who earn over the maximum have a significant wage loss penalty due to the maximum. Others believe the maximum is consistent with other Canadian jurisdictions and should not be changed.

Recommendation

No change to the Legislation.

DAY OF ACCIDENT

BACKGROUND:

Workers Compensation Legislation excludes the payment of benefits by the Board for the day of the accident.

When the Workers Compensation Act of Prince Edward Island was enacted in 1949, it provided for a wait period for the first seven days of disability, during which time no compensation, other than medical aid was provided to the injured worker. In 1951 the wait period was changed to four days and in 1962 the wait period was eliminated until 2002 when a three fifths wait period was introduced (the Committee's review of the three fifths wait period was addressed earlier in the report).

Benefits are not payable until the day after the injury, subsequently the three fifths wait period does not take affect until the day after the injury. It is then possible an injured worker would not receive wage loss until four days have passed from the time of injury.

Compensation benefits are not paid for the day of the accident by any Canadian jurisdiction. However, a number of jurisdictions have legislation that requires the employer to pay the worker for the day of the accident (Alberta, Manitoba, Ontario, Newfoundland and Labrador and Quebec).

COMMITTEE DECISION:

Some committee members believe the worker should not be financially penalized for a workplace injury. The historical compromise means the employer should bear the full cost of the system. Worker groups recommend compensation for the injured worker through wage loss benefits from the Workers Compensation Board or by direct pay from the employer for the day of the accident.

Others committee members hold the opinion that wait periods are similar to deductibles in insurance policies and are consistent with the principle of insurance. A basic principle of Sir William Meredith is collective liability; the total cost of the compensation system is shared by all employers who contribute to a common fund. The financial liability of the system becomes their collective responsibility. Direct pay by the employer is in direct opposition to this founding principle. The employer representatives were concerned with the administration of a direct pay scheme.

Recommendation

No change to the Legislation.

GENERAL MEDICAL AID

BACKGROUND:

Medical Aid is defined in the Workers Compensation Act, "…includes medical, surgical and dental aid, hospital and nursing services, chiropractic services provided by a registered chiropractor, occupation therapy and physiotherapy services provided by a licensed practitioner, x-ray and other treatment, drugs, dressings, appliances, apparatuses, transportation and other goods, services and things the Board may authorize in promoting the medical rehabilitation of an injured worker".

The Act provides the Board with the authority to approve all medical aid for workers (e.g. medications, physiotherapy), determine what medical aid will be approved and determine what fees are charged for medical aid.

Section 18(1) states "The Board may provide any worker entitled to compensation under this Part with medical aid…". In reviewing the specific wording of the legislation of other Canadian jurisdictions, only New Brunswick and Saskatchewan use the word "shall" rather than the word "may".

COMMITTEE DECISION:

A summary of the worker position is found in the submission by the Federation of Labour which states, "While we accept that the medical aid provided is at all times subject to the control and supervision of the Board, nonetheless it is important that there be a strong legislative onus on the WCB to deliver medical aid. The Federation of Labour recommends that the W.C. Act be amended to clearly state that a worker entitled to compensation "shall" be entitled to such medical aid as is necessary as a result of the accident or occupational disease."

Other Committee members too accept that the medical aid is at all times subject to the control and supervision of the Board therefore it is unnecessary to amend the legislation.

Recommendation

No change to the Legislation.

PRE-EXISTING CONDITIONS

BACKGROUND:

The legislation addresses situations whereby a worker with a pre-existing condition has a work place injury and the pre-existing condition delays the recovery of the injury. For example, a worker with diabetes has an accident at work resulting in a laceration. Normal recovery times may be two weeks for a worker without this pre-existing condition.

The diabetes may delay the healing times for this worker resulting in a need for compensation beyond the normal two weeks. This worker is compensated until the injury is healed. This particular legislation is unique to Prince Edward Island although other jurisdictions do provide benefits for the same circumstances.

Five other jurisdictions have legislation that specifically speaks to an injury that aggravates a pre-existing condition and the coverage for the extent of the aggravation. If it can be shown that the new work related injury was a significant factor in the cause of the current disability or need for treatment, then workers compensation would apply even in those cases in which the pre-existing conditions were not work related. If an incident at work aggravates a pre-existing condition in such a way that the employee cannot work, the entire disability is considered work related and the worker is entitled to benefits based on the level of disability. The pre-existing condition does not have to be work related but the aggravation or exacerbation of the condition must be work related. Although Prince Edward Island's legislation does not directly speak to these circumstances, in practice, the worker is compensated.

