May 7, 2013

Dear [REDACTED],

Re: Your request for access to information under Part II of the Access to Information and Protection of Privacy Act [Our File #: EC/5/2013]

On April 9, 2013, the Executive Council received your request for access to the following records/information:

1. Any documents relating to the following amendments made under sections 8 and 9 of An Act to Amend the Workers' Compensation Act, S.N. 1992, c. 29:

   (a) The addition of section 44.1 of the Workplace Health, Safety and Compensation Commission Act, RSNL 1990, c. W-11 (the "WHSC Act"), and

   (b) The substitution of section 45 of the WHSC Act.

2. Any documents relating to the following amendment made under section 7 of An Act to Amend the Workers' Compensation Act, S.N. 1994, c. 12:

   (a) The addition of section 44.1(2) of the WHSC Act.

I am pleased to inform you that your request for access to these records has been granted in part. In particular, access is granted to the portion of the cabinet records that are responsive to your request for information related to items 1 (a) and (b) as cited above. These records are cabinet records which have been in existence for 20 years or more, therefore access is permitted.

Your request for documents as outlined in item 2 (a) has been refused as the addition of section 44.1(2) to the Workers' Compensation Act occurred in 1994 and the cabinet records associated with that amendment are less than 20 years old, therefore not subject to disclosure at this time. These records are withheld in accordance with S.18 of the Access to Information and Protection of Privacy Act (the Act), which states:
Cabinet confidences

18. (1) In this section

(a) "cabinet record" means
(iii) a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet; and

(2) The head of a public body shall refuse to disclose to an applicant a Cabinet record, including

(a) an official Cabinet record.

As required by subsection 7(2) of the Act, we have severed information that is excepted from disclosure and have provided you with as much information as possible. In accordance with your request for a copy of the records, the appropriate copies have been enclosed.

Section 43 of the Act provides that you may ask the Information and Privacy Commissioner to review this partial refusal of access or you may appeal the refusal to the Supreme Court Trial Division. A request to the Information and Privacy Commissioner shall be made in writing within 60 days of the date of this letter or within a longer period that may be allowed by the Commissioner.

The address and contact information of the Information and Privacy Commissioner is as follows:

Office of the Information and Privacy Commissioner
34 Pippy Place
P. O. Box 13004, Stn. A
St. John’s, NL. A1B 3V8

Telephone: (709) 729-6309
Facsimile: (709) 729-6500

In the event that you choose to appeal to the Trial Division, you must do so within 30 days of the date of this letter. Section 60 of the Act sets out the process to be followed when filing such an appeal.

Please be advised that these records will be published following a 72 hour period after the response is sent electronically to you or five days in the case where records are mailed to you. It is the goal to have the responsive records posted to the Office of Public Engagement's website within one business day following the applicable period of time. Your personal information will not be posted online.

If you have any questions, please feel free to contact Elizabeth Day at (709) 729-5691 or by e-mail at elizabethday@gov.nl.ca.

Sincerely,

Paula Burt
Deputy clerk and Associate Secretary to Cabinet
Appendix A sets out the Statutory Review Committee recommendations and respective stakeholders positions on organizational or operational changes that should be referred to the Workers' Compensation Commission for action.

Appendix B sets out the Statutory Review Committee recommendations and respective stakeholders positions on occupational health and safety changes that are the responsibility of the Minister of Employment and Labour Relations to act upon.

Appendix C sets out the Statutory Review Committee recommendations and respective stakeholders positions on corporate structure that must be acted upon by the Minister and Cabinet through appointments at the Workers' Compensation Commission.

Appendix D sets out the Statutory Review Committee recommendations and respective stakeholders positions on substantive legislative or policy changes that Cabinet must decide upon in the interest of ensuring a viable system of compensation coverage for workers into the future.

Appendix E summarizes other changes which have been identified from time to time as warranting legislative action and which should preferably be included in a consolidated package of Workers' Compensation Act amendments.

MINISTERIAL RECOMMENDATION

The recommendations in Appendix A and Appendix B attached to this Submission are referred for the general information of Cabinet.

Recommendations in Appendix C, Appendix D and Appendix E require a decision by Cabinet in each individual case.

[Signature]
Roger Grimes
Minister
Department of Employment
and Labour Relations

FEBRUARY 28, 1992
RECOMMENDATIONS ON LEGISLATIVE/POLICY

CHANGES REQUIRING A DECISION BY GOVERNMENT

RECOMMENDATION #40 - PAGE 50: LEGISLATION BE AMENDED TO STIPULATE THE CHOICE OF A WORKER TO CLAIM COMPENSATION OR TAKE LEGAL ACTION.

The Board had previously recommended to the Minister that legislation be changed to stipulate the choice of a worker to claim compensation or take legal action for recovery from third parties.

The Federation of Labour agrees with the option to sue third parties as long as compensation is not interrupted while awaiting court determination.

The Employers' Council supports this recommendation.

The Board of Trade reserves a position on this recommendation pending further review.

The Nurses' Union supports this recommendation.

ANALYSIS

The current legislative provisions which allow workers to claim workers' compensation and commence legal action against a third party for damages creates administrative and collection problems for the Commission. This puts at risk the repayment of certain recoveries to the Injury Fund and places an added strain on the Commission's relationship with claimants.

