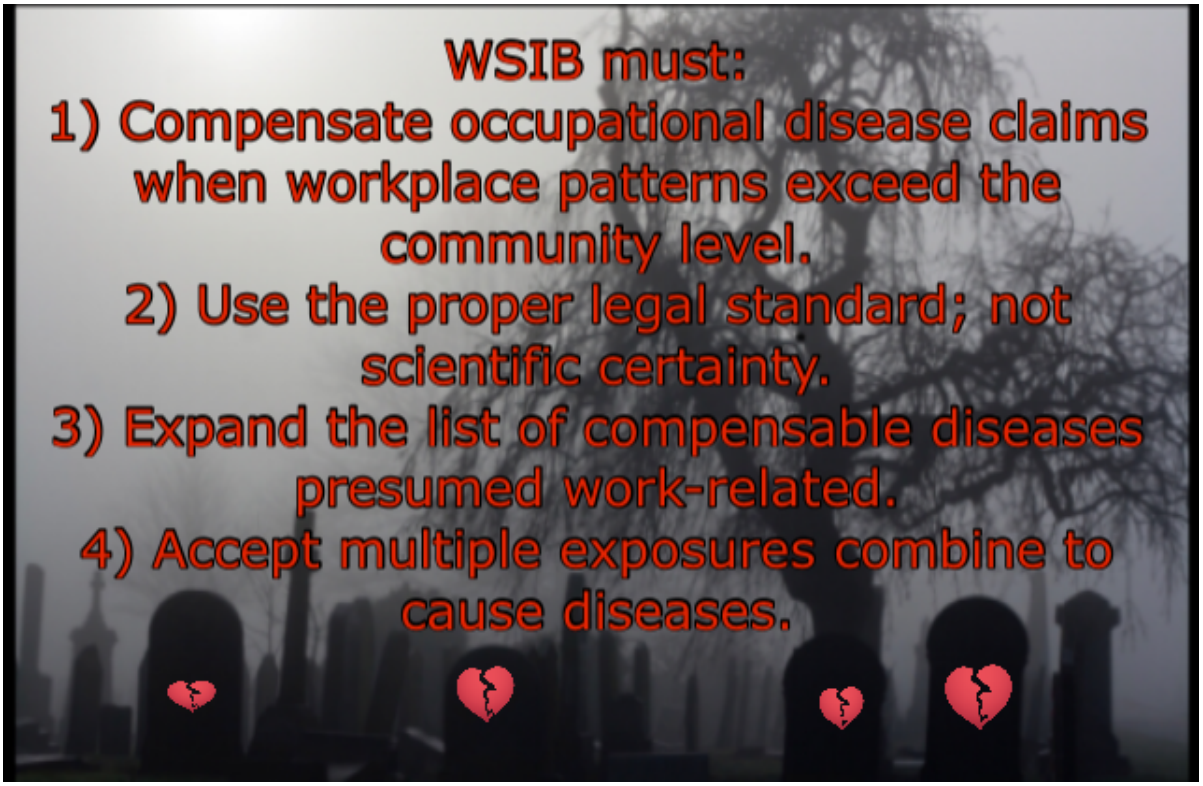

A CALL FOR JUSTICE FOR THE VICTIMS OF OCCUPATIONAL DISEASE

Making a Case for Change in WSIB Occupational Disease Adjudication Principles

ABSTRACT

There have been several clusters of occupational diseases in workplaces across this province. Representatives from these cluster groups have come together to form an alliance and to call for change. We are the Occupational Disease Reform Alliance (ODRA).

Who we are:

We are a group of people with various backgrounds from across the province who have come together for a common goal, to demand justice for victims of occupational disease. Our group name is the Occupational Disease Reform Alliance (ODRA), and it includes members who are; victims of occupational disease (workers, retirees, and family members including far too many widows), advocates (Union and Community alike), and allies (injured worker groups, injured worker representatives, and others who believe in this cause). Members in this group are from Peterborough, Sarnia, Kitchener, Waterloo, Hamilton, Niagara, Toronto, Sudbury, Elliot Lake, Sault Ste. Marie, Thunder Bay, and Dryden. We have witnessed the injustices to the workers and families who filed occupational disease claims related to their work at GE, Ventra, Neelon Castings, Algoma Steel, Uniroyal, and in other industries or mining, especially those who were forced to inhale McIntyre Powder. A common goal of fighting for justice for the victims of occupational disease has united us, and we are calling on the government and the WSIB to implement necessary changes.

Background:

Occupational disease has been observed and documented as early as the 1700s by Bernardino Ramazzini and Percivall Pott. Pott[1] observed an increased incidence rate of scrotal cancers in chimney sweeps and made the link to the soot as the cause of their squamous cell carcinomas which were later referred to as chimney sweeps' carcinoma. Ramazzini has been called the father of occupational medicine[2] for being the first to catalogue diseases of workers in his work titled *De Morbis Artificum Diatriba*. We believe it is worth noting that not all diseases catalogued by Ramazzini resulted from exposures; some were from physical agents much like bursitis that is listed as an occupational disease in Schedule 3, essentially, he recognized injuries and diseases that are currently defined in the WISA. It is clear that observing diseases in groups of workers isn't new, and that epidemiological studies aren't necessary to determine a causal link to the workplace.

Providing compensation for occupational diseases (previously called industrial diseases) has been part of the history of Ontario's workers' compensation system from its inception. In fact, Sir William Ralph Meredith stated that,

> "It would, in my opinion, be a blot on the act if a workman who suffers from an industrial disease contracted in the course of employment is not entitled to compensation[3]" (page XV, second full paragraph, fourth sentence).

