

# **Workers' Compensation Act Review**

Discussion Paper

2003-04



## Message from the Chair

On behalf of the panel, I am pleased to present this discussion paper regarding the Yukon Workers' Compensation Act. The production of this document completes Phase 1 of the review. We look forward to pursuing our goal of ensuring that the Workers' Compensation Act serves the needs of all Yukoners to the greatest extent possible.

This paper was created with the participation of key stakeholders and other interested parties. Information was gathered over numerous steps. First, issues mandated for review and issues of concern known to the panel were compiled. Stakeholders and other interested parties were invited to review these issues and to provide additional issues of concerns. The panel received 15 submissions that identified more than 100 issues. All issues brought forward, which were within the scope of the review and in accordance with the principles of workers' compensation, were then communicated back to stakeholders and other interested parties for their comments. Eleven responses and hundreds of comments were received; including an issue by issue examination by the Yukon Workers' Compensation Health and Safety Board. This discussion paper includes a compilation of the issues brought forward for consideration and comments on those issues.

Extensive steps were taken to ensure that all stakeholders and Yukoners were aware of the review. Letters were sent to all people who received Yukon Workers' Compensation benefits during the last year and to all employers who were registered with the Board. Information packages were sent out to stakeholders and other interested parties. Yukon First Nations were invited to participate in the review. Additionally a communications campaign was undertaken which included newspaper and radio advertisements, press releases and media interviews and the creation of a Web site. Panel members also personally invited the participation of several stakeholders and interested parties.

The panel looks forward to the next phase of the review, that being the creation of recommendations to address issues of concern. The principles behind the workers' compensation system, trends in provincial and territorial workers' compensation and recent court decisions will be carefully considered. Additionally, changes that will impact the fund must be carefully examined. This is especially important in light of the release of the Board's recent financial statement.

In light of the very short time frame given for the review, which was a concern to most stakeholders, we would appreciate receiving your comments and direction as soon as possible.

Patrick Rouble



Chair, Workers' Compensation Act Review Panel

## **Discussion Paper**

The following document is a compilation of the 88 issues and several hundred comments brought forward to the review panel. Issue specific comments have been extracted from submissions and organized under common headings. Additionally the originator of the issue and their original comments are provided. Full reproductions of the original submissions are included in the appendix. Reproductions of submissions received during the call for issues were produced in the “List of Issues Brought Forward” document.

The panel has taken extensive steps to ensure all comments were included and presented in the appropriate area. We sincerely apologize for any errors or omissions.

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- Whitehorse Chamber of Commerce
- Workers' Compensation Appeal Tribunal
- Yukon Chamber of Commerce
- Yukon Contractors Association: President's submission
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- Yukon Federation of Labour
- Yukon Injured Workers' Alliance
- Yukon Workers' Compensation Health and Safety Board

# 1, Process to lodge administrative complaints

One of the objects of the Act is to ensure that workers, dependants of deceased workers and employers are treated with compassion, respect and fairness.

## Comments Received

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association: Item should be included in the review.

Ian Robertson: ...there should be a process to lodge administrative complains (sec. 1.1h, 92.1a) and the process should indicate who can mediate such disputes. There should also be a deadline for action as this could also be a significant time waster. I do not think this needs to be in the Act or Regulations but should be part of a normal “customer-service” policy...

Joseph Radwanski: Currently there is no process in place to lodge a complaint against the Administration of the Compensation Board. I have heard countless complaints from injured workers that they have suffered the high handedness of certain individuals...Perhaps a review committee could be set up through PSC...

Yukon Injured Workers Alliance: The difficulties we have here is not lodging a complaint but having it dealt with properly by an independent body.

WCHSB: When the 1999 Task Force Review recommended the inclusion of these provisions in the Objects of the Act, they noted the difficulty of trying to set standards for service through legislation. If one of the parties named in this section believes they have not been treated in this fashion as a result of a decision, they may appeal that decision under this Act. There are also non-legislated opportunities, such as laying a complaint with the Board.

A review of other jurisdictions' legislation reveals that no one else includes this particular phrase in their direct legislation. And in no case are there explicit provisions for lodging administrative complaints.

Setting a precedent in this area may result in unexpected financial impacts. There are other non-legislative solutions that may be sought to any problems arising in this area.

## Issue Brought Forward By

Robbie King: Process for lodge complaint of poor treatment by WCB.

# 2, Age limitation of claimants

Currently, compensation ceases at 65 years of age unless a worker is injured after the age of 63 in which case they are entitled to 24 months of benefits for loss of earnings.

## Comments Received

WCHSB: The financial impact of removing or changing the retirement age would be enormous in areas such as rehabilitation/claims costs and administration costs. The injury recovery of a worker as they age is considerably longer thus increasing rehabilitation costs and administration costs. In order to maintain a solvent Fund, compensation benefits cannot be paid indefinitely, there must be an age when benefits stop and annuities are paid.

The Supreme Court accepted the proposition that retirement at 65 is protected under section 1 of the Canadian Charter of Rights and Freedoms. A collateral benefit that comes from retirement at 65 should

be protected as another factor establishing reasonable grounds for discrimination. Our Act also replaces wage loss by annuities, which means one benefit is replaced by another benefit. This is not the case of creating a disadvantage to an individual by reason of age, but rather by providing differing kinds of benefits, including benefits other than wage loss, that continue to be paid after age 65. The Board is extremely concerned about the major financial impact that a legislative change in this area would have on the Compensation Fund and administration costs.

**Comments received during call for issues**

Shelly Hobbis: Act 3

**Issue Brought Forward By**

Review Panel

**3, How government consents/accepts responsibility for volunteers**

Volunteers are covered by compensation if they are within set groupings or the Government of Yukon determines them to be volunteers. Currently there is no specific public listing of who is or is not covered as volunteers. A method of how the Government of Yukon consents to volunteers being workers also is not included in the Act.

**Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Chamber of Commerce: Issue that should be withdrawn from the Review process.

Yukon Contractors Association: Item should be excluded from the review.

Ian Robertson: The question of how volunteers are handled needs to be clarified (sec 4.1d). Currently, my understanding is that this only applies to workers in connection with a public emergency...Considering the number of events in the Yukon that rely on volunteer labour and upcoming events like the Canada Winter Games, perhaps this needs to be looked at.

WCHSB: Section 4.1(2) is the section that spells out it is Cabinet who can prescribe who would be designated as workers through an OIC, which is a public document. The construction of this provision is generally congruent with other jurisdictions.

Section 4.1(3) spells out the minimum level of earnings for people designated as workers in this area. Section 91(1) (c) spells out how the Yukon Government will pay for these claims, which is cost plus an administration fee of 15%.

**Issue Brought Forward By**

Review Panel

**4, Termination of benefits**

Currently the board may suspend or reduce compensation payable to or in respect of a worker based on s.7. (1) of the Act.

## Comments Received

Ian Robertson: I support the present wording in section 7(1) regarding termination of benefits. The answer to the issue of benefits during an appeal is to ensure the appeal process occurs in a timely manner. This also seems to be a central concern with respect to limitation periods...In a jurisdiction as small as the Yukon, it should be reasonable to expect claims to be processed in a fairly short period—say 2 weeks with a maximum of 3 months for a complicated case going through the entire appeal process...

WCHSB: Reduction is not always seen to include zero or be permanent. Clarity of legislation would greatly be increased through addition of " *terminate*" to the phrase in section 7.

## Issue Brought Forward By

WCHSB: Clarify that board can terminate compensation, not just suspend or reduce. Clarify language.

## 5, Benefits during appeal period

The board is a third party independent decision-maker. Making decisions based on the facts and legislation and not bias to either the employer or worker. Currently, the board makes a decision and implements it. If either the worker or employer objects, they appeal. However, the decision of the board remains in place until it is altered by a hearing body.

## Comments Received

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Injured Workers Alliance: Injured workers should not be penalized further by having their benefits suspended during the appeal process, which may take up to, and more than, a year to complete.

WCHSB: The current legislation is completely consistent with all jurisdictions. It is also consistent with general principles in the justice system where a decision stands until overturned or changes (for example, license suspensions). This kind of change would fundamentally alter the current authority of an adjudicator to make decisions.

To change the current system would provide a significant incentive to appeal every decision, even if the original decision is patently reasonable and not likely to be changed by an appeal body. It would also remove any incentive for quick and efficient resolution of appeals and claims and could lead to consequences such as increased delays in bringing closure to outstanding issues. The impact on those claimants who may have legitimate reasons for appeal could be a reduction in service and attention to their issues due to pressures on the overall appeal system.

There would be an increase in administrative costs - for the board and the worker advocate and the appeal tribunal - due to the likely increases in appeals. There would be an increase in administration costs in efforts to recover benefits that may not have been upheld.

There would be an impact on the fund and the number of appeals, and an impact on employers of a worker chooses not to return to work as they collect benefits while waiting for an appeal decision. In addition, the WCHSB is extremely concerned about the impact on the injured worker, as this may serve as a deterrent to the worker's recovery.

## Issue Brought Forward By

The Workers Task Force: Continuation of benefits during appeal period.



## **6, Board's notice to employer of a claim for compensation**

The Act is currently silent on this issue.

Workers are required to notify the board and the employer of an injury.

Employers are required to notify the board if they have knowledge of an injury.

Doctors/hospitals are required to notify the board if they have knowledge of a workplace injury.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Joseph Radwanski: Employers must be compelled to file accident reports...

WCHSB: It is currently WCHSB practice to provide notice to employers automatically. Not only do employers get a copy of the acknowledgement letter sent on receipt of an injured worker's or medical report, they also get a copy of the decision letter.

This would appear to be an internal administrative issue for very large employers. There are non-legislative solutions.

### **Issue Brought Forward By**

PSC: Claims management should require immediate notification to employer of an employee claim.

## **7, Recourse to review Workers' Advocate decisions under Section 11.1 (3)**

Currently, there is no right of review of the Workers' Advocate's decision.

### **Comments Received**

Joseph Radwanski: ...Workers Advocate telling injured workers that he won't be able to represent them for at least a year. To an injured worker...this is unacceptable.

WCHSB: The fact that the Worker Advocate decides not to assist a worker in no way affects the worker's general right to appeal. Additionally, there is potential recourse to the Ombudsman; this would appear to be consistent with general principles of public sector administration.

### **Issue brought forward by:**

Review Panel

## **8, Annual reporting of the Workers' Advocate**

The Auditor General identified the annual reporting of the Workers' Advocate as an issue.

### **Comments Received**

Joseph Radwanski: I agree with the Auditor General's recommendations. Not only should this be done, but accountability for man hours spend on interviewing injured workers, time spent on appeal files, appeals, court proceedings, and dredging up old files should be addressed.

WCHSB: The Yukon is currently one of the eight jurisdictions to have this position enshrined in legislation, and one of two jurisdictions that address reporting requirements in legislation.

In the 2002 Special Examination, the Auditor General recommended strengthened performance reporting in determining effectiveness and efficiency of operations for the workers' advocate office.

Section 105(1) of the Workers' Compensation Act states that the review of the Act "...shall consider...(g) the role and effectiveness of the workers' advocate...".

The position and the budget are outside the control of the Board. It is noted that legislative funding obligations reduces the Board's ability to control costs. Any expansion of the role will have a financial impact on the compensation fund and administration costs.

### **Issue Brought Forward by:**

Auditor General

## **9, Limitation periods**

Workers must make a claim for compensation within 12 months of the date the disability (workplace incapacity) arose. There is no specified time frame in which to appeal written decisions.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Contractor's Association: We feel [this] item should be included into the new Act. The lack of time limits lengthens the finalization of claims and increases the cost of the claim.

Whitehorse Chamber of Commerce: The lack of time limits for appeals to the Hearing officer, Appeal Tribunal and the review of Appeal decisions has caused an unduly length of time to finalize claims and claims costs...The compensations system is based on current employers funding the present and future liabilities of the injured worker. In order to prevent future employers being charged with the benefits liabilities of past claims, a time limit for appeals must be introduced...One of the ways to reduce [appeals] costs is to introduce a cap between the length of time a worker is injured to the time that he/she is able to make a claim. We suggest a cap of 3 years.

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

Yukon Injured Workers Alliance: Section 9.(2) should have more clarification as to the allowance of a late claim.

WCHSB: There are currently no time limitations in Yukon for filing reviews or appeals for claims for compensation under the WCA. In her September, 2002 report, the Auditor General of Canada recommended "the Minister may wish to consider proposing a legislative amendment that would limit the period of time in which reviews and appeals of decisions may be filed, as certain other jurisdictions have done".

Time limits for appeals can be considered to be unfair, particularly when legislation changes and new procedures are put into place regarding appeals. There may be a backlog of issues that need to be heard or long-standing grievances by individual claimants. There are also issues about having to maintain two different appeal processes and bodies depending on when the claim arose or a decision was made.

## **Issue Brought Forward By**

WCHSB: Absence of limitation dates. While there may have been a “backlog” of cases when the new appeal system was first set up in 2000, the system required some certainty. Most jurisdictions have time limits on appeals.

PSC: Employee Appeals. Time limitations on employee appeals should be considered. There should be time limits for accepting employee appeals of claim decisions and clear criteria if any claims are going to be accepted beyond the prescribed time limitation. Should be consistent interpretation of Act based on clear policy and directives for claims management (As noted in Auditor General’s report, 2002.)

## **10, Decisions must be in keeping with the Act & policies**

At times the policy, regulation and the Act are inconsistent with the Act.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Ian Robertson: The admission that at times policy, regulations and the Act are inconsistent is quite disturbing and quite inexcusable...Policy should never be out of sync with the regulations or the Act...Policy should be written in plain language.

Joseph Radwanski: Administration should be better schooled as to the Act and Board Policies.

WCHSB: There appears to be some confusion about the possible conflict between competing policy objectives as an absolute inconsistency. No identification of inconsistencies of the Act with itself are apparent. Regulations and policies must be consistent with the Act, although if it is necessary to put in a statement to that effect there would not likely be major consequences. Although implied by the legislation, it may be helpful to also specify every officer and employee of the Board as being bound by the policies established by the Board, in much the same way as the province of Nova Scotia.

### **Comments received during call for issues**

WCHSB: Review most cost-effective way of dealing with different pieces of legislation and policy. Should we be looking at a different system, to minimize the need to administer different pieces of legislation and policies in their entirety? A strong costs analysis would be needed; there may not be a good model out there; legislation by exception can be just as hard to administer.

Ian Robertson: I find it odd that decisions are being made that are inconsistent with the Act, Regulations and Policies (sec 18.3.2, 18.4.1, 9.5)...

## **Issue Brought Forward By**

Review Panel

## **11, Process of dealing with new evidence**

The decision-making hierarchy at the Workers’ Compensation Board is: adjudicator, Hearing Officer and then Appeal Tribunal. Therefore, once an adjudicator makes a decision only the adjudicator or the Hearing Officer can overturn it, and once the Hearing Officer makes a decision only the Hearing Officer or the Appeal Tribunal can overturn it.

A situation arises when new evidence comes forward (that may alter the original adjudicator's decision) after the issue has been heard by the Hearing Officer or Appeal Tribunal.

### **Comments Received**

Ian Robertson: ...do not understand how an adjudicator can overturn their own or another adjudicator's ruling. This relates both to the questions of new evidence and the use of mediation. In most review processes I am familiar with when a decision is made at one level and a review is requested, the reviewer is usually senior to the person making the first decision.....section 17...is silent on the question of experience.

Workers' Compensation Appeal Tribunal: WCAT supports the legislation as it is. Board submission is unclear. They are suggesting changes to legislation that will allow the adjudicator to overturn a hearing officer or appeal tribunal decision if new evidence is received. In some cases, this will mean that the worker will have to go through the appeal process more than once on the same issue. It will defeat the purpose of the hearing process as it stands and one of the objects of the Act "to provide an appeal procedure that is simple, fair and accessible, with minimal delays."