A legislative change to permit a worker to claim compensation or commence a third party action would be more in line with the situation in most other jurisdictions and would address current difficulties by giving the Commission control over follow-up legal action so as to maximize recoveries of funds available through third party action. At the same time, any amounts collected through litigation over and above that paid by the Commission in compensation plus the cost of the legal action would be paid out to the worker.

MINISTERIAL RECOMMENDATION

Section 33 of the Workers' Compensation Act be amended to stipulate the choice of a worker to claim compensation or take legal action.
MISCELLANEOUS LEGISLATIVE CHANGES
PUBLIC LIABILITY INSURANCE CLAIMS

SUMMARY

The right to compensation provided by The Workers' Compensation Act, 1983 is in lieu of all rights of action to which a worker or his dependents are or may be entitled to against an employer or a worker. This preclusion or statutory bar is extended to persons operating motor vehicles or travelling by other modes of transportation even though public liability insurance is required to be carried by the employer or worker in relation to the vehicle.

This has meant that the workers' compensation system is in many instances subsidizing the public liability coverage of private insurers. This situation has been cited by some members of the legal profession in Newfoundland as an unacceptable bar to legal action.

ANALYSIS

Other jurisdictions including Manitoba, Nova Scotia and New Brunswick have dealt with this situation by exempting the statutory bar to recover costs for accidents in the transportation sector for which there is public liability insurance either for motor vehicle mishaps only or transportation accidents generally. Similar action in Newfoundland would therefore not be out of line. It would also have a positive impact on the Commission's financial position through accident recovery from private insurance funds otherwise payable through workers' compensation. This change would redistribute costs through higher private insurance premiums having to be paid by those who make motor vehicle or public conveyance accident claims under public liability coverage of the typical insurance coverage.

RECOMMENDATION

The Workers' Compensation Act be amended by providing that the statutory bar in Section 33, does not apply where the worker was injured or killed while being transported in the course of the worker's employment by any mode of transportation in respect of which public liability insurance is required to be carried, or as a result of an accident involving the use of a motor vehicle by the worker or any other person.
The following is a Copy of a Directive passed by Cabinet at a Meeting held on 1992-09-29

The Submission of the Honourable the Minister of Employment and Labour Relations respecting an Act to Amend The Workers' Compensation Act, 1983, was considered.

The draft bill, entitled "An Act to Amend the Workers' Compensation Act, 1983", (the "Act"), a copy of which is on file with the Clerk of the Executive Counsel, is approved for introduction into the House of Assembly, subject to an amendment to section 3 of the act, to require the Board to obtain the prior approval of the Lieutenant-Governor in Council for the appointment of the chief executive officer.

Clerk of the Executive Council
Title:

An Act to Amend the Workers' Compensation Act, 1981

Other Considerations:

1. This paper is in response to policy direction provided by Cabinet and outlined in M.C. 92-0578 and M.C. 0370.

2. While a number of legislative, organizational and administrative changes were approved to the workers compensation system, government was primarily concerned with the financial viability of the Commission. Clauses 15 through 20 inclusive in the proposed Bill are aimed at correcting existing trends.

3. The Secretariat draws the Committee's attention to the following:

(a) Officials in the Department of Employment and Labour Relations have advised that the Minister intends to raise the matter of employer compensation to injured workers (commonly known as topping-up) once again as a result of approaches that have been made to him by some unions. In the meantime Clause 20 in the Bill would give the legislative authority to accomplish government's intention. It should be noted, however, that Item (b) in M.C. 92-0578 referred to a 3 year time frame with respect to terminating existing top-ups. This is not addressed in the Bill.

(b) The attached Bill does not amend in any way existing provisions with respect to the Appeals Tribunal. This matter will be dealt with in a future Cabinet paper.

(c) ELR 9-92 recommended that a physician be a member of the Board and that one member be either a lawyer or an accountant. This recommendation was approved. However, the recently submitted ELR 39-92, which dealt with appointments to the Board, recommends 3 worker representatives, 2 employer representatives and a physician. Cabinet deferred a decision on that submission subject to additional information being received from the Minister.

Recommendation:

The Social Policy Committee recommends that the Minister's Submission be approved but referred Clause 20 dealing with top ups to Cabinet as per ELR 40-92.

Unanimous 4 - 0

September 17, 1992
Date received illegible on scanned submission.
Date received recorded at time of scanning.

EXECUTIVE COUNCIL

DATE RECEIVED: AUG. 13, 1992

DATE SCANNED: JULY 25, 1995
MEMORANDUM TO EXECUTIVE COUNCIL

SUBJECT: AN ACT TO AMEND THE WORKERS' COMPENSATION ACT, 1983

PURPOSE

Cabinet approval is sought for the introduction of the attached Bill into the Fall sitting of the House of Assembly for passage so as to permit implementation on January 1, 1993.

BACKGROUND

MC 92-0578 dated May 28, 1992 authorized the drafting of amendments to the Workers' Compensation legislation based on the recommendations contained in ELR 9-92. The draft legislation is required to be submitted back to Cabinet for final approval. Cabinet specifically requested that changes in Section 28.1, Section 44 and Section 45 be discussed with the Minister of Justice prior to recommendations for legislative amendment being finally decided.