[1] Sir Percivall Pott, English Surgeon, Britannica https://www.britannica.com/biography/Percivall-Pott
[2] Bernardino Ramazzini: The Father of Occupational Medicine https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446786/
[3] Sir William Ralph Meredith, *Final Report on Laws Relating to the Liability of Employers* https://archive.org/details/finalreportonlia00onta/page/n17/mode/2up

At that time there was only Schedule 3 and it started with six diseases listed, which likely created issues when seeking compensation for an occupational disease not in the schedule. However, it is clear that the intent of the Act was to provide compensation for occupational diseases and that remains a primary objective in the current version of the legislation (see section 1(4) of the WSIA).

The current version of the Act lists 30 occupational diseases in Schedule 3 that are afforded a rebuttable presumption regarding work-relatedness; with an additional 4 diseases in Schedule 4 that have an irrebuttable presumption. Section 15(1) and 15(2) as well as the definition of 'occupational disease' found in section 1 of the WSIA provide a mechanism to compensate for diseases that aren't listed in the schedules. Despite the evolution of the legislation, the fight for compensation for occupational diseases remains a difficult task.

WSIB has Administrative Practice Documents (formerly referred to as Adjudicative Advice Documents) that can be used to assist in understanding issues that are common to occupational disease and injury claims (e.g., loss of earnings, maximum medical recovery, weighing of medical evidence, etc.). They also have some that are specific to certain claims such as traumatic mental stress, but there isn't one single document of that nature to specifically address occupational disease. The overall message in the Adjudicative Advice Document *Initial Entitlement (Disablement)*[4] seems to call for a liberal interpretation of the worker's report and advises against adjudicating these claims in an "unnecessary restrictive" manner. Applying this type of adjudicative principle to occupational disease claims (which usually result in a disablement) would be justified and is in fact consistent with section 15(1) of the WSIA. It shouldn't be so difficult to get justice for the many victims of occupational disease.

Recommendations:

ODRA members have observed many issues with occupational disease adjudication and have 4 recommendations that we believe would help resolve a lot of issues. Overall, we are calling for recognition of occupational disease that is more reflective of the disease burden noted in reviews such as the Ontario Cancer Research Centre's *Burden of Occupational Cancer Project*.

1. We are calling on the WSIB to grant entitlement for occupational diseases when they exceed the level out in the community.

2. To accomplish this, the WSIB must not wait for scientific certainty. Canada's Supreme Court has confirmed that this is not what the law requires for workers' compensation. Instead, the WSIB must use the evidence at hand, including evidence

[4] WSIB Adjudicative Advice: Initial Entitlement (Disablement) https://www.wsib.ca/sites/default/files/2019-03/advice_initialentitlement.pdf

gathered by workers and communities about occupational disease in the workplace. WSIB must not leave workers and families in poverty until the body count has mounted up over decades.

3. Additionally, the WSIB must implement presumptions of work-relatedness for cancers listed in categories 1 and 2 by the International Agency for Research on Cancer (IARC). Irrebuttable presumptions for those with the most significant occupational contribution and a rebuttable presumption for the others.

4. WSIB must also recognize diseases resulting from exposures to multiple carcinogens/irritants (i.e., cancers, COPD, etc.) as recommended by the Demers Report, rather than focusing on single separate exposures.

These recommendations are specific to occupational disease, and address issues regarding initial entitlement. They are not the only issues with the compensation system, and once victims of occupational disease are granted entitlement, they become part of a system that needs to change the way it treats injured workers. Therefore, in addition to these specific recommendations we support the Ontario Network of Injured Workers Groups (ONIWG) in their call for change in the workers' compensation system regarding issues such as deeming, return to work issue, reliance on external medical consultants in place of the treating physician, adjudication delays, etc.

Some recommendations required a more detailed explanation than the others, but the length of that explanation shouldn't be viewed as an indication of preferring one recommendation over another. We will be referencing the recent reviews of the WSIB where relevant to the issue, but that shouldn't be taken as an endorsement of the recommendations contained therein unless specified. Cited works will be included in the footnotes and any additional materials considered (such as the OCRC project mentioned above) will be in Appendix A. Given that there have been two government commissioned reviews of the WSIB, and one value for money audit that will be referenced, we want to be clear that we are not calling for any further reviews and that it is our position that the time for action is overdue.

Making the Case for Change:

Each of our four recommendations have come from our experience that includes a combined total of hundreds (if not thousands) of occupational disease claims registered with the WSIB. We also recognize that there are likely just as many, if not more, occupational diseases that were never reported to the WSIB. Some of that lack of reporting comes from a place of unfamiliarity with the reporting requirements of the WSIB, and others come from workers who made the decision not to take on the added fight of filing a claim. Far too many workers have died from occupational diseases without being provided compensation, and others never see their claim successfully resolved. All workers deserve a compensation system that is fair and just; that is the driving force behind our recommendations.

Recommendation #1: Compensate occupational disease claims when workplace patterns exceed the community level.

Recognizing diseases in workers that are more prevalent than in the surrounding community and/or general population is a large part of the reason why some people may have heard of Ramazzini and Pott. This type of observation has also led to other important discoveries, such as the origins of diseases (e.g., Typhoid Mary, mad hatters' disease, etc.). Observed increased incidences are a reliable indicator that something is wrong, and while the exact cause might not be known it isn't required to determine that there is a causal relationship present. Knowing the work history of those affected by disease could lead to the conclusion that there is something in that workplace that is a significant contributing factor in the onset of the observed disease. Accurate work history information also prevents counting the work observations as community incidence which would skew any comparison if counting one case in both categories wasn't avoided. Implementing recommendation 1 not only allows for compensation to be provided, but it also identifies a workplace risk that can be used to hopefully prevent future cases.

