

Report of the Task Force on WorkSafeNB

July 2018

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**Report of the Task Force on WorkSafeNB
July 2018**

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July 2018

Department of Post-Secondary Education, Training and Labour
470 York Street
Fredericton, New Brunswick
E3B 3P7

Attention: Honourable Gilles LePage, Minister

Dear Minister:

The Report of the Ministerial Workers' Compensation Task Force is enclosed. The Task Force consisted of employer and worker representatives together with WorkSafeNB employer and worker members and an independent chair. The report has been written governed by the Terms of Reference.

The Task Force was entrusted with a significant undertaking. This consensus report strikes the right balance among compensation for injured workers, the employers' financial interest and the long-term sustainability of the system.

The Task Force is unanimous in its belief that the implementation of all recommendations, without exception, will ensure the system is transparent, accountable, predictable and sustainable in the long-term.

Yours truly,
Dennis Browne, Q.C. - Chair

Introduction

The Ministerial Task Force appointed to review New Brunswick's Workers' Compensation System, focusing on short term solutions and long-term sustainability, has fulfilled its mandate. WorkSafeNB's governing legislation, the effectiveness of the system, and the system's overall objectives have been studied. The Task Force deferred to the Auditor General's Value for Money Audit and the Comptroller's study pertaining to WorkSafeNB's financial situation.

The assistance of the staff and board of WorkSafeNB is gratefully acknowledged, as is the dedicated work of our executive support, Mr. Greg Lutes.

The Task Force of employer and worker representatives, together with WorkSafeNB employer and worker board members, was entrusted with a significant undertaking. Working together a unanimous report was developed after carefully considering the interests of the stakeholders and injured workers. The recommendations contained in this report result from a considerable volume of information gathered from public and private meetings, and from extensive consultation with people holding special knowledge and expertise.

The Task Force applied the Meredith Principles in ensuring that recommendations were stakeholder balanced. Solutions should follow with the implementation of all of these recommendations.

To my Task Force colleagues, your collective knowledge, experience and judgment were consistent throughout. New Brunswick has been well-served in the result.

Finally, thank you to the people of New Brunswick who took the time to make submissions and attend the province-wide forums. Your concern for the continued success of the province's compensation system in providing reasonable benefits to injured workers was evident.

Dennis Browne, Q.C. - Chair

About the Task Force

The Task Force was announced May 30, 2017 by the Minister of Post Secondary Education Training and Labour (PETL) to review New Brunswick's Worker's Compensation system focusing on short term solutions and long-term sustainability. The Task Force consists of nine members, an independent chair and three representatives from the employer's stakeholder community and three representatives from the worker's stakeholder community together with an employer representative from WorkSafeNB Board and a worker representative from the WorkSafeNB Board.

The minister in appointing Task Force members stated: "Workers and labour have expressed a desire for increased benefits to injured workers, employers and industry have expressed concerns about rising compensation premiums. The Task Force will attempt to strike the right balance between compensation for injured workers, employer's financial interest and the long-term sustainability of the system".

Objectives

The objective of the review is to identify short-term solutions, and establish a plan that ensures the system is transparent, accountable, predictable and sustainable in the long-term.

Mandate

The Task Force was mandated to examine WorkSafeNB's current financial situation, the governing legislation, and overall objectives and effectiveness of the system. The mandate required a discussion paper, which was released in the fall of 2017, to detail the current environment and facilitate discussion. In preparing this discussion paper, the Task Force met with stakeholders, worker's advocates, employer's advocates, Morneau Shepell, WorkSafeNB and others.

The Task Force travelled to Bathurst, Campbellton, Edmundston, Fredericton, Moncton, and Saint John to collect input from stakeholders and injured workers.

Members

- Dennis Browne, QC – Chair
- Sherri Deveau – Employer representative
- Louis-Philippe Gauthier – Employer representative
- Heather Hogan – Worker representative
- Joel Richardson – Employer representative
- Gary Ritchie – Worker representative
- Lucien Sonier – WorkSafeNB Board employer representative
- James Stanley – WorkSafeNB Board worker representative
- Glenn Sullivan – Worker representative

Summary of Recommendations

The Task Force is unanimous in its belief that the implementation of all recommendations, without exception, will ensure the system is transparent, accountable, predictable and sustainable in the long-term.

Recommendations

Rate setting

1. WorkSafeNB restate its policies permitting a variance of the Accident Fund not to exceed 120 per cent.
2. Surplus funds above the 120 per cent be managed by WorkSafeNB in a fair and transparent manner, accountable to all stakeholders.
3. WorkSafeNB recently embarked upon providing timely information to stakeholders in information sessions. The Task Force recommends such practices continue and WorkSafeNB provide reports to employers and other stakeholders, indicating the components of the rate, its impact, and how each component is managed.

Workers' Compensation Appeals Tribunal (WCAT)

4. Repeal of sections of the Act: **21(8.1), 21(8.2), 21(9), 21(12.2)**.
5.
 - a. That legislation be enacted wherein the Appeals Tribunal shall decide the appeal based on the provisions of that Act, the regulations, the policies of WorkSafeNB and the facts as established from the evidence in the proceedings. In addition, WorkSafeNB shall certify to the Appeals Tribunal the record of proceedings.
 - b. No new evidence shall be introduced before the Appeals Tribunal until that evidence has been first considered by an officer of WorkSafeNB and becomes a part of the record.
 - c. If an Appellant attempts to present new evidence on appeal, the Appeals Tribunal shall adjourn the hearing until that new evidence can be first considered by an officer of WorkSafeNB and becomes a part of the record. Following that procedure, the Appellant's case will then be prioritized.
 - d. The Appeals Tribunal shall not make any order or decision of a general nature affecting the policies of WorkSafeNB. Each appeal shall be decided on its own merits. The Appeals Tribunal decision shall pertain to the Appellant's case only.
 - e. The Appeals Tribunal will not have jurisdiction to alter, vary, reverse or amend any policy established by WorkSafeNB. However, the Appeals Tribunal can bring to the attention of WorkSafeNB policies that in the opinion of the Appeals Tribunal require variance.
 - f. The Appeals Tribunal should have the ability to postpone an appeal and refer a policy or legislative issue to WorkSafeNB. When appeals are postponed, WCAT shall have the authority to issue an interim award to the appellant, if the circumstances warrant.
 - g. Subject to the foregoing, enact legislation enabling the Appeals Tribunal to confirm, vary or reverse the decision of a hearing officer of WorkSafeNB.
 - h. Legislation to clarify WorkSafeNB's jurisdiction to refer matters to the Court of Appeal.

Occupational Health and Safety (OHS)

6. Section 44 of *the Occupational Health and Safety Act* be amended:
 - a. Requiring WorkSafeNB to send to employers copies of the *Occupational Health and Safety Act* and Regulations.
 - b. Publicizing penalties for violations of the Act.

7. WorkSafeNB ensure that the Joint Health and Safety Committees (JHSC) are effective, representative of the employer and employee groups, and are sufficiently trained to carry out their duties.
8. WorkSafeNB assign resources to ensure review and follow-up concerning the matters recorded in the filed minutes of the JHSC committees.
9. Mandatory *Occupational Health and Safety Act* and Regulations be devised:
 - a. Requiring the public sector employers (self-insured) adopt toolbox style meetings at the commencement of each shift devising a safety plan for that day's work.
 - b. Requiring the public sector to place greater accountability on department heads and managers to ensure OHS compliance and practices.
10. WorkSafeNB conduct a review of the cost of enforcing the *Occupational Health and Safety Act* in the workplaces of the self-insured employers, and the self-insured employers be required to pay their fair share of those costs to WorkSafeNB annually.

Return to work

11. WorkSafeNB adopt a proactive role in promoting back-to-work plans and accommodation of injured workers.
12. Functional ability forms for reporting and sharing information be practical and relevant, and similar to those used in Ontario.
13. Physicians complete a functional abilities evaluation which will assist in the creation of a back to work plan. As in Ontario, the requirement for physicians to complete such WorkSafeNB forms be non-discretionary and privacy compliant.
14. WorkSafeNB adopt practices pertaining to opioid addictions in collaboration with the NB Medical Society to assist injured workers.
15. WorkSafeNB continue its efforts pertaining to injured workers suffering from work-related mental health issues, focussing on functional abilities while respecting the privacy of the individual.

Rehabilitation

16. WorkSafeNB review annually the Grand Bay Rehabilitation Centre, comparing service delivery options and results to those in other jurisdictions, and publicizing these comparisons.

Benefits

17. Legislation to enhance WorkSafeNB's exclusive jurisdiction to establish and enforce policies.
18. Legislation to ensure injured workers receive fair and reasonable income replacement, apportionment of other revenue sources, but also establish incentives for injured workers to seamlessly apply for available benefits, a standard practice in other jurisdictions.
19. Legislation clarify the authority of WorkSafeNB to determine additional benefits other than prescribed income replacement.
20. Legislation clarify definitions of pre-existing conditions and intervening conditions, and applicable benefits.
21. That WorkSafeNB be the final authority on benefit entitlement.

Governance

22. The Task Force notes that revisions to legislation have often been ad hoc and require consolidation. The Task Force recommends a redrafting of WorkSafeNB's enabling legislation, and that this be completed no later than 2019. Subsequently, legislative reviews be mandated every five years.
23. WorkSafeNB is vulnerable to special interest lobbying and political interference regarding benefits. However, amendments to benefits should be a decision of WorkSafeNB following open and transparent consultations with all stakeholders and injured workers, and based upon the best available evidence.
24. Legislation require worker representatives and employer representatives be nominated by stakeholders. Chair and Vice-Chair appointments be made in consultation with WorkSafeNB. Appointments to be timely.
25. The relationship between WorkSafeNB and the government be transparent and respectful, recognizing WorkSafeNB's unique jurisdiction.
26. Mandate letters from the ministry reflect the unique nature of WorkSafeNB as a stakeholder-driven crown corporation. Mandate letters be publicized. Directives in any mandate letter acknowledge WorkSafeNB's independence.
27. Regular value-for-money audits be prescribed in legislation, to be completed by the Auditor General every five years.