ALTERNATIVES

Upon consultation with the Minister of Justice, it was decided that a review of all Sections dealing with the operation of the Workers' Compensation Appeal Tribunal was advisable rather than only dealing with provisions for Board of Directors review of WCAT decisions. The results of this review, that I have now initiated,
will be communicated in a separate Cabinet Submission later this summer for a decision on further legislation changes to be incorporated in the draft Bill to be presented in the House of Assembly this Fall.

In discussing with the Minister of Justice amendments to Section 44 to remove the statutory bar to sue for damages when motor vehicle or common carrier liability insurance exists, it was recognized that any action by Government depends on its assessment of the policy issues. On the one hand, a complete statutory bar can be argued as workers' compensation is a universal, no-fault insurance program that employers fund in return for immunity from legal suit. On the other hand, by requiring employers to claim against private liability insurance before accessing workers' compensation would reduce the financial burden on the workers' compensation insurance program. Restoring financial stability in workers' compensation was the principal reason behind the changes Government announced. On balance therefore, I recommend that exceptions to the statutory bar in Section 44 as contained in provision 9 of the draft Bill be approved as was done in several other jurisdictions in Canada.

The Minister of Justice and I agree that the existing provisions of Section 45 which enable injured workers to claim compensation and also sue third parties for damages should be changed to require injured workers to elect, within a specified time, to receive compensation or take legal action. Provision 10 of the draft Bill reflects this change. A further policy change is also reflected in subsection (7) that if injured workers elect to take legal action they give up their right to compensation even when less is recovered from legal action than may otherwise be available through workers' compensation. I feel this is defensible in that individual choice is maintained while giving all workers basic access to the Commission initiating third party litigation, the proceeds from which if more than the compensation paid out will be payable to the worker.
RECOMMENDATION

Cabinet approve the attached draft Bill "An Act to Amend the Workers' Compensation Act, 1983" for introduction in the Fall setting of the House of Assembly.

Roger Grimes
Minister
Department of Employment and Labour Relations

August 10, 1992
A BILL

AN ACT TO AMEND THE WORKERS' COMPENSATION ACT

Analysis

Be it enacted by the Lieutenant-Governor and House of Assembly
In Legislative Session convened, as follows:

1. (1) Section 2 of the Workers' Compensation Act is amended by adding the following immediately after paragraph (g):

"(g.1) 'disability' means the loss of earning capacity of a worker as a result of an injury;".

(2) Section 2 of the Act is also amended by adding the following immediately after paragraph (i):

"(i.1) 'impairment' means a physical or functional abnormality or loss, including disfigurement, as a result of an injury;".

(3) Subparagraph 2(v)(ii) is amended by deleting the word "annual".

2. (1) Subsections 4(1) and (2) of the Act are repealed and the following substituted:

"4. (1) There shall be a board of directors responsible for the administration of this Act, which shall consist of 7 members appointed by the Lieutenant-Governor in Council, one of whom"
shall be appointed chairperson by the Lieutenant-Governor in Council.

(2) Workers and employers shall be equally represented in the membership of the board.

(2) Subsection 4(3) of the Act is amended by inserting after the phrase "the appeal tribunal" a comma and the phrase "the Assistant Deputy Minister of the Department of Employment and Labour Relations responsible for Occupational Health and Safety".

(3) Subsection 4(3) of the Act is repealed.

2. Section 6 of the Act is repealed and the following substituted:

3. Section 6 of the Act is repealed and the following substituted:

Chief executive

"6. (1) The board of directors shall, subject to the approval of the Lieutenant-Governor in Council, appoint a chief executive officer of the commission who shall devote the whole of his or her time to the performance of duties under this Act.

(2) The person who is on the commencement of this section the chief executive officer of the commission may continue to so act."

4. Subsection 8(2) of the Act is repealed and the following substituted:

"(2) All expenses incurred in the administration of this Act shall be paid out of the injury fund."

5. Subsection 12(1) of the Act is amended by deleting the words "before April 1" and by substituting the words "before June 1".

6. Paragraphs 19(1)(b) and (c) of the Act are amended by deleting the word "disability" and substituting the word "impairment".

7. (1) Subsection 43(2) of the Act is amended by deleting the word "disabled" and substituting the word "impair".

(2) Section 43 is further amended by adding the following immediately after subsection (2):
"(3) The commission shall pay interest on compensation payable for loss of wages to a worker or the worker's dependents where the payment of that compensation is delayed, for more than 30 days, as a result of circumstances that are in the control of the commission.

(4) The rate of interest paid under subsection (3) shall be calculated in accordance with the provisions of the Judgment Interest Act.

9. The Act is amended by adding the following immediately after section 44:

44.1 Section 44 shall not apply where the worker is injured or killed

(a) while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried; or

(b) as a result of an accident involving the use of a motor vehicle by the worker or another person.

9. (1) Subsection 45(1) of the Act is amended by deleting the word "and" and by substituting the word "or".

(2) Subsections 45(2) to (10) are repealed and the following substituted:

(2) The worker or his or her dependents shall make an election under subsection (1) within 6 months of the injury and an application for compensation is a valid election for the purpose of this section.

