



2019 STATUTORY REVIEW:

Submission of the
Newfoundland and Labrador
Teachers' Association

Injury On Duty And Workers' Compensation Benefit: Statutory Review 2019

Introduction

The Newfoundland and Labrador Teachers' Association (the Association) represents just over 7000 substitute, replacement and permanent teachers in Newfoundland and Labrador. Pursuant to the *Newfoundland and Labrador Teachers' Association Act*, the Association promotes the cause of education in the province and is responsible for advocating in matters related to teacher welfare. The Association bargains collectively and represents its members in employment related matters, including matters falling under the *Workplace Health, Safety and Compensation Act* (the Act). This submission will address the following issues:

1. Psychological Injuries and Violence;
2. Benefits: Employer Top Ups, Income Replacement Rates, and Maximum Assessable Earnings;
3. Internal Review Process;
4. Musculoskeletal Injuries;
5. Pandemic Response;
6. Allocation of Surplus and Provision of Benefits; and
7. Statutory Review.

The Discussion Paper for the 2019 Statutory Review – Workers' Compensation System (the Discussion Paper) poses the following general questions:

- *What recommendations would you make that could improve the overall workers' compensation system?*
- *What recommendations should WorkplaceNL and /or the WHSCRD commence to improve the workers' compensation system?*

Please consider this submission as responsive to both questions. As well, where sections pertain to other questions, this has been highlighted in those sections.

Thank you for considering the Association's submission. A summary of recommendations follows in Appendix A. The Association looks forward to substantive changes to benefit workers, including teachers, as a result of this important review.

1. Psychological Injuries and Violence

Workplace psychological injury and violence are risks for teachers in Newfoundland and Labrador. Every week, the Association receives calls from teachers who are grappling with psychological hazards and/or violence in their workplace. Workplace cultures need to change to ensure that these hazards are given the emphasis and employer resources required to effectively control these significant risks.

The Discussion Paper asks the following question, which is relevant to this section of the Association's submission:

Are worker benefits being provided in a fair and efficient manner? If not, what are possible areas of improvement?

The Association respectfully submits that legislative provisions relating to benefits for workers suffering from psychological injuries must be improved. Further, legislative improvements are required for teachers who encounter violence in their workplace.

The Employee Assistance Program available to teachers maintains statistics related to, among other things, counselling services. The percentage of teachers availing of counselling services is increasing, as is the percentage of these teachers who identify their workplace as a factor in their need to access counselling. From 2014–2015, 693 teachers (9.4% of teachers) accessed counselling services. In 2015–2016, this number increased to 733 (10%); there was a further increase in the one-year period ending in August 2017, to 785 teachers (11%). In August 2018, this number grew to 900 teachers accessing the program (i.e. 12.8%).

In 2014–2015, 6.7% of teachers accessing the program identified “work stress” during problem assessment. In 2015–2016, 9.5% of teachers accessing counselling identified work stress as one of the causes. In 2016–2017, there was a further increase to 11.6% of teachers identifying work stress as an issue. While this decreased slightly to 9.1% in 2017–2018, the percentages are still significant.

Sections 2(1)(o) and 2(2) of the Act refer to “stress” when discussing such injuries. As a preliminary matter, the Association respectfully submits that when discussing such harm, it is more appropriate to refer to such injuries as “psychological injuries”, which better reflects the severity of the harm suffered.

Safe and healthy workplaces in 2020 are not solely focused on physical injuries, risks and hazards. Psychological harm must also be recognized and addressed. The Mental Health Commission of Canada articulates it well:

Workplaces can play an essential part in maintaining positive mental health. They can give people the opportunity to feel productive and be a strong contributor to employee wellbeing. Yet it can also be a stressful environment that contributes to the rise of mental health problems and illnesses. No workplace is immune from these risks and we cannot afford to limit our definition of occupational health and safety to only the physical.

Section 2(2) of the Act is an “override” provision, operating even in cases where the above conditions are met. It provides that psychological injury that may be the result of an employer's decision or action relating to the employment of a worker including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment does not constitute an injury, and is therefore not compensable under the Act.

