



100 Eileen Stubbs Avenue
Dartmouth, N.S.
B3B 1Y6

308 – 7071 Bayers Road
Halifax, N.S.
B3L 2C2

July 13, 2009

Nancy Stacey
Policy Analyst
WCB of Nova Scotia
PO Box 1150
Halifax NS B3J 2Y2
Email: nancy.stacey@wcb.gov.ns.ca

Dear Ms. Stacey:

**Re: Background Paper and Draft Program Policy (Number 1.3.7) -
“General Entitlement – Arising Out of and in the Course of
Employment”**

We are writing in response to your letter of June 9, 2009 in which you asked for comments on the above-noted draft policy by July 13, 2009. Together, we represent over 40,000 public and private sector workers in Nova Scotia who are very concerned about having an effective occupational health and safety system in place and a fair and responsive Workers’ Compensation Board. We have participated in earlier WCB policy consultation processes and we appreciate this opportunity to provide comments.

Almost 100 years ago, workers agreed to give up their right to sue their employers’ in the event of an injury or illness at work in exchange for a no-fault compensation system that was non-adversarial, quick and fair. Workers, when injured at work, should be compensated in a timely manner, for lost wages or potential wages.

Too many workers, including our members, suffer injury and illness and even death at work. We and others in the Province have worked tirelessly to make our workplaces more healthy and safe, pushing for better rules and regulations, more enforcement and prosecution, as a means of preventing workers from paying the ultimate price for a job.

Basic Principles

For this “foundation and follow-up” year, we believe that the starting-point should be a statement of basic principles. Such a statement entitled “The Stanhope Manifesto on Workers Compensation” was developed in 2002 jointly by the Canadian Union of Public Employees (CUPE), the National Union of Public and General Employees (NUPGE), and the Compensation Employees’ Union (CEU). It was re-affirmed and re-titled in 2006 as the “Principles of a Fair and Comprehensive Workers’ Compensation System”. We have enclosed it at the end of the text of this letter.

This Manifesto forms the basis of our comments and includes twenty-seven principles, one of which is the need for recognizing the universality of workers’ compensation coverage to all workers in the Province. While this issue may be beyond the mandate of this review, we believe it should not be overlooked in any consideration of basic principles for Workers’ Compensation.

At the same time, we agree with the summary taken from the text “Workers’ Compensation in Canada “ by Terence G. Ison with respect to the principles used to guide the adjudication of entitlement to Workers’ Compensation set out on pages 7 and 8 of the Background Paper.

If the WCB wants to clarify basic principles, it should be done as a separate document entitled as “Basic Principles and General Entitlement”. This proposed draft policy document which was sent to us should be re-titled as “General Entitlement – Non-Disease related accidents and Injuries” as stated on page 4.

Comments on The Background Paper

We understand that this Background Paper is focussed on the “non-disease related accidents and injuries”. However, we believe that the decision-making process, the principles, and the provisions of the Workers’ Compensation Act (WCA) and Regulations apply equally to occupational disease. We do not want our comments to be in any way misinterpreted as supporting a distinction in how these workplace issues affect workers in Nova Scotia.

We are very concerned about the potential adverse impact that this draft general entitlement policy may have for the current adjudication process of interpreting the Act and for future possible changes in that process such as moves to auto-adjudication as is the case in British Columbia and Ontario. We are troubled about anything that potentially dilutes the clear language of the legislation in support of compensation for workers in Nova Scotia. If, as stated on page 10, this program policy is intended to clarify “...how the WCB makes general entitlement decisions while remaining consistent with the Act and not imposing

new limits on access to compensation benefits or services”, this should be clearly stated in the policy statement such as in the preamble.

The Background Paper introduces a concept of “deviations” which might render an employee ineligible for workers’ compensation. It is preferable to identify these as statutory exclusions in the WCA itself, and not introduce a term “deviations” which is not part of the legislation. We are concerned that the WCB may be seeking to exclude certain types of accidents or conditions. We are opposed to any listing of circumstances when compensation would not be paid.

