

# Do No Harm

Recommendations to support the continued health of  
Newfoundland & Labrador's Worker's Compensation System

*Submission to the 2020 Statutory Review*

10/6/20

## ACKNOWLEDGEMENTS

Pulling together a submission to the Statutory Review on our Workers' Compensation system that reflects the varied and sometimes competing interests of all employers in the province requires a tremendous effort. Many bright and dedicated individuals on our WorkplaceNL Committee gave time and expertise over the past number of months to develop the recommendations contained in this document.

Also, the Board of Directors of the NL Employers' Council spent many hours debating the various recommendations that came forward from that committee, weighing the pros and cons of each, and finely settling on suggestions that they believed are achievable and responsible.

The Employers' Council staff also contributed significantly to this report and deserve special mention for their hard work and dedication.

All those involved in creating the document believed strongly in this project. Their commitment is reflected in the quality of this submission. Our province's employer community owes these individuals a debt of gratitude for their efforts to make the Workers' Compensation system better for all.

**Richard Alexander**



*Executive Director,  
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## INTRODUCTION

### THE CURRENT STATE (2020) OF WORKERS' COMPENSATION IN NEWFOUNDLAND AND LABRADOR

#### Four realities of Newfoundland and Labrador's workers' compensation system

**Fact #1 -- In approximately three decades, the injury rate in Newfoundland and Labrador has dropped 314%**

The lost time incident rate in Newfoundland and Labrador (NL) in 1990 was 5.03 per 100 workers. In 2020, thanks to the millions invested by employers into Health and Safety together with the initiatives and commitment of WorkplaceNL, unions, business associations, employees, employers and the government's Occupational Health & Safety (OH&S) enforcement division, that rate was reduced to an astounding 1.6. A 314% drop in injuries. NL is today one of the safest provinces to work in Canada. Hundreds of thousands of workers in this province have gone home alive and without injury thanks to our safety efforts. It is a significant achievement for all involved. Efforts to move our injury rate even lower will require a political will to tackle industries that politicians have historically been unwilling to address. Workers in these industries deserve better.

Newfoundland and Labrador, is today, among the safest provinces to work in Canada.

**Fact #2 -- Injured worker benefits in our province are as good as or better than the rest of Canada**

There is a misconception among some that entitlements under our workers' compensation system are well below those provided in other jurisdictions, but this is not accurate. There are many different entitlements under our Workers' Compensation System, and all must be examined to fully understand how our injured worker benefits compare to other jurisdictions. As an example, NL provides coverage for 98% of the workforce. Ninety-eight percent is not only the best in Atlantic Canada; it is the best in the country. More workers are covered in our province than any other – a significant benefit that carries higher levels of cost. As an example, Nova Scotia who only covers 73% of their workforce. When the total benefits package mix is compared across jurisdictions, it shows that benefits are as good or better than the rest of the country.

#### Injured worker benefits are the best in Atlantic Canada (2020)

Province	% of earnings received	Maximum Earnings	Workforce Covered	Waiting period for benefits?
NL	85% net	\$66,980	98%	No
NB	85% loss of earnings	\$66,200	91%	Yes
NS	26 weeks 75% then 85%	\$62,000	73%	Yes
PEI	85% net	\$55,300	98%	Yes

The current pressures on our workers' compensation system from COVID-19, an economy in recession and increasing claims costs stemming from recent increases in benefits means we must be diligent and work hard to protect and maintain benefit levels provided to injured workers in our province.

**Fact #3 -- For two decades, employer workers' compensation insurance premiums were the highest in Canada**

At the time of the last statutory review, employers had been paying the highest workers' compensation employer insurance premiums of any province in Canada for two decades. The gap between what employers paid in this province compared to other provinces had been staggering. Between 2000 and 2010, NL premiums were 33% to 89% higher than the Canadian average. A [2012 study](#) conducted by the University of Toronto professor Dr. Morley Gunderson concluded these high premiums had a significant negative impact on jobs, wages, our economy, and communities.

The injury fund's recent financial health enabled the WorkplaceNL Board to lower our province's premiums gradually. The reduction in rates was made in line with the mutually agreed upon funding policy IF-01. The current employer premium is much better than it was but is now coming under pressure due to recent increases in worker benefits, the COVID-19 pandemic, and an economy in recession. WorkplaceNL will likely have to increase rates soon. As Dr. Gunderson evidenced, increasing employer premiums will reduce jobs, wages, and our economy in an already difficult economic time. This is to no one's benefit.

**Fact #4 – For the first time in two decades, the system is bringing in enough revenue to pay for the benefits that have already been promised.**

Over the last two decades, the funded position had been as low as 66%, but today, the system is running as it should. Newfoundland and Labrador's injury fund, as of June 30<sup>th</sup>, 2020, is expected to be 115% funded -- a percentage in line with WorkplaceNL's funding policy IF-01. That is a tremendous accomplishment and was mainly achieved by decades of excessively high premiums and improvements in occupational health and safety. Being funded today means that the injury fund has enough revenue to cover the cost of all claims in the system for the first time in decades. Today's funded position must be protected. Going backward benefits no one.

## SECTION A – THE NLEC’S FUNDAMENTAL RECOMMENDATIONS

### HOW STATUTORY REVIEW WORKS

Section 126 (2) of the Workers' Compensation Act provides the Provincial Government with authority to review the workers' compensation system every five years. This obligation has been in place since the 1950s.

