

The Workers Compensation Act

Legislative Overview

2009

Program Development and Review
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I General Principles of Workers Compensation

In Canada, workers compensation is a system of compulsory no-fault insurance for workplace injuries. The system is administered by statutory corporations or commissions established under the legislation of each province and territory. The Manitoba legislation is called *The Workers Compensation Act*, R.S.M. 1987, c. W200 (the *WCA*). Employees of the federal government who suffer work-related injuries or disease receive the same benefits as other workers in the province under federal legislation (the *Government Employees Compensation Act*, R.S.C. 1985, c. G5) administered by provincial and territorial workers compensation authorities.

The principles of Canadian workers compensation are influenced by the 1913 report of Sir William Meredith of Ontario. The fundamental principles in the Meredith report continue in Manitoba today, but with the addition of two new principles – (i) prevention and (ii) return to work. These new principles mirror the evolution of workers compensation philosophy and practice in Canada over the last century.

Since January 1, 2006, workers compensation principles are enshrined in the preamble to the *WCA* to guide the delivery and administration of workers compensation into the twenty-first century. These principles are:

Collective Liability

In return for immunity from suit, covered employers wholly fund the compensation system through premiums or “assessments” paid into an Accident Fund (subsection 81(1), *WCA*). Compensation is paid from the Accident Fund maintained by the Workers Compensation Board (WCB) and is not dependent on an employer’s ability to pay.

No-Fault Compensation

Compensation is payable to injured workers regardless of fault of either the workers or the employers who fund the system (section 4, *WCA*).

Income replacement

Income replacement is a cornerstone of workers compensation and is designed to fairly compensate injured workers for the loss of earning capacity due to work-related injury or illness.

No Right of Action

Workers gave up their right to sue employers in return for security of compensation (subsection 13(1), *WCA*). This principle is called the "historic compromise." The *WCA* provides immunity to employers and workers from civil suits.

Prevention of Workplace Injuries and Diseases

This principle is based on the belief that injuries and illnesses in the workplace are preventable and that safe workplaces should be the norm for all employers and industries in Manitoba.

Timely and Safe Return to Health and Work

Enabling a worker to return to health and work safely and quickly has become a key goal of compensation boards across Canada. Timely return to work leads to better recovery and reduces the impact of the injury or illness on the worker's quality of life, while also reducing costs to employers.

Independent Administration

Workers compensation is administered by the Workers Compensation Board, an independent agency. Cases are decided on their merits, without regard for strict legal precedent (subsection 60(4), *WCA*). Workers compensation matters are handled quickly, without the costs, uncertainty and formality of court proceedings. Courts have a limited role in workers compensation matters.

The WCB of Manitoba has exclusive jurisdiction to determine all matters under the *WCA* (subsections 60(1) and (2), *WCA*). Courts, including the Supreme Court of Canada, have upheld workers compensation authorities' expertise and exclusive jurisdiction over the workers compensation system.

II Legal Framework

WCB is an Administrative Tribunal

The WCB of Manitoba is an administrative tribunal. “Administrative tribunal” is a broad term that encompasses various kinds of statutory bodies that perform functions set out in legislation. Governments delegate powers to specialized administrative tribunals to perform various functions, such as municipal planning and development, supervision of utilities, regulation of industries and professions and adjudicating rights and obligations. The powers of an administrative tribunal are defined in the legislation that creates it.

All administrative tribunals must act fairly and impartially when making decisions. This is called the duty of fairness. The extent of the duty of fairness depends on the function of the administrative tribunal.

WCB is a Quasi-Judicial Tribunal

Some tribunals, like the WCB, adjudicate and enforce the rights and obligations of parties under their jurisdiction. These are called quasi-judicial tribunals. For quasi-judicial tribunals, the duty of fairness is similar to the standards applicable to courts.

The WCB of Manitoba and the Appeal Commission are quasi-judicial tribunals.

The WCA Defines the WCB’s Authority

The WCA defines the WCB’s authority. The WCB has statutory responsibility for all matters concerning the workers compensation system in Manitoba, including adjudication and administrative enforcement of workers compensation matters. In addition to the WCA, there are regulations and policies approved by the Board of Directors.

The WCB considers cases based on the WCA, regulations and Board policy. The WCB has an interest in maintaining a pattern of consistent decisions, but each case is unique.

WCB Decisions Are Final

Workers compensation in Manitoba is designed to provide prompt, non-legalistic resolution of a high volume of cases, without resort to the courts. Workers compensation matters are handled quickly, without the costs, uncertainty and formality of court proceedings.

Parties may challenge WCB decisions through an appeal process set out in the *WCA*. The final level of appeal in Manitoba is the Appeal Commission. Decisions of the Appeal Commission are final and cannot be appealed to the court.

Limited Role of Courts

The Manitoba legislature has limited the role of the courts in workers compensation matters because of the specialized expertise of the WCB and the Appeal Commission. The legislature intends that these decisions are final so that people may implement the decisions with some certainty.

The *WCA* contains a “privative clause” which means that there is no appeal to court. In very limited circumstances, the court can review the decision of the Appeal Commission (called judicial review). However, the court cannot substitute its opinion for the opinion of the Appeal Commission. All that the court can do is give the decision back to the Appeal Commission for further consideration.

Mandatory *versus* Discretionary

There are mandatory and discretionary sections in the *WCA*. Generally, where the *WCA* uses “shall”, the section is mandatory. Sections using “may” are enabling, providing the WCB with the discretion of whether and how to proceed.

Liberal Interpretation

Workers compensation is social legislation that must be given a broad and liberal interpretation in order to achieve the social policy objectives behind it. In contrast, criminal or taxing statutes are given a very narrow interpretation.

Timing of Application of Legislative Change

New workers compensation legislation is typically enacted on a prospective basis: that is, the new legislation applies only to claims that arise on or after the date that it comes into force. Claims that arose prior to the new legislation continue to be adjudicated in accordance with the legislation in effect when those claims arose.

Different sections of the same legislation may become effective at different times. The legislation itself will set out the effective date or dates.

III The Workers Compensation Act

Date of Accident

The *WCA* that is in force on the date of the accident is the Act that will apply to that accident, even if that Act is subsequently amended, repealed or replaced by later legislation.

