COVID-19 Pandemic – Can Workers Submit WSIB Claims and Will They will Be Allowed If You Become Infected? It Depends on the Route of Acquisition

Understanding the law and history of past microbial pathogen cases is a good starting point. Members understand the frustration in dealing with WSIB to get claims approved for straight forward work injuries, particularly when there is a pre-existing condition. Now factor in the unique epidemiology of COVID-19, and this will create a significant hurdle in getting WSIB claims approved. Here's WHY.

The WSIB website states "the nature of some people's work may put them at greater risk of contracting the virus, for example those treating someone with COVID-19. Any claims received by the WSIB will need to be adjudicated on a case-by-case basis, taking into consideration the facts and circumstances." Clearly the message is geared to front line health care workers.

Under the law, the *Workplace Safety & Insurance Act* ("WSIA") recognizes injuries resulting from single episode trauma, as well as gradual onset injuries. The Board also accepts occupational disease claims when there is a relationship between the disease and work exposure, either immediate or long term latency (some cancers, asbestosis etc.).

Therefore, if a worker contracts QOVID-19 and there is a strong probable nexus/relationship that the worker likely acquired the disease from work, then a WSIB claim should be submitted. The claim would also be adjudicated on its merits.

The Law and Policy

The definition of accident in section 2 of the WSIA includes a disablement arising out of and in the course of employment. Board Policy 15-02-01 defines disablement to include a condition that emerges gradually over time or an unexpected result of working duties. For entitlement to be allowed, the decision-maker must examine the nature of the work (environment), the nature of the injury (disease) and the relationship between the nature of work and injury. It is important to understand that accident and injury is broadly defined and includes diseases.

Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. The standard of proof in workers' compensation proceedings is the balance of probabilities.

There is a statutory presumption contained under Ontario Regulation 175/98 of the *Workplace Safety and Insurance Act*. Schedules 3 and 4 give legal recognition to a link between specifically listed occupational diseases and the corresponding work processes and occupational setting. Asbestos related lung disease falls under Schedule 4, and includes asbestosis and mesothelioma, however, Meningitis, SARS, H1N1, and QOVID-19 are not listed. That does not mean these cannot be work related in certain circumstances, but there is no legal presumption they arise out of and in the course of employment, and must be adjudicated on the merits and justice of each claim.

Past History as a Guide

Fifteen years ago a LU 353 member developed meningitis which is a bacteria that lives in the nose and throat and spread from one person to another by contact. It can spread easily through everyday behaviours, including coughing & sneezing, sharing drinks & eating utensils, kissing and living in close quarters.

The question arose whether the meningitis was contracted through work because the member was working on a TTC subway project and there were thousands of people who commute using TTC and one of these people *may have* infected the member. My review at the time centered on the fact that this was a speculative possibility with respect to work causation which fell short of the evidentiary standard of the balance of probabilities.

Around the same time there was a Deputy Fire Chief who contracted meningitis and died. His WSIB claim was allowed because the Fire Chief had attended a public ceremony and shook the hand of a person who had meningitis. It was determined that the Fire Chief was in the course of employment, and shaking the hand of a person during a public ceremony was deemed work related because the "route of acquisition" of the bacteria could be established. It was more probable, than not, that the Fire Chief contracted meningitis through work. These two scenario's draw an important distinction between a *speculative* and *probable* work related nexus.

Member Contracted Gastroenteritis at Ashridges Bay (sewage plant)

In *Decision 526/04*, a member who has been a foreman and steward on many jobs was working at a Toronto Waste Treatment building where treated human waste biosolids were loaded onto trucks. The issue under appeal was whether an electrician acquired gastroenteritis as a result of exposure to human waste biosolids in the workplace in February 2001.

The employer was represented by Justice William Lemay, who in 2015 was appointed to the Ontario Superior Court of Justice. He argued the WSIB correctly concluded that the member's exposure was more likely, than not, related to his food preparation habits at home, and not work related.