The 3-day waiting period

28. The legislation requiring a 3-day waiting period be repealed.

Meredith Principles

What are the Meredith Principles?

The Meredith Principles are a historic compromise through which employers fund the workers' compensation system, and injured workers in turn surrender their right to sue their employer for their injury.

They can be expressed in different ways. However, there are five basic concepts that underlie most workers' compensation legislation in Canada today.

1. No-fault compensation, which means workers are paid benefits regardless of how the injury occurred. The worker and employer waive the right to sue. There is no argument over responsibility or liability for an injury.
2. Security of benefits, which means a fund, is established to guarantee funds exist to pay benefits.
3. Collective liability, which means that covered employers, on the whole, share liability for workplace injury insurance. The total cost of the compensation system is shared by all employers. All employers contribute to a common fund. Financial liability becomes their collective responsibility.
4. Independent administration, which means that the organizations who administer workers' compensation insurance are separate from government.
5. Exclusive jurisdiction, which means only workers' compensation organizations provide workers' compensation insurance. All compensation claims are directed solely to the compensation board. The board is the decision-maker and final authority for all claims.

These principles are the foundation upon which the majority of Canadian workers' compensation legislation is built.

(Source: Association of Workers' Compensation Boards of Canada)

Discussion and recommendations of the Task Force

A. Rate setting

Rate setting practices

The Task Force was created because of a perceived crisis pertaining to assessment rates and the procedures to calculate them. Assessment rates increased from \$1.11 to \$1.70 per \$100 of payroll in just two years, more than 60 per cent. Many employers submitted this was unacceptable.

Worker stakeholders submitted that previous rates were artificially suppressed through the use of surpluses for rate reduction. Others stated that rates were low compared with other jurisdictions, and also when compared with historical rates in New Brunswick.

The rate setting process is not well understood. Based on the Meredith Principles the amount employers are assessed each year should approximate annual expenditures. The bulk of expenditures consist of benefits and services to injured workers. Also included are WorkSafeNB's operational expenses, including the Grand Bay Rehabilitation Facility. Additionally, there are adjustments based on the performance of the Accident Fund investments. Previous surpluses or deficits are considered.

This chart illustrates the complexity of the rate structure and the fluctuations over the past five years:

Average assessment rate					
Required revenue projections for 2014 to 2018 per \$100 payroll					
	2014	2015	2016	2017	2018
New injury costs	0.92	0.97	1.03	1.09	1.47
Administration	0.45	0.58	0.51	0.55	0.46
Benefit changes	0.10	-	-	0.06	-
Target funding	(0.26)	(0.44)	(0.43)	(0.23)	(0.23)
Total	1.21	1.11	1.11	1.48	1.70

Source: WorkSafeNB

The assessment amount is tabulated. There is a calculated average and this number is communicated to employers and considered the benchmark for the entire system. However, there are other adjustments. Individual employers pay assessments based on that particular sector's safety history. Also, the safety record of specific workplaces may cause a further variance. These components establish the annual assessment rates for employers.

To reflect their cost components, WorkSafeNB reports to employers ought to include: (1) costing of administration and benefits and (2) Accident Fund investments and past surpluses and deficits. The latter would be based on market variations reflecting on the investment fund; the former would be based on costs that WorkSafeNB can control.

In 2013, Doug Stanley (former CEO of WorkSafeNB) produced a discussion paper for the Ontario Workplace Safety Insurance Board (WSIB) and addressed premium rate setting considerations with a focus on rate stability. Stanley supported annual rate setting and maintained this ensured intergenerational fairness as current employers are paying into the system to off-set current costs.

“Meredith’s principles of security of benefits and equity in employer funding of the system require that there be an accurate determination of the costs of accidents (present and future costs) in any one year and that the money to fund those costs are raised through an assessment on employer payrolls in that year.”

Source: WSIB Rate Framework Consultation Discussion Paper. Douglas Stanley. January 2013

The Task Force received actuarial evidence which concluded that making long-term projections is problematic. Rates are based on actual experience and current data which are time-based and not subject to adjustment.

The Task Force discussed other approaches to the rate setting process. However, the Task Force concluded, based on cross-Canada practices and research, that there were no better options than the current practice. Also, stakeholders were not opposed to the current rate setting process. Rather, stakeholders expressed concern over benefits, costs, rate setting reporting, issues pertaining to the investment fund returns, and how surpluses/deficits were tabulated.

The Task Force opines that a complete communications effort on rate setting practices may alleviate some concerns. WorkSafeNB has recently embarked upon providing timely information to employers via information sessions. The Task Force recommends continuation of that practice with the consistency the situation demands.

Surpluses and Deficits

Currently the Act implicitly requires that the Accident Fund be large enough to cover 100 per cent of the projected benefits for injured workers.

54(1) The Commission shall every year assess and levy upon and collect from the employers in each class, by an assessment rated upon the payroll, or otherwise as the Commission may deem proper

- (a) sufficient funds to meet all claims for compensation incurred during that year;
- (b) the estimated cost of those claims in paragraph (a) payable during subsequent years; and
- (c) such sum as the Commission considers appropriate for the administrative expenses of the Commission.

WorkSafeNB has adopted a policy on Long-term Fiscal Strategy which builds on the legislation and calls for 110 per cent funding. The extra 10 per cent is meant to provide a cushion for stock market variations which cause fluctuations in the investment fund.

WSNB Policy 37-100 - Sect. 4.0: “In recognition of the potential magnitude of the fluctuations in the market value of the fund, it is prudent to establish a funding goal in excess of the full funding of claim costs. As a result, the Board of Directors has set the funding goal at 110 per cent of assets over liabilities.”

The current situation has been exacerbated by repayment of past surpluses. Also, continuing positive investment performance in the Accident Fund cause assessment rates to appear artificially low. As recently as four years ago, the Accident Fund was over-funded at 140 per cent. WorkSafeNB decided to refund that surplus to employers through assessment reductions spread over seven years. The rates being charged to employers left the impression that costs were declining. In fact, the cost of benefits for injured workers did not change much from year to year prior to 2015. The posted average rate was decreasing because of a number of factors (see Chart 1).

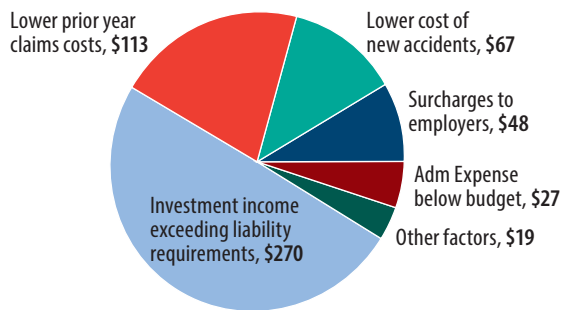
Chart 1: Positive investment returns drive historical surplus levels

What are the key drivers of changes in funding levels over time?

Drivers of funding level increase

December 31, 2008 to December 31, 2014 (\$ Millions)

- Funding level went from 89% to 138%, a difference of \$544 M
- Where did \$544 M come from?



(Source: WSNB)

Employers advocate that surplus funds be rebated to the businesses that paid the original assessments.

Workers submit that WorkSafeNB was designed to represent both workers and employers. It is the position of workers that surpluses and deficits be fairly distributed and efforts be made to engage and inform both constituency groups when redistributing surplus funds.

The Task Force recommends that the Accident Fund policy allow over-funding up to 120 per cent. This should result in stability. If the fund extends beyond 120 per cent then WorkSafeNB should have jurisdiction to decide how that surplus ought to be distributed.

Recommendations:

Rate setting

1. WorkSafeNB restate its policies permitting a variance of the Accident Fund not to exceed 120 per cent.
2. Surplus funds above the 120 per cent be managed by WorkSafeNB in a fair and transparent manner, accountable to all stakeholders.
3. WorkSafeNB recently embarked upon providing timely information to stakeholders in information sessions. The Task Force recommends such practices continue and WorkSafeNB provide reports to employers and other stakeholders, indicating the components of the rate, its impact, and how each component is managed.

B. Workers' Compensation Appeals Tribunal

Recent changes

In 2014, Bill 73 to amend the Workplace Health, Safety and Compensation Commission and *Worker's Compensation Appeals Tribunal Act* (the "Act") was enacted. This legislation came into effect in 2015. The Worker's Compensations Appeals Tribunal (WCAT) was the result. WCAT's jurisdiction was enlarged from that of the previous appeals tribunal.

The result was significant. The legislative changes included:

21(1) Notwithstanding any other provision of this Act, the *Workers' Compensation Act*, the *Firefighters' Compensation Act* or the *Occupational Health and Safety Act*, but subject to subsections (1.1) and (2), there shall be a final right of appeal to the Appeals Tribunal from

(a) any decision, order or ruling of any officer of the Commission under this Act,

(b) any decision, order or ruling of any officer of the Commission under the *Workers' Compensation Act* affecting the rights of an employer, a worker or a dependent, and

(b.1) any decision, order or ruling of any officer of the Commission under the *Firefighters' Compensation Act* affecting the rights of a firefighter, former firefighter or a dependant or a municipality or rural community,

(c) an order of any officer of the Commission under the *Occupational Health and Safety Act*, and confirmed, varied, revoked or suspended by the Chief Compliance Officer under subsection 37(1) of the *Occupational Health and Safety Act* or made under subsection 37(2) of the *Occupational Health and Safety Act* by the Chief Compliance Officer by any person affected by the order.