In most cases, the date of accident is clear. For injuries of gradual onset or long latency, such as diseases, determining the date of accident may be more difficult but it is an important adjudicative determinant in establishing which legislation applies to the claim.

Benefit Models

There are two benefit models in effect in Manitoba. These are:

Disability Model

Benefits for injuries that occurred before January 1, 1992, are based on the disability model. This model calculates benefit eligibility through combining temporary and permanent loss of function together with loss of earnings. Benefits are paid as a commuted payment over a period of time in the form of a pension.

Dual Award Model

Benefits for injuries that occur after December 31, 1991, are based on a dual-award system of wage replacement and impairment awards. Impairment awards are entitlements paid out as a one-time lump-sum payment based on the degree of loss of function. Wage loss is paid out based on the average earnings of the worker, is time-defined and tied to recovery and re-employment of a worker. These entitlements are awarded separately.

Entitlement to medical aid and rehabilitation services generally remain unchanged under either model.

The Workers Compensation Amendment Act, S.M. 2005, c. 17 **(“Bill 25”)**

Bill 25 is the most recent amendment to the WCA. The benefit provisions in Bill 25 apply to accidents that occur on or after January 1, 2006. While Bill 25 changed the amount of some benefits and entitlements, it did not change the benefit model.

Bill 25 was the result of recommendations made by a Legislative Review Committee (LRC) mandated to conduct a complete review of the WCA. The review was the first extensive public consultation in almost 20 years. The report of the LRC, *Working for Manitoba*, was presented to the Government in February 2005.

Some of the recommendations of the LRC were accepted by Government and are reflected in Bill 25, which was unanimously adopted by the Legislature. Bill 25 modernized and updated the WCA, and will ensure that the compensation system remains affordable, balanced and practical.

Presumption re: Firefighters

The WCA was amended in 2002 to include a rebuttable presumption for firefighters that have primary-site brain, bladder or kidney cancers, non-Hodgkin’s lymphoma and leukemia. In 2005, this list was expanded to include primary-site colorectal, ureter and lung cancers. The cancer presumptions apply to full-time and part-time firefighters and are applicable with a minimum qualifying period of employment, as prescribed in regulation. In the case of lung cancer, the presumption will only apply if the firefighter has been a non-smoker for the minimum period of time prescribed by legislation. The occurrence of these injuries in firefighters shall be presumed to be an occupational disease the dominant cause of which is employment as a firefighter unless the contrary is proven (subsections 4(5.1) to 4(5.4)). The effective date for the firefighter presumptions is 1992 for full time firefighters, and June 9, 2005, for part-time firefighters.

The WCA also contains a rebuttable presumption that a heart injury suffered by a firefighter within 24 hours of attending an emergency response is presumed to arise out of or in the course of employment.

This presumption applies to heart injuries occurring on or after June 9, 2005.

Scope and Coverage of the WCA

Inclusionary Coverage Model

Since 1917, it was mandatory for industries listed in the Schedule to the Act to register for coverage and pay WCB premiums for that coverage. Employers in industries *not* identified in the Schedule to the Act did not require coverage and were considered non-compulsory. They had the option of applying for coverage for themselves and their workers, on a voluntary basis.

Exclusionary Coverage Model

On January 1, 2006, the WCB changed to an *exclusionary* coverage model for all employers, industries and workers in Manitoba. Exclusionary coverage means that it is mandatory for employers, industries and workers to obtain WCB coverage, unless excluded by regulation. As of January 1, 2006, Regulation 196/2005 reflected the *status quo* for WCB coverage in Manitoba. That is, no additional industries were required to have WCB coverage because of the new approach. Regulation 169/2008 lists employers, industries, and workers that currently do not require compulsory coverage. All other provinces and territories with the exception of Ontario and Nova Scotia have exclusionary schedules.

Expansion of Coverage by Consultation

The *WCA* includes a provision that the expansion of compulsory coverage to employers, industries and workers will occur only after consultation with stakeholders (subsection 2.1(2), *WCA*). No expansion of coverage will occur without prior consultation with affected industries. Following consultations in 2006 and 2008, new industries were required to obtain coverage beginning in 2007 and 2009.

Coverage for Directors of Corporate Employers, Volunteers, Individuals in Work Experience Programs and Resident Family Members

The legislation permits directors of corporations that are employers or independent contractors to obtain optional coverage. A similar

provision allows non-profit and charitable organizations to obtain coverage for their volunteer workers. Individuals who participate in work experience or job training programs and those who are resident family members are considered to be workers and are covered by the WCB. Section 14 of the *WCA* does not permit employers and workers to contract out of the *WCA*.

IV Governance and Administrative Structure

Sections 50 and 51 of the *WCA* sets out the governance structure for the WCB. The Board of Directors determines the internal operations and policy parameters at the WCB.

Board of Directors

A corporate-style Board of Directors was introduced in 1990.

The Board of Directors is appointed by the Lieutenant-Governor-in-Council (LGC). The Board is made up of a chair, three representatives of workers, three representatives of employers, three representatives of the public interest and the WCB's Chief Executive Officer (who is a non-voting member). Members of the Board are appointed for a fixed term which must not exceed four years. The terms of appointment for Board members are staggered so that no more than one-third of the appointments expire in one year. Each member of the Board of Directors is eligible for reappointment.

Responsibilities of the Board of Directors are:

- To approve and supervise the policies and direction of the WCB for compensation, rehabilitation, assessment and investment of the Accident Fund;
- To consider and approve operating and capital budgets of the WCB;
- To plan for the future of the compensation system (subsection 51.1(1), *WCA*).

The Board of Directors also appoints the Chief Executive Officer of the WCB and determines the CEO's salary and duties. These duties include employing all other staff, setting their duties and determining their salaries.

Under the *WCA*, the Board may establish committees that it considers necessary and must establish a policy and planning committee, an audit committee and an investment committee. As of April 2009, the Board's committees will be:

- The Policy, Planning, Governance and Service Committee,
- The Investment and Finance Committee, and
- The Audit Committee.

Statutory provisions as of January 1, 2006, allow the appointment of up to three additional non-board members to the Audit Committee and the Investment Committee.

