Manitoba Federation of Labour **Legislative Submission**

Bill 18
The Workers Compensation Amendment Act

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Manitoba Federation of Labour
Fairness For Everyone

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The Manitoba Federation of Labour (MFL) is Manitoba's central labour body, representing 30 affiliated unions and more than 100,000 unionized workers in our province. The MFL is a strong advocate for better health and safety laws and practices, greater focus on the prevention of workplace injuries and illness, and a fair workers compensation system that provides the care workers need to recover and to get back to work and all the other parts of their lives after an injury. We are pleased to share our views on Bill 18*: The Workers Compensation Amendment Act.*

Manitoba's WCB system is built on a strong foundation of tri-partite governance, with a Board of Directors made-up of representatives of workers, employers and the public interest. Although no longer part of this bill, we were pleased that this government included changes in its budget implementation legislation to codify this existing practice by explicitly naming the MFL as the nominating body of worker representatives to the Board of Directors (with the Manitoba Employers Council playing the same role for employer representatives). The MFL is committed to nominating strong candidates who reflect the diverse make-up of Manitoba's workforce and labour movement.

The MFL has always supported the long-standing practice of government ordering regular comprehensive legislative reviews of *The Workers Compensation Act* by a review committee comprised of a representative from labour, a representative from employers, a representative of the public interest and a neutral chair. We note that the most recent legislative review was carried out in 2016-17, and that the Legislative Review Committee (LRC) included Anna Rothney (the Executive Director of the MFL) representing workers, Chris Lorenc (MHCA) representing employers, Ken Sutherland representing the public interest, and Michael Werier serving as the Chair.

This tri-partite review structure has allowed for sharing different perspectives, building understanding between stakeholders, and developing consensus recommendations that aim to improve the overall fairness and effectiveness of the workers compensation system. Of course, in practice, we understand that consensus reports are often built upon a series of compromises between different interests, and that's why it's so important to the integrity of the consensus-building process that such reports be treated as an integrated package, and accepted in whole.

We acknowledge and are pleased to see that government is acting on many of the LRC's recommendations, but, and as we will point out in more detail below, we are troubled and disappointed that some very important recommendations – including with respect to fair and equitable coverage of psychological injuries – have not yet been actioned. Ignoring certain key recommendations of the LRC undercuts the consensus report as a whole, and thereby undermines the consensus behind each of its recommendations.

We begin our submission by discussing a number of positive changes contained within Bill 18.

Establishing a Schedule of Occupational Disease with Presumptive Coverage

We are very pleased to see that Bill 18 would allow for the establishment a Presumptive Schedule of Occupational Diseases, as recommended by the LRC [Bill section 4(4.1)]. The MFL has long argued that the current WCB practice of applying a "dominant cause" standard of causation to the adjudication of occupational disease claims results in systemic discrimination against such claims and, correspondingly, workers suffering with occupational diseases.

It is a well-established fact that occupational diseases are systematically under-reported by workers. Workers face extreme challenges in proving that work is the "dominant

cause" of their disease, due to long latency periods (workers may not experience symptoms for decades after exposure) and complications related to workers being exposed at potentially many different workplaces (and, sometimes, at different non-work locations as well) over the course of a worker's career.

A Presumptive Schedule of Occupational Diseases will allow the WCB to recognize known occupational diseases as clearly occupationally caused, so that the work-related nature of such diseases is established and accepted in advance, and individual workers are not forced to go through the extremely challenging process of establishing dominant cause in every individual case. We strongly applaud this move, and urge the WCB to begin work immediately, in close collaboration with occupational health specialists, labour and employers, to begin the process of forming the Schedule. Too many workers have fallen through the cracks of the existing system and never received support for their occupational diseases. It is incumbent on us to act quickly to put this new, fairer system into place. It will also be important that the WCB stay abreast of the latest information about the work-related causes of disease and update the new Schedule at regular intervals.

The MFL has already provided a well-researched brief to the WCB with comparative medical information from other jurisdictions that have Schedules established already. We'd be happy to share this with the Minister too, if it is of interest to him.