The mandate of the review committee is to "...review, consider, report and make recommendation to the Lieutenant-Governor in Council upon matters respecting this Act and the regulations and the administration of each as the committee considers appropriate and upon other matters which the Lieutenant-Governor in Council or the minister may refer to the committee".

The last five reviews occurred in 1990, 1996, 2000, 2005 and 2013. The significant implications and issues facing the system at the time of those reviews are as follows:

- In 1990 two comprehensive actuarial studies indicated that workers' compensation costs were escalating so dramatically that the system was in danger of collapsing if serious measures were not taken.
- In 1991 the statutory Review Committee on Workers' Compensation recommended reductions to injured worker benefits to bring the system's costs under control.
- In 1998 following modest improvements in the financial position, before WorkplaceNL reached its financial targets -- the government improved worker benefits. The system's costs increased rapidly, and in 2000 WorkplaceNL's actuaries determined that the system was headed to collapse if something drastic was not done.
- In 2000, another statutory review was held. In reaction to the Commission's precarious financial position, that review added early and safe return to work, re-employment obligation provisions, the most aggressive occupational health and safety requirements in any province, and a doubling of the experience rating surcharge for employers. It resulted in the most expensive system in the country.
- Before the impact of these changes had been realized, the 2005 Statutory Review made another 44 recommendations. Most recommendations were designed to increase costs and erode the gains that had been made since 2000. Some recommendations would work against the objectives of others. Fortunately, government rejected all of the costliest recommendations.
- The 2013 Statutory Review on Workers' Compensation was called when employers in the province paid the highest workers' compensation premiums in Canada for 20 years -- a full 54% higher than the Canadian average. But things were improving financially in the system. Many of the recommendations arising out of that review were on initiatives already underway due to WorkplaceNL's strategic planning process. It was, essentially, a paper exercise. There were significant delays in government accepting or rejecting the recommendations. Delays were understandable as many of the recommendations were redundant and may have interfered with WorkplaceNL's own strategic plan - a plan developed with stakeholder consultation and oversight.

## Rationale for Change

There are three goals to a healthy and functioning workers' compensation system.

1. Injured worker benefits are comparable to other provinces.
2. Employer insurance premiums are comparable to other provinces.
3. A fully funded injury fund.

In 2020, in our province, stakeholders have achieved all three of these goals for the first time in decades. These goals have been achieved despite, not because of, the statutory review process.

Statutory Reviews have historically opened the door to political interference that has caused wild swings in both benefit levels and costs of the system. It has a long history of interfering in the process and making it more challenging to balance stakeholders' requirements. Leadership at WorkplaceNL has, in many cases, worked to mitigate the potential impact of statutory reviews on the system.

As an example, in 2010, leadership within WorkplaceNL was so concerned about the potential of the statutory review process sidetracking or eroding stakeholders' gains that they attempted to put some control over the next scheduled review. The Employers' Council, NL Federation of Labour (NLFL) and WorkplaceNL agreed to a series of guidelines designed to safeguard against political interference and damaging recommendations. It included such things as requiring the Statutory Review Committee members to have expertise in Workers' Compensation. The committee would comprise a representative from the WorkplaceNL Board, the Employers' Council and NLFL and a narrowing of the review scope.

Since the 1950s, when the statutory review requirement was written into the Act, WorkplaceNL has adopted a modern governance model that involves and engages stakeholders continuously and at all levels in the organization, not just every five years. As recently as October 1st, the entire board of WorkplaceNL, senior management, the Employers' Council, NLFL met to review the success of the three-year work plan and 2019 annual report of WorkplaceNL.

The Employers' Council and NLFL both can appoint a representative to the WorkplaceNL board.

We have collectively consulted and agreed on some of the most successful policies and initiatives in WorkplaceNL's history. Policies such as IF-01 Long Term Financial Strategy Injury Fund and Reserves (better known as "the funding policy"). This policy is designed to ensure the system has funds to pay for increases in benefits. We have also successfully partnered on initiatives such as the formation of safety sector associations that prevent injuries through industry-wide partnerships.

A modern insurance system run by a board of directors with a modern governance structure and three-year strategic plans, updated and reported annually with high stakeholder engagement levels, does not need an external review every five years to improve the system. Past reviews have, at best, made recommendations already part of the strategic plan at WorkplaceNL or, at worst, made recommendations that have caused wild swings in benefits and costs that have threatened the system.

Four jurisdictions in Canada do not see the need for a statutory review process and have no legislation requirements. Two others have a legislative authority to conduct a review if necessary, but no fixed requirement is outlined in statute. One other jurisdiction has a requirement to conduct a one-time review. Manitoba is the only other jurisdiction with a regular review in legislation, and it has a time frame of ten years between reviews. The government will always retain its ability to call an external review of the workers' compensation system but mandating that a review every five years in legislation is wasteful and dangerous.

#### **Recommendation A.1**

*The legislated requirement for a statutory review of our workers' compensation system be eliminated.*

### **THE 2012 LEGAL REVIEW OF THE WORKPLACE HEALTH, SAFETY AND COMPENSATION ACT**

As part of the 2012 Statutory Review Process, an independent review of the Act was conducted. A report compiled by technical legal advisors Laurel Courtenay (legal counsel at WorksafeBC) and Douglas R. Mah (legal counsel at WCB -Alberta) was submitted to the 2012 Statutory Review Committee.

The purpose of the review was to recommend ways to modernize the Act based on a jurisdictional and best practice review of workers' compensation legislation elsewhere in Canada.

The 120-page report highlighted an Act desperately in need of updating. The recommendations included themes such as ensuring the Act's language is gender-neutral and removing possible instances of gender-based discrimination within the legislation to modernizing the idea of occupational disease. These recommendations to modernize the Act were never implemented.

