

Comments for the
INDEPENDENT REVIEW PANEL
On the WHSCC of New Brunswick

Submitted by the Office of Workers' Advocates
November, 2007

Introduction:

The Office of Workers' Advocates ("WA") had initially decided not to make any submissions to this Panel even though collectively we have considerable experience with compensation matters, particularly from an injured worker's perspective. We concluded that because we are not mandated to be a lobby group, recommendations on legislative matters should come from injured workers directly or from other groups who have a mandate to speak for injured workers collectively: labour bodies, Advisory Council on the Status of Women, etc.

While we are still of the view that we should not be making recommendations for legislative change, we do have certain observations that may be of assistance to the Panel in its deliberations since those observations have not been submitted by others to our knowledge.

By way of introduction, the six WA in N.B. represent on approximately 300 appeals and review and provide advice on some 600 files annually. We do not refuse representation on appeals (barring the occasional frivolous or impractical request) although some workers decide not to pursue an appeal based on our assessment of the likelihood of success.

While we clearly have considerable direct experience with claim files and appeals – probably far more than any other individual or group outside of the WHSCC – we acknowledge that we not see all claim decisions. However, I suggest the numbers we are involved with elevate our observations beyond the level of being merely anecdotal.

As a final introductory note, given the nature of the contacts we receive, our submission not surprisingly reads as somewhat negative towards the WHSCC generally. However we intend no disrespect to WHSCC staff who are bound by the directions and training provided to them

1. The use of WHSCC policies in the appeal process:

As the Panel knows, the success rate of appeals is very high, and rising every year. We believe it is important to inform the Panel that the WA rely on WHSCC policies in the majority of our appeals. We do not maintain this as a statistic but we estimate – very conservatively – that we rely entirely or extensively on WHSCC policy in 50% of our hearings.

That estimate suggests, first, that WHSCC policy was not applied or not applied properly in the decision being appealed from and second, that it would not be very difficult for the Tribunal to allow an appeal from a decision that did not apply policy. In other words, while the very high rate of success before the Tribunal might on the surface appear unusual, a large number of appeal results are very easily explained as mere application of the Board of Directors' own policies.

2. Decision-making delegated to medical advisors:

Medical information and opinion are obviously important elements in the administration of compensation claims. However, administration of the Workers' Compensation Act (WCA) is not a medical function. The legal standard for acceptance of a compensation claim is the preponderance of evidence standard. It involves consideration of the Act, policy and judgments of the N.B. Court of Appeal as well as other sources of law to a lesser extent. Almost without exception however, claims at the adjudication level are decided solely by a medical advisor on the basis of a medical opinion only. The adjudication function has been effectively delegated to the medical advisors and adjudicators themselves merely forward claim documents to them. The advisors express an opinion, which is then in turn simply relayed to the worker verbatim without any apparent consideration of applicable legislative provisions (although there does appear at times to be a valiant attempt by staff to "pad" the medical advisor's opinion).

Without minimizing the need for or importance of the medical advisors' opinions, those opinions do not address all (or sometimes any) of the relevant questions that need to be answered in order to properly adjudicate a claim.

As evidence of the extent to which medical advisors control the adjudicative function, the advocates have never encountered a file where the adjudicator went back to the advisor for further explanation, clarification or to pose a follow-up question even though medical opinions offered to adjudicators are at best "terse". Nor is the medical advisor posed specific questions to elicit a relevant opinion. We assume, but don't know, that asking specific questions or going back to the advisor is not allowed.

3. The need for express legislative authority to award interest on benefits:

Although the introduction to this submission stated that we would not make recommendations for legislative change, we feel compelled to identify one area that we see as being important to consider particularly since it has not been submitted for consideration by others.

It may well be that the current Act impliedly allows the WHSCC and/or the Appeals Tribunal to award interest on delayed payment of benefits. However, because any such authority is not express, it is not seen as an option and is not currently awarded by either the WHSCC or the Tribunal.

The Panel has heard and read submissions identifying the problems which delays in Tribunal hearings/decisions cause injured workers. We won't comment on the pros and cons of creating time limits for the Tribunal to hear and decide cases. However, the provision for interest awards would serve two important purposes. It would ameliorate somewhat the effect of a delay in obtaining benefits by at least providing the full value of the financial benefit involved. Interest awards would serve that purpose whether or not time limits were in place.

