SBCI UPDATE

June 2011 *NEWSLETTER*

MESSAGE FROM THE CHAIR

On April 8, SBCI held its Annual General Meeting and the following people were acclaimed to the SBCI Board of Directors for two-year terms:

- Ronald Bender--Conseil scolaire de district catholique de l'Est Ontarien
- Maura Quish--Waterloo Catholic District School Board
- Roger Richard--Limestone District School Board
- Mary Lynn Schauer--Renfrew Catholic District School Board
- Gerry Thuss--Huron-Perth Catholic District School Board

I would like to offer my congratulations as well as thank them for offering their expertise to the Board. SBCI has an exciting few years ahead of it and we look forward to their contributions to our deliberations. At the subsequent Board meeting, the Board elected myself as Chair and Lynda Coulter, York Catholic District School Board, as Vice Chair. We are both honoured by the confidence that the Board has in placed in us.

Over the weekend of May 14/15, SBCI moved its offices for only the second time in its history. The move went very smoothly, and phone and fax numbers remain the same. The new offices provide more space in a better area on a long-term sublease. Being a sublease, we were able to obtain the space on favourable terms.

I am very pleased to say that SBCI has a new member school board. The co-operative will start providing Workers' Compensation and H&S services to Ottawa-Carleton DSB from June 1. We welcome OCDSB as a member.

We also welcome April Wei and Shawn Tang to SBCI's staff. April started as Executive Assistant to Senior Management in early May, and Shawn joined our Actuarial team around the same time. Also, as mentioned in my previous Message, Anne Huska has now joined us to cover for Melissa Hewit's maternity leave.

Finally, as we approach the end of the academic year, I draw your attention to the article later in this Newsletter on WSIB Loss of Earnings in the Summer.

I wish everyone a safe and enjoyable summer, when it finally starts.

If you have any questions, comments or ideas regarding the Co-operative, please give me a call or send me an email. Our aim is always to improve the services that we provide to you. I can be reached at Gerry_thuss@hpcdsb.edu.on.ca or on (519)345-2440 X330.

Gerry Thuss
Chairperson

IN THIS ISSUE

2011 SCHEDULE 2 EMPLOYERS' GROUP CONFERENCE

The 22nd annual Schedule 2 Employers' Group conference will take place on September 27 and 28, 2011 at the International Centre conference facilities located near Pearson International Airport. Accommodation will be available at a preferred rate of $115.00 per night at the Marriott Fairfield Inn & Suites.

One of the confirmed keynote speakers is Corrie Spitzer who is an engineer and health and safety professional who will talk about responding to disasters. What lessons can we learn from the mistakes of the past in places like the Gulf of Mexico, etc?

There will be a varied line-up of workshop topics in the fields of health and safety, disability management, attendance management, WSIB, labour relations, human rights, risk management and health care. Some of the speakers will have presented at the conference in the past but there will also be many new presenters.

It is expected that the complete conference agenda will be available for viewing in late June with on-line registration starting in early July. If you have questions about the conference please contact chris@sbci.org.

BILL 160

On March 3, 2011, the Ontario Government introduced Bill 160, "An Act to amend the *Occupational Health and Safety Act* and the *Workplace Safety and Insurance Act*, 1997 with respect to occupational health and safety and other matters." Bill 160 follows the December 2010 report of a Government-appointed Expert Advisory Panel on Occupational Health and Safety. The Panel,

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chaired by former Ontario cabinet secretary Tony Dean, recommended 46 changes to how Ontario regulates occupational health and safety. Bill 160 is intended to implement the Panel's recommendations and has been passed into law. Bill 160 has resulted in a number of significant changes to the regulation of occupational health and safety in Ontario.

Some of the key aspects of Bill 160 are summarized below.

Training Standards and Approved Providers

Ministry Of Labour would set the standard of for training programs required under the OHSA and Regulations and there are now criteria on the collection of training records of any individual. The MoL would also be responsible for the approval of all training certification for providers.

