

FINAL
REPORT OF THE CHAIR
OF THE
OCCUPATIONAL DISEASE ADVISORY PANEL

EXECUTIVE SUMMARY

FEBRUARY 2005

Introduction

This is an executive summary of the Chair's Report.

The Report recommends legal and scientific guidelines to assist the WSIB in dealing with complex occupational disease issues. It also recommends a way of providing ongoing advice to the WSIB from an expert panel with respect to occupational disease issues.

These guidelines aim to provide a solid and clear platform for both fair and consistent occupational disease policy-making and adjudication in Ontario.

History and Context

Workers compensation for occupational disease presents unique challenges. Disease symptoms may not occur until many years after a particular working experience, often making their possible connection to a specific workplace difficult to determine. Moreover, certain diseases may have a variety of causes, some related to workplaces and some not.

While the *Workplace Safety and Insurance Act*, in essence, does not distinguish between workplace caused injuries and diseases for purposes of compensation, it does contain special provisions to assist in determining entitlement for certain occupational diseases. These special provisions are known as Schedule 3 and Schedule 4 of the Act; they list certain diseases and conditions and the work process associated with each of them. If a person presents a disease listed in Schedule 4, along with proof of having worked in the defined industrial process, compensation is automatic. In the case of Schedule 3, the person's condition is assumed to be work-related unless it can be shown otherwise.

However, most diseases that can potentially be caused in the workplace are not listed in the schedules. Many of them are covered by WSIB policies that are approved by the WSIB Board of Directors but are not embedded in the legislation through the schedules. These policies guide compensation decisions by defining working conditions that may cause specific diseases. Occupational disease compensation claims also involve diseases and conditions that are not dealt with in the schedules or policies. These are adjudicated on case-by-case basis.

In 2000, the WSIB adopted an Occupational Disease Response Strategy. The key aims of the strategy were to prevent occupational disease in the future and provide timely compensation and assistance to workers affected by occupational disease, their families and their survivors. As well, the strategy called for developing appropriate guidelines to:

- aid adjudication of occupational disease claims; and
- support the WSIB Board of Directors
 - in the evaluation of existing policies and development of new policies and
 - when making recommendations to the government for the scheduling of certain diseases.

To assist in this process the WSIB created the Occupational Disease Advisory Panel (ODAP) in 2001. ODAP members represented employers, workers, researchers, the Ministry of Labour and the WSIB. It was asked to develop guidelines for the application of legal and scientific principles to be used in scheduling, policy development and case-by-case adjudication of occupational disease claims.

ODAP met numerous times to present and discuss options, and considered a number of drafts of a possible report. Late in the process it became apparent that consensus was not possible between the employer and worker representatives. As a result, the Chair of ODAP was requested by the Chair of the WSIB to report on the work of ODAP and make recommendations, which would then be subject to public review. The public review was completed in 2004, and the final Report was completed for the Board of Directors in 2005.

The Report is divided into five sections:

Legal principles:

This section highlights relevant sections of the Act and explains the related legal principles which are currently used to decide compensation claims. The Report recommends that these principles be formally incorporated into WSIB guidelines;

Role of evidence:

This section recommends *what* kinds of evidence should be used to determine the cause of an occupational disease, and in what circumstances;

Establishing Causation:

This section recommends *how* such evidence should be used;

Adjudicative channels:

This section recommends *how much* evidence should be required for

- (a) listing a disease in the *schedules*,
- (b) developing or revising *policies*, or
- (c) *case-by-case* adjudication;

Future consultation:

This section recommends the creation of an ongoing occupational disease advisory group.

Legal Principles

This section begins with an outline of the statutory provisions, historical background and definitions related to occupational disease. It concludes:

As a practical matter, the legal consequences flowing from the distinction between injury by accident and occupational disease under the *Act* are virtually non-existent. The only real legal significance now relates to Schedules 3 and 4 as they may only include ‘occupational diseases.’

The Report outlines existing legal principles that are currently being used by the WSIB and the Workplace Safety and Insurance Appeals Tribunal (WSIAT) and are generally accepted for establishing work-relatedness in occupational disease claims.

Causation Test:

Diseases may have more than one cause. It is possible that the workplace is only partly responsible for causing a disease. The issue is: how big does “partly” have to be before compensation is awarded?

Current practise has adopted a test of “material” or “significant” contribution that was first developed in the courts. This test says that a contributing, or causal, factor is “material” if it falls outside the *de minimus* range.

The Report recommends:

In determining work-relatedness, the Workplace Safety and Insurance Appeals Tribunal (WSIAT) has adopted a test of ‘significant contribution’ for both personal injuries by accident and occupational diseases. The WSIB has adopted a similar test *de facto*, although no formal policy was ever adopted. It is recommended that this current test now be made explicit in the statement of legal principles.

