Turning the Tide

Renewing workers compensation in Manitoba

Introduction

The Manitoba Government recently published a review of workplace health and safety in Manitoba. Such a review was long overdue and was welcomed by all those with an interest in workplace safety and health. Unfortunately it was not accompanied by a review of the Workers Compensation Act, which sets out the rules for the system that seeks to meet the financial, rehabilitative, and educational needs of those who suffer from work-related injury or illness. Workers compensation is meant to provide compensation on a no-fault basis to those with work-related illnesses or diseases. The funds are raised by assessments that are paid by employers, who pay a percentage of their payroll costs to the WCB, and from an investment fund. Because all employers pay into the fund the system is said to be based on the principle of collective responsibility.

This paper seeks to raise the issue of workers compensation, to consider the impact of the Manitoba Workers Compensation Act in the context of changes introduced over the past ten years, and revive interest in the concept of universal compensation systems. It does not focus on the details of the existing Board, nor is it critical of the Board's current directors, managers, or staff. Rather it uses broad strokes to sketch out WCB policies, the implications of those policies for the organization and for injured workers, and to examine a useful set of alternatives.

This paper argues that the Workers Compensation Act is in need of significant amendment. It must be changed for the following reasons:

- Thousands of workers whose health has been undermined by their work are not receiving any compensation.

- Thousands of workers whose health has been undermined by their work are not receiving adequate compensation.

- The rate setting policy is at odds with the fundamental principles upon which workers compensation is based. By rewarding employers who use the appeal process it is reviving many of the worst elements of the previous system, in which workplace health and safety questions were determined by market forces.

The Manitoba workers compensation system underwent significant reform during the

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1990s. These reforms were undertaken to reduce the Board's large unfunded liability. It is the position of this paper that many of those reforms undermined many of the compensation system's original goals. Fault and conflict have been brought back to what was intended to be a no-fault, non-adversarial system. The reforms have been largely based on an assumption that the unfunded liability was the result of workers' over-utilization of the system. The response therefore has been to reduce the value of compensation awards and to reduce access to the system. Injured workers have had to make do with less—or in many cases, with nothing. Conflict between employers and workers over the right to an award has increased, as has conflict between the Board and injured workers.

It should be noted that during this same period the WCB has devoted considerable resources and attention to the issue of service. This is a positive development and should be encouraged. However, improved service is not an alternative to the delivery of appropriate benefits levels. That there have been improvements in the treatment that individual workers receive does not change the fact that the staff must also adhere to the WCB policy and legislative mandate—and at that level the changes amount to a disservice to injured workers.

Furthermore, the compensation system has not properly addressed the full range of sickness and disability caused by the contemporary workplace. New technologies have introduced new problems, while new rules make it difficult for workers to receive any compensation for industrial diseases.

This paper will discuss those areas where it is appropriate for the WCB to abandon the market-driven policies of the 1990s. It also points out that it may be time for a move to a new, national system that provides compensation for all accidents and disabilities, whether they arise from the workplace, the home, birth, or the community. The current system amounts to little more than a lottery that is expensive, inequitable, and through its operations—and despite the best intentions of the people who work in it—often the source of additional pain and anxiety.

The roots of workers compensation

The modern workers compensation system is the result of an historic compromise reached at the beginning of the twentieth century. Under that compromise workers gained the right to guaranteed compensation for work-related illnesses and accidents. They would receive compensation without having to go to court and prove that their injury or illness was the result of employer negligence. In exchange for a guaranteed benefit, workers gave up the right to sue. Employers agreed to collectively (as opposed to individually) pay the compensation bill. For agreeing to this collective liability, employers were protected from negligence suits filed by injured workers.

In its design and intention, this system was meant to provide quick, assured benefits to injured workers and relieve both workers and employers of the costs and necessity of lawsuits. In moving to this system governments were rejecting a previous, market-based approach to addressing the needs of injured workers. That market-based approach held, as a core belief, that workers voluntarily assumed the risks that were associated with employment when they accepted an offer of employment. Their paycheque not only bought their labour, it paid them to risk their health. (As a contemporary market-oriented critic of workers compensation sniffed in a recent book, the system arose and continues because, "society is apparently unwilling to see individuals suffer the natural consequences of their actions" (Vaillancourt 83).)

The early market-based belief manifested itself in the common-law doctrine of employer liability (a doctrine that, its name to the contrary, freed employers from liability for most workplace accidents). Prior to the introduction of workers compensation laws in the second decade of the twentieth century, a worker who had been injured on the job had to sue his or her employer for negligence. The doctrine of employer liability held that there was no case against the employer if it could be demonstrated:

- That the worker had contributed to the injury.
- That a co-worker had contributed to the injury.
- Or that the worker had assumed responsibility for the risk by agreeing to work for the employer (and it was taken for granted that workers did assume the risks of the work that they agreed to do).

Under this system very few workers who were injured on the job even bothered to sue their employer. Their chances of winning were slight, while the costs of legal representation were prohibitive. Workers who had been temporarily or partially disabled were also highly unlikely to sue their employer since they would thereby jeopardize any chance of returning to work.

Despite this, some workers did sue, and a small number of them actually prevailed in court. These victories could be costly, particularly for small employers. In these cases a victory in the courts could prove to be hollow, since a bankrupted employer could not pay compensation to an injured worker. Although the doc-

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trine of employer liability had served employers well, they recognized that by the early twentieth century there was a growing demand for their elimination. The prospect of unlimited legal actions and the growing political unrest caused by a system that seemed rigged in the employers' favour led many employers to see the value in the creation of new method of compensating injured workers.

For many workers attempting to win compensation, the system was a lottery for which they could not even afford to buy a ticket.

While the unrestricted right to sue would have benefited some workers, the fact remained that for many workers attempting to win compensation, the system was a lottery for which they could not even afford to buy a ticket. As a result, both labour and business had an interest in developing a different approach to compensation.

Starting in 1915 in Ontario, Canadian provincial governments began establishing workers compensation systems across the country. These systems were characterized by the following principles:

- No fault. In determining if a worker was to be compensated the key question that had to be answered was, "Did the injury arise out of and in the course of employment?" With limited exceptions no questions were asked about who was at fault in causing the accident.

- Collective liability. All employers had to contribute to a fund to pay for workers compensation. This was the price for being free of the possibility of a lawsuit. Employers paid for the compensation based on how dangerous their industry was.

- Guaranteed benefits. A worker would be guaranteed benefits even if the employer went bankrupt. At first, an injured worker would receive benefits equal to half of the wages he or she was making at the time of the injury. Over time this amount increased.

- Independent administration. The compensation system was to be run by an independent agency with representation from business and labour.

- Exclusive jurisdiction. This means that, with rare exceptions, the courts could not review compensation board decisions.

When one looks at these principles, one sees that this historic compromise provided benefits to both workers and employers.

Benefits to workers

The benefits to workers included the following:

- An end to the doctrine of assumption of risk. Society no longer made the claim that by accepting a paycheque workers were agreeing to accept any and all health risks associated with the job. Workers were giving up the right to direct their own labour power while they were on the job, but they were not giving up their health.