21(8) In respect of any matter coming before the Appeals Tribunal for decision, any person that may be affected by the decision shall be entitled, upon application, to present evidence and make representations before a decision is made by the Appeals Tribunal.

21(8.1) The Commission shall have standing in any appeal to the Appeals Tribunal involving any question as to the interpretation or application of this Act, the *Workers' Compensation Act*, the *Firefighters' Compensation Act*, the *Occupational Health and Safety Act* or the policies approved by the Commission.

21(8.2) In an appeal, the Appeals Tribunal may receive and accept information that it considers relevant, whether or not the information would be admissible in a court of law.

21(9) In an appeal, the Appeals Tribunal shall

(a) make its decision based on the real merits and justice of the case, including whether a policy approved by the Commission is consistent with this Act, the *Workers' Compensation Act*, the *Firefighters' Compensation Act* or the *Occupational Health and Safety Act*,

(b) apply a policy approved by the Commission that is applicable in the case, to the extent that the policy is not inconsistent with this Act, the *Workers' Compensation Act*, the *Firefighters' Compensation Act* or the *Occupational Health and Safety Act*, and

(c) not be bound to follow precedent.

21(12) Any decision, order or ruling of the Appeals Tribunal shall be final, subject only to an appeal to the Court of Appeal involving any question as to its jurisdiction or any question of law.

21(12.1) Unless the Appeals Tribunal otherwise determines or the Commission applies to the Appeals Tribunal for a statement of facts under subsection 23(1) and, within 30 days after receiving the statement of facts, commences an appeal under subsection 23(4), a decision of the Appeals Tribunal shall be implemented by the Commission within 30 days of issuing the decision.

21(12.2) If the Appeals Tribunal determines that a policy approved by the Commission is inconsistent with this Act, the *Workers' Compensation Act*, the *Firefighters' Compensation Act* or the *Occupational Health and Safety Act*, the decision binds the Commission in respect of any matter before the Commission.

These legislative changes became contentious and were the focus of presentations to the Task Force.

Court decisions

Prior to enactment under Bill 73, injured workers had complained that WorkSafeNB's appeals procedures were ineffective. The province's Court of Appeal called for revisions to the appeals procedures in 2012:

"[16] ... This is but one in a series of recent cases before our Court in which WHSCC is named as a party, and the concerns I have with the Commission's position in this matter are not new. **I will, however, take this opportunity to articulate my frustration with the situation in the hope it may lead to either a change in approach or a change in the governing legislation.**"

"[21] ... The remarkable aspect of the Douthright appeal was having the Commission argue the Appeals Tribunal's decision was wrong, that it should be set aside, and that the Court should embrace the position of the appellant employer and allow the appeal. Given the clear wording of s. 21(11) of the Act, **the Commission was in effect saying that its own decision was made in error, and that its own decision should be overturned and set aside.**"

"[22] The reason scenarios such as the one which occurred in Douthright should not be allowed is straightforward: **the Commission should not be permitted to seize upon an appeal to this Court as a second chance to make the case it "lost" before its own Appeals Tribunal.**"

"[24] With respect, **perhaps the time has come for the Legislature to consider the implications of s. 21(11).** In the alternative or in the meantime, I am of the opinion the Commission should come before this Court adopting a clear, consistent position: the decision of the Appeals Tribunal was correct, and should be upheld."¹

(Note: emphasis added above) (Source: NB Court of Appeal. Sanford v. Workplace Health, Safety and Compensation Commission, 2012 NBCA 86)

These judicial comments caused governments to undertake legislative reviews. A consultation-based study focused on WorkSafeNB's appeal procedures. The Consultant's Report completed in October 2013 ended the review process. Bill 73 was the result. In 2015 WCAT was constituted and functioning.

Impact

Based on the evidence, neither WorkSafeNB, the actuaries, nor the stakeholders had considered the financial implications pertaining to WCAT's broad new jurisdiction. Furthermore, WorkSafeNB had not scrutinized its policies to ensure compliance with the new legislation. Once proceedings commenced before WCAT, injured workers were represented by Workers Advocates, whereas employers oft times chose not to appear. Although WorkSafeNB had standing before WCAT under Section 21(8.1), for the most part WorkSafeNB failed to take advantage of the provision.

WCAT in a brief period of time varied WorkSafeNB's policies by changing the definition of a worker, the application of a 3-day waiting period, repayments and overpayments, care allowances and personal non-compensable intervening circumstances *inter alia*. Although WCAT's decisions were jurisdictionally correct, these resulted in a significant financial impact to WorkSafeNB's Accident Fund which had not been anticipated.

The results were significant. The average assessment rate charged to employers increased from \$1.11 in 2016 to \$1.70 for 2018. The Task Force received an actuarial analysis which showed since 2015 \$100 Million in annual benefit costs resulted from WCAT decisions. These costs carry into the future and also create potential unfunded liabilities.

New Brunswick employers submitted that the figures referenced above were undermining the stability of WorkSafeNB's Accident Fund. Employers opined that left unchecked the Accident Fund could not sustain further WCAT decisions.

The actuaries maintained that the financial stability of WorkSafeNB's Accident Fund was in jeopardy.

Labour groups and injured workers support the new WCAT appeals process. They noted that in the 1990's workers gave up benefits in an effort to sustain the Accident Fund during a crisis. These benefits were not returned to workers, even after the fund had been rebalanced.

The Task Force has carefully considered the submissions of employers, employees, and injured workers, as well as WorkSafeNB, actuaries, relevant legislation and comparable provincial regimes. The Task Force has concluded if the legislative jurisdiction of WCAT is not changed the sustainability of the WorkSafeNB Accident Fund will be further compromised. Ultimately, this will be detrimental to employers, employees and injured workers. WCAT's broad legislative jurisdiction is endangering the financial integrity of the Accident Fund. This cannot continue.

A return to the basic tenants as found in the Meredith Principles should restore integrity to the Accident Fund. The original Meredith Report from 1913 states:

"It is in my opinion essential that as far as is practicable there should be certainty that the injured workman and his dependents shall receive the compensation to which they are entitled, and it is also important that the small employer should not be ruined by having to pay compensation ..."
(Source: Ontario Legislative Library)

In short, stakeholders' interests including the interests of injured workers have to be balanced. The Task Force opines that WCAT must remain independent from WorkSafeNB. An injured worker's right to appeal based on the rules of natural justice should continue.

The Task Force notes there is urgency here. The following recommendations should be pursued without delay.

Recommendations:

Workers' Compensation Appeals Tribunal (WCAT)

4. Repeal of sections of the Act: **21(8.1), 21(8.2), 21(9), 21(12.2).**
5.
 - a. That legislation be enacted wherein the Appeals Tribunal shall decide the appeal based on the provisions of that Act, the regulations, the policies of WorkSafeNB and the facts as established from the evidence in the proceedings. In addition, WorkSafeNB shall certify to the Appeals Tribunal the record of proceedings.
 - b. No new evidence shall be introduced before the Appeals Tribunal until that evidence has been first considered by an officer of WorkSafeNB and becomes a part of the record.
 - c. If an Appellant attempts to present new evidence on appeal, the Appeals Tribunal shall adjourn the hearing until that new evidence can be first considered by an officer of WorkSafeNB and becomes a part of the record. Following that procedure, the Appellant's case will then be prioritized.
 - d. The Appeals Tribunal shall not make any order or decision of a general nature affecting the policies of WorkSafeNB. Each appeal shall be decided on its own merits. The Appeals Tribunal decision shall pertain to the Appellant's case only.
 - e. The Appeals Tribunal will not have jurisdiction to alter, vary, reverse or amend any policy established by WorkSafeNB. However, the Appeals Tribunal can bring to the attention of WorkSafeNB policies that in the opinion of the Appeals Tribunal require variance.
 - f. The Appeals Tribunal should have the ability to postpone an appeal and refer a policy or legislative issue to WorkSafeNB. When appeals are postponed, WCAT shall have the authority to issue an interim award to the appellant, if the circumstances warrant.

- g. Subject to the foregoing, enact legislation enabling the Appeals Tribunal to confirm, vary or reverse the decision of a hearing officer of WorkSafeNB.
- h. Legislation to clarify WorkSafeNB's jurisdiction to refer matters to the Court of Appeal.

C. Occupational Health and Safety

Workplace Safety

A compelling presentation was delivered to the Task Force by Leica Gahan, a Health and Safety Officer for an excavation company. Leica is also the mom of a 21-year-old son who died on the job in Alberta. She speaks with the knowledge of an expert in her field but also as someone who lives in the aftermath of a workplace fatality that could have been avoided.

Additionally, Leica is a member of WSNB's Injured Worker Advisory Committee ("IWAC"). The members of this group have made an important contribution to this report. We are grateful to all of the injured workers who came forward to speak to the Task Force. There is work to do.

The *Occupational Health and Safety Act* (OSHA) requires:

Section 44 (1): "Every owner or employer shall keep posted in a prominent place or places at the place of employment where they are most likely to come to the attention of the employees

(a) a copy of this Act and the regulations; and

(b) in addition to such notices and reports as are otherwise required by this Act or the regulations to be posted, any notice which an officer considers advisable to enable employees to become acquainted with their rights, liabilities and duties under this Act and the regulations."

Ms. Gahan's made the case for revisions to the Act.

"I would suggest that when a company registers for WorkSafeNB, a comprehensive information package is sent to them and all the information is provided. This comprehensive package should include a complete bound copy of the OHS Act and Regulations so they can see the complexity of the document and understand their responsibilities."

The Task Force has reviewed relevant sections of the legislation and considered WorkSafeNB's current practices. The Task Force accepts Ms. Gahan's recommendation.

