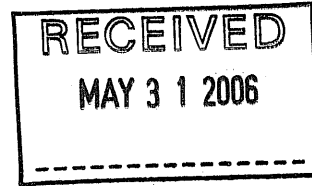




Public Service Commission
Box 2703, Whitehorse, Yukon Y1A 2C6



May 31, 2006

Mr. Patrick Rouble, Chair
Workers' Compensation Act Review Panel
Box 2703
Whitehorse, YT
Y1A 2C6

Dear Mr. Rouble,

Thank you for the opportunity to provide a written submission to the *Workers' Compensation Act* Review Panel. The attached submission represents the perspective of the Public Service Commission as a public sector employer.

As stated in the submission, the Commission has major interests in a sustainable and effective workers' compensation system. Accordingly, the PSC is interested in legislative amendments that will ensure:

- a system that provides effective and timely support when employees suffer a work-related disability, including appropriate support for return to work;
- a compensation system that is sustainable in the long run;
- responsible and effective administration of the compensation fund, with appropriate risk management; and
- support for effective prevention, to reduce the human and financial costs associated with work-related disabilities.

We understand that this document will be made public, along with others, and that you may be circulating submissions to the stakeholders prior to the deadline.

We would welcome any questions you have on the attached presentation, and we are looking forward to the final report of the *Workers' Compensation Act* Review Panel. Thank you again for the opportunity to provide comment.

Patricia N. Daws,
Public Service Commissioner

Submission to the Workers' Compensation Act Review Panel Yukon Public Service Commission May 2006

Introduction

The Public Service Commission represents the territory's largest single employer. As such, the PSC has major interests in a sustainable and effective workers' compensation system. Accordingly, the PSC is interested in legislative amendments that will ensure:

- A system that provides effective and timely support when employees suffer a work-related disability, including appropriate support for return to work;
- A compensation system that is sustainable in the long run;
- Responsible and effective administration of the compensation fund, with appropriate risk management; and
- Support for effective prevention, to reduce the human and financial costs associated with work-related disabilities.

Background

Prior to 1993, the Yukon Government's participation in the Yukon workers' compensation system was on what is called a "self-insured" basis. Government employees injured on the job were adjudicated and paid by the WCB, and government paid the direct costs of those claims plus a 15% administration fee under that legislation.

In 1992, a major rewrite of the *Workers' Compensation Act* was undertaken following extensive public and stakeholder consultations. Under this new legislation, the Yukon Government became an assessable employer with set premium payments. The government was treated the same as any other employer, with a few exceptions. The exceptions deal with volunteers, where the government pays the direct costs plus an administrative fee set out in the Act, as well as particular audit provisions given the nature of government as a public body and other governing legislation such as the *Access to Information and Protection of Privacy Act*. (The government agreed to join the system in 1993 as an assessable employer on the understanding that the audit provisions would not apply.)

Issues

The PSC sent observers to the hearings of the *Workers' Compensation Act* Review Panel held in Whitehorse, both for the public sessions and the stakeholder sessions open to the

public. The Commission was not part of the WCH&SB-led stakeholders' meetings that resulted in a large number of consensus positions being presented to the Panel.

There are several issues where the interests of the government as a publicly-funded employer differ from those of the other stakeholders and the WCH&SB. This submission focuses on those issues of major interest to the Commission as an employer. The Commission will not be offering general comment on those issues that have major public policy implications, to avoid any perception of conflict of interest.

The submission follows the structure of the Panel's latest discussion paper, entitled "*Options for Legislative Changes to Yukon's Workers' Compensation Act.*" The issues are broken down into four categories, and numbered using the Panel's system. Eleven issues of concern have been identified and are discussed below.

Governance Issues

Governance Issue #5: reporting structure of the president (page 21).

The issue deals with the reporting structure of the president of the WCH&SB. The issue is presented as being one of a "conflicting relationship" by the president, as the position reports to both a Minister¹ and the Board by virtue of being a deputy head (also known as "deputy minister"). The submission notes that three other jurisdictions follow the model currently in use by the Yukon: Ontario, PEI, and Newfoundland & Labrador.

The discussion paper suggests that the Act be changed so the president reports only to the Board, with no status as a deputy head. The discussion paper also suggests that somehow the employees could remain public servants and be accountable to the president. This option was the one supported by stakeholders.