Workers' and employers' deserve a modern Act that reflects workers' compensation legislation's best practices.

#### **Recommendation A.2**

*The Legal Review of the Workplace Health, Safety and Compensation Act RSNL 1990 Chapter W-11, submitted on June 22nd, 2012 to the 2012 Statutory Review, be implemented.*

### **THE SYSTEM NEEDS TIME**

In the last three years, there have been six increases in worker benefits in our workers' compensation system.

1. The income replacement rate increased from 80% to 85%,
2. The maximum compensation ceiling increased to \$66,980,
3. PTSD presumptive legislation was extended to all workers in our province,
4. Burial expenses increased from \$5,000 to \$10,000,
5. Changes in pension preplacement benefits were made to include all workers, and
6. Presumptive cancer coverage for firefighters was implemented.

Senior management at WorkplaceNL has reported that the full costs of these recent increases in benefits are still largely unknown. At the recent stakeholder forum on October 1st, 2020, WorkplaceNL's management team reported that claims costs and duration are rising due to these changes and time is required to ensure WorkplaceNL can adjust and pay for these additional costs.

Adding to this uncertainty is the COVID-19 pandemic and global recession. Both are negative on WorkplaceNL's assets, and the full extent of these negative impacts on our workers' compensation system remains unknown but is profoundly concerning.

This statutory review represents a significant opportunity – an opportunity **not** to undo the excellent work that has been done to get us to this place. Sometimes the best strategy to improve the system is to stay the course, do no harm, and allow those working in the system to use their experience and education to continue making professional decisions about how best to improve the workers' compensation system.

### **Recommendation A.3**

*The 2020 Statutory Review Committee should make no recommendations to increase benefits or costs to the system.*

We turn to specific opportunities to improve the health of our worker's compensation system.



## SECTION B – 5 OPPORTUNITIES FOR A HEALTHIER WORKER’S COMPENSATION SYSTEM

### OPPORTUNITY 1: RETURN WORKERS TO FULL EMPLOYMENT SOONER

#### Background

The length of time it takes an injured worker to return to full pre-injury duties is called “claim duration” and is a key cost driver of the workers’ compensation system. When a worker is injured in the workplace, the attending physician provides the injured worker with functional abilities information, outlining the injured worker’s restrictions on what they can and cannot do physically. The employer and injured worker are required by section 89 of the Workplace Health Safety and Compensation Act (WHSC) to utilize those functional abilities to develop a plan to return the injured worker to full employment. The goal is to return the injured worker to full pre-injury duties as early and as safely as possible. Early & Safe Return to Work (ESRTW) is fundamental to rehabilitation and is in the best interest of all parties, including the worker.

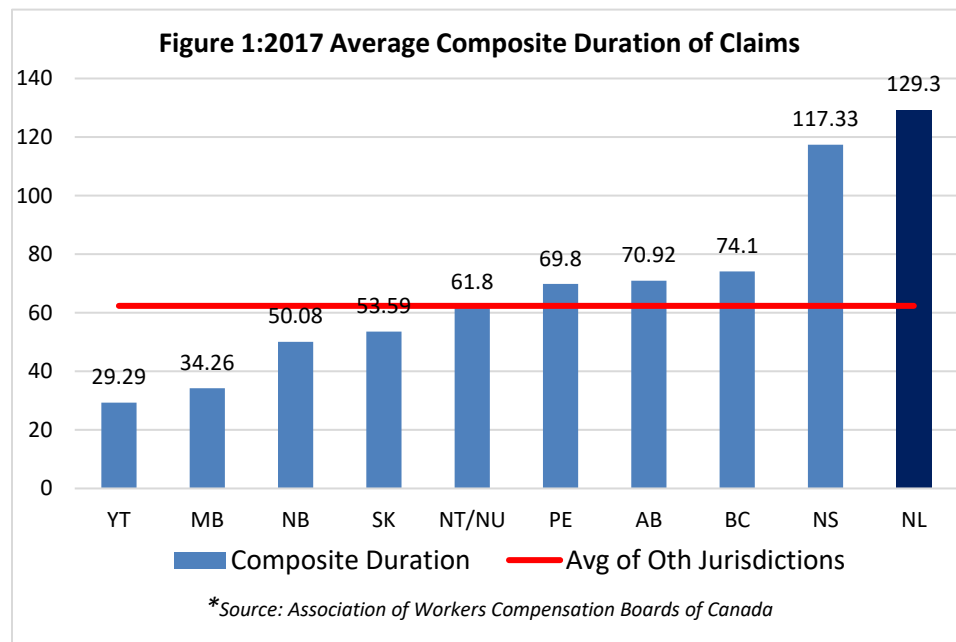
Unfortunately, NL severely lags behind other jurisdictions in our ability to return injured workers to work in a reasonable timeframe.

According to the Association of Workers’ Compensation Boards of Canada (AWCBC) in 2017, the average composite duration of claims for NL was 129.3 days. In comparison, the average of the other provinces and territories<sup>1</sup>

averaged 62.35 days. In other words, it took injured workers in NL more than twice as long to return to work following an injury than the average of the other Canadian jurisdictions. In 2018, our average composite duration increased to 135.07 days.

There are reasons to explain this statistic; one of the most cited is

that we provide benefits to more injured workers in this province than almost any other province in Canada, particularly those in seasonal industries. Whatever the reason, the numbers are staggering.



