Workers' Compensation

For the 21st Century

Presentation on Behalf

of Injured Workers to the

Legislation and Policy Core Review

James F. Sayre, Staff Lawyer
Workers' Compensation Advocacy Group
c/o Community Legal Assistance Society
#800 - 1281 West Georgia Street
Vancouver, B.C. V6E 3J7
Tel: (604) 685-3425
Fax: (604) 685-7611
E-Mail: clas@vancouver.net

November 5, 2001

Presentation to the Legislation and Policy Core Review

Workers' Compensation For the 21st Century

Preface

This is our response to the October 1, 2000 invitation from Deputy Minister of Skills Development and Labour Lee Doney to participate in the consultation process of the Workers' Compensation Legislation and Policy Core Review.

Our recommendations have the support of the BC branch of the Canadian Injured Workers Alliance (CIWA), along with many other advocates for injured workers, including Legal Services Society staff, private lawyers, and representatives of many different unions.

We are also very pleased to advise that the BC Coalition of People With Disabilities has asked us to indicate that they support our recommendations, and will not be making separate submissions regarding the core review process.

The very wide range of issues raised by the terms of reference (which includes the recommendations of the Royal Commission) makes it necessary for us to give only brief answers to the questions posed. In most cases, we rely on the positions which we have previously taken or endorsed in regard to the hearings and final report of the Royal Commission on Workers' Compensation.

We have also had an opportunity to review a late draft of the position of the Workers' Advisers, and for the most part we are in agreement with them. The most significant exception concerns the appeal system, which we do not believe requires "streamlining" as has been proposed by the Royal Commission, employer groups, and the current government when it was in opposition. Even here, however, we agree with the Advisers' specific suggestions about making the internal review process as independent as possible from the Board's staff and guaranteeing personal meetings with the worker so that there would be some semblance of fairness.

The most concise previous statement of our position is contained in our letter of May 21, 1999 to the Minister of Labour regarding the recommendations of the Royal Commission. That letter endorsed and elaborated upon the position of the B.C. Federation of Labour, and both documents are contained in Appendix A.

Appendix B is a more detailed criticism of the recommendations of the Royal Commission. It was prepared to help the injured workers groups and others better understand the final

report.

Appendix C is our written submission on behalf of injured workers to the Royal Commission, which was presented during the final two weeks of hearings in April, 1998. The submission provides a more detailed explanation of our position regarding many of the issues raised in the core review. It also contains a number of proposals designed to make employers more accountable for practices that cause injuries, and to make the Board more accountable for conduct which harms injured workers.

Appendix D is the 1997 report of the Auditor General, which sets out his proposed accountability standards by which the Board should measure the success of its compensation, rehabilitation, and prevention decisions. This approach was endorsed by the Royal Commission, and nominally adopted by the Board (though we have not seen the approach put into practice in any meaningful way). In our view, these standards should be reflected in the legislation, as the goals of the Board's decisions.

Appendix E consists of *Villani v. Canada* and *Wirachowsky v. the Queen*, two very recent decisions of the Federal Court of Appeal concerning the manner of determining whether a person is unemployable, and therefore eligible for a disability pension under the Canada Pension Plan. We submit that the realistic approach set out in these decisions is also required when the Board makes decisions about a worker's employability in awarding or denying a loss of earnings pension.

Appendix F is a submission concerning vocational rehabilitation that was adopted by the Advocacy Group over ten years ago. It proposes a statutory right to rehabilitation, and a process that is triggered by a doctor's certificate. We also proposed optional assessment by an outside consultant, and an expedited appeal process. The proposal concludes with an outline of an incentive scheme to encourage all employers to accommodate injured workers by rewarding those that do with lower assessments.

These attached documents explain our position in greater depth and detail than we have been able to cover in this submission, and we ask that the appendices be considered in full as part of our response.

November 5, 2001

James Sayre, Lawyer

Introduction

The underlying theme of our submission is that the historic compromise upon which the workers' compensation was founded more than 80 years ago must be respected. Workers have bought and paid for the protection which the system provides by giving up their right to sue an employer or another worker responsible for causing their injury. In the process, they have renounced the very large general damages which courts can award for the devastating non-economic impact a serious injury has upon the victim's life.

In return for right to sue, and the right to full compensation for non-economic losses, workers are entitled to receive full compensation for the economic effects of work-related injuries and diseases, regardless of fault. And they are entitled to have their compensation administered by an informal tribunal which fairly adjudicates the many aspects of their claim even if they do not have a lawyer or other advocate or know how to carry on complicated proceedings on their own.

Any arrangement that is more than 80 years old, such as the historic compromise, may need to be readjusted somewhat to better achieve its objectives. We have made a couple such proposals to guarantee injured workers the same standard of medical care as other patients, and to make the very worst employers legally accountable for their misconduct to workers who are injured by it. A bolder approach to restoring partial access to the courts is discussed in detail in Appendix C, at pages 11-14.

In the main body of our submission, we will address the terms of reference in order, and provide our responses to the questions which it raises.

Fundamental Principles

The following fundamental principles have been adapted from the submission which we made on behalf of injured workers to the Royal Commission (Appendix C). Because of their importance, we have reproduced them here.

1. Compensating and rehabilitating injured workers is the central reason for the Board's existence. To ensure that their perspective remains uppermost when policy and other governance decisions are made, the governing body must include representation from injured workers, as well as significant representation from labour, which has steadfastly promoted their interests since the Meredith and Pineo Reports led to enactment of the earliest legislation in Canada and BC prior to 1920.

2. Injured workers are responsible, hard-working adults who have had the misfortune to suffer a work-related injury or disease. They are not children or criminals. Throughout the compensation and appeal process, workers' autonomy, dignity, and right to privacy must be respected.

3. An independent, impartial judiciary is the cornerstone of our legal system, and workers should not lose all access to the courts simply because they are injured at work. The worker should be entitled as of right to elect to sue an employer or a co-worker in specified circumstances, such as where criminal conduct has caused the injury, or where the employer is already universally insured against liability for the type of injury suffered by the worker (e.g., motor vehicle accidents or medical malpractice) .

4. In order to carry out its mandate, the Board is entitled to receive all relevant information from the worker, employer, treating doctors, and other sources. The worker should be entitled to full disclosure of that information upon request, so that he or she can participate meaningfully in the adjudication process. The Board should not disclose a worker's information to anyone else, including the employer, unless the worker consents, and the disclosure is necessary for the fair administration of the claim.

5. Injured workers should receive full compensation for their loss of earnings or earning capacity due to work-related injury, disease, or vulnerability, whether the cause of the condition is a physical accident or the accumulated physical and mental impact of work activities. Where the condition has a serious and/or permanent impact on the worker's non-employment activities, there should also be modest compensation for intangible losses.

6. An injured worker who cannot safely return to the pre-injury employment should be

entitled to receive a reasonable amount of vocational rehabilitation benefits to reestablish his or her pre-injury earning capacity in a new occupation. A worker who does not want to accept a substantially different job for the pre-injury employer or another employer in the same industry should not automatically be denied all such benefits.

7. Throughout a claim, an injured worker's condition should be assessed and treatment should be determined by the worker's treating physicians. If the Board or worker wishes to dispute the assessment of the treating physicians, any additional evidence that may be needed should be obtained by a referral to an independent specialist, not a medical adviser employed by the Board. At no point should the Board or appeal tribunals assume that the worker's attending physicians are biased.

8. Workers' compensation is a no-fault social insurance program which replaces the adversarial process of court proceedings. Allowing an employer the status of an adverse party to every claim contradicts this fundamental principle, and reintroduces unnecessary and destructive elements of the adversarial process. An employer should only be a party to a decision such as a penalty assessment which imposes direct financial consequences.

9. Disputes between an injured worker and the Board should be resolved by independent tribunals which can make any needed investigations, hold fair hearings, and reach decisions within a reasonable time. There should be a final right of appeal to the courts respecting issues with important consequences to injured workers.

10. All workers should be entitled to free legal advice and assistance with their claim. Where there is a dispute, and the issues are complex and financially important, the worker should be entitled to full representation by a lawyer or other trained advocate. Where representation is provided by a private lawyer, this cost of that representation should be borne by the Board if the worker is successful. Workers should not automatically be denied free assistance simply because they may belong to a union.

11. The Board must be generally accountable to its governing body and stakeholders, and consult with them regarding policy development and other important initiatives. Its decisions should be judged by how well they achieve their legislatively recognized goals, and there must be effective mechanisms to correct departments, officers, or the entire Board, if there is a general failure to achieve these goals. The Board must also be accountable for improper conduct toward the injured worker affected by it. Where an officer deliberately violates policy or otherwise acts improperly in administering a claim, there should be an independent complaint process with effective remedial powers.

Issues Raised By the Terms of Reference

Governance

Q. Does the current governance structure provide the required stewardship to the workers' compensation system? If not, how can effective governance be assured?

The present system was never intended to be permanent, and is particularly unacceptable now that it consists of only two administrators, both with accounting backgrounds, and no representatives of labour or injured workers.

Q. What are the components of effective governance in the context of the workers' compensation system in terms of:

Composition of the board; Criteria for selecting board members;

Selection process for board members;

Terms of appointments;

Role of the chair;

Time commitment for board members, including the Chair;

Mechanisms for ensuring board cohesiveness;

Role of stakeholders in relation to the board;

Role of stakeholders in the policy and regulation development process; and

Direct reports to the Panel of Administrators.

The original Board of Governors scheme created in 1990 had many good features. It recognized that labour and employers - the two parties to the historic compromise - must have a major role in the governance process. These representative governors were to be encouraged to negotiate with each other to resolve contentious matters, and then to use

their credibility with their own constituencies to foster acceptance of the decision. The Board of Governors model also recognized that governors with other backgrounds could provide helpful perspectives, and could also prevent deadlock on certain issues.

The reasons for the collapse of that model in 1995 are complex and controversial. Workers blame employer groups for intentionally bringing about deadlock over the ergonomic regulations in particular, and then walking out in a simulated huff when the Chair supported labour's position. Employers would explain it differently.

No model of government has ever worked effectively on every occasion and in every circumstance, including the parliamentary system. There are many countries where elected governments fall repeatedly, causing instability and confusion, and precluding effective action to deal with national problems. Yet no one suggests that such instances prove that the parliamentary system is itself a failure, and should be abandoned everywhere. So perhaps the former government was too quick to abandon the Board of Governors model of WCB governance, merely because the first attempt failed to work.

The model of governance recommended by the Federation of Labour and endorsed by the Workers' Compensation Advocacy Group in May of 1999 essentially accepted the recommendations of the Royal Commission, with slight modifications. Those recommendations would preserve most of the virtues of the original Board of Governors. The May, 1999 correspondence (Appendix A) states our position.

Q. With respect to issues of accountability and agency independence, what should be the role of the Minister of Skills Development and Labour in relation to the workers' compensation system?

In our view, the Minister's role should be limited to appointment of the Governors, and to oversight of the Board's performance. Accountability requires that the Board be held responsible for meeting reasonable standards of performance. We support the recommendations of the Auditor General in his 1997 Special Report, which measures performance by looking at the results of the decisions. (See Appendix D.) We proposed other means of making the Board more accountable in Appendix C, such as a complaint process for injured workers who feel that the Board has acted abusively or in bad faith toward them. See pages 20-21.

Where the Board has seriously failed to meet reasonable standards, and there is no effective plan to remedy this, the government must step in and protect the parties to the compensation system - workers, employers, and the public. But otherwise the Board should be free to develop and use its expertise without political interference.

Appeals

Q. Should the workers' compensation appeal system be changed? If so, what system should be put in place to ensure the fair, expeditious, efficient and effective resolution of appeals?

The only effective solution for the perceived problems at the appeal tribunals is to improve decision-making at the WCB. This is also the only real solution to the hardships caused to workers whose benefits are unfairly denied or ended. No appeal process will avoid substantial, often devastating harm to workers and their families when their remaining source of income is denied while they are still unable to reenter the workforce.

We oppose the recommendations of the Royal Commission and others for a one-level, sudden-death appeal process. And we don't see preliminary reviews by the adjudicator and a senior officer as having any benefit for workers, any more than similar processes such as managerial reviews do today.

If there were to be any change in the appeal system, it is essential that all levels of the process be made independent of the WCB. There are two reasons for this.

First, there would otherwise be an appearance of bias that would deprive the new process of any credibility with those workers who appeals must be rejected. Administrative tribunals must not only do justice, but also be seen to do justice, or the terrible reputation which now afflicts the Board and, to a lesser extent, the tribunals associated with it will continue regardless of their actual performance.

Second, any internal review system would almost certainly be biased in fact as well as appearance, as the staff and adjudicators will be hired by and answerable to the same governing body that is responsible for the rest of the WCB. Recently we have seen the "quality adjudication" process turn from a study of why the Board has performed so badly, into an excuse to establish a new bureaucracy of senior officers whose main function will be to review decisions under appeal. It would indeed be ironic if the appeal system, which is clogged because of the large number of shoddy initial decisions by WCB, were to be reformed or "streamlined" by putting that same Board, under the direction of the same cadre of senior officials, in charge of the appeal process.

We understand that the Workers' Advisers have taken a different approach to this question, and have argued for a greater degree of independence and for guarantees of

fair procedure by the internal review process. While such steps would improve the process recommended by the Royal Commission, they could not replace true independence.

Q. What are the components of an effective appeal structure in terms of:

The number of levels of appeal;
The jurisdiction of appeal body(ies);
The reporting relationship of appeal body(ies);
The relationship of appeal body(ies) to the Panel of Administrators;
The appropriate degree of independence;
Whether board policy should be binding on appeal body(ies);
The role of medical advisors in the appeal process, and specifically the role of the medical review panel process;
Mechanisms to reduce appeal volumes and to prevent/address the development of backlogs in the system;
The role and structure of internal review processes;
The role of alternative dispute resolution in the system;
Mechanisms to enhance consistency and predictability of decision-making within the system;
Standards for performance measurement and accountability for appeal bodies;
The organizational structure of any new appeal body(ies); and
The role of any representational members.

We continue to support the position taken in regard to the Royal Commission. This includes providing additional staff for the Review Board, and then requiring it to reach most decisions within a reasonable time after an appeal is commenced. We also support transferring the WCB's role as "registrar" for the Medical Review Panels to the Review Board, while preserving the independent nature of MRP process.

We do not support a change in the de novo jurisdiction of the Review Board or the Appeal Division. When the Appeal Division was first created, one of the alternatives which was rejected was to limit the Appeal Division's role to an appellate or judicial review like function -similar to the Umpire in EI appeals or the British Columbia Benefits Appeal Board in welfare appeals. There was good reason for rejecting this approach. New evidence or

changed circumstances are very common in workers' compensation cases, and an appellate approach would make it very cumbersome for the Appeal Division to consider them.

An even better reason, in our view, is that it makes no sense to hire intelligent, well-trained people to spend time reviewing a claim file, and then to tie their hands so they can't fix a wrong decision unless it's caused by a certain kind of legal rather than factual error. Everyone who deals with a claim at all levels should be focused on making the right decision, and correcting any wrong decisions.

This does not mean that there can be no changes in the way in which the tribunals now go about their business. For example, since the Appeal Division will continue to exercise a de novo function, the Review Board could expedite its decisions by conducting appeals in a much more informal, proactive manner, in such a way that workers would have less need to wait until they can receive representation. This would mean more use of one-person panels (which is already becoming the norm), taking more initiative to obtain any missing evidence, and taking responsibility to identify errors by the Board even if the appellant hasn't been able to point them out. Personal contact between the panel and the worker should be required, but it could normally resemble a meeting more than a hearing. Overall, the Review Board's procedure could be an greater embodiment of the inquiry system on which workers' compensation has always been theoretically based.

This streamlining of Review Board procedures would also reduce the delay in completing the decision. Generally, findings should be short and direct, with the outcome being decided immediately after the hearing and the written decision drafted and mailed within a week or two. A legislated deadline such as the 90 days required of the Appeal Division should be achievable, unless the worker needs more time or wants to await a related decision by the Board so that all appeals can be heard together.

Such an informal approach can only work if the system still provides a second level of appeal for cases where evidence or issues may have been overlooked or imperfectly resolved. In a sudden death system, every worker is going to insist on waiting for full legal advice and if possible representation, placing additional strain on the advocacy community and defeating any attempt to speed up the process.

While the initiation and preparation of Medical Review Panels should be integrated into the new appeal structure, the Panels must not become mere advisors to the other tribunals. The role of the worker's doctor in assisting with the WCB claim has been an essential part of the system since it was created, so much so that s. 56 makes it an offence for a doctor to refuse to provide such assistance. It therefore makes sense that the worker, together with the attending physician, should have to right to identify a crucial

medical issue in dispute, and to require that it be resolved by a medically expert tribunal.

The other and more fundamental problem with the existing Medical Review Panel appeals is that a Panel usually can't resolve a worker's entire dispute, since it can't rule on non-medical issues such as the amount of benefits, or otherwise deal with the implementation of its own certificates. If the worker does "win" the appeal, the ordeal may just be beginning, as the Board's interpretation will often lead the worker into a new cycle of appeals.

We therefore propose that when a Medical Review Panel issues its certificate, the implementation be referred first to the Review Board (or Appeal Division, if the appeal is from a Review Board decision). That tribunal should be authorized to determine the amount of benefits (or the basis for calculating them) itself, or to refer the matter to the Board, while retaining the right to intervene if the Board's decision disputed.

For similar reasons, we agree with the Royal Commission that a tribunal should have jurisdiction over the implementation of its decisions. Simply giving the Review Board and Appeal Division the power to determine implementation should deter the Board from trying to avoid the consequences of a successful appeal. The power would not have to be exercised in most cases.

Q. Should there be a power of reconsideration and, if so, should there be constraints placed on this power (i.e. similar to that provided under the Labour Relations Code)?

This question is addressed below under the heading of "finality" below.

Q. With respect to compensation claims, if there is new evidence that is of a substantial and material nature, should it be considered by the first level of Board adjudication before it may be considered by an appeal body?

No, this should not be a requirement. There is no harm in allowing an appeal tribunal to send evidence back for review, but only if the worker requests it, or if it appears to the tribunal that the new evidence should inevitably lead to a change in the decision. New evidence on appeal is a normal feature of workers' compensation claims. Requiring that all such evidence be returned to WCB for reconsideration, where it could sit for weeks before anyone has time to review it, would greatly prolong the appeal process.

Q. If a new appeal process is recommended, how should transitional issues be addressed? What is a reasonable time frame within which to operationalize a new appellate structure and process?

The transition should not be rushed. It's much more important to get the new system set up and staffed well than to do it quickly. In any event, all pending appeals must be decided by the tribunal that presently has jurisdiction, and no worker currently in the appeal system should lose an existing right of appeal due to the changes. This means that sufficient staff must be retained at the Review Board and Appeal Division to complete all the pending cases.

Q. Should estates of deceased workers have standing on appeal?

Yes. The issue in an appeal is almost always whether the worker, while alive, was denied benefits that should have been payable. Such benefits would have added to the estate, so the executor or personal representative should be entitled pursue the appeal for the estate's benefits. WCB should not be permitted to profit from outlasting a worker, or even (in the most extreme cases) driving a worker to suicide or otherwise hastening his death.

Scope & Coverage

Q. Should the Act continue to provide "universal coverage" or should the scope of the coverage revert to the "exclusionary coverage" provided prior to the enactment of Bill 63 in 1994, or some other variation?

Coverage should be universal except for specified exclusions, as it has been since enactment of Bill 63. The public complaints by some injured workers about Bill 63 is not really about the scope of coverage - whether workers in the newly insured industries, such as doctor's office staff, should be insured against work injuries. Instead, the complaints concern the irrational extension of the bar to lawsuits which indirectly resulted from Bill 63, as exemplified by the Kovach case. The solution is not to deny coverage to medical receptionists, but to enact a specific provision like the one in Quebec which restores the right of an injured worker to sue for damages resulting from medical negligence in the treatment of the work injury.

Pensions

Q. How should workers who are left with a permanent residual disability as a result of an occupational injury or disease be compensated?

The present legislation and policy regarding pensions has existed for many years. It was enacted and continued without change by governments representing numerous political parties, it has enjoyed the support of all stakeholders. The system isn't broken, so it needn't and shouldn't be "fixed" by making ill-considered structural changes. The perceived problems, such as the totally unacceptable delays in reaching decisions, are part of the Board's general failures in service delivery, not a reason to change the concepts of compensation.

Q. Should the current pension system be retained, or should the approach currently used in other provinces be adopted? Specifically, should the Act provide for two separate types of pension awards: a lump sum for the non-monetary effects of a permanent impairment, and a pension to age 65 if there is an actual loss of earnings? If such a system is adopted, what type of benefits should be paid after age 65?

No - such a scheme would be a complete violation of the historic compromise, as it would deny seriously disabled workers any meaningful compensation merely because they are able to return to work for a time without a provable loss of earnings. The commission proposed that non-economic awards range from $35,000 maximum for workers 65 or older, to $85,000 for workers 15 and younger. Only totally disabled workers would receive the maximums. Thus a 40 year old worker who loses an eye (a 16% disability) would receive only 16% of $60,000 (the maximum for his age), or $9,600. A 50 year old worker who loses a leg (a 50% disability) would receive 50% of $50,000 (the maximum for his age), or $25,000. If both workers managed to return to their jobs, they would receive no pension benefits. Such a change would be utterly unacceptable to workers in BC, as it was in Ontario, where riots occurred after it was introduced.

The purpose of functional pensions is explained in s. 23(1) itself:

"*Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable*

during the lifetime of the worker or in another manner the board determines."

I.e., the legislation itself recognizes that a significant disability has an impact on a worker's earnings and future earning capacity, either current or potential. A worker who has lost a leg may still be able to carry on with an office job, as long as the employer (with encouragement from the Board, if necessary) provides whatever accommodation may be needed. But the loss of a leg will immediately foreclose many opportunities for advancement or alternative employment which the worker would have had but for the injury. Should the employer go out of business, or the worker have to move for family or other reasons, the amputation may have a very serious impact on the worker's ability to find a suitable new job.

It would be not only difficult, but impossible to measure these potential and actual impacts accurately as the worker life progresses, and more and more unrelated medical and other developments occur in the worker's life. A permanent disability changes everything that happens afterward, but changing the worker's physical capacity and therefore the range of choices the worker can even consider.

The functional impairment system of compensation recognizes this fact, and provides a moderate and consistent award based on the physical (or, in rare cases, psychological) disability faced by the worker. We submit that this approach is far preferable to requiring each permanently disabled worker to confide in the Board throughout the major events of his or her future life, so that new decision can be made (and in many cases, appealed) about an actual loss of earnings whenever the worker becomes unemployed and the injury affects his or her ability to find a new job.

The need to revisit the loss of earnings issue repeatedly during the worker's life would thus cause serious administrative problems for the WCB and the appeal tribunals. The decisions would become more intrusive and complicated as more time passes, guaranteeing frequent disputes and new cycles of appeals.

In addition, the amount of the non-economic award itself would be more contentious than a functional pension is under s. 23(1). The Royal Commission proposed that the award be based on the worker's age, plus a functional impairment type determination of the degree of disability. General damage awards by the courts show, however, that subjective factors are highly important assessing the non-economic impact of an injury on the plaintiff. Any attempt to impose a meat-chart approach to compensation for pain and suffering, etc., would be extremely offensive, and bring the workers' compensation system into further disrepute. The Board will therefore have to attempt to gauge the actual impact of the injury on the worker's pain, ability to enjoy recreational activities, or other non-economic factors, it would have to create entirely new policies on how to determine these matters, and the

appeal tribunals would have wrestle with the interpretation of the new provisions and evolving policies. Policy and factual disputes would occur in numerous cases. If the government wants to streamline and speed up the workers' compensation process, changing the underlying principles of the pension system is the wrong way to go about it.

Q. How should employability be assessed for the purposes of a loss of earnings pension? To what extent should non-compensable factors be considered when assessing employability?

We oppose any change that would increase the use of deeming beyond the minimum required by circumstances, such as circumstances where it is impossible to provide the worker with effective rehabilitation leading to an actual job, or where the worker has made a deliberate choice not to pursue reemployment. Examples of the former would be a pension decision resulting from a reconsideration of a much earlier decision, or an appeal decided in the worker's favour after a lengthy delay. Examples of the latter would include a worker who chooses to "retire" rather than undertake a new and different occupation, or a worker who decides to pursue a college degree, using his or her own resources as well as the value of the rehabilitation the Board concedes it would have paid to restore the pre-injury earnings.

Employability should be determined in terms of real world jobs and opportunities in the community where the claimant lives, taking into account his or her age, education, language skills, and other "non-compensable" factors. See Appendix E - the recent decisions of the Federal Court of Appeal in *Villani v. Canada* and *Wirachowsky v. the Queen*. The Court also commented in *Wirachowsky* that simply saying the person can perform a vague category of job, such as "semi-sedentary" (or "minimum wage", a favourite refuge of the Board), is not sufficient.

Vocational Rehabilitation

Q. Should the objective of vocational rehabilitation be employment or employability?

Both - the Board should be allowed to settle for training (without assistance in finding work) only if the worker freely chooses an ambitious educational program for which the Board is legitimately only partly responsible - such as entering college. Otherwise, the Board's assistance should continue until actual suitable and available work is found for the worker.

Q. To what extent should the WCB provide vocational rehabilitation to injured workers? What, if any should be the limits to the WCB's discretion in this regard?

At a minimum, every worker should be entitled to vocational rehabilitation to restore the pre-injury earning capacity, to the extent that this is reasonably practical. See Appendix C for more discussion, and Appendix F for a detailed proposal that would make this a right, not a matter of discretion.

Q. Should there be a statutorily mandated duty upon employers to accommodate injured workers? If so, should the nature of the duty vary depending upon the size of the employer and/or industry?

Yes, but not limited to two years and large employers as the RC proposed. Instead, WCB should have the authority to enforce the duty to accommodate in human rights legislation, in respect to the accident employer.

The Board should also consider implementing an incentive scheme such as that proposed in Appendix F, which would reward any insured employer who accommodates an injured worker, and would reimburse the employer in some cases for accommodation costs.

Q. Should there be a statutory duty placed on workers to take all reasonable steps to mitigate any losses and return to work?

No. Workers are already penalized for not accepting suitable and available jobs. The Board can decide that the worker is able to return to work, and reduce or terminate benefits accordingly. The real abuse is the frequency with which this happens despite medical evidence from the worker's own doctors that he or she is not capable of working.

Benefit Rate and Amount

Q. What changes, if any, should be made to the method of calculating a worker's average earnings for the purposes of Section 33 of the Act?

In Appendix C, at pages 23-24, we listed a number of needed changes. These include the method of dealing with EI benefits and periods of unemployment, which is highly unfair to workers who happen to have been unemployed and collecting EI during their average earnings calculation period.

Another very important change is to include employment benefits such as health plans, group insurance, pension plans, etc., in determining the wage rate.

Another important s. 33 issue is the cap on insured earnings. As argued at p. 22 of Appendix C, the cap is a serious violation of the principle that workers should be compensated for their full loss of earnings, and should be removed.

Q. When, if at all, should benefits from other government agencies, employment-related benefits, and private insurance plans be stacked and when, if at all, should these benefits be integrated with workers' compensation benefits?

Benefits for which the worker has fully or partially paid, such as CPP or private insurance, should never be deducted from WCB benefits. Many government benefits, such as welfare and E.I. contain their own rules which makes WCB the 'first payer'. Trying to reverse this rule for BC workers would initiate a war of jurisdiction with the federal government, and would effectively deprive BC workers of the CPP benefits for which they have paid, while similar injured workers in other provinces still receive such benefits.

Q. Should the compensation rate be changed to a rate based on percentage of net earnings? Should the rate of compensation remain the same throughout the entire period of short term disability?

No, for reasons given in Appendix C, at p. 25, using net earnings would add to the Board's administrative burden by requiring it to make more complicated calculations, and by requiring it to reconsider the net figure at various times during the worker's life when events occur that would change the worker's taxation rate or deductions.

If, despite these concerns, net earnings are to be use, they must take into account all group benefits, etc., and the benefit rate should be 100% of net. Anything less violates the fundamental principle that workers should receive compensation for their actual loss of

earnings due to the injury.

Q. Should the way in which benefit payments are indexed be changed?

No, the present system is a practical and reasonable way to ensure that benefits keep pace with inflation. There is no reason to change a system that works.

Q. With due regard to the experience of other Canadian jurisdictions, should there be a waiting period for eligibility for workers' compensation during which the employer is obliged to maintain the worker on payroll? If so, should the employer be reimbursed by the system when the claim is accepted?

There is no compelling reason to institute such a waiting period, and it would have several undesirable effects. Workers should not be forced to pursue employment standards claims or grievances to get a couple of days pay from employers who refuse to comply voluntarily. Any such scheme would therefore have to guarantee that the Board will pay the worker if the employer does not, even in cases where the employer asserts that the worker's claim is unjustified, or that the job would have ended anyway (as in the case of casual workers).

A waiting period would encourage employers to oppose valid claims, if they would then be permitted to recover the wages from the worker on the basis that the injury was personal, or didn't occur at all. To avoid this, workers would have to appeal all such cases, no matter how minor the injury or brief the time off work. Thus, the proposal would add a new adversarial element to the workers' compensation system that would benefit no one, and further add to the Board's administrative work. Employers who pay the first few days of a worker's claim should be reimbursed, to lessen somewhat the adversarial impact.

Q. Should there be time limits on the ability to obtain reconsideration of past decisions with respect to compensation, occupational health and safety, employer assessment or classification matters? If so, what should these limitations be?

First, this question combines too many different types of decisions, as well as several distinct bases for reconsideration. I'll deal first with compensation issues:

Reconsiderations can be based on new evidence as to past events, or changes in the worker's circumstances.

It would certainly be unacceptable to prevent a worker whose condition has become worse from seeking additional benefits.

It would also be unacceptable to deny reconsideration of other changed circumstances, such as the worker's earning capacity. If a loss of earnings pension has been denied because the accident employer accommodates the worker at considerable expense, and the employer then goes out of business, it must be possible to recalculate the loss of earnings based on the suitable and available jobs that still exist for the worker.

Reconsideration based on new evidence as to past entitlement may seem less clear, but we believe that it should also be allowed without time limits. Under present policy, such applications only require that the Board consider the new evidence. If it decides that the evidence doesn't justify "rehearing and reconsidering" the original decision per s. 96(2), there is no right of appeal. That is a sufficient protection against endless cycles of applications, and it provides a crucial protection for workers who often had no representation when the initial decision was made, and therefore failed to present an adequate case.

Reconsideration based on an allegation that the original decision constituted an error of law or jurisdiction must be allowed, unless the outcome would inevitably be the same. In such cases there was no lawful initial decision to begin with.

Reconsideration of the remaining matters - OHS decisions, assessments, and classifications - raise entirely different issues. There should perhaps be a limited right of employers to challenge decisions that have a major financial impact (classification matters, for example), or where there appears to have been a manifest error by the Board.

Occupational Disease

See Appendix C, pages 54-55 for further discussion of these issues.

Q. Should the WCB continue to cover occupational diseases for compensation purposes, and if so how should they be addressed?

Absolutely! The very fact that this question has been posed is frightening...

Q. Should there be a mechanism for assessing and providing proportional entitlement for occupational injury and disease?

The present rules seem reasonable, if they're applied fairly. Why change them? The crucial principles are that the "thin-skull" rule must continue to apply to injured workers, and that proportionate entitlement must only apply where there was an actual disabling disease prior to the disability caused by occupational exposure or activity. For more discussion of proportionate entitlement generally, please see Appendix C, p. 44.

Q. Should the current economic test remain for occupational diseases

No, the language of s. 6(1) should be changed so that functional pension benefits can commence even if the disease doesn't disable the worker until after he or she has left the workforce.

Q. How should applications for occupational diseases with long latency periods be dealt with under the Act?

Benefits should be payable on a functional basis at a rate determined by the worker's average earnings and earning capacity when the exposure or activity that caused the disease took place. Benefits should commence as of the date when the condition becomes disabling, whether or not the worker is retired from the work force at that time. If the worker is still in the work force, loss of earnings benefits should be payable for any period when the loss of earnings due to the occupational disease exceeds the functional award.

