



## Lung Cancer In Workers With Clinical Evidence of Asbestos Exposure Are Allowable Claims Under WSIB Policy 16-02-13

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



So far in 2018, two members have passed away due to mesothelioma, which is an asbestos related cancer of the pleural lining of the lung. Mesothelioma is an end-stage occupational disease in workers with a documented history of asbestos exposure. If you worked in construction, and are diagnosed with mesothelioma, there is a presumption the disease is work related.

### Standards for Occupational Disease Scheduling

There are two occupational disease schedules contained under Ontario Regulation 175/98 of the *Workplace Safety and Insurance Act*. Schedules 3 and 4 give legal recognition to a link between occupational diseases and the corresponding processes. In each Schedule, the disease is listed in Column 1 and the corresponding process (occupational setting) is listed in Column 2.

Asbestos related lung diseases fall under Schedule 4, and includes asbestosis and mesothelioma, however, lung cancer is not listed.

### Law and Policy - Presumption

The inclusion of various occupational diseases under Schedule 3 and 4 of the WSIA regulations has legal and administrative implications. For instance, the *WSIA* legislation states:

If the worker at or before the date of disablement was employed in any process mentioned in the second column in Schedule 3 or 4, and the disease contracted is the disease in the first column of the Schedule set out opposite to the description of the process, the disease shall be deemed (presumed) to have been due to the nature of the employment unless the contrary is proved.

If a worker was employed in a process set out in either Schedule 3 or 4, and contracts a disease specified in the Schedule, the disease is presumed to have occurred due to the nature of the workers employment unless the contrary is shown. This is referred to as presumptive legislation.

### Why are the Scheduled Diseases Significant?

Schedule 3 contains a list of thirty diseases for which WSIB will pay benefits if you prove you have the disease and you worked in a process listed next to that disease. You will not receive benefits if either WSIB or your employer proves the disease did not arise from your work. For example, WSIB or the employer can argue that the workplace exposure to a substance was not long enough to be significant, or that other factors such as smoking were responsible for the disease.

### SCHEDULE 4

#### OCCUPATIONAL DISEASES (DEEMED UNDER SUBSECTION 15 (4) OF THE ACT)

	Description of Disease	Process
1.	Asbestosis	Any mining, milling, manufacturing, assembling, construction, repair, alteration, maintenance or demolition process involving the generation of airborne asbestos fibres
2.	Primary malignant neoplasm of the mesothelium of the pleura of peritoneum	Any mining, milling, manufacturing, assembling, construction, repair, alteration, maintenance or demolition process involving the generation of airborne asbestos fibres
3.	Primary cancer of the nasal cavities or of paranasal sinuses	Any process at the Copper Cliff sinter plant of Inco Limited
4.	Primary cancer of the nasal cavities or of paranasal sinuses	Any process in the Port Colborne leaching, calcining and sintering department of Inco Limited that was practised before January 1, 1966

Schedule 4 contains a list of only 3 diseases which are directly applicable to electrical workers. To receive benefits for diseases listed in Schedule 4, you only need to prove that you have the disease and that you were employed in the listed work process (ICI construction & maintenance). However, lung cancer is not listed in Schedule 4.

### Pleural Plaques Evidence of Asbestos Exposure

So how does one establish that you are an asbestos worker? An important clinical marker of asbestos exposure is found in imaging studies that reveal the presence of pleural plaques.

Although Pleural Plaques are viewed by the American Society of Thoracic Surgeons to be a benign pathology, typically without pulmonary complications (shortness of breath). It is usually discovered in a routine x-ray or CT scan in which calcified shadows are revealed on the diagnostic scans. It has been explained that calcification of asbestos bodies in the lungs is the human bodies' natural defence mechanism to envelop or cocoon asbestos fibres which become calcific deposits. In several Tribunal decisions, this has been referred to as scarring of the lung. While technically benign, pleural plaques are clinical evidence of past asbestos exposure, and workers so diagnosed are at greater risk for developing other asbestos diseases such as asbestosis or mesothelioma.



## Lung Cancer In Asbestos Workers

Recently I submitted a claim for lung cancer, which was allowed. The claim reminded me of a members case 10-years ago who was diagnosed with lung cancer and passed away. He was a friend of my father's, and profoundly upset that Dr. Bernstein, the former head of Cancer Care Ontario, did not believe his lung cancer was causally related to asbestos exposure. Dr. Bernstein, contacted me early one morning and explained that attempting to link the lung cancer to past asbestos exposure was problematic. He used the analogy of a man falling from a 10-storey building and said the asbestos contribution to the man's death was akin to a breeze as he hurtled to the ground. Simply, the man's cause of death was not from the gust of wind on the way down, but blunt force trauma.

Upon receipt of Dr. Bernstein's opinion, I realized we had a problem which I explained to the member, who pleaded "if the union does not fight for me, who will?" He didn't understand that whenever there is a dispute regarding causation, and whether a disease or injury is work related, decision makers' focus on the opinions of treating doctors, especially specialists, and evidence based medical science (epidemiology).

At that moment, I had an epiphany. Why should the union be the gatekeeper and decide whether the members lung cancer claim should proceed. That's not to suggest we take forward every case regardless of merit. Let the WSIB make the decision whether there is a causal relationship. Much to my surprise, the WSIB allowed the members lung cancer claim, under Operational Policy 16-02-13.

Under Policy 16-02-13, Lung Cancer in asbestos workers is accepted as an occupational disease under sections 2(1) and 15 of the *Workplace Safety & Insurance Act* as peculiar to and characteristic of a process, trade or occupation.

### Entitlement Criteria

Based on medical studies, lung cancer claims are favourably considered when the following circumstances apply:

- there is a clear and adequate history of at least 10 years occupational exposure to asbestos, and
- there is a minimum interval of 10 years between first exposure to asbestos and the appearance of lung cancer.

Claims which do not meet these guidelines will be individually judge on their own merit, having regard to the intensity of exposure and other factors peculiar to the individual case.

However, the fact an electrician may have worked in construction does not automatically mean they are presumptively "asbestos workers" pursuant to Ontario Reg. 175/98. And therein lies the challenge, because not every lung cancer claim is asbestos related and the pathogenesis (cause) is typically multi-factorial. On the other hand, if a member has been diagnosed with pleural plaques, which many members have because I have filed many occupational disease claims for them, then they are *de facto* asbestos workers.

I often tell members, usually from an older age group, that there is no bag of money for registering a pleural plaque occupational disease claim with WSIB. However, if they do develop asbestosis, mesothelioma, or lung cancer later on, we can reopen the claim in the future.

And contrary to Hollywood movies celebrating bucket lists, it's my experience that once you receive a troubling diagnosis one's focus is on treatment, coping with loss of health, and running to endless doctors' appointments. Before signing off, did you know that actor Steve McQueen and musician Warren Zevon died from mesothelioma?

### Gary Majesky

WSIB Consultant  
Direct Line (416) 510-5251  
gary\_wsib@ibew353.org



## SATURDAY, JULY 28, 8PM



Tickets will be available in June.

## Victoria Day

is a Statutory Holiday to be observed on Monday, May 21, 2018. If your employer asks you to work on this day, you must be paid double time for working!