NEWFOUNDLAND AND LABRADOR
HEALTH BOARDS ASSOCIATION

Brief to the Task Force On the Workers' Compensation System

NLHBA Mailing Address
P.O. Box 8234
St. John's, NF
A1B 3N4

NLHBA Delivery Address
Beclin Building
1118 Topsail Road
Mount Pearl, NF
A1N 2M3

Telephone (709)364-7701
Facsimile (709)364-6460
Email nlhba@nlhba.nf.ca
Web Site www.nlhba.nf.ca

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INTRODUCTION

In November 2000, the Task Force on the Workers' Compensation System distributed a discussion paper to facilitate discussion and seek input from stakeholders. The discussion paper highlighted numerous problems with the current compensation system, the most urgent problem being the current financial position. The financial position of the commission is so tenuous that the viability of the system is at risk. The challenge is to take immediate action to resolve the financial crisis and at the same time, ensure that our province can maintain a compensation system that is both affordable to employers and meets the needs of injured workers.

The Newfoundland and Labrador Health Boards Association

Founded in 1962, as the Newfoundland Hospital Association, The Newfoundland and Labrador Health Boards Association (NLHBA) is the federation of provincial health boards for the province of Newfoundland and Labrador. The NLHBA members include hospitals, nursing homes, community health boards and integrated health boards. A list of our members is attached as Appendix A.

On behalf of member health boards, the Newfoundland and Labrador Health Boards Association represents their interests, advocates to Government and Government agencies as well as the public on priority issues. It is in this capacity that on May 26, 2000, the NLHBA provided a written response to the WHSCC position paper entitled, "Duty to Accommodate Injured Workers in the Workplace… Shared Responsibilities" (see Appendix B).

The NLHBA recognizes the need to address the issues identified in the November 2000 Task Force Discussion Paper and welcomes this opportunity to provide both a written brief and a presentation to the Task Force. Through the combined efforts of the Task Force, WHSCC and all stakeholders, we are

confident that viability of the WHSCC system can be restored. Enclosed is a response to the November 2000 Task Force Discussion Paper which was prepared by the NLHBA on behalf of its member boards.

ISSUES

In Appendix I of the November 2000 Task Force Discussion Paper, key issues were identified for discussion as follows:

1. Prevention Strategy
2. Occupational Health and Safety Committees
3. Rate Setting Model
4. Experience Rating
5. Unfunded Liability
6. Waiting Periods
7. Benefit Levels for Injured Workers
8. Indexing Benefits
9. Deeming
10. Duty to Accommodate (and Return to Work)
11. Benefit of Doubt – Section 60

These issues are discussed in detail throughout this document and have been numbered for ease of reference.

1. PREVENTION STRATEGY

The obvious solution to reducing claims costs is to prevent injuries from occurring in the workplace. Prevention programs must include active participation from all stakeholders and the WHSCC should take the lead role in coordinating this effort. In discussing the Statutory Review with our member employers, it was clear that the issue of paramount importance to them was the development of innovative and effective prevention programs. Improving and promoting Health and Safety Services may have the added benefit of improving the public's perception of the

WHSCC. A focus on health and safety will provide an opportunity for the organization to be seen as an active participant in injury prevention.

Following the last statutory review, prevention services of Occupational Health and Safety (OH&S) were transferred and merged with The Workers' Compensation Commission to form the WHSCC. This was viewed as a potential opportunity to improve awareness and education in the area of health and safety. Employers welcomed this merger and anticipated that it would facilitate the development of effective health and safety programs in the workplace. It is clear that the Commission has improved several of their programs since the merger, such as the Workplace Inspections Module. Also, several employers have found the Worksafe Program to be helpful in identifying health and safety deficiencies in the workplace. The Commission should be commended for these programs but there is still a void that exists with respect to meeting the health and safety needs of employers. For example, the Worksafe Program is helpful in identifying deficiencies in health and safety, however, the program does not offer assistance or solutions for employers to overcome the identified deficiencies. In order to meet the needs of employers, the Health and Safety Services Department must provide innovative and cost-effective programs to overcome the identified deficiencies in health and safety.

Several employers have remarked on the lack of promotion or communication of the Department regarding the availability of health and safety programs. Several of our member employers noted that they have very little interaction with the Health and Safety Services Department. For employers to avail of the programs offered by the Health and Safety Services Department, they must first be made aware of the available programs. The Health and Safety Services Department should regularly canvass employers to determine the needs of employers and develop programs accordingly. Soft tissue injuries, particularly those of the neck, shoulder and back, are quite common in the health care sector. Accordingly, the Commission should act as a resource to provide current and accurate information to employers on the prevention of such injuries. As an example of

other program needs, at the Western Health Care Corporation, the employer is particularly interested in developing and implementing a hearing conservation program as well as a respiratory safety program. In order to implement these programs, the employer requires a resource to provide current and accurate information on hearing conservation and respiratory protection. Unfortunately, while many of our employers would like to have staff dedicated solely to health and safety, they do not have the resources to do so. It should be the role of the Health and Safety Services Department to act as a resource for health and safety information, since they are the experts in injury prevention.