They would also serve as an incentive for the WHSCC to be confident of its decisions in the first place or at least to eliminate those of the more egregious sort. Currently, there is no financial consequence for a clearly wrong decision (nor are we aware of any other kind of consequence or even review). As it is now, further to an appeal the worker simply receives what he or she should have received in the first place, some eight, ten or twelve months earlier. Ideally, interest awards would not only provide workers the full value of their benefits, but would go a long way to easing the workload of the Tribunal by reducing the number of questionable decisions (and thus even further reduce the delay and extent of interest costs).

4. Minimum benefit level:

There currently is no minimum benefit level even though there is a maximum. It is not rare for workers who are "occasional workers" and are unable to work due to an injury to receive less than \$50 weekly in benefits. A worker who is employed in the Province is guaranteed by law to earn at least the minimum wage. An injured worker is not guaranteed to earn even 85% of the legislated minimum wage. We receive a fair number of calls about this situation.

5. Bizarre decision-making:

We stated earlier that probably the majority of appeals handled by the WA involve a failure to apply WHSCC policies. There is another category of case we should identify here; smaller in number to be sure but not insignificant.

That category includes decisions that are inexplicable, clearly wrong or utterly irrational (the “no-brainer” category). For example, the claims for aggravation of a pre-existing condition (ss.7(5) of the WCA) that are denied on the advice of the medical advisors because the pre-existing injury was “exacerbated” by the employment, not “aggravated”.

6. Decisions very rarely impacted by advocates’ input:

Advocates do contact the decision-maker either orally or in writing in the large majority of cases. It is still surprising to us whenever a decision changes prior to an appeal as a result of our input because it happens so rarely. Given the number of successful appeals we are involved with year after year, we continue to wonder why our input is not accorded a bit more attention by WHSCC staff.

7. Potential entitlements often not brought to claimant’s attention:

The panel has heard a number of submissions concerning the denial of claims or related benefits. It is not unusual when advocates are reviewing a worker’s claim for some reason to notice that certain potential entitlements were never considered by the WHSCC or considered internally only. Most often those entitlements involve benefits such as PPI awards and temporary or long-term care allowances. When advocates come across such cases we will advise the worker to pursue the benefit involved. This observation suggests that WHSCC staff responsible for a particular claim do not have a means of ensuring that appropriate entitlements are considered. And even if an entitlement, a ppi award for instance, is considered by the case manager to not be appropriate on the facts, no letter is sent to the claimant notifying the worker of the decision (i.e. where the worker did not expressly request it). The worker therefore, not being aware of the existence of the potential entitlement, will not even be aware that it was denied.

8. Provisional medical benefits:

Even though the WHSCC itself is well aware for the need for prompt medical care in many cases, particularly the provision of physiotherapy for certain injuries, it will not approve such treatment unless and until it approves the claim. Workers who must rely on the public system for this kind of treatment may wait several months, thus exacerbating their condition. In those cases where the claim is ultimately accepted by the Tribunal, the worker’s condition can be significantly worse at least in terms of the time it will take for the worker to be able to return to work.

This of course increases costs for the employer involved as well as prolongs the “down-time” of the worker. The provision of certain medical treatments on a “without prejudice” basis might avoid some of these problems.

Conclusion:

The biggest source of frustration for the advocates is not the number of questionable decisions we see for we are used to that; rather, the advocates are frustrated by the belief that for every claim we are able to resolve, there may be at least an equal number of claimants – if not many more than that – who will not contact us for one reason or another, likely because they are unaware of our services or perhaps they simply accept statements from the WHSCC as valid or, as stated above, maybe they are not even aware that a benefit was denied.

That belief in an unknown number of injured workers who have been improperly denied benefits is a source of frustration because so many of the decisions we review have enormous implications for workers and their families. All of the advocates have had clients who have committed suicide while on a claim; we have all had many clients whose marriages have broken down while on a claim; many of our clients have had to resort to social services (along with the perceived stigma) pending an appeal of their case.

Notwithstanding that particular frustration and the negative tone of the remarks presented within, the advocates all enjoy their role immensely. We see ourselves as an important, perhaps essential, part of the workers’ compensation system that has existed in this province for close to a century. A recurring theme of our submissions to the WHSCC and the Appeals Tribunal is the need to maintain the integrity of that system.

We work diligently to improve our skills and knowledge in order to better serve injured workers but in the end, we believe it is the WHSCC itself that can have the biggest impact on an improved system. To the extent that the Independent Review Panel’s work will consider the day-to-day administration of the Act, we hope our submission will be of some small assistance toward that end.

Respectfully submitted,

Guy Dagenais
Manager,
Office of Workers’ Advocates