Workers' Compensation

For the 21st Century

Presentation on Behalf

of Injured Workers to the

Service Delivery Core Review

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Preface

This is our response to the October 1, 2001 invitation from Deputy Minister of Skills Development and Labour Lee Doney to participate in the consultation process of the Workers' Compensation Service Delivery Core Review.

At our meeting on December 3rd, 2001, we gave you a binder containing our submission regarding the Legislation and Policy review. The binder also contained background documents which address service delivery as well as law and policy issues. We ask that you review them carefully before deciding on your recommendations:

- the January, 1998 report of the Auditor General (Appendix D),
- two recent decisions of the Federal Court of Appeal regarding employability under the Canada Pension Plan (Appendix E),
- a brief critique of the Final Report of the Royal Commission (Appendix B), and
- the written submission we submitted on behalf of injured workers to the Royal Commission (Appendix C).

In addition to the binder, we gave you a very recent study of the Injured Worker Participatory Research Project in Ontario, which focuses on problems with service delivery in a province which seems to be serving as the model for many of the changes we expect to result from the Legislation and Policy core review. While much of the hardship described in the Ontario report results from the law and the structure of that system, not all of it does. We hope that your report will make recommendations that will save injured workers in BC from the traumatic experiences that have occurred in Ontario due to avoidable problems with service delivery in that province.

A good reference to the current service delivery problems at the WCB is the Quality Adjudication study completed by R. J. Hurst in March, 2000. We understand that you have a copy of the study. If not, please let us know and we will provide you with one.

For your convenience, we will also send by email copies of our submission on the Legislation and Policy Review, and the Ontario study. Both documents are in pdf format.

December 24, 2001

James F. Sayre

Introduction

The core review of Legislation and Policy raised numerous issues covering the entire workers' compensation system. The issues raised in this review are far fewer. In fact, there is really only one issue, which can be directly answered very briefly - is the WCB doing an acceptable job of implementing the law and policy to carry out its mandate, and if not, what changes should be made?

No, the fairness, effectiveness, and efficiency of the Board's compensation service delivery are not acceptable. The most important change that is needed is to enhance the quality of initial decisions by making the Board and its individual officers genuinely accountable for the legality, fairness, and timeliness of their decisions and other actions.

While this submission will not be as lengthy as our response to the Legislation and Policy review, the outcome will be at least as important for injured workers, as most of their grievances and complaints have been about poor decision-making and unfair procedures. Indeed, many experienced advocates would argue that the current legislation and policy would be perfectly acceptable, if only they were implemented as written.

We will address 12 issues relating to service delivery. All of these concern the Board's compensation and vocational rehabilitation services.

We understand that the B.C. Federation of Labour is addressing service delivery as it relates to the Board's responsibility for prevention of injuries, and we support its position that there must be more emphasis on inspections, orders, and their enforcement, and less on education and consultation.

We have not addressed assessment and classification issues, which are generally outside our members' experience and area of responsibility. We express no opinion about the Board's service delivery in those areas.

Service Delivery at the WCB of British Columbia

The key to improving service delivery is to improve the legality, fairness, and timeliness of the Board's initial adjudications. This should be self-evident, but events at the Board over the last few years show that it's not. The March 22, 2000 report of R. J. Hurst on Quality Adjudication clearly identified many of the shortcomings of the Board's current practices. Yet the only significant response we have seen was the flawed pilot project under which certain decisions under appeal to the Review Board were reviewed by senior managers, but only after the worker and advocate had done all the work necessary to prepare the appeal and had then filed Part 2. That project - a classic example of closing the barn after the horses have gotten away - has now been turned into a permanent new division at the Board. This was done without consultation with any stakeholders, apparently in the belief that the new division would automatically become the internal review component of the new appeal procedure which is expected to result from the Legislation and Policy Core Review.

In the meantime, nothing has been done to correct the problems which have led to so many appeals. It must be noted that many of the senior managers who are now part of (or seeking to join) the new internal review division were in charge of the adjudicators whose decisions have created the crisis at both the Board and the appeal tribunals. To change metaphors, this is like hiring arsonists to help fight fires.

For the Service Delivery Review to have any meaningful impact on the Board's performance, and the welfare of the injured workers who rely upon it, real changes must occur at the initial adjudication level. At our meeting, and in this summary, we describe some of the more important changes that are needed.

We will first list the recommendations, and will then discuss most of them in greater detail.

1. **Implement the recommendations in the Quality Adjudication Report**: The recommendations of R.J. Hurst's March 22, 2000 study would greatly improve service delivery, particularly when combined with Jim Dorsey's admonition to the Board in the early 1990's to rely on the Claims Manual and other official statements of WCB policy, rather than precedents and guidelines developed by the "loremasters". [Detailed discussion follows.]