In order to have an active role in reducing workplace injuries, the Health and Safety Services Department must provide effective and innovative injury prevention programs. Programs should include regular employer visitations and education sessions for employers and employees. The Health and Safety Services Department must promote themselves as a resource to employers and employees in the establishment and monitoring of in-house health and safety programs. To carry out this mandate, the Health and Safety Services Department must staff their department with sufficient personnel who are qualified and experienced in health and safety. Continuing education of staff is essential to ensure the provision of quality programs and services to employers and employees. In addition, Health and Safety Services staff must work closely with the compensation services department. Case managers, intake adjudicators and injured workers can provide valuable information to identify the cause and nature of workplace injuries.

2. OCCUPATIONAL HEALTH AND SAFETY COMMITTEES

All of the NLHBA members employ more than 10 workers and thus all of our members are required to have an Occupational Health and Safety Committee. The presence of an occupational health and safety committee can provide an effective channel of communication to the WHSCC. It is through these

committees that health and safety education can be promoted to everyone in an organization.

3. RATE SETTING MODEL

The present rate setting model should be revised. At present, there are identifiable inequities that exist. A rate code should accurately reflect the risk associated with the industry. For example, the Health and Community Services Boards are presently appealing their rate code classification of 641. This classification carries a high assessment rating and includes boarding homes, homes for special care, home care services (including nursing care), home support services (including respite/companionship, handicapped & disabled, personal care & home making services) as well as community health services. Our member Health and Community Services Boards provide services in the areas of continuing care, mental health, health promotion, health protection, addictions, child welfare, family and rehabilitation services and youth corrections. Due to a change in mandate, the vast majority of services offered by the Health and Community Services boards involves very limited “hands on” contact with clientele. From 1995 to 1997, the Health and Community Services Boards paid out $3,909,901 in assessments while only $171,229 was claimed in injury costs. Accordingly, it is evident that the present rate setting model is inequitable and lacks statistical credibility. These statistics demonstrate that in some industries there is no financial incentive for employers to reduce or manage workplace hazards.

4. EXPERIENCE RATING

Experience rating can offer employers an incentive to take a proactive role in health and safety management that can lead to innovation in health and safety programs, improved education and reduction in workplace hazards. Some of

the opposition to this approach, as noted in the Task Force Discussion Paper, included underreporting and diversion of attention from accident prevention to claims cost control. However, issues regarding underreporting can be addressed through legislative requirements and corresponding penalties for failure to report injuries. With respect to diverting attention from accident prevention to claims cost control, it appears that the present focus, as evident through this discussion paper, is cost control. Focus on cost control may actually result in better rehabilitation strategies and return to work programs. It will offer further incentive for employers to accommodate injured workers back into the workplace. Since an effective injury prevention program would provide employers with a lower experience rating as a result of fewer injuries in the workplace, it seems logical to conclude that this will actually act as an incentive for employers to become more “safety-conscious”.

5. SELF-INSURERS

As noted in the Task Force Discussion Paper, self-insured employers are individually responsible for the actual cost of injuries incurred by their employees. It appears that this method can be very cumbersome and may be too labour-intensive for most employers. However, in order to determine the viability of such an option, further research is needed to evaluate the effectiveness and efficiency of such a program.

6. UNFUNDED LIABILITY

Numerous reasons have been cited for contributing to the increase in the unfunded liability. Some of the factors include:

a) Increase in lost time claims. Virtually all new claims were due to strains, sprains or non-specific work incidents.

b) Increase in lost-time claims in workers over the age of 40.

c) Composite duration of claims is significantly higher in Newfoundland and Labrador than the next highest Canadian jurisdiction and more than twice the national average.

d) Long-term disability liabilities make up 35% of new injury costs. The number of long-term disability claims in Newfoundland and Labrador is at least twice the expected average for a wage loss system.

e) External factors such as lack of workplace programs or high unemployment

f) Factors not necessarily related to the work injury (such as preexisting conditions)

g) Internal factors such as varying interpretations of important legislative provisions

h) More liberal entitlement adjudication practices and generous application of the benefit of doubt clause

i) Inconsistencies between the Commission and Workers' Compensation Review Division interpretations.

Each of these factors, (a) to (i) are discussed in detail below.

a) Increase in lost time claims. Virtually all new claims were due to strains, sprains or non-specific work incidents.

This factor highlights the importance of educating all stakeholders in injury prevention. Considering the significant increase in soft-tissue injuries, the Health and Safety Services Department should develop an education program that specifically targets the prevention of soft-tissue injuries in the workplace. The commission should conduct research into these types of programs to identify effective prevention and treatment strategies.

Soft-tissue injuries often occur without a specific, identifiable incident. Thus, it can be difficult to establish whether the injury is work-related or due to some other factor such as physical deconditioning or a pre-existing condition. With respect to the acceptance of injuries for which there is no specific work incident, in Issue #11 of this brief, the NLHBA recommends that the legislation be amended so that the language in section 60 of the WHSCC Act (the benefit of doubt clause) is changed from “reasonable inferences “ to “preponderance of evidence”. Thus, this will ensure there is a clear, causative link between the injury and the workplace.

To further establish a clear, causative link between the injury and the workplace, claims for non-specific work incidents should be carefully scrutinized and the medical department should review such claims in conjunction with the claims adjudicator. This process will ensure that there is sufficient medical evidence to establish a link between the injury and the workplace.

b) Increase in lost time claims in workers over the age of 40.

Considering that workers in the over-40 age group require longer recovery times and more medical care, the WHSCC should conduct research into the most effective treatment programs for injured workers in this category. In general, many people become more sedentary and deconditioned as they age, which in turn increases the risk of injury. Health and fitness should be promoted by both employers and the WHSCC as an element of injury prevention.

c) Composite duration of claims is significantly higher in Newfoundland and Labrador than the next highest Canadian jurisdiction and more than twice the national average.

