

**WORKERS' COMPENSATION ACT REVIEW  
Public Consultation**

**Willow Room, Yukon Inn, Whitehorse, Yukon  
April 21, 2006**

**Appeals Process, Legal and Policy Issues**

<b>PANEL:</b>	Patrick Rouble	Chair
	Ivan Dechkoff	Member
	Michael Travill	Member
<b>PRESENT:</b>	Douglas Rody	Yukon Federation of Labour
	Robbie King	Injured Workers' Alliance
	Derek Holmes	Public Service Commission, Health & Safety
	Rick Karp	Whitehorse Chamber of Commerce
	Mark Hill	YWCHSB

(The meeting was called to order at 9:15 a.m.)

**Mr. Rouble:** If we could come to order, please. This is the next meeting of the *Workers' Compensation Act* Review. The topics for today's meeting are "The Appeals Process, Legal and Policy Issues", Issues 25 through 48.

Judging by past practise, it looks like there is Mr. King... I don't want to make any assumptions, but I think you might be the only person that would want to present now. Would you like to move forward, and we can turn it over to you? Or, before we do that, are there other folks that want to present this morning?

Mr. King, would you like to come up front, or do you feel more comfortable sitting at the back?

**Mr. King:** Well, I'm okay here, thanks. I'm just going to comment on some of these issues here, as time goes on here.

**Mr. Rouble:** Well, why don't we turn things over to you, then, sir?

**Mr. King:** Well, okay, I'm going to start with Issue #25, and it's called "Roles and use of indexing of benefits". And the options are talking about using the Consumer Price Index number.

In the second paragraph, on page 120, it states: "A steep drop in average wages in the 2000 reference year would have resulted in a rollback of wage loss benefits if not for the Board practice of implementing only positive adjustments to

wage loss benefits.” Well, that’s not true, because, in 2003 or ’02 or ’04, I’m sorry, I don’t have the maximum wage rate charts with me, but they actually did roll back the maximum wage rate, from 66,200 to 65,800. So the Board doesn’t, obviously, follow their own practice.

My other comment here is that, if we’re going to use CPI, which I think that’s satisfactory, and it’s pretty common across the country, why they’re suggesting, in option 3, using the Whitehorse CPI less 1%... I don’t know why we have to use less 1%. If we’re going to use the CPI, as I said yesterday, it’s not the core CPI, it’s the whole CPI thing. Core CPI is half a percent less than the whole CPI. And we should use the Whitehorse CPI, not all of Canada, because this is benefits affecting Yukoners, not all Canadians.

**Mr. Travill:** Robbie, you’re okay with going up and going down? I mean, if there is a negative change, then implement the negative change?

**Mr. King:** Well, I was thinking about that last night, and I think that perhaps, unless there’s a downward trend showing, that it could be maintained for a year. And, if the trend continues downward in the second year, they would reduce it, just like they did from sixty-six two to sixty-five eight, that \$400. I don’t think the downward trend would be talking about thousands of dollars, or the downward reduction would be any great amount of money. So it’s not bouncing all over the place, if the calculation ended up in a lesser amount, well, let’s just see what happens that following year, and make a change there.

I don’t know what you think of that, but I did consider that. If that’s not acceptable, going up and down, well... it’s happened in the past.

**Mr. Travill:** Thank you.

**Mr. King:** Does that happen in other provinces? I mean, is it going up and down in other provinces, do you know, through your work?

**Mr. Travill:** I’m not sure.

**Mr. King:** Did the Panel look into that? Is it going up and down in other provinces? Because, obviously, your issue states Manitoba, British Columbia, Prince Edward Island, Nova Scotia. Have you checked to see if there is bouncing up and down?

**Mr. Travill:** We didn’t check, but one of the things is, the CPI seldom goes into the negative framework. And the other ones, a lot of them have that plus or minus, and then they have a prevention against the

decreases right in the legislation, and it's also written what the decrease is, and how to decrease.