Yukon Injured Workers Alliance: Any and all new evidence must be presented to the Hearing Officer or the Appeal Tribunal. New evidence must override any time limitations set by the Act.

WCHSB: This is an area that needs to be approached with some care. Situations have arisen in the past wherein a claimant may have substantial new evidence, which would affect their claim. They would like to bring this substantially new evidence to an adjudicator for review of benefits and/or services.

However, in some cases the claimant has appealed to an Appeal Panel or the Appeal Tribunal and a decision has been rendered. There is some question as to whether this new information should, at this point, be dealt with by the adjudicator of the claim, or the Appeal Tribunal.

The adjudicator must be able to deal with substantial and material new evidence even where an Appeal Tribunal or an Appeal Panel has made a prior decision on the claim. The appeals process should not become a means of undermining the adjudicator's decision-making authority in relation to matters that would normally fall within the scope of his or her duty. The effect is a continual feeding into the adversarial system. A respectful working relationship between the adjudicator/counselor and the claimant is crucial and must be maintained.

At the same time, caution has to be exercised in dealing with this, to avoid creating undue delays in resolving a claim due to the ongoing introduction of new evidence, which may be minor in nature. This is particularly relevant as each decision by an adjudicator could potentially go to appeal. There is also a link between this issue and the proposed time limits for appeals.

The clarity of the legislation would be greatly increased should this one aspect of this area be remedied.

### **Comments received during call for issues**

WCHSB: New evidence. Clarify that new evidence that may affect prior decisions of a hearing officer or appeal tribunal should be dealt with by an adjudicator.

### **Issue Brought Forward By**

Review Panel

## **12, Mediation as an effective method of primary dispute resolution**

The appeal system is the formal and legalistic method to address disagreements with claims for compensation.

## **Comments Received**

WCHSB: In claims, alternative dispute resolution may be a helpful feature when focussed on areas such as return to work or obligation to re-employ; having this as an option may be a useful approach in some cases, and stakeholder participation may facilitate joint resolution.

Expansion into other areas must be made in consideration of service implications and case management to ensure timelines for resolution are not increased due to the increased number of resolution processes.

There are also significant concerns about financial and service impacts if mediation is mandatory in the claims and rehabilitation process.

In assessments, this process could be seen to be less adversarial for an employer dealing with an assessment dispute. Criteria regarding its application would require addressing to ensure small dollar value appeals, new evidence, etc. are taken in account in ensuring a viable process.

The Board currently prefers to use a collaborative approach to resolving disputes.

There will be financial impacts if there is a formal reference in legislation to some of the current informal practices.

A carefully-crafted legislative provision may help alert stakeholders that this service is available.

## **Comments received during call for issues**

WCHSB: Alternative Dispute Resolution. Currently there is no provision for alternative dispute resolution. This may be a useful tool to resolve issues or complaints at an early stage.

Ian Robertson: I agree that the option for mediation should be available (sec 11, 17, 18.)

## **Issue Brought Forward By**

Review Panel

## **13, Administration standing at hearings**

Currently a worker, a dependant of a deceased worker, or the worker's employer may appeal a decision made under section 17 to the appeal tribunal.

The Act identifies that only workers or their dependents and employers are parties to hearings.

## **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Ian Robertson: ...it is only fair and reasonable to allow the worker and employer to each appoint someone as their representative...larger issue is whether the Board should pay for such representation...the Board could consider allowing any party with administrative standing the right to a consultation and have a list of specialists and fixed fee rate.

Joseph Radwanski: The Board has no place at Appeal hearings...The Compensation system was set up as a non-confrontational system. This principal will be destroyed if every injured worker is subjected to cross examination by the Board lawyer...costs will skyrocket.

Workers' Compensation Appeal Tribunal: WCAT supports the legislation as it is. In our view it is not appropriate for a decision-maker to have standing at tribunal hearings. This will allow board counsel to participate at hearings and has the potential to turn the hearing procedure into an adversarial process rather than an inquiry-based process.

Yukon Injured Workers Alliance: The Act as it now reads should remain in place. If the administration wants standing at a hearing, the IW should have access to legal representation.

WCHSB: Up to now, the majority of applications have been brought by workers or the Workers' Advocate on behalf of a worker. The Appeal Tribunal has not had the participation of representatives of the WCHSB to explain the record. There was one instance where the WCHSB was requested to appear to discuss jurisdiction.

In certain circumstances, the case under review goes back many years when decision-writing was minimal, and reasons for a decision were not fully explained. At times, the issues are complex and may not always be readily apparent. The assistance of the WCHSB in explaining the record may assist the Tribunal in its inquiry process. If mandatory, there will be implications for resources. If appearance is at the discretion of the Board, these impacts can be mitigated.

It is critical that the legislation be amended to give the administration standing at appeal hearings.

### **Comments received during call for issues**

WCHSB: Standing of WCHSB at Appeal Tribunal. Right now the board is not a party and cannot make a submission. This is particularly problematic when reviewing cases that go back many years when decision-writing standards were different, but it may also cause additional problems in the future.

### **Issue Brought Forward By**

Review Panel

## **14, Process for release of claims information**

Intended to ensure all and only the information relevant to an issue of appeal is released.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Ian Robertson: ...the Act requires release of "all" information yet I know for a fact that all information is not released (e.g. legal opinions)...only get to see all the information at the appeal stage when I should be able to review the file at any time.

Yukon Injured Workers Alliance: The more individuals requesting presence at a hearing, the more the confidentiality agreement of an IW's claim is broken.

WCHSB: Currently access to claim files, for the appeal process is different for the worker and the employer. The worker is entitled to examine and copy all file information. The employer receives all information the board feels is relevant to an issue under appeal, upon the approval of the worker. The worker can appeal the release of information to the President.

Determining what is relevant to the appeal can be time consuming, especially when reviewing volumes of files. The Board feels that any further restriction on access to files could consume considerably more time and impact on the level of service provided. There are models in other jurisdictions that are simpler and worth exploring.

### **Issue Brought Forward By**

Review Panel

## 15, “Documents in respect of their claim” access to claim file

Currently the Act calls for the release to a worker, or the dependant of a deceased worker all information in the possession of the board in respect of their claim.

### Comments Received

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: The worker is entitled to examine and copy all file information. The Board releases this information in accordance with the *Workers' Compensation Act* and the principles of the *Access to Information and Protection of Privacy Act*.

The issue of evidence gathered in the course of an investigation, and the placement of the same on a claimant's file, is very important to the claimant and the system. Issues around videotape evidence are being addressed through administrative solutions. There are strong linkages between this issue and the question of fraud investigation, not only related to claimants. Increasing complexity in this area can have an impact on administrative costs.

### Issue Brought Forward By

The Workers Task Force: Disclosure of all information held by the Board and its contractors including audio and video surveillance.

## 16, Implementation of the decision of the appeal tribunal timeframe

After the Hearing Officer or Appeal Tribunal renders its decision the board has 30 calendar days to implement the decision or have an implementation plan in place.

### Comments Received

Yukon Injured Workers Alliance: We see nothing to prevent the board from implementing the decision of the Hearing Officer or the Tribunal within 30 days...Why the board would want to cause further stress and hardships to a person innocently injured on the job, and has a family to feed and bills to pay, is beyond being reasonable.

WCHSB: Due to the relatively small size of the Yukon administration compared with other jurisdictions, a thirty-day time frame for implementation of decisions is often extremely difficult, and even an implementation plan can be difficult, depending on the complexity of the worker's claim. While adjusting this time frame, or allowing for some discretion in this regard, may have some impact on the particular individual, there can also be larger service implications when other workers' files must be set aside in order to remain in compliance with the legislated time period. Where a decision of the Appeal Tribunal is not clear (see also “Board ability to seek clarification of decisions”), further pressure may be added to the situation. Longer, consistent timelines could reduce resource costs and result in better, more comprehensive and more appropriate implementation plans.

The compensation system would be strengthened tremendously by using the same basis for implementation of a decision as for the making of a decision by the Appeal Tribunal, i.e. 45 *working* days.

### Comments received during call for issues

WCHSB: Implementation. The cumulative impact of a number of decisions being released within a short timeframe can stretch the resources of the compensation system to the limit. Tribunal has 45 *working*

days to issue a decision; Hearing Office has 30 *working* days ; Board has 30 *calendar* days to review and to implement or have a plan.

Ian Robertson: ...I note that the Board is uncomfortable responding to an appeal tribunal decision within 30 days (sec. 19). It is my view that standards of performance should be set out as policy or regulation and include time limits for all aspects of service...

### **Issue Brought Forward By**

Review Panel

## **17, Term “adjudicator”**

The Act refers to decisions made by an adjudicator and rights to appeal decisions of adjudicators.

Titles have changed; adjudicators have specialized and are now comprised of disability case managers, auxiliary adjudicator, senior adjudicator, benefit entitlement clerk, etc.

With organizational changes, and in situations of conflict of interest, people other than adjudicators are making decisions and making statements that have the effect of being decisions.

### **Comments Received**

Joseph Radwanski: There should be one person assigned to ensure that the Act and Policies are adhered to and why a decision is being made. To label all people involved as an adjudicator will only water down the process allowing the buck to be passed.

WCHSB: The Board agrees that a broad reference to include all decision-makers is preferable. Policies would require changing to reflect the new terminology. Consideration should be given to assure workers that the people making the decisions have the authority to do so. This change will have no service or cost implications.

### **Comments received during call for issues**

PSC: Should address conflict of interest in managing claims by WCB employees and should have mechanism for using outside adjudicators.

### **Issue Brought Forward By**

Review Panel

## **18, Gender choice for medical consultant**

The Act is currently silent on this issue.

### **Comments Received**

Ian Robertson: ...gender choice for medical consultant does not need to be in the act or legislation. This is a policy matter and it is not an unreasonable request.

WCHSB: In the Yukon, the board may appoint one or more medical consultants to provide advice to the board. The board may also require a worker to have a medical examination. On appeal, the appeal committee is required to consult with the worker and the worker's medical practitioner before appointing



an independent medical practitioner or a panel of independent medical practitioners. This allows some opportunity for the worker to have input on the gender of the independent medical practitioner. The Workers Compensation Health and Safety Board recognizes there may be some sensitivity. However, legislating gender in regard to the medical consultant would have an impact on administrative costs that would need to be quantified. For example, in a small jurisdiction like the Yukon, there may be difficulties in finding a local physician willing to serve - including taking the training - which would require flying someone up or flying someone out. There are non-legislative solutions to any problems which may arise in this area.

### **Issue Brought Forward By**

The Workers Task Force: Gender choice for medical consultant.

## **19, Board ability to seek clarification of decisions**

Currently the board may stay and refer back to the Tribunal decisions, which in their opinion, do not comply with Act, regulations or policies.

### **Comments Received**

Yukon Injured Workers Alliance: The IW should have the same ability as the board to refer decisions back to the deciding body.

WCHSB: From time to time an appeal tribunal decision may require some clarification or interpretation before it can be implemented. In these cases the board needs the ability to send the decision for clarification or interpretation, with a corresponding ability to suspend the timeframes while clarification is obtained. It is not expected this will arise often but it has been an issue in the past.

The compensation system would be strengthened by amending the legislation to allow the Board to seek clarification or interpretation of a Tribunal decision, and where necessary, allow for the implementation deadlines to be extended pending the clarification.

### **Issue Brought Forward By**

WCHSB: Board ability to seek clarification of decisions. From time to time an appeal tribunal decision may require some clarification or interpretation before it can be implemented. In these cases the Board needs the ability to send the decision for clarification or interpretation, with a corresponding ability to suspend the timeframes while clarification is obtained.

## **20, Jurisdiction of Appeal Tribunal**

Currently the Appeal Tribunal hears claim issues under s. 7(1), 17.(1) and 19(4)  
Currently an appeal panel of the Board of Directors hears assessment and OH&S appeals.  
Currently any and all adjudicators' decisions are appealable.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Contractor's Association (Stakeholders Representative): We feel [this] item should be included into the new Act. Currently injured workers can appeal all adjudicator's decisions through a process independent of the Board., while employers can only appeal to a panel of the Board of Directors. In all fairness employers should be allowed to appeal decisions to an independent body also.

Whitehorse Chamber of Commerce: ...there needs to be a balance created so that employers also have the ability to appeal their decisions to an independent appeal tribunal...There needs to be a balance struck to ensure that certain decisions of a minor nature/costs are no longer able to be appealed.

Ian Robertson: It is...inconsistent in that employers must appeal decision to the Board and not an independent body. It does not make sense to have all matters appealable given the cost and amount of time involved. Perhaps for relatively trivial and low cost items there should only be one level of appeal available or the option for mediation. Another option might be to create a standard appeal letter form...with the submission reviewed by a member of the appeal tribunal.

Workers' Compensation Appeal Tribunal: WCAT has no position on this. However, concern has been expressed that legislative changes which includes the hearing of assessment and OH&S appeals by appeal tribunal members would impact not only on the workload of part-time members, but also carries financial implications of increasing honoraria costs.

WCHSB: The potential expansion of the Tribunal's current jurisdiction to include matters other than claims for compensation raises a number of issues. Unlike many of the much larger jurisdictions, the addition of one, or potentially two, new complex areas may prove extremely taxing for the Yukon's relatively small, volunteer Tribunal who do not have day-to-day contact with such matters. While the Occupational Health and Safety Act currently allows the WCHSB standing on appeals, the issue relating to the standing of the WCHSB with regard to assessments (see discussion under issue # 13) would be relevant.

Then there is the issue of determining the relative priority of appeals, and the difficulty of giving weight to, for example, a worker who has lost her only source of income versus an employer whose workplace has been shut down.

There is also the question of administrative costs. In her September, 2002 report, the Auditor General of Canada noted that while the addition of the Appeals Tribunal and the Workers' Advocate strengthened the system, appeals remain inherently costly. So therefore, any proposed legislation in this area would need to be analyzed in view of the impact on administration and other cost drivers.

One of the main reasons for the Appeal Tribunal was to ensure there was no conflict between claims decisions and the fiduciary obligation of the Board. Allowing an independent body to make final decisions on assessment rates would fundamentally alter the Board's fiduciary responsibilities to the Compensation Fund. Recognition must be given to the major financial impacts that an expansion of the Appeal Tribunal's jurisdiction would cause.

The Board is extremely concerned about the impact on service and the major financial impact that an expansion of the Appeal Tribunal's jurisdiction would have on the Compensation Fund, including the impact.

### **Issue Brought Forward By**

Yukon Chamber of Commerce: Limitation on what aspects of the board decisions can be appealed to the Appeal Tribunal. This would allow the board to deal with general issues on a timelier basis and with more finality to them.

## **21, Application to Supreme Court**

Issues include:

- Parties able to initiate an application to Supreme Court.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Contractor's Association: We feel [this] issue should be excluded from the list of options open to consideration under the Act review.

Yukon Chamber of Commerce: Issue that should be withdrawn from the Review process.

Yukon Contractors Association (President): Item should be excluded from the review.

Ian Robertson: I do not support expanding the right of others to make application to the Supreme Court (section 18.5.1). As set-up under the Meredith principles, the Board and the Appeal Tribunal are both representatives of the interests involved.

Yukon Injured Workers Alliance: IW's should have the ability to make application to the Supreme Court for a determination of whether a policy established by the board is consistent with the WCB Act. It is Constitutionally unfair to not let the IW have this ability, and as a result, a challenge could be launched under the Constitutional Rights.