Considering this significant disparity, the Commission should compare the legislation, policies and procedures of other Canadian jurisdictions to those of Newfoundland to determine potential reasons for such a disparity.

Research indicates that early intervention is a key element in injury rehabilitation. With increasing numbers of claims, it seems that early intervention may be compromised. The Commission should ensure that it has sufficient resources to facilitate early intervention. Employers can also take an active role in this regard by maintaining regular contact with the injured worker and the Commission to ensure that injured workers are provided with effective rehabilitation programs. Also, employers can take an active role by modifying work so as to accommodate injured workers back in the workplace as soon as possible.

The significantly higher claims duration causes one to question the effectiveness of the present treatment and rehabilitation programs offered through the WHSCC. Programs offered by health care professionals should be carefully monitored and terminated where there is no demonstrated benefit. Health care professionals should be held more accountable to the WHSCC and this increased accountability can be facilitated through amendments to the legislation. For example, reporting standards of health care providers should be strengthened to require reports of objective clinical findings at regular intervals throughout the treatment/rehabilitation process. For quality assurance, the Commission should develop an outcome measurement program in order to identify the value of the various rehabilitation programs.

While health care providers are not able to identify a specific injury recovery time, guidelines regarding such time frames do exist. To ensure that injuries do not reach a chronic phase, once it is determined that a worker's recovery will exceed the anticipated duration, the worker should

be referred to the WHSCC medical department for development of an appropriate treatment plan.

d) Long-term disability liabilities make up 35% of new injury costs. The number of long-term disability claims in Newfoundland and Labrador is at least twice the expected average for a wage loss system.

It is unreasonable to conclude that 35% of workplace injuries will result in long-term disability, particularly when it is compared to the national average and considering that the vast majority of new claims are soft-tissue injuries. Such a figure is indicative that the rehabilitation programs are not effective and/or claims are being improperly accepted for long-term disability. It appears that since the last statutory review, significantly more claims are being accepted for long-term disability and this may reflect an ineffective deeming process. Problems and identified suggestions to improve the deeming process are outlined at issue #9 of this document.

e) External factors such as lack of workplace programs or high unemployment

While high unemployment is beyond the immediate control of stakeholders, workplace programs are something that all stakeholders can take an active role in implementing. Obviously, commitment is needed from employers and employees to foster development and participation in return to work and injury prevention programs. The Commission's role in this process is to educate, evaluate and provide the necessary resources. The development of mentoring programs between large and small employers is one method that can lead to a sharing of knowledge and other resources needed for successful return to work and safety programs.

Many employers do not have the resources or knowledge to devote to the development of workplace programs. Thus, the Commission's role as educator is essential. If employers are educated in proper lifting techniques, ergonomics, etc., they can educate their workforce and arrange the methods of performing work to reduce potential hazards.

Financial incentives, in the form of experience rating, for employers who implement effective safety and prevention programs will offer further encouragement for these stakeholders to strive toward an accident-free workplace and will help to offset the expenses related to the purchase of ergonomic and safety equipment.

f) Factors not necessarily related to the work injury (such as preexisting conditions.

As noted in Issue #11, the degree of proof required to substantiate a workplace injury should be clarified. The legislation should be changed in section 60 of the Act from "reasonable inferences" to a "preponderance of evidence". This change will limit the present broad application of the benefit of doubt provision.

Where an injured worker suffers from a preexisting condition unrelated to the work injury, there should be a medical review of the claim prior to acceptance. Compensation should reflect only the effect of the workplace injury on the disability. The event of the injury should be carefully considered. For example, a person with pre-existing back problems performs a common, non-strenuous work activity and then suffers back pain that causes him to lose time from work. Certainly, such an event is more likely attributable to a pre-existing condition and not the work activity. It seems unreasonable that compensation should be payable in this circumstance. Thus, where it is more likely that the injury was caused by the pre-existing condition and not the workplace, the claim should be

denied. Where it is shown that the workplace genuinely aggravated a pre-existing condition, compensation should be reduced to reflect the effect of the preexisting condition. To ensure that compensation is not awarded for factors unrelated to the work injury, the definition of "injury" should be strengthened to provide for an identifiable link between the injury and the employment.

g) Internal factors such as varying interpretations of important legislative provisions.

A lack of consistency in this regard reflects a lack of training for staff. There should be ongoing education of staff regarding the interpretation of legislation. Where the legislation is capable of varying interpretations, it should be amended to provide clarification or, alternatively, the Commission should develop clear policies to guide interpretation.

h) More liberal entitlement adjudication practices and generous application of the benefit of doubt clause.

As noted in issue #11, providing more clarity in section 60 of the Act should result in a proper weighing of evidence. Policies should be developed to ensure there is consistency in adjudicating claims such as repetitive strain and other injuries where there is no clearly identifiable link to the workplace. To ensure proper and consistent weighing of evidence, staff should be provided with the appropriate training.

i) Inconsistencies between the Commission and Workers' Compensation Review Division interpretations.

Principles of Administrative Law state that deference should be afforded to the decision maker at first instance. Unfortunately, it appears that the Workers' Compensation Review Division (WCRD) does not always abide

by this principle. Thus, the legislation as it applies to the WRCD should be amended to more clearly define the role and jurisdiction of WCRD. This legislative change should reflect that the role of WCRD is limited to ensuring that the Commission made a reasonable decision, based on the legislation, policy and procedures.