Of course, the MFL has always advocated to eliminate "dominant cause" altogether, but we are nevertheless pleased to see this important step in the right direction.

Tighter Restrictions on Employer Access to Workers' Health Information

The MFL is pleased to see that Bill 18 would impose badly needed restrictions on how and why employers can access private health information contained within workers WCB claim files, limiting employer access to cases of reconsideration or appeal [Bill

section 101 (1.2)]. Bill 18 is positive in establishing a clear obligation on employers to destroy any such documentation once a reconsideration or appeal is dropped or completed [section 101 (1.9)]. This amendment addresses the very real risk of a breach of privacy that can occur – deliberately or unintentionally - when employers use file information inappropriately or hold on to files unnecessarily.

Alarming information obtained from WCB by the Manitoba Nurses Union (MNU) points to a serious current problem with employers accessing workers' private health information inappropriately. We are concerned that this creates the risk of "snooping" and, increases the risk of employers taking discriminatory action against employees related to private information uncovered in their WCB files. According to information provided to MNU by the WCB, in only 35% of cases where any employer requested and obtained access to a worker's health information was an appeal actually filed. This suggests that in almost two thirds of cases, the employer received the private information for no good reason.

While overall, we are pleased to see this legislative strengthening of restrictions on employer use of worker health information, we are concerned about a potential loophole, and would propose a minor, but, important amendment to Bill 18. The bill currently specifies that worker information must not be used for any purpose other than reconsideration or appeal "without the Board's written approval" [Bill section 101(1.8), but we cannot think of any good reason whatsoever why the Board would and should grant approval for broader use of workers' private health information by their employer. This potentially expansive loophole/caveat should be eliminated from Bill 18.

Redefining Psychological Injuries & Illnesses Outside of Occupational Disease

Psychological injury and illness is the leading cause of disability in Canada and the World Health Organization estimates that it is the second leading cause of disability globally. It is estimated that the 500,000 Canadians miss work due to mental illness any

given week, and 1 in 5 Canadians will suffer from a mental health issue in their lifetime. Work is where we spend over 60% of our lives and it is a reality that the conditions and stresses of work can have direct impact on our mental health.

Manitoba's current WCB system discriminates against mental health injuries, treating them fundamentally differently than physical injuries, significantly limiting coverage and support for workers. The MFL has advocated for two major changes to the legislative structure for covering psychological injuries - Bill 18 addresses one, but ignores the other.

Bill 18 moves forward with the LRC recommendation to remove psychological injuries and illness from the category of occupational disease, which, as noted above, applies a "dominant cause" burden of causation, making it very difficult for workers to prove the occupational nature of their psychological illness. This difficulty is clearly evidenced in the fact that last year 57% of all psychological injury claims were rejected by the WCB.

Psychological injuries and illness are not specific to certain occupations, like occupational diseases are - they do not originate in the same manner or in the same workplace circumstances, and they are not brought on necessarily by traditional hazards or exposures. Ending the practice of categorizing psychological injuries as occupational diseases and assessing claims under a dominant cause framework is an important step in improving coverage for workers.

However, as we will discuss in greater detail below, we are very disappointed that Bill 18 continues to limit WCB coverage to only a very small segment of psychological injuries, thereby perpetuating the unequal treatment of mental health relative to physical health.

Other Bill 18 Improvements

We are also pleased to see that Bill 18 proposes to implement the following LRC recommendations, which will improve fairness for injured workers and their families, including those sometimes facing extreme hardship:

1. Bill 18 would allow the WCB to repay workers directly (and promptly) in cases where employers improperly apply deductions to their wages, rather than forcing workers to "fight it out" with their employer. Of course, we also urge the WCB to step-up education and enforcement in this regard so that improper deductions are not made to workers' pay in the first place. But, we are happy that the WCB will be able to step-in and fix the problem for workers when employer errors are made. [Bill section 16]

