Ontario Legal Clinics'
**WORKERS' COMPENSATION NETWORK**
Réseau d'échange des cliniques juridiques
de l'Ontario sur la loi des accidentés du travail

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WSIB Consultation Secretariat
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Dear Consultation Secretariat:

Re: Communicable illnesses policy consultation

The Ontario Legal Clinics' Workers' Compensation Network is comprised of legal workers who handle workers' compensation cases from Ontario's 71 community legal aid clinics. Our members are involved in individual representation, continuing public legal education, and development of law and policy reforms. Many of our members have practiced workers' compensation law for several decades and the Network is a group of the most highly experienced workers' compensation advocates in the Ontario Legal Clinics.

**A separate Policy for COVID-19**

We have reviewed the comments by Michael Green and other colleagues who make the case for a separate policy on COVID-19. We agree that a policy specifically on COVID-19 is one of most important policies the WSIB could make. The number of workers who have died or will die, or who have suffered or will suffer from serious health consequences, as a result of exposure to the COVID-19 virus at work will exceed the number for any other disease with the possible exception of occupational cancer. COVID-19's consequences have afflicted, and will afflict, much younger workers than occupational cancers, and the work-acquired infections will also affect their families because of its communicability. COVID-19 is significantly different from the common cold and influenza and we agree that it deserves its own policy.

**"Determining whether the worker contracted a communicable illness"**

This section provides that entitlement is on order if "one or both" of 2 pieces of evidence are provided but that evidence may not be necessary in 3 or more circumstances in which case there are 4 or more alternative pieces of evidence that may support entitlement.

This is confusing and prone to misinterpretation which may result in inappropriate claim denials. In addition, the WSIB is required to decide each claim on the evidence provided. The question of whether the WSIB feels the worker has a legitimate reason for not having a clinical or laboratory test is not relevant to the criteria for entitlement in the legislation.

The same criteria could be restated more clearly as follows:

*In addition to other relevant evidence gathered during the adjudication of a claim, one of the following will generally be necessary to establish the worker has or had at the relevant time a specific communicable illness:*

1. *laboratory confirmation of current infection (e.g., positive laboratory or diagnostic test result), or*
2. *a diagnosis by a treating health professional qualified to provide such a diagnosis based on a clinical assessment of the worker during the period of illness.*
3. *In the absence of laboratory or clinical evidence, decision-maker will consider the diagnostic criteria for the communicable illness and the available evidence such as:*
    - *a laboratory test to detect a previous infection (e.g., antibody test)*
    - *the worker's presentation (i.e., signs and symptoms)*
    - *the advice or opinion of a medical consultant*.

**"Determining whether the communicable illness was contracted in the course of employment"**

Decision makers must be guided by the evidentiary principles of workers compensation law. In our experience many operating level decisions do not apply, or do not understand the legal test of causation or the statutory requirement to decide in favour of the claimant when the evidence is evenly balanced.

The draft policy provides that "The inability to identify a specific work-related contact source for the worker's communicable illness does not mean the worker did not contract the communicable illness from exposure occurring in the course of employment." This is a helpful expression of the WSIB's obligation to make a decision for or against an issue based on whatever evidence there is.

In addition, the policy should explain that it is not an acceptable decision to conclude that 'I am not satisfied that the claimant has provided evidence that the illness was work related.' A negative decision must explain the reasons why the decision maker has concluded that the work related exposure did not make a significant contribution to the development of the illness.

The draft policy continues "In the absence of a specific work-related contact source, the decision-maker must determine the issue of whether the communicable illness was contracted by the worker while in the course of employment after weighing all of the available relevant evidence."

This is correct but too vague to properly guide decision makers. This is where the policy should specifically restate and explain in detail, with examples, the "significant contributing factor" test for causation and the application of s.119(2) of the WSIA regarding when "the issue shall be resolved in favour of the person claiming benefits."

**"Determining whether the communicable illness arose out of employment"**

The draft policy provides

"A worker's employment will have made a significant contribution to contracting a communicable illness when the decision-maker is satisfied that:

- the employment placed the worker at an increased risk (i.e., increased likelihood) of contracting the communicable illness as compared to the risk experienced by the general public during ordinary or routine activities of daily living, and
- the communicable illness was contracted by the worker from exposure that occurred in the course of their employment as a result of the identifiable increase in risk.

The worker's employment will generally not have made a significant contribution to contracting the communicable illness when these conditions are not met."

This wording does not accurately reflect the significant contributing factor test of causation. It would be reasonable to state:

*A worker's employment is presumed to have made a significant contribution to contracting a communicable illness when the decision-maker is satisfied that:*

- *the employment placed the worker at an increased risk (i.e., increased likelihood) of contracting the communicable illness as compared to the risk experienced by the worker during their ordinary or routine activities of daily living,*

The question is not whether the workplace placed the worker at greater risk than the general public. The question is whether the workplace was a greater risk than the activities of this individual. An injured worker may take strict precautions outside work, leaving little or no risk compared to the general public who goes shopping, eats out in public restaurants, takes public transit, etc.