Current legislative structure. Under the *Public Service Act*, deputy heads are appointed by Cabinet on the recommendation of the Premier, following certification by the Public Service Commission. Under the *Workers' Compensation Act*, the president is a deputy head. However, instead of the Premier recommending the appointment following certification by the Commission, this authority is delegated to the Board. In addition, the president may only be dismissed by Cabinet on recommendation of the Board, and this dismissal is mandatory if the Board recommends it. This is not found for any other deputy head.

The only way the president may not be a deputy head is if Board employees are removed from the *Public Service Act*. This would make the WCH&SB akin to the College and Hospital, with successor collective agreements and independent staffing/classification/payroll/compensation/training structures. This would likely increase administrative costs.

¹This is not an accurate portrayal of the legislative structure. As a whole, deputy heads are appointed by Cabinet and report to the Premier and not to individual Ministers, except where the Minister has delegated authority to the deputy head, or there is some other statutory provision.

Discussion. There is no doubt that best practices in corporate governance suggest that the president should report solely and directly to the board of directors. The corollary of this best practice is that the staff report solely to the president. The option suggested by a number of stakeholders would see public servants remaining as public servants accountable to the Yukon Government, while reporting to the president of the Board. The president would not be a deputy head, but instead would report to the Board directly.

Unfortunately, this is not a structure that would work. Public servants must report to a deputy minister. The entire structure of the collective agreements are premised on the clear accountability and authorities of deputy ministers under the *Public Service Act*. There is no precedent in the Yukon for public servants under the *Public Service Act* to report to anyone other than a deputy head, nor is there any provision for delegation of hiring and firing and other decisions, other than through a deputy head.

In addition, right now deputy heads are governed by the classification for all deputy ministers. Without this, the Board could determine how much it would pay. Experiences in other jurisdictions have demonstrated significant concern over significant payments to chief executive officers, including substantial severance packages². Executive compensation increases would lead to increases in administrative costs.

Finally, the current structure is designed to mesh with the legislative authorities for collective bargaining under the *Public Service Labour Relations Act*. It would be impossible to have Board employees working for the Yukon Government as employer, while at the same time reporting to the Board through the president, who would not be a deputy head, with the powers and safeguards given that position.

To remove the president as a deputy head means one of two things: the public servants will no longer be employees of the Government, or they will report to a different deputy head within government.

To sum up, currently the WCH&SB president can only be hired and fired on recommendation of the Board (the candidate must be certified as being qualified by the PSC prior to hire). This is a very clear reporting relationship. Nothing in the *Workers' Compensation Act* nor in the *Public Service Act* makes the position accountable to a minister.

Conclusion and alternative. The hiring and firing procedures are very clear in establishing the reporting relationship of the president to the Board. However, to further strengthen this relationship, the *Workers' Compensation Act* could be amended to clearly give the Board the authority to conduct performance reviews, and to approve merit increases within the framework set out for deputy heads. This delegation is similar to that already granted the Board in terms of hiring and firing, and would be consistent with the structure.

² This led BC some years ago to put limits on all public sector executive compensation. No such limits exist in the Yukon.

In addition, section 116 could be amended to make it clear that in the performance of the president's duties as outlined in s. 116(1), the president is solely responsible to the board for the carrying out of those duties, except for the functions related to the personnel of the board where the president must respect the authorities of the *Public Service Act*.

Assessment Issues

Issue #3: Equal treatments for all employers (pages 47-48).

The *discussion* under this issue focuses on the treatment of the Yukon Government in terms of the subsidies offered to all Yukon employers from 1992 onwards – even those who started their businesses after 1992. However, the *options* presented deal with the question of auditing the Yukon government by the Board. There is no analysis of why this would be needed, nor is there any discussion of the implications of this option, which simply appears out of the blue.

It is this suggestion of amending the legislation to allow the WCH&SB to audit the government that is of concern.

As noted earlier, the government joined the system as an assessable employer through the 1992 Act revisions, on the understanding that it would not be subject to the audit provisions. The government's books are open through the Auditor-General and the Public Accounts, including all information on personnel expenditures. All government contracts and their amounts are posted publicly at least annually.

