WSIB Benefits Policy Review Consultation Process

Report to the President and CEO of the WSIB

Jim Thomas

Independent Chair

May 2013

May 30, 2013

Mr. David Marshall
President and CEO
The Workplace Safety and Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Mr. Marshall,

I am pleased to provide you with my Report on the Benefits Policy Review Consultation Process that you invited me to chair. I hope the advice and recommendations contained therein will assist WSIB not only in the revision of the benefits policy areas within my mandate but in fashioning consultation processes in the future. I cannot overstate the high quality of the submissions and presentations by employer and worker representatives nor the extraordinary support and professionalism of the many officials in your organization who responded to my requests for assistance.

Thank you for providing me with this opportunity to participate in this extremely interesting undertaking.

Sincerely,

Jim Thomas

WSIB Benefits Policy Review Consultation Report

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Chapter 1: Introduction

Mandate

Last year, the President and CEO of the WSIB asked me to chair a consultation process around four benefits policy areas that the WSIB intends to review and revise: recurrences, work disruptions, permanent impairments and aggravation basis. This is the first occasion in which the WSIB has undertaken a systematic policy review under its new Framework for Policy Development and Renewal. WSIB officials concluded that for this reason, it warranted a comprehensive stakeholder consultation process, led by an independent chair.

My mandate had two parts. First, provide the WSIB with advice on how to achieve more consistent, clearer and more understandable policies in the four benefits policy areas. Second, offer advice on ways of improving the consultation component of future policy reviews, where stakeholder consultation is deemed necessary.

Process

Following preliminary meetings with WSIB officials and informal discussions with some stakeholders, I released a Discussion Paper on July 27, 2012, which provided all interested stakeholders with a framework for preparing their submissions and presentations. It described my understanding of the scope and mandate of this review, and included chapters on each of the benefits policy areas with a list of questions to guide the development of stakeholder submissions. Each policy chapter contained a brief description of the policy challenges encountered by the WSIB as well as a high-level description of relevant Workplace Safety and Insurance Appeals Tribunal (WSIAT) decisions and approaches taken by other Canadian jurisdictions.

Stakeholders were invited to prepare written submissions and take part in regional public hearings. Seven days of public hearings took place from late October to the end of November 2012 (Toronto (three days), Hamilton, London, Ottawa, and Thunder Bay). In total, 17 worker groups and six employer groups made presentations and I received 12 written submissions from stakeholders not presenting. The Discussion Paper and all written submissions were posted on the WSIB website. A list of those who presented and/or prepared a written submission is included in this report as Appendix A.

I cannot say enough about the high quality of the presentations and submissions. Employer and worker groups obviously took this process seriously, spent a significant amount of time preparing for the hearings and offered well thought-out views on the issues under consideration. The hearings were designed to be informal and the dialogue was constructive, even on topics where the presenters had passionate and strongly held views. I learned a great deal from the presentations and the written submissions and I am extremely grateful to all who participated in this process. I hope this report does justice to the quality of the submissions.

After the conclusion of the public hearings, I met again with WSIB senior officials and with some consultation participants to communicate my preliminary observations. As will be seen later in this report, a recurring theme emerged across three of the four benefits policy areas: pre-existing conditions. Because this was not part of my original mandate,

I thought it would be important to determine the willingness within the WSIB to address this complex and challenging matter head-on. I found tremendous support amongst all WSIB senior officials to include this topic in my reporting out to stakeholders and in this report.

I invited stakeholders to a half-day session on February 19, 2013. The purpose of the session was to play back to stakeholders what I had heard, to indicate what I was planning to propose to the President and CEO of the WSIB and to afford everyone an opportunity to ask questions and comment on what they had heard. A number of stakeholders attended the session, as did the Chair of the Board and the President of the WSIB. While some stakeholders raised questions and a few concerns during that session, I concluded that my presentation indeed could form the basis of and framework for my report to the President.

Some stakeholders expressed doubts that the WSIB would act on the advice contained in this report. It is that sentiment that caused me to spend time with WSIB officials to ensure they understood what I was proposing and the implications of doing so, in order to increase the likelihood that the changes that would flow from accepting this advice are ones they can embrace. It increased my confidence level that what I am proposing and the way I am doing so will not only be accepted by the WSIB, but will form the basis for meaningful improvements in all four benefits policy areas and ultimately in how claims in these areas are adjudicated.

