

**General Entitlement – Occupational Disease Recognition
Final Program Policy Decision and Supporting Rationale**

Introduction

In setting the Program Policy Agenda, the Workers' Compensation Board (the WCB) undertakes a program policy issue identification process. This process involves the identification of program policy issues where the development of new and/or revision of existing policy statements will improve consistency in decision-making and/or assist the WCB in achieving its corporate/system goals.

General Entitlement – Occupational Disease Recognition was considered a “major” policy issue by the Board of Directors and placed on the 2009 Program Policy Agenda. The WCB began policy development in October 2008 with the release of the Stage 1 Consultation Paper, “*Issues Clarification Paper: General Entitlement – Occupational Disease*”. The WCB considered the feedback provided during the November 2008 Program Policy Summit, and carried out additional research and analysis throughout April-September 2009 on this program policy topic.

At the September 17, 2009 Board of Directors' meeting, the Board agreed to initiate Stage 2 consultation with stakeholders on the proposed draft program policy. On September 28, 2009, the document titled “Policy Background Paper: General Entitlement Occupational Disease Recognition” and a draft program policy were mailed out to individuals on the key stakeholder mailing list, and posted to the WCB website for a period of 30 days. The deadline for submissions was October 28, 2009. The WCB granted a two day extension. The WCB received 7 submissions from 8 stakeholders (one joint submission).

The Issues Clarification Paper and a Policy Background Paper can be found in the Policy Archives on the WCB website at www.wcb.ns.ca .

On February 11, 2010, the Board of Directors approved the new program policy, *General Entitlement – Occupational Disease Recognition* (please see Appendix A for the new program policy).

This Report includes:

A Paper titled: “Key Issues Raised by Stakeholders during Stage 2 Stakeholder Consultation and the WCB's Analysis of Policy Change Recommendations”, organized by source of feedback.

- Appendix A: The final policy decision as reflected in the final version of the program policy; and
- Appendix B: A summary of feedback received during Stage 2 Consultation.

Key Issues Raised by Stakeholders during Stage 2 Stakeholder Consultation and the WCB's Analysis of Policy Change Recommendations

This paper contains key issues raised by stakeholders, the WCB's analysis of the issues, and where appropriate, the policy revisions made in response to this input. For a detailed overview of input received from stakeholders, see Appendix B – Stage 2 Stakeholder Consultation Summary.

Injured Workers' Association, Labour, and System Partners

Stakeholder Issue #1 - Proving a Claim in an Ordinary Manner

Nothing in s.12 prevents a worker from proving a claim in the ordinary manner under the *Act*.

WCB Analysis

The WCB agrees that a claim for compensation relating to a disease that is not an "occupational disease" under the *Act* can be adjudicated without reference to section 12 of the *Act*. The definition of accident includes both an "occupational disease" and diseases that may not be peculiar to or characteristic of a particular trade, occupation or employment. In a situation where a worker believes that a disease has been caused by work, but it does not meet the definition of an occupational disease, the WCB will determine whether the disease is one arising out of and in the course of employment, with no reference to section 12 of the *Act*.

This approach is reinforced by the inclusion of the following question in *Policy 1.3.7, General Entitlement - Arising Out of and in the Course of Employment*:

"Was the injury caused by an exposure in the workplace, or as part of the employment activities?"

Since this issue is addressed under *Policy 1.3.7*, which applies to the adjudication of all claims for compensation, the WCB does not believe that it is necessary to add further language to the *General Entitlement – Occupational Disease Recognition* policy. The WCB has not changed the language in the final version of the policy in response to this issue.

Stakeholder Issue #2- Definition of Accident

The policy should reference the definition of accident as it appears in the *Act*. The definition of "accident" in section 2(a) of the *Act* is inclusive (the *Act* uses the word "includes"), meaning non-exhaustive, which means the categories of "accident" are not closed. The draft policy, however, suggests that the definition of "accident" is exhaustive (the draft policy used the word "means") and hence, closed.

WCB Analysis

The use of language in the draft policy that was circulated for stakeholder consultation may have unintentionally narrowed the definition of “accident”. This is an important distinction, and the WCB has changed the language in the final version of the policy (by removing the word “means” and adding the word “includes”) to reflect the language in the *Act*.

Stakeholder Issue #3 - One or More Employments

Why do all employers have to be covered under the *Act*? Occupational diseases are often characterized by a worker having had multiple employers by the time the worker files a claim for an occupational disease. Having one or more non-covered employers over the course of a worker’s career may still entitle the worker to receive compensation for occupational disease as long as the employment with covered employer(s) satisfies the necessary criteria.

WCB Analysis

The WCB agrees that not all employers have to be covered under the *Act*. Section 12 of the *Act* provides compensation for an occupational disease where it is due to the nature of employment in which a worker was engaged, whether under one or more employments. To accept a claim for workers’ compensation benefits or services, a relevant exposure which causes the disease must occur while under the employment of at least one employer who is a covered employer under the *Act*. Since this stakeholder issue is addressed by section 12 of the *Act*, the WCB has not changed the language in the final version of the policy.