WCHSB: There is one possible area of deficiency in our present legislation. The Appeal Tribunal or the YWCHSB should have the right to determine if the Tribunal's decision is not only consistent with policy, but with the Act itself. Section 18.3 states that the Appeal Committee is bound by the Act, the regulations and all policies of the Board.

At the same time, the WCHSB is concerned that expanding the parties who can initiate an application will undermine the compensation system and the fund. A key part of the original Meredith report to set up the system was to limit court intervention. Expansion of the number of parties who can initiate application can potentially greatly increase administrative costs or reduce service in other areas.

### **Issue Brought Forward By**

Workers Task Force: Add Worker Advocate to Section 18.5(1) [Application to Supreme Court]

## **22, Return to work and obligation to re-employ**

The Act is currently silent on this issue.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Ian Robertson: It is not practical to legislate that an employer is obligated to re-employ an injured worker (issue 22). While this may not be an unreasonable burden on a large employer or government, it is unreasonable for a small business. Existing human rights legislation already requires employers to make a reasonable effort to accommodate a disabled employee but there are any number of situations where a disabled worker would not reasonably be accommodated...because of the nature of the work...there can also be situations where the return of the injured worker would be detrimental to the health and safety of others.

WCHSB: Currently, the Act does not obligate employers to re-employ their injured workers. The Act does establish factors for the Board to pay the cost of rehabilitation assistance, so the injured workers can return to employability.

A legislated obligation for employers to re-employ injured workers is seen as beneficial to the workers and employers. Providing a job for the worker to return to reduces the claim duration by providing timely rehabilitation and a return-to-work incentive.

However, applying a blanket re-employment clause could create hardship for the smaller and seasonal employer. This could be overcome by stating that re-employment obligations will apply only to the larger employers, as is done in other jurisdictions. Other jurisdictions also include provisions for exclusion through regulations for employers in seasonal businesses, such as construction. There are also models for length of service for employees to be eligible for reemployment.

This would require additional resources to monitor and enforce. Standards on what would constitute "undue hardship", would likely be required. Potential benefits to workers and employers may outweigh the increased cost.

### **Issue Brought Forward By**

The Workers Task Force: Obligation to re-employ

WCHSB: Obligation to re-employ. Right now there is no obligation to re-employ, even for large employers. This can leave issues around "accommodation" and "undue hardship:" up to the Human Rights Commission process (much longer than compensation). Other jurisdictions include a version of this and have time periods built in. (There will be questions around how to deal with seasonal industries, balanced with the length of continuous employment, enforcement and monitoring, and the size of business.)

## **23, Commuting of benefit payments**

The current Act does not allow commuting of benefits.

Currently there are instances where injured workers are requesting that their loss of earnings, benefits, annuities and pensions be commuted to a lump sum payment, in lieu of receiving monthly payments.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Chamber of Commerce: Priority review issue.

WCHSB: The Yukon had some provision for lump sum payments in prior years' legislation. Experience with that provision shows that the impact on the Compensation Fund goes beyond simply taking amounts already set aside in the claims liability reserve and paying it directly. There can be *significant* financial impacts of liquidating assets from the market and withdrawing the cash, particularly if the market is in a downturn. The Yukon's Fund is particularly vulnerable to the impacts of large and unplanned cash withdrawals of lump sum payments, due to our small size.

If this provision were to be reinstated, all actuarial assumptions would need to be reviewed and the benefits liability reserve would need to increase, as the assumptions are based on regular payments made periodically and averaged over a larger client base.

There are also major financial and service implications in terms of reduction in vocational rehabilitation participation and effectiveness, the relationship to deeming, the inability to regularly review the claim in light of new medical technologies or advances and possible return to work. There are also questions of what happens if there are new injuries if the claimant did take a lump sum and subsequently returned to work.

The Board is extremely concerned about this proposal and subsequent impacts on the injured worker, stakeholders, and the overall compensation system. This proposal would have major financial impacts on the Compensation Fund and administrative costs.

### **Issue Brought Forward By**

Robbie King: Ability to payout as full and final.

Yukon Chamber of Commerce: Should the board be allowed to commute an injured worker's pension or a dependant's benefits? Currently there are instances when injured workers are requesting that their pension or other benefits be commuted, in lieu of receiving monthly pensions.

## **24, Award for pain and suffering**

Currently the Act does not provide for payment for pain and suffering.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Contractor's Association: We feel [this] issue should be excluded from the list of options open to consideration under the Act review. This would limit the ability of the Board to set policy and would only make the settlement of claims costlier and longer.

Yukon Chamber of Commerce: Issue that should be withdrawn from the Review process.

Yukon Contractors Association (President): Item should be excluded from the review.

WCHSB: "Pain and suffering" damages are formed in the court system, as part of special damages. In a court action, the court may award in this area but would also include factors not currently found as part of the no-fault compensation system. These factors may include finding and apportionment of blame for the incident giving rise to the loss or finding of negligence.

In 1982 the Yukon *Workers' Compensation Act* was amended to provide a lump sum for permanent impairment, separate from loss of earnings. This includes factors such as disfigurement and "non-financial factors".

The dual system wage-loss system includes economic loss through wage loss benefits and non-economic loss through the permanent impairment award.

The Board is concerned about the major financial impact that a legislative change in this area would have on the Compensation Fund and possibly the administration costs.

This issue is also linked to issue #87 Earnings, regarding non-economic losses.

### **Issue Brought Forward By**

The Workers Task Force: Awards for pain and suffering.

## **25, Maximum non economic – loss award**

Currently 100 per cent of non economic loss is \$80,000 in 1992 plus formula in 20.2 (b). ( On June 19, 2003 the amount was \$86,285.84)

### **Comments Received**

Yukon Injured Workers Alliance: Any change to the non-economic loss award must float to ensure the BS created as a result of two WCB Acts beginning and ending, (such as between the 1986 WCB Act, ending December 31, 1992 and the 991 WCB Act beginning January 1, 1993) NEVER OCCURS AGAIN.

WCHSB: Except for Manitoba, the Yukon has the highest non-economic loss award in the country. There are a number of factors for consideration in this area. Attached is table 9 from the AWCBC *Worker's Compensation Benefit Comparison - 2003*, Part VI Permanent Disability Awards.

There would be direct financial impacts on claims costs if the amount is changed and possibly in administration costs if the indexing formula is made more complex. Further financial analysis would be

needed to determine the possible range of impact depending on whether the amount is increased or otherwise.

**Issue Brought Forward By**

The Workers Task Force: Permanent Partial Impairment raise from current level.

Robbie King: Raise PPI to \$120,000 for 100%

**26, Compensation for personal property loss (amount)**

If a person suffers an accident that results in a workplace disability and sustains a loss or destruction of personal property the board may replace the lost or damaged goods up to a maximum amount of \$200. The amount is fixed by board policy.

**Comments Received**

Joseph Radwanski: The current loss of personal property is sadly outdated.

WCHSB: Legislation states that the maximum amount of compensation for loss or damage is set by Board Order. A listing of the items of personal property where the board will provide for the loss or damage, as done in some other jurisdictions, is an option. However, other jurisdictions also leave this to policy to ensure sufficient flexibility. In the Yukon, there are other, non-legislative solutions to any issues that may arise in this area.

**Issue Brought Forward By**

Review Panel

**27, Compensation for loss of personal property (triggers)**

The current trigger for compensation for loss of personal property is “disability”.

**Comments Received**

Joseph Radwanski: Using the term ‘disability’ as a trigger for loss of personal property makes no sense whatsoever.

WCHSB: In the Yukon, compensation of personal property can be paid (to a maximum set by Board Order), if there is some element of wage-loss after the day of injury. This has been subject to some interpretation and clarity would be helpful in ensuring consistency.

At the same time, care will be needed in dealing with this issue in conjunction with #26, to avoid creating some kind of incentive to use the compensation fund for replacing items broken or needed replacement through normal wear and tear. Otherwise there could be major impact on costs, both claims and administrative.

Clarity to the legislation would remove the link between loss of personal property and wage-loss benefits, while ensuring a strong link between loss of personal property and a work-related accident.

**Issue Brought Forward By**

Review Panel

## 28, Pay on day of injury

The Act is silent on this issue.

### Comments Received

Joseph Radwanski: A worker should be compensated from the *moment* he or she becomes injured.

WCHSB: Minimal time is spent administratively on No Time Loss claims, although they currently represent 60 percent of all claims. Changes to day of injury payment would have an impact financially. At this time, claims in which workers seek medical attention and return to work the same day are considered No Time Loss. These would change to Time Loss status, with a corresponding change to payment for day of injury. According to the 2002 Annual Report, there were 542 No Time Loss claims accepted in that year. This number would shift if the current practice were changed.

An additional impact with a change to day of injury payment would be on administrative resources. Adjudicators would be required to follow-up with employers to verify earnings, and to determine whether the employer had already paid the worker for the day of injury, or any portion of that day. This added time would also be required for day of injury payment for all Time Loss claims. These administrative impacts make it clear why no other jurisdiction in Canada pays the worker for the day of injury. In fairness to the worker, and to ensure that he or she is compensated for his or her work on the day of injury, some jurisdictions have made legislated requirements for payment by the employer. Clarity of the legislation would be greatly increased by making it clear that there will be no wage-loss benefits paid for the day of injury. Additionally, the compensation system would be strengthened should the Panel adopt the model used in other jurisdictions of requiring the employer to be responsible for pay on the day of injury.

### Issue Brought Forward By

Review Panel

## 29, Calculation of wage loss benefits

By policy the board calculates pre-accident earnings through two methods. For the first 180 days workers receive 75 per cent of what the worker was making based on hourly, weekly or monthly rate of pay. After 180 days the board recalculates the pre-accident earnings to be based on 75 per cent of the best 12 consecutive months out of the past 24 months.

### Comments Received

Joseph Radwanski: An injured worker should be completely compensated for the amount he or she was earning immediately at the time of the accident, unless further calculation benefits the worker financially. There is presently no consideration given to subsistence lifestyles, Employment Insurance as income, or the loss of quality of life...

WCHSB: In Yukon, there is currently only one rate set in legislation, which is 75% of a worker's weekly loss of earnings from all employment. Although not specified in legislation, 75% of gross earnings are paid. There is no short-term or long-term rate set out in legislation, however, s. 101 states that "average weekly earnings" shall be calculated based upon such sources of earnings and *over such period of time* as the board considers fair and just [emphasis added].

In Yukon there is a fairly high degree of seasonal employment. Section 22 deals with *weekly* earnings, which may exceed average *annual* earnings for seasonal workers, while section 23(b) (which is used as the basis for the policy on "deeming") focuses on *average weekly* earnings with no reference to annual

averages. If the two clauses are read together, a worker who is unable to return to his or her prior occupation could potentially be paid compensation benefits at a level substantially exceeding his or her original *annual* earnings. However, as noted above, section 101, definition of “average weekly earnings” allows the Board the discretion to make calculations over such period of time that it considers fair and just. As this is the case, there is no requirement that the purpose and timeframe established for section 22 mirror the purpose and timeframe established for section 23.

Many jurisdictions have a short-term and long-term disability rate, to accommodate seasonal workers and to ensure that workers are not paid more when suffering a work-related disability than they would have earned while working. Some do this through policy and others through legislation.

If any legislative changes are made, it is suggested that consideration be given to using a model from another jurisdiction rather than setting a new model, due to the potentially high cost and service impacts of using an unknown model on this issue.

### **Comments received during call for issues**

Robbie King: Calculation of pre-accident earnings (immediately before).

Shirley LaRoy: I would like to see the Act changed so that those higher income injured workers would see their compensation adjusted upwards annually as the maximum compensation amount is adjusted until the maximum compensation reached their indexed pre-injury income.

Shelly Hobbis: Act 22. Act 23

### **Issue Brought Forward By**

Review Panel

## **30, Vocational rehabilitation benefits are established and provided based on calculation of wage loss benefits**

There are two methods of calculating rate of compensation s. 22 and 23 (see Issue 29). Questions have been raised about which rate should be used when workers are re-training after a workplace disability.

### **Comments Received**

Joseph Radwanski: An injured worker should be completely compensated for the amount he or she was earning immediately at the time of the accident, unless further calculation benefits the worker financially. There is presently no consideration given to subsistence lifestyles, Employment Insurance as income, or the loss of quality of life...

WCHSB: The Objects of the Worker’s Compensation Act include providing disabled workers with rehabilitation to assist them to overcome the effects of work-related disabilities as much as possible. Section 30 of the Act fleshes out this requirement, while section 44 provides that the board maintains a single contingency reserve for such purpose.

The current legislation does not contemplate the paying of different levels of wage loss benefits based on the services one receives, nor could a similar provision be found elsewhere in Canada. A decision to pay short term wage loss benefits while a worker is retraining after a workplace injury could potentially have significant impacts financially, as well as on service provision.

In some cases, workers receive less for loss of earnings under the short-term rate than under the long-term rate. These workers would be negatively impacted financially by an extended payment of the short-term benefit rate while retraining.

In other cases, individuals may receive a financial advantage where there is a prolonged payment of the short-term benefit rate. It is possible that this advantage may then act as a motivational disincentive to



return to work, thereby also extending the duration of the vocational rehabilitation plan. Depending on the number of workers being paid at the short-term rate, and the difference between the worker's wage loss benefits under the short-term as opposed to the long-term rate, the result could be a considerable impact to the fund. Generally speaking, the short-term rate is greater than the long-term rate in seasonal occupations.

The Board is concerned about the impact on the injured worker, the impact on service, and the major financial impact that a legislative change in this area would have on the Compensation Fund.

### **Comments received during call for**

Shelly Hobbis: Act 22. Act 23. Act 30.

### **Issue Brought Forward By**

Review Panel

## **31, The use of deeming**

The standard used by the board to determine estimation of earning capacity.

### **Comments Received**

Joseph Radwanski: Too often deeming has been an easy out for the adjudicator in resolving claims. I equate this practice as being all powerful, as in: "I deem you to be fully recovered, now go back to work". It is not a fair solution.

Yukon Injured Workers Alliance: The board currently uses the practice of deeming an IW at somewhere near the minimum wage level without determining which sort of a job the person is capable of performing, and what that job actually pays.

WCHSB: Deeming is a necessary feature of any wage loss compensation system. Deeming usually occurs only after maximum medical improvement has been reached and an assessment of employability is appropriate. Its practice requires not only that the effects of permanent impairment be estimated but also that the current and future labour market implications of that impairment be evaluated. As a result, it is dependent on interpretations of suitability and availability of employment and the capacity of the disabled worker.

The Board agrees that deeming can be a difficult issue. Having said this, deeming is used as a last resort, after attempts to rehabilitate and return to employability have failed. Any constraints within the legislation will remove the flexibility of approaching this on an individual - by - individual basis.

### **Comments received during call for issues**

Robbie King: Wage increases for learners and apprentices who become injured, raises should continue as if in trade.

Shelly Hobbis: Act 22. Act 23. Act 30.

### **Issue Brought Forward By**

Act requirement

## **32, Reimbursement of compensation payments to the employer and other insurers**

This issue includes:

- Criteria for when section is used (may vs. shall);
- Act limits payments to employers only;
- Relationship between compensation payment to the employer and compensation payment to the worker.

### **Comments Received**

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

WCHSB: Outside of a provision of payments to employer, the current Yukon legislation does not address relationships between other service providers (except vehicles re: Limitation on Legal Rights - Vehicles Summary).

#### **Employer-Board Relationship**

With regards the issue of reimbursement of compensation to the employer, the use of "may" appears to allow the worker to make a selection between having the employer continue salary/benefits, or having the WCHSB pay compensation directly.