Whatever examples you provide here to illustrate the significant contribution test, they will not be an exhaustive list of all possible examples of the significant contribution test. Therefore it is overly restrictive and inappropriate to state that the "worker's employment will generally not have made a significant contribution to contracting the communicable illness when these conditions are not met."

The draft policy goes on to provide that there is an increased risk of contracting the illness in the workplace if "the rate of the communicable illness is significantly higher in the worker's place of work than in the general population." "Significantly higher" is a limitation on claims that is not defined and will create obstacles for initial entitlement. The word "significant" should be deleted.

The second example of increased risk is "the worker's employment activities create opportunities for exposure to and transmission of the communicable in excess of the opportunities associated with ordinary or routine activities of daily living." In keeping with the revised wording in italics above, this should be clarified "in excess of the opportunities associated with ordinary or routine activities of daily living" **of this worker.**

The draft policy states "Employment-related activities that may create opportunities for exposure to and transmission of a communicable illness in excess of the norm include, but are not limited to:
- activities that require a worker to have direct and prolonged close contact with one or more person(s) known to have or suspected of having the communicable illness in the context of delivering health care, personal care, emergency aid, custody, or transport to these persons"

Where there is evidence that worker got the illness after direct and prolonged close contact with one or more person(s) known to have or suspected of having the illness, entitlement is obvious and one does not need a policy to explain that. The medical science does not require "prolonged" exposure, a brief exposure is sufficient to transmit the illness, so the word "prolonged" should be deleted. The list of occupations is unnecessary. If a list of occupations is to be included it should be evidence based. From the experience with COVID-19, other examples of direct, repeated close contact with co-workers, customers and clients includes workers in manufacturing settings, meatpacking plants, taxi drivers, retail and grocery stores, and restaurants.

**"Community-acquired communicable illnesses"**

It is correct that many communicable illnesses are highly transmissible and can be prevalent in the general population. However, we disagree with the policy generalization that "Therefore, a worker who contracts one of these communicable illnesses in the course of employment is generally not entitled to benefits unless the worker's employment increased their risk of contracting the communicable illness in some additional way." We are concerned that this section creates a presumption against entitlement that is inconsistent with the legislation. Each claim must be decided on the basis of the evidence available. Entitlement should not be denied because the worker's employment did not increase their risk of contracting the communicable illness. The decision maker must consider the workers actual employment exposure and explain why nothing in that exposure could have made a significant contribution to the development of the illness.

**Public health emergency**

The policy provides that "During a government-declared public health emergency related to a communicable illness, a worker's employment-related risk of contracting that communicable illness may be increased …" This can assist with entitlement decisions but should be carefully worded so as not to imply that the adjudication should be different in the period leading up to or following a government declared emergency. The fact that these are "government" declarations confirms that they are political decisions not based solely on medical science. The rates of transmission, infection, hospitalization and death may be just as high before and after the public health emergency.

**Loss of earnings (LOE) benefits and period of communicability**

This section does not mention disability related impairment. The worker may be unable to work beyond the period of communicability due to the onset of more severe symptoms. The policy should note that LOE can be provided beyond the period of communicability if there is medical evidence stating the worker is unable to return to work or if they require restrictions that cannot be accommodated by their employer. The duration of entitlement must be decided on the evidence of each claimant, not on the basis of usual healing times.

This can be an example of the "thin skull principle" and that principle should be explained in detail, with examples, in this section of the policy. This is particularly important because some individuals will experience more intense symptoms and medical complications for unknown reasons or possibly because of an asymptomatic pre-existing condition.

**Prevention of communicable illnesses**

The draft policy says "A worker who is exposed to a communicable illness in the workplace, but free of illness (i.e., symptom-free and no laboratory confirmation or clinical diagnosis), may be legally required to self-isolate or may be sent home by the employer. Workers who are free of illness do not have entitlement to benefits under the Workplace Safety and Insurance Act." This is not consistent with the definition of "occupational disease" in s.2 of the WSIA which includes "a medical condition that in the opinion of the Board requires a worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an occupational disease."

An example of the correct policy approach may be found in the WSIB's treatment of uranium miners who have reached their maximum allowable level of exposure to radiation. They are removed from the workplace and receive compensation for lost earnings. Policy 16-02-17 states, "Uranium miners and mill workers who have been exposed to the maximum radiation exposure level of 2 Working Level Months (WLM) per quarter and 4 WLM per annum may be entitled to benefits while the workers are obliged to remain out of the radiation exposure environment." The same should apply to workers sent home by their employer as a result of a work related communicable disease.

**APPENDIX**

An appendix like this can be helpful in claims adjudication. There should be a commitment that the information contained in the chart will be subject to periodic review in order to remain up-to-date with the most contemporary scientific information. There should also be a qualifying statement which outlines that the information in the chart is general in nature and that if an individual's symptoms are different or prolonged, they may still be entitled to WSIB benefits.

Thank you very much for considering our views on the draft policy. We would be pleased to meet with you if further discussion would be of assistance.

Yours truly,
Ontario Legal Clinics Workers Compensation Network
Per:

John McKinnon
Co-chair