WSIB Claims Management Update

April 2014 ***Flash NEWSLETTER***

Dear Members,

The WSIB has released five new draft policies related to the payment of benefits. The policies include: Aggravation Basis, Recurrences, Work Disruptions, Permanent Impairment (NEL's) and Pre-existing Conditions. SBCI is participating in the consultation process and have drafted up an official response, which is enclosed below.

Overall, we believe that the WSIB is moving in the right direction with these policies. They are beneficial to our work as advocates on our members' behalf. Some aspects of the policies, however, are problematic and we have provided commentary and recommendations where we believe it is appropriate to do so. The new policy on Pre-existing Conditions is controversial as it will significantly impact worker's benefits. Most of our commentary is directed towards Pre-existing Conditions.

Aggravation Basis

We are generally supportive of this policy as there are no substantive changes from the previous version. We also are appreciative of the elimination of duplication of wording and terms for greater clarity.

However, there is one point that we wish to raise which involves the scope of determining when a pre-accident impairment is identified under this policy. The draft policy provides the following:

> **Determining pre-accident impairment**
>
> Before entitlement for an aggravation is considered, the decision-maker must determine if a pre-accident impairment exists. Evidence of this includes, but is not limited to, the worker having:
>
> - A previously identified and symptomatic medical condition/impairment
> - Medical precautions/restrictions and performing modified work prior to the accident.
> - Received regular health care treatments prior to the accident
> - Lost Time from work before the accident.

Although we appreciate that this list is not exhaustive, we believe that there should also be language inserted concerning when workers address their own medical concerns and accommodations. We would describe these as "self-modification" and "self-prescribing over the counter medication." The trend in Ontario is an aging workforce. As a result more people are going to be affected by degenerative changes and this may impact how they perform their work and what medications are required. Oftentimes, these issues remain under the radar when medical issues do not impact a worker's ability to function on a day to day basis yet are present nonetheless. This can create the scenario of individual workers self-modifying their activities to compensate for the onset of age-related factors. This may also involve the increased use of NSAIDS or other over the counter medications. Although these measures may not be formalized in a documented accommodation plan, they are nonetheless, additional factors that should be taken into account when determining whether a pre-accident impairment exists.

Recurrences

We are generally very supportive of the changes to this policy, especially the new test that requires "clinical compatibility" and "continuing symptoms" be present in order for entitlement to be granted. However, we believe that a further amendment is required. The new policy provides the following:

> **New Accident**
> A significant deterioration may arise when there is no new accident or may result from a significant or insignificant new accident.
>
> A significant new accident breaks the causal link between the original injury/disease and the significant deterioration. An accident is significant if it would normally be expected to cause a disabling injury.

The definition of what is considered significant vs. insignificant, as it is currently written, is insufficient. We would ask for a more comprehensive description and definition of the terms significant and insignificant in this context.

Determining Permanent Impairment

We are generally very supportive of the changes in this policy, especially where pre-existing conditions are to be factored in for the purposes of offsetting NEL awards when a pre-existing condition is identified.

Work Disruptions

We are generally supportive of the changes in this policy.

Pre-existing Conditions

The draft policy on pre-existing conditions is new and very impactful. Generally, we are supportive of the WSIB's decision to delve in a meaningful way into the area of pre-existing conditions and how they are to be assessed and factored into the decision-making process. However, there are areas that raise some concern which we believe should be addressed.

The draft policy provides the following:

> **Policy**
> The WSIB does not consider the impact of pre-existing conditions when determining initial entitlement. Once initial entitlement is established, decision-makers consider the impact, if any, of pre-existing conditions on the worker's ongoing impairment
>
> **Principles**
> The *Workplace Safety and Insurance Act, 1997 (WSIA)* directs that compensation be provided for injury/disease resulting from workplace accidents while entitlement is not granted for injury/disease resulting from other factors, such as non-work-related pre-existing conditions.

As you will appreciate, the above statements appear to be contradictory. Although the *Act* compels the WSIB to provide compensation for work-related injuries/diseases only, the Policy, in so far as initial entitlement is concerned, appears to side-step the issue of pre-existing conditions altogether and this appears out of line with the *Act*.

In our view, in many cases where a worker has had a prior similar problem, it will not be possible to make a meaningful determination about whether an accident has arisen "out of and in the course of employment" unless information about the prior condition is gathered and factored into the decision making process at claim outset. This is especially true in situations where a gradual onset condition is reported or a work incident appears to be very minor yet the claimed injury appears to be out of proportion to the activity or incident. In those circumstances we would submit that information concerning the nature and extent of the pre-existing condition is important to making a fair determination of whether there really was an accident arising out and in the course of employment.

Therefore, we ask that if the WSIB will not have regard to pre-existing conditions at the initial entitlement stage, that the WSIB should re-consider initial entitlement if it later receives medical information that confirms that the worker had a significant pre-existing condition that calls into question the relationship between the work accident/incident and the allowance of the claim. In our view the WSIB should reconsider initial entitlement on its own initiative or on request of the employer. This should result in a new written entitlement decision which is appealable by either the worker or the employer in accordance with the usual six-month time limit for appeal.