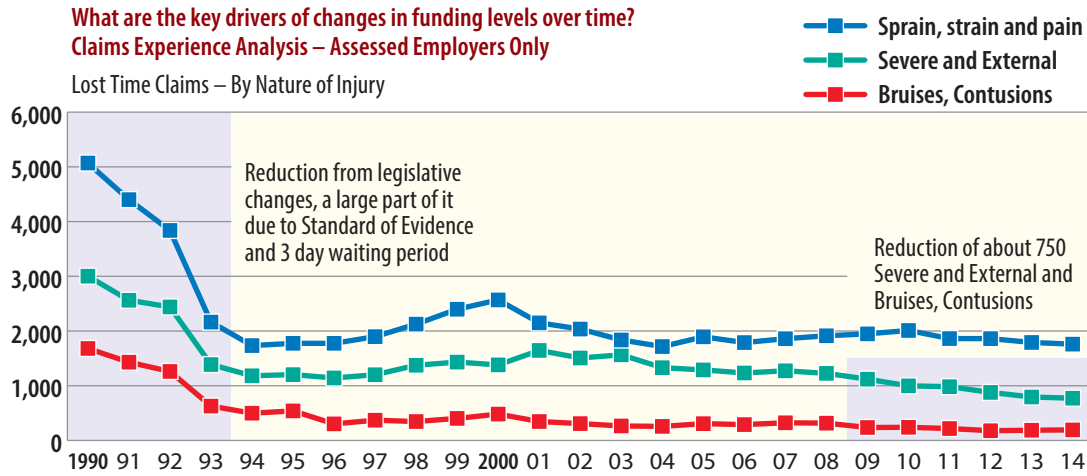
JHSC Committees

A number of persons and groups appearing before the Task Force raised an issue related to the effectiveness of many of the Joint Health and Safety Committees (JHSC). *The Occupational Health and Safety Act* requires that every employer with twenty or more employees had to establish a joint health and safety committee. The committee is to be comprised of equal representation from the employer and employees, chosen by their respective group. The committee is to keep minutes of their meetings and file a copy of those minutes with WorkSafeNB.

Additionally, the Task Force heard from many presenters that the JHSC's were either ineffective, not representative of the employer and employee groups, or were not sufficiently trained to carry out their duties. There was concern over adequate monitoring by WorkSafeNB of the matters raised in the filed committee minutes.

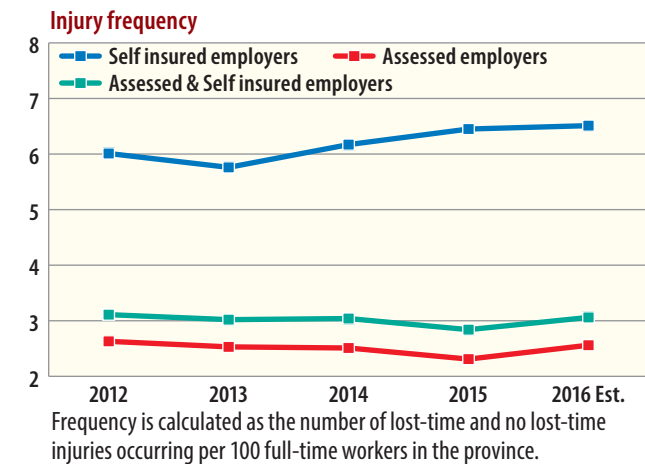
Private Sector / Public Sector

Data provided by WorkSafeNB indicates a steady decline in private sector workplace fatalities and injuries in recent years.



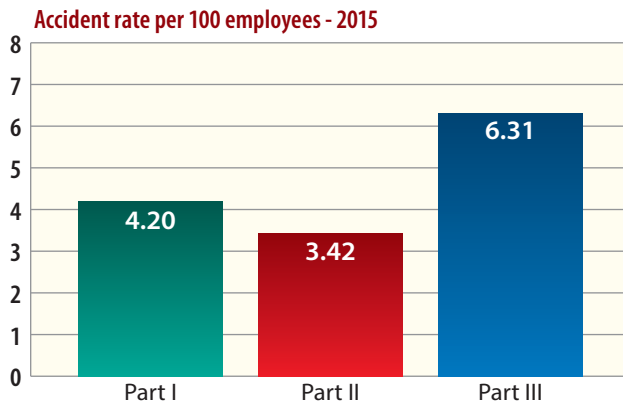
(Source: WorkSafeNB presentation to stakeholders – June 2017)

Some private sector employers are to be commended for their efforts in creating safer and healthier workplaces. By comparison, the provincial public sector (which comprises the vast majority of “self-insured” employers) has a dismal workplace safety record. The following data underscores the work to be done in the public sector.



(Source: WorkSafeNB via NB Chamber of Commerce presentation to Task Force. Only federal and provincial government entities are self-insured)

Further statistics provided by the provincial government demonstrate particular problems in the health-care sector (Part III of government). The education sector and departmental employees also report a higher than average accident rate.



(Source: Treasury Board presentation to Task Force)

An intervention is required in the public sector to bring that sector in line with the practices of the private sector. The Task Force also notes for the most part “return to work” programs in the public sector are non-existent.

The public sector can no longer ignore a failed workplace safety record. They need to emulate the safety practices of the private sector. The best safety practices of the construction trades and the professional firefighters can be imported into the public sector. Specifically, daily safety planning before each shift is required. The involvement of those who have expertise in dealing with these best safety practices in the construction trades, the professional firefighters, forest companies, manufacturing shops, and NB Power, is recommended. WorkSafeNB can coordinate these measures throughout the public sector.

Some years ago, the construction trades focussed on the need to improve their safety practices and culture. The resulting solution was the morning “tool box meeting” or “tailgate meeting”. All the workers for a particular job site are expected to meet briefly each morning to discuss the planned work for the day, the associated risks, and any mitigation or response plans. New Brunswick’s professional firefighters use a similar approach with a trained officer conducting a “size-up” upon arrival in responding to an emergency - within minutes a safety plan is devised. Furthermore, there is a safety evaluation after each event.

“A **Toolbox Talk** is an informal safety meeting that focuses on safety topics related to the specific job, such as workplace hazards and safe work practices. Meetings are normally short in duration and are generally conducted at the job site prior to the commencement of a job or work shift. It is one of the very effective methods to refresh workers’ knowledge, cover last minute safety checks, and exchange information with the experienced workers. **Toolbox Talks** are also intended to facilitate health and safety discussions on the job site and promote your organization’s safety culture. Toolbox talks/meetings are sometimes referred to as tailgate meetings or safety briefings.” Source: BC Construction Safety Alliance

Cost Allocation

The Task Force heard from a number of presenters that the self-insured were not contributing on a pro-rata basis to cover or contribute to the cost to WorkSafeNB in enforcing the *Occupational Health and Safety Act* in their workplaces. It was submitted that the insured employers were required to pick up that cost, which resulted in higher assessment rates on those employers.

Recommendations:

Occupational Health and Safety (OHS)

6. Section 44 of the *Occupational Health and Safety Act* be amended:
 - a. Requiring WorkSafeNB to send to employers copies of the *Occupational Health and Safety Act* and Regulations.
 - b. Publicizing penalties for violations of the Act.
7. WorkSafeNB ensure that the Joint Health and Safety Committees (JHSC) are effective, representative of the employer and employee groups, and are sufficiently trained to carry out their duties.
8. WorkSafeNB assign resources to ensure review and follow-up concerning the matters recorded in the filed minutes of the JHSC committees.
9. Mandatory *Occupational Health and Safety Act* and Regulations be devised:
 - a. Requiring the public sector employers (self-insured) adopt toolbox style meetings at the commencement of each shift devising a safety plan for that day's work.
 - b. Requiring the public sector to place greater accountability on department heads and managers to ensure OHS compliance and practices.
10. WorkSafeNB conduct a review of the cost of enforcing the *Occupational Health and Safety Act* in the workplaces of the self-insured employers, and the self-insured employers be required to pay their fair share of those costs to WorkSafeNB annually.

D. Return to work

Best interests of the injured worker

The Task Force was made aware of the challenges of early return to work (RTW) following an injury. In most cases presenters painted a positive picture of workers who want to remain attached to their employment. Employers were willing to provide accommodation to injured workers and cite value in early return to work regimes.

However, barriers exist. Workers are not always aware of their rights and obligations. Employers do not fully understand their responsibilities. And medical professionals are reluctant to expedite early return to work for injured patients. In the result, New Brunswick's injured workers are not returning to work in a timely manner.

Research

Insufficient academic research exists relating to injured workers. However, the Institute on Worker Health interviewed 97 health-care providers in British Columbia, Manitoba, Ontario and Newfoundland and Labrador. Conclusions were drawn many of which echo the input to the Task Force during the consultation phase.

"... most health-care providers did not encounter significant problems with the workers' compensation system or the RTW process when they treated patients who had visible, acute physical injuries that were supported by clear "objective" evidence.

We found health-care providers faced challenges when they encountered patients with multiple injuries, gradual-onset or complex illnesses, chronic pain and mental health conditions.

In these circumstances, many health-care providers experienced the workers' compensation system as opaque and confusing, with little clarity about their role in it. When health-care providers dealt with injuries that were complex,

their views and the views of case managers were sometimes misaligned with respect to the timing and appropriateness of RTW.

Forms and recovery guidelines were viewed as ill-suited to these conditions, and communication difficulties between case managers and health-care providers made it difficult to convey important information needed for decision-making and effective RTW planning.

In the absence of regular and effective communication, internal medical consultants were used to help case managers with medical decision-making. For treating health-care providers, however, this practice contributed to their further alienation from the workers' compensation system."

(Source: The Role of Health-Care Providers in the Workers' Compensation System and Return-To-Work Process. Institute for Work & Health. Toronto.)

This research underscores the importance of creating a plan involving all parties promoting timely return to work for injured workers.

