Update on CEIR Reports, Failure to Report Timely Injuries & Legal Obligation to Cooperate in an Early & Safe Return to Work

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This month I want to review three issues that all union representatives, workers and supervision need to a refresher.

In order to document periodic exposures that construction workers experience, the WSIB, in conjunction with construction industry stakeholders, developed a ***Construction Exposure Incident Report*** that should be completed if there has been an unexpected workplace exposure where there is no lost time and no illness.

Conversely, the trigger in registering an occupational disease claim is when a worker has experienced an illness, usually an occupational disease requiring treatment (e.g., diagnostic tests, medication or ongoing assessment).

CEIR Reports Sent to WSIB

Periodically I receive batches of Construction Exposure Incident Reports (CEIR) that members complete at work when there has been an unexpected workplace exposure. They typically give these to a Business Rep who forwards these to my office and I ship these off to the WSIB.

Members have complained they're not receiving feedback from WSIB. However, my October newsletter describes the administrative problems plaguing WSIB.

In response to member complaints this past summer, I contacted the Director of Occupational Disease whose department manages the CEIR program. What a pleasant surprise to receive the Director's call while she was at the airport ready to board a plane. She was upset when I told her that our members are not receiving "acknowledgement letters" nor is CEIR information readily accessible on the new WSIB website. The Director thought it was available, but good luck finding it. I certainly didn't. What also concerned me was a WSIB Case Manager failed to respond to my concerns regarding the status of the CEIR program.

CEIR Acknowledgement Letters

In the past when WSIB received a CEIR exposure form, an acknowledgement letter was sent to the employer and worker, providing an incident number for future reference. The WSIB keeps exposure information on behalf of workers and employers in a database so it can quickly be retrieved by a WSIB decision maker if there is a future illness. However, there is no time line when WSIB acknowledgement letters are issued, and furthermore, the WSIB has restructured its operations and there are problems with the current service delivery model.

Please bear in mind that the union would not be aware of any WSIB follow-up because there are privacy issues, and furthermore, no authorization to legally represent members since these are not claims. I have been assured WSIB is cataloging the CEIR forms, but there are delays in sending acknowledgement letters to workplace parties.

No Legal Requirement to Register WSIB Claim for Exposure

It is important to clarify that an exposure is not an accident or injury as those terms are defined under the law in the *Workplace Safety and Insurance Act*. Consequently, there is no requirement to register a WSIB claim for workplace exposures, particularly when an exposure does not cause an immediate injury or disease. Under the *Workplace Safety and Insurance Act* ("WSIA") there must be a *work related injury* in order to register a WSIB claim. Simply, an incidental exposure to asbestos, fumes or particulate matter is *not* an injury under the law, because the morphology of any occupational disease, for instance asbestos lung disease, takes decades to develop, if at all.

Failure to Report Timely Claims

To those members who submit timely WSIB claims, thank-you. However, there are too many members who fail to report injures and then submit untimely WSIB claims for myriads reasons. Often times after a layoff. Typically, members don't want to cause friction with the employer, and worry they'll be on the next round of layoffs. It's amazing how the membership have a universal belief that there are employment ramifications in filing a WSIB claim.

However, this workplace culture is not an excuse when you ultimately submit an untimely WSIB claim many weeks, months or years after an injury. When members are late entrants into the WSIB system, the typical adjudicative response is to deny the claim because they can't establish "proof of accident." And by the way, reporting to your foreman does not discharge your legal obligation to submit a WSIB claim. I've heard the plaintive wails of members that my employer or health care professional didn't submit the paperwork to the WSIB.

Let me be very clear, although health professionals and employers must submit WSIB paperwork, it is the worker who has the legal obligation to submit a timely WSIB claim. Often time's members are stoic and continue working and many months later or when surgery is necessary, this prompts the registration of a WSIB claim.