Stakeholder Issue #4 - Use of the Word ‘Exposure’

The Policy should not use the word “exposure”. The word “exposure” is only used in the *Workers’ Compensation Act* with respect to sections 13 and 15 which set out particular occupational diseases (silicosis or pneumoconiosis). It is inappropriate to require an “exposure” of the same sort for a determination of a “case by case” adjudication of a possible “new” type of occupational disease.

WCB Analysis

The WCB reviewed medical literature and conducted a jurisdictional scan of occupational disease policies to ensure that the use of the word “exposure” in the occupational disease policy is appropriate, and not limiting.

The Steadman’s Medical Dictionary defines “exposure” as the proximity and/or contact with a source of a disease agent in such a manner that effective transmission of the agent or harmful effects of the agent may occur. The word “exposure” is used in the occupational disease policy because it describes the necessary contact between the worker and the source of a disease agent in the workplace. The WCB intentionally refrained from defining “exposure” in policy to ensure that claims adjudication would not be limited. The term is necessarily broad enough to include exposures to vibrations, temperatures, noises, and the like. If “exposure” was defined as a substance (biological, dust, metal or chemical) then the definition would have limited disease coverage.

A jurisdictional review of occupational disease policies indicates that the word “exposure” is commonly used. The following jurisdictions, among others, use the word exposure in occupational disease policies to describe contact between the worker and a source of a disease agent:

- Determining if the specific exposure caused the disease (NB)
- There must be current medical or scientific evidence of a causal link between the exposure, the disease, and the employment (NWT/NU)
- If there is a clear and adequate history of occupational exposure (MB)
- Other causes of occupational hearing loss, such as chemical and biological exposure, may also be considered (NL)
- The inception (latency) period between the first exposure and appearance of lung cancer is at least 10 years (ON)
- Latency can vary with intensity and type of exposure. Usually it is biologically plausible that the disease occurs -15 years after first employment in a “dusty occupation” OR – 5 years between first employment in mines with radon progeny and the diagnosis of the disease (ON)

In addition to the jurisdictional scan, the WCB considered the standardized language of the Material Safety Data Sheet, and descriptions of disease mechanisms in the American Medical Association’s, Guides to the Evaluation of Permanent Impairment (AMA Guides). Material Safety Data Sheets describe, among other things, exposure limits, personal protection, and medical conditions aggravated by exposure. The AMA Guides also use the word ‘exposure’ as is illustrated by a passage taken from chapter 5, The Respiratory System:

Assessment of the respiratory system should begin with the patient’s description of the specific complaints related to respiration. Then a review should follow of personal habits and workplace exposures to potentially toxic substances that might explain or contribute to the existence of the symptoms (p. 5/153).

The WCB has carefully considered stakeholder input respecting this issue to insure that use of the word “exposure” would not narrow the scope of occupational disease adjudication. Although other language could be used in the policy (i.e. encounter, or contact with), occupational disease policies in other jurisdictions (and in NS), Material Safety Data Sheets, and the AMA Guides commonly describe contact with a source of a disease agent as an ‘exposure’. Therefore, the WCB has determined that use of the word “exposure” is appropriate language to use in the occupational disease policy, and has not made any changes to the language of the policy in relation to this stakeholder issue.

Stakeholder Issue #5 - Duration, Level, and Latency Questions

We do not believe that the legislation asks the adjudicator to determine the “frequency” or “level” of exposure ... It may be that a particular individual is susceptible and negatively affected by a lower level of exposure.

Neither do we believe that the legislation requires the adjudicator to determine the latency period specific to the disease.

WCB Analysis

The legislation requires the WCB to determine whether the occupational disease is arising out of and in the course of employment. To make this determination, the WCB must gather information about exposure(s) including type, nature, duration, and level. The mechanisms resulting in the development of disease are numerous and complex. Exposures may be of short term, intermediate or long term duration. If toxicological evidence indicates that long term exposure to a substance is a necessary precondition to disease then evidence respecting duration must be considered. If the worker was exposed to a dose of a substance well below that which is necessary to cause an adverse or harmful effect then this evidence is relevant in the determination of arising out of and in the course of employment. Since an adjudicator may consider medical evidence respecting the duration and level of exposure, the WCB has not made any changes to the language of the policy.

Stakeholder Issue #6 - Quoting Sections of the Act in Policy & References

The WCB should include the following sections of the *Act* in this program policy:

- s.187 – benefit of the doubt
- s. 10(4) – the presumption relating to arising out of and in the course of employment
- s.12(3) – presumption in relation to Schedule B occupational diseases

The references at the end of the draft policy should include:

- s.2(v) - definition of occupational disease
- s.12 - compensation for occupational disease.