In response to the Occupational Disease Advisory Panel's Final Report commissioned by the WSIB, a draft protocol document was created by the Board. This document will be referenced as part of rationale for all four recommendations, and it demonstrates that these recommendations aren't foreign concepts at the WSIB. For the purpose of recommendation 1, we want to draw your attention to page 20 where it states that,

> "In general, the WSIB does not use the public health approach of "doubling" the risk as the baseline to define an "increased" risk" (first bullet under the heading 'Strength of association')[5].

It is our position that recommendation 1 aligns with the WSIB's protocol document and that it should already be part of occupational disease claims adjudication process.

Scientific and/or medical evidence doesn't exist in every case; the absence of such evidence should never be viewed as an absence of a causal connection. The draft protocol document provides a reason for scarce or absent evidence of this nature on page 24 under the heading 'Funding of research'. It takes a fair sum of money to conduct epidemiological studies and that is disadvantageous to workers who can't afford to fund a study. Industries have the money to pay for research, and that money provides the freedom to choose the researcher who will serve their needs best. The use of scientific and/or medical evidence in the proper legal context will be discussed below.

[5] *Taking ODAP into the future, A protocol for occupational disease policy development and claims adjudication* https://www.wsib.ca/sites/default/files/2019-03/protocoldraft05.pdf

The WISB would already have the information required for most of the groups that we represent to look at the difference between the workplace incidence compared to the community or general population. Statistics for disease incidence from reliable sources such as the Canadian Cancer Society are readily available on the internet. It is noted in the protocol document that the WSIB has an Occupational Disease Information and Surveillance System to provide information on disease and fatal claims submitted to the WSIB (page 4, first bullet, footnote 4). Given this information, we see no obstacles that would prevent the implementation of recommendation 1.

We have several examples that can be provided to show where the WSIB has denied claims for workers when the incidence rate exceeded that of the surrounding community and/or general population. Should the WSIB wish to confirm this is the case they need only look at the past breast cancer claims from Bell or Ventra Plastics, glioblastoma multiforme claims for coke oven workers at Algoma, or the lung cancer claims at Ventra Plastics, among others to verify our point. While we recognize that a cluster of breast cancer claims at Bell was denied by the Tribunal, our point is that those claims should have never had to be appealed. The test to recognize these claims as work-related includes implementing recommendation 2.

Recommendation #2: Use the proper legal standard; not scientific certainty.

The documentation establishing the proper legal standard to be employed includes numerous Supreme Court of Canada Decisions, Tribunal decisions, reviews of the compensation system, and the WSIB draft protocol document. We recognize that section 119(1) of the WSIA stipulates that the Board is not bound by legal precedent, and documentation that we're referencing is intended to be instructive on the issue. Not being bound is different from not having to consider that information, and nowhere in the Act does it stipulate those legal precedents are to be completely ignored. In fact, the requirement to base the decision on the merits and justice requires consideration of all relevant information as stated in WSIB Policy 11-01-03 *Merits and Justice*.

In the previously mentioned *Final Report of the Chair of the Occupational Disease Advisory Panel*[6] (ODAP) the legal standard was described in four sections that combine to set the proper legal standard (see pages 7 – 11). Those sections are:

- The causation test to determine the relationship between the condition and work,
- Burden of proof clarifying who is responsible for proving the case,
- The standard of proof describing the degree of certainty required, and
- Applying the benefit of doubt as prescribed by section 119(2) of the WSIA.

[6] *Final Report of the Chair of the Occupational Disease Advisory Panel*
https://www.wsib.ca/sites/default/files/2019-03/docd_chairfinalreport2005.pdf

It is noted on the WSIB website that the ODAP Final Report was approved by the Board of Directors on June 9, 2005 for implementation[7]. Most of the information in the report is reflected in the Board's protocol document, but we are not seeing this reflected in the decisions of the WSIB adjudicators.

Rather than duplicate all the information provided in the ODAP Final Report and the WSIB draft protocol document, we will simply state where we have observed the Board's adjudicators departing from the proper legal standard. For the examples given regarding our position, we would be happy to provide specific claim examples but feel that there are so many it shouldn't be difficult to verify our position. We will also stipulate why we disagree with the limitation placed on the use of the benefit of doubt, and why the Board should not place such a limit in the decision-making process.

Burden of proof:

The burden of proof in the compensation context is very different from the courts. Neither the employer nor the injured worker is required to prove their case, and an adjudicator cannot refuse to provide a decision based on insufficient evidence. Workers' compensation is an inquiry system, not an adversarial like the courts. However, we recognize that the adjudicator isn't responsible for making the case for either party and they need only gather the information that they feel necessary to render a decision. Workers and employers are required to provide the WSIB with information they request, and it is also open to the parties to provide additional information that they feel is relevant to the case. This information is captured in Policy 11-01-02 *Decision-Making* under the heading 'Principles' which reads,

> "As an inquiry system (rather than an adversarial system), the WSIB gathers the relevant information, weighs evidence, and makes decisions."

Causation test:

Significant contribution has been equated with material contribution (the term used by the courts) and accepted as the test for causation as stated in both the ODAP Final Report and the WSIB draft protocol document. It is curious that the only WSIB Policy that even mentions significant contribution is Policy 15-02-03 *Pre-existing Conditions*. This is the well accepted established test for causation, and it isn't even found anywhere in the suite of "Decision Making" policies.

Adjudicators use the phrase "significant contributing factor" in multifactorial claims that are adjudicated on a case-by-case basis, but we believe that the concept isn't fully understood as demonstrated in numerous decision letters. Far too often an occupational disease claim is denied because the adjudicator determines that the workplace wasn't a

[7] Chair's final report https://www.wsib.ca/en/chairs-final-report

significant contributing factor in the onset of the disease, but we are of the position that it falls short of considering the standard of proof. The causation test is only one part of determining entitlement under the WSIA and it isn't a stand-alone test as it must be used in conjunction with the standard of proof applying the benefit of doubt where necessary (e.g., when the evidence on the issue is approximately equal).

