Statutory Review Submission 2019

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DMC represents the interests of 300+ employers in most Canadian Jurisdictions. As such, we work on behalf of employers to reduce the time and costs associated with managing workers' compensation and sick leave claims. With years of experience in many varied disciplines, our Disability Managers work diligently to provide early and safe return to work strategies for employees. With hundreds of clients nationwide, we have helped businesses across multiple industries.

Administrative Law is one of the basic areas of public law dealing with the relationship between government and the public. Administrative law ensures that government actions are authorized by the provincial legislatures and that laws are implemented and administered in a fair, reasonable manner as they were intended. Administrative law is based on the principle that government actions must be legal, and that the people who are affected by unlawful government actions must have effective remedies. A strong administrative law system maintains public confidence in government authority.

WorkplaceNL is governed by a constituency model Board of Directors with equal representation from employers, workers, the general public, including a member representing the interests of injured workers, and an independent Chairperson. Board members ensure that stakeholder implications of policies and decisions are identified and considered as part of their governance of the organization. While Board members must act in the best interests of WorkplaceNL as a whole, and not as advocates for particular stakeholder interests, their ongoing connection with stakeholder groups provides a valuable source of information and perspective.

Pursuant to Section 19 of the Act, WorkplaceNL has exclusive jurisdiction to examine, hear and determine all questions arising under the Act. As with other workers' compensation boards across Canada, WorkplaceNL operates on the basis of an inquiry model.

WorkplaceNL is required to gather information, examine and weigh the evidence and make decisions. Through the claim's management process, there is ongoing and continuous receipt of information from multiple sources including healthcare providers, the worker and the employer. In some cases, there are multiple decisions dealing with different benefit entitlements on the same claim. Decisions are appealable by both the worker and the employer.

However, recently, we have encountered what we would consider to be an anomaly in representing our clients here in the NL jurisdiction. In accordance with Policy GP-01, WorkplaceNL collects and maintains information for the purposes of adjudicating and managing claims for injured workers or their dependents. WorkplaceNL also registers employers and collects employer assessments.

WorkplaceNL operates in an environment where it must balance the interest of workers who may be seeking or receiving benefits and services under the Act, and that of employers, who have an interest in the same matters. WorkplaceNL seeks to ensure a balance between the confidentiality of the parties involved and the rights of other interested parties to obtain the necessary relevant information in order to fulfill their statutory obligations. Information accessed or disclosed under this policy may only be used

for purposes under the Act. WorkplaceNL expects individuals and organizations to protect this information and any violation of that principle will be viewed seriously by WorkplaceNL.

Furthermore, the purpose of WorkplaceNL's internal review process is to ensure that decisions of operating departments are fair, reasonable and consistent. It may be accessed by a worker, dependent or employer who outlines their disagreement with a specific decision.

We have recently received numerous responses to concerns outlined on specific claims whereby we have been told that no decision and/or rationale will be provided to us. In fact, this issue has been raised through to middle and senior management at WorkplaceNL, with the same response. We have been advised that decision makers do not have to provide rationale to the employer for decisions regarding the medical management of a claim. Accordingly, this also means without a reasoned decision, there is no option for accessing the appeal process. As I'm sure you know, however, there are many examples whereby employer's have questioned services approved or decisions rendered and pursued the matter through all levels of appeal, which is the right of the employer. While I recognize and agree the Commission has exclusive jurisdiction to determine matters under the Act, including whether an injury has arisen out of and in the course of the employer, these are appealable issues. The Commission does not have the statutory authority to refuse to make a decision.

Further, WorkplaceNL have introduced PRIME which has two components. The PRIME Experience Incentive Component is in effect for all eligible employers. "*By managing claims costs today, employers can help minimize costs so that they receive the greatest experience refund or lowest experience charge possible." (WorkplaceNL Website).*

Employers have access to the Prime schedules and Health Care Cost reports on a monthly basis, in order to influence claims costs. In fact, the employer is responsible to identify errors in the monthly cost reports, implying the employer is a stakeholder in the process. These PRIME status reports allow employers to monitor and question the costs applied to them.