Burden of Proof:

Who bears a burden of proof? Employer or worker? The answer is that as the Ontario worker’s compensation scheme is investigative rather than adversarial, there is no burden on either party to prove a case. The Report recommends that the statement of legal principles to be adopted by the WSIB should include that:

It is the responsibility of the decision-maker to conduct the investigation and obtain the necessary evidence. The decision-maker cannot refuse to make a decision on the grounds that there is not enough evidence. He or she must use whatever evidence is available or can be obtained and then make a decision based upon it.

Standard of Proof:

The “standard of proof” describes the relative weight of the evidence required to establish one side or another. The accepted standard of proof in the workers’ compensation system is the “balance of probabilities” which is the same standard applied by the courts in civil law negligence cases. This is distinguished from the standard used in criminal cases, which is “beyond a reasonable doubt.” The Report recommends that:

The statement of legal principles should indicate that in the application of the balance of probabilities to the proposed test for causation, the question for decision-makers is: Is it more likely than not that this worker’s employment was a significant contributing factor to the development of the occupational disease?

Benefit of Doubt:

This principle applies in cases where the evidence is too close to call. The Report refers to section 119(2) of the Act, which states:

If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against is approximately equal in weight, the issue should be resolved in favour of the person claiming benefits.

The Report recommends that the statement of legal principles include two important points about this section *of the Act, and goes on to say:*

... the statement of legal principles should [state]: First, this provision is related to decisions on ‘issues,’ not the final decision itself. Therefore each time there is an issue for the decision-maker to decide, s.119(2) applies. The statement of legal principles should include a brief discussion and/or a definition of the term “issue”. Second, this provision only applies where the evidence either way is approximately equal ...

For clarity, the statement of legal principles should recognize that the interpretation also applies to a similar clause in the *Workers’ Compensation Act*.

Role of Evidence

This section recommends that guidelines for scientific evidence must distinguish between what kinds of evidence exist and in what circumstances different kinds of evidence may be used.

The Report notes that the standard that determines the use of different kinds of evidence will vary with circumstances. For example, the primary evidence to be considered in drafting policies or entries to the schedules is scientific findings.

In contrast, the Report notes that:

Adjudication of individual claims should require consideration of a number of other types of evidence where available, including employment history, hygiene exposure assessments, third party observations and anecdotal reports, as well as scientific evidence ... establishing causation for a disease does not have to be done with scientific certainty. Rather, the causal link between the workplace and disease must be established using the legal standard, which is, based on the balance of probabilities, taking into account all of the evidence.

While scientific certainty may not be required in the adjudication of a claim, the Report recommends that the statement of legal principles should:

... make it clear that the WSIA requires that a disease be work-related before benefits may be paid and the WSIB, in its role as investigator, must have some evidence of a connection between the disease and the employment ... that evidence must demonstrate some credible or plausible connection between the employment and the disease.

The Report rates and recommends the various kinds of evidence that can be used. Following are the four categories identified, with highlights of what is recommended for the scientific evidence guidelines.

Epidemiology

The guidelines should state that evidence arising from randomized controlled trials, which are very rare in this field, and evidence provided through well-conducted epidemiological studies offer the most persuasive evidence of the relationship between exposures and disease.

The Report offers criteria for evaluating epidemiological studies and assessing the strength of evidence provided by such studies.

Toxicology

The science of toxicology provides useful scientific evidence for assessing the possible harmful effects of agents that may be present in the workplace. However, the Report notes that:

... due to the high doses normally used in tests involving living animals or cell culture, as well as...other factors, it is at times difficult to directly translate the results to humans. Evidence from a variety of animal species having similar responses, when the test agent is administered through a relevant route of exposure, have the highest validity for extrapolation to human exposures.

Employment and exposure history

Where warranted, each worker's personal employment history should be assessed from the earliest, through to the most recent, employment. Each workplace experience should be explored to characterise the working conditions to which that worker was exposed.

Individual Medical History

The medical history can hold much that is relevant to the disposition of a claim ... such relevant information may include diagnosis ... [and] family history of disease and any predisposing and lifestyle factors relevant to the condition(s) of interest.

Establishing Causation

Drawing a causal inference is a question of judgement based on a number of medical, scientific and social dimensions. There are no specific rules, but the Bradford Hill criteria can provide a useful framework when making causal determinations. The Bradford Hill criteria should be incorporated into the guidelines, and include: strength of association, consistency, specificity, temporality, dose-response (biological gradient), biological plausibility; coherence; experimental evidence and analogy.