<sup>1</sup> Excluding ON and QC for whom data was not available

A comparison of NL's numbers with those of Manitoba, whose 2018 average claim duration was 35.54 days, demonstrates our duration's extreme nature. Injured workers in Newfoundland and Labrador take on average over 100 more days, or more than three months longer, to return to work than those in Manitoba.

## **Rationale for change**

Attempts to address this problem without negatively impacting extended earnings loss have not been successful. Reducing claim duration was addressed following the 2001 statutory review, *Changing the Mindset*, with an amendment to the legislation to include section 89 and 89.1 – a legal requirement for employers and employees to work together under the ESRTW model for employers to re-employ injured workers following an injury. This first attempt to reduce claim duration had modest success. Claim duration was again addressed following the 2006 statutory review report, *Finding the Balance*, with the start of implementing a new case management model, a model designed to reduce claim duration. This second attempt did not yield any appreciable reduction in average composite duration. In fact, the average composite duration for NL in 2006, as reported by the AWCBC, was 121 days. Five years later, in 2011, it remained 121 days. The 2013 statutory review recommended using disability duration guidelines to help with expectation setting in ESRTW. Despite the implementation of this recommendation, duration has continued to increase. In 2013 NL's average composite duration was 114.76 days. In 2018, it was up to 135.07 – an 18% increase.

Employers are at a loss to understand and explain why managing duration remains such a challenge. Employers widely report the need for more aggressive case management and enhanced use of disability duration guidelines as well as the need for improved cooperation from workers and physicians in ESRTW. Often employers report a lack of functional information from health care providers; they also perceive that the information they do receive is not timely. They cite a lack of worker participation, and that communication barriers exist with WorkplaceNL case managers.

The Employers' Council has respectfully suggested that WorkplaceNL implement internal improvements to case management to better facilitate ESRTW. There is a need to encourage a more robust work to recover mindset in the medical community, amongst case managers, and injured workers. All parties have a role to play in returning workers to the workplace in a reasonable timeframe.

Short term claim duration reported by WorkplaceNL also increased five days in 2019, from 40 days in 2018 to 45. Cost per claim is also increasing. According to WorkplaceNL senior staff, when you "increase the basket of benefits" as has happened over the last year, it is commonly known that you will see an increase in both duration and costs. Given NL already has claim duration that is so much higher than the rest of the country, this is incredibly concerning. We cannot allow our claim duration to spin any further out of control. It has drastic implications on the cost to the system and workers' well-being if we are not returning them safely to work in an appropriate timeframe.

While improvements to case management and increased cooperation from physicians are necessary, this may not be enough. All previous attempts to bring NL's duration in line with the rest of Canada have failed. It appears that under the current legislative structure, it is impossible to return workers to work

in timeframes that align with the rest of the country. Given the inability to address this problem over decades of attempts, a thorough investigation into its root cause is warranted.

### **Recommendation B.1**

*The Statutory Review Committee initiate an in-depth review of claim duration in our province to determine why Newfoundland and Labrador is such an outlier and make recommendations to improve duration. Alternatively, the Statutory Review Committee could recommend that WorkplaceNL hire an external organization to conduct such an analysis. Consideration must be given to impact that claim duration can have on extended earnings loss and long-term liabilities.*

## **OPPORTUNITY 2: REDUCE HIGH ADMINISTRATIVE COSTS**

### **Background**

There are also high administrative costs associated with worker's compensation claims in NL compared to the rest of the country. In 2018, the national average administrative cost per claim was \$7479; however, NL's average administrative cost was \$10,340 –38% higher than the Canadian average. There are redundancies within the administration of health and safety in NL that could be eliminated. The legislated responsibility for OH&S education lies with WorkplaceNL. The enforcement responsibility rests with the Department of Government Services. The separation of these responsibilities requires separate Ministerial offices, infrastructure, and administrative supports to deliver those functions. All of this is paid for through workers' compensation employer insurance premiums.

### **Rationale for change**

A proven strategy to increase efficiencies and ensure prudent spending is the amalgamation of related or similar functions under one department or agency. Many provincial governments have successfully employed amalgamation as a strategy to find efficiencies and reduce spending in this province and others, including combining the agencies or departments responsible for OH&S education and enforcement. British Columbia, Quebec, New Brunswick, Prince Edward Island, Northwest Territories and Nunavut and the Yukon have combined the responsibilities for education and enforcement under their workers' compensation commissions. Under the current fiscal and economic climate, finding efficiencies should be a top priority for the NL government.

### **Recommendation B.2**

*WorkplaceNL be given the legislative responsibilities for education and enforcement of OH&S to achieve greater efficiency and prudent spending.*

## **OPPORTUNITY 3: INCREASE THE INCENTIVE TO IMPROVE SAFETY IN THE PRIME PROGRAM**

### **Background**

Experience rating is a fundamental principle of insurance systems, including all Worker's Compensation systems, providing refunds to employers with low injury rates to financially incentivize safety. The 2013

Workers' Compensation Statutory Review recommended a review of the province's experience rating system, known as the Prevention, Return-to-Work, Insurance Management for Employers and Employees (PRIME) program. Between May and September 2018, WorkplaceNL completed this review. They received a clear recommendation to develop a replacement program over the next two to three years, considering lessons learned from PRIME and what is happening in other jurisdictions. Interim changes to PRIME are being considered as a new program is developed.