We take the view that the Act which authorizes Prime to impact the employer financially together with exclusive jurisdiction requires the Commission provide reasons as to why the Commission chooses not to reopen or review a claim decision. The External Review Division exists under statute that the employer is statutorily entitled to utilize if it disagrees with the Commission's decisions made under its exclusive jurisdiction. That statutory right of appeal is being denied to employers, arbitrarily, by refusing to record the decision as to why a review under S. 64 was not required or undertaken by the Commission given the new information/evidence provided to it.

As such, we acknowledge the authority of WorkplaceNL to medically manage a claim, however, that doesn't negate the right of an employer to manage/question claims costs. Exclusive jurisdiction under the Act does not mean "*no accountability*". The other question that comes to mind is, if you deny such services, does the worker have the right to question your rationale and/or appeal it (and of course the answer is yes). Yet the employer's rights and not being viewed in the same way.

Further, when a decision maker has approved payment for benefits under the Act, whether it is medical treatment such as physiotherapy, chiropractic care, travel, wage loss etc, then they have made a decision under the Act that such entitlement exists. Once a decision has been made, it is subject to question by the worker and/or the employer and that includes Internal and External Review. We have to question

whether the worker would be denied the right to appeal access to a particular health care benefit for example. We already know the worker would have every right to make a case to internal Review if he/she were denied continued physiotherapy, for example. How then can that same access to Internal/External review (or indeed even a written decision) be denied to the employer?

We have been advised through discussions with industry in general, that appeal numbers are down, and this is being viewed by WorkplaceNL as a positive sign that decision making is improved. However, we challenge that it could simply be that employers are being denied access to reasoned decisions and the appeal process.

Which brings us to our next discussion point i.e. decision making/analytical abilities of Case Managers.

Exclusive jurisdiction does not mean lack of accountability. Independent decision making with appropriate accountability measures is a must in this system. It also helps to minimize criticism of an unfair or biased system and allows employers who fund the system as well as workers who benefit from the system, equal footing as stakeholders. Collaborative case management that includes all stakeholders in the process is essential to controlling claims duration and unnecessary costs.

It is the Commission's responsibility to ensure that workers, employers, and health care providers are working toward the common goal of returning a worker safely back to meaningful work. As an employer representative, I have seen first-hand, problems with acquiring and accessing timely functional abilities information. In these types of case, the Case Manager's need to have alternatives such as referral for specific functional abilities, however, our experience is that if the doctor or physiotherapist provide no objective functional abilities information but simply state "*off work",* the Case Manager simply waits for update functional changes.

Case Manager's either lack the training to do the job, the skill or the authority to appropriately do the job. There is little analytics demonstrated in decision making, although admittedly there are exceptions. The overall feeling is that Case Manager's lack the decision-making ability even though it is their job to weigh evidence, assess credibility, investigate a claim, and make a decision.

Finally, I wish to speak to sustainability. I think it is fair to say that the vision of WorkplaceNL is of safe and healthy workplaces within a viable and sustainable insurance system which reduces the impact of workplace injuries by providing the highest level of service to workers and employers.

Client service is fundamental to each of the Commission's lines of business. The Commission strives to achieve a balanced approach that promotes a safe, healthy workplace, ensures injured workers receive the best care and benefits to which they are entitled, recover from their injuries and return to work in an early and safe manner and ensures adequate funding for services through sound financial management.

As a system that serves workers and employers, decisions must be fair, transparent, balanced and built on a foundation of evidence and law. Many factors impact the sustainability of the Injury Fund, including

costs associated with the duration of claims, which is impacted by astute Case Manager. The duration of claims is also significantly influenced by how pre-existing conditions are managed.

Pre-existing conditions include any physical or psychological conditions that existed prior to a workplace injury that are confirmed by objective medical evidence. There is currently no standalone policy in place to guide the adjudication of claims involving these conditions.

