

Brief

OECTA Submission to the 2012 WSIB Benefits Policy Review

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The Ontario English Catholic Teachers' Association (OECTA) represents 45,000 professional women and men who teach all grades in publicly funded English Catholic schools in Ontario. OECTA is an advocate for the welfare of our members injured in the workplace and is affiliated with the Ontario Teachers' Federation, the Canadian Teachers' Federation, Education International, the Ontario Federation of Labour (OFL) and the Canadian Labour Congress (CLC).

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1. OVERVIEW

1.01 OECTA supports the review of the Workplace Safety and Insurance Board (WSIB) operational policies as it offers our organization an opportunity to assist in ensuring WISB policies, as well as the implementation of those policies, is consistent with the *Workplace Safety and Insurance Act* (WSIA). Operational policies that are up to date, easily understood, and transparent assure that workers, employers, and their representatives understand how the WSIB will apply the broad terms of WSIA.

1.02 Any changes to the WSIB operational policies must uphold the Meredith Principles:

- compensation for workplace injuries;
- an employer funded system;
- no right to sue for injuries sustained in the workplace;
- no fault insurance, and
- independent adjudication.

2. RECURRENCES

2.01 It is not unusual for workers who have been off work and in receipt of workers' compensation to return to work for a period of time and then at some point find themselves needing to leave work at the time an old injury becomes problematic again. There should be a statement of principle to guide decision-making on recurrences and it should state that the purpose of the policy is to determine whether a worker's compensable condition is a significant contributing factor to a worsening in their condition. If the answer to this question is yes, the worker has suffered a recurrence. If not, it is a new injury which will have to be evaluated and may or may not be compensable.

2.02 Recommendation: Add a statement of principle that clearly outlines the intent of the recurrence policy.

2.03 The policy should provide a greater degree of clarity around the relationship between compatibility and continuity. There are too many cases where Board decision makers have denied recurrence claims because there is not enough evidence of continuity, without any analysis of the strength of the compatibility evidence. The policy should state that when there is strong evidence of compatibility, proof of continuity may not be necessary. The policy should emphasize the fact that the shorter the period between the injury and the potential recurrence, the less need for evidence of continuity.

2.04 Recommendation: Clarify the relationship between compatibility and continuity.

2.05 Board decision makers often deny recurrence claims where the worker did not get regular medical attention for their injury. The policy does provide the opportunity to consider other evidence of continuity such as complaints to supervisors and/or co-workers, and lifestyle changes.

2.06 Recommendation: Emphasize non-medical evidence of continuity.

2.07 The policy should emphasize that the presence of non-compensable factors, such as degenerative conditions, will not automatically mean that the worker should expect to be rejected for entitlement to a recurrence. This amendment is necessary because there has been a trend recently where decision makers as a matter of practice deny claims in cases where there is any suggestion that degeneration exists and compatibility and continuity evidence is not even considered.

2.08 Recommendation: Explain the approach to non-compensable factors.

2.09 Instead of revising its policies to limit entitlement, the Board should focus on improving its adjudication of claims involving degenerative conditions. The WSIB should provide funding for independent research on the interaction between work-related and degenerative conditions.

2.10 Recommendation: Resist overhauling the policy to limit entitlement.

3. WORK DISRUPTIONS

3.01 Work disruptions include layoffs (short-term, long-term, seasonal, and permanent) and a strike or lockout relating to a labour dispute. Any work disruption should be treated the same with respect to determining entitlement to WSIB benefits and services. A worker's employability is not affected by the type of work disruption he or she happens to be a victim of and to make such a distinction is discriminatory.

3.02 Recommendation: Create a single, comprehensive work disruption policy.

3.03 The definition of employability should include where *an injured worker has a "distinct advantage" in finding similar post-accident work when compared to an*

uninjured worker. The policy should include the concept that it is not sufficient to just consider the work that the worker was doing prior to the work disruption. Decision makers must also consider the personal characteristics of the worker including language, education, how long the worker has been doing the accommodated job, what training they received before commencing the accommodated job, and how different is the accommodated job from the pre-accident job.

3.04 Recommendation: Clarify the determination of whether a worker’s work-related impairment has a clear effect on employability.

3.05 The policy should also take into account what the worker’s pre-accident job was and not necessarily what work they were doing immediately prior to the work disruption. In many cases, workers are offered alternative work that is lighter in nature. If they are accommodated on their pre-accident job, the worker should be considered highly accommodated. Most of these “light duty” jobs are not available in the general labour market. Sometime workers return to their pre-accident job, but do not resume the heavier tasks of the job. Situations like this should be considered “highly accommodated” as there can be no reasonable expectation that an employer in the general labour market would offer the same type of position.

3.06 Recommendation: Provide clarification to the term “highly accommodated.”

4. PERMANENT IMPAIRMENTS

4.01 There should be a statement of principle to guide decision-making on the determination of permanent impairment. “Threshold criteria” for Non-Economic Loss (NEL) is already in place – the requirement found in Section 36 of WSIA requires application of significant contribution test.