Q. How should the condition of chronic stress be dealt with under the Act?

Chronic Stress is a misnomer. Psychological disabilities such as anxiety conditions,

depression, etc., should be compensable on the same basis as other disabilities - is they are work-related, and if they require medical treatment and/or affect the worker's earnings. The policy should avoid a generic "chronic stress" label, which suggests that such disabled workers are simply tired and overworked, and need a vacation.

Q. How should the condition of chronic pain be dealt with under the Act?

Like chronic stress, chronic pain is a misnomer. In the Nova Scotia legislation currently under constitutional challenge in the *Martin and Laseur* appeals to the Supreme Court of Canada, the regulations define chronic pain essentially by comparing the worker's pain to some arbitrary average that the Board expects workers to suffer from that type of injury. The definition imposes a "cookie cutter" approach to benefits, and ignores the difference between pain which may be psychologically based, and pain which results from unusual vulnerability of the individual worker, or from an undiagnosed condition or complication.

Workers' compensation is about disabilities that affect a person's ability to work. Clearly chronic pain does this, as do back injuries and many other types of well-recognized conditions. There is no justification for allowing the Board to limit or reduce or deny benefits simply by labeling a condition "chronic pain".

Funding

We will begin with a general but crucial comment. Experience rating is misguided as presently practiced, and it poisons the system. It does this by penalizing innocent employers for every work injury, thus encouraging them to oppose valid claims and to seek to minimize benefits. While some employers may be persuaded by the cost of a claim to cooperate with return to work initiatives (which is desirable), other employers may initiate or resist appeals and otherwise act engage in undesirable conduct to try to avoid the experience rating hit.

By tying experience rating to the cause of the injury, most of these harmful effects disappear, and new benefits arise. Employers would be less likely to resist claims where they are truly at fault, and when they do get involved, their focus will usually be on their responsibility for causing the injury. The inquiry into cause wouldn't affect the worker's benefits, but instead would focus on how the injury could have been avoided.

Please see Appendix C, pages 28-31 for a more complete discussion.

Q. Are the current relief of cost provisions contained in the Act and in Board policy meeting their intended objectives? Are these objectives still valid? Should the relief of cost provisions be continued or should alternative mechanisms be implemented? If so, what mechanisms and why?

Section 39(1)(e) relief applications have mainly provided a source of income for "consultants" who have generated disputes between employers and the Board. Inevitably, it's large employers who have the knowledge and volume of claims to use such services, and the result of the process is therefore to skew the costs of the system unfairly in the direction of small employers. See also Appendix C, page 32.

Powers to combat fraud

Q. Should the WCB have additional powers to combat fraud within the system? If so, what should these powers be?

No - there are already ample provisions in the *Act* and the *Criminal Code* to deal with actual fraud, by workers, employers, or WCB employees and suppliers. Additional "powers" is a code word for reduced standards of proof and/or liability, or reduced rights of privacy for injured workers. None of these changes are acceptable in terms of civil liberties and human rights, nor are they needed to combat genuine criminal or civil fraud. We heard recently about one case where a worker was sued by the Board for fraud on the same day his benefits were terminated, allegedly because he was considered to be "exaggerating" his disability. This is an indication that the Board's present powers are too broad.

Whatever anti-fraud program the Board has must be applied evenly to workers and employers. If a workers are subject to criminal charges for claiming an injury which didn't occur, or which happened off the job, employers should be charged or sued as well for providing false information to the Board in opposing a worker's claim or appeal. What's sauce for the goose is sauce for the gander, or should be.

Q. Do the current provisions of the Act ensure appropriate entitlement and adequate

benefits for survivors following the death of a worker? What, if any, changes should be made to the Act in this regard?

No, the current provisions are not satisfactory. We agree with the position of the Worker' Advisers. That position adopts many of the views of Survivors for Change, and in general supports the recommendations of the Royal Commission, with a couple of notable exceptions. In particular, we agree with the Workers' Advisers that CPP benefits should not be deducted from fatality benefits under the Act, any more than CPP disability benefits should be deducted from injured workers' own benefits.

Occupational Health and Safety and Regulatory Review

Q. Identify any overlap or duplication of regulations that can be immediately repealed without negative consequences for occupational health and safety.

Q. Do the occupational health and safety requirements administered by the WCB provide an appropriate balance of performance and prescriptive powers?

Q. Provide a plan for the effective review and reduction of health and safety regulations that is consistent with ensuring an appropriate balance between performance and prescriptive regulations without jeopardizing the health and safety of workers.

Q. How should the specific needs of large and small employers be addressed in the development and application of occupational health and safety regulations?

Q. To what extent can these needs be addressed through technological solutions and/or amendments to the Occupational Health and Safety Regulation?

Q. Identify and address issues relating to occupational health and safety arising out of the Royal Commission Reports and the subsequent enactment of Bill 14.

Our organization focuses primarily on claims issues, although many of our individual members participate in their union's OHS committees. In general, it is our impression that the revised regulatory system created by Bill 14 is working reasonably well. The system was enacted following extensive hearings, and an additional multi-party consultation process after the Commission's first report was released. The regulatory process itself also requires extensive consultation. We can see no reason to change the process at this

point.

No one wants unnecessary or duplicate regulations. If there are such anomalies, the existing process for reviewing and revising OHS regulations can address them.

Role Clarification

Q. Should the authority to amend Schedule B of the Act (the presumptive schedule of occupational diseases) and to establish regulations of general application with respect to occupational diseases continue to reside with the WCB?

Yes. The Board is the only institution with the expertise, experience, and political independence to make such decisions.

Q. What role should the Office of the Workers and Employers Advisors play in the workers' compensation system generally, and the review and appeal process in particular?

Workers' Advisers are currently the major source of advice and representation for non-union workers. They must be given the staff and other resources to perform this crucial role adequately. Simply handing out pamphlets, and giving workers with serious injuries an interview to advise them on self-representation just isn't good enough. The need for actual representation would become even more crucial if the appeal system is reduced to a single, sudden-death process.

There are alternative means of delivering these services that would supplement the efforts of the Workers' Advisers. The Legal Services Society, through its branch offices, community law offices, and native community law offices, has lawyers and paralegal counsellors throughout BC. LSS can only be significant resource, however, if it has the staff needed to address other major areas of law including criminal and family legal aid administration, and other areas of poverty law such as welfare, disability, housing, employment standards, etc.

Q. What role, if any, should the government play in the establishment, review and updating of occupational health and safety regulations? What is the appropriate role for WCB?

WCB is the only institution with the expertise, experience, and political independence to make such decisions. The authority of the Minister under s. 229 of the *Act* should only be exercised in exceptional circumstances, such as a serious threat to workers' health or safety which the Board fails to address. Otherwise, the Board should be allowed to do its job.

Workers' Compensation

For the 21st Century

Appendix A

May, 1999 Submission to the Minister of Labour regarding the Recommendations of the Royal Comission on Workers' Compensation in British Columbia

Workers' Compensation Advocacy Group

c/o ***Community Legal Assistance Society***

#800 - 1281 West Georgia Street
Vancouver, B.C. V6E 3Y2

Please direct your reply to:
James Sayre

Tel: (604)685-3425
Fax: (604)685-7611
E-Mail: clas@vancouver.net

May 21, 1999

Honourable Dale Lovick
Ministry of Labour
Parliament Building
Victoria, British Columbia
V8W 9E2

By Mail & Fax

Honourable Minister:

Re: Report of the Royal Commission on Worker's Compensation

Since our letter of March 3, 1999, we have had an opportunity to review the response of the Federation of Labour to the Royal Commission's report. Subject to the comments below, we agree with the Federation's position, especially the concern they have expressed about the damage which implementing the Royal Commission's recommendations would do to the rights of injured workers.

We concur with the introductory comments, and the observations under the heading "General Issues" in the Federation's paper. We also agree that no legislation should be passed in the current session, and that a great deal of additional study should be done before any legislation is enacted.

- **Further Consultation and Cost Analysis**

We do not entirely agree with the Federation's comments regarding further consultation and cost analysis. In particular, we believe that a cost analysis of recommendations, such as the transition to 90% of net benefits, the deduction of C.P.P. benefits, and the substitution of non-economic loss lump sum payments for functional pensions, would collectively cost injured workers hundreds of millions of dollars. The Royal Commission does not appear to have done such a calculation (or if it did, evidently did not want to share the results with the public). We think that a cost analysis would demonstrate just how unfair the recommendations would be to injured workers, and should be undertaken if any consideration is to be given to implementing these disastrous recommendations. All that being said, we also agree with the Federation's final comment under this heading, which is that cost effectiveness per se is not a valid measure of appropriateness of changes to the Workers' Compensation system.

- **We fully agree with the Federation's list of recommendations that must not proceed**

(immediately or otherwise).

- **Governors**

We agree with the Federation that the recommendations regarding governance are generally acceptable, with the caveats mentioned in their position paper. We also agree that a one year trial of the new government's model makes little sense; if it is to be instituted, it should be done on a permanent basis.

- **Mandate of the Governors**

We completely agree with the Federation's statement under the heading, "Looking Beyond a Constituency", that the focus of the Workers' Compensation system must be to protect workers from work injuries, and compensate those who are injured. If "Looking Beyond a Constituency Group" means focusing on this core purpose of the legislation, rather than the narrow interests of the employer or union group from which the Governor has been chosen, we would support such a broad focus.

- **Appeals**

For the most part, we strongly support the position of the Federation concerning the appeal system. We do have some concern about the change included under heading "b" that the review board be restructured to include the medical review panels. Appeals to medical review panels have long been a vital tool of worker advocates, and have often corrected wrong decisions made not only by W.C.B. officers, but also by the review board and the appeal division. Making the medical review panel an adjunct of the review board process would, in our view, seriously detract from the right of the injured workers for a fair and equitable appeal system. That being said, we recall that the 1987 Systems Study done by the Ombudsman of the day, Stephen Owen, recommended that the review board rather than the W.C.B. act as the "registry" for medical review panels. That would add to the appearance of independence of the medical review panels.

- **Non-economic Loss Awards v. Functional Pensions**

The Federation rightly points out that replacing functional pensions with non-economic loss lump sum awards, as recommended by the Royal Commission, would cost injured workers millions of dollars per year in benefits. The recommendation is also blatantly discriminatory against older workers, resulting in ridiculously low compensation for serious disabilities simply because the worker is close to the age of 65 when injured. As we recall, such a scheme was introduced in Ontario some years ago, and resulted in riots by injured workers on the steps of the Ontario legislature. We are at a loss to understand why the Royal Commission would recommend that B.C. follow such a disastrous precedent.

- **Minimum and Maximum Rates of Compensation**

We agree with the Federation that every worker, whatever their past employment history, should receive compensation for a work injury based on a wage rate that is at least equal to the minimum wage. We also strongly support the position that there should be no maximum rate of compensation, especially if the current immunity of employers and co-workers to law suits by injured workers is to remain in effect. The consequence of having a maximum rate is that even

if the injury is completely the fault of the employer the worker receives no compensation from W.C.B. or elsewhere for earnings above the maximum.

- **Net v. Gross Benefits**

We fully support the Federation's position that any transition to net benefits must provide full compensation for the worker's losses. If calculated on a net basis, benefits should be paid at 100% of net rather than 90% as recommended. We pointed out to the Royal Commission (without success) that a fair scheme of net benefits at whatever rate would require that the board periodically review the worker's circumstances that would affect the percentage of income tax which the worker would have to pay. For example, a worker injured in his early twenties when he is single would be taxed at a relatively high rate, resulting in a lower net benefit rate than a worker of exactly the same age who already has a family. If the first worker were later to marry and start a family, it would be highly unfair to maintain his compensation at the single worker rate simply because he was not married at the time of injury. The employer would have paid the same assessment for both workers, and the benefits should be the same. Calculation of benefits on a gross basis has many practical advantages, administratively and in terms of equity, which the Commission appears to have overlooked.

- **C.P.P. Benefits**

We agree with the Federation that the recommendation to deduct C.P.P. benefits from Workers' Compensation Benefits would be a great injustice to injured workers. As pointed out, workers pay for C.P.P. benefits through their contributions, which they are required to make by law. In fact, C.P.P. can be thought of as a kind of statutory disability insurance scheme, as well as a retirement and life insurance scheme. In most cases, there is no over-compensation for workers receiving both types of benefits, because of the limited nature of C.P.P. benefits and the deficiencies in the way that Workers' Compensation determines wage rates, etc. Even if there were an overlap in isolated cases, Workers' Compensation should continue to be the primary payer, since the work injury is the reason for the worker's disability.

- **Compensation for "Stress"**

The very term "stress" is a misnomer. We do not know any advocate who believes that workers should receive compensation simply because they are exhausted or need a rest or vacation. The claims (universally rejected by W.C.B.) which are referred to as "stress" are actually claims for diagnosed psychological disabilities such as anxiety syndromes, clinical depression, etc. These are conditions which arise partly or entirely out of and in the course of the worker's employment, and in principle should be compensated on the same basis as a back injury, repetitive strain injury, or industrial disease. We agree with the Federation that the Commission's recommendations would still result in unequal and unfair compensation for workers suffering from such psychological disabilities caused by their work.

- **Re-employment of Injured Workers**

We generally agree with Federation's comments concerning the limits and inadequacies of the Commission's recommendations. We strongly support the suggestion that a much more effective way to encourage the re-employment of injured workers would be for W.C.B. to be given the authority to directly enforce the duty to accommodate which is part of human rights law.

- **Fatal Benefits**

Our group strongly supports the recommendations of the Royal Commission to improve benefits for the dependants of workers killed on the job. While the number of such workers is relatively small compared to the thousands who suffer serious injuries each year, the fact that these workers have literally lost their lives requires that the Board make the greatest effort to provide full and fair compensation to their dependants. We accept the viewpoint of Survivors for Change, and other organizations representing Workman's Compensation survivors, that the Royal Commission's recommendations would improve survivor's benefits for all age groups and categories of survivors. On that basis, we recommend that the government implement these recommendations at the earliest legislative opportunity. It should be noted that the issue of survivor's benefits was to be dealt with in phase one of the Royal Commission's process, along with the prevention of injuries. The prevention recommendations have been implemented in Bill 14, and it is therefore consistent to implement the fatal benefits recommendations as well, despite the fact that they were not released until the final report was issued.

- **Invitation to Future Meeting**

In our previous letter, we invited you to meet with our group so that we could discuss our views in greater detail. That invitation remains open, and we are very hopeful that such a meeting can take place within the next few months. If a lengthy delay is to take place, we would like to meet with your Deputy Minister, and with the Chair of the Panel of Administrators, Don Cott, as soon as possible, so that your government can take our views into account in deciding how to respond to the Royal Commission's recommendations.

Once again, we look forward to your response.

Yours very truly,

James F. Sayre
Lawyer

JFS:se

Encl.

B.C. Federation of Labour

May, 1999

RESPONSE TO THE MINISTRY OF LABOUR

Re: ROYAL COMMISSION ON WORKERS' COMPENSATION

QUESTIONS FOR STAKEHOLDERS

Introduction

On January 20,1999 the Royal Commission on Workers' Compensation released its final report entitled For the Common Good. The B.C. Federation of Labour has many concerns about the Commission's recommendations, particularly:

* The appeal structure
* Compensation payable at 90 percent of net eamings
* Lump sum payments for non-economic loss
* CPP disability benefits deducted from compensation
* Loss of eamings pensions after retirement replaced with retirement benefits.

We acknowledge that some of the recommendations do benefit injured workers; however, the benefits of the positive recommendations are not as substantial as the Report suggests and are negligible in relation to the effect of the recommendations we oppose. The Federation does not support the Report in its entirety and feels that it cannot be implemented as is.

It is important that the workers in this province benefit from the Royal Commission on Workers' Compensation. In our view, the government cannot just ignore the Report. It is important that the govemment pass legislation during its term in office; however, we do not support legislation being passed this spring. We ask that you give serious consideration to the concerns and suggestions we present in this report

1. General Issues

Workers' compensation is a complex system. A study of the system requires indepth knowledge of the intricacies of the system. It also requires time. In our view, the Commission ran out of time and was not able to complete the process at hand. This is evidenced in the dichotomy present between the body of the Report and the recommendations. The body of the Report outlines many of the problems injured workers experience with the Board. To a great extent, the Commission empathized with the treatment injured workers have endured. The Commission found the Board to be adversarial, providing questionable adjudication and creating a climate of distrust and animosity. The Report and the Commission process itself gave injured workers hope that did not materialize in the recommendations. Many of the recommendations if implemented

would worsen the situation for injured workers. In our view, the recommendations are evidence that the Commission did not listen to the concerns labour and injured workers presented at the Commission hearings.

Legislation this Spring

It is very important that legislation be passed in this government's term of office; however, in our view, legislation should not be passed this spring. The Federation has many concerns about the recommendations. It is important that we have the opportunity to consult with our affiliates and develop a detailed alternative to the recommendations we oppose (e.g. appeals, benefits and pensions).

Our support for policy, procedural and operational changes taking place this spring is conditional. It would depend on the specific policy, procedural and operational changes that were going to be made.

Further consultation

It is important that we have the opportunity to make our views known to the government. We do not, however, support a broad and involved consultative process on the Report as a whole.

Cost analysis

We do not support conducting a cost analysis of the recommendations. We strongly believe that workers in British Columbia achieved the right to receive compensation for work-related accidents, injuries and illnesses in 1917 when the first Workers' Compensation Act was passed. Workers are entitled to compensation regardless of the cost. We understand the need for the Workers' Compensation Board to operate in a cost-effective manner; however, costeffectiveness cannot be applied to the principles of workers' compensation benefits or injury prevention.

Proceeding with the recommendations

We are not adamant that any of the recommendations proceed immediately. We are, however, adamant that certain recommendations do not proceed. They are the recommendations concerning:

* The appeal structure
* Compensation payable at 90 percent of net earnings
* Lump sum payments for non-economic loss
* CPP disability benefits deducted from compensation
* Loss of earnings pensions after retirement replaced with retirement benefits.

Next steps

Workers in British Columbia, the unions that represent them and the Federation are deeply concerned about many of the recommendations made by the Commission. We feel that it is imperative that this government pay close attention to and act upon the concerns expressed.

2. Governance

We generally accept the governance recommendations of the report. There are several issues, however, that are of concern.

1. Public interest needs to be clearly defined. It should be comprised of one public health activist, one occupational health specialist, and one injured worker.

2. The wording " worker representative" should be changed to read "labour representative."

3. Representatives must be selected by the stakeholders, not the Deputy Minister.

One year trial

Establishing a new governance structure and developing an effective structural process that would enable the Govemors to achieve the work that is necessary for them to do requires time. In our view, one year does not provide sufficient time for the Governors to accomplish much of the work before them. A one-year trial would not accurately judge what the new governance model could potentially achieve.

Looking Beyond Constituency Groups

We do not agree with the principle of appointing members "... who could look beyond their constituency groups". The workers' compensation system was set up to protect workers. Workplace injuries, illnesses and diseases must be prevented and injured workers must be compensated. That must continue to be the major focus for the Board.

A Possible Chair

We do not feel that this is the appropriate time to put forward suggestion for a Chair; however, we would appreciate having the opportunity to discuss this with the Minister in the future.

3. Appeals

The Commission found that the appeal process is time consuming. Their research indicated that a rejected claim going through all levels of appeal took nearly three years; one year for the Review Board to makes its decision, four months for the Appeal Division and 18 months for the Medical Review Panel to makes its decision. In addition, the Commission felt that the emotional and economic hardship workers experience, the

adversarial nature of the Board, the complexity of the process, administrative insufficiency and inconsistency and delay in decision making required a restructuring of the appeal process. The Commission also felt that the appeal system was often used to correct what are essentially problems in the initial adjudication, that the appeal system has become a substitute for quality decision making at the claims adjudication level.

We understand that the Commission wanted to correct the problems in the appeal structure and process and was attempting to do so through the recommendations they made. The Federation does not however support the changes the Commission has recommended.

The Commission's recommendations to restructure the appeal process are based on their belief that the appeal system needs to be simplified and streamlined. Simplifying and streamlining do not necessarily improve the system. The appeal process must adhere to three basic principles: accessibility, fairness and timeliness. In our view, the act of simplifying and streamlining the system does not address these principles.

An internal review by the original adjudicator is not of any benefit. That the adjudicator would overturn his/her original decision is not very probable. The same holds true for an internal review by a senior adjudicator. These steps allow the adjudicators with another opportunity to reiterate and clarify their original decision but do not address issues of quality and fairness. Moreover, they do not in any way address the Commission's expressed desire to shorten the overall time for appeals.

We suggest that the following changes would improve the appeal process.

a. Improve the quality of the initial adjudication. This can be done through:

- more training and education for adjudicators
- adequate staffing
- smaller caseloads
- accountability
- quality control
- specialized adjudicators to look after specific industries
- performance reviews that examine what percentage of the adjudicator's decisions are overturned by the Review Board or
the Appeal Division and whether there are particular injuries that do not get accepted

b. restructure the Review Board to include new staff, statutory limits and the medical review panels

c. have an external Review Board and an external Appeal Tribunal

d. ensure that appointments are participatory, monitored, and accountable.

We are in support of a more detailed analysis of the recommendations concerning appeals

as well as a focused consultation before legislative changes are made. We recognize and support that this would mean that legislation could not proceed before the 2000 session.

4. Improving Service Delivery

We do not have any concerns with a plan of action to proceed with non-legislative changes to improve service delivery. We also do not have any concerns with further consultation on the legislative recommendations. We acknowledge that this would mean that potential changes would not be made until the 2000 session.

5. Other Significant Changes

Non economic loss awards

Currently, injured workers receive an award for a permanent functional impairment (PFI). The award is based on the percentage of function an injured worker has lost because of the injury (for example, the loss of an entire small finger would result in a PFI of 2.5°/0 of total body function. The loss of all the toes is 5% of the total body function).

Current PFI calculation

Wage rate = 52000 per month
75% of gross = $1500 per month
PFI 5% = $75 per month for life
PFI 100% = $1500 per month for life

Recommended Calculation

Recommendation #153 recommends that a lump sum payment replace the pension award system. The payment would be based on the following calculation:

Maximum amount = $85,000 for 15 years and under

PFI 5% : Lump sum payment = 5% of $85,000 = $4,250

Also, the maximum amount of $85,000 is inversely proportional by $1000 for every year over 15 years of age. The maximum payment for a 50-year-old worker, for example, would be $35,000.

Changing the non-economic loss awards from a pension to a lump sum payment system is a tremendous cost-savings for employers. For the injured worker, it is unfair and inadequate compensation for the loss incurred. We feel that this recommendation is penalizing workers for their injuries and is not in keeping with the original intent of the workers' compensation system; that is, compensating workers for work-related injuries,

illnesses and diseases.

Minimum and Maximum Rates of Compensation

We support a minimum rate of compensation that is not less than minimum wage. We do not, however, support a maximum rate of compensation. Setting a maximum means that injured workers earning more than the recommended maximum receive less on compensation than their net earnings. The effect of a maximum rate would be even more dramatic if the recommendation of 90 percent of net earnings were implemented.

Compensation Benefits: Net vs. Gross

Compensation benefits are currently based on a worker's gross average earnings. Permanent total disability and temporary total disability benefits are equal to 75% of gross earnings. Permanent partial disability and temporary partial disability benefits are equal to 75% of the difference of earnings pre and post injury. The Commission recommends that this be changed so that benefits would be calculated at 90% of net earnings.

This recommendation, if implemented, would have a dramatic economic impact on injured workers. A worker earning $39,000, who is married and has a non-working spouse or is single with one child, would receive $3,149 less in benefits. A single worker without dependants, earning $39,000, would receive $4,467 less in benefits.

This recommendation moves the Board away from the original intent of the workers' compensation system - to compensate injured workers for their workrelated injuries. In our view, this penalizes workers for their work-related injuries while appeasing employers' by decreasing injured workers' benefits. Workers should not receive less money on compensation than when they are working. The Federation is totally opposed to 90% net. We do accept the concept of 100% net but only if there is no maximum rate of compensation.

CPP Benefits

We are totally opposed to the changes recommended by the Commission to integrate CPP benefits into workers' compensation benefits. Currently, an individual is eligible for CPP disability benefits four months after CPP finds them disabled. The average amount received on CPP is $673.22 per month. The maximum is $895.36 per month. The Commission recommends that the CPP benefits be deducted from the workers' compensation benefits. For injured workers, this means a substantial decrease in benefits. We are opposed to this for several reasons:

- it is compulsory for workers to participate in the Canada Pension Man; therefore, workers should realize the benefits when necessary

- deducting the CPP benefits from the workers' compensation benefits is offloading the responsibility of workers' compensation onto the public system

- reducing the amount of workers' compensation benefits is a direct subsidy to the employers.

Compensation for stress

The Federation supports the concept of providing compensation for occupational stress. The recommendation made by the Commission conceming occupational stress is extremely restrictive and does not really provide workers with any better opportunity to have occupational stress compensated than what is currently available.

Re-employment of Injured Workers

We support the concept of re-employing injured workers. The Commission's recommendation is limited and only pertains to some workers. The recommendation is limited to employers with 20 or more workers and to workers who have been with an employer for one year or more. The employer is required to return the worker to work for two years.

We have several concems with this recommendation. First, the recommendation does not apply to new workers injured on the job. This would greatly affect workers in many situations, particularly:

- seasonal workers in sectors such as construction, agricultural and fishing

- young workers just starting out in the workforce

- workers who have remained in the workforce but who have changed employers due to a lay-off or better opportunities

- women re-entering the labour force after caring for their young children.

WCB statistics indicate that 30% of injuries occur in the first 5 months of employment in a given job; 50% occur within the first 18 months. These workers would not benefit from this recommendation.

Another major concern with this recommendation is that the employer is only required to return the worker to work for two years. In our view, the employer should simply be required to return the injured to work. We do not agree with the two-year limit or any time limit being attached to the requirement.

This recommendation offers workers less than what is available to them through the BC Human Rights Act. In our view, allowing the WCB to enforce the duty to accommodate would be a more effective way to return injured workers to work.

Other recommendations

The Federation does support the recommendations requiring the employer to:

- continue to pay certain benefits for one year after disability

- pay full wages for an employee for the first day of injury

- compulsory coverage for independent contractors and labour contractors in industries and occupations specified by Cabinet

Further comments

The Federation and its affiliates are deeply concemed about many of the recommendations made by the Commission. Our concerns have been expressed in this report. It is critical that this government give serious consideration to the suggestions presented here. It is important that you demonstrate to the workers in this province that you have their interests at heart and that you have heard the concerns they have expressed about the workers' compensation system in British Columbia.

Workers' Compensation

For the 21st Century

Appendix B

Critical Annotations to the Recommendations of the Royal Comission on Workers' Compensation in British Columbia

Workers' Compensation Advocacy Group

c/o ***Community Legal Assistance Society***

#800 - 1281 West Georgia Street
Vancouver, B.C. V6E 3J7

Please direct your reply to:
James Sayre

Tel: (604)685-3425
Fax: (604)685-7611
E-Mail: clas@vancouver.net

October 31, 2001

The Royal Commission's Recommendations

Introduction

This document contains the major excerpts from an annotated version of the Royal Commission's recommendations which was prepared in January, 1999 to assist injured workers groups and others in understanding the implications of the Commission's final report and recommendations.

Overall, it's fair to say that the requests of injured workers were largely ignored. We got almost none of the major changes we asked for on behalf of injured workers. The Commission didn't specifically recommend that injured workers have a role in governance, and it rejected our requests for an independent complaint process, greater access to the courts, and adequate legal assistance. Far worse, they recommended five major changes to the system that would greatly damage the benefits and appeal rights of all injured workers.

> *1. The existing appeal system, which now allows two or three types of appeal to independent tribunals, would be replaced with a reconsideration by the adjudicator who made the initial decision, another reconsideration by a senior adjudicator, and a sudden-death appeal to a new tribunal, which would be required to follow WCB policy even if it is illegal, and would not be required to hold an oral hearing. Medical review panels would be replaced by a limited referral to a new panel of medical specialists, which would be done only at the discretion of the appeal tribunal. [Recommendations 56 - 107]*
>
> *2. The basis of all temporary and permanent benefits an injured worker receives would be reduced from 75% of the gross wage rate to 90% of the net rate. This would cost a totally disabled worker or the survivors hundreds of dollars per month. [Recommendations 140, and 144 - 147]*

3. If the worker is receiving a Canada Pension Plan disability pension, it would be deducted from the workers' compensation benefits. This would cost seriously disabled workers (the only ones who qualify for a CPP pension) up to $1,000 per month. [Recommendation 151]

4. All "functional" disability pensions (which pay a percentage of total disability benefits to a disabled worker based on the seriousness of the disability) would be eliminated. Instead, workers would receive a much smaller "non-economic loss" award based on their age and the seriousness of their condition. The only other benefit a permanently disabled worker might receive would be a loss of earnings award, but only if the worker could prove that the disability prevented him or her from earning as much as before the injury. The commission proposed that the non-economic awards range from $35,000 maximum for workers 65 or older, to $85,000 for workers 15 and younger. Only totally disabled workers would receive the maximums. Thus a 40 year old worker who loses an eye (a 16% disability) would receive only 16% of $60,000 (the maximum for his age), or $9,600. A 50 year old worker who loses a leg (a 50% disability) would receive 50% of $50,000 (the maximum for his age), or $25,000. If both workers managed to return to their jobs, ***they would receive no pension or other financial benefits****. [Recommendations 126 - 130, and 153]*

5. Even those worker who manage to qualify for a loss of earnings pension would lose much more of it at age 65 than they do under the present legislation. At present, a worker who is under the age of 50 when injured receives a full loss of earnings pension for life, since the injury has impaired the ability to save for retirement. The Commission would reduce every worker's benefits at age 65 to 2% of their previous pension for each year since the injury. [No, 2% is not a typo...] The most that "retired" pensioners could get would be 70% of their previous pensions, and they would only receive that if they were injured at least 35 years earlier. [Recommendation 154]

The report does conclude that the Board has badly failed in its duty to deliver fair benefits in a timely fashion. This vindicates the many complaints which injured workers made to the Commission about their treatment. To that limited extent, the result is positive.

The Commission recommended a number of governance, management, accountability, and structural changes to the Board which are meant to force it to do a better job in the future. It's difficult to judge how effective such changes would be, however, since much of the problem is due to way in which the senior people have exercised the powers they already have.

The Commission also recommended some improvements to specific problems with wage rates, psychological disabilities, and survivor's benefits.

Comments on Specific Recommendations

Governance: Recommendations 1 - 31 are a slight improvement on either the present panel of administrators or the former board of governors. There is more consultation with stakeholders, and an attempt to define qualifications for board members. The consultation process would provide an opportunity to promote the appointment of one or more injured workers, to sit either as a worker governor or a public interest governor. However, the failure to recommend that injured workers have a defined role on the governing body is one of the major disappointments in the report.

Prevention: In recommendation 32 - 33, the Commission concludes that the Board should remain responsible for health and safety regulation. Leaving the Board in charge of prevention seems reasonable, especially when compared with the alternative, which is - politically motivated interference with the protection of injured workers. Knowledge of the reasons for work injuries along with scientific and technical expertise should drive the regulatory process. The Board is in the best position to weigh these factors.

Vocational Rehabilitation: Recommendations 35B seems intended to discourage deeming. Whether it will do so is debatable. The general goals and standards in no. 34 seem reasonable, and increased accountability is desirable. No. 36 is a step backwards - even the panel of administrators recently decided to pay continuity of income benefits at the wage loss rate unless the worker has refused to cooperate in rehabilitation or withdrawn from the work force. The RC seems to suggest that the rate be reduced to a "rate estimated by the board" for permanent loss of earnings. The Commission was told by the Board's staff itself that cutting benefits during the rehabilitation process often interferes with rehab, by causing distrust and hostility between the worker and the board at a critical stage of the process. The RC seems to have overlooked that evidence...

Adjudication: Recommendations 40 - 48 are intended to make adjudicators accountable for the quality of their decisions, which is a goal that arose from the hearings, and one which we certainly support. The interest requirement in no. 48 would create a new appealable decision - "what did the Board know and when did it know it?"

Right to legal representation: Recommendations 49 - 50 seem to be the only reference to the need of injured workers to have accessible legal advice throughout the claims process. They are woefully inadequate. They leave the decision as to whether a worker "needs" to be represented entirely up to the overworked advisers, whose opinions will not be appealable. The changes to the appeal system described below will be devastating even to workers who have ongoing, experienced representation. To suggest that any

worker should have to navigate such an appeal system without competent assistance is cruel and absurd.