Additional Training Provisions

At present, one worker member and one management member of the joint health and safety committee (JHSC) are required to be "certified" by the Workplace Safety and Insurance Board. Under Bill 160, the Minister will require the Health and Safety Representative for sites less than 20 employees to be certified.

JHSC Recommendations

There are new provisions to allow the Co-chairs of the JHSC to make recommendations to the employer where the JHSC was unable to reach consensus.

Prevention Council

Under Bill 160, a "Prevention Council" would be established and responsible for providing advice to the Minister. This council would comprise worker and employer representatives and other persons with occupational health and safety experience. Essentially, the functions of the Prevention Council would be to advise the Minister on the appointment of a "Chief Prevention Officer," then to advise the Chief Prevention Officer on health and safety matters.

The Chief Prevention Officer would be responsible for: (i) developing a provincial occupational health and safety strategy; (ii) preparing an annual report on occupational health and safety; (iii) exercising powers or duties delegated by the Minister; (iv) providing advice to the Minister on the prevention of workplace injuries; and (v) providing advice to the Minister on proposed changes to the funding and delivery of services for the prevention of workplace injuries.

Finally, the Minister would have the power to designate an entity as a "safe workplace association" or as a "medical clinic or training centre specializing in occupational health and safety matters." Any such entity would be required to meet, and continue to abide by, certain "standards" established by the Minister. Any entity that is already designated under the WSIA would be deemed designated under Bill 160.

Reprisal

Ministry of Labour inspectors now have the power to send warranted complaints of reprisals for enforcing the OHSA in a workplace against a worker to the Ontario Labour relations boards. The onus is on the employer to prove that it is not a reprisal.

Minister of Labour powers

With the addition of new amendments the Minister of Labour has new powers transferred from the WSIB. These powers include promotion of occupational health and safety, public awareness, education, fostering commitment and providing monies as necessary to support occupational health and safety.

Implications for Employers

Bill 160 has passed and is to be fast tracked. It is important to note that the Ontario Government has showcased its "record" on occupational health and safety, and has indicated that it plans to implement all 46 recommendations of the Expert Advisory Panel within the next three to five years[1]. Accordingly, it may be that Bill 160 is only the first step in a more comprehensive overhaul of Ontario's occupational health and safety system. School boards need to be aware of the changes and provide funds accordingly to comply as required.

EXCESSIVE ABSENTEEISM-AN EMPLOYER'S ADMINISTRATIVE OPTIONS

The following case law decision will be of interest to school boards with an Attendance Management Programme or working towards the implementation of an AM Programme.

The recent decision in *The Ottawa Hospital v. The Canadian Union of Public Employees* (March 2011) supports employers' rights to reduce an employee's employment status to part time due to innocent absenteeism and as a form of accommodation.

Arbitrator Kathleen O'Neil dismissed part of the Union's grievance of the Hospital's decision to convert an employee from full-time to part-time due to innocent but excessive absenteeism. The Arbitrator ruled that in light of the excessive absences, and the lack of any evidence to suggest that the employee's attendance would improve in the future, the Hospital's action was reasonable.

The Hospital had an "Attendance Management Plan" (the "AMP" or the "policy"). The policy provided for progressive administrative consequences where an employee's attendance did not conform to the Hospital's average rate of absenteeism. The grievor was placed into the AMP in 2004. Over the three year period between 2005 and 2008 the Hospital calculated the grievor to be absent on 94 occasions - approximately 45% of the time. The Hospital was also of the view that the grievor failed to meet her responsibilities under the AMP by not providing proper medical documentation when she was absent. As a result, in April of 2008, the Hospital exercised its administrative option under the AMP to reduce the grievor to part-time hours for a six-month period.