Standard of proof:

In the criminal justice system, a high bar is required to be sure that the decision to punish someone for a crime is correct, so they employ the standard of "beyond a reasonable doubt" to attain the required certainty. A lesser standard is used in civil proceedings, and that lesser standard has been accepted as the standard under the WSIA which is the balance of probabilities. The protocol document provides an eloquent explanation on pages 37 and 38 stating that,

> "The analysis of the balance of probabilities should be evident in any claim where the significant contribution test is applicable.
>
> There is a difference between balance of probabilities and work-relatedness. For example, a worker smoked four packs of cigarettes a day and was also exposed to agent X. The question is whether it is more likely than not that his or her employment significantly contributed to the development of the disease. The adjudicator does not consider whether it is more likely than not that the disease is work-related. Considering work-relatedness suggests the concept of a "predominant cause", which is a higher standard of proof than envisioned by the WSIA.
>
> Using the balance of probabilities as the standard of proof also reminds us that adjudicators can make decisions without having scientific or other certainties."

It is our position that making a determination regarding whether it is more likely than not that a worker's employment significantly contributed to the development of the disease using the balance of probabilities requires examination of the evidence on both sides. We believe that this is where the WSIB stops short and will discuss it further after explaining our issue with the limitation place on the benefit of doubt because it is our contention that they are all connected.

Benefit of doubt:

Both the ODAP Final Report and the WSIB draft protocol document state that the benefit of doubt doesn't apply to the final decision, but no such exclusion is found in the WSIA or WSIB Policy 11-01-13 *Benefit of Doubt*. The wording in the ODAP report could be taken to mean that the benefit of doubt shouldn't be reserved until the final decision and should be applied during the entire process whenever the evidence is approximately equal in

weight. However, the WSIB draft protocol document clearly, and incorrectly, states that the benefit of doubt only applies to specific issues "not the final decision" (page 38, first bullet, footnote 4). No document, report, memo, or anything of that nature can supersede the WSIA or WSIB Policy.

Policy 11-01-02 *Decision-Making* stipulates that,

> "The WSIB's decisions and practices must be consistent with the provisions of the Act and the rules of natural justice."

By extension of that statement, and consistent with the spirit and intent of section 126(4) of the WSIA, WSIB Policies must be consistent with the provisions of the Act. As noted above, Policy 11-01-13 *Benefit of Doubt*[8] is consistent with the Act (specifically section 119(2)) but deviating from the direction provided in the WSIA is a breach of the WSIB's legislative duty.

There are rare and unusual circumstances where an adjudicator can depart from applicable WSIB Policy described in Policy 11-01-03 *Merits and Justice*. However, the Policy clearly states that,

> "If there are specific directions within the Act that are relevant to the facts and circumstances of the case, decision-makers are legally bound to follow them with no exceptions."

The only time that section 119(2) isn't relevant to a worker's case is when the evidence isn't approximately equal in weight. Therefore, section 119(2) must be applied to all issues being decided, including the final decision, whenever the evidence is approximately equal in weight.

It was suggested by the ODAP Chair that there should be a discussion and/or a definition of the term "issue", but that seems to ignore past and current practice and rules that would eliminate any need to further define the word issue. One very common "issue" in dispute or issue decided by the WSIB is initial entitlement, which would be the final decision of that adjudicator. This past and present practice of using the word issue in this manner (i.e., something that requires a decision) supports our position that the final decision is an "issue" within the accepted definition of that word.

The plain and ordinary meaning rule of interpretation and the Legislation Act, 2006, would also be applicable and lead to the conclusion that the final decision is an issue. The word isn't part of the definitions clause and absent a specified definition in the WSIA then the plain and ordinary meaning rule would direct us to the dictionary to find the meaning of issue. Merriam-Webster[9] defines an issue as:

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[8] WSIB Policy 11-01-13 *Benefit of Doubt* https://www.wsib.ca/en/operational-policy-manual/benefit-doubt

[9] Merriam-Webster definition for issue https://www.merriam-webster.com/dictionary/issue

- A vital or unsettled matter,
- A matter that is in dispute between two or more parties,
- The point at which an unsettled matter is ready for a decision, etc.

The plain and ordinary meaning rule would lead to the conclusion that the final decision is an issue that is subject to section 119(2) when the evidence is approximately equal in weight.

Section 64 of the Legislation Act, 2006, prescribes the rule of liberal interpretation stating that,

> "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.[10]"

One objective, or object, is to provide compensation as stated in the purpose clause (see section 1(4) of the WSIA). Section 118 of the WSIA prescribes the Board's authority to decide all matters and questions arising under the Act and section 131(4) requires that those decisions be provided in writing demonstrating that decisions are an object of the legislation. It should be noted as well that section 119(2) applies to providing a decision on an issue since it specifically states,

> "If, in connection with a claim for benefits under the insurance plan, it is not practicable to **decide an issue** because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits" [emphasis added].

The requirement for the issue to be in connection with a claim for benefits means that section 119(2) doesn't apply to other issues decided by the Board (e.g., employer classification or other employer account matters). However, the final decision on entitlement is an issue that is connected to a claim for benefits and where the evidence is approximately equal in weight then section 119(2) must be applied.