At the same time, it is important for readers to be aware of my understanding of the "status" of this report and the advice contained herein. I have tried to offer reasons for the advice I am providing and for the suggestions I might have to improve how claims are adjudicated in the four benefits policy areas and in the area of pre-existing conditions. To the extent that my suggestions make sense and are seen to be helpful in writing policies, I hope that they will be acted on by the WSIB. But, in no way was I asked nor am I intending to write a report that is binding on the WSIB.

I offer this commentary at the outset because it will become evident to the reader that I have on occasion strayed outside the four corners of my mandate. This was not of my own making but arose from the consultations that extended into topics such as principles that underpin benefits policies and pre-existing conditions. It may turn out that when some of the suggestions are applied to situations or policies that have not been part of this process, they may not work or make sense in those different situations. It is for this reason that I want to raise this cautionary note at the beginning of this report.

Chapter 2: Benefits Policy Principles

Benefits policy reform is an elusive concept in the world of Workers' Compensation. Dating back several decades to when I was last directly involved in Workers' Compensation[1], I recall that it was impossible to find enough common ground within the stakeholder community to move forward with benefits policy reforms. It would appear that little has changed since then. Stakeholder opposition, stemming from the fact that what is a "win" for injured workers is an additional cost for employers, and vice versa, has thwarted attempts at reforming benefits policies.

It is unfortunate that this is the case. Circumstances change over time. New adjudicative situations are encountered. Medical science moves forward. Surely it should be acknowledged by everyone associated with the WSIB that to stay constant is to miss opportunities to improve. That is why I find it encouraging that the WSIB has put in place a Framework for Policy Development and Renewal. It is a positive step for an organization to commit to regular, cyclical reviews of its policies, including benefits policies. This consultation process is an opportunity to explore what might need to be present for meaningful benefits policy reforms to take place. If a way could be found for this to become a possibility through this consultation process, that achievement alone would be a breakthrough.

In other parts of my life I am an interest-based negotiator and mediator. I believe that an interest-based approach to resolving conflicts is the best way of finding common ground. In my experience, a topic even as apparently intractable as Workers' Compensation benefits policy reform can be underpinned by principles and assumptions that are or should be shared by employers and workers. In fact, throughout the consultation process, there were numerous references to foundational principles from many stakeholders. Because I believe that a principle-based approach to benefits policy reform might be a key to unlock the paralysis that has occurred over decades of failed attempts at benefits policy reform, I have decided to begin my report here.

The WSIB's Framework for Policy Development and Renewal sets out half a dozen principles that the WSIB believes should be followed when undertaking any policy reform, benefits or otherwise. It is not my intention to diminish the importance of those principles or to suggest that the Framework necessarily be revised to reflect the contents of this chapter. Indeed, some of the principles set out below are the same as or similar to the Framework principles[2] (see Appendix B).

The ones I am describing in this chapter are ones that serve a specific purpose. That purpose is to provide a common starting point for revising benefits policies. To the extent that stakeholders generally support them and the WSIB is willing to reflect them in

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[1] I was Alternate Chair of the Ontario Workers Compensation Appeals Tribunal from 1985 to 1988, during its early years, and was Ontario's Deputy Minister of Labour from 1992 to 1994. For approximately six weeks of that time, I was acting President and CEO of the Workers' Compensation Board.

[2] 1) Policies will be grounded in the fundamental objectives of the Act (the purpose clause) to satisfy legal requirements.

2) Policies will provide clear direction to workers, employers, WSIB staff, Workplace Insurance and Safety Appeals Tribunal (WSIAT) and all others who use the policies.

3) Policies will respect the WSIB's strategic direction.

4) The WSIB will take into consideration stakeholder expectations and consult on new and/or substantially revised policies.

5) Policies will be fair, practical, and effective to ensure that they can be applied with timeliness, transparency and consistency.

6) Policies will be fiscally responsible and ensure the long-term sustainability of the system.

undertaking benefits policy reforms, they can provide a framework that facilitates constructive dialogue.

During my presentation to stakeholders in February of this year I indicated that I intended to include a chapter in my report on this subject. While I am not suggesting that this constitutes "buy-in" from the stakeholder community, what follows should not come as a surprise to those who attended the session. Nor should these principles come as a surprise to the WSIB, not only because its two most senior officials attended the February session but because I have taken pains to share my thinking with them along the way. This is consistent with my belief that the only value that will come from this report is implementing it.