(3) Where the worker or his or her dependents elect to bring an action he or she or they shall immediately serve notice in writing of the election on the commission, and where an action is commenced he or she or they shall immediately serve notice in writing of the action on the commission.

(4) Where the commission is satisfied that due to a physical or mental disability a worker is unable to exercise his or her right
of election, and undue hardship will result, it may pay the compensation provided by this Act until the worker is able to make an election.

(5) Where the worker referred to in subsection (3) elects not to claim compensation, no further compensation may be paid, but the compensation so paid shall be a first lien against a sum that may be recovered.

(6) Where a person who is required to make an election under this section is under the age of 18 years his or her parent or guardian may make the election.

(7) Where a worker referred to in subsection (1) or the worker's dependents bring an action or settle out of court and less is recovered and collected than the amount of the compensation to which the worker or dependents would be entitled under this Act, the worker or dependents are not entitled to claim compensation under this Act.

(8) Where the worker or the worker's dependents apply to the commission claiming compensation under this Act, neither the making of the application nor the payment of compensation under it shall restrict or impair a right of action against the party liable, but in relation to those claims the commission is subrogated to the rights of the worker or his or her dependents and may maintain an action in his or her or their names or in the name of the commission against the person whom the action lies for the whole or an outstanding part of the claim of the worker or his or her dependents.

(9) The commission has exclusive jurisdiction to determine whether it shall take an action, release its claim for an action or compromise the right of action, and its decision is final.

(10) Where in an action under subsection (1), a worker or the worker's dependents receive money as the result of a judgment given by a court of law and the commission is owed money under this section by the worker or his or her dependents, the judge shall order that the money owed be paid to the commission.
(11) Where the commission is subrogated to the rights of a worker or the worker's dependents and recovers and collects more than the amount of the compensation to which the worker or dependents would be entitled under this Act, the sum representing the amount of the excess, less costs and administration charges, shall be paid to the worker or dependents.

(12) Costs may, notwithstanding that a salaried employee of the commission acts as its solicitor or counsel, be awarded to and collected by the commission in an action taken by the commission under this section.

10. Section 47 of the Act is amended by adding the following immediately after subsection (2):

"(3) Where an injury results in a permanent functional impairment to a worker, he or she may be entitled to compensation for the impairment notwithstanding the fact that there is no loss of earnings."

11. Section 65 of the Act is amended by adding the following immediately after subsection (1):

"(1.1) Notwithstanding subsection 123(1), the commission may increase annually the amount of compensation paid to the worker's surviving dependent spouse and children by applying the Consumer Price Index for Canada as published by Statistics Canada."

12. Section 71 of the Act is repealed.

13. Subsection 72(1) is amended by deleting the figure "16" and substituting the figure "18".

14. (1) Subsection 73(1) is amended by deleting the word "disfigured" and by substituting the word "impaired".

(2) Paragraph 73(1)(b) and subsection 73(3) of the Act are amended by deleting the phrase "disability or disfigurement" wherever it appears and substituting the phrase "permanent impairment".

15. (1) Subsection 74(2) is repealed and the following substituted:
(2) After December 31, 1992 the rate used for calculating a worker's loss of earning capacity shall

(a) for the first 39 weeks, be 75%; and

(b) after 39 continuous weeks 80%

of the difference between the worker's average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed amount under subsection 80(8), and the average weekly net earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining that injury.

(2.1) The rate used for calculating the loss of earning capacity for a worker who is injured prior to January 1, 1993 and who has been receiving compensation for

(a) less than 40 continuous weeks shall be 75%; and

(b) 40 continuous weeks or more shall be 90%

of the difference between the worker's average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed amount under subsection 80(8), and the average weekly net earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining that injury.

(2.2) The calculation for a worker referred to in paragraph (2.1)(a) who is still entitled to receive compensation after 39 continuous weeks shall be 80% of the difference between the worker's average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed amount under subsection 80(8), and the average weekly net earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining that injury.

(2.3) Notwithstanding paragraph (2.1)(b), the rate paid to a worker who is referred to in paragraph (2.1)(b) and to whom section 74.1 does not apply shall from January 1, 1994 be
Compensation to be reviewed annually

reduced annually by 2.5% until the rate used for calculating the amount of compensation to be paid to that worker reaches 80%.

(2.4) Notwithstanding paragraphs (2)(b) and (2.1)(b) where a worker’s claim for compensation is re-opened the rate used for calculating that worker’s loss of earning capacity shall

(a) for the 1st 39 weeks after the claim is re-opened be 75%;

and

(b) after 39 continuous weeks be 80%

of the difference between the worker’s average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed amount under subsection 80(6), and the average weekly net earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining that injury:

(2) Subsection 74(6) of the Act is repealed.

16. The Act is amended by adding the following immediately after section 74:

"74.1. (1) Extended earnings loss benefits being paid to a worker shall be reviewed annually and the Consumer Price Index for Canada as published by Statistics Canada shall be applied to that worker’s estimated annual earnings prior to the commencement of his or her loss of earnings resulting from the injury and the benefits shall be recalculated in accordance with subsection 74(2).