- A guaranteed compensation for work-related injuries, even if the employer went out of business.

- A system that, because it was not attempting to determine fault, did not involve a lengthy, stressful, and unpredictable adversarial process.

- Industry-wide incentives to create safer workplaces. (For details on the improvement in corporate safety records following the introduction of WCB see Aldrich.)

- A reduction in conflict with specific employers over the nature and cause of an injury. Because the cost of compensation was paid by the industry as a whole and not the employer, the employer and worker were not drawn into adversarial roles, nor was there significant incentive for an employer to challenge a claim.

- A system that was managed by individuals who had a knowledge and understanding of contemporary workplaces and were not professionally committed to adversarial tribunals. This was a marked improvement over the previous court-based compensation system.

Benefits to employers

The benefits to employers included:

- The elimination of the threat of large and costly lawsuits. This was of tremendous benefit to employers. The workers compensation system allowed employers to calculate how much they would likely be paying in compensation costs each year.

- A reduction in conflict with employees. The no-fault model improved morale by eliminating one very significant area of conflict between employers and employees.

- Employers also benefited from the shift to a system that was directed by people who had a knowledge and understanding of contemporary workplaces and were not professionally committed to adversarial tribunals.

- Improved social and political legitimacy (see Berman, Tucker).

Injured workers were no longer covering the full costs.

The impact of this new system was immediate and dramatic. Hundreds of thousands of injured workers began receiving assured benefits for the injuries that arose as a result of workplace accidents. While economists have long debated exactly who pays the final costs of payroll taxes such as WCB fees, the people who could least afford them, injured workers, were no longer covering the full costs. Furthermore, employers did react to the increase in costs that workers compensation contributions represented by investing in measures that reduced on-the-job industries (Aldrich). Injury rates dropped dramatically during this period as manufacturers changed employment practices to cut WCB assessment costs.

This is not to say that the new system was without drawbacks. The benefits that workers received initially were quite low—so low in fact that it can be argued that this was not a no-fault system. It also was a more effective system in compensating those injuries that resulted from traumatic events—falls from ladders, cuts, explosions and so forth, than those diseases that arose from workplace exposures and work processes. This remains true to this day: those workers who experience traumatic injuries that prevent them from working for several weeks have few complaints with the current workers compensation system. The problems arise for those workers who experience permanent disablement or suffer from occupationally related diseases.

Compensation systems have undergone continuous adjustment over the past 85 years. Benefits have been altered, new forms of injury have been recognized, rehabilitation services have been introduced, a variety of measures have been employed to encourage employers to improve workplace safety, new forms of governance have been employed and a quasi-judicial appeal process has been developed. These innovations have come about in response to a variety of pressures: to reduce costs, speed rehabilitation, reduce suspected fraud, and improve safety. The workers compensation system in Canada is under continued pressure to undertake further reforms. These include an expansion of experience rating (discussed in greater detail later), reduced benefits, and strict limitations on the compensation of occupationally related diseases.

This approach certainly guided the Manitoba Government when it amended the Workers Compensation Act in the 1990s.

Between 1996 and 1999 the Board rolled back premiums by 33 percent andrebated over $8 million to employers.

The reforms of the 1990s

In the 1990s the Manitoba government adopted a series of amendments to the Workers Compensation Act that undermine the historic compromise upon which workers compensation is based. The changes had the impact of reducing benefits, reducing the number of compensable injuries, and reintroducing an adversarial approach to the system.

This approach is evident in changes that included the following:

- The exclusion of ordinary diseases of life and stress (other than an acute reaction to a traumatic event from the WCB definition of compensable diseases).

- The requirement that employment must be the dominant cause of any disease before it can be compensated.

- The expansion of the use of experience rating in determining employer contributions.

Just as significant were the changes in benefits. The Board moved from a system in which workers were compensated at a rate of 75 percent of their gross income to one in which they received 90 percent of their net income. Furthermore, the rate dropped from 90 percent to 80 percent of net income after two years.

A new system for compensating impairment was also introduced. The permanent partial disability awards (PPD) were reduced dramatically. Under the previous system a 25-year-old worker with a 2 percent PPD and total temporary disability rate of $300 per week would receive a lump sum payment of $4416.75. Under the new system the payment would be $500. For a 45-year-old worker with a 10 percent PPD, the rate dropped from $16,818 to $1,000. The benefit given to a 40-year-old worker with a 20 percent PPD dropped from $27,531 to $11,000. Workers injured after these changes went into effect received benefits that were significantly lower than those implemented prior to that date. Workers over the age of 45 experienced even larger declines in benefits. The benefits for de-

pendent spouses were also limited as what were once lifetime pensions were transformed into benefits of limited duration.

At the same time that benefits were being reduced, a provision was put in place that allowed the Board to assess a worker up to $250 for any appeals that were deemed to be frivolous.

The Filmon government did not merely tinker with the workers compensation system. These were major changes and they had real results. Between 1996 and 1999 the Board rolled back premiums by 33 percent and rebated over $8 million to employers. The differences between the Workers Compensation Board of Manitoba's financial performance in the 1980s and the 1990s were dramatic. In the period from 1983 to 1988, employer assessment rose by an average of 20 percent each year. During the same period, unfunded liabilities rose by $200 million. These were dramatic increases and needed to be addressed—and they were. The trends were sharply reversed in the 1990s. The unfunded liability dropped from $232 million in 1988 to $224 million in 1990. It was down to $58 million by the end of 1994 and $25 million by the end of 1995. By the late 1990s the Board was running surpluses and cutting rates. In 1997, 1998 and 1999 the Board was able to cut assessments, while in 2000 the board froze rates. It would not be accurate to say that the Board balanced its budget solely on the backs of injured workers. Improved management, investments in a robust market and a variety of policy initiatives all contributed to the Board's improved economic position. However, cuts in the benefits rates, and the limitations on qualification for compensation, played very significant roles in reducing the liability. Injured workers bore most of the burden of reducing the WCB's unfunded liability.

How did the changes affect workers?

Metro Fincaryk, of the Manitoba Rolling Mills, was compensated for two similar injuries, before and after the mid-1990s reforms to workers compensation.

For a permanent shoulder injury that he suffered prior to 1992 he was awarded what amounted to a monthly pension for life of $154 a month. When his other shoulder was permanently injured, after 1992, he was given a one-time payment of $1,030, which was reduced to $824 because he was past the age of 45.

The thinking behind the changes of the 1990s

One of the clearest outlines of the thinking behind the sorts of amendments that were made to the workers compensation system in Manitoba can be found in a book of essays published by the C.D. Howe Institute in 1995. Entitled *Chronic Stress: Workers' Compensation in the 1990s*, it argued that the system was in crisis across Canada because it was overly generous. This generosity had led to large-scale deficits (properly termed "unfunded liabilities") that could only be addressed by cutting back on benefits, limiting the number of diseases and conditions for which workers could claim compensation, and reintroducing market incentives such as experience rating to the system.

