

***The Report of
Public Inquiry Respecting the
Yukon Workers' Compensation
Health and Safety Board***

*Whitehorse, Yukon
June 1996*

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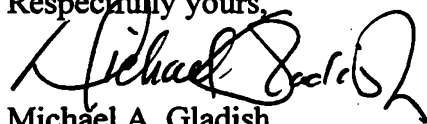
**The Honourable Alan Nordling
Minister Responsible for
Yukon Worker's Compensation Health and Safety Board
Yukon Legislative assembly
Box 2703, Whitehorse, Yukon
Y1A 2C6**

Dear Mr. Nordling

I am pleased to submit my report for Report of the Public Inquiry Respecting the Yukon Workers' Compensation Health and Safety Board. I trust you will find it useful in evaluating the issues which prompted the Public Inquiry.

I would like to thank you for giving me the opportunity to conduct this Inquiry.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Michael Gladish". The signature is written in a cursive style with a large, stylized "M" and "G".

**Michael A. Gladish
Board of Inquiry**

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1. ACKNOWLEDGEMENTS

The Public Inquiry would like to thank the efforts of so many people who gave of their time and energy to participate in the hearings and interviews; to the injured workers and their families for their trust and confidence in allowing the Inquiry to share their innermost feelings, fears, and personal experiences, thank you for helping the Inquiry to understand what it is to be an injured worker on compensation.

Also thank you to the Members of the Board and the employees of the Yukon Workers' Compensation Health and Safety Board for their cooperation, insight, candid observations and their many suggestions.

2. INTRODUCTION

In the latter months of 1995, the Workers Compensation Health and Safety Board was severely criticized by the public and the press for the way the board was seen to be handling injured workers' claims and for alleged poor management practices. Following the resignation of a long standing labour representative on the Board and with repeated calls from elected officials, the Minister initiated the Public Inquiry. The Inquiry was mandated to investigate the operation of the board; the allegations of several former employees and a labour representative of the Board; and, the concerns raised by the many injured workers who had appealed to the Minister for assistance.

This report of the Public Inquiry respecting the Yukon Workers Compensation Health and Safety Board is the result of four months of hearings and intensive interviews. In spite of the short time in which the Inquiry was conducted, some research and review of reports prepared by other jurisdictions was undertaken to gain broader perspective of the issues confronting all compensation boards in Canada.

The findings of the Inquiry affirm the overall opinion that fundamentally workers compensation is a good and responsive system that must deal with very difficult and complex issues arising from work related injuries and, for the most part, meets the needs of injured workers.

The Inquiry did not set about to find fault or to assign blame. Rather the intent was to articulate the issues and concerns raised and to show how they impinge upon injured workers and the board; and, to address some of the controversial allegations which brought about the inquiry. This report will serve to inform readers about the complexities of the compensation issues and problems faced by the board. In the end, the readers of this report will be left with a better understanding of workers' compensation; gain a better appreciation of the issues and concerns raised by injured workers and stakeholders; of the environmental, political, legal and other constraining factors under which the Workers' Compensation Board must operate; and, the efforts of many organizations and individuals helping to direct the board forward to build a more responsive, compassionate and fair system of compensation for all workers of the Yukon. The Inquiry

trusts this report will only be used in a constructive manner. To use this report in any way other than to improve the Yukon Workers Compensation system; to build on what we know and understand about the system and issues in general; can only hurt the cause of injured workers, employers, the board and the many other stakeholders who participated in the hope of making positive and constructive proposals for change. Inevitably, some stakeholders may feel their particular concerns were overlooked or not given much consideration as they would have liked. The Inquiry considered as many issues and concerns as possible. Essentially, the most frequent and commonly raised issues directed the investigative thrust of the Inquiry and formed the theme of this report.

3. OBJECTIVES OF THE PUBLIC INQUIRY

The terms of reference provided in the Workers' Compensation Health and Safety Board Public Inquiry Regulations specifically directed the Inquiry to report on:

- the response of the Yukon Workers' Compensation Health and Safety Board to injured workers;
- the operations of the Yukon Workers' Compensation Health and Safety Board in relation to the requirements set out in the Workers' Compensation Act, regulations, Board orders, policies and procedures;
- the internal operations and management practices of the Yukon Workers' Compensation Health and Safety Board and
- any relevant issues or concerns arising during the course of the inquiry.

3.1. Methodology

In keeping with the terms of reference, the Inquiry undertook to make stakeholders and others aware of the Public Inquiry and to solicit input. Notices were placed in the daily news papers announcing the formation of the Public Inquiry and explaining where and how interested persons could make their presentations.

The Minister chose to conduct the Inquiry under the provisions of the Public Inquiry Act because it was thought that this would be a means of assuring an independent, unbiased inquiry. Although the investigation was to be a Public Inquiry, it was felt that the investigative process should not take place in a public form or quasi judicial setting; but, rather the process should be an informal and consultative one. The Public Inquiry Act empowered the Board of Inquiry with the right to subpoena documents and compel persons to deliver testimony under oath, however, this was not considered necessary because the hearings and interviews would be

conducted in camera to respect the confidentiality and privacy of the participants; and, assure greater participation and comfort for all concerned. The informality of the process did not negate the Inquiry's legal obligation to be judicious and impartial.

The Inquiry decided to conduct the hearings in camera in order to preserve the privacy and confidentiality of the presenters. Interviews with injured workers, representatives of other stakeholder groups and board employees were conducted in Whitehorse between January 5, and April 30, 1996. Initially, it was believed that the interviews would be concluded within a matter of two months. However, it was realized that this schedule was too optimistic as the Inquiry was besieged with a far greater number of injured workers than was anticipated. Consequently, more time was needed to allow as many people who wished to speak to the Inquiry.

The interviews with Workers' Compensation Board employees were initially planned to include management and a sample of employees. The interview schedule was expanded to include all Workers' Compensation Board employees because Workers' Compensation Board employees felt they would be more comfortable knowing that all employees would be required to appear. The Inquiry also adjusted the interviewing schedule while legal issues concerning confidentiality and access to information were resolved. The Inquiry was later extended for an additional month to ensure the Inquiry had sufficient time to analyse the extensive volume of data it collected and to write the report.

The Board members expressed the opinion that an investigation of Workers' Compensation Board operations was not needed, as alleged issues concerning management practices and poor employee morale were unfounded. It viewed the issues as the protestations of a small number of disgruntled injured workers who believed they were not getting the benefits they wanted, and, the complaints of a few disgruntled employees.

4. THE PRINCIPLES OF WORKERS COMPENSATION

The fundamental principles of workers compensation were established in Canada by Ontario Chief Justice, William Meredith, in 1913. Justice Meredith recommended a no fault system whereby workers would receive compensation regardless of the causes of the accident and employers would be protected from civil action. This "historic compromise" is the basic premise which has guided the compensation system in the Yukon since 1917.

There are six fundamental principles on which all compensation systems are founded:

- the collective liability of all employers who pay into a centrally administered fund used to pay all injured workers benefits;
- benefits for injured workers are guaranteed by legislation;
- the system is no fault;
- workers give up the right to sue employers or co-workers in exchange for the guarantee of compensation;
- the compensation system be administered by an organization independent of government, governed equally by representatives from labour and industry, presided over by a neutral chair; and,
- the Board must have quasi judicial authority to make decisions that are final on all claims.

The system of compensation in the Yukon is referred to as a "dual award" system which compensates injured workers for:

- wage loss which compensates for loss of earnings during medical recovery and for partial wage loss for post recovery reduced earning capacity; and,

- permanent impairment, such as the loss of an arm or leg. Permanent impairment awards recognize the non-economic loss associated with impairment .

5. THE WORKERS COMPENSATION ACT

In 1992 the amended Worker's Compensation Health and Safety Act was passed into legislation and came into effect January 1, 1993. Section 1 of the new Workers' Compensation Act sets out a number of objectives:

- to provide an open and fair system of guaranteed, adequate compensation for all workers or their dependents for work related disabilities;
- to provide disabled workers with rehabilitation to assist them to overcome the effects of work-related disabilities as much as possible;
- to maintain a solvent compensation fund managed in the interest of workers and employers;
- to provide fair assessments on employers;
- to provide an appeal procedure that is simple, fair, and accessible, with minimum delays;
- to combine efforts and resources for the prevention of workplace disabilities, including the enforcement of health and safety standards; and,
- to establish a board, independent of government, with equal representation from workers and industry and a neutral chair to administer workers' compensation, health and safety for all industries.

6. THE YUKON WORKERS' COMPENSATION BOARD

6.1. The Mandate

The Yukon workers' compensation system is intended to provide injured workers and employers with a no fault system of wage loss insurance for injuries sustained in the workplace.

Workers are provided:

- medical and rehabilitation treatment of injured workers, for work related injuries; while, at the same time maintaining their level of earnings throughout the recovery period;
- permanent impairment awards for the loss of bodily function;
- vocational rehabilitation which may include vocational retraining and assistance in re-employment;
- compensation to injured workers for wage loss supplements in the event they are unable to return to their pre-accident occupation or suffer decreased earning capacity; and,
- survivor benefits for the survivors in the event of a fatality.

In return for guaranteed compensation, workers gave up their legal rights to sue their employer or co-workers for negligence resulting in a workplace injury. This is commonly referred to as the "historic compromise" of worker's compensation system.

7. THE STRUCTURE OF WORKERS' COMPENSATION BOARD

The Workers' Compensation Health and Safety Board has an official complement of 47 employees. The board comprises six functional components; three are program or service oriented functions; and, the remaining three provide primarily administrative support functions. Of the three program branches, two are responsible for processing claims and providing client services to injured workers and one is responsible for Occupational Health and Safety.

Benefit Entitlement-formerly the Claims Processing Branch. Benefit entitlement adjudicators are responsible for determining the eligibility of a claim; for determining and calculating the appropriate level of benefits to which each claimant is entitled during the life of the claim.

Client Services Branch has the responsibility to facilitate the quickest possible return to work; or, to assist in returning an injured worker to employability. The are two key rehabilitation services performed by the branch.

First, Client Services is responsible for Medical Rehabilitation:

- managing and coordinating various aspects of the medical rehabilitation;
- serving as a resource to adjudicators in areas where in-depth medical knowledge needed; and,
- ensuring early and appropriate provision of medical services needed to mitigate the affects of the workers injuries through consultation with workers' physicians and other health care professionals.

Second, it is responsible for Vocational Rehabilitation:

- developing a comprehensive rehabilitation plan with the worker;
- providing a full range of rehabilitation services;

- conducting comprehensive assessment, testing and counseling. Rehabilitation assists workers who are unable to return to their previous occupations by helping them identify and develop other options leading to employability; and,
- providing career counseling; and, when appropriate, vocational retraining.

The Client Services Branch is also responsible for conducting occupational hearing tests of workers on behalf of their employers throughout the territory.

The third program branch is Occupational Health and Safety which has a regulatory role and is responsible for enforcing the Occupational Health and Safety Act and Health and Safety training and education.

The remaining functional components comprise:

Finance-which is responsible for the all financial administration of the board; assessments, payments and corporate investments;

Corporate Services-which is responsible for general administration, human resources, corporate policy and planning, records and information systems management; and,

The Executive-which is responsible for corporate management; the Internal Review Committee; Client Advisor, and Communications.

8. THE HEARINGS – ISSUES AND CONCERNS

The Inquiry was overwhelmed by the number of injured workers who willingly came forward were many who have active claims. Noticeably absent, however, injured workers who did not have active claims or for whom the system had served well. The Inquiry received two formal written submissions from employer representatives and was able to speak casually to less than a half dozen others. For the most part, the majority of participants were injured workers who have had long standing or disputed claims.

8.1. Common Perceptions

The number of injured workers who made presentations represent a small fraction of all claims processed by the board each year. The Inquiry was well aware that it was hearing only negative responses; and that the injured workers who expressed concerns were not necessarily representative of the majority of workers receiving services from the board. Those who appeared before the Inquiry, were for the most part, disputing their claims and, by and large, uncomplimentary about their experiences with the board. Many complaints were case specific and related to individual circumstances and concerns. Nevertheless, the issues that were consistently and regularly raised clearly suggested they were systemic problems rather than isolated incidents.

The inquiry heard presentations from more than 122 injured workers; some of whom were accompanied by family members; labour and business representatives; Board members and employees of the board. A number of workers appeared several times. Generally, these injured workers had long standing claims with the board, some as long as 20 years. A vast majority of the claims involved complications arising from injuries that had not healed properly; or, had been aggravated by subsequent injuries. Of the these 65 injured workers, approximately 85 percent of these had injuries which prevented them from returning to their original occupation. Also, 80 percent of the total were workers who suffered from back injury. A large number of these workers had undergone extensive treatment or

surgery with varying results, and were still experiencing extensive pain or disability.