To that end, section 2(2) of the Act must be closely examined. That section provides:

Notwithstanding paragraph (1)(o), stress that may be the result of an employer's decision or action relating to the employment of a worker including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment does not constitute an injury.

Section 92.6(3) of the Act contains a similar provision. While section 92.6(2) creates a presumption of workplace injury where a worker is exposed to a traumatic event or events in the course of the worker's employment and is diagnosed with post-traumatic stress disorder (PTSD) by a psychiatrist or a registered psychologist, section 92.6(3) overrides that presumption, stating:

Notwithstanding subsection (2), post-traumatic stress disorder that may be the result of an employer's decision or action relating to the employment of a worker including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment does not constitute an injury.

The Association respectfully submits that the appropriate legislative focus is whether a psychological risk or hazard has, objectively, been created, rather than providing employers with overly expansive protection when exercising their management rights. While the intention of sections 2(2) and 92.6(3) may be to respect the *legitimate* exercise of management rights, the sections do not easily reconcile with cases of management harassment or bullying of workers (which may involve work assignment changes, investigations, discipline and the like). The Association respectfully submits that sections 2(2) and 92.6(3), as well as supporting policies and procedures, should be amended to narrow their scope to better reflect their purpose. Harassment and bullying must be recognized as legitimate workplace hazards and risks whoever the perpetrator, and treated as such for the purposes of compensability and injury prevention. This is consistent with recent amendments to provincial occupational health and safety regulations, which recognize harassment as a workplace hazard.

WorkplaceNL cites the following principles as central to its strategic planning:

- All workplace injuries and illnesses are preventable;
- Employers have the core responsibility to create a safe and healthy workplace;
- Safety partnerships will be developed to encourage collaboration and build on existing initiatives and activities to avoid duplication and maximize use of resources;
- Workplace injury prevention will be evidence-based and incorporate best practices;
- The safety and health needs of employers and workers will be placed at the forefront of the service delivery and policy framework;
- A shared and inclusive vision will achieve the strategic goals; and
- The standards of health and safety in all industry sectors of the province will be elevated.

Respectfully, it is confusing how the blanket protection for Employer actions found in sections 2(2) and 92.6(3) can possibly be reconciled with most, if not all, of the above principles. As well, only psychological injuries are subject to the restrictions in sections 2(2) and 92.6(3). In addition, as further evidence of the glaring inconsistency of treatment between workers and employers, **workers** can be disentitled from benefits under the Act if their injuries can be attributed to their “serious and wilful misconduct.” (See section 43(1) of the Act.) Employers, in contrast, are given a blanket “pass” for wrongful conduct that results in psychological injury, as long as that conduct can be brought under the expansive protections of sections 2(2) and 92.6(3). Given the imbalance of power in favour of employers, workers have little chance of a successful claim if their employer has not prevented incidents of bullying and harassment or has engaged in other inappropriate management conduct.

Violence in the workplace may result in both psychological and physical injuries. In *Advancing a Strong Safety Culture in Newfoundland and Labrador: A Workplace Injury Prevention Strategy 2018–2022*, WorkplaceNL recognizes violence as a workplace hazard, stating:

*The Mental Health Commission of Canada has estimated that one in five Canadians suffer from a mental illness. Psychological injuries, post-traumatic stress disorder (PTSD) and workplace violence pose significant challenges for workplace injury prevention. Prevention strategies for work-related PTSD include creating supportive work environments, systematic employee training and proper follow-up with employees after a critical event. Over the past decade, the rate of workplace violence has increased from 5.2 injuries per 10,000 workers to 8.9—an increase of 71 per cent. **Occupational health and safety legislation requires risk assessments to be completed for workplace violence and working alone. Unfortunately, these risk assessments are not widely employed in workplaces and more education and enforcement is required. [Emphasis added.]***

The Association agrees that, in its experience, employers often do not have risk assessments completed despite clear indications that violence is a hazard or risk in their environment. Further, in the Association’s experience, there does not seem to be a good understanding of how occupational health principles apply in the context of violence. Further, those individuals who are required to complete risk assessments, as well as to identify mandatory workplace arrangements, policies and procedures in cases where there is a risk of violence, lack the knowledge required to be effective at containing the risk in the educational context.