WCB Analysis

The WCB agrees that it improves reader comprehension and overall clarity of the policy to state the relevant sections of the *Act*. The WCB would like to clarify that the relevant provisions of the *Act*, including sections 187 and 10, always apply. *Policy 1.3.7, General Entitlement – Arising Out of and in the Course of Employment*, is also used to adjudicate all claims for compensation involving a personal injury by accident, including occupational diseases. The WCB also revised section 1 of the policy by adding the words, “including an occupational disease”. The intent is to clarify that Policy 1.3.7 applies to occupational diseases. As a result, it is not necessary to repeat, in this policy, the provisions of the *Act* that are in Policy 1.3.7.

The WCB agrees that section 12(1) of the *Act* should be referenced in the program policy as this requirement is specific to occupational disease claims. Section 12(1) of the *Act* has been added to the final version of the program policy.

Injured Workers' Associations, Labour, and System Partners -and- Employers and Others

Stakeholder Issue #7 – Bradford Hill Criteria to Determine Peculiar to or Characteristic of a Trade, Occupation or Employment

The policy should be edited and all references to the Bradford-Hill criteria and associated questions removed (Injured Workers' Association, Labour)

The phrasing, "peculiar to the particular trade, occupation or employment" should be used throughout the policy (Employers and Others).

The text should be modified to read, "The WCB then considers the evidence gathered throughout the claim adjudication process, and weighs the evidence to determine whether the exposure is causally connected to the disease, whether the disease arose out of and in the course of employment, *and resulted from causes peculiar to the particular trade, occupation or employment* (Employers and Others).

WCB Analysis

Stakeholders have expressed a number of concerns related to the "peculiar to" section of the policy. Most of the feedback suggests that the WCB did not clearly describe how the WCB determines causes or condition peculiar to or characteristic of a particular trade, occupation, or employment in the original discussion paper.

Diseases are unlike injuries with a traumatic origin. It is not uncommon for injured workers to file a claim for compensation many years after employment has ceased given the long latency periods and complex profiles of many diseases. In order to determine the origin of the disease the WCB needs to examine, among other things, the toxicology of the substance the worker reports exposure to, and the epidemiology of the disease reported.

The Bradford-Hill criteria outlined in this policy provide a framework for gathering and analyzing evidence to determine if a specific workplace exposure causes the disease reported. This process is particularly important when the WCB is presented with new occupational diseases which require expert analysis and opinion respecting, among other things, laboratory results (toxicology), peer reviewed randomized clinical trials (medical research), population health studies and other data (medical statistics) respecting the incidence of a disease in a specific population (epidemiology).

The Bradford-Hill criteria for assessing evidence of causation do not apply to the adjudication of the individual claim, per se. The criteria are used to draw causal inferences when the question is asked, "Does a particular exposure cause the disease in specific population". Bradford-Hill criteria are widely used by the medical and scientific community to draw causal inferences. None of the criteria to consider can bring indisputable evidence for or against cause and effect. This is an inference of causation.

As a result of stakeholder feedback, the WCB has changed the policy to clarify that the “Bradford-Hill Criteria to Consider” are used to determine causes or conditions that are peculiar to or characteristic of a particular trade or occupation, or peculiar to the particular employment. The WCB also removed the reference to Bradford-Hill’s name (the questions to consider remain in the policy) to ensure that the policy does not direct medical experts to apply only Bradford-Hill criteria. Although Bradford-Hill has made valuable contributions to our knowledge of the incidence and cause of industrial diseases, questions posed by other causation experts would also be relevant to consider in this analysis.

The WCB believes that transparency and accountability require the inclusion of Bradford-Hill criteria in the policy. The Bradford-Hill framework is used by the WCB and the medical and scientific community; the criteria are explicitly stated in the general entitlement occupational disease policies of New Brunswick and Northwest Territories/Nunavut; and they are recognized by the World Health Organization as having long provided a background framework to demonstrate associations between an exposure and a health outcome, (Bulletin of the WHO, October 2005, 83(10)). Therefore, the Bradford-Hill questions to consider remain in the final version of the policy.

Stakeholder Issue #8 - Alternate Causes

The policy should be changed by removing the following statement: “Evidence of an alternate cause(s) of the worker’s disease such as hobbies, medical conditions, exposures outside of employment, or exposures in employment not covered by the *Act*’ (Injured Workers’ Associations, Labour).

An alternate cause may only be considered for the purpose of apportionment, after it is determined that the disease is arising out of and in the course of employment, and the claim is accepted (Injured Workers’ Associations, Labour).

The policy should be focused on evidence peculiar to or characteristic to industry rather than the focus being on an alternate cause (Employers).

WCB Analysis

The WCB believes that it is appropriate for a decision maker to consider evidence of an alternate cause of a disease. It is important to highlight that the types of information identified in the policy, and gathered to determine arising out of and in the course of employment, are not mandatory or absolute. An alternate cause of a disease is just one piece of information that a decision maker may consider when presented with evidence that the workplace exposure is insufficient to cause the disease, and there is evidence that an alternate cause exists. The WCB believes that it is appropriate to consider evidence to the contrary.