The Union contested the Hospital's action on a number of grounds:

- It constituted a layoff and, therefore, had to be consistent with collective agreement provisions
- The conversion to part-time was not responsive to the grievor's particular medical condition

- The six-month period of part-time status was arbitrary
- The employee was treated in the same manner as a non-disabled employee which constituted a breach of the *Human Rights Code*.

The Hospital framed the issue as a question of the reasonableness of its actions and the necessity to be able to address the situation where an employee cannot attend work on a regular basis. It claimed that conversion to part-time was the only measure of accommodation available that would keep the grievor employed.

The Arbitrator dismissed the Union's arguments that the layoff provisions of the collective agreement had been breached. The conversion from full-time to part-time was better characterized as a demotion.

The Arbitrator also accepted the Hospital's position that the administrative option of reducing an employee's hours to part-time, rather than termination, is not in itself discriminatory towards persons suffering from a disability. On this point the Arbitrator stated: *It is clear from the jurisprudence…that there comes a point where the employer is entitled to consider all of the absences in determining whether an employee can fulfill her bargain to attend work regularly, where there is nothing further that can reasonably be done to accommodate the disability to enable the employee to attend more regularly at work and there is little prospect for future improvement.*

The Arbitrator found that the grievor was not fulfilling the Hospital's expectations, either as to attendance at work, or as to the provision of the specific type of medical information required by the AMP. The Arbitrator stated: …*there is no argument, submission or evidence before me that there was something that the grievor needed as accommodation, or that there was something other than offering part-time work that the hospital could have or should have done to further accommodate the grievor…*

The Arbitrator dismissed that part of the grievance challenging the Hospital's decision to convert from full-time to part-time, holding that the Hospital's offer of part-time work rather than proceeding to termination was not shown to be unreasonable in the circumstances.

Case law states that within an Attendance Management Programme, termination for innocent absenteeism can occur. This latest decision provides employers who have an AM Programme another administrative option, other than termination, to address attendance issues, even where the absences are related to a disability.

REVISED FORM 8

WSIB posted a revised Form 8 (Health Professional's First Report) on their website on March 28, 2011. This form is to help "facilitate early intervention and improve recovery and return-to-work outcomes". The website instructions for treating physicians included a message encouraging them to contact a WSIB Medical Consultant, at any time, to help return the worker to work. The new form highlights low back, shoulder and fracture injuries and includes medication information (including Opioids). The third page asks for functional abilities information, which the Health Professional is supposed to send to WSIB as part of the revised Form 8. This eliminates the need to complete a FAF on the initial visit.

Apparently, there were consultations with the Ontario Medical Association, WSIB Medical Consultants and front-line delivery staff at WSIB. However, employer stakeholder feedback was not elicited. This is unfortunate as there are many concerns from the employer community about this form. Many employers have the FAF embedded in their return to work program and have this form as a vehicle to start the conversation about modified work. This opportunity is now over-shadowed by the fact that the treating physician will complete the third page of the Form 8 with the functional abilities information and this is the form that will be paid for by WSIB. Other concerns are as follows:

- Many times, the Health Professional does not complete the Form 8 at the time of visit, but will complete paperwork later. The opportunity to discuss functional abilities with the worker is now lost and the employer is left with having to request this information from the Health Professional.
- The Health Professional has been encouraged to complete the Form 8 electronically. How does the form get signed? Also, how can it be confirmed as to who completes page 3?
- The Health Professional's designation is not indicated on page 3 and again, how can it be confirmed who completes page 3?

SBCI has provided feedback and concerns on behalf of the member School Boards to WSIB. At this time, WSIB is still getting feedback and is taking it under advisement. It will be interesting to see the changes, if any, will be made to this process.

ROLES OF THE DOCTOR AND SCHOOL BOARD IN RETURN TO WORK

The Human Rights Tribunal of Ontario issued an important decision for school boards on January 28, 2011. The decision included specific statements about information provided by Doctors in medical certificates; employees' responsibilities to cooperate in providing appropriate medical information; and the employer's role in accommodating disabled employees.