The issue of ongoing entitlement is dealt with under the section titled, Determining ongoing benefits where there is a pre-existing condition. The draft policy provides the following:

> If the pre-existing condition is impacting the ongoing level of impairment, the decision-maker considers the impact of the pre-existing condition rather than whether the work-related injury/disease significantly contributes to the worker's ongoing impairment.
>
> If the pre-existing condition is degenerative in nature and is impacting the worker's ongoing level of impairment, WSIB benefits continue until the clinical evidence shows the worker is at the point he or she would have been at if the work-related injury/disease had not occurred.

According to the draft policy, the issue of ongoing entitlement has a new test for determining ongoing entitlement and that appears to be the impact test which borrows extensively from the "crumbling skull" rule which essentially provides the following:

> The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage…. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award…This is consistent with the general rule that the plaintiff must be returned to the position he would have been in. (Athey vs. Leonati, Supreme Court of Canada, 1996)

The principles of thin skull and crumbling skull are tests commonly used by the Tribunal. However, the Tribunal and WSIB-decision makers, most notably within the Appeals Branch have also and prominently relied on the "significant contribution test" which the new policy sets aside altogether for a new "impact" test.

The pre-existing contributing factor policy brings about a major change to the existing causation approach in WSIAT case law by rejecting the significant contributing factor test as a causation rule for determining on-going entitlement for cases with a pre-existing condition.

We have several concerns about displacing the significant contributing factor test in regard to on-going entitlement decisions where there is a non-work related pre-existing condition that impacts the work related disablement. We believe that creating a new test for this aspect of decision making and

not apparently for initial entitlement will add unnecessary confusion to an already complex decision making system.

The significant contributing factor test has been used for better than twenty years which has led to a whole body of WSIAT jurisprudence as well WSIB ARO jurisprudence. We expect that such a major change in approach would result in a significant additional number of appeals moving through the system to resolve the numerous issues that will likely be raised by this new test.

Furthermore, the impact determination is to be made on the basis of clinical evidence. Our concern with this approach is the fact that "clinical evidence" is not defined. It is perhaps broader than medical evidence as the *Workplace Safety and Insurance Act* (WSIA) includes a long list of health care providers. However, we would recommend that if the WSIB does adopt the clinical impact test that the policy focuses on medical evidence provided by physicians or surgeons as being the best evidence available.

An additional concern we have with the obligation on decision makers to obtain clinical evidence are the delays that will likely occur before the required clinical evidence is obtained, and will result in employers bearing additional costs as the worker continues on benefits from the initial entitlement determination. This is of particular concern to school boards who primarily operate under Schedule 2 and who must bear the full cost of accidents. We encourage the WSIB to ensure that processes be put in place to allow clinical evidence to be obtained in the most timely fashion. Employer's will not be aware that clinical evidence is being obtained unless they are objecting to initial entitlement and thus have access to the claims record even though they bear the cost directly. The process should be designed to keep employers informed without the necessity of having to object to some aspect of the claim that there is a pre-existing condition issue, and that additional medical evidence is being obtained in the decision making process.

We would submit that the decision making outcomes desired by the WSIB can be achieved by keeping the significant contributing factor test while still focusing on the need to consider objective clinical evidence.

We have further concerns and comments re the general topic of information flow. These comments are indirectly related to the draft Pre-existing Conditions policy thus we insert these comments here. To explain:

- The employer often records concerns about a claim on page 4 of the Form 7;
- The employer expects the WSIB to read the concerns and conduct any necessary enquiries;

- It has come to our attention that:

  (i) Eligibility Adjudicators are not reading the comments (which may include information re a prior condition) unless box 12 is checked off (which asks if submissions are attached) and that

  (ii) if box 12 is not checked off, adjudication is done automatically by computer and that

  (iii) the WSIB plans to expand automation of adjudication as the WSIB upgrades their computer systems;

Therefore, we submit that the employer should be able to raise concerns on page 4 of the Form 7 or in other places in the document and have confidence that those issues will be reviewed and addressed by the WSIB as part of the initial adjudication process. If the WSIB wants to rely more on computer assisted adjudication then it is important that the WSIB clearly identifies for employers the steps that they need to take to have their concerns and issues fully assessed as part of the initial adjudication process.

We submit that the parties should not be excluded from learning of other information of importance (i.e., adjudicative advice documents which are not available to the public, etc.). These information flow issues are all the more important where a file contains information relating to a pre-existing condition as the file is already a complicated case by virtue of that fact.

In summary, and in brief, we support the creation a pre-existing conditions policy. However, we ask that the above suggested changes be incorporated to ensure that the policy is in accord with the WSIA and to ensure that pre-existing conditions are appropriately addressed.

CONCLUSION

Thank you for inviting submissions and for considering our concerns. Please do not hesitate to contact our group if you have any question regarding our submissions.

Please note that we would be very happy to assist in any way with the next phases of your policy review process by participating in focus groups, by providing feedback on further drafts, or in any other way which may be of assistance. In the event that there are going to be significant changes to any of the draft benefit policies then we would request the opportunity to participate in further consultation before the new policies are implemented.