Sometimes there are real issues with the employer paying, as they may pay based on an 8-hour day rather than the pattern of employment at the time of injury. There are also issues where the Board may reimburse an employer and yet the employer requires a worker to use sick leave benefits and pockets the compensation. The worker thus ends up using a personal benefit for a work-related injury. At the same time, a direct employee-employer relationship is maintained through this election.

If employees elect to remain on the employer's payroll, clarification ensuring that employment-related credits are not used should be considered. There may be broader impacts for changing this that may not have been considered and require further analysis.

#### **Other Insurers-Board Relationship**

Addressing the relationship between the Board and other insurers would assist in service improvements to injured workers.

It is noted that there is no obligation in the Act for repayment on amounts paid out by another insurer.

Privacy issues would have to be addressed.

In addition, there may be a desire to have the legislation provide the same kind of interplay for other private insurers as currently set out for vehicle insurance, to increase the efficiency of providing benefits to workers.

### **Issue Brought Forward By**

The Workers Task Force: Ensure workers receive greater than or equal to any amount paid to employer under s25 agreement.

WCHSB: Relationship between board and other insurers. See if there is a way to clarify the relationship between the board and other insurers. This would help expedite resolution where a claim may be non-work-related but a decision by the WCHSB is required before another insurer will pay benefits.

Yukon Chamber of Commerce: Payments to employers -Section 25 of the Act currently states "If the worker receives earnings in respect of a period of disability, the board may pay to the worker's employer an amount equal to the compensation to which the worker would have otherwise have been entitled."

Recommend the word "may" be replaced by "shall".

### **33, Different minimum compensation levels**

Currently there are different minimum levels of compensation – the volunteers are spelled out in legislation; regular workers are spelled out by Board order; and minimum level optional coverage is set by policy.

#### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: For clarity it may help if the legislation set only the different methods for setting a minimum and the different levels. The degree of consistency for these three categories will depend on the policy objectives.

#### **Workers**

Workers are assessed compensation based on earnings up to the maximum wage amount. They are paid compensation based on loss of earnings under policy, CL-35 Loss of Earnings Benefits. Minimum compensation is based on the threshold of \$16K for earnings below that amount; where the rate changes from 75% to 100% of actual earnings.

#### **Optional Coverage**

For optional coverage, the minimum amount established by policy for purchase is \$14K. This was developed based on the premise of minimum wage rationale. Compensation is paid on actual earnings regardless of assessments paid. The minimum amount for purchase assists to off-set minimum compensation costs such as doctor visits. While the loss of earnings for a compensation claim can be minimal to zero for a business operating at or near a loss, coverage still includes indemnification, medical, etc. This is similar to the minimums and provisions for workers.

#### **Volunteers**

Yukon Government pays claim costs plus 15% administration under WCA for those deemed volunteers under section 4. Volunteers including inmates in a work program receive the greater of either their average weekly earnings or one-half of the maximum wage-rate for a compensation claim; inmates cannot receive compensation during incarceration.

#### **Summary**

It is suggested that no changes be made to the legislation which would restrict the Board's ability to set minimum levels of compensation for workers and for optional coverage.

It is suggested that if the minimum levels for volunteers as set in the legislation are reviewed, some consideration be given to increasing the level for students who must participate in work programs in order to graduate.

#### **Issue Brought Forward By**

WCHSB: Minimum compensation levels – should all minimums be the same? Should method for setting be the same? Right now there are different minimum levels of compensation – the volunteers are spelled out in legislation; regular workers are spelled out by Board order; and minimum level optional coverage is set by policy. There may be valid policy purposes for having different minimum rates but this should be considered.

### **34, Minimum compensation**

Currently, if a worker earns less than \$16,000 he/she receives 100 per cent of his/her pre-accident earnings.

## Comments Received

WCHSB: While some of the jurisdictions are silent with regards to minimum compensation, some state a minimum and will pay this minimum or the lesser of actual calculated earnings as defined in their legislation. A couple of exceptions are QB who appear to pay based on minimum wage legislation and BC who will consider setting an amount in inequitable situations. NF eliminated its minimum wage provision. AB, like the Yukon, has a mechanism of considering 100% compensation on earnings under certain conditions.

NB contains a provision relating to injured youth that may be seen as a remedy for those circumstances in which a young worker or student sustains a long-term injury and their earnings at the time of injury does not reflect the increased earnings capacity they would have likely achieved had it not been for the injury. There are other non-legislative solutions for addressing the issue of minimum compensation.

## Issue Brought Forward By

Review Panel

## 35, Annuity

Currently entitlement to annuity ends with the non-work related death of the worker with no payment to the estate.

Currently there is no ability to withdraw an annuity prior to death. (See Issue 23)

## Comments Received

Yukon Injured Workers Alliance: The IW's annuity should be controlled by the worker, and if the person requests to withdraw his annuity, he should be allowed to do so, at any time.

WCHSB: Actuaries calculate assumptions, including mortality tables. The purpose of the annuity is to provide compensation for a worker past retirement. The existing wording in the Workers' Compensation Act does not suggest that these funds would be paid to anyone other than the worker. Once the worker has the funds, by the payment of an annuity, the matter no longer is an issue. Once the annuity is purchased, the worker can leave it to the estate, or spouse, or children.

If the worker dies prior to the purchase of the annuity, no monies are paid out to the estate.

Policy FN-06 states that all monies that are set aside will be paid out to dependants as a lump sum. "Dependant" is defined under the Act as a member of the family of the worker who was wholly or partially dependent on the worker's earnings for the ordinary necessities of life or who, but for the worker's work-related disability, would have been so dependent.

If the decision in the Act Review is to recommend expanding payments to persons other than a worker, there will be increased costs. This, in turn, raises the issue as to whom should the funds be paid. If the worker dies without a will, who should receive the funds – a spouse or spouses, the family, children, or dependants, or a charity?

This provision provides some recognition of the loss of contributions to the Canada Pension Plan. In this regard, CPP does not provide for payments of a benefit to an estate rather than a spouse.

## Issue Brought Forward By

Cindy Dixon: ...an annuity had been set up in [my father's] name and that he would received the money on such and such a date. There was also a plan number as well as the amount of interest that the annuity had accumulated since it had been set up in his name a few years back. This letter also stated that in the event of his death the money would go to his estate...Awhile later I called back and they had changed there minds, saying the letter should not have been sent out as it was referring to old legislation...

## **36, Claims management**

The Act does not give direction on the claims management process, it is currently regulated in practice and policy.

### **Comments Received**

WCHSB: This is an area that can have a major impact on both claims and administration costs. Without knowing the detail of what is contemplated here, there are issues around flexibility and responsiveness in terms of service. Depending on the level of detail, service will be negatively impacted as new practices are developed which are more effective and efficient.

Changes to legislation are more difficult, more expensive in terms of resources, and take a much longer time than changes to policies or procedures.

There are also difficulties around choice as to which claims management approach should be used, particularly considering that the best approach today may be useless tomorrow. A legislated approach to processes is fraught with peril, unknown pitfalls, and unknown costs such as system impacts, and should not be considered appropriate.

### **Issue Brought Forward By**

PSC: Rehabilitation Services. Joint WCHSB/employer case management model should be mandated, developed and implemented.

Auditor General issue

## **37, Rehabilitation assistance for incidental costs**

The Act is not specific in how this is addressed. It is currently addressed in policy.

### **Comments Received**

WCHSB: The Board feels that if legislation is too specific regarding expenditures made for incidental costs, it would limit any ability to incorporate best practices or changing technology. Accordingly the type and amount is better left up to policy.

### **Issue Brought Forward By**

Robbie King: Guarantee, when away from home because of wcb, receive 30 minutes of phone time and flight either back or family down every 4 week.

## **38, Definition of “initial treatment site”**

Emergency transportation Where a worker suffers a work-related disability, the worker's employer shall immediately provide and pay for emergency transportation for the worker to a hospital, medical practitioner, home, or other place that may be required by the worker's condition.

### **Comments Received**

WCHSB: There will be financial implications if the employers' requirement for emergency transportation is reduced or varied, both in terms of the cost of transportation being transferred to the WCHSB and the resources required for monitoring and ensuring compliance. Questions have been raised about whether this obligation is met by having first aid or medical attendants visit the worksite, although it would appear not to be the intent. There are also possible issues when Yukon-based employers are operating

internationally and the Board may be liable for major medical and travel expenditures. There are a fair number of remote Yukon sites where this requirement may come into play. Consideration could be given to ensuring through legislation Yukon employers operating internationally are responsible for all aspects of transportation and medical care which may be needed outside the country.

## **Issue Brought Forward By**

Review Panel

## **39, The role and use of indexing of benefits**

This was identified as an issue to be reviewed in this Act.

### **Comments Received**

Yukon Injured Workers Alliance: Increases should begin January 1 of every year, not the anniversary date of the person's injury, and the increase should never be less than 2%...

WCHSB: Between January 1, 1983 and May 13, 1990 wage loss benefits paid by the Yukon Workers' Compensation Board were adjusted for cost of living increases using the full amount of the annual percentage change in the consumer price index. In 1990, the YWCHSB began using an approach which is unique in Canada. Cost of living adjustments in the Yukon began to be made using a combination of two distinct concepts: a) lost promotion/advancement opportunities and b) changes in the cost of living as approximated by changes in average wages in Canada and price inflation. The cost of living adjustment approach introduced in 1990 was modified in 1993 with a switch to a Yukon measure for average wages and the removal of price inflation from the adjustment equation.

With one exception, the policy response to the negative impact of price inflation on the purchasing power of disabled workers by workers' compensation authorities across Canada has been the same.

Compensation benefits are indexed to some measure of price inflation such as the consumer price index (CPI). The exception to this is in the Yukon where compensation benefits are indexed according to a pair of factors which do not make direct reference to price inflation.

Chart 2 [in appendix] been assembled in order to allow readers to assess whether the Yukon's current indexing approach has resulted in a reasonably accurate proxy for changes in the cost of living in the Yukon. As can be seen from the chart, annual changes in the Yukon's average wage have been highly variable over the 1993 to 2003 period. The high degree of variability in the Yukon's average wage has contributed to wage loss benefit cost of living adjustments as high as 5.8 percent and as low as 0.0 percent. 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.

In comparison, the two CPI-based approaches to adjusting for increase in the cost of living have been much more stable over the same period. Using the same reference period definition as specified for the calculation of annual changes in the average wage, the annual change in the CPI for Whitehorse during the 1993 to 2003 period ranges from a low of 0.5 percent to a high of 3.3 percent. The annual change in the CPI for Canada exhibited similar stability over the same period ranging from a low of 1.0 percent to a high of 3.2 percent.

If there should be any legislated changes in this area, they need to be carefully costed prior to inclusion. The legislation should be kept as simple as possible, avoid dependence on current statistical series, and recognize the time limitations of certain data sets.

## **Comments received during call for issues**

Shirley LaRoy: I would like to see the Act changed so that those higher income injured workers would see their compensation adjusted upwards annually as the maximum compensation amount is adjusted until the maximum compensation reached their indexed pre-injury income.

Shelly Hobbis: Act 34.

Ian Robertson: While it makes sense to index benefits to the cost of living, it does not make sense to index benefits to potential earnings from assumed promotions etc. This is a very tricky issue with considerable case law. Again, I think we return to the principle that the benefits should allow a disabled person to live with dignity and as much independence as possible without being a burden to their family and community (sec 34.1 )

## **Issue Brought Forward By**

Act requirement

## **40, The adequacy of the system for spouses**

This issue includes the level of monetary remuneration and other assistance to the spouse of seriously injured worker.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: The adequacy of the system of benefits available to spouses in the Yukon can be examined according to two frames of reference. The first frame of reference is relative adequacy and the second is absolute adequacy.

An examination of relative adequacy would require comparing the Yukon's package of benefits with packages available in other jurisdictions. While the information presented in Table 1 (see attached) provides a preliminary assessment of the differences between jurisdictions, a thorough examination will require advanced analysis.

An examination of the absolute adequacy of the Yukon's package of survivor benefits would require comparing the level of support provided by the workers' compensation system against some measure of a "reasonable standard of living" for the Yukon. A key difficulty in making a determination of absolute adequacy will be achieving agreement on what constitutes a reasonable standard of living at a given point in time.

It should perhaps again be pointed out that the Yukon approach is simple, transparent and presumably efficient in terms of administrative costs. It cannot be disputed that an adequate system of benefits is of exceptional importance to those who survive fatally injured workers. However, in a small jurisdiction such as the Yukon where the number of individuals who survive fatally injured workers each year is very small, the costs of administering a complex set of rules could easily outweigh the additional benefits of an approach more finely-tuned to individual circumstances.

The analysis focuses on spouses of deceased workers, as legislation elsewhere is generally silent on services to spouses of injured workers, which would be contrary to the general principles of workers' compensation and moving in the direction of family compensation.

If any legislated changes in this area are considered, they should be carefully costed prior to inclusion, and the principle must be tested against the intent of workers' compensation.

**Comments received during call for issues**

The Workers Task Force: Spousal rights to retraining for seriously injured workers.

Steve Cardiff: Any time a worker is injured to the extent that their disability is, or approached, 100% for a period expected to be greater than two years, the family can experience extreme emotional and financial stress. It would help in situations like this is if the Board would fund career training or upgrading for the uninjured spouse, as well as family counseling, as required.

**Issue Brought Forward By**

Act requirement

**41, Limitation on legal rights as it relates to vehicles**

A worker cannot bring action against another employer or workers of that other employer covered under the Act unless the disability was caused or contributed to by the use of a vehicle.

**Comments Received**

WCHSB: Expanding the possibility of introducing suits beyond these circumstances would not be consistent with the overarching Meredith principles and the historic compromise. Maintaining the broad definition of a vehicle provides the YWCHSB increased access to other insurance plans for the recovery of damages, and is consistent with other jurisdictions. The Board does not pursue action where there is no insurance policy. It is also cognizant of not pursuing an action against an individual employer such that may cause bankruptcy. In the Yukon, there are no limits or prohibitions regarding compensation payment, regardless of whether the workplace injury involved a vehicle and resulted in an action against defendant.

**Issue Brought Forward By**

Review Panel

**42, Division / control of subrogated claims**

Section 42.(2)(c) states that no payment or settlement may be made in respect of the cause of action without the prior approval of the board.

**Comments Received**

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

WCHSB: The main issue is the ability of the Board to be the body that determines whether the board sues and if there is a law suit, for the board to be the final determining body for the settlement. This is not unlike insurance cases where if you have insurance and there is a loss, you are paid out and in return, the insurance company is subrogated to your rights. In other words, the insurance company steps into your shoes with all of the rights that you have at the time of the accident. Given the different models, the Yukon model has been working exceedingly well and to date affected workers have never disagreed with the final settlement or their amount. Any changes in this area may well lengthen the time and process, resulting in longer periods to resolve a claim. It may also increase the cost of legal fees, with little board control over the settlement and a corresponding potential reduction in recoveries for the board.



## **Issue Brought Forward By**

Review Panel

### **43, Compensation Fund within the Yukon Consolidated Revenue Fund**

The Act states an account called the compensation fund shall be established within the Yukon Consolidated Revenue Fund into which all monies received by the board shall be deposited.

#### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: Changes to this section would streamline the Board's financial operations, and would be more consistent with the fundamental Meredith principles of workers' compensation, as noted by the Auditor General. There would be links to the *Financial Administration Act* which would require clarification (discussed in Issue #44).

Comments received during call for issues

Ian Robertson: I would also like to see a discussion of board investment policies and the options available.

## **Issue Brought Forward By**

Review Panel

### **44, Financial Administration Act (FAA) and independence of the board**

A number of parts of the FAA apply to the WCH&SB, including parts that address: Management Board and its role, public accounts, revenues, expenditures, statutory authority, payments, assets and investments, liabilities, enforcement and miscellaneous (including appropriations).

#### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: While some provisions may be relevant, it is not clear how the other FAA provisions are applicable or why they are needed. For example, issues have arisen in the past about Management Board Directives and their applications in light of section 46(5)(c) and (6). This has created significant administrative problems. Some sections could be imported into the Act, if legislative authority or protection is needed. A detailed review to determine which sections could be imported would be required.

It is critical that the legislation be amended to remove any uncertainty in this area.

## **Issue Brought Forward By**

WCHSB: Financial Administration Act (FAA) and independence of the Board. A number of parts of the FAA apply to the WCHSB, including parts that address things like Management Board and its role, public accounts, revenue, expenditures and statutory authority, payments, assets and investments, liabilities, enforcement, and miscellaneous (including appropriations). While some provisions are

applicable or apply, it is not clear how the other FAA provisions are applicable or why they are needed. Some sections could simply be imported into the Act, if legislative authority or protection is needed.

Ian Robertson: I would also like to see a discussion of board investment policies and the options available.

## **45, Authority over Fund**

Currently there is a requirement within the Act that prior to any changes to the investment strategy of the fund; the Commissioner in Executive Council needs to approve these amendments.

The board is restricted to administer the fund under the requirements of the *Trustee Act* and it is the fiduciary responsibilities of the board of directors to ensure that the fund is managed as effectively as possible based on the current market conditions and opportunities.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: Given that all jurisdictions except Alberta have some legislated restriction, it would be preferred if the specific restriction be spelt out in legislation, rather than adding another layer of approval with potential impact on the Fund. The *Trustee Act* minimum set in the current legislation should provide sufficient guidance to the WCHSB, so the provision for Cabinet approval of the investment policy should be dropped.

### **Comments received during call for issues**

Ian Robertson: I would also like to see a discussion of board investment policies and the options available.

### **Issue Brought Forward By**

Review Panel

## **46, Access to information on which individual assessment rate is based and calculated and rationale for any change to assessment rate**

Currently the Act does not require the board to provide this information.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: This information is currently available on an industry wide basis. Release of assessment rate information to third parties would need to comply with the principles of the ATIPP Act or related policy. Employers are given information under other provisions of the Act. To legislate this would require detailed analysis and lengthy exemption clauses to protect the privacy and confidentiality of businesses. There would be financial and resource impacts to accomplish this, including systems requirements. There are other, non-legislative solutions.

## **Issue Brought Forward By**

PSC: Requirement to provide sufficient financial information to employers, minister and public to explain and justify assessment rates, administration costs, maximum wage rate and employer subsidies. Requirement to provide information on which individual assessment rate is based and calculated and rationale for any changes to assessment rate. Employer Appeals. Process should require that all necessary information held by WCB related to assessment rate calculations and revisions be provided to the employer so that the employer can assess its position and make an informed determination on whether to appeal the assessment rate and put forward an informed case for appeal of assessment rates.

## **47, The distribution of administration costs to industry classifications**

The Act does not provide direction on this.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Joseph Radwanski: This idea is good in theory. The problems I see arising are Employers not filing claims at even a greater level, and workers being harassed into not filing a claim. On the plus side, maybe Employers in high risk industries will start to monitor their industries to reduce accidents...there are over 60 employees servicing our small jurisdiction, and the Empire grows larger every year with no end in sight.

WCHSB: Implementation of this option would require a major commitment of board resources with no apparent added financial or service value. It would require a break-down of all costs together with determining a fair and equitable allocation of the costs over and above what is done now. As there is no legislative precedent the impacts may be even greater than apparent at first review. There are other, non-legislative solutions.

## **Issue Brought Forward By**

Yukon Chamber of Commerce: Review of YTG's assessment calculations and the administrative costs they pay to the Board and the overall impact to the fund.

Yukon Contractors Association: Review of YTG's assessment calculations compared to their claim costs.

## **48, Access to employer's safety and claims' cost information**

Currently this information is confidential between the board and the individual employer.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Contractor's Association: We feel [this] issue should be excluded from the list of options open to consideration under the Act review. Confidentiality: claims information must remain as private between employers and employees as they are between injured workers and their medical/personal information.

Yukon Chamber of Commerce: Issue that should be withdrawn from the Review process.

Yukon Contractors Association: Item should be excluded from the review.

Ian Robertson: While specific case file information should remain confidential, section 55 allows that if an employer has a bad record or the negligence that resulted in the injury occurred by an employer in another claim class, the cost can be apportioned to either that class or that specific employer. It is not unreasonable for an injured worker to want to determine whether their employer has a bad claims history because it helps establish a pattern of negligence. The WCB process is not intended to shield an employer against a claim for damages arising out of repeated negligence and it does not I believe shield an employer from a lawsuit if the negligence arises from an illegal activity.

WCHSB: Caution should be taken with this option, as providing the information to a 3<sup>rd</sup> party would need to comply with the restrictions under the ATTIP Act or related policy, such as confidential business interests or financial information. It would also set a legislative precedent which could result in unanticipated consequences and costs.

### **Issue Brought Forward By**

Robbie King: Ability to see employers safety and claims cost information.

## **49, Incentive programs**

The board may adopt incentive programs to reward employers for safe worksites.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Contractor's Association (Stakeholders Representative): We feel [this] item should be included into the new Act. As the individual costs of injuries climbs it is imperative that the WCB provide an incentive to those companies willing to "go the extra mile" to reduce injuries.

Whitehorse Chamber of Commerce: The Chamber has stated, in the past, that the YWCHSB provides little incentive for employers to encourage safety. It has been proven that employees monitor themselves and that workplace injuries dramatically decrease when incentive policies and penalties (for not complying) are in place. ..There is presently no incentive, by way of reduced assessment rates, for employers that focus on prevention activities within the workplace. In other jurisdictions within Canada, where employers have focused on prevention activities, claims costs have been reduced by up to 50%...The incentive program can be created on a "net zero" basis where employers who are actively involved in prevention activities receive a reduction in their personal assessment rates while employers who have not demonstrated prevention activities will pay substantially increased assessment rates.

Yukon Chamber of Commerce: Priority review issue.

Ian Robertson: Where incentive and disincentive programs have been instituted within businesses and within the WCB jurisdictions there is a significant reduction in claims...I strongly support such programs because it rewards the committed and penalized the lazy and uncommitted.

WCHSB: The purpose of incentive programs is not generally to "reward" employers, as stated in the issue. Rather, the purpose is to encourage safe workplaces.

Most jurisdictions provide the ability to implement such a program under legislation - the Yukon is no exception. The wording is very similar in each jurisdiction.

The Yukon once had a merit rating system, but such a program is no longer in place. There is currently a subsidized rate rather than a rebate.

Most jurisdictions leave the details of any program up to the Board, to ensure sufficient flexibility to any best practices or new methodologies, as well as to ensure cost-efficiency. Links between any incentive program, merit rebates, and the current assessment subsidies would need to be carefully examined, particularly where changes may occur to any one of these elements in future.

As with any merit rating system, there are pros and cons for such a program. These range from improved safe workplaces (pro) to under-reporting of accidents due to negative impact on merit rating (con). If changes to this section are proposed, further analysis of the financial impacts would be needed, including enhanced investigation abilities, and relationship with any possible merit rebate system or assessment subsidies.

In order to ensure sufficient flexibility for such a program, enshrining details in legislation could result in an ineffective program which could not be altered.

### **Comments received during call for issues**

Ian Robertson: ...It makes sense to apply incentives where the objective is improve behaviour but one should not be rewarded for doing the minimum or simply fixing bad behaviour. If a company has a bad track record, the burden of their behaviour should not be reflected against all members of that class but should be assessed against the firm that is not behaving appropriately...

### **Issue Brought Forward By**

Review Panel

## **50, Standing at assessment hearings**

Currently the individual employer and the board have standing at an assessment hearing.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Contractor's Association: We feel [this] issue should be excluded from the list of options open to consideration under the Act review. Confidentiality-Assessments should be done only between the Board and the Employer.

Yukon Chamber of Commerce: Issue that should be withdrawn from the Review process.

WCHSB: The present practice for Assessment appeals is to have all of the employers' record together with any relevant policies provided to the Appeal Panel. If the Chair of the Panel wishes to have representatives of the Board attend the hearing, the Chair will direct this to occur. Under the Principles of Natural Justice and Procedural Fairness, the employer can cross-examine those witnesses. Employers can also call other witnesses to support their case.

If parties other than the administration were to be parties to these hearings, there would be a slight administrative impact on coordinating hearings and providing the necessary materials, but it would not likely be significant. If the legislation were to change in this regard, then the board should formally be added as a party for consistency.

### **Issue Brought Forward By**

The Workers Task Force: Employee and or Worker Advocate to have standing at assessment hearings (Section 68).

## **51, Employers' appeal process**

Currently the process is left to policy and the board determines how the appeal is disposed of.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

Ian Robertson: It is...inconsistent in that employers must appeal decision to the Board and not an independent body. It does not make sense to have all matters appealable given the cost and amount of time involved. Perhaps for relatively trivial and low cost items there should only be one level of appeal available or the option for mediation. Another option might be to create a standard appeal letter form...with the submission reviewed by a member of the appeal tribunal.

WCHSB: The Yukon's legislation is consistent with other jurisdictions in the amount of detail included in legislation, with the possible exception of timelines for issuing decisions.  
See related issue # 20 Jurisdiction of Appeals Tribunal and #72 Limitation Periods.

### **Issue Brought Forward By**

Review Panel

## **52, Process for collection of assessment and penalties for late or non-reporting**

The Act does not address situations that may arise under the conversion to "Actual Reporting of Assessable Payroll" system.

### **Comments Received**

WCHSB: Currently the Act is not explicit regarding dealing with late reporting for actual payroll, although there are broad provisions for other areas. There is also no clear provisions for penalties on switching between actual and estimated amounts. Minimum amounts for penalty assessment may be considered.

Clarity of the legislation would be increased by providing greater certainty in dealing with reporting systems which may change to increase flexibility for employers.

### **Issue Brought Forward By**

WCHSB: Penalties for late or non-reporting. There would be new penalties for late filing of Confirmation of Assessment. In addition, there may be a need for penalties when using different payroll reporting methods, to ensure timely reporting (particularly when a company switches to Actual Reporting rather than Estimated Reporting, and then does not report the actuals).

## **53, A process for dealing with fraud**

The Act states that a person who knowingly provides any false or misleading information to the board is guilty of an offence and is liable for fines and or imprisonment. By order of the board, the president shall conduct an investigation into any matter in connection with the administration of the Act.

The Act does not address reporting of fraud, investigation and process for prosecution including recoveries.

### **Comments Received**

WCHSB: The Board agrees that a process for investigating non-compliance, by claimants, employers, medical suppliers, etc. should be in place, but would be concerned about setting a precedent in legislation across Canada. It is important to maintain the principle that rights are balanced by obligations. Care should be taken to ensure that the process will uphold the principles in a cost effective manner. Any process must be clear and include the ability for the WCHSB to enforce the penalties and conduct the investigation, i.e. done separately from the RCMP or the Yukon Government. The Board's preference is the development of policy or procedures, rather than setting legislative precedents.

### **Issue Brought Forward By**

Yukon Contractors Association (Stakeholders Representative): A system needs to be in place to investigate fraudulent claims.

## **54, ATIPP (Access To Information and Privacy Protection)**

ATIPP no longer applies to the Workers' Compensation Health and Safety Board.

### **Comments Received**

Yukon Injured Workers Alliance: ATIPP procedures as they now stand should be adopted by the board to allow the same access to properties to an individual, had the ATIPP program still been in place.

WCHSB: Similar to the Manitoba legislation, a reference in the *Workers' Compensation Act* to clarify that if there is a conflict between the *Workers' Compensation Act* and the *Access to Information and Protection of Privacy Act*, the *Workers' Compensation Act* will prevail would be helpful. Being under the ATIPP legislation as a public body goes against the Meredith Principles of the Board being an independent body from government. This would also allow the board to set clear policy in how access to information will work, including appeal processes.

### **Issue Brought Forward By**

Review Panel

## **55, Employer education and representation / Employer Consultant**

The Act states that the members of the board shall promote awareness of the basic rights and obligations of workers under this Act 93.(i)

Issues include:

- The Act is silent on representation;
- This position has been contracted out for a two-year period; and
- This deals with the role, effectiveness, reporting and balance of the Employer Consultant.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Chamber of Commerce: Priority review issue.

Ian Robertson: If we are to continue to have both a workers and employers advocate position, the accountability process should be the same. It also needs to be open and transparent with the same annual reporting requirements...who are these two positions accountable to—their client base, the Board or government...what is wrong with the present systems that makes such positions necessary and are there any better, more cost effective approaches.

Joseph Radwanski: Both the Employer and Workers Advocates are a colossal waste of money. The Workers Advocate has done only 16 appeals in the last year...

WCHSB: For...four jurisdictions found to have this position enshrined in legislation, the method of appointment(s), remuneration, duties and/or functions are common elements in the legislation. A provision for review of this position was found in 50% of these cases. No reporting requirements were found in any of the jurisdictions.

The question was raised as to whether there was any correlation between a jurisdiction having an employer's consultant and a merit rebate program. Of the four jurisdictions researched, experience rating is optional in the legislation ("may"). Regarding assessment modification rates, ON had a mandatory requirement to adjust rates based on frequency of accidents or injuries.

Further analysis regarding this correlation would require examination of other information sources, such as policies, prior to any conclusions being drawn in this area.

If legislated, funding of the position would be out of the Board's control. It is noted that legislative funding obligations reduces the Board's ability to control costs.

### **Comments received during call for issues**

PSC: Worker and Employer Advocates. Roles should be reviewed for effectiveness and for scope. Roles and authorities of the Worker and Employer Advocates should be clearly communicated to the employer.

Ian Robertson: It also seems to me that the need for a workers and employers advocate is an admission that the system is not working properly or as effective as it should. I do not oppose the idea of keeping such positions because both worker and employer are generally ill-equipped to stickhandle a situation through the process. However, I do believe we have to look behind the issue and identify symptom and cause to determine what changes need to be made to make the process work more effectively for all.

### **Issue Brought Forward By**

Review Panel

## **56, Worker education and representation / Workers' Advocate**

The Act calls for the Minister to consider the role and effectiveness of the Workers' Advocate.

Issues include:

- the role;
- effectiveness;
- reporting; and
- balance.



## Comments Received

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Chamber of Commerce: Priority review issue.

Ian Robertson: If we are to continue to have both a workers and employers advocate position, the accountability process should be the same. It also needs to be open and transparent with the same annual reporting requirements...who are these two positions accountable to—their client base, the Board or government...what is wrong with the present systems that makes such positions necessary and are there any better, more cost effective approaches.

Joseph Radwanski: Both the Employer and Workers Advocates are a colossal waste of money. The Workers Advocate has done only 16 appeals in the last year...

WCHSB: The Yukon is currently one of the eight jurisdictions to have this position enshrined in legislation. Some jurisdictions do have other requirements spelled in legislation, such as program reviews, cost control mechanisms, program supports, right to service, qualification requirements, etc.

In the 2002 Special Examination, the Auditor General noted that the increased independence has enhanced the appeal process. She also recommended strengthened performance reporting in determining effectiveness and efficiency of operations.

Currently, the worker's advocate does not have jurisdiction in employer assessment or OH&S appeal areas; specific requirements for consideration of this were not identified.

Any expansion of the role in this area can possibly lead to increased administration costs and impact the compensation fund as currently the position and the budget are outside the control of the Board. It is noted that legislative funding obligations reduces the Board's ability to control costs.

## Comments received during call for issues

The Workers Task Force: Add Worker Advocate to section 18.5(1). Employee Consultant (Part 10 – Miscellaneous).