Medical information

Physicians must become engaged if their injured worker patients are to return to work as early as practicable. Current forms required by WorkSafeNB to initiate the claims process only request the name and location of the first physician consulted. There is scant medical information provided and there is no back to work plan included. This system is not working.

The Task Force looked to other jurisdictions. The Ontario approach has merit. Forms adopted by the Ontario Workplace Safety and Insurance Board (WSIB) are clear, easy to read and allow for an exchange of information between the injured worker and the employer. The forms require a back to work plan and there is a functional abilities table which must be completed by a physician on the request of the worker or employer. WorksafeNB, stakeholders, and injured workers would be well served by emulating this Ontario practice.

Privacy

The Task Force acknowledges that private medical records should remain under the control of physicians and their patients. Nevertheless, there are precedents available which ensure privacy protection while also allowing WorkSafeNB's system to function as intended. Ontario has legislation enabling physicians to provide relevant information:

Section 37(3) of the Ontario legislation states:

Report re functional abilities

(3) When requested to do so by an injured worker or the employer, a health professional treating the worker shall give the board, the worker and the employer such information as may be prescribed concerning the worker's functional abilities. **The required information must be provided on the prescribed form.**

(Note: emphasis added above)

In their submission to the Task Force, the NB Medical Society stated a willingness to participate in a reference group study which would result in improvements to the workers compensation system:

“As discussed, with the Task Force, the NBMS is also interested in discussions related to simplifying and clarifying requirements for information from NB physicians to support an injured worker’s return to work. We would also like the Task Force to consider the establishment of a physician advisory committee whose role would be to provide advice and recommendations to WSNB on how to best engage, communicate, and collaborate with the physician community on matters related to workers compensation and occupational health and safety.”

The Task Force agrees there is a necessity for systemic changes if injured workers are to return to work early. These changes can only occur with the cooperation of New Brunswick physicians.

Emerging issues

The Task Force became aware of emerging medical issues, including those pertaining to mental health, opioid prescriptions, and cannabis. It was acknowledged that opioid addiction is a concern. The Task Force opines that WorkSafeNB should be proactively addressing this issue and become the subject of a future safety conference with the NB Medical Society participating.

Medical and non-prescription cannabinoids were less of a concern. Employers reported that monitoring drug use is already part of their workplace health and safety traditions. As cannabis becomes a legalized substance later this year, WSNB should continue to monitor its impact on workplace health and safety.

Recommendations:

Return to Work

11. WorkSafeNB adopt a proactive role in promoting back-to-work plans and accommodation of injured workers.
12. Functional ability forms for reporting and sharing information be practical and relevant, and similar to those used in Ontario.
13. Physicians complete a functional abilities evaluation which will assist in the creation of a back to work plan. As in Ontario, the requirement for physicians to complete such WorkSafeNB forms be non-discretionary, and privacy compliant.
14. WorkSafeNB adopt practices pertaining to opioid addictions in collaboration with the NB Medical Society to assist injured workers.
15. WorkSafeNB continue its efforts pertaining to injured workers suffering from work-related mental health issues, focussing on functional abilities while respecting the privacy of the individual.

E. Rehabilitation

The Grand Bay Rehabilitation Centre

The Grand Bay Rehabilitation Centre (“Grand Bay” or GRC) is designed to assist with rehabilitation efforts for more complex cases. Grand Bay has no provincial comparator. Grand Bay opened in 1977 replacing the original Ridgewood Rehabilitation in Saint John. In the intervening years, while Grand Bay continued to operate, other provinces adopted community-based services. Grand Bay remains an outlier. That is not to state that rehabilitation results emanating from Grand Bay were unsuccessful; GBRC statistics show otherwise:

WRC Profile

- 531 clients discharged in 2017
- On average, clients are admitted 584 days post-injury
- 39 types of specialized treatments
- 100 per cent of WRC clients have had no success utilizing local treatment
- 83 per cent return or are able to return to work (RTW) after successful treatment at the WRC
- 66 staff, with a 2:3 staff to client ratio
- 2018 budget: \$6,920,917
- Cost per client: \$10,725
- 40,000 square foot outpatient facility

Financial reviews

The provincial Office of the Comptroller conducted a review of Grand Bay in 2017. The Comptroller found that the centre operates at a higher cost than other extra-provincial options.

The Auditor General has also been tasked with examining WorkSafeNB operations, which may include Grand Bay.

The Task Force will defer to the work conducted by both the Comptroller and the Auditor General in reference to whether there is value for the funding provided to operate the Grand Bay Rehabilitation Centre.

Other issues

There was a consistent theme from injured workers who have utilized Grand Bay. These injured workers experienced language barriers, lack of reasonable accommodations, and social stressors relating to dislocation from their families and communities.

Grand Bay therefore requires continuing scrutiny. Outreach programs throughout areas of the province which Grand Bay currently services may be preferable. What is certain is that rehabilitation services require restructuring to the benefit of those injured workers currently served.

Recommendations:

Rehabilitation

16. WorkSafeNB review annually the Grand Bay Rehabilitation Centre, comparing service delivery options and results to those in other jurisdictions, and publishing these comparisons.

F. Benefits

Benefits

Injured workers receive a variety of benefits. The most significant benefit is income replacement up to net 85 per cent (tax free) of pre-accident income amounts. Presenters made suggestions for increased income replacement. The Task Force has decided given the circumstances that such increases should not be considered at this time.

WSNB plays an important role in recovery and rehabilitation programming. Ancillary to medical and therapy related assistance, some injured workers require additional benefits. Such benefits, other than prescribed income replacement, facilitate participation in rehabilitation.

There are standard services provided to injured workers. However, some client situations are unique. Front-line staff have the impossible task of distinguishing “need” from “want” every day. The system depends upon experienced personnel and good management.

Complicating matters, the decisions of the front line staff have sometimes been undermined by WCAT decisions. Uncertainty has resulted due to expansive benefits which have been imposed on the system from WCAT decisions, and created systemic financial strains. The Task Force recommendations for changes to the WCAT legislation should result in the restoration of confidence in the decisions front-line staff make based on policy, and result in control of expenditures without foregoing fairness.

Over-Payment Recovery

One of the reasons for creating WCAT was to address WorkSafeNB’s policies pertaining to overpayment recovery. The Meredith Principles suggest that a worker, while claiming workers compensation benefits, not retain additional income through accessing other income replacement programs. It is important to ensure that the system provide fair benefits to the injured worker while also being fair to the employers who pay into the system.

Many injured workers who were receiving Canadian Pension Plan (CPP) or other benefits successfully appealed from imposed WSNB reductions. Adhering to decisions of the Court of Appeal, the WCAT ruled the recovery of other pension income *ultra vires*. The general policy pertaining to overpayments was then discontinued by WorkSafeNB.

Striking down this policy placed financial stress on the Accident Fund by prohibiting recovery which had been permissible under the general policy. This WCAT decision requires adjustment on a go-forward basis.

The Task Force supports changes in the legislation to ensure the following:

- Injured workers to receive fair and reasonable income replacement;
- Apportionment of other revenue sources to reflect injury-related circumstances;
- Incentives for injured workers to apply for federal or insurance benefits where applicable;
- Clarity for WorkSafeNB staff to apply fair rules; and
- Application of Meredith Principles.

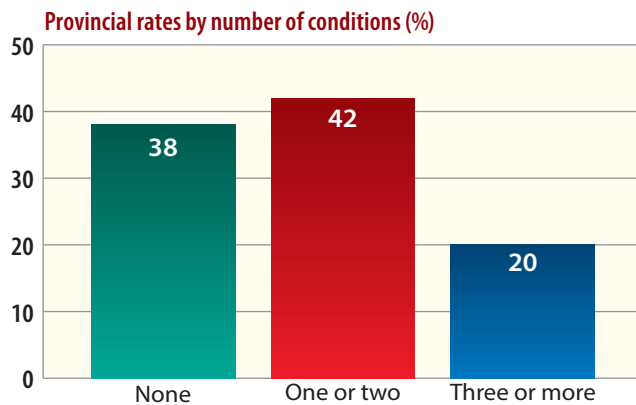
Pre-Existing conditions

The Task Force received submissions on the systems and services in place to help injured workers rehabilitate following an injury. Most injured workers received WorkSafeNB services, recovered, and were able to get back to work. This was particularly the case where injuries were straight-forward, such as a broken bone, sprained wrist, and similar injuries. Often, injured workers had the benefit of local services including physiotherapists and other professionals during their recovery.

Some injured workers suffer from pre-existing conditions. When this occurs WorkSafeNB’s rehabilitation system is challenged.

WorkSafeNB’s clients are no different from the general population. New Brunswickers have the highest rates of diabetes and obesity in the country. The province generally scores low on health indices. WorkSafeNB’s rehabilitation efforts become more difficult when such factors come into play.

*“Chronic health conditions are common: 62 per cent of New Brunswickers have one, and 20 per cent have three or more. According to a 2014 report by the Health Council of Canada, **New Brunswick is the province with the highest prevalence of chronic health conditions in Canada.** Additionally, the 2014 edition of the NBHC’s Primary Health Survey shows that a large number of New Brunswickers have multiple chronic conditions (multimorbidity), with 20 per cent of the population experiencing three or more chronic conditions.”*



(Source: NB Health Council. “The Cost of Chronic Health Conditions to New Brunswick”. Emphasis added)

In the result, WorkSafeNB has had to deal with pre-existing conditions. Current legislation relating to pre-existing conditions states:

Pre-Existing conditions:

7(5)Where a personal injury by accident aggravates a pre-existing disease or condition, compensation shall be allowed without regard to the pre-existing disease or condition if the pre-existing disease or condition did not cause any disability affecting the worker in the worker’s employment before the accident; and compensation shall be allowed only to the extent that the personal injury by accident has aggravated the pre-existing disease or condition if the pre-existing disease or condition caused any disability affecting the worker in the worker’s employment before the accident.