The following is summarized from an April 2011 Education Law eBulletin from Shibley Righton LLP Barristers and Solicitors.

The *Baber v. York District School Board* case involved a Secondary Teacher who was terminated in September 2009. The Teacher's Psychiatrist and another Doctor offered suggestions and recommendations to re-assign the Teacher to specific jobs they felt would be of benefit to the Teacher noting her bona fide medical conditions. The teacher was also to undergo a performance assessment (TPA) with her Principal which the Teacher requested be postponed to 2012. The school board attempted to clarify the Teacher's need for the reassignment by attempting to obtain specific restrictions

and limitations which neither the Teacher nor her Doctors ever provided. The school board offered the Teacher various options and made several attempts to resolve issues to enable the Teacher to provide specific medical information. Despite these attempts, the Teacher failed to provide the information, ultimately resulting in her termination. The Tribunal upheld the termination and found that the employee had not provided sufficient medical information to support her inability to participate in a performance assessment or to fulfill her essential duties as a teacher. The Tribunal also found that the school board discharged its duty to accommodate the Teacher by requesting medical information that the employee did not provide.

The Tribunal stated:

> *"It is not sufficient for a medical certificate to merely state that an employee would benefit from placement in a particular job. The medical practitioner's role in the accommodation process is not to identify the specific job in which an employee is to be accommodated but rather to identify the employee's disability-related needs and restrictions. It is then up to the employer, who has the ultimate responsibility for accommodation in the workplace, to take that basic information and to determine whether and how the applicant's disability-related needs might be accommodated up to the point of undue hardship."*

These are important statements for school boards in relation to disability management and the accommodation process. The decision reinforces the roles and responsibilities of employers, employees and Doctors in the accommodation process for disability management:

a) The school board's role is to determine if an employee can perform their essential duties and be accommodated to do so
b) The employee has an obligation to cooperate in providing appropriate medical information
c) The Doctor has a role to provide specific restrictions, limitations and abilities to demonstrate a need for accommodation.

Thus, it is important for school boards to proactively obtain restrictions and limitations and make the decision as to whether or not an employee can be accommodated to perform their essential duties.

SECTION 63 AGREEMENTS

Recently, one of our member school boards successfully completed a Section 63 Agreement with one of their employees. Section 63 is a provision in the Workplace Safety and Insurance Act which allows Schedule 2 employers and a worker/survivor to enter into an agreement that *fixes the amount that the employer will pay to the worker or survivor under the insurance plan; or in which the worker or survivor agrees to accept a specified amount in lieu of or in satisfaction of the payments to which he or she is entitled under the insurance plan.*

The process was quite rigorous with the WSIB ably guiding the participants to ultimately reach a successful resolution. Through this process, a number of important lessons were learned and should be shared with all of our Schedule 2 school board clients. They are:

- The settlement agreement under Section 63 only applies to compensation benefits and does not include Health Care, re-employment or LMR/Work Transition. This means that the worker still has access to some benefits under the claim, even though Loss of Earnings will not be one of them.
- The agreement, which is actually a highly formalized document which must contain specific language, only comes into force after the WSIB has approved the agreement between the parties.
- The approval process involves a "fairness" test", meaning that the amount provided by the employer fairly represents what the worker may have received under the claim. The "fairness" test can only be answered by the WSIB Claims Manager who, along with the Case Manager, reviews the facts in the case and attempts to establish reasonable parameters within which the employer must operate when fixing an amount of the settlement.
- The worker must have had access to legal representation during the negotiations. In most cases, school board staff have union representatives which are not the same as having legal representation which is a key factor when determining that the worker had competent representation.

Although a Section 63 Agreement is not recommended for all situations, it is a useful tool when a School Board wishes to bring closure to a claim insofar as Loss of Earnings benefits are concerned.