The Compensation and Assessment Appeal Process

This section of the report, comprising recommendations 56 to 107, is a complete disaster. The Royal Commission has adopted the Ontario model of appeals. In fact, this proposal is worse than Ontario's. It at least does not have any time limit for appeal. In B.C., the short time limits would be an added source of injustice. And Ontario has a tribunal counsel's office which may undertake legal research in certain cases, and which reduces the claim file to a set of documents that are relevant and necessary to the case. In B.C, the entire burden of preparing and presenting the appeal will still be borne by the parties.

To sum the proposals up, instead of having the right to a hearing by the review board, another hearing at the appeal division, and an independent examination and decision by the medical review panel (for medical decisions only), workers would have only one appeal to a new, independent tribunal. The medical review panels would be replaced by a new medical issues adjudication branch, which could be a single specialist (no. 90). The branch would be attached to the appeal tribunal, which could refer a medical issue to it (but would not have to do so even if the worker's doctor certified that a medical dispute exists - no. 77). The medical branch would only answer the questions specifically referred by the appeal tribunal (no. 80), and the appeal tribunal would have to determine all the "non-medical facts" before any such referral was made (no. 79). We would get reasons, however - no. 80(b)(ii).

The Commission recommended two preliminary steps, but as described they are virtually worthless. The first "appeal" would be to ask the officer who made the original decision to reconsider it. Steve Mantis, the executive director of the Canadian Injured Worker's Association (CIWA), says that in Ontario, from which the Royal Commission has taken these recommendations, officers typically say that they're too busy even to think about their past decisions, and simply reaffirm them.

Step two is an "appeal" (with a thirty day time limit) to a "senior, experienced adjudicator (internal review officer)". This is nothing more than a managerial review, which most experienced advocates consider to be a complete waste of time.

Once this senior officer has dismissed the appeal, the worker would have 30 days to appeal to the appeal tribunal. Despite the fact that this is the only independent review the worker would be allowed, an oral hearing would not necessarily be held (no. 71-72), and the decision might be made by only one member (no. 73-74). To make matters worse, the appeal tribunal would be required by the Act to follow board policy even if the policy has been found to violate the law - no. 103(a). In such cases, the tribunal could refer the issue to the board of governors, which would be required to consider it within ninety-days

and either affirm the policy, change it, or refer the question to the court of appeal for determination. While all this is happening, both the board and the appeal tribunal would be required to continue applying the illegal policy (no. 103, 105). So much for the principle of independence.

One slight improvement to the existing appeal process would be that the appeal tribunal would have jurisdiction over the implementation of its decisions - no. 63(c).

Privacy and Disclosure: Recommendations 108 - 125 would tighten up the control of information in the Board's possession, so that it is less likely to be omitted from disclosure. The efile tracking requirement is needed. In failing to eliminate an employer's right to be a party to a claims appeal, and hence the right to disclosure, the Commission missed an opportunity to enhance worker's rights and make the process cheaper and more efficient at the same time.

The only improvement to privacy rights for workers is that they can object to disclosure of sensitive medical information (but apparently not any other kind). Even then, the employer would be entitled to receive the information if it was relevant to the appeal. Relevancy decisions would presumably be appealable (no 124).

There is no recommendation regarding the timeliness of disclosure, other than the requirement that the Board comply with the FOI legislation. Since the Board told the Commission that they were generally providing disclosure within 8 working days, it should not need 30 days in most cases.

Benefits: Recommendations 126 to 155 contain a number of unexpected bombshells for injured workers.

Elimination of Functional Pensions: In no. 126-130, Judge Gill and Commissioner Oksana Exell have recommended that functional pensions be discontinued and replaced by a lump sum award for non economic losses. This is another instance of the Commission copying a bad Ontario model. In fact, the adoption of such a scheme in Ontario literally provoked riots by injured workers on the steps of the Ontario legislature. Steve Mantis advises that a typical "non economic loss" award in Ontario is equivalent to one and one half years of the monthly pension that the worker would have received as a functional pension. Other than that, if the worker has returned to the previous employment (or another job paying equally well), **or if the worker is deemed capable of performing such a job**, no further compensation is payable for the disability.

Steve was a member of the Ontario Board in 1989 when this scheme was being developed. At the time, the Board commissioned a careful, scientifically based study of

20,000 workers to assess the actual impact which various types of injuries had on the quality of life. The resulting recommendations would have led to awards that were often greater than the capitalized value of corresponding functional pensions, at which point the government decided the scheme would cost too much and instead adopted the AMA guide. If B.C. ever considers converting to this approach, it should adopt the Ontario study, which at least attempted to measure the real "non-economic impact" of an injury.

Wage Rates and Average Earnings: Recommendations 131 - 136 would make modest improvements in the determination of fair wage rates. Recommendation 132 would benefit workers where a multi-year average is used. 133-134 would make it clear that the Board can use date of injury earnings. (It can do so now, but rarely does.) No. 135 recommends further study of doing the long term rate review after 13 weeks rather than 8, although WCB staff itself supported such a change at the hearings because reducing benefits at 8 weeks creates conflict at a crucial time in the return to work process.

Recommendation 143 would be a major step forward for seasonal workers and others who have regular layoffs in their work history, as their E.I. benefits would be reflected in their wage rates. There is still, however, a need to deal more fairly with irregular periods of unemployment that reduce benefits for other injured workers.

Mandatory Re-employment: Recommendation 137 would require employers to re-employ an injured worker for up to two years after the injury, even if this requires an accommodation in the previous job. However, this only applies if the employer has 20 or more workers, and only up to the point of "undue hardship on the employer or other workers". This is yet another Ontario import. Its intent is good, but Steve advises that the Ontario Board almost never enforces it.

In fact, when combined with the proposed new pension system, mandatory reemployment could constitute a nasty trap for a disabled worker. If the worker does return to work for the prior employer (who may be motivated mainly by a desire to keep the claims cost down), and is then let go after the two year window, the Board will claim that the worker's inability to find another job is due to economic and market factors, not the work disability, and will still refuse to award loss of earnings benefits, or further rehabilitation. This will lead to new cycles of appeals, and the ultimate result could be that a worker with a serious disability ends up receiving nothing more from the Board than a few thousand dollars for non-economic losses.

A far more effective means of giving injured workers the advantage of the duty to accommodate a disability (which is already an implied requirement of human rights legislation) would be to authorize the Board's vocational rehabilitation officers to exercise the powers of human rights staff where it appears that an employer is not complying with its implied duty.

Minimum and Maximum Earnings: Recommendations 138-139 make only minor changes to the minimum/maximum earnings scheme of the present Act. The Federation and injured workers both argued that there should be no maximum level of earnings, especially if workers were permitted to sue a responsible employer or worker for the loss of "excess" earnings not covered by the compensation system. The Commission rejected this position because, as it explained in the report, it felt that it would be hard to justify having a minimum earnings level if there were no maximum. [One response to that silly argument is that we have minimum wage laws for the same reasons as a minimum benefit rate. None of the existing federal or provincial parties have even suggested that equity somehow requires an equivalent maximum wage law...] The Commission's new formula would lead to a 1997 maximum wage of approximately $64,000, compared to $56,000 under the current Act.

Reducing Benefits to 90% of Net:

Perhaps the costliest recommendation to injured workers is that the present benefit rate of 75% of gross earnings be replaced by 90% of net earnings. Net would be calculated by subtracting CPP, EI, and income tax deductions from gross earnings. This approximates a worker's take-home pay, but the majority (Judge Gill and Ms. Exell) recommend that the worker only receive 90% of it. At the hearings, we argued that this employers' request was like a debtor arguing that he should only have to repay 90% of what he owes. The impact of the change varies according to wage levels - the higher a worker's wage rate, the more he or she will lose.

The use of net earnings also discriminates against workers without dependents who could be claimed by the worker on the income tax return. There was no good answer when we asked during the hearings whether the board would be prepared to keep re-calculating the rate during the worker's lifetime as the number of children or other deductions changed. Young single workers with serious disabilities could lose thousands over their lifetimes compared to workers with identical injuries who happen to have dependents when injured.

The Big CPP Ripoff: The majority (Judge Gill and Ms. Exell) also recommended that CPP disability pensions be deducted from workers compensation benefits, despite the fact that the worker's contributions have partly financed the payments. This change would only affect the most disabled workers, who are the only ones to qualify for a CPP pension.

Reduced benefits at age 65: Yet another reduction in current benefits would occur at age 65, when the loss of earning pension would be reduced so that the most a worker could receive (and only if injured at least 35 years before retirement) would be 70% of the

previous award. At present, if a worker is injured before age 50, the full loss of earnings award continues for life.

Fatality benefits: Under recommendations 155 - 159, the Act would still discriminate on grounds of age, only in a less severe (and more confusing) way. The younger the spouse, the lower the monthly pension, but the greater the lump sum benefit. One advocate for widows has calculated the impact of the changes on surviving spouses at various ages, and has concluded that almost all would benefit from the changes, and younger survivors most of all. The fact remains, however, that age has no direct bearing on the survivor's need, and even less on her loss of family income, so the rationale behind its continuing use is likely explained by the reference in the report to "cost-containment".

Scope of Compensation: Who is Covered (and How)? There is nothing very dramatic in recommendations 160 - 177. Ms. Exell dissented from no. 168(a), which calls for the act to be amended to allow the board to require that in certain industries, independent operators and labour contractors to have coverage. The Commission heard evidence that in coastal logging, for example, it is common for the company which has cutting rights (and thus controls access to the work) to require that everyone from fallers to cat skinners register with the Board as "contractors", thus removing the incentive to ensure safety for the party in the best position to do something about it. The regulations could solve this problem. No. 168(b) would require contractors who purchase optional protection to do so in an amount "commensurate to their proven earnings". This is also a good idea; many working contractors try to save money by under insuring themselves, which can cost them and their families dearly if they suffer a serious injury.

The Scope of Compensation: What Conditions Are Covered?

According to recommendation 192, a loss of earnings due to "sensitization or allergy" caused by exposure to contaminants would be covered. No. 193 would cover medical care, even if the exposure hasn't yet caused a disability. No. 194-195 would include non-physical conditions arising from non-physical and non-traumatic factors in the employment will be covered, with certain exceptions. No. 196, however, deprives such a claimant of the benefit of the s. 99 presumption of the doubt clause. With the exception of 196, we support these changes.

Recommendations 180-190 concerning occupational diseases seem generally neutral, except for No. 187 which weakens the burden of proof on the Board or employer required to show that a disease to which s. 6(3) and Schedule B applies was nevertheless not caused by the employment. Mr. Stoney dissented, and we agree with him.

Recommendation 191 creates a right to protective reassignment, but only for workers with one year's tenure, and only if it does not cause an undue hardship to the employer or to co-workers. These limitations make no sense, given the purpose of the changes.

Section 10 and 11: Court Actions: Recommendation 197 is a fairer way to calculate the Board's "share" of the proceeds of a subrogated lawsuit, but the Commission ignored injured workers' demands for greater access to the courts, either to challenge unfair decisions, or to sue the party responsible for their injuries.

Fatality Investigations:

Recommendations no. 198-201 concern better information and record keeping practices concerning fatalities, which may help the board learn from each case and improve safety regulations. There is certainly justification for the Board to address the causes of every death with particular attention; not to do so suggests to the survivors that the worker's life was not regarded as very important. However, fatal injuries are fortunately a very small fraction of the serious injuries which occur to workers, and the Board could also learn a great deal from investigating many non-fatal injuries.

Injured workers recommended that the board be required to decide in all serious cases why the injury occurred, and whether anything done or omitted by the employer contributed to it. We argued that only when this is so should the employer's experience rating suffer. This would remove the incentive for an innocent employer to oppose a valid claim, but equally important, it would direct the attention of the board (including the prevention department) at the causes of serious injuries so that all concerned - employers, workers, and the Board itself - would have a better opportunity to prevent their reoccurrence. The Royal Commission missed the boat on this opportunity, as on so many others, because of its misinterpretation of the historic compromise.

Performance Indicators: Recommendation 202 supports adoption of the auditor general's performance review standards. We agree.

Funding: The board is already overhauling its entire assessment and ERA process, and apparently has the full support of the employer community for what it has proposed. As noted, the RC has missed the opportunity to force the Board to address the causes of all serious injuries by linking the employer's responsibility to its experience rating.

Workers' Compensation

For the 21st Century

Appendix C

April, 1998 Submission on Behalf of Injured Workers to the Royal Commission on Workers' Compensation in British Columbia

ROYAL COMMISSION ON WORKERS' COMPENSATION

Presentation on Behalf of Injured Workers

Workers' Compensation For the 21st Century

Preface

The injured workers of British Columbia need and deserve to have the best system of workers' compensation in the world. From the perspective of injured workers, we will summarize the changes that must be made to achieve this ambitious goal.

First, an explanation: by "best system", we do not mean that the Commissioners should turn the pocketbooks of B.C.'s employers inside out and make a workers' compensation claim a short road to riches for injured workers. Fiscal realities must be addressed in any realistic proposal for change, and throughout these submissions we will demonstrate again and again that the "best" system doesn't have to be the "most expensive" one. In fact, some of the changes which we recommend to make the system more effective for injured workers will also benefit employers as a whole by eliminating unnecessary costs.

A few of the changes we will recommend may seem quite dramatic. In evaluating them, we ask that the Commission refuse to become trapped by the thinking of the 19th century, when the "historic compromise" was achieved. Few legal concepts have remained unchanged throughout the 20th century, in which we have experienced the greatest changes ever in society, technology, government, and law. Are all of the elements of the so-called historic compromise so perfect that they still represent a sound foundation for a system that must carry us into the 21st century? Ask any of the hundreds of injured workers who appeared before the commission whether the system is perfect. For that matter, ask the government, which appointed this Commission because of the intense anger the Board has aroused from both workers and employers. The parties that have appeared before the Commission since its work began may agree on nothing else, but they all know that the existing system is badly flawed. It would be irrational to assume that these serious problems are completely unrelated to the historic compromise which established the basic principles of the existing system, or that all of the problems can be solved without varying any of those principles.

Many individual recommendations will be made on behalf of injured workers, affecting various aspects of the system. Before discussing these detailed recommendations, we will describe the major themes that will be advanced throughout the presentations. These are the broad concepts that will give some unity to our positions on individual issues.

Fundamental Principles for a Just Compensation System

1. Compensating and rehabilitating injured workers is the central reason for the Board's existence. To ensure that their perspective remains uppermost when policy and other governance decisions are made, the governing body must include significant representation from injured workers.

2. Injured workers are responsible, hard-working adults who have had the misfortune to suffer a work-related injury or disease. They are not children or criminals. Throughout the compensation and appeal process, workers' autonomy, dignity, and right to privacy must be respected.

3. An independent, impartial judiciary is the cornerstone of our legal system, and workers should not lose all access to the courts simply because they are injured at work. The worker should be entitled as of right to elect to sue anyone responsible for the injury other than his or her own employer and co-workers. The courts should also have a discretion to allow the worker to sue the employer or a co-worker in specified circumstances, such as where the employer's misconduct has caused the injury, or where the employer is generally liable for the type of injury suffered by the worker (e.g., motor vehicle accidents or medical malpractice) .

4. In order to carry out its mandate, the Board is entitled to receive all relevant information from the worker, employer, treating doctors, and other sources. The worker should be entitled to full disclosure of that information upon request, so that he or she can participate meaningfully in the adjudication process. The Board should not disclose a worker's information to anyone else, including the employer, unless the worker consents, and the disclosure is necessary for the fair administration of the claim.

5. Injured workers should receive full compensation for their loss of earnings or earning capacity due to work-related injury, disease, or vulnerability, whether the cause of the condition is a physical accident or the accumulated physical and mental impact of work activities. Where the condition has a serious and/or permanent impact on the worker's non-employment activities, there should also be compensation for intangible losses.

6. An injured worker who cannot safely return to the pre-injury employment should be entitled to receive a reasonable amount of vocational rehabilitation benefits to reestablish his or her pre-injury earning capacity in a new occupation. A worker who does not want to accept a substantially different job for the pre-injury employer or another employer in the same industry should not automatically be denied all such benefits.

7. Throughout a claim, an injured worker's condition should be assessed and treatment should be determined the worker's treating physicians. If the Board or worker wishes to dispute the assessment of the treating physicians, any additional evidence that may be needed should be

obtained by a referral to an independent specialist, not a medical adviser employed by the Board. At no point should the Board or appeal tribunals assume that the worker's attending physicians are biased.

8. Workers' compensation is a no-fault social insurance program which replaces the adversarial process of court proceedings. Allowing an employer the status of an adverse party to every claim contradicts this fundamental principle, and reintroduces unnecessary and destructive elements of the adversarial process. An employer should only be a party to a decision such as a penalty assessment which imposes direct financial consequences.

9. Disputes between an injured worker and the Board should be resolved by independent tribunals which can make any needed investigations, hold fair hearings, and reach decisions within a reasonable time. There should be a final right of appeal to the courts respecting issues with important consequences to injured workers.

10. All workers should be entitled to free legal advice and assistance with their claim. Where there is a dispute, and the issues are complex and financially important, the worker should be entitled to representation by a lawyer or other trained advocate. Workers should not automatically be denied such assistance simply because they may belong to a union.

11. The Board must be generally accountable to its governing body and stakeholders, and consult with them regarding policy development and other important initiatives. The Board must also be accountable for improper conduct to the injured worker affected by it. Where an officer deliberately violates policy or otherwise acts improperly in administering a claim, there should be an independent complaint process with effective remedial powers.

Introductory Discussion

One of the greatest strengths of the workers' compensation concept is its potential as a social insurance scheme to eliminate the adversarial atmosphere which accompanies a fault-based process such as tort law. In theory, rather than pointing fingers and attributing blame for a work-related injury or disease, the focus should generally be on compensating, treating and rehabilitating the worker, regardless of fault. Since fault should not matter, an employer should have no self-interested reason to oppose a claim, and should be willing to cooperate in investigating the cause of the injury, helping the board determine a fair level of compensation and trying to find a suitable job for the worker given the consequences of the injury.

Instead, conflict has poisoned the compensation system so badly that it often cannot function effectively. Some employers routinely oppose all claims, or at least all appeals, in the same way that they would routinely defend all lawsuits against them. The misguided e.r.a. system, supposedly meant to motivate employers to make greater efforts to ensure safety, instead motivates them to go to great lengths to oppose claims, or to minimize benefits, and to also to waste a great deal of time and energy of the Board and others seeking to shift the cost of the claim from the employer's own class to the general accident fund. In the process, tens of thousands of workers have their confidential compensation files sent to employers, where they end up as part of the worker's personnel records, and where any curious employee with access to those records may learn intimate details of the worker's medical condition, and often other very private aspects of the worker's life.

Part of our recommendations will therefore be to eliminate the aspects of the system that motivate employers to oppose claims for reasons other than their merits. One of those adversarial aspects is the status of an employer as a party to each compensation claim by one of its workers. We believe that eliminating e.r.a., and the employer's party status, will bring many benefits, and not merely to workers. Blameless employers will no longer feel aggrieved at being assessed more because of an injury for which they had no responsibility. Workers' privacy rights will no longer be sacrificed merely because they have had the misfortune to suffer a workplace injury. Workers will also benefit by not having to face two adverse parties in an appeal - the Board which has made the decision and created the record on which the appeal will be decided, and the employer who has been turned into an adversary because its financial interests are at stake. Employers as a whole will pay less, because there will be lower administrative, disclosure, and appeal costs.

Our recommendations are intended to fit together into a coherent system, and therefore cannot be fully evaluated in isolation from each other. For example, one of the three explanations given by Professor Thomason last July for having an experience rating system is that

> *... linking employer cost to firm accident experience rating provides employers with incentives to invest in accident prevention. In other words, because the employer's costs depend on its accident experience the employer has an incentive to reduce*

> *accidents in order to save costs and I think that this is really an important point to make here. That's probably the primary rationale for experience rating.*

While we are completely unconvinced that e.r.a. does any such thing, there can be no question that accident prevention is a vital goal for the workers' compensation system. Injured workers, of all people, are best able to appreciate the importance of preventing future injuries to other workers. They have been there.

How then can there be an effective link between this crucial goal and an individual injury, if we abandon the irrational approach of penalizing the employer no matter how the injury occurred. Our presentations will answer that question in a number of ways. For example:

(1) In place of automatically assessing the employer with part of the cost of an injury, unless there is a substantiated reason to relieve it, the Board should consider whether the circumstances suggest that some deficiency in the employer's safety program and compliance with regulations was in any way related to the occurrence. If so, there should be a separate decision concerning the employer's responsibility, and what steps should be taken to prevent similar injuries in the future. These steps could be remedial or educational, instead of or in addition to an additional assessment.

If the Board does impose an additional assessment, it should be based on the degree of the employer's responsibility, rather than the cost of the worker's claim. (The worker's medical information would therefore be irrelevant, and disclosure of the claim file would not be necessary.) The worker's benefits would not be affected, and while an important witness, he or she would not be a party to that decision. The decision would be appealable separately (and not necessarily to the same tribunal or in the same manner as compensation decisions are appealed). The entire decision-making and appeal process would focus on the supposed objective of e.r.a. - the effectiveness of the employer's accident prevention program, and its relationship to the injury.

(2) One of our fundamental principles states that workers should regain partial access to the courts, including the right to sue their employer or co-worker in specific circumstances, and with the court's leave. The Act should set a significant threshold for granting such leave, such as gross negligence, willful violation of the regulations, intent to injure, or other serious failing on the part of the employer.

In our view, such a system would be far more effective in encouraging safe work practices than the present e.r.a. system, which from the standpoint of an innocent employer amounts to a lottery. Each significant work injury would lead to an examination (sometimes very detailed, sometimes quite brief) of the causes, focusing specifically on whether the injury could have been avoided, and if so, how. The answer would result in an appropriate action, which again would focus on the cause of the injury. That action might range from an order to repeat worker safety education to an enforcement order coupled with a high penalty assessment. Finally, in the relatively rare cases where the employer's fault meets the litigation threshold, two beneficial results will occur. First, a worker who has been the victim of the employer's serious failing will receive the same level of compensation as a personal

injury victim in a motor vehicle accident. Equity demands no less. Second, the employer will be required to pay the cost of such a judgment directly (or through its liability insurer), rather than passing it on to all members of its subclass. Equity to innocent employers also demands this.

Another principle is the restoration of substantial access to the courts. The legislation should allow a worker the absolute right to elect to sue anyone responsible for the injury, other than the worker's own employer or co-workers. There is no defensible excuse for depriving a person of equal compensation for an injury caused by someone with whom he has no employment relationship merely because that person was working at the time.

Another fundamental principle is that workers are entitled to be treated with dignity, and that their right to autonomy and privacy should not be forfeited simply because they have suffered a work-related injury or disease. Now, the system violates both rights. The Board regularly ignores the opinions of a worker's own doctors, and relies on its own medical advisors who clearly appear to have a motive to deny or reduce benefits. Few aspects of the current system so infuriate injured workers, and often their doctors as well.

The principle of autonomy means that the Board must generally respect a worker's right to make vital decisions concerning treatment and rehabilitation. Wherever possible, workers should have a choice of service providers, and should be entitled to receive both physical and vocational rehabilitation services from external sources even where the Board can provide the service itself.

As for privacy, it must be remembered that most adults' circle of acquaintances centers on their employment. The release of sensitive medical and other claims information to the employer can be an extremely serious violation of the worker's right, all the more so if the purpose of the disclosure is to assist the employer to defeat the worker's claim.

Another principle we have advanced is that the Board must be accountable for its specific conduct in administering a claim, as well as its policies. An independent review process would enable a worker who feels that the Board has violated its own policies or otherwise acted improperly in administering the claim to seek additional compensation for avoidable losses, and would give Board officers a real incentive to respect workers' rights.

Perhaps the most important principle of all is that an injured worker should receive full compensation for what he or she has lost due to the injury. Partial coverage for losses is a feature of private insurance schemes where the person may choose the amount of coverage (e.g., life insurance) and where the right to benefits in no way prevents the person from suing someone responsible for the loss for full compensation. It is also a feature of some social insurance schemes such as Employment Insurance, but here too the scheme in no way precludes the claimant from seeking full damages from an employer, as in an action for wrongful dismissal.

The principle will be reflected in many specific recommendations concerning wage rates, the statutory maximum, and conditions which are treated as non-compensable because the worker's inability to

return to employment is characterized as "preventive". It is also reflected in the treatment of workers who cannot work because of diagnosed mental conditions resulting from the psychological effects of their work or work-related events. Most glaringly, it is reflected in the pernicious practice of deemed employability, which reduces a worker's compensation by the amount of wages which the worker has not, will not, and cannot receive.

Rehabilitation is second only to compensation in its importance to injured workers. In fact, the two cannot really be separated; to the extent that the worker is successfully rehabilitated, compensation will be less needed. The current legislation and policy gives too much discretion to the Board, and imposes too many restrictions on the right of an injured worker to determine how to spend the rest of his or her life. It also depends too much on the Board to evaluate the worker's needs. It is the injured worker's life, and the system must respect the worker's right to decide what to do with it, given the effects of a work injury, and must offer the worker a reasonable level of assistance in achieving that goal.

The need for fairness in decision-making (both real and perceived) is another fundamental requirement of a fair compensation system. This must be present from the outset of the claim until the final levels of the appeal system. Given the complexity of the legislation, the issues, and their importance to a worker, anyone who has suffered a serious injury must be entitled to free, independent legal advice and representation. Without this, other rights will have little meaning.

No system involving so many difficult decisions can expect to get them all right the first time around. The most recent issue of the Reporter series, Volume 14, Number 1, consists of ten decisions of the Appeal Division concerning applications to reconsider their own previous decision because of an error of law going to jurisdiction. Over half of those applications were successful. If a generally respected tribunal which usually has the benefit of a Review Board decision to clarify the facts and issues still makes acknowledged serious errors, how can it be seriously suggested that a person whose family income for life may depend on the outcome should only have one level of appeal? The Employment Insurance system allows three appeals (including a judicial review as of right by the Federal Court of Appeal), and that decision usually involves less than ten months of benefits. The Canada Pension Plan also allows three levels of appeal for disability and other pension decisions, two of which are conducted as full "de novo" hearings. We submit that rather than restricting the current appeal options, workers should be granted a final right of appeal to the courts.

We do agree that some changes are needed to the existing appeal system. The Review Board has received much criticism due to delays, and to perceived poor decision-making. The Appeal Division is seen by many workers as a part of the Board (and hence, the worker's true adversary), even though most experienced advocates do not believe that it is unduly influenced by its internal status. Since the perception of fairness itself is crucial, however, we would prefer to see the senior appeal tribunal independent of W.C.B.

Medical Review Panels serve a vital, though limited function, in adjudicating medical disputes. However, the process suffers from delays, and also from weaknesses at both the front and rear ends

of the system, where the Board continues to control both the establishment of the panels and the implementation of their decisions. While we certainly can't support the Review Board's suggestion that the M.R.P. become nothing but an advisor to the general appeal tribunal, we do see much benefit in partially integrating the M.R.P. process by having a common appeal registry (something the Ombudsman recommended in his 1987 report) and by having an expedited procedure for the worker to challenge the Board's determination of the non-medical consequences of a certificate.

Finally, the workers' compensation system is just what is called - a system to compensate **workers.** What most important perspective can there be for the governance of such a system than the viewpoint of those who have been there? Workers must have a meaningful permanent role in the Board's governance. As a major stakeholder, injured workers should be consulted regularly about policy issues. And for the role of all stakeholders to be meaningful, the Board's governing body must be firmly in control of its policy. We will propose that a clear rule be announced and enforced that any change in the way the Board administers claims, assessments, or other aspects of its mandate, which affects the substantive rights of its clients - workers, but also employers - must first be approved by the governors. The debate over "code R", etc., and whether it involved changing policy or merely practice is really a dance around semantics. What is important is the Board management changed the amount of benefits received by workers after their wage loss benefits end without the authorization of the governing body. Such changes should simply be prohibited, no matter what label is attached to them.

Over the next two weeks, we will present in further detail the changes in the existing compensation system that are needed to provide B.C.'s workers with an excellent level of compensation coverage that continues to be easily affordable for employers.

What Workers and Others Are Covered?

The main problems with who is covered by the system are primarily related to the people who should probably be workers, but are forced by those who want to "hire" them to register in their own names. Examples are courier drivers, some loggers, etc. There is currently an appeal before the Court of Appeal in B.C. arising from a human rights complaint by an injured worker who was "hired" on a contract basis by a truck dealership, which terminated his employment after several years when he had a minor new injury and W.C.B. ruled that he was actually an employee of the dealership. That case appeared to be motivated by the dealer's fear that it would suffer if the worker became disabled due to his earlier injury while working for them. (Incidentally, this is an illustration of the negative impact of e.r.a., and the fear it engenders among employers.)

The Board should be more diligent in investigating situations in which employers may be forcing people who are really performing employment to register in their own name. In many cases, this should be regarded as claims avoidance (at least, that is the employer's intent), and the Board should be able to take effective steps to penalize the employer.

The other area of major concern is the differences between Personal Optional Protection (POP) and regular compensation coverage. So long as the broad bar to litigation exists, we submit that the Board should be required to assess such a person on their full proven earnings or earning capacity, and to pay them accordingly if they are hurt. At present, the POP applicant can choose a very low level of coverage, which many optimistic or financially strapped workers do. If they become injured, the savings turns into a trap.

The problem is that W.C.B. coverage is not like private insurance, in which a person can purchase the level of coverage he or she wants from one company, supplement it from other sources, and still sue the person who causes them to become disabled. The unique aspects of the Board's process requires that it ensure that the level of coverage is a fair reflection of the person's potential loss, whether or not they might prefer a lower amount.

Moreover, despite some assurances to the contrary during the presentations, we are advised that workers with POP are subjected to an 8 week review, which can result in a lower wage rate than the coverage they have purchased, but not a higher one.

We recommend that the Board assess all people who want POP on the basis of their proven past earnings. We also recommend that if an injury occurs, the Board pay the claimant (like all claimants, in our view) for all the earnings and earning capacity they have lost, as determined at the time of the injury. Mr. DuGas acknowledge that the Board could both assess and pay on that basis.

What Injuries and Conditions Are Covered?

The scope of coverage raises a number of important issues which the Commission should address in order to ensure that workers who are covered by the Act are not deprived of benefits when they lose income due to their work activities.

1. Occupational diseases raise a number of problems which will be addressed under that heading next week.

2. The "normal body motion" issue should not be one. Almost any movement or activity could occur off work. It is no more a "pure coincidence" that a person turns their ankle walking into their office than it would be if they fell down a flight of stairs carrying a toolbox.

3. Another non-issue should be injuries suffered when a worker is doing something wrong, such as failing to follow safety rules. If compensation were always denied merely because the worker could have avoided the injury with perfect work habits and attention, many people would not be covered. The Board has it just about right now in excluding people who are really misbehaving on the basis that they are not in the course of their employment.

4. "Stress" is a sly misnomer for psychological disabilities arising out of work activities which the Board now adamantly refuses to accept. These are not claims for being tired, worn out, or feeling harried. They are genuine medically diagnosed anxiety disorders and other conditions which in many cases are clearly related to the workplace, yet are denied coverage because of political (small "p") and policy reasons.

5. Far from legislatively removing such conditions from the Act, as the employers suggest, the Commission should recommend that the Act specifically state the such disabilities are covered, and that the governing body should develop a fair policy to adjudicate such claims as requested by the former Chief Appeal Commissioner several years ago.

6. Preventative compensation may also be discussed under pensions and rehabilitation. The Board should compensate a worker for what he or she has actually lost due to the inability to return to the pre-injury employment because to do so would almost inevitably result in a reinjury. It is simply sophistry to suggest that such workers are not "disabled" because they can function "normally" as long as they avoid the particular work activity or workplace exposure.

Section 10 and 11: Workers' Compensation and the Courts

Throughout our legal system, the courts provide redress for those who have suffered injury due to another person's violation of their legal responsibilities. As part of the "historic compromise", an injured worker's right to sue his or her own employer and fellow workers was taken away. However, the legislation goes too far. It takes away all right to sue, even if a violation of safety regulations or other legislation by the employer or fellow worker led to the injury. It also takes away the right to sue another employer or a person working for another employer. Because of the extension of universal coverage, a worker who suffers additional injury during the course of treatment may be barred from suing for malpractice. And a worker who is innocently injured in a motor vehicle accident while working cannot sue if the responsible driver is also working and covered by the system.