The WCB considered stakeholder input, reviewed the occupational disease adjudication literature, and the content of general entitlement occupational disease policies in other jurisdictions. A number of jurisdictions, including New Brunswick, Saskatchewan, Prince Edward Island, and Manitoba have occupational disease general entitlement policies that explicitly reference an alternate cause or a cause not related to work.

The WCB believes that evidence of an alternate cause (evidence to the contrary) is an appropriate consideration for a decision maker and therefore this “criterion to consider” remains in the final version of the policy.

Stakeholder Issue #9 - Personal Protective Equipment

We do not believe that the legislation asks the adjudicator to determine whether a worker used personal protective equipment (PPE). Remove from the policy the statement: “Use of personal protective equipment to determine whether, and to what extent, the worker was protected from exposure” (Injured Workers’ Associations, Labour).

In gathering accurate industrial hygiene information on exposure, the type of PPE worn must be information that is gathered and it is recommended that this be included as a question of gathered evidence (Employers and Others).

The WCB should focus on whether the causes are peculiar to the work, and not put the onus on the employer to show that it could be caused by something else (Employers and Others).

WCB Analysis

The question respecting personal protective equipment appears in the policy for the purpose of determining, where appropriate, duration, level and frequency of exposure. The intent of the question is not to undertake an analysis of fault based on the use, efficacy, or provision of personal protective equipment. Workers’ compensation is a no-fault insurance system.

When presented with medical evidence that the concentration or presence of a contaminant may not present a hazard to the worker, as a result of the use/type of personal protective equipment used/worn, the WCB must consider that evidence, as well.

The WCB believes that it is important to consider “use of personal protective equipment”, where relevant, in the analysis of arising out of and in the course of employment. The WCB also agrees that including “type” of personal protective equipment in the list of evidence to consider is a valuable addition to the policy. Therefore, considering evidence of the use/type of personal protective equipment has remained in the final version of the policy.

Employers and Others

Stakeholder Issue #10 – Policy 9.3.5R Claims Costs and Rate Setting

Employers agree that the language respecting rate setting in Policy 9.3.5R is vague and requires clarity.

WCB Analysis

Policy 9.3.5R, Claim Costs Which Are Excluded from Rate Setting, sets out the rules respecting exclusion of occupational diseases, for the purpose of rate setting, as follows:

The following are claims costs which are excluded from consideration for Rate Setting Purposes.

...

1.4 Occupational disease claims which on average require exposure for two or more years before manifestation into a disability.

Section 1.4 is applied when the condition under consideration requires an exposure of two or more years, on average, before disability develops. Exclusion is based on the disease (as a category) and not case by case claim adjudication. Therefore, if a disability developed after 1.5 years of exposure in a specific case, the costs would still be excluded from rate setting because the disease generally requires two or more years of exposure (on average) before a disability develops.

Policy 9.3.5R is not used to determine whether a disease is an occupational disease, but rather whether an occupational disease is excluded from rate setting.

Since rate setting is determined under *Policy 9.3.5R*, this policy concerning *General Entitlement – Occupational Disease Recognition* has not been changed or modified to reflect the rate setting explanation provided above.

General Comments

Stakeholder Issue #11 - Two Steps that are Two Different Things

Stakeholder input generally indicates that the WCB needs to clarify the process for determining recognition of an occupational disease. In particular, the difference between (a) peculiar to or characteristic of a trade, occupation or employment; and (b) arising out of and in the course of employment; and the function of section 12(1) of the *Act*.

WCB Analysis

The definition of an “occupational disease” consists of two distinct parts: (a) causes or conditions peculiar to or characteristic of a trade occupation or employment; and (b) arising out of and in the course of employment.

(a) “Peculiar to or Characteristic of”

Determining whether a disease is an “occupational disease” requires evidence that the disease is resulting from causes or conditions that are peculiar to or characteristic of a particular trade or occupation; or peculiar to the particular employment. In other words, determining whether a disease is an occupational disease requires evidence that the disease is due to the nature of any employment.

The “peculiar to” analysis involves recognition that an exposure causes a disease. This is a medical conclusion/inference based on medical and scientific literature. In the same way that the medical and scientific community recognizes that smoking is a common cause of lung cancer, the medical and

scientific community recognizes that specific exposures which cause specific diseases may be particular to certain types of employment. This general conclusion or inference is different than “arising out of and in the course of employment”.

(b) “Arising out of and in the course of”

Not every disease contracted by a worker is due to workplace exposure. The analysis for “arising out of and in the course of employment” occurs when the WCB asks whether this particular worker’s disease is caused by the workplace exposure. Just as not every lung cancer contracted by a smoker is caused by smoking, not every disease contracted by a worker is caused by work (including those diseases currently recognized by the WCB as occupational diseases). The WCB looks at the individual facts to determine whether this worker’s disease is “arising out of and in the course of employment”.

Section 12(1)

Section 12(1) of the *Act* is about entitlement to benefits and services under the *Act*. To be eligible for benefits or services for an occupational disease, the disease must cause earnings loss, permanent impairment or death. This legislated requirement is unique for occupational diseases.

