WSIB 2012 Benefits Policy Review

Submissions of the

Police Association of Ontario

November 22, 2012

1. Description of the Police Association of Ontario

Founded in 1933, the Police Association of Ontario (PAO) is the official voice and representative body for Ontario's front-line police personnel. It provides representation, resources and support for 57 police associations across the province. Our membership is comprised of over 33,000 police and civilian members.

The core objectives of our organization include providing resources to member associations, providing progressive and effective leadership on provincial issues and delivering training and education programs.

Many of the PAO's member associations provide active representation to their members who are claiming or receiving benefits through the Workplace Safety and Insurance Board. As a result, we are in a position to provide a unique perspective on how the policies and practices of the WSIB have an impact on police personnel.

2. Overview of Submissions

The PAO has reviewed the consultation discussion paper prepared by Chair Jim Thomas and we welcome the opportunity to provide constructive recommendations.

Our submission will begin with an outline of our concerns with the discussion paper and the direction the policy review appears to be taking. More specifically, the PAO is concerned that, despite statements to the contrary, the underlying purpose behind the review is cost-cutting. We are concerned with the strong focus on demographics, aging, degenerative conditions and what appears to be a search for tools to reduce or eliminate benefits for older workers. Finally, we are concerned with what appears to be a focus on predictability and consistency in decision-making rather than on fairness to the individual injured worker in all the unique circumstances of his or her case.

In the second part of our submission, the PAO will outline our vision and framework for policy review. The PAO submits that policies that deal with benefits to injured workers should not change with changing demographics or strategic plans or even finances. Policies should interpret the *Act* and should do so in a manner consistent with its underlying principles and the remedial nature of the legislation.

Fairness to each individual injured worker must be at the forefront, not ease of administration and predictability. There should be less emphasis on policies that address every potential complexity. By trying to make a policy do too much, its capacity to support its overriding goal is eroded. The PAO recommends that each policy contain a clear statement of principle that sets out its overriding purpose. Separate procedural guidelines should be developed. These guidelines would ensure the proper steps are taken to obtain the information necessary to make a decision consistent with the overriding purpose.

3. The PAO's Context and Environment

Policing is a difficult and often dangerous vocation. As a “workplace”, it is unique in terms of the ever-present potential for serious harm to our members. It is unique as well because of the tremendous dedication our members have to their mandate to serve and protect the public. Our members will often attempt to return to work even before their health care providers deem it wise to do so. Given their depth of motivation, it is sometimes a difficult and rude awakening for our members when their claims are denied because they cannot satisfy the evidentiary standard in some of the policies under review.

For example, the policy on recurrences emphasizes the need to demonstrate “continuity of complaint”. This poses difficulties in a police culture which implicitly discourages complaints to fellow officers or supervisors about aches, pains or other indications of ongoing discomfort or weakness. The tendency for our members to “suck it up” is at the root of many disputes around levels of impairment, work-relatedness and secondary conditions. Our members are shocked to discover their claim may have been stronger had they complained sooner, longer and more loudly about their injuries.

Furthermore, in a profession that requires a high level of physical fitness, the distinction between work-related fitness training and "lifestyle" activities that may contribute to impairment are blurred. Moreover, the physical nature of the day-to-day job duties may have well have caused or contributed to the underlying conditions that adjudicators now try to carve out as being unrelated to the workplace. The unique features of the police sector demonstrate why cookie-cutter policies that try to solve all claims with predictable results are not achievable or even desirable.

As noted in the discussion paper, Ontario’s workforce is aging and it is no different in the police sector. Although there are exceptions, it is not unreasonable to assume that when an older worker suffers a workplace injury, he or she may develop more serious symptoms than a younger worker and may take longer to recover due to underlying conditions. It has always been difficult to adjudicate claims where work-related injuries intersect with degenerative conditions. That is an unfortunate, but unavoidable by-product of the system we have. The fact that these claims may occur more often in an aging workforce is no reason to change the rules of the game to make it easier to deny or reduce benefits. This is not fair to older workers.