**Mr. King:** Well, it says here that the Board practices implementing only positive adjustments, so, if that's the practice, then we wouldn't have a decrease.

**Mr. Karp:** Mr. Chair, In relation to the CPI, from 1993 to 2003, the average CPI in Yukon ranges from a low of .5% to a high of 3.3% in given years. The annual change in the CPI, for Canada, showed similar stability, from a low of 1% to a high of 3.2%, over that decade. So it was never in a negative, at least during those years.

**Mr. Rouble:** Thank you. Are there other issues that people wish to comment upon?

**Mr. King:** I'll comment on Issue #33, "Access to employer's safety and claims cost". This was one of my issues. I felt that it would be fair to the worker that he or she be allowed to know the employer's safety record.

Now, this claims cost information... I don't know where that came into it. If I said that, that was a mistake, because a worker doesn't need to know the claims cost information of an employer. It would be nice to know what their safety record is.

I mean, if I'm going to go to work at a mine, I'd like to know that this mine has had 200 injury-free days in a row, sort of thing, and they've got a good track record of looking after their employees. I think a worker feels safe, knowing that they're going to work for an employer who has a good safety record.

So, that was my purpose of bringing this one up. I'm not looking for claims cost information. The safety record should be made available to workers who are asking. This wouldn't be provided on the Internet or anything, but if a worker asks for it from the Board, or I don't know who they ask for it, let them know that an employer's safety record is available to workers.

**Mr. Dechkoff:** Robbie, how would you feel, then, if employers wished to know the safety record of workers?

**Mr. King:** Do workers have a safety record? The only thing you have is their record with claims submitted to WCB. I don't know how you have a safety record for a worker. If a worker is injury prone, always making claims against WCB, or making claims with the Board, that would give an indication of the worker's proneness to injuries. I don't know, Ivan.

**Mr. Rouble:** Mr. Rody.

**Mr. Rody:** Just while we're on this subject, I'd like to take the opportunity to rap the knuckles of your consultant for using the phrase "accident prone". It implies that some accidents aren't preventable; that's something we want to get away from. "Accident prone" is a bad phrase to be using in Workers' Compensation.

**Mr. Rouble:** Okay, we'll certainly take note of that. I'd like to add that, while the Panel did work with a consultant on preparing this, this is the work of the Panel. The Panel members went through this document, literally word for word, and achieved consensus on the document. We apologize for any slight that people have taken, and we'll certainly take note of the concern, and take efforts to prevent issues like that from arising in the future.

**Mr. Rody:** It's just a phrase that implies that an accident is not preventable, which all accidents are preventable.

**Mr. Rouble:** We certainly appreciate that. We have endeavoured to present all of the information in as unbiased a manner as possible, to the extent where it's even drawn criticism that we haven't fully explained ourselves because we're trying to be so careful in our use of language on occasion. But we do note your concern, and we'll take efforts in the future to not allow comments like that.

Any other comments on this issue? Are there other issues people wish to raise?

**Mr. King:** Issue #40, page 145. I think that this issue could be dictated by the timeframe it takes to run an appeal, and to go through the appeal process from start to finish. To put a restrictive time limitation period could be seen as being unfair to whatever body's making an appeal.

We talked about the worker's record being looked at, his file being looked at by the president, to send the appropriate documents to the worker's employer in the case of an appeal; and that the president's decision is final, and this is it. And we talked about suggestions for perhaps appealing the president's decision on what documents could be allowed to be sent to the employer. You know, this is a process that involves time; and time of who knows how long? It could really lengthen the time of a person's appeal, just because we're going through a process of appealing the president's choice to send certain documents that a worker doesn't feel are relevant to the accident. So that's just one instance.

I agree with the thought about having a second look at what the president is saying should be allowed. That was talked about at our last meeting. I agree with that. It's just that there's time involved with that, and I think that a worker could be really harmed by a restrictive period. I'm not saying no periods, or no

limitation period, but I think that the timeframe should be closely looked at before deciding the limitation period.