To apply section 12 of the *Act*, the decision maker must first insert the definition of “occupational disease” from section 2(v) of the *Act* into section 12(1). Section 2(v) defines “occupational disease” as a disease arising out of and in the course of employment; and peculiar to or characteristic of a trade, occupation or employment. This policy explains/outlines the questions and evidence to consider when determining if a disease is an “occupational disease” according to the definition.

As a result of stakeholder feedback, the WCB has changed the order and flow of the policy to clarify that there are two distinct steps which mirror the occupational disease definition. The WCB also changed the order of items in the policy to improve the clarity and understanding of the policy.

Appendix A - Final Program Policy

GENERAL ENTITLEMENT – OCCUPATIONAL DISEASE RECOGNITION Policy 1.2.14

Effective Date: February 11, 2010

Date Issued: February 16, 2010

Date Approved by the Board of Directors: February 11, 2010

Topic: General Entitlement – Occupational Disease Recognition

Section: Entitlement

Subsection: Occupational Diseases

Preamble

The purpose of this policy is to: 1) identify the basic requirements that must be met to be eligible to receive compensation benefits and services for an occupational disease; and 2) describe the typical questions, general principles and sections of the *Workers' Compensation Act* (the "Act") the *Workers' Compensation Board* (the "WCB") considers in determining whether a disease is an occupational disease.

Definitions

"accident" is defined in section 2(a) of the *Act* and includes

- (i) a wilful and intentional act, not being the act of the worker claiming compensation,
- (ii) a chance event occasioned by a physical or natural cause, or
- (iii) disablement, including occupational disease, arising out of and in the course of employment, but does not include stress other than an acute reaction to a traumatic event.

"occupational disease" is defined in section 2(v) of the *Act* and means a disease arising out of and in the course of employment and resulting from causes or conditions

- (i) peculiar to or characteristic of a particular trade or occupation, or
 - (ii) peculiar to the particular employment,
- and includes silicosis and pneumoconiosis.

Policy Statement

1. Section 10 of the Act

The WCB uses section 10 of the *Act* and *Policy 1.3.7, General Entitlement – Arising Out of and in the Course of Employment*, to adjudicate all claims for compensation involving a personal injury by accident, including an occupational disease.

2. Basic eligibility requirements

To be eligible to receive compensation benefits and services a worker must:

- a) be a worker as defined by Section 2 (ae) of the *Act*;
- b) meet the requirements for filing a claim for compensation in Section 83 of the *Act*;
- c) be caused a personal injury by accident arising out of and in the course of employment as required by Section 10 of the *Act*; and
- d) depending on the facts of the claim, meet any other applicable sections of the *Act*.

3. Occupational disease claim adjudication process

To accept a claim for compensation the WCB must determine whether the disease is an occupational disease that is arising out of and in the course of employment. To determine eligibility the WCB:

- (a) Evaluates medical and scientific literature to determine if the disease is resulting from causes or conditions peculiar to or characteristic of a particular trade or occupation; or peculiar to the particular employment; and
- (b) Gathers evidence specific to the claim to determine if the disease is arising out of and in the course of employment.

(a) Evaluating medical and scientific literature to determine if the disease is resulting from causes or conditions peculiar to or characteristic of a particular trade or occupation; or peculiar to the particular employment

The WCB considers medical and scientific literature to determine whether there is a causal connection between an exposure and a disease. The WCB *may* consider, among other things, the following questions:

- Is there a biologically plausible relationship between the reported exposure and the condition?
- Did the condition occur after a reasonable duration of exposure and latency based on current medical/scientific knowledge?
- Is the condition linked to a specific type of exposure as opposed to multiple exposures?
- Is there consistency across the literature on the relationship between the reported exposure and the condition?
- What is the incidence of the condition under study between those exposed and those not exposed?
- Does the employment expose the worker to a greater risk of this type of disease than the normal risk/incidence to the public at large?
- Is there an abnormal prevalence of the disease in people carrying out the same employment?

(b) Gathering evidence specific to the claim to determine if the disease is arising out of and in the course of employment

The WCB gathers evidence specific to the claim to determine whether the disease is arising out of and in the course of employment. The WCB *may* consider, among other things, the following:

- Where the exposure occurred
- Type, nature, duration and frequency of the worker's exposure
- Level of exposure
- Latency period specific to the disease
- Confirmation or diagnosis of a disease, and date of first diagnosis
- Medical history, specialists' reports, pathology reports
- Use/type of personal protective equipment to determine whether, and to what extent, the worker was protected from exposure
- Evidence of an alternate cause(s) of the worker's disease such as hobbies, medical conditions, exposures outside of employment, or exposures in employment not covered by the *Act*

4. Weighing the evidence

The WCB considers the evidence gathered throughout the claim adjudication process, and weighs the evidence to determine whether (a) the disease is resulting from causes or conditions peculiar to or characteristic of a particular trade or occupation; or peculiar to the particular employment; and (b) whether the disease is arising out of and in the course of employment.