Finally, the PAO's members are not normally claiming or receiving workers' compensation in the context of work stoppages. As a result, our submissions will focus only on the policy review for Recurrences, Permanent Impairment and Aggravation Basis Claims.

4. The purpose of the review

In his introductory comments to the Consultation Discussion Paper, Chair Jim Thomas stated that the policy review is necessary because of the following:

- Many benefits policies have not been reviewed for a number of years

- Decisions of the Workplace Safety & Insurance Appeals Tribunal (the "Appeals Tribunal") may have influenced how WSIB staff interpret or apply policies
- There has been enormous change in the workplace
- The demographics of an aging workforce
- Advances in medical science “may usefully contribute to better adjudication”.

The PAO believes that it would be naïve to suggest that other factors have not provided a more powerful influence. These, of course, include the present size of the WSIB’s unfunded liability, the KPMG Value for Money Audit, and the Harry Arthurs Funding Review.

It is difficult to accept that the timing of the policy review is coincidental, coming as it does within months of the KPMG report and funding review. Both of those reports are candid in stating that the WSIB has limited options for achieving financial stability; increase revenues, decrease costs (benefits) or a combination of both. The KPMG report expressed repeated concerns with the aging workforce and policies that may provide benefits for the increased symptoms suffered by older workers with degenerative conditions. These concerns have become the priority of this policy review. In light of this, it is difficult to accept this policy review is not connected to attempts to reduce the unfunded liability.

We are encouraged by Chair Thomas’ personal statement that he will not be providing “advice on whether the policies can be adjusted for the purpose of increasing the amount of compensation or reducing the unfunded liability”. The PAO encourages the Chair to resist pressures to use this policy review to design policies aimed at reducing and/or retiring the unfunded liability. Such an approach will inevitably lead to fewer benefits for injured workers, especially aging injured workers.

The PAO has some concerns with the stated reasons for the policy review. First, the PAO has difficulty understanding how the aging workforce prompts a need to change policies unless the primary purpose is to reduce the costs associated with claims by workers who are increasingly older and more vulnerable to injury.

Our experience with decisions of the Appeals Tribunal has been the opposite of what Chair Thomas suggests. Tribunal decisions have had very little influence on the manner in which adjudicators apply polices. Rather, it often appears that the WSIB has had no regard at all for Tribunal jurisprudence when interpreting and applying policies. The PAO supports the discussion paper’s efforts to incorporate the principles established by the Appeals Tribunal into the policies. This alone will do much to improve the consistency of decision-making.

Finally, the discussion paper states that a review was needed because of potential advances in medical science that improve our understanding of the interaction between work-related and non-work-related factors in causing impairment. It later states that policies must be consistent with “modern medical adjudicative approaches”. The PAO is unclear on what is meant by these references. To the extent the policy review generates information about advances in medical science or new medical adjudicative processes, the PAO requests that stakeholders be provided the opportunity to review it and make supplementary submissions.

5. The undue focus on carving out non-work-related factors

A common thread throughout the discussion paper is the repeated concern with distinguishing work-related impairment from age-related degenerative conditions with a view, presumably, to reduce or deny benefits where any competing cause can be identified. The discussion paper identifies the following concerns:

- For Recurrences: There are challenges in distinguishing between deterioration in a worker's work-related injury and degenerative changes due to natural aging
- For Permanent Impairment: There is a lack of parameters to distinguish between work-related and non-work-related factors that could have contributed to a permanent impairment such as those attributable to natural aging, lifestyle, or pre-existing conditions
- For Aggravation Basis: There is a need for guidance in determining how a worker with a pre-existing condition may have deteriorated due to natural degeneration had the workplace injury not occurred

These are difficult questions. But they are not new. These are the questions that are inherent in any compensation system that requires distinguishing between work-related and non-work-related injuries. They are questions inherent in establishing causation in tort law. They are not easy and cannot be resolved by designing cookie cutter policies. These matters require a diligent review of all available medical information and relevant facts. However, the Appeals Tribunal and the courts have established legal tests for approaching them in a fair manner.