If you wish to have more details on the Section 63 process, please contact Robert Orrico at robert@sbci.org, or (905)669-4449, ext. 225.

SURFING THE NET

The new Work Reintegration policies came into effect in December, 2010. The interim policies are currently in use to administer the Work Reintegration program. Stakeholders were given the opportunity to provide submissions on the policies and SBCI did a submission on behalf of member School Boards.

The WSIB is reviewing the submissions and recommendations received from worker and employer groups as part of the policy consultation process and will give consideration to their opinions and concerns before the policies are finalized.

The 'Back Book' is being given to all workers who register claims with WSIB that involve work-related back injuries. It is on the WSIB website www.wsib.on.ca in read-only version. It emphasizes the fact that it is important that injured workers work with their health care professionals, employers and WSIB to achieve successful recoveries. Research shows staying as active as possible will help injured workers to return to their normal work and leisure activities.

The Customer Experience Office is up and running at WSIB. The staff in this office is supposed to provide expert advice to WSIB management and staff to ensure that employers and workers receive excellent service, every time we call, visit or correspond with WSIB. This office is not a decision-maker, a customer contact centre or a replacement for regular channels of communication with WSIB staff or programs. To provide feedback, you can complete the Customer Feedback Form online or fill one out if you visit a WSIB Information Centre or reception area at any of the WSIB offices across the province.

TIPS FOR HIRING NEW AND YOUNG WORKERS

It's spring going to summer!

And many school boards are thinking about hiring summer workers.

This can be a positive experience for everyone – new and young workers are an asset to your workplace with fresh eyes, and new ideas.

But did you know new workers have 5 to 7 times the risk of injury in the first four weeks of a new job?

Unfortunately, new and young workers often get hurt on the job because they take on jobs for which they're not trained, they sometimes don't have appropriate supervision and they often work with dangerous equipment. They're also less likely to ask questions because they're eager to do a good job and want to seem capable.

As an employer, you can offer your seasonal workers a great work experience while also protecting them from injury on the job.

Here's What You Need To Do:

Give them the needed training like WHMIS, and how to safely perform the jobs they are doing in the classroom first.

Spend more time explaining the job to your young and new workers (i.e. task specific, process, procedures etc.).

Use the "tell me, show me, practice" method of teaching – always have new workers demonstrate that they can do the work safely.

Keep in mind that supervisors must be "competent" and that new and young workers need a different kind of supervision. Supervisors need to spend more time in the first few weeks making sure new staff understands why a task is performed in a certain way. Be clear about the expectations – people are more likely to follow the rules if they know what they are! Supervisors must always observe new workers performing a task before leaving them to perform the work alone.

Employers should ensure that supervisors follow-up often with new staff.

Supervisors need to be available and open to answering questions and providing advice – remember, many young and new workers will not ask questions unless encouraged to do so. Be available for your new workers.

Explain the importance of prompt reporting of unsafe conditions and concerns. Ensure new workers know it is a priority for you and tell them how and to whom to report a hazard or concern. It is important to act on those concerns, otherwise workers quickly learn that the school board isn't really interested in creating a safe and healthy environment.

And remember, your example is key in influencing others.

WSIB ACCIDENT "ARISING OUT OF" AND "IN THE COURSE OF"

SBCI has noted a change in the decision that WSIB is making in regards to a worker who sustains injuries from fainting. The position previously taken by the WSIB was that while the cause of the fainting was not allowable, the sustained injuries were allowable. Schedule 1 employers receive SIEF 100% cost relief. Schedule 2 employers do not receive any cost transfer and bear the full cost of the claim. This has always been an issue.

In recent decisions, the position taken by the WSIB is that there must be an "accident" as defined by the Workplace Safety Insurance Act and WSIB policy. Circumstances involving a faint followed by a fall are considered as "disablement – unexpected result of working duties". There must be a causal relationship with the work being performed. Under disablement, the accident must have arisen out of and in the course of the employment. Both criteria must be met. It is not sufficient that the disablement comes on during work, but rather there must be something about the work which can be considered to have caused the disability to come on. There must be a precipitating event or occurrence.