In a paper titled *The Escalating Costs of Workers' Compensation in Canada*, Terry Thomason, one of the books' editors, argued that the key cause of the increase in the compensation claims was an improvement in benefits, an increase in the maximum benefits, and a decrease in the waiting period. In large measure, his argument

was based on the premise that there was some natural level of utilization of workers' compensation and that this level had been exceeded. His arguments are founded on a number of highly speculative assumptions. For this reason it is worthwhile quoting them at length:

> First, since increased compensation benefits reduce accident costs, workers are more likely to engage in risky behaviour that could result in an occupational injury. Second, the hope of gaining relatively large benefits may induce workers to report injuries that would otherwise have gone unreported. Finally, the chance of sizable compensation benefits may lead workers to make fraudulent claims. (Thomason 39)

It may be the case that workers are more likely to apply for benefits that are of increased value, but that does not necessarily mean that the worker is not entitled to the compensation.

The key words in the above paragraph are "likely," "may," and "may." There is no hard evidence that a slight increase in the value of workers compensation induces workers to engage in risky behaviour. There is no evidence to suggest that the increase in benefit pay-outs was due to some sort of dramatic increase in workplace carelessness. It may be the case that workers are more likely to apply for benefits that are of increased value, just as a pedestrian is more likely to stop and pick up a loonie and walk by a penny. But that does not necessarily mean that the worker is not entitled to the compensation. It could be argued just as easily that low benefits force workers to work through their pain, possibly putting themselves and other workers at further risk, rather than go off on compensation. Thomason can only speculate that there was an increase in fraud during the 1980s. But this does not stop him from concluding, "Thus, it seems likely that more generous compensation benefits have increased the incidence of fraudulent claims" (Thomason 40).

Thomason also argues that more liberal benefits have lengthened the duration of disability.

Using a sample of injury claims from Quebec, Dionne and St-Michel (1991) demonstrate that higher compensation benefits are associated with longer duration of temporary disabilities. They also find that this effect is significantly greater for injuries that have fewer objective symptoms, such as lower back pain and spinal disorders, than for injuries that are easier to diagnose, such as fractures, friction burns, contusions, and amputations without permanent disability. All these studies strongly suggest that higher compensation benefits lead to increased and illegitimate program utilization (Thomason 41-42).

Note again the number of assumptions that underpin all of this. At the end of the day, the evidence does no more than "strongly suggest" that there is increased and illegitimate program utilization. Nowhere in Thomason's article is any consideration given to the concept that the crisis may be located in Canada's workplaces, not its compensation system. By this point Thomason believes that he had proven that workers have been led to make fraudulent claims and to exaggerate the extent of their disability. Now, it may be the case that some workers have done both. However, it does not mean that all workers have or that a fair and equitable solution would be to reduce coverage in general and to deny coverage for certain conditions. But that is exactly what Thomason recommends. Thomason makes clear what conservative politicians were never prepared to admit—their reforms were forcing workers quite literally to shoulder more of the cost of workplace injury and illness. Fraud (which is assumed to be the real cost driver) will be fought by reducing the

value of the benefit, not through administrative measures.

"The implication," Thomason writes, "is that losses due to an accident should be shared between the insurer and insured—cost sharing discourages fraudulent claims and malingering (Thomason 42). This cost sharing could be achieved by:

- Making benefits less generous through such policies as a reduction in benefits from 90 percent to 80 percent.
- Lengthening the waiting period for benefits.
- Making it more difficult to claim for occupational disease.
- Refusing to provide compensation for occupational stress.
- Opening the door to employer access to employee medical records.
- Opening the door to privatization through self-insurance.

Virtually all of these measures were adopted by the Manitoba Government in the 1990s.

In a separate paper, economist Francois Vaillancourt argues for an increased use of experience rating in setting rates. (This is the practice of rewarding employers who low claims rates with lower WCB assessment rate.) Again, he makes this argument on the basis of economic theory, not a firm body of evidence:

> I too think that experience rating does somewhat reduce the incidence of accidents that occur and that are reported to WCBs (Vaillancourt 86).

The argument for experience rating is based on his view that it "somewhat" reduces accidents. Vaillancourt, who thought that a wage replacement rate of 80 percent was probably still too high, called for 75 percent of net rate. And he went on to call for the reintroduction of fault into the compensation system by experience rating workers as well as employers:

> Rates should target only high-risk workers, who I define as those who have a high frequency of morally hazardous accidents (situations, such as lower back pain and psychological disorders, in which cheating is relatively easy) (Vaillancourt 89).

Because some might cheat—and no one is prepared to say how many do cheat—some workers with back injuries must be forced to pay compensation assessments. The articles published by the C.D. Howe Institute are important, because they make it clear that the dominant philosophy of the period was that workers were likely to be malingerers, whiners, and outright frauds. The prime focus of the compensation board in such a situation is not rehabilitation and therapy, but to keep the number of claims under control.

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Unfunded liabilities

Employers who injure their workers when the stock market is hot pay a smaller share of the total compensation bill than employers who injure their workers during recessions.

While this paper does not take a position on the issue, an important point must be made about the fluctuations in the size of unfunded liabilities. Workers compensation systems are meant to be fully funded, as opposed to pay-as-you-go systems. (A pay-as-you-go system is one in which the premiums are set at a rate to cover the entire amount that needs to be paid out in that year.) In a fully funded system the assessments collected are intended to pay for all the obligations that the Board incurs in that year. It should be borne in mind that many of these obligations will last for decades. The argument for providing funding on this basis is that the employers who are responsible for injuries should not escape paying for those injuries. To not operate on a fully funded basis would make the employers of the future responsible for the failings of contemporary employers. This argument ignores the point, made elsewhere in this paper, that many workplace injuries and illnesses are not compensated. Should those workers succeed in winning compensation in the future, the employers of the future will have to assume the costs for past injuries. The point is not to downplay the concept of attempting to have employers pay for the cost of the harm that is inflicted on their workers—rather it is to underline the point that full funding is only partially successful in meeting this goal.

Second, the size of the unfunded liability (or WCB surplus) is also related to the assessment rate and the amount of income that the Workers Compensation Board earns through investments. The hot stock market of the late 1990's has provided the Manitoba WCB with returns that exceeded the cost of living and allowed it to cut rates. In some measure, the obligations that the board assumed in those years were funded not by the employers of the day, but by the employees of the firms in whom the WCB had invested. As the market slows down, we may very well see a return of unfunded liabilities and employer hostility to rate increases. This could lead to another round of reduction in benefits levels. The point here is that employers who injure their workers when the stock market is hot pay a smaller share of the total compensation bill than employers who injure their workers during recessions.

Changes needed

This paper argues that the Workers Compensation Act is in need of significant improvement. However, these changes will represent a move away from the sorts of reforms that been implemented in recent years. It must be changed for the following three reasons:

1. Thousands of workers whose health has been undermined by their work are not receiving any compensation.

2. Thousands of workers whose health has been undermined by their work are not receiving adequate compensation.

3. Experience rating is at odds with the principle of collective liability. By rewarding employers who use the appeal process it is reviving many of the worst elements of the old law of Employers Liability.