The Appeals Tribunal has generally relied upon the "significant contribution" test in determining whether an impairment or loss of earnings was caused by the workplace incident. The worker need not show that the workplace incident was the sole cause or even the predominant cause of the impairment or loss of earnings. It is enough to show that the workplace incident significantly contributed to either the loss of earnings or impairment. And when a significant contribution is demonstrated, with a few limited exceptions, all the loss of earnings or all the impairment is attributable to the incident, even where there may have been other causes. This legal interpretation is consistent with the law or causation in personal injury cases.

As recently as 2005 The WSIB's Occupational Disease Advisory Panel recommended this test be adopted in determining the work-relatedness of disease. At page 8 he noted:

> The “significant contribution” test was developed by the WCAT/WSIAT (the Appeals Tribunal) with reference to the common law, based on the reasoning that the conversion from a common law to a no-fault statutory system was not intended to reduce the breadth of protection for workers.

The PAO supports the continued use of this principle in interpreting the language of *Act* and its underlying principles. It should be clearly incorporated into the three policies at issue.

This will reduce the need to search out and quantify the contribution of underlying conditions and intervening events.

The PAO is also concerned with what appears to be an attempt to expand the use of the "crumbling skull" doctrine in ways that undermine the underlying principles of the *Act*. The essential purpose of compensation is to restore a person to the position he or she would have been in had the accident not occurred. The courts and the Appeal Tribunal regularly apply the doctrine of the "thin skull" to assess entitlement for compensation where there is an underlying condition. The basic principle behind the "thin skill" doctrine is that the employer must take the worker as it finds him. It is irrelevant that the worker had an underlying condition that increased his or her susceptibility to injury or to more severe symptoms. If the workplace accident significantly contributed to the impairment, the injured worker is entitled to compensation for all resulting loss.

The "crumbling skull" doctrine is a narrow doctrine that limits compensation if the injured worker had a *deteriorating* condition prior to the accident. In the context of a workers' compensation scheme it means that benefits could be reduced or denied where it can be demonstrated that an injured worker had a degenerative condition that would have deteriorated on its own even if the workplace accident had not occurred.

The PAO urges the Chair resist any effort to expand the use of the "crumbling skull" doctrine. It is inappropriate, for example, to cut off benefits to an older worker with low back strain on the basis that generalized research shows that he was likely already on the road to functional compromise before the accident. This type of approach will create injustice and, in many cases, great hardship.

It is exceedingly difficult to determine what the "natural progression" of a pre-existing condition might be, especially if there were no symptoms of the condition before the accident. As a result, the PAO submits that benefits should continue as long as functional compromise in the affected body part continues to cause a loss of earnings. Any decision to terminate benefits on the basis that the work-related injury has healed despite continuing symptoms would be seen as arbitrary and would inevitably cause further chaos in the appeals system.

The PAO strongly urges that the "crumbling skull" doctrine be adopted only in the most scientifically sustainable cases where such an approach is unquestioningly appropriate in the individual circumstances of the case, keeping in mind that where there is any question, the benefit of the doubt must be resolved in favour of the person claiming benefits pursuant to s. 119(2) of the *Act*.

6. Don't make the policies more complex

A common thread that emerges in our review is that the existing policies are too complex. They attempt to do too much and the policy review seems intent on having them do more.

The Framework for Policy Development and Renewal document states that, among other things, the policies should be grounded in the fundamental objectives of the *Act,* provide clear direction to the parties, respect the current strategic direction, consider stakeholder expectations, be fair, practical, effective and fiscally responsible. They should be designed so they can be applied with timeliness, transparency and consistency. The discussion paper adds that the policies must also reflect modern medial adjudicative approaches. In identifying issues for each policy, the discussion paper lists questions or challenges it hopes revised polices will address.

The PAO submits that we may be asking the policies to do too much. The greater the expectations placed on what a policy should accomplish, the greater the risk of either conflicting expectations or failed expectations. By striving to have policy address every potential administrative complexity, its capacity to support its overarching goal is eroded.