4.02 Recommendation: Add a statement of principle.

4.03 Recognition of Permanent Impairment is very important in the broader context of the benefit scheme as a whole. Permanent Impairment must be properly recognized and compensated. Further to this, where a Permanent Impairment exists work reintegration requires additional attention.

4.04 Recommendation: The policy should confirm the role of permanent impairments in the benefit scheme.

4.05 It would be appropriate to provide some direction on the application and meaning of significant contribution test in policy since the WSIB has previously endorsed significant contribution in occupational disease context. The proper test is significant contribution. Did the workplace accident make a significant contribution to the worker's permanent impairment? Adjudicators and WSIB cannot substitute some other standard.

4.06 Recommendation: Policy should expressly require applications of significant contribution test.

4.07 There is extensive WSIAT case law on whether NEL benefits can be reduced/apportioned where multiple injuries exist. The policy must distinguish between multiple causes and multiple impairments. It is not appropriate to reduce benefits where multiple causes result in a single impairment. The employer community and the KPMG report took the position that workers were overcompensated for disabilities related to: Age; and Minor injuries in which pre-existing conditions, especially age-related ones, were the real cause. Under the compensation system in Ontario (and nowhere else in Canada) permanent impairment benefits are calculated by multiplying the percentage of impairment by a pool of money that is determined by the worker's age at the time of impairment. That means that worker gets less money for each year of age. The fact that age is a significant determinant of the benefit payment might possibly be a violation of the Human Rights Code where a younger person will get a significantly greater benefit than an older worker with the same PI. WSIAT jurisprudence has held that WSIB benefits should not be apportioned or reduced where the worker suffers a single, indivisible injury with multiple causes.

4.08 Recommendation: Policy should not address apportionment.

4.09 If the Supreme Court of Canada (Athey) had believed it adequate to simply estimate the causal portion of an impairment attributable to non-compensable causes in order to attribute or reduce liability, it would have expressly said so.

4.10 Recommendation: Policy should not address apportionment.

5. AGGRAVATION BASIS

5.01 There should be a statement of principle to guide decision-making on aggravations. The purpose of the Aggravation Basis Policy is to limit entitlement where workers suffer a relatively minor accident that aggravates the progress of a symptomatic pre-existing impairment. The Policy allows the WSIB to limit entitlement to the period of work-related worsening of a pre-existing impairment.

The Aggravation Basis Policy should state that it only applies to limit entitlement in specific.

5.02 Recommendation: Add a statement or principle.

5.03 The Policy should direct decision-makers to obtain information from the worker's treating health professional(s) (or a WSIB-appointed physician) in all cases to determine when the work-related aggravation has ended or alternately whether the worker may have a permanent aggravation cause by the work-related accident. The medical evidence must determine the outcome. The Policy should direct the decision-maker to obtain medical information about the relative contribution of the pre-existing impairment (including any deterioration in said impairment) and the work accident to the worker's ongoing condition. This will allow the decision-maker to apportion appropriately.

5.04 Recommendation: Include specific guidance about how to assess that the worker is at the "pre-accident state", and how to access relative contributions of pre-existing impairments and work-related injury.

5.05 The Policy recognizes some pre-existing impairments will reoccur but the Policy states workers may only be compensated for one such repair, even in the event they suffer multiple work-related accidents. This provision is inconsistent with the fact that workers are entitled by statute to compensation for the consequences of work-related accidents. It also appears to be inconsistent with the rest of the Policy.

5.06 Recommendation: Eliminate the "Once only repair" provision.

5.07 Decision makers at the WSIB commonly base claim management decisions around what is referred to "normal healing times" of injuries. It would not be helpful to include any "one size fits all" guidelines regarding how to adjudicate the substance of any specific types of claims. The Policy should not include guidelines that list how certain commonly encountered pre-existing impairments are "expected" to progress. Every case must be adjudicated on its own merits. The role of the Policy is to guide decision-makers to make decisions based on evidence and facts of each individual claim.

5.08 Recommendation: "Normal Healing" guidelines about when injuries should resolve should not be used.

6. SUMMARY OF RECOMMENDATIONS

6.01 Recurrences

Add a statement of principle that clearly outlines the intent of the recurrence policy.

Clarify the relationship between compatibility and continuity.

Emphasize non-medical evidence of continuity.

Explain the approach to non-compensable factors.

Resist overhauling the policy to limit entitlement.

6.02 Work Disruptions

Create a single, comprehensive work disruption policy.

Clarify the determination of whether a worker's work-related impairment has a clear effect on employability.

Provide clarification to the term "highly accommodated".

6.03 Permanent Impairments

Add a statement of principle.

The policy should confirm the role of permanent impairments in the benefit scheme.

Policy should expressly require applications of significant contribution test.

Policy should not address apportionment.

6.04 Aggravation Basis

Add a statement of principle.

Include specific guidance about how to assess that the worker is at the "pre-accident state", and how to assess relative contributions of pre-existing impairments and work-related injury.

Eliminate the "Once only repair" provision.

"Normal Healing guidelines about when injuries should resolve should not be used.