Failure to Report Work Injuries an Ongoing Problem – Usually Because Members Believe They'll Be on the Next Round of Layoffs or They Don't Want to Financially Harm The Employer with WSIB

By: Gary Majesky, *WSIB Consultant & Executive Board Member*

In my experience members often times engage in economic calculus whenever they are injured. Essentially members weigh the costs (i.e., consequences), if they submit a WSIB claim, voice concern about a health and safety issue or assert their rights under the collective agreement. There is a general consensus that filing a WSIB claim will result in a layoff.

It saddens me when members roll the dice and later on undergo surgery because of a work related shoulder, back or knee injury, which may end their career as an electrician. They are emphatic that "I was injured at work" but I must advise them you did not register a WSIB claim, therefore, for all intents and purposes you *do not* have a work related injury. Here's WHY.

Law and Policy

Under the law (legislation & policy), claims should be registered immediately, particularly if a worker reported and sought health care for an injury. Section 22 of the *Workplace Safety and Insurance Act*, stipulates claims must be reported within 6-months at the latest.

> 22(1) A worker shall file a claim and soon as possible after the accident that gave rise to the claim, but in no case shall he or she file a claim more than six months after the accident, or in the case of an occupational disease, after the worker learns that he or she suffers from a disease.
>
> (3) The Board may permit a claim to be filed after the six-month expires, if in the opinion of the Board, it is just to do so.

The criteria contained in Board policy with respect to the time limits to file a claim in chance event cases provides that a claim must be filed within 6 months of an accident. In contrast, the criteria contained in Board policy with respect to the time limits to file a claim in disablement cases provides that in disablement claims the 6 month deadline begins from the date the worker reports the disablement as work-related.

Two Different Reporting Clocks (WSIB)

Most workplace parties are surprised to learn that there are two reporting clocks. One for chance event accidents, which are single episode trauma claims and require a claim to be filed within 6-months from the date of accident/injury. These claims are easy to identify because there is an identifiable or discrete mechanism of injury e.g., tripped, stumbled, fell, lifted, banged, or pulled/pushed resulting in an immediate injury. Even though the legislation says 6-months, the expectation is to report and register a claim immediately.

The other branch of accident is disablement, which are typically gradual onset repetitive strain injuries (RSI) and cumulative trauma disorders (CTD). The mechanism of injury is often times the physical demands of your job, a concept many employers do not understand.

Extension of Time Limits to File Claims

Policy Document No. 15-01-03 stipulates that the Board will allow an extension of time for filing a claim where there are "exceptional circumstances", including:

- Compelling personal reasons
- The worker may have been unable to understand the time limit
- Whether the worker reported the accident to the employer, health professional, or co-workers.

Like all Board policies, this policy is subject to the merits and justice provisions of the Act and Board policy.

Worker Has Positive and Legal Obligation to Report Injuries

When members attend Safety and Orientation sessions when starting work with a new contractor, reporting injuries and incidents is one of the talking points. This constitutes notice that as a worker you were advised to report ALL injuries. I've stopped counting the number of signed S & O forms employers send to WSIB whenever a member delayed in submitting a WSIB claim. Delay in reporting claims usually become "proof of accident disputes."

Case Law, Discoverability

There is some wiggle room in disablement claims (i.e., gradual onset injuries) when there has been no diagnosis so the health professional can make an informed judgement whether the injury is work related. In these situations the union can rely on the principles or rule of discoverability to extend the time limits on filing a claim. In *Decision No. 1830/09*, the Vice-Chair noted the principles of discoverability that have been endorsed by the Supreme Court of Canada at paragraph 23 as follows:

> The Supreme Court of Canada applied and upheld the discoverability principle in Peixeiro v. Haberman, [1977] 3 S.C.R. 549. The Supreme Court stated in Peixeiro (supra) that the discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue, by providing that time limits do not begin to run until it is reasonably discoverable that the person had a cause of action.

In *Decision No. 1454/08* the Vice-Chair considered the provisions of Board policy in the context of disablements, and at paragraph 24 stated:

Board policy reflects the position recognized by the Courts, that a limitation period cannot run against a person until the person knows of the facts to which the time limit applies. A disablement is an injury that occurs gradually over time. It is very difficult to know when and whether it has been caused by a workplace activity, because that relationship is not necessarily clear. Board policy provides that the time limit runs from the time that a worker reports his injury as work-related to his health professionals, employer or the Board. That is a reasonable approach to determining when a worker is sufficiently aware that the injury may be work-related to establish a start-date for the time limit.

There is a profound irony when members fail to submit timely WSIB claims for fear of a layoff, because an injured worker may have re-employment rights under section 41 of the *Workplace Safety and Insurance Act*, and Ontario Regulation 85/08, Re-employment Obligation in the Ontario Construction Industry.

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