Annual Report

The LGC appoints the WCB's auditor (section 69, *WCA*). Each year, the independent auditor audits the WCB's financial statements in accordance with generally accepted accounting principles.

The WCB's annual report is tabled in the legislature (section 71, *WCA*). The WCB is also required to prepare a five-year plan about its operations (section 71.1, *WCA*). The five-year plan is also tabled in the legislature (section 71.2, *WCA*).

Appeal Commission

The Appeal Commission was created as an external and independent body in 1990 (subsection 60.2(1), *WCA*). Its members are also appointed by the LGC for a period not exceeding five years or less than two years. The Appeal Commission is made up of representatives of workers, employers and the public interest. Issues are decided by Appeal Panels, which consist of a chair who is a representative of the public interest and one representative each of workers and employers. Panel members are selected for each case from a list of available full-time and part-time commissioners.

While the Appeal Commission is a separate entity from the WCB, it is still bound by the *WCA*, accompanying regulations and Board policy (subsection 60.8(6), *WCA*). It is not bound by internal WCB procedures or guidelines.

Worker Advisor Office

The Worker Advisor Office (WAO) is part of the Department of Labour and Immigration and provides free advocacy services for injured workers and their dependants. The WCB funds 100% of the costs of

the WAO but the Office is independent of the WCB. Worker advisors are civil servants who are specially trained in workers compensation matters. They assist workers with claims matters both at the WCB and at the Appeal Commission.

Workplace Safety and Health Division

Responsibility for accident prevention is vested with the Workplace Safety and Health Division of Manitoba Labour and Immigration (WSHD). The WSHD covers all employers in Manitoba except those in federally-regulated industries.

The WCB provides an annual grant to the provincial government to fund the operating costs and related overhead of WSHD in accordance with a funding formula set out in the *WCA* (section 84.1).

V Principles of Adjudication

Inquiry Model

The WCB operates on an inquiry model, which means that the WCB must either prove or disprove a claim through investigation. It is not the responsibility of the worker to prove the claim, nor is it the responsibility of the employer to help prove or disprove a claim. There is no formal or legal burden of proof on any party but the WCB. The WCB is responsible for ensuring that there is sufficient information on which to base a decision. Workers, employers, and health-care professionals are required to report to the WCB. The WCB then undertakes whatever additional inquiries are necessary to determine eligibility and compensation entitlement.

Medical Evidence

Medical evidence is useful but not necessary in every case. Medical evidence is usually described as being objective or subjective. Some evidence is clearly objective, such as a fracture shown on x-ray. Some evidence is clearly subjective, such as complaints of pain or tenderness on palpitation. Whether evidence is subjective or objective may sometimes depend on the skill and training of the examiner, diagnostic techniques and the like. Objective medical evidence, while helpful, is not required in every case.

Balance of Probabilities

Issues are determined according to the balance of probabilities (i.e., “more likely than not”), the standard of proof used in civil litigation. This is in contrast with the higher burden of proof under criminal law, which is “beyond a reasonable doubt.”

Some workers compensation acts contain “benefit of the doubt” provisions favouring the worker. There is no statutory entitlement to “benefit of the doubt” in the Manitoba *WCA* in favour of the claimant or employer. Each case must be decided on a balance of probabilities.

Merit

Each case must be decided on its own facts, regardless of how other similar claims may have been decided. The *WCA* stresses this point in subsection 60(4): “The decisions of the board shall always be given upon the real merits and justice of the case; and it is not bound to follow strict legal precedent.” This is a fundamental principle of the system.

The Five Fundamental Questions

Five fundamental questions must be answered to determine eligibility for workers compensation. These questions are contained in subsection 4(1) of the *WCA*:

Compensation payable out of accident fund
4(1) Where, in any industry within the scope of this Part, personal injury by accident arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part shall be paid by the board out of the accident fund, subject to the following subsections...

1. Is the person a worker?

The WCB has exclusive jurisdiction to determine whether a person is a worker within a covered industry. “Worker” has a very broad definition under subsection 1(1) and includes learners, casual emergency workers, persons employed for more than twenty-four hours a week by the same employer in domestic service or as a sitter or companion to a child or aged, infirm or ill members of the household, persons in work-experience programs and resident family members. The WCB also has broad jurisdiction to deem persons to be workers.

The definition of “worker” does *not* include;

- Directors of a corporation unless the WCB has approved an application to have the Director brought within the scope of the Act;
- Outworkers;
- Certain casual workers who are employed for purposes other than the employer’s trade or business; and

- Independent contractors.

Most of these non-covered workers may receive voluntary coverage from the WCB.

2. Is the person in a covered industry?

Workers are entitled to coverage based on whether their employer is in a covered industry. The WCB has exclusive jurisdiction to determine this status. As of January 1, 2006, Manitoba follows an exclusionary model of workers compensation coverage. The exclusionary model covers all industries unless they are specifically exempted by regulation.

There is no requirement for application or admission. Coverage is automatic, whether or not assessments have been paid. If a covered employer has not paid assessments to the WCB, injured workers are covered under the *WCA* and are entitled to compensation from the WCB. Similarly, whether or not assessments have been paid by the employer, workers in industries covered by the *WCA* do not have the right to sue their employers.

Employers in industries that are excluded by regulation may apply for coverage. Coverage by application is also available for independent contractors.

Employers or individuals with coverage by application are treated virtually the same as those that are automatically covered under the *WCA*.

3. Is there personal injury?

Compensation is provided for “personal injury.” Injury is not defined but the WCB has jurisdiction to determine whether personal injury has happened. It is usually not difficult to establish that personal injury has occurred. Often, the issue for WCB consideration is whether the personal injury or ongoing problems are related to an accident.

Personal injury includes physical and psychological injury.

Under the *WCA*, wage-loss benefits are payable for a loss of earning capacity following the day of the accident and for the duration the worker remains injured and unable to return to work. Employers are required to pay workers for the day of the accident.

4. Was there an accident?

Subsection 1(1) of the *WCA* defines an accident as follows:

“accident” means a chance event occasioned by a physical or natural cause; and includes

(a) a wilful and intentional act that is not the act of the worker

(b) any

i. event arising out of, and in the course of, employment, or

ii. thing that is done and the doing of which arises out of, and in the course of, employment, and

(c) an occupational disease,

and as a result of which a worker is injured.