The present rules make little sense, and would almost certainly be rejected if workers' compensation were new legislation being proposed today for the first time. For example, when no-fault auto insurance was recently proposed, a broad coalition of disability advocates joined the private bar and others in successfully opposing it, because it would largely take away the right of an accident victim to sue for damages. A bar to court proceedings as broadly based and unrelenting as s. 11 would be roundly condemned and rejected in any other legal context. It is time for the workers' compensation system to rejoin the mainstream.

It must be stressed that "the right to sue" means much more than the choice of the type of hearing and the evidentiary and procedural rules that will determine the outcome. General damages (and, in extreme cases, punitive damages) can be a large component of the compensation for a non-work injury, but are totally unavailable under B.C.'s workers' compensation legislation. This is not an inherent part of a workers' compensation system, and some jurisdictions do provide for limited general payments. As long as B.C. continues to deny such damages, losing "the right to sue" really means receiving no compensation for a very substantial part of the worker's losses.

The same point can be made about numerous other aspects of the current system which fall short of providing injured workers with full compensation for their financial and other losses. These include the determination of future earning capacity, the maximum earnings ceiling, denial of medical and related expenses, and highly inadequate rehabilitation. If all of these issues could be finally resolved, it might then be possible to argue that the bar against suing is primarily an issue of "venue" and "process" - where do injured workers go for redress, and what are followed when they get there. Unless and until that happens, however, the s. 11 bar simply amounts to forcing people injured in the course of their employment to go uncompensated for much of their losses, even when they believe that they can prove someone else to have been at fault.

The bar against suing also removes from the work injury arena another function of tort law, which is to provide a monetary, non-governmental incentive to people to behave responsibly and to take

steps to avoid causing injury to others. In the case of highway accidents, the driver who is found to be at fault will pay significantly higher premiums. An innocent driver, however, does not pay more for insurance simply because he or she is involved in an accident. In non-highway cases, the responsible party may have to pay the full amount of the judgment personally. Perhaps most significantly to the deterrence factor, the Insurance (MV) Act deprives a driver of insurance protection if the driver was impaired, engaging in dangerous driving, or otherwise severely at fault for the accident. Why should an employer who intentionally ignores safety regulations, resulting in catastrophic injuries to a worker, suffer no worse consequences (with the possible exception of a penalty) than one who is entirely blameless? Even worse, why should a worker whose life would not have been shattered but for such an intentional violation of the law receive no more compensation than a worker whose own negligence caused the injury?

Consequently, we recommend that the bar to suing other employers and their workers be removed. Prudent businesses have liability insurance to protect them from the cost of lawsuits by customers and others who may be injured due to their conduct. A person buying a rebuilt transmission for his own car from a wrecker's will be allowed to sue if the wrecking yard's guard dog escapes and attacks him, or if he slips on a puddle of oil carelessly left on the floor and injures his leg. He will be entitled to compensation for pain and suffering and other intangible losses as well as any loss of earnings. Why should someone sent to wrecker's to pick up a transmission for his employer's car be denied equal compensation for an identical injury? It simply makes no sense. Liability to third parties with whom one has no employment relationship is a fact of life which all businesses must accept and from which they must take steps to protect themselves.

If anything, the bar to suing is even less defensible in cases of motor vehicle accidents and negligence during medical treatment. All doctors and hospitals, and all drivers and vehicle owners must as a matter of law have liability insurance covering the risk of exactly that type of injury. Why should the benefits of these universal insurance systems be denied to someone merely because they are working? Since s. 11 makes no sense in such a case, we recommend that a worker be permitted to elect to sue anyone responsible for such an injury, including the employer or a co-worker.

Finally, we recommend that the Court be entitled to give leave to a worker to elect to sue the employer or a co-worker in other circumstances. These will have to be defined carefully to preserve the general purpose of workers' compensation (taking most work injuries out of the adversarial litigation system), while serving other valid goals that are more pressing in the circumstances of the particular case. We have already referred to employers who are grossly negligent, or who deliberately decide to violate the requirements of the law. There would appear to be no valid reason why the cost of such injuries should be borne by all the employers in the subclass, or why such a victimized worker should have to settle for anything less than a court would award in similar circumstances. There also should be a residual discretion to grant such leave in other cases where, in all the circumstances of the case, it is just and convenient to do so. This would allow a fair disposition of such situations as an injury or disease involving dangerous materials supplied by other companies. A prudent plaintiff's counsel would want to include the employer as a defendant, since it may be responsible for exposing its workers to the risk. Under the present scheme, the potential partial liability of the employer (and

of any other insured B.C. employer) would simply result in a reduction in the compensation if the lawsuit is successful. This introduces unnecessary risks and complexities for a worker wanting to seek full compensation in such cases, and may deter the action altogether, thus letting the liable third parties off the hook as well (unless the Board decides to pursue a subrogated action against them).

That raises the next point - what if the worker does claim compensation in a case where another employer or its worker is responsible. Since the worker has a right to elect to sue, should the Board be able to do so in the worker's name? In our view, the answer should normally be no. While there is no compelling reason why an employer should not be liable for injuring a person who is working, there are policy reasons why W.C.B. should not be carrying on lawsuits against its own customers (unless they have done something sufficiently serious to forfeit their immunity). In such cases as gross negligence or intentional violation of the law, however, sound public policy favours such action by the Board to recover its costs, just as it favours allowing I.C.B.C. to sue a drunk driver who injures or kills someone.

Some other brief points regarding civil liability and the Workers' Compensation Act:

1. The B.C. Act should shift from an "elect or sue" model to a "claim and sue" model. See the Board's presentation on sections 10 and 11, slides 17 - 19.

2. The time limit for making an election should not be shorter than the limit for claiming compensation under s. 55 (one year in most cases). We applaud the Board for making the present legislation work by regularly waiving the 3-month requirement. The Act should be changed, however.

3. The current practice of allowing a worker to take action directly where the Board decides not to exercise its right of subrogation is quite reasonable, even if "elect or sue" is retained.

4. The current 29% administration fee which the Board retains in such cases seems excessive, given the full recovery of actual expenses and the likely award of legal costs. The fee seems to be based on the global "overhead" of the Board divided up by all of its claims. It would be more reasonable to limit the administration fee by the difference between taxable solicitor and client costs (since the Board has acted as the worker's solicitor) and whatever cost it has already recovered from the other party.

5. We do not agree that allowing workers to sue for their excess earnings or for gaps in the compensation system, would result in a fair or sensible system. If it is acknowledged, e.g., that it is unfair for the bar to litigation to apply to a worker's wages above the $56,000 statutory ceiling, it makes very little sense to respond by introducing partial litigation which can only recover the "gaps". The obvious and fair response is to remove the ceiling so that all of a person's wages are either insured or not insured. The same can be said of other present and potential gaps in the system, such as the 3-day waiting period sought by

employers, or the value of group benefit packages not included in calculating average earnings.

Privacy and Disclosure

The following observations and recommendations are presented on behalf of injured workers, and in order to promote and protect their right to privacy during the compensation process.

1. The Board should be entitled to whatever information it genuinely needs to fairly administer the claim. It should strive, however, to request and retain only relevant information, and should destroy clearly irrelevant material or return it to whomever submitted it. Ms. McDonald stated that the Board does this when, e.g., it receives medical information from the worker's doctor about unrelated conditions. We ask that the act make this mandatory.

2. The worker should be entitled to early, ongoing and complete disclosure of all information which the Board receives about him or her, subject only to the exceptions contained in the legislation, including the F.I.P.A. This is not only beneficial to the worker, but also the Board, because it allows the worker to correct any misinformation at an early stage, before it has had time to become repeated so frequently in various officers' summaries of the facts that the very repetition seems to give it credibility. Where there is a genuine difference about a material fact, early and ongoing disclosure will at least flag that issue so that it can be properly investigated.

3. By "complete" disclosure, we mean that the worker should be provided with an opportunity to receive all information the Board may have, even if it's kept apart from the claim file. There can be no justification for the gamesmanship described by Ms. McDonald when she said that if workers used the magic words, "... all the information the Board has about me" or specifically mentioned the F.I.P.A., they would receive full disclosure, but otherwise they would only get the claim file. A worker who is seeking disclosure obviously wants what the Board has about him or her. At the very least, each such request should trigger an inquiry as to whether the worker also wants disclosure of any information being kept apart from the claim file. A better change, however, would simply be to provide workers who request any form of disclosure with all of the documents.

4. Workers have the right to comment on information they consider inaccurate, and to have those comments flagged and linked to the challenged information.

5. We will be recommending that the employer's status as a legal party to individual claims be eliminated, along with e.r.a. as it is presently constituted. If this is done, the employer will not have a right to file an appeal or oppose one as a worker, and there is no reason why it should have a right to disclosure. Even if the Commission refuses to go quite that far, however, there is legislative precedent for a provision allowing an interested person to participate in a proceeding without having the rights of a party to disclosure and other attributes of natural justice. See, e.g., s. 11 of the Environmental Management Act, which allows the EAB to grant a person either full party or limited "participant" status on appeals. As a "participant", in a worker's appeal involving an issue of general importance, the

employer could have right to present evidence as a witness, or to make submissions, or both, but not to receive confidential information provided by the worker. Such a carefully tailored compromise, if used sparingly, might meet whatever legitimate needs the employer has to challenge an appeal that it sees as a dangerous precedent without sacrificing the worker's right to privacy or reintroducing a full-blown adversary system into the compensation process. It should be noted, however, that the employers' counsel have made it clear in questioning that employers will not be satisfied with anything short of complete disclosure.

6. The only alternative that would offer any protection to a worker's privacy while allowing employers to retain their status as parties would be the Ontario appeal model, where both the employer and the tribunal only receives documents determined to be relevant to the issue under appeal. As Mr. O'Brien acknowledge on April 6th, however, that would be a very expensive and time-consuming addition to the present appeal procedure. It would also make it very difficult for the tribunal to perform an inquiry role, since it might not even know of the documents which would indicate the need for investigation.

7. E-file would appear to introduce some new problems regarding privacy right, while potentially solving many of the problems with disclosure. In particular, the fact that it is virtually impossible to delete information from the e-file computer, even where the Board agrees that it is irrelevant and should not be part of the file, means that a person with the necessary computer skills and access could retrieve such information in the future, for whatever purpose.

8. The increasing use of third party providers by the Board creates new challenges and concerns. E.g., we have seen a contract between the Board and Kinko's for copying files for disclosure purposes. The extent of the confidentiality provision seems fairly complete, but it says nothing about training or supervising the employees who actually do the work. This is a concern for all third party providers used by the Board.

As indicated, only complete removal of the employer's right to disclosure (other than the "need to know"information described by Ms. McDonald) will satisfactorily resolve the conflict between the worker's right to privacy and the requirements of natural justice. The Commission should not assume that such a step would be a hardship on employers. According to the Board's statistics, 7,500 appeal disclosures were made to employers in 1997. Eliminating this would be a substantial cost savings for the system which employers insist that they, and they alone, fund.

Protecting the System from Fraud and Misconduct

No one, including injured workers, supports fraud. They agree that the Board should be able and willing to take effective action when fraud occurs. But innocent workers should not be humiliated by an investigation motivated by an anonymous telephone "tip" or by an adjudicator believing that the worker has been off work too long, unless there is real evidence of wrongdoing. Such circumstances are difficult to articulate clearly, but crucial for worker's interests.

A worker I represented many years ago was followed around and photographed in the small town where he lived, and learned upon receiving disclosure that the Board's field investigator had questioned various people, such as the liquor store clerk and the head of the community college about his drinking habits and physical activities. The whole humiliating process was the result of a fishing expedition; the worker had successfully appealed a number of Board decisions, and the staff was upset and looking for vindication.

While it occurred some time ago, this illustrates very well the need to establish a fair threshold for the Board to meet before it engages in such potentially destructive activities. If a witness identifies himself or herself and states that a worker who claims to be unable to work due to a back injury has just spent several hours helping a friend move, the Board has the right to investigate. If the Board simply receives an anonymous call saying that the worker is cheating the system, no action should be taken that could result in embarrassment for the worker. The Board can pursue the tip in other ways, such as reviewing the recent medical reports to ensure that the doctor still considers the worker to be disabled.

As the employers conceded in their opening statement, the Board should also investigate alleged fraud and other illegal conduct by third party providers, employers, and its own staff. As with workers, there should be a reasonable threshold of reliable evidence before an intrusive investigation is undertaken. A fraud "tip line" seems unlikely to meet this requirement, and in any event the person who wants to report apparent fraud can telephone the Board now.

One area where the Board needs to become more active is in the monitoring of "incentive" programs. There can be few more compelling forms of claim suppression than the knowledge that making a claim will cause all of your co-workers to lose their safety bonus, etc. The answer is quite simple - make it specifically illegal for an employer to offer or withhold a safety-related benefit for one employee because of another employee's performance. The intent of some such programs may be quite innocent, but the effect will still be to make it very difficult for a worker to make a claim.

Adjudication of Claims

Despite the importance of this subject, and the number of complaints which result from poor adjudication, our discussion will be relatively short. The Board's role and duty is set out reasonably well in s. 99 of the Act: to make its decisions according the merits and justice of the Act, and in evenly balanced cases, to give the benefit of the doubt to workers. The fundamental principles set out at the beginning of our submission further describe how decisions should be made.

Workers understand that the system is not able to turn over large sums of money to every claimant. They do not, however, understand why the Board seems to assume that they are lying, or why it will not accept the evidence of their own doctors, who know far better than some WCB medical adviser what their condition is. We will continue to make recommendations throughout these submissions concerning the adjudication process. The most important ones, however, are:

1. Injured workers are responsible, hard-working adults who have had the misfortune to suffer a work-related injury or disease. They are not children or criminals. Throughout the compensation and appeal process, workers' autonomy, dignity, and right to privacy must be respected.

6. Throughout a claim, an injured worker's condition should be assessed and treatment should be determined the worker's treating physicians. If the Board or worker wishes to dispute the assessment of the treating physicians, any additional evidence that may be needed should be obtained by a referral to an independent specialist, not a medical adviser employed by the Board. At no point should the Board or appeal tribunals assume that the worker's attending physicians are biased.

It's fairly easy to recommend principles such as treating injured workers with dignity, but much harder to implement and enforce. Workers are not merely upset with perceptions of rudeness, distrust, and lack of concern on the Board's part. Such perceptions are common, and arouse justified resentment, but more important is the unfairness of the decisions themselves. This has been demonstrated over many years by the high rate of success on appeal, and the Commission has heard about many unfair decisions from the affected workers and their unions.

We are cautiously optimistic about the case management proposal that the Board relied upon so heavily during its presentations as an answer to workers' complaints. As the process was described by the Board's speakers, the injured worker will (or should) become much more a partner in the process of managing his claim, treatment, and rehabilitation, and there should be less reason for serious dispute over the compensation decisions that will occur along the way. The best indication that this is true (or otherwise) will be the trend in appeal rates over the next few years as the process is implemented across B.C. and becomes settled.

The Commission cannot, of course, wait that long, nor should it do so. We ask that many of the positive promises made by the Board during the presentations be adopted by the Commission, not as simply an acceptable policy or practice, but as principles of conduct to be contained in the new legislation. If time permits, we will file some suggestions for these statutory principles of conduct at a later date.

Accountability of the Board at All Levels

One of the most common complaints of injured workers who appeared before the Commission was that the Board cannot be held accountable for the damage it does through improper conduct and unfair decisions. We recommend that an independent process by created to allow complaints of serious misconduct by the Board itself to be investigated and to provide an appropriate response when such complaints are found to be justified. Such a process might resemble the police complaint procedure in some respects, although in other ways it would be very different. To be effective, the essential requirements are that it be independent of the Board and that it have the authority to provide a real remedy to a worker who can show that the misconduct caused losses that are not met by later awarding the denied benefits at an appeal or review.

In addition to showing greater respect for the concerns of aggrieved workers, and in some cases granting a meaningful remedy, the mere existence of such a process would be a motivation to staff to treat workers properly, particularly if the accountability body also has a disciplinary role (if only on an advisory basis).

The January, 1998 report of the Auditor General makes a number of recommendations that will enhance accountability at the highest level to the Board's stakeholders. The complaint process we have just proposed will inject some degree of accountability at the "bottom" of the system, on the part of the officers who actually decide claims. There remains the question of accountability of the Board's management (senior and middle). Without that, fair and consistent decision-making will simply only happen where the individual officer is committed to it.

Many of the Auditor-General's recommendations are useful, but two in particular stand out because they are brilliant in their simple, yet direct focus on the Board's three most important purposes - preventing injuries, compensating injured workers, and providing rehabilitation that restores their earning capacity:

(1) At pages 17 - 19, he recommends that the Board examine the causes of serious injuries, including factors that may influence worker or employer behaviour, and report on this to the governing body.

(2) At page 16 he recommends that the Board assess the adequacy of the compensation it pays by comparing workers' pre-injury and post-injury incomes.

(3) At pages 16 - 17 he recommends that the Board assess and report on the effectiveness of its rehabilitation services by analyzing the return to work results for to determine whether workers have really returned to work at the pre-injury income levels, and remained employed on a durable basis.

Perhaps this should not seem so profound or revolutionary. What more obvious way to determine how well the Board is doing than to examine the impact of its decisions on injured workers, who are the subject of its mandate and the reason for its existence? Whether the suggestions should have

seemed obvious or not, what is important is that the Board simply doesn't do it that way. And that is a major reason for the wide dissatisfaction with its decisions.

To achieve accountability at management level, then, the Board should not only measure its overall effectiveness, but should compare the results from each area office and managerial unit. Where it appears that the staff in one area is doing significantly worse on one or all of these performance tests, further analysis should be done to determine what the reason is and how to correct it.

Benefit Levels

As the Auditor General notes, the best way to measure the Board's success in awarding fair compensation is to ask how many workers end up receiving roughly equal income after their injury as they were able to earn beforehand. The language of s. 33(1) and s. 23, 29 and 30 of the Act all reflect the Legislature's intent, which is much more relevant today than the intent of 1913 authors of the so-called historic compromise. Nothing in that language suggests that the Act is intended to under-compensate workers in order to provide some compensation to others. On the contrary, the language clearly suggests that the goal is to do exactly what the Auditor General says - to enable the worker's post-injury income to match his or her pre-injury earnings. The provisions which may result in some workers receiving more than they pre-injury earnings and earning capacity are very limited in scope, such as s. 29(2), and do not support the idea that other workers should receive less than full compensation to pay for the excess. To put it bluntly, the Act does not seek to redistribute the income of injured workers among themselves to achieve socialist ends, and it should not do so.

Given the goal, then, of adjudicating a claim so as "best to represent the actual loss of earnings suffered by the worker by reason of the injury" [the words of guidance contained in s. 33(1)], what features of the existing system must be changed to achieve that purpose?

Statutory Maximum

The provision limiting a worker's wage rate to $56,000 per year, no matter how much he or she is actually earning, simply must be changed. This issue has been discussed thoroughly before. We believe that much of the value of the Act is lost if it forces an injured to BOTH claim and sue in order to receive full compensation for his or her economic losses. Indeed, the employers would feel highly aggrieved if every highly-paid worker was permitted to sue for the excess earnings. They want their full protection in return for paying only partial assessments. We say that this is unfair.

Wage Rate Determination

This is a hugely complex and important (and often misunderstood) component of the compensation process. A worker's benefits are calculated on the basis of two basic factors:

(1) the earnings and earning capacity at the time of injury, which result in the wage rate; and

(2) the degree of disability, as measured either by reference to loss of physical (or mental) function compared to a totally disabled person, or as measured by directly comparing the worker's earnings capacity after the injury with the wage rate.

If both factors are measured fairly, the result should be a level of compensation that, when added to the worker's reduced earning capacity, restores him or her to the pre-injury position.

The second factor is the pension assessment process, which will be discussed below. The wage rate is the first factor.

Section 33, the key provision when determining a wage rate, is unnecessarily complex, and perhaps unintentionally restrictive. The purpose of the process is contained in the words of guidance quoted above. But other aspects of the language have been interpreted by the Board to restrict its ability to achieve that goal. For example, the Board interprets "earnings" to exclude the possibility of adding in the U.I. benefits a person may have received shortly before the injury. The Board also does not believe that it can base the wage rate on a typical period of time in the worker's past work history, but instead must use a continuous period ending with the injury. These views, which are often applied to the same claim, make it impossible to reach a fair result if the injury occurs after a lengthy period of low employment and hence low earnings.

Another grievance workers have described many times is the Board's refusal to consider the value of group health and other "fringe benefits" when determining a wage rate. In certain cases, those packages may cost employers several dollars per hour. If the union (or individual worker) had chosen to negotiate for that money as additional wages, it would be included in the wage rate without question. There is no rationale that can justify ignoring these important benefits.

Numerous other issues involving wage rates are described in documents from 1993 and 1994 which were prepared on behalf of the Workers' Compensation Advocacy Group for the Board of Governors. Each of the specific issues, in the end, is concerned with the same difficulty - the current policy (perhaps due to weaknesses in the legislation) does not result in accomplishment of the goal stated in s. 33(1) in certain cases.

Taken as a whole, there are two types of problems that result in unfairly low wage rates. First, the Board interprets "average earnings and earning capacity" in a peculiar manner. If usually disregards the capacity part of the phrase, although that is the most relevant term if one is measuring not what the worker did earn in the past, but rather what the injury will prevent the workers from earning in

the future. Second, the Board interprets "earnings" to confine the inquiry to wages, etc., and to exclude other forms of income such as unemployment benefits. This is perverse, since the very basis upon which the worker receives E.I. benefits is that he or she is involuntarily unemployed, and therefore has unused earning capacity. In Manitoba, I believe, the Board and stakeholders engaged in a similar debate several years ago, but the issue was significantly different. There the Board conceded the U.I. benefits should be included as average earnings, and the dispute was over the remaining 40% of the worker's capacity which the U.I. Act did not pay.

The U.I. issue does raise some complex questions and considerations, and we won't go into them further in this forum. Instead, having recognized that the current system does not adequately measure what the worker actually stood to lose at the time of the injury, we should consider the possible solutions. In our view, the answer is to both simplify and broaden the language so that the intent is clearer, and so that there is no limitation on the reasoning and calculation processes the Board can use to achieve the goal of compensating each worker for what he or she has really lost and or will lose by reason of the injury.

"Net" v. "Gross"

Our position is that an injured worker is entitled to full compensation for what has really been lost due to the injury. 75% of the gross wage rate is a fairly straight-forward way to do that. It may theoretically result in high-income earners getting a small benefit, since their combined federal and provincial tax rate might be higher than 25%, and it may correspondingly deprive low-income claimants of equal benefits to what they earned before the injury.

There are two possible fair alternatives, both of which would cost considerably more and increase the complexity of the system. The employers' proposals to go to a flat rate of 80% or 90% of net earnings is totally unfair and unacceptable, since they would deprive the injured worker of a portion of his or her economic losses (not to mention the non-economic losses the worker has already been denied), without restoring the right to seek that compensation in the courts. In effect, such a law would simply seize a substantial portion of injured worker's earnings, without compensation.

The first alternative would be to pay 100%of gross earnings, but make them taxable. That would automatically adjust each worker's total income to the pre-injury amount (if the pension percentage is correct), but would result in much higher costs to employers, and a windfall to both levels of government.

The second alternative would be to pay 100% of net earnings (non-taxable). The problem with using net earnings, however, is that the net which the worker would have received if not injured changes several times throughout his or her life. It is affected by marriages and divorces, by the birth or adoption of children, and by other factors that may be difficult to measure. The theoretical gain in equity of going through this process would be more than offset by the increased complexity, the repeated intrusions into the worker's life to review the basis for the calculation of net, and appearance of unfairness of a different kind: a worker with more dependents will receive more benefits from the Board for the same degree of injury and same wage rate.

We therefore support continuation of the existing 75% of gross standard.

Funding the System

Classification System

The Board is in the relatively early stages of completely revising its classification system and policies (based on the current legislation). It appears that many of the problems with irrational classifications and arbitrary differences in rates will be corrected by this process. From what we understand of the proposals, they appear sensible and workable, and should resolve many of the complaints made by employers. We agree with the basic choice made by the Board to base classifications on the employer's major activity, rather than the individual occupations of its employees. The details of the classification system are primarily a matter for the Board to work out with employers. This is not true of the other aspects of the funding system: rate-making and experience rating.

Rate-making

The current and proposed systems of rate-making determine rates on the basis of payroll. With the exception of the relatively few employers who can qualify for multiple classifications, the entire payroll will be subject to the same rate, which in turn will be based on the collective experience of the subclass and the overall experience of the system, and on the experience rating of the individual employer. In our view, the reliance upon payroll, rather than hours worked, is wrong, and contributes indirectly to the Board's tendency to set unfairly low wage rates based on past earnings, rather than future earning capacity.

The importance of measuring a worker's future earning capacity (which is what the worker has totally or partially lost by reason of the injury) rather than merely calculating past average earnings (which the worker has already received before the injury) is discussed under the heading of "Compensation - Benefit Levels", and need not be repeated here. What does require emphasis in this consideration of funding policies, however, is the close link between the payroll method and the reliance on past earnings.

Take an example from construction. A union ironworker may earn $25 per hour plus benefits for high-rise construction. A non-union ironworker whose employer competes with the union company for contracts may only earn $15 per hour. A rate-setting system based on payroll charges the non-union employer only 60% of the WCB assessments of the union company, for the same number of hours worked. A system based on hours would charge both companies the same.

When asked to justify this, the Board refers to insurance principles that the cost should be related to the potential loss; i.e., they assume that because the non-union worker is being paid less when he is injured, his compensation will be correspondingly less. When asked at a March 20th consultation on the Employers' Services Strategy whether the Board had statistics showing that the cost of

compensation is directly related to the amount being paid at the time of injury, the Assessment department was unsure.

The more important question, however, is not whether cost of compensation has been so related in the past, but whether it should be so related in the future. The discussion under "Compensation - Benefit Levels" will explain why, in our view, the focus has to be on the future loss, since the fundamental purpose of the wage rate is to measure the worker's actual loss of future earnings by reason of the injury. It follows that a similar injury to two ironworkers of the same age with comparable skills should lead to very similar long-term benefits, even if their short-term losses would be quite different based on their employment at the time. Otherwise, the Board is assuming that the non-union ironworker would never have been able to secure union-wage employment, either by securing union work or because changes in the labour market or in labour legislation will eventually force non-union companies to match union wages.

In addition to supporting the unfair assumption that a worker's long-term losses can be accurately determined solely by measuring their past earnings, the current reliance on payroll unjustly subsidizes companies which compete for contracts by paying their workers low wages. The risk of injury for those workers, on an hourly basis, is at least as great as it is for workers earning much higher pay. We suspect that greater adherence to safety standards by union companies and the relatively greater experience of union workers may result in a greater risk in the non-union sector, but it does not appear that the necessary statistics have been kept to determine this.

It will no doubt be argued by some employer interests that the Board should not interfere in what is really a labour relations issue. Our point, however, is that the Board is already taking sides with the non-union employers, by enhancing their competitive advantage by charging them lower WCB assessments for identical work with at least equal risk. If only to preserve a "level playing field" (such as it is) for union and non-union employers in the same business, the Board should charge each of them the same basic rate for an hour of risk (employment).

Experience Rating

It is our firm position that experience rating is a profoundly irrational process, and that its negative effects far outweigh whatever slight effect it may theoretically have in promoting safety efforts and/or accommodation of injured workers by employers. Professor Thomason said in his evidence that:

> *... linking employer cost to firm accident experience rating provides employers with incentives to invest in accident prevention. In other words, because the employer's costs depend on its accident experience the employer has an incentive to reduce accidents in order to save costs and I think that this is really an important point to make here. That's probably the primary rationale for experience rating.*

We urge the Commission to require the Board to devise a far more effective method of rewarding employers for safety efforts (and imposing sanctions for unsafe practices) than the clumsy imposition of identical assessment increases on all employers whose workers suffer an injury no matter what the cause or degree to which the employer could have done anything to prevent it. The universal motor vehicle insurance system in B.C., while not perfect, has a much more rational link between unsafe driving practices as represented by accidents and claims, and the cost of insurance. While a few employers may consider the e.r.a. system a reason to prevent injuries, a much more natural response of employers to a system that charges them more for something they could not have avoided will be oppose every claim, no matter how legitimate.

We believe that the great majority of employers are conscientious and socially responsible, and will make all reasonable efforts to prevent injuries because they know and care about their workers, and because the law requires it. It is depressing to hear repeatedly from the organized employers who speak through the ECG that the only way to make them care about safety is to make it economically beneficial for them. Considering the cynical position taken by the ECG regarding virtually every compensation issue that has arisen, however, we cannot feel very surprised.

The fact remains that socially and systemically undesirable conduct is far more likely to flow from experience rating than genuine safety programs. Those employers who only respond to economic motivations will find it much more advantageous to avoid claims in other, more direct ways.

1. They may require workers to register with the Board as "contractors" with their own coverage, as was described in the coastal logging industry example related to the Commission on April 7th. Where the employment has been structured in that fashion, experience rating simply adds pressure on these workers (in these cases there can be no doubt who is paying for the system) to refrain from making claims for any but the most serious injuries. It also frees the real employer from any incentive to promote safety, by shifting the obligation to the worker/contractor who must make a cruel choice between refusing unsafe work and losing their income or gambling with their lives and health.

2. They may refuse to hire older workers, people with disabilities, or people who have had prior W.C.B. claims, because they are seen as being more likely to become injured and make a claim in the future. The truck dealership case described on April 7th, currently before the Court of Appeal regarding a human rights complaint, illustrates such conduct.

3. They may oppose even legitimate claims and seek to minimize benefits in much less positive ways than accommodating an early, safe return to work. Even if the worker eventually receives fair benefits, the employer's active opposition throughout the claims process will do serious damage to any prospect of the worker returning to that employer on a durable basis, and will increase the administrative, disclosure and appeal costs of handling the claim.

4. Experience rating also drives the relief of costs process discussed below, which requires the Board to make a determination in every case of whether there was something wrong with the worker that should lead to full or partial relief. This process adds to administration time and expense, disclosure costs, violations of workers' privacy, and puts added burden on the appeal system, all to determine just what "pocket" the Board dips into to pay for the claim.

Experience rating has even more bizarre consequences in the public sector, where budgets are often fixed and where it is the taxpayer who ultimately pays the compensation costs, not the owners or shareholders of the employer. In fact, the only people directly "penalized" for an experience rated injury in a school or hospital may be the students or patients, if the result is that something must be taken out of the budget to pay the increased cost.

A New Focus on the Causes of Injuries

We propose that the current unfocussed and arbitrary process of experience rating be replaced by requiring that the Board consider in each claim the way in which the injury occurred. This would enable the Board to follow the advice of the Auditor General and determine trends and patterns in the occurrence of injuries, so that prevention programs can be directed where they will do the most good. It will also enable the Board to categorize the claim so that the financial and other consequences to the employer will be appropriate.

Only where it is found that a identifiable failing in the employer's prevention program caused or contributed to the injury should the Board consider an increased assessment. Moreover, the punitive response of increased assessments should not be the only response open to the Board. Where the degree of the employer's responsibility is small, and consists of less than ideal efforts to train and supervise its workers, other kinds of remedial steps may be more appropriate, and would certainly meet with less resistance. Such non-economic responses should be the norm in the public sector, since the public user of the system and the taxpayer would otherwise be penalized for the inadequate safety program.

The focus of this entire decision making and appeal process would be the employer's responsibility for an injury or disease and the steps that can be taken to prevent it from recurring. To further reduce the adversarial nature of the present system, the worker would not be a party to such determinations or appeals (although he or she may be a key witness), as the result would not affect the worker's benefits. Similarly, the employer should no longer be a party to a compensation claim (and should therefore have no right of appeal, right to participate in the worker's appeal (except as a witness), or right to disclosure.

We have recommended that workers should regain the right to sue in certain cases, such as those where the employer not only contributed to the injury, but did so by grossly negligent or criminal conduct, or by intentionally disobeying the safety regulations. The decision-making process just described would often be the first step in identifying such hopefully rare circumstances. When it is decided that this high threshold has been met, the worker (or the worker's survivors) should be entitled to claim benefits, and the Board's legal department should be directed to recover the cost of the claim, together with general damages, punitive damages (which would be appropriate in many such aggravated cases), and all other costs by taking court action in the worker's name.