2. **Rely exclusively on medical evidence from the attending physicians and other doctors independent of the WCB**: The Board should be required to act upon the

medical evidence and opinions of the worker's treating physicians, or to hire an independent specialist chosen randomly from a list developed by the medical profession to provide a second opinion. No doctor employed by the Board should be allowed to give an opinion about a worker's claim. [Detailed discussion follows.]

3. **Make the Board and its adjudicators individually and collectively accountable for their decisions and conduct:** The WCB and the officers who make its decisions must be held accountable for their work. We recommend that the criterial proposed by the Auditor General in his January, 1998 report be adopted. This would require the Board to follow up on its decisions, and to report regularly to the governors, stakeholders, government, and public on its overall success. Any individual officers whose decisions are unacceptable, as measured by these standards, should be subject to effective corrective action - including, if necessary, demotion or dismissal. [Detailed discussion follows.]

4. **Vocational rehabilitation must aim for real employment, not just training**: The goal of the vocational rehabilitation process must be to support the worker in finding a real job opportunity, not just a training program that leads to a deemed earning capacity decision. [Detailed discussion follows.]

5. **Employability assessments must reflect the worker's real circumstances**: These assessments must be based on jobs which the worker has actually performed, or been offered, and for which the worker is genuinely qualified in the "real world". This means that any limitations resulting from the worker's age, educational level, language skills, or non-compensable disabilities must be taken into account in determining what jobs are suitable and available to the worker following the injury. [Detailed discussion follows.]

6. **Pension and other key decisions should be made only after the worker has had an opportunity to submit new evidence and observations**: The Board should give the worker an opportunity to comment on a proposed decision that will terminate or reduce benefits, or determine the worker's future income, and it must **genuinely pay attention** to the response it receives from the worker, doctor, or representative. [Detailed discussion follows.]

7. **All steps in the appeal process, including any new internal review stage, must be carried out by staff who are truly independent from the decision-makers**: If the Legislation and Policy core review results in an internal review process replacing the independent appeal which workers now have to the Review Board, it is crucial that the staff performing the internal reviews be (and be perceived to be)

fully independent of the Board. It is also essential that all significant decisions regarding a worker's claim be appealable to an external appeal tribunal as well. [Detailed discussion follows.]

8. **The Board must be able to reconsider and change its past decisions, where the decisions have been shown to be wrong**: The Board must be allowed to reconsider its own decisions, not only on the basis of new evidence or new medical developments, but also where the worker can demonstrate that an earlier decision was wrong. [Detailed discussion follows.]

9. **Appeal decisions must be implemented promptly and fully, unless a further appeal is filed**: Decisions implementing a successful appeal must be treated with priority, and must carry out the tribunal's intent in good faith. Any failure by an officer to do so should lead to serious repercussions under the accountability procedures. [Detailed discussion follows.]

10. **Any worker facing a significant decision must be entitled to effective, trained legal assistance**: Due to the complexity of WCB law and policy (as well as many of the key medical issues), and the likelihood that the appeal process will be reduced to a single independent step, all workers must have access to free legal assistance and representation. The Workers' Advisers office, and/or other agencies such as legal aid groups, must be given the resources and mandate to assist every injured worker who needs and desires such help. [Detailed discussion follows.]

11. **Third party providers of rehabilitation services must not be encouraged by the terms of their contracts with the Board to provide misleading evidence about the worker's condition**: We understand that third party providers of "work hardening" and other rehabilitation services work under a contract that requires them to achieve a specific percentage of "success" (i.e., workers who are reported as being fit to return to work) in order to receive payment for their services and qualify for future contracts. This motivates providers to report workers as being ready to return to work when doing so would be impossible or dangerous. It also leaves the provider at the mercy of adjudicators who may refer workers to such programs despite objections from them and their doctors that they cannot complete them safely.

12. **Surveillance of injured workers must be restricted to circumstances where there is a concrete basis to suspect fraud, and officers ordering, supervising and carrying out surveillance must be held strictly accountable for any abuses**

or violations of policy that may take place: Few activities of the Board which may occur during its handling of a claim are as damaging as surveillance to the rights and dignity of an injured worker and his or her family. Discovering that an investigator has followed a worker around the community, or parked outside the home and videotaped the family's activities, is humiliating to an honest claimant. Such workers often talk of feeling violated, as though they had become suspected criminals because they were injured at work, or needed longer than average to recover. Fishing expeditions, unsupported anonymous tips, or an adjudicator's dislike of a hostile claimant must never be the underlying reason for such violations of privacy. The Board must create very specific policies to determine when and how surveillance can be ordered and carried out, and how the results are to be documented and communicated. And any intentional violation of those guidelines must be treated as serious misconduct by the officer or investigator responsible.

