PUBLIC SERVICE ALLIANCE OF CANADA

Brief submitted to the Workplace Health, Safety and Compensation 2012 Statutory Review Committee - NL

April 2, 2013

The Public Service Alliance of Canada (PSAC) represents over 180,000 workers from coast to coast to coast. Our members work for federal government departments, federal crown corporations and agencies, the Yukon and Northwest Territories governments and a variety of other public and private sector employers. The PSAC also represents people who work abroad in embassies and consulates.

The Atlantic Region represents almost 20,000 members organized in166 locals. Our members in the Atlantic are employed in large and small communities throughout the region. Most of us work for the federal government, agencies, and crown corporations and an increasing number work in the private and community services sectors. We preserve Canada's natural and historic heritage, we collect statistics for the business community, we maintain airport runways and navigation systems, we monitor fish stocks, we administer pensions and employment insurance, we respond to emergencies at airports and at sea, we help new Canadians get settled, we make sure your food is safe to eat, we support veterans and their families, we send you your tax refund and we provide a safe refuge for abused women and their children. We do all this, and more.

The Atlantic Region is serviced by four Regional Offices located in St. John's, Charlottetown, Moncton and Halifax.

We welcome the opportunity to provide our views and recommendations to the NL - Workplace Health, Safety and Compensation 2012 Statutory Review Committee.

Putting the squeeze on injured workers

From 1914 to the late 1980's, workers compensation laws and practices continued to improve in each Canadian province. Waiting periods were eliminated. Benefits levels were increased. More occupational diseases were recognized. Inflation indexing of pensions was introduced. Independent appeal systems were established. Formerly secret WCB policies and decisions were published.

All of these improvements came about because Unions fought for them. Widows camped out on the steps of provincial legislatures; injured workers groups demonstrated repeatedly; newspapers, radio and television carried stories about

injustice to workers with disabilities; and unions lobbied for improved benefits. These efforts resulted in positive improvements to the workers' compensation system.

During the 1990's, however, for the first time in Canadian history, the workers' compensation system came under a dramatic attack.

The international corporate agenda of privatization, deregulation and free trade has had far reaching effects in Canada. Our social institutions were under attack like never before.

Workers' compensation is no different. Employers tried to reduce their costs and erode a system Canadians have had as a right for ninety years. Remember, the historic compromise required employers to pay all of the costs for workers' compensation while workers gave up the right to sue them. The employers' attack on workers' compensation took place in the context of free trade with the attempt to harmonize downwards to the lower benefit levels of the privatized U.S. system.

Unfunded Liability

According to Workers' Compensation Acts, the WCBs must set aside all of the money to pay for future pension costs (the future liability) of disabled workers' claims in the year they occur (or when the pension is calculated). If they fail to set aside all the money required for all such claims the WCB is said to have an unfunded liability. If they set aside too much money, the WCB is said to have a surplus. If the right amount of money is set aside, the WCB is said to be fully funded.

If assessments rates are set high enough, there is no unfunded liability or, at worst, a temporary small unfunded liability. Some Boards however have had their assessment rates set too low for years. Employers have successfully lobbied governments and WCBs to keep their assessment rates low.

According to the Workplace Health, Safety and Compensation Commission, Strategic Plan 2011-2013 (page 15):

> *The Commission practices sound financial management of the funds collected through employer assessments to ensure the financial sustainability of the insurance system. Managing sustainability is done through investment policy, establishing experience based assessment rates and providing affordable compensation benefits.*

It also states on to the Workplace Health, Safety and Compensation Commission, 2011 Annual Report (page 8):

> *The Commission and its employer and worker partners work in three specific areas to help ensure the financial sustainability of the workplace health, safety and compensation system:*
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> - *Reducing injuries;*
> - *Working closely with health care providers and other suppliers to contain costs while maintaining service to our injured workers, employers and workplace partners;*
> - *Adhering to the stakeholder supported funding policy.*

The report further states on page 9:

> *Most important, we have made significant progress in reducing workplace injuries. A dozen years ago the Commission was accepting more than 6,500 claims per year for workplace injuries that caused loss of wages. In 2011, that number was reduced to 4,070, despite the fact the labour force has grown by more than 25,000 workers. This reduction in injuries has resulted in the savings of hundreds of millions of dollars in claims costs and future liabilities.*

No one will disagree with a financially viable worker's compensation system. We believe, like many others across Canada, that injured workers have been overwhelmingly impacted by the changes brought forward by employer-friendly amendments to benefits and negotiated collective agreement language. We will further elaborate on specific recommendations in our brief.

