

FOR THE COMMON GOOD: 222 RECOMMENDATIONS
ROYAL COMMISSION REPORTS ON
WORKERS' COMPENSATION SYSTEM

Vancouver, B.C. (Jan. 20/99): While British Columbia's workers' compensation system deserves praise for its fiscal responsibility, the Workers' Compensation Board (WCB) of British Columbia has lacked direction from its board of governors and has failed in its mandate to administer fair and equitable benefits to injured workers, often those most in need of assistance.

These two key findings are the backbone of the 26-month, 1,348-page report entitled *For The Common Good*, prepared by the three-member Royal Commission on Workers' Compensation chaired by Judge Gurmail Singh Gill. The other two members of the commission are Gerry Stoney, former president of the IWA-Canada, and Oksana Exell, a former director of the Canadian Federation of Independent Business.

Since it began reviewing British Columbia's workers' compensation system in November, 1996, the commission visited 38 communities, heard 825 presentations and received 2,036 submissions from injured workers, employers, labour organizations, members of the public and other interested parties throughout the province. The commission's comprehensive examination of the workers' compensation system is the first in 30 years, prompting the three commissioners to call for regular reviews of the system which administers 190,000 claims a year at a cost of \$1.2 billion.

"Never again should such an important part of our business and social fabric be allowed to go it alone for so long," explained Gill. "If the workers' compensation system and the WCB had been reviewed on a regular basis, this commission's work would not have taken so long and the recommended changes would not be so extensive. The WCB needs regular check-ups and preventive maintenance if it is going to remain in good shape."

Exell added that today's modern workers' compensation system has its roots in the "historic compromise" of the 19th century in which workers gave up their right to sue employers for work-related harm in return for guaranteed, no-fault coverage. However, Exell points out that it has never been more difficult to define "workers."

"British Columbians worked very differently 30 years ago. Entire sectors of today's economy didn't exist three decades ago," said Exell. "Thirty years ago if you cut down a tree, mined a lump of coal or caught a fish, you were a worker. Over the course of our review, we found that with so many new home-based businesses, independent contractors and owner-operators in just about every sector of the economy, people who were once considered workers are now working outside the system, even though they are still facing work-related risks."

Stoney added that interest in the commission's work has been both broad-based and extensive, ensuring that the commission heard from a true cross-section of interested individuals and organizations.

"In addition to visiting communities, we toured offices, plants, mills and shop floors, in order to get a real feel for the system as it looks today," Stoney said. "There are still far too many workers killed or seriously injured

in the workplaces of BC. For those who require it, workers and employers agree that there should be a fair and equitable system of compensation to provide for disabled workers and their families.”

“We’ve tried to shape a system that provides a safer workplace and a more accessible workers’ compensation system to provide benefits in a timely fashion.”

Of the commission’s 222 recommendations, 205 were unanimous with the rest receiving majority support from two of the three commissioners.

Among the commission’s findings and recommendations:

GOVERNANCE

- The workers’ compensation system was and is based on an exchange of rights between workplace parties for the common good. It should remain distinct from government in order to reflect the nature of this agreement.

However, government must demand more accountability of the WCB, the agency responsible for overseeing the system, thereby ensuring that the WCB is not making public policy decisions outside of its mandate, as though it were an elected body. That is the role of the government.

- The purpose of the WCB is to prevent injuries, provide medical and vocational rehabilitation, and fair compensation, and to do so in a cost-effective manner. This purpose should be enshrined in legislation.
- Between 1991 and 1995 the WCB employed a model of governance which included representatives of labour and industry. These stakeholder governors committed themselves to their individual stakeholder groups and not the overall well-being of the workers’ compensation system. Ultimately this model broke down and was replaced with the current caretaker panel of administrators.

The commission recommends that the current panel be replaced by a 10-person board that includes equal representation from workers, employers and the public, plus a neutral chair. These new governors should be required, through legislation, to act in the best interest of the workers’ compensation system.

REHABILITATION

- The WCB’s rehabilitation services attracted the criticism of many injured workers in presentations to the commission. Many of their submissions raised concerns that the jobs deemed to be appropriate for recovering injured workers were unsuitable, unrealistic or not reasonably available.

The commission has recommended a number of legislative changes to enhance the sufficiency and efficiency of these services.

ADJUDICATION AND APPEALS

- The WCB handles straightforward claims relatively well, but often does a poorer job with more difficult or complex claims.

- The appeal process is a complex, open-ended maze beyond comprehension, a "treadmill" inadvertently designed to frustrate and demoralize participants.
- Currently the WCB appears to rely on the appeal system as a substitute for effective primary adjudication. As a result, 40% of appeals are allowed reflecting the need for major improvements in the initial adjudication process. The WCB must work to make the right adjudication decision early in the claim process.
- Currently, the appeal process deals with medical issues separately from non-medical issues. The commission recommends that both medical and non-medical issues should be determined in a single process.
- The commission recommends minimizing the opportunity for appellate bodies to create or change policy. Where necessary, the board of governors must react quickly (90 days) to decide cases of policy that are considered illegal.
- The commission recommends a faster review process, including:
 - mandatory re-adjudication by the original adjudicator;
 - an internal review by a senior adjudicator, with a hearing if necessary; and
 - the right of appeal to an external, independent tribunal.
- Currently, the scope of employer assessment appeals is restricted under the *Workers Compensation Act*. The commission recommends that this be broadened to match the scope of other appeals.
- Employers access to worker claim files during an appeal should be subject to a worker's opportunity to object to the release of sensitive medical information.
- Workers should have the opportunity to access an employer's prevention-related files where an appeal is pursued subject to an employers objection to the release of specific information.