If prevention of psychological and other injuries as a result of workplace violence is a priority for WorkplaceNL, provincial legislation (i.e. workers’ compensation or occupational health and safety legislation) must be strengthened. This would include, but not be limited to:

- The addition of meaningful, tougher enforcement provisions to ensure compliance with provisions relating to violence; and
- Mandatory employer and worker training, to ensure timely and appropriate responses to violence in the workplace.

Recommendations:

Amend sections 2(1)(o) and 2(2) of the Act to remove references to “stress”, and to refer to such injuries as “psychological injuries”.

Amend sections 2(2) and 92.6(3) of the Act to ensure that wrongful exercises of management rights by Employers do not preclude access to benefits.

Add meaningful, tougher enforcement provisions to ensure compliance with provisions relating to violence.

Add requirements for mandatory employer and worker training, to ensure timely and appropriate responses to violence in the workplace.

2. Benefits: Employer Top Ups, Income Replacement Rates, and Maximum Assessable Earnings

The Discussion Paper asks:

Are worker benefits being provided in a fair and efficient manner? If not, what are possible areas of improvement?

The Association respectfully submits that the answer to this question is a resounding “NO.” On January 1, 1993, Newfoundland and Labrador’s Provincial Government implemented substantive changes to the [then] *Workers’ Compensation Act*, which negatively impacted on the level of take-home pay available to an injured worker. The changes required benefit levels received by teachers to be decreased to 75 percent of net pay for the first 39 weeks and 80 percent of net pay for any weeks beyond 39 weeks. As well, any employer top up was prohibited, whether negotiated via collective agreement, or otherwise.

Prior to January 1, 1993, Articles 16 of the Provincial Collective Agreement and 35 of the Labrador West Collective Agreement provided teachers who were injured at work with special Injury on Duty leave, and resulted in the payment to the teacher of normal net pay benefits. As a result of unilateral legislative changes that stripped existing collective agreement rights without consultation or right of law, Articles 16 and 35 of the NLTA Provincial and Labrador West collective agreements (respectively) were rendered inactive. This prohibition on employer top ups to benefits still exists, in sections 81.1 and 81.2 of the Act. Rights obtained via collective bargaining are protected pursuant to section 2(d) of the Canadian Charter of Rights and Freedoms. Government’s stripping of freely negotiated collective agreement rights must cease immediately.

After considerable pressure from injured workers throughout the province and a recommendation from the Government’s own Statutory Review Committee, benefit levels (i.e. the income replacement rate) were increased to 80 percent of net pay for all approved and future claims under regulations, effective January 1, 1998. The 80% income replacement rate was again changed, effective March of 2018, to 85% of net pay. While any increase is positive, it is notable that the application of the 85% income replacement rate still results in considerable economic

hardship for teachers, especially when combined with maximum compensable and assessable earnings that are considerably lower than most teachers' salaries.

As such, when considering benefits, it is essential to note that the maximum compensable and assessable earnings under provincial legislation are capped at \$66,980 as of January 2020. After a teacher is approved for benefits under the Act, all other regular deductions (e.g., all insurances carried under the Group Insurance plan, provincial pension premiums, NLTA fees, etc.) are deducted from the workers' compensation benefit level to establish a teachers' "take home pay" (net pay) available via workers' compensation benefits. As such, teachers' regular pre-injury net pay levels are substantially reduced, when compared to the take home pay level available under workers' compensation benefits. For example, at current salary rates, any permanent or replacement teacher beyond Certificate V, Step 7, or Certificate VI, Step 5, will be negatively affected by the cap of \$66,980, in addition to the detrimental effect of the 85 percent income replacement rate. All permanent or replacement Certificate VII teachers are negatively affected in this way as well.

Recommendations:

Repeal sections 81.1 and 81.2 of the Act, with immediate effect.