The member testified he was installing light fixtures in a building where treated human waste biosolids were loaded on to trucks. He was accidently exposed to water spray used to clean biosolids from the truck loading area. He became ill on February 23, 2001. On February 25, he attended a hospital emergency department with symptoms of fever and chills, poor appetite, diarrhea, vomiting and dehydration. Stool tests were negative for Salmonella, Shigella, Yersinia, Campylobacter, Escherichia coli D157 and Clostridium difficile. His doctor diagnosed gastroenteritis.

The only protective equipment provided was coveralls and gloves, and showers. The plant manager told WSIB that "there was no history of truck drivers getting sick." The employer's witness testified that the sewage sludge was tested two times per day for bacteria. If it did not meet Ministry of Environment guidelines, the sludge was sent back for further treatment. The sludge was not tested for viruses, but stored anaerobically for 20 days.

Because the issue under appeal involved a complex medical question of causation, the Tribunal selected Dr. Donald Low as the Tribunal appointed medical assessor for this appeal. Dr. Low was a Professor of Medicine and Microbiology at the University of Toronto where he was Head of the Division of Microbiology in the Dept. of Laboratory Medicine and Pathology. In addition, he was Chief to the Toronto Medical Laboratories and Mount Sinai Hospital Department of Microbiology, a shared laboratory serving over 10 hospitals in the greater Toronto area.

An interesting side note, Dr. Low became a familiar face to the Canadian public during the 2003 SARS crisis and was also the lead microbiologist during the SARS epidemic and instrumental in taming the microbial outbreak, which lead to infectious disease protocols that have since been adopted world-wide. Dr. Low answered several questions set out in an interim decision, and opined:

> [15] I think it is quite possible that the employee was exposed directly to contaminated material via the oral route when he was splashed at work. The fact that the biosolids had undergone treatment does not mean that they were still not infectious to humans. Even if testing of the biosolids had coliform counts that fell below those within the regulations (<2,000,000 FC/gram of solids), they may still contain viable bacteria, viruses and/or parasites that can cause disease when directly inoculated into a person's mucosa.
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> The fact that a patient had a negative stool culture for known pathogens does not mean that the patient did not have an infectious cause of his gastroenteritis. There are numerous types of viruses and parasites which are able to cause gastroenteritis that would not be detected by routine microbiological techniques. It is also possible that the causative pathogen may not have been detectable at the time of the testing. Routine testing for enteric pathogens is not a 100% sensitive or specific.
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> … I have looked at the interim report and my opinion would be that it is possible that the employee could have contracted a food borne pathogen outside of the workplace, but this is unlikely given the information that has been provided. In my opinion the most likely source of this person's illness is the workplace.

In her judgement allowing the members claim, the Tribunal Vice-Chair concluded:

> Section 13 of the *Workplace Safety and Insurance Act* provides that a worker who suffers a personal injury by accident arising out of and in the course of his employment would be entitled to benefits under the insurance plan.
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> I find that the worker was accidently exposed at work to water spray contaminated with biosolids, that is, treated human waste, at some time during the period of February 19 to 23, 2001. He became ill with gastroenteritis on February 23, 2001.
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> The issue to be determined is whether the workplace exposure to biosolids contributed in a significant or material way to the development of the medical condition in question. It is well accepted in workers' compensation law that the test for determining whether a causal relationship between the work and the injury exists, is that of significant or material contribution. A material contribution need not be the sole contribution, but must be more than a minimal contribution. Causation need not be determined with scientific precision. Medical experts ordinarily determine causation in terms of certainties, but the law requires a lesser standard. It is the function of the trier of fact to make a legal determination of the question of causation, using a "robust and pragmatic approach", where there is medical uncertainty with respect to causation. Reasonable inferences may

> be made from the primary facts of the case. Causation is determined on a balance of probabilities, or applying the benefit of the doubt where the evidence is equally weighted. However, a finding of causation may not be made based on mere speculation or evidence of a possibility, rather than a probability.[1]

The Vice-Chair relied on the medical evidence submitted by IBEW LU 353, and Dr. Low, an expert in medical microbiology, infectious diseases who was of the opinion that the worker's exposure to biosolids was the most likely source of the gastroenteritis. There was a close temporal connection between the hose spray incident and the development of severe gastroenteritis and concluded that the worker's gastroenteritis resulted from accidental exposure to human waste biosolids.