Most of the workers recounted how their lives and family relationships had changed. Many have been forced to spend their savings, RRSP's, and sell whatever assets they possessed in order to pay their bills. A majority of injured workers expressed a great sense of pride and self-esteem in their chosen careers; and, were left feeling bitter and angry because many could no longer see any hope at returning to their former occupation.

Injured workers said they felt there is a stigma attached to being on Workers Compensation; and, many stated they wished they could "get out from under the board's thumb". One worker said that her experience with the board made her feel guilty - "her sin", she said, was being injured. Other workers said they are humiliated by fellow workers, employers, friends, family members; and, even unwittingly by their physicians - the very people in whom they place their trust and confidence.

When injured workers enter the compensation system, they often do so with perceptions influenced by many factors. Their perceptions are based on the experiences of other injured workers and negative media stories. They are often armed with bad advice based on confusing or erroneous information offered by workers who have dealt with other boards in other jurisdictions. It's not surprising then, that many injured workers come to the board with a prejudice steeped in fear and misunderstanding.

There are people, injured workers among them, who are convinced that some workers use their injuries to avoid work; a malingerer who uses compensation to gain additional paid holidays. The perception that injured workers deliberately seek to abuse the system is far from the truth. Research done in other jurisdictions on the subject of malingering clearly shows that very few injured persons are malingerers, the vast majority seek and expect a speedy recovery. However, injured workers who are unable to return work, by no fault of their own, are often perceived to be malingering. For many worker's, their injuries heal quickly, and with little complication; enabling them to return to work within a reasonable amount of time. For others, healing may be protracted by an early return to work, where the injury is further exacerbated; and, they find themselves back on compensation. Ultimately, these workers may not be totally incapacitated;

but, unable to continue working at their original occupation. In the end, following months or even years of wrangling with the board for compensation and treatment, when neither physical nor vocational rehabilitation are successful, the worker is "deemed" capable of returning to work.

To some workers deeming comes like a further insult to their person adding to the pain and suffering of their injury. Many of them perceive the deeming process as removing the last vestige of their self esteem. One worker characterized his experience with the board, when deemed, by saying; "They make me feel like it was all my fault; that, I caused this to happen so I should accept their word for it: I should find a job they tell me I am supposed to be able to do; to go away and not expect anything more."

The realities of the Yukon are such that the seriously injured worker, those with chronic disabling pain; and, for whom rehabilitation is neither effective nor an option, will very likely be permanently shut out of the work force. They may be destined to a lifestyle that is characterized by chronic unemployment, a dependence on welfare, emotional and physical illness; family break down; and for some, suicide.

A large proportion of the Yukon labour market consists of seasonal employment with limited employment opportunities for many able persons much less for injured and disabled workers. Employers depend on and expect employees to perform a wide variety of tasks that often preclude persons who have disabilities or an impairment. The board often deems workers to be capable of working at a job for which there is no reasonable expectation of the work or a position ever becoming available.

It is increasingly difficult for the large number of injured workers over 45 years of age, who may possess limited education and skills, to find suitable employment. Transferring into new careers or re-educating them for the demands a shrinking, competitive, and complex technology oriented job market may be out of the question; both, from a practical and economic perspective. Many workers are also unable to afford to relocate to areas where job opportunities may be greater; while still others, hold fast to a view that the Yukon is their home; and, they just don't want to leave. The system is neither able to help many workers in this group to become re-employable; nor, may not be economically sensible to even try. The

realities of the limited employment market in the Yukon, coupled with a worker's physical and skill limitations, only adds further to the difficulties faced by the worker and the board.

There are many examples of injured workers where the system was unable to successfully return them to a desired level of employability. Many have been on compensation for such a long time that their injuries have become so problematic from delays in diagnosis or treatment, that they are no longer able to work. With no one else to turn to for help, compensation becomes the only possible source of financial support. For many workers, their injury is the only cause of their predicament; and, therefore, they believe compensation as a right that should not be denied.

8.2. Adjudication Concerns

Throughout the hearings, injured workers repeatedly raised a number of concerns relating to the adjudication of their claims. Following is a few of the more significant issues that were expressed:

The lack of adequate information about the compensation system. Injured workers told the Inquiry they knew very little about the legislation or the board. Most of the injured workers said they had neither been informed about the claims process and what was expected of them of their rights; nor, did they understand the obligations and responsibilities of the board. Many knew little if anything about the appeal process or even how to launch an effective appeal. A number of injured workers had no idea, whatsoever, of what would happen to their claim once it was filed; or, how long it might take before they received the first benefit cheque. Others repeatedly explained that they neither understood what was happening; nor, the reasons for many of the decisions. Others said that the explanations given for the medical examinations, tests and assessments, left them feeling uneasy and apprehensive. Furthermore, they were often presented with documents and asked to make decisions without sufficient understanding of the implications. Workers also said that not only were promises made to them concerning benefits or treatment; but, adjudicators and client service rehabilitation counselors offered different explanations

and reasons for decisions. Some injured workers went so far as to suggest that the board deliberately withholds information from workers so they will be at a disadvantage when dealing with the board. The Inquiry believes there are many such examples of communication difficulties between the board and the claimant, which lead to a mis-understanding and confusion about future benefit entitlement.

Adjudicators did not respond promptly to inquiries from injured workers.

Many said their calls went unanswered or were not returned for several days. Several clerical staff members concurred with the remarks made by workers. Certain adjudicators or counselors would not take or return calls even though they were able to do so.

Injured workers feel they have no right to self determination. This was so often articulated by injured workers as a sense of powerlessness, of losing control-surrendering their lives to the board. Injured workers characterize the system and staff as controlling, (not understanding or supportive) and demanding compliance to a host of rules and regulations; which, to many workers seem to make little sense. One worker compared being on compensation to being in prison-"Even prisoners have more rights." Another stated, "At the welfare office they treat you with more dignity".

The Inquiry heard injured workers tell of how adjudicators and rehabilitation counselors made decisions on their behalf without consulting them or their physician. Several told the Inquiry, the board made travel arrangements for them with little or no consultation, notice, or, without allowing them the opportunity to make arrangements either for themselves or their family's needs. When the workers expressed concerns about their ability to comply with the arrangements, on such short notice, they were curtly told that if they didn't cooperate their benefits would be "cut-off". Workers frequently said that every move they made had to meet the approval of the adjudicator.

Injured workers would be cut-off all compensation without warning.

Workers complained that they were not given an adequate explanation of the reasons for the problems with their claims.

It takes too long to process claims. A number of injured workers said they experienced financial difficulty because their claim was delayed. Several workers said they became frustrated with the system because they were left in limbo - waiting weeks or even months to learn of the adjudicator's decision or to receive benefits. The Injured Workers' Alliance want to see a limit placed on the time board requires to process claims and to respond to requests for information. The Alliance reasoned that this would speed up the process and reduce the uncertainty and frustration injured workers experience, while waiting for claims and inquiries to be processed.

Adjudicators and client service personnel treat claimants with indifference, insensitivity and a condescending manner. Repeatedly injured workers told of staff who appeared indifferent and insensitive; or, lacking in compassion for their circumstances. Others said, staff were offensive and rude. For example, one woman worker related that a staff member told her *"What you need is to find yourself a man"*. In other instances workers tell of feeling looked down upon because they were labourers; and, that they shouldn't expect retraining for other work. While others said, staff made hurtful remarks which left them feeling they were somehow less than deserving of attention. One man, a university graduate with a degree in English, said that he was made to feel very inadequate by his adjudicator and rehab counselor, because he was working as a mine labourer. He told; how they inferred that he didn't have the education or the intelligence to really understand the issues of his case. In retrospect, some workers conceded that perhaps some remarks may have been said in jest; however, at the time, the comments appeared cruel and inappropriate.

Several workers for whom English is a second language said they were poorly treated by board employees. Workers stated that board staff exhibited little patience or understanding of them; because, they were unable to communicate well in English; and, had some difficulty in understanding what they were told. Others related; how, adjudicators offended their sense of pride and did not understand or appreciate their different cultural or social values.

Injured workers are made to feel they have to justify their injury to the board, to employers and others, because, it is believed they are trying to "rip-off the system".

Injured workers expressed dissatisfaction with adjudication decisions. Not surprisingly, the Inquiry heard from injured workers who repeatedly complained about the adjudication process. Workers are convinced that many decisions are arbitrary and based on economics, rather than on individual circumstances. They may be deemed fit to return to work before they were able to do so and cut-off benefits; because, they were identified as having chronic pain. They firmly believe healing times are set arbitrarily by the board, purely for economic reasons. A number of the workers related how the board seemed to make decisions that are contrary to the opinion and recommendation of the worker's physician. A large percentage of the injured workers stated that the board is far too rigid in their interpretation of policies. Physicians also share this view with respect to the board's interpretation of prescribed healing times, and, that the resultant application of the chronic pain policy is arbitrary and restrictive; particularly, in the case of more complex injuries.

Adjudicators constantly change. Claimants relate having had several adjudicators administering their claim, with each one telling them something different. It was not uncommon to hear of workers who had multiple adjudicators and rehabilitation counselors in a short space of time. For example, one claimant had seven adjudicators in one year. Workers said, that with each new adjudicator they felt they were starting the process all over; by, having to re-justify their injury again. From what injured workers said, this was only contributing further to increasing their anxiety and frustration with the process; and, undermining any trust and faith they had; that adjudicators and the board knew what they were doing. Injured workers claim that the high turnover in staff is seriously affecting claims processing and the level of service to injured workers. The preponderance of examples given by injured workers tends to support their concerns. The frequent changes to adjudicators probably contributes to the inadequate follow-up and the delays that many claimants reported.

Board policies are too restrictive. Injured workers view board policies, such as the chronic pain policy and deeming, to be too restrictive and used as a means to bring closure to their claim. Many others believe that policies are written to protect the board and to exercise absolute control over the injured workers.

In general, injured workers expressed dissatisfaction with the basic principles of the wage loss system. Workers reason that wage loss compensation is not broad enough in its coverage; and, should consider the impact of an injury on the overall quality of the workers life, not just the immediate effect on income. The Yukon workers compensation system has attempted to recognize this through its "dual award" system. Workers cannot accept they may not be compensated for the long term impact that an injury has on their lifestyle. Furthermore, believe that those who suffer from aggravated injuries or chronic pain resulting from their injuries; and, who are either unable to return to their former employment or be vocationally retrained, should be entitled to further compensation. As one worker said, "after all, I was hurt at work and that is what compensation is for."

There be should a Workers Advocate. Typically, injured workers share the common conviction that they are disadvantage when it comes to dealing with the board, in particular when presenting an appeal. Many workers expressed that they feel intimidated by the system; have difficulty interpreting the legislation and policies; and, are unable to effectively present their case before the Internal Review Committee (IRC) or the Appeal Panel. A significant number of workers have resorted to engaging the services of external advocates to represent them at appeals.

Workers believe that interest should be paid on outstanding compensation payments that are caused by delays in processing claims or awarding benefits. Workers believe that when they are entitled to compensation that money is rightfully theirs; and, reason that if payments are delayed they should earn interest on the money. Presumably, for those receiving retroactive payments, some would stand to gain considerably if interest were paid on the outstanding amounts.

8.3. Medical Issues

Many injured workers voiced strong opinions about the standards of medical reporting; and, the manner in which the board chooses physicians

for medical assessments. Some of the more common concerns are as follows.

Adjudicators overrule the opinion of the claimant's physician in deciding when they were able to return to work, resulting in an end to benefits. Injured workers contend that their doctor's medical diagnosis and assessments are often discounted or contested by the board.

Medical reports contain information or statements that are subjective and irrelevant to the assessment of their injury. Workers believe such comments create a bias which influences the adjudicator's decision against the worker. Workers believe speculative comments concerning the cause or other factors relating to their injury are often used by adjudicators to deny benefits.

Apparently, injured workers were very distressed about the role of the board's Medical Consultant; and, of specialists to whom the board send them. A number of workers suggested independent examiners were selected for their bias toward the board. Other stakeholders suggested that the board should be prohibited from the practice of "doctor shopping"; the same criticism the board often makes of injured workers.