Not only is this interpretation of the benefit of doubt provision of the WSIA consistent with interpretation rules, regulations, and WSIB Policies, but it is also consistent with WSIAT jurisprudence (see for examples WSIAT Decision Nos. 97/01[11], 1672/04[12],

[10] Legislation Act, 2006 https://www.ontario.ca/laws/statute/06l21#BK74
[11] WSIAT Decision No. 97/01
https://www.canlii.org/en/on/onwsiat/doc/2001/2001onwsiat148/2001onwsiat148.html?autocompleteStr=Decision%20No.%2097%2F01&autocompletePos=1
[12] WSIAT Decision No. 1672/04
https://www.canlii.org/en/on/onwsiat/doc/2009/2009onwsiat150/2009onwsiat150.html?autocompleteStr=Decision%20No.%201672%2F04&autocompletePos=1

1780/04[13], & 2018/17[14]) and potentially consistent with WSIB decisions. We are not asking for a retraction of the statements made in error about the application of the benefit of doubt, only that the Board use the proper application of this provision. The method described herein is the way that the benefit of doubt must be applied (when the evidence is approximately equal in weight) in the application of the proper legal standard despite the statements made in the ODAP Final Report or the WSIB draft protocol document in that regard.

Application of the proper legal standard:

We will stipulate that the WSIB uses the phrases 'balance of probabilities' and 'significant contributing factor' in their decision letters but contend that they don't properly apply the legal test even when those phrases are utilized. This has been frequently demonstrated in claims where the WSIB's Occupational Disease Policy and Research Branch (ODPRB) have conducted scientific literature reviews on a topic, and our contention on this issue is easily verifiable. It is especially true when the ODPRB has graded the evidence in their review as lower than having a positive association (i.e., "limited evidence" or "inconclusive evidence" gradings).

Since there is a thinly veiled reference to the fact that the WSIB ignores Policy 16-02-11 *Gastro-Intestinal Cancer-Asbestos Exposure* on a regular basis in the KPMG Value for Money Audit[15], we would be derelict in fighting for change in the compensation system if we failed to address it. If issues of this nature were corrected by the WSIB, then they could proclaim that they are applying the proper legal standard. Currently, the WSIB is holding claims to a much higher standard than required by the WSIA and have failed in far too many claims to properly apply the benefit of doubt provision.

<u>Use of scientific information:</u>

Both the ODAP Final Report and the WSIB draft protocol document discuss the various types of scientific evidence and their weaknesses, with the overall message being that such information is only part of the evidence to be considered by the adjudicator. While such evidence can be persuasive on an issue, it shouldn't be considered determinative, and all information must be considered in the proper legal context applying the benefit of doubt when the evidence is approximately equal in weight. Unfortunately,

[13] WSIAT Decision No. 1780/04
https://www.canlii.org/en/on/onwsiat/doc/2005/2005onwsiat179/2005onwsiat179.html?autocompleteStr=Decision%20No.%201780%2F04&autocompletePos=1
[14] WSIAT Decision No. 2018/17
https://www.canlii.org/en/on/onwsiat/doc/2018/2018onwsiat32/2018onwsiat32.html?autocompleteStr=Decision%20No.%202018&autocompletePos=1
[15] February 7, 2019 KPMG Value for Money Audit Report; Occupational Disease and Survivor Benefit Program
https://www.wsib.ca/sites/default/files/2019-05/wsib_occupational_disease_and_survivor_benefits_program_vfma_report.pdf

WSIB adjudicators adopt scientific conclusions of the ODPRB as a legal determination on the issue of entitlement and deny claims when the evidence is graded as 'limited' or 'inconclusive'.

The definitions for the terms used in grading the evidence are on pages 17 & 18 of the WSIB's draft protocol document (footnote 4), and there is also a discussion about the type of evidence required for adding to Schedule 4 on page 26 indicating that when the evidence is graded as "Positive evidence" that such a disease association can be included. Schedule 4 is afforded an irrebuttable presumption and most other claims only required that the workplace be more likely than not a significant contributing factor in the onset of the disease. Requiring evidence to be at the same level for initial entitlement as for adding to Schedule 4 is holding the claim to a higher standard than required by the WSIA.

'Limited evidence' is defined as,

> "The evidence is considered limited if a preponderance of scientific evidence or suggestive evidence supports a causal association, but inconsistent results and methodological weaknesses ***preclude a definitive conclusion***." [emphasis added].

Since there is no requirement for scientific, medical, or other certainties then you would expect this grading of the evidence to be viewed as supporting a causal relationship, but the WSIB denies claims when the evidence is graded as 'limited'. The balance of probabilities doesn't require that the evidence supporting a claim consist of a preponderance of evidence. Having a preponderance of evidence supporting one side of the issue would render the benefit of doubt inapplicable. Requiring a definitive conclusion may be reasonable in the field of science or even medicine, but it is a standard that is much higher than the balance of probabilities which is the proper legal standard of proof.

The 30 conditions listed in Schedule 3 are afforded the rebuttable presumption prescribed by section 15(3) of the WSIA. Having a rebuttable presumption implies that there is a level of uncertainty regarding the work-relatedness of those conditions and allows for the opportunity to show that a claim for one of those conditions might not be due to the worker's employment. It shifts the onus from proving a claim to disproving the work-relatedness of that condition, but claims are allowed that include a degree of uncertainty. Therefore, it is submitted that denying claims based on evidence graded as limited by the ODPRB holds claims to a much higher standard than required by the WSIA.

'Inconclusive evidence' is defined by the ODPRB as,

> "The scientific evidence is considered inconclusive if it is neither consistent nor strong. Both positive and negative findings may result from a variety of study weaknesses. ***A causal association can neither be identified nor ruled out.***" [emphasis added].

Adjudicators are advised to use the benefit of doubt provision when the scientific evidence about the possible causal connection to the worker's condition (see page 38, footnote 4), but they tend to simply deny claims based on the evidence being graded as 'inconclusive'.

There is also direction stating that the adjudicator must still compare the circumstances of the claim before them with the information reported in the literature (see page 54), and that the grading of the evidence as 'inconclusive' doesn't negate the responsibility to apply the proper legal standard (see pages 28 & 29). Scientific conclusions are not legal determinations, and they don't use the proper standard to decide issues arising under the WSIA. It is therefore submitted that the WSIB might use the proper terminology, but they are failing to apply the proper legal standard in far too many claims.