1. Thousands of workers whose health has been undermined by their work are not receiving any compensation.

In theory, a worker is eligible for compensation for an injury that arises out of and in the course of employment in an industry that is covered by the Workers Compensation Act. Not all Manitoba employers are covered by the Workers Compensation Act. As written, the Act specifies which industries are to be covered—all others are exempt. Exempt industries include farming, insurance, real estate, financial institutions, and education institutions. If employers so choose, they can be covered by the act and pay assessments to the compensation board. Instead of a system in which certain industries are specifically cited for inclusion under a workers compensation system scheme, it would be more appropriate to have a system under which all industries except those specifically exempted were included under workers compensation.

The Act is in need of significant improvement

Not only is compensation denied to those injured workers who work in the wrong industries, this system fails to provide adequate compensation to workers who develop occupational diseases even when they work in included industries. This occurs for a variety of reasons that will be outlined below. However, in Manitoba, the problems facing workers who develop work-related diseases are exacerbated by the fact that the current legislation specifically excludes ordinary diseases of life and "stress, other than an acute reaction to a traumatic event" from compensation. These exclusions fly in the face of the underlying principles of workers' compensation and can only be seen as an attempt to control costs. Furthermore, under the Manitoba Act, compensation is only provided if work is shown to be the dominant cause of the disease. This is a level of proof that is not required for other injuries.

Dr. Allen Kraut's research on the extent of morbidity and mortality due to occupational disease in Canada illuminates the degree to which the Canadian workers compensation systems fail to provide adequate compensation to all workers whose health is impaired due to their work. Kraut makes extensive use of what is termed the proportionate model of total disease. This model identifies the total incidence of a disease and estimates the proportion of that dis-

ease that is of occupational origin. The model employs epidemiological studies that compare morbidity and mortality rates among various occupations. As can be imagined this is a difficult and lengthy process, and in many cases there is insufficient data available to calculate the probability of a disease having an occupational origin. However, sufficient data is available to make estimates on cancer, asthma, chronic airways disease, heart disease, and carpal tunnel syndrome.

Kraut estimated the number of new occupational diseases that arose in 1989 to be between 77,900 and 112,000. In that year Canadian workers compensation boards only accepted 37,927 occupational disease claims. This suggests that between 40,000 and 74,000 Canadian workers develop occupational diseases each year for which they receive no compensation. Since Manitoba has approximately four percent of the Canadian population, it would appear that the provincial number would be between 1,600 and 2,960 a year. However, as Kraut notes in his conclusion:

> These data, however, will likely underestimate the true magnitude of the problem, as only a select number of disorders have been studied. Cases of chronic neurologic, hepatic, or renal disorders have not been included, although occupational factors can clearly contribute to their causation. (Kraut 276)

All of this underlines a point that will arise elsewhere in this paper: workers compensation board statistics represent accepted claims as opposed to all work-related health injuries. Aside from the thousands of occupational illnesses that are not accounted for in WCB statistics, it is important to recall that not all workers are covered by the compensation system and that WCB statistics only record those reported incidents for which there is a wage loss or a permanent disability.

The reasons why an industrial disease may not be compensated are numerous. First of all, the worker is not likely even to file a compensation claim for any of the following reasons:

- The medical community may not be aware of a link between the disease and work.
- The worker's physician may not be aware of the link between the disease and work.
- The physician may not take a work history.
- The worker may not be aware of the relevant information.

Having a claim recognized requires jumping further hurdles:

- Establishing the link between work exposures or practices and the disease (this puts the worker in the position of having to make a case that could require years of research and millions of dollars).
- Establishing that work was the dominant cause of the disease (often the worker may find that the WCB claims that the worker's lifestyle was the dominant cause of the illness, and the concept of fault is smuggled into the supposedly no-fault compensation system).

Many of these problems arise because workers compensation is a caused-based compensation system. That is, it provides compensation

to a disabled person based on the cause of the disability—not on the basis of any other possible criteria such as citizenship, seriousness of injury, fault (or lack thereof), or type of loss. The chief argument for such a system is that the funding for the compensation is provided by those responsible for creating the disability.

The first and most significant problem with cause-based systems is that they often raise questions that scientists are not capable of answering. For example, an honest scientist may say that it is not possible to determine the dominant cause of a disease. Second, even when science may be capable of answering a question, the necessary evidence may not be available.

The cause-based model would have fewer problems if each and every person were identical in physical attributes and characteristics and did not degenerate over time and at different rates. That is, however, not the case. Furthermore, during the course of each person's life, he or she is exposed to an innumerable number of chemicals in an innumerable number of combinations. All of these chemicals have differing impacts on health depending on the other chemicals that they interact with. Each individual responds to chemicals in different ways—and over time and exposure their responses change.

A worker is likely to experience numerous disabilities, both work- and non-work related, over the course of a working career. It is likely that a person would experience many of these disabilities simultaneously, making it extremely difficult to determine whether the person is off work predominantly because of work or non-work related disability. The compensation system does a better job of addressing work-related injuries, but it is disastrous in providing compensation for work-related illnesses and diseases. It is extraordinarily difficult to determine the cause of disease, back backs, sprains, strains, or heart attacks.

There is no reason to believe that the scientific community will resolve these problems in the near future. Indeed they are likely to get worse since the number of chemicals being introduced into the working world is increasing at a rate that outstrips our knowledge of their impact, individually and collectively. It should be borne in mind that even when a pathologist conducts an autopsy and identifies a person's cause of death, what is being identified is the one factor without which death would not have occurred—and that this is simply a medical opinion, with which other medical experts may well disagree.

Cause-based systems often raise questions that scientists are not capable of answering.

The problems that flow from the difficulties in easily fixing the cause of a disease are enormous—and significant for workers compensation. When one looks at the causes of death for individuals between the ages of 20 and 60 one discovers that for every person who dies of an accident, four die from disease. Many of these diseases are likely to be work related, and few are likely to be compensated by WCB systems.

Researchers increasingly understand that disease and illness are multifactoral in causation: that means that there are numerous causes for most illnesses. They are also recognizing that in the case of heart disease, these determinants of ill health can include the way that work is organized and paced (Shainblum, Sullivan and Frank; Frank and Maetzel). This research has significant implications for workers compensation. It suggests that while few illnesses and soft tissue injuries are purely work-related, many conditions that were once thought to be non-work related have a significant relationship to the work experience. The reforms of the 1990s in effect recoil from this understanding, seeking to restrict and narrow the grounds on which

a worker can receive compensation. The following chart shows the decline in the number of occupational disease cases compensated by the Workers Compensation Board since 1988.