The *WCA* explicitly states that the definition of accident does not include any change in the employment status of a worker, including promotion, transfer, demotion, lay-off or termination (subsection 1(1.1)).

Prior to 1992, the *WCA* defined accident to include conditions that occasion an industrial disease. After that date, the *WCA* refers to occupational disease, which is defined in subsection 1(1). The *WCA* excludes ordinary diseases of life and stress, other than an acute reaction to a traumatic event, from the definition of occupational disease.

5. Did the accident arise out of and in the course of employment?

The *WCA* is intended to compensate for workplace injuries. It is not a general insurance program that covers non-occupational injuries. The WCB must satisfy itself that the accident arose **both** out of the employment **and** in the course of employment. The injury must be related to the employment.

The incident must have happened at work or while working for the employer or doing one's employment duties.

Sometimes, the WCB can determine one issue but not the other. Under the *WCA*, if one of the requirements is met, then the other is also presumed, unless the contrary is proven. Before the presumption can apply, the WCB must first determine either that the accident arose out of the employment, or that it occurred in the course of employment. Subsection 4(5) creates a presumption that can be disproved by the evidence.

VI Workers Compensation Benefits

In Manitoba, various WCB benefits are available, depending on the nature of the injury. In addition, the date when an injury has occurred is relevant in determining the type of compensation and entitlements for an injured worker and his or her dependants.

Injuries occurring before January 1, 1992, are paid according to the disability model while accidents occurring after December 31, 1991, are paid according to a system of wage loss and impairment. Under the dual-award system, one award compensates workers for their lost wages and the other award compensates workers for any permanent impairment. In spite of differences in monetary compensation amounts and minor changes to the *WCA*, medical aid and rehabilitation services have remained largely unchanged (sections 27 and 37-43, *WCA*).

Medical Aid

The WCB pays directly for workers' health-care costs, including prescription drugs, hospital charges and fees for health-care practitioners as well as for the cost of transportation of an injured worker to any health-care facility. Provincial health plans do not pay for these costs.

Rehabilitation

Workers may also be entitled to academic, vocational or rehabilitative assistance (subsection 27 (20), *WCA*). Rehabilitation is intended to help a worker achieve maximum physical, psychological, economic and social recovery from the effects of a work-related accident on a timely basis.

Wage-Loss Benefits

<i>For injuries occurring:</i>	
<i>On or after January 1, 2006</i>	<i>Between January 1, 1992 and December 31, 2005</i>
Employers are required to pay injured workers their regular wages and benefits for the full day of the injury. The WCB is responsible for paying wage-loss benefits after that day (subsection 4(1.1) and 4(1.2), <i>WCA</i>).	Employers are <i>not</i> required to pay injured workers for the day of the injury, and entitlement to WCB wage-loss benefits begin the first day after the accident.
Injured workers are entitled to 90% of net loss of earning capacity regardless of the duration of the injury or illness (subsection 39(1), <i>WCA</i>).	Benefits are reduced from 90% to 80% of wage loss after 24 months.
There are no maximum insurable earnings. Wage-loss benefits will be paid based on 90% of total net earnings (subsection 39(5), <i>WCA</i>).	Wage-loss benefits and surviving partners' monthly fatality benefits are based on a maximum amount that was indexed annually;
Injured workers earning less than the minimum annual earnings will receive wage-loss benefits based on 100% of net earnings (subsection 39(6), <i>WCA</i>).	There was no minimum wage loss benefit level.

A worker's loss of earning capacity is the difference between his or her net average earnings before the injury and the net amount he or she is capable of earning after the injury (subsection 40(1), *WCA*). The WCB first determines the worker's gross average earnings before the injury. From gross average earnings, the WCB subtracts probable deductions for income tax, Canada Pension Plan and Employment Insurance to arrive at net average earnings. The WCB also determines the net amount the worker is capable of earning after the accident. This amount can change from time to time. The

difference between net average earnings and the net amount after the accident is the loss-of-earning capacity.

After 24 months, wage-loss benefits are indexed annually by an indexing factor based on the industrial average wage (subsection 40(2) and section 47, *WCA*).

Injured workers who are 61 years of age or older are eligible to receive wage-loss benefits until they are fit to return to work, or for 48 months, whichever comes first. Prior to January 1, 2005, benefits were payable to workers over the age of 63 at the date of accident for a period of 24 months (subsection 39(3), *WCA*).

Impairment Awards

If a worker suffers a permanent impairment as a result of a workplace injury, he or she is eligible for an award based on the percentage of impairment, even though the impairment may not impede the worker from returning to work. Impairment awards are based on each full degree of impairment. (The loss of an index finger, for example, is rated as a 5% impairment, while becoming blind in both eyes is rated as a 100% impairment.) No monetary award is made if the impairment is less than 1% (section 38, *WCA*).

Until December 31, 2005, a worker's age was a factor in the calculation of impairment awards. These awards were reduced by 2% for each year the worker was over age 45 at the time of the award, with a maximum reduction of 40% (section 38, *WCA*). The age reductions to impairment awards are now eliminated. The value of the award has also been increased.

Awards are not offset by other benefits or services offered to the worker by the WCB or outside sources as a result of the impairment. The WCB may also pay for modifications required to the worker's residence, vehicle or workplace to accommodate the injury, for any required prosthetic devices, and for all associated medical costs. Vocational rehabilitation services may also be provided.

Survivors' Benefits

If a worker dies as a result of a workplace accident or from a work-related condition, survivors' benefits are payable to the worker's dependants (sections 29-35, *WCA*).

A surviving dependent spouse or common-law partner is entitled to an initial lump-sum award (subsection 28(2), *WCA*). Prior to January 1, 2006, the survivor's award was reduced by 2% for each year the worker was over the age of 45 at the time of death, subject to a minimum payment. This age-defined reduction no longer applies.

The surviving spouse or common-law partner is also entitled to monthly benefits equal to 90% of the worker's net pre-accident income. Generally, monthly benefits are payable for 60 months, or until the worker's youngest resident child is 18, whichever is greater. The duration of monthly benefits also depends on the age of the spouse or partner when the worker died. For accidents on or after January 1, 2006, the duration of monthly benefits is 48 months for surviving spouses and partners who are 61 years of age or over at the time of the worker's death.