Additional information can be easily requested. Unlike other Yukon employers, the government is covered by the *Access to Information and Protection of Privacy Act*. This legislation has its own stringent requirements for the release of information, along with provisions to protect the privacy of individuals and third parties. It also provides for a separate appeal process and enforcement of decisions.

Given the information that is already available, and the other legislation governing the government as employer, it is difficult to understand what purpose would be served by giving the board legislative authority to audit the government.

No information has been provided on what problems have arisen, whether there are non-legislative alternatives, and what the issues actually are. No information or analysis has been provided on why the legislation would require a change in this area. The only rationale in the discussion under this issue is related to “equal treatment” – and yet that rationale has been broken several times in terms of the assessment rate subsidies.

Finally, it is also important in this context to note that government essentially “backstops” the board in terms of funding. The government therefore has an interest in ensuring it meets its obligations to the Compensation Fund and the stakeholders in the compensation system.

To summarize, the government's books are open to the public and are already audited by the Auditor-General of Canada. Other information is easily accessible except where the release is prohibited by law. No issues have been identified nor any rationale provided that would require a legislative change in this area.

Conclusion: Option 1 should be chosen, i.e. no change to the legislation.

Benefits Issues

Issue #2: How government consents to/accepts responsibility for volunteers (p. 52).

The *Workers' Compensation Act* was amended in 1997 to permit government to provide compensation coverage for volunteers providing services on behalf of the government. Following is an extract from the Hansard debate (November 17, 1997) on why the legislation was being amended:

"Prior to the introduction of the new Workers' Compensation Health and Safety Act in 1992, volunteers were covered by board order on a cost recovery basis, That is, if a volunteer received benefits from the Workers' Compensation Board as a result of an accidental injury, the government would repay those expenses to the board, along with a 10 percent administration fee.

After the new act was introduced, the Yukon government had begun work on a regulation pursuant to the act to provide the necessary coverage for non-paid volunteers. Instead, the board agreed to address the issue through a new board order, 1993.01, similar to the order that existed under the old act. In February 1995, the board revoked order 1993.01 with the result that all non-paid volunteers became ineligible for benefits under the Workers' Compensation Act and volunteers were left with no coverage.

Who are these volunteers you may ask. They are people who volunteer to perform a wide range of activities with several departments. Let me give you a few examples. A volunteer is someone who is called upon by the Emergency Measures Organization in the event of a disaster occurring. A person acting on behalf of the government under the deputy conservation officer program that is administered by the Department of Renewable Resources is a volunteer. A volunteer includes a parent who assists a teacher with a class outing once a year, as well as someone who regularly assists staff with elderly patients at Macaulay Lodge. Inmates at the Whitehorse and Teslin correctional facilities who perform community services are also, for the purposes of this act, deemed to be volunteers. They're in your neighbourhood."

As noted by the Panel's discussion paper, coverage of volunteers is common in all jurisdictions' legislation. The Yukon's legislation is called "superior" because of the level of detail of who is covered. It is also common that government pay the direct costs of these claims; legislation requiring the payment of an administration fee appears to be rare, if it exists at all.

Conclusion. Because this issue affects the Yukon Government so directly, the PSC would like to state that it strongly supports option #1 – no change to the legislation. If there are concerns about government communication in this area, it would be good to learn what these are and how communications can be improved.

Issue #10: Compensation for loss of personal property - triggers (p. 63).

Under the current legislation, loss of personal property associated with the accident that caused a work-related disability is covered by the compensation system where there is actual wage loss. Two options are presented: the first is no change to the legislation; the second would amend the Act so that a worker should not have to suffer a wage loss in

order to be compensated for loss of personal property as a result of a workplace accident/incident.

The question is whether it should be the workers' compensation system that should be responsible for personal property loss when there are no compensation benefits to be paid, or whether it should be the individual employer's insurance. The next question relates to the potential liability, and the potential increase in costs.

The Yukon WCH&SB already has very high administrative costs, according to the special examination by the Auditor-General of Canada. The latter cautioned against changes that would increase administrative costs. This kind of change may well be one of these examples. The need to verify that the loss of personal property was related to some kind of work-related accident instead of just wear and tear will increase the complexity of adjudicating no-time-loss claims. Increases in complexity generally increase costs, particularly as adjudicative decisions are subject to appeal.