Industrial disease claims compensated

1988	184
1989	225
1990	141
1991	64
1992	34
1993	63
1994	46
1995	51
1996	63
1997	61
1998	66
1999	52
2000	68

Source: *Annual Reports,* Workers Compensation Board of Manitoba

It is clear that only a fraction of those workers suffering from work-related illnesses are receiving compensation, largely because of the difficulties in determining cause of illness. Not only do cause-based systems provide better compensation to those who suffer from injuries as opposed to disease, they also are more likely to provide better compensation to men rather than women. This because men are more likely to be injured on the job, while women are more likely to experience work-related illnesses. The Quebec-based researcher Karen Messing has pointed out this has become a vicious circle that serves to under-compensate women. Researchers are often unable to get funding for research into the health hazards of certain female-dominated occupations because workers in those occupations establish few compensation claims. Rather than being a sign of the healthy nature of their work, this could well be a sign of a lack of research into the links between work and health problems. As long as there is no research, those workers will not be able to establish claims. And until they establish claims, there will be no research (Messing).

Not only do cause-based systems lead to under compensation of many classes of disability, they create uncertainty and delay, and foster an adversarial approach to the provision of compensation. This is both costly and counterproductive to rehabilitation.

There are a number of steps the WCB could take in this area. The WCB should also be mandated to establish an Industrial Diseases Panel. This panel, made up of representatives of business, labour, and the medical community, would be charged with creating and maintaining a schedule of industrial disease. The panel would develop criteria for the acceptance of claims. The panel would play a role both in compensation and prevention in that it would be linking hazardous products and practices with workplaces and diseases. The schedule established by this committee should serve as a floor, not a ceiling.

Recommendations (1)

- **All provincial workplaces should be covered by workers compensation.**
- **All occupationally related diseases should be compensable.**
- **An industrial disease panel should be established to create a schedule of industrial diseases.**

2. Thousands of workers whose health has been undermined by their work are not receiving adequate compensation.

The current system provides for an income replacement rate of 90 percent of net, which drops to 80 percent after two years. The 90 percent of net was introduced in the early 1990s to replace the old system of paying 75 percent gross income. This shift was undertaken because in certain circumstances injured workers would receive more in WCB payments than they had been receiving in take home pay. This was seen as unfair to other workers (both injured and non-injured) and as an incentive to fraud and malingering. The decision to use net pay was a sensible shift, particularly when one recalls the WCB system of paying a benefit based on gross income was introduced prior to the development of income tax or other payroll deductions. The decision to compensate at a 90 percent rate is not as defensible, while the decision to reduce benefits to 80 percent after two-years is both arbitrary and mean-spirited.

Compensation at a 90 percent rate is in keeping with the general insurance principle that argues against 100 percent insurance of any product. A 90 percent rate means that premiums are lower and the insured is required to shoulder some of the risk (and therefore is encouraged not to be careless.) Such a measure is also intended to reduce fraud. It is questionable whether this principle should be applied in the case of a social insurance program such a workers compensation.

There is no evidence that workers are more careful because they will not get full wage replacement. The level of malingering within the compensation system is not well established. The changes made to the WCB rates in the 1990s were based on the belief that a worker should not be better off on compensation than he or she is when drawing a full salary. This is a fair proposition. But fairness suggests that a worker should not be worse off—yet this is exactly what the 90 percent accomplishes.

To the degree that an injured worker is less well off than when that worker was employed, the worker is subsidizing the business community. Employers may argue that they cannot afford a system that pays 100 percent of net salary, but currently it is injured workers who are being asked to give up the 10 percent that employers are not willing to pay.

Indeed, has been argued in the past that it would be appropriate to pay benefits at 100

percent of net. This was a minority position advanced in the 1987 Manitoba Government Review of Workers Compensation. It should be noted that the 1987 commission recognized that moving to 90 percent of net would provide the WCB with a 10 percent saving. In other words, funding the benefits at 100 percent of net as opposed to 75 percent of gross would have been revenue neutral. While that review's majority position recommended a rate of 90 percent of net, it did not recommend the cut to the 80 percent rate after two years.

The growth of self-employment—which in reality is often simply a reflection in the growth of the contracting out of work—has increased the number of workers who are described as contractors when they apply for compensation benefits. The benefits that these workers are paid are based on a calculation of the percentage of their income that is meant to compensate labour costs. The workers are not compensated for other costs associated with their employment. However, many of these costs, such as car and truck payments for couriers, continue even when the worker is off on compensation. Such low labour percentages require the worker to go into considerable debt during periods of injury or to sell the assets that they require to continue to earn their living.

It is in the area of the reduction of the rates for total permanent partial disability (TPPD) that one finds some of the most serious injustices that arise from the changes made in the 1990s. Under the previous legislation when a worker was judged to be partially disabled for life, the worker would be awarded a benefit that was paid to that worker for life. This award was separate from any other workers compensation benefits that the worker might receive and continued even after the worker returned to work. While this was not a true pension, it was often referred to as a pension system. The size of this pension, which was based on what was termed the "meat chart," which was based on a table that assigned a value to each limb and was commonly referred to as the "meat chart." The payments under this system, what unionists called the butcher's bill, were criticized as being inadequate to the needs of the injured worker (Beattie, Crevar).

One of the advantages of a TPPD benefit of this sort is that it removes any disincentive to a return to work. Under this system the worker can seek out whichever job she or he is capable of and earn the rate available in that industry. Because the pension is guaranteed, the worker can participate in a WCB employment rehabilitation program with security (Ison).

Under the current system, the board makes a simple lump sum payment for permanent impairments. This award is calculated at a much lower rate than the formulas that had been used to calculate the previous TPPD awards. This means that the worker who suffers from a TPPD and returns to work, will receive no additional benefit other than the original lump sum payment. In addition, this benefit level is reduced by two percent a year for every year that a worker is over the age of 45. As one trade unionist observed, "Under the new system, the meat is on sale – it has never been cheaper." This is a discriminatory practice that should be eliminated (Beattie, Crevar).

Recommendations (2)

- **Injured workers should receive 100 percent of their net income.**
- **The pension model should be reinstated to provide benefits in the case of disability.**

3. Experience rating is at odds with the principle of collective liability. By rewarding employers who use the appeal process it is reviving many of the worst elements of the old law of Employers Liability.

Workers compensation rests on a compromise. Employers assume collective responsibility, workers give up the right to sue, and benefits are awarded without regard to fault. Each of these provisions provides advantages and disadvantages to each party. The worker whose injury is clearly due to employer negligence might well win a far greater compensation benefit for a serious injury if she or he had the right to sue his or her employer. The employer with a very low accident rate may well end up subsidizing another employer who puts production ahead of worker safety. Compromises are only reached however when all parties make sacrifices: the workers compensation system, when working properly, provides speedy benefits to injured workers at a low cost to employers. This final point is often ignored. Despite the fact that assessment rates rose during the 1980s, workers compensation is still very cheap insurance. A recent study on the cost of workers compensation concluded:

Evidence indicates workers' compensation programs in Canada, and the British Columbia program in particular, enjoy a relative cost advantage when compared to those in the United States. That is, the employers' average cost of workers' compensation, in terms of both assessments per $100 of payroll and weekly premiums after controlling for industrial composition, appears to be less in British Columbia and Ontario than it is in the average U.S. jurisdiction. This relative cost advantage was found both before and after controlling for a number of determinants of compensation costs, including benefit levels, compensation coverage, injury rates, the proportion of PPD claims, and union density. However, attempts to control for two institutional features thought to influence costs – self-insurance and open competition – reduced the Canada-U.S. differential. In fact, the differential would appear to disappear altogether for Ontario (Thomason and Burton 291).