The WCB also offers academic or vocational rehabilitation assistance to assist surviving spouses or partners to become employable or to increase their earning capacity. The intent is to minimize the impact of the worker's death by assisting the spouse or partner to become more self-sufficient before WCB benefits end.

Dependant children receive a monthly payment until they reach 18 years of age. A child's monthly benefits can continue beyond that age if he or she attends school or university. Other dependants may also be entitled to a monthly payment.

There are monthly maximum payments for all dependants (section 31, *WCA*). After 24 months, monthly fatality benefits are indexed annually (subsection 29(4), *WCA*).

Emergency Expenditures

In the event of the death of a worker, or if a worker is hospitalized in critical or serious condition as the result of a work-related accident,

the WCB may reimburse one member of the worker's immediate family for whatever reasonable emergency expenses he or she incurs (subsection 27(1.1), *WCA*). Often, emergency expenses include travel and accommodation expenses.

Automatic Indexation of all Benefits

All payable benefits, including pensions, survivors' benefits and wage-loss benefits, are automatically indexed to reflect the increase in the province's industrial average wage (section 47). Separate indexing formulae are used for disability benefits, pensions and survivors' benefits awarded under the pre-1992 *WCA*. Those indexing formulae are based on the Manitoba consumer price index.

Annuities for Lump-Sum Awards

Lump-sum payments made to workers or dependant spouses or common-law partners may be convertible (at the request of the beneficiary) into an annuity administered by the WCB.

A worker or dependant who is eligible to receive an annuity may obtain independent financial advice, and the WCB may pay all or part of the fee (subsection 36(3), *WCA*).

Restrictions on Payable Benefits

Wage Loss

An underlying principle of the *WCA* is that no worker should receive wage-loss benefits in an amount that represents more than 90% of net income (subsection 39(5), *WCA*). The tax-free status of workers compensation payments can give rise to income tax refunds for some workers. In those circumstances, the WCB recalculates the worker's actual loss of earning capacity to take into account the refund of previously deducted taxes.

As of January 1, 2006, an employer may "top-up" an injured worker's wage-loss benefits up to a maximum of 100% of a worker's regular take home pay. For injuries occurring prior to 2006, most additional, non-taxable benefits (e.g., private group or employer "top-up" benefits) that a worker received were subtracted from WCB wage-loss benefits so that the total wage-loss benefits would not exceed

90% of net income. (This did not affect any lump-sum awards, medical aid, or other non-wage-loss benefits payable.)

Prior to January 1, 2006, certain top-ups contained in collective agreements in force on January 1, 1992, with certain self-insured employers and certain other approved employers were allowed (subsection 41(5), *WCA*).

Risking Re-Injury

If a worker persists in working in an occupation for which he or she is medically unfit, the WCB has offered rehabilitative assistance for another class of employment, and the WCB has asked the worker not to return to that work, then benefits for future claims might be limited or denied (section 27.1, *WCA*).

Occupational Disease

The *WCA* provides compensation for workplace-related injuries only. It can be difficult to determine whether a disease resulted from the workplace, the worker's lifestyle, heredity, the general environment or a combination of all these factors. After December 31, 1991, claims for occupational diseases are compensable if the workplace was the dominant cause of the disease. Ordinary diseases of life are excluded from the definition of occupational disease.

Stress

Effective in 1992, the definition of accident excludes injury arising out of a personnel action (such as a transfer, promotion, demotion, termination or lay-off). Stress, other than an acute reaction to a traumatic workplace event, is excluded from the definition of occupational disease.

Directors' Coverage

As of January 1, 2006, employers' liability protection is extended to directors of corporate employers. Prior to this date, directors of a corporate employer were not considered workers and were not eligible for compensation. Neither were they considered employers with immunity from lawsuit.

VII Employers

WCB Financial Overview

The WCB has two main sources of revenues: premiums from employers and investment revenue from the WCB investment portfolio. Investment income can fluctuate quite significantly each year and can place pressure on premium rates as a result.

Premiums are based on a rate per \$100.00 of assessable payroll. Each firm is assessed based on the industry rate code and the firm's claims experience. Firms with good claims experience will pay less than the industry rate and vice versa.

Revenues fund the Accident Fund, which pays compensation and program costs and maintains reserves for future costs.

Employer Classifications

In order to allocate the costs of compensation appropriately among employers in similar industries, and to prevent cross-subsidization between self-insured employers and the collective pool of employers, section 73 of the *WCA* structures the major employer classification groups for assessment purposes as follows:

- Class A includes provincially funded industries
- Class B comprises self-insurers set out in regulation. They pay the cost of compensation for their employees directly. Self-insurers wishing to have "pay as you go" status are responsible for future costs by fully funding their reserves, or posting an acceptable security with the WCB.
- Class C is the Government of Manitoba and its agencies.
- Class D is the City of Winnipeg.
- Class E employers in all industries in Manitoba not excluded by regulation.

Employers are classified by the industries in which they do business rather than by occupation. This classification system is used because:

- many occupations are difficult to categorize;
- individual classification would result in more complicated payroll reporting procedures and the increasing need for WCB audits; and
- there would be an increased risk of fraudulent payroll reporting, leading to higher costs to administrate the compensation program.

Rating by occupation alone would greatly increase the number of classifications used. Consequently, each of these classification units would be far smaller than the current industry classes, leading to a less stable statistical base and the possibility of wide fluctuations in assessment rates.

Rate Model

Employers' rates are based on two factors: their own experience and the experience of their industry. In 2000, the WCB revised the rate-setting model that is used to determine the share that each employer will pay to cover the costs of running the compensation system.

The WCB set four guiding principles in the creation of the new rate model:

- Promote and enhance prevention, safety, and injury reduction
- Promote effective disability management
- Be fair
- Maintain the financial soundness of the WCB

Fatalities

The new rate model includes fatality-related provisions, including the setting of an average cost for a fatal injury instead of assigning the actual cost to a firm's experience. If an average cost is not used, the cost of a fatality could vary from a few thousand dollars to a million or more depending upon the workers' status (i.e., whether the worker was married, single, his or her age, whether he or she had any dependants, etc.). The impact of a fatal claim on one firm compared to another would vary widely.