NL's experience rating system was changed in 2005 from a system that provided refunds and surcharges based solely on costs to a system that considered both performance and costs experience. PRIME consists of two components, a "practice incentive" and an "experience incentive." Under the PRIME program's practice incentive, employers are provided with a 5% reduction in their workers' compensation insurance rate for implementing and executing several elements of OH&S and ESRTW programs. Those elements for large PRIME assessment employers include:

- OH&S and RTW policy statement signed and posted in a prominent place in the workplace;
- OH&S Committee established, trained and active;
- injury reporting system established in the workplace;
- foundations of an OH&S program established in the workplace, and;
- foundations of a Return to Work program.

While injury rates have improved overall since the introduction of PRIME, it is only one of a "suite of tools" that have contributed to this improvement. There is no evidence to conclude how much PRIME has contributed to injury rate reductions. Comparing PRIME employers to non-PRIME employers indicates that both groups have seen reduced injury rates. NL has one of the lowest lost-time injury rates in Canada, and 92% of the province's workplaces are now injury-free. This even though 10,000 of the 16,000 employers eligible for PRIME do not participate or fail to meet the PRIME validation requirements. In fact, the program, and in particular the practice incentive, is viewed by many employers as a "paper exercise" that does little to improve safety.

### **Rationale for change**

PRIME was designed when the safety culture in our province was much different than today. The program's punitive nature, the generic nature of the practice incentive requirements, and the inclusion of ESRTW in the program decrease its effectiveness and uptake. Modifications could represent a significant opportunity to reduce the injury rate further. A particular barrier to participation is the requirement that employers "pass" the "practice incentive" to be eligible for PRIME experience rating refunds. WorkplaceNL has decided to keep the link in the interim, combined with improved communication and other system changes, saying it provides a greater incentive for those employers without OH&S systems in place to begin their implementation.

It is the position of the Employers' Council that the linkage of the practice incentive to the experience refund is flawed, as it removes the positive reinforcement and financial incentive of the experience rating refund. NL is the only province in Canada that requires an employer "pass" a safety incentive to

receive an experience rating refund. The PRIME program's uptake is low, and many employers are not receiving the financial feedback from PRIME simply because they leave a checkbox blank on their employer payroll statement. Leading indicators are important and best practices should be rewarded and incentivized. However, they should not inhibit rewarding and incentivizing the achievement of desired outcomes. As it is currently designed, PRIME prevents employers from receiving financial feedback even if they are achieving good safety and RTW outcomes, merely due to “non-compliance” with prescriptive paper processes - that may or may not actually improve workplace safety and duration.

The PRIME practice incentive is a generic, paper-based, punitive audit of a workplace’s OH&S activities that is defensive and implies a lack of trust in employers. Other provinces encourage employers to participate in the safety incentives by offering voluntary practice incentives, many of which offer larger financial incentives than NL’s 5% practice incentive instead of forcing employers to complete the practice incentive to access their experience refund. This approach is much less punitive, and respects and rewards the commitment employers have made to improve workplace safety in this province, while also encouraging them to go “above and beyond” through greater financial incentive. Unlinking the practice incentive refund from the experience refund may help improve awareness. Communication on how to access additional refunds through a practice incentive program could accompany the notice of an experience rating refund or charge. This financial impact is much more likely to get noticed than a form on a payroll statement.

### **Recommendation B.3**

*WorkplaceNL unlink the current practice incentive as a requirement to participate in the experience rating incentive program.*

The current practice incentive should be replaced by education and outreach to non-compliant employers that provide broad guidelines and support, and/or voluntary practice incentives designed to address real industry challenges. Such programs would provide flexibility to implement safety and ESRTW programs as best suited to the company culture, values, and industry needs. An incentive program for small employers that targets the top five risks as identified by research and individual workplaces, for example, would be more effective in reducing injuries than the current practice incentive, which includes items as a signed policy posted on the wall.

### **Recommendation B.4**

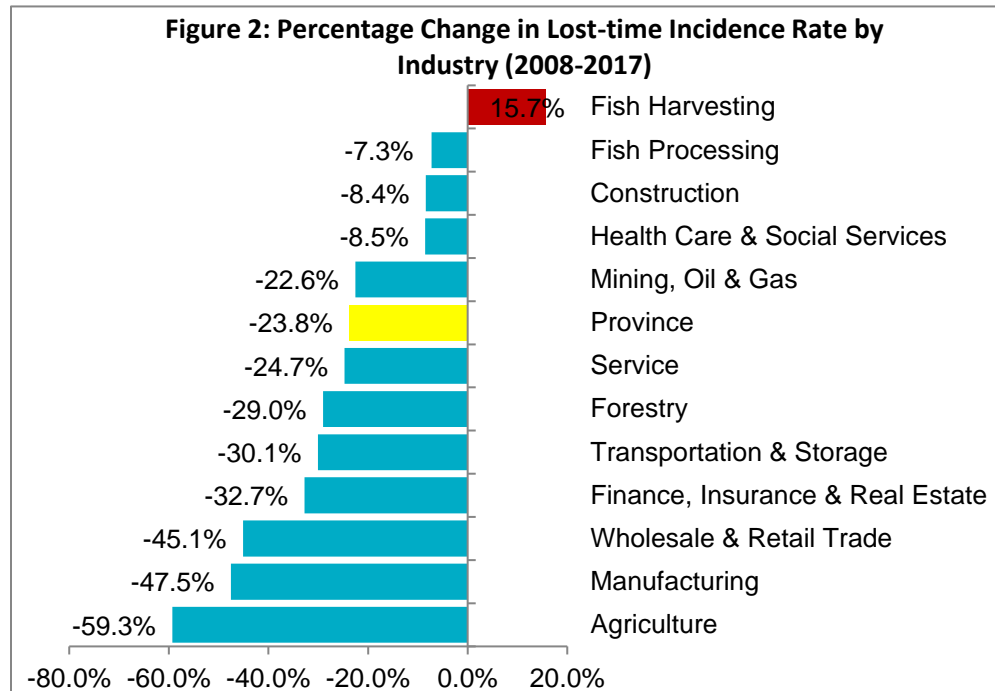
*WorkplaceNL increase the effectiveness of the PRIME practice incentive by replacing current generic requirements with programs that are relevant to employers based on their size, industry, and frequent risks.*

Further detail on the above recommendations can be found in the Employers’ Council’s submission to the WorkplaceNL PRIME Program Review [Beyond a Paper Exercise](#).