Amend section 74(2) of the Act to increase the income replacement rate to at least 90%.

Amend sections 21(1) and 21(2) of the Workplace Health, Safety and Compensation Regulations [the Regulations] to increase the maximum compensable and assessable earnings to at least \$100,000. This is the most important recommendation in this submission, and the Association respectfully requests that it be prioritized as such.

3. Internal Review Process

Workers have the right to appeal a decision on their claim, with requesting an internal review as the first step. Workers must request an internal review in writing within 30 days of receiving the WorkplaceNL decision to be reviewed. After completing the internal review, WorkplaceNL sends a final decision in writing. As per WorkplaceNL's Internal Review pamphlet, "Internal Review is a flexible process which reconsiders initial decisions with as little delay as possible... The Internal Review Specialist provides WorkplaceNL's final decision in writing within 45 days from the date the request is received."

The Discussion Paper asks the following question, relevant to this section of the Association's response:

Are any adjustments required to the workers' compensation system's Internal Review and External Review processes? If so, what changes would be beneficial?

Workers, who are generally unfamiliar with WorkplaceNL's legislation, policy and procedures, normally have 30 days to file their internal review request, unless they can bring themselves within section 64 of the Act. Yet, WorkplaceNL has 45 days to complete an internal review. This is too long. Even where a worker submits a request for review within a week of receiving a decision, there is the potential for weeks of delay in correcting errors and omissions.

Recommendation

Establish a 15 day mandatory timeline, in legislation, for WorkplaceNL's final decision in response to a worker's request for an internal review.

4. Musculoskeletal Injuries

In *Advancing a Strong Safety Culture in Newfoundland and Labrador: A Workplace Injury Prevention Strategy 2018–2022*, WorkplaceNL cites musculoskeletal injury as a priority area, stating:

Musculoskeletal injuries represent 68 per cent of all workplace injuries and \$85 million in claim costs annually in Newfoundland and Labrador. Repetitive work, awkward postures, static positions and overexertion must be addressed within workplaces. Risk assessments to evaluate ergonomic hazards must be the focus of education and enforcement efforts. Through proper risk assessment, more effective controls can be implemented. Integrating technology and ergonomic best practices into the workplace will also help mitigate ergonomic risks.

The Association agrees with this stated position. However, in our experience, musculoskeletal hazards, including but not limited to ergonomic hazards, are not dealt with in a timely fashion by either WorkplaceNL staff/contractors, or employers. At times, it has taken months or years to obtain a meaningful response from the appropriate party.

As it currently stands, occupational health and safety legislation in the province provides that employers must recognize factors in the workplace that may expose workers to a risk of musculoskeletal injury, and evaluate the risk to workers presented by those factors. Further, an employer is required to eliminate, or where elimination is not practicable, minimize the risk of musculoskeletal injury to a worker through the implementation of control measures. Interim control measures must be implemented without delay when the introduction of permanent control measures are delayed. These are not new provisions; they have been law since at least 2012. Yet, at least in the Association's experience, employers do not respond in a timely fashion to even the most straightforward requests for supports and assessments. Further, in at least one case that the Association was involved with, it took months after a claim was filed to get a simple workplace ergonomic assessment completed.

Again, if prevention of musculoskeletal injuries is truly a priority for WorkplaceNL, provincial legislation (i.e. workers' compensation or occupational health and safety legislation) must be strengthened, including but not limited to the addition of meaningful enforcement provisions and mandatory employer training, to ensure timely and appropriate responses to musculoskeletal injuries.

Recommendation:

Strengthen legislation, including but not limited to the addition of meaningful enforcement provisions and mandatory employer training, to ensure timely and meaningful responses to musculoskeletal injuries.

5. Pandemic Response

As it currently stands, the Act does not address or specifically contemplate issues arising from a pandemic. Given the potential for high rates of infection that quickly increase during a pandemic, we respectfully submit that workers' compensation legislation should provide for presumptive coverage of workers who are likely to be exposed to pandemic disease in the workplace. While this would most obviously pertain to health care workers and other essential workers, teachers too are potentially at risk given the population they serve and the close quarters in most schools. We also respectfully submit that pandemic planning and response need greater emphasis when it comes to training and enforcement requirements through WorkplaceNL.