COMMITTEE DECISION:

Some Committee members suggested the legislation should be expanded such that the aggravation of the pre-existing condition is itself a personal injury. Concerns were expressed regarding the aggravation of a pre-existing condition from the cumulative effect of work activities in the absence of an actual accident. The employer should bear the cost of the cumulative effect a workplace has on a worker's body. As a worker ages, pre-existing conditions may be aggravated due to the nature of the work.

Other Committee members believe the employer should only be responsible for accidents and injuries that are caused by the workplace, not for injuries or medical conditions that are attributable to other causes.

Recommendation

No change to the Legislation.

WORKER ADVISOR

BACKGROUND:

The Worker Advisor is an employee of the Government of Prince Edward Island with the Department of Communities, Cultural Affairs and Labour. The position is independent of the Workers Compensation Board however it is financed through the accident fund. The Worker Advisor provides general information about the WCB policies, procedures and the appeal process, advises injured workers on what actions they can take, helps gather necessary information and appears as the worker's representative at an appeal hearing. The Worker Advisor program was introduced into legislation in 1995 with the enactment of the current WCB Act.

COMMITTEE DECISION:

Some Committee members believe the Worker Advisor should continue to be funded by the WCB but should be administered by the Federation of Labour rather than a department of Government. The Federation offers advocate services on behalf of all workers, not only those in a unionized environment.

Other members believe the Worker Advisor should continue to be funded by the WCB and should continue to be administered by a department of Government. The majority of workers covered under the Act are not working in a unionized environment and should not have advocacy services provided by the Federation of Labour.

Recommendation

No change to the Legislation.

Unanimous Recommendation – No Change

Recommendations in this section represent the decisions of the Legislative Review Advisory Committee where the decision was UNANIMOUS to leave the Workers Compensation Act and/or associated Regulations as written.

DESCRIPTION	SECTION OF THE ACT
Stress exclusion – traumatic event	1.1
Unlawful employment	5
Personal Injury	6(1)
Misconduct and entitlement	6(3)
Presumption	6(4)
Impairment – Board may pay	6(6)
Non-compliance in providing information	6(12)
Accidents occurring outside the province	7,8
Work not normally performed	9(1)
Apprentices – coverage	9(2)
Cannot sue another worker or employer	12, 13
Worker cannot forgo rights	14
Employer cannot charge assessments to the worker	15
Assignment of benefits	16
Benefit of the doubt – merits and justice	17
Employer pays first ambulance	18(6), 18(7)
Worker can co-pay medical aid	18(8)
Worker non-compliance	18(12)-18(14)
Role / Power of Board	20-27
CEO	28
Board staff	31
Jurisdiction, powers and legal rights	32
Staff pension and medical	36
Benefits end – age 65	40(2), 40(3)
Earnings in Excess 85%	40(4), 40(5)
Average earnings / loss of earnings capacity	41
Recurrences	41(5) – 41(7)
Pension replacement benefit	43
Unassessed earnings	44(2), 44(5)
Apprentice wages	44(3)
Special expenses not included	44(6)
Review Old Act EWLs	49.1(1), 49.1(2)
Wage loss ends – 65	50(4),50(5)
Incapacitated workers	51(1)-51(4)
EWL/PMI effective dates	51(6),51(7)
Garnishment of spousal/child support	53
Proof of dependency	55

DESCRIPTION	SECTION OF THE ACT
Right to appeal prior to 2002	56.1
Indemnification of staff	57, 58
Worker – how to file claim	59(1)
Employer required to file	59(3), 59(5)
6 month filing limitation	59(4)
Classification of employers	60,61
Rate Setting	62,63
Collections	64-68
Employer no longer in business	69(2)
Old reference to bulk sales act	70
Assessments to maximum	71
Records/Reporting requirements	72(1) – 72(10)
Audits	72(11) - 72(12)
Penalties	73
Sub-contractors	75-79
Board may make regulations	80-82
Review of Act every five years	85.1
Rights of workers not covered	87-90

Appendix A

Alpha Summary of Amendment Recommendations

Access to Information

Amend the legislation so a worker need not have a bona fide issue in dispute to access his or her personal claim file.

Amend the legislation so survivors access claim files as determined by the Board.

Amend the legislation to allow access to claim file information for parties requiring information for claim administration purposes such as an employer during the return to work process.

Amend the legislation to change the term “claim” to “claim file” for clarification purposes.

Amend the legislation to allow agreements with Federal and Provincial Government entities for ease in claim administration.

Amend the legislation to allow for the exchange of information with third parties for purposes other than administering the claim (e.g. statistics, national reporting).