We are troubled by the four reasons outlined on pages 4 and 5 to justify why this policy is needed. That Nova Scotia is the only Province without such a policy is not a reason, on its own, to develop a policy. A review of the policies of the various Workers’ Compensation Boards across the country reveals vast differences in the depth and detail of policies – from simple paragraphs to 100 page documents which can be found at: <http://www.awcbc.org/en/index.asp> Having greater clarity and transparency, laying the foundation for more specific entitlement issues, and supporting the development of program policies on more complex issues in the future are all admirable goals but could be compromised if the fundamental questions and concerns we raise about the need for and content of this policy are not addressed.

Comments and Suggestions for Change on the Draft Program Policy

We do not agree with the format of the Draft Policy. We think this Policy is a “Draft Program Policy Statement” that would include the Preamble and Definitions and that would include separate numbered headings throughout it. However, we will offer comments and suggested changes in the format provided.

Preamble

This is an acceptable statement except that it should indicate as we stated earlier that this program policy is intended to clarify how the WCB makes general entitlement decisions while remaining consistent with the Act and not imposing new limits on access to compensation benefits or services,

Definitions

The provision should indicate that the definition of “accident” is taken directly from Section 2 of the WCA. We are concerned that the use of the word “accident” in the Act and its limitations/connotations with respect to illness and the limits on its definition which prohibits gradual onset stress or chronic stress from being included. This effectively eliminates any worker from compensation as a result of psychological harassment and intimidation in the workplace.

Policy Statement

Provision 1 – “real merits and justice of the case”

Section 186 of the WCA does not require the WCB to consider each “individual” merits and justice of the case. Policies that change even one word of the legislation may unwittingly start down the path of violating the provisions of the legislation. The reference should be as stated in the WCA, in full.

186. The decisions, orders and rulings of the Board shall always be based upon the real merits and justice of the case and in accordance with this Act, the regulations and the policies of the Board.

We suggest that the provisions of Section 187 of the WCB be quoted in full as Provision 1 of the Policy Statement. The Policy Statement refers to Section 187 of the WCB in Provision 7 and limits it to the question of “out of and in the course of employment”.

Section 187 does not limit the “benefit of the doubt” to that question. Rather, it provides as follows:

187. Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issue shall be resolved in the workers’ favour. [emphasis added]

We recommend that Section 187 of the WCA be quoted in full and be Provision 1 of the Policy Statement.

The current Provision 1 would be renumbered, and Section 186 of the WCA copied in full.

The rest of current Provision 1 is confusing. The “general principles and questions” do not “provide the WCB with EVIDENCE” to consider when making a decision.

The “EVIDENCE” comes from the claim. The “general principles and questions” provide a “structure for the exercise of decision making” with respect to an individual claim. We suggest the language be changed in this manner.

Provision 2 – basic eligibility requirements

The reference in (a) should identify the particular provisions of the WCA that define a “worker”. The most obvious required reference is to Section 10(1) of the WCA which requires the worker to be in “an industry to which this Part applies”. The other provisions should be identified.

The Background Paper refers to issues relating to the age of a worker, beyond noting that benefits cease when a worker reaches the age of 65. No issue is raised about the effect of amendments to the Human Rights Act of Nova Scotia which effect July 1, 2009, eliminated the former exemption for retirement. The reference in (b) should identify the particular provisions of the WCA that set out the requirements for filing a claim, such as Section 82 (“filing of claim”) and Section 83 of the WCA (“notice of accident or injury”)

The reference to (c) does not accord with the first part of the phrase. It reads “to be eligible to receive compensation benefits and services a WORKER MUST have been caused a personal injury by accident arising out of and in the course of employment as required by Section 10 of the Act”.

However, we understand that this curious and confusing language is consistent with the provisions of Section 10(1) of the WCA and should be maintained as written in the Draft Program Policy.

Provision 3 – “determining if an accident arose out of and in the course of employment”

Provision 3 should quote in full the provisions of Section 10(4) of the WCA which provides as follows:

10(4) Where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment”.

Provision 3 should also state that consideration should be made to the “time, place and circumstances under which the accident took place and the link between the injury and the risk created by or related to the employment” as set out by the Nova Scotia Court of Appeal in NS (Department of Transportation and Public Works) v NS (WCAT) (Puddicombe), 2005, 231 N.S.R. (2d) 390 (C.A.)