Robbie King: After worker has been disabled for longer than 180 days they should have an introduction to the system by the Workers Advocate Office. Employee consultant at \$250,000 same as chamber.

PSC: Employer Appeals. Process should clarify the role of the Workers Advocate in employer-initiated appeals and access by employer to employee information on a disputed claim.

Worker and Employer Advocates. Roles should be reviewed for effectiveness and for scope. Roles and authorities of the Worker and Employer Advocates should be clearly communicated to the employer.

Ian Robertson: It also seems to me that the need for a workers and employers advocate is an admission that the system is not working properly or as effective as it should. I do not oppose the idea of keeping such positions because both worker and employer are generally ill-equipped to stickhandle a situation through the process. However, I do believe we have to look behind the issue and identify symptom and cause to determine what changes need to be made to make the process work more effectively for all.

## Issue Brought Forward By

Act review requirement: the role and effectiveness of the workers' advocate

## 57, Entire Governance Structure

Part 11 “Workers Compensation Health and Safety Board” of the Act addresses Governance.

Issues include:

- Effectiveness and efficiency;
- Roles and responsibilities;
- Representation and accountability (The Auditor General has suggested that the presence of public interest representatives on the Board could help ensure that members put the interests of the system ahead of specific individual or group interests); and
- Relationship between the Minister/ Executive Council and the board.

### Comments Received

Yukon Contractor’s Association (Stakeholders Representative): We feel [this] item should be included into the new Act. The WCB must be autonomous.

Whitehorse Chamber of Commerce: ...like any successful enterprise, the Yukon Workers’ Compensation Health & Safety Board (YWCHSB) should be managed and operated in an accountable, business-like manner. This includes the implementation of good management practices, policies and procedures covering operation, purchasing, strategic planning and human resources.

...the Chamber supports the Auditor General’s position that the President should report to the Board and not to the Minister...the Board...in turn is responsible for reporting to the Minister...legislative changes should clearly outline the relationship between the Government of Yukon and the compensation system.

...our primary concern is that the workers’ compensation fund is stable and that fair and competitive assessment rates are assigned. We support a philosophy that keeps rates to a minimum for good a fair insurance coverage.

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

Ian Robertson: It is logical that the President reports to the Board and not to the government of the day. It also follows that the Board should be accountable to its shareholders which include employers who pay the costs and workers who agree to be governed by the legislation. Perhaps one way to make the Board more independent and still accountable is to have it report to the Legislative Assembly...3 territories should work together to form one board...

WCHSB: Enshrining service standards in legislation would be complex. The roles and responsibilities of the various elements of the governance structure are quite clearly laid out in the legislation. The Board has a long list of duties and responsibilities, as does the President. The Minister’s and Cabinet’s responsibilities are found through the Act. It is clear that there is to be no political interference in any individual’s claims, although it is only the Minister who is prohibited directly or indirectly from being involved. Any amendments in this area must remain consistent with the Meredith Principles and maintain an arm's length relationship with government.

With regard to public interest representation, there have been analyses in other jurisdictions. Some see it as a contravention of the Meredith principles, others see it as a way to avoid constant stalemates at the board table. Some have noted that what can happen is that the public interest representatives end up being the "swing votes", and may represent a direct political or government interest on the Board.

In terms of structure, the Yukon legislation is consistent with other jurisdictions in relation to the Meredith Principles and the set up of its board and administration.

WCHSB (cont): The Yukon legislation does not provide for public interest representation.

This issue was discussed during the 1999 Task Force Review of this legislation. The Task Force recommended that, instead of legislative amendments, the Minister expand the consultation process for vacancies on the board. The Task Force also recommended expanding the potential # of members. The Auditor-General special examination recommended that consideration be given to adding public interest representation on the Board.

There have been analyses in other jurisdictions of public representation. Some see it as a contravention of the Meredith principles; others see it as a way to avoid constant stalemates at the Board table. Some have noted that what can happen is that the public interest representatives end up being the "swing votes", and may represent a direct political or government interest on the Board as well.

### **Comments received during call for issues**

WCHSB: Relationship with Yukon Government. Clarify the arms' length relationship established by Meredith, consistent with other suggested amendments.

Ian Robertson: ...the Minister, Board and Auditor General have raised concerns about accountability and performance measurement....

I agree with the auditor general that the present reporting relationship is confusing and not very practical. It is impossible to serve two masters—the Minister and the Board.

Yukon Contractors Association (Stakeholders Representative): The compensation system has to be efficient and accountable for administration costs.

Yukon Chamber of Commerce: Current structure of the overall compensation system. Is the board of directors effective and efficient? Should we look at other governance systems, such as a Board of Governors who would have a more hands on approach to governing the system? Do we need to have such a large management structure at the board? Are there other alternatives? How can we make the overall system more effective and efficient?

## **58, Voting role of the Chair**

Currently the board consists of voting and non-voting members. The Act is not clear on the chair voting.

### **Comments Received**

Yukon Injured Workers Alliance: The Chair **should not** be allowed to vote in any matter before the board. His position is of neutrality by the Act.

WCHSB: Further clarification regarding the role of the Chair may be desirable.

Joseph Radwanski: The Chair has no real role on the Board.

### **Issue Brought Forward By**

Review Panel

## **59, Equal treatment of all employers**

Currently section 91 (3) states that section 67 and all of Part 8 of this Act shall not apply to the Government of the Yukon.

## **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Chamber of Commerce: Priority review issue.

WCHSB: Under the Meredith Principles, there is a collective liability for all employers. The present Act requires the Board to assess all employers for such sums as the Board may require for the administration of this Act.

A secondary issue is permitting the Board to use the procedures and inquiries to collect the necessary amount of money for assessments.

Contractors, subcontractors or sole proprietors may work for the Government of Yukon. The Workers' Compensation Act requires a principal to be responsible for assessments by a contractor or a subcontractor. The definition of a worker under Section 101 of the Act requires the employer, who is engaged in that industry, to be responsible for assessments for a sole proprietor, who is not registered with the Board.

The main issue is treating all employers on an equal basis.

The second issue is obtaining the necessary information to assist the Board in collecting these assessment payments.

## **Issue Brought Forward By**

WCHSB: Relationship with Yukon Government. Clarify the arms' length relationship established by Meredith, consistent with other suggested amendments.

Yukon Chamber of Commerce: Review of YTG's assessment calculations and the administrative costs they pay to the Board and the overall impact to the fund.

Yukon Contractors Association: Review of YTG's assessment calculations compared to their claim costs.

## **60, The link between powers of the board and the objects of the Act**

Currently the board of directors is not explicitly linked to the Objects (s.1) of the Act.

### **Comments Received**

WCHSB: A clear connection within legislation between the Objects of the Act and the Powers of the Members of the Board would provide clarity of roles and responsibilities, which in many cases are now an assumed responsibility, such as maintaining a solvent fund.

A general duty should be added to the Board's duties along the lines of upholding the objects of the Act.

### **Issue Brought Forward By**

WCHSB: Powers of the Board and link to Objects of the Act. It may be helpful to ensure a clear link between the Objects of the Act and the responsibilities of the Board, in areas such as solvent compensation fund, etc.

## **61, Reporting structure of President**

The president can only be hired and dismissed on recommendation of the board of directors and has the status and responsibilities of a deputy head under the *Public Service Act*.

## Comments Received

WCHSB: Under the *Public Service Act* a deputy head is responsible to the Premier and Cabinet, as well as responsible for supervising and directing the employees of his department or branch and such other powers and duties as may be assigned by Cabinet. Under the *Workers' Compensation Act*, the president is responsible to the duties assigned by the members of the board. This creates a potential conflict in the president must be responsible to two parties. This is further complicated by the reporting relationship of employees because, as public servants they are and must be responsible to a deputy head.

In almost all other jurisdictions, the President reports to the Board.

The Auditor General recommended clarification: "The Minister may wish to consider proposing legislative amendments to require that the President report only to the Board of Directors and not to the Minister."

## Comments received during call for issues

WCHSB: Reporting relationship of the President including deputy head. Clarify reporting relationship to the Board; need to avoid potential conflict between duties of President under this Act and duties of deputy head under the *Public Service Act*.

## Issue Brought Forward By

Auditor General Issue

# 62, Relationship between the Appeals Tribunal and the board

The Chair of the Appeal Tribunal is a non-voting member of the board of directors.

## Comments Received

Workers' Compensation Appeal Tribunal: WCAT supports that the Chair of the Tribunal be removed as a non-voting member of the board of directors.

WCHSB: In her September 2002 report, the Auditor General of Canada raised the matter of the Chair of the Appeal Tribunal sitting as a non-voting member of the Board. While outlining the Task Force's reasons for the recommendation, she also noted that the Act makes no distinction between the responsibilities of its voting and non-voting members. Further, she suggested that the participation of the Chair of the Appeal Tribunal in board discussions could create the perception that the appeal Tribunal is not independent.

The Auditor General recommended as follows:

The Minister may wish to consider proposing legislative amendments to remove the requirement that the Chair of the Workers' Compensation Appeal Tribunal be a member of the Board of Directors, but require that representatives of the Appeal Tribunal and the Board meet regularly\*

\* In her initial discussion of the issue, the Auditor General suggested meeting "...on a regular basis, perhaps quarterly, to share information on matters of common interest and importance to the workers' compensation system."

Issues have arisen where the role of the chair, in commenting on policy, may result in a conflict of interest or a perception of conflict. In order to maintain the independence of the Appeal Tribunal, the chair must not be a member of the Board of Directors. There are other non-legislative solutions to issues of co-ordination.

## Issue Brought forward By

Auditor General Issue

## 63, Annual Reporting of the Appeals Tribunal

The Auditor General identified the annual reporting of the Appeals Tribunal as an issue.

### Comments Received

Workers' Compensation Appeal Tribunal: WCAT is unsure of this issue. Annual reports have been forwarded to the Minister well in advance of the 90-day limit stated in the Act and have contained the information required. The Minister responsible decides whether or not they should be tabled in the Legislative Assembly.

WCHSB: 2002 Special Examination of the YWCHSB by the Auditor General of Canada:  
123. The Minister may wish to consider proposing legislative amendments to require that annual reports of the Workers' Compensation Tribunal and Workers' Advocate be tabled in the Legislative Assembly. The Appeal Tribunal and the Workers' Advocate should also measure and report information that they could use to determine the effectiveness and efficiency of their operations. It is noted that legislative funding obligations reduces the Board's ability to control costs.

### Issue Brought Forward By

Auditor General

## 64, Process for appointment(s) to the Board and Appeal Tribunal

The Act calls for the Minister to consult prior to appointments.

### Comments Received

Yukon Injured Workers Alliance: Appointments to the Board and Appeal Tribunal should not be controlled by the Minister. The consulting process should be scrapped, as the Minister may portray to the public he is consulting, when in fact it is only going through the motions...

WCHSB: In addition to the observations from the 1999 Task Force Review as mentioned above, the Auditor-General Special Examination also offered some comment on this issue. The Special Examination noted that both the government and the Board "have a role in ensuring that directors are appointed who have the qualifications the Board needs.... appointments have been made with little consideration of the core competencies and time investment required....stakeholders told us they want to see a nomination process that is transparent, efficient, effective and representative of their needs and expectations." The Board has approved a Governance Handbook which includes a clear outline of the competencies and commitment board members should possess. This is not binding on the Minister or Cabinet in considering appointments.

### Comments received during call for issues

Workers Task Force: Definition of "consult" (Section 92.(5) and Section 18.1 (5))

### Issue Brought Forward By

Review Panel

## **65, Board policy development (emerging issues, are policies current)**

There is no process in the Act as to how and how quickly the board will develop, review or implement policies.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Chamber of Commerce: Priority review issue.

Joseph Radwanski: The Board does not see this as a priority, given the huge amount of outdated policies dating back ten years or more.

WCHSB: While it was more common for CDN WCB legislation to outline how policies would be developed, no jurisdiction has parameters describing how quickly the board would develop or review policies. Common areas of responsibility were that the board reviewed, superintended, approved and developed policy while the CEO/President advised, administrated and/or implemented policy. In the Yukon, policy priorities are currently set through the strategic planning process, which includes stakeholder input.

There would be substantial financial impacts on administration costs if a clause requiring mandatory review times was incorporated in legislation, as well as a lack of flexibility to address emerging priority issues. There are other non-legislative solutions. The Board is concerned about the major financial impact that the change would have on the compensation fund and administration costs.

### **Comments received during call for issues**

PSC: Should address conflict of interest in managing claims by WCB employees and should have mechanism for using outside adjudicators.

Should establish consistent basis for considering claims on newly emerging hazards, for example, multiple chemical sensitivity.

### **Issue Brought Forward By**

Review Panel

## **66, Consultation process on Policy Development**

The current consultation process for policy development is outlined in s. 93 (h.1).

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Injured Workers Alliance: Policy Development should have more input from stakeholders, and the input drafted into the policies.

WCHSB: Yukon has one of the more comprehensive mandatory consultation requirements found in the CDN WCB jurisdictions. The Yukon's provisions contain a tremendous amount of detail about advertising, time periods, etc. which are not found anywhere else.

At this time the requirement is restricted to claims affecting compensation. Other policies do generally receive review through the Stakeholder Advisory Committees of representative members. The Board sets larger policy priorities through its strategic planning process and the three-year operational plan.

If changes are considered for this area, it should be limited to removing the detailed process that is more appropriate for procedures.

### **Issue Brought Forward By**

Yukon Chamber of Commerce: The current consultation process as outlined in the Act for dealing with new and amendments to policies is ineffective and too costly. The Act needs to be changed to allow the Board to deal with emerging issues on a timely basis and review all of the old policies that have not been reviewed since the last major Act amendment.

## **67, Annual reporting of board & president to the Legislative Assembly**

Currently there is a requirement that the chair of the board of directors and the president appear annually.

### **Comments Received**

WCHSB: Currently the Yukon jurisdiction is the only CDN WCB that has an annual requirement for the board and the president to appear before the Legislative Assembly. This was included as part of the 1999 Task Force Review recommendations, to enhance accountability.

### **Issue Brought Forward By**

Review Panel

## **68, The release of the Annual Report and the Financial Statements**

Currently the financial statements must be into the Minister by June 30 of each year and the annual report must be to the Minister within 90 days after the end of each calendar year.

### **Comments Received**

WCHSB: It appears that most jurisdictions publish financial report information at the same time and as a component of the annual report. This is unlike the Yukon which currently has two separate timelines for release of this information. This has an impact on administration costs, as well as accountability - such as financial statements with no links to activities. The Auditor-General of Canada has set standards for effective annual reports; these cannot be met under the current legislative constraints.

It is important that the legislation be changed to require only one annual report, including the financial statements.

### **Issue Brought Forward By**

Review Panel

## **69, Consistency of scheduling of Annual Information Meeting**

The Act states that the board shall hold an annual meeting within 90 days after the public release, under subsection 94(2), of the audited financial statement.

### **Comments Received**

WCHSB: The board is mindful that an assigned date in legislation would provide consistency, but also in placing a specific date in legislation, it may not always be attainable, i.e. it could fall on a Sunday or



holiday. It is not clear what the issue is, as the meetings have been held in September since this legislation came into effect. In fact, there have usually been two meetings in order to accommodate different work schedules.

There are other, non-legislative solutions to any problems that arise in this area.

### **Issue Brought Forward By**

Robbie King: Annual information meeting 1<sup>st</sup> week of September not left floating.

## **70, Disclosure of financial/management information**

The act identifies the information that the board must present.

The Auditor General has requested that there be more meaningful reporting to stakeholders in the annual report.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: The 2002 Special Examination of the Auditor General recommended that the YWCHSB "develop measurable goals and targets and report on the achievement of results". This task is being worked towards with the production of the report on first year indicators and is planned to be enhanced over time.