Many presenters could not understand why the medical opinion of their physician or a specialist, to whom they were referred, was ignored or not accepted by the board. Several workers told of situations where they had been to several specialists, sometimes at their own expense, and whose assessment supported their doctor's initial findings, yet the board did not accept the findings. After all they say " This guy" (the board Medical Consultant) is not a specialist he's only a GP. So why won't they accept my doctor's report?"

Some workers question how the board Medical Consultant is able to assess the condition of an injured worker on the basis of a review of past medical reports, or without performing a medical examination of his own. This was of particular concern to one claimant; because, the board medical consultant had not seen or examined the worker in several years.

Workers are dissatisfied with the way in which the board applies the chronic pain policy. Concern came for both injured workers and their physicians. Injured workers believe that the chronic pain policy is discriminatory and grossly unfair. Workers suggest that the board uses the chronic pain policy to limit its liability. Some workers were told by employees to expect to have pain; that every one has to live with a certain amount of pain.

8.4. Rehabilitation Issues

Workers believe that rehabilitation counselors are unrealistic in their assessment of the injured workers ability to obtain suitable employment following the completion of the rehabilitation program. Injured workers say that some physicians and rehabilitation specialists suggest that a worker could return to light duty work. Workers repeatedly reminded the Inquiry that in the Yukon there are few jobs that could be considered light duty work-that this was not Edmonton or Vancouver where the prospect of obtaining light duty work might be more realistic.

Workers were dissatisfied with job search plans or re-employment assistance. Injured workers explained that they were expected to undertake a job search without a clear employment objective or a knowledge of where and how to search for job opportunities given their various limitations. They complained of job search activities that were unrealistic, physically demanding and frequently proved to be ineffective. Many expressed frustration and anger because they felt coerced; and, threatened with losing benefits if they could not prove that they had conducted a specified number of job searches. As an example, one worker explained that he was required to conduct eight searches per day, five days a week, for over a month. Within a short time, the worker said he had exhausted all the possibilities and didn't know where else to look. Others gave examples of job search efforts that were without guidance or clear employment goals. Others felt they were expected to accept any job that was available, without consideration for their personal goals, skills, education or physical limitations. It was even suggested, that the board opted to place people into a job search, rather than offer any form of

retraining; because, this presented board with a less demanding and more cost effective solution.

Claimants took issue with the boards use of private investigators. The Inquiry was informed of several claimants who felt their privacy had been violated by investigators. They also alleged that the investigations were poorly done and that the information was malicious, false and inaccurate. Some workers had no objection to the board conducting an investigation if fraud is suspected. However, they want the board to be more reasonable when deciding an investigation is needed, and more selective of who is hired to do the investigation.

Many stakeholders including workers expressed a view that workers must take some responsibility for their own rehabilitation and career objectives; and, that the board should not be viewed as a replacement for unemployment insurance or welfare. Furthermore, they said, there are no guarantees that anyone will be employed indefinitely, even under the best of circumstances; so, one should not expect to remain on compensation for ever. To help rationalize this point of view, one must consider that a non-work related injury can have the same impact on a persons life and earning potential as a work related injury. There are those who believe that we must accept personal responsibility to create a successful outcome for our recovery, careers and eventual employment.

Deeming is unjust and misused by the board. Deeming is one of the more contentious issues that injured workers addressed. They consider deeming unfair, and that, it does not afford injured workers a guarantee of their pre-injury level of income. Many workers are unable to return to work at a real job; and, income they are deemed capable of earning is fictional. Others see it as a means to limit the board's liability; and, as a means of removing as many injured workers as possible from the system. Injured workers have also suggested that deeming should only be applied when a worker has refused a reasonable job offer. In general, most injured workers understood the purpose of deeming; and, could accept its principles if they are applied fairly. However, many workers believed the board is misusing the policy.

8.5. Labour Concerns

Organized labour generally see its responsibility as seeking a more liberal interpretation of the legislation and policies in favour of workers; and, to argue for better benefits and the expansion of basic compensation coverage.

The concerns raised by labour representatives and trade Unions can be classified into two distinct categories. First, issues concerning the claim benefits and rights of injured workers. Second, concerns about the managerial, administrative and political aspects of board operations.

The issues related to claims were consistent with many of those raised by injured workers. Specifically, they expressed dissatisfaction with:

- the length of time it takes to process a claim and the resulting hardship this has on their members;
- the adjudication process in general. The process is seen to lack sensitivity, and is focused more on controlling claims costs than ensuring the fairness of the entitlement decisions;
- the board routinely ignoring the medical diagnosis and opinions of workers physicians in favour of the board's Medical Consultant, and
- the absence of a worker's advocate.

As a rule, labour representatives strongly support the need for worker representation at appeals; and, thus support the efforts to establish the role of an independent Worker's Advocate.

Finally, the unions raised typical union issues. Principally, they are focused on labour management relations at the board and stem from the accusations made by former employees and a labour representative of the Board. Surprisingly, not all, labour representatives support the accusations made by the former Board member.

Union representatives raised a number of key issues:

- employees fearful of losing their employment;
- management exercise control through intimidation and the use of threat;
- the board is ignoring the public service hiring practices and contracting out too many jobs;
- employee morale is poor;
- the board has lost its neutrality and is no longer seen to be serving in the best interests of the stakeholders; and,
- the government, in particular the Minister, is interfering in the operations of the board and in individual claims.

8.6. Employers Concerns

Employers expressed their concern for the apparent increase in administrative costs incurred by the board over the past three or four years. Generally, they wish to see their assessments maintained at the lowest rates possible and spent wisely; since, they see higher assessments as a disincentive to business. The business community view lower assessments, however, as a incentive to attract more business to the Yukon. Thus, any move to increase rates or liberalize the legislation and policies that might expand the coverage of compensation is seen as a potential increase in cost to the employer; unless, offset by decreased administrative costs, increased return on investments or lower claims resulting from the early intervention and earlier return to work.

8.7. Medical Practitioners Concerns

The Yukon Medical Association made a formal presentation to the Inquiry on behalf of its members, which was focused on administrative and financial concerns. Of primary concern, were proposed changes to administrative procedures that would affect their members administration and the operating costs. In particular, association members were concerned about how the board would reimburse them for several proposed changes to their reporting procedures. The physicians viewed the board's proposal not to pay for certain procedures as shifting the burden of cost onto the Yukon Health Care system. They were also concerned that the board was demonstrating an unwillingness to negotiate in good faith. The Association said, the board was being unreasonable and was attempting to dictate conditions. Physicians suggested, this attitude was a reflection of the autocratic and dictatorial style of the president.

A number of doctors express concern for the lack of consultation between the board and the physician concerning the diagnosis and treatment of injured workers. There is consensus among some doctors that the board needs to improve the level of communication with the medical community, particularly, with respect to the development of new policies and practices concerning medical management.

Many physicians (who count injured workers among their patients) have said they would characterize the relationship between the board and the injured worker as insensitive, antagonistic and downright abusive. Some go so far as to say their own relationship with the board is the same.

8.8. Power Program

The Power Program (Program of Work Evaluation and Rehabilitation) is a therapy program designed to help injured persons overcome the effects of their work related injury. The program is run by the Thompson Center and is partially funded by the board; and, offers three basic programs of treatment.

- An early treatment program for individuals with recent injuries.
- Functional Capacity Evaluation which assesses the workers ability to perform work related activities; and,
- Work hardening which is a therapy program designed to meet the needs of workers who have been away from work for an extended period of time.

Physicians, board rehabilitation staff, and injured workers all expressed concerns about the quality of services provided by the POWER program. Injured workers stated " that's where you go to get re-injured". In fact, several workers have been injured while attending the POWER program. Some typical concerns are as follows.

- There is not enough consultation with workers' physicians.
- The Center does not have accreditation. At the time of writing, the Thompson Center was working on a plan to achieve full accreditation.
- A comprehensive evaluation and screening is not undertaken before injured workers are admitted to the POWER program. It is thought that approximately 15 per cent of those participating in the POWER program may have other disabling conditions which must be attended to; otherwise, an early recovery would be compromised.
- The program is not flexible enough to meet the needs of the individual given their particular circumstances and physical limitations.

Doctors and rehabilitation staff are concerned the present program is not meeting the needs of workers. They say, the program must be re-designed; accredited to ensure the program is capable of delivering a consistently high standard of service that meets the needs of Injured workers; and, compliments the board's rehabilitation program.

9. UNDERSTANDING THE NATURE OF THE ISSUES

One must place stakeholders' concerns and issues in the proper context of the changes the organization has experienced; so, the reader may better understand the significance of both the issues and the changes.

Of the total claims processed in the past year, approximately 60 per cent of claims did not involve time lost from work. 39 percent of time loss claims resulted in some form of temporary disability; the average recovery time was any where from 12 to 18 weeks. In comparing information from other jurisdictions, the average duration of short term disability ranges from 4 to 10 weeks. These figures tend to support stakeholder remarks concerning delays in the system; and, that something in the system is not working as it should.

Over the past three to four years, the organization has undergone significant changes to the Workers' Compensation Act; and, to its management and operational framework. The rate and the number of changes has contributed, in some measure, to a perception of poor and inconsistent service; and, has destabilized the organization. The changes have rippled throughout the system and the organization, not only affecting employees and operations, but also injured workers and the public. Furthermore, the negative perceptions have been fueled by the harsh criticism of under or mis-informed stakeholders, certain disaffected staff and the media. The intensity and the manner of the criticism has only served to undermine employee morale and effectiveness; to erode the confidence and trust of stakeholders; and, to a certain extent, strained the relationship between the president, and the Minister. But equally important, the negative criticism appears to have directly contributed to compromising the level and quality of service to injured workers by affecting the productivity and working relationship between board staff and injured workers.

Injured workers whose claims are most affected by the changes are the ones who have sought and gained the most public attention. By comparison, however, they represent a disproportionate small number of the overall claims processed each year. The majority of claimants, who appeared before the Inquiry, currently have active claims that are

anywhere from one to fifteen years old. Many of these were originally initiated under previous legislation, their injuries have become problematic and as well, were managed by a number of different adjudicators over the lifetime of the claim.

The board has introduced measures that will influence how injured workers claims will be processed in the future. Late in 1995, the board initiated a study, entitled Care Management, that identified ways to improve claims management. The document outlined a plan to restructure the Claims Branch (Benefit Entitlement) to improve service by streamlining claims processing and eliminating delays. The board is also working toward improving the coordination between the claims processing function of Benefit Entitlement with the medical management functions of Client Services; to create a more effective and integrated early intervention and care management program.

9.1. Benefits - Claims Processing and Adjudication

The majority of the injured workers who appeared before the Inquiry had long-standing claims and who had come to rely on the board for assistance and support for months and even years. The majority of other cases are generally straight forward; and, do not involve much time to adjudicate or to bring to a satisfactory conclusion. In general most cases fall into one or more of the following three categories:

- no time loss claims which as the definition implies have no time off work with minor medical attention required;
- time loss claims which are concluded once the normal healing period is reached and the worker returns to their former employment.
- long term cases which have become problematic or chronic and generally result in a failure to recover within an acceptable time frame.

All injured workers rely on the board for medical or other services and injured workers with time loss claims require financial assistance during the

period of their recovery. Difficulties begin to develop when the injured workers are unable to achieve a satisfactory and full recovery. In these cases, the future prospects for employment appear uncertain and the workers expectation of what the system can provide, become less clear. They become increasingly unhappy, anxious and inclined to blame the system for its failure to make their recovery happen. From this point forward, a worker may begin to develop financial and psychological dependency on the system.

When there is no objective medical reason for failure to recover as expected, the injured worker begins to question the original diagnosis and medical treatment. If explanations seem unsatisfactory, they may begin making the rounds of physicians seeking other more acceptable medical opinions and treatment.

As the injured worker becomes more dependent on compensation they view each setback to their recovery as a total breakdown of the system and failure to address their needs or expectations. The board's expectations for a successful outcome may be very different from those of the worker; and, these differences can lead to fundamental misunderstandings that generate conflict between the worker and the board. The conflict tends to focus on how and when the relationship and benefits will come to an end.

By the time that dependency is established, the board has usually invested considerable effort and money to help the injured worker toward a satisfactory recovery; only to find, there may be no satisfactory resolution to the problem. Consequently, everyone is left with uncertainty about what appropriate action and direction should be taken. These cases tend to drag on and become fraught with other issues unrelated to the injury, thus making a satisfactory resolution almost impossible.

When medical examinations can not confirm the subjective symptoms, disagreement often arises about the root causes of the disability or condition. It is difficult to convey to a traumatized worker that an ongoing condition may no longer be attributable to the injury originally sustained. This is particularly so, when the worker has been receiving compensation for months or years and has been through numerous rehabilitation programs. The worker doesn't understand why the board has now

reverses its position about continuing compensation and feels frustrated abused and unable to handle the situation. Without further responses or attention from the board, the injured worker may seek out external sources to apply pressure on his behalf.

