INJURED WORKERS
COMMUNITY LEGAL CLINIC

REPRESENTING INJURED WORKERS
FREE OF CHARGE SINCE 1969
A community directed not for profit legal aid clinic

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Draft WSIB Occupational Disease Policy Framework

Injured Workers Community Legal Clinic is pleased to respond to the above draft policy framework. We are a community legal clinic that has provided assistance to injured and ill workers since 1969. In this submission, we will draw on some of our experience working with victims of occupational disease as well as previous inquiries into this important aspect of workers' compensation.

Ontario WSIB is falling way behind in recognizing occupational diseases

Our WSIB and the employer lobby are very attentive to competition with respect to other jurisdictions when it comes to certain issues, like average premium rates. However, not much attention or concern seems to be paid to another kind of "competition" (or comparison), that is: how well the Ontario WSIB recognizes occupational disease.

The Paul A. Demers report of January 9, 2020 showed that Ontario is falling embarrassingly behind. Figure 3 on page 9 of the report is telling. It shows Ontario to be significantly behind Germany, France, Denmark, Italy and Belgium with respect to the accepted claims rate. Germany, at the top, is at 15.1% per 100,000 insured workers. Ontario is at 2.9%. Imagine if Ontario had a premium rate significantly above other jurisdictions? Would the WSIB and employers not call it a "crisis"? We ask why the meagre acceptance of occupational diseases isn't considered a crisis.

We urge the Policy framework to raise the bar for occupational disease acceptance, in order to bring some reparation and justice to victims of occupational disease in Ontario. We are now outpaced by progress made in other jurisdictions and we view this as a blot on our compensation system.

Important background setting

We appreciate that the draft policy framework gives a historical context to the issue and links coverage and compensation of occupational disease to the very founding of our compensation system going back to Justice William Meredith and the Meredith principles:

"The Meredith Report is known for proposing that the workers' compensation system be established on the principles of no fault compensation, collective liability, security of payment, exclusive jurisdiction, and an independent board. Less widely known, the Meredith Report also recommended that a workers' compensation system should provide equal access to benefits for physical injuries and industrial diseases (now occupational diseases").

In our submission, we will be reflecting on the issue of "equal access to benefits to physical and occupational injuries as well as reflecting on the Meredith principle of the independence of the board.

Reflecting on Meredith's concept of "equal access" or "same footing"

Chief Justice Meredith's final report said:

"By my draft bill, following in this respect the British act, industrial diseases are put on the same footing as to the right of compensation as accidents. The (Canadian Manufacturers Association's') bill applies only to accidents…It would, in my opinion, be a blot on the act if a workman who suffers from an industrial disease contracted in the course of his employment is not to be entitled to compensation. The risk of contracting disease is inherent in the occupation he follows and he is practically powerless to guard against it. A workman may to some extend guard against accidents, and it would seem not only illogical but unreasonable to compensate him in the one case and to deny him the right to compensation in the other." (The Meredith Report, October 31, 1913).

It's important to note that Justice Meredith overcame the resistance of the then most powerful employer lobby. His position was based on a principle of parity of all work-related conditions and also based on justice, a word he used repeatedly but which today seems almost retired from official vocabulary. He did not "compromise" and water down his report for a superficial principle of "balance". Indeed, in his final paragraph, he urged to legislature "not to be deterred from passing a law designed to do full justice owing to groundless fears that disaster to the industries of the Province would follow from the enactment of it."

The WSIB's reference to its founding father should not be superficial. Rather, it should strengthen its own understanding that it is an independent Board, and as such is the steward of the interest of injured and ill workers.

What does "equal access" or "equal footing" mean to the consultation?

The prevailing test to adjudicate the work-relatedness of any kind of injury or disease is one of "significant contribution." This means that if a worker's employment or activities related to their employment are shown to be a significant contributing factor in their injury or disease, then the worker will get WSIB benefits. This doesn't mean that a workplace accident or injury has to be the only cause of a worker's condition or disease. So long as the workplace accident is found to have "considerable effect or importance,"[1] entitlement may be established, even if other non-compensable factors exist. The Workplace Safety and Insurance Tribunal (WSIAT) case law applies the principle that "it is enough to show that the work-related factors contributed significantly regardless of the existence of other non-compensable factors which might also have contributed significantly."[2]

