ISSUES RESEARCH

Compensation Services, Adjudication & the Appeals Process
in Canadian Workers' Compensation Systems

Prepared for:
Royal Commission on Workers' Compensation in British Columbia

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I. The Project

The purpose of this project was to research, compile and organize information on a number of issues relating to compensation services and adjudication and the appeals process in the Canadian workers' compensation systems.

Specifically this project examined

- compensation services and adjudication issues, such as the calculation and readjustment of short term and long term benefits, including the use of deeming, and the approach to adjudication of claims including access to information; and

- the review and appeals process, including the internal or first level review mechanisms in place and the formal appeal process and approach for disputed decisions of the workers' compensation boards.

This report supplements information contained in the report, "Comparative Review of Workers' Compensation Systems and Governance Models" (Final Report Update, January 12, 1998). It is intended to be read in conjunction with that report in order to provide a comprehensive view of the compensation and adjudication system through the appeals process for the Canadian workers' compensation systems.

The scope of the project included all the Canadian jurisdictions, except for British Columbia. A review of the British Columbia system in these areas would be redundant given the extensive research and review that has been undertaken by other Royal Commission staff and researchers on these issues.

II. Methodology

A three step approach was used to undertake this research and prepare this report:

- an interview template for each issue area - compensation services and adjudication and the appeals process, further broken down into the internal review process and the appeal process - was prepared in consultation with the Royal Commission researchers working on these areas and sent to each jurisdiction (a copy of the three interview templates are included as Appendix 1);
telephone interviews were then arranged and held with the appropriate contacts in each of the jurisdictions to obtain the desired information\(^1\); many jurisdictions also provided additional written information by phone or by facsimile;

the information from the interviews was recorded in interview notes (see Tab 3) and was used to finalize the summary matrices and prepare this report.

### III. Comments and Observations

#### Compensation Services and Adjudication

As noted in the Comparative Review report, there is considerable diversity in both the approach to compensating injured workers and the level of compensation. The Comparative Review report provided information on the level and rate of compensation benefits whereas the information collected as part of this research is intended to supplement that information by providing information on how a claim is adjudicated and how the compensation rate for any individual injured worker is determined\(^2\).

#### Rate Adjustment

All jurisdictions provide compensation for temporary wage loss which at some point is converted into a long-term loss of earnings or pension award. As outlined in the Comparative Review report, six of the Canadian jurisdictions have in place a dual award system wherein an injured worker is entitled to an ongoing wage loss benefit combined with a lump-sum or one time award for permanent physical or functional impairment.

Some jurisdictions, notably Ontario, Québec and New Brunswick, require some form of periodic or regular review of the wage loss benefit for the purpose of adjusting the rate to take into account a change in circumstance (level of disability or level of earnings capacity). Most, however, simply adjust for cost of

\(^1\) Generally three separate interviews for each jurisdiction, taking about 30 to 45 minutes per interview.

\(^2\) For compensation rates and levels refer to "Compensation Benefits" section of Comparative Review Report - current to January 1, 1998.
living on an annual basis. The award for permanent impairment is generally a one-time, lump-sum award and is not subject to review and adjustment unless at the request of the injured worker where there has been some exacerbation of the injury for which they have been compensated.

**Topping Up**

Five jurisdictions, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland prohibit "topping up" of an injured worker's compensation benefit by another source. Manitoba, New Brunswick and Prince Edward Island will reduce the worker's compensation benefit equivalent to any amount provided to the worker. New Brunswick and Prince Edward Island will allow topping up above the compensation rate if the worker's wage exceeds the maximum insurable earnings rate. There are some concerns with prohibitions against topping up. Some jurisdictions questioned the appropriateness of a provision that effectively undermines a provision in a collective bargaining agreement (in fact, Nova Scotia is phasing out its prohibition against topping up and currently allows topping up if it is provided for in a collective agreement). Newfoundland indicated that it has serious enforcement concerns with its prohibition against topping up.

**Rate Calculation**

Generally, the rate of short term compensation benefit is calculated simply on the basis on the earnings history of the injured worker. There is no consideration of age, marital status, and number of dependants (other than indirectly as allowed for and reflected in deductions and taxable income under income tax rules). Training and education may be taken into consideration if the injured worker has a short employment history and the compensation rate adjusted for what the worker should have made in that job over a longer period of time.

Deeming is used to some extent in all jurisdictions except the Northwest Territories, for calculating long term earnings capacity. Generally deeming is used as a last resort following the completion of all intervention by the board and at the point of maximum medical improvement for the injured worker.

**Approach to Adjudication**

All jurisdictions indicated that they have in place an inquiry based approach to adjudication. Some jurisdictions are experimenting with ways to make the
adjudication and management of claims process more efficient. Some jurisdictions have implemented an early identification and streaming process (triaging) to separate medical only and short term claims and longer term, more complex claims.

In adjudicating a case, board officials are generally bound by board policies. Some jurisdictions indicated that there is a significant scope for the use of discretion or judgement by decision makers which is encouraged; others indicated that there was less room in their jurisdiction for the exercise of discretion. In all cases, exercise of discretion is subject to review. The exception to this general approach is Ontario. Under the Ontario statute there is a specific provision providing that the decision maker is not bound by legal precedence and must decide each case on its merits - when the facts are equally balanced the benefit is to be given to the claimant.

Most jurisdictions when presented with new evidence on a case, will transfer that case back to the original decision maker or decision maker or record for reconsideration. Some will only return a case to the original adjudicator if the new evidence relates to an entitlement issue.