Although the thrust of the board's planning efforts have been toward changes in the area of claims processing, the planning does not specifically address the subject of rehabilitation management. The Client Services Branch is currently undertaking to develop of an early intervention program that will serve to identify the specific medical rehabilitation needs of individual workers and to initiate the rehabilitation process early. Early intervention will identify cases that may potentially become problematic; thus, ensuring that workers are afforded the greatest opportunity for the appropriate treatment leading to a speedy recovery and an early return to work. Chronic and problematic claims now in the system, are not likely to see any immediate benefits from this initiative.

As mentioned, delays in processing claims were a major concern to a majority of injured workers. This is acknowledged by the board as an on-going problem and occurs at all levels of the claim processing from adjudication, through rehabilitation, to the appeal process. The Inquiry believes that a delay of any kind does not make for a fair compensation system. To have injured workers waiting for months, in some cases years, to receive benefits or services that they should have received is unjust. Few injured workers have the financial resources to survive while the board wrangles over past policy decisions or conflicting medical opinions, and questions of appropriate treatment protocol.

Delays can also occur because the injured worker, having notified the employer, may believe nothing further is required of him and thus does not to file a report with the board. Thus, the board does not initiate a claim until it receives a worker's report even though the board may have received both the doctor's and the employer's report. Considerable time may have passed before the worker becomes aware of his responsibility.

Adjudication is the process by which the board determines whether an injury condition is compensable. Adjudicators examine the information from the reports submitted by the worker, the employer and the physician. In determining the eligibility of the claim, the appropriate legislation and

policies are reviewed, and when required, medical advice is sought to assist the adjudicator in interpreting and understanding the significance of the medical reports. When the circumstances of the work environment or job are unclear, the adjudicator may interview the worker, the employer or even visit the job site to become more familiar with the conditions which may bear on the adjudication decision. Any delay in obtaining relevant information or an early medical diagnosis may result in a delay in either accepting or rejecting a claim. The Inquiry believes that this is contributing to the problems reported by injured workers.

For the most part, the problems reported by claimants are not new and should be viewed in the context of the time in which many of the claims were initiated and processed. With the new Workers' Compensation Act coming into force in January 1993, the board was faced with implementing the new Act with little or no relevant policies. Recognizing this problem, the Board directed the Policy and Planning Branch to develop new policies that would respond to the needs of the new Act. This effort resulted in a large number of policies being brought to the Board for approval, often without the appropriate research and analysis having been undertaken. The president realized that policy and procedural implementation would lag behind policy development and therefore, undertook a review of processing and management of claims in order to streamline the process.

A policy compliance file review was also undertaken to help identify improvements and to evaluate whether claims were being adjudicated and processed in accordance with the policies approved by the board and pursuant to the relevant legislation. The initial review identified significant problems of non-compliance with the policy and the legislation in force, as far back as 1974. As a result, the review was expanded. The Policy analysts subsequently identified that approximately 50 percent of the claims reviewed were found to be in non compliance. These preliminary findings suggested that that as many as 100 of the 200 active claims might also be in non-compliance. It was determined that many of the claims involved ineligibility, or benefits that had been paid in error. The Board was advised of the situation and reminded of its fiduciary responsibilities under the Financial Administration Act and the Trustee Act. The Board instructed the president to continue with the review; and, take the appropriate action to correct the situation, resulting in the eventual termination of benefits for some claimants. From this action arose the

public concern that the board was acting arbitrarily to "cut injured workers off compensation".

The results of the review have affected and will continue to affect a number of claimants who will undoubtedly have their benefits reduced or discontinued. The board must act responsibly and within the law to correct any situation that comes to their attention. The Board is subject to the Financial Administration Act and the Trustee Act. The Board is legally obligated to act, however, painful it may be for injured workers, by instructing the board to discontinue the benefits of those claimants who are found not to be legally entitled. Injured workers obviously view this action of the Board as a means to reduce the number of injured workers on compensation and save employers money. This issue has been sorely misunderstood by many, who cannot understand the position the board must hold on this issue. The Board must take responsible action to resolve the issue and to do so within the law; but with sensitivity and compassion.

When reviewing some of the claim files presented by injured workers, the Inquiry also observed and noted what appeared to be irregularities. The Inquiry's observations were shown to be consistent with the findings of the compliance audit and the file review. Later, the Inquiry also confirmed its initial observations by spot checking a random selection of the official claim files.

The following are some of the more important of the findings the Inquiry noted and commented on:

- appropriate legislation was not always used;
- a lack of documentation supporting adjudication decisions;
- reasons for the decisions were not clearly stated or documented on files or in correspondence;
- decisions appear to have been made using contradictory medical evidence;

- in some instances medical reports stated injured workers were fit to return to work; however, they were still receiving benefits. The board terminated benefits in cases where physicians stated workers were unable to return to work because they were still experiencing injury related medical problems;
- decisions appear to be influenced by subjective information contained in medical reports, i.e., observations about personal situations or conditions that are not medically relevant to the specific injury;
- in offering his opinion, the board's medical consultant may have implied an adjudication decision rather than strictly a medical opinion;
- information and documents are not always complete or in chronological order;
- benefits were awarded without an adjudication decision being documented or supported;
- action on claims initiated under legislation prior to 1993 was undertaken using the new legislation;
- benefits were being paid for training and job development schemes for which there appears to be no justification;
- in one case, a claimant received money, several times, to support vocational retraining schemes; for which, no plans were developed and no apparent appropriate authorization was given; or, without any accountability for how the funds were used;
- delays in paying benefits and appropriate follow up is done to ensure that benefits were properly awarded. In one case, it was discovered, when the claim was reactivated that the claimant was still owed benefits which should have been paid some seven years before;
- claims were handled by several adjudicators which may have attributed to any number of problems, such as, the lack of appropriate follow-up,

poorly documented decisions and commitments to claimants that later became contentious;

- in cases where workers have been re-injured and were re-activating their claim there was no clear distinction made between the original claim and continuation of an existing claim.

It is important to consider the circumstances at the time when many of these cases were adjudicated; to understand why these discrepancies may have occurred. For example:

- claims adjudication was under staffed, prior to Aug 1993 the entire claim load was handled by two adjudicators;
- new legislation and policies were being implemented and applied without sufficient training and with little guidance;
- cases were adjudicated by contract adjudicators from other jurisdictions who may have been unfamiliar with the relevant legislation and policies, and
- there was a lack of clear management direction.

Recommendations:

All adjudication decisions must be documented with the reasons clearly stated; supported by the appropriate references to the legislation and policies. Copies of all relevant documents and reports supporting the decision must be placed onto the claim file.

Letters to claimants outlining decisions must be clear and comprehensive; and, where practical technical terms or jargon are used must be clearly defined;

The board must implement a quality assurance program for claims management, which must include periodic claim file reviews;

Develop a mandatory training program for upgrading adjudicator's skills; and, when hiring new adjudicators the board must ensure potential candidates possess identified requisite skills and experience.

Adjudicators be afforded every opportunity for training related to medical conditions; work place ergonomics and job site analysis that are industry specific.

Maintain the continuity of the claim management process - one claim one adjudicator-to minimize the number of adjudicators that service a claim.

9.2. Medical Issues

The Medical Consultant plays a pivotal role in the claims adjudication process through involvement in determining both, the work relatedness of an injury, regarding eligibility for benefits and services. In reviewing claimant files and medical reports, the medical consultant frequently that the Medical Consultant comments on individual cases or offers recommendations concerning treatment protocol. In a number of cases, the medical advisor seems to have discounted opinions of medical specialists and appears to provide subjective information that may influence the decisions of the adjudicators. The Inquiry acknowledges, it has only a lay persons understanding of the medical nuances.

It is not appropriate for the Medical Consultant to comment on non-medical aspects of cases. It is the function of the adjudicator to relate the general medical information to the case in question. The Medical Consultant should provide interpretation of medical reports from the claimants practitioners; offer objective advice to assist adjudicators in making decisions; and, determine the level of physical impairment to establish permanent partial impairment benefits. Where there may be strong reason to question the validity or appropriateness of a medical decision, referral to another physician may be requested to obtain a second opinion. Where medical opinions are disputed, a review panel comprised of community

physicians might be a reasonable and expedient means to resolve these disputes.

The role of the medical advisor should only be providing consultation and advice to lay staff about medical matters, and to assess the degree of impairment. In a number of cases, the Medical Consultant's reports appeared to be directing treatment.

The Inquiry repeatedly noted that the medical advisors frequently make remarks that appear to be unrelated to the medical issues in question. They include comments relating to a worker's apparent disposition, references to family situations and lifestyle. In some instances, workers may not feel comfortable with the physician conducting the examination; and may consequently exhibit characteristics or personality traits, which could also be misinterpreted or misleading. If these are included in the report, they may prejudice the reader. Physicians must be made aware that their comments may easily be interpreted out of context. Although the consulting physician's report may draw the correct conclusions with respect to the medical condition of the worker, additional comments which are presumably meant to add tone and intent to the report are not necessary; as, they are not needed for adjudicating, establishing work relatedness or determining the degree of impairment; which are the only reasons that medical examinations should be ordered by the board.

The Inquiry believes medical reports should deal only with the relevant medical facts and not include comments concerning other non-medical information. The claimants physician should be solely responsible for all examinations, diagnosis, treatment and referral for treatment; and, to provide information concerning the workers physical restrictions. This will require that the worker's physician be an active and willing participant in the rehabilitation and care management process.

The adjudicator must be the only one responsible for determining whether the injury is compensable. The Inquiry noted several instances where comments on medical reports state the opinion that "retraining would be a good idea". These comments may easily be taken by claimants to mean that the physician is recommending it; and, thus raising expectation that the board will provide it. It is important that such recommendations or

proposals be the responsibility of the rehabilitation counselors and the board.

Recommendations:

Where there may be reason to question the validity or appropriateness of a medical decision, the board's Medical Consultant should make a referral to another physician to obtain a second opinion.

A review panel of community physicians should be established to resolve medical opinions that are disputed by claimants.

The Medical Consultant's role should be limited to: providing consultation and advice to adjudicators and lay staff about medical matters; and, assessing the injured worker's degree of impairment.

The claimants physician should be solely responsible for examinations, diagnosis, treatment, referral for treatment; and, providing information concerning the workers physical restrictions.

9.3. Independent Medical Examination

Injured workers have expressed their concerns with what they believe is a process that is fraught with bias. Workers want to have the exclusive right to chose the physician who will perform the independent medical examination. In Section 16 (2), the board is granted the right to appoint an independent medical examiner. Although, this is done in consultation with the worker and the attending medical practitioner, many injured workers still feel they and their physicians are pressured into accepting the medical examiner appointed by the board.

One proposal is for the Yukon Medical Association to submit a list of medical practitioners and specialists in various fields of practice; that may be used as a source list from which the workers and their physicians can

select. The list should be reviewed every two to three years to ensure it is up to date. The worker and the physician could choose a specialist from the list. The board would be responsible for making the necessary appointments. Injured workers have said they would find this more acceptable than having the board appoint the physician.

Section 16 (6) states, *A certificate provided to the board by a medical practitioner under this section is conclusive of the matters therein, unless the board otherwise directs.* At first glance it would appear that the results of the medical examination should be conclusive; and therefore, binding on the board. However, *unless the board otherwise directs* seems to suggest; that, if the board didn't agree with the results of an independent examination or a previous board decision, it could choose to ignore the findings and dictate a decision more favourable to the board. The Inquiry believes that this section gives too much discretionary power to the board; and, that the legislation should be amended to make the findings of an independent medical examination binding on the board, the worker and employers. The Inquiry believes these simple steps could go a long way toward improving the level of trust and confidence of injured workers, as well as, ensure a greater degree of fairness in the process.

Recommendations:

That a list be prepared A list of appropriate medical specialists be prepared by either the Yukon Health Care or the Yukon Medical Association from which the board, workers and their physicians may choose when the board requires a worker to undergo an Independent Medical Examination.

The Workers' Compensation Act should be amended to make the results of Independent Medical Examinations binding on the board, the worker and the employer.

9.4. Deeming

Deeming is a process which measures a worker's post-accident earning capacity. Deeming generally occurs following the conclusion of medical and vocational rehabilitation; and, may be done whether or not the worker is employed. In either event, if the post-accident earning capacity is less than the pre-accident; and, the decrease is the result of the injury or condition, the worker is entitled to a wage loss supplementation to recognize the difference. Obviously, the higher the post-accident capacity, the less the difference, which in turn results in a lesser supplementation.

