DOCUMENT A

BACKGROUND MEMORANDUM ON OCCUPATIONAL DISEASE ISSUES

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Introduction

In 2005, the report of the Chair of the Occupational Disease Advisory Panel (ODAP) will be presented to the Board of Directors (BOD). The purpose of this memo is to provide new BOD members with background information on occupational disease issues in Ontario. A history of the ODAP process is outlined in an accompanying document.

Occupational Disease Recognized at the Outset of Workers' Compensation

From its inception, the *Workplace safety and Insurance Act* recognized the need to compensate for "industrial diseases" that were caused in the workplace. Schedule 3 of the Act listed certain industrial diseases closely allied to specific industrial processes and in which the relationship between the disease and a specific employment is clearly established and can be presumed. Initially six diseases were recognized, and by the 1940's the list had been expanded to 15 items.

Definition of Industrial Disease Broadened

During the post WWII years, the number of new industrial substances and processes used in Ontario industry, and the diseases that they could potentially give rise to, grew at a high rate. To cope with this, the Legislature decided to broaden the scope of coverage by permitting compensation to be paid for any occupational disease where a causal relationship with the workplace could be established. Rather than adding to Schedule 3 the Board developed "policies" which set out guidelines with respect to the nature and duration of exposures that will be eligible for compensation.

If an occupational disease claim cannot be adjudicated under a policy or pursuant to an entry in Schedule 3 or 4, it is subject to "case-by-case" adjudication, where a decision is made on the available evidence in that particular case.

Schedule 4, which lists four diseases and related processes, was added to the Act in the early 90s. It differs from Schedule 3 in that the presumption of workplace causation is not "rebutable" once it is established that the worker has the specified occupational disease and suffered the specified workplace exposure.

It should be noted that what the WSIB recognizes as an "occupational disease" (earlier called an "industrial disease") includes such conditions as dermatitis, and acute reaction to fumes or poisons as well as hearing loss. Together, conditions such as these amount to over 90 percent of allowed occupational disease claims. What most people think of as a "disease", e.g., cardiovascular, cancer, or respiratory conditions, amounts to a small

percentage of the number of claims, but in the case of cancer, a very large percentage of the costs.

Royal Commissions, Weiler and a Government Task Force

The debate that still goes on over occupational disease more-or-less began with the discovery that a disease could be caused in the workplace, but may undergo an extensive period of latency before manifesting its symptoms. However the fact that diseases such as cancer may also result from non-work related risk factors makes work-relatedness more challenging to establish.

Nonetheless, in 1977 the Royal Commission on Mine Safety concluded that there was a relationship between radiation in uranium mines and lung cancer. The seminal Weiler Reports (1981 and 1983) and the Royal Commission on Asbestos (1984) also reinforced the notion that certain diseases were work related.

Weiler was impressed by studies that estimated the compensation system was recognizing a bare fraction of the cancer cases that were actually caused by workplace conditions. This suggested that sometime in the future there could be dramatic rise in cancer compensation claims. He criticized the WSIB's policy guidelines as being overly restrictive, and urged that more use be made of Schedule 3. To assist in this process, he recommended the creation of an Industrial Disease Standards Panel (IDSP) which would be composed of experts who would have responsibility for determining which diseases would be added to the Schedules and so on.

The Royal Commission on Asbestos characterized the WSIB's use of occupational disease policy guidelines as "unstructured", "informal", "unsystematic" and "piecemeal".

In 1993 a Ministry of Labour task force on occupational disease recommended that more use be made of Schedule 3. It also recommended that WCB and the IDSP "develop guiding principles for the adjudication of occupational disease claims", and that the IDSP itself be expanded and strengthened.

The Industrial Disease Standards Panel

Returning to Weiler, his proposed Industrial Disease Standards Panel (IDSP) was in fact created in 1986 but the new panel differed in two important respects from what he had recommended. First, it was advisory and did not have the final responsibility for listing industrial diseases. Second, the IDSP included worker and employer representatives as well as medical experts. Weiler had advised against this because the "ultimate judgement should not be the result of the tug of frankly partisan views".

Until it was disbanded in 1997,[1] the Panel issued some 20 reports recommending certain actions with respect to occupational diseases. Nine of these, including reports on lung cancer in gold and uranium mining and due to asbestos, were generally accepted and,

[1] By then it was known as the Occupational Disease Panel.

where appropriate, implemented by the WSIB. (Some of these reports found no connection between a certain substance and disease, e.g. aluminum and PCBs and so no Board action was required.) Four reports were either partially implemented (e.g. firefighters' diseases and the second asbestos report) or set aside pending further study (e.g. lung cancer and hard rock mining). The WSIB has not responded (to date) to the last six reports, which deal primarily with machining fluids and certain cancers, stomach cancer in gold miners and the relationship between cancer of the larynx and nickel. From time to time the Panel also issued other reports on subjects such as universal disability, policy making and adjudication and the use of Schedule 3.

Debate over Legal and Scientific Standards

So far this brief history has focused on the issues surrounding policy setting, i.e., which diseases should be recognized as having an occupational origin and who should make this decision; and the use of schedules versus policies.

Another vigorous debate arose over the relationship between the role of science versus that of legal principles in claims adjudication. Apparently, it was (and some say it still is) the practice of adjudicators and medical advisors to deny claims unless they fit exactly within WSIB policy guidelines and/or could be supported by hard scientific evidence. However, some legal commentators, including the Supreme Court of Canada, take the position that that the law actually demands a less rigorous standard of proof, where support from scientific data ought to be considered as simply one of several types of evidence, and its absence should not in itself be sufficient to deny a claim. Legal commentators have also observed that in law, a claim which does not fit policy guidelines still needs to be adjudicated on its own merits.

Sarnia

The Sarnia situation is another significant piece of the ODAP background. In the late 1990's numbers of significant health problems and premature deaths were identified amongst workers and retirees who had experienced major exposures to asbestos and/or the fiberglass production process. This led to a significant increase in public concern about occupational disease and a corresponding increase in the number of compensation claims.

WSIB Occupational Disease Response Strategy

The WSIB reacted by funding a new occupational health clinic in Sarnia; creating a special working group to deal with the issues arising from the fiberglass plant and developing a broader-based Occupational Disease Response Strategy (ODRS) of which ODAP was one part.

The history of the ODAP process is outlined in an accompanying document.