WCB legislation allows for the setting of an average cost of a fatality (clause 82(4)(c), *WCA*). The firm does not pay the average cost; it is simply the cost assigned to their experience for the purposes of calculating the next year's rate. The amount, following actuarial advice and consultation with stakeholders, was set at \$250,000.

Allocation of Costs

The current rate model is a more experience-based assessment rate setting system than the previous model. However, it still maintains the core elements of collective liability. To ensure that costs are allocated fairly among employers, the *WCA* includes a number of sections permitting costs to be allocated to another employer or to the rate-stabilization and cost-relief funds. Situations when costs can be reallocated include:

- Negligence of another employer,
- Fatalities,
- Third-party claims,
- Occupational disease claims,
- Pre-existing conditions.

Self-Insured Employers (Class B)

The current self-insured employers include:

- Canadian National Railway Company (and subsidiaries)
- Air Canada
- Via Rail Canada Inc.
- Canadian Pacific Limited (and subsidiaries)

Self-insured employers do not contribute to or have access to the cost-relief fund, rate-stabilization reserve, and the five-year claim limit or defunct-firm fund.

Under Policy 35.20.50 – *Requests for Self Insured Status*, no new applications for self-insurance were granted after January 1, 1999.

Directors Held Liable for Assessments

Directors of a corporation are liable, together with the corporation, for unpaid assessments in excess of \$1,000.00, and any penalties or interest (subsection 85.2(1), *WCA*). This follows a model similar to

The Payment of Wages Act (Manitoba), the Employment Insurance Act (Canada), and the Income Tax Act (Canada). Directors who are elected pursuant to a collective agreement (i.e., workers employed by the corporation who are entitled to representation on the board of directors) are exempt from this provision.

Assessments Given Priority in Non-Bankruptcy Situations

When an employer owes money to the WCB, the assessments owing take priority over other liens and charges in non-bankruptcy situations (section 104, *WCA*). Once the WCB registers a statement with the Land Titles Office, the amount owing will also be a lien and charged against the land. Amounts owing to the WCB do not take priority over wages and perfected purchase money security interests.

Funding Deficiencies

If, during the year, the amount of assessments collected from employers proves to be insufficient to meet the costs of the year, the WCB may make further assessments or levies during the year, as necessary, temporarily advance the amount out of any fund for such purpose or it may add the deficiency to a later assessment for a period not exceeding three years (subsection 81(5), *WCA*).

Minimum Assessments

A minimum assessment has been established by the WCB through regulation (subsection 81(9), *WCA*).

Merit/Surcharge of Assessments

The WCB has the authority under the *WCA* to reduce assessments for employers who meet particular accident prevention or safety criteria. Conversely, the WCB may also levy a surcharge on employers when these criteria are not being met (subsections 82(6) and (7), *WCA*).

VIII Responsibilities and Reporting

Workers

A worker or dependant must report an accident in writing to the employer within 30 days of the accident (section 17, *WCA*). Failure to notify the employer is a bar to compensation, unless the failure is excused by the WCB.

The duty to report to the employer is different from the filing of an application for compensation. The worker or dependant wishing to claim compensation must file an application with the WCB within one year after the date of accident or the death of the worker. The WCB may enlarge the time for an application where it believes an injustice would result (section 109, *WCA*).

Workers have an ongoing obligation to inform the WCB of any substantial changes in their circumstances.

If the WCB requests it, workers are required to attend the WCB for a medical examination (section 21, *WCA*). A worker's right to compensation can be suspended if the worker fails to submit to the examination or obstructs it.

Injured workers have an obligation to mitigate, or take reasonable steps to minimize, the damages caused by an accident (section 22, *WCA*). Workers are urged to play an active role in their recovery from a workplace injury. If, in the opinion of the WCB, a worker engages in activities that would risk or delay recovery, refuses medical or surgical treatment, or fails to mitigate the consequences of an accident, the WCB may reduce compensation.

Employers

Employers have the primary responsibility to report accidents to the WCB. When an accident occurs, the employer has five business days to report the accident to the WCB from the day the employer learned of the accident (section 18). An employer who fails to report an accident is guilty of an offence.

New Responsibilities

Since January 1, 2006, employers have a number of added responsibilities.

- Employers are required to pay injured workers their regular wages and benefits for the full day of the injury.
- Employers are responsible for transporting workers requiring medical attention, but as of January 1, 2006, the cost will be met by the WCB.
- Employers or their agents cannot interfere with, intimidate or coerce workers not to report an accident (subsection 19.1(1), *WCA*). The scope of claim suppression has been expanded to include actions taken to prevent the filing of a claim, interference with a claim once file or to take retaliatory action in connection with the filing of a claim. Violation of this provision carries an administrative penalty, and upon summary conviction, a fine.
- Both employers and workers are required to notify the WCB when a worker returns to work. Non-compliance carries an administrative penalty.

Beginning January 1, 2007, certain employers will have an obligation to re-employ injured workers.

Health-Care Practitioners

Health-care professionals must also provide reports to the WCB of injuries that are covered by the *WCA* (section 20). Reports are for the WCB's use and purposes and the worker's consent is not necessary.

Health-care providers also have a duty to give reasonable information and assistance to workers and dependants in making applications for compensation. This duty is separate from the duty to report to the WCB. The WCB can require a practitioner's report whether or not the worker files a compensation claim.

Third-Party Claims

Immunity from lawsuit only applies to workers and employers covered by workers compensation. On occasion, a covered worker may be injured under circumstances that entitle him or her to sue a person other than a covered worker or employer, a "third party". In third-party cases, the injured worker or his or her dependants may elect to claim

workers compensation or take an action against the third party (subsection 9(1), *WCA*).

If the worker elects compensation, the right of action vests in the WCB (subsection 9(5) *WCA*). The WCB may pursue legal action on behalf of the worker, his or her dependants and the WCB. In third-party cases, the WCB seeks full common-law damages. WCB benefits are payable to the worker or dependants whether or not the third-party action is successful.