5. Compensation for occupational disease

Pursuant to section 12(1) of the *Act*, where an occupational disease is due to the nature of any employment to which Part I of the *Act* applies in which a worker was engaged, whether under one or more employments, and (a) the occupational disease results in loss of earnings or permanent impairment; or (b) the worker's death is caused by the occupational disease, the worker is entitled to compensation as if the occupational disease was a personal injury by accident.

6. Application

This program policy applies to new claims for compensation made on or after February 11, 2010.

7. References

Workers' Compensation Act (Chapter 10, Acts of 1994-95), sections 2, 10, 12, and 83.

Appendix B - Stage Two Stakeholder Consultation Summary for General Entitlement - Occupational Disease Recognition

Introduction

At the September 2009 Board of Directors' meeting, the Board agreed to initiate consultation with stakeholders on a draft program policy: *General Entitlement – Occupational Disease Recognition*. On September 28, 2009, the document titled "Policy Background Paper: General Entitlement Occupational Disease Recognition" and a draft program policy was mailed out to individuals on the key stakeholder mailing list, and posted to the WCB website. The deadline for submissions was October 28, 2009. The WCB granted a two day extension. The WCB received 7 submissions from 8 stakeholders (one joint submission).

Feedback Summary

Generally, the Injured Workers' Association, that provided comment, does not believe that a program policy respecting occupational disease recognition is necessary to improve accountability or transparency in the decision-making process. They suggest that a "Fact Sheet" or other communication tool is adequate for this purpose.

The Labour submissions expressed the importance to have clarity and transparency in decision making, and to articulate the principles that guide the adjudication of occupational disease claims, but caution that the policy framework should not introduce elements that conflict with the decision making framework of the *Workers' Compensation Act*.

Employer representatives also expressed concern that the program policy not be created or constructed by language, so as to change or expand the current legislation or rules. Employers support the WCB's initiative to consolidate and provide clarity and transparency to the issue of Occupational Disease Recognition through a program policy to better guide the adjudication process.

The Injured Workers' Association and Labour submissions also expressed concern that elements of the policy have the potential to change and/or limit the existing criteria for determining entitlement to occupational disease claims, and requested that the WCB remove all references to Bradford-Hill criteria and associated questions to consider. There is concern that some or all of the Bradford-Hill criteria would be considered mandatory, as opposed to permissive (questions and/or a framework to consider). Further, in some submissions, stakeholders objected to the Bradford-Hill criteria because they believe it introduces a new element into the claims adjudication process which is not permitted under the legislation.

Employers, Injured Workers' Association, and Labour identified different concerns about similar "questions to consider" under the section titled, "arising out of and in the course of employment".

Overall, comments from stakeholders indicate that the WCB did not clearly explain some significant concepts in the draft policy and accompanying paper. In particular, there appears to be confusion in the stakeholder community respecting the difference between "peculiar to or characteristic of a trade, occupation or employment" and "arising out of and in the course of employment". The WCB has

made some changes to the flow and language of the policy to improve clarity and understanding of these concepts.

Overview of Stakeholder Submissions

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

Injured Workers' Association, Labour, and System Partners

General Comments

- ... does not support the codification of the principles that guide the adjudication of entitlement claims into Board Policy. It is our position that such guidelines can be communicated most effectively by means of a “fact Sheet” or similar communication tool. The codification into Board Policy creates a more litigious element to adjudication as the policy directives are binding upon all decision-makers.

Definition of accident

- The definition of “accident” in s.2(a) of the *Act* is inclusive (“includes”), meaning non-exhaustive, which means the categories of “accident” are not closed. The draft policy, however, suggests that the definition of “accident” is exhaustive (“means”) and hence, closed.

Proving a claim in another manner

- Nothing in s.12 prevents a worker from proving a claim in the ordinary manner under the *Act*.
- ... for the purpose of this “high level” policy, we presume that it is therefore drafted pursuant to the provisions of Section 12(4) of the WCA which provides as follows:
- 12(4) Nothing in this Section affects the rights of a worker to compensation in respect of a disease to which this Section does not apply, if the disease is the result of an injury in respect of which the worker is entitled to compensation pursuant to this part.

Multiple employments

- Under Adjudication Process (p.6), why do all employers have to be covered under the *Act*? Occ diseases are often characterized by a worker having had multiple employers by the time the worker claims for occ disease. Having one or more non-covered employers over the course of a worker’s career may still entitle the worker to receive compensation for occ disease as long as the employment with covered employer(s) satisfied the necessary criteria.

Quoting specific provisions of the Act & References at the End of the Policy

- ... Section 187 of the *Act* be quoted in full
- Section 10(4) of the WCA ... should also be quoted in full ...

- The *Workers' Compensation Act* contains particular 'benefit of the doubt' provisions with respect to certain occupational diseases [12(3)]
- The references at the end of the draft policy should include references to s.2(v) (definition of occupational disease) and s.12 (compensation for occupational disease) of the *Act*.