Under-reporting of injuries

Many studies point to significant under-reporting of workplace-related injury, illness and death statistics. In fact a study of Canadian workers published in the American Journal of Industrial Medicine in December 2002 found 40 per cent of those suffering an injury, eligible to receive compensation did not submit a claim. Additional research referenced in this study points to even higher non-reporting rates.

From a financial perspective, under-reporting means that funding for medical costs that should be paid for by workers' compensation boards are actually paid by the provincial governments. From a preventive medicine perspective, employers are not aware of the full cost of injuries and illness that occur in their

workplace, and thus they may not invest adequately in preventive health and safety measures.

It has long been recognized that work-related injuries are under-reported to workers' compensation boards, yet a review of the literature provides few empirical data.

Health care funding represents a substantial portion of government spending. The defraying of costs for work-related injuries and illnesses can be resolved by appropriate reporting and billing of work-related injuries and illnesses.

The negative effect that under-reporting has on preventive health and safety measures in the workplace is more damaging than the financial consequences. Employers are guided by injury and illness statistics in designing and implementing workplace health and safety programs, and if employers are not fully aware of the events that occur in their workplace, preventive efforts may become less of a priority. This is particularly important with respect to occupational illnesses, because the timely identification of causal factors for illnesses such as asthma and dermatitis can have a drastic effect on individual outcomes.

The employer is legally responsible for reporting work-related injuries; however, the incentives for not reporting a work-related injury or illness make this avenue potentially unreliable. Thus, it is often up to the employee to file his or her claim. There are many reasons an employee might decide not to file a claim, ranging from fear of reprisal and social stigma to a lack of understanding of the compensation system.

We believe that the Commission needs to invest resources in ensuring that employers register with the Commission and pay assessments based on their workers' earnings and report all contractors.

More resources need to be invested by the Commission to ensure all employers control their costs by providing safe and responsible work environments where accidents are prevented and workers return to work as soon as possible after an injury. The longer an injured worker remains out of the workplace the more difficult it becomes to return in a timely manner.

Maximum Earnings Covered

A good indicator of the burden carried by injured workers in the Atlantic and in Newfoundland & Labrador specifically is the issue of maximum earnings covered that has seriously impacted our members.

In our occupational groups, many more skilled workers are faced with a significant reduction of income when injured in Newfoundland & Labrador.

As a simple example, many of our members are part of the ‘’Programme Administration Sevices’’. At a level of PM-04, the entry level of annual salary is $63,663 and the last step of that classification is of $68,793 per year.

All our rates of pay are posted on the Treasury Board of Canada Website.

We recommend that the maximum earnings covered be increased significantly to provide adequate compensation to injured workers. In our opinion, it would need to be at least equivalent to the one established in British Columbia (i.e. $75,700).

Top-Ups

Top up agreements are found in many collective agreements negotiated by unions, including the one between the PSAC and Treasury Board of Canada. They compel employers to make up the difference between benefits awarded by the provincial workers' compensation acts and the injured worker’s full salary.

Section 81.1 of the Workplace Health, Safety & Compensation Act of Newfoundland and Labrador imposes such a prohibition on any agreement between an employer and an injured worker. Accordingly, amendments have been made to the income tax system to change the application of the Newfoundland and Labrador income tax provisions.

This situation, exclusive to the Workplace Health, Safety & Compensation Act of Newfoundland and Labrador, creates regional disparities among PSAC members working for the Federal Government.

Injury-on-duty leave provisions found in our collective agreements were achieved by our union by collectively bargaining all of our pay, conditions of employment and benefits. We achieved injury-on-duty leave by giving up other possible gains at the collective bargaining table. Our employer agreed that it was the fair thing to do. We gave up other possible gains in pay and benefits to better protect our injured members. This language represents an historical collective bargaining trade-off that we are proud to offer to our injured workers.

We strongly recommend that section 81.1 of the Workplace Health, Safety & Compensation Act of Newfoundland and Labrador be repealed to harmonize the benefits levels with every other jurisdiction of Canada.

Chronic Stress to be Recognized as a Compensable Injury

We believe that the WHSC Act should extend its definition and include specific provisions to ensure that all workers have coverage for chronic stress. It is a well established fact that this condition is increasing in the workplace at an alarming rate. Government cutbacks, restructuring, early retirement, privatization have all had a significant impact on worker's health. Stress is a major factor in the depreciating health of workers in today's new workplace.