Despite the fact that assessment rates rose during the 1980s, workers compensation is still very cheap insurance.

This was not what the researchers had expected to find. They concluded that a major implication of their work is that "the costs of workers' compensation in Canada has not im-

paired the competitiveness of Canadian firms versus their U.S. counterparts" (Thomason and Burton 292).

Despite this, over the past decade attempts have been made to move back to the nineteenth century market-based model of providing compensation by introducing experience rating.

Researchers ... concluded "the costs of workers' compensation in Canada has not impaired the competitiveness of Canadian firms versus their U.S. counterparts."

Experience rating is the term that is used to described a form of funding of workers compensation in which employers pay variable rates depending on their WCB claims records. The Workers Compensation Board of Manitoba has employed various forms of experience rating for the past decade.

The case for expanding the role that experience rating plays in workers compensation is based on the view that neither enforcement models (such as the US Occupational Safety and Health Administration) nor the joint committee model (such as the Internal Responsibility System that is employed by most Canadian jurisdictions) have been able to significantly reduce accident rates. Few would dispute that conclusion. However, many critics of those approaches argued that they failed because governments had failed to fully embrace them. The history of OSHA under Reagan and the Bushes, Senior and Junior, is a tale of understaffing, underfunding, and underenforcement. Similarly, in Canada, Robert Sass, one of the architects of the Internal Responsibility System, has emerged as one of the system's strongest critics, pointing out that as currently structured, the system does not redress the power imbalance in the workplace.

The policies of the past decade, however, have not been guided by these approaches. Instead, governments have chosen to move from regulation to market-based incentives, of which experience rating has become the most common. The Canadian economist Boris Kralj makes the argument for experience rating in a recent book on workers compensation in Canada. His arguments are worth citing in detail, since they underscore the philosophy that lies behind this approach.

> Most economists argue that the injury-tax approach, experience rating, is preferred to direct standards or control. Experience rating alters the incentives for health and safety in the desired direction, leaving the particulars of how best to achieve the optimal level of safety to employers and workers. … The most compelling reason for using workers' compensation experience rating to regulate workplace safety is that the firm is free to choose the most cost-effective means of removing the risk. (Kralj 197)

This is a return to the thinking of the nineteenth century, when the courts argued that the market would oblige employers to adopt the safest possible practices. It should be noted that while Kralj argues that expedience rating will leave the particulars of how to improve health and safety "to employers and workers," the reality is that it leaves it solely in the hands of the employer. It does not provide workers with any power or authority to control work practice or policy.

Kralj recognizes that the introduction of experience rating is a serious departure from the founding principles of workers compensation, namely pooled responsibility. He argues that pooled responsibility had meant that the more safety conscious firms were being forced to pay a portion of the compensation bill of firms with poorer safety records. This was not a new realization—the subsidization of the less safe by the more safe had been built into the system from

the outset. It was an element of the compromise on which the system is built. Experience rating ensures that firms with higher accident rates pay higher premiums. As Kralj notes this creates an incentive to both reduce accidents and to reduce claims:

An empirical linkage between experience rating and workplace safety has proved to be elusive … a number of studies have suggested that there is minimal or no evidence that experience rating has any effect on workplace safety. Generally, though empirical evidence is supportive of a positive effect on reducing injury frequency rates. (Kralj 203)

The studies that Kralj discusses in fact assess the impact of experience rating on compensation rates and benefit levels, not injury rates. The number of cases accepted and the benefit levels paid out fluctuate in response to a variety of factors, many of which can be controlled by government and need not reflect increases or decreases in overall workplace safety.

According to Kralj there are only five studies that look at the impact of experience rating on the length of disability. As he notes, the evidence is ambiguous. Three studies show a reduction in the duration while the two Canadian studies suggest "that experience rating increases claim duration." (Kralj, page 206) Kralj's own research in this area concludes that:

> Experience rating increased firm awareness and focus on controlling workers' compensation claim costs so as to reduce experience rating costs. Claims costs (and hence experience rating costs) can be reduced by claims-management procedures (e.g., claims monitoring and appeal) and accident-prevention activities. In essence, experience rating does lead to reductions in claims costs through both greater stringency in claims management and accident-prevention, although the former effect is greater than the latter. (Kralj 208)

That last point is crucial to this debate, since the labour movement has argued from the outset that experience rating leads to claims control and suppression, not increased safety. Kralj also found that experience-rated firms are more likely to initiate appeals of WCB claims than non-rated firms.

The argument against experience rating is that it is based on a fundamental confusion between accidents, injuries and illnesses, and accepted WCB claims. Experience rating is based on the latter by giving employers an incentive to reduce accepted claims. From the worker's perspective, it would be more appropriate if economic incentives existed to reduce accidents and illness. Because of its focus on claims, experience rating:

- Encourages employers to monitor and oppose the number of claims their employees file; and

- Encourages employers to appeal decision to grant their employees benefits.

The monitoring, opposing and appealing of claims has amounted to a return to the days when injured workers found themselves in conflict with their employers over their right to compensation. Then, as now, many workers simply realize that in such a conflict the cards are stacked against them.

Policies that are associated with experience rating include:

- Employer pressure on employees not to report accidents.
- Employer pressure on employees to return to work when there is no suitable work for them.
- Employer appeals of compensation claims.
- Safety programs that create peer pressure not to report accidents (often in the form of prizes to the shift or crew with the lowest accident rate).
- Employer harassment of WCB adjudicators.
- Delays in completing WCB forms (see Ison for more detail on this point).

Experience rating is not the appropriate tool for the Manitoba setting. Instead the government should mandate the Board to collect penalty assessments

These trends erode the collective liability elements of the compromise – at the same time, workers are still denied the right to sue. It would be disastrous to return to the previous tort system where workers had to go to court to win benefits. However, the current compensation system cannot retain its claim to legitimacy if only one partner to an historic social compromise is holding up its end of the bargain.

Experience rating operates on the principle that there are relatively inexpensive steps that employers can take to reduce accident, injury and illness rates. However, many employers have taken most of the economically viable steps (a very important qualification in this debate) to reduce injuries. At this point the employer can achieve a better return by investing in claims management as opposed to accident reduction. One cannot help but note that under experience rating the Hudson Bay Mining and Smelting Company, a firm whose health and safety record leaves something to be desired, received rebates on its WCB assessment. Since industrial diseases take a lengthy period of time to develop and are rarely compensated, experience rating provides no incentive to invest in the sorts of technological controls that might reduce disease rates. The increase in employer appeals of WCB awards led the Manitoba Federation of Labour to develop a special manual and training program for WCB advocates. This is clear evidence that the current system is returning to the adversarial model.