Provision 3(a) Description of “arising out of” employment

We are concerned that the introduction of the phrase “some risk related to the employment” will become yet another “hoop” for an injured worker, rather than answering the question as to whether the injury “arose” out of employment. Introducing the “causal” connection in the “arising out of” section is also confusing.

Provision 3(b) Description of “in the course of” employment

The reference to “time” and “place” were specifically approved by the Nova Scotia Court of Appeal (Puddicombe, supra), but an investigation into the “circumstances” is also suggested.

The reference in (iii) should not say “directly related” to employment, if the option of being “incidental” employment is permitted. As long as the activity is “related” to employment, it is sufficient.

It is also appropriate to indicate that if the personal injury happened off the employer’s premises and/or outside usual working hours, it may be work-related, if evidence shows that a worker’s injury arose out of the employment in any event.

Provision 3 (c) – Questions Considered – “arising out of and in the course of employment”

We support the use of questions or ‘triggers’ and agree that this would help an injured worker understand the decision making process of the WCB better. The fundamental question to be answered is “but for” employment, would the worker have been injured.

We suggest a few additional types of questions:

- “Did the injury/illness occur while the worker was exposed to some contaminant in the course of their employment”
- Was participation in the activity directed, requested, or endorsed by the employer?

Provision 4 – “aggravation, acceleration of pre-existing disease or disability and injuries due to other causes”

We agree that it is appropriate to refer to the provisions of Section 10(5) of the WCA . However, we are concerned that an inappropriate focus on “proportionality” regarding pre-existing disease, disability or injuries will cause WCB adjudicators to engage in detailed determinations of “fault” that are based on a tort system completely opposed to the no-fault insurance system explained at page 5 of the Background Paper. The WCB cannot exclude certain types of “accidents” or pre-existing injuries or conditions.

Provision 5 – “serious and wilful misconduct”

Section 10(3) of the WCA provides for disentitlement for benefits (unless the result is death or serious and permanent impairment) in situations where a “personal injury is attributable wholly or primarily to the serious and wilful misconduct of the worker”.

We recognize that this is a statutory exemption provided for in Section 10(3) of the WCA. However, as stated in the “Background Paper”, the exemption is very

infrequently used. We are opposed to increasing the determination of this question to the detriment of the “no fault” nature of the legislation and the two presumptions in favour of workers in Section 187 and Section 10(4) of the WCA.

Provisions 6 and 7 – Presumption and Benefit of the doubt

We suggest that both Section 10(4) and Section 187 of the WCA be placed at the very beginning of the policy to make it absolutely clear that the provisions must run throughout the decision-making process and not just at the very end of a determination.

Provision 8 – Application

If the policy is a restatement of existing practices, what effect will a “start” date have on the claims adjudication process? Why not just have a date of reference that would also refer to the Act?

Conclusion

We believe a separate document about basic principles and general entitlement should be prepared. We think this proposed draft policy document which was sent to us should be re-titled: “General Entitlement – Non-Disease related accidents and Injuries”. We are very concerned about the potential adverse impact that this draft general entitlement policy may have for the current adjudication process of interpreting the Act and for future possible changes in that process such as moves to auto-adjudication. We do not think the four reasons cited for this policy justify the need for it unless the fundamental questions and concerns we raise can be addressed. We have offered comments and suggested changes to the draft policy.

We appreciate this opportunity to provide input. We look forward to participating in providing comments and suggestions about the additional “foundational” topics – “General Entitlement – Occupational Disease” and “General Principles – Medical Aid”.

Yours sincerely,



Joan Jessome
President
NSGEU



Danny Cavanagh
President
CUPE – NS Division

c. Rick Clarke, President, Nova Scotia Federation of Labour

The Stanhope Manifesto on Workers' Compensation

Introduction

In 2002, representatives of three unions representing unionized workers at various workers' compensation boards across Canada met in Stanhope, Prince Edward Island. The three unions were the Canadian Union of Public Employees (CUPE), the National Union of Public and General Employees (NUPGE), and the Compensation Employees' Union (CEU). The decision to develop a statement of principles of a fair and comprehensive workers' compensation system was made at that meeting, hence the name, "Stanhope Manifesto".