(2) Notwithstanding subsection (1), the extended earnings loss benefits being paid to a worker shall not be increased under subsection (1) by applying the Consumer Price Index for Canada until the time that the amount of compensation being paid to that worker is equal to 80% of that worker’s estimated annual earnings as adjusted by the application of the Consumer Price Index for Canada.”.

17. Section 75 of the Act is repealed and the following substituted:
75. (1) Where a worker who is eligible for benefits as a result of an injury that occurred after December 31, 1983 reaches the age of 65, an amount equal to the amount of a benefit that the worker demonstrates to the commission, that he or she has lost as a result of an injury for which he or she is receiving compensation under this Act, under the Canada Pension Plan or from a registered employer sponsored pension plan covering the worker and which is registered with and certified by the Superintendent of Pensions in accordance with the Pension Benefits Act shall be paid to him or her by the commission.

(2) All the money that the commission has set aside in reserves of the commission on behalf of a worker to provide an annuity shall, after December 31, 1992, revert to the injury fund of the commission.

(3) After December 31, 1992 a right that a worker may have had to receive the money set aside in reserves of the commission prior to January 1, 1993 or to have the money paid into an established superannuation fund is extinguished.

18. Section 77 of the Act is amended by renumbering it as subsection (1) and by adding the following immediately after subsection (1):

"(2) After December 31, 1992 where a worker suffers a recurrence of an injury whether the initial injury occurred before or after January 1, 1993 the calculation for the loss of earning capacity shall

(a) for the 1st 39 weeks be based on 75%; and
(b) after 39 continuous weeks be based on 80%,

of the amount that is reached under subsection (1)."

19. Section 81(3) of the Act is repealed and the following substituted:

"(3) A benefit relative to an injury that a worker is entitled to receive under the Canada Pension Plan, shall be considered as wages that the worker is capable of earning in calculating the compensation to be paid by the commission for loss of earning capacity."
20. The Act is amended by adding the following immediately after section 81:

"81.1 (1) After January 1, 1993 an employer and a worker in the province shall not in a collective agreement or other contractual arrangement agree that the employer will pay the worker's wages or a portion of the worker's wages where the worker is unable to work as a result of being injured in the course of his or her employment and is receiving compensation under this Act.

(2) Where an employer and a worker enter into an agreement referred to in subsection (1) that agreement is of no effect.

(3) Notwithstanding subsections (1) and (2), where prior to the coming into force of this section, an employer has entered into a collective agreement or other contractual arrangement that provides for the payment of the worker's wages or a portion of the worker's wages where the worker is unable to work as a result of being injured in the course of his or her employment and is receiving compensation under this Act, that agreement shall be valid until the collective agreement comes to an end.

(4) Notwithstanding subsection (3), the amount paid under the terms of a collective agreement or other contractual arrangement by an employer to a worker who is receiving benefits under this Act shall not, after the coming into force of this section, exceed the amount being paid prior to the coming into force of this section."

21. (1) Section 88 of the Act is amended by deleting the word "or" at the end of paragraph (b), by deleting the period at the end of paragraph (c) and substituting a semi-colon and the word "or".

(2) Section 88 of the Act is further amended by adding the following immediately after paragraph (c):

"(d) to assist a surviving dependent spouse by providing the same counselling, academic and vocational services as provided to an injured worker where in the opinion of the commission, those services are required by the dependent spouse."
22. Section 90 of the Act is amended by adding the following immediately after subsection (3):

"(3.1) Where a worker referred to in subsection (1), who at or immediately before the date of the disablement was employed in a process involving asbestos, is suffering from the industrial disease known as asbestosis, the disease shall be conclusively considered to have been due to the nature of that employment."

23. Paragraph 116(1)(b) of the Act is repealed and the following substituted:

"(b) by way of providing a reserve fund to be used to meet the part of the cost of claims of workers suffering enhanced disabilities, because of similar or other disabilities previously suffered, as in the opinion of the commission is the result of the previous disabilities, and to meet the cost of subsequent injuries resulting while a worker is participating in a rehabilitation program;"

24. The Act is amended by adding immediately after section 126 the following:

"127. (1) Where a right to compensation exists in respect of a worker or his or her dependent under The Workers’ Compensation Act, the entitlement to compensation payable under that Act if it had remained in force shall continue under this Act, subject to those adaptations and modifications that may be prescribed by regulations by the commission with the approval of the Lieutenant-Governor in Council.

(2) Notwithstanding subsection (1), the commission may apply annually to compensation payable to a worker’s surviving dependent spouse and children under subsection (1) the Consumer Price Index for Canada as published by Statistics Canada.”

25. Section 14 of the Occupational Health and Safety Act is amended and the following substituted:

"14. (1) The council shall consist of not more than 11 members."
(2) The membership of the council is to include equal representation from labour and management.

(3) Members are to be appointed for terms not exceeding 3 years and are eligible for reappointment for not more than 2 consecutive terms.

(4) The assistant deputy minister and the chief executive officer of the Worker's Compensation Commission, or their designates, are, by virtue of their office, to be members of the council.

(5) The members of the Occupational Health and Safety Council appointed prior to the coming into force of this section shall cease to hold office upon the coming into force of this section.