This would create a comparable incentive to promote safety (and to refrain from recklessly endangering workers' safety) as the provisions of the motor vehicle insurance legislation which deprive a driver who has caused an accident while impaired or otherwise behaving criminally of any indemnity protection.

The represented employer community claims to support experience rating because it is more equitable to make the "bad"employers pay more and because it will encourage safety programs. We believe

that the current system will do neither. However, the proposals we have made will accomplish both objectives very effectively, and at the same time will enable the Board's prevention staff to focus their efforts on the identified causes of claims coming before the Board.

Relief of Costs Applications

The purpose of such applications will largely disappear if experience rating is confined to injuries for which the employer's conduct or safety program has been found to be responsible. In neither of those situations would cost relief be appropriate anyway. The remaining possible basis for relief of costs would be situations in which a worker's previous condition contributed to the cost of the injury. However, since there would be no impact on the employer's assessments, the only purpose such an application would serve would be to shift the cost of the claim from the subclass to the general accident fund.

Does it make sense to have a formalized decision making and appeal procedure for doing this? We say no. Such a process would result in numerous shifts of claims from all subclasses to the general fund, largely offsetting each other. It is quite possible that the additional administrative and appeal costs would result in almost all employers paying more because costs have been added to the system, without removing any in return. If relief applications are eliminated altogether, there would be no reason to disclose information concerning a worker's medical condition to employers. The gain in protecting workers' privacy and reducing administrative costs far outweighs any theoretical benefit of fine-tuning subclass assessments.

Vocational Rehabilitation

Introduction

Effective vocational rehabilitation is one of the Board's three interrelated goals, along with preventing injuries and compensating injured workers fully for the their losses. Debates about which of these have the most priority are of limited value; what is crucial is that the Board recognize that all three must be achieved if the system is to be successful.

Every prevented injury is a real (though usually invisible) victory for the Board, the employer, and most of all the worker who would otherwise have been injured. Preventing all injuries and diseases, however, is plainly impossible - as long as people engage in work activities, human nature, the limitations of current knowledge, and the imperfections of technology will continue to cause some workers to become injured (or even to die) in the course of their jobs. When that happens, the overriding obligation of the Board is to fully compensate them for their economic losses (injured workers absolutely cannot accept the notion that they should receive less than full compensation). That obligation is the minimum which the law can morally provide for taking away the worker's right sue for all losses where the employer or a coworker were at fault.

Like prevention, successful vocational rehabilitation benefits all parties. To the extent that the worker can return to his pre-injury earnings, the cost of fully compensating the worker is reduced. There are also very important non-economic benefits that flow from successful rehabilitation. The worker once again enjoys the satisfaction of being independent and self-supporting. The post-accident employer may benefit economically from training assistance or other WCB incentives, but its biggest gain is the addition (or return) of a valuable, motivated employee to its workforce. Unlike compensation, which costs money and may therefore seem to pit the interests of workers against the Board and employers, vocational rehabilitation is a "win-win" objective.

At least, that's the way it should work. In reality, when deemed employability rather than a real return to work becomes the standard for assessing the loss of earnings pension and the need for rehabilitation, the only winners are the Board and employer. The worker loses a substantial part of the pre-injury earnings without compensation. We propose that decisions based on deemed employability in both the rehabilitation and pension contexts be restricted to very limited circumstances in which it is clearly the only alternative.

Section 16 currently gives the Board the authority, but not the obligation, to provide vocational rehabilitation. The current policy recognizes that the worker has a right to such help in certain circumstances, and there is a full right of appeal regarding rehabilitation decisions. While this mitigates the discretionary nature of rehabilitation, there should be a recognition in the Act itself that such assistance is a right when an injured worker cannot return to his or her pre-injury employment, or to comparable work. This would enhance the worker's autonomy over the most important decision he or she faces - "How am I going to spend the rest of my life?"

One proposal which we will discuss would make rehabilitation a statutory right, and also provide incentives through the assessment program to encourage employers to provide job opportunities for injured workers. If successful, such incentives could be converted into a program separate from workers' compensation, which would apply to all persons with disabilities. While such a law would be outside the Commission's mandate, it would further the rehabilitation goals of the Board. We will ask that the Commission consider this broader proposal, and you agree that it has potential merit, recommend that it be investigated.

Rehabilitation and Case Management: Timing is (Almost) Everything

We are cautiously optimistic that the case management approach, if implemented as it was described to the Commission by Mr. Buchhorn and others, will go a long way toward eliminating the existing delay in implementing vocational rehabilitation, which is conceded by almost everyone to be a very serious impediment to its success. In theory, the vocational rehabilitation consultant will be part of a return to work planning process that will begin relatively early in the claim, and will involve the injured worker and the treating physician(s), as well as the employer, as full participants.

This will make it possible to identify return to work impediments, such as the insistence of some employers that an injured worker be fully recovered before returning to the job, or the simple inability of some employers to accommodate a worker who has any residual disability or vulnerability to reinjury. Early recognition of rehabilitation problems should enable many of them to be resolved without the economic pressure which termination of wage loss benefits places on the worker. In fact, it may even be possible to conclude an expedited appeal over an early rehabilitation decision before wage loss ceases, especially if the proposed Review Board pilot project for mediation of rehabilitation disputes proceeds and is successful.

Injured workers agree with the Board that it is important to keep a clear focus on successful treatment and return to work during the initial few months of a disability. This supports the Board's January 29, 1998 proposal that the 8 week rate review be delayed to 13 weeks, so that a reduction in the wage rate doesn't poison the atmosphere and thwart the cooperation that is necessary if the continuum of care interventions are to succeed. However, the Board's proposal doesn't go far enough. A reduction in the wage rate will have just as disruptive an effect on vocational rehabilitation planning and execution. If the goal is to facilitate a durable return to employment for workers who cannot go back to their previous jobs, the date of injury earnings rate should be maintained unless there is specific evidence that the job would be ended or that there would have been other significant changes in the worker's earnings.

Eligibility Issues

When a worker has been injured, and cannot return safely to the previous work, the goal of all concerned should be to assist the worker in restoring his or her earnings in another employment.

Board policy currently recognizes this. In fact, the policy regarding rehabilitation avoids some of the mistakes in the compensation policy, such as the refusal to acknowledge that workers who cannot return to pre-injury employment because they are likely to become immediately reinjured are disabled and entitled to benefits. These so-called preventive situations will be addressed below as one of the issues where the policy on pensions must change. In the rehabilitation arena, however, the Board rightly considers such workers to be eligible for benefits.

Scope of Rehabilitation Assistance

Within the limits of the Act's goal, which is to restore the worker's pre-injury earning capacity, the scope (and cost) of rehabilitation are largely left to Board discretion. At the upper end, this is inevitable; it is very difficult to imagine how policy (let alone a statute) could rigidly define how much assistance will be required in each case. That is not true of minimum benefits, however. We propose that the statutory right to rehabilitation entitle a worker who cannot return to pre-injury employment, or to a substantially similar kind of work, to a specified length of assistance as a matter of right. This assistance should be a kind of fund that the worker can draw upon years after the injury, if a worsening of the disability or changes in the economy again create a need for it.

A major benefit of such entitlement is that it would work to preserve workers' control over their lives after the initial return to work. The five "Phases" of rehabilitation options set out in paragraph 87.20 of the Policy Manual will mean that most workers will be channeled back to their pre-injury employer, or at least industry. As a general pattern, that will often be appropriate, and indeed will be what many (but not all) workers desire. Sometimes, however, this will result in a job that is only suitable only because of substantial accommodation by the employer. Should the employer go out of business, or the job disappear, the worker will again face unemployment which is really due to the work injury, though it may superficially appear to be due to lack of work. (If not for the injury, the worker would have many other options for work.)

Given the risk of such future changes, many workers would no doubt choose to "save" a portion of their guaranteed rehabilitation entitlement so that it would be there for them should they need it. This would reduce the disruption to the worker's life resulting from renewed unemployment, and serve much the same ends as the case management system is designed to serve immediately after the injury: the worker will be able to move promptly into retraining

Continuity of Income and the Alphabet Soup

The Commission has probably heard at least twice as much it would have liked about "Code R" and its various relatives. The twists and turns of the Code R story are perhaps most significant for what they tell us about the particular view of policy (and "practice") followed by the Board, and the need to find a clearer way of guaranteeing that only the governing body can change the rules about the amount of benefits workers receive. This issue will be discussed below in the context of governance and policy.

Continuity of income benefits are of vital importance for injured workers whose wage loss benefits are terminated because their condition is said to have stabilized, or reached a "plateau". This is typically one of the most sensitive and difficult times for a permanently disabled worker. The active treatment process is usually concluded, and the worker essentially has to accept the fact that the disability is unlikely to become any less, and that he or she will have to change jobs. The current practice (or policy, depending on one's view) only adds to the inherent stress of this phase of the claim by drastically cutting the level of benefits even before the loss of earnings assessment is completed. While the Commission was told that the practice now requires that the worker be given 30 days notice to make a submission before the reduction actually takes place, there is no guarantee that the Board will change its mind no matter what the worker tells it.

According to Ms. Wakelin and Mr. Buchhorn, the only workers that will be negatively affected by the change to Code R will be those who do not qualify for one of the other "Code" benefits because they are not pursuing rehabilitation. It was suggested that these would mostly be older workers who were content to live on the partial pensions being assessed by the Board, plus savings and perhaps other benefits they receive from CPP, group disability plans, etc. That is not the experience of the advocates who persisted in raising this issue since the change in Code R became known. In any event, workers who do not believe they are fit to return to work yet will be placed in this category by the Board.

In our view, the whole process is misguided. The solution is simple - wage loss benefits should continue until the pension assessment is completed. The Board's presenters confirmed that the case management process will result in the vocational rehabilitation consultant becoming involved in a claim long before wage loss benefits would be terminated. Case management will make the Board an active partner in creating a return to work plan which may include rehabilitation assistance of various kinds. In the process, the consultant will (or could) acquire and update most of the information needed to complete an employability assessment for pension purposes. At the same time, the proposed Arcon project (or an alternative process of assessing the worker's functional disability without waiting months for an appointment with a Board doctor) should end that portion of the delay. The functional examination can be done almost immediately, and the consultant can complete the report simply by obtaining and considering a few missing pieces of evidence. Why then upset the

worker and disrupt whatever cooperation he may have with the Board merely to reduce benefits for a few weeks? Instead, the wage loss benefits should simply continue.

Paying for Rehabilitation Assistance

Over the years, many injured workers have financed most or all of their own rehabilitation by commuting their pensions, because the Board would not agree to sponsor them in the direction they wanted to go. This is an added argument for a right of rehabilitation, rather than a discretion. Paragraph 88.51 recognizes that the Board should contribute the amount it concedes to be necessary to restore a worker's earnings to a more extensive program which the worker may wish to pursue. However, the policy also suggests that the worker might have to resort to a commutation if the desired training is a program which the worker "might well have undertaken regardless of the injury."

Creating a Statutory Right to Rehabilitation

We will distribute a document that was prepared in 1991 entitled "Defining the Right to Vocational Rehabilitation". While some of the specifics may need to be adjusted in light of case management and other changes in since then, the proposal will at least serve as an reasonable example of how a coherent, worker-driven process which give the worker a right to rehabilitation.

Creating Incentives for Employers to Accommodate Injured Workers

The final section of the 1991 paper proposes a scheme of incentives based on adjustments to the assessments of larger employers, which would serve as an incentive to hire (and to maintain the employment of) disabled workers. This is a modification of a much more ambitious new act proposed in the attached document, which would benefit all persons with disabilities.

Deeming Employability for Pension Assessment Purposes

The infamous issue of deeming employability will be discussed under this heading, since employability assessments are performed by rehabilitation consultants, although deeming itself is really part of the pension process.

Injured workers oppose deeming employability except in circumstances where it is impossible to provide the worker with effective rehabilitation leading to an actual job, or where the worker has made a deliberate choice not to pursue reemployment. Examples of the former would be a pension decision resulting from a reconsideration of a much earlier decision, or an appeal decided in the worker's favour after a lengthy delay. Examples of the latter would include a worker who chooses to "retire" rather than undertake a new and different occupation, or a worker who decides to pursue a college degree, using his or her own resources as well as the value of the rehabilitation the Board concedes it would have paid to restore the pre-injury earnings.

Pensions

Elements of a Pension Decision

As Mr. Ingraham confirmed in his presentation, a pension decision involves several different issues, each of which affects the worker's entitlement. These include

1) the start date;
2) the wage rate;
3) the functional impairment; and
4) the projected loss of earnings.

In addition, if a claimant who will receive a loss of earnings pension says that he or she would have worked past the age of 65, the Board must decide when the loss of earnings will cease.

Start Date

This is rarely a subject for dispute. Pensions start when the wage loss benefits were terminated. Any rehabilitation or other "Code x" benefits received in the interim are nominally repaid from the pension. If there is a dispute involving this question, it's usually over the termination of wage loss benefits, and any appeals are from that decision (by the Claims Adjudicator), rather than the pension decision.

Pension Wage Rate

Approximately 20% of pension decisions set a different wage rate than that used for wage loss purposes. We believe that this number should be much greater.

Virtually all of the concerns raised over wage rate determinations above apply equally to this element of the pension decision. For pension purposes, we will only address the differences.

By definition, a pension is a lifetime benefit. The wage rate must therefore represent the worker's pre-injury earning capacity over the longest term. Vagaries in the worker's employment history prior to the injury, such as non-seasonal periods of unemployment, have little relevance to the worker's capacity over the rest of his or her life. Even more than the 8 week (or 13 week) rate, the pension wage rate must focus on future capacity, not past history.

Earlier I gave an example of two ironworkers who suffer identical injuries. They are the same age and have the same skills. One worked for a union employer, earning $25 per hour, and the other for an unorganized employer paying $15 per hour. Their short term (immediate) loss due to an injury would reflect this difference in their current pay. But for pension purposes, which must estimate the

loss over the balance of the workers' lives, the two ironworkers would have identical earning capacity. In our submission, it would be grossly unjust to pay the non-union worker only 60% as much as his union counterpart throughout the balance of his life. Yet that is almost certainly what the Board would do.

This failure to recognize the differences between short-term and long-term wage rates can lead to even more bizarre consequences for a worker with two or more injuries. If a worker is hurt after a year in which there were substantial periods of unemployment or part-time work, the Board will establish a long-term rate based on that earnings history. Even if a period of more than one year is used, the inclusion of the "bad" year will drag down the average. The pension benefits payable as a result of this injury will be reduced accordingly.

What if this worker returns to the pre-injury employment despite the disability, works through a year or more when the economy is strong and there are no shortages of work, and then suffers a further injury? This time, the Board will take the "good" year into account. The result could very well be that the same worker's wage rate (supposedly representing his or her earning capacity) for the second claim, **despite the disability from the first injury**, will be higher than the wage rate assessed when the worker was slightly younger and had no disability at all. This irrational result flows from the failure of the Board to focus sufficiently on the future rather than the past in determining long term wage rates.

A special wage rate issue arises in the case of younger workers, such as high school students engaged in work experience. In such cases, there may be little or no work history to rely upon. The Board responded to a question about this by suggesting that it would not automatically base the wage rate of a student on the low earnings at the time of injury if there were evidence that the student would have gone on to medical school or entered another highly paid occupation. Based on past experience, such a generous decision seems highly unlikely. The Act needs to provide more flexibility in the ways wage rates can be determined, especially in determining the rate for pension purposes, which will be payable for life. Greater reliance on class averages would often be a more accurate and reliable way to estimate an injured worker's lifetime earning capability, provided the appropriate class is selected. Special problems are posed for the Board when injuries occur to young people (and others) who did not consider the work at which they were injured to be their permanent occupation.

Functional Impairment Assessment

As in other areas where the Board's presentation consisted mostly of descriptions of a new program or approach that has yet to be fully implemented, we find it difficult to take a definite position. The new technological approach ("Arcon", which is only one of the alternative companies that could have been selected) has both advantages and weaknesses. It takes the assessment out of the hands of the Board's medical advisors, which injured workers will heartily applaud. But it replaces them with a machine and a technician, supervised by a doctor employed by the third party which performs the assessments and owns the equipment. That will make workers nervous.

The Arcon equipment measures range of motion, but not (as we understand it) strength or durability. Life measurements taken by a doctor, the results will be affected by the slight differences in the way the technicians conduct the tests, although the differences should be less.

The approach also leaves little room for subjective comments, unless the worker and treating physicians insist on submitting them separately after the examination. We submit that the Board should be required to make the attending physician part of the pension assessment process. We could be done at the time of the Arcon examination, or afterward, when the doctor reviews the Arcon results. The observations of the doctor, who may well have treated the worker for many months or years, will be very valuable in understanding just how the injury affects the worker's capacity to function, and hence the pension entitlement.

Loss of Earnings Assessments

Loss of earnings pensions are the core of the compensation system for workers with serious permanent disabilities. Without them, many workers who cannot return to their previous employment could not receive adequate replacement of their lost earnings. However, misuse of deemed employability and the way in which the Board estimates the worker's maximized, long-term earnings undermine the ability of the system to provide full compensation for the worker's losses. Deeming generally is addressed above under the Rehabilitation heading.

Even where the worker has returned to employment which the Board acknowledges to be suitable, and has thus done everything possible to minimize the loss of earnings due to the injury, the Board often refuses to accept the worker's actual earnings as the basis for the calculation. Instead, it chooses a higher post-injury rate, supposedly based on the amount which the worker will be able to earn at that occupation in the future, after receiving raises and other increments. Often this maximized amount is based on wages paid in relatively rare union jobs which the worker has no realistic hope of obtaining.

The unfairness of this approach is enhanced by the fact that the Board takes the opposite approach when determining the worker's wage rate, which is the first factor in the loss of earnings equation. Except where there has been a lengthy history of steady employment at the pre-injury job, the Board

is rarely willing to use maximized earnings for the wage rate. By subtracting artificially "maximized" post-injury earnings from an artificially reduced wage rate, the Board often assesses a loss of earnings pension that falls far short of providing full compensation for the worker's real losses.

Reviews and Changes to Loss of Earnings Pensions

Board policy calls for at least one periodic review of each loss of earnings pension to see whether the worker is doing better than expected. According to material supplied by the Board in response to counsel's request, only a few loss of earnings pensions were increased from 1995 through 1997 as a result of reviews, and usually the functional pension was increased as well. These were presumably cases where the worker's condition had deteriorated between the original assessment and the review. In the majority of other cases, the loss of earnings pension was reduced or terminated as a result of the review.

These figures show that periodic reviews are a one-way street. If the worker has done better than projected, the pension will be reduced or eliminated. But if the worker still hasn't found the job the Board considered to be suitable and available, or still hasn't matched the optimistic earnings level projected for such employment, the pension simply remains unchanged. This is an obvious inequity that must be changed. If the Board continues to review loss of earnings pensions (and we agree that at least some reviews are warranted), the pension should be adjusted upward as well as down as a result of the findings.

Commutations

The Board's current policy on commutations is, in its own words, "paternalistic". [See Tab "O" of our materials for the Board presentations.] This is offensive to injured workers, and inappropriate in a period when workers are no longer mostly naive and illiterate, and when most of them regularly make crucial economic decisions that affect their long-term interests such as purchasing a home, saving for their children's education, purchasing life insurance, and numerous other matters. Why should the Board assume that workers who deal with banks, accountants, and others in making these decisions need to be protected from their own folly once they are injured? The exchange of correspondence at Tab "O" clearly shows the irrationality of the current policy; the worker would have saved more than the value of the pension by paying down his mortgage early, but was refused the commutation because the officer didn't think the CPP was "stable".

Lump Sum Compensation for Non-economic Losses

This is a benefit which has never been payable as such under our legislation, except perhaps for the small payments awarded for disfigurement (and even they are conceptually linked to their impact on the worker's earning capacity). Injured workers should be entitled to such compensation when serious injuries drastically affect their lives. Otherwise, the Act will continue to fall short of providing full compensation for what the worker has lost, which in our view is a fundamental principle of a just compensation system.

There can be a threshold for such benefits, based on the nature and severity of injury. In establishing it, however, the Commission should bear in mind the fact that seemingly minor disabilities (at least, from a functional impairment perspective) can drastically affect the worker's personal life.

Some years ago the Supreme Court of Canada set a limit of $100,000 for non-monetary compensation in personal injury cases. Courts have been applying this limit with adjustments for inflation, and the limit is now approximately $250,000. We submit that this would also be an appropriate maximum for the Board to pay for any one injury or disability. The proportion of this amount that would be paid in each case should be based on a realistic assessment of the impact the injury has had on the worker's life, and not just the functional impairment itself. The compensation should at least be payable in cases where the worker would have had a good cause of action against an employer or worker, but cannot pursue civil remedies because of s. 10. Arguably, in a no-fault system, at least partial non-monetary compensation should be payable even where no one except the worker is at fault.

Proportionate Entitlement

Proportionate entitlement under section 5(5) of the Act applies to reduce a worker's pension benefits when the work injury is superimposed on a pre-existing injury or disease. Only in the case of a functional pension does apportionment make sense. If the work injury has worsened a previous disability in the worker's back from 2% to 5%, the Board should compensate the worker for the increase of 3%.

We submit that proportionate entitlement should never be applied to temporary benefits, and that the current policy must be changed so that it does not apply to a loss of earnings pension either. The reason is that in both cases, the worker was working and earning the pre-injury wages despite the pre-existing disability. It was the work injury, and that alone, which in such cases caused the loss of those earnings, and it would be unjust and contrary to principle to reduce the compensation for that loss merely because the worker was able to achieve the earnings despite a non-compensable disability.

Does this mean that a worker who has a partial disability pension and then becomes disabled for non-compensable reasons should lose that pension? Of course not. Nothing in the Act, nor in the principles upon which it is founded, would support taking away benefits which the worker is already receiving because of a subsequent event which prevents employment. After all, the worker is entitled to choose not to work, if he or she wishes, and will still receive the pension which the Board has awarded. Why should the worker's position be any worse after a non-work injury or other disability prevents continued employment?

Section 98(3) - Terminating Benefits for Imprisoned Workers

This provision, and accompanying policy, results in automatic termination of benefits when a worker is imprisoned, unless there are eligible dependents to whom the benefits can be paid. In our view, this provision is perverse, and should be removed from the Act.

As noted above, a worker is entitled to choose not to work and will still receive compensation benefits flowing from the disability. That is even true for loss of earnings pensions prior to the age at which the considers that the worker would have retired had the injury not occurred. Suspension and/or cancellation of benefits during imprisonment is an exception to this general rule. In our view, the exception doesn't stand up to scrutiny, and results in the Board quite literally profiting from the crime which led to the worker's imprisonment.

Appeals to the Review Board and Appeal Division in 1992 and 1993 led to decisions which ruled that the Act doesn't authorize the Board to cancel such benefits automatically, as the policy requires, nor does it extend to workers who have day parole status and are permitted to engage in employment. Section 15 of the Charter of Rights and Freedoms was argued in these cases, but the tribunals did not find it necessary to decide the case on that basis. We now have two appeals pending before the Review Board raising similar issues, and will again rely upon the Charter.

From a policy perspective, however, we submit that the provision should be repealed (and the policy with it). Presumably, its intent is to prevent prisoners from amassing large savings from their benefits while they are incarcerated at public expense. If so, it is misguided. It is not the function of the Workers' Compensation Act or Board to punish criminals. Moreover, the Board simply keeps the "savings" resulting from s. 98(3) and its policy. In effect, it confiscates the injured worker's benefits for the Board's benefit, thereby discouraging the victim of the crime from seeking civil compensation since there will often be no other significant assets from which a judgment could be satisfied.

The policy would make somewhat more sense if it required the benefits to be paid to the victim, or to the prison authorities in partial repayment for the cost of imprisonment. Such repayments, however, should not be required only from injured workers. Until there is a general scheme allowing people serving sentences to the charged for the cost of their imprisonment, injured workers should be able to retain their benefits just as other prisoners do, subject to any judgments which their victims may obtain.

Chronic Pain and Psychological Disabilities

Employers' groups have argued that the Commission should recommend that the Act be changed to prevent injured workers from receiving compensation for chronic pain, or for psychological disabilities that are not the result of physical injuries. Injured workers strenuously disagree with both arguments.

The fundamental basis for the compensation system is that a worker who becomes disabled in the course of the employment and because of that employment is entitled to compensation for at least the economic losses resulting from that disability. Any ad hoc exceptions to this principle such as those proposed by employers undermines the system. In fact, Mr. Bates stated during his presentation on section 10 and 11 that there is an exact correlation between section 5 and 6 entitlement and the bar to litigation in section 10. We agree. Accordingly, the effect of legislatively excluding psychological disabilities from the compensation system would be to expose employers to lawsuits by workers who believe they can prove that the employer (or a fellow employee) was responsible for the condition.

The situation is different in the case of chronic pain. Employers argue that B.C. should follow the lead of Nova Scotia and restrict benefits flowing from a chronic pain condition to minimal treatment amounts (and deny compensation altogether). This would leave injured workers who suffer from disabling pain arising from a work injury with no compensation for their losses, and no right to sue. There can be no principled reason for such an unjust result, and employers have not presented any. They merely argue that the causes of such pain conditions are often unclear, that the mechanism of causation may be complex, and that some workers are more susceptible to such disability than others. All those things are true of many disabilities. They do not justify denying compensation where the worker can demonstrate by the weight of medical evidence that in his or her case the pain is caused by the work injury.

The Appeal System

Introduction

This part of our submission will address both the formal appeal system, and other mechanisms currently available to enable injured workers to resolve disputes over their compensation claims and benefits. These other mechanisms, which are critical to the effective running of the system, include reconsiderations at all levels, managerial reviews, the Ombudsman (both the internal WCB position, and the B.C. Ombudsman's office), and judicial review in the Supreme Court. First, however, we will discuss the formal appeal system.

There can be no misunderstanding about the importance of an effective appeal process. Unlike some types of benefit legislation, the outcome of a compensation claim can literally determine the financial well-being of the worker and his or her family for life. Its importance is comparable to a Supreme Court proceeding for similar injuries sustained in a motor vehicle accident or other personal injury. The goal of ensuring that a just decision is reached in such crucial cases cannot be balanced against any short-term cost benefit of eliminating a level of appeal.

While workers have legitimate complaints about the appeal structure, we must keep in mind that the anger is not nearly as widespread or intense as the animosity which existed before 1991 toward the former commissioners. Realistically, if one or more of the existing tribunals were eliminated or combined, many of the current decision-makers at the Review Board and Appeal Division would be offered a role in the new system, and rightly so. The challenge before the Commission is to ensure that any changes to the appeal system will enhance the overriding goal of reaching a just result in every significant dispute between the worker and the Board. Speed, efficiency, and cost are all legitimate secondary goals, but all of them combined are not nearly as important as reaching a fair outcome to each appeal.

The Parties

The true parties to a compensation dispute are the worker and the Board. In an essentially no-fault system, the employer need not and should not be considered a separate party in its own right. It is simply one of the collectively insured within the subclass that may be affected by a claim. If our submissions on a new approach to employer accountability are accepted, the employer will not be directly affected by a claim unless it has been found by the Board to be responsible because of something which it has done or omitted to do. That will be a separate decision focusing on employer responsibility, leading to a separate or review appeal process. Consistently with our position on the employer's role in a compensation appeal, the injured worker should not be a party to this process either.

Proposals for Change

On behalf of injured workers, we totally oppose the suggestion that one or more of the current levels of appeal be abolished (or combined) in order to save costs and reduce the overall length of the appeal process. Achieving a fair outcome is of such vital importance to the worker and his or her family that one level of appeal is simply not acceptable. CPP, EI, and BC Benefits, social benefit legislation which may have less impact on a person's welfare than a compensation appeal, all allow two or three levels of appeals and reviews.

In considering the position of the employers' groups and the Review Board that there should only be one level of appeal, it is important to beware of false economies. The Appeal Division would not have been able to achieve the high level of worker satisfaction it now enjoys if the Review Board did not resolve the majority of appeals, and if it did not produce a focused decision and record in the cases that do go on. A single new tribunal will not have these advantages, and will require more time to determine the same number of appeals that are now coming before the Review Board.

In our view, the work performed by the existing tribunals will reappear before any new tribunal, perhaps in new forms, and will require nearly as many resources. For example, the Review Board's submission acknowledges that a mechanism will be needed to allow parties to seek reconsideration of a decision which is believe to be based on an error of law or jurisdiction. It will not be possible to maintain a neat line between such "legalistic" proceedings and applications relying in part on new evidence. Whatever the Act might say, workers and their advocates will feel compelled to bring deserving cases before the reconsideration panel, in the hope that it will find a way to reach a fair decision on the merits. Like many tribunals faced with such pressures, the reconsideration panel may "push the envelope" further and further in order to find ways to give relief in cases where the formal appeal decision now seems unfair. Whether it does so or not, much time will be occupied deciding applications by workers who realize only after their appeal is rejected that they did not present their best evidence and arguments.

The Formal Appeal System

The Review Board is the heart of the existing appeal system. It hears nearly all initial appeals by injured workers (and currently by employers as well). It hears these appeals "in the raw", in the sense that it does not have the benefit of a lower tribunal decision setting out the facts and evidence, as the Appeal Division has should the matter proceed there. The Review Board normally holds oral hearings at a party's request, and does so in communities throughout B.C. Workers are less likely to have trained representation before the Review Board than they are when they get to the Appeal Division, and there are more likely to be gaps in medical or other evidence that may make it difficult to decide an important issue.

The Commission has heard many complaints about the delay in receiving decisions from the Review Board. These are justified, and indeed the Review Board itself has proposed that a time limit be imposed on the new Appeal Tribunal which is proposed in its submission. Presumably Mr. O'Brien and the other authors of that submission would concede that a similar limit should be imposed on the Review Board, provided it had sufficient vice-chairs, members, and other resources to comply. The factors described above would make it impractical to comply with a 90 day limit from the date of initiation, but a longer limit or one which starts from the time of filing Part 2 might work.

Some of the recommendations in the Review Board's submission are worthy of consideration. For example, incorporating the MRP procedure as a means of resolving a medical issue in an appeal may make sense. Adverse decisions rarely involve **just** a medical issue - the actual dispute is always over denial or termination of benefits, or the amount of benefits, based on a medical determination. There could be a real advantage to injured workers in having an general appeal tribunal such as the Review Board able to decide what benefits flow from the medical decision.

The proposal for mediation is more questionable. If all workers have competent representation, and if the Board participates in good faith, mediation could lead to faster, more certain results than an appeal decision, and give the worker greater control back over his or her claim (and life) in the process. But it could also lead to a climate of expected "trading" in which a worker would be almost required to abandon some legitimate disputes in order to secure a fair settlement of others. More fundamentally, mediation between the worker and the tribunal whose decision is under appeal seems bizarre. If the Board is willing to admit that some parts of its decision are wrong, why should the worker have to drop other appeals before the Board will correct the acknowledged error? Any such process could compromise the appeal tribunal's neutrality in the eyes of the appellant worker, should it appear that the mediator is pressuring the worker to accept a compromise that is not acceptable.

Appeal Division

The Appeal Division is generally performing very well, within the limits of the current legislation and mandate. There are some problems, however. Oral hearings are denied almost routinely, forcing workers to try to present their own case in writing, or to find an advocate able and willing to do so for them. The promptness and brevity of decisions sometimes leads to poor analysis of the issues. The lack of any effective mechanism to challenge a bad decision is one of the greatest weaknesses of the present system. In our view, appellate and review processes should focus on the merits of the issue that is raised, not on artificial jurisdictional requirements. The Act and policy should be revised so that the appeal tribunals can reconsider any decision they have made, on the same standard of correctness that applied at the appeal itself.

More importantly, both the appeal division and the medical review panels should be fully independent of the Board. It would be quite feasible to set up a common appeal registry for all three tribunals, with common procedural rules that would simplify the process for claimants and insulate the tribunals from suspicion that they are tools of the Board. See the 1987 System Report of the Ombudsman for a variation of such a proposal regarding the Medical Review Panels.

Medical Review Panels

The MRP process itself is not working badly, but there are several minor, and two serious problems associated with the WCB's role in the process. These problems occur at the front end (initiation and establishment of the panel) and the rear end (implementation of the resulting decision).

