

**Presentation to the Joint OFL/ONIWG conference  
June 2, 2015 USW Hall Cecil Street Toronto Ontario.  
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**History of Occupational disease since the introduction of Bill 99.**

**The Occupational Disease Standards Panel (then Occupational Disease Panel)**

- Bill 101 (1985) created the Industrial Disease Standards Panel (IDSP) to research and make recommendations on occupational diseases
- Later renamed Occupational Disease Panel (ODP)
- The ODP Released 20 formal reports
  - Several highly controversial and vigorously opposed by employer groups (e.g., mining)
  - Most never implemented
- ODP shut down in 1998 by Bill 99

**The Occupational Disease Advisory Panel (ODAP)**

The Occupational Disease Advisory Panel (ODAP) created to fill the void

- Tripartite (WSIB, employers, workers) convened in May 2001
- Mandate to seek consensus on occupational disease issues:
- Role and assessment of scientific evidence
- Legal principles
- Future consultation
- “Adjudicative channels” (i.e., case-by-case, policy, scheduling, ODP reports)

**Collapse of the ODAP process**

- Apparent consensus reached in late 2002
- Employer members submitted new draft report changing position on several key issues
- Chair of panel (Brock Smith) to issue own report
- Held public consultations:
- Sudbury, Timmins, T. Bay, Sarnia, Windsor, Hamilton, Toronto
- 96 presentations and 77 written briefs
- Final report released in February 2005

## Effect of ODAP on Occupational disease decisions

- Chair's report adopted by WSIB directors in June 2005
- WSIB was to implement report via new policies but none yet (consulted 2008)
- Draft protocol for implementation released March 2005
- Covers path forward and day-to-day adjudication of occupational disease
- In practice, has anything changed? Hit and miss at best.
- Has always been in practice at the WSIAT

## Fire Fighter Presumption added

- Bill 221, May 2007 (amended 2009)
- *WSIA* sections create rebuttable presumptions for certain occupational diseases
- Applies to firefighters & fire investigators
- Functions like firefighter-only Schedule 3
- Diseases prescribed by regulation
  - Eight primary-site cancers: brain, colorectal, bladder, leukemia, ureter, kidney, esophageal, non-Hodgkins lymphoma
- Retroactive to 1960
  - Claims may be refiled if denied
  - Time limits do not apply

## Occupational Disease clusters

- Large numbers of cases arising out of a single workplace/industry
- Often centered around a single, large employer or workplace
- Workers have higher incidence of disease or death than general population
- Tend to come to light in unionized workplaces because of level of organization and communication
- Many likely undiscovered
- Not all occupational disease occurs within cluster

## Clusters within OWA

- Elliot Lake ( mining exposures including radiation, silica, diesel, and blasting fumes)
- Gold mining (Mining exposures to numerous agents: silica, arsenic, radiation, oil mist, blasting fumes, diesel exhaust, cyanide)
- Fiberglass Canada/Owens corning (Manufactured insulation in Sarnia
  - Exposures to glass fibres, formaldehyde, dust and asbestos)
  - Study by McMaster University showed:
    - Significant increase in lung cancers – especially for workers with long history of employment (SMR = 282)
    - Kidney cancers double expected rate
  - Hundreds of claims filed by union and OHCOW
  - OWA now representing cluster with lead case format at WSIAT

## Homes Foundry

- Made auto parts and insulation from 1918-1988
- 1958 Ministry of Health testing
- - Asbestos 28 times standard
  - 6720 times current legal limit
- Exposures as high as 852 fibres/cc of air
  - More that 8000 times current limit
- Study results:
  - Six-fold increase in lung cancer mortality for those with two or more years exposure
  - 11-fold increase in respiratory disease mortality
  - Four-fold increase in all| malignancies

### Uniroyal Tire Kitchener

- Exposures to asbestos, formaldehyde, benzene, lead and many other carcinogens
- Union sponsored OD clinic in 2002
- Health problems documented include numerous cancers (bladder, testicular, brain, stomach, prostate, lung), asthma, erectile dysfunction
- Over 400 workers' compensation claims filed, including 190 cancer claims

### General Electric Lamp Plant Peterborough

- Union sponsored intake clinic in 2004
- Exposures to a wide variety of agents
  - Heavy metals, Solvents, PCBs, Acids
  - Dust, silica
  - Radiation
- Several types of occupational diseases recorded
  - Blood cancers (leukemia / lymphoma)
  - Asbestos-related disease (PP)
  - COPD
  - Prostate cancer
  - Heart Disease

There are many more potential Occupational disease clusters

Most disease claims do not fall in a cluster, or have more than one exposure between clusters and other industries. Trades People are the classic example.