Board policy states: When a worker is deemed the board shall demonstrate that a workers estimated earning capacity in a suitable occupation is reasonable given current wage scales, and that the occupation for which a worker is deemed capable is reasonably available to the worker.

For workers to be in receipt of wage loss means remaining in the system under board influence and control, rather than being independent and self-reliant. Workers likely to suffer the most from deeming, are those who: experience difficulty in finding suitable occupations; have serious injuries which would be further aggravated by returning to work; and, those who because of age or education are incapable of benefiting from vocational rehabilitation.

An issue of particular concern for a number injured workers was how the board interpreted the terms suitable occupation and reasonably available and modified work. Suitable employment, as the board defines it, is an occupation for which the worker has the skills, education and physical ability to undertake; and, which is reasonably available to the worker. Reasonably available means an occupation is obtainable; but, that an actual job vacancy may not necessarily exist at the moment. Realistically, modified work or light duty jobs are not readily available in the Yukon. Yukon businesses and industries tend to be smaller; where, an employee who cannot meet the full physical demands of the workplace represents a significant productivity and economic liability to the employer. Thus, few opportunities are available for injured workers. A number of workers also said, that rehabilitation counselors did not understand that the kind of demands placed on workers in the field are different than test conditions in

a clinical situation. Following a Functional Evaluation, workers would be told that they were deemed capable of returning to work; because, the evaluation demonstrated they were now capable of certain physical activities. A number of workers try and are injured again. Injured workers want the board to either, redefine these terms altogether, or to be a more flexible in their interpretation.

The board is commonly criticized for deeming workers capable of jobs where there is no realistic chance of employment (such as taxi dispatchers, for which there are relatively few in the Yukon) or deeming them capable of jobs they may be qualified to perform; but, not necessarily suited for; or, suggesting they return to light duty or modified work. Many workers expressed concerns that jobs for which they have been deemed do not exist in the Yukon; and, if they do exist, they are few in number and are likely to be unavailable.

One worker tells that he was informed that; because, he had worked in construction for most of his career he was capable of working as an estimator. As he told the Inquiry, his search turned up few such jobs in Whitehorse; and, those that he found were filled. Furthermore, most jobs required more specialized education than he possessed. Many so called estimator jobs, were only add-on functions of other jobs; that, more often than not, demanded the physical abilities he no longer possessed. Clearly, there is something wrong with process which deprives a worker of a substantial portion of compensation benefits because, the circumstances of his education, age, physical limitations, or other factors.

The Inquiry is of the opinion that deeming an injured worker should be done only when the worker is fully qualified, physically capable of performing the demands of the work; and, there must be more than a reasonable expectation that the worker can be employed in the occupation. The board must be able to demonstrate that there is a reasonable selection of jobs in the local job market; and, that the turnover rate is sufficiently active that a worker could be successfully employed; and, that the worker can perform all the requirements of the job description as defined by the employer. The worker should also be considered for more than one occupation. This means that a thorough labour market analysis must be done prior to the deeming.

When determining wage rates for deeming, it appears that board counselors are not consistent in determining the income level to use as the base rate. Some counselors use an average of the salary range for the particular deemed occupation; while, others seem to have arbitrarily selected a figure from the range of rates in the industry overall. The latter tends to provide a higher average salary than the going rate for the job in the local marketplace. Thus, the wage loss supplement paid to the worker is lower. The deeming rate should reflect rates in the local job market and be based on the entry level rate, and not on upper most limit of the occupation. In most cases, injured workers going back into the workforce in a new occupation are, after all, likely to be starting at the bottom of the pay scale.

Recommendations:

Deeming should only be done when a worker is qualified, physically capable of performing the work; and there the worker must have more than a reasonable chance of being employed in the occupation.

The board must be able to demonstrate that there is a reasonable selection of jobs in the local job market; and, that the turnover rate is sufficiently active so that a worker could be successfully employed; and, that the worker is able to perform all the requirements of the job description as defined by the employer.

The deeming rate should reflect rates in the local job market; and, be based on the entry level rate, not on upper most limit of the occupation.

9.5. Chronic Pain and Chronic Pain Syndrome

Chronic pain and chronic pain syndrome form a category of claims which are as difficult to diagnose as they are to adjudicate. Workers who experience chronic pain following an injury generally may be depressed, have low self-esteem and feel vulnerable. They are no longer the productive workers they once were; but, now are dependent patients

injured, frightened and often questioning their mental state. It is at a time like this that compensation should no be terminated.

Many workers spoke of pain that just wouldn't go away; how, they didn't have this pain before they were injured; but, now have disabling pain almost all the time. They tell of how physicians have been unable to help the pain; and, how they have become dependent on medication to help them make it through the day.

Board policy defines chronic pain as a *pain that lasts longer than the normal healing time for the tissue involved. Chronic pain may exist in the absence of chronic pain syndrome.*

Chronic Pain Syndrome is defined as a *disabling pain which usually last beyond the normal healing time, and has resulted in a significant or marked life disruption. Chronic pain may develop into chronic pain syndrome.*

The policy goes on to state the board will only deal with chronic pain; where it can be established that it is a direct result of a work related disability, *it may be treated if it hinders the recovery of the disabled worker, and ...that once considered suffering from chronic pain a worker may receive rehabilitation for up to six months.* This means that only during the course of the injury's healing, and for a period of six months following, the board may acknowledge responsibility to compensate or treat chronic pain.

The board appears to subscribe to a hypothesis that assumes that a person, who suffers from chronic pain or psychological trauma, in some way benefits from the pain; and, therefore, is responsible for the condition - that people would rather be ill, and be paid for it, than be well and working. The cause of chronic pain and chronic pain syndrome can be determined through expert medical evaluation, and should be undertaken at the earliest indication. However, a number of cases came to the Inquiry suggesting that the board routinely uses any medical indication or suggestion of chronic pain, or chronic pain syndrome to apply policy as a blanket for closure; without considering the individual circumstances and cause of the injury.

The way in which the policy appears to be applied creates a category of injured workers who are disqualified from receiving benefits because they bear the label of a chronic pain sufferer. It is the diagnosis of chronic pain that is being used to determine eligibility while the Inquiry believes, eligibility should rest with the cause. Where chronic pain arose out of and in the course of employment, chronic pain should be compensable. Based on the submissions of injured workers, the Inquiry believes the board should be responsible for continuing benefits and assisting injured workers to overcome the effects of chronic pain, even if it requires on-going treatment beyond six months.

Recommendations:

The Board review its current policy on chronic pain and chronic pain syndrome. The board adjudicate chronic pain as it would any other injury; and where chronic pain arises out of and in the course of employment, it should be compensable. The cause of the chronic pain must be the criterion that determines compensability; and not the diagnosis of chronic pain.

The board should be responsible for continuing benefits to injured workers diagnosed with work related chronic pain and assisting them to overcome the effects of chronic pain and chronic pain syndrome; and, provide treatment beyond six months, as the board would provide benefits to workers with other of compensable injuries.

9.6. Psychological Trauma or Post Traumatic Stress

The board does not recognize the psychological affects of serious injuries or traumatic incidents that occur in the workplace; and, as such has no applicable policy. The Inquiry was told of several cases where workers were unable to return to full employability as a result of a psychological problem resulting from a traumatic work related incident. As with chronic pain, adjudicating compensability for such cases is difficult. The Inquiry believes, that it is the responsibility of the board to do so, regardless of how difficult it may be. The fact a psychological condition exists is not in

dispute, however, it is not compensated because it appears to be too difficult to demonstrate that the condition is work related, in the absence of some form of measurable physical disability. It is also thought, that it is easy for workers to abuse the system by claiming psychological trauma; and thus, the board deliberately discourages efforts to consider it as a compensable condition.

It is not possible to predict how an incident will affect any one person on the severity of the incident alone. The inquiry heard from several workers who witnessed traumatic injuries or deaths of co-workers. Although they themselves may not have suffered a serious injury, the affects of the incident linger with them long after the occurrence. Everyone has a different ability to cope and to adapt to traumatic situations.

In dealing with the issues of compensability and the work relatedness of psychological impairment or disability, the board must recognize the significance of work related psychological injury and as such must make it a compensable condition. Unlike a fractured appendage, psychological injury shows little or no tangible evidence immediately. As some workers have said, there are days when they have no problems and others when the images of the incident haunt them to the extent they are unable to cope with the simple tasks of living, let alone working. To say that because there is no outwardly appearance of injury; or, that the situation was not life threatening is to deny that something traumatic happened. The Inquiry believes, that ignoring the issue of psychological injury reflects a tendency to develop blanket policy that does not recognize individual circumstances.

For injured workers, with psychological conditions the system must be supportive, flexible, and compassionate to help them cope with an injury that can be as disabling as any other. The Inquiry is not suggesting that the board should accept and compensate every case of chronic pain or psychological trauma without questioning the cause; but, that the best comprehensive medical attention to determine and mitigate the cause through appropriate treatment protocol; that, will enable the worker to lead the best quality productive work life possible.

Recommendations:

The board must recognize psychological impairment or disability and with a view to compensating the condition where expert medical opinion establishes a conclusive work related link; and, where the condition is severe enough to hinder or affect the ability of the worker to obtain and hold suitable employment.

The Inquiry recommends that in cases where psychological impairment or disability is suspected or evident, the board recommend an appropriate assessment to determine the degree of impairment or disability.

9.7. Pre-existing conditions

A premise of workers compensation is that employers accept workers as they are at the time of employment. If employers accept workers with all their strengths and inherent weaknesses, so should the compensation system. Therefore, a condition which existed at the time of employment, even though it is unknown to the worker and the employer; and, it has not affected the worker's ability to perform his job, should not limit benefits.

Under normal circumstances, a pre-existing condition does not become a factor in determining whether the injury is compensable or not. It is simply a weakness that renders the affects of the injury more serious than otherwise may have been anticipated. These types of pre-existing cases are relatively easy to adjudicate and the board rarely, if ever, disqualify such cases. When the injury has healed the worker can return to work and no further compensation is required. However, when the healing period of an injury becomes extended and a pre-existing condition is recognized or suggested in medical reports, the system appears to "kick into overdrive" in its efforts to substantiate closure. Workers complain that the board uses any reference or hint of other conditions such as obesity, smoking, or old injuries that have healed, to justify bringing a claim to closure.

The more difficult cases to adjudicate are those where a pre-existing condition is exacerbated and becomes permanently aggravated; thus, making the apportionment of liability between the injury and the pre-existing condition difficult to assess. When an injury becomes complex and has gone beyond the normally expected healing time, injured workers believe the board uses the pre-existing condition policy to obviate further liability.

Recommendations:

Review the application of the pre-existing condition policy with stakeholders to determine whether it is being applied too restrictively as alleged by injured workers.

9.8. The Impact of Changes on Injured Workers' Claims

Staff explained that during the time the new legislation was being developed, the organization was left to operate in the absence of effective leadership; because, the president and directors were busy and preoccupied.

Furthermore, the Claims Branch underwent an operational review; and, an entirely new model was designed for the processing of claims. Duties were changed and reassigned. At the same time, there was a management change followed by a series of acting directors who helped, while continuing their usual duties elsewhere. The acting had little claims knowledge. The preceding was complicated by the introduction of new legislation which became effective prior to the development of the supportive policies and procedures.

To address the policy vacuum, old policies were adapted; while, new ones were rapidly developed without clear direction, strategy, or an implementation plan. Staff had to cope with the changes; as well as, trying to maintain productivity and business as usual. This chaotic operating environment lead to delays in processing, and sometimes, confusion about the benefits and services to injured workers.

The Inquiry became aware of how the changes in legislation, organization and management structure contributed to shaping the public perception of the board. To a great extent, the perceptions arose from a lack of knowledge and understanding of the board, and of compensation issues in general. It is not enough, that the board extol the virtues of low assessments; and that it is the best funded board in the country. Clearly this is the wrong message to send injured workers, as "Don't tell me how good you are, but rather tell me what you can do to help me," is the sentiment of many injured workers. The board must communicate more than the financial health and the technicalities of calculating assessments. It must educate and inform workers and employers about the developing changes in compensation and help prepare them to take advantage of and benefit from any new programs and initiatives. The board must become less insular and more open to all stakeholders. It must communicate with them by offering encouragement and the assurance of professional quality service.