Science studies of occupational disease often do not actually come down to what causes what. They simply lay out various observations that the scientists have made. For scientists, causation is a matter of statistical probability not certainty. However, in workers' compensation the issue of causation must be dealt with directly. Therefore, guidelines for how to use scientific evidence must include a method of moving from general scientific findings to determining actual causation in a particular circumstance.

This section does this by recommending detailed guidelines on how scientific evidence should be used to determine whether a claim should be allowed. Depending on the scientific evidence available, an adjudicator may be able to decide a claim in a straightforward manner or an adjudicator may look to individual subgroups identified in studies or the adjudicator may have to seek out other information if there is conflicting evidence.

Adjudicative Channels

The term "adjudicative channels" refers to the four ways permitted by the law for dealing with occupational disease: Schedule 3 of the Act, Schedule 4 of the Act, policies, and case-by-case adjudication. The main purpose of this section is to recommend how much evidence should be required to find workplace causation of occupational disease in each of the "channels."

Schedule 4

The recommended standard for adding a disease to Schedule 4 is:

Strong and consistent epidemiological evidence that in virtually every case the disease occurrence is linked to a single cause and that cause is associated with an occupation, workplace or work process.

Schedule 3

The recommended standard is:

Strong and consistent epidemiological evidence supporting a multi-causal association with the disease, one cause being occupation.

A primary consideration is that use of Schedule 3 should result in quick and clear claims resolution. This is best achieved by including in Schedule 3 only those diseases and processes for which the presumption of work-relatedness is not usually rebutted. Where the disease outcome is common in the general population and is often attributable to non-occupational factors and the work-relatedness of individual claims is often rebutted, it is preferable not to use Schedule 3.

Occupational Disease Policy

The recommended standard is:

Strong and consistent epidemiological evidence supporting a single or multi-causal association with disease, one cause being occupation. This category can be used when Schedule 3 criteria are met but the process cannot be defined.

Compared to scheduling, policy affords a more flexible approach for drawing broad guidelines for adjudication. Policies can focus on specific subgroups, levels of exposure and occupational categories to a degree that is not possible in the schedules.

Case-by-case Adjudication

The recommended standard is:

Inconclusive evidence as to whether an occupation is a definitive or likely cause of a disease.

When the scientific evidence is inconclusive or there is no research as to whether an occupation is a definitive or likely cause of a disease, a causal relationship cannot be ruled out. The evidence may be too equivocal or inadequate to make a general policy. Alternatively, the scientific evidence may be conclusive but the worker may not fit the study group or occupational category sufficiently to meet the schedule or policy requirements. Nonetheless, as with all claims, a decision

must still be made on the balance of probabilities as to whether the work was a significant contributing factor in the development of the disease.

Where evidence for or against causation related to a particular exposure is currently unclear but may be clarified if subject to further systematic review, the WSIB should consider initiating such a review in parallel to a particular adjudication particularly if the adjudication may represent a “leading case”.

This section also includes recommendations on a number of “technical” issues. It is recommended that “Rebuttal guidelines” for use in Schedule 3 should be developed as a structured approach for analysing evidence to determine whether the presumption is rebutted. The statement of legal principle should also clarify what is legally permissible to be included in the schedules, including “double entries” and “qualifications” in the schedules.

Future Consultation

This section of the Report contains a recommendation of the Chair of ODAP for an ongoing advisory committee on occupational disease.

This advisory body would be drawn primarily from the scientific community but also include legal and perhaps other policy experts and would:

- Meet regularly with the relevant staff with the WSIB to review, discuss and advise on occupational disease policy issues.
- Meet occasionally with the WSIB’s Board of Directors, particularly when the WSIB has occupational disease issues before it.
- Advise on future changes to the guidelines for legal and scientific principles flowing from this Report.
- Approve an annual report prepared by WSIB staff with respect to occupational disease policy developments.
- Oversee the work of *ad hoc* advisory panels.

The following recommendations were added as a result of the public review completed in 2004 and are discussed in the document entitled “*Chair’s Response to ODAP 2004 Public Consultation*”:

1. Monitoring of occupational disease costs should be a priority of the WSIB. If these costs continue to escalate as they have during the past two years, the Board should consider alternative strategies to cope with them.

2. The Board should look at directing the WSIB to prepare a paper on the issue of alternative funding formulas for the Board's consideration. The paper could also be circulated for public comment.

Appendices

The Report includes the following appendices.

A. Members of ODAP.

B. Changes to Schedule 3.

C. Conducting Systematic Scientific Reviews of Occupational Epidemiology.

D. Drawing Conclusions from Epidemiological Evidence.

E. Types of Research Design.

F. Policy on Healthy Worker Effect