At the front end (by which we mean all of the steps preliminary to the MRP meeting, examining the worker, and issuing its certificate which answers the questions asked of it pursuant to s. 61), the process is entirely controlled by the Board. This is itself a difficulty, given the lengthy conflict likely to have taken place between the worker and the Board by the time a dispute reaches the MRP. How likely is it that a worker, after battling the adjudicator, Review Board, and Appeal Division (in most cases), will trust a tribunal which depends entirely on WCB to file and process the appeal, appoint the panel members, set up the hearing, define the issues, create the evidentiary record, etc.?

The inherent perception of Board control, while important, is not the only issue of concern. Section 61, as interpreted by the Board, requires that every MRP be asked to answer the whole range of medical questions relevant to the worker's claim. These go far beyond the specific issue that was defined by the enabling doctor's certificate. Consequently, appellants must be advised that there is a possibility that the Panel will not only deny their appeal of the specific issue in question, but also reverse a previous medical decision that favoured them. The law seems to contradict itself: why insist that the doctor define the "particulars" of the medical issue in dispute if the panel is going to be asked to answer all possible medical questions anyway?

Another difficulty of the present legislation is that an MRP is limited to medical issues. Even where the decision in question is clearly based on a medical finding, the worker's concern is almost always with the compensation consequences of that finding. I.e., the worker is not concerned per se with how his disability is described, but rather with the benefits which flow from it. An MRP cannot directly decide such benefit questions, and the worker must therefore rely on the Board to implement its decision. As often as not, the implementation results in a new "non-medical" dispute, which can only be resolved by a new appeal to the Review Board, and perhaps later the Appeal Division. Since the Review Board and Appeal Division may already have dealt with the medical decision before it was resolved by the MRP, the time and resources spent on such a matter could be truly enormous should a second cycle of appeals be necessary.

The solution to this problem is not to eliminate levels of appeal, thus leaving unfairly treated workers with no recourse, but rather to ensure that appeal decisions are implemented in good faith and on their real merits. Moving the responsibility for initiating appeals, defining issues, and implementing decisions to the Review Board, without changing the independence of the MRP within its own jurisdictional sphere, was a key recommendation of the Ombudsman in his 1987 System Study, Public Report No. 7.

Reconsiderations, Reopenings, and Managerial Reviews

The current policy and legislative provisions regarding this informal and discretionary means of resolving disputes are generally acceptable. One major difficulty is s. 96.1, which places severe limitations on the ability of the Appeal Division to reconsider its own decisions. The limits on the types of new evidence that can lead to such a reconsideration is especially unfortunate in a system which generally seeks to follow the spirit of s. 99 in determining claims. Like all tribunals, the Appeal Division makes serious errors from time to time, and needs the authority to fix them without requiring the worker to first go to the Supreme Court and overcome the privative clause.

The Role of the Ombudsman

The role of the Ombudsman in the compensation system has been important to injured workers since the office was formed. The 1987 System Study was a major element in the process leading to the 1991 amendments.

In recent years, the Ombudsman's role has been largely performed by Peter Hopkins, a Board employee, on an internal basis. According to information we have received, the office has been quite successful in resolving some types of disputes.

That being said, injured workers who are locked in bitter conflict with the Board do not trust any Board employee to assist them. Since the Ombudsman is often the end of the line for a worker, it is important that he or she be seen to be independent of the Board. We have been assured that the B.C.

Ombudsman's office will continue to respond to complaints against WCB if the worker doesn't want to have it dealt with by the internal office.

An Appeal to the Courts

For reasons already described, many injured workers with the bitterest disputes simply do not trust any tribunal or other entity which they see as being part of the system. One of hallmarks of a good appeal structure is the "loser satisfaction index" - the extent to which those who are unsuccessful at the end of the day leave with at least the sense that their case has been fairly and courteously heard and considered, even if it was ultimately rejected.

For many injured workers, the only tribunal in which they would have that level of confidence is the regular court system. The Commission heard from many workers who said that they wanted their day in court. Sometimes this was described as wanting to sue the Board, sometimes as wanting to appeal, and sometimes as wanting the courts to administer benefits. However the individual workers put it, what they wanted was the ability to have a judge, whom they perceive to be truly independent of the Board's influences, determine their dispute.

Because of the overriding importance which workers' compensation has in the lives of significantly disabled workers, we recommend that a special form of appeal to the court be added to the existing appeal structure. In proposing this, it is only fair to point out that there is a fairly strong sentiment in the worker advocacy community opposing such a step, because of fears that appeals to the court would necessarily be complex, expensive, and time-consuming, and that they would lead to much greater involvement of lawyers in the system.

The latter may be inevitable anyway, if workers are to receive the level of representation they need in resolving disputes over the most significant legal disputes they may ever face in their lives. The 1987 Ombudsman Report discusses the need for trained representation, and another theme which the Commission heard repeatedly from injured workers is that they do not now feel that they have adequate access to advice and representation. See the submission to the Board of Governors from the Canadian Bar Association, which proposes a limited, partial response to this concern.

As for appeals to the Court necessarily being expensive, complex, legalistic, and time-consuming, that will depend on the procedures and rules which are developed. Courts can operate quite informally, if the legislation indicates that they should do so. Procedures can also be informal. Quite a few years ago the Supreme Court of Canada ruled that Family Court judges could not issue injunctions to enforce custody orders. This led to development of the Supreme Court's "Interim Family Rules" which expressly overrode the general rules of court and established a very informal, free process for bringing such issues to the Court. Typically, hearing in Chambers are quite informal, and a separate time could be set aside to enable the Court to hear compensation appeals separately from other cases. The judges assigned to hear such cases could be limited to a modest number (as needed in light of the workload) who would develop expertise as they hear more and more cases.

We would not favour limiting such appeals to issues of law or jurisdiction, as that would be little improvement over the access to the courts which workers now have by way of judicial review. At what will clearly be the final hope for vindication, a worker should be able to talk about the real issues, and to receive a decision based on those issues.

If it is felt that allowing all decisions to be appealed to the Court would result in too many appeals for the system to absorb, we would prefer to see a system of applications for leave to appeal to a registrar-like official used to control the floodgates, rather than restricting the grounds for appeal. The leave process can be flexible enough to recognize that some appeals should simply proceed because of their financial importance to the worker, while others might to granted leave because they do involve a legal issue of general importance. Whatever the status of the Appeal Division, such an appeal to the Court would certainly result in decisions which the Board would be obliged to follow in other cases turning on the same legal issue.

Occupational Diseases

Our full written submissions on this important subject will be filed as soon as possible. The major points are as follows:

1. Anomalies in the present language of the Act must be eliminated. For example, the reference to "... and is thereby disabled from earning full wages at the work at which he was employed..." in s. 6(1) should be changed so that a worker suffering an occupational disease which doesn't become disabling until after retirement is not denied all compensation. In cases of permanent disabilities due to injury, functional pension benefits payable under s. 23(1) continue for life, whether or not the worker would have been retired anyway. While there are theoretical explanations for this, the appearance to injured workers is that victims of occupational disease are not receiving just compensation (in fact, they're not receiving any compensation), and that this is discriminatory and unjust. It should be noted that the creation of a new benefit for non-economic losses, as we have proposed under the heading of pensions above, could be a more appropriate form of compensation in such cases.

2. The cost of occupational disease claims should be allocated to the classes representing the industries where the relevant exposure occurred. This is an area where employers do need an economic incentive to spend what may be large amounts of money and/or disruption to the work process in order to replace dangerous materials with safer ones, provide better protection from airborne and other potential causes of disease, and change the process of the work to reduce risks.

3. The Commission has received a submission from West Coast LEAF urging that sexual harassment be specifically recognized as a compensable, work-related injury. The section 10 bar and the current limits of compensation would raise some problems, but the submission makes the excellent point that harassment makes women distracted and increases the risk of injury both to the victim and to others, and that the Board is in the best position to educate employers on the need to develop policies and rules that prevent harassment from occurring, and respond appropriately when it does. By not regarding this as a compensation issue, the prevention of such harmful and potentially dangerous activities is also removed from the Board's mandate.

4. The same point can be made about work-related cancers, which according to comparative statistics from the U.S., are vastly under-reported (and therefore under-compensated) in B.C. Cancer is one of the leading causes of disablement and death. It poses special problems for the Board both respecting prevention and compensation, because it is often so long after the causative exposure before the cancer appears, and because there are so many potential other causes of most cancers that proving causation is extremely difficult. If that a reason for the system to leave cancer victims uncompensated? We say no. We also say that only by recognizing that many cancers are work-related, and paying the appropriate compensation in such cases, will the Board do what is necessary to prevent or reduce further occurrences. It's

really quite appalling that municipal governments (meaning we, the taxpayers) are spending large amounts fighting compensation claims by firefighters and others who are exposed to clearly dangerous substances in the course of their employment protecting our lives and property. The focus of both the Board and employers should be on acquiring the knowledge to avoid the most dangerous exposures with better protective equipment, and to search for means to neutralize the damage caused by exposure after it occurs. That will not happen until the responsibility of the Board and employers is accepted. The same can be said for many other workplaces and work processes in both the public and private sectors.

Governance of the Board

The governance of the Board is obviously of great importance to injured workers. They are the intended beneficiaries (and, too often, the unintended victims) of the Board's policies, which are created by the governing body. They are equally affected throughout their dealings with the Board by the manner in which the administration carries out those policies.

Accountability has been an important theme of injured workers' presentations to the Commission. We have tried to suggest various ways to make the system more accountable, such as changing the focus of experience rating from the cost of a claim to the employer's degree of responsibility, if any, for its occurrence. We have also urged the creation of an independent body to hear complaints of abusive, illegal, or otherwise improper conduct by the Board respecting a worker (and there is no reason in principle why employers should not have equal access to this process).

Accountability starts at the top, however, and injured workers want and deserve to have a recognized role in the governance of the Board. We recommend that there be injured worker representation on the governing body itself. At this stage in the development of an injured workers' movement in British Columbia, it is not feasible to detail a formal means of choosing those representatives. Injured workers have been disenfranchised and ignored by the system, until this Commission (to its great credit) determined that their interests be represented in the final phase of the hearing process. Granting the injured worker community the respect it deserves and the role it needs to be able to perform will bring about changes that will gradually enable the choosing of its representatives to be done on a semi-autonomous basis, as is the case with the representatives of the Federation of Labour and the employer community. In the interim, the Minister may have to choose injured worker representatives, following a careful and fair process of consultation with all interested parties.

In addition to a role on the governing body, injured workers and their groups and leaders must be included in the consultation process which the Board now undertakes regarding significant policy issues. Since consultation leads to advice and criticism, but not decisions, the existing groups and leaders should be included at their request, and new groups added as they are formed. The perspective of these representatives of the community, while they will often disagree with one another, can only benefit the governing body in reaching decisions that respect the needs and desires of injured workers in general.

Policy and Law

What is Policy?

Complex administrative agencies such as the Workers' Compensation Board require complex and detailed legislation to define their powers and the ways in which it may be used. Most drafters do not attempt to include all of the needed details in the statute, both because it would be too

cumbersome and because it would be too difficult to change. Instead, the statute sets out broad principles, and confers authority on an appropriate person or body to fill in the details by enacting regulations. Once validly enacted under the authority conferred by the statute, the regulations have the same force of law as the Act itself.

In many cases, no detailed written rules, whatever form they take, could be sufficiently broad and flexible to allow the administrators to reach a fair decision in the many different and sometimes unforeseen circumstances that will come before them. The most common approach to such situations is to grant the administrator a range of discretion, coupled with guiding principles which should indicate the kind of result intended by the legislators for all situations. An important provision of the Workers' Compensation Act which tries (however imperfectly) to achieve this is s. 33(1), in which the Board is directed to determine the worker's average earnings and earning capacity so as "best to represent the actual loss of earnings suffered by the worker by reason of the injury..."

Because consistency is considered an important element of justice, agencies which must employ many administrators to make a great many decisions often feel the need to define as precisely as possible how their discretion should be exercised in any given case. They do this by issuing general policy guidelines. For the WCB, the main set of such guidelines is the Rehabilitation and Claims Manual.

As important as the goal of consistency is, it should not be forgotten that the legislation granted the Board a wide discretion precisely because it is required to deal with a myriad of different situations that cannot be fully foreseen in advance. Good policies must be carefully drafted to reflect their limited purpose, which is to guide the exercise of discretion toward the statutory goal in the great majority of cases, without precluding the administrator from finding another way to achieve the goal in the unusual and unforeseen cases. While the Manual often strikes such a balance, there are many instances where it does not do so, leaving the Board's officers with the view that they must apply the policy in a certain way however irrational and unfair the result may be.

It has been well established that policy is not "law" and that an administrative agency errs if it attempts to treat policy as law. The Supreme Court of Canada has said that an administrator "may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion … but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion..." *Maple Lodge Farms v. Canada* [1982] 2 S.C.R. 2, quoting the reasons of Le Dain J in the Federal Court of Appeal with approval. The British Columbia Court of Appeal has applied the Supreme Court's reasoning to the Workers' Compensation Act in *Testa v. W.C.B.*

The applicability of these principles to the current workers' compensation system should be clear. There have been frequent suggestions, however, that the references to "policy" in s. 82 and to

"published policy of the Governors, " in s. 96(4), both of which was added to Act in 1991, somehow elevates policy to a higher plane. In our view, that position is untenable. All that these references do is to designate the Governors as the appropriate part of the Board to create and change policy (clearly consistent with the Munroe Committee's view of their role) and to provide an way for the Board to secure a second examination of a decision of the Review Board which appears to violate a policy. It makes sense for the Board to have this ability, to be used if its senior executive officer agrees that the issue is serious enough to warrant its use. It by no means follows that the Legislature meant to make the Board's "published policy" (which is not even defined in the Act) to have the status of law, like the Act or regulations, until it has been formally set aside by a court or revised by the governors.

How Should Policy Be Made (and Changed)?

We agree that policy should only be made (and changed) by the governing body of the Board. Section 82 requires this. However, as the "code R" debate demonstrates, the line between policy and "practice" needs to be more clearly defined so that the administration cannot do an end run around the safeguards that apply to policy changes by treating them as practice changes (or as issues of the "implementation" of policy, which fall within the president's authority under s. 84(3)(b) of the Act. It should be noted that the president's powers may be delegated pursuant to s. 84(4) to "an officer of the board **or any person**..." [emphasis added]. Only by calling the president to account can the governors control the implementation of their policies at the individual claims level. This is a necessary feature of such a large organization handling so many individual matters, and would not be a matter for concern if both the governing body and the administration understand the line between creating policy and implementing it.

The present official system for stakeholder consultation before any policy changes are made is also a reasonable one. If it is followed in good faith by the governing body, all affected parties will at least have an opportunity to participate in the process, although they may be disappointed by the result. **We recommend that established groups and leaders in the injured worker community be included in these consultations.** This includes the right to attend information meetings to discuss policy development (such as the ongoing Employer Services Strategy process), and written notice of upcoming issues so that they can participate by way of written submissions to the governing body.

Interim Policy Changes Following Appeals

The current practice of ignoring decisions of the Appeal Division that a policy is illegal (in that it violates the Act, for example) and continuing to apply that policy until it has been changed by the governors cannot be allowed to continue. The appeal system loses much of its credibility when the same issues must be re-appealed and re-decided in claim after claim. The solution is to put an interim policy into place in these infrequent but high-profile and important cases. The Board failed to do this when the Appeal Division ruled that current policies violated the Act by automatically terminating

all loss of earnings pensions at age 65, and by automatically cancelling all functional pension benefits upon a worker's imprisonment. An interim policy was eventually adopted regarding the loss of earnings pensions, but even after several years, the imprisonment policy is still being applied.

What should this interim policy be? The most "neutral" approach is for the Board to advise its officers to disregard the portions of the existing policy which have been ruled illegal, and simply administer the Act according to the remaining policy and general principles of law. One of the misconceptions which seem to underlie some of the Board's repeated problems with "policy" issues is the implicit belief that a policy is needed for every situation which arises. In fact, the Act could be administered without any policies at all, although consistency of decision-making would suffer and claimants would be even more confused about the "rules" than they are now. The former Chief Appeal Commissioner asked the Governors to develop policy covering claims for psychological disabilities not resulting from a physically traumatic incident. The fact that the governors did not do so certainly doesn't mean that the Board is entitled to reject all such claims simply because there is no policy to allow them. (Unfortunately, however, statistics show that this is exactly what the Board has done.) Instead, such claims must be adjudicated according to the fundamental principles set out in s.5 and 6 of the Act, and the relevant medical and other evidence. This applies equally to situations in which the existing policy has been ruled illegal, but not yet replaced.

Finally, a related issue which concerns the structure of the appeal system is the Board's present view that it would somehow be improper for it to judicially review a decision of the Appeal Division, because it is internal to the Board. That reticence will be removed if the Commission agrees with us the appeal division, like the review board, should be independent of WCB. If that does not happen, however, we believe that the Board should change its position on judicial review. Since s. 85(5) of the Act, etc., protect the decision-making function of the Appeal Division from interference by the Board, there is no apparent reason why the Board could not apply to set aside a decision which is thought to be based on an error of law or excess of jurisdiction. We believe that the court would recognize and respect the Legislature's intention that the Appeal Division operate at arm's length from WCB, and recognize that a judicial review is the only appropriate means the Board has of ensuring that the Appeal Division doesn't exceed its own limited but independent jurisdiction.

Why would injured workers advocate a more active judicial review stance by the Board, given that many (though by no means all) of the challenged decisions involve appeals by workers that have been allowed? In short, because the Board would then no longer have an excuse to apply the decision only to the individual claim, forcing other workers in similar circumstances to file and pursue their own appeals.

In our view, the Board's present position is somewhat hypocritical. If the decisions of the Appeal Division must be regarded as the Board's own, and therefore unassailable in court, it should follow that the Board must observe them in similar cases. The present position that the Board "can't" or "shouldn't" challenge a decision it disagrees with, but is free simply to disregard it in all future cases is totally unacceptable in any system that seeks to administer benefits according to law.

How Should Policy Be Implemented?

Policy should be implemented according to the spirit of the *Maple Lodge Farms* and *Testa* decisions. I.e., the administrator must never lose sight of the ultimate objectives of fair compensation as embodied in the Act itself. Where the details of existing policy seem to lead to a result that contradicts the "merits and justice of the case," section 99 requires the administrator to depart from the policy to the extent needed to achieve that goal.

Remaining Issues from the 1V' Phase: Fatalities and Prevention

Fatality Benefits

Should Fatality Benefits Be Based on Need or Loss?

Our position is that surviving dependents of a worker killed on the job should receive compensation for the family's economic loss, and that this should be paid not as charity, but because justice and fairness demand it. Need should not be the focus of survivor's benefits, anymore than it is for other types of compensation. The surviving dependents should receive compensation for the income which the worker brought to the family without having to plead and establish poverty. It follows that the distinctions based on age should be repealed, whether they are constitutional or not, because they can only be a very clumsy attempt to address need.

Remarriage in the context of "need" and "loss"

Terminating benefits for surviving spouses who remarry is more difficult to analyze in "need" v. "loss" terms. From one viewpoint, the "loss" from which the Act insures workers includes the loss of their contribution to their dependents should they die on the job. When a worker dies, benefits should be paid regardless of whether the dependents later find new sources of support (which could be a new job or life insurance, as well as a new spouse). An alternate view is that since tort law may take the contingency of remarriage into account, and might also deduct a new spouse's actual contribution if the remarriage occurred before the trial, workers' compensation should do the same. We submit that workers' compensation is much more an insurance system than a tort system, and that the former approach is therefore more appropriate.

Charter of Rights Issues

Age Discrimination

As counsel for the appellant widow in the closely related Canada Pension Plan case (Nancy Law), which was argued before the Supreme Court of Canada in January and is now awaiting decision, I am in a relatively good (yet awkward) position to comment on the question of whether the age distinctions in s. 17 contravene the Charter. I will therefore comment briefly on the issues raised at page 149 of the Commission's interim report.

I personally believe that the age distinctions in s. 17 are discriminatory and unconstitutional. The two earlier decisions of the Appeal Division were right, and the most recent one is wrong. The latest decision is based on a misguided analysis of whether the stereotypical assumptions underlying the notion that younger survivors have less need are flattering or insulting. The constitutionality of a provision which uses a group characteristic such as age to determine the right to receive an economic benefit should not turn on such a subjective factor. If it does, the government will always argue that the legislature simply didn't feel that the excluded group needed it. Rarely will the record show that a group of people was excluded because the government didn't like then and wanted to make them suffer.

This approach is wrong because s. 15 of the Charter is primarily concerned with the discriminatory impact on the persons affected by the law, not the intent of the government. The proper approach is to ask whether the group characteristic used to grant or withhold the benefit is a reliable indicator of whether an individual fits within the law's purpose or not. For reasons set out clearly and logically in the Decision 93-1222, age bears little if any relationship to need, which is clearly the only purpose the age distinctions could address. Age may not even be relevant to need, but it certainly is not so closely related that it can be used in place of a direct economic test.

Remarriage and the Charter

We will primarily address this question as a matter of fairness and justice for survivors rather than constitutionality. In a Charter context, remarriage could be seen as a much more direct indicator of need than age, and remarriage may also be considered relevant to whether the survivor continues to suffer a loss. However, its relevance to either need or loss could only be determined by examining the details of the financial position of the new spouse, as well as the survivor. Moreover, the relationship to loss also depends on whether the Court is willing to treat loss as "net economic loss" determined by subtracting the new spouse's contributions from those which the deceased worker would have made. We will argue below that this is an offensive and insulting analysis which a court may well be unwilling to employ, especially in a Charter equality case.

Prevention of Injuries

What Agency Should Be Responsible for Prevention?

We agree with the Federation of Labour and employer groups that WCB should continue to be the agency responsible for prevention, including both educating employers and workers and enforcing the regulations, by carrying out inspections, making remedial orders, imposing penalties, and assessing the cause of an injury or disease for purposes of an employer responsibility rating process that should replace the present system of experience rating. The Board told the Commission that the updated computer system now being installed would enable staff in preventions, assessments, and claims instant access to information collected by any of the Board's departments.

Having this comprehensive safety and health information about each employer would be a great advantage if the Commission agrees with us that the the experience rating system should be changed to focus on the causes of serious claims and whether the employer bears any responsibility for them.

Safety and Health Education

It also makes sense for the Board to be a major source of safety and health education program for employers and workers. In fact, it should be a priority for the Board to develop a short program on workplace safety that can be incorporated into the work experience programs of B.C.'s secondary schools. Aside from the benefits of reaching students before the leave school to go into the workforce, such a program could help to reduce the risk of injury during work experience itself.

The Board's education program can go beyond the current limits of compensability to deal with behaviour that makes injuries more likely to occur. For example, the submission of West Coast LEAF argues effectively that sexual harassment distracts its victims from their work and increases the risk of injury to them, and to their co-workers. While sexual harassment per se is unlikely to be made compensable (in the absence of an injury which disables the victim from working), it is a very legitimate subject for prevention regulations and education.

Preventing Injuries to Home Business and Homeworkers

This is an especially difficult area of workers' compensation reform, since it leads to a conflict between the safety and health of workers and their right to privacy and autonomy in their own homes. A carefully designed solution is required, since advances in technology, and the increasing problems and costs of commuting and working in big cities will inevitably make such work arrangements more and more common. With almost universal coverage, many types of work arrangements that would previously have been outside the Act altogether are now covered.

The task is not simply to protect a new class of cottage peasants from exploitation by their masters. The "new home workers" do include recent immigrants employed by the garment industry at low piecework wages, but many other home workers are highly educated professional and consultants who have sought the right to work at home because they value the flexibility and independence such arrangements offer. With technology improving, more and more clerical workers may want the advantages of working at home to avoid commuting and stay closer to their children. Most of the new home workers will not thank the Board if an overzealous prevention program introduces expensive and inconvenient new rules that dictate how their home work areas must be arranged and equipped.

The Commission also should not exempt all home workers from all safety rules. Home workers who are covered by the Act, whether they work at home primarily for the employer's benefit or their own, are still at risk of suffering an injury, for which the Board would have to pay compensation. The Commission must weigh the invasion of worker's privacy and loss of control over their family homes against the need to promote safe work practices and reduce claims costs by avoiding preventable injuries.

In our view, the need to balance these factors calls for different results, depending on the particular circumstances of the home workers in question.

1. Those who have chosen to purchase P.O.P. protection should be required to comply with reasonable safety requirements even in their own homes, since they will expect the Board to compensate them for any injuries they may suffer while working there.

2. People who not only work out of their own homes themselves, but also employ others to work there should be subject to whatever safety requirements are necessary to protect their employees from injury. Workers should not be left at greater risk because their employer has chosen to operate the business from the employer's residence rather than a separate workplace.

3. Some home workers are self-employed persons who have mandatory coverage only because they have incorporated their business or practice, and are employees of their companies. There is no convincing policy reason why such "employees" (who are also owners, and hence their own "employers") should be covered by the Act at all, unless they voluntarily take out

P.O.P. coverage. If the Commission agrees that coverage in such cases should be optional, those who voluntarily remain in the system should be subject to reasonable regulations.

4. Home workers whose employers require such arrangements as a condition of employment (or strongly encourage it because it saves the employer overhead costs) should be subject to reasonable regulations, which should be sufficiently flexible that they do not effectively force the employer to dismiss the worker. Since the home work arrangement was reached at the employer's initiative, any costs of complying with the regulations should be borne by the employer. When orders are made in such circumstances, the Board should be vigilant in protecting the worker from dismissal.

5. Employees who work at home all or part of the time at their own initiative pose the most difficult problem. If the arrangement is primarily for the worker's benefit, any regulation or order that requires the employer to spend a significant amount on the worker's home work area is quite likely to bring the situation to an end. However, it would be a sharp departure from the fundamental principles of the Act for the Board to be able to force the worker to make such changes at his or her own expense. One solution is to make the regulations advisory rather than mandatory in such cases, and leave the question of costs to be worked out between the two parties.

   The law does not have to arrive at a definite answer to every circumstance. The solution we have proposed would balance the opposing rights, leaving it to the worker, who is most affected by both the cost and the risk, to make the choice. Would this necessitate depriving the worker of full compensation if injured in a way that would probably not have happened had the regulations been strictly applied? In our view, no. Workers will not be reckless with their health; self-preservation is a basic instinct, and especially in their own home, workers will be reasonably careful whatever the law may say.

   Should the employer be financially affected by an injury that would not have occurred, had the worker who was working at home at his or her own request complied the Board's safety regulations? Probably not, if this was the worker's own choice. Since the law would allow a worker to make such a decision, it can be argued that there was nothing in such an employer's conduct (or inaction) that brought about the injury.

   Finally, the task for the Board of determining whose idea it was for the employee to work at home would not be as difficult as it might first seem. The starting point is the history of the arrangement. Other factors would include whether co-workers doing similar jobs also worked at home, whether the employee also has a desk or other workspace at the employer's site, whether the arrangement is full or part time, whether the employer paid to have specialized equipment installed in the worker's home, etc. This finding of fact will be relatively easy in most cases, while other circumstances it will pose difficulties. That is no different than many workers' compensation decisions.

Regulations Must Be Reasonable

In all of these cases, regulations which will apply to the worker's home must be reasonable, and include considerable flexibility to accomplish the safety goals in different ways, so long as the goal is met in the end. (Of course, all regulations should be reasonable; but the fact that these requirements are to apply as a matter of law to the worker's own home makes such flexibility especially important.)

Workers' Compensation

For the 21st Century

Appendix D

January, 1998 Accountability

Reporting Review by the

Auditor General of British Columbia

regarding the Workers' Compensation

Board of British Columbia

Workers' Compensation Advocacy Group

c/o ***Community Legal Assistance Society***

#800 - 1281 West Georgia Street
Vancouver, B.C. V6E 3J7

Please direct your reply to:
James Sayre

Tel: (604)685-3425
Fax: (604)685-7611
E-Mail: clas@vancouver.net

November 6, 2001

From Jim Sayre

Re: **January, 1998 Report of the Auditor General**

M E M O R A N D U M

Some of you may remember that the Auditor General issued a report in January, 1998 in response to a request from the Board's management, which in 1997 requested that his office review the WCB's accountability reporting.

I've attached the executive summary and recommendations, which generally seek to measure the quality of the compensation, rehabilitation, and safety activities of the Board by looking at their outcomes. This is a refreshingly simple concept which would confront the Board with the poor quality of its adjudication process. For example (the following are in my words...):

- Do workers end up with at least equally high incomes (combining their compensation and earnings) after the injury as they had before it?

- Do loss of earnings pensions really reflect the worker's long-term post-injury earnings, even after the earnings have become "maximized"?

- Are workers who are ruled fit to return to their old occupations really able to continue to do so over the long term?

- Do workers who receive vocational rehabilitation assistance to find a different occupation really remain working after the assistance ends?

The extent to which the answers to these questions are "no" or "not always" is the extent to which the system is failing injured workers.

The full report (almost 2 mb...) can be downloaded from the WCB's web site. The url is:
http://www.worksafebc.com/corporate/about/ar/auditgen.pdf

Here is the executive summary and list of recommendations.

Executive Summary

The Office of the Auditor General was invited by management of the Workers' Compensation Board (WCB) to provide an independent assessment of the accountability information they provide to the Panel of Administrators (the Panel), through a number of reporting mechanisms, and to the external stakeholders, through the annual report. (We restricted our review to the annual report because, at the outset, it was agreed that the annual report was the prime mechanism for accountability reporting.)

We acknowledge the innovative thinking of WCB management in inviting our Office to provide an independent assessment of its performance measures. We accepted the invitation willingly because we believe that, in the future, stakeholders will be concerned with the reliability of the performance information being provided by management, and, as a result, the role of auditors will be to provide this assurance to the stakeholders.

Given the innovative nature of this exercise, we undertook the work in a spirit of mutual learning with the WCB, and we acknowledge the assistance of the WCB in providing support for the project. The method of assessment we used was experimental, as there is no well-established body of experience and practice in this area. We describe our methodology in the "Introduction" chapter of the detailed report.

Our conclusions should be read in context. The art of performance measurement in the public sector is in an early stage of development. Many organizations have not yet begun to address key areas of performance, such as outcomes, quality of outputs, and service quality. In our view, management of the WCB has made considerable advances compared to many other organizations in British Columbia in identifying key performance measures.

In providing our recommendations, we recognize the potential for WCB stakeholders to be overloaded with data. We have some suggestions to offer in this regard. First, the frequency with which each information set is provided should be reviewed carefully. The readers should not receive information more frequently than decision making requires. Second, the information should be layered. If high-level indicators should prompt stakeholders to seek further information and analysis, the more detailed information should be made accessible to them, rather than providing all the information repetitively. Third, every attempt should be made to provide information in graphic format, as this is the most efficient means of communicating most of the information that WCB provides. (In fact, most of the WCB's existing key performance indicators are presented in this manner.) Finally, the costs of gathering the information should be weighed against the benefits. Some of the longitudinal outcome information that we suggest can be expensive and difficult to collect, and therefore reporting cycles of longer than one year may be appropriate for these.

We understand that discussions between management and governing body members have occurred in the past, with regard to the content, style, and frequency of accountability information. We encourage this dialogue to continue. We also would encourage the Panel to consider innovative means of getting to

understand the organization and its programs, such as site visits and "Town Hall" meetings with stakeholders and staff.

Our overall conclusions follow.

Assessment of the Accountability Reporting

We reviewed recent samples of accountability reports provided to the Panel and the 1996 annual report and statistical summary and compared them to our criteria, which were based on the accountability framework described in the joint report of the Deputy Ministers' Council and the Auditor General. From our criteria, we identified the following key areas of accountability for the WCB:

Mandate and Direction of the WCB
– Mandate and legislative compliance
– Mission, vision, values, and standards of conduct
– Strategic goals
– Relevance of WCB programs and regulations

Outputs and Outcomes of the WCB
– Adequacy of compensation to injured workers
– Restoration of injured workers to pre-injury status
– Safety in the workplace
– Fairness of funding load
– Financial sustainability
– Quality of adjudication
– Service quality
– Public awareness
– Efficiency
– Secondary impacts

Organizational Capacity
– Human resources
– Quality of information
– Risk management

We found that the information contained in the reporting to the Panel is substantially complete in that it addresses most of these key areas of performance of the WCB, while accountability reporting in the annual report is less complete.

We recommend that the following areas of performance should be included or enhanced in the accountability reporting of the WCB. Our detailed recommendations are contained within the detailed report and summarized in Appendix A.

Mandate and direction of the WCB

We recommend that the WCB discuss its interpretation of its mandate in the annual report.