9.9. Advocacy

Section 19 (6), is the only section of the Act that refers to the rights of an agent of a worker, dependent of a deceased worker, or of employers to access claim file information.

More and more injured workers are turning to the use of advocates who act as agents to represent injured workers in their dealings with the board, particularly on appeals. Many of these agents/advocates are lawyers or paralegals. In other cases, lay persons, friends or representatives of lobby groups have been involved. The Inquiry is aware of lay persons who may have had personal success in dealing with the board and who have taken to representing other workers. Although, these agents/advocates have good intentions, they may lack the necessary skills, knowledge and diplomacy to effectively mount and present an appeal. Consequently, they may be conveying inaccurate, misleading, or erroneous information about the legislation and policies or can be inadequately prepared to make presentations at appeal. This can be inhibiting the process and contributing to the burden on the appeal system, creating delays and initiating needless challenges to the system. Injured workers may be

disadvantaged by engaging inexperienced and unskilled persons, who may lack the competence to perform the services they are being asked to perform.

The individuals who act as agents should be aware of the principle of agency law; and, the nature of the relationship that is created when they assume the advocacy role. In addition to advising the worker how to deal with the system, an advocate would be able to represent the worker at hearings when required. It is unfortunate, that any benefits gained by using an agent come with a cost to the worker, who by reason of their financial circumstances, are often least able to afford such "assistance."

Workers believe that a Workers' Advocate independent of the board is justified and needed. The board currently Client Advisor that reports directly to the president (the Client Advisor position was renamed from Workers Advisor following a recent review of the position). The role of the Client Advisor is to provide general information to injured workers and employers concerning the system; providing information and guidance concerning the appeal process; conducting administrative functions relating Internal Review Committee (IRC) and the Appeal Board appeals; advising appellants of appeal dates; and assisting claimants to clearly define appeal issues.

Until very recently, the Client Advisor position performed a strong advocacy role. However, the review recommended the role be re-defined to remove the advocacy role; and, with it the perceived conflict of interest. It was clear that the Client Advisor could not serve in the best interests of workers while at the same time serving in the interests of the board. Injured workers see this change in role of the Worker Advisor as removing their only opportunity to be on an equal in their dealings with the board. Workers allege that the advocacy role was subverted by the board; because, the Advisor was too successful in presenting cases before the appeal panels.

Consultation with stakeholders is currently underway to define a role and identify an appropriate responsibility center that would accommodate a Worker's Advocate. Some stakeholders have proposed that a lawyer from the Department of Justice could be available to advise workers and represent them on appeals. Other stakeholders suggest the newly created

Ombudsman might be the appropriate organization to assume responsibility for the function. While other stakeholders are strongly opposed to the idea of an advocate and suggest that if workers require an advocate, "they should hire their own lawyer."

Although there is a broad base of support for the concept of a Workers' Advocate, there are no clear proposals for where or how the position would be established and who would pay for it. Employers do, and will object strongly if the board pays the full cost of the advocate function; because, they consider that they are paying to challenge a system they support with their assessments. Furthermore, business representatives contend that a Worker Advocate is counter to the basic principals of a no fault compensation system. They believe, if workers are provided with an advocate then employers should also be afforded a similar and equal service.

The Injured Workers Alliance and labour supporters believe that an advocate is essential; that, position must be non-partisan, separate from the board and able to act independently. Moreover, the worker's right to an Advocate must be provided for, and protected by legislation.

Representatives of the business community support neither a Workers' Advisor, nor a Worker's Advocate. In their written presentation, the Chamber of Commerce stated that a public relations role should be intrinsic to the job description of every board employee who has contact with the public. They contend that all employees should have strong interpersonal skills, sound knowledge of the legislation and activities of the board; and therefore, there should be no need for an Workers' Advisor.

They also believe, the current Client Advisor cannot be supported on the basis of the low number of complaints and requests for information. They site data that suggests 124 claimants, representing less than nine per cent of the total claims processed in 1994, actually requested or used the services of the Advisor. Of the 2163 employers registered with the board, however, as few as five to six employers sought the Advisor's assistance. Representatives of business believe the cost of funding this position just to travel around the territory "...with costly dog and pony shows" is unacceptable, and cannot be justified. In fact, the Advisor's public informational role represents a small component of the job. More than 45

per cent of the workload is attributable to administration associated with the appeal process.

In spite of dissenting opinion, there is support for an Advocate a number of other stakeholder groups. Opinions differ, however, about how and where the position should be established; and, who would be responsible for it financially and administratively.

In considering the various points of view on this topic, the Inquiry proposes an option it believes can be acceptable all to stakeholders. The Inquiry suggests that a non-profit organization (for example the Injured Workers Alliance) could engage the required professional services to fulfill the Advocacy role. The board, labour, business and government could co-operatively provide financial support for the position. This would insure the advocacy function is at arms length to the board; and, provide the independent advice that Workers are seeking. The Advocate must have the right and power to investigate claims; and, have full unrestricted access to all files and records pertaining to claims, policies and board decisions. The Advocate's rights should therefore, be included in the Workers' Compensation Act.

Recommendations:

The board, business, labour and government work together to establish and fund a Worker Advocate.

Amend the Workers' Compensation Act to establish the role of a Worker Advocate with investigative power, and unrestricted access to all files, records and Board decisions pertaining to claims

The Worker Advocate be engaged and report to an non-profit agency, such as, a credible non-profit organization.

9.10. Appeals

One of the provisions of compensation is to assure injured workers of a fair system. Fairness is supported through the right of appeal. The appeal process is structured to provide a means of reviewing the decisions of the board in a manner which is open, informal and with minimal delays.

In the Yukon the first level of appeal is the Internal Review Committee (IRC) which is a committee of senior managers who are not involved in the case being reviewed. The IRC reviews adjudication process, ensures the correct application of legislation and policy; and, that all relevant facts of the claim have been considered. Any decision of the IRC can be appealed to the Appeal Panel of the Board, which is the final level of appeal.

Appeal Panels of the Board are comprised of three Board members. The Panel must apply the Act and all relevant regulations, and policies in rendering their decisions. The appeal panels decide each case on the individual merits, and are not bound by previous Board decisions. At least two members of the Appeal Panel must agree on a final decision. The Board will consider all information on file and any further information presented. Injured workers and their employers have the right to be present and to present information to the Board. Decisions rendered by the Appeal Panel cannot be appealed, however, the Board may decide to re-hear any decision if it so decides.

Injured workers said they did not clearly understand how the Appeal process worked. They found the process frustrating, stressful and too long. Panel members said they too find the process frustrating; because, frequently appeal issues are not clearly defined or would change in the midst of the appeal process. Some panel members said that often they are unable to devote enough time to properly prepare for an appeal or subsequently for writing the decisions; because, the process is often labour intensive, time demanding and required more than a "part time" Board can offer. In order to ensure fairness in the appeal process, all panel members must be able to devote the proper amount of time for adequate file review, analysis, and for writing decisions.

The quality of written appeal decisions was raised as an issue by a number of presenters. The Inquiry reviewed a number of past appeal decisions and observed the following points which seem to support the concerns that were raised:

- the format, structure, detail and clarity of the appeal decision varied from decision to decision;
- decisions in which the appellant was identified by name;
- information presented in the appeal decision, such as dates and facts conflicted with the information that appeared in the claimants files; and,
- in cases where more than one issue was being appealed it was not always clear which issues had been upheld or overturned. In some cases the appeal decisions appeared to be ambiguous.

Recommendation:

That the Board should review its current procedures for preparing writing and reviewing appeal decisions; and, adopt a standard set of guidelines for preparing and writing appeal decisions.

9.11. Policies and Procedures

Historically, the practice of developing policy was done in an ad-hoc manner, addressing crisis situations rather than within a framework complimenting planned legislative changes; or, program and operational needs. As a consequence, when legislative changes came into effect there was little or no relevant policy development to support the changes. To fill this vacuum, existing policies were hastily revised or new ones developed. The pace of development ultimately led to policies which were confusing to interpret and difficult to apply consistently. The difficulties

were identified; and, at the urging of management and staff, the Board requested that policy development be slowed to coordinate operational and policy changes more effectively.

Many of the concerns expressed by injured workers during the Inquiry have their roots in issues arising out of the policy development process. The Inquiry heard from many participants who took issue with the way policy was developed and wanted to see more stakeholder participation. In the Inquiry's view, it is important that the board not lose sight of the needs of those whom it serves when developing new policy. It must never satisfy their own interests or overlook the needs and interests of the stakeholder. Therefore, the Inquiry believes that the board's policy agenda must include key stakeholder input. The process must always include representatives from the operating branches who can identify and discuss potential issues, problems, and impacts arising from new policy. Annual meetings, periodic external communication bulletins and limited public consultation offer several means to solicit the input of external stakeholder groups; convey potential policy changes; and, to evaluate the impact of policies. The public consultation process, however, should be used cautiously; and, only when the issues are such that there is an identified need to broaden the scope of stakeholder input.

Recommendations:

The Policy and Planning Directorate must provide external stakeholders as well as operational staff greater opportunity:

- **to bring forward issues or concerns for review;**
- **to identify priority issues that need to be addressed;**
- **to review and determine what will or will not work with the existing or proposed policy;**
- **to review the draft of the policy before final approval is given.**

The current process of policy development is a more formal and structured one that facilitates the appropriate research and analysis of relevant issues. This should result in future policies that will be more easily interpreted and applied. Thus, contributing to more effective and consistent decision making, in both adjudication and appeals.

Furthermore, as claims and client services undergo changes to their operations the board must also develop relevant operational procedures; that complement the policies and the system changes.

Recommendation:

When developing or amending policy, the corresponding operational procedures must also be developed ensuring consistent application and effective implementation of the new policy.

9.12. Client Services - Rehabilitation Programs

The Client Services Branch has two components. One is the management of medical rehabilitation and the other is the management of vocational rehabilitation. The primary objective of both medical and vocational rehabilitation is to return workers to a level of employability; by assisting them to achieve a level of fitness and skills that will allow them to return to a suitable occupation which is reasonably available.

Working in cooperation with the Benefit Entitlement Branch, Client Services:

- ensuring timely delivery of appropriate medical services are available to assist injured workers in their medical recovery; and,
- work with employers to identify and facilitate early return to work programs and rehabilitation options.

The Client Services Branch also arrange for Independent Medical Examinations as required by the board; and, hearing tests on behalf of employers.

As referred to earlier in the report, injured workers are often suspicious of the board's use of private sector clinics or specialists. Client Services explain, that they choose private services because tests and evaluations can done more quickly than in the public health care system. One could argue, that board's costs are probably much higher than they would be in public health care system. However, time is an important factor in diagnosing and prescribing an appropriate treatment program which directly impacts recovery and an earlier return to work. Supporting research suggests that the sooner, and more injured worker is involved in the treatment process, the less likely they are to develop secondary disabilities resulting from prolonged inactivity. The continued use of private health services by the board is in the best interest of the worker. The Inquiry believes the practice should continue.

Recommendation:

The continued use of private health care services by the board is in the best inters of the injured worker. The practice should continue.

9.13. Vocational Rehabilitation

Research in other jurisdictions suggests that Vocational Rehabilitation is the fastest growing area of cost for compensation systems. Rehabilitation experts believe, that vocational rehabilitation programs do little to further the real purpose of compensation; and, are not working to the best advantage of the injured worker. This may appear to be the case in the Yukon; because, the board has no means, at present, to validate the effectiveness of their current rehabilitation programs. This is an area of weakness the Inquiry believes must be addressed.

The rehabilitation board policy defines vocational rehabilitation to mean the reintegration of a worker back into the work force. This is usually achieved

through a series of assessments; which, determines individual aptitude, physical ability, and skills. The goal is to return the worker, as close as possible, to their pre-injury level of employability. Once it is determined, that the worker is unable to return to their former employment, find a new or suitable alternate employment, or benefit from on the job training; they become eligible for re-education or self-employment assistance. For some severely injured workers job re-training is the best solution only when the worker is motivated, his interests and abilities fit the training program; and, when there is a reasonable expectation that the worker will be employed at the end. For most, however, vocational rehabilitation is unlikely to work effectively.

Together, with the factors of an injured worker's educational level, skills, age; and, the realistic prospects for employment opportunities; it is questionable whether for re-training is a truly viable component of the board's rehabilitation program. In the Yukon context of limited employment opportunities and a low number of claims, it may well be more cost effective to deem a worker for a theoretical occupation; than, to expend resources to provide a vocational solution; because, in the end, the worker may be deemed anyway. This appears to be what the board is doing - as some injured workers suggest.