26. This Act shall come into force on January 1, 1993.
CABINET DIRECTIVE

The following is a Copy of a Directive passed by Cabinet at a Meeting held on 1992-11-05

MC 92-1097
ELR/DM
C.Lake
AG
AF
/ File

ELR 46-92. The Submission of the Honourable the Minister of Employment and Labour Relations respecting a bill to amend the Workers' Compensation Act was considered.

Cabinet approved the draft bill, entitled "An Act to Amend The Workers' Compensation Act", a copy of which is on file with the Clerk of the Executive Council, respecting a range of amendments to the Act, including amounts paid in excess of compensation and appointment of Chief Executive Officer, for introduction into the House of Assembly.

[Signature]

Clerk of the Executive Council

(NOTE: Forwarded 92-11-25 - To replace MC 92-1097 previously forwarded)
The following is a Copy of a Directive passed by Cabinet at a Meeting held on 1992-11-05

ELR 46-92. The Submission of the Honourable the Minister of Employment and Labour Relations respecting a bill to amend the Workers' Compensation Act was considered. Cabinet approved the draft bill, entitled "An Act to Amend The Workers' Compensation Act", a copy of which is on file with the Clerk of the Executive council, respecting amounts paid in excess of compensation and appointment of a chief executive officer, for introduction into the House of Assembly.

Clerk of the Executive Council
Date received illegible on scanned submission.
Date received recorded at time of scanning.

EXECUTIVE COUNCIL

DATE RECEIVED: Nov. 02, 1992

DATE SCANNED: July 25, 1995
MEMORANDUM TO EXECUTIVE COUNCIL

SUBJECT: AMENDMENTS TO THE WORKERS' COMPENSATION ACT, 1983

PURPOSE

This paper seeks approval of the attached draft Bill for introduction into the House of Assembly.

BACKGROUND

MC 92-0984 approved draft amendments to the Workers' Compensation Act, 1983, subject to the inclusion of the word "prior" in Clause 3 of the Bill. The attached draft reflects that change.

MC 92-0985 directed the preparation of amendments to the Act in order to eliminate the practice of "top-up". Clause 20 of the attached draft Bill reflects the directions in relation to top-up.

RECOMMENDATION

I recommend the attached draft Bill be approved for introduction into the House of Assembly.

ROGER D. GRIMES
Minister
Employment & Labour Relations

1992 11 02
Attachment
OCTOBER 27, 1992

AN ACT TO AMEND THE WORKERS' COMPENSATION ACT
A BILL
AN ACT TO AMEND THE WORKERS' COMPENSATION ACT

Analysis

Be it enacted by the Lieutenant-Governor and House of Assembly
in Legislative Session convened, as follows:

1. (1) Section 2 of the Workers' Compensation Act is amended by adding the following immediately after paragraph (g):

"(g.1) "disability" means the loss of earning capacity of a worker as a result of an injury;"

(2) Section 2 of the Act is also amended by adding the following immediately after paragraph (l):

"(l.1) "impairment" means a physical or functional abnormality or loss, including disfigurement, as a result of an injury;"

(3) Subparagraph 2(v)(iii) is amended by deleting the word "annual".

2. (1) Subsections 4(1) and (2) of the Act are repealed and the following substituted:

"4. (1) There shall be a board of directors responsible for the administration of this Act, which shall consist of 7 members appointed by the Lieutenant-Governor in Council, one of whom
Chief executive officer shall be appointed chairperson by the Lieutenant-Governor in Council.

(2) Workers and employers shall be equally represented in the membership of the board.

(2) Subsection 4(3) of the Act is amended by inserting after the phrase "the appeal tribunal" a comma and the phrase "the Assistant Deputy Minister of the Department of Employment and Labour Relations responsible for Occupational Health and Safety".

(3) Subsection 4(5) of the Act is repealed.

3. Section 6 of the Act is repealed and the following substituted:

"6. (1) The board of directors shall, subject to the prior approval of the Lieutenant-Governor in Council, appoint a chief executive officer of the commission who shall devote the whole of his or her time to the performance of duties under this Act.

(2) The person who is on the commencement of this section the chief executive officer of the commission may continue to so act.".

4. Subsection 8(2) of the Act is repealed and the following substituted:

"(2) All expenses incurred in the administration of this Act shall be paid out of the injury fund.".

5. Subsection 12(1) of the Act is amended by deleting the words "before April 1" and by substituting the words "before June 1".

6. Paragraphs 19(1)(b) and (c) of the Act are amended by adding immediately after the word "disability" the phrase "or impairment".

7. (1) Subsection 43(2) of the Act is amended by adding immediately after the word "disabled" the phrase "or impaired".

(2) Section 43 is further amended by adding the following immediately after subsection (2):
"(3) The commission shall pay interest on compensation payable for loss of wages to a worker or the worker's dependents where the payment of that compensation is delayed, for more than 30 days, as a result of circumstances that are in the control of the commission.

(4) The rate of interest paid under subsection (3) shall be calculated in accordance with the provisions of the Judgment Interest Act.

8. The Act is amended by adding the following immediately after section 44:

   44.1 Section 44 shall not apply where the worker is injured or killed

   (a) while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried; or

   (b) as a result of an accident involving the use of a motor vehicle by the worker or another person.

9. (1) Subsection 45(1) of the Act is amended by deleting the word "and" and by substituting the word "or".