To accept this kind of risk of increased liability and cost does not appear warranted, without substantial verification of the need, and the potential cost. The proposed option 2 has virtually no parameters, and therefore this option would be of major concern to the government.

Conclusion. The Yukon Public Service Commission recommends option #1 – no change to the legislation.

Issue #17: Different minimum compensation levels (pages 73-74).

There are several different minimum compensation levels set out in the *Act*: one for volunteers designated by the Yukon Government; one for workers based on their earnings; and one for optional coverage based on assessments and earnings.

As discussed earlier under Benefits Issue #2, the provision of coverage for volunteers is an important feature of the legislation. There is good and historic reason for this coverage, including why the minimums for volunteers are different from workers with demonstrated earnings. The Yukon Public Service Commission concurs with the recommendations of most of the stakeholders that no change is needed to the *Act* in this area.

There are no additional costs to the WCH&SB, as the claims costs are fully paid by the Yukon government, along with a 15% administration fee. This represents an increase from the previous fee of 10%. A quick scan of other jurisdictions' legislation reveals that no other government pays a legislated administration fee, although volunteer coverage is similar.

The suggestion that a different administration fee should be legislated would be a substantially new issue, and not covered in the original submissions, the analysis, or any subsequent consultation. It should therefore not be included in the issues that the Panel

considers. If it is, additional time would be needed to analyze this issue and to obtain information from other governments on how this matter is handled, in order to ensure a full understanding of possible options, and a thorough analysis of the potential implications.

Conclusion. The Yukon Public Service Commission recommends option #1 – no change to the legislation.

Issue #21: Maximum wage and assessable earnings rates (page 79-80).

The current formula for determining the maximum wage rate and the maximum assessable earnings uses a combination of a projection method, combined with a specific data set. The goal was evidently to ensure that the maximums would be the same, and would cover the earnings of 90% of the workforce.

Over time, the formula proved to be problematic. Appropriate data was not published within a useful timeframe, and changes to that data resulted in some difficulties in interpretation and implementation.

The choices that have been suggested are to use some method of calculation based on the average wage rate, or based on the consumer price index. Both of these methods acknowledge the need to ensure some form of economic increase over time, based on a reasonable comparator.

Conclusion: The Public Service Commission agrees with the other stakeholders that changes to the current formula to set the maximums are needed, in order to simplify the proceedings and ensure that the data is available without increasing costs to the stakeholders. It is important that the two rates run together, to avoid any unintended consequences, and to ensure that stakeholders have certainty and appropriate coverage. The Public Service Commission has no preference on the average wage rate over the consumer price index, as both methods would have resulted in increases over the years. However, if one method produces data more quickly and consistently, there would be some obvious merit to considering that one.

Appeals Process, Legal and Policy Issues

Issue #14 & #15: release of claims information and access to file (pp. 100-101).

In other jurisdictions over the years, the ability of a worker to have access to her or his claims information and files was often a source of controversy. This issue has almost universally been resolved in favour of ensuring that workers have reasonable access to the information on their file.

New issues have now arisen around access to information in relation to appeals of compensation claim decisions. The legislation currently provides that the board must release to the employer – upon request - all information in a worker’s file relevant to an issue under appeal. The worker or their representative has the opportunity to object to the release of certain information. This objection is subject to review by the president of the board, whose decision on the matter is basically final unless the appeal tribunal³ decides otherwise in the course of a hearing.

It is quite apparent that this system can cause problems when employers are trying to make a decision on whether to appeal or support a claims decision, without access to relevant information. It is hard for an employer to argue before the president (or even the tribunal) that the information should be released, when they have no idea what has been omitted in the first place. If the tribunal does keep in mind what was and wasn’t released in reviewing the evidence, and does decide the employer should have had a copy, then this causes further delays in a decision while the employer reviews the information and considers whether to proceed with the appeal or to continue participating as a party to the appeal.

The Public Service Commission found the following extracts from the WCH&SB’s submission of July 2003 to be of interest. We did not notice an update to this portion of information in the discussion paper.

Inter-Jurisdictional Research:

Within all legislation, a worker, a personal representative, a dependant in the case of death, and in most cases, the employer, may have access to WCB files or records. This is generally relevant to an issue under review and requests must be made in writing.