The WCB can play an important role in improving worker health and safety. But experience rating is not the appropriate tool for the Manitoba setting. Instead the Government should mandate the Board to collect penalty assessments.

Employers pay these assessments to the Workers Compensation Board when the employer does not comply with workplace health and safety laws and regulations. The assessment is levied when a health and safety inspector observes a breach of regulations, as opposed to a simple increase in accepted claims (as happens under experience rating). Penalty assessments are not levied automatically, and the assessment rates are set based on the threat presented to workers, the number of workers at risk, and the steps being taken to eliminate the hazard. The assessment can remain in place until the hazard is addressed. Unlike the current court system, penalties in this model are being levied on the risk being created, not the damage done.

Because these assessments are not fines, they are collected without any reference to the court system. The employer can appeal a penalty assessment but the appeals are heard within the compensation system, where decisions are based on a balance of probabilities not the legal system's much higher standard of proof. And while the courts are not allowed to look at such mat-

Recommendations (3)

- **The compensation act should prohibit experience rating.**
- **Penalty assessments should be introduced.**
- **Return to work programs should be regulated.**
- **Employers should be denied a right to appeal a worker's compensation claim.**
- **Employers should not receive a worker's medical records through the WCB process.**
- **In the adjudication process there should be no denial of benefits without the opportunity of a meeting between the adjudicator and the applicant.**

ters as previous convictions, the rules of procedure in the compensation system allow for examination of an employer's health and safety record. It is a speedy, low-cost and efficient system that provides enforcement officials with a flexible and effective tool.

Return to work

The area of return to work is complex and beyond the scope of this paper. It must be acknowledge that there are numerous benefits to returning a worker to his or her original workplace as quickly as possible. There is considerable therapeutic benefit from maintaining the social connections and rhythms of daily life associated with work. However, there are dangers of humiliation if there is meaningless or nonexistent light duties to be performed. And there are also numerous dangers in returning to work before an injury has been properly healed. The return to work programs that currently exist are in many ways the children of government policy, they must be evaluated and regulated by that government.

Decision making

Decision making in the workers compensation system should be based on the principle that there must be the opportunity of a face-to-face meeting between the applicant and the decision-maker before an application is rejected. Under the current system, it is possible for an adjudicator to reject a worker's application without meeting with the worker, for the same adjudicator to reconsider and then continue to reject the application, and for the review office to reject an application for review, without having

met with the worker. (It should be noted that the Board has put in place a number of case management measures to improve service in this area.) Once these processes are exhausted, the worker has the right to make an appeal to the external Appeal Commission. It is at this level, that the worker has the right to a face-to-face hearing. While new case management procedures are improving the quality of service in this area, this is an area where the applicants need policy protection.

The system would be very cumbersome and costly if every application required a person-to-person discussion before the approval of a claim. However, an injured worker deserves to have his or her story heard in person before it is rejected—in many cases such a hearing could provide additional information that might lead an adjudicator to rule in favour of the worker. There is no reason to think that every injured worker who has a legitimate claim but has been turned down by the adjudicator will automatically appeal the decision. This is particularly less likely in the case of workers who do not come from a unionized workplace. However, the Act appears to assume that there is a link between suffering and litigiousness.

The current system further discourages workers from seeking justice by allowing employers access to portions of their files if they make an appeal. The worker does have the right to review the file and limit the material to which the employer can have access. The worker must provide reasons for refusing access to this information, furthermore that request from the worker can be overruled by the WCB.

Personal medical information should be private. Workers have good and sound reasons to oppose passing such information on to their employer, particularly in the context of an appeal of a WCB decision. It is arguable that the employer has a right to access to this file during the appeal process since the employer's interests are affected by the outcome of the appeal. This is only true if experience rating is used to set WCB rates. If, as this report suggests, experience rating were eliminated, there would no just reason for providing employers with access to the worker's file.

Universal Disability Insurance

The reforms outlined above will ensure that more injured and disabled workers receive more compensation. It will also reverse the trend towards the establishment of a more adversarial system. However, because it would remain a cause-based system, certain inefficiencies and inequities would remain. In a cause-based system people who are injured or disabled as a result of their employment qualify for income replacement. People who are injured or disabled in other ways—or cannot establish that their injury is work-related—must seek support from other sources. Those injured in automobile accidents turn to Manitoba Public Insurance. Those injured due to the negligence of others turn to the courts. Those whose disabilities arise from causes that cannot be attributed to the actions of others turn to private insurance, Employment Insurance, the Canadian Pension Plan, or the provincial income security plans and this is a far from being an exhaustive list. All of these plans have differing criteria and provide different levels of benefits. The level of support and income assistance one receives is very much related to how one becomes disabled. Given that few people have any control over the manner in which they become disabled, this is in effect a lottery – a lottery in which approximately half of the victims of accidents are not eligible for any form of compensation or assistance (Ministry of Finance).

Inequity is not the only major problem with the current system. Because cause must be determined before benefits can be delivered, the system has to devote significant resources to adjudication. As noted above, at times the adjudicators are required to give firm and definitive answers to questions that cannot in fact be answered definitively. Current writing on occupational health and safety stresses the fact that injuries and illnesses are often, if not usually, multifactoral—they arise out of a complex intersection of numerous factors. Work, diet, level of activity, social class, housing, income, the environment: these are among the key determinants of each person's health. And they cannot be simply, easily or accurately untangled. Yet across Canada workers compensation systems devote hundreds of thousands of dollars to determine whether work was a cause of a disease—a question that often has little scientific meaning. And this is an efficient system compared to the court process. Negligence cases can last for years and consume vast amounts of resources. Shainblum, Sullivan and Frank conclude on this point:

> In the long run, existing models of workers' compensation will have to change. The current change appears to be in the direction of narrow constraint on coverage. Alternatives include an acceptance of broader disability coverage without regard to causation or, down the road, moving towards the technical determination of proportional compensation (Shainblum, Sullivan and Frank 88).

For over 20 years Canadian governments have recognized that there is merit to creating single comprehensive disability insurance plan. As envisioned, such a plant would replace:

- Workers' compensation.
- Actions for damages for personal injury and death, automobile accident benefits.
- Compensation for the victims of crime.
- The Employment Insurance the sickness benefit.
- The Canada Pension Plan disability and death benefits.
- Veterans' benefits.
- Benefits to persons who are temporarily or permanently disabled.

This is not an idle concept. Over the past 20 years the governments of New Zealand and the Netherlands have brought in universal accident and disability insurance programs.

The funding would be provided from a variety of sources. Employers would pay an assessment similar to the levy currently charged by workers compensation, automobile insurance would be collected in a manner similar to the current system, while additional funding could be provided through general revenues.

A national government agency could administer the program. There would be a premium charged to those operating or involved in hazardous activities. A portion of the fund would have to come as well from general revenues or from premiums that are adjusted to reflect the ability to pay.