(2) Subsections 45(2) to (10) are repealed and the following substituted:

"(2) The worker or his or her dependents shall make an election under subsection (1) within 6 months of the injury and an application for compensation is a valid election for the purpose of this section.

(3) Where the worker or his or her dependents elect to bring an action he or she or they shall immediately serve notice in writing of the election on the commission, and where an action is commenced he or she or they shall immediately serve notice in writing of the action on the commission.

(4) Where the commission is satisfied that due to a physical or mental disability a worker is unable to exercise his or her right

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of election, and undue hardship will result, it may pay the compensation provided by this Act until the worker is able to make an election.

(5) Where the worker referred to in subsection (3) elects not to claim compensation, no further compensation may be paid, but the compensation so paid shall be a first lien against a sum that may be recovered.

(6) Where a person who is required to make an election under this section is under the age of 18 years his or her parent or guardian may make the election.

(7) Where a worker referred to in subsection (1) or the worker's dependents bring an action or settle out of court and less is recovered and collected than the amount of the compensation to which the worker or dependents would be entitled under this Act, the worker or dependents are not entitled to claim compensation under this Act.

(8) Where the worker or the worker's dependents apply to the commission claiming compensation under this Act, neither the making of the application nor the payment of compensation under it shall restrict or impair a right of action against the party liable, but in relation to those claims the commission is subrogated to the rights of the worker or his or her dependents and may maintain an action in his or her or their names or in the name of the commission against the person whom the action lies for the whole or an outstanding part of the claim of the worker or his or her dependents.

(9) The commission has exclusive jurisdiction to determine whether it shall take an action, release its claim for an action or compromise the right of action, and its decision is final.

(10) Where in an action under subsection (1), a worker or the worker's dependents receive money as the result of a judgment given by a court of law and the commission is owed money under this section by the worker or his or her dependents, the judge shall order that the money owed be paid to the commission.
(11) Where the commission is subrogated to the rights of a worker or the worker's dependents and recovers and collects more than the amount of the compensation to which the worker or dependents would be entitled under this Act, the sum representing the amount of the excess, less costs and administration charges, shall be paid to the worker or dependents.

(12) Costs may, notwithstanding that a salaried employee of the commission acts as its solicitor or counsel, be awarded to and collected by the commission in an action taken by the commission under this section.

10. Section 47 of the Act is amended by adding the following immediately after subsection (2):

"(3) Where an injury results in a permanent functional impairment to a worker, he or she may be entitled to compensation for the impairment notwithstanding the fact that there is no loss of earnings.".

11. Section 65 of the Act is amended by adding the following immediately after subsection (1):

"(1.1) Notwithstanding subsection 123(1), the commission may increase annually the amount of compensation paid to the worker's surviving dependent spouse and children by applying the Consumer Price Index for Canada as published by Statistics Canada.".

12. Section 71 of the Act is repealed.

13. Subsection 72(1) is amended by deleting the figure "16" and substituting the figure "18".

14. (1) Subsection 73(1) is amended by deleting the word "disfigured" and by substituting the word "impaired".

(2) Paragraph 73(1)(b) and subsection 73(3) of the Act are amended by deleting the phrase "disability or disfigurement" wherever it appears and substituting the phrase "permanent impairment".

15. (1) Subsection 74(2) is repealed and the following substituted:
(2) After December 31, 1992 the rate used for calculating a worker's loss of earning capacity shall

(a) for the 1st 39 weeks, be 75%; and

(b) after 39 continuous weeks 80%

of the difference between the worker's average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed amount under subsection 80(8), and the average weekly net earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining that injury.

(2.1) The rate used for calculating the loss of earning capacity for a worker who is injured prior to January 1, 1993 and who has been receiving compensation for

(a) up to 39 continuous weeks shall be 75%; and

(b) 39 continuous weeks or more shall be 90%

of the difference between the worker's average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed amount under subsection 80(8), and the average weekly net earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining that injury.

(2.2) The calculation for a worker referred to in paragraph (2.1)(a) who is still entitled to receive compensation after 39 continuous weeks shall be 80% of the difference between the worker's average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed amount under subsection 80(8), and the average weekly net earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining that injury.

(2.3) Notwithstanding paragraph (2.1)(b), the rate paid to a worker who is referred to in paragraph (2.1)(b) and to whom section 74.1 does not apply shall from January 1, 1994 be
reduced annually by 2.5% until the rate used for calculating the amount of compensation to be paid to that worker reaches 80%.

(2.4) Notwithstanding paragraphs (2)(b) and (2.1)(b) where a worker’s claim for compensation is re-opened the rate used for calculating that worker’s loss of earning capacity shall

(a) for the 1st 39 weeks after the claim is re-opened be 75%; and

(b) after 39 continuous weeks be 80% of the difference between the worker’s average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed amount under subsection 80(8), and the average weekly net earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining that injury.

(2) Subsection 74(6) of the Act is repealed.

16. The Act is amended by adding the following immediately after section 74:

74.1. (1) Extended earnings loss benefits being paid to a worker shall be reviewed annually and the Consumer Price Index for Canada as published by Statistics Canada shall be applied to that worker’s estimated annual earnings prior to the commencement of his or her loss of earnings resulting from the injury and the benefits shall be recalculated in accordance with subsection 74(2).

