

Issues Clarification Paper:

General Entitlement - Occupational Disease

October 24, 2008

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1. PURPOSE

This paper is intended to help readers understand the current environment related to the topic of “General Entitlement - Occupational Disease”. Responses to this paper will assist the Workers’ Compensation Board (WCB) to clarify areas of concern, understand the scope of the issue, and ensure all issues are considered. The WCB requires a comprehensive understanding of both employer and worker concerns around “General Entitlement - Occupational Disease” in order to determine the best approach to addressing this topic.

2. BACKGROUND

In 2007, approximately 1350 workers registered 1600 occupational disease claims at the WCB. This means the WCB made numerous decisions about the work-relatedness of a disease. This is the first, and one of the most important, decisions the WCB makes in the claims adjudication process because it determines whether or not a worker is eligible to receive the benefits or services provided for in the *Workers’ Compensation Act* (the “Act”).

The *Act* sets out the conditions for workers’ general entitlement to WCB benefits and services. Workers who are employed in industries or occupations covered by the *Act* are entitled to medical aid and earnings loss benefits or services if they suffer from an occupational disease. An occupational disease is a disease arising out of and in the course of employment and resulting from causes or conditions peculiar to or characteristic of a particular trade or occupation, or peculiar to the particular employment (s.2(v) *Act*).

Workers are entitled to compensation if they suffer from a disease that is due to the nature of their work, and the disease has resulted in a loss of earnings or permanent impairment, or the worker’s death (s.12(1) *Act*).

Currently, the WCB has some policies that outline the criteria for determining the work-relatedness of specific types of diseases (i.e. lung cancer in foundry workers). However, the WCB does not have a program policy or publically available guideline that communicates to injured workers, employers and stakeholders generally how the WCB determines if a disease arises out of and in the course of employment, and results from causes or conditions peculiar to or characteristic of a particular trade or occupation, or peculiar to the particular employment.

The subject of this paper is general entitlement where a worker is suffering from a disease. Examples of disabilities commonly considered diseases include infections, noise induced hearing loss, and contagious diseases. While related, the WCB believes that the topic of general entitlement where a worker has suffered an injury (for example, a specific incident such as a fall) is better addressed in a separate program policy or guideline. This is because the adjudication of disease claims can be very complex, and there are separate sections of the *Act* that address occupational diseases. Please see the Issue Identification Paper titled “General Entitlement – Arising out of and in the course of employment” for a discussion of the issues related to determining general entitlement where a worker has suffered an injury.

3. THE ISSUES

The following are the key points, problems, or opportunities identified to date that the WCB believes should be considered when determining the best approach to addressing the topic of “General Entitlement - Occupational Disease”:

1. Currently, the WCB does not have an occupational disease general entitlement program policy or publically available guideline that outlines the basic principles that will be followed when adjudicating these claims. The WCB believes that clearly communicating how this decision is made will improve transparency of the decision making process for injured workers, employers, and stakeholders generally.

Most compensation claims involve a personal injury where it can be readily determined whether the event or series of events leading to the injury arose out of and in the course of employment. According to the Canadian Centre for Occupational Health and Safety, occupational disease claims are challenging to adjudicate given long latency periods, complexities involved in linking work and health issues, and limited disease reporting and data collection (From: Recognizing and Preventing Occupational Disease: Strategies and Recommendations from Canadians, 2005).

There is currently no WCB documented program policy or publically available guideline specifying how the WCB determines, generally, whether or not a disease arose out of and in the course of employment. Workers and employers should be able to easily access information on the key factors/criteria the WCB considers when determining whether an occupational disease is work related and therefore compensable.

Occupational disease general entitlement decisions have important implications for the worker, employer, and the WCB. For example, determining that a disease is work-related grants a worker entitlement to WCB benefits and services and also has implications for the experience rating of employers. While the WCB believes its decision making is sound, clarifying the WCB’s approach to “General Entitlement - Occupational Disease” will increase the transparency of the decision making process and contribute to a common understanding, by all stakeholders, of how this decision is made. This will make the claims adjudication process easier to understand and make it easier for injured workers and employers to participate in the system.