7. WAITING PERIODS

As noted in the Task Force Discussion Paper, both Nova Scotia and New Brunswick have adopted a concept known as a "waiting period" before an injured worker can receive compensation. Thus, a worker will not receive compensation benefits until either the third or fourth day following a workplace injury. However, the Task Force Discussion Paper did not note whether or not injured workers would be able to access sick leave during the waiting period.

In discussing this issue with our employers, several of them noted that where an employee is able to access sick leave, a waiting period would cause an increase in sick leave costs. In the health sector, the majority of employees have access to sick leave banks. Accordingly, employers will face a significant increase in their operational costs if a waiting period is implemented. Also, several employers fear that a waiting period will lead to under-reporting of work injuries, particularly if employees are not able to access sick leave benefits during the waiting period. Under-reporting will compromise employers' ability to develop and properly monitor safety programs. On the other hand, one of our employers suggested that if an employee can avail of sick leave during the waiting period, it may actually encourage employees to report their workplace injuries since they will not encounter a reduction in income during the waiting period. Thus, while there was no consensus on the issue, most of the Health Board employers, with whom we discussed the issue, did not recommend the implementation of a waiting period.

8. BENEFIT LEVELS FOR INJURED WORKERS

The present benefit level in Newfoundland and Labrador is 80% of net earnings. Prior to the most recent statutory review, benefit levels for the first 39 weeks were 75% of net earnings. The present benefit level appears to be reasonable and provincial comparisons support this conclusion. Accordingly, the NLHBA supports the continuation of the present benefit level.

9. INDEXING BENEFITS

Under the Act, long-term disability benefits must be indexed annually in accordance with the Consumer Price Index for Canada. This practice does not appear to be rationally connected to a "wage-loss" system since generally, income does not increase according to the Consumer Price Index. Accordingly, such indexing should only occur at either the discretion of the Board or approval by Cabinet.

10. DEEMING

As identified in the Task Force Discussion Paper, modification in deeming practices over the last few years has contributed significantly to the dramatic increase in costs. Instead of basing entitlement on the capacity to work and earn as the Act requires, entitlement is often extended to cover matters such as low education levels and inability to find work after an injury. It appears that this change was in response to the last statutory review, which criticized previous inequitable deeming practices. In addition, several decisions at the WCRD level have led to consideration of factors not related to work capacity.

While the NLHBA supports the need to compensate workers for their lost earnings capacity, one must bear in mind that extending benefits to cover low education and employment levels is outside the scope and intent of the legislation. The WHSCC system was never intended to be an unemployment insurance program. It appears that the pendulum has swung from a very inequitable deeming process to one that is too liberal and thus unaffordable. The challenge is to develop a realistic approach to deeming. A review of the practices of other jurisdictions may be useful in this regard.

To overcome prior inequitable deeming practices, the Commission should strive to identify more than one job when determining a person's earning capacity. At the same time, factors such as low education and employment levels should not be considered in the deeming decisions. Furthermore, the present manner of deeming is quite rigid and expensive. A deeming decision requires that an employee undergo a functional capacity evaluation to determine their present level of functioning. A potential job is then identified and the Commission must ensure that a recent Job Site Analysis has been completed which details the physical tolerances required of the job. Then, a job match is required to ensure the physical tolerances of the worker match the Job Site Analysis. Psychological testing may also be required to determine whether or not an injured worker has the intellectual capacity to perform the identified job. Labour Market Surveys are required to determine the expected level of income for a given occupation. This is a very rigid, time consuming and expensive process since outside agencies/professionals must perform each of the aforementioned evaluations. Also, where there is no successful Job Match, the process must be repeated. The rigidity of such a process tends to be unrealistic, inefficient and ineffective. Jobs are varied and may change day to day. Often, adaptations can be made to the work environment that can accommodate a worker's needs but when invoking the deeming process, most likely, the identified position is not a position the worker will work in – it is simply an example of a job that a person <u>could</u> perform.

Any process of deeming requires cooperation from all stakeholders, including health care professionals. Often, they don't fully understand the process and instead of contributing to the process, they may terminate it based on subjective complaints of the worker and not objective clinical findings. This can be remedied through education and increased legislative accountability.

Injured workers must fully cooperate in the deeming process in order for it to be successful and they should take an active role in identifying alternate work opportunities. While the Commission does have the ability to terminate programs/benefits due to non-compliance, this mechanism is rarely used where circumstances warrant such action.

Employers should also be active participants in this process and while the NLHBA does not support legislating the duty to accommodate, the duty to accommodate should be incorporated into the policies of the Commission so that it can provide clarification on the roles and responsibilities of stakeholders. At the same time, consideration must be given to the realities of the workplace. For example, consideration must be given to the costs of accommodation and the impact on the employer's ability to provide services to its clients, patients or customers.

To overcome some of the problems associated with low education and high unemployment rates in the province, the WHSCC should more actively promote on-the-job training opportunities to employers. Financial incentives should be provided to employers who offer such programs. Such programs could resolve some of the problems that injured workers face in securing employment post-injury. Also, financial incentives may enable employers to expand their workforce and at the same time, a reduction in long-term claims costs may be achieved.

