

**Workers' Compensation Board of Nova Scotia**

**Employer Access to Injured Worker Claim File Information:  
Consultation Summary**

**Date: June 13, 2007**

## **Introduction:**

At the March 2007 Board of Directors' meeting, the Board agreed to initiate consultation with stakeholders to gather input on the specific issues surrounding Policy 10.3.5 – Access by Employers to Information Contained in Clients' Claim Files. On March 26, 2007, the Issues Identification Paper entitled "Employer Access to Injured Worker Claim File Information" was mailed to individuals on the key stakeholder mailing list and posted to the WCB website for a period of 45 days. At the request of stakeholders, the deadline for submissions was extended one week to May 18, 2007. The WCB has received submissions from 9 stakeholders (including both individual employers and stakeholders associations) regarding the issues identified relating to employer access to injured worker claim file information.

The purpose of this document is to provide a high-level overview of stakeholder input received in response to the Issues Identification Paper pertaining to employer access to injured worker claim file information. The submissions are presented as submitted (with minor grammar edits) by stakeholders. The submissions have not been analyzed by staff with a view to reconciling or validating them in comparison to WCB or other jurisdiction's current practice. This will occur in the next stage of the development of a revised or new policy when they are considered by the policy working group. In September, we expect to present a draft policy and background paper to the Board of Directors for consideration and discussion.

## **Feedback Summary:**

A review of the submissions indicates that there are divergent views amongst stakeholders on the issue of employer access to injured worker claim file information.

Generally, employers believe that the current Policy 10.3.5 – Access by Employers to Information Contained in Clients' Claim Files should be revised to clarify and allow for increased access to claim file information. A common theme expressed by employers is that the present legislation and policy do not recognize the need for employers to be active participants in the workers' compensation system and does not facilitate the exchange of information at the initial claim acceptance stage or during the return- to- work process.

In comparison, injured workers' associations, unions, and the Nova Scotia Federation of Labour generally believe that the current policy is adequate and strikes the appropriate balance between relevant access to injured worker claim file information and the injured worker's right to privacy.

Outlined below is a summary of general comments submitted by various stakeholders.

## **Employers:**

- The Employer comments as outlined in the Issues Clarification Paper express the views of our company.
- Section 192 and 193 offer the employer the opportunity to participate – but are constraining. It does not foster a spirit of co-operation and exchange of information at the initial claim stages and restricts any opportunity for the employer to be actively involved in assisting their employees with rehabilitation and return to work.
- The current process we have developed with the WCB for the exchange of information between injured workers, the employer, and physicians – with the worker’s consent – should remain in place. This ensures as employers we are assisting our employees in every way possible.
- Federal and provincial statutes state very clearly employers have a higher standard to meet when it comes to accommodating their employees in return to work. Employers also recognize the legal obligation to ensure the right to privacy is upheld for any individual.
- Sound Return to Work and Disability Management best practices require having all stakeholders communicating and working together to assist injured workers in mitigating the impact both financially and psychosocially as a result of workplace injuries. The language in section 192 and 193 does not embrace this approach.
- As assessed employers, funding the Workers’ Compensation Board of Nova Scotia, the responsibility rests with the governing Board to recognize the importance of the employer’s role as not adversarial but conciliatory.
- The current policy creates an adversarial environment by permitting access to relevant claim file information only on appeal, and does not facilitate the exchange of information at the initial stage of a claim, or during the return-to-work process.
- A policy is needed to clarify the Employer’s access to necessary claim file information in order to manage and assist in claims adjudication and manage safe and timely return to work.
- Employers require increased access to injured worker claim file information in order to verify the legitimacy or illegitimacy of claims and return-to-work schedules.
- Employees should have an expectation that information will be disclosed from their claim file to the employer. Information will be disclosed so the worker will not be expected to perform unreasonable tasks or duties which are beyond his/her capacity. Employees are well aware of the employer’s legislative obligations under both the *Workers’ Compensation Act* and the *Human Rights Act* to accommodate them in the workplace. Any accommodation must be safe. Adequate disclosure keeps the accommodation safe.