## OPPORTUNITY 4: REDUCE FATALITIES AND INJURIES IN OUR FISHERY

### Background

How fish harvesting enterprises submit workers' compensation employer insurance premiums is unique, and fundamentally compromises the application of WHSCC principles in an industry that is one of the most dangerous – and injury-prone – of all sectors. From 2008-2017 the province saw a decrease in



its lost-time incidence rate of 23.8% while the Fish Harvesting Industry experienced an increase of 15.7% (see Figure 2).

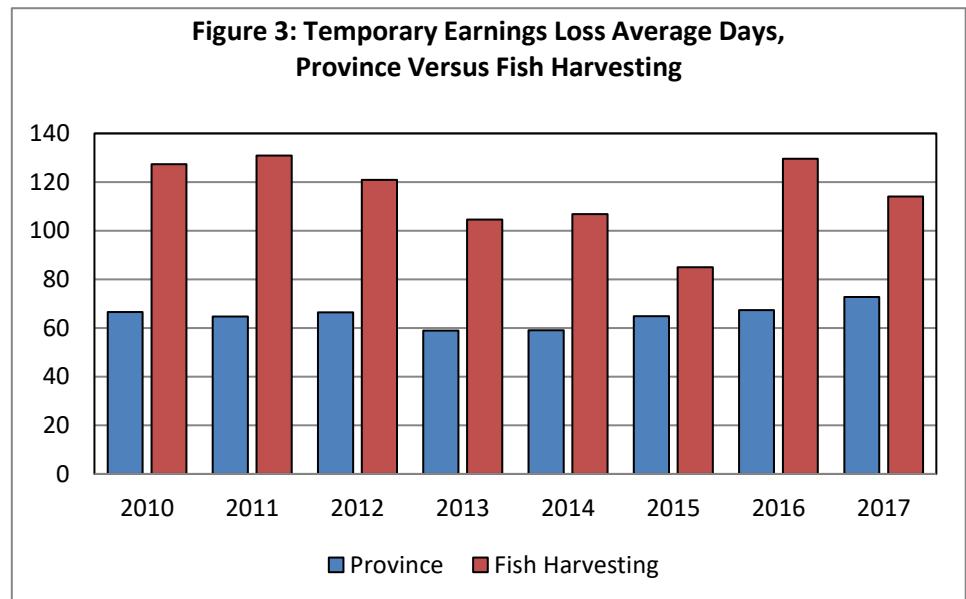
In the fish harvesting industry, the WHSC ACT designates the fish buyer or primary processor as the entity that pays workers' compensation insurance premiums on behalf of the fish harvester for all fishing vessels classed under 65 feet. Processors are then barred in regulations from deducting this premium from the payment to the harvester or fish harvesting enterprise. Premiums are also calculated as a percentage of the landed value of the catch and not as a percentage of the employee's actual wages (as is the case for almost all other employers). Because the rate is calculated based on the gross revenue and not the fish harvester's actual wage, the real cost of workers' compensation is hidden. The result of these provisions is that the fish harvesting "employer" does not see the cost of workers' compensation in their operation as they do with other costs deducted from the landed value of the catch. Workers' compensation employer insurance premiums are hidden in the overall price they are paid.

There are approximately 3000 fish harvesting enterprises with vessels under 65 ft in the province. WorkplaceNL has refused to change the collection model on the grounds that it would be too administratively complex to require all fish harvesting enterprises to register with them. The question of administrative complexity is no basis to have someone else pay the bill for a different workplace or the lack of accountability for safety in the fish harvesting sector.

## Rationale for change

A fundamental principle of any insurance system is financial feedback for accidents and injuries. Most people are familiar with this principle through their vehicle insurance policies. If an individual has a car accident, he/she expects the premium to go up, sees the increase and feels its impact. The financial incentive for employers and employees to implement and practice OH&S in the fish harvesting sector is hidden in their remuneration so entirely to be functionally ineffective. The statistics bear it out: the lack of financial accountability is a disincentive to improved safety and claims management in the fish harvesting sector.

The average number of days lost in the fish harvesting industry in 2017 was 114 days, 57% higher than the provincial average of 72 days (see Figure 3). Of even more concern is that according to the WorkplaceNL 2019 industry fact sheet, the **serious incident rate in the fish harvesting industry is four times the provincial average.** Hearing loss incidence is double.



The fish harvesting industry is a significant cost driver of our workers' compensation system. Fish harvesting represented 4.2% of all costs at WorkplaceNL in 2019, while only making up 1.8% of the workforce. Given that NL is the only province in Atlantic Canada covering all fish harvesting enterprises under worker's compensation insurance, this cost impacts all employers and worker benefits and must be effectively managed.