Appointment of the Board

Amend the legislation so Board members may be reappointed for only one term.

Apportionment

Amend the legislation so the portion of an injury that is attributable to a cause other than the accident is borne by all employers, not by the rate group.

Amend Section 6(11)(a) to change from impairment to impairment **award** for clarification purposes.

Assessments Based on Actuals

Amend the legislation so the Board may waive the requirement to furnish an estimate of payroll and where the Board has waived the requirement, the employer must provide the Board with a record of wages of the employer's actual payroll, for a period determined by the Board.

Audits and Reporting

Amend the legislation so the Lieutenant Governor in Council may appoint the Auditor General to audit the Workers Compensation Board.

Collateral Benefit

Amend the definition of collateral benefit to indicate only the portion related to the injury is collateral.

Consumer Price Index – Indexing of Benefits

Amend the legislation from 75% of CPI to 100% of the change in CPI for Charlottetown and Summerside.

Court of Appeal

Amend the legislation to specify reasonable costs are awarded to a worker or employer as a result of a successful appeal.

Definition of Accident

Amend the definition of accident to reflect disablement due to injuries resulting from cumulative events.

Definition of Occupational Disease

Amend the legislation to remove the exclusion of ordinary disease of life from the definition of occupational disease.

Definition of Worker

Amend the legislation to remove the reference to “municipal” with respect to fire fighters under the definition of worker.

Director Duties – Safety Associations

Amend the legislation to allow the Board of Directors the authority to establish policy and programs in relation to injury prevention and safety.

Amend the legislation to allow the Board to collect a levy on behalf of safety associations to fund programs related to injury prevention and safety.

Exclusions from Coverage

Amend the legislation to remove the exclusion of farming operations and fishing operations.

Amend the legislation to expand the volunteer coverage to include the provision of supervised volunteer emergency services.

Expediting Treatment

Amend Section 52 to remove reference to the avoidance of heavy payments for disability.

Impairment

Amend the definition of impairment to that used by the World Health Organization (WHO), specifically “any loss or abnormality of psychological, physiological or anatomical structure or function, that results from the accident".

Amend the legislation to allow entitlement to an impairment award provided the impairment assessment has been completed.

Internal Reconsideration

Amend the legislation to remove the requirement of a written request to receive the written decision of the Internal Reconsideration Officer.

Maximum Annual Earnings

Amend the legislation to be specific in using the Statistics Canada table referring to the percentage change from June of one year to June of the next for clarification purposes.

Medical Reporting

Amend the legislation to provide consistency between the sections and provide more generic terms to allow for the changing specialties of health care providers.

Occupational Disease

Move section 6(10) to Section 84 for purposes of clarity.

Amend the legislation so the date of disablement is the date of accident for claims for occupational disease.

Pension Recurrences and New Claims

Amend the legislation so the permanent partial or total disability pension is not deducted from wage loss benefits for new claims or recurrences.

Pension Reviews

Amend the legislation to allow a worker in receipt of a pension to have the impairment reassessed with a change in medical condition.

Return to Work

Amend the legislation to replace the word “early” with “timely”.

Safety of Premises

Amend the legislation related to entering the employer’s premises by moving this section to the “employer section” of the Act for clarification purposes.

Amend the legislation to remove references to the Board writing orders with respect to safety under the Workers Compensation Act.

Seasonal and Casual Worker Wages

Amend the legislation by removing the wording “in the opinion of the Board” and where it says “may” be replaced with “shall” with respect to determination of average earnings for seasonal and casual workers.

Six Month Limit for Invoices

Amend the legislation to use the term “may” rather than “shall” when determining payment for accounts.

Survivor Benefits

Amend the definition of spouse to reflect the legality of same-sex marriage.

Amend the definition of spouse to require that the spouse is cohabiting with the worker at the time of death.

Amend the legislation so the spousal lump sum payment is payable only to the cohabiting spouse.

Amend the legislation to allow where there is no spouse, each child up to the age of 18 years is eligible to be paid an educational allowance of $10,000. For the children between the ages of 18 and 25 the lump sum is only payable if enrolled full time in school.

Amend the legislation to remove the Board administered education fund (replaced by amendment recommendation 34).

Repeal the legislation which states a surviving spouse can only receive benefits in respect of one deceased worker.

Repeal the legislation which states a child can only receive benefits in respect of one deceased worker.

Amend the legislation so when there are “other dependents”, those individuals are also eligible to be paid a benefit which is limited to a pecuniary portion of the children’s benefit.