...BC and New Brunswick the workers’ advisor and employers’ advisor have access at any reasonable time to the complete claims files and any other material pertaining to the claim. Manitoba, Prince Edward Island, Nova Scotia and Ontario state that anyone who is party to the reconsideration of a board decision or appeal commission may examine and copy all documents respecting the claim. The employer can have what the Board feels is relevant on notice to the worker...

³ Technically this refers to an appeal committee of the appeal tribunal, but for purposes of simplicity the term “tribunal” is used instead.

The panel's options paper points out that in Alberta and the NWT/Nunavut, the board will provide access to the relevant information to those persons directly concerned with the appeal.

The stakeholder consensus articulated at a public meeting is a preference for a significant variation of option 1 - no change to legislation, *except* to allow a direct appeal to the appeal tribunal of the decision of the president regarding the release of a worker's information. Frankly, this whole process is very convoluted, time consuming, and if the decision can be appealed to the tribunal directly then it may serve to be another barrier to speedy resolution of any appeals. It adds an additional level of appeal, increases complexity, and the potential is for this wrangling to delay the return to work of an employee.

Conclusion: Based on the above analysis, the Public Service Commission would respectfully submit that the preferred option should be option #2 – to delete the current lengthy and adversarial issues surrounding access to information relevant to appeals. This would add an element of procedural fairness, and be more consistent with other jurisdictions' legislation. At the same time, it might be possible to strengthen the protection of the workers' information by requiring the employer to return any such information to the board for disposal, on conclusion of all appeals, or if a decision is made not to participate in the appeal.

Issue #20: Return to work and employer's obligation to re-employ (pp. 106-110).

This issue is one of the most critically important to the Public Service Commission as employer. It touches on all four of the major interests presented at the beginning of the submission. It has the potential for significantly affecting current programs and initiatives undertaken by the Commission as an employer. Because of the significance, the discussion will begin by reviewing the current environment, and then an analysis based on each of the major interests.

In reviewing the discussion below, it cannot be emphasized enough that the Public Service Commission absolutely supports the concept of effective return-to-work programs. The Commission is proud of its increased efforts in this regard, and recognizes that greater achievement is possible. At the same time, these efforts could well be in jeopardy if the Commission is forced to respond to mandatory legislative provisions, instead of focusing on best practices and improvements.

Government Environment

Like all other employers, the Yukon Government is subject to the Human Rights Act. From time to time, decisions have been made by the Human Rights Commission that require adjustments to current practices for accommodating employees with disabilities. For example, a new policy on accommodation was developed and is being implemented throughout government.

The Government has collective agreements with its two bargaining agents. Some employment decisions are governed by these agreements or by the related statutes, and are subject to interpretation by adjudicators under the two public sector Labour Relations Boards. There are internal procedures for other complaints, such as harassment.

Government decisions not governed by any of the above may also be subject to review and decision by the Ombudsman.

Over the past few years, the Yukon Government has significantly increased its investment in safety and wellness. A new Workplace & Wellness Unit was created, incorporating occupational health and safety and reintegration, with additional staff and a new manager.

Reintegration deals not only with employees who have a work-related disability; reintegration also deals with employees who may have a disability for other reasons. The commission works not only with the WCH&SB, but also with disability and health insurance providers. The Public Service Commission also has a unit devoted to building workplace diversity, including employment opportunities for people with disabilities.

To sum up, the Yukon Government operates in a complicated legal environment, providing services and programs to support employees with disabilities regardless of their cause.

Other jurisdictions

The Yukon is one of five jurisdictions where the government participates in the workers' compensation system as an assessable employer, rather than on a self-insured basis (the others are Alberta, Saskatchewan, Quebec, & NWT/Nu).⁴ Out of all these jurisdictions, none except Quebec has a legislated obligation to re-employ under the Workers' Compensation Act – and they operate within a different legal context. There are therefore no models that the Yukon Government can look to in determining how other government employers deal with the issues inherent in a mandatory obligation to re-employ, or to determine its effectiveness.

Out of the western jurisdictions, with their unique labour markets and economic structures, there are no jurisdictions with a mandatory obligation to re-employ.⁵ This means it is difficult to look for models within the context of the western labour markets, the Yukon's most direct competitors for investment and for skilled labour.⁶

⁴ Association of Workers' Compensation Boards of Canada (AWCBC) – Individually Liable Employers, January 2006.