The statement sets out the principles that unionized workers of Canadian workers' compensation boards believe are the minimum conditions for a comprehensive and fair workers' compensation system.

The statement is consistent with the principles expressed by Sir William Meredith in 1910, which are known as the historic compromise. With the historic compromise, workers gained the right to workers' compensation benefits regardless of fault, in return for giving up the right to sue their employers.

In our federal political system, each jurisdiction has the authority to develop its own legislative framework and workers' compensation board. While we respect the decision-making authority of each jurisdiction, we believe that the principles of the Stanhope Manifesto should be reflected in all workers' compensation boards in Canada.

We ask organized labour in Canada to endorse these principles.

Principles of a Fair and Comprehensive Workers' Compensation System

Safe and healthy work

1. All people have the right to employment that is free of injury and illness and the threat of injury and illness.

Coverage

2. Workers' compensation and health and safety laws should cover all workers.

3. All work related disabilities, injuries, or illnesses, including repetitive strain and workplace stress, should be covered under workers' compensation law and policy.

Public system

4. Workers' compensation should:
 - Be publicly delivered
 - Be administered in a not-for-profit system, collectively-controlled through legislation
 - Receive appropriate support from provincial governments
5. Service should respect the individual needs of the injured worker and be provided in a non-bureaucratic fashion.

Independent system

6. Government should remain at arm's length to allow for independent decision-making and rate setting under the terms of legislation.
7. Politicians should not exert any influence on workers' compensation boards to ensure the boards are nonpartisan.
8. All employers should be treated the same; special treatment should not be given to any employers.
9. The boards should not allow any inappropriate external attempts to influence the organization. Any such attempt should be publicly reported.

Compensation

10. Workers have the right to be fully compensated if they are injured or become ill due to their work. They should be returned to meaningful employment. The help they receive should be provided in a manner that respects their individual capacity and treats them with dignity and respect.
11. Pension benefits should be provided to workers with permanent impairments arising from work-related injuries and conditions. These benefits should recognize and adequately compensate workers for their losses.
12. If a worker dies due to a work-related illness or injury, dependent family members should receive compensation.
13. Wage loss benefits should recognize all earnings lost due to work injury and illness. Benefits should be adjusted to inflation. There should be no waiting period for benefits.

Rehabilitation

14. Workers' compensation boards should provide in-house vocational rehabilitation services to help injured workers return to employment. Such services should provide at least pre injury earnings.

Appeals

15. Appeal procedures should ensure that injured workers' complaints are resolved quickly and fairly, and respect their rights to due process. Compensation systems should be staffed and workloads set at levels that allow this.

Legislative review

16. Legislation and regulations for workers' compensation should be publicly reviewed regularly (at least every four years). The input of frontline workers and their representatives should be actively sought in the review process.

Compliance

17. Workers' compensation boards should not allow employers to intimidate or discourage employees from filing workers' compensation claims. Boards should have the authority, ability, and responsibility to ensure employers comply with claims reporting requirements.

Research

18. Workers' compensation boards should be pro-active in identifying conditions that are eligible for compensation.

19. Workers' compensation boards should conduct ongoing and thorough research on the impact of workplace injury and illness. Research should also be conducted on the adequacy of the compensation system to address the impact of workplace injury and illness.

Prevention

20. Workers' compensation boards should be proactive in ensuring that all reasonable measures are taken to prevent workplace injuries.

21. Workers' compensation boards should educate and train young workers about workplace hazards and their rights under workplace safety and health legislation.

Technology

22. Advances in technology should be used to enhance fair and timely compensation to injured workers.

23. Technology should be used to enhance injured workers' access to the system.

24. Technology should not be used to eliminate the duty of board employees to adjudicate all claims or assess employers.

25. Technology should be owned, operated, and controlled by the workers' compensation board that it serves.

Board management

26. Staffing resources should be maintained at levels that ensure employees can meet the needs of stakeholders.

27. Workers' compensation boards should provide employees with a safe, healthy, and secure work environment. Board management should provide employees with the support they need to do their jobs effectively and efficiently.