If injuries are to be prevented and lives saved in the fish harvesting industry, direct financial accountability for injuries and fatalities must be implemented. That can be achieved while recognizing the administrative burden individual registration and assessment would reportedly cause WorkplaceNL.

### Recommendation B.5

*WorkplaceNL develop and implement a pilot project that creates financial rewards and penalties to incentivize good safety performance and disincentives poor performance in the fish harvesting industry.*

Fish harvesters can be made aware of the cost of worker's compensation by merely treating premiums in the same manner that processors deduct other costs per \$100 of fish payroll, such as EI premiums,

CPP premiums, and other expenses such as ice and bait. The cost can be deducted as a line item on the payment given to the fish harvester by the fish processor. Under this scenario, collection responsibility would remain with the processor, but greater transparency on costs would be achieved.

#### **Recommendation B.6**

*WorkplaceNL permit fish processors to deduct fish harvester workers' compensation employer insurance premiums as a separate line item on the landed value of the catch and forward the same to WorkplaceNL on behalf of the enterprise.*

Also, the vessel's size required to remit workers' compensation employer insurance premiums directly to WHSCC could easily be lowered from the current 64'11" vessel to 45' vessel size. There are fewer larger boats in the industry, and many are incorporated and use professional accountants' services. They are like any other business. These enterprises should be treated as all other employers under the WHSC Act, and make their own payments directly to WorkplaceNL.

#### **Recommendation B.7**

*The vessel's size required to register with WorkplaceNL and remit workers' compensation employer insurance premiums directly be reduced from 64'11" to 45'. Vessels over 45' should also be required to participate in the PRIME system of practice and experience incentives.*

Another anomaly in worker's compensation in our province is that all fish harvesting enterprises are covered under our workers' compensation legislation. This is unique in Atlantic Canada. In Nova Scotia, coverage is extended only in instances of three crew or more. PEI has a system of optional coverage for both captain and crew. In NB, it is optional for vessels with less than twenty-five crew, i.e. the inshore fishery. Small boat operators in NL should have the option of not having WHSCC premiums deducted from their payments from processors.

#### **Recommendation B.8**

*The Workers' Compensation Act be amended to provide optional coverage for Fish Harvesting operations conducted in vessels under 45' in length in a similar manner as it is currently providing to independent contractors and the fish harvesting industry in Prince Edward Island.*

### **OPPORTUNITY 5: PROTECT THE FAIRNESS OF BENEFITS AND INTEGRITY OF THE SYSTEM**

#### **Background**

On July 1<sup>st</sup>, 2019, the government enacted presumptive worker's compensation coverage for PTSD for all workers in NL. There has been significant public political pressure brought by organized labour to extend presumptive coverage to all mental illnesses and injuries. This type of legislation would presume that all mental illnesses/injuries in the province were the result of work and compensable by WorkplaceNL, in the absence of adjudication and proof to that effect. While well-intentioned, this is a very dangerous and unnecessary provision that risks the worker's compensation system's integrity and the benefits



provided to all workers. Implementing presumptive legislation for all mental stress claims, for all occupations, as is proposed by NAPE and other groups, would place the cost of all mental health treatment for the majority of the population on employers through the worker's compensation system. This would be patently unfair. Workers' compensation is a workplace insurance system. Injuries and illnesses that do not arise out of the course of employment are legally non-compensable. Deviations from this principle jeopardize the integrity of the system and all worker benefits.

The provision of *presumptive* coverage for mental illness/injury is not the same as *coverage* for mental illness/injury. Promoting mental wellness, increasing efforts to prevent mental illness due to workplace stressors, and providing support for any worker struggling with mental health concerns are in the best interest of workers, employers, and the province. **The Employers' Council supports access to worker's compensation for all workers who have PTSD or other mental illnesses due to workplace incidents. That coverage exists now.**

In March of 2018, the Employers' Council supported changes to WorkplaceNL's Mental Stress policy EN-18 that broadened coverage for mental stress and significantly improved access to worker's compensation for all workers. This policy expanded coverage to include workers who experience traumatic events as an inherent risk of their occupation (such as first responders), recognized the cumulative reaction to traumatic events, broadened the definition of a traumatic event, and the types of resulting mental health issues that are compensable. This policy change eliminated many of the concerns and issues that labour had with access to worker's compensation for mental stress claims without the need for a presumption. We have a modern, compassionate workers' compensation system for adjudication and provision of benefits. Approximately 97% of all claims for benefits to WorkplaceNL by injured workers are approved. However, it is an essential principle of worker's compensation that claims include documentation of a work-related cause and are adjudicated based on evidence.

### **Rationale for change**

In this case, it is not a question of "what needs to change," but of what does not. There is no ethical or medical reason for presumptive coverage for any injury or illness, including mental stress and PTSD in a workers' compensation system. Presumptive coverage is a fundamental contradiction to the Principles of a Worker's Compensation System. The worker's compensation system is built upon a historic trade-off — injured workers gave up the right to legal action in exchange for no-fault insurance for **work-related** injuries or illness, paid for by employers. Injuries and illnesses that do not arise out of the course of employment are legally non-compensable. Presumptive clauses provide benefit without evidence or investigation to ensure a work-related cause, opening up the potential to provide benefits in cases where an injury/illness is not work-related. It does not provide for evaluation of if pre-existing conditions or other non-work-related factors have contributed. Presumptive coverage constitutes preferential treatment for one group of workers or one class of injury to the potential detriment of other workers in the system. This raises serious issues of fairness, contradicts the aim of worker's compensation, and erodes the relationship on which the system is built.