However, what constitutes pre-existing conditions is not clear, and interpretations have not been consistent among authorities (WorkSafeNB, WCAT, and the Courts). The resulting ambiguity has resulted in a financial stressor on WorkSafeNB’s resources. Legislative clarity is required.

Personal intervening conditions

Some workers who are rehabilitating cannot complete their recovery due to their previous health conditions and/or new arising health issues. To what extent is the workers compensation system responsible for such coverage? Recent WCAT decisions have effectively eliminated existing WSNB policies concerning pre-existing or intervening conditions.

WCAT Decision # 20157681:

“While Appeals Tribunal decisions are not binding on this Panel, the Court of Appeal’s rulings in *Nadeau* and *Kelley* are determinative and precedent setting. Based on these unequivocal authorities, **the Commission is clearly not permitted to suspend a claimant’s compensation benefits based on internal policy.**”

Once a claim has been accepted as compensable, the claimant is entitled to receive compensation unless legally disentitled. Section 41 of the *WC Act* sets out the limited instances whereby the Commission has authority to suspend claimant benefits, and on the basis of a “personal, non-compensable intervening condition” is not included.”

(Note: emphasis added)

The foregoing WCAT decision underscores the extent of WSNB’s liabilities pertaining to pre-existing and intervening conditions. The legislation governing these types of situations must reflect reality; the Accident Fund cannot possibly bear all of these costs.

The majority of cases are straight forward. A worker is injured and then proceeds to diagnosis and rehabilitation. The focus should be on returning to work as soon as reasonably possible. When a worker cannot complete this process due to poor health, new injuries, or mental stressors, questions then arise as to “who should pay” and “which entity should be providing the services”?

When citizens have health issues unrelated to a workplace incident there is access to Medicare and the provincial care system. This includes mental health support services. Likewise, there are income replacement programs available. Where there are intervening or pre-existing conditions, there are various outlets to assist the client.

Therefore, the Accident Fund should only provide for income replacement and rehabilitation services in relation to injuries directly related to a workplace accident. Private insurance and other public services would provide for needs not directly related to the workplace injury. The Task Force received evidence that this is not the case in practice.

The Task Force recommends that WorkSafeNB prioritize the development of a fair process to ensure that workers receive program support from the appropriate authorities. This includes Employment Insurance, Canada Pension Plan, Medicare, company benefit plans, income replacement insurance, and social assistance. There is a governing principle here. WorkSafeNB is not a component of the social safety net per se; rather it is insurance funded by employers to benefit the insured injured workers.

Recommendations:

Benefits

17. Legislation to enhance WorkSafeNB’s exclusive jurisdiction to establish and enforce policies.
18. Legislation to ensure injured workers receive fair and reasonable income replacement, apportionment of other revenue sources, but also establish incentives for injured workers to seamlessly apply for available benefits, a standard practice in other jurisdictions.
19. Legislation clarify the authority of WorkSafeNB to determine additional benefits other than prescribed income replacement.
20. Legislation clarify definitions of pre-existing conditions and intervening conditions, and applicable benefits.
21. That WorkSafeNB be the final authority on benefit entitlement.

G. Governance

Relationship with provincial government

WorkSafeNB is a crown corporation establishing insurance for injured workers. This insurance is employer funded and operated under the guidance of employer and employee stakeholders. WSNB is therefore a unique crown corporation. Other such corporations have a more direct relationship with government.

WSNB receives mandate letters from government and other requests from time to time. Some stakeholders maintain Government's relationship with WorkSafeNB requires clarification. Employer stakeholders in particular want to ensure that WorkSafeNB has the independence necessary to complete its mandate. Independence of administration is one of the cornerstones of the Meredith principles.

Without an open and transparent process, WorkSafeNB will continue to be vulnerable to special lobbying efforts regarding benefits entitlement. Such interventions could adversely affect the Accident Fund.

The current legislation charges WorkSafeNB with "advising" the Minister on policy developments and "proposing" legislative changes. This section should be strengthened to ensure WorkSafeNB's independence.

Composition of the board

A consistent issue raised before the Task Force concerned the board and how its directors are chosen. Stakeholders maintain that directors should be nominated exclusively by recognized stakeholders.

Currently, the procedure allows anyone interested in applying to become a director via the GNB appointments website. These names are then forwarded to the board when a vacancy arises. Thereafter a list is forwarded to government for appointment. Legislation should ensure stakeholder representativeness is factored into this appointment process.

The New Brunswick legislation currently requires:

8(1) The affairs of the Commission shall be administered by a board of directors consisting of the following persons who shall be appointed by the Lieutenant-Governor in Council

(a) a Chairperson of the board of directors who, in the opinion of the Lieutenant-Governor in Council, is not representative of either workers or employers,

(a.1) a Vice-Chairperson of the board of directors who, in the opinion of the Lieutenant-Governor in Council, is not representative of either workers or employers,

(b) four or more persons **who, in the opinion of the Lieutenant-Governor in Council, are representative of workers,**

(c) four or more persons **who, in the opinion of the Lieutenant-Governor in Council, are representative of employers,**

By comparison, the British Columbia legislative model could be considered:

81 (2) The Lieutenant Governor in Council must, for an appointment:

(a) under subsection (1)(a)(i), select a person from a list of at least 3 persons, each of whom is **nominated by one or more organizations that represent workers or classes of workers,**

(b) under subsection (1)(a)(ii), select a person from a list of at least 3 persons, each of whom is **nominated by one or more organizations that represent employers or classes of employers,**

Timeliness of appointments is an issue. Flexibility in the legislation is required to extend appointments or make temporary appointments when a vacancy is not filled within prescribed timeframes. The appointment of the Chair and Vice-Chair should also require stakeholder consultation.

Recommendations:

Governance

22. The Task Force notes that revisions to legislation have often been ad hoc and require consolidation. The Task Force recommends a redrafting of WorkSafeNB's enabling legislation, and that this be completed no later than 2019. Subsequently, legislative reviews be mandated every five years.
23. WorkSafeNB is vulnerable to special interest lobbying and political interference regarding benefits. However, amendments to benefits should be a decision of WorkSafeNB following open and transparent consultations with all stakeholders and injured workers, and based upon the best available evidence.
24. Legislation to require worker representatives and employer representatives be nominated by stakeholders. Chair and Vice-Chair appointments be made in consultation with WorkSafeNB. Appointments to be timely.
25. The relationship between WorkSafeNB and the government should be transparent and respectful, recognizing WorkSafeNB's unique jurisdiction.
26. Mandate letters from the ministry reflect the unique nature of WorkSafeNB as a stakeholder-driven crown corporation. Mandate letters be publicized. Directives in any mandate letter acknowledge WorkSafeNB's independence.
27. Regular value-for-money audits be prescribed in the legislation, to be completed by the Auditor General every five years.

H. The 3-day waiting period

History

Some twenty-five years ago the workers' compensation system in New Brunswick was under duress. The Accident Fund did not have sufficient value to meet future obligations. Both employers and workers came together to find solutions. A compromise package was devised which included both higher employer premiums and cost control mechanisms. One of these measures was the introduction of an unpaid, 3-day waiting period after a claim is initiated.

The 3-day waiting period was effectively a deductible similar to other insurance. The purpose was to curb nuisance or minor claims.

However, workers envisaged the 3-day waiting period as a temporary measure. The Task Force heard from workers on this issue. Workers submitted that the three-day waiting period should have lapsed after the Accident Fund became stable, and are seeking redress.

Other Jurisdictions

Today only Nova Scotia maintains a 2-day unpaid deductible. It is worth noting that the Nova Scotia fund has been under duress for some years and is still not at 100 per cent. Their average assessment fees are the highest in the country.

Prince Edward Island reduced their waiting period to two days in 2014 and eliminated it altogether in 2016.

New Brunswick is one of the last jurisdictions to impose unpaid waiting periods.

The Legislation

38.11(2) Where injury or recurrence of an injury to a worker referred to in subsection (1) results in a loss of earnings beyond the day of the injury, the Commission shall estimate the loss of earnings therefrom and shall pay compensation to the worker in an amount equal to eighty-five per cent of the estimated loss of earnings.

38.11(3) Notwithstanding subsection (2), the Commission shall not pay compensation under subsection (2) until the worker who is injured or has suffered a recurrence of an injury has not received any remuneration from the employer or any income replacement or supplement benefit from the employer or from an employment-related source for a period of time after the injury or recurrence of the injury that is equivalent to three working days.

38.11(4) The Commission shall not pay compensation to a worker in respect of the period of time referred to in subsection (3) except as provided for in subsection (5), (6), (7), (8) or (8.1).

38.11(5) Where a worker who is injured is admitted to a hospital facility as an in-patient as a result of the injury, the Commission shall pay compensation in respect of the period of time referred to in subsection (3) unless compensation is paid under subsection (7).

38.11(6) Where a worker who suffers a recurrence of an injury is admitted to a hospital facility as an in-patient as a result of the recurrence of the injury, the Commission shall pay compensation in respect of the period of time referred to in subsection (3) unless compensation is paid under subsection (7).

38.11(7) Where a worker is disabled as a result of an injury or recurrence of an injury for more than twenty working days, the Commission shall pay compensation to the worker in respect of the period of time referred to in subsection (3) unless compensation is paid under subsection (5) or (6).

38.11(8) Where a worker has a recurrence of an injury within twenty days after the initial injury, and the worker did not receive compensation from the Commission in respect of the period of time referred to in subsection (3) with respect to the initial injury, the Commission shall pay compensation in respect of the period of time referred to in subsection (3) with respect to the recurrence of the injury.