Another method to overcome the issues of low education and high unemployment rates in the province is to further develop the concept of self-employment assistance. At present, the policies of the Commission enable a

worker who provides the Commission with a viable business plan, a one-time financial grant of up to $20,000. Unfortunately, there are few workers who can avail of such an opportunity, considering the limited amount of funding available. Thus, consideration should be given to expanding the grant where there is merit in doing so.

11. DUTY TO ACCOMMODATE (AND RETURN TO WORK)

On May 26, 2000, the NLHBA submitted a document to the WHSCC addressing the Duty to Accommodate. It is attached as Appendix "A".

12. BENEFIT OF DOUBT – SECTION 60

Section 60(1) of the WHSCC Act states as follows:

> "60. (1) It is not necessary for a worker to bring forward conclusive proof of his or her right to the compensation applied for, but the commission shall draw from the circumstances of the case, the evidence and medical opinions, *reasonable inferences in favour of the worker." (emphasis added)*

This language, as noted previously, has been given a very liberal application that appears not to have been contemplated by the drafters of this provision. The Task Force Discussion Paper suggests clearer legislative language and provided the phrase, "preponderance of evidence" as a potential alternative to "reasonable inferences in favour of the worker". The NLHBA supports such legislative change. This will enable the Commission to make sound decisions based on a proper weighing of the evidence.

CONCLUSION

Throughout this document, numerous recommendations have been made. It is the position of the NLHBA that there is no “one” solution to the financial crisis the WHSCC is facing. Lowering benefit levels, raising assessment rates or legislating duty to accommodate are “quick fixes” which will not resolve the true problems with the Worker’s Compensation system. Accordingly, the NLHBA supports a broad-based approach which includes improving and expanding Health and Safety Services. We also recommend an amendment to section 60 of the WHSCC Act to provide enhanced objectivity to the adjudication process. The NLHBA recommends that all stakeholders be held accountable for the decisions and actions they take within the confines of the Workers’ Compensation system. The internal operations of the WHSCC must also be carefully reviewed to improve the efficiency and effectiveness of the claims management process. A broad-based approach which seeks to improve the entire system will ensure the long-term viability of the Workers’ Compensation system.

APPENDIX A

List of Members

Health Care Corporation of St. John's
Health and Community Services – St. John's Region
St. John's Nursing Home Board
Avalon Health Care Institutions Board
Peninsulas Health Care Corporation
Eastern Health and Community Services Board
Central East Health Care Institutions Board
Central West Health Corporation
Health and Community Services – Central Region
Western Health Care Corporation
Western Regional Health and Community Services Board
Grenfell Regional Health Services Board
Health Labrador Corporation
The Newfoundland Cancer Treatment and Research Foundation

APPENDIX B

Response to the WHSCC Discussion Paper Entitled "Duty to Accommodate Injured Workers in the Workplace … Shared Responsibilities"

Introduction

The Newfoundland and Labrador Health Boards Association (NLHBA) is the federation of provincial health boards for the Province.

In March of this year, the Workplace Health, Safety and Compensation Commission (WHSCC) distributed a discussion paper entitled, "Duty to Accommodate Injured Workers in the Workplace … Shared Responsibilities". The discussion paper was in response to the provincial government's concern over employers' duty to accommodate injured workers and their corresponding belief that the requirement of employers to accommodate injured workers should be strengthened.

As a stakeholder in the WHSCC, the NLHBA was asked to provide feedback on numerous questions posed in the document. Accordingly, the NLHBA formed a committee comprised of representatives from various health boards to develop the enclosed response.

The provincial health boards employ a large portion of the provincial workforce. The provincial health boards recognize the importance of return to work programs and the need to work in collaboration with all stakeholders to improve the quality and effectiveness of these programs. The NLHBA appreciates this opportunity to provide feedback on the discussion paper and is confident that the WHSCC will give thorough consideration to the enclosed comments.

1. Do current programs meet the needs of workplace parties?

- Some of the return-to-work programs offered by the Commission are effective in returning injured workers to the workplace. There are a variety of return-to-work programs that are designed to meet the individual needs of injured employees returning to work.

- In the current programs offered by the WHSCC, there are few or no incentive programs for employers and employees which would further facilitate early intervention and return to work. Neither are there negative incentives to deter non-compliance and unsafe practices.

- Recently, the WHSCC has implemented a new step in the claims management process which has been designated as the Early Intervention Team. This team will manage a claim for the first 10 weeks after an injury occurs before it is forwarded to a case manager. Unfortunately, the Early Intervention Team is not meeting the needs of employers and injured workers. While the idea is positive, it has not been effective. Employers want early intervention but unfortunately the Early Intervention Team has only added another step in processing claims, thereby creating further delays. There have been some positive experiences reported but since the Team was comprised of new case managers it is difficult to fairly evaluate the effectiveness of such a team.

- The adjudication time for recurrences can be unacceptably long i.e., weeks or months. This results in delays in accessing programs such as physiotherapy and occupational therapy. It appears that there is a correlation between the time for acceptance and the age of the recurrence.

- Current programs offered by the Commission do not address issues relating to the duty to accommodate, assessing undue hardships and permanent accommodation of physical restrictions and limitations.

2. What are the current obstacles for effective return to work for injured workers?

- Health care employers experience delays in having claims processed through the Intake Adjudication level and thus, early intervention is compromised. The delays may be due to the fact that health care employers continue to pay employees while awaiting claim adjudication. Thus, injured workers are not pressing the Commission to process their claims.