All provincial workers' compensation boards recognize post traumatic stress and we believe that the WHSCA should go beyond this baseline coverage by following the lead of many other jurisdictions in extending their coverage to include chronic stress.

There are many reasons for the inclusion of chronic stress as compensable claims. They include:

- A fundamental purpose of the system is to compensate all "truly work-caused" claims, so where chronic stress can be proven to be "work-caused" it should be compensated.

- Several Canadian jurisdictions have excluded stress claims except for claims arising from an acute reaction to a traumatic event but concerns have been raised in those jurisdictions about how that is accomplished.

- A possible concern includes the fact that if such claims are not allowed they may become actionable under certain circumstances.

- We share with many others the concern that such exclusion would offend the Charter of rights.

Ultimately the legislation must set out the express conditions that need to be met in order for a worker to be entitled to receive compensation benefits for chronic stress.

We strongly recommend that the WHSCA should follow suit with some of the most progressive provinces and extend their coverage to include chronic stress.

Compensating Psychosocial Conditions including Mental Injuries
(Injuries involving many forms of violence in the workplace)

Research in this field has been extensive over the last 5 years.

The Shain Reports on Psychological Safety in the Workplace, prepared for the Mental Health Commission of Canada in 2009 is an excellent resource in understanding the general trend of recognizing mental injuries and chronic stress.

Dr. Martin Shain illuminates a dramatic evolution of the employee-employer relationship, stressing that employers who fail to understand the shifting legal terrain are at serious risk of liability.

Dr. Shain defines a psychologically safe workplace as “one that does not permit harm to employee mental health in careless, negligent, reckless or intentional ways.” Simply, it is “one in which every practical effort is made to avoid reasonably foreseeable injury to the mental health of employees.” A new National Standard on Psychological Health & Safety in the Workplace was recently released and its’ vision is that workplace parties will actively work to prevent harm to worker psychological health. The goal is to help organizations strive towards this vision as part of an on-going process of continual improvement to health.

In the *Stress at Work* report, prepared for the Mental Health Commission of Canada, Dr. Shain explains that a growing number of case law precedents, legislation changes and tribunal deliberations support a trend toward envisioning the duty to provide a psychologically safe workplace as an implicit term of the employment contract.

Shain’s April 2010 updated report is titled ***Tracking the Perfect Legal Storm: Converging systems create mounting pressure to create the psychologically safe workplace***. According to Shain:

> *A perfect legal storm is brewing in the area of mental health protection at work. This storm brings with it a rising tide of liability for employers in connection with failure to provide or maintain a psychologically safe workplace.*

Remedies available to employees are multiplying and for the first time it appears that real redress for harm to psychological health is within the reach of many, if not most, workers. Shain summarizes the rapid and dramatic nature of the change:

> *From a time no more than ten years ago, when only egregious acts of harassment and bullying resulting in catastrophic psychological harm could give rise to legal actions for mental injury, we have arrived at a point where even the negligent and chronic infliction of excessive work demands can be the subject of such claims under certain conditions.*

Workers Compensation Law

The traditional refusal to accept claims for compensation of mental injury resulting in whole or in part from “gradual onset stress” (chronic stress) appears to be changing.

A provincial court of appeal found that allowing compensation for mental injury *only if it was an acute reaction related to sudden traumatic workplace events* treats those suffering from mental disability differently from those suffering from physical disability. The standard of proof to meet the threshold of compensability for *physical* accidents is simply that they arose out of and in the course of employment, while in the case of *mental* injury there was an added criterion that limits compensation to those who have suffered from an acute reaction to a sudden and unexpected traumatic event. This higher standard of proof in legislative provisions has been characterized as discrimination based on mental disability, and has been the target of a successful *Charter of Rights and Freedoms* challenge.

A provincial court of appeal also held that the mental injury resulting from chronic stress can be compensable if caused by events or situations that are unusual and excessive according to the norms of the industry or occupation in question.

Mental injury as a result of both acute and chronic stress is also being compensated through awards made to victims of heart attacks and their families when fatal or debilitating heart attacks are precipitated by abusive and mentally injurious acts or omissions.

We believe that the WHSCA should recognize mental injuries and join the many progressive workers’ compensation acts that allow the filing of such claims.

Submitted Respectfully by the Public Service Alliance of Canada

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