

Back to basics: Workers compensation in Manitoba

A brief to the Manitoba Government

Workers Compensation Review Committee

June 2004

Back to basics: Workers compensation in Manitoba

A brief to the Manitoba Government

Workers Compensation Review Committee

June 2004



CANADIAN CENTRE FOR POLICY ALTERNATIVES-MB
309-323 Portage Ave.
Winnipeg, MB • Canada R3B 2C1
ph: (204) 927-3200 fax: (204) 927-3201
ccpamb@policyalternatives.ca
www.policyalternatives.ca/mb

Back to basics: Workers compensation in Manitoba

When a worker is hired at any Canadian workplace, that worker is making a deal with the employer to sell them his or her labour power for a fixed period of time. What is not for sale, or what is not supposed to be for sale is the worker's health.

This was not always seen to be the case. At the outset of the industrial revolution, the courts ruled that workers accepted the risks that might come with work when they accepted the job. If a job were dangerous, it was reasoned, an employer would have to pay more to get workers or make the work safer. In this way, the market would over time make workplaces safer. In cases of gross negligence, workers could take their employers to court.

- For the past 90 years workers who were injured on the job have had the right to turn to provincial workers compensation systems for assistance when they are injured on the job. Workers compensation replaced the market-based approach to compensating injured workers. It has to be seen as a historic compromise. Under this compromise:
- Workers gave up the right to sue employers
- Employers agreed to have liability spread across employers as a class.

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 percent of their payroll costs to the Workers

Compensation Board (WCB) and from a WCB investment fund. Because all employers pay into the fund, the system is said to be based on the principle of collective responsibility.

The WCB compromise was significantly undermined over ten years ago when the Filmon government amended the *Workers Compensation Act*. Those changes:

- made benefits less generous through such policies as a reduction in benefits from 90 per cent to 80 per cent
- made it more difficult to claim for occupational disease
- refused to provide compensation for occupational stress

The results of these changes are not surprising.

- 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
- 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.
- The rate setting policy is at odds with the fundamental principles upon which the workers compensation is based. By rewarding employ-

ers who use the appeal process it is reviving many of the worst elements of previous system in which workplace health and safety questions were determined by market forces.

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.

The *Workers Compensation Act* should be amended to abandon the market-driven policies of the 1990s. But this 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 reforms of the 1990s

In the 1990s the Manitoba government adopted a series of amendments to the *Workers Compensation Act* that embraced an approach to compensation that works to 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 re-introducing an adversarial approach to the system. This has led to the emergence of the following problems.

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

It is important to recognize that not all Manitoba workers 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. As a result, close to one-third of Manitoba workers are not covered by workers compensation.

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 were included under workers compensation. Any exemptions must be justified.

Recommendations:

- All provincial workplaces should be covered by workers compensation.

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. 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 *Workers Compensation 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 system fails 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 disease that is of occupational origin. The model employs epidemiological studies that com-

pare morbidity and mortality rates among various occupations. As can be imagined this is a difficult and lengthy process, and in many cases there is not enough 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 per cent 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)

The reasons why an industrial disease may not be compensated are numerous. First of all, the worker is not likely to even 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
- establishing that work was the dominant cause of the disease.

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.

Recommendations:

- All occupationally-related diseases should be compensable.
- An industrial disease panel should be established to create a schedule of industrial diseases. This panel, made up of representatives of business, labour, and the medical community, would be charged with creating and maintaining a schedule of industrial diseases. The panel would develop criteria for the acceptance of claims. The panel could 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.

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

Under the Filmon government the *Workers Compensation Act* was changed so that workers were compensated at a rate of 90 percent of their net income rather than 75 percent of their gross income, as was previously the case. Furthermore, the rate dropped from 90 percent to 80 percent after two years.

There were problems with the old system – since under certain circumstances a worker could actually make more on WCB than he or she received as a take home salary. But while there was a justification for switching to a system that was based on net rather than gross income, there is no justification for partial compensation. The 1987 Manitoba Government Review of Workers Compensation recognized that moving to 90 per cent of net from 75 per cent of gross would provide the WCB with a 10 per cent saving. In other words, funding the benefits at 100 per cent of net as opposed to 75 per cent of gross would have been revenue neutral. Both the 90, and 80 per cent restrictions, are direct cuts to worker income.

There is no evidence that workers do their jobs more carefully because they will not get full wage replacement: those who call for wage reductions simply assert: “it seems likely that more generous compensation benefits have increased the incidence of fraudulent claims.” (Thomason, page 40) Nor is the level of malingering within the compensation system 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 also suggests that an injured worker should not be worse off—yet this is exactly what the 90/80

percent accomplishes.

Under the previous legislation when a worker was judged to be partially disabled for life, that worker would be awarded a benefit that was paid 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,” was often criticized as being inadequate to the needs of the injured worker.

One of the consequences of a benefit of this sort is to remove any disincentive to return to work. Under this system the worker can seek out whatever 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. (Beattie, Crevar)

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 awards. This means that the worker who suffers from a permanent disability 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 per cent a year for every year that a worker is over the age of 45.

Recommendations:

- Injured workers would receive 100 per cent of their net income
- The pension model should be reinstated to provide benefits in the case of permanent disability.