This program would in essence cover all disabilities no matter how they were caused. In so doing it would eliminate one of the greatest inequities of the current system, the fact that the benefit level is related to the cause of the disability rather than need. The current systems have grown independently. There are people who fall between program cracks and the programs are not guided by any single overall logic. Some programs require clients to undergo vocational rehabilitation and reduce their benefits if they do not find work, other programs do not provide any benefit unless the applicant has been labelled unemployable and effectively barred from any vocational training opportunities.

A national universal comprehensive program would focus on the needs of the client, rather than determining the cause of the injury and apportioning fault. While people would be free to use private insurers to top up their coverage, the current system in which many people are overinsured and many more are underinsured would no longer exist.

No-fault does not mean no responsibility. Just as penalty assessments ought to be levied in the workers compensation system, the courts and administrative bodies can be used to hold negligent individuals accountable. However, the disabled will no longer be required to mount and win a civil prosecution before gaining compensation.

Under the proposal, an income allowance would be paid in cases of total disablement from work, whether temporary or permanent. Partial disability benefits also would be paid. There have been a number of proposals in the last 20 years outlining a national comprehensive disability program. Different models propose different limits on who is to be covered and the level at which income is to be replaced. Some suggest, for example, that short-term absences from employment simply be covered by employer sick leave provisions. Some set the wage replacement at 80 percent, while some place it at 90 percent. They also have differing recommendations as

to how the Income Tax Act should address such benefits.

These are, of course, political decisions. The Canadian labour movement, in theory, supports the concept of universal disability insurance. However, the experience of such programs in New Zealand and the Netherlands has been mixed. Conservative governments have reintroduced market-based elements and notions of fault into such programs and sought to restrict access to benefits and reduced benefit levels. The fact also remains that even in its current state the WCB benefit level is more generous than those benefits available to other disabled Canadians. This causes many in the labour movement to think twice about amalgamating workers compensation into a larger system since benefits could in fact be levelled downwards. On the other hand, most of those disabled people living on meagre benefits from Income Security, CPP, and EI, are or were workers. Many have been worn out or poisoned by their jobs but were never able to establish a WCB claim.

A move to a universal compensation would not bring to an end controversies that arise over benefit levels, rehabilitation, and re-employment. Questions would arise as to how comprehensive a comprehensive program should be, whether it is an income replacement program or an income support program. This is an important question since many of the disabled people in this country have been kept out of the workforce – they have no incomes to replace. Furthermore two people with the same disability may have differing capacities to carry out the activities of daily life and participate in the labour force. Some people with disabilities feel that society is locking them out a labour market in which they can find social fulfilment – others believe, correctly, that participation in that market has robbed them of their ability to participate in society.

An equitable system would try to ensure fairness in the treatment of:

- Earners and non earners.
- All people with disabilities no matter what the cause.
- Those with differing levels of disability.
- Those with long-term disabilities.

Those charged with administering the Workers Compensation Board of Manitoba are also aware of the inequities that exist within the current system. In the WCB's 1991 annual report, Judge Robert Kopstein, the outgoing chair of the WCB, wrote:

> It is clear to me that there are gaps in the protection provided to workers under the present concept of workers compensation. Many of those gaps could be addressed, in my opinion, through a jointly funded universal, all-cause workers compensation system which would eliminate the need, the cost and the anguish of having to prove that an injury or disease which results in disability was work-related. Preexisting conditions would not affect worker's rights to benefits. The question of allocation of costs in the program between the workers' fund and the employers' fund would be determined within the board, but the worker's entitlement to benefits due to disability arising out of an accident or disease, however caused, would be secure. With few limitations, as I envision

> it, his or her protection against the loss of employment income would depend only on proof of disability due to accident or disease. Elimination of the need to prove work-relatedness, and to negate preexisting conditions would remove the cause for delay in the processing of many claims and the rejection of some. These legal requirements create a heavy burden upon the shoulders of some workers. As well as the other benefits, all-cause coverage would reduce the costs of adjudication. (Workers Compensation Board of Manitoba Annual Report, 1991 1-2)

The system that Kopstein described could well serve as the first step to the creation of such a universal compensation system. This could be accomplished by first, as recommended above, expanding the current industries covered by the Manitoba Workers Compensation Act. The second step would be to provide twenty-four hour a day, seven-day a week coverage to all individuals covered by workers compensation. Workers who were injured while not on the job would receive the same level of WCB coverage as if they had been injured at work. This level of benefit could be funded by a premium paid by all workers. The premiums could be used to create an investment pool that could be used to support Manitoba-based economic activities. A number of issues, such as the fact that workers currently contribute to other compensation systems and would have a right to draw on benefits from those systems, would have to be addressed to ensure that the system operated in an equitable and efficient manner. These issues are not beyond the skills of the people who work for the Workers Compensation Board of Manitoba.

This would amount to true workers compensation as opposed to the current system of workplace compensation. It would provide workers with a form of 24 hour a day disability insurance at a fraction of the price they would have to pay for such insurance on the private market. It could be undertaken with minimal additional government spending and provide immeasurable benefits to Manitoba workers and the Manitoba economy. It would also provide a model for the eventual development of national disability insurance system.

Conclusion

The arguments presented in this paper suggest that the current workers compensation system in Manitoba:

- fails to provide compensation to all workers injured through employment;
- fails to provide appropriate levels of compensation;
- represents an erosion of the founding principles of compensation.

These are not minor failings—they are festering injustices. Policies that deny benefits to injured workers because they work in the wrong industry or because scientists cannot prove that work was the dominant cause of injury should be seen for what they are: heartless attempts to make the sick and injured shoulder the full cost of their work -induced illnesses. Policies that make injured workers take a 20 percent cut in income are based on the assumption that workers are responsible for 20 percent of their work-related illness. Policies that encourage employers to block and appeal claims are not in keeping with the historic compromise upon which the WCB system is based.

Steps can be taken to addresses each of these three policy issues. They should be the focus of a provincial review of workers compensation in Manitoba. Beyond these measures a fundamental national rethinking of workers compensation is required to address the problems that are inherent in a cause-based compensation system.

Governments are rightly concerned about the costs of new initiatives, particularly in the area of health care and rehabilitation. However, governments cannot ignore the growing body of evidence regarding the failure of the workers compensation system to address contemporary worker based health needs. For governments to plead poverty in this area is to force those who are amongst the poorest in our society—sick and injure workers—to shoulder the cost of work-related injury and disease.

These are not minor failings—they are festering injustices.

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Turning the Tide

Renewing workers compensation in Manitoba

Summary of recommendations

- All provincial workplaces should be covered by workers compensation.
- All occupationally related diseases should be compensable.
- An industrial disease panel should be established to create a schedule of industrial diseases.
- Injured workers should receive 100 percent of their net income.
- The pension model should be reinstated to provide benefits in the case of disability.
- The compensation act should prohibit experience rating.
- Penalty assessments should be introduced.
- Return to work programs should be regulated.
- Employers should be denied a right to appeal a worker's compensation claim.
- Employers should not receive a worker's medical records through the WCB process.
- In the adjudication process there should be no denial of benefits without the opportunity of a meeting between the adjudicator and the applicant.

Turning the Tide

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by Doug Smith

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