Recommendations:

Amend workers' compensation legislation to provide for presumptive coverage of workers who are likely to be exposed to pandemic disease in the workplace, including but not limited to teachers.

Ensure pandemic planning and response is given emphasis in WorkplaceNL training and enforcement requirements.

6. Allocation of Surplus and Provision of Benefits

The Discussion Paper asks:

How well is the balance between provision of benefits and employer assessment rates being achieved?

As of the end of 2018, the WorkplaceNL Injury Fund was 119.5 percent funded at the end of 2018, above its target of 110 percent. The Association respectfully submits that any surplus should be used to increase benefits to workers as per Section 2 of this Submission.

Recommendation:

Use Injury Fund surpluses to increase benefits to workers as per Section 2 of this submission.

7. Statutory Review

As per section 126 of the Act, Government must, at least once every five years, appoint a committee to review, consider, report and make recommendations to Cabinet regarding matters respecting the Act and the regulations, and the administration of each as the committee considers appropriate and upon other matters which the Lieutenant-Governor in Council or the Minister may refer to the committee. The Discussion Paper states, "Section 126 (2) of the Act provides the Provincial Government with the authority to review the workers' compensation system every five years." Respectfully, the section does not only provide the authority for review; it imposes a **responsibility** to review.

On January 17, 2014, the Minister responsible for the workers' compensation system in the province received the final report of the last Statutory Review Committee. This report was received

roughly two years after that review began. The report prior to that one was received by Government on May 31, 2006. As currently implemented, the system is, realistically, on a seven to eight year cycle for review. If the intent is to regularly review the legislation and administration of the workers' compensation system in the province, the legislation should be amended to require that a review be **completed** at least once every five years regarding matters respecting the Act and the regulations, and the administration of same.

Recommendation

Amend section 126 of the Act to require that a review be completed at least once every five years regarding matters respecting the Act and the regulations, and the administration of same.

APPENDIX A RECOMMENDATIONS

Psychological Injuries and Violence

1. Amend sections 2(1)(o) and 2(2) of the Act to remove references to “stress”, and to refer to such injuries as “psychological injuries”.
2. Amend sections 2(2) and 92.6(3) of the Act to ensure that wrongful exercises of management rights by Employers do not preclude access to benefits.
3. Add meaningful, tougher enforcement provisions to ensure compliance with provisions relating to violence.
4. Add requirements for mandatory employer and worker training, to ensure timely and appropriate responses to violence in the workplace.

Benefits: Employer Top Ups, Income Replacement Rates, and Maximum Assessable Earnings

5. Repeal sections 81.1 and 81.2 of the Act, with immediate effect.
6. Amend section 74(2) of the Act to increase the income replacement rate to at least 90%.
7. Amend sections 21(1) and 21(2) of the Workplace Health, Safety and Compensation Regulations [the Regulations] to increase the maximum compensable and assessable earnings to at least \$100 000. **This is the most important recommendation in this submission, and the Association respectfully requests that it be prioritized as such.**

Internal Review Process

8. Establish a 15 day mandatory timeline, in legislation, for WorkplaceNL’s final decision in response to a worker’s request for an internal review.

Musculoskeletal Injuries

9. Strengthen legislation, including but not limited to the addition of meaningful enforcement provisions and mandatory employer training, to ensure timely and meaningful responses to musculoskeletal injuries.

Pandemic Response

10. Amend workers’ compensation legislation to provide for presumptive coverage of workers who are likely to be exposed to pandemic disease in the workplace, including but not limited to teachers.
11. Ensure pandemic planning and response is given emphasis in WorkplaceNL training and enforcement requirements.

Allocation of Surplus and Provision of Benefits

12. Use Injury Fund surpluses to increase benefits to workers as per Section 2 of this submission.

Statutory Review

13. Amend section 126 of the Act to require that a review be completed at least once every five years regarding matters respecting the Act and the regulations, and the administration of same.



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