Discussion

The following discussion addresses some of the issues listed above in greater detail.

1. Implement the recommendations in the Quality Adjudication Report

R.J. Hurst made numerous recommendations from pages 28 - 33 of his report that addressed problems with

- inadequate training,
- poor documentation,
- failure to communicate effectively,
- incomplete pre-decision investigations,
- inconsistent mentoring and coaching of new staff,
- continuum of care that adopts a cookie cutter approach to injured workers,
- failure to involve treating physicians in decision-making,
- lack of regular audits or feedback from appeal decisions,
- overly complex claims handling procedures,
- inadequate and confusing e-file documentation, and
- lack of effective feedback from the appeal tribunals

Advocates have seen no significant improvement in any of these areas. It's particularly frustrating that the only response to Mr. Hurst's comprehensive recommendations was to initiate a pilot project that only addressed decisions that were ready for hearing by the Review Board, and made no effort to correct the problems which cause so many appeals in the first place.

2. Rely exclusively on medical evidence from the attending physicians and other doctors independent of the WCB

Few changes are so badly needed, and so easy to implement (given the will to do so) as dismissing the WCB medical advisors and requiring the Board to base its decisions exclusively on the opinion of the treating physician, or of an independent specialist to whom the claim is referred by the Board for that purpose. Many doctors are incensed by WCB's apparent lack of respect for their professional judgment, and some even refuse to accept patients who have an active WCB claim. And the Board will never be seen as a fair tribunal as long as it regularly rejects the evidence of the doctors who have actually

examined and treated injured workers in favour of the opinions of medical advisors who rely on the Board for much or all of their income.

For change to be effective, however, the Board must not be permitted to replace its salaried advisors with the same or similar "captive specialists" who consult with it constantly. The independent advice the Board is entitled to seek must be provided by doctors chosen at random from lists of specialists drawn up by the College of Physicians and Surgeons, or the BC Medical Association. The lists use for Medical Review Panels (or a new form of appellate medical referral that may replace them) would be suitable.

3. **Make the Board and its adjudicators individually and collectively accountable for their decisions and conduct**

Accountability is the most important goal for improving the delivery of the Board's services. An excellent approach was recommended by the Auditor General in his January, 1998 report to the Board (Tab D of our submission on Legislation and Policy).

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. 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. 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 to determine whether workers have really returned to work at the pre-injury income levels, and remained employed on a durable basis.

These recommendations seem obvious, yet the Board still hasn't carried them out. What better way could there be 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?

To make these measures effective, the Board should not only measure overall results, but should make comparisons of area offices and managerial units, and also of individual adjudicators. Where it appears that 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.

Injured workers also want accountability for abuses of power and violations of policy by the Board. Because of the provision in s. 96 which protects the Board's employees from liability for any conduct which they even "believe" was within their jurisdiction, lawsuits for

abuse of power are not a practical remedy in all but the most obvious cases. An independent complaint process, somewhat analogous to the police complaint procedure, would enable an injured worker to initiate an inquiry when the Board violates the worker's privacy by ordering surveillance without any reasonable justification, maliciously terminates benefits in the face of all medical evidence, or otherwise abuses its powers.

4. **Vocational rehabilitation must aim for real employment, not just training**

This issue was raised in the terms of reference for the Legislation and Policy Review. Our response was that, "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." Requiring the Board to continue to provide assistance (as long as the worker is cooperating) is crucial to the service delivery side of vocational rehabilitation.

One of the most unfair and infuriating types of decisions involve deeming a worker's earning capacity on the basis of jobs which have never been available to the worker, and never will be. Such deeming is usually done by vocational rehabilitation consultants as part of the pension assessment process. An effective way to reduce such unfair decisions, which almost always result in appeals, is to require the Board to continue assisting an injured worker until he or she actually finds suitable work. There would then be little advantage to the Board in pressuring the worker into a course that doesn't lead to real job opportunities.

5. **Employability assessments must reflect the worker's real circumstances**

This is a separate policy and legal issue, indirectly related to the previous point. As the Federal Court of Appeal decided in recent decisions regarding unemployability under the *Canada Pension Plan* (as a condition for receiving a disability pension), a person's employability must be assessed in the "real world" - where age, education, and language skills are crucial factors, along with any physical and mental disabilities.