The principles I believe could give rise to a common ground approach to WSIB benefits policy reforms are the following:

1. *Grounded in the Workplace Safety and Insurance Act, 1997:* Benefits policies must be grounded in the fundamental objectives of the Act and must be consistent with the intent of the Legislature as discerned from the language of the Act. In setting a guiding principle for benefits policy reform, it is important to recognize that there appear to be two legislative objectives that are key. One is "to provide compensation and other benefits to workers and the survivors of deceased workers in a financially responsible and accountable manner", and the other is that there must be a personal injury "arising out of and in the course of employment", that "results in" certain types of benefits.

   These two legislative objectives would appear to be at the heart of the challenges the WSIB encounters when it seeks to reform benefits policies. Simply stated, is it right to use the causation levers found in "arising out of" and "results in" to achieve financial responsibility and accountability. I believe it is possible to reconcile these objectives and will return to them later in this chapter.

2. *Consistent with the Meredith Principles:* The WSIB's 2012 – 2016 Strategic Plan re-affirms the WSIB's commitment to the Meredith Principles, which are:
   a. No-fault compensation
   b. Collective liability
   c. Security of payment
   d. Exclusive jurisdiction
   e. Independent board

   This principle was referenced so many times by numerous stakeholders that I would think it reasonable to conclude that it indeed is one that is shared by stakeholders and the WSIB alike.

Taken together the above two principles might be described as the foundational underpinnings for WSIB benefits policy reforms.

3. *Respecting common law doctrines and established jurisprudence:* While the Meredith Principles are foundational ones they are not the only source of guidance to benefits policy writers. Civil law and judicial reviews can offer assistance. For example, the *Thin Skull Doctrine* is a well-established doctrine that flows from personal injury litigation law – you take your victim as you find

him/her. If a goal of benefits policy reform is to achieve consistent outcomes across benefits policy areas, and I assume there would be no disagreement on this goal, evaluating whether they fall within common law doctrines and established jurisprudence would seem to be an effective way of achieving that goal.

I am not attempting to elevate this principle to the same degree of importance that one might ascribe to the first two principles set out above. There may be good reasons for the WSIB to conclude that the common law doctrines or established jurisprudence should not be followed in a particular circumstance or situation. If this happens, it would be a positive exercise in transparency for the WSIB to indicate why it concluded that there were good reasons for concluding that the doctrines or jurisprudence should not apply.

4. *Alignment with appeals decisions:* There are two sources of information flowing from the appeals processes that should be given consideration in a benefits policy review. The first level of appeals is internal to the WSIB. If there has been a high rate of allowance of appeals with respect to a policy under review, it might suggest that there is a need to consider why the initial claims level consistently is making decisions that are overturned. If so, is it because of a different interpretation of an aspect of the policy? Is there a policy gap that needs to be filled?

   The other source of appeals information is WSIAT decisions. I appreciate and was oft reminded that WSIAT decisions are not binding on the WSIB. That does not mean that they should not be read and assessed for the contribution they might make to clarifying and explaining policies. WSIAT adjudicators consider and apply the same policies that WSIB adjudicators use on a daily basis. They often are able to spend more time on individual cases because their volume is lower and in many situations end up addressing claims that are more complex and challenging than the norm. When a policy is reviewed, the review process provides an opportunity to ensure that adjudication practices and external appeals decisions are brought together, either by accepting and adopting the appeals reasoning or by confirming the appropriateness of the adjudicative interpretation. In either case, but particularly if the latter conclusion is reached, WSIAT should be informed that future appeals should be conducted using the revised policy.

I would hope that the above principles might be seen to be sufficiently logical and sensible that there would be little debate as to their application in shaping future benefits policy development and reviews. In my view there are other principles that tend to flow from these, that if adopted by the WSIB and accepted by stakeholders, would provide a reasonably comprehensive, principle-based approach to benefits policy reforms.

5. *Outcomes reasonably consistent with civil courts:* The historic compromise that underpins the Meredith report is no-fault benefits for workers in return for workers giving up their right to sue their employer. It may not exactly follow that giving up one's right to sue means receiving benefits that are the same as what would happen in civil courts. But, I think that in evaluating potential benefits policy reforms, there ought to be consideration of whether the resulting outcomes would be reasonably consistent with what a court would do in a personal injury law suit.

If the resulting outcome is vastly different, absent good reasons that explain the difference, policy writers should consider whether they have gotten it right.