Legal/Medical Challenges in Establishing Work Related Causation

The above analysis serves to highlight the complexity in establishing causation even when there is a likely and probable work association. These cases also set out the inherent evidentiary challenges when dealing with microbial pathogens, such as COVID-19, and in particular the "route of acquisition." In every WSIB claim there must be a causal work connection that rises above a mere "speculative possibility."

Transmission of COVID-19

As members and citizens living through a global pandemic, all of us have been following developments of COVID-19 from when it first emerged in Wuhan, China. Medical experts recognize the virus has an incubation period/time lag before people may develop symptoms. Initially infected travelers were suspected carriers of COVID-19, but now public health officials acknowledge evidence of community transmission.

LU 353 members, in fact all workers, who are still going to work are worried and scared since many Countries, Ontario and 48 USA States, notably New York, Illinois, and California have declared a State of Emergency. Boston was the first major city to shut-down the construction industry, along with enormous parts of the economy. That means we are dealing with a national and global pandemic, and not a simple workplace hazardous environment, and therein lies the inherent challenge in establishing a work-related connection.

Health & Safety Vigilance Paramount

Going forward, it is important for members still at work to be aware of anyone on site who has tested positive for COVID-19, and ordered to stay-at-home, quarantined or hospitalized, including self-isolation. This is a workplace health and safety issue that must be disclosed in health and safety meetings between labour management representatives. Open and free flowing information is paramount, and failing to disclose or hiding behind a veil of secrecy, or privacy laws is unacceptable.

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[1] See the judgement of the Supreme Court of Canada in *Snell v. Farrell*, [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73; *Laferriere v. Lawson* [1991] 1 S.C.R. per Gonthier J.

Lesson's From SARS Outbreak

Workers and unions should also follow the recommendations of Justice Archie Campbell who investigated Ontario's SARS outbreak in relation to workers in the hospital health care sector. One of his chief findings was "we cannot wait for scientific certainty before we take reasonable steps to reduce risk." And when dealing with "serious infectious disease outbreaks, the health-care system must follow the precautionary principle" and err on the side of caution. Although Justice Campbell was tasked with investigating how hospitals managed SARS, his findings are sound and good public policy readily applicable to other employment settings.

A recent example is a TTC mechanic in the Duncan Shop who was diagnosed with QOVID-19 after traveling abroad. Once the employer was alerted, the 170 employees at the shop, members of ATU Local 113, were sent home to self-isolate, and special cleaning measures and disinfection were enacted, with particular attention to high-touch areas.

Should I File A WSIB Claim

Unless there has been a positive COVID-19 case reported in your workplace, I do not recommend filing a WSIB claim at this time. However, members should submit a *WSIB Construction Incident Exposure Report* (CEIR) if you believe you may have been exposed to COVID-19 because someone at your workplace is suspected or infected with COVID-19. This includes indirect contact by touching communal surfaces, materials and tools in the workplace. The purpose of the CEIR is to gather information about the exposure while it is readily available, should a worker become ill in the future.

In order to have a viable WSIB claim there must be a work injury or disease. An exposure to COVID-19 is not an injury, therefore, you should not submit a WSIB claim until you get sick.

If a previously exposed member develops QOVID-19 and there was an infected worker in the workplace, I recommend that you file a WSIB claim. There will certainly be questions regarding work relatedness and causation based on the above legal analysis, and a strong adjudicative reflex to deny COVID-19 claims because the virus is ubiquitous and now transmitting in the general community. The route of acquisition how you contracted COVID-19 will be a key issue in all WSIB claims. The situation is exacerbated because clinicians recognize COVID-19 is hardy virus that can live on surfaces for upwards to three days.

To summarize, the difficulty here is considerable because we are dealing with a microscopic pathogen that you cannot see or detect, including a latency/incubation period before someone may develop COVID-19 symptoms. In the meantime, until job sites are shut-down, members should submit CEIR reports, and exercise your right to refuse under the *Occupational Health and Safety Act*. It is also important to involve a Steward, Business Representative and notify the Hall. Please visit the IBEW Local 353 website for information (**www.ibew353.org)** and on social media.

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