- There are insufficient resources (case managers, employers, health care providers) to co-ordinate and closely monitor return to work programs. Proactive monitoring would ensure that rehabilitation programs are not continued for an unreasonably long time and that any problems with the program are identified and resolved quickly.

- There is some overlap between the employer's role and the WHSCC role. For example, some employers are actively involved in early intervention. Both the WHSCC and employers may be calling employees and health care

providers for the same information. This is not an efficient use of resources. Improved communication between all stakeholders would help overcome this obstacle.

- Workplace modifications to facilitate a return to work can be very costly for employers and this should be considered in assessing undue hardship.

- Collective Agreement language often hinders a successful return to work. Provisions such as seniority, recall and layoff are often in conflict with accommodating injured workers back into the workplace. Also, in a unionized environment, there are "work of the bargaining unit" issues. For example, an injured nurse may be physically suited and qualified for a NAPE LX position in blood collection but because it is the work of another bargaining unit, NAPE LX members will have preference for the position. While there have been recent decisions in other jurisdictions which suggest that bargaining unit lines can be crossed in some circumstances, this will certainly place a strain on labour relations.

- Some of the return-to-work programs offered by the Commission are not suited to the operations of employers. For example, many of the employers have 12-hour shift schedules, so it may be difficult to accommodate ease-back hours and/or permanently accommodate a reduced workday tolerance.

- Employers lack confidence in the W.C.R.D. Appeal Process. Extended earnings loss decisions and return-to-work plans are often successfully appealed by the employee to the W.C.R.D. The corresponding rationale for the overturned decision is often in conflict with the present legislation and policies of the Commission.

- The WHSCC should attend W.C.R.D. hearings. Unfortunately, the WHSCC is not represented at most hearings and thus the responsibility falls on employers to be experts in WHSCC policies, procedures and legislation.

- In some areas, long waiting lists to see specialists results in delayed treatment, diagnosis and/or delayed implementation of return-to-work programs.

- In rural areas, injured workers may have to travel long distances to see specialists.

- In some cases, employees fail to put forward full effort during the treatment and rehabilitation process.

- Health care providers often fail to give adequate consideration to return-to-work options. Medical reports submitted by primary care givers are often vague and lack objective clinical findings. Oftentimes, primary care providers will recommend that a worker not participate in a return-to-work program or remain off work based on subjective complaints of pain rather than objective clinical findings. It appears that primary care providers are placed in the difficult position of attempting to balance the subjective complaints of their patient against the patient's physical abilities. Furthermore, it is financially

beneficial for health care providers to extend treatment. To deal with this problem the WHSCC should educate health care providers regarding the impact they have on the WHSCC system. Also, the form 8/10 (Physician's Reporting Form) should be revised to ask direct questions regarding a worker's return to work capabilities.

- There are no positive or negative financial incentives for injured workers to participate in return-to-work programs. In some cases, it is financially beneficial to remain at home. For example, injured workers with children will be able to care for their children when they are receiving temporary earnings loss benefits. If required to participate in an ease-back program, the employee will incur child care expenses as well as travel costs.

- Some employees have disability insurance on their loans and mortgages. When an employee suffers a workplace injury resulting in decreased income, disability insurance on a loan can compensate for that lost income. However, when an employee returns to work on an ease back program, even though the income level does not increase, the disability insurance may cease. For this reason, there can be a financial disincentive to participate in ease back programs.

- In some cases employers are left with the responsibility of developing creative return to work programs. For example, the Health Care Corporation of St. John's had developed a Transitional Work Program whereby the employer will fund and create project work for injured employees which may or may not be related to his/her pre-injury work.

- There is no requirement to have regularly scheduled meetings regarding return to work issues between the WHSCC, the employer, the employee, union representative and health care providers.

- Unions are often uncooperative with respect to accommodation issues and grieve attempts by the employer to accommodate injured workers.

- High caseloads hinder the case manager's ability to promote early intervention, return to work and close monitoring of each worker's progress. Thus, the case manager is unable to be as proactive as he/she would like to be. High caseloads of Intake Adjudicators hinder their ability to thoroughly review claims.

- In collective agreements that enable workers to exercise bumping rights, this can disrupt the working relationships as there may be animosity between the person bumping and the person being bumped. This obstacle can be addressed by providing the injured worker with priority status for future vacancies and reassigning tasks rather than initiating a bumping process.

- There is a perceived problem with acceptance of the injured worker by peers and managers.

3. What are the roles and responsibilities of the following stakeholders in returning injured workers to work?

a) Employer

- Respect an employee's right to confidentiality regarding diagnosis and other health information.
- Become educated in employer roles and responsibilities regarding the duty to accommodate.
- Appeal decisions of the WHSCC that were not made in accordance with policy. Attend W.C.R.D. hearings and lobby for WHSCC presence.
- Explore all options in consultation with other stakeholders regarding potential modifications to the working environment and/or alternate employment options.
- Offer support to injured workers by listening to their concerns and accommodating "reasonable" requests for modifications to the workplace or work schedules.
- Maintain contact with major stakeholders and provide regular feedback regarding return to work issues.
- Educate workers on safety precautions and implement safe work practices.
- Promptly and thoroughly investigate accidents and incidents in the workplace.
- Be an active participant in the return-to-work goals.
- Assign an internal person to monitor injured employee claims.
- Consider implementing a pre-placement screening process and conduct job site analyses on existing positions within the organization.
- Become educated in the return-to-work options offered by the Commission.
- Educate employees regarding workplace injuries, return-to-work programs, etc.