A presumptive clause also creates significant financial uncertainty in the system. One of the challenges in estimating the cost of these changes is that there is minimal cost history in Canada about presumptive mental stress policy. Most jurisdictions that have such legislation typically only cover PTSD in first responders, and those that cover PTSD for all workers have only been in place for a year or two. At the time of this report, WorkplaceNL could not provide these changes' actual cost, despite having been in place for over a year. During the PTSD presumption announcement, WorkplaceNL estimated the cost of this coverage to be between \$7.6 and \$15.1 million annually. They indicated it would likely increase employer assessments by an estimated 9 to 18 cents annually in future years. The government, as a self-insured employer, will also be impacted. The government's cost for this coverage was estimated to be a maximum of \$2.5 M. To expand this coverage to include all mental illnesses/injuries would increase this cost dramatically.

To “Do No Harm,” it is essential that the system be allowed to adjust to recent increases in benefits before making any significant changes that jeopardize the system. Presumptive coverage is unnecessary, and the recommendation of any presumptive clause by the Statutory review committee would be irresponsible and unnecessary and defy the principals of Worker’s Compensation.

For more information, see the Employers’ Council’s [position paper](#) on presumptive PTSD coverage, and [this letter](#) sent to MHAs that corrects some inaccuracies and dated information used in past arguments put forward in support of presumptive mental health coverage.

#### **Recommendation B.9**

*To ensure the worker’s compensation system’s integrity and fairness to all injured workers regardless of the type of injury or illness, all claims should be subject to the same due diligence in determining a proven work-related cause. The Statutory Review Committee must not recommend presumptive clauses in any situation.*

## SECTION D – SUMMARY OF RECOMMENDATIONS

### FUNDAMENTAL RECOMMENDATIONS

- 1) ELIMINATE THE LEGISLATED REQUIREMENT FOR A WORKER’S COMPENSATION STATUTORY REVIEW.
- 2) IMPLEMENT THE LEGAL REVIEW OF THE WORKPLACE HEALTH, SAFETY AND COMPENSATION ACT RSNL 1990 CHAPTER W-11, SUBMITTED ON JUNE 22ND, 2012 TO THE 2012 STATUTORY REVIEW.
- 3) MAKE NO RECOMMENDATIONS TO INCREASE BENEFITS OR COSTS TO THE SYSTEM.

### OPPORTUNITIES FOR A HEALTHIER WORKER’S COMPENSATION SYSTEM

**B.1** *The Statutory Review Committee initiate an in-depth review of claim duration to determine why NL is such an outlier and make recommendations to improve duration. Alternatively, the Statutory Review Committee could recommend that WorkplaceNL hire an external organization to conduct such an analysis. Consideration must be given to impact that claim duration can have on extended earnings loss and long-term liabilities.*

**B.2** *WorkplaceNL be given legislative responsibilities for education and enforcement of OH&S and the policy function currently contained within the Labour Relations Agency to achieve greater efficiency.*

**B.3** *Unlink the current practice incentive as a requirement to participate in the experience rating incentive program.*

**B.4** *Increase the effectiveness of the PRIME practice incentive by replacing current generic requirements with programs that are relevant to employers based on their size, industry, and frequent risks.*

**B.5** *Develop and implement a pilot project that creates financial rewards and penalties to incentivize good safety performance and disincentives poor performance in the fish harvesting industry.*

**B.6** *Permit fish processors to deduct fish harvester workers’ compensation employer insurance premiums as a separate line item on the landed value of the catch and forward the same to WorkplaceNL on behalf of the enterprise.*

**B.7** *The vessel's size required to register with WorkplaceNL and remit workers’ compensation employer insurance premiums directly be reduced from 64’11” to 45’. Vessels over 45’ should also be required to participate in the PRIME system of practice and experience incentives.*

**B.8** *Amend the Workers’ Compensation Act to provide optional coverage for fish harvesting operations conducted in vessels under 45’ in length in a similar manner as it is currently providing to independent contractors and the fish harvesting industry in Prince Edward Island.*

**Recommendation B.9** *To ensure the worker’s compensation system's integrity and fairness to all injured workers regardless of the type of injury or illness, all claims should be subject to the same due diligence in determining a proven work-related cause. The Statutory Review Committee must not recommend presumptive clauses in any situation.*

## **ABOUT THE NLEC**

The NL Employers' Council is the only province-wide business advocacy organization representing and connecting senior business leaders from all industries. The Employers' Council is the core business stakeholder for WorkplaceNL. This fact is reflected in section 4 of the WHSC Act that provides the Employers' Council with the legislated right to appoint an employer representative to the Board of Directors of WorkplaceNL.

The Employers' Council's membership consists of Newfoundland and Labrador's largest and most economically significant employers. Established in 1982, the Employers' Council provides a strong collective voice for the province's business leaders. The organization is widely recognized as the lead business advocate on Workers' Compensation and Occupational Health and Safety in the province.

### **Mission**

**Enhance employers' ability to contribute to the economic growth and prosperity of Newfoundland & Labrador.**

### **OUR VISION**

**Improve the competitiveness of Newfoundland & Labrador's business environment.**

We achieve this vision through credible, solutions-focused public policy recommendations, effective advocacy, and support to individual employers. Our positions are developed through diligent, evidence-based research, input from members, and collaboration with key stakeholders.

### **WHAT WE STAND FOR**

- Non-partisanship
- Respect
- Trust & Credibility
- Open communication and collaboration
- A lean and nimble structure
- A prosperous future for all citizens of NL

For more information, visit [www.nlec.nf.ca](http://www.nlec.nf.ca)