That's what I have to say on that issue.

**Mr. Rouble:** Okay, thank you.

**Mr. King:** Issue #42, "Administering prior years' legislation, policy or orders". You have options 2 and 3. This was brought up at the last Act Review, if I remember correctly, trying to have older Acts brought into this new Act or whatever. I think that there is so much information, and so many sections, that are not in the newer Act, that were just dropped between Acts, that, if you're going to amend the legislation to retroactively apply the current legislation to all claims back to 1992, or all claimants, that persons that have – I think you have to go through each Act, section by section, because there are things that were taken out, that aren't in today's legislation. When a person gets injured, the Act they're injured under is more or less a contract. I mean, basically, this is a contract, here's what you're allowed, here's what we say, or here's what the law says. And just to do a blanket, say, well, coverage saying that people are going to be affected not only with new legislation, they're taking away – unless you go through each Act, section by section, you're taking away a lot from people who are injured under prior Acts.

Now, let's say, in the 2000 legislation, it was written about interest, and it basically was very clear, that interest applied only to people after 2000, you know, with that Act. So the legislation is picking and selecting who is affected by it.

In the same tone, if we adopted a new Act, we say this applies to people who were injured under pre-1992 legislation; or legislation that was in effect at the time of their injuries, '87 or '82 or whatever. But to just blanket say, well, we're under a new Act now... workers are not being treated fairly, because what legislation was in effect at the time of their injury is being erased.

**Mr. Dechkoff:** Robbie, just for clarity, which of the options are you supporting, or which one are you feeling would be the –

**Mr. King:** Number 1, no change to legislation.

Since the 1992 Act came into effect, basically, there's just been amendments to that Act; especially under the 2002 Act, we're still using 1992 sections, and we're referring back to them. So, basically, we're just talking about pre-1992 injuries, really. As time goes on, those people are moving out of the system; getting old, they're 65 or whatever, they're leaving the system. So it's not much longer. We're not talking a million people, or thousands or hundreds of people; there are some people, we're talking about.

**Mr. Travill:** Yes, the issue came up because it's so difficult. When you're working in a system, you have to be able to deal with each different piece of legislation, all the way from the '53 Ordinance, because people were entitled under that. And what the Board was asking, when they put it forward, was to make it simple. The only way to make it simple would be to have everybody administered under one Act. But, like you say, there are entitlements that are different, under the old Acts, than under today's Act. But that was why this came forward.

**Mr. King:** I'm sure they have enough staff over there that they could have adjudicators that know certain other Acts, inside and out, so that, when a new claim comes in, and it has to deal with a 1987 injury, that the adjudicator, who's assigned to that claim, will know the '86 Act.

So that's my comment on Issue #42.

**Mr. Rouble:** Are there others that wish to comment on this issue?

**Mr. King:** On Issue #43, "Access to the Board's independent legal opinions"... this has to do with difficulties I've had in the past during appeals. It has come out from the Board, they say, "Well, we have a legal opinion that states you're not entitled to this", or whatever, that "we're only obliged to give you this." I say, "Okay, well, let's see this legal opinion." "We can't give it to you." Well, how do I know it exists? They could just be saying that, as far as I know.

So, what I'm looking at here, why this is brought up here, it's for the purpose of appeals, and I think that, if a claimant is appealing an issue, that he should be allowed access to legal opinions that the Board claims are there. The legal opinions don't have to be on the person's file, so that the person has them at their own discretion; but they're available to him or her in the event that it's being used in an appeal process.

It has been stated to me that "Hey, we have a legal opinion that says that we're right", and I think a person should be allowed to have access to that legal opinion; to say, well, I want to see this. I want to be able to challenge your legal opinion, I want to see if it makes any sense. Or maybe, as a worker, I can see your light here, and maybe I'm wrong.

**Mr. Travill:** Just to clarify, legal opinions are just an opinion of a lawyer, so they don't really carry any weight; they're just a lawyer's opinion.