This task is being completed through the strategic plan, and will continue in the years ahead. This work is scheduled with consideration of the capabilities of the system and the potential impact on administrative costs.

The difficulty with setting details out in legislation is that the detail can end up being inconsistent with the strategic objectives of the Board, and change is difficult and lengthy. There may also be unanticipated administrative costs.

If legislative changes were made, consideration to add to the powers of the Board to set the general requirements for reporting is suggested.

### **Comments received during call for issues**

PSC: Requirement to provide sufficient financial information to employers, minister and public to explain and justify assessment rates, administration costs, maximum wage rate and employer subsidies. Requirement to provide regular, meaningful reports to individual employers on their specific WCB experience so that employers can establish effective accident prevention and leave management programs.

Ian Robertson: ...the Minister, Board and Auditor General have raised concerns about accountability and performance measurement....

### **Issue Brought Forward By**

Auditor General Issue

## **71, Promotion of WCB and OH&S programs and accident prevention activities**

The Act states the members of the board shall make publicly available all policies of the board relating to claims for compensation, assessment procedures and occupational health and safety.

## Comments Received

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Chamber of Commerce: Issue that should be withdrawn from the Review process.

Yukon Contractors Association: Item should be excluded from the review.

WCHSB: The Auditor General Special Examination of 2002 spent some time reviewing the efforts of the Yukon WCHSB regarding prevention. The report made a number of observations and recommendations in this area, including:

need for a formal prevention strategy

need for performance targets and indicators

incentives for employers to encourage safety - and the need to determine the level of prevention effort that the WCHSB and employers realistically can afford

need to step up efforts to ensure employers have safety programs that are operated effectively, where required.

The Yukon WCHSB has continued to make efforts to improve in this area, as a result of the above recommendations and the long-range strategic plan.

One of the current objects of the Act is: 1(f) to combine efforts and resources for the prevention of workplace disabilities, including the enforcement of health and safety standards.

## Issue Brought Forward By

PSC: Requirement to provide meaningful WCB program information to explain where funding is being distributed to assist employers with the implementation of effective OHS programs, accident prevention procedures and case management strategies. Current statistics identifying number of worksites inspected and orders issued annually are of little value to employers. WCHSB funding for OHS programs or accident prevention activities (such as funding provided for formation of local Construction Safety Association).

Employer Appeals. Process should require that all necessary information held by WCB related to assessment rate calculations and revisions be provided to the employer so that the employer can assess its position and make an informed determination on whether to appeal the assessment rate and put forward an informed case for appeal of assessment rates.

The role of WCHSB Service Teams and assistance they provide to employers and to workers should be clearly communicated to the employer.

## 72, Limitation periods

There is no time limitation on when an issue can be brought before or dealt with by the board or appeal panel.

## Comments Received

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Contractor's Association (Stakeholders Representative): We feel [this] item should be included into the new Act. The lack of time limits lengthens the finalization of claims and increases the cost of the claim.

Yukon Injured Workers Alliance: Limitation periods could certainly compromise an IW's rehabilitation and benefits. New evidence must be considered on a claim, and must not be disallowed due to a time frame limitation.

WCHSB: OH&S appeals are not considered to be overly complex. Employers can file within the 21 days and still have enough time to do the research or withdraw their appeal. Lengthening the time may have some unintended impacts in terms of fully implementing the orders, and in terms of restoring an effective relationship between the board, employers and workers who may be affected.

For further analysis concerning limitation periods for appeals, please refer to Issue #9, Limitation Periods. With regard to decision-writing timelines, administratively it is preferable to have appeals resolved quickly so that relationships can continue once closure has been reached.

If time limits are placed on the board or appeal panels of the board for issuing decisions on appeals, they should be consistent with the legislation regarding timelines for the appeal tribunal and therefore set through regulation, not enshrined in legislation.

### **Comments received during call for issues**

WCHSB: Absence of limitation dates. While there may have been a “backlog” of cases when the new appeal system was first set up in 2000, the system required some certainty. Most jurisdictions have time limits on appeals. Employee Appeals. Time limitations on employee appeals should be considered. There should be time limits for accepting employee appeals of claim decisions and clear criteria if any claims are going to be accepted beyond the prescribed time limitation.

### **Issue Brought Forward By**

Review Panel

## **73, The effectiveness and appropriateness of the Board administering both the *Workers’ Compensation Act* and the *Occupational Health and Safety Act***

The Act states that the issue of the effectiveness and appropriateness for the Board to administer both The *Workers’ Compensation Act* and the *Occupational Health and Safety Act* must be reviewed.

### **Comments Received**

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

WCHSB: The issues which characterize the debate around combined *versus* separate administration of the *Workers’ Compensation Act* and the *Occupational Health and Safety Act* are not specific to the Yukon. A variety of approaches to the administration of workers’ compensation and OHS which address those same issues can be found across Canada’s 13 workers’ compensation jurisdictions.

The Yukon’s approach of combined administration under the direction of a bipartite board is not unique. It fits well within the parameters defined by practices in other jurisdictions. As a result, it is a conclusion of this research project that the current combined administration arrangement does not present any significant structural impediments to the combined achievement of the objectives of both statutes. In addition to the finding that the combined administration approach is not unique to the Yukon, project research did not identify any factors which clearly suggest that the Yukon situation is significantly different than in other jurisdictions. In other words, in this circumstance, there does not appear to be anything unique about the Yukon situation which requires a unique solution. Thus, it is a further conclusion of this research project that in terms of the qualitative factors examined, the existing combined administration arrangement appears to fit reasonably well within the general parameters of effectiveness and appropriateness.

In fulfilling its fiduciary obligations with regard to the Compensation Fund, it is important that the Board have control over prevention activities, which can be major cost drivers.

The current legislation should remain as it is, as it has been proven to be effective and appropriate. If consideration is given to taking a next step and actually amalgamating the two pieces of legislation, further detailed work and analysis would be needed, as the *Occupational Health & Safety Act* has not been reviewed since the 1980's.

### **Issue Brought Forward By**

Act requirement

## **74, Claims costs**

The Auditor General identified controlling increasing claims costs as an issue.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: The board is deeply committed towards maintaining a healthy compensation fund, including appropriate management of claims costs. It is important to note that claims adjudication has changed considerably over the years, with a dramatic change in the types and complexity of claims, heightened expectations for claims management, and more complicated calculation of compensation rates and interest all have increased claims costs. The Yukon is not alone in this area - claims costs are also increasing in other jurisdictions.

One aspect in managing and controlling claims costs is access to fundamental information regarding claimants, such as statistics on the number of people returning to work, number of treatment days, average cost of treatment, and so on. This information is currently not easily available, but work is underway to try and improve the system.

Claims costs are driven in large part by the legislative framework. Increasing the complexity of the system, reducing flexibility, and setting legislative precedents will have an impact on increasing costs, without necessarily improving service.

### **Issue Brought Forward By**

Auditor General issue

## **75, Administration costs**

The Auditor General identified controlling increasing administration costs as an issue. The board of directors approves the administration budget.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: The board notes that work of compensation boards has changed over time. In the past, compensation payments were made and injuries may or may have been subject to medical intervention. A case management approach is now used, with rehabilitation a key component of the compensation system as enshrined in legislation. This has increased the system's costs, as has the shift in focus from enforcement to prevention. The requirement for public consultation also adds to the time, cost and complexity of policy development. The recent creation of the Workers' Advocate and the Appeal Tribunal has also added to administration costs.

Administration costs are driven in large part, by the legislative framework. Increasing the complexity of the system, reducing flexibility, and setting legislative precedents will have an impact on increasing costs, without necessarily improving service.

### **Comments received during call for issues**

WCHSB: Review most cost-effective way of dealing with different pieces of legislation and policy. Should we be looking at a different system, to minimize the need to administer different pieces of legislation and policies in their entirety? A strong costs analysis would be needed; there may not be a good model out there; legislation by exception can be just as hard to administer.

Yukon Contractors Association: The compensation system has to be efficient and accountable for administration costs.

Yukon Chamber of Commerce: Review of YTG's assessment calculations and the administrative costs they pay to the Board and the overall impact to the fund.

### **Issue Brought Forward By**

Review Panel

## **76, Attraction and retention of key personnel**

Currently employees of Yukon Workers' Compensation Health and Safety Board are governed under the Public Service Act. The board also has contracts of service with medical and legal practitioners.

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: The Board agrees that the ability to attract and retain key personnel, especially claims staff, is further amplified by our size and location. As referenced by the Auditor General, the Board agrees that there be no change to the public services status of employees. See extract below.

102. ... This would mean its staff would not be members of the Yukon public service and would therefore not come under the provisions of the *Public Service Act*.

103. This solution is not without its pitfalls. The staff of the WCHSB may oppose being moved outside of the Yukon public service. If the Minister is amenable to this approach, the WCHSB must take care to ensure that salaries increase only in the claims management positions where staffing has been a problem. Controls such as Board approval of management salaries and exceptions to existing collective bargaining agreements would be needed, to ensure that any salary increases were market-based. Total salary expenditures, the largest portion of administration costs, would also have to be monitored to ensure that they did not increase sharply. The disclosure of executive compensation in the annual financial statement would also provide some assurance to stakeholders that the exemption was being only where necessary. The Auditor General actually recommended:

131. Finally, recruiting and retaining staff with experience in claims management or other special expertise has been difficult within the salary constraints of the Government's classification system. The YWCHSB should explore options with the Yukon Government for more flexibility in classification and salary levels for certain positions that require special expertise and that the YWCHSB can show are difficult to recruit for and staff. The YWCHSB also needs to develop a strategy for filling key positions when they become vacant.

Even if Board employees are no longer covered by the *Public Service Act*, successor provisions would still apply.

One of the Meredith principles is that the compensation fund should be administered by a body independent of government.

## Comments received during call for issues

Robbie King: Lawyers, doctors and computer people should all be wcb not contractors. Independent Legal opinions, not in-house. This method is seen to be opinionated, and the results are in the best interest of WCB. Whenever a legal opinion is required, it should be contracted out to a local firm, and all parties involved be allowed access to it. The firm should have no ties with WCB.

Yukon Chamber of Commerce: The structured employee relationship between the Board and the Government of Yukon needs to be removed to allow the board to attract and retain key personnel.

## Issue Brought Forward By

Auditor General issue

## 77, Employee right to sue board for damages caused or exacerbated by the board's actions

The Act states that no proceedings by or for the board shall be restrained by injunction, declaration, prohibition, or other process or proceedings in any court or be removed by certiorari, judicial review, or otherwise into any court, in respect of an act or decision of the board within its jurisdiction nor shall any action be maintained or brought against the board, board members, employees or agents of the board in respect of any act or decision done or made in the honest belief that it was done within its jurisdiction.

## Comments Received

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Contractor's Association (Stakeholders Representative): We feel [this] issue should be excluded from the list of options open to consideration under the Act review. Contradicts the original intention of the compensation system and must be excluded.

Yukon Chamber of Commerce: Issue that should be withdrawn from the Review process.

Yukon Contractors Association (President): Item should be excluded from the review.

Ian Robertson: ...right to sue an employer for compensation for something excluded from the Act, while an understandable position, opens the employer up to additional risk and a requirement for separate insurance. It also goes against the intent of having a workers compensation act... maybe more practical to set reasonable parameters on what can be included. I would also not want to see the individual's responsibilities for their own health diminished.

I do not think a worker or the worker's advocate on their behalf should have the right to sue but I have no difficulty with them having the right to appear or make representation. While the threat of having the ability to sue the Board over delays etc. might encourage more speedy action on some cases, the present act is worded so the Board has the last word.

Yukon Injured Workers Alliance: The WCB is responsible for the management of a worker's injury. If they fail to act in good faith, fail to follow standard procedures, or fail to provide all which is needed and recommended for a worker's return to good health and his/her employability, they then are accountable, and should be liable in a court of law.

WCHSB: The ability of a worker to sue the Board for damages caused or exacerbated by the Board's alleged actions or inaction does not exist anywhere in Canada - it is contrary to the Meredith Principles.

This proposal would undermine the exclusive jurisdiction granted to all Workers' Compensation authorities in the country. It may affect other jurisdictions' willingness to have the Yukon participate in the Interjurisdictional Agreement, with corresponding negative impacts on both workers and employers. Aggrieved workers would have the opportunity of choosing to litigate and seek damages against the Board and its individual employees instead of pursuing the appeals process as set out in our Act. This in turn would permit our Courts to second guess all decisions made at the adjudicative level. It is much easier to use hindsight than be accountable for decisions of the day.

The threat of litigation could be used as a means of influencing the claims adjudicative process.

At the possible expense of providing good services, adjudicators would need to concentrate on making notes to file and seeking legal advice.

The impact on claims and administration costs would be substantial and incalculable at this point, as would be the impact on the ability of the board to attract and retain personnel.

Absolutely no consideration should be given to including this in legislation.

### **Issue Brought Forward By**

The Workers Task Force: Employee right to sue Board for damages caused or exacerbated by the Board's actions.

## **78, Administering prior years' legislation, policies or orders**

Various pieces of legislation, policies and orders must be applied depending upon the date of disability.

### **Comments Received**

Yukon Injured Workers Alliance: Legislation, policies and order in place **at the time of a worker's injury** are to be applied to their claim...What they are doing now with regards to Section 32 of the 1986 WCB Act is illegal...

WCHSB: When developing policies for today's issues, it is often difficult to anticipate future problems, future changes in technology etc. A clause in the legislation allowing the Board to address these unanticipated problems would reduce the processing time for claims and provide timely service to clients. Consideration should be given to the approach of the Alberta Board, which gives the Board discretion to make an order effective retroactively.

Consideration is needed on how to simplify the transition from one piece of legislation to the next.

Currently significant Board resources are used in determining the application of previous legislation and policies. Simplification would reduce this workload and thereby improve service to clients.

Saskatchewan has a different model in that the new legislation applies **except** where noted (mostly around benefits). The board recommends that the Saskatchewan Board be contacted to determine the implications of their transitional clause.

Compensation and assessments are paid and received based on the legislation in place at the time the disability arose. Retroactive changes to benefits should therefore be avoided, as the costs and impact on the fund can be considerable.

### **Issue Brought Forward By**

WCHSB: Ability to remedy problems with prior years' legislation, policies or orders. Consider clarifying the methods to allow the Board to address unanticipated problems that may arise under old policies or orders. Similar clauses can be found in some jurisdictions. Review most cost-effective way of dealing with different pieces of legislation and policy. Should we be looking at a different system, to minimize the need to administer different pieces of legislation and policies in their entirety? A strong costs analysis would be needed; there may not be a good model out there; legislation by exception can be just as hard to administer.

Robbie King: When act is changed the board should find effected workers and pay them not wait for them to come and ask.

## **79, Access to the Board's independent legal opinions**

The act is silent on this issue.

### **Comments Received**

Yukon Chamber of Commerce: Issue that should be withdrawn from the Review process.

Yukon Contractors Association: Item should be excluded from the review.

Yukon Injured Workers Alliance: Any Board legal opinion should be contracted out and made available to the public, or at least the parties involved.

WCHSB: No jurisdiction references access to the Board's independent legal opinions in legislation. This is not legislatively restricted in any jurisdiction. All boards have in-house legal counsel. The practicality of insisting that the board seek legal counsel from various firms, rather than in-house, is very difficult. There are a limited number of practitioners in administrative law, which can lead to problems around in depth knowledge of compensation law, timeliness of advice, and avoiding conflicts of interest as some of these practitioners currently do work for the Appeal Tribunal.