⁵ Manitoba's legislation includes a mandatory re-employment provision but it is not yet in force, pending consultation with stakeholders.

⁶ After a thorough review of the issue, the B.C. Government and the comprehensive B.C. Legislative and Policy Review by Alan Winter opted **not** to add a duty-to-accommodate requirement. Part of the rationale is that this duty is already covered under human rights legislation. Imposing a size restriction on this could duplicate the liability for larger employers, but send the wrong message to smaller employers about their obligations under human rights legislation.

One of the stated rationales for considering this mandatory legislated approach is to reduce claims duration. It is not at all clear how claims duration would be affected by mandatory return to work in a labour market dominated by seasonal employment. In addition, evidence that this approach results in lower claims duration does not appear to be the case across all jurisdictions⁷, and may be attributed to other causes.

The next sections describe some of the concerns, categorized according to the Public Service Commission's interests.

Interest #1: A system that provides effective and timely support when employees suffer a work-related disability, including appropriate support for return to work.

The Yukon Government has some different categories of employment, unique to the government. This includes seasonal auxiliaries, and on-call auxiliaries. Because of this different method of categorization, there could be a disproportionate impact on YG not faced by any other employer. This impact would undermine the Meredith principle of collective responsibility.

Mandatory return-to-work legislation appears to be a relatively new initiative. Research does not appear to be readily available that can describe the consequences, other than a few select indicators, which may not be at all or even largely cause-and-effect.

There could be a concern about consequences such as possible deterrents to accepting employees before they are ready to return to work, given the possible consequences. This could form a barrier for initiatives such as work-hardening, graduated return-to-work, and so on.

It would also be interesting to note if there were any correlations between this mandatory return to work, and a drop in reported claims. There is a possibility that increasing direct costs to employers may result in pressure – formal or informal – on employees not to report claims.

Interest #2: A compensation system that is sustainable in the long run.

Mandatory return-to-work legislation marks a move towards enforcement, rather than encouragement. It also fundamentally changes focus of rehabilitation from returning workers to employability, to returning them to employment. This is potentially an enormously significant change, particularly in a jurisdiction with relatively high employer turnover and few large employers.

⁷ See for example Nova Scotia's report on average duration of short-term disability claims, rising from 82.56 days in 1999 to 100.46 days in 2003, http://www.wcb.ns.ca/annualreport2003/content_e/stat_summary_e/average_sh_term_e.html. This contrasts with Newfoundland, where average claims duration dropped from 116 days in 2001 to 102 days in 2004, Workplace Health Safety & Compensation Review Discussion Paper, <http://www.whscc.nf.ca/news.htm>.

It is not clear, as mentioned elsewhere, how this approach supports the Meredith principle of collective employer responsibility for worker injury. Initiatives that undermine the Meredith principles have a way of eroding long-term trust in the system.

Finally, the return to work programs and services offered by the WCH&SB received among the lowest “perceived value” ranking of all WCH&SB programs/services⁸. It may be more prudent, therefore, to work on changing this ranking and improving the service.

Interest #3: Responsible and effective administration of the compensation fund, with appropriate risk management.

Mandatory return-to-work legislation changes the fundamental team or case approach to rehabilitation, with clear roles and responsibilities, to one where the worker must deal more directly with the employer. For example, see the PEI WCB information on workers’ return to work and workers’ responsibilities – the board plays a much smaller role in facilitating the return to work, with a heavier emphasis on monitoring and enforcement.⁹

There is a potential incentive for the WCH&SB to reduce services to the employers and to the injured workers, as they no longer bear the responsibility for return to work. Employees may be encouraged to return to work full-time before they are ready to offset the board’s costs or reduce duration, potentially undermining the fundamental purpose of rehabilitation.

At the same time, this proposal could result in increased administration costs through enforcement and/or reduced service. The requirement for the Board to have to interpret “undue hardship” adds complexity and administrative cost to an already complex and costly system. It also adds uncertainty for employers.

Interest #4: Support for effective prevention, to reduce the human and financial costs associated with work-related disabilities.

One of the largest areas of concern for the Commission is the potential that having to meet mandatory return-to-work legislated provisions will detract from current reintegration program delivery. Increased costs to employers may require a realignment of resources away from longer-term prevention. These increased costs can include increased complexity in coordinating return-to-work and associated processes for employees on disability insurance and those on workers’ compensation.