38.11(8.1) Where a firefighter as defined in the *Firefighters' Compensation Act* or a police officer as defined in the *Police Act* is injured, the Commission shall pay compensation in respect of the period of time referred to in subsection (3).

No general application

The initial legislation governing the three-day waiting period was premised on general application. However, the provincial government, which is a self-insured employer, was bound under collective agreements. The result is the 3-day waiting period has not been consistently applied in the public sector. By contrast, employees in the private sector generally abide by the legislation governing the three-day waiting period.

This distinction between the public sector and the private sector in the application of the 3-day waiting period is unfair and discriminatory. The Task Force has concluded that this inconsistency is unwarranted and cannot continue.

Actuarial analysis

WorkSafeNB has conducted reviews of the three-day waiting period and the implications of repealing the 3-day waiting period. The WorkSafeNB Board in the past has recommended a 2-day waiting period. In a submission to the Phase II Legislative Review Panel in 2015, WSNB noted:

“The following impacts to the system could be expected based on a reduction of the wait period to two days:

An approximate 10 per cent increase in claim frequency based on Prince Edward Island’s experience;

Rate increase for assessed employers will range between \$0.05 and \$0.25; and

Estimated cost for self-insured employers between \$0.5 and \$3.4 million.”

Current actuarial analysis on the cost implications of repealing the three-day waiting period have been referenced by a recent Morneau Shepell report to WorkSafeNB:

“The estimate of the impact of removal of the three-day period on rate setting for assessed employers is in the order of \$0.00 to \$0.27 per \$100 of assessable payroll due to an increase in new accident costs, depending on the number of additional claims.

The estimated increase in annual new accident cost due to removal of the three-day waiting period for self-insured employers (public sector) is in the order of \$0 to \$4,400,000, dependent on the number of additional claims annually.”

(Note that Morneau Shepell’s above reference costs are based on current provisions of the *Worker’s Compensation Act* and WorkSafeNB’s policies and practices in effect in January 2018.)

Recommendations:

The 3-day waiting period

28. The legislation requiring a 3-day waiting period be repealed.

History of Reviews

2008 Report

An Independent Review Panel (IRP) was struck in early 2007. The IRP released six discussion papers and held five held public consultations in Edmundston, Fredericton, Saint John, Bathurst, Moncton.

The final report “Strengthening the System” had 64 recommendations. The report was tabled with the government in June of 2008.

As a result of the review, the *Workers’ Compensation Act* was amended to improve pension benefits for injured workers. The review panel also recommended changes to the *Workplace Health, Safety and Compensation Commission Act*. These include extending the terms of board members, appointing a vice-chairperson, eliminating the position representing the general public, and adding a fourth member to each group representing the workers and employers.

According to WorkSafeNB in their 2008 Report to Stakeholders, they “were pleased that the panel endorsed our operational name change, from the Workplace Health, Safety and Compensation Commission to WorkSafeNB. Also, that “the Independent Review Panel suggested improving stakeholder engagement, and in the fall we began this process with a provincial consultation session with stakeholders in the construction industry.”

The same report to stakeholders noted that: “Other recommendations we have acted upon include hiring additional health and safety officers to enhance enforcement activities and changing our industrial classification code from SIC to NAICS, a move that will improve accuracy and ensure fairer assessment rates to employers while minimizing risk to WorkSafeNB.”

2013 “Phase I” Report

A multi-phase review of the legislative framework for workers compensation in New Brunswick was announced on the 6th of August in 2013. Stakeholder meetings were held in five regions – Bathurst, Grand Falls, Fredericton, Moncton and Saint John. A summary produced of the consultations was released in October of 2013.

At the same time, a consultant was hired to specifically review the Appeals Tribunal. The final report, “Proposals for the Structure, Governance and Mandate of the Appeals Tribunal” was received in November of 2013. This report contained 15 recommendations and had a further six “Policy Issues” identified for government decision.

The result of Phase I was a significant overhaul of the appeals tribunal process. New legislation was introduced in 2014 in order to make the Workers Compensation Appeals Tribunal (WCAT) independent and arms-length from WSNB.

2016 Phase II Report

The next phase of the legislative review saw stakeholder meetings held in five regions (Bathurst, Edmundston, Fredericton, Moncton and Saint John) in 2015. The summary of the consultations was produced in November of 2015.

Similar to Phase I, a consultant was hired to draft recommendations for consideration. The final report called “Legislative Review – Phase II” was written by Gordon A. MacKinnon, a private practice lawyer from Winnipeg, Manitoba.

This report included 53 Recommendations identified for government decision. Proposals for changes to the Governance of the Board of WorkSafeNB (19), Advocate Services (4), and Benefits (30). It was received in the spring of 2016.

Government announced a number of amendments to the workers compensation legislation in November of 2016. Some of the changes reflected recommendations from the Phase II review, and some were meant to address consequences of the Phase I amendments relating to the creation of the Workers Compensation Appeal Tribunal (WCAT).

Other reviews

The government requested the Comptroller's Office in the Treasury Board to conduct a high-level assessments of WSNB and its operations.

On the same day that the Task Force was created in May 2017, the provincial government announced a formal request to the Auditor General to assess the value for money of WSNB programs.

WSNB ongoing reviews

The Board and Management of WorkSafeNB have their own processes for reviewing and updating their strategy, policies and programs. They are currently working within a "2017-2019 Strategic Plan" with numerous goals and key actions in place. Policies in particular are subject to a regular, evidence-based process.

Task Force 2017-2018

The Task Force on WorkSafeNB was created in May of 2017. It is made up of four worker representatives, four employer representatives, and an independent Chairperson. Public consultation meetings were held in six regions – Bathurst, Campbellton, Edmundston, Fredericton, Moncton and Saint John. Written submissions were also received from workers, employers, professional health associations, injured workers and others. More than 37 stakeholder presentations were tabled from individuals, organizations, government, and injured workers.

Appendices

Legislative Definitions

Accident: includes a wilful and intentional act, not being the act of a worker, and also includes a chance event occasioned by a physical or natural cause, as well as a disablement caused by an occupational disease and any other disablement arising out of and in the course of employment, but does not include the disablement of mental stress or a disablement caused by mental stress, other than as an acute reaction to a traumatic event

Accident Fund: means the fund providing for the payment of compensation, outlays and expenses under Part I of the Workers' Compensation Act and administrative costs under this Act and the *Occupational Health and Safety Act*

Appeals Tribunal (WCAT): means the Workers' Compensation Appeals Tribunal established under this Act.

Board of Directors (Board): means the board of directors of WorkSafeNB (Board)

Commission (WSNB): means the Workplace Health, Safety and Compensation Commission (also known as WorkSafe).

Employer: includes

(a) every person having in his service under contract of hire or apprenticeship, written or oral, express or implied, any worker engaged in any work in or about an industry,

(b) a municipal corporation, commission, committee, body or other local authority established or exercising any powers or authority with respect to the affairs or purposes, including school purposes, of a municipality,

(c) a person who authorizes or permits a learner to be in or about an industry for the purposes mentioned in the definition "learner",

(c.1) a deemed employer, and

(d) the Crown in right of the Province of New Brunswick, and of Canada, and any permanent board, commission, or corporation established by the Crown in right of the Province of New Brunswick, or of Canada, in so far as they, or either of them, in their capacity as employers, submit to the operation of the relevant legislation.

Minister: means the Minister of Post-Secondary Education.

Union: means:

(a) a trade union as defined under the *Industrial Relations Act*,

(b) any organization other than a trade union referred to in paragraph (a) representing employees formed for purposes that include the regulation of relations between employers and employees that has a written constitution, rules or by-laws setting forth its objects and purposes and defining the conditions under which persons may be admitted as members thereof and continued in such membership.

Worker: means a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes:

(a) a learner,

(a.1) an emergency services worker within the meaning of any agreement made under the *Emergency Measures Act* between the Government of Canada and the Government of New Brunswick in which provision is made for compensation with respect to the injury or death of such workers,

(b) a member of a municipal volunteer fire brigade, and

(c) a person employed in a management capacity by the employer, including an executive officer of a corporation, where that executive officer is carried on the pay-roll.

Acronyms

GBRC Grand-Bay Rehabilitation Centre

GNB Government of New Brunswick

IWAC Injured Worker Advisory Committee

JHSC Joint Health & Safety Committee

NBMS New Brunswick Medical Society

OHSA *Occupational Health and Safety Act*

WCAT Workers Compensation Appeals Tribunal

WHSCC Workplace Health Safety and Compensation Commission

WSIB Workplace Safety and Insurance Board (of Ontario)

WSNB WorkSafeNB

**Functional Abilities Form
for Planning Early and Safe Return to Work**

Health Professionals, please use this form ONLY when requested by an employer or worker.

The purpose of this form is to identify your patient's overall functional abilities and work restrictions that will assist his/her return to suitable work.

Please promptly complete and return pages 2 and 3 of this form to the worker or employer to assist the workplace parties in planning an early and safe return to work.

PLEASE ENSURE YOUR BILLING INFORMATION IS NOT GIVEN TO THE WORKER OR EMPLOYER.

Authority to Release Information

Section 37(3) of the *Workplace Safety and Insurance Act, 1997* provides the legal authority for health professionals to give the Workplace Safety and Insurance Board (WSIB), the injured worker and the employer such information as may be prescribed concerning the worker's functional abilities.

When completing this report, please **print** in **black ink**.

Worker and/or employer should complete Sections A and B of this report. If your patient needs assistance, please help. Please submit this report even if Section A is not fully completed.

Information about your responsibilities can be found on **Page 4**.

The WSIB will pay health professionals for completing this form.