Amend the legislation to allow for spousal benefits to be apportioned and paid to a person who was being paid by the worker because of a court order or separation agreement.

Amend the legislation to allow for compensation benefits owed to a worker at the time of his or her death are paid to the “estate” or “others” as determined by the Board.

Amend the legislation to include that benefits cease at age 25, if the child is enrolled full time in school.

Amend the legislation to change “monthly” to “periodic”.

Amend the regulations so 30% of the worker's benefits are divided among the dependents where there is a surviving spouse.

Amend the regulations so 100% of the worker's benefits are divided among the dependents where there is no surviving spouse.

Temporary Supplements

Amend the legislation to allow **all** workers' wages to be reviewed and calculated as of the date of the accident or the date of the subsequent loss of earnings capacity, whichever appears to the Board to best represent the loss of earnings capacity suffered by the worker.

Amend the legislation to reflect that prior Act EWL reviews should be based on gross earnings not net earnings for clarification purposes.

Third Party Claims

Amend the legislation to specify funds (excess of the claim costs and fees) resulting from a third party claim are paid to the worker.

Amend the legislation to allow for the collection of an administration fee in a third party action.

Unlawful Employment of Youth

Repeal Section 54.

Vocational Rehabilitation

Amend the legislation to state the Board shall take (rather than may) such measures and make such expenditures as it may consider necessary or expedient.

Wage Loss Benefits

Amend the legislation so the wage loss benefits are calculated at 80% of net for the duration of the claim.

Wait Period

Amend the legislation to remove the wait period.

Workers Compensation Appeal Tribunal

Amend the legislation to specify those appointed to WCAT have knowledge and experience relating to the principles of Workers Compensation legislation.

Amend the legislation so a WCAT term of appointment is for three years.

Amend the legislation so WCAT members can be reappointed for only one additional term.

Amend the legislation so WCAT members can be removed for cause.

Amend the legislation so WCAT decisions are issued within 60 days of the hearing.

Amend the legislation to allow appeal parties to receive decisions without a written request.

Amend the regulation to remove the specific address for filing an appeal.

Amend the regulation to provide fifteen days from the date of receipt of the appellant's materials for WCAT to distribute the materials to the other parties to the appeal.

Amend the regulation to provide fifteen days from the date of receipt of the respondent's materials for WCAT to distribute the materials to the other parties to the appeal.

Amend the regulation to provide that all applications for extensions must be made within the time prescribed by the regulations.

Amend the regulation to provide the hearing must be held within 60 days of receipt of the respondent's filing of materials.

Appendix B

Non-Legislative Recommendations

Under the terms of reference outlined for the Legislative Review Advisory Committee, members were invited – "where information is received on non-legislative issues"- to report on these matters in a supplementary document. Committee members expressed frustration that issues arose, not so much from the wording of the Act or the Regulations, but with the policy and procedural practices of case management and administration. While there was general acceptance that the scope of this review did not allow for a comprehensive examination of all policy documents, the Committee wishes to forward to the Board its concerns related to a number of these items.

Appeal Timelines:

Probably the greatest concern expressed by Committee members and mirrored in submissions and in the comments of focus group participants relates to the timelines involved in processing appeals. While this concern was expressed in relation to all levels of the appeal process, they were most strident in reference to issues before the Appeal Tribunal. While formal recommendations addressing the Appeal Regulations are included in the main report, there is a universal desire, on the part of Committee members, to further speak to this concern in this supplementary document. Both the Employer Advisor and Worker Advisor report being involved in cases which are unduly delayed for months and even years where the time delays seem to be bureaucratic, due to a failure on somebody's part to forward documents, schedule hearings or simply draft and circulate a panel decision. It appears to Committee members that time guidelines are being ignored without repercussion and it should not be the responsibility of those depending on the decision to see this is addressed. There is a recognition that the Appeal Tribunal operates at arms length from the Board. Regardless, someone, whether the Minister responsible, or someone else duly authorized, needs to address this issue. Recent staffing changes in the Tribunal Office should alleviate some of these backlogs but if further resources are needed to ensure timely decisions, then so be it. In the opinion of the Committee, this issue negatively impacts the image of the whole workers compensation system.

Access to Information:

The formal submissions and the report of the focus group sessions identified several issues pertaining to the circulation of confidential medical information that is not related to the "bona fide issue in dispute." It is suggested that in response to a request for medical information from the family physician, files need to be screened more carefully to ensure unrelated information is not inadvertently forwarded. While this is more directly an issue between the patient and the doctor, several suggestions were forwarded to improve this process. Probably the most fool proof method would be to have prior patient approval before any information is transferred. Secondly, a review of the medical information transfer practices in other provinces might identify possible improvements. Related to this, changes in the wording of the letter requesting clinical notes from WCB to medical practitioners could further raise sensitivity to these concerns. While there is awareness that each additional safeguard risks extending the timelines and adding to the bureaucracy, the current level of distrust on the part of injured workers justifies an examination of policies and procedures related to Section 83(2) of the Act.