Finally, dealing with mandatory legislative provisions could direct WCH&SB resources away from collaborative approaches to prevention and rehabilitation, towards an enforcement mentality.

⁸ Yukon Bureau of Statistics, YWCHSB Stakeholder Review, November 2001, http://www.wcb.yk.ca/fileadmin/user_upload/PDF_files/reports_and_publications/stakeholder01.pdf.

⁹ Workers (sic) Guide to Return to Work, PEI WCB, <http://www.wcb.pe.ca/index.php3?number=1012971>, May 22, 2006.

Other potential consequences

Other potential consequences are beyond the scope of the Board's interests, but may be of interest to the public as a whole. Instituting mandatory return-to-work programs in a jurisdiction this size could have a "chilling" effect on employment. Employers who may be slightly below whatever number is chosen may decide not to hire new employees. Depending on how employees are defined (by number or by full-time equivalents), employers may choose to look at alternate forms of employment, such as changing the number of part-time employees, or changing hours, or releasing employees just before they reach the term of employment after which the mandatory return to work kicks in. This is not information that WCBs are likely to obtain or monitor, as they do not affect claims or prevention but rather the terms and conditions of employment.¹⁰

An alternative approach

Rather than seeking mandatory provisions in the legislation, the board could take an alternate approach. Along with other stakeholders, the Commission was pleased to participate in the extensive discussions leading to a new approach to rehabilitation. This new approach includes a case management team involving those employers who choose to be involved, along with any relevant unions, the worker, the family, board staff, and health professionals where appropriate. This is entirely consistent with best practices in other jurisdictions, and supported by research as a viable method, with "...the collaborative approach being the most effective means of attaining success."¹¹

For example, instead of an employer being told an injured worker has been deemed, even though the employer could easily have found alternative work, the employer would be involved. In addition, instead of having injured workers abruptly show up saying the WCH&SB has told them to come to work, resulting in sometimes major upheaval to the workplace, the employer would be engaged and would be able to plan for the transition. Both of these have happened within the past year – and would be avoided if the rehabilitation policy were to be fully implemented.

The WCH&SB could set up general duration guidelines that would be of help to the employer in planning for return to work.¹² The WCH&SB could also help promote existing programs to facilitate return to work that are now available. The WCH&SB

¹⁰ There is some evidence that unfortunately, mandatory legislation can have an effect contrary to the intended purpose. Discussions and evidence on this negative response of employers due to the higher costs of the accommodation requirements is provided in Acemoglu, D. and Joshua Angrist, 1998, "Consequences of Employment Protection: The Case of the Americans with Disabilities Act," National Bureau of Economic Research Working Paper 6670. Other sources can also be found.

¹¹ Sharon Switzer-McIntyre, *Prevalence of Return to Work Programs in the Manufacturing Sector*, University of Toronto, WSIB-funded research, <http://www.wsib.on.ca/wsib/wsibsite.nsf/public/researchresultsprevalancemfgsector>, updated May 18, 2006.

¹² This is an approach used by a number of jurisdictions, although it should be noted that Ontario just deleted reference to duration guidelines in its policies, as they did not always correspond with emerging medical evidence (March 2006).

could set up benchmarks to track return to work, and provide this information to employers. The WCH&SB could pilot changes to return to work programs as part of its secondary prevention program, to model best practices within the Yukon context.

Finally, with a full-fledged program in place, the WCH&SB could track improvements in claims duration that might reasonably be attributed to effective return to work. Evidence-based information could then be provided in considering this issue when the next review of the *Workers' Compensation Act* is set to take place.

Conclusion: The Public Service Commission recommends the use of a non-legislative approach as outlined above, and would therefore support option 1, no change to the legislation.

Issue #22: Reimbursement of compensation payments to employers and other insurers (pp. 114-115).

According to the stakeholders, both the Yukon Government and the Hospital Corporation are the source of concern in this area. Evidently there have been cases where an employee may normally be working 30 hours a week, even though their position may only technically be half-time. The WCH&SB pays compensation based on actual hours, and may reimburse the employer for more than the worker can receive.