b) Worker

- Provide all necessary medical documentation as required.
- Obtain clearance for return to work from the health care provider when required.
- Fully participate in the return-to-work process.
- Follow safe work practices.
- Maintain regular communication with stakeholders and keep them informed of progress.
- Keep scheduled appointments with physicians and other health providers.
- Be honest regarding the status of the injury, limitations and restrictions.
- Follow the advice and direction of physicians and other health care providers.
- Work with the case manager and other stakeholders to explore the best treatment options and/or return to work plans.
- Report injuries immediately so they can be investigated and reported to WHSCC.

c) Health Care Provider

- Be objective, timely and proactive with treatment options.
- Terminate those treatment or return-to-work options that are not providing positive results.
- Consider all treatment options and select those that will most likely result in a positive return-to-work experience.
- Maintain regular contact with the case manager regarding recommendations and objective findings.
- Consult with the employer when considering return-to-work options.
- Be supportive of return to work programs.
- Limit judgements to clinical assessments.
- Provide service within acceptable time frames and self-evaluate client outcomes.

d) WHSCC

- Investigate questionable claims.
- Attend all W.C.R.D. hearings.
- Provide relevant information to health care providers and the employer.
- Access cost-effective and necessary clinical intervention related to the worker's injury.
- Develop performance measures for, and evaluate outcomes of, health care providers such as physiotherapists and occupational therapists.
- Compare incident rates, adjudication duration, and claims duration with other provinces and share this information with stakeholders.
- Regularly evaluate the outcomes of services provided by the WHSCC to the employers.
- Incorporate health and safety into compensation services through a team model.
- Consider extenuating circumstances before issuing fines to employers in cases where reporting of an injury is delayed. This will provide employers with the necessary time to conduct a thorough investigation.
- Contact the worker and employer, as well as the health care provider, in a timely fashion.
- Make efforts to reduce the waiting list to see specialists.
- Educate employers and employees as to their roles and responsibilities in the return-to-work effort and accommodation issues.
- Maintain regular contact with the stakeholders.
- Use statistics to determine the most effective treatment options. Keep apprised of new treatment and rehabilitation programs offered in other jurisdictions as well as the effectiveness of same.
- Consider all evidence in adjudicating claims. Adjudicate in an effective and efficient manner.
- Conduct safety audits of employers and provide feedback on safe practices.
- Quickly initiate return-to-work programs.
- Educate and train stakeholders in return to work programs and accommodation issues.

- Initiate a program of positive and negative financial incentives for stakeholders with respect to return to work programs and accommodation of injured workers.
- Provide funding for small employers to support accommodation of injured workers.
- Fund clinical tests and assessments to identify reasonable return to work programs.
- Promote the human and financial benefits of return to work programs and accommodation.

e) Union

- Actively support accommodation options and cooperate with the employer and the WHSCC in providing reasonable accommodation alternatives to the point of undue hardship.
- Provide feedback on the return to work process and outcomes.
- Respect an employee's right to confidentiality regarding diagnosis and other health information.
- Support the injured employee through exploring alternate work options and/or modifications to the work environment.
- Cooperate with the employer and the WHSCC in facilitating a successful return to work for the injured employee.
- Educate members on the importance of safety in the workplace.
- Educate union members on the importance of accommodating injured workers.

f) Co-Workers

- Support the injured worker through assistance with physically demanding tasks when formally requested by the employer.
- Offer encouragement to the injured employee.
- Adopt safe practices at work to prevent injuries.
- Advise the employer of any hardship resulting from the accommodation of an injured worker.

4. What needs to be done to ensure that everyone carries out their roles and responsibilities effectively?

- Conduct compliance audits of employers to ensure that they are fulfilling their roles and responsibilities.

- Consider implementing policies to clarify the onus on employers and unions to accommodate injured workers.

- Train and educate all stakeholders regarding services and programs offered by the WHSCC.

- Conduct regular meetings between the employer, injured worker, union representatives and WHSCC, and where possible, healthcare providers, to facilitate a cooperative return-to-work program.

- Offer incentives for employees who participate in return-to-work programs. (i.e. full salary with an option for the employer to either share the cost with the WHSCC or have the WHSCC fully fund the full salary)

- Send a letter to the employee outlining his/her obligations in the return to work effort and the consequences of non-compliance.

- Develop statistical information on, and research the duration and effectiveness of, various treatment programs and return-to-work options.

- Strengthen the wording of the WHSCC policies to place more onus on employees to participate in return-to-work programs.

- Monitor the effectiveness and duration of rehabilitation/treatment options and develop outcome expectations for health care providers.

5. Do you believe the injury employer has a greater responsibility to accommodate injured workers than other employers?

- Yes, this will motivate employers to maintain a safe working environment. Accommodating injured workers will help control the cost of claims by reducing claim duration. Furthermore, the employee will be able to maintain employment benefits such as pensions and group insurance. The employer will benefit by retaining valued human resources.

6. Are new programs required? What do you suggest?

- The WHSCC should consider hiring a team of rehabilitation specialists (Occupational Therapist, Physiotherapist) in each of their regional offices to offer objective advice on the duration of treatment programs and to treat injured employees in communities where rehabilitation services are not currently available.

- Caseloads of case managers is a concern. It is difficult for case managers to provide efficient service when managing 70 or more cases. The Commission should consider piloting an outcome measurement program to determine the effect of a reduced caseload on claim duration and cost. As well, the effectiveness of the case management system should be evaluated.