The WCB Appeal Commission has exclusive jurisdiction to decide whether a right of action against an employer or worker is removed under the *WCA* and this decision is final (subsection 60.8(1), *WCA*). The courts recognize the finality of these decisions.

Immunity from lawsuit applies to accidents that happen in Manitoba. For work performed outside Manitoba, the WCB extends benefit coverage to workers in certain cases (section 5, *WCA*). However, the law where the accident happens generally governs the employer's immunity or liability.

Employers and workers are subject to the laws in the jurisdiction where an accident happens. This is a general legal principle and is not unique to Manitoba. Most Canadian jurisdictions have similar provisions that cover workers and provide immunity for employers for accidents that happen in the particular jurisdiction.

Workers injured outside Manitoba may also be entitled to compensation under the workers compensation system in the place where the accident occurred. Workers are required to choose in which jurisdiction they want to file a claim (section 6, *WCA*).

If the work-related injury involves a motor vehicle accident in or out of Manitoba, the worker may elect between workers compensation and personal injury benefits from Manitoba Public Insurance (section 195 *MPIC Act*).

If a third-party action is successful, Section 10 of the *WCA* requires the WCB accident fund to be reimbursed for amounts advanced, including

legal expenses and compensation payments. The WCB then pays the excess, if any, to the worker or his or her dependants. If no excess is recovered, the worker or dependants are still entitled to the full amount of workers compensation.

IX Appeal Processes

The *WCA* gives the *WCB* the exclusive jurisdiction to decide cases and establishes an appeal process for decisions relating to both claims and assessments (section 60.1).

1. The general practice is for the affected worker or employer to bring the issue to the attention of the initial decision-maker. If, after bringing the matter to the attention of the initial decision-maker, the injured worker or employer remains dissatisfied with the decision, they may request a reconsideration.
2. The review of initial decisions for compensation-related matters is undertaken by the *WCB* Review Office. Review of assessments and other matters related to employers is the responsibility of the Assessment Committee. The worker or employer is required to write to the Review Office or Assessment Committee and explain where the error was made and the grounds on which the request is based.
3. If, after receiving the decision of the Review Office or the Assessment Committee, the worker or employer is still dissatisfied, there is a final avenue of appeal. The Appeal Commission is the highest level of appeal for any compensation claim or assessment issue. Only issues previously appealed at the Review Office or Assessment Committee will be considered.

The legislature intends that Appeal Commission decisions are final. Once an issue has been decided by the Appeal Commission, further review is available only in limited circumstances. Section 60.9 of the *WCA* provides the Board of Directors with the authority in extraordinary circumstances to set aside a decision of the Appeal Commission when the Appeal Commission has not properly applied the *WCA*, regulations or policy of the Board. Section 60.9 is not another level of appeal.

Under section 60.10(1), a party may apply to the Chief Appeal Commissioner for a new hearing on the basis of substantial and

material new evidence that either did not exist at the time of the previous hearing or could not have been discovered with the exercise of due diligence.

Judicial Review

The Court of Queen's Bench will consider an application for judicial review of a WCB decision only in limited circumstances. A judicial review generally occurs where the WCB has acted outside its authority, acted without authority, or failed to perform its duties. Generally courts will not hear an application for judicial review until internal appeal processes have been exhausted. This approach is consistent with the courts' deference to the WCB's specialized expertise. The courts will not interfere with a decision of the Appeal Commission as long as the Commission has not exceeded its authority under the *WCA*.

Employer Access to Medical Information

For the purposes of reconsideration or appeal, an employer may receive copies of relevant claim file information, including medical information (subsection 101(1.2), *WCA*). Access to all documentation on a file, including medical information, is limited to only the information pertinent to the appeal. No medical information submitted prior to January 1, 1992, may be released to an employer. If an employer requests copies of documentation on a worker's file, the worker is informed of the request before any information is released. If the worker has just cause as to why information should not be released to the employer, the worker may object in writing to the WCB. Either the worker or employer may appeal the issue of relevancy to the Chief Appeal Commissioner, who will take these objections into consideration and decide whether copies of the file should be released (subsections 101(1.2) to (1.7), *WCA*). The Appeal Panel has the final say on this issue.

Strict guidelines are attached to the use of medical information. Employers are subject to fines up to \$5,000.00 if they use information for any purpose other than an appeal or reconsideration of a claim.

File Copies

Workers (or their advocates) whose claims are denied, or who wish to appeal a claim, will receive the first copy of their WCB file at no charge upon request (subsection 101(1.7), *WCA*).

Medical Review Panels

The *WCA* authorizes the WCB or the Appeal Commission, at any time, to convene a Medical Review Panel (MRP) to provide advice on a medical matter (subsection 67(3), *WCA*). A Chairperson of Medical Review Panels is appointed by the Minister Responsible for the *WCA*. Each Panel is comprised of the Chair and two physicians who specialize in the medical matter under consideration. The worker and employer may each select a physician to sit on the MRP from a list provided by the College of Physicians and Surgeons.

The worker has a right to an MRP when there is a difference of medical opinion between the worker's physician and a WCB Medical Advisor which affects entitlement to compensation (subsection 67(4), *WCA*). A difference of opinion between the worker's own physicians does not trigger a worker's right to an MRP. The MRP report is routinely provided to both the WCB and the worker. Employers may also make a written request to refer an injured worker's medical matter to an MRP when the matter has a substantial impact on entitlement to compensation.

MRPs have a duty to act fairly in carrying out their duties, but they are not adjudicative bodies. The MRP's report is evidence to be considered by the WCB or Appeal Commission.

Fair Practices Advocate

The Fair Practices Office is not part of the appeal process at the WCB. The Office was established in the tradition of the ombudsman role to assist injured workers and employers when they identify concerns arising out of fairness or natural justice. The Fair Practices Office's mandate is to hear complaints, investigate and make recommendations if it is determined that a decision has misapplied WCB policy or legislation. As of January 1, 2006, the *WCA* (subsection 108(4)) includes a provision for the appointment of a Fair

Practices Advocate by the Board of Directors and describes the scope and functions of this office.

The Fair Practices Advocate reports to the Board of Directors, operating at arms length from the management of the WCB.