(2) Notwithstanding subsection (1), the extended earnings loss benefits being paid to a worker shall not be increased under subsection (1) by applying the Consumer Price Index for Canada until the time that the amount of compensation being paid to that worker is equal to 80% of that worker’s estimated annual earnings as adjusted by the application of the Consumer Price Index for Canada.

17. Section 75 of the Act is repealed and the following substituted:
Annuity at age 65

"75. (1) Where a worker who is eligible for benefits as a result of an injury that occurred after December 31, 1983 reaches the age of 65, an amount equal to the amount of a benefit that the worker demonstrates to the commission, that he or she has lost as a result of an injury for which he or she is receiving compensation under this Act, under the Canada Pension Plan or from a registered employer sponsored pension plan covering the worker and which is registered with and certified by the Superintendent of Pensions in accordance with the Pension Benefits Act shall be paid to him or her by the commission.

(2) All the money that the commission has set aside in reserves of the commission on behalf of a worker to provide an annuity shall, after December 31, 1992, revert to the injury fund of the commission.

(3) After December 31, 1992 a right that a worker may have had to receive the money set aside in reserves of the commission prior to January 1, 1993 or to have the money paid into an established superannuation fund is extinguished.

18. Section 77 of the Act is amended by renumbering it as subsection (1) and by adding the following immediately after subsection (1):

"(2) After December 31, 1992 where a worker suffers a recurrence of an injury whether the initial injury occurred before or after January 1, 1993 the calculation for the loss of earning capacity shall be increased as follows:

(a) for the first 39 weeks of 75%, and
(b) after 39 continuous weeks of 80%,

of the amount that is reached under subsection (1)."

19. Section 81(3) of the Act is repealed and the following substituted:

"(3) A benefit relative to an injury that a worker is entitled to receive under the Canada Pension Plan shall be considered as wages that the worker is capable of earning in calculating the compensation to be paid by the commission for loss of earning capacity."
20. The Act is amended by adding the following immediately after section 81:

"81.1 (1) After January 1, 1993, an employer and a worker shall not in an agreement provide that the employer shall pay an amount in excess of the amount that the worker as a result of an injury is receiving as compensation either under this Act or as if the worker were a worker within the scope of this Act.

(2) Where an employer and a worker enter into an agreement in contravention of subsection (1), that agreement is of no effect.

(3) Where, prior to the coming into force of this section, an employer has entered into an agreement to pay all or a portion of the worker’s wages where the worker sustains an injury, the liability of the employer for that payment

(a) continues until the operation of the agreement ceases but in any event shall not continue after January 1, 1995; and

(b) shall not be any greater than it was prior to the commencement of this section.

(4) For the purpose of this section, the word “agreement” means a collective agreement or other contract of employment.”.

21. (1) Section 88 of the Act is amended by deleting the word “or” at the end of paragraph (b), by deleting the period at the end of paragraph (c) and substituting a semi-colon and the word “or”.

(2) Section 88 of the Act is further amended by adding the following immediately after paragraph (c):

“(d) to assist a surviving dependent spouse by providing the same counselling, academic and vocational services as provided to an injured worker where in the opinion of the commission, those services are required by the dependent spouse.”.

22. Section 90 of the Act is amended by adding the following immediately after subsection (3):
"(3.1) Where a worker referred to in subsection (1), who at
or immediately before the date of the disablement was employed
in a process involving asbestos, is suffering from the industrial
disease known as asbestosis, the disease shall be conclusively
considered to have been due to the nature of that employment."

23. Paragraph 116(1)(b) of the Act is repealed and the following
substituted:

"(b) by way of providing a reserve fund to be used to meet the
part of the cost of claims of workers suffering enhanced
disabilities, because of similar or other disabilities pre-
viously suffered, as in the opinion of the commission is
the result of the previous disabilities, and to meet the
cost of subsequent injuries resulting while a worker is
participating in a rehabilitation program;"

24. The Act is amended by adding immediately after section 126
the following:

"127. (1) Where a right to compensation exists in respect of a
worker or his or her dependent under The Workers' Compensa-
tion Act, the entitlement to compensation payable under that
Act if it had remained in force shall continue under this Act,
subject to those adaptations and modifications that may be
prescribed by regulations by the commission with the approval
of the Lieutenant-Governor in Council.

(2) Notwithstanding subsection (1), the commission may
apply annually to compensation payable to a worker's surviving
dependent spouse and children under subsection (1) the Con-
sumer Price Index for Canada as published by Statistics
Canada."

25. Section 14 of the Occupational Health and Safety Act is
repealed and the following substituted:

"14. (1) The council shall consist of not more than 11 mem-
bers, 2 of whom shall be the assistant deputy minister and the
chief executive officer of the Worker's Compensation Com-
mission."
(2) The membership of the council is to include equal representation from labour and management.

(3) Members are to be appointed for terms not exceeding 3 years and are eligible for reappointment for not more than 2 consecutive terms.

(4) The members of the Occupational Health and Safety Council appointed prior to the coming into force of this section shall cease to hold office upon the coming into force of this section.

26. This Act shall come into force on January 1, 1993.