Time Limits to File Work Injury Claims

Under section 22 of the *Workplace Safety and Insurance Act*, there is a 6-month time limit to submit claims for chance event injuries, however, a delay in reporting an injury 1-2 weeks later, has been sufficient reason for WSIB to deny your claim.

There are two reporting clocks under WSIB policy and case law. Chance events, which are single episode trauma claims require a claim to be filed within 6-months from the date of accident/injury. These claims are easily identified because there is an identifiable or discrete mechanism of injury i.e., tripped, stumbled, fell, lifted, banged, carrying, resulting in an immediate cause/effect injury. But don't think the 6-month time limit is a grace period or license to delay filing WSIB paperwork.

The other branch of accident is disablement, which are gradual onset injuries. Repetitive strain injuries (RSI) and cumulative trauma disorders (CTD) are typically gradual onset injuries and the reporting clock starts ticking once the worker knows the injury is work related. Sometimes the clinical focus is on diagnosis, before the question of causation can be determined (work relatedness).

WSIB Research Recognizes Under-Reporting Problem

In 2013, the WSIB hired Prism Economics and Analysis to investigate under-reporting. Their report *Workplace Injury Claim Suppression* made a number of important findings that ultimately led to an amendment to the *Workplace Safety & Insurance Act* making it a prosecutable offence for employers to induce or pressure a worker to not submit a WSIB claim. But claim suppression is not a one-way street, because the research findings identified worker complicity:

Worker Under-Claiming:

Based on the research literature, 20% is a plausible estimate of the proportion of likely compensable, work-related injuries or illness for which workers do *not* submit claims. Both higher and lower estimates can be supported.

However, there is more support for a 20% estimate. The research literature suggests employer inducement is sometimes a factor. However, other factors behind worker under-claiming include: avoiding a reputation for carelessness, perceptions about the time required to claim compensation benefits, uncertainty about eligibility, perceptions that the injury or illness is not severe, and preference for other forms for income support, such as sick leave plans or wage continuation.

Case Law, Early & Safe Return to Work

Another catch-22 for members is modified work. Sometimes members don't return to work after an injury and believe they have a valid medical reason to be absent from work. That's when things go sideways. It's important that your treating health professionals be made aware if modified work was offered, because WSIB will call the physiotherapist or doctor and ask "are you aware that modified work was offered to your patient?" When the health professional says NO, you're toast and WSIB will deny LOE benefits.

Also bear in mind that employers and workers are legally obligated to cooperate and remain in contact as part of the Early and Safe Return to Work process. In reviewing the legal authorities, there is settled jurisprudence where a finding that modified work offered by an employer is suitable has potentially significant and far-reaching consequences for a worker's entitlement to benefits. Generally, a worker who refuses suitable work is not entitled to **LOE** benefits (see *Decision 2189/14*).

In *Decision 759/12*, a Tribunal Vice-Chair ruled:

Even if the work offered by the employer had not been suitable, the worker would not have been entitled to **LOE** benefits. The worker failed to co-operate in ESRTW. Non-co-operation can lead to a reduction of suspension of benefits. The ramifications of non-co-operation had been explained to the worker in a letter from the Board. Co-operation in ESRTW is more than seeking and following medical advice and treatment. Communication between employers and workers is a key to successful ESRTW.

In *Decision 1961/07*, a Tribunal Vice-Chair ruled:

The employer offered modified work. The worker expected the job to be perfect from the first day. However, Board Operational Policy Manual, Document No. 19-02-02, provides that the employer is obligated to commit to a process to return the worker to suitable available work. Both the worker and the employer are obligated to work towards identifying a suitable job. The worker had concerns about some of the features of the job.

There are several situations where a worker is unable to return to modified duties (surgery) even though suitable work has been offered by the employer. These are "level of disability" disputes. Often times WSIB robotically rules the work is suitable. My advice is to attempt the modified work and see what happens. I'm not talking about poking your nose in the door, then skedaddling. You need to try the modified work and allow for some give and take before concluding the modified work isn't suitable. The best scenario is an employer saying "we don't have modified work for the worker."

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