In addition, after a certain period of time would the same practitioners giving advice still be considered independent, or would the board be forced to use counsel outside the Yukon. And finally, the efficiency and effectiveness of the board's operations would be substantially diminished, given the high cost of counsel used on a case-by-case basis.

There may be some advantages to clarifying the relationship with the current Yukon Government Department of Justice Act. An amendment could be considered to the current Workers' Compensation Act so that the Board can obtain and use counsel without seeking the approval of the Yukon Government on the issue and the choice of lawyers. This would also place the Board on an equivalent level with the Appeal Tribunal in terms of obtaining counsel.

### **Issue Brought Forward By**

Robbie King: Independent Legal opinions, not in-house. This method is seen to be opinionated, and the results are in the best interest of WCB. Whenever a legal opinion is required, it should be contracted out to a local firm, and all parties involved be allowed access to it. The firm should have no ties with WCB.

Panel Voice Mail (Robbie King): Legal opinions should be obtained from outside legal counsel and should be made public. The board needs to be neutral.

## **80, Definition of Disability**

Issues include:

- Chronic Stress
- Chronic Pain

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.



Yukon Contractor's Association (Stakeholders Representative): We feel [this] item should be included into the new Act. The Act Review Panel must deal with the issues of chronic pain and chronic stress so that litigation does not become the determining factor.

Whitehorse Chamber of Commerce: The definition of disability is currently very broad and needs to be more clearly defined. The significant question that needs to be answered is what types of chronic pain and chronic stress should be considered as a disability under the Act...The Act must be changed so as to not be silent on this definition...We also suggested that the Board research this are very carefully and prepare a discussion paper...

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

Ian Robertson: ...potential for these issues to have a profound impact on the viability of the entire program...very difficult if not impossible to separate workplace stress from other stress...In the case of pain and suffering, I can only see an award in this area where negligence can be determined or the process of reviewing the claim has put the claimant in a situation of undue or unnecessary hardship...these terms are going to have to be defined. Leaving the terms silent is no longer prudent.

Yukon Injured Workers Alliance: The definition of Disability can be found in the AMA Guides, and should be followed.

WCHSB: The "meaning of disability" is a subject area which bears close monitoring. In addition, there is a need to ensure that sufficient regulatory and policy flexibility is in place. It will likely be easier for the WCHSB to position itself sooner rather than later to be able to respond to new medical evidence while at the same time maintaining an appropriate balance between compensation fund considerations and workers' entitlement to compensation.

The Board is concerned about stress being a compensable disability, with the exception of a specific diagnosis of post-traumatic stress disorder.

Any expansion of the meaning of the phrase disability would have significant financial and service impacts. There are models in other jurisdictions' legislation that should be explored.

### **Comments received during call for issues**

WCHSB: Definition of disability, particularly in relation to issues such as chronic stress and chronic pain. Right now the definition of disability is broad and there is lack of certainty around issues such as chronic pain and stress. This includes the possibility of a worker receiving compensation because she or he is being fired, being laid off, being evaluated, or other legal employer-employee interaction and claiming compensation for stress.

PSC: Should have clear criteria, definitions and consistent approach for 'stress-related' claims and stress-based claims for employees facing termination should not be allowed.

Ian Robertson: I am very concerned that the definition section is out of date and incomplete. I agree that a definition of chronic pain and stress is needed but am very concerned that this will open a floodgate to new claims that are very difficult to prove and disprove (sec 3 101).

Mervel Ambrose: Part 3: Compensation for workers act reference 3 "chronic pain".

### **Issue Brought Forward By**

Act requirement: expansion of disability, within the meaning of the Act.

## 81, Disability vs. Impairment

Currently there is a lack of clarity around the use of the word disability and no definition for impairment.

### Comments Received

PSC: Issue of significance for the Yukon Government as an employer.

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

Yukon Injured Workers Alliance: The terms Disability and Impairment can be found in the AMA Guides also.

WCHSB: It is not clear what the difficulty is with this issue, as the Act and related policy clearly define a disability and what defines an impairment. This may have been an issue in prior year's legislation but it would appear to be remedied in this one.

### Comments received during call for issues

Mervel Ambrose: Part 12: Definitions Act reference 101 "chronic pain". "Disability vs. impairment".

### Issue Brought Forward By

Review Panel

## 82, Maximum Wage and Assessable Earnings Rates

Issues Include:

- Method of calculating the maximum wage rate/ assessable earnings.
- Basis of calculating the maximum wage rate/ assessable earnings.
- Cap on maximum compensation and maximum assessment.
- Currently, workers or Directors who have earnings from two or more sources must be assessed up to the max on each source on of earnings and can only collect benefits to the maximum wage rate or the optional coverage.

### Comments Received

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

WCHSB: Director Coverage

Yukon is one of the jurisdictions where a director is automatically deemed a worker under the Act, unless they apply and receive approval from the Board for exemption. Directors can be assessed based on actual earnings up to the maximum wage rate or on an estimated value of service where there are no earnings. Where an individual is Director for more than one company, they pay assessment for each company. In a few cases, this can result in a net amount of assessment revenues over the maximum wage amount. However, this is not inconsistent with workers who work for more than one company. Any changes in this practice would need to be examined in light of consistency & fairness (with regular workers who have similar circumstances) and service and financial implications (cost-benefit of improved service against extra administrative resources, impact on revenue).

No jurisdictions were found to have dealt with this issue in their legislation.

## Earnings

There may be a need to define earnings for sole-proprietors and value of service directors. WCA has a definition of earnings as it relates to an employee and this definition states that earnings "does not include any amount for expenses incurred by the worker by reason of the worker's employment". In defining earnings for a sole-proprietor, requirements to factor out business expenses may be considered, given that gross income is often matched with high operating expenses. Value of service directors have a similar need for clarity around what constitutes earnings.

There would be complications around changes to this area, as legislative precedents do not seem to exist. Currently the Yukon Act allows the board to set any conditions for coverage of sole proprietors, despite any other provisions of the Act.

## Optional Coverage

There are cases when sole-proprietors come under the compensation system for coverage. This occurs when they:

- 1) hire other workers whom require coverage (become an employer);
- 2) act as a sub-contractor and work at a site where there are other workers (applied through section 58 of WCA & possibly assessed through an organizational test);
- 3) work in a contract of service (as an employee they automatically come under the Act - administrative and legal complexity for identifying such exists); and,
- 4) are deemed the worker of another employer in the same industry whom they work for and do not already have coverage as a sole-proprietor.

However, this can be confusing as these provisions are found throughout the WCA.

Key common circumstances are the possibility of injuring or being injured by another worker, or by the negligence of the employer. The Board's clear ability to deem the sole proprietor as worker, particularly when working with other workers is strongly recommended.

The continued ability of the Board to set policy on the definition of earnings for sole proprietors or directors addresses this issue. Clarity of the legislation would be increased by having one place in the legislation address when a sole proprietor is not eligible for optional coverage and the sole proprietor is to be considered a worker. As has been demonstrated earlier in this paper (see appendix), the setting of the maximum wage rate is of significant importance to both sides of the operations equation. By way of example, consider an increase of five percent in the Yukon's maximum wage rate from its current level of \$65,100 to \$68,400. The increase will serve to increase both revenues (through higher aggregate premiums) and expenditures (through higher benefit levels). Note, however, that the relative increase in revenue and expenditures may not be equal to five percent and that the relative increase may not be the same on both sides. A five percent increase in the maximum wage rate could result in a one percent increase in revenues and a four percent increase in expenditures. The reverse could also be true.

The determination of the relative quantitative impacts on revenues and expenditures from a change in the maximum wage rate would require advanced modeling and analysis which is well outside the scope of this paper. The observation that can be made, however, is that changes to the maximum wage rate may have impacts on the health of the compensation fund which are not immediately obvious but which only become apparent over time. For example, if an increase in the maximum wage rate has a higher relative impact on the revenue side of the equation than the expenditure side, the fund may accumulate an unintended surplus.

## Comments received during call for issues

A second observation to be made is that the health of the fund is reliant upon a set of complex variables and factors of which the maximum wage rate is but one. Thus to tinker with the maximum wage rate can have impacts which go beyond simple revenue and expenditures.

A third observation for consideration is that the maximum wage rate is an effective compensation fund lever. In the Yukon context, compliance with the concept of actuarial equity, whereby benefits are paid according to the rules in place at the time of injury or disability, is a statutory requirement. It necessarily follows that changes to the maximum wage rate must be made with care. Changes of a discontinuous nature such that the maximum wage rate "jumps" from one level to another, as was implemented in 1993,

must be made with even greater care. A recent amendment to the Yukon *Workers' Compensation Act* (Bill 73) which adjusted the wages of approximately 27 workers injured prior to 1993 to be equivalent to the maximum wage rate in 2002 speaks to this need for care.

The maximum wage rate calculation should be kept as simple as possible. Further, the provisions for changing the maximum wage rate must be simple and take into account the lag in available data.

The Workers Task Force: Cap on maximum compensation and maximum assessment.

WCHSB: Maximum Wage Rate. Formula must be kept simple, to avoid confusion. Need to recognize limits of Stats Can data, particularly around timeliness. Director Coverage. Clarify treatment of directors, particularly multi-company directors so that assessments do not have to be paid with respect to each and every company.

Shirley LaRoy: I would like to see the Act changed so that those higher income injured workers would see their compensation adjusted upwards annually as the maximum compensation amount is adjusted until the maximum compensation reached their indexed pre-injury income.

Yukon Chamber of Commerce: Review of YTG's assessment calculations and the administrative costs they pay to the Board and the overall impact to the fun.

**Issue Brought Forward By**

Review Committee

**83, Definition of a vehicle**

The current definition of a vehicle is any mode of transportation the operation of which is protected by liability insurance. This includes heavy machinery and airplanes.

**Comments Received**

Yukon Chamber of Commerce: Priority review issue.

Yukon Contractors Association (President): Item should be included in the review.

WCHSB: The Yukon's broad definition of a vehicle is not unusual; many jurisdictions contain a broad definition which may include vehicles as defined under a highway act, covered by public liability insurance, which are registered or not, or may be used on highway, air or water.

Maintaining a broad definition provides YWCHSB increased ability to access other insurance plans for recovery of damages.

Rationale for legislative change is unclear for this issue.

**Issue Brought Forward By**

Review Panel

**84, Definition of compassion**

There is no definition of "compassion".

**Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

WCHSB: While there is no definition of “compassion” in the WCA, there is also no definition of the equally important principles of “respect” and “fairness”.

The Task Force has already noted the difficulty of mandating client service in legislation.

### **Issue Brought Forward By**

Review Panel

## **85, Definition of wholistic approach to rehabilitation**

There is no definition of “wholistic approach to rehabilitation.”

### **Comments Received**

PSC: Issue of significance for the Yukon Government as an employer.

Ian Robertson: A wholistic approach considers body and soul as a complete entity. In some instances we recognize that trauma can be so debilitating that the person can no longer do the work they use to do even though the physical injury has been repaired...A wholistic approach addresses root causes not just symptoms.

WCHSB: The Preamble is used in legislation to give a statement of general principle. The reference to a holistic approach to rehabilitation is referenced in the *Workers’ Compensation Act* Preamble, and definitions are not provided for statements within the Preamble.

If there is an intent to place this within the Act itself, and not just the preamble then this would set a legislative precedent across the country. Financial impacts are not clear, but the potential for unanticipated cost drivers is tremendous.

### **Comments received during call for issues**

Ian Robertson: ...It makes sense to apply incentives where the objective is improve behaviour but one should not be rewarded for doing the minimum or simply fixing bad behaviour. If a company has a bad track record, the burden of their behaviour should not be reflected against all members of that class but should be assessed against the firm that is not behaving appropriately. Again, good record keeping is essential to track problems and cut them off at the pass before they become bigger issues. The bottom line is that if we improve all performance, everyone benefits through lower assessments and less use of the service. Since medical costs will continue their inevitable rise, a holistic approach should underpin the operations of the Board.

...to what degree is [a worker’s] stressed condition really work related or a matter of the worker not taking responsibility for their own lifestyle? Some illnesses are difficult to determine and assess objectively. Similarly, unless a holistic approach is taken, the real reason the injury occurred may not be detected...A whole health approach will only work if there is recognition by all parties of their responsibilities.

### **Issue Brought Forward By**

Review Panel

## **86, Average weekly earnings**

The Act states “average weekly earnings” shall be calculated based upon such sources of earnings over such period of time as the board considers fair and just.

## Comments Received

WCHSB: There is a strong link between this issue and issues #29 and #87.

There is no doubt that there can be difficulty in the area of determining average weekly earnings, particularly where there is a great deal of seasonal employment. However, it is important that the Board retain flexibility to make changes and reflect best practices as those change over time.

If changes to the legislation are overly restrictive, there will be financial, administrative and service impacts.

## Issue Brought Forward By

WCHSB: Defining earnings. Clarify this areas, particularly with relation to the definitions section and “average weekly earnings”.

## 87, Earnings

Issues include:

Inclusion of EI, CPP, WCB benefits, Social Assistance, non-monetary (e.g. dental plans) and non-employment related benefits (e.g. harvesting wild meat)

## Comments Received

Yukon Injured Workers Alliance: Earnings are ‘employed’ earnings only, and should not include benefits of any sort. The board should not consider any other benefits as ‘earnings’.

WCHSB: The issue of what constitutes earnings was not a matter considered by either the 1999 Task Force Review, or the Auditor General of Canada in her report released in September of 2002. Currently Yukon offers the highest possible benefit level in Canada. (Please note also discussion under issue #29.) The idea of providing for losses that are non-monetary in nature presents numerous difficulties, not the least of which includes the problem of attempting to assess the monetary value of those losses. Such a move could represent considerable financial implications for the Board in administrative costs alone, given the number and potential complexity of losses that may require quantification. There would also be service implications, as the ability of staff to respond quickly and efficiently to injured workers is reduced with this additional, and potentially significant, time expenditure. The practical implications of a move in this direction are a genuine source of concern for the administration.

The purpose of compensation for loss of earnings is obvious. The purpose of a lump sum payment for disability is not so clear. There is some question as to whether this payment may, in part, provide compensation for these other non-monetary, and sometimes unquantifiable losses.

According to reports done by Professor Paul Weiler in the early 80’s, leading to the dual wage-loss system, the lump sum payment is for physical impairment “and other non-financial issues”.

This issue links to other issues including deeming, rehabilitation and the maximum wage rate. The question of how assessments will be made on these non-earnings benefits is also of concern. If EI or other government payments are included as earnings, the question arises as to whether they will also be deducted, as in other jurisdictions. There may also be questions regarding the tax-free status of this portion of compensation.

The Board is extremely concerned about the impact on the injured worker, the impact on service, and the major financial impact that a legislative change in this area would have on the Compensation Fund.

## Issue Brought Forward By

WCHSB: Defining earnings. Clarify this areas, particularly with relation to the definitions section and “average weekly earnings”.

Robbie King: Put EI, CPP and WCB in earnings.

Denis Carriere: ...Being from Dawson City the work was limited, we would hunt for food and cut our own firewood...

Shelly Hobbis: Non earning benefits – 101

## **88, Special Examinations**

The Auditor General completed this examination in September 2002

### **Comments Received**

Yukon Contractors Association (President): Item should be included in the review.

WCHSB: Special examinations are more intensive reviews of the entire organization than audits - there are major resource impacts on the WCHSB and on the Auditor General. As stated by the Auditor General, "This special examination was extensive and time-consuming. It required a significant level of effort from the management and staff of the Yukon Workers' Compensation Health & Safety Board, the Appeal Tribunal and the Workers' Advocate." The current legislation does reference the appointment of the Auditor General to conduct annual financial and account audits. Requests for special examinations must be made in accordance with the *Yukon Act* to Ottawa.

### **Issue Brought Forward By**

Review Panel