In the event of a fainting type of episode from an unknown cause (with a resulting fall causing an injury), while the injury occurred "in the course of" employment, if the WSIB is unable to establish that it "arose out of" the employment, then the claim is denied. If the WSIB is unable to establish both criteria, then there is no causal relationship between the injury and the work performed. Therefore the faint-related fall cannot be accepted by the WSIB. It must be established that the work caused or brought on the fainting event.

WSIB LOSS OF EARINING BENEFITS DURING SUMMER BREAK

We are nearing the end of the school year and approaching the summer break for 10 months employees. This is by way of a reminder.

For 10 month employees who are currently considered totally disabled and in receipt of full WSIB loss of earnings benefits it is important that you closely monitor the disability and obtain functional abilities information. If the employee is able to work with accommodations, provide a written Return to Work Plan to the employee and copy the WSIB. Where possible, return the individual to full time hours by the end of the school year or earlier. If it is not possible, then still provide a plan with gradual return to work extending into the summer months, as if the employee were still working beyond the end of the school

year. The WSIB will pay partial loss of earnings benefits in accordance with the employer's Return to Work plan. The written plan should be detailed so that the WSIB can make the decision that the offer is suitable and only pay partial loss of earnings.

WSIB will pay full loss of earnings benefits into the summer months if the employee is medically totally disabled, even though the employee works only 10 months. If the medical findings indicate the employee is only partially disabled at some point during the summer and functional abilities information is available, provide a RTW plan to the employee and copy the WSIB, as if the employee was working. Again, the WSIB will pay partial loss of earnings according to the gradual hours in the Return to Work plan. If a written plan is not provided to the WSIB, full loss of earnings will be paid until the employee returns to work in September 2011.

SBCI BOARD OF DIRECTORS

Gerry Thuss (Chair)
Lynda Coulter (Vice Chair)
Ronald Bender
Carolyn Miljan
Mark Musca
John O'Connor
Maura Quish
Roger Richard
Mary Lynn Schauer
Anna Sequeira

DATES OF MEETINGS

Board of Directors Meetings

Friday, June 24, 2011

August 13 to August 15, 2011 (White Oaks Resort, Niagara On The Lake)

Friday, October 7, 2011

Friday, November 11, 2011

Friday, December 9, 2011

Friday, February 3, 2012

Friday, March 2, 2012

AGM, Friday, April 13, 2012

Friday, May 11, 2012

SBCI STAFF

Brian Brown, Chief Executive Officer
Lynn Porplycia, Chief Operating Officer
Wendy Achoy, Chief Actuary
Joe Huang, Actuarial Analyst
Shawn Tang, Actuarial Analyst
Ellen Xu, Actuarial Analyst
Mary Luck, Senior Claims Manager
Darlene Iwaszko, Claims Manager
Christopher James, Claims Manager & Lawyer
Kelly Melanson, Claims Manager
Robert Orrico, Claims Manager
Louise Bellamy, Financial/Office Coordinator
April Wei, Executive Assistant
Lily Li, Executive Assistant (Temporary)
Anne Huska, (Acting) Supervisor, Data Management
Sylvie David, Data Management Assistant
Rose Erbay, Data Entry Clerk
Audrey O'Connor, Data Entry Clerk
Rolly Montpellier, Marketing Consultant
Robbin Lavoie, Senior Health & Safety Specialist
Christina Bick, Heath & Safety Specialist
France Germain, Health & Safety Consultant
Cheryl Luke, Attendance Support Practice Leader
Byron Franson, Attendance Support Consultant
Kathleen Gratton, Attendance Support Consultant
Shoba Thomas, Bilingual Attendance Support Consultant
Patrick Gani, Senior Programmer Analyst