

WSIB revamps benefit policies

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For Law Times

For those injured at work, the playing field is changing in the form of new Workplace Safety & Insurance Board policies affecting pre-existing conditions, recurrences, aggravations, and permanent impairments.

After a two-year review, there was some hope the new guidelines would deliver clearer, fairer, and more consistent decisions. The WSIB is confident they will, but workers compensation lawyers remain skeptical.

Perhaps the most pervasive response to the WSIB's new operational policies and administrative directions is relief that there are now definitive guidelines in place. While workers compensation lawyer Michael Green is no fan of the changes, he prefers to have something concrete to work with.

"The one positive thing about the November 2014 policies is that it is better to have open, unbalanced, and bad policy directives than secretive, terrible policy dicta from senior management. This is thin gruel for injured workers. The policies unfortunately are not balanced. As for consistency of decision-making, the policies do leave a fair bit of leeway to decision-makers."

Carissa Tanzola of Sherrard Kuzz LLP takes a more positive view. "It is commendable that the WSIB has made such an effort to clarify policies that the WSIB, employers, and workers have previously struggled with," she says. "For the most part, the WSIB appears to have achieved its goal."

The WSIB has merely reworded or consolidated some policies, such as the aggravation and the work disruption directives, but has significantly changed others. The pre-existing conditions policy is a completely new one that describes how to draw the line between work- and non-work-related matters. "It attempts to clarify what happens when a worker has a pre-existing condition and that condition overwhelms the impact of a work-related injury," says Tanzola.

"Similar to the policy for the second injury and

enhancement fund, the new pre-existing conditions policy notes that benefits will continue if the pre-existing condition is prolonging the worker's recovery or the workplace injury has aggravated the pre-existing condition. While this is helpful, the new pre-existing conditions policy defines pre-existing condition as any condition that existed prior to a work-related injury [or] disease and may include injuries, diseases, degenerative conditions, and psychiatric conditions. This is differently from [the second injury and enhancement fund], which covers an underlying or asymptomatic condition which only becomes manifest post-accident. Further confusion may arise yet when dealing with the continuation of benefits and cost relief."

While Green isn't a fan of the new pre-existing condition policy, he notes it could have been worse. "The original policies as proposed in March 2014 would have been the nadir of 100 years of the system. The pre-existing condition policy was that bad. The government then improved the policies in November so they are merely as bad as anything I have seen in the 35 years that I have been doing this work."

Green believes that rather than protecting "workers by setting a fair threshold for when benefits may end," as the WSIB suggests, the policy in fact swings the decision-making power too far in the employer's favour. "The pre-existing condition policy allows the board to completely disentitle workers who have impairments that relate to both work-related and non-work-related conditions."

The new recurrence policy is also causing some concern. It outlines how to determine entitlement to benefits when a worker experiences a recurrence of a work-related injury or disease. It identifies clinical compatibility of the current condition with the original work-related injury or disease as the primary consideration in making this determination. "The new recurrence policy instructs adjudicators to



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look for a causal link between a significant deterioration of the original work-related injury and the new incident to determine if there is clinical compatibility," says Tanzola. "The new incident does not have to be work-related."

She notes that previously, the WSIB considered both clinical compatibility and continuity in granting entitlement for a recurrence. "The result was if a worker did not have ongoing pain, active treatment or restrictions, the WSIB would deny entitlement for a recurrence. Now, however, the WSIB recognizes that continuing symptoms may be an indicator of a causal link but that continuing symptoms or continuity is not required. This benefits both workers and employers. Workers may now receive benefits for injuries that might otherwise not have qualified for coverage. Em-

ployers may avoid a new claim and the accounting and cost consequences that go along with a new claim by having the recurrence linked to the prior claim."

A new policy for determining permanent impairment outlines the criteria for establishing that a work-related permanent impairment exists. Green believes it continues to represent an overall imbalance. "To balance the system, the government would need to acknowledge that younger workers have been systematically disadvantaged by board policies since the days of [former premier] Mike Harris. They are caught two ways in the long run. Lower pre-accident wages for younger people is compared with higher post-accident earnings capacity for loss-of-earnings purposes, and benefits deindexation results in significant losses to them over the long haul."

While Tanzola sees benefits for workers and employers in the new policies, Green is hoping for more employee-friendly policies in the future. "This will tie injured workers to a cold board until the age of 65. Resolution long before that is in both parties' interests."