Adopting a scientific conclusion doesn't just hold the claim to a higher standard it also amounts to abdicating the authority of the Board prescribed by section 118 of the WSIA. The ODPRB papers are only one piece of the evidence to be considered, and in that consideration the proper legal standard must be applied. There must be an examination of that evidence to determine the relevance in order to assign the appropriate weight to be afforded that piece of evidence. When the evidence is approximately equal in weight then the adjudicator must apply the benefit of doubt provision. WSIB has been failing to deliver this justice to injured workers despite being the agency that has been legislated to provide it.

An example of the WSIB's failure to properly evaluate an ODPRB paper that graded the evidence as 'inconclusive' can be found in WSIAT Decision No. 2863/17[16]. That case didn't require the application of the benefit of doubt but did require a careful review of the scientific information provided by the ODPRB. The ODPRB used mortality ratios in their review for kidney cancer which are unreliable to determine the risk posed for a cancer with a low mortality rate as stated by the WSIAT Medical Assessor in paragraph 17 of the decision. It was also noted by the Medical Assessor that the ODPRB used studies that weren't relevant to the worker. These points were made to the WSIB by the advocate prior to the appeal progressing to the Tribunal, and the appeal could have been avoided had the WSIB adjudicator applied the proper legal standard instead of abdicating their decision-making authority to the ODPRB.

Standard for consideration of non-occupational factors:

There is nothing in the WSIA, or anywhere else for that matter, that would support using a different standard when considering any non-occupational risk factors in the decision-making process. It is stipulated in the WSIB's draft protocol document that the benefit of doubt provision applies to the worker's medical history and the scientific information regarding non-occupational risks (see page 38, last two bullets, footnote 4). Therefore, it is implicit that non-occupational risks be determined to be significant contributing factors in the onset of the medical condition to support a decision that the worker isn't entitled to benefits.

To be clear, we are not suggesting that the WSIB needs to determine the exact cause, only that the balance of probabilities requires consideration of both sides of the issue to

[16] WSIAT Decision No. 2863/17
https://www.canlii.org/en/on/onwsiat/doc/2019/2019onwsiat2178/2019onwsiat2178.html?autocompleteStr=Decision%20No.%202863%2F17&autocompletePos=2

determine which is more likely. The requirement of examining both sides of the evidence is also necessary to determine if the benefit of doubt is applicable (e.g., is the evidence approximately equal in weight?). In reviewing the non-occupational risk factors the same legal standard must be applied as a matter of fairness and impartiality.

For example, the Canadian Cancer Society lists the risk factors for kidney cancer[17] as: smoking tobacco; overweight and obesity; high blood pressure; certain genetic conditions; end-stage kidney disease and dialysis; family history of kidney cancer; contact with trichloroethylene (TCE) at work; and tall adult height. Some risks could be significant contributing factors like heavy tobacco use, while others are simply correlational risks that aren't significant contributing factors like being tall, and these types of determinations are necessary to know which cause is more likely (occupational or non-occupational) or if the evidence is approximately equal in weight to trigger the application of the benefit of doubt. It would be an injustice to victims of occupational disease to deny their claim based on a separate standard used to determine the non-occupational risks for their condition.

Gastro-intestinal cancer-asbestos policy:

It is noted in the KPMG report that,

> "the WSIB currently uses Adjudicative Support Documents (ASD) in place of outdated policies" (see page 14, footnote 13).

The report goes on to state that WSIAT is bound by WSIB policy (as per section 126 of the WSIA) and not ASDs, but that statement overlooks the fact that the WSIB is bound by policy too. Since the KPMG report is specific to occupational disease, and that there is a memo dated May 27, 2009, regarding the adjudication of gastro-intestinal cancers for asbestos exposures (not an ASD), then it becomes obvious that this is the issue being referenced.

As stated above, Policy 11-01-03 *Merits and Justice* allows adjudicators to depart from a relevant policy in,

> "rare cases where the application of a relevant policy would lead to an absurd or unfair result that the WSIB never intended."

The WSIB's draft protocol document further clarifies the use of this exception to applying all relevant policies stating that,

> "adjudicators do not use the "merits and justice" argument to avoid the intended result of a policy simply because they do not like that result." (page 42, third bullet, footnote 4).

[17] Canadian Cancer Society, Risk factors for kidney cancer https://www.cancer.ca/en/cancer-information/cancer-type/kidney/risks/?region=on

With respect to using adjudicative advice documents, or ASDs, the WSIB's draft protocol specifies that such materials

- do not direct the adjudicator in deciding a claim
- do not offer fixed criteria
- do not set guidelines to be applied in decision-making
- **do not replace policy**, and
- **must work with existing policies**. [emphasis added, see page 31].

The unchallenged statement found in the KPMG report is demonstrating the WSIB's disregard for policy, transparency, fairness, and justice.

Using an unpublished memo in place of policy is not fair, transparent, or just and such a practice should have never been initiated by the very agency responsible for administering the WSIA and developing policy. There is some indication that the WSIB knows that this course of action isn't appropriate because there is no mention of it in the report from Dr. Paul Demers *Using scientific evidence and principles to help determine the work-relatedness of cancer*[18] released in 2019 or in the 2020 review conducted by Sean Speer and Linda Regner-Dykeman (Speer/Dykeman report) *Workplace Safety and Insurance Board operational review report*[19]. The WSIB must stop this practice and re-adjudicate past claims that were wrongfully denied on that basis.