2. Bill 18 would expand and clarify the definition of Medical Aid to allow payment for any medical aid which cures and / or provides relief for injured workers. This helps fix an unnecessary restriction in the current Act which has sometimes led to WCB disallowing coverage in very sad and difficult situations when only relief is possible, but no cure. [Bill section 27]

3. Bill 18 would allow the WCB to now pay fees related to committee ship and administration by the Public Guardian and Trustee to ease the burden on families who are managing the affairs of loved ones who have been seriously injured. [Bill section 27(8)]

4. Bill 18 would establish a new Administrative Penalty for hindering inspections [Bill section 99(6)]. This recognizes that barriers to investigations drag out claims, hold-up needed supports and benefits for injured workers, and interfere with the administration of justice. However, while it may seem obvious, we feel the need to say that in order for this new penalty to have its desired effect, it is crucial that WCB apply sufficient resources to enforcement. A lack of enforcement currently represents a major problem within the system, limiting both the preventive impact

that penalties should have, and the overall fairness of the system. As compared to years prior, 2019 saw a 50% drop in the application of Administrative Penalties, suggesting a major and deeply concerning reduction in enforcement activities. (More on this below).

5. Bill 18 would also establish a Prevention Advisory Council as an external committee to continue and hopefully expand the extremely important work of prevention. The MLF would like to acknowledge the tri-partite structure of the committee and the continued importance prevention plays in WCB's future activity.[bill section 54.2(1)]

We turn now to areas of concern for the MFL.

Employer Advisor Office / Claim Suppression

We note that Bill 18 would establish an Employer Advisor Office with a mandate "to advise employers about the interpretation and administration of this act and any regulation made under this Act and the effect and meaning of decisions made under this Act" [Bill section 108(5)a].

While we remain deeply concerned about this proposal, we are relieved to see that government has backed away from Minister Cullen's initial proposal, which was to establish an Employer **Advocate** Office. To quote from our submission to the LRC on the subject of Minister Cullen's employer advocate proposal:

> "The MFL strongly opposes this proposal, as we believe it will contribute significantly to an adversarial process, and support even more elevated levels of claim suppression, particularly through the filing of illegitimate employer appeals.

Manitoba's WCB system is based on an inquiry model, which is intended to be non-adversarial. Workers are supposed to be entitled to guaranteed benefits, on a no-fault basis – it's the trade-off for giving up their right to sue employers for injuries and illnesses caused by work. The WCB is governed by a Board of Directors comprised of members appointed by government from nominations submitted by employer, labour and the public.
If employers need more information about filing requirements, billing or account details, availability of the new prevention incentive, or any other administrative matters, they should be able to access this information from existing WCB customer service.

But there is no justification consistent with the Meredith principles to provide resources to make it easier for employers to file appeals of workers' claims. Indeed, it is only because of the perverse incentives that go along with a rate model based on experience rating – which ties an individual employer's premiums to the claims record of his or her own individual employees - that so many employers are filing appeals, in an effort to minimize their individual premiums, and at the cost of denying workers what should be guaranteed, no fault benefits. This is a practice that should be shut-down, not encouraged and resourced.

Unless an employer has concrete evidence of employee fraud, there is no justified reason for employers to be filing appeals. More and more, however, employers are filing illegitimate and unfair appeals as a matter of common practice, in the hopes that even a small proportion of them will be accepted. Some employers file appeals in all or nearly all cases, or cases over a certain value benchmark, often with support of paid 'claims management' consultants. It is also not uncommon for employers or 'claims management' firms to signal an intent to appeal before an initial adjudication is completed. This represents a true

perversion of the system, and constitutes unjustifiable harassment of employees and a crass form of claim suppression."

We note that the LRC supported the idea of government establishing employer advisory services with respect to WCB but was clear that these services should be restricted to providing information and advice, and not advocating for employers against worker claims.