2. Stakeholders have identified concerns and issues linked to the need for clear and transparent adjudicative principles for determining entitlement for occupational disease claims.

After carrying out research and analysis on some of the issues/concerns raised by stakeholders during the 2009 Program Policy Agenda Setting Process (i.e. determining the compensability of hearing loss, pandemic flu, and WCB accountability for decision making), the WCB believes the root cause of these concerns can be traced back, at least in part, to a lack of a common understanding and agreement on how the WCB makes occupational disease general entitlement decisions.

The WCB believes that clarifying and communicating the basic principles related to the topic of general entitlement – occupational disease will contribute to a common understanding among workers and employers of the basic adjudicative principles used by the WCB, therefore making the claim process easier for workers and employers to understand, facilitate participation in the system and improve transparency of decision making.

3. Clarifying and communicating the WCB’s approach to determining whether a disease is work-related would act as a foundation for future work on more complex topics.

Clear adjudicative criteria for determining whether or not a disease is work-related will support existing occupational disease policies and lay the foundation for further work that may be needed to support the adjudication of new/complex disease claims. This is important because the WCB can expect an increase in complex claims adjudication in the future due to increased awareness of some workplace hazards (ie. air quality), the emergence of new diseases (ie. pandemic flu), an aging population, and new technologies (ie. the use of nanotechnology in manufacturing).

Workers and employers should have confidence that the WCB will be able to successfully face future adjudication challenges. Clarifying basic principles such as those related to general entitlement – occupational disease, will ensure the WCB is prepared to adjudicate new/complex disease claims in the future. This approach is supported by the opinion of the Association of Workers’ Compensation Boards in Canada (AWCBC) who have stated that occupational diseases will have important implications for WCB’s in the future, and are an emerging issue for workers’ compensation.

4. CURRENT PRACTICE

In determining general entitlement to compensation benefits and services, the WCB applies commonly accepted workers’ compensation principles. These principles are reflected in the *Act*, and are very similar to the approaches used in other Canadian jurisdictions. While the WCB uses general principles to guide decision making, each claim for compensation is considered on its own merits and entitlement decisions are based on the facts of each case. The following are the basic issues that must be considered by the WCB when determining general entitlement to compensation benefits and services for diseases:

1. The worker making the claim has coverage under the *Act*; and
2. The worker is suffering from a disease that arose out of and in the course of employment.

In considering issue 2, the WCB reflects on various indicators or questions to assist in determining if there is a causal connection between the exposure reported and the disease. Some basic indicators or questions that would be considered by the WCB include, but are not limited to, the following:

- Consider the workers' medical evidence to determine if the exposure and the disease are work related;
- Evaluate the medical literature to determine whether there is a causal connection between the exposure and the disease;
- Where applicable, determine whether the worker was a coal miner for 20 years or more under section 35 of the *Act*;
- Determine whether the worker is or was a firefighter covered under section 35A of the *Act*;

Depending on the nature and circumstances which gave rise to a disease, the number and type of indicators or questions considered by WCB decision makers may vary.

5. JURISDICTIONAL INFORMATION

Most jurisdictions in Canada have a legislative framework similar to Nova Scotia's. For example, in all jurisdictions (except Quebec) compensation is payable for an occupational disease that arose out of and in the course of employment.

Seven jurisdictions have used occupational disease policies to assist to clarify and communicate how they determine if there is a causal connection between a disease and a worker's employment. Typically, these policies address:

- Determining whether a claim should be adjudicated as an occupational disease claim;
- General guidelines for determining if the disease arose out of and in the course of employment (i.e.: review of medical literature to assess a causal connection generally; how to evaluate if the specific exposure and the disease are work-related);
- Automatic assumption provisions;
- Distinguishing between occupational diseases and diseases of ordinary life
- Determining accident date; and
- Adjudication guidelines for some specific diseases (i.e. contact dermatitis).