All too often, vocational rehabilitation fails to provide workers with any long term employment opportunities. In many cases, the inquiry noted that repetitive evaluations and retraining programs provided little positive outcome; suggesting that the program has been the victim of ineffective planning; and, has been lacking clearly defined program guidelines.

The success of any vocational rehabilitation depends on a good assessment and evaluation of a workers abilities, and individual situation. The board must do this, for the assessment will allow the board to determine a realistic goal; and, plan for the services and support that will be required for its achievement. Furthermore, before embarking on what may become a costly process of re-training, the board also must answer the crucial question; whether in the particular case. there is a reasonable chance of a successful outcome. If not, then other alternatives to re-training must be considered. The board is obligated to offer workers a speedy recovery and return to work at a justifiable cost; and, therefore, it should focus on effective and alternative means of returning workers to

employability. The Inquiry is of the opinion, vocational rehabilitation programs should only be offered to injured workers when they represent a reasonable alternative, that is both cost effective and realistic.

There are any number of examples of injured workers who have been provided with several opportunities for re-training; and, they were either unable to complete the program, because the courses were beyond their ability, or they quit voluntarily. Following the completion of the assessment; and, after determining the cost effectiveness of a potential rehabilitation program; the board should prepare a terms of reference which clearly outlines the eventual re-employment goal, strategies, and the responsibilities of the injured worker and the board. If the injured worker should quit (for other than legitimate reasons) before completing the program, the board should not be committed to offer further re-training.

The board must also find alternatives to re-training, such as, encouraging employers to actively participate in the program through cooperative work-sharing with other employers. However, the effectiveness of a return to work or a modified return to work program which involves employers, depends on a number of factors beyond the control and influence of the board. For the employer, there must be a direct and recognizable benefit. The duration and the expense of taking on a worker at less than full productivity, is both burdensome and impractical from a business perspective. This is particularly relevant to the Yukon experience, where businesses are generally smaller; and, few can absorb the costs. The board may consider incentives to encourage employers to participate in programs; such as, cooperative work sharing with other employers; or, by tying the return to work to their experience account. Nevertheless, the board and employers have an obligation to work together; and, share the responsibility for ensuring that an early return to work is achieved.

Clearly, employers can benefit from the return of skilled and talented workers to the workforce. As well as, contributing to the re-employment of injured workers; they are ensuring shorter recovery periods, reducing immediate and future claim costs; and, controlling assessments.

Offering vocational rehabilitation and training with no reasonable expectation of a definitive result, other than a life of dependency on compensation, does not constitute a successful resolution of an injured

worker's predicament. By strengthening the components of vocational rehabilitation that work well and eliminating those that are ineffective, the board can hope to control costs; and, deliver more substantial and meaningful benefits to injured workers.

The Inquiry also noted a number of claimants sought additional vocational rehabilitation benefits; even though, they had completed a program; and, were unsuccessful at finding appropriate work; dropped out of a program; or received funding for job creation schemes that were unsuccessful. Still others, either, had not completed their retraining program or were unable to achieve the academic requirements of the courses, in which they had enrolled. Repeating rehabilitation efforts, over and over again, is not in the best interest of the worker; it only promotes further dependency on the compensation system; and, is an costly for the board. The board must place limits on the number of times that vocational rehabilitation is tried as an option before alternative solutions are sought.

Recommendations:

Every rehabilitation initiative must be supported by a well documented plan, that is realistic and achievable, and must include a cost benefit analysis.

Adequate client follow-up must be done to evaluate the effectiveness of the rehabilitation plan.

Vocational rehabilitation should only be offered to injured workers when it represents a reasonable alternative; is supported by a well documented plan; that, is realistic, achievable, and includes a cost benefit analysis.

Encourage employers to support and participate in rehabilitation programs, through means such as cooperative work sharing with other employers.

9.14. Early Intervention and Care Management

Early Intervention is by definition: *an active process deployed for the express purpose of facilitating recovery from a work related injury and subsequent resumption of the injured capacity to function in normal life activities, which includes return to work in the most appropriate, coordinated timely and safe manner.*

Typically, past attempts at care management have, in large part been ineffective for a number of reasons. The process has been fragmented; and, cooperation between claims management and Client Services has not been effectively coordinated. The Client Services functions have, until recently, been subjected to ineffective: health care management, rehabilitation, functional and vocational assessment, vocational planning and retraining. The efforts have seen repeated failures, mainly because they have been fraught with little or no goal setting; ineffective and incomplete strategic and operational planning; no performance measurement or program evaluation; and, a failure to offer consistent, effective and appropriate alternatives to problematic and chronic injury cases. All of which, has unquestionably shown up in one form or other, as delays in appropriate diagnosis and treatment; protracted waiting times; programs that are ambiguous and unmanageable; inconsistent procedures; ineffective communication and sharing of information resulting in misinformation and a breakdown in client trust; and, in the end, a delayed return or no return to work.

The board must exercise greater control over each component of the recovery process. It must do so with an understanding of how the system components affect the rehabilitation of the injured worker. The participants, who include injured workers, employers and support services must share a common commitment to meeting the injured workers needs first. As one manager said, there are many conflicting self interests that so often stand in the way of placing injured workers' interests above all the rest; and, where organizational or personal interests become competitive rather than cooperative. For any early intervention program to be effective. the board, employers, service providers and including the injured worker, must be committed to the care management plan.

Many of the issues identified by the Inquiry have already been acknowledged by the board management, who are undertaking steps to identify and implement the necessary and desired changes. How quickly, and when injured workers will see the effects of these changes, is uncertain.

The board is currently developing a rudimentary intervention program that will bring aspects of claims management and medical management together, to form the basis of an integrated early intervention program. The concept of early intervention is to shorten the period between the injury occurrence and the commencement of medical rehabilitation; thus, lowering the risk that an injured worker will become chronically disabled. Typically, injured workers who become chronically disabled account for approximately 80 - 90 per cent of total claims costs. Particularly important to the success of the program, is to ensure there is an effective program of follow-up and evaluation.

Physicians and client service staff identified the need to address the "whole person" in the treatment of the injury; and, to pay equal attention to psychosocial factors. By employing treatment methods such as stress management and chronic pain management they can help the injured worker to adjust and cope with the disability and pain. Thus, the injured worker will not have to rely on passive treatment or medication. Injured workers must be kept informed throughout the process and offered information about:

- limits of compensation - what will or will not be covered;
- roles and responsibilities and obligations of both the board and the injured worker;
- role of their physician and other medical professionals in their recovery;
- goals and objectives of rehabilitation are and the expectations for their participation in their medical and vocational rehabilitation;
- what employability means and how it is a part of their recovery process;

- what board services and community support is available; and,
- the avenues and process for dispute resolution.

Recommendation:

That all Injured workers whose claims have been identified as having the potential to become chronic or problematic should be required to attend an orientation program designed to address issues and concerns relating to the expectations for recovery and rehabilitation.

10. OCCUPATIONAL HEALTH AND SAFETY

The Occupational Health and Safety Branch (OH&S) was amalgamated with the Workers Compensation Board with the promulgation of the new Workers' Compensation Act. The branch operates under the Occupational Health and Safety Act, which is distinct from the Workers' Compensation Act.

OH&S has benefited from the integration because the board provides more stable funding than the department of Justice, with its other funding priorities. The disadvantage of integration is that OH&S is a regulatory body operating within a service organization. OHS may find it difficult to maintain credibility with employers, upon whom they must enforce safety regulations, while at the same time provide information, training and counseling on compensation issues.

On a day to day basis, OH&S depends on timely and accurate information from the claims information system; to monitor employer accident experience, and to identify and respond effectively to high risk situations.

Claims information is needed for assessment and evaluation of inspections; employer compliance, and; allowing the identification of high risk employers and hazards. It will facilitate the development of effective monitoring and risk reduction strategies; which, are aimed at decreasing the number, severity of injuries and overall costs of accidents.

The inquiry believes, that if employers truly want to reduce the costs of claims, then greater emphasis must be placed on the front end; meaning, more cost effective accident prevention, through safety, safety audits and enforcement. Furthermore, honest modified work programs can support earlier return to work and help prevent the problems associated with prolonged lay-off.

Recommendations:

To reduce role, conflict the educational and informational role must be separated from the regulatory and enforcement role.

Management information systems initiatives undertaken by the board must incorporate the information needs OH&S; thereby, enabling the branch to monitor and evaluate its effectiveness.

Encourage accident prevention through expanding education and enforcement of health and safety by assisting employers to design and implement safety programs and, audit safety performance.

Safety inspections were a problem identified by OH&S staff, which they believed, are a "numbers game" by volume, rather than an effective preventative program measured by a quantifiable result; such as, decreased accidents or decreased costs.

Other problems identified were internal and performance or management related, and included:

- not feeling respected for their professionalism and technical ability;
- not treated as competent or trustworthy;
- authority undermined causing diminished credibility;
- double standard to judge staff performance versus management;
- over controlled with little opportunity to exercise discretion over schedules and process, and,
- individual performance are considered neither meaningful nor attainable.

Recommendations:

The OH&S Branch review current performance standards with its staff, evaluate their validity; and, develop where necessary, new more measurable and meaningful performance standards; that will measure operational efficiency and effectiveness.

Management must understand and accept the concerns of staff; and, revitalize the level of respect and trust for professional and technical competence, skills, ability and judgment of the subordinate staff.

Safety officers and field personnel must be allowed to work to their full potential. They must be permitted to perform duties and exercise judgment to the extent of their legislated responsibilities.

11. MANAGEMENT AND ADMINISTRATION

11.1. Reporting

Part 2, Sections 8 through 10 and S.11 of the Worker's Compensation Act outlines the requirements of workers, employers and physicians for reporting a work related injury. The reporting requirement for each is different.

A worker must bring a work related disability to the attention of an employer within a reasonable time; but, are only obligated to file a claim with the board within twelve months from the date a disability arose. Employers are required to notify the Board within three days of receiving information concerning a possible work related injury or disability. The attending physician must forward a report to the board within two days of attending to a worker.

Presently, accident reports and documents are held for 30 days. If no worker's report is received, no claim is established and all documents are returned to the originators. Medical reporting fees are paid but treatment fees are not. This process does not provide for the retention of originating documents in the event of future disability nor does it recognize the legitimate cost of a work related injury.

From January to March, 1996, 236 accidents were reported. Of these, 148 workers failed to claim; and so, 148 case documents that were sent to the board were returned to employers and treating doctors.

The Inquiry believes that legitimate medical costs of work related injuries must be borne by the compensation system, rather than having doctors submit their accounts for work related treatment to the public health care system.

Recommendations:

Originating documents, received by the board, should be retained in a numbered file for future reference as necessary. The absence of a worker's report should not prompt the return of the documents.

The true medical expenses of work related injuries should be paid by the compensation system; and, should not become a burden to the public health care system.

11.2. Records Management

The Inquiry randomly selected a number of claim files to observe the general condition of records. The Inquiry observed, for the most part, that effective records management practices are lacking. Documents are haphazardly filed; and, not in chronological order; medical reports are intermingled with notes to file; and, with general correspondence.

Medical records and reports should be consolidated into a separate volume; and, filed in chronological order to ensure ease of review and reading. The correspondence should also be maintained in a separate volume, as should all the financial payment records.

Recommendation:

Claim files be split into three volumes, one for adjudication decisions, one for medical reports and data, and one for correspondence.

11.3. Workers' Compensation Board - Board of Governors

The YWCH&SB Board is a seven member board of governors appointed by the Executive Council, on the recommendation of the Minister. The Board is comprised of two members, representing workers, two representing employers, one member who acts as a neutral chair and one as an alternate chair. The president is a non voting member of the Board. A principle duty of the Board members, excluding the president, is to act as the final level of appeal for decisions in disputes.

Stakeholders view the selection and appointment process of the Board and the Chair with skepticism. Some, are convinced that the Chair can not be neutral because it is appointed by the Minister; and therefore, they believe that it is in this way the Minister exerts his influence over the Board. Many stakeholders perceive that the interests of injured workers are being subjugated to the financial interests of employers (to ensure the assessment rates are maintained the lowest in the country) and to the government (to ensure that government policy is followed and supported).

Stakeholders believe that the appointments of Board members should be reviewed. It is felt that terms should overlap to ensure experienced members are on the Board at all times. In the past twelve months the Board has changed dramatically. Many new members, have little or no knowledge and experience serving as board members and little no knowledge of workers' compensation, the Act or of the policies, systems or of the appeal process. It is critical to have an overlap of appointments, particularly the with the Chair and the alternate Chair, to ensure their experience and knowledge are carried over from one Board to the next.