The ongoing seriousness of claim suppression within the WCB system cannot be overstated. Workers continue to be pressured and bullied to not report their injuries, and to come back to work prematurely before it is safe after an injury, all in an effort to save on employer WCB costs. It's imperative that government and WCB do everything possible to encourage employers to prevent injuries, not suppress claims to reduce their WCB costs. If an Employer Advisor Office is to be created, it will be imperative that services be informational, geared at helping the system function more smoothly, and in a non-adversarial manner, and that the office proactively educate employers about illegality of claim suppression, and about employer obligations with respect to re-employment and providing safe work and accommodations.

Additionally, we would like to raise concern with the fact that the existing Worker Advisor Office has been badly under-staffed and resourced for years now. It is critically important that a new employer adviser office not intensify the already insufficient resources of the Worker Advisor Office and that each will be afforded fair resources, and not take away from current services to workers.

Reinstating a cap on maximum insurable earnings

After becoming the first province in Canada to remove a cap on maximum insurable earnings in 2006, Bill 18 re-establishes a cap on the amount of worker income that is covered by WCB, such that only income up to $150,000 annually will be insured (and

subject to replacement in the case of injury requiring time away from work). The MFL has always opposed the idea of a cap on insurable earnings on principle: simply put, it's unfair and discriminatory against higher income earners.

Wage loss replacement benefits should be based on a worker's earning capacity, not an arbitrary cap. No worker wants to get injured and lose his/her capacity to earn a wage, so why should his/her wage replacement benefits be capped at something less than what he/she would otherwise earn?

That said, and knowing that this government had clearly signaled its intention to re-establish a cap, we are relieved that the LRC recommended a high cap. At income of $150,000, it is our understanding that more than 99% of workers will remain fully insured.

Exclusions on Coverage for Psychological Injuries

As noted above, Bill 18 proposes to make one positive change respecting the adjudication of psychological injury claims: that is, moving administration of such claims outside of occupational disease and "dominant cause" burden of causation. However, we are disappointed that Bill 18 retains major discriminatory restrictions on what kinds of psychological injuries are compensable, limiting coverage to only a small fraction of work-related psychological injuries.

It remains the MFL's strongly held position that psychological and physical injuries should be treated equitably under the Act, and that coverage of psychological injuries should not be arbitrarily restricted. Currently, psychological injuries caused by workplace stressors are explicitly excluded from coverage, unless stemming from an acute reaction to a traumatic event. As a result, there is no definition in legislation of workplace stressors that may cause psychological injury or illness, and workers

suffering from workplace stressor-induced injuries are not eligible for WCB supports to recover.

Other WCB systems across the country (BC, Ontario, Alberta) have begun to address mental health claims more substantively and have extended coverage to mental health claims resulting from workplace stressors.

While we recognize that the LRC did not recommend any immediate legislative changes in this regard, they did recommend that WCB undertake a review, after two years of experience, of those WCB systems across the country which have already moved to expand coverage to all workplace-related psychological injuries, including those cause by workplace stressors. We believe that this recommendation was intended to build understanding about how such changes have worked in other provinces, and relieve fears about an "influx" of new claims. And so we are extremely disappointed that even though it has been two years since the LRC made this recommendation, no work has begun on this important review. We urge the government and WCB to move on this recommendation immediately. Manitoba is only falling further behind through inaction on this important file, and injured workers, their employers, and our economy as a whole are paying the price.

Recognition of Probable Future Earnings

Currently, the WCB has the ability to recognize an injured worker's probable (higher) future earnings, in the calculation of long-term wage loss replacement benefits, but only in certain limited circumstances: namely, for young workers (currently defined as 28 or younger) and workers engaged in an apprenticeship program. This means that a worker who is seriously injured in the final year of an apprenticeship program may receive consideration for their probable higher future earnings as a journeyperson in the way in which WCB calculates long-term wage replacement benefits.

However, this consideration is not extended to other categories of workers engaged in education or training, upgrading or advancement. For example, if a student in their final year of a nursing degree is seriously injured at their part-time job as a server, the WCB does not have authority to consider her probable higher future earnings as a nurse in determining wage loss replacement. Similarly, someone who is in the final year of a Master's of Computer Science degree, but is seriously injured while working a summer retail job, would not be entitled to consideration for probable higher future earnings. In short, the current system is unfair and should be expanded.