The fact that WSIAT refuses to apply the WSIB memo in place of Policy 16-02-11 should also reaffirm that this practice isn't consistent with law and policy. WSIAT Decision No. 1429/11[20] noted that the memo wasn't policy and didn't work with an existing policy, and WSIAT Decision No. 25/13[21] provided an interpretation of the policy as well as noting that the memo wasn't an appropriate substitute for policy. There are at least a dozen WSIAT Decisions that have cited and followed the reasoning of Decision No. 25/13 (e.g., Decision Nos. 124/20, 3588/17, 1064/20, 503/19, etc.). Workers and/or their survivors shouldn't be forced to endure years of waiting for an appeal decision to provide justice when a published policy should have been applied to their first decision from the Board and the claim should have been allowed at that level.

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[18] *Using scientific evidence and principles to help determine the work-relatedness of cancer*, Dr. Paul Demers https://www.ontario.ca/document/using-scientific-evidence-and-principles-help-determine-work-relatedness-cancer

[19] *Workplace Safety and Insurance Board operational review report*, Sean Speer and Linda Regner-Dykeman https://www.ontario.ca/document/workplace-safety-and-insurance-board-operational-review-report

[20] WSIAT Decision No. 1429/11 https://www.canlii.org/en/on/onwsiat/doc/2012/2012onwsiat1404/2012onwsiat1404.html?autocompleteStr=Decision%20No.%201429%2F11&autocompletePos=1

[21] WSIAT Decision No. 25/13 https://www.canlii.org/en/on/onwsiat/doc/2013/2013onwsiat437/2013onwsiat437.html?autocompleteStr=Decision%20No.%2025&autocompletePos=1

Putting it all together:

There was a comment in the KPMG report about undue political interference in cluster case management giving the examples of General Electric (GE) and McIntyre Powder (see page 15, footnote 13). We take exception to that statement and believe that it is a gross mischaracterization. It is our position that neither of those clusters were an example of undue political interference, but rather a reflection of the WSIB's inconsistency in the application of the proper legal standard.

For McIntyre Powder the WSIB had a Policy that was nothing more than an exercise in fettering discretion and it was only recently revoked. When the policy was in place there was a rigid adherence to its direction that claims relating to aluminum powder for neurological conditions weren't occupational diseases. This precluded the consideration of entitlement for a claim which meant that the proper legal standard wasn't applied. Clearly, the WSIB only has itself to blame for the negative attention it attracted as a result of their mishandling of those claims that some would argue was an abuse of power.

In the case of the GE claims there were several well written news articles that shouldn't need to be cited here to establish the events. Again, it was issues with WSIB's handling of those claims that drew the negative attention. This negative attention, and the negative consequences suffered by the victims of occupational disease, could have been avoided if the proper legal standard had been applied.

The low acceptance rate and low reporting rate of occupational diseases was noted in Dr. Demers' report (see pages 4 & 5, footnote 16). He also noted that the denied claims only made up a fraction of the gap between the estimated number of occupational cancers and allowed cancer claims (see page 14). One way to improve the underreporting of occupational disease claims is to increase the number of accepted claims because these workers know each other and talk about their experiences which could discourage others from filing. As noted above, there have been news stories covering the issues with occupational disease claims adjudication that could also discourage victims of occupational disease from filing WSIB claims. Applying the proper legal standard to claims would increase the acceptance rate and likely have a positive impact on the reporting of occupational diseases as well as improving the WSIB's reputation.

Recommendation #3: Expand the list of compensable diseases presumed work-related.

There are two recent reports that have recommended the WSIB expand the list of diseases and/or conditions in Schedules 3 & 4 (see footnotes 13 &16). Both the ODAP Final Report and the WSIB draft protocol document provided a framework for adding to the Schedules, which would indicate that expanding the lists was their recommendation as well. Schedule 3 has expanded from just 6 diseases to now including 30 diseases and/or conditions, but there haven't been any additions made to it since the early 1990s. Schedule 4 (introduced in 1986) hasn't existed as long as Schedule 3 has, and nothing has been added

to it since the 1990s (it was an empty Schedule until that time). Expanding the list of compensable diseases presumed work-related isn't a novel concept and it should be part of the ongoing work to provide justice for victims of occupational disease.

We prefer the wording of the recommendation in Dr. Demers' report (footnote 16) that states,

> "the WSIB should update and greatly expand the list of presumptions regarding cancer in Schedules 3 and 4" (page 6 under the heading 'Recommendations to update presumptive list and cancer-relevant policies').

KPMG's report is the only one cited that includes a response from the WSIB to their recommendations, and the response regarding Schedule 3 & 4 is disappointing. The WSIB's response on page 17 (footnote 13) under the heading 'Response to Recommendation 3' was that,

> "The WSIB will do a preliminary review of the current state of the science, against Schedules 3 and 4 over the course of 2019 and explore with the Ministry of Labour whether there is an opportunity to update."

From that statement it appears that the WSIB is only interested in determining if there is an opportunity to eliminate diseases or conditions from the Schedules and not exploring opportunities to expand them. Instead, the WSIB should be looking to greatly expand the Schedules as recommended in the report from Dr. Demers.

In any review of current scientific information, the WSIB needs to be mindful of the fact that this current information could be a reflection of reduced exposures compared to past practices. Occupational disease claims are generally a result of past exposures, and the older studies likely reflect the experience of those workers. This approach would be consistent with the merits and justice provision of the WSIA as well as WSIB Policy requirement to consider all relevant facts and circumstances.

Another issue regarding the Schedules that needs to be addressed is the rebutting of the presumption of section 15(3) of the WSIA. In some of the Tribunal decisions referenced regarding the application of the benefit of doubt, there is a reference to the Supreme Court of Canada (SCC) Decision *F. H. v. McDougall, 2008 SCC 53*[22] which clarified that the only standard of proof in civil law is the balance of probabilities. Our issue isn't with the SCC's decision, or even that WSIAT Decisions that were cited referencing the SCC decision, it's with the application of that determination in the compensation system which wasn't part of the SCC decision.