- The WHSCC should continue to research creative return to work options.

- Incentive programs, both positive and negative, would benefit and motivate all parties to actively participate in the return to work process.

- There are presently several return to work programs offered by the WHSCC, but consideration should be given to the uniqueness of each job situation and each employer.

- The Commission should become more aggressive in conducting investigations stemming from information provided by employers and others.

- A separate investigation file should be kept to maintain confidentiality of persons providing information for investigations. Investigations should be removed from the Legal Department and placed in the Compensation Services Department to promote a team approach to claims management.

7. Should existing or new programs include incentives for either employers or workers?

- Yes. Currently, there are limited incentives for employers to implement safe practices. Also, there are few incentives for employees to return to work. As previously noted, many employees incur greater costs while participating in return-to-work programs versus simply staying at home.

- Incentives for employers should include the following:
  - Merit system for implementing return to work programs.
  - Provide funding to employers for internal assessment services such as occupational health and occupational therapy.
  - The WHSCC should provide support for investigating questionable claims.

- Incentives for employees should include the following:
  - Provide additional financial support for employees who participate in return to work programs.

8. What are the challenges for small businesses?

- Not applicable.

9. Is the role of health care providers satisfactory?

- Health care providers should be more accountable for their recommendations. For example, primary care providers often recommend that injured workers remain off work due to subjective, rather than objective, findings.

- Physicians are often in a conflict between maintaining a positive relationship with their patient and providing objective information to the WHSCC.

- Functional Work Assessments are very effective in providing objective data to develop a return-to-work program. Health care providers should be required to provide thorough and objective data regarding the work injury and treatment plan.

10. Should legislation enforce duty to accommodate?

- No. There are some concerns that enforcing the duty to accommodate through legislation would result in “forum shopping”. At present, an injured worker can enforce a duty to accommodate through human rights legislation, and possibly through the grievance and arbitration process. Adding “duty to accommodate” to the WHSCC legislation would provide another avenue for

redress. Thus, an employer may have to defend itself in three different forums.

- The objective of accommodating injured workers back into the workplace can be achieved through existing mechanisms. Recent court decisions regarding the application of human rights legislation indicates that there already exists a duty upon employers to accommodate injured workers. Rather than implementing legislation, the Commission can take a proactive role regarding the duty to accommodate through their policies. This can be accomplished by clearly stating the roles and responsibilities of stakeholders in the duty to accommodate. In addition, the Commission can promote the duty to accommodate through publications and information sessions with stakeholders.

- Legislation would help resolve some of the problems that employers encounter regarding the language of collective agreements. Some collective agreement language limits an employer's ability to accommodate an injured worker. Since legislation would take precedence over the collective agreement language, employers could take a more flexible approach in accommodating injured workers back into the workplace. However, given recent developments in the common law and Human Rights legislation, this flexibility already exists. Thus, the solution is education rather than legislation.

- Legislation that incorporates "duty to accommodate" may reduce long term claims costs.

- Legislation that enforces the "duty to accommodate" may encourage employers to be more proactive in health and safety issues.

- If the duty to accommodate is legislated, larger employers may find it very difficult to establish "undue hardship" due to the size of their operations, even where there exists a legitimate and significant negative impact, financial or otherwise.

11. Should legislation outline the rights and responsibilities of workplace parties?

- Again, there is some concern that outlining the rights and responsibilities through legislation may result in an additional forum for redress where these rights and responsibilities are seen to be violated.

- Outlining the rights and responsibilities of workplace parties through legislation may motivate parties to cooperate and actively participate in the return-to-work process. However, this can also be accomplished though policy development and education.

- At present, unions are seen as having very little, if any, responsibility for accommodating injured workers. This responsibility rests squarely with employers. However, restrictions imposed by collective agreement language as well as union interference often create the greatest impediment to

accommodation. Although we do not agree that legislation in this area is necessary, if it is enacted, it should outline the union's responsibilities as well as the employers and they should be held equally accountable.

12. Is it more important to educate stakeholders before developing new programs or implementing new laws?

- It is extremely important that stakeholders be made aware of new programs or new laws as this may have an impact on the manner in which they conduct business or do work.
- Stakeholders must be educated in new programs and new laws in order to determine the feasibility of implementing same.
- Stakeholders must be educated in order to know how to implement these programs or laws.

13. What guarantees should injured workers have that they will not be laid off after being accommodated?

- This may be an unrealistic expectation as employers are often unable to foresee the circumstances that could result in a layoff situation.
- At present, there exists human rights legislation which would guard against discrimination of employees on the basis of disability. This should be sufficient to address concerns of improper layoff.

14. What needs to be done to protect the rights of co-workers who may be affected by the accommodation of an injured worker in the workplace?

- If legislation or policy is enacted to implement the duty to accommodate, consideration should be given to whether the displacement of an employee as a result of accommodating an injured worker would constitute undue hardship.

Conclusion

The NLHBA supports the need for creative and effective return to work programs, including accommodation of injured workers. Human Rights legislation prohibits discrimination on the basis of disability and corresponding developments in case law regarding accommodation make it unnecessary and in fact redundant to include the duty to accommodate in the WHSCC legislation.

If you require further information regarding this submission, please do not hesitate to contact Mr. John Peddle, Executive Director of the NLHBA, at 364-7701 (ext. 317).