We believe that the future earning potential of all workers engaged in education and training upgrading at time of injury, regardless of type of program or age, should be factored into long-term wage replacement benefits. Workers undertaking academic or vocational study are often employed in part-time or in lower wage jobs temporarily while attending university or college. The WCB should have the scope to recognize exceptional but legitimate circumstances when a worker's pre-accident average earnings do not fairly or adequately represent the earning capacity lost as a result of a compensable injury.

The LRC recommended that the WCB develop a more inclusive policy in this regard, but we have been advised that no work has yet begun, thereby perpetuating this discriminatory practice. Again, we urge the government and WCB to take action immediately and create a probable future earnings policy that is more inclusive and fair.

Inconsistent Terminology re. "Discriminatory Action"

We note that while Bill 11, *The Workplace Safety and Health Amendment Act*, proposes to rename the practice of "discriminatory action" (action taken by an employer as reprisal against a worker) to "reprisal", Bill 18 does not propose to make the same terminology change in the context of workers compensation. We believe that workers and employers would be better served with consistent terminology. We suspect this

inconsistently in the two Acts is just an oversight, and we urge the government to make a simple correction.

Conclusion

Finally, we would like to take this opportunity to raise three other important issues with Manitoba's current WCB system.

Lack of Enforcement of the WCA

In 2019 there was a 50% drop in administrative penalties levied against those contravening the WCA. Over the last three years there were very few penalties for very serious and prevalent problems including: only one administrative penalty given failure to re-employ, one penalty for illegally garnishing wages and only 6 fines for acts of claim suppression. Administrative penalties are supposed to set clear consequences for inappropriate action in legislation and act as effective tools of deterrence. With over fourteen administrative penalties in the WCA, 2019 only saw fifty two administrative penalties given out for contraventions. Penalties are tools that are supposed to help deter bad behaviors, but their impact can only be felt if they are used. The MFL is calling on the WCB to re-focus on enforcement and strengthen compliance measures to ensure the credibility of the Manitoba's compensation system.

Adjudication Period of PTSD Claims

In 2016 Manitoba proclaimed presumptive legislation for PTSD that covers all workers, in the effort to make it easier for workers suffering from work induced PTSD to receive care and benefits to help manage this debilitating injury. Unfortunately four years later the effectiveness of the legislation has been hampered by unacceptably long adjudication timelines averaging 189 days in 2018, and 165 days in 2019, leaving workers suffering for six months before WCB deals with their claim. This is only

exasperated by the WCB practice of refusing to accept medical diagnosis of workers treating doctors and forcing workers to see WCB medical advisors, or psychologists who are not covered under Manitoba's healthcare. The MFL continues to push the WCB to implement clear procedures to speed up the process to provide fair and compassionate compensation to those suffering with PTSD.

Claim Suppression by WCB

Lastly the MFL would like raise the issue of the institutionalized claim suppression used by the WCB to directly prevent or strip workers of needed benefits and care. WCB's own brand of claim suppression includes systematically overturning treating physician diagnosis, no mediation of conflicts between physicians and WCB medical advisors and systematically excluding psychological injuries rooted in workplace stressors from compensation. These issues strike at the heart of WCB's lack of credibility and much of the distrust Manitoba workers have with the compensation system.

Overturning treating physicians' opinions has led to situations where some physicians in Manitoba are reluctant to see those who have been injured at work. This in turn has led to less medical professionals knowing how, or wanting to engage in workplace injury claims. Workers have been left without proper resources as the WCB often makes decisions on applications without even communicating with the worker or their doctor. Those who are suffering from psychological injuries often have no avenues to access WCB or treatment. These are results of WCB's own making that can be rectified, but first, the WCB needs to acknowledge that their own policies and practices suppress claims they were created to address.

The MFL continues to advocate for fairness in our compensation system, the proposed changes in Bill 18 take a couple of steps in that direction but there is still a long way to go.

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