Pre-existing conditions include, but are not limited to conditions that have produced periods of impairment/ disease requiring health care; underlying or asymptomatic conditions which only become manifest after a workplace injury occurs; a pre-existing condition, which by its very nature, it degenerative etc.

A policy on preexisting conditions would provide guidance for decision makers in terms of initial entitlement, and would also provide guidance on determining work-relatedness of the ongoing impairment where there is evidence of a pre-existing condition, and both the compensable injury and the pre-existing condition are contributing to ongoing impairment.

Like any other claim for compensation, when a worker with pre-existing condition makes a claim for compensation, it must first be established if they have suffered a compensable injury. Any claim for compensation must meet the entitlement criteria as having arisen out of and in the course of the employment, whether or not the worker has a pre-existing condition.

For an injury to be work related there must be, on a balance of probabilities, a causal relationship between the alleged injury and the workplace. The term *"arising out of and in the course of employment"* means the injury is caused by some hazard which results from the nature, conditions or obligations of the employment and the injury happens at a time and place, and in circumstances consistent with and reasonably essential to the employment.

A health problem that is not related to work may be worsened by work. If this happens, the worsening of the health problem, or aggravation, may be considered a work injury. All decisions are made on the real merits and justice of the claim, based on the facts of the case. The Act is clear that where the evidence for and against the issue in a claim is approximately equal in weight, the benefit of the doubt must be given to the worker. Currently, at the initial stage of claim adjudication in claims involving pre-existing conditions, it is appropriate to consider the impact to be a temporary worsening of the pre-existing condition.

So once the decision maker establishes the injury was work-related, the claim will be considered for compensation. This is the case even when a pre-existing condition may have been impacted by, or part of, the compensable injury. In other words, the existence of a preexisting condition is not grounds to deny a claim.

So what happens when it is no longer causally linked to the compensable injury. While the requirement to accept claims with a pre-existing component is clear, what is not clear is what decision makers need to consider in terms of evidence, definitions, or ongoing case management. Because of this, most other Canadian jurisdictions have a pre-existing conditions policy.

Policy is required to clarify how the relationship between the pre-existing condition and the compensable injury is causally linked throughout the life of the claim. This is important when considered with the requirement that a worker be returned to their "pre-accident state." There is no requirement to treat the pre-existing condition after it reaches the point where it is no longer affecting the compensable injury. This is where we find there is no critical analysis. Rather, our experience is once a claim is accepted as having arisen out of and in the course of the employer, albeit an aggravation of a pre-existing condition, coverage for the claim continues well beyond the impact of the work injury.

Currently it is not always clear when WorkplaceNL stops compensating for the temporary worsening of a pre-existing condition. WorkplaceNL is not responsible for the natural progression of a pre-existing condition. This means that WorkplaceNL has fulfilled its responsibilities when either the temporary worsening of the pre-existing condition has returned to its usual state, or the permanent worsening of the pre-existing condition has been treated, and the effect on the injured worker's loss of earnings is established. In other words, WorkplaceNL's responsibility ends when the worker has returned to their pre-injury state.

Benefits continue until the worker's current level of impairment would persist regardless of the work related injury/disease, and the work-related injury/disease on its own would not likely result in a similar level of impairment, typically, if the worker is permanently disabled after an injury, compensation is approved without regard for the impact of the pre-existing condition.

In such circumstances, an allowance for cost relief can allow the employer to limit its claims cost to reduce premium liability.

Generally speaking, all costs associated with a compensable injury are attributed (or "charged") to an employer' experience account where they ultimately play part in contributing to future premium assessments. However, in almost all Canadian jurisdictions, Commissions maintain some discretion to relieve employers from claims costs in certain exceptional circumstances.

The general idea behind cost relief is that it allows for a transfer of costs away from the employer's experience rating in circumstances where claims costs arise from circumstances that are not really within the employer's control.

We maintain the introduction of a policy to deal with "*aggravations"* would assist in ensuring a more responsive sustainable change. This is particularly so when we see the threshold in establishing a claim in the first place is so low i.e. the worker says it must have happened at work and there is no concrete evidence to the contrary.