[22] F.H. v. McDougall, 2008 SCC 53 (CanLII), [2008] 3 SCR 41, https://www.canlii.org/en/ca/scc/doc/2008/2008scc53/2008scc53.html

There is a notable distinction between the WSIA and civil litigation which is that the WSIA provides presumptions whereas none are afforded to the parties in civil litigation. As noted above, there is a presumption in criminal law that an accused person is considered innocent until proven guilty beyond a reasonable doubt. It is not clear from the Tribunal decisions that referenced the SCC decision that sufficient consideration was given to this notable distinction between civil litigation and workers' compensation. In a system without any presumptions, it makes sense to only have one standard of proof, but in the worker's compensation system there are presumptions which change the onus from proving a claim to disproving it if possible. Claims without a presumption are established based on the standard of proof of the balance of probabilities and to rebut the presumption the same standard would essentially nullify the presumption.

Clearly the legislature intended for the claims that are afforded a presumption to require a higher standard of proof to rebut the presumption, in fact there isn't even an opportunity to rebut the presumption of section 15(4) of the WSIA. The wording of the presumption demonstrates that the Legislature intended for workers to be entitled to compensation, even when there are alternative theories of causation, unless the contrary is shown. Suggesting that there are other theories of causation doesn't show that claim wasn't work-related, and it wouldn't be proper to weigh various theories of causation on a balance of probabilities to rebut the presumption. It is our position that rebutting the presumption requires clear and convincing evidence to establish that the contrary has been shown.

We propose that addressing the recommendations regarding the Schedules needs to include transparency regarding the standard required to rebut the presumption of section 15(3) of the WSIA.

Recommendation #4: Accept multiple exposures combine to cause disease.

It was noted in the ODAP Final Report that,

> "A single exposure rarely results in a disease outcome. However, exposure of a given individual to several causal agents may increase his/her risk of disease in a synergistic, additive or antagonistic manner. Equally, different individuals may respond differently to specific exposures depending on their individual susceptibilities, on the promotional effects of the exposures, or on other contributory factors.
>
> Given the many combinations and permutations of occupational exposures, it is not uncommon for the WSIB decision-maker to be faced with adjudicating a claim for which there is no specific relevant scientific evidence. In other circumstances, the scientific evidence may be weak or contradictory" (last paragraph on page 20 and first paragraph on page 21).

This issue has been a challenge for the WSIB and noted in other reviews as well, with the exception of the Speer/Dykeman report. Recommendations from some of those reviews

include additional training for WSIB decision-makers and policy development to address this complex issue.

Dr. Demer's report contains a section titled 'The combined impact of multiple causes' noting that such a combination can range from additive to multiplicative. It was also noted that most epidemiological studies don't address the issue of multiple exposures combining to cause diseases, and in the absence of evidence to show that a combined effect is multiplicative that the exposures should at least be presumed to have an additive effect. A practical example of such consideration in a claim can be found at paragraph 10 in WSIAT Decision No. 2863/17 (footnote 14). That type of explanation regarding the consideration of the effects of multiple exposures from the workplace hasn't been consistently part of the decision letters of the WSIB.

Workers aren't lab rats that are being subjected to one substance to observe its effects, they are fathers, mothers, sons, and daughters working to provide for themselves and/or their families. That work far too often involves exposures to multiple carcinogens, toxins, irritants, chemicals, etc. in various forms (gas, liquid, solid, etc.) with different exposure routes (skin contact, inhalation, ingestion, etc.). The cause of their disease(s) would likely be multifactorial and there needs to be full consideration of all potential factors, including their interaction(s) with each other.

Conclusions:

ONIWG and the various reviews referenced herein have made several important recommendations, but there hasn't been any action taken. We recognize that two of the referenced reports were commissioned by the government and that the WSIB might take the position that the follow-up for those reports is the government's responsibility. However, the impact from the lack of action (dating back to before the ODAP report) has been borne by the victims of occupational disease.

While we have representatives in this group from most of the occupational disease clusters in this province, we recognize that we are not the voice for all victims of occupational disease. We are confident that all concerned would like to see improvements in the compensation system and many would like the opportunity to have their voices heard. COVID-19 has dominated the news lately, but it hasn't stopped the government from having consultations, including health, safety, and workers' compensation issues. Therefore, we are calling on the government as well as the WSIB to hold the necessary consultations to implement our recommendations and to hear the voices of all injured workers regarding the recommendations of the recent WSIB reviews.

We look forward to your response to this call for change and we also look forward to participating in the consultations required to implement recommendations in the very near future.

Appendix A:

Additional materials mentioned and web link.

- Workplace Safety and Insurance Act https://www.ontario.ca/laws/statute/97w16
- Schedule 3 of the WSIA https://www.ontario.ca/laws/regulation/980175#BK13
- Schedule 4 of the WSIA https://www.ontario.ca/laws/regulation/980175#BK14
- WSIB Administrative Practice/Adjudicative Advice Documents https://www.wsib.ca/en/businesses/claims/administrative-practice-documents
- Ontario Cancer Research Centre *Burden of Occupational Cancer Project* https://www.occupationalcancer.ca/burden/
- International Agency for Research on Cancer (IARC) https://www.iarc.who.int/
- Ontario Network of Injured Workers Groups (ONIWG) https://injuredworkersonline.org/injured-workers-community/ontario-network-of-injured-workers-groups-oniwg/
- Canadian Cancer Society https://www.cancer.ca/en/get-involved/events-and-participation/home-march/?region=on
- Supreme Court of Canada Decisions https://www.canlii.org/en/ca/scc/
- Workplace Safety and Insurance Appeals Tribunal Decisions https://www.canlii.org/en/on/onwsiat/
- Workplace Safety & Insurance Board Policies https://www.wsib.ca/en/policy/operational-policy-manual