We recommend that the WCB report on its internal climate: the culture, attitudes, values, and skill base for key functions, such as benefit entitlement and rehabilitation.

We recommend that WCB provide periodic assurance of the continued relevance, that is, the fit between the needs of clients and the services provided by WCB programs, especially in prevention and rehabilitation.

Outputs and outcomes of the WCB

We recommend that the WCB enhance its reporting on key corporate outcomes, including adequacy of compensation to injured workers, restoration of injured workers to pre-injury status, safety in the workplace, fairness of the funding load, and financial sustainability.

We recommend that the WCB provide assurance on the quality of adjudication to its stakeholders.

We recommend that the WCB enhance its reporting on service quality.

We recommend that the WCB measure and report on public awareness of the WCB's mission, vision, values, and goals, as well as WCB regulations, and awareness of workplace safety issues.

We recommend that the WCB enhance its current reporting on overall efficiencies.

We recommend that the WCB identify and report on significant secondary impacts.

Organizational capacity

We recommend that the WCB enhance its current reporting on human resource management, management information, and risk management.

In certain cases, we have recommended that the WCB address areas of performance, but we were unable to suggest specific measures or methodologies, as it would take considerably more time than we had available. In the short run, we have chosen to point to these areas of performance and to suggest that WCB management begin to explore how to measure performance in these new areas. We acknowledge the challenge of developing and reporting on these new areas. We wish to emphasize that it will require a long-term commitment on the part of the WCB, involving significant time and resources, integration and cooperation of each division within the WCB, and the cooperation of its external stakeholders. However,

as WCB has already taken the first steps in developing appropriate performance measures and inviting our office to assess them, we believe that it will also be able to take the next steps required to ensure that it is fully accountable to its stakeholders.

Appendix A: Recommendations

This appendix provides a list of all the recommendations included in the main body of the report.

In providing our recommendations, we recognize the potential for WCB stakeholders to be overloaded with data. We have some suggestions to offer in this regard. First, the frequency with which each information set is provided should be reviewed carefully. The readers should not receive information more frequently than decision making requires. Second, the information should be layered. If high-level indicators should prompt stakeholders to seek further information and analysis, the more detailed information should be made accessible to them, rather than providing all the information repetitively. Third, every attempt should be made to provide information in graphic format, as this is the most efficient means of communicating most of the information that WCB provides. (In fact, most of the WCB's existing key performance indicators are presented in this manner.) Finally, the costs of gathering the information should be weighed against the benefits. Some of the longitudinal outcome information that we suggest can be expensive and difficult to collect, and reporting cycles of longer than one year may be appropriate for these.

We understand that discussions between management and governing body members have occurred in the past, with regard to the content, style, and frequency of accountability information. We encourage this dialogue to continue. In certain cases, we have recommended that the WCB address areas of performance, but we were unable to suggest specific measures or methodologies, as it would take considerably more time than we had available. In the short run, we have chosen to point to these areas of performance and to suggest that WCB management begin to explore how to measure performance in these new areas. We acknowledge the challenge of developing and reporting on these new areas. We wish to emphasize that it will require a long-term commitment on the part of the WCB, involving significant time and resources, integration and cooperation of each division within the WCB, and the cooperation of its external stakeholders.

However, as WCB has already taken the first steps in developing appropriate performance measures and inviting our office to assess them, we believe that it will also be able to take the next steps required to ensure that it is fully accountable to its stakeholders.

Mandate and Direction of the WCB

Mandate and legislative compliance

1. We recommend that the WCB continue to periodically analyze the relevance and clarity of the legislation and mandate governing the WCB and report the findings to the Panel and in the

annual report. WCB should also provide assurance about its compliance with governing legislation.

Mission, vision, values, and standards of conduct

2. We recommend that the WCB mission, vision, and values be included in the annual report to the Legislative Assembly.

3. We recommend that WCB management report on its code of conduct in the annual report and confirm that the code has been adhered to in all material respects. The possibility of conducting an independent "ethics audit" should also be considered.

4. We recommend that the WCB identify key cultural and value dimensions of the organization. WCB management should include in staff surveys a measurement of staff perception of the importance of values and the extent to which they perceive that they are being adhered to by themselves or their colleagues. Management should also identify key service and performance values, competencies, and principles for each key decision making role and report on reinforcement and education activity, as well as client perceptions regarding the exercise of these values (e.g., whether claims are handled fairly, compassionately, courteously, and expeditiously).

Strategic goals

5. We recommend that the WCB develop and report on indicators with respect to the extent to which the fifteen strategic goals in the annual report and in the reporting to the Panel are being met.

Relevance

6. We recommend that management provide periodic assurance on the continued relevance of WCB programs, such as prevention, rehabilitation, assessment, and compensation. To assess program relevance, management should track and report on key worker, employer, and environmental factors and compare these trends to WCB program activity types and levels to assess the relevance of WCB programs in light of this information. Activity levels and trends, such as the number of hours dedicated to inspections versus education, should be reported in a manner that allows the reader to compare this information to the trends in needs, such as workplace safety, injury types, and injury severity.

Outputs and outcomes of the WCB

Adequacy of compensation to injured workers

7. Although we are unable to recommend specific measures at this point, we believe that WCB should explore the possibility of developing and reporting on pre- and post-injury incomes. Reporting should be provided to the Panel and included in the annual report.

Restoration of injured workers to pre-injury status

8. We recommend that the WCB assess the success of the WCB rehabilitation network in restoring claimants to pre-injury physical and mental status and report on its success to the Panel and in the annual report.

9. We recommend that the results of a comprehensive return to work analysis be provided to the Panel and the external stakeholders. This analysis should include:

- a break down of return-to-work results (by type of claim, type of injury, type of intervention, and deemed versus actual return-to-work cases);
- durability; and
- information on reopenings.

As much as possible, this information should be segregated in a meaningful way, possibly by type of injury, size of employer, and type of occupation. In addition, durability, longer than three months, should be considered for specific types of injuries and could be assessed through periodic, longitudinal studies.

Safety in the workplace

10. We recommend that management define the seriousness of injuries and the potential for improvement of the most serious injuries and provide this information to the Panel and in the annual report.

11. We recommend that the reporting to the Panel and the annual report include a review of the significant causes of injuries and diseases in the workplace and an analysis of trends in the causes. This analysis should also involve a review of the underlying causes of injuries, including other factors that may affect worker and employer attitudes and behaviour, such as WCB legislation, regulations, and policies, as well as government policies. We recognize the difficulty in this type of analysis and suggest that the WCB conduct more research and apply existing research to completing this analysis.

12. We recommend that WCB management continue to report on the number of additional assessments recommended and imposed. The WCB should also report the number of inspection reports issued, including contextual information, and explore ways of reporting on the level of compliance it is seeing during its audits and inspections and the outcomes of its site visits.

13. We recommend that management enhance ways to measure the impact of prevention activities on the safety performance of targeted firms, to assess which activities have the greatest impact on which type of firms and under what specific circumstances. Results of these assessments should be reported to both the Panel and the external stakeholders.

Fairness of the funding load

14. We recommend that the reporting to the Panel and the annual report continue to provide output information on the number of employers registered. Management should also provide information annually on its estimate of the completeness of registration and on the efforts and processes used to ensure this completeness. This information should be provided to the Panel and in the annual report.

15. We recommend that the Panel receives periodic assessments of the classification process, the methodology used, the categories chosen, employer satisfaction, and any significant issues regarding classification. A summary of this information should also be included in the annual report.

16. We recommend that the Panel and the external stake-holders be provided more detailed information on the completeness of collection, including the percentage of penalties collected, the total write-offs, the age of accounts receivable, and the collection ratio (i.e., the total assessment revenue receivable for the fiscal year divided by total assessment income for the fiscal year).

17. We recommend that the WCB define "fairness" in relation to assessment rates and then develop an indicator to measure the level of fairness and report on the level to both the Panel and the external stakeholders.

18. We recommend that management provide its stake-holders with the information they need to make their own evaluation of the fairness of the assessment rates, including an explanation of and the actual merit/demerit spread and information on prevention performance by employer class and subclass.

Financial sustainability

19. We recommend that return on investment information be compared to investment benchmarks in the annual report.

20. We recommend that the return on capital expenditures be reported to both the Panel and the external stakeholders, as soon as this information is available.

21. We recommend that management provide the Panel and the external stakeholders with an inventory of the key internal financial controls and annual assurance about the integrity of the internal controls, including mechanisms that exist to prevent and detect fraud.

Quality of adjudication

22. We recommend that management report on the benefit entitlement/adjudication process in a way that would provide assurance to the Panel and in the annual report on the quality of the adjudication process. Indicators, such as allow/disallow rates and appeal rates, would be included. As noted in recommendation 4, each of the factors that affect this quality, including corporate culture, direction, policies, quality assurance processes, and the skill base of the staff handling claims, should also be included in this assurance. We acknowledge the difficulty of this assessment and suggest that the WCB explore appropriate methods.

23. We recommend that the Panel and the external stake-holders receive information on the number of appeals and the outcome of these appeals for all the appellant bodies, including the Appeal Division and the Medical Review Department. The annual report should also include the number of claims allowed, disallowed, or rejected, and the overall disallow rate for all types of claims.

Service Quality

24. We recommend that management report on timeliness of its client service, beyond simply the first short-term disability payment or long-term disability award.

25. We recommend that management provide the Panel and the external stakeholders with more detailed timeliness information, beyond simple averages (possibly including ranges and frequency of distribution), to alert them to types of injuries or claims that pose a particular timeliness problem.

26. We recommend that overall satisfaction with the performance of the WCB and attitudes towards it, be periodically measured and reported to the Panel and in the annual report for the following stakeholder groups:

- workers (i.e., all, not just injured workers);
- employers;
- MLAs; and
- the medical community.

These are broad categories, and we believe some work should be done to segment the "market" into meaningful groups, and so enable the WCB to pinpoint areas of concern, both by

WCB program and by stake-holder type. Measurement of satisfaction should include issues of how WCB communicates with clients and the complexity of the process as experienced by claimants.

27. We recommend that management define "fairness" in relation to access to services and then develop an indicator to measure the level of fairness and report on the results to the Panel and the external stakeholders.

Public Awareness

28. We recommend that the general awareness, understanding, and support for the WCB's mission, vision, values, and objectives be measured periodically and the results provided to the Panel and in the annual report.

29. We recommend that the general awareness of and support for WCB regulations and workplace safety be reported in the annual report.

Efficiency

30. We recommend that management clarify the meaning of "administrative" in the annual report.

31. We recommend that the WCB explore the possibility of developing and reporting on more meaningful efficiency measures, such as performance measures that attempt to correlate administrative expenses with service quality.

32. We recommend that management report on all significant dimensions of strategic projects in the annual report.

Secondary Impacts

33. We recommend that the WCB identify potential secondary impacts and assess which ones are worthy of investigation and reporting. Those identified should be reported to both the Panel and the external stakeholders.

Organizational Capacity

Human Resources

34. As noted in recommendation 4, we recommend that the WCB inventory required competencies for key functions (e.g., benefit entitlement and rehabilitation), conduct an assessment of the skill base of the incumbents, and report the results to the Panel and to the external stakeholders. This assessment should be conducted periodically, perhaps every two or three years.

35. We recommend that the WCB's Executive compensation policy be reported in the annual report.

36. We recommend that the WCB continue its employee surveys and report the findings and proposed actions to the Panel.

37. We recommend that the diversity of the WCB workforce be reported in the annual report, including any impact the joint committee has on this diversity.

Quality of Information

38. We recommend that the Panel receive periodic assurance about the adequacy of the WCB's management information systems, its critical performance measures and data, and the integrity of the data collection processes. This could be done every two years, or the elements could be segmented and reported on a cyclical basis, covering the entire population over a two- or three-year period.

Risk Management

39. We recommend that the significant business risks faced by the WCB and its strategy to deal with those risks, be reported periodically to the Panel.

Workers' Compensation For the 21st Century

Appendix E

Villani v. Canada and *Wirachowsky v. the Queen*, recent decisions of the Federal Court of Appeal concerning the manner of determining whether a person is unemployable under the *Canada Pension Plan*

Indexed as:

Wirachowsky v. Canada

Between
Gerald H. Wirachowsky, applicant, and
Her Majesty the Queen, respondent

[2000] F.C.J. No. 2094
Docket A-72-97

Federal Court of Appeal
Regina, Saskatchewan
Linden, McDonald and Malone JJ.A.

Heard: November 17, 2000.
Judgment: December 20, 2000.
(8 paras.)

Counsel:

Gerald H. Wirachowsky, the applicant, on his own behalf.
John Vaissy Nagy, for the respondent.

The judgment of the Court was delivered by

¶ 1 McDONALD J.A.:— This is an application for judicial review of a decision of the Pension Appeals Board (the "Board") dated July 26, 1996 dismissing the applicant's appeal from a decision of the Review Board dismissing a prior appeal from the decision of the Disability Adjudicator which denied the applicant a disability pension as provided for by paragraph 44(1)(b) of the Canada Pension Plan [See Note 1 below] (the "CPP").

Note 1:
R.S.C. 1985, c. C-8.

¶ 2 In the five years preceding the applicant's request for a disability pension on May 29, 1991, the applicant had been variously employed as a cook, taxi driver, carpenter and coffin assembler. In January, 1991, the applicant slipped and fell on a patch of ice, and has not worked since. In response to the questionnaire accompanying his application for a disability pension, the applicant identified his main disabling condition as the loss of strength and control in his arms and legs. He also stated that when he sits down or bends over and

straightens back up, he comes very close to passing out. The applicant also claims to suffer from severe headaches, periods of reduced coordination and the inability to sit or stand for long periods of time.

¶ 3 On April 30, 1991, the applicant was diagnosed by his family physician as suffering from a chronic pain syndrome known as fibromyalgia. [See Note 2 below] The applicant has since been examined by a neurosurgeon, a neurologist, a rheumatologist, an orthopaedic surgeon, a radiologist, another family physician and a chiropractor. The medical reports prepared on the basis of these examinations were unanimous in restricting the applicant to work that did not involve any heavy lifting. Particular reports also ruled out "excessive bending" and "prolonged continuous sitting". The applicant was also diagnosed with degenerative disc disease causing chronic back, leg, neck and shoulder pain. [See Note 3 below]

Note 2: Medical Report of Dr. Brian Gamborg dated April 30, 1991, Respondent's Application Record at
41-43.

Note 3: Letter from Dr. S. Jugdeo dated September 1, 1992, Respondent's Application Record at 61.

¶ 4 On July 30, 1991, the applicant's application for a disability pension was denied by the Disability Adjudicator. Unfortunately, due to an administrative error, the applicant received a letter dated January 6, 1993 informing him that his appeal from the Disability Adjudicator had been allowed and that he was disabled under the terms of the CPP. The applicant was informed of the mistake by letter dated April 20, 1993 enclosed with which was the correct decision denying his appeal. The applicant's appeal from this decision was in turn denied by the Review Tribunal on September 1, 1993. The applicant appealed to the Board.

¶ 5 The Board denied the appeal on the basis that the applicant's disability was not "severe" within the meaning of the CPP. The Board explained that an applicant must have a disability that is "severe and prolonged" in order to qualify for a pension under paragraph 44(1)(b) of the CPP. The Board then stated that, according to paragraph 42(2)(a) of the CPP, a disability is severe and prolonged where it "renders a person incapable of regularly pursuing any substantially gainful occupation" and is determined to be "long continued and of indefinite duration or likely to result in death". [See Note 4 below] Given that the applicant last met the minimum qualifying period for pension benefits in December of 1991, the Board held that the applicant had the burden of proving that his disability was "severe and prolonged" as of that date and up to the date of the application. Finding that the medical reports contained nothing that would prevent the applicant from pursuing gainful employment in a semi-sedentary occupation, the Board concluded that the applicant's disability was not

"severe" within the meaning of the CPP and therefore dismissed the applicant's appeal.

Note 4:
Subparagraphs 42(2)(a)(i) and (ii) of the CPP.

¶ 6 The applicant argues that the Board based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it as per paragraph 18.1(4)(d) of the Federal Court Act. [See Note 5 below] In Powell v. Canada (Minister of Human Resources Development), [See Note 6 below] this Court had the occasion to consider the appropriate standard to apply in reviewing the assessment of evidence by the Board in a paragraph 42(2)(a) "severe and prolonged" analysis. In that decision, Desjardins J.A. adverted to the functional and pragmatic approach to determining the appropriate standard of review; however, she concluded that

Note 5:
R.S.C. 1985, c. F-7.
Note 6:
[2000] F.C.J. No. 1008.

> [13] In the case at bar, the applicant claims that the Board, while embarked on a paragraph 42(2)(a) analysis, ignored "the material before it". Her argument is based on paragraph 18.1(4)(d) of the Federal Court Act. The standard applicable for this statutory review is the same as the standard of patent unreasonableness.

¶ 7 I am satisfied that the Board failed to consider all of the medical evidence before it in deciding that the applicant was not disabled under the CPP. Of particular significance was the Board's failure to consider the evidence of the applicant's orthopaedic surgeon, Dr. Jugdeo, that the applicant "should also avoid jobs that involve prolonged, continuous sitting". [See Note 7 below] Similarly, Dr. G.D. Chadwick indicated that the applicant "cannot lift or maintain an upright posture for long periods of time". [See Note 8 below] These medical opinions corroborate the information supplied by the applicant in the questionnaire attached to his application for the disability pension. That information indicated that the applicant could only sit and stand for short intervals before experiencing numbness and pain. [See Note 9 below] In the circumstances of this evidence, the Board's holding that the applicant was capable of semi-sedentary work is untenable. I should also note that the phrase "semi-sedentary work" referred to in the medical evidence and the Board's decision is, in my opinion, incapable of conveying clear meaning for the purposes of assessing disability under

the CPP.

Note 7: Letter from Dr. S. Jugdeo dated September 14, 1992, Respondent's Application Record at 62.

Note 8: Report of Dr. G.D. Chadwick dated May 8, 1991, Respondent's Application Record at 76.

Note 9: Questionnaire, Disability Benefits, Canada Pension Plan, Respondent's Application Record at 44.

¶ 8 Having regard to all of the evidence before the Board, I am of the view that the decision cannot stand. The application for judicial review is allowed and the matter will be remitted to the Board for reconsideration in accordance with these Reasons. The applicant should be reimbursed for his actual and reasonable expenses incurred both here and at the Board level.

McDONALD J.A.
LINDEN J.A.:--
I agree.
MALONE J.A.:--
I agree.

QL Update: 20010105
cp/d/qlcvd

Indexed as:

Villani v. Canada (Attorney General)

Between
Giuseppe Villani, applicant, and
The Attorney General of Canada, respondent

[2001] F.C.J. No. 1217
2001 FCA 248
Docket A-245-00

Federal Court of Appeal
Toronto, Ontario
Linden, Isaac and Malone JJ.A.

Heard: June 4, 2001.
Judgment: August 3, 2001.
(52 paras.)

Counsel:

Guiseppe Villani, the applicant, for himself.
Mary Tobin Oates, for the respondent.

The judgment of the Court was delivered by

¶ 1 ISAAC J.A.:— This is an application for judicial review of a decision of the Pension Appeals Board (the "Board"), dated 11 February, 2000, which concluded that the applicant was not disabled within the meaning of subsection 42(2) of the Canada Pension Plan, R.S.C. 1985, c. C-8 (the "Plan") and was therefore not entitled to a disability pension under paragraph 44(1)(b) of the Plan.

Background and Medical History

¶ 2 The applicant was born in Italy on 3 June, 1938 and received a grade 5 education before emigrating to Canada in 1955. After finding several odd jobs, the applicant found permanent employment at Rothman's of Pall Mall, the tobacco company, on 4 July, 1963. He worked at Rothman's for the next twenty-three and a half years until the plant closed in December of 1986. During this period at the company, the applicant worked his way from general labourer to machine adjuster.

¶ 3 In 1969 and 1974, the applicant sustained knee injuries which led to three separate operations -- the first for a torn meniscus, the second for a left Baker cyst and the third to

free the perineal nerve from pressure. In 1976, he sustained a shoulder and neck injury which resulted in stiffness and discomfort extending down his back. In 1979, pain from the neck injury recurred and required the applicant to consult with a number of doctors, including those of the Workers' Compensation Board of Ontario (the "W.C.B."). He then began using a TENS machine for pain relief. In 1985, he was awarded a 10% partial disability pension by the W.C.B. In 1992, the disability was confirmed as being permanent. Since September of 1996, the W.C.B. has granted him a 20% pension for the permanent disability in his shoulder and neck.

¶ 4 Despite his injuries, the applicant was able to continue work at Rothman's until the plant was closed in 1986. After Rothman's closed its plant, the applicant studied for and passed the Ontario Real Estate Board's examination and thereby obtained a real estate agent's licence in 1987.

¶ 5 For one month in 1992, the applicant worked as an inside worker and van delivery man for Golden Loaf Bakery. In 1993, he renewed his real estate agent's licence and became registered with National Group Realty Services Inc. In the same year, he first applied to the W.C.B. for a pension for the injury to his knee. He was granted an 8% pension on 2 March, 1994 which was raised to a 12% pension on 14 January, 1996. Unfortunately, the applicant was unable to generate a customer base for his real estate business. His registration with National Group Realty ceased in December of 1995 at which time he felt he could not continue to work because of his deteriorating physical health. The applicant's real estate licence lapsed in 1997. It has not been renewed.

¶ 6 Throughout the period mentioned in the preceding paragraphs, the applicant also experienced some visual and hearing impairment, the latter a product of environmental noise at the Rothman's plant. For this impairment, he has been receiving from the W.C.B. a 4.5% pension since 1983.

Procedural History

¶ 7 On 11 March, 1994, the applicant -- then nearly 56 years old -- applied for a disability pension under the Plan, citing his main disabling condition to be pain in his right knee, his shoulders and his back. He also complained of numbness in his lower leg and hands as well as hearing loss and difficulty reading, even with glasses. In addition, the applicant reported pain and a burning sensation in his stomach. By letter dated 25 March, 1994, the respondent Minister denied the application. On reconsideration, the respondent maintained his view and communicated his decision to the applicant by letter dated 6 September, 1995.

¶ 8 The applicant appealed the denial to the Review Tribunal ("the Tribunal"). In its decision of 14 May, 1996 (See Respondent's Application Record, Vol I at 20-21), the Tribunal affirmed the respondent's decision, stating:

> ...This claimant does not present with sufficient objective evidence of medical anatomical or physiological impairments which would be expected to

> restrict him from performing all physical activities and work... [Emphasis added]

¶ 9 The applicant obtained leave to appeal the decision of the Tribunal to the Board. The appeal was heard on 3 December, 1998. On 6 January, 1999, the Board dismissed the appeal on the basis that the applicant had not adduced sufficient evidence to demonstrate his disability prior to 31 December, 1995. The Board noted that neither of the applicant's doctors had described the applicant as "totally disabled" prior to the critical date and that both of them had indicated that he was "capable of performing non-physical work with limitations" (Respondent's Record, Vol II at 426).

¶ 10 The applicant applied to this Court for judicial review of the Board's decision. However, the application never came on for hearing, the parties having agreed to refer the application back for redetermination by another panel of the Board on the basis of the applicant's allegation that he was unable to hear the original appeal proceeding (Consent Order dated 26 October, 1999, Applicant's Record, Tab 11 at 321).

¶ 11 A new hearing before a different panel of the Board was convened on 7 February, 2000. In a unanimous decision dated 11 February, 2000, the new panel determined that the applicant was not, at the relevant time, disabled within the meaning of subsection 42(2) of the Plan. The Board placed considerable emphasis on the repeated statements of the applicant's family doctor, Dr. Soutar, that the applicant (at least prior to October of 1998) was totally disabled only from "all physical work and work involving prolonged standing or repetitive use of his hands" (Reasons of the Board, Respondent's Record, Vol. I at 9). In the opinion of the Board, this diagnosis of partial disability was consistent with the applicant's receipt of only a partial disability pension from the W.C.B. and the applicant's apparent mental and linguistic ability to undertake work in the real estate industry between 1987 and 1991 and between 1993 and 1997.

¶ 12 At page 10 of its reasons, the Board explained the statutory definition of a "severe" disability found in subparagraph 42(2)(a)(i) of the Plan:

> It is very important to note that the words "regularly pursuing any substantially gainful occupation..." means just that: any occupation. It is not, as some insurance policies say, "...any occupation for which the applicant is reasonably suited..." It is any occupation, even though the applicant may lack education, special skills, or basic language.
> A second factor is availability of work. This is not a matter that is or can be considered by this Board. So the state of the local job market is irrelevant: It is legally assumed that work is available to do. [emphasis in original]

¶ 13 In support of the its interpretation of the severity requirement in subparagraph 42(2)(a)(i) of the Plan, the Board cited the following passage from the reasons of Teitelbaum

J. in Davies v. Canada (Minister of Human Resources Development) (1999), 177 F.T.R. 88, [1999] F.C.J. No. 1514 (QL) (F.C.T.D.):

> [43] The relevant inquiry in determining if an individual has a severe disability is whether they have the physical capacity to pursue some type of substantially gainful employment, irrespective of what their previous work experience has been. The legislation specifies that this employment be "substantially gainful" and subsection 42(2) articulates what factors will inform this assessment.
> [44] There is no ambiguity in which factors are relevant in assessing disability. The decisions of the PAB in Bains v. MHRDC, (1997) CP 4153 at pages 2 and 3, Aitkins v. MEI, (1996) CP 3408 at page 5, and Wilson v. MEI, (1996) CP 4109 at page 6 are unambiguous in stating that the applicant's inability to perform their previous job, the availability of work, their skills and education, and other personal barriers do not form part of the consideration into the severity of the disability.
> [...]
> [46] However, the legislation does not provide for the consideration of age or education under subsection 42(2). The only issue is whether he is capable of obtaining some type of substantially gainful employment, not necessarily anything related to his previous job.

¶ 14 Applying that definition of a "severe", the Board concluded that the applicant's disability was not severe within the meaning of the Plan. The Board's opinion was articulated in the following terms (at pages 12-13 of its reasons):

> (d)
> While one acknowledges immediately that suitable sedentary work with relief times to walk around is not easy to find, the test is not "Is the work available?" but rather, "If it were there, could he do it?" In my opinion the answer is yes. He is a highly intelligent man with excellent language skills who was able to carry out the ordinary skills of living -- walking short distances and driving a car.
> (e)
> In the witness stand Mr. Villani complained of the disabling pain. I can only say that up to December, 1995, in my opinion, he may well have been disabled from doing what he wanted to do -- a good job earning high wages -- but he was not disabled from a job he was capable of doing either mentally or physically. [emphasis in original]

¶ 15 It is from the dismissal of his appeal by the Board that the applicant now seeks judicial review. In his oral and written arguments, the applicant attacked the decision of the Board on several grounds, including a large number of procedural arguments and arguments touching on whether the Board had applied the correct legal test for determining a severe

disability under the Plan. The Court did not require the Crown to answer any of the grounds raised by the applicant except those relating to the issue of whether or not the Board had applied the appropriate legal test. Counsel for the Crown, in her submissions, supported the test which the Board applied in this case by referring the Court to earlier decisions of the Board.

Relevant Provisions of the Plan

44. (1) Subject to this Part,

[...]

(b)
a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

(i)
has made contributions for not less than the minimum qualifying period,

(ii)
is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or

(iii)
is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;

(iv) [Repealed, 1997, c. 40, s. 69]

42(2)
For the purposes of this Act,

(a)
a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this

paragraph,

(i)
a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii)
a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; ... [emphasis added]

* * *

44.
(1) Sous réserve des autres dispositions de la présente partie :

[...]

b)
une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :

(i)
soit a versé des cotisations pendant au moins la période minimale d'admissibilité,

(ii)
soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,

(iii)
soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;

(iv)
[Abrogé, 1997, ch. 40, art. 69]

42(2)

Pour l'application de la présente loi :

a)
une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :

(i)
une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,

(ii)
une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

The Standard of Review

¶ 16 Before considering the merits of this application, it is necessary to determine the appropriate standard of review to be applied to the decision of the Board. This undertaking has as its primary concern the legislative intent of Parliament in creating the tribunal whose decision is being reviewed. That intention must be gleaned from the constating statute of the tribunal in order to appreciate whether the question which the tribunal has answered was intended by legislators to be left to its exclusive jurisdiction (Pasiechnyk v. Saskatchewan (Worker's Compensation Board), [1997] 2 S.C.R. 890 at para. 18).

¶ 17 This task requires a Court to consider and weigh a number of different factors which assist in indicating the degree of deference to be given to the decision under review. That degree of deference is now measured on a spectrum of standards running from the most deferential -- patent unreasonableness, to the least deferential -- correctness. Since the Supreme Court's decision in Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, a mid-point on the spectrum of deference has been identified which requires a standard of reasonableness simpliciter.

¶ 18 The principal factors to be considered in arriving at the appropriate standard of review are the following: (i) the existence or absence of a privative clause, (ii) the expertise of the tribunal relative to that of the reviewing court, (iii) the purpose of the Act as a whole and of the provision in particular and (iv) the nature of the problem or question decided by the tribunal (See Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 at paras. 29ff). No one of these factors alone is dispositive. Rather, they must be analysed together in order to identify the proper standard of review to apply in each

case. This is the "pragmatic and functional" approach to determining legislative intent, and it must be applied in this case to determine the amount of curial deference this Court owes to the Board and its decision in respect of the applicant.

¶ 19 In this case, the Court did not have the benefit of full submissions from the parties on the question of the appropriate standard of review, because the appellant was unrepresented by counsel. Though the respondent did make submissions on this point, those submissions were limited to the appropriate deference to be accorded the Board on questions of fact. That issue is quite straightforward and I agree with the respondent that on questions of fact the standard is one of patent unreasonableness. This view has been articulated in previous decisions of this Court involving judicial reviews of decisions of the Board pursuant to section 28 and paragraph 18.1(4)(d) of the Federal Court Act (See Wirachowsky v. Canada (Minister of Human Resources Development), [2000] F.C.J. No. 2094; Powell v. Canada (Minister of Human Resources Development), [2000] F.C.J. No. 1008).

¶ 20 However, the appropriate standard of review on questions of law or mixed fact and law decided by the Board has never, to my knowledge, been thoroughly addressed by this Court, except on one other occasion. In Canada (Minister of Human Resources Development) v. Skoric (C.A.), [2000] 3 F.C. 265, [2000] F.C.J. No. 193 (QL), this Court reviewed a decision of the Board respecting the appropriate contributory period applicable for the payment of a benefit to a surviving spouse under paragraph 44(1)(d) of the Plan. The primary issue was whether the Board erred in deciding whether the pre-or post-January 1, 1987 version of subparagraph 44(2)(b)(ii) applied to the circumstances of the case.

¶ 21 Evans J.A. applied the pragmatic and functional approach and concluded that the decision of the Board was entitled to little or no deference. He reasoned as follows:

> [15] It was more or less common ground between the parties that the standard of review applicable in this case is at the correctness end of the spectrum. I agree. A pragmatic or functional analysis clearly indicates that this is not a situation in which curial deference is appropriate.
> [16] First, there is no privative clause restricting the scope of judicial review. Subsection 84(1) of the Plan provides that, "except for judicial review under the Federal Court Act", the Board's decisions are "final and binding for all purposes of this Act". Since this provision expressly exempts judicial review from its scope, the effect of the finality clause can only be to restrict the jurisdiction that the Board would otherwise have had to reconsider its decisions pursuant to Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848. However, subsection 84(2) expressly permits the Board to reconsider its decisions "on new facts".
> [17] Second, the Board has no broad regulatory responsibilities, but performs only the adjudicative function of hearing appeals from the Review Tribunal: subsection 83(1) [as am. by S.C. 1995, c. 33, s. 36]. Third, the Chair, Vice-Chair and other members of the Board must be judges of the Federal Court or of specified section 96 [Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by Canada Act 1982, 1982, c. 11 (U.K.), Schedule to the Constitution Act, 1982, Item 1) [R.S.C.,

1985, Appendix II, No. 5]] courts: subsection 83(5); retired judges of these courts are eligible to be appointed as additional "temporary members": subsection 83(5.1). Fourth, the questions in dispute in this case involve the interpretation of the Board's enabling statute and have an application beyond the facts of this dispute. Fifth, the subject-matter of the dispute is the adjudication of an individual's legal rights.

[18] On the other hand, a consideration pointing to curial deference is the fact that Parliament probably entrusted appellate functions to an administrative tribunal, the Pension Appeals Board, rather than to the Federal Court, to take advantage of the benefits of economical and expeditious decision-making, and more accessible process, normally offered by tribunals.