**Mr. King:** I realize that.

**Mr. Travill:** But, if a Board adjudicator, or a Board person, says, "I'm not providing you something because of this legal opinion", that is tantamount to how the policy or regulation is being implemented, and normally you should have access to that through an ATIPP. But, if it's a legal opinion where the Board asked their lawyer something, and their lawyer gives them advice in something, then usually people aren't allowed that because that's solicitor/client privilege. But if they're using something to administer your claim, then you should have access to it.

**Mr. King:** That's the only reason I brought this up. I don't need to know Bruce's opinion on whether this and that has to be done in a certain way, with regards to whatever. But, if it involves my case that I'm appealing, I'd like to know what your opinion is that the Board is using. Because I'm never going to see it, even at the appeal level, because it's not a document I'm entitled to.

So that's why I brought this issue up, and it was just in regards to the claimant's own file; not all legal opinions regarding all matters of the Board.

**Mr. Rouble:** Anyone else wish to make a comment on this issue? Are there other issues that people wish to comment upon?

**Mr. King:** I have a comment on Issue #45, "Disability vs. impairment". I don't have a lot of notes made about this, but all I know is that this issue was in the Supreme Court, and I think Judge Veale made a distinction between "disability" and "impairment", and I would suggest to the Panel that they review his decision and his findings on the difference between "disability" and "impairment", and see what the courts have said about that, before going on and making changes to the Act, or an amendment to the Act.

**Mr. Rouble:** Any other comments, or any other issues people wish to comment on?

**Mr. Rody:** Just a question under option 5 there, "Amend the legislation to exclude specific conditions... from the workers' compensation system." As part of that option, would it be specific, then, that those conditions would be subject to tort law?

**Mr. Rouble:** Well, is that one of the conditions that you would like to see in place, then, if there were things excluded? That's certainly one of the conundrums here.

**Mr. Rody:** Well, what I would suggest is, if there are specific conditions that would be excluded from Workers' Compensation, then, by definition, it would be subject to tort law.

So, I mean, what I'm getting at, I guess, is that there are some people who may think, well, this would be advantageous, but it should be pointed out to them that, if that's the case, there are consequences.

**Mr. Travill:** The principle is, you're always allowed some method of redress.

**Mr. Rody:** Yes. If it's not through the compensation system, then it becomes subject to court action.

**Mr. Travill:** Yes.

**Mr. Rouble:** Mr. King.

**Mr. King:** Thank you, Mr. Chairman. I'll read a little bit from Judge Veale's analysis, his decision of June 12<sup>th</sup>, 2003. In his analysis, he says: "The words 'disability' and 'impairment' should not be equated."

And at item 40, he states that: "Where the medical consultant, as in this case, lends himself to an assessment of impairment from the AMA Guide and Policy number 24, which also focuses on impairment, it is clearly left to the non-medical person appointed by the Board to assess the other crucial factors, such as the nature of the injury and the employee's occupation, experience, training and age. Thus, a disability may begin with an AMA Guide-based evaluation of impairment, but the expectation is that the non-medical person will assess the gap between what a person can do and what the person needs or wants to do."

So, I just want to make it clear that this is handed down by the court, so this issue here, 45, should be carefully scrutinized to deal with that, with reference to what the courts have said.

**Mr. Rouble:** We certainly appreciate your comments on that. Many things have happened and changed since the beginning of this Act Review. The Act Review did begin in 2002, and this is certainly one of those changes that has happened since then.

Any other comments or issues to comment upon? I certainly don't want to rush anyone, but, if there are no other issues that people wish to comment upon, then we'll come to a close.

Okay, if there are no other issues people wish to comment upon, then we'll bring this meeting to a close. Thank you for your attendance and participation.



The Panel will reconvene this afternoon at 1:00 o'clock, when we meet with the Stakeholder Advisory Groups, and that meeting is also open to the public.

(The meeting was adjourned at 9:40 a.m.)