The policies in other jurisdictions primarily focus on the question "is there a causal connection between the exposure reported and the disease?" This question is answered by using approaches designed to assist in the interpretation and assessment of evidence about the source and spread of a specific disease to determine whether a general causal relationship exists between exposure to an agent (ie. a specific chemical) and a disease.

6. PROVIDING YOUR COMMENTS

We are interested to hear your comments on the information presented in this paper. In particular, we encourage you to consider whether there **are any additional issues you would like to see addressed as the WCB considers the best approach to addressing the topic of General Entitlement - Occupational Disease.**

Comments may be provided to the WCB in two ways:

1. Stakeholder presentation at the WCB Policy Summit on November 26th, 2008

On November 26th, 2008 the WCB will be hosting a Policy Summit at the Westin Hotel from 1:00 – 4:00 pm. As part of the summit, stakeholders and interested parties will have an opportunity to make 5-10 minute presentations that identify and clarify their issues related to the three policy topics on the upcoming year's Program Policy Agenda including, "General Entitlement – Occupational Disease". If you are interested in making a presentation at the WCB Policy Summit please contact Marcy Dalton at (902) 491-8904 or e-mail at marcy.dalton@wcb.gov.ns.ca by **November 12, 2008**. For more information on the WCB policy summit please go to the WCB website at www.wcb.ns.ca.

2. In writing by mail or e-mail

Alternatively, we encourage all stakeholders to share their issues and/or concerns related to the three policy topics on the upcoming year's Program Policy Agenda with the WCB in writing by **December 8, 2008**. This will ensure a full and accurate understanding of your issues by the WCB. Please provide written submissions to:

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Manager Policy, Procedure & Research
Workers' Compensation Board of Nova Scotia
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APPENDIX A

Relevant Sections of the *Workers' Compensation Act*

Interpretation

2. In this Act,

(a) "accident" includes

- (i) a willful 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;

(v) "occupational disease" 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.

Payment of compensation

10 (1) Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.

(4) Where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

Compensation for occupational disease

12 (1) Where an occupational disease is due to the nature of any employment to 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.

Compensation for coal miners

35 Any coal miner who

- (a) has worked at the face of a mine or in similar conditions twenty years or more; and
- (b) suffers from a permanent impairment that is a loss of lung function,

shall be compensated according to the permanent impairment as calculated pursuant to Section 34.

Presumption respecting firefighter

35A (1) In this Section, "firefighter" means an employee, including officers and technicians, employed by a municipality and assigned exclusively to fire protection and fire prevention duties notwithstanding that those duties may include the performance of ambulance or rescue services, and includes a member of a volunteer fire department who performs those duties.

(2) Where a worker who is or has been a firefighter suffers an accident that is a cancer or other disease that is prescribed by the Governor in Council by regulation, the accident is presumed to be an occupational disease, the dominant cause of which is the employment as a firefighter, unless the contrary is proven.

(3) The presumption in subsection (2) applies only to a worker who has been a member of a fire protection service of a municipality or a volunteer fire department for a minimum period prescribed by the Governor in Council by regulation and who has been regularly exposed to the hazards of a fire scene, other than a forest-fire scene, throughout that period.

(4) The presumption in subsection (2) applies to accidents that happen on or after January 1, 1993.

(5) The Governor in Council may make regulations

- (a) prescribing diseases for the purpose of subsection (2);
- (b) prescribing periods of employment or volunteer work for the purpose of subsection (3),

and may prescribe different periods for different diseases prescribed for the purpose of subsection (2).

(6) The exercise by the Governor in Council of the authority contained in subsection (5) is regulations within the meaning of the *Regulations Act*.

(7) Subsection 83(2) does not apply with respect to a firefighter who learned before this Section came into force that the firefighter suffered from a disease prescribed pursuant to this Section.

(8) For greater certainty, compensation payable for the period before this Section came into force shall be calculated in accordance with this Part and not in accordance with the former Act.