[19] In my view, the balance of the factors in the pragmatic or functional mix favours affording little deference to the Board's interpretation of its constitutive legislation, especially in the absence of any evidence in the record indicating that members of the Board acquire considerable expertise in the Canada Pension Plan as a result of the volume of appeals that they hear and decide.

¶ 22 There is little to distinguish the decision of the Board in Skoric from the decision of the Board in the present case. In each case, the decision related to the application of the statutory language of the Plan. None of the factors in the pragmatic and functional analysis point to a deferential standard of review in this case. On the contrary, except as relates to questions of fact, I am of the view that the decision in this case is one which involved the interpretation and application of the definition of a "severe" disability within the meaning of subparagraph 42(2)(a)(i) of the Plan. As such, it should be reviewed on a standard of correctness, at the least deferential end of the spectrum.

Benefits for Disabled Persons Under the Plan

¶ 23 Section 44 of the Plan lists the various benefits that are payable under that statute. Specifically, that section provides for the payment of retirement pensions, death benefits, survivor's pensions, disabled contributor's child's benefits and orphan's benefits. There is also provision for a disability pension. In this connection, it is worth repeating the text of paragraph 44(1)(b) of the Plan:

> 44. (1) Subject to this Part,
>
> [...]
>
> (b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

(i)
has made contributions for not less than the minimum qualifying period,

(ii)
is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or

(iii)
is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;

(iv) [Repealed, 1997, c. 40, s. 69]

* * *

44.
(1) Sous réserve des autres dispositions de la présente partie :

[...]

b)
une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :

(i)
soit a versé des cotisations pendant au moins la période minimale d'admissibilité,

(ii)
soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,

(iii)
soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en

application des articles 55 et 55.1;

(iv)

[Abrogé, 1997, ch. 40, art. 69]

¶ 24 Not surprisingly, one of the conditions in paragraph 44(1)(b) for the payment of a disability pension is that the applicant be disabled. The Plan contains a comprehensive definition of the term "disabled" for the purposes of determining entitlement to a disability pension. That definition is found in paragraph 42(2)(a) of the Plan which reads:

42(2)

For the purposes of this Act,

(a)

a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i)

a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii)

a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and [emphasis added]

* * *

42(2)

Pour l'application de la présente loi :

a)

une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :

(i)

une invalidité n'est grave que si elle rend la personne à laquelle se

rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,

(ii)
une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

¶ 25 Subsection 42(2) makes it clear that an applicant's disability must be both severe and prolonged before a pension will be payable under paragraph 44(1)(b). There is no issue here as to whether the applicant's disability is prolonged. The only issue is whether it is severe. Of interest in this application is the statutory definition of a "severe" disability contained in subparagraph 42(2)(a)(i). This Court has not yet had occasion to comment on that definition. However, the circumstances of the present case warrant a close analysis of the legal test for determining whether or not a disability is "severe" within the meaning of the Plan.

(a) Applicable Principles of Legislative Interpretation

¶ 26 Section 12 of the Interpretation Act, R.S.C. 1985, c. I-21 reads:

12.
Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The enactment of this general principle abolished the traditional distinction between penal and remedial legislation for the purposes of statutory interpretation (See R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at 356). Under the traditional distinction, penal legislation was construed strictly while remedial legislation was given a large and liberal construction. The liberal approach to remedial legislation flows from the notion that such legislation has a benevolent purpose which courts should be careful to respect.

¶ 27 In Canada, courts have been especially careful to apply a liberal construction to so-called "social legislation". In Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 36, the Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant. This interpretive approach to legislation designed to secure a social benefit has been adopted in a number of Supreme Court decisions dealing with the Unemployment Insurance Act, 1971 (see Abrahams v. A.G. Canada, [1983] 1 S.C.R. 2; Hills v. Canada (A.G.), [1988] 1 S.C.R. 513; Canada (Canada Employment and Immigration Commission) v. Gagnon, [1988] 2 S.C.R. 29; and Caron v. Canada (Canada Employment and Immigration Commission), [1991] 1 S.C.R. 48).

¶ 28 It is evident to me that the Plan is benefits-conferring legislation analogous to the Unemployment Insurance Act, 1971. The Plan provides for the payment of disability benefits to claimants who have been contributors under the scheme. When the Plan was introduced in the House of Commons as Bill C-136 (26th Parl., 2nd Session, November 9, 1964, Hansard at 9899), the Minister of National Health and Welfare referred to the proposed legislation as a

> ... comprehensive social insurance measure... which provides help as of right rather than on a need or a means test, for those who suffer the loss of a loved breadwinner or those who find themselves disabled and unable to carry on work. I think hon. members will agree this is a giant step forward in Canada's social security program.

The Minister was more specific in her characterization of the supplementary benefits made available under the proposed legislation (Hansard, supra at 9923):

> In a sense, therefore, supplementary benefit pensions are more generous, especially for those in lower income brackets, than the new retirement pensions. This approach is justified because of the special need of widows, orphans and disabled contributors, and is certainly warranted on both humanitarian and economic grounds.

On second reading, the Minister of National Revenue added his opinion that the Bill was "the most far reaching piece of social legislation ... proposed in many years" (Hansard at 10140, November 16, 1964).

¶ 29 Accordingly, subparagraph 42(2)(a)(i) of the Plan should be given a generous construction. Of course, no interpretive approach can read out express limitations in a statute. The definition of a severe disability in the Plan is clearly a qualified one which must be contained by the actual language used in subparagraph 42(2)(a)(i). However, the meaning of the words used in that provision must be interpreted in a large and liberal manner, and any ambiguity flowing from the those words should be resolved in favour of a claimant for disability benefits.

(b) Is the Disability "Severe"? -- The Board's Approach

¶ 30 The Board has readily acknowledged that, on its reading of the Plan, the requirements for a severity finding with respect to an alleged disability are extremely strict indeed. This was expressed by the Board in the following passage from its reasons in Marie Atkins v. The Minister of Employment and Immigration, CP 3408 (February 16, 1996) at 5:

> The intention of the legislation has been found on many occasions to preclude

> disability pensions being granted except in cases of total disability, incapacity to work, in the sense of Section 42(2). This legislation is not welfare legislation. The fact that many applicants are older, cannot return to their old jobs, cannot find any part-time or sedentary positions (in which they could perform) in today's very difficult work place, is not the question we must answer. Nor are those facts, in the real world, a reason, sympathetic as we might be to applicants, to allow a pension.

¶ 31 The position that subparagraph 42(2)(a)(i) of the Plan does not permit consideration of an applicant's age, skills level, education or language proficiency in deciding whether he or she is incapable regularly of pursuing any substantially gainful occupation has been repeated in a number of Board decisions (See e.g. Antonio Macri v. Minister of Employment and Immigration, CP 3079 (January 9, 1996); Alfred Wilson v. Minister of Employment and Immigration, CP 4109 (May 31, 1996); Surjit Bains v. Minister of Human Resources Development, CP 04153 (January 24, 1997); Minister of Human Resources Development v. Steven W. Stewart, CP 07942 (September 28, 1999); Patricia J. May v. Minister of Human Resources Development, CP 06197 (November 22, 1999)).

¶ 32 However, there is another and earlier line of cases in which the Board has adopted a more liberal interpretation of the severity definition in subparagraph 42(2)(a)(i) of the Plan. In these cases, the Board chose to take what it has called a "real world" approach to the application of the severity requirement. This approach requires the Board to determine whether an applicant, in the circumstances of his or her background and medical condition, is capable regularly of pursuing any substantially gainful occupation.

¶ 33 The "real world" approach was first adopted by the Board in Edward Leduc v. Minister of National Health and Welfare, CCH Canadian Employment Benefits and Pension Guide Reports, Transfer Binder 1986-1992 at para. 8546, pp. 6021-6022 (January 29, 1988). In that case, the Board found for the applicant on the following basis:

> The Board is advised by medical authority that despite the handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well be true. However, the Appellant does not live in an abstract and theoretical world. He lives in a real world, people [sic] by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the Appellant. This Board cannot envision any circumstances in which such might be the case. In the Board's opinion, the Appellant, Edward Leduc, is for all intents and purposes, unemployable.

¶ 34 The "real world" approach has been applied in a number of Board decisions since Leduc (See e.g. Danells v. Minister of National Health and Welfare, CP 2657 (June 18, 1993); Reuben Daly v. Minister of Employment and Immigration, CP 2919 (August 11, 1994); Elaine Gaudreau Morley v. Minister of Employment and Immigration, CCH Employment Benefits and Pension Guide Reports, Transfer Binder 1993-1997 at para. 8592, pp. 6115-6116 (November 23, 1995); Constance M. Osachoff v. Minister of Human Resources Development, CP 05635 (July 7, 1997); Appleton v. Minister of Human Resources Development, CP 04619 (November 21, 1997); Paul M. Scott v. Minister of Human Resources Development, CP 10014 (September 30, 1999).

¶ 35 In fact, the first recorded disability determination under the Plan of which I am aware took a generous view of the severity requirement analogous to the Board's approach in Leduc. That view, however, was not couched in the "real world" terminology coined by the Board in Leduc and repeated in subsequent cases. In Minister of National Health and Welfare v. Jaeger CCH Employment Benefits and Pension Guide Reports, Transfer Binder 1968-1985 at para. 8546, pp. 6066-6068 (August 25, 1971), the Board applied then subparagraph 43(2)(a)(i) in the following manner:

> On the merits of the case, the medical and other evidence tendered persuades us that the degenerative arthritis of the respondent, in that it prevents him and will prevent him from engaging in his normal work or anything remotely resembling an occupation which is suitable to his peculiar abilities and aptitudes, must be classified as a severe disability... We find that the respondent is, as s. 43(2)(a)(i) of the Act puts it, "incapable of regularly pursuing any substantially gainful occupation". The words "regularly" and "substantially" must be given due emphasis in the light of the evidence as to the respondent's work record, station in life and future economic prospects. In this case, there is undoubted incapacity to carry on any sort of gainful occupation in any line of work for which the respondent is suited.

Similarly, in Minister of National Health and Welfare v. Raymond G. Russell, CCH Employment Benefits and Pension Guide Reports, Transfer Binder 1968-1985 at para. 8684, pp. 66279-6280 (June 26, 1974), the Board restated its jurisprudence to that time in the following words:

> The Board has always interpreted the language of the statute to mean exactly what it says, and in many cases has had to say that the fact that suitable work has not been available to an applicant is irrelevant to the question of whether or not he qualifies. However, various circumstances have been held to bear upon this question, such as age, education and aptitude.

¶ 36 It is evident from a review of the Board's disability decisions, particularly its recent case law, that the Board's position regarding the severity requirement in

subparagraph 42(2)(a)(i) of the Plan has been applied inconsistently. In the recent cases, there has been no discernible reason for the change in approach to the definition of "severe" in the Plan. For this reason, it becomes necessary for this Court to give direction concerning the proper legal test to be applied in determining whether an applicant suffers from a "severe" disability within the meaning of the Plan.

(c)
The Appropriate Legal Test for Disability under the Plan

¶ 37 Except for one case, none of the recent decisions of the Board has analyzed fully the text of subparagraph 42(2)(a)(i) of the Plan. That one occasion was the Board's relatively recent decision in Patricia Valerie Barlow v. Minister of Human Resources Development, CP 07017 (November 22, 1999). It is worth repeating the central passage of the Board's decision in that case:

> Is her disability sufficiently severe that it prevents her from regularly pursuing any substantially gainful occupation?
> To address this question, we deem it appropriate to analyze the above wording to ascertain the intent of the legislation:
>
> > Regular is defined in the Greater Oxford Dictionary as "usual, standard or customary".
> > Regularly -- "at regular intervals or times."
> > Substantial -- "having substance, actually existing, not illusory, of real importance or value, practical."
> > Gainful -- "lucrative, remunerative paid employment."
> > Occupation -- "temporary or regular employment, security of tenure."
>
> Applying these definitions to Mrs. Barlow's physical condition as of December, 1997, it is difficult, if not impossible, to find that she was at age 57 in a position to qualify for any usual or customary employment, which actually exists, is not illusory, and is of real importance.

¶ 38 This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations

which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

¶ 39 I agree with the conclusion in Barlow, supra and the reasons therefor. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the Plan and result in an analysis that is not supportable on the plain language of the statute.

¶ 40 I find additional support for adopting the ordinary meaning of subparagraph 42(2)(a)(i), as interpreted by the Board in Barlow, in the Canada Pension Plan Regulations, C.R.C. c. 85. Subsection 68(1) of those Regulations requires that anyone applying to the Minister for disability benefits under the Plan must supply the Minister with particular information. It reads:

> 68.
> (1) Where an applicant claims that he or some other person is disabled within the meaning of the Act, he shall supply the Minister with the following information in respect of the person whose disability is to be determined:
>
> (a)
> a report of any physical or mental impairment including
>
> (i)
> the nature, extent and prognosis of the impairment,
> (ii)
> the findings upon which the diagnosis and prognosis were made,
> (iii)
> any limitation resulting from the impairment, and
> (iv)
> any other pertinent information, including recommendations for further diagnostic work or treatment, that may be relevant;
>
> (b)
> a statement of that person's occupation and earnings for the period commencing on the date upon which the applicant alleges that the disability

commenced; and

(c)
a statement of that person's education, employment experience and activities of daily life. [emphasis added]

* * *

68.
(1) Quand un requérant allègue que lui-même ou une autre personne est invalide au sens de la Loi, il doit fournir au ministre les renseignements suivants sur la personne dont l'invalidité est à déterminer :

a)
un rapport sur toute détérioration physique ou mentale indiquant

(i)
la nature, l'étendue et le pronostic de la détérioration,

(ii)
les constatations sur lesquelles se fondent le diagnostic et le pronostic,

(iii)
toute incapacité résultant de la détérioration, et

(iv)
tout autre renseignement qui pourrait être approprié, y compris les recommandations concernant le traitement ou les examens additionnels;

b)
une déclaration indiquant l'emploi et les gains de cette personne pendant la période commençant à la date à partir de laquelle le requérant allègue que l'invalidité a commencé; et

c)
une déclaration indiquant la formation scolaire, l'expérience acquise au travail et les activités habituelles de la personne.

On the Board's strict interpretation of the severity requirement, the information relating to an applicant's education, employment experience and activities of everyday life which is required to be supplied to the Minister pursuant to paragraph 68(1)(c) of the Regulations would be completely irrelevant to a disability determination. Of course, the mandatory requirement that applicants supply the Minister with information related to their education level, employment background and daily activities can only indicate that such "real world"

details are indeed relevant to a severity determination made in accordance with the statutory definition in subparagraph 42(2)(a)(i) of the Plan.

¶ 41 It is also clear from the minutes of the special joint committee appointed to consider Bill C-136 that the precise words of subparagraph 42(2)(a)(i) were chosen with particular care by the drafters of the Plan. During the clause by clause review of the Bill, the severity requirement was explained in the following way by the Deputy Minister of Welfare at the time, Dr. Joseph Willard (See Special Joint Committee of the Senate and House of Commons Appointed to Consider and Report upon Bill C-136, Minutes of Proceedings and Evidence, No. 2 at 247 (Tuesday, December 1, 1964)):

> Mr. Thorson: ...Subclause (2) defines what is meant in this bill by the expression "disabled"...
> Hon. Mr. Croll: How does it vary from the definition in the disability act at the present time?
> Dr. Willard: Mr. Chairman, the disabled persons' legislation that we have at the present time has the definition of permanent and total disability, which would be a more severe definition than the one set out here. You will notice in this Bill that the severity is related to a person being capable of regularly pursuing any substantially gainful occupation. It, therefore, brings in an additional concept of employability...

¶ 42 The explanation by the Deputy Minister of Welfare is unambiguous. The test for severity is not that a disability be "total". In order to express the more lenient test for severity under the Plan, therefore, the drafters introduced the notion of severity as the inability regularly to pursue any substantially gainful occupation. The clear wording of the legislation, the companion provisions in the Regulations, and the clear intent of the drafters all indicate with equal force that the crucial phrase in subparagraph 42(2)(a)(i)'s severity definition cannot be ignored or pared down.

¶ 43 But this is precisely what the Board has done in the present case. The Board has adopted the strict abstract approach to the severity requirement in subparagraph 42(2)(a)(i) without analysing all of the legislative language. For ease of reference, the Board's analysis of the severity definition in subparagraph 42(2)(a)(i) is repeated below (See page 10 of the decision):

> It is very important to note that the words "regularly pursuing any substantially gainful occupation..." means just that: any occupation. It is not, as some insurance policies say, "...any occupation for which the applicant is reasonably suited..." It is any occupation, even though the applicant may lack education, special skills, or basic language.
> A second factor is availability of work. This is not a matter that is or can be considered by this Board. So the state of the local job market is irrelevant: It is legally assumed that work is available to do. [emphasis in original]

It is evident, to my mind, that the Board in this case has effectively read out of the severity definition the words "regularly", "substantially" and "gainful". In this way, the Board has reduced the legal test to the following: is the applicant incapable of pursuing any occupation? This approximates the "total" disability test eschewed by the drafters of the Plan. Indeed, the Board's repeated emphasis on the word "any" appears to have been a contributing factor in its misinterpretation of the statutory test for severity.

¶ 44 In my respectful view, the Board has invoked the wrong legal test for disability insofar as it relates to the requirement that such disability must be "severe". The proper test for severity is the one that treats each word in the definition as contributing something to the statutory requirement. Those words, read together, suggest that the severity test involves an aspect of employability.

¶ 45 Unfortunately for decision-makers under the Plan, employability is not a concept that easily lends itself to abstraction. Employability occurs in the context of commercial realities and the particular circumstances of an applicant. That is not to say that the Minister, the Review Tribunal or the Board must make intricate postulations respecting an applicant's employability in order to arrive at a severity determination. Furthermore, I wish to express that I should not be taken as stating that employability is to be determined purely by reference to an applicant's chosen occupation. Unlike section 95, paragraph 3 of the Quebec Pension Plan, R.S.Q. c. R-9, which specially provides that an applicant who is sixty years of age or over will have a severe disability where he or she is "incapable regularly of carrying on the usual gainful occupation" that he or she holds at the time of becoming disabled, the federal Plan makes no provision for a finding of severity where an applicant is merely disabled from pursuing his or her ordinary occupation as at the onset of the alleged disability. Rather, the test under the Plan is in relation to any substantially gainful occupation.

¶ 46 What the statutory test for severity does require, however, is an air of reality in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation. Naturally, decision-makers already adopt a certain measure of practicality in their severity determinations. As an obvious example, the scope of substantially gainful occupations suitable for a middle-aged applicant with an elementary school education and limited English or French language skills would not normally include work as an engineer or doctor.

¶ 47 In other cases, however, decision-makers ignore the language of the statute by concluding, for example, that since an applicant is capable of doing certain household chores or is, strictly speaking, capable of sitting for short periods of time, he or she is therefore capable in theory of performing or engaging in some kind of unspecified sedentary occupation which qualifies as "any" occupation within the meaning of subparagraph 42(2)(a)(i) of the Plan.

¶ 48 Indeed, the tendency to speak in terms of vague categories of labour was singled out for criticism by this Court in Wirachowsky, supra. In that case, the applicant was only

able to sit and stand for short intervals but had been found by the Board to be capable of semi-sedentary work. On behalf of the Court, McDonald J.A. noted (at paragraph 7) that the phrase "semi-sedentary work" was, in his opinion, incapable of conveying any meaning for the purposes of assessing disability under the Plan. The risk of thinking in terms of such "occupational" categories is that all reference to a regular, tangible, and profitable occupation is likely to be forgotten. As a consequence, an applicant may be deprived of the very protection which the Plan was designed to provide and for which an applicant has been contributing during periods of healthy and active employment in the labour force.

¶ 49 Bearing in mind that the hearing before the Board is in the nature of a hearing de novo, as long as the decision-maker applies the correct legal test for severity -- that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

¶ 50 This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities. Cross-examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others.

¶ 51 In summary, I am of the opinion that the Board has failed to attribute meaning to the plain words of subparagraph 42(2)(a)(i) of the Plan. It has preferred to articulate an abbreviated and decidedly ungenerous version of the statutory definition of a "severe" disability, thereby subverting the benevolent purposes of the legislation. Having reached this conclusion, I do not find it necessary to canvass the many procedural grounds of review which the applicant advanced in his oral and written argument.

Disposition

¶ 52 Accordingly, for these reasons, I would allow the application for judicial review with costs to the applicant, set aside the decision of the Board dated 11 February, 2000, and remit the matter to the Board for redetermination by a differently constituted panel in accordance with these reasons and on the basis of the record as constituted as well as other relevant evidence that the parties may wish to adduce.

ISAAC J.A.
LINDEN J.A.:--
I agree.
MALONE J.A.:--
I agree.

Workers' Compensation

For the 21st Century

Appendix F

December, 1991 Memo of the

Rehabilitation Committee of the

Workers' Compensation Advocacy Group

Proposing that Injured Workers Have

a Statutory Right to Vocational Rehabilitation

M E M 0 R A N D U M

FROM: **Workers' Compensation Advocacy Group Rehabilitation Committee**

December 11 , 1991

DEFINING THE RIGHT TO VOCATIONAL REHABILITATION

A 1egally defined right to rehabilitation could be inserted in the Workers' Compensation Act by way of a future amendment. However, since the Board's discretion under s. 16 is virtually unlimited, the Board of Governors could also create such a right under their present policy-making authority. We should urge them to adopt to latter course, both to bring the new rights into force sooner, and also to enable changes to be made conveniently in response to problems that may arise. Once the new rehabilitation policy has been in operation for one or two years, and the "wrinkles have been ironed out", we should then seek to have the right defined by amendment.

The following is a discussion of subjects that should be covered, in as much detail as possible, in the rehabilitation policy. The overall goal should be to reduce greatly the element of discretion so that both workers and the Board have clear expectations of the rehabiltation process. A second goal should be to make the process "worker-driven", so that delays due to WCB staff limitations, etc. are minimized.

Right to Vocational Rehabilitation

1) Trigger Factors

The policy should set out as clearly as possible what circumstances trigger a worker's right to vocational rehabilitation. For example, the right could be triggered by a certificate signed by the family doctor and/or a specialist in the relevant area of medicine stating that the worker cannot or should not return to the pre-injury employment, either because the worker will have a permanent disability, or will be unreasonably vulnerable to further injuries.

The Ccmmittee feels that the factors now recognized by Board policy as sufficient to justify approval of vocational rehabilitation are appropriate. These factors, as described in paragraph 89.11 or the Manual, are as follows:

(a) the worker is, by reason of the residual disability, unfit to return to the pre-injury occupation;

(b) although the worker may be fit to return to the preinjury occupation, to do so would involve an undue risk of further injury having regard to any residual disability or to a vulnerability to disability; or

(c) to return to the pre-injury occupation with the disability would put the worker at a long-term, disadvantage compared with others in that occupation, and compared with alternative occupations.

In cases where a deceased worker's dependent is applying for rehabilitation assistance, the factors set out in paragraph 89.20 are acceptable.

2) **Timing**

The policy should state when the right to rehabilitation arises in relation to the date of injury and/or filing of the claim. The Committee feels generally that the required "waiting period" following the injury should be no longer than 8 weeks, provided that a "trigger factor" is clearly present. In cases of very serious and permanent disabilities, such as spinal cord injuries, amputations, etc. listed in paragraph 87.10 of the Manual, no minimum waiting period should be required.

The Committee did not come to a conclusion whether there should be a maximum time during which the worker must exercise the right to rehabilitation. It was noted that workers should be encouraged to take advantage of their remaining physical capability, and their existing training and work experience. Doing so should not deprive the worker of the right to rehabilitation assistance, if the alternatives do not prove satisfactory. It may, however, be justified to have some ultimate time limit during which the right to vocational rehabilitation would have to be exercised. If so, the Board should continue to have a discretion to provide services.

3) **Decision Making**

There will obviously have to be some WCB control over the rehabilitation process. If the right to rehabilitation is triggered by a hen-WCB action, such as a certificate from the worker's doctors, there would have to be a mechanism for the Board to review the doctors' opinion and challenge it if appears to be unjustified. That procedure should be very carefully designed, with strict time limits structured in such a way that it does not cause undue delay in implementing a rehabilitation plan. For example, the policy could provide that the certificate is binding on the Board unless it is questioned within a specified time by a rehabilitation officer, in which case the question would be referred to a Board medical advisor. Should the Board medical advisor disagree with the certificate, the medical issues could be resolved by referral to an independent specialist. It should not be necessary to go to the Review Board or Medical Review Panel, as these formal appeals normally take too long. However, those appeal

procedures should also be applicable for rehabilitation decisions, should the worker wish to invoke them in place of the informal process or after the informal process has ruled. The employer should have no right to challenge or appeal a rehabilitation decision. See paragraph 13 below regarding the charging of the costs of rehabilitation services. The appeal and charging changes would require amendments to the Act.

4) **Assessment**

The policy should provide for a swift assessment of the worker's rehabilitation needs. The assessment could be done either by WCB officers, or by independent rehabilitation consultants who bill the Board for their services. The right to such an assessment should arise automatically upon receipt of the doctors' certificate or other initiating factor, even if the Board challenges that certificate and invokes the review process. In such cases, the assessment should be done by an outside consultant.

5) **Disclosure**

As the Committee has previously recommended, there should be a policy that the worker receives full and prompt disclosure of all Board documents concerning the rehabilitation process. Wherever disclosure is not provided on an ongoing basis, however, all documents should certainly be disclosed prior to a final decision regarding any aspect of rehabilitation. The worker should then have an adequate opportunity to make suhmissions.

6) **Interim Benefits**

Where a doctors' certificate or other triggering factor has taken place, the policy should provide for interim benefits equivalent to wage 1oss benefits during the time required to resolve any challenge raised by the Board. Such benefits should not be repayable, unless the worker has been found to be guilty of fraud or misrepresentation.

7) **Scope of Rehabilitation**

The policy should set out as specifically as possible the minimum scope of rehabilitation which the Board is required to provide, at the request of the worker, once the triggering factors have taken place and the right to rehabilitation is confirmed. The minimum scope of rehabilitation could be described in a number of ways, including:

a) The duration of the rehabilitation program, and compensation benefits the worker is entitled to receive while taking it. There seems to be a vague consensus of the Committee that two years would be an appropriate 1imit;

b) The maximum amount of money which the Board is required to spend, not including wage loss benefits;

c) The range of training which the Board is required to provide, in relation to the occupation and industry in which the worker was employed at the time of the injury, or for which the worker was already qualified by reason of the training or work history;

d) The extent of actual job assistance which the Board is required to provide, such as training on the job subsidies, or other incentives to persuade perspective employers to hire the worker;

e) The right, if any, to basic educational upgrading and other training which is not specifically intended to enable the worker to qualify for a particular suitable occupation;

f) The extent of non-vocational rehabilitation that the Board is recuired to provide, to enable the worker to develop recreational activities, participate in community affairs, etc., where the results of the compensable injury are so severe that the activities at which the worker spent his or her "personal time" prior to the work injury are no longer possible.

8) **Discretion to Provide Additional Rehabilitation**

The policy provides a right to rehabilitation within the limits described in paragraph 7 above. This right should not be subject to Board discretion, provided that it is part or a rehabilitation plan developed by the worker and a certified rehabilitation consultant, and approved by the Board. The Board should, however, continue to have considerable discretion to approve a plan which goes beyond some of the minimums, if the plan is considered necessary to achieve successful rehabilitation.

9) **Approval of Rehabilitation Plan**

The policv shculd establish a speedy, worker-driven method of obtaining Board approval for an appropriate rehabilitation plan. The worker should be entitled to use independent consultants to prepare a plan, in which case the Board would have the right to challenge the appropriateness of the plan, in a limited manner as outlined in paragraph 3.

10) **Goals of Rehabilitation**

A right to rehabilitation should include specific goals, which wil1 enable the Board or an appeal tribunal to determine when WCB has satisfied its obligations. It would be unreasonable to require that the Board automatically provide an injured worker with, for

example, two years of full time training, if the goals of the rehabilitation process can all be satisfied in six months (or six weeks). The definition of the goals is therefore a critical factor in defining the right to rehabilitation. Presently, the Board generally limits vocational rehabilitation to the training required to enab1e the worker to match the pre-injury long term wage rate, used for the purpose of calculating wage loss and pension benefits.

The Committee reached consensus that a worker who has teen disabled by reason of a work injury from the occupation of his or her choice should not be denied rehabilitation assistance simply because there may be a suitable and available occupation at which the worker could match the pre-injury earnings. It must be recognized that deciding what new occupation to pursue will determine many important aspects of the worker's life, including his or her work activities, standard of living, prospects for advancement, choice of communities, social contacts, standing in the community, self image and self respect, etc. For that reason, there should be a right to rehabilitation assistance, once one of the trigger factors has been established.

An exception may be justified where the worker has actually carried on an alternative occupation for a lengthy time, and is capable of continuing to do so, but asks the Board to assist him or her in qualifying for some new field. In those circumstances the Board should have the right to appeal (to a neutral body) the worker's choice, on some such grounds as: "that it would be unreasonable in all the circumstances to require the Board to pay for vocational rehabilitation in 1ight of the worker's ability to exceed his or her pre-injury earnings at a suitable and available job, the worker's reasons for failing to participate in rehabilitation within two years of per the compensable injury and all other relevant factors."

11) **Non-Discrimination**

The policy should make it clear that the right to rehabilitation exists without regard to the sex, age, religion, education, or racial/ethnic background of the worker. The policy should guarantee that women, for example, are entitled to rehabilitation in "male fields", and that the Board is not entitled to refuse a worker's rehabilitation plan simply because of the worker's age.

12) **Deeming**

Most advocates agree that "deeming" the worker to be capable of jobs which have never been offered or peformed, and refusing rehabilitation on the basis of such judgments, is one of the major abuses of the present system. The Board's policy should be revised to eliminate such "deeming". It should also be recognized that for the rehabilitation officer to perform a deemed employability assessment for pension purposes conflicts with the trust and cooperation required for successful rehabilitation.

13) **Charging of Rehabilitation Costs**

The Committee discussed the need to have the cooperation of employers i= the Board's rehabilitation program is to succeed. Consequently, it was felt that the Board's rehabilitation services should be funded by the accident fund in general, and that the costs of a worker's rehabilitation, should not be charced to the individual employer. As a consequence of this, the employer should not have any right of appeal from such decisions. This would require an amendment to the Act.

Adjustment of assessments has been used by the Board in order to promote better safety practices, insofar as the cost of compensation is concerned. Paragraph 14 below proposes that assessments similarly be adjusted by the Board to encourage employers to make the rehabilitation system more effective, by providing work opportunities for disabled workers.

14) **Incentives to Obtain Cooperation of Employers**

An incentive policy should be designed which encourages emplovers to hire disabled workers. The coal should not be limited to re-employment of the employer's own disabled workers. This often 1eads to a "mismatch" between the worker and the jobs which the employer is able to offer, and may 1eave the worker 1ocked into an unsatisfactory job from which there is no prospect of promotion or development. Instead, all employers should be encouraged to employ disabled workers.

The incentive policy should be based upon a coal of at least 5% disabled employees in every work force covered by the B.C. Workers' Compensation system. Employers who attain that goal should be rewarded with a significant reduction in their annual assessments. The required percentage of disabled employees should be phased in over a period of years, and should be subject to existing seniority provisions and collective agreements. The overall level of assessments should be sufficient to enable the Board not only to pay for vocational rehabilitation as a matter of right (as proposed above), but also to enhance to employment opportunities of all disabled workers by such means as

a) compensating employers for part of the cost of making work places accessible;

b) creating new jobs for significantly disabled persons;

c) paying extra incentives to employ severely disabled persons;

d) paying incentives to employ more than the minimum percentage of disabled persons.

This proposal is offered as a first stem toward achievement of provincial or national program of employment for the disabled, similar to that in Germany. In Germany, approximately 90% of disabled people are employed. In Canada, less than 20% are employed. The cost of this unemployment to all levels of government and also to workers' compensation boards across the country is enormous. The Workers' Compensation Act grants the Board a broad discretion to provide rehabilitation assistance, and already contains a structure for assessing employers, evaluating disabilities, and resolving disputes about individual cases. It is therefore an ideal setting in which to begin the process of making it possible for disabled Canadians to participate fully in our society.