Mail to:
Workplace Safety and Insurance Board
200 Front Street West
Toronto, ON M5V 3J1

OR

Fax to:
416-344-4684
or 1-888-313-7373



A guide to completing this form is available at www.wsib.on.ca



Mail to: 200 Front Street West Toronto ON M5V 3J1
 or Fax to: 416 344-4684 OR 1-888-313-7373

FAF

Functional Abilities Form for Planning Early and Safe Return to Work

Claim No.

A. Section A to be completed by the employer and/or worker.

Worker's Last Name	First Name	Telephone	
Address (no., street, apt.)	City/Town	Province	Postal Code

Employer's Name		
Full Address (No., Street, Apt.)		
City/Town	Prov.	Postal Code

Date of Birth (dd/mm/yyyy)
Date of Accident/Awareness of Illness (dd/mm/yyyy)
Employer Telephone
Employer Fax No.

1. Type of job at time of accident (where available, please attach description of job activities)	Area(s) of injury(ies)/illness(es)
2. Have the worker and the employer discussed Return To Work <input type="checkbox"/> yes <input type="checkbox"/> no	If no, will be discussed on dd mm yyyy
3. Employer contact name	Position

B. Worker's Signature

By signing below, I am authorizing any health professional who treats me to provide me, my employer and the Workplace Safety and Insurance Board (WSIB) with information about my functional abilities on the WSIB's "Functional Abilities for Planning Early and Safe Return to Work" form.

Signature	Date dd mm yyyy
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C. Health Professional's Billing Information

For billing purposes fax or mail pages 2 and 3 to the WSIB.

Health Professional's Designation
 Chiropractor Physician Physiotherapist Registered Nurse (Extended Class) Other _____

PROVIDER BILLING INFORMATION IN THE BOLDED AREA OF SECTION C SHOULD NOT BE PROVIDED TO THE WORKER OR EMPLOYER.

Are you registered with the WSIB? <input type="checkbox"/> yes <input type="checkbox"/> no Please enter the WSIB Provider ID. in the box provided <input type="checkbox"/> Please call 1 - 800-569-7919 to register	WSIB Provider ID.
	Your Invoice Number
Health Professional's Name (please print)	Service Code FAF
Address (No. Street, Apt.)	Complete these fields if HST is applicable to this form HST Registration Number Service Code HST Amount Billed ONHST \$.
	City/Town Province Postal Code Fax

I hereby declare that the information being submitted in Sections C, D, E and F of this form is true and complete. It is an offense to knowingly make a false or misleading statement or representation to the WSIB.

Health Professional's Signature	Telephone	Date dd mm yyyy
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Please PRINT in black ink

Worker's Last Name	First Name	Claim No.
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D. The following information should be completed by the Health Professional to identify the patient's overall abilities and restrictions.

1. Date of Assessment dd mm yyyy	2. Please check one: <input type="checkbox"/> Patient is capable of returning to work with no restrictions. <input type="checkbox"/> Patient is capable of returning to work with restrictions. Complete sections E and F. <input type="checkbox"/> Patient is physically unable to return to work at this time. Complete section F.
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E. Abilities and/or Restrictions

1. Please indicate Abilities that apply. Include additional details in section 3

Walking: <input type="checkbox"/> Full abilities <input type="checkbox"/> Up to 100 metres <input type="checkbox"/> 100 - 200 metres <input type="checkbox"/> Other (please specify)	Standing: <input type="checkbox"/> Full abilities <input type="checkbox"/> Up to 15 minutes <input type="checkbox"/> 15 - 30 minutes <input type="checkbox"/> Other (please specify)	Sitting: <input type="checkbox"/> Full abilities <input type="checkbox"/> Up to 30 minutes <input type="checkbox"/> 30 minutes - 1 hour <input type="checkbox"/> Other (please specify)	Lifting from floor to waist: <input type="checkbox"/> Full abilities <input type="checkbox"/> Up to 5 kilograms <input type="checkbox"/> 5 - 10 kilograms <input type="checkbox"/> Other (please specify)				
Lifting from waist to shoulder: <input type="checkbox"/> Full abilities <input type="checkbox"/> Up to 5 kilograms <input type="checkbox"/> 5 - 10 kilograms <input type="checkbox"/> Other (please specify)	Stair climbing: <input type="checkbox"/> Full abilities <input type="checkbox"/> Up to 5 steps <input type="checkbox"/> 5 - 10 steps <input type="checkbox"/> Other (please specify)	Ladder climbing: <input type="checkbox"/> Full abilities <input type="checkbox"/> 1 - 3 steps <input type="checkbox"/> 4 - 6 steps <input type="checkbox"/> Other (please specify)	Travel to work: <table style="width:100%;"> <tr> <td style="width:50%;">Ability to use public transit</td> <td style="width:50%;">Ability to drive a car</td> </tr> <tr> <td><input type="checkbox"/> yes <input type="checkbox"/> no</td> <td><input type="checkbox"/> yes <input type="checkbox"/> no</td> </tr> </table>	Ability to use public transit	Ability to drive a car	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> yes <input type="checkbox"/> no
Ability to use public transit	Ability to drive a car						
<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> yes <input type="checkbox"/> no						

2. Please indicate Restrictions that apply. Include additional details in section 3

<input type="checkbox"/> Bending/twisting repetitive movement of (please specify)	<input type="checkbox"/> Work at or above shoulder activity:	<input type="checkbox"/> Chemical exposure to:	<input type="checkbox"/> Environmental exposure to: (e.g. heat, cold, noise or scents)	<input type="checkbox"/> Limited use of hand(s): <table style="width:100%;"> <tr> <td style="width:33%;">Left</td> <td style="width:33%;">Gripping</td> <td style="width:33%;">Right</td> </tr> <tr> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td></td> <td>Pinching</td> <td></td> </tr> <tr> <td></td> <td>Other (please specify)</td> <td></td> </tr> <tr> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> </table>	Left	Gripping	Right	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		Pinching			Other (please specify)		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Left	Gripping	Right																	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																	
	Pinching																		
	Other (please specify)																		
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																	
<input type="checkbox"/> Limited pushing/pulling with: <input type="checkbox"/> Left arm <input type="checkbox"/> Right arm <input type="checkbox"/> Other (please specify)	<input type="checkbox"/> Operating motorized equipment: (e.g. forklift)	<input type="checkbox"/> Potential side effects from medications (please specify) Do not include names of medications.	<input type="checkbox"/> Exposure to vibration: <input type="checkbox"/> Whole body <input type="checkbox"/> Hand/Arm																

3. Additional Comments on Abilities and/or Restrictions.

4. From the date of this assessment, the above will apply for approximately: <input type="checkbox"/> 1 - 2 days <input type="checkbox"/> 3 - 7 days <input type="checkbox"/> 8 - 14 days <input type="checkbox"/> 14 + days	5. Have you discussed return to work with your patient? <input type="checkbox"/> yes <input type="checkbox"/> no
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6. Recommendations for work hours and start date: <input type="checkbox"/> Regular full-time hours <input type="checkbox"/> Modified hours <input type="checkbox"/> Graduated hours	Start Date dd mm yyyy
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F. Date of Next Appointment

Recommended date of next appointment to review **Abilities and/or Restrictions.** dd mm yyyy

I have provided this completed Functional Abilities Form to: **Worker** **and/or** **Employer**

Important Information

To receive benefits, the worker must apply for benefits within six months of the date of a work-related injury or illness. When filing a claim for benefits, the worker must also consent to the disclosure of functional abilities information provided by a health professional to his or her employer for the purpose of facilitating an early and safe return to work. Failure to file a claim or provide consent for the release of the functional abilities information can result in no benefits.

If you have questions about the completion of this form please call 1-800-387-0750.

Worker's Responsibilities

- This form is to be completed by a treating health professional, who will discuss the information with you.
- Once completed, contact your employer **immediately** to review the information on the completed form. Together, you and your employer will begin to plan an early and safe return to work.

Employer's Responsibilities

- This form provides general information about this worker's functional abilities and restrictions to help you plan an early and safe return to work.
- When you provide this form to the treating health professional, ensure that you have the worker's signed consent (Section B) for the release of functional abilities information.
- Where available, also attach a description of the worker's job activities to assist the health professional in completing the form.
- The prescribed form that is available from the WSIB is a generic form developed to assist with general functional abilities information.
- The WSIB will pay the health professional to complete the prescribed WSIB form only. A charge will appear on your Accident Cost statement or Schedule 2 Invoice which reflects the cost of payment for each form completed.
- If you have a form that is specific to your workplace and have the cooperation of the worker in providing consent for the release of information on your form, you may use your own form. If you create your own form, you must reimburse the health professional directly.
- Do not send a copy of the completed Functional Abilities Form for Planning Early and Safe Return to Work to the WSIB. The health professional is responsible for submission of the form.

Health Professional's Responsibilities

- The employer and worker will use this information to plan the worker's early and safe return to work.
- Their return to work plans will reflect the functional abilities and restrictions you have noted and presume that no clinical contraindications exist for other work activities, therefore it is crucial that all sections be completed in full.
- The completion of this form is based on your examination of the worker and does not require a specialized functional abilities evaluation.
- Diagnostic or confidential information **must not** be included.
- Please add specific information on the duration of temporary restrictions or maximum times or weights to be considered, in section **E3** under **abilities and/or restrictions**. If necessary, attach an additional page to this completed form to describe abilities and restrictions.
- **Completion of this form does not replace clinical reporting requirements to the WSIB.**
- **Once you have received this form, promptly complete it and give it to the worker and/or employer.**
- **For billing purposes fax or mail pages 2 and 3 to the WSIB. When faxing, do not mail a copy.**

The WSIB will pay the health professional for the completed form when pages 2 and 3 are received.

Workplace Safety and Insurance Board
200 Front Street West
Toronto ON M5V 3J1

WSIB Fax 416-344-4684
or 1-888-313-7373