Board members must render decisions that have profound affects on the lives of injures workers and their families. Without sufficient training, experience and preparation time to allow for a comprehensive review of claim files, the results of the appeal process may be questionable. The process may suffer and for the injured worker, that is not fair.

The field of compensation is extremely complex and dynamic. It demands that members must dedicate a considerable amount of time to train and ,

develop their knowledge and understanding of compensation so they can render fair and impartial judgment on appeals.

Board members discovered that the labour intensity of their duties create a time demand that exceeds their part-time status. The Inquiry is aware that although Board members receive a stipend, it is inadequate to encourage a greater time commitment at the expense of time lost from usual employment.

Recommendations:

Therefore, the Inquiry recommends that the Chair and alternate Chair be appointed for four year terms with the alternate Chair serving two years in each position.

At least one experienced Board member must serve on appeal panels.

The re-numeration paid to Board members should be commensurate with the level of responsibility; and, time required to properly execute their duties.

11.4. Board Confidentiality and Conflict of Interest

The Board does not have guidelines or a set of principles governing conflict of interest and conduct. Section 93 of the Act clearly sets out the responsibility of the Board to define and prepare these guidelines. In reviewing the Minutes of Board meetings, the partiality respecting constituent interests that was a concern, as was, expressing opinions in public on matters before the Board; and, discussing issues with board employees which may be confidential.

The Board must ensure that members act responsibly and must establish guidelines for appropriate conduct that are binding on Board members and all board staff.

11.5. Powers of the Board

The Board has a very broad jurisdiction over many matters under the Act. Of all the powers vested in the Board, the one the Inquiry found most troubling was the power given the Board under Section 96 (5). This section enables the Board ... *to inquire into and hear any matter that it has dealt with previously and has the power to rescind or change any decision or order previously made by it.* Some injured workers are concerned that this section of the Act could be used in a punitive manner.

11.6. Employee Concerns

The Inquiry spoke with all the present and several past employees. Many times information appeared contradictory, for example, some former employees alleged certain managers were autocratic, abusive, intimidating and threatening; while, many present staff described management as being supportive, considerate and genuine. Furthermore, some present staff believe certain employees were malcontents, with a negative attitude toward management; while others, were dissatisfied at being passed over for promotion or didn't meet performance expectations. Repeatedly, it was said that certain managers deliberately challenged the president's authority in an effort to undermine him.

Several staff said the president provided a focus - a strong sense of direction - while making managers more accountable. Former staff did not contradict this view but added that the president's style was domineering, controlling, insensitive, without mutual trust and lacking respect for subordinates. Some managers, past and present, said they experienced intimidation and felt threatened, while at the same time, other managers were neutral.

In addressing the present situation, staff reported many change relating to concerns such as, adjusting to new jobs, confusion over performance expectations, fear of job loss through abolishment, or possible downsizing

and insufficient information to comprehend what the final outcome might be.

Notwithstanding, earlier supportive comments regarding management, there is still concern for the style of more than one manager. Feelings and ridicule, degradation and withholding of career opportunities were expressed as concerns by a number of the board staff.

The Inquiry believes, the board will experience increased difficulty in areas of productivity and service while its staff is distracted by feelings of insecurity.

Recommendations:

The board must decide on the management style it considers appropriate; and, the management principles it supports. The principles should be documented; and, made available to staff.

The board must continue to monitor and evaluate the impact of the changes on staff; and, moderate or adjust them accordingly.

11.7. Contract Employees

The board has been criticized by the unions for its use of contract employees; and, the manner in which employment opportunities are filled.

The board explains that because workers' compensation is unique and specialized, the local market cannot match the need for experienced personnel. Contract personnel fill the temporary needs, often pending recruitment; and, always with the intent to maintain service levels especially, with regard to injured workers.

12. ACCOUNTABILITY AND INDEPENDENCE

The issues of independence, accountability and control of the board may well be the root of conflict concerning issues of perceived government interference with board operations.

The government has attempted to determine the independence of the Workers' Compensation Board in a number of different ways:

- by reference to the manner in which government ministers have referred to the Workers' Compensation Board in debates in the legislature;
- the manner in which the Workers' Compensation Board is dealt with in the Financial Administration Act (FAA). The Workers' Compensation Act refers to the board's responsibilities for prudent fiscal management and investment in accordance with the FAA; and, that certain Management Board directives can be prescribed by the Executive Council; however, only after consultation with the stakeholders and the board.
- the specific powers and authority granted the board as outlined in the Workers' Compensation Act;
- by the structure of the reporting relationship of the Workers' Compensation Board to the minister and the Executive Council; and
- the method of appointment and the process of dismissal of the Board and officials of the Workers' Compensation Board.

Although, many of the preceding references still maintain a certain degree of government involvement with respect to how the board operates within the framework of the legislation. Independence is how the Workers' Compensation Board behaves, as an organization, not simply the technical or legal definitions.

The past president may have embarked upon a deliberate course to establish a stronger identity for the Workers' Compensation Board; one that would be more clearly recognized within government; and, publicly as having separate functions and roles from government. By not making the board a visible part of the government it would establish a clearer arms length relationship. This desire to strengthen the independence of the board almost certainly brought the president and the minister into conflict.

The Board reports to the minister responsible and the president reports to the Board. Thus, the element of conflict for the president is one of balancing the requirement to be seen as independent of ministerial control; yet, accountable to the minister. The president is accountable to the board for the day to day administration of the board; and, as a public servant, the deputy head is also accountable to the minister. Board members who are also appointed by the Commissioner in Executive in Council are accountable through the minister to the Executive.

Accountability refers to the requirement to give account; and, control refers to the ability or authority to give direction and instruction. The assumption is that accountability to the minister will inevitably lead to more control; and, undesirable political interference over the administration and operations of the board. Thus, it is easily understood how the president might have perceived the minister's request for accountability (information) as leading to more control, when in fact, this was not the minister's intent. Providing the minister with information (such as briefing notes or status report concerning the issue of a claimants complaint or inquiry) and creating an awareness of the changing issues with which the board must respond, is seen as the level of accountability that was, and is appropriate.

12.1. Management Information System

Technical problems with the management information systems limit management's ability to readily access information without considerable manipulation. The system is not structured in a way that can easily provide the kind of information needed for effective organizational and operational performance evaluation. Performance data (not the data in financial

statements) presented in the annual reports, does not offer any indication of how well the organization is performing. As an example, most reports indicate the number and types of claims processed, the parts of the body affected by accidents; or, the number of employers registered, and so on. This tells one nothing about performance, about the quality of service or client satisfaction. It only serves to demonstrate that the board is doing something. The organization must have relevant information of a kind that will enable it to monitor its effectiveness; and, to identify areas where problems may be developing so adjustments can be made to satisfactorily achieve goals and objectives. The information must be meaningful for management as well as to provide accountability to stakeholders.

Recommendation:

Redesign the current management information system to provide more relevant and meaningful performance indicators and include this information in the annual reports to enhance accountability to stakeholders.

12.2. Management Board Directives.

The issue of whether the Board must abide by Management Board Directives has created conflict that has brought the government and the board into conflict.

Section 46 (5) (b) of the Workers' Compensation Act states: A management Board Directive shall not apply to the board unless the Commissioner in Council prescribes that it shall apply.

However Section 46 (5)(b) states: Before the Commissioner in Executive Council makes a regulation under paragraph (5)(b), the Minister shall consult with representatives employers and workers and the board concerning whether a Management Board Directive should be made applicable to the Board.

Although the government set out establish a board *independent of government* , presumably the Act intended to provide a means to protect the interests of employers and employees; and, to ensure sound financial control. Furthermore, the government needs to ensure the Board and management fulfill their obligations and responsibilities as outlined in the Workers' Compensation Act, the Financial Administration Act and Management Board Directives.

If Management Board directives do not apply to the Board; and; if there are no set policies and procedural directives in a board financial Administration Manual, then the board president can issue directives under Section 100 of the Workers' Compensation Act. This would appear to concentrate the power and authority of the president and reduce the provision of control.

Recommendations:

The Board must ensure that appropriate directives are in place that provide clearly defined guidelines for the financial and administrative operations of the board in accordance with the Financial Administration Act and the Workers Compensation Act.

The board may adopt Yukon Government Management Board Directives or prepare directives of their own.

Section 100 of the Workers' Compensation Act be amended to require that all directives are approved by the Board of Governors.

13. CONCLUSION

The Inquiry has attempted to address as many stakeholder issues, concerns and opinions about the Yukon Workers' Compensation Health and Safety Board; and, of the compensation system. The Inquiry experienced pressure from many stakeholders who wanted to influence the outcome of the report, to reflect the issues and concerns they perceived were appropriate. One can only trust, that the Inquiry has been objective and fair in its investigation, as possible; and, of the final presentation of ideas and issues.

This report has attempted to provide more than explanations of the issues and concerns articulated by the people who contributed to the Inquiry. Moreover, it can provide an understanding of some very complex issues which confront the Yukon Workers Compensations system. The major theme throughout the report is that the Board has undergone significant changes that have had a profound impact on the organization, its services and public perception.

The findings reflect a need for the board to pay more attention to the concept of service excellence. It must be more understanding of the individual needs of injured workers and treat them with greater respect and dignity which are the essential elements to rebuilding faith and trust in the board and the system. The board must recognize the distinctiveness of the operating environment; and, develop innovative and unique solutions for providing compensation benefits and services to its constituents.

Any criticism of Workers' Compensation, or the legislation, is meant to be constructive. The Inquiry recognizes and understands the difficulties faced by the board in administering a very complex system. It gives credit, and holds a great deal of respect and admiration for the people who have dedicated their careers to serving the cause of injured workers, and who continue to work for the betterment of the system, despite adversity.

For years the system had remained static without modification. The Inquiry has raised so many issues and concerns that could not be included in this report. The forum of the Inquiry has given injured workers an opportunity to express their views and frustrations with the system. The Inquiry was

overwhelmed with the sheer volume of information; and, the number of issues presented. Under the circumstances; and, in the time available, the Inquiry did the best it could.

Although, legislative review was undertaken at the time the new Act was being revised, its focus was on the legislative changes that needed to be made; and, not specifically on the issues of process or structure of the board.

Since the Yukon workers' compensation system will be affected by changes in society; and, economic and social structure, and programs; that the board must remain responsive to the issues that will affect its future. Therefore, the Inquiry believes a regular and formal process of reviewing the Yukon Workers' Compensation Board must be established.

The review process should be entrenched in the Act. Future reviews should be made up of a representative cross section of stakeholders and the board, ensuring balance and objectivity. Appropriate resources must be afforded the review body to ensure a thorough and comprehensive review can be undertaken. The review body must not be constrained by the Workers' Compensation Act; and, therefore, must be granted full and unobstructed access to all information pertaining to the compensation system. Any move to conduct a comprehensive review at this time would not be appropriate. The organization needs time (two or three years) to develop and implement the structural and system changes currently underway, before any evaluation is done. The Inquiry believes, that not only will the review process be a catharsis for the organization; but, will also make for a more open and accountable board.

Conducting a regular review is only part of the process. The value of the review can only be purposeful if the ideas and suggestions that arise from the process are accepted, acted upon and monitored. To ensure the process remains a viable and productive one and the outcome meaningful it must be followed up by some form of systematic audit or evaluation. The Inquiry has not attempted to define the structure or the mechanism to carry out the process but leaves the proposal open for the Board and stakeholders to consider and negotiate how best they can achieve it.

Recommendation:

The Workers' Compensation Act be amended that will require the Workers' Compensation Board to conduct a periodic comprehensive review of the system. The Inquiry further recommends that a review be conducted every five years.

A review committee comprised of representatives of stakeholder groups; and, the board be established with powers to access all information pertaining to the compensation system.

Overall, there is a need for better and more open communication and a greater understanding by all stakeholders of the compensation issues in general; and, the role the board plays in the day-to-day lives of many workers and employers. A stronger emphasis must be placed on the right of workers to have the best compensation system possible - to receive the right benefits in a fair and just manner. The board must remember, that Workers' Compensation is a monopoly; that its clients can't go elsewhere and they have no legal recourse. This imposes a serious responsibility on the board to remain vigilant in avoiding the temptation to become self-serving.

Despite all the criticism, the Inquiry believes the board is committed to providing the best possible compensation system; and, to its ongoing improvement. If the board is to continue adapting and changing compensation and administration to meet needs of Yukon workers and employers, it must do so on the basis of strength in knowledge and information that is relevant to the needs of the environment in which it serves.

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