## Hope on the Horizon? Looking back and to the future: WSIB Survivors' Benefits

Bill 99 resulted in reform to the *Workers' Compensation Act*:

- Now called the *Workplace Safety and Insurance Act, 1997*
- Significant change from benefits being tied to “disability” (s. 37 of the *WCA*) to benefits being tied to “loss of earnings” (s. 43 of the *WSIA*)

Impact on injured workers and their Survivors in Long-latency Occupational Disease Claims:

- Policy 18-02-02, Determining Short-term Average Earnings, excerpt:  
*In long-latency occupational disease claims, no distinction is made between the short-term and long-term average earnings. In all cases, the average earnings are based on the greater of*
  - *the annual earnings of a fully qualified worker at the time of diagnosis or accident engaged in the same trade, occupation, profession, or calling to which the worker's disease is due, or*
  - *the worker's annual earnings in the 12 months prior to the date of accident.**If a worker suffering from a long-latency disease dies, as a result of the work-related disease, the average earnings previously used to determine the LOE benefit payable to the worker are also used to determine the benefits payable to any survivors*
- Although the policy states “in all cases” the policy is silent on the issue of injured workers who had retired and were no longer in the course of employment when diagnosed with an occupational disease
- Despite the language of the *WSIA* which ties benefit entitlement to “loss of earnings” the WSIB was awarding LOE to these injured workers under this policy

Employer Perspective:

- Employers were not pleased with this and notable employer representatives mounted a very aggressive campaign to challenge the way the WSIB adjudicated these cases
- Essentially employer's felt that the current policy (#18-02-02) was not applicable in the cases where workers had retired and had removed themselves from the labour force and then were diagnosed with an occupational disease
- The employer position essentially boiled down to if the worker was not experiencing a loss of earnings as a result of their injury/disease then they were not entitled to LOE benefits
- If there is no applicable or relevant WSIB policy then decision-makers must defer to the *WSIA* to adjudicate the claims

Significant WSIAT Case Law and its Impact:

- Decision no. 1581/06
- The worker had been retired since 1987 when 16 years later in August 2003 he was diagnosed with work-related mesothelioma
- The worker was awarded LOE benefits from the date of diagnosis until his death on October 27, 2004
- As a result of his death his wife was awarded survivor's benefits based on WSIB policy #18-02-02 calculations
- The employer represented by Rob Boswell appealed the ARO decision
- This decision first looked at whether the policy the WSIB was using to adjudicate these claims was relevant, if so then the WSIAT as per S. 126(1) is bound by the WSIB's policy
- The Vice-Chair recognized the significance of the issue before him and the impact determining this issue would have on other workers and their survivors in this situation
- Submissions were obtained by Tribunal Counsel Office (TCO) and from the WSIB legal counsel

- The Vice-Chair concluded after seeking submissions from Tribunal TCO and WSIB legal counsel that the policy was not applicable in the case before him as it did not address the issue of retired injured workers, workers no longer in the workforce when diagnosed with a late-latency occupational disease
- The WSIB confirmed it did not have a policy on this specific case scenario
- Thus the Vice-Chair found that the policy was inconsistent with the legislation both with regards to LOE and how survivor's benefits were awarded
- Paragraph 45 of the decision sums up quite succinctly the quandary the Vice-Chair had before him and the limits to which he was bound in his decision-making:

*It is more important to emphasise that the authority of a Panel or Vice-Chair is limited to that which is given to the Tribunal under the WSIA. The merits and justice of a case must be addressed in all appeals at the Tribunal. Consideration of the merits and justice of a case, however, is subject to the statutory limits provided in the WSIA. Remedies sought by parties that exceed the ambit of the law, regardless of how appropriate or worthy they may seem, cannot be awarded by the Tribunal without authority to do so under the law. **Where the remedy sought exceeds the law, the appropriate venue for redress is the Legislature.** (emphasis added)*

- As a result of this decision injured workers who were retired at the time of their diagnosis were not awarded LOE benefits, for the most part, unless it could be established that but for the disease they had intended to return to employment
- As a result of this decision where injured workers were found to not have a loss of earnings as a result of their injury/disease their survivors were only awarded the minimum periodic payment under s. 48 (3) - \$15, 312.51 – this resulted in many survivors having their benefits slashed drastically

#### The WSIB's Response:

- As a result of this decision the WSIB drafted a memorandum dated January 18, 2010 entitled OD&SBP Practice Guidelines – Loss of Earnings (LOE) Benefit Entitlement – No Earnings on Date of Injury
- The memorandum changed the way the WSIB adjudicated these claims as per the WSIAT decision; however, it made this practice prospective as of December 7, 2009
- No benefits were recalculated or terminated where they were in effect prior to December 7, 2009
- Employer's took these appeals to the WSIAT and won, as no new WSIB policy had been made and the WSIAT is not bound by WSIB memorandum

#### Hope on the Horizon?

- Timely announcement of proposed changes to the WSIA specifically s. 48:  
*The Section provides that for the purpose of determining amounts payable, the Board may, in such circumstances as it considers appropriate, take into account the average earnings at the time of the worker's injury of a person engaged in the same trade, occupation, profession or calling as the worker was engaged in and out of which the worker's injury arose.*
- If the WSIA is amended to reflect the proposed changes, workers and their survivors will be permitted to have past negative WSIB and WSIAT decisions reconsidered