We note with concern that the draft paper seemingly contemplates introducing a higher adjudicative bar with respect to recognition of occupational diseases. Specifically, it states that "when there is *strong and consistent scientific evidence* that an occupational risk factor is linked to a disease, it enables the WSIB to recognize the occupational disease in regulation or policy, which streamlines and simplifies determinations of work-relatedness."[3] While we don't take issue with the emphasis on medical evidence as a basis to make entitlement decisions, we caution against importing a much more stringent standard of proof from the scientific/medical world. The Supreme Court of Canada considered a British Columbia case involving a cluster of breast cancer cases in a group of hospital workers.[4] The expert reports before the Tribunal were unequivocal: the available evidence could not establish any causal relationship between the workers' employment as laboratory technicians and the development of their breast cancer. However, the Supreme Court of Canada pointed out that the inability of the reports to reach scientific conclusions to support a causal connection between employment and the workers' breast cancers did not speak to the standard of proof required under the workers compensation legislation to determine causation.[5] The judges noted the standard of proof is that where the evidence is evenly weighed on causation, that issue must be resolved in the workers' favour. [6]This standard of proof contrasts sharply with the scientific standards employed by the medical experts. The Supreme Court decided that the majority of the provincial workers compensation Tribunal was right to consider that the scientific experts imposed a too stringent standard of proof that did not align with what was contemplated in the workers compensation legislation.[7]

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[1] *Decision No. 280* (1987), W.C.A.T.R. 27
[2] *Decision No. 1742/12*
[3] Workplace Safety and Insurance Board Draft Occupational Disease Policy Framework
[4] *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25
[5] *Ibid.*
[6] *Ibid*.
[7] *Ibid*.

The significant contribution test should be affirmed as the standard approach to determining the work-relatedness of a particular occupational disease, as for all injuries. There shouldn't be a different evidentiary standard applied between how a physical injury is assessed for benefit entitlements by the board versus an occupational disease claim. We submit that each claim should be evaluated and adjudicated based on the specific circumstances of the injured worker, along with all applicable medical evidence and opinions from treating health practitioners.

Applying different evidentiary standards to occupational diseases is problematic and will only serve to stigmatize certain injured workers, and will likely make it even more difficult to access critical benefits. The Supreme Court of Canada has held that it can be discriminatory and contrary to the *Charter of Rights and Freedoms* to exclude workers from benefit programs on the basis of the type of injury they experience. In reference to the denial of entitlement to benefits for workers with chronic pain in Nova Scotia, the court said that their exclusion from benefits under the compensation scheme sent "a clear message that chronic pain sufferers are not equally valued and deserving of respect as members of Canadian society."[8] The court's decision stands for the principle of parity when it comes to how injuries should be treated by workers compensation systems. This principle must illuminate how all claims, including occupational disease claims, are adjudicated by the board.

Reflecting on the principle that the WSIB is an INDEPENDENT board

Our organization has been supportive of the newly formed Occupational Disease Reform Alliance (ODRA) since its inception. We fully endorse their submission to this consultation. The ODRA includes victims and survivors of occupational disease as well as deeply knowledgeable experts in the compensation of occupational disease. The group believes that key to addressing the issue of occupational disease in Ontario is to have legislation to meet its four demands: 1) compensate occupational disease claims when workplace patterns exceed levels in the surrounding community; 2) expand the list of compensable diseases presumed to be work-related; 3) use the proper legal standard, not scientific certainty; 4) accept that multiple exposures combine to cause disease.

If the WSIB were a "dependent" board, it would automatically respond that this issue is in the purview of the government, since government is in charge of legislation. However, the WSIB should reflect on its "independent" status going back to its foundational principles. Why does the Act confer on the board the power to suggest legislative change to government under Section 159? Is it not because the WSIB is in effect "closest" to injured worker issues than the more distant government apparatus? Is it not because the WSIB is independent and as such a welcomed voice for the concerns of injured and ill workers?

[8] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur* [2003] 2 SCR 504 at para 101.

We urge the WSIB to suggest the legislative initiatives recommended by the ODRA.

We oppose the proposal that policy development will be "consistent with the WSIB strategic direction"

This is precisely a main reason why Ontario is embarrassingly behind other industrialized jurisdictions in accepting occupational disease claims. It is well known that the WSIB has contradictory internal functions. It is tasked with providing fair decisions for workers but is responsible for managing the money paid out to workers and has a goal of achieving low premium rates for employers. Quite plainly, achieving more justice for victims of occupational disease can and will be resisted if the WSIB has a goal of reducing employer premiums (which are now "proudly" announced to be at $1.30 per $100 of payroll, down from $3.20 in the early 90's). The strategic goal of eliminating the unfunded liability while reducing employer premiums has also been detrimental to justice. Money speaks clearly: if the goal is to achieve and increase the WSIB fund and reduce premiums to historic levels, justice for injured and ill workers will *de facto* be sidelined.