Provincial Ombudsman

The Provincial Ombudsman is also an avenue open to those who believe that they have been treated unfairly by the WCB. The Ombudsman has the power to investigate, make recommendations and report publicly.

IX Brief History of Workers Compensation

The evolution of Manitoba's workers compensation legislation can be traced through legislation, royal commission reports, and studies launched to investigate the WCB and the WCA. Recommendations from these reports provide insight into the changes that have occurred over time.

- 1917:** The Workers Compensation Board was created to administer a compensation system for injured workers.
- 1919:** Act passed by Canada providing for payment of compensation to workers of the federal government, to be administered by the provinces or another body approved by the Governor General in Council.
- 1920:** Accident Fund funded by an assessment of all classified employers to compensate injured workers.
- 1921:** Wage-loss benefits increased to 66 $\frac{2}{3}$ % of gross average earnings.
- 1951:** Second Injury Fund established by an assessment against all classes to be used to cover the claims costs of claims of workers suffering enhanced disabilities that, in the opinion of the WCB, are due to previous disabilities.
- 1953:** Vocational Rehabilitation offered to injured workers. Before 1953, the WCB could not spend any of the general funds on retraining. Funds for retraining were deducted from the funds set aside for the injured workers pension.

Also, an assistance officer was appointed by the Minister of Labour to aid workers in preparing and presenting their cases before the WCB. This position was later renamed the Worker Advisor.

Wage-loss benefits were increased to 70% of gross average earnings.

- 1956:** Wage-loss benefits were increased to 75% of gross earnings.
- 1957:** The Turgeon Commission was established to inquire into and investigate every aspect of *The Workmen's Compensation Act*.
- 1959:** The recommendations of the Turgeon Commission were implemented:
- Created first medical appeal board
 - Coverage expanded to include the Crown, retail, hospitals/nursing homes, hotels and restaurants, radio stations, municipalities, and clerical workers in industries covered by the *Act*.
- 1965:** Proclamation of *The Employment Safety Act* transferred responsibility for industrial accident prevention from the Department of Labour to the WCB.
- First merit/demerit rating system put in place for employer assessments.
- 1971:** WCB designated to act on behalf of the Attorney General's Department to administer *The Criminal Injuries Compensation Act*.
- 1972:** Further general amendments to the *Act* included an expansion of coverage to new classes of workers and an increase in pensions and benefits.
- 1974:** *The Workmen's Compensation Act* was renamed *The Workers Compensation Act* to reflect the participation of women in the workplace.
- 1977:** Responsibility for industrial accident prevention was transferred from the WCB to the Department of Labour. This occurred when *The Employment Safety Act* was

repealed and *The Workplace Safety and Health Act* was proclaimed.

- 1980:** The Lampe report was submitted. The tripartite committee, commissioned by the Lyon government in the late 1970s, made recommendations on how to tighten up Board policy and procedures.
- 1982:** In response to a Board employee's public allegations of mismanagement and unfair treatment of claimants at the WCB, a report on the entire field of workers compensation by Inspector D.C. Cooper of the RCMP Commercial Crime Section was released. As a result,
- the Commissioners and senior management of the WCB were replaced
 - a private consultant firm was employed (CERECO Inc.) to aid the new Board and to conduct a management review
 - the rehabilitation program and procedures of the Board were reviewed and
 - worker advisors were hired and mandated to assist claimants in pursuing their claims through the system.
- 1983:** The CERECO report was released, criticizing the Board's management practices.
- 1985:** A Legislative Review Committee led by Brian King was formed with the broad mandate to review the *WCA*, policies and directives of the WCB and to recommend improvements to the *WCA*.
- 1987:** The King Report was submitted. Its recommendations dealt with benefits, the adjudicative process, administrative framework, and financing the program.
- 1990:** Bill 56 altered the administrative framework of the compensation system. The Bill separated the appeal

function from administration by creating a separate Appeal Commission. Other changes included:

- establishing a policy committee of the Board of Directors
- stipulating that government must consult with employer and labour communities before making appointments to the Board of Directors and Appeal Commission
- stiffer penalties for fraud and late payment of assessments. Payroll underestimation or non-reporting by employers became subject to a fine.

- 1991:** Bill 59 changed the compensation system from one based on disability to one based on loss of earning capacity and/or permanent impairment.
- 1992:** Bill 59 came into effect on January 1, 1992.
- 1999:** Special payments were made to certain dependant spouses of deceased workers
- 2001:** Rights to benefits and services were extended to same-sex couples.
- 2002:** The *WCA* was amended to include a rebuttable presumption of compensation for full-time firefighters who are regularly exposed to fire scene hazards (other than forest fire scenes) for a prescribed minimum period and who contract primary-site brain, bladder or kidney cancer, primary-site non-Hodgkin's lymphoma or primary-site leukemia. The minimum period of employment for each type of cancer is set out in regulation.
- 2004:** A Legislative Review Committee (LRC) was established with a mandate to conduct a complete review of the *WCA* and recommend legislative changes based on broad principles that encompass a vision for the future of workers compensation in Manitoba.

2005: The LRC completed its review and presented a report comprising 100 recommendations for changes to the WCA and WCB policy. Changes to the WCA were tabled at the Legislature *via* Bill 25, which was adopted unanimously on June 9, 2005.

2006: **Bill 25, *The Workers Compensation Amendment Act***, became effective on January 1, 2006, for all injuries or illnesses occurring on or after this date. Bill 25 introduced numerous enhancements to benefits such as 90 % of wage replacement regardless of claim duration (eliminating the 90% to 80% step-down for wage replacement after 24 months), as well as higher rates for impairment and fatalities. The Bill also legislated mandatory coverage for all employers and workers in industries in Manitoba, except those excluded by regulation. In addition, the Bill incorporates prevention and return-to-work into workers compensation principles, and expands the rebuttable presumption for firefighters to include ureter, colorectal and lung cancers as well as heart injury within 24 hours of attending an emergency response. These presumptions, except the heart injury presumption, are retroactive to 1992 for full-time firefighters. The heart injury presumption for all firefighters, and the cancer presumptions for part-time firefighters, took effect on June 9, 2005. The Bill also strengthened the governance structure of the WCB.