As discussed in more detail below, the PAO recommends that a statement of principle be added to each policy to clarify its over-riding goal. It further recommends that no changes to existing policies be made unless there is clear evidence that the policy is incapable of meeting its over-riding goal. The PAO further recommends the development of separate procedural guidelines be to assist the decision-making process.

7. The Starting Point: The Meredith Principles and the *Act*

The PAO submits that benefit policies should not change with changing demographics or annual plans or even finances. Policies should interpret the *Act* in a manner consistent with its underlying principles and the remedial nature of the legislation. Fairness to each individual injured worker, not ease of administration and predictability, must be at the forefront. While the PAO is not insensitive to the current financial problems in the workers' compensation system, the answer, we submit, does not lie in curtailment of benefits for injured workers.

Both the framework document and discussion paper confirm that polices must be grounded in the fundamental objectives of the *Act.* Yet there is very little emphasis on the fundamental objective of the *Act* at the centre of these three policies: **To provide compensation and other benefits to injured workers.**

The starting point is for each policy must be to ensure it furthers the objective of providing compensation and benefits to injured workers in a manner consistent with the underlying principles and the remedial nature of the legislation.

The underlying principles

The underlying principles of our workers compensation scheme were established in 1915 by Sir Justice William Meredith who developed Ontario's first legislated protection for workers injured in their place of employment. Until then, workers were required to sue their employers in the case of an allegation of negligence on the employer's part. Where they could not prove, or could not afford to prove, employer negligence, injured workers received nothing.

Meredith proposed that workers be given “no fault” insurance in the event of a work injury. The benefits workers would receive would come from a central “Accident Fund”, to be administered by a Compensation Board. In exchange for funding the plan, employers would be exempt from civil action. This was the historic tradeoff.

Meredith proposed that the workers' compensation system be based on the following principles:

- No-fault compensation
- Collective liability of employers for the cost of the compensation system.
- Security of payment - Injured workers are assured of prompt compensation and future benefits.
- Exclusive jurisdiction of the compensation board to make decisions
- An independent board that is both autonomous and non-political

There is general agreement that these fundamental principles should not be compromised as a result of this policy review. The PAO submits that this policy review should also keep in mind the social justice purpose underlying the Meredith principles as explained in Meredith's final report:

> In these days of social and industrial unrest it is, in my judgement, of the gravest importance to the community that every proved injustice to any section or class resulting from bad or unfair laws should be promptly removed by the enactment of remedial legislation and I do not doubt that the country whose Legislature is quick to discern and prompt to remove injustice will enjoy, and that deservedly, the blessing of industrial peace and freedom from social unrest. Half measures which mitigate but do not remove injustice are, in my judgement, to be avoided. That the existing law inflicts injustice to the workingman is admitted by all. From that injustice he has long suffered, and it would, in my judgement, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but of what is the least he can be put off with; or if the Legislature were to be deterred from passing a law designed to do full justice owing to the groundless fears that disaster to the industries of the Province would follow from the enactment of it.[1]

The underlying principles are not about balancing competing interests or about doing as little as can be done. The principles focus is on what is *just* to the injured worker.

The remedial nature of the legislation continues to be a guiding force in statutory interpretation. Section 64(1) of the *Legislation Act*, 2006 provides as follows:

[1] Final Report on the laws relating to the liability of employers to make compensation to their employees for injured received in the course of their employment which are in force in other countries and as to how far such laws are found to work satisfactorily, The Hon. Sir William Ralph Meredith, October 31, 1913.

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

The PAO submits that, first and foremost, the policies must embody the *Act's o*bjective of providing compensation to injured workers in a manner that embodies the Meredith Principles, the underlying remedial nature of the legislation and with a focus on what is fair and just to the injured worker.

8. Policies and administrative guidelines should be separated

As previously noted, the PAO believes that the discussion paper puts considerable emphasis on policies that provide clarity, consistency and predictability in decision-making. While desirable, these objectives must be tempered by the prime objective of fairness to the member. For example, a policy which states that a recurrence must occur within one year or two years of the original accident will provide consistent and predictable results. However, it provides no guarantee of fairness in any individual case.