- Employers are in the best position to offer advice about the adjudication of claims with respect to their employees as they often have knowledge of the employee's activities inside and outside the workplace.
- With access to information, employers can design specific safe return to work plans that work in the company rather than rely upon an outside agent's return to work plan that would be based on the company's generic job task analysis. Return to work plans, without the full disclosure of information from the Board, are problematic at best. Most medical practitioners (Doctors and Physiotherapists) do not have understanding of work conditions (eg heat, cold, height, repetitive motion, hours of work, time of work, lifting, weather conditions). Often external medical opinions are only based on reports of the worker, which can be incomplete, in that they offer only a limited view of the workplace (ie. only the section the worker worked) and any potential modified duties.
- The vast majority of employers of our group deal with confidential employee information in all facets of their operations. Longstanding privacy safeguards are in place to protect employee information. Such information can only be utilized for legitimate purposes. In terms of Workers' Compensation, any such information can only be used to verify a claim and assist in the return to work processes.
- Lack of information on a claim can lead to a "rumour mill" at the workplace and create an atmosphere of mistrust.
- Increasing employer access to claim file information would not be an "unreasonable invasion of privacy" under the *Freedom of Information and Protection of Privacy Act* (FOIPOP) because the information has a reasonable and direct connection to the purpose for which it was collected, employees provide the information to the Board knowing it will be used for claims adjudication – of which the Employer is a party to-, the information is available to the employer on appeal anyway, some personal health information is provided during case meetings already, and the information is being provided to specialists and practitioners who have systems in place to protect the privacy of personal information.
- The following principles should be included in the policy:
  - Principles for the release of information on a need to know basis
  - The policy should not require direct employee consent.
  - Full disclosure of all relevant file information shall be made upon request.
  - Employers must commit to protect the file and use it for the purpose of the claim, and limit the information to those who need to know. A penalty for violations could be implemented and the Board could offer specific privacy training to employers through a Board sponsored program
  - The Board should have the ability to inspect the privacy policies and practices of any employer making a request for disclosure.
  - There should be no ability for an employee to appeal a request for disclosure. There should be no appealable issue since the Board

would only be disclosing relevant information on an active WCB claim.

### **Injured Workers' Associations, Unions, and NS Federation of Labour**

- The balance between relevant access to injured worker claim file information and the right to privacy is satisfied by the current policy. The employer can obtain copies of relevant documents or records relating to an appealable decision and relevant information relating to return to work plans by meet. If employers are granted more access, the historical compromise between workers and employers will be tipped in favor of the employer.
- The current Board Policy, 10.3.5 is consistent with the legislation in that it restricts employer access to a worker's file information until an appealable decision has been made and it provides assurance that only information relevant to the appeal will be released to the employer. The Board must maintain the equitable balance between protecting a workers' privacy and providing employer access to file information relied upon by the Board in making decisions.
- Who decides what is relevant? How are staff trained to operate within areas of confidentiality, law and ethics? There is a significant lack of confidence in the ability of the WCB to determine what is and is not relevant.
- Although the Board has a current practice of providing information to employers outside the appeal process, it is important to note the Board is doing so without legislative or policy authority. The Act and policy only provide for the release of information after an appealable decision has been made. There is no authority to release information with respect to programs such as a safe and timely return to work initiatives.
- The employer currently is able to obtain any information from a worker's file directly from the WCB where a worker provides the employer with written authority. Interestingly, the WCB will not forward a copy of the worker's file to an injured workers association despite the worker providing the WCB with written authority. The WCB upholds this procedure even when the injured workers' association is identified as the official representative in appeal matters. The WCB sends a copy of the file to the worker who, in turn, may provide a copy to the association.
- An employer can actively and effectively participate in a return to work initiative without obtaining copies of various medical and physiotherapy reports. Information such as the nature of the worker's injury, medical and physiotherapy diagnosis, functional abilities, return to work dates, limits on number of hours worked, and types of work that can be safely performed can be obtained through case conferencing with the worker, WCB staff and medical practitioners. In cases where a case conference is not possible, the information can be relayed in the form of a written summary report outlining the necessary information.

- Only the employee can grant access to personal information under any condition.
- In situations where a worker has provided consent for the release of claim file information to an employer's company physician, how can anyone verify that these documents are not read by secretaries, clerks and others in the employer's place of business?
- The employer has ample opportunity to object to the acceptance of a worker's claim for compensation without the need to have increased access to the worker's file information. If the employer has evidence that an injury is not work related then it is incumbent upon the employer to challenge the claim at first instance. If new evidence becomes available following the acceptance of the claim the employer has the option to challenge the decision.
- Employers receive decisions stating why/how the WCB arrived at its decision to accept a claim for compensation. The problem here seems to be more apparent than real unless the case managers/hearing officers are not giving the reasons they are required to.
- The employer should have no right to appeal on issues relating to a worker's entitlement to benefits. The employer gains an unfair advantage in the workers' compensation system by receiving the benefit of immunity from lawsuits and also the ability to challenge a worker's entitlement to benefits. It is our position an employer should only have the right to appeal on issues relating to the compensability of a claim or in matters relating to their assessments.
- The employer should not have a role in claims adjudication. The employer should be focusing on prevention and creating safe workplaces rather than challenging benefit decisions and becoming involved in claims adjudication. The role of the employer in the claim adjudication process should end after the claim is accepted as compensable.
- With respect to medical information, it must be kept in mind that doctor's files/reports often contain information on third parties e.g. family members. These individuals have not consented to the release of information so must be excluded. Certain medical reports e.g. psychiatrist, can be released only by a court.
- Appeal provisions relating to the release of claim file information would appear to be mandatory for protection of the employee's personal information, reputation and prevention of potential conflict with the employer.
- A 2% appeal rate of 34,000 claims on 680 appeals per annum with 62 requests from employers for copies of claim file information does not seem to be a "major policy issue" nor something employers should have as "their highest priority".
- Allowing employers access to an injured worker's compensation file would be unwise, unwarranted and perhaps in excess of jurisdiction (absent changes to the Act). The present access to information is more than adequate for the employer to meet their needs and responsibilities under