We oppose the proposal that "policy guidance will be fiscally responsible and ensure the long-term sustainability of the system"

The concept of "fiscal responsibility" is open to interpretation that could and has been used to negatively affect benefits and entitlements to injured and ill workers. We are not advocating that workers and survivors be paid on demand, or in fiscally irresponsible ways. However the WSIB should make decisions based on justice, not on cost. The proposed wording puts an artificial restraint, or a fetter, on fair decision making.

The concept of "ensuring the long-term sustainability" of the system has been used as a code-word over the years to mean elimination of the unfunded liability (UFL). Having an UFL wold be relevant if the WSIB went bankrupt, which did not happen in the last century despite two world wars and the Great Depression. But now there is no UFL anymore. This has now been achieved and exceeded, to no small extent due to the reduction of benefits to injured and ill workers. From 2010 to 2017, as an example, benefits to injured and ill workers decreased from $4.8 billion to 2.3 billion. All while the employer premium contribution to the fund has decreased dramatically, four times in recent years, as the WSIB is proud to say.

To talk about ensuring the long term sustainability of the system today is strange, since the WSIB's assets are about $40 billion. There has been so much surplus money that the government has passed legislation to allow it to be given back to employers. This surplus redistribution is occurring as we speak.

Injured and ill workers have a legitimate question: why is the board linking occupational disease policy to fiscal responsibility, while the multiple reduction of employer premiums were not subject to any such policy consideration?

It appears hypocritical to ask policy development addressing victims of occupational disease to be fettered by financial concerns while the WSIB is not sharing the same concerns with respect to redistribution to employers. Since the proposal can potentially restrict fair compensation, we recommend this term be deleted.

Integration with other WSIB policies (e.g. psycho-traumatic policy)

The draft policy framework is looking at policy for occupational diseases in isolation from other policies. For example, there should be direction that victims of occupational diseases that progressively lead to death be **also assisted** by the psycho-traumatic policy both in terms of compensation and treatment.

This was a recommendation of the 1984 Royal Commission on Asbestos that while shelved for decades, is important to revive today in the interest of those affected by terminal occupational diseases and their families. Here are some relevant quotes from Volume 3 of the Report of the Royal Commission on matters of Health and Safety Arising from the Use of Asbestos in Ontario:

"The authorities we have cited satisfy us that as a matter of general medical fact, psychological impairment can be expected to result from learning one suffers from an irreversible, normally progressive disease. We can then find stronger and more specific reason for inferring that psychological impairment arises as a matter of medical fact if, in the circumstances just outlined, experienced practitioners of clinical medicine have recognized its reality in the patients they treat. On this score we cite the following evidence from our transcript of sworn testimony, wherein Mr. Nick McCombie, representing the Injured Workers' Consultants, was cross examining Dr. Vingilis, member of the ACODC:

"Q. …do you know if anyone has done any studies on the psychological impact of asbestos, insofar as a worker all of a sudden discovering that they do have and asbestos-related disease, and…the effect that that may or may not have on the individual?"

"A. You notice this very much by examining those people. Yes"

"Q. You notice it, but do you know if there are any studies that are done by the Ministry or anyone else?"

"A. I don't' think there was psychological studies done, but that was a fact I felt very strongly about – many people been disturbed, and disturbed to depression and anxiety, and so on."

"We conclude that psychological impairment in asbestos sufferers can be taken to be a matter of medical fact." (page 745).

"…we find a simple rationale grounded in common sense for recognizing the permanent psychological impairment of victims of irreversible and normally progressive disease as a matter of Board policy. In all but the most exceptional cases, the accident victim suffers his maximum

loss at the time of the event. The worst that could happened has happened, and his condition is likely to be stabilized or even improved following rehabilitation. The victim of irreversible and progressive disease, for his part, must live with the notion that the worst has yet to happen: the likelihood of progressive physical impairment, of a shortened lifespan, and indeed of death from the disease or a related cause are his unsettling prospects. In our judgment these prospects, if anything, make the grounds for recognizing psychological impairment in victims of chronic, irreversible lifespan-shortening disease more compelling than those that obtain in the realm of accidents. They also suggest that a policy of permanent compensation for such diseases victims need not, of itself, dictate a change in the Board's psychotraumatic guideline that involves temporary compensation in individual cases that arise in the realm of accidents." (pages 747-748).

We strongly recommend that Board policy development moving forward recognize the needs of the most vulnerable and affected victims of occupational disease: those with irreversible progressive disease. The recognition of the disease itself, without recognizing the inevitable effect on the victim's emotions is only a half measure. The recommendations of the Royal Commission of Asbestos are old, were ignored for a long time, but the more so should be implemented today without delay.

All of which is respectfully submitted this 28th day of February 2022.

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