The decisions to be made by adjudicators are difficult, especially where there may be multiple causes of impairment. They require a full review of complex medical information and all the unique facts of the case. The unique circumstances of each claimant do not always fit into a structured decision-making formula. The PAO believes it would be a mistake to inject even more complexity into the policies by trying to address each possible scenario. Policies should improve the adjudicator's capacity to ability to address complex matters, not provide a formula or checklist.

To ensure that the over-riding goal of the policy is clear to all parties the PAO recommends that each policy contain a statement of principle. The policies should then only be amended to the extent necessary to ensure they are consistent with the statement of principle.

The PAO further recommends that procedural guidelines be developed, similar to the current collection of "adjudicative advice" documents to aid in the decision-making process. It is the ***process*** involved in decision-making that needs to be consistent and transparent. The procedural guidelines would assist is ensuring that all the available information has been gathered and all appropriate factors considered so that the decision that reflects the objective of the policy. These guidelines should be made available to the public via the WSIB's website.

Separating policies from administrative guidelines have another advantage. Under section 126(1) of the *Act,* the Appeals Tribunal is required to apply Board policy. Since policies and procedural guidelines are now linked in the same document, the Appeal Tribunal is required to "apply" both. This considerably fetters the Tribunal's ability to engage in a "fresh look" at the evidence when considering an appeal from a decision of the Board. By separating policy from procedural guidelines, the Appeals Tribunal would have the discretion required to ensure decisions reflect the statement of principle in each policy.

9. Recurrences

The PAO recommends the following statement of principle be added to the Recurrences policy.

> A claim for benefits will be accepted where the evidence establishes, on a balance of probabilities, that the original accident and injury made a significant contribution to the onset of the condition for which the benefits are claimed.

The statement provides clarity, consistency, timeliness, practicality and transparency. It does so while being grounded in the fundamental objectives of the *Act* and the foundational Meredith principles.

The PAO further recommends that the policy clearly emphasize that clinical or medical compatibility is sufficient to ground a claim for recurrence. It is our experience that adjudicators routinely require that a claimant demonstrate "continuity of complaint" in addition to clinical compatibility. Because of this emphasis, more stoic or pain-tolerant workers with ongoing medical problems are less likely to qualify for benefits than workers with lower pain tolerance and a greater propensity for letting others know about it. As noted earlier, this gives rise to significant problems in a police culture and has led to the rejection of claims for many of the members we represent.

In our view, there is nothing wrong with a strong reliance on "medical compatibility". The adjudicator must use all available medical information available to determine whether the original injury has made a significant contribution to the recurrent symptoms.

From concerns raised by WSIB staff in the discussion paper, it appears that they desire a means to separate out *any* contribution of co-morbid medical conditions that may have intervened between the time of the original injury and the recent onset of symptoms. The development of degenerative disc disease in claims for back injuries is a common example. One way to address this problem is to utilize the "aggravation basis" policy. That policy provides that where an underlying condition is a factor in the worker's symptom complex, it will not be "separated out" if the condition was not causing any impairment in the year or so prior to the injury.

8. Permanent Impairments

According to the discussion paper, this is not so much a review of an existing policy as it is the development of a new policy – one that assists decision-makers in determining if a work-related permanent impairment exists. The current policy deals with the assessment and quantification of a permanent impairment, but that can only be done once the decision-maker is satisfied that one exists. The existing policy is silent on that threshold issue, though the *Act* provides significant direction.

The *Act* defines impairment as a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss.

Merriam-Webster's Online dictionary defines "permanent" to mean "continuing or enduring without fundamental or marked change".

From this, we can construct the threshold test for a "permanent impairment":

> A worker has a permanent impairment when the injury produces a physical or functional abnormality or loss (including disfigurement) and/or psychological damage and the abnormality, loss or damage is expected to continue or endure without fundamental or marked change.