Stakeholders suggested a different option than any of those proposed by the Review Panel – this would see a legislative amendment requiring the employer to pay the worker no less than the amount provided by the WCH&SB. The Public Service Commission is not opposed to this option, as the technical possibility exists that a worker could receive less from the employer than the employer is receiving from the board for the worker. Prior to any legislative change, the Commission would also like to ensure that this circumstance is not arising, and would welcome information to the contrary so that appropriate action may be taken.

Conclusion: The Public Service Commission supports the stakeholder-recommended option, as outlined above.

Issue #34: Incentive programs (pp. 136-137).

The stakeholders' consensus is that the current reference in the *Act* to "merit rebate" be replaced by "system of incentives". The consensus further stated that legislation should state that the Board decision in this area would be by policy instead of Board order (probably because this would trigger consultation). The consensus eroded as to whether the *Act* should say "may" or "shall".

Conclusion: The Public Service Commission has an interest in ensuring that the legislation provides clear direction, but without putting the WCH&SB into a straitjacket. The Commission concurs that there should be an amendment to replace "merit rebate" with "system of incentives" in s. 57. Further, the

Commission believes that this should be policy rather than by Board order. Finally, the Commission would prefer that the Board retain some discretion in this area, given the changing nature of the workforce and employer history, so would prefer to continue the use of the term “may” rather than “shall”. This would avoid being too prescriptive in the future.

Issues #44 & #45: definition of disability (including chronic pain and chronic stress) and disability vs. impairment (pp. 152-159).

The panel's discussion paper, the research paper produced by the WCH&SB¹³, and various earlier submissions have raised some thought-provoking points about the definition of "disability" within the workers' compensation system. There is no doubt that as the nature of the economy has changed over time, so too has the type and nature of injuries arising in and out of employment. As the economy has changed, so too has society and for some disabilities, it is increasingly difficult to precisely isolate the cause of the disability – work, home, society, or some combination thereof.

As the WCH&SB stated in its submission to the panel (July 2003): "A requirement for a linear causal link between the work and the injury is embedded in the general design of workers' compensation systems in Canada. Chronic disabilities -- which tend to be non-linear in terms of causality (i.e., they have multiple causes, complex interactions and long latency periods) -- do not readily fit the workers' compensation mould since it is often difficult to attribute disability to work-related factors."

Some commentators (such as Terence Ison and Dr. Morley Gunderson) have speculated that because of the difficulty in isolating the cause of certain disabilities with psycho-social elements,¹⁴ it may be preferable to reduce the compensation paid for these disabilities and at the same time forego the need to prove that the workplace is not the primary cause of these disabilities. As the panel's paper notes, others have recommended different approaches, such as BC.

As stated at the beginning of this submission, the Commission has a vested interest in the sustainability of the workers' compensation system, as well as a system that provides effective and timely support when employees suffer a work-related disability. In its definition of disability, and related terms, the current legislation provides some flexibility. It allows the board to determine the "work-related incapacity" through policy, following public consultation.

Conclusion: Like the other stakeholders in their verbal presentation, the Commission is satisfied that the current legislation requires no change in this area. However, the Commission would urge the Board to continually monitor its policies in this area, to ensure that normal work relations are not impaired, and that appropriate interpretations are given to the causal relationships for certain disabilities. Developments in other jurisdictions should be reviewed on an ongoing basis, to determine if there are lessons that can be learned and appropriately applied within the smaller Yukon context.

¹³ Vector Research, *Yukon Workers' Compensation Act* section 105(1) Research Series, *Expansion of the Meaning of Disability*, March 2003, http://www.wcb.yk.ca/fileadmin/user_upload/PDF_files/reports_and_publications/research_backgrounders/disability.pdf.

¹⁴ Those most commonly cited are chronic stress, chronic pain, and may include multiple chemical sensitivity.

Closing

In closing, the Public Service Commission wishes to thank the *Workers' Compensation Act* Review Panel for the opportunity to provide input into some of the 88 issues compiled and analyzed by the panel. The Commission is mindful that although it may be the Yukon's largest single employer, it is but one voice among many of the two stakeholder groups. The positions put forward in this document are intended to support the role of the Commission as employer, respecting the divergent needs and approaches of other interested parties and stakeholder members.

The Commission looks forward to the final report of the panel and its recommendations for legislative change.