Estimated Earnings Capacity:

We know of no workers compensation system that does not rely on some form of deeming. Yet there seems to be almost universal dissatisfaction expressed by workers as to the implementation of deeming. In the P.E.I. Federation of Labour's brief to the Legislative Review Advisory Committee, reference is made to the Federation's longstanding distaste with this practice. The brief states "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."(p. 13). This sentiment was expressed by a number of individuals and groups and the issue seems more pertinent on P.E.I. where alternate employment opportunities for partially disabled workers are more limited. While the Committee is not recommending the termination of deeming, members felt compelled to share the concern so as to heighten sensitivity to the plight of injured workers in accessing meaningful reasonable paying jobs. On a related front, the Committee recommends the Board review the vocational rehabilitation policy as it pertains to retraining and job search such that it more accurately reflects only those positions actually available and those which the worker is capable of performing.

Employer/Worker Advisors:

Although the Employer Advisor and Worker Advisor positions have been in place for a number of years, many stakeholders do not possess an awareness and understanding of the positions. These positions operate at arm's length from the formal workers compensation system, and outside the Committee's terms of reference. Because the roles so closely overlap the formal workers compensation structures it seemed prudent to share expressions of concern forwarded in briefs and submissions. In its submission to the Committee, the Appeals Tribunal noted "…the significant number of appeals in which the injured worker is representing himself/herself." and later in the same section the document states; "In virtually all cases they have little or no working knowledge of the *Act*, Board Policies, and/or applicable Case Law." In spite of the obvious efforts of Board staff to inform workers of the services available to them, the message is not being received. Whether this is based on the belief that individuals can adequately represent themselves, or whether they are not fully aware of the nature of the support available or whether they simply do not trust the independence of the Office, the Committee could not judge. Regardless of the underlying reasons, some mechanism has to be identified to ensure appellants have the best possible representation when they appear before the Appeal Tribunal.

Periodic Review of Act:

As part of the final meeting, Committee members engaged in a very open and productive discussion on the review process they had engaged in over the last eight months. The group felt there was value in sharing the substance of that discussion with Board members. There was a general endorsement for the structure of the Committee and the selection process leading to the appointments. The presence and expertise of Board staff as part of the project team were critical to every aspect of the project. The presence of Employer and Worker Advisors ensured that the informed concerns of employers and employees were represented. Several Committee members including the Chair expressed personal reservations regarding their limited prior knowledge of the machinations of workers compensation. While recognizing this as an issue, Committee members indicated selecting an independent unbiased Chair was more critical than the individual's knowledge of the workers compensation system.

The size and composition of the group was deemed appropriate and after much discussion on the appropriate interval between reviews, the five year interval was considered appropriate. Members expressed support for the opportunities to provide input; (submissions, presentations, focus groups and internal review by Board staff). While open public meetings are often part of similar reviews, their absence in this case was not deemed to have compromised the project. Several suggestions are offered to strengthen the process itself. A more comprehensive orientation of Committee members is needed. Such orientation to provide greater understanding of the structure of workers compensation, (divisions, organizational charts, roles of Board and Board staff, life cycle of a claim) more elaboration of the terms of reference, clearly articulated role descriptions and more information on the interplay of legislation, regulation, policy and procedure.

Unfunded Liability:

Concerns regarding the unfunded liability were influential in a number of decisions during the 2001 Legislative Review. The Board introduced a number of initiatives at that time to address this issue. Submissions for this review present widely varying accounts of the degree to which this liability has been addressed and widely varying accounts of the impact of this liability on claim decisions and assessment rates. In the opinion of the Review Committee Chair, the Board needs to do a better job of clarifying its current position related to the unfunded liability. Such clarity will add credibility to the whole system.

Exclusions:

One of the first recommendations to come out of Committee discussion was a decision to remove farmers, fishers and certain volunteer groups from the list of exclusions. The resolution was unanimously endorsed by group members. It was noted that recent act reviews in Manitoba and Saskatchewan have endorsed a consultation process with affected groups before their removal from the exclusion lists. Again, in the opinion of the Chair, this seems a prudent first step to ensure an orderly integration of all such affected groups into the workers compensation system.