We urge that this definition be adopted as the over-riding policy statement. The PAO recommends an administrative guideline to assist in determining whether such a condition exists. In some cases (an amputation, for example), the determination is relatively straightforward. In others (chronic pain, anosmia) the determination is more difficult. The difficulty is exacerbated by the WSIB's historic reliance on "objective findings". To the best of our knowledge, there are no objective findings when it comes to assessing pain, or psychological decline. Invariably, those kind of determinations must be subjective. The medical practitioner and decision maker must rely largely on what the worker tells them about their condition.

We also propose that the guideline include a list of injuries that are more likely than not expected to produce a permanent impairment. For each such injury, there should be a list of objective and subjective signs that would be indicative of a permanent impairment.

Mechanism of Injury	Objective Signs of Permanent Impairment	Subjective Signs of Permanent Impairment
• Severe trauma / fracture(s) to lower leg	• Absence of lower leg	• Pain • Psychological distress
• Exposure to horrific auto accident	• Clinically verified psychological abnormality	• Life disruption

We expect that such a list would rely heavily on contributions from persons with suitable medical qualifications.

9. Aggravation

The PAO recommends the following statement of principle for the Aggravation Basis policy similar to that recommended for Recurrences.

> A claim for benefits will be accepted where the evidence establishes, on a balance of probabilities, that the original accident and injury made a significant contribution to the onset of the condition for which the benefits are claimed.

As previously noted, the PAO submits that benefits under the Aggravation Basis policy should continue as long as functional compromise in the affected body part continues to cause a loss of earnings. Any decision to terminate benefits on the basis that the work-related injury has healed despite continuing symptoms would further erode the credibility of the WSIB as an institution with a mandate to preserve the Meredith principles.

CONCLUSIONS

The PAO hopes that our submissions and recommendations will assist Chair Thomas in developing his report to the Workplace Safety and Insurance Board. We thank the Workplace Safety and Insurance Board and Chair Thomas for giving stakeholders this opportunity to participate in the policy review process.

SUMMARY OF RECOMMENDATIONS OF THE PAO

1. The policy review should ensure all policies interpret the *Act* in a manner consistent with its underlying principles and the remedial nature of the legislation.

2. The underlying objective of the three policies at issue is to provide compensation and other benefits to injured workers in a manner that focuses, first and foremost, on fairness and justice to the individual worker in the unique circumstances he or she faces.

3. There should be strong resistance to pressure to develop policies that will reduce or deny benefits to older workers who experience more severe symptoms and longer recovery following workplace accidents because of underlying conditions.

4. The Board should formally endorse the "significant contribution test" when there may be multiple causes to impairment. Where the workplace incident significantly contributes to the loss of earnings or impairment all the loss of earnings and all the impairment should be attributable to the incident.

5. The PAO strongly urges that the “crumbling skull” doctrine be applied only in the most scientifically sustainable cases where such an approach is unquestioningly appropriate. Cutting benefits to an older worker on the basis that he may already have been was on the road to eventual functional compromise before the accident will create injustice and, in many cases, great hardship.

6. The goal of consistent, clear and predictable outcomes must be tempered by the primary goal of fairness and justice to the injured worker. Injured workers face unique circumstances that cannot be addressed through cookie cutter policies that attempt to address every scenario.

7. There should be a clear statement of principle added to each policy.

8. The Board should introduce procedural guidelines that assist in decisions-making, similar to current adjudicative directives. These should be available on the website.

9. The Recurrences policy and the Aggravation Policy should include the following policy statement:

> A claim for benefits will be accepted where the evidence establishes, on a balance of probabilities, that the original accident and injury made a significant contribution to the onset of the condition for which the benefits are claimed.

10. Less emphasis should be put on requiring "continuity of complaint" to claim benefits for a recurrence. In many cases, clinical capability is sufficient.

11. Where benefits are awarded for an Aggravation Basis claim, the should continue as long as functional compromise in the affected body part causes a loss of earnings

12. The PAO recommends the following definition to assist with the threshold issue for a permanent impairment

> A worker has a permanent impairment when the injury produces a physical or functional abnormality or loss (including disfigurement) and/or any psychological damage that is expected to continue or endure without fundamental or marked change.

13. A procedural guideline should be developed that includes a list of injuries that are more likely than not expected to produce a permanent impairment.

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