- the Act. Employers are entitled to, and gain full access to, the relevant information if the decision is appealed under the Act.
- Relevant claim file information is information that is related to the injury, limitations, restrictions, anticipated rehabilitation time and expected return to work date.
  - To grant employers ongoing monitoring opportunities to treatment, assessment and potentially influence over the injured worker's treatment, assessment and rehabilitation would extend to them a broader invasive authority than they now enjoy absent the applicable compensation legislation. Further access to a worker's claim file will lead to unwarranted interference and endeavors to influence the claim, the claimant and the WCB.
  - Given the often extreme sensitivity of information contained on an injured worker's file, including case worker notes and comments, and the issue of an injured worker's right to privacy and the protection of their personal and medical information, the file should not be given to employers. The Act gives the WCB broad authority over the injured worker, and the claim adjudication is, and should remain, the exclusive responsibility and mandate of the WCB.
  - An injured worker should be able to maintain some faith in the workers' compensation system that it is not controlled by the employer, and that their personal claim information is kept secure and protects their rights to privacy.
  - We believe employers have more than sufficient access to claim files now and there is nothing put forward to justify an expansion of this access. Limited access had been granted to employers for good reason and this limited access should be maintained.
  - When a worker is injured at work and is no longer able to work due to this injury, the worker then becomes responsible to the WCB and not the employer, and we do not support changes to enable the employer greater access to claimant file information to micro-manage this process.
  - It is very concerning when at stakeholder meetings, there is a general view or opinion that our system is currently far too legalistic, and yet, we see a proposal brought forward that could bog down the process with further legalities, with the injured worker paying the price through more delays. I wonder what the response of the employers would be if workers had access to their employers files; to be able to verify if all accidents or incidents are being properly reported. How would the employers feel and react if we sought the right to information to provide opportunity to object to the level of assessments? What if we took it a bit further and worker access to an employer files found supporting information of wrong doing; then perhaps we could open the door to legal action. We are not putting forward these suggestions but point them out as possibilities of where this direction could lead; turning the complete system into a legal battle field.
  - There are some employers that would use this access, if granted, as a fishing expedition, in an attempt to find ways to disallow or hamper the

- progress of a claim or to use confidential and personal information found in the file, to embarrass or intimidate the worker.
- The employer can now obtain updates on functional capacities and anticipated return to work dates through case conferences and discussions with WCB employees, therefore greater access to claim file information is not required for this purpose and should not be given.
  - A worker's file contains information that is considered confidential and personal and should not be shared with the employer, or anyone without the specific consent of the worker.
  - If it is truly believed additional medical information from the claim file is necessary, information can be provided with the consent of the worker as already provided for thus no need for additional access.

**Other :**

- Given the limited information available to employers at the time of a decision, it is difficult to make reasonable decisions regarding appeals without access to the file and a thorough understanding of the rationale and information which led to the decision.
- We propose an opportunity for employers, after a decision is made in favor of a worker, to request a copy of the claim file (access) for a review with the intention to appeal. This reduces the number of appeals which are 'fishing expeditions' but which must be carried through because the employer had to appeal prior to understanding the scope of the file. In Ontario, access is granted with an eye to an appealable issue, and a form is sent with access, with a limited amount of time to be returned and an appealable issue identified. Often, an appeal is not pursued after a review of the file, this saves the compensation board time and money.
- The employer should be able to review the entire file after it has been vetted by an Access Specialist, this would include all related medical information, this is vital information in determining whether to appeal and also for RTW purposes. All medical info related to the compensable condition (or contributing medical conditions) should also be revealed and the employer held under strict privacy guidelines, as they are for all information. Only revealing medical information to the company physician is limiting and discriminatory against smaller and mid size employers who do not have a company physician.
- Relevant information is all information in the file related to the nature of the accident, details of reporting, medical attention, lost time, medical information including diagnosis, treatment and restrictions - all related to the compensable condition or any other condition which contributed to, is extending lost time, or caused the original accident.
- If Nova Scotia's intent is to make access issues and process more clear then they should make it very clear on the website under "Employers" that if an employer appeals they must complete the appropriate access form and the Board should provide an easy link to that form.