ACCOUNTABILITY AND PERFORMANCE EVALUATION

- The commission recommends that the WCB be required to present annually its strategic plan to the minister and that the plan be tabled in the Legislature.
- While the WCB has begun to attempt to measure the effectiveness of its programs, services and initiatives:
 - it often measures business activity rather than actual performance;
 - it often prematurely implements new and sometimes expensive initiatives without adequate evaluation; and
 - it is plagued by a "silo" mentality which inhibits the internal divisions and departments from sharing important information.

The commission believes that this must change. The WCB must set firm benchmarks for performance, as well as do a better job of collecting, evaluating and distributing pertinent information.

ADEQUATE BENEFITS

- The commission found that compensation under the *Workers Compensation Act* is often not paid consistently or equitably. The result is that injured workers with similar disabilities may receive markedly different benefits. The commission recommends abolishing the overly simplistic schedule of presumed loss of earnings based on the extent of injury. The system should pay compensation for actual loss of earning capacity where it arises and should provide separate compensation for functional impairment even in the absence of earnings loss.
- The commission recommends changing the compensation rate from its current 75 % of gross earnings to 90 % of net earnings. This recommendation will keep BC at one of the highest levels in the country.
Loss of earnings benefits should be replaced, on retirement, by a separate system of benefits which would be payable for the remainder of the worker's life.
- The commission also recommends that employers should fund existing benefit plans — such as pensions, health and dental coverage — for their injured workers, for a maximum of one year or until the worker returns to work.
- Individuals who provide for their own private disability coverage should not be penalized. Such benefits should not be deducted from compensation payments.
- Injured workers should have a job to return to. Statistics show that the longer an injured worker is out of the workforce, the less likely it is that the worker will return to productive work. Therefore, the commission is recommending that workplaces with 20 or more people keep a position open for at least two years following the date of injury in order to re-employ an injured worker.

FATALITY BENEFITS

- Currently, spouses under 40 years of age receive a lump-sum payment following the work-related death of their spouse. Pensions are payable to spouses over 40.
The commission is recommending a lump-sum payment for all surviving spouses that would be inversely proportional to the surviving spouse's age. The commission is also recommending a pension based on the age of the surviving spouse.
- The commission also recommends that benefits to surviving spouses should not be terminated on remarriage.

ENTITLEMENT TO COVERAGE

- Recognizing that many workers in high-hazard occupations are now contractors or owner-operators, the commission is recommending that the WCB, subject to cabinet approval, designate industries or occupations for compulsory coverage.
- The commission recommends that any owner or operator of a fishing vessel be included in the definition of employer under the Act and that any

member of a fishing crew working for a share of the profit of a fishing vessel be defined as a worker. Assessments for fishers should be collected and remitted to the board by commercial purchasers.

DETERMINING WORK-RELATEDNESS

- The commission found that determining work-related injuries is more difficult and complex today than 30 years ago. The commission recommends that the Act clarify the extent to which work-related psychological conditions are covered and further recommends that the coverage of such work-related medically-diagnosed conditions be broadened. These new conditions should be adjudicated under a higher standard of proof than that used for other injuries.

FUNDING

- The commission recommends that the *Workers' Compensation Act* explicitly require full funding of current and future costs of claims.
- Recognizing the possibility that many of today's occupations may be found to cause occupational diseases for which workplace causation has not yet been established, the commission recommends a reserve fund to cover such claims, as and when needed.
- The commission recommends increasing the possible variation in the employer's experience rating beyond the current 33 % in order to enhance workplace safety. In addition, other measures should be taken to make the experience rating of smaller employers more equitable.
- The WCB should explore the potential benefits of using factors other than claims costs in calculating experience-rated assessments.
- Government should address situations where retroactive benefit changes would unfairly transfer the costs of workplace injuries between generations of employers and consider a societal funding component in such instances.

In October 1997 the commission released its first report which included 60 recommendations in the areas of occupational health and safety, regulatory reviews and fatality benefits. Among its recommendations at the time:

- A new occupational health and safety statute that would identify fundamental rights and responsibilities of all parties.
- Workers should have the right to refuse unsafe work without retaliation.
- As an alternative to prosecution, employers, workers and other workplace parties should be subject to financial penalties.
- WCB regulations should be reviewed on an ongoing basis every three years.
- The definition of "spouse" should be expanded to include common-law and same sex relationships.
- Funeral benefits should be increased from \$2,900 to \$6,000.
- Survivor benefits to separated spouses and their children should be paid at a level equal to existing court maintenance or separation order.

"While the responsibilities for the administration of workers' compensation in British Columbia are heavy, we were impressed with the knowledge and dedication of many people at the Workers' Compensation Board," added Gill. "That said, the recommendations that we have made will only be successful if there is an acceptance of change by the WCB and its staff. Clearly, a business-as-usual attitude is not going to resolve key issues, including the concerns of injured workers who feel trapped in what they feel is an often uncaring and bureaucratic system, more intent on process and paper than performance."

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