Experience rating is at odds with the principle of collective liability

“Experience rating” is the phrase used to describe 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.

Experience rating 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
- encourages employers to appeal decisions 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. (Ison)

These trends erode the collective liability elements of the workers compensation 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, market-based model.

Recommendations

- The Workers Compensation Act should prohibit experience rating.

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 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.

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 (Shainblum, Sullivan and Frank; Frank and Maetzel). 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.

For over 20 years Canadian governments have recognized that there is merit to creating a single comprehensive disability insurance plan. 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.

Funding for such a disability plan 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 public auto insurance system, while additional funding could be provided through general revenues.

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 over-insured and many more are under-insured 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 per cent, while some place it at 90 per cent. They also have differing recommendations as to how the Income Tax Act should address such benefits.

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, called for a dramatic expansion of workers compensation in Manitoba to "eliminate the need, the cost and the anguish of having to prove that an injury or disease which results in disability was work-related." (Workers Compensation Board of Manitoba Annual Report, 1991, Pages 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 also be used to support Manitoba-based economic activities.

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 will also provide a model for the eventual development of national disability insurance system.

Sources

- Aldrich, Mark. *Safety First: Technology, Labor, and Business in the Building of American Work Safety 1870-1939*. The Johns Hopkins University Press: Baltimore, 1997.
- Beatty, Harry. "Comprehensive Disability Compensation in Ontario." *Journal of Law and Social Policy*. 7 1991.
- Beekman, D. "The Dutch Experience in Disability Benefits." Caledon Institute of Social Policy. *Proceedings of the Experts' Forum on Canada Pension Plan Reform*. Ottawa, September, 1996).
- Berman, Daniel. *Death on the Job*. New York: Monthly Review Press, 1978.
- Crevar, Karl. *Some Thoughts on Universal Disability Insurance Universal disability: a variety of perspectives*. (Toronto: Industrial Disease Standards Panel, 1993.
- Cwitco, Gary. "UDI-The Case for Building a System." *Universal disability: a variety of perspectives*. Toronto: Industrial Disease Standards Panel, 1993.

- Deweese, Donald N. "Private Participation in Workers' Compensation." *Workers' Compensation: Foundations For Reform*. Morley Gunderson and Douglas Hyatt, eds. Toronto: University of Toronto Press, 2000.
- Frank, John and Andreas Maetzel. "Determining Occupational Disorder: Can This Camel Carry More Straw?" *Injury and the new world of work*. edited by Terrence Sullivan, ed. Vancouver: University of British Columbia Press, 2000.
- Government of Manitoba. *The Workers Compensation Act Legislative Review Committee*. 1987.
- Ison, T. *Compensation Systems for Injury and Disease: The Policy Choices*. Toronto: Butterworths, 1994.
- Kralj, Boris. "Occupational Health and Safety: Effectiveness of Economic and Regulatory Mechanisms." *Workers' Compensation: Foundations For Reform*, Morley Gunderson and Douglas Hyatt, eds. Toronto: University of Toronto Press, 2000.
- Kraut, Allen. MD, FRCPC. "Estimates of the extent of morbidity and mortality due to occupational disease in Canada." *American Journal of Industrial Medicine*. 25:267-278, 1994.
- Workers Compensation Board of Manitoba. *Annual Report*. 1991.
- Messing, Karen. *One-Eyed Science: Occupational Health and Women Workers*. Philadelphia, Temple University Press, 1998.
- Ostry, Aleck. "From Chainsaws to Keyboards, Injury and Industrial Disease in British Columbia." *Injury and the new world of work*. Terrence Sullivan, ed. University of British Columbia Press, 2000.
- Shainblum, Esther, Terrence Sulive and John W. Frank. "Multicausality, Non-traditional Injury and the Future of Workers' Compensation." *Workers' Compensation: Foundations For Reform*. Morley Gunderson and Douglas Hyatt, eds. Toronto: University of Toronto Press, 2000.
- Sullivan, Terry and John Frank. "Restating Disability or Disabling the State: Four Challenges" *Injury and the new world of work*. Terrence Sullivan, ed. Vancouver: University of British Columbia Press, 2000.
- Thomason, Terry, and John F. Burton, Jr. "The Cost of Workers' Compensation in Ontario and British Columbia." *Workers' Compensation: Foundations For Reform*. Morley Gunderson and Douglas Hyatt, eds. Toronto: University of Toronto Press, 2000.
- Thomason, Terry. "The Escalating Costs of Workers' Compensation." *Canada, in Chronic Stress: Workers' Compensation in the 1990s*, Terry Thomason, F. Vaillancourt, T. Bogyo and A. Stritch eds. Toronto: C.D. Howe Institute, 1996.
- Weiler, Paul. "The No-Fault Model of Workers' Compensation: Its Future Prospects." *Universal disability: a variety of perspectives*. Toronto: Industrial Disease Standards Panel, 1993.
- Vaillancourt, Francois. "The Financing and Pricing of WCBs in Canada." *Chronic Stress: Workers' Compensation in the 1990s*. Terry Thomason, F. Vaillancourt, T. Bogyo and A. Stritch eds. Toronto: C.D. Howe Institute, 1996.