To promote consistency in decision making, several jurisdictions have in place a quality assurance function. Others use a variety of mechanisms including case conferencing and policy forums. It is interesting to note that Québec has recently eliminated its quality assurance function. The CSST felt that quality assurance had an adverse impact on the exercise of decision making and use of judgement by board staff.

**Access to Information**

All jurisdictions provide comprehensive access by workers to their own information and file and by employers to their employers' file. Some jurisdictions have some limits on the release of medical information to the worker. Generally this access is provided through the workers' compensation legislation and board practice and not through the imposition of freedom of information legislation (some jurisdictions did indicate that they are reviewing their current practices in light of the freedom of information and protection of privacy laws).

There is a range of approaches to the provision of workers' information to employers. Some jurisdictions are quite conservative in releasing information from an worker's file to the worker's employer and will only permit it if the employer is involved in a dispute and then only information relevant to the
matter under dispute. Others permit fairly broad access by the employer to the worker's file, subject to some capacity for the worker to object to the release of personal and medical information.

**Complaints Process**

No Canadian jurisdiction has implemented an independent complaints process for handling service quality and conduct complaints related to board officials (this was recommended in Newfoundland in its 1997 statutory review, but was not adopted by the government). Several jurisdictions have a provincial ombuds who will handle such issues. Manitoba has an internal "Fair Practices Advocate" and Ontario has an internal ombuds office located inside the board. Several jurisdictions also have in place a formal process for addressing and dealing with complaints. However, none of these complaints processes includes the power to alter or change a decision of the board.

**Review and Appeals Process**

**Internal Review Process**

Most jurisdiction have in place a formal, statutorily required internal review process. Only New Brunswick does not have an formal internal review process designed as a first level reconsideration or appeal of a disputed decision of the board.

In some cases this internal review process is supplemented by an informal process not mandated by legislation. A notable example of such a process is the PARD process in Ontario which is effectively an early resolution approach applied at the earliest stages and throughout the adjudication process. The PARD process was developed to address the significant rise in reviews and appeals in Ontario since the early 1990s and is based on a philosophy of dispute resolution and conciliation.

In some of the larger jurisdictions, the internal review function is a responsibility of a separate unit of the board staffed by review or hearing officers. In other jurisdictions, the review function is undertaken by senior staff with other responsibilities. The approach is generally quite informal and inquiry based. In several jurisdictions the review process consists only of a file or documentary review with, possibly, some follow up and inquiry. Other jurisdictions provide for a combination of documentary or file review and oral hearing. Several
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Jurisdictions indicated that the focus of their internal review process is neither to readjudicate the original decision or undertake the job of the appeal body, but is simply to ensure that the law and policy has been applied.

The above are some general comments on the internal appeal process. The "Summary Matrix - Internal Review Process" and interview notes should be referred to for details on the structure and operations of the internal review processes.

**Appeal Process**

There are a variety of approaches and models in place in the Canadian workers' compensation systems to provide an appeal to decisions of the workers' compensation board.

Three jurisdictions, Saskatchewan, the Yukon and the Northwest Territories, do not have an independent or separate appeal authority and provide for an appeal from decisions of the WCB to the board of directors or a panel of the board of directors of the WCB. The other jurisdictions have in place a separate body, but with varying degrees of independence or autonomy from the WCB and its board of directors.

In only one jurisdiction, New Brunswick, is a member of the independent appeal body an ex officio member of the board of directors of the WCB. In some cases, there is some degree of control of the appeal body by the board of the WCB (for example, approval of the appeal bodies rules, policies or practices). However, most jurisdictions with an independent appeal body make significant efforts to ensure both the perceived and actual independence of the appeal body from the board. Several jurisdictions have some degree of informal reporting relationship with the board of the WCB and indicted that there is a good working relationship between the appeal body and the board.

In all jurisdictions but Québec policy of the board of directors of the WCB is binding the appeal body. Some jurisdictions have in place a process for addressing policies of the board that the appeal body considers unlawful, but in no jurisdiction does the appeal body have the authority to change a policy of the board of directors of the WCB.

In all jurisdictions, the scope of appeal is very broad - any final decision of the WCB is appealable, subject to some very limited exceptions (final decision meaning that the issue under dispute has progressed through any informal and formal internal review processes). Many jurisdictions indicated that the process
is inquiry based and relatively informal, even in the case where the appeal proceeds by way of oral hearing. Generally, the practice is to consider appeals by way of oral hearing, but some jurisdictions have in place a system of categorizing and dealing with appeals according to different processes depending on the issue and complexity of the case.

The above are some general comments on the internal appeal process. The "Summary Matrix - Appeals Process" and interview notes should be referred to for details on the structure and operations of the appeal body and appeal processes.

**Data & Statistics**

There were significant problems in terms of both collecting and recording data on compensation issues and the review and appeal processes. There is little available data on the incidence of deeming and on the incidence of short term versus long term disability awards and their duration, size and distribution. Where there is data available, there are problems with its comparability because of different underlying definitions and meanings and the way it is collected.

The data provided in the interview notes and the summary tables should be treated with caution. Care should be taken in undertaking any inter-jurisdictional comparison of the statistics because of the lack of standardization of terms used and of the information collected.

**IV. Summary Matrices**

The information collected through this exercise is summarized in three matrices included in Tab 2 to this report:

- Compensation Services and Adjudication
- Internal Review Process
- Appeals Process

These matrices are of necessity relatively succinct and the interview notes and material collected from the various jurisdictions should be referred to for further detail.
V. **Interviews with Jurisdictions**

Tab 3 contains the interview notes for each of the jurisdictions, supplemented by additional written information provided by those interviewed. Further information provided by jurisdictions which could not be easily photocopied and included in the report is listed in Appendix 2 and can be obtained through the Royal Commission library.