The WCB must never be allowed to deem a worker capable of jobs which are not actually available to him or her, on the specious reasoning that the jobs would be suitable if the worker were younger, better educated, or fluent in English. The worker, with whatever competitive disadvantages may exist due to age, education, and language skills, was able to work prior to the injury. If the injury prevents the return to that or any other suitable

employment, the loss of earnings is solely due the injury. In such cases, the Board must either offer the worker basic educational upgrading and language training, where this will make the worker competitively employable, or accept the fact that the worker has suffered a total loss of earnings.

6. **Pension and other key decisions should be made only after the worker has had an opportunity to submit new evidence and observations**

The Quality Adjudication report and other studies have indicated that the Board must improve its pre-decision investigations if initial decision-making is to become acceptable. What better way to do this than to involve the worker, representative, doctor, employer, and union in the process by alerting them to a proposed decision and offering them a reasonable opportunity to provide additional evidence and observations? In fact, such an interactive procedure was the unfulfilled promise of the case management process. Had the promise been carried out, and the submissions of the worker and other parties considered in good faith, it's very likely that the Board would not be an institution in crisis, where the volume and allow rate of appeals has reached record levels.

Should the Legislation and Policy Review result in greatly reduced rights of appeal, as now seems likely, it will be that much more important for the Board itself to act as an administrative tribunal determining the legal rights of the worker, which it what it is. Doing this will often involve meeting with the worker and other involved parties, and should always involve direct contact with them before crucial decisions are reached.

7. **All steps in the appeal process, including any new internal review stage, must be carried out by staff who are truly independent from the decision-makers.**

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 its tribunals will continue regardless of their actual performance.

Secondly, neither an external nor an internal review tribunal can work if the staff are reluctant to second-guess the initial decision-makers. The workers' compensation system has had an internal review procedure for many years - managerial reviews. Advocates usually consider them to be useless because managers won't antagonize their staff by overturning a decision unless the evidence or other grounds are overwhelming.

8. **The Board must be able to reconsider and change its past decisions, where the decisions are shown to be wrong**.

As noted in our submission to the Legislation and Policy Review, present policy only requires that the Board consider any new evidence, or submissions that the initial decision was contrary to the Act or policy. If the Board decides that "rehearing and reconsidering" the original decision is not justified under s. 96(2), there is no new right of appeal. That is a sufficient protection against endless cycles of applications, and there is no need to eliminate or restrict the power to avoid unjustified requests. The power of reconsideration provides especially important protection for workers who had no representation when the initial decision was made, or did not realize the importance of the decision and therefore failed to pursue an appeal.

9. **Appeal decisions must be implemented promptly and fully, unless a further appeal is filed**.

We recommended to the Legislation and Policy Review that the appeal tribunals have the authority to retain jurisdiction over the implementation of their decisions, if disputes or unreasonable delays should occur. The Royal Commission made a similar recommendation regarding the proposed new Appeal Tribunal. We suggested that the existence of this authority (and the knowledge that the tribunals were prepared to use it) would make the Board less likely to obstruct the implementation process, which would mean that the power would rarely have to be exercised.

As a further means of reducing delays and avoiding a new cycle of appeals due to failure implement decisions fairly, we recommend that a separate unit of experienced officers be established to carry out implementations. The unit should have sufficient staff to keep up with the flow of appeal decisions, and should be administratively independent of the initial adjudicators, so they will not feel that they are under pressure to defend the original ruling despite the appeal.

An advantage to such a separate appeals implementation division is that the unit's overall responsibility would enable it easily to identify common elements in the decisions coming out of the tribunals and to convey this to the staff at the Board responsible for quality adjudication. This would be more effective and efficient than having separate staff review appeal decisions solely for that purpose.

10. **Any worker facing a significant decision must be entitled to effective, trained legal assistance**

A work injury or occupational disease may permanently affect the worker's earnings (and hence the welfare of the worker's family). The system is far too complicated to expect the average worker to be able to understand it and protect his or her own interests without trained and experienced assistance, which frequently means actual representation. Simply handing out pamphlets, or advising workers on self-representation is frequently not enough.

Representation should not be limited to appeals. Effective representation at an early stage of the claim can reduce overall costs by ensuring that the Board has the relevant evidence before it makes decisions about long term wage rates, the worker's ability to return to work safely, and other issues that would otherwise end in confrontation, disputes, and appeals. Trained advice and representation is much more cost-effective than even one preventable appeal. It must be available to any worker who wants it, promptly and without charge. Doing this means having many more advocates than currently exist, and having them available throughout the province.

Workers' Advisers office and other sources of assistance such as the Legal Services Society must have the staff and other resources to inform, advise, and where necessary represent workers throughout their dealings with the Board. 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 counselors 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.

Conclusion

We feel that the measures we have outlined would, if implemented in full by the Board, result in greatly improved decision-making and other service delivery for injured workers. We urge you to recommend them to the government.