Process for recognition of new occupational disease in policy

- ... we think the policy should clarify the process for recognizing new or additional specific disease policies. For example, it has been our experience already that such specific policies are needed for chronic stress, chemical sensitivities and mental illness. Such specific policies should recognize that they are bone fide occupational diseases and the factors or considerations that will be evaluated in the adjudication of a claim.

Inappropriate headers

- "Eligibility Requirements" We believe that this title is inappropriate. The paragraph describes the decision-making process, not basic eligibility for benefits.
- "Adjudication Process" We believe that this title is inappropriate. The paragraph described basic eligibility for benefits as part of a 'pre-adjudication' process. We do not disagree with the questions. They should be repeated in the policy statement.

Incorrect process

- The [background] document sets out the next steps prematurely, we believe. Section 12(1) of the WCA outlines the determination that an adjudicator must make to determine entitlement to benefits due to occupational disease as follows:

Compensation for occupational disease

- Where an occupational disease is due to the nature of any employment which this part applies in which a worker was engaged, whether under one or more employments, and (a) the occupational disease results in loss of earnings or permanent impairment; or (b) the worker's death is caused by the occupational disease, the worker is entitled to compensation as if the occupational disease was a personal injury by accident.
- The next logical questions for the adjudicator to ask are whether the worker has actually lost earnings, become permanently impaired or died. If the answer is no, then the examination of a causal relationship is unnecessary.

Bradford-Hill criteria to determine peculiar to or characteristic of

- The Program Policy states that the adjudicator is to "evaluate" medical and scientific literature to determine if there is a causal connection between the reported exposure and the disease. .. with respect, it is not for the adjudicator under the legislation to become physicians or scientists seeking a "second opinion"

- ... if the worker provides the WCB with demonstrated proof of a disease, that has caused lost earnings, permanent impairment or death, supported by a medical opinion linking the disease to the workplace, that should be the end of the inquiry...
- Policy Statement 2 (iv) evaluating medical and scientific literature. This statement should be edited to remove all reference to the Bradford-Hill criteria with associated questions ...
- Justice Leo D. Barry of the Supreme Court of Newfoundland Trial Division, in *Ring v. The Queen*, 2007 NFLD 146; 268 NFLD & PEI R. 204, referred to the nine guidelines to evaluate the weight of evidence regarding an exposure-disease association and wrote at paragraph 11:

“Hill referred to these as nine “features to be specially considered” or “viewpoints” from which one should evaluate associations before declaring them causal. He did not assert that they all must be met in order to prove causality, nor did he state that any one guideline was a requirement for a causal connection.”

- The Bradford-Hill criteria were never identified in the past as being used by WCB in determining causation. Our association was founded in 1992 and the first time we became aware of the Bradford-Hill criteria was via the Program Policy Background Paper on occupational disease. The inclusion of such criteria in the proposed policy has significant potential to change and limit the existing criteria.
- The potential limiting effect is particularly evident when one considers the WCB of Nova Scotia has been funding research projects on its own and in partnership with Boards in other jurisdictions, such as WorkSafeBC. It is interesting to note that stakeholders were not informed of such funded research as part of the Policy Consultation process. It appears not coincidental that WCB is promoting specific reference to an epidemiologist in policy, which is binding upon all decision-makers, but neglects to inform stakeholders of its efforts to create a library of scientific literature.

Exposure inquiries to determine arising out of and in the course of employment

- The word “exposure” is only used in the *Workers’ Compensation Act* with respect to section 13, and 15 which set out particular occupational diseases (silicosis or pneumoconiosis). It is inappropriate to require “exposure” of the same sort for a determination of a “case by case” adjudication of a possible “new” type of occupational disease.
- We agree that the adjudicator needs to determine that the “exposure” that caused the illness must be “due to the nature of any employment” and therefore it is acceptable to ask where the exposure occurred.
- We do not believe that the legislation asks the adjudicator to determine the “frequency” or “level” of exposure ... It may be that a particular individual is susceptible and negatively affected by ‘lower’ doses standards.

- Neither do we do [sic] not believe that the legislation requires the adjudicator to determine the latency period specific to the disease ...
- The request for medical history, specialists' reports and pathologist's reports are not automatic if a determination can be made based on the confirmation or diagnosis of the disease.
- We do not believe that the legislation asks the adjudicator to determine whether a worker used personal protective equipment (PPE) ...
- If the Employer denies "exposure", how does the adjudicator propose to answer that conflict in the evidence?
- Remove ... "Use of personal protective equipment to determine whether, and to what extent, the worker was protected from exposure"
- Many occupational disease claims have been recognized where personal protective equipment has been available and used at the work site. The availability and use of personal protective equipment does not entirely eliminate the risk of exposure. In order for this point to be used to determine causation there would have to be irrefutable evidence to prove the particular equipment provided 100 % protection. This would be nearly impossible to establish. Furthermore, some work sites may have protection equipment available but do not require mandatory usage. There are just too many variables respecting the availability and usage of personal protection equipment at the work site to include this as an element to determine causation. The inclusion of this point to determine causation has potential to limit recognition criteria and should not be included in the policy.
- Remove ... "Evidence of an alternate cause(s) of the worker's disease such as hobbies, medical conditions, exposures outside of employment, or exposures in employment not covered by the *Act*."
- The focus at this stage of adjudication must be on whether or not there are any causes or exposures in the work place that can be reasonably related to the condition/disease. If there is evidence of causation from the workplace, any non-work related exposures should not and must not be used at this stage of adjudication. Evidence of alternate causes or non-employment related exposures are very relevant to these claims but should be considered only after the claim has been recognized. If such evidence of non-employment exposures or alternate causes exist, then the decision-maker is required to consider and apply Board Policy 3.9.11R1 ("The Apportionment Policy")

Application of the policy (effective date)

- We do not know whether the WCB intends for this to have a retroactive application. If the policy is a restatement of existing practices, what effect will a "start" date have on the claims adjudication process?

Burden or standard of proof

- I have several concerns about the proposed Policy; however they all fall under the general heading “burden of proof” or “standard of proof”. ... That concern is reinforced by the Discussion Paper at page 7 where the author writes:

Upon completion of information gathering, the claim then proceeds to the final stage of adjudication. At this stage, the decision-maker must assess and weigh all of the relevant evidence to determine whether the exposure is the probable cause of the disease, and if the disease arose out of and in the course of employment. (emphasis added)

- Probable has never been the test in the Workers’ Compensation; probable cause means on the balance of probabilities.
- In the evaluation process you have referred to the Bradford Hill Criteria for Causation. This criteria is inconsistent with Section 187 and the introduction of it into your Policy will undoubtedly lead to court challenges.
- Elements of the proposed policy have potential to “raise the bar” in requiring a worker to establish causation beyond the criteria of section 10 of the *Workers’ Compensation Act*...

Employers and Others

General comments

- Employers wish to emphasize that any development of the program policy re: Occupational Disease not be created or constructed by language, so as to change or expand the current legislation or rules.
- ... supports the WCB’s initiative to consolidate and provide clarity and transparency to the issue of Occupational Disease Recognition through a program policy to better guide the adjudication process.
- Employers emphasized that there should be no expansion of occupational disease entitlement. While the policy does not change the law, feedback is requested regarding any anticipated impact in the Board’s application of this new policy.
- It is the understanding of employers that occupational disease claims are on the increase in many Canadian jurisdictions. Employers felt that the *General Entitlement – Occupational Disease Recognition* policy does provide more transparency as intended by the WCB and will be helpful in making the initial entitlement decision.

Exposure inquiries to determine arising out of and in the course of employment

- In gathering accurate industrial hygiene information on exposure, the type of PPE worn must be information that is gathered and it is recommended that this be included as a question of gathered evidence.
- The policy should be focused on evidence peculiar to or characteristic to industry rather than the focus being on an alternate cause.
- Employers felt that the WCB should focus on whether the causes are peculiar to the work, and not put the onus on the employer to show that it could be caused by something else (Employers and Others).

Bradford-Hill criteria to determine peculiar to of characteristic of

- Employers recommend that the bullet “Does the employment expose the worker to greater risk of this type of disease than the normal risk/incidence to the public at large” – should be revised to include language which includes “peculiar to the occupation”
- Employers suggested that this phrasing [causes peculiar to the particular trade, occupation or employment] should be used throughout the policy

Carpal Tunnel Syndrome

- A number of employers questioned why “Carpal Tunnel Syndrome 1.2.4R was included in this appendix [B] as an Occupational Disease policy since it is not adjudicated as an occupational disease.
- Employers identified that carpal tunnel is a well established over time injury. The WCB should consider applying the two year rule when assessing claim costs for carpal tunnel syndrome.

Infectious disease adjudication and H1N1

- Employers are acutely aware, with the information regarding H1N1 that the scope of what is covered by WCB as an occupational disease has the ability to explode ... given our likelihood of contracting outside the workplace... Employers continually cautioned that any adjudication for these type of health issues be done by well trained staff at WCB, and that there is a direct connection to the work or work task by being characteristic of work or peculiar to work/work task.
- How would claims related to MRSA be handled once this policy has been approved and implemented? Causation is more difficult to prove with viral/bacterial infections.

Weighing the evidence

- The text should be modified to read, “The WCB then considers the evidence gathered throughout the claim adjudication process, and weighs the evidence to determine whether the exposure is causally connected to the disease, whether the disease arose out of and in the course of employment, and resulted from causes peculiar to the particular trade, occupation or employment.

Rate Setting

- Under the background information, Section 5: Occupational Disease recognition for Rate Setting, members agreed that the language was vague and required clarity, “In accordance with Policy 9.3.5R, Claims Costs which on average require an exposure of two or more years before manifestation into a disability are excluded from consideration for rate setting purposes.