6. *Policies should not fetter adjudicative discretion:* If benefits policies are to be written in ways that respect administrative law principles, a corollary of that principle would be that they should not fetter the discretion of adjudicators. It is the government's responsibility to pass legislation and in doing so, be as prescriptive as it feels it needs to be. If, for instance, the government wishes to set time limits or impose monetary limits or thresholds, it is within its legislative authority to do so.

   Policies are very different than legislation. Not only must they be consistent with the legislative framework within which they are situated, but they must be written in ways that allow adjudicators to evaluate claims on the real merits and justice of the individual case. During this consultation process, for instance, the WSIB suggested to me early on that it would improve adjudicative consistency if I were to advise its policy makers to set specific thresholds for permanent impairments or time limits beyond which a recurrence would not be allowed. While I understand the sentiments behind seeking these provisions, I do not think they are ones that could be sustained even if I felt inclined to offer that advice.

7. *Integrity of the system:* The WSIB has a responsibility for ensuring the integrity of the Workers' Compensation system, including maintaining policies and administrative practices that produce results that a reasonable person might expect from a Workers' Compensation system and ensuring that the Workers' Compensation system is responsible for work-related impairments. Policies should be written clearly, be capable of consistent application recognizing that cases must always be adjudicated on a case-by-case basis and recognizing also that there always will be a degree of ambiguity in adjudicating complex cases.

   It is because the WSIB has a responsibility to preserve and enhance the integrity of the system that makes it so important for the WSIB to ensure that policies are grounded in the Act, the common law and the relevant jurisprudence. It is why policies should not be written in ways that fetter discretion. Any of these "violations" could result in successful judicial reviews of the policies. If policy writers asked themselves whether the policy they have written or revised would pass or fail a judicial review, they would be confident that if the answer is "yes", they have gone a long way towards satisfying many of the above principles.

   Earlier in this chapter, I indicated that I would offer some advice on how WSIB policy writers could navigate between the legislative goals of providing benefits in a financially responsible and accountable manner and the causation goals of providing benefits that result from accidents arising out of and in the course of employment. I believe the following framework might help reconcile these goals.

8. *Asking the work-relatedness, not the cost, question:* In carrying out periodic reviews of benefits policies, it is reasonable for the WSIB to ask whether, in light of what it has learned from adjudicating claims since the last review, the line between workplace and non-workplace factors is being drawn in the right place. Since that is a primary goal of benefits policies, asking whether that goal is being achieved fairly and reasonably is a proper question to ask.

From a policy review perspective, how might that question be answered? Unless there are good reasons for not doing so, the starting point should be to assume that a benefits policy that has been in place for many years most likely is drawing the line roughly in the right place. If the WSIB has been accepting recurrence claims for many years using a well-established recurrences policy, a benefits policy review should presume that the underpinnings should continue to apply, absent some change in circumstances. That is certainly the stakeholder reaction to the four policies under consideration in this review. Most stakeholders felt the policies as written were "just fine". They had useful suggestions to improve them, make them clearer, or easier to understand. But no one fundamentally disagreed with the spirit and intent of the four policies under review. This would seem to be consistent with my view that there should be a going-in presumption of validity – of the approximate correctness of where the work-relatedness line has been drawn.

If the WSIB believes that the work-relatedness line is being drawn in the wrong place, the WSIB needs to make the case for moving the line. And when the WSIB does make the case for re-drawing the line, the case should be made for work-related and not cost reasons. Entitlement to benefits is established through causation provisions in the Act – through the application and interpretation of "arising out of and in the course of employment" and phrases such as "results in". None of those provisions includes the WSIB's ability to pay as a factor in deciding where to draw the line. Part of ensuring the integrity of the Workers' Compensation system is to ask the work-relatedness question when a benefits policy is being reviewed. Another component of ensuring the integrity of the system is to focus on work-relatedness as the motivator and not the cost to the system.

One might then ask that if cost cannot or should not be the motivator for changes in benefits policies, how can the WSIB achieve its legislated goal of being a financially responsible and accountable organization? If benefits costs go up, are the additional costs to be borne solely on the shoulders of employers? Much of the answer, I believe, lies not in narrowing entitlement for the purpose of saving money but in exploring the other levers that the WSIB has at its disposal. During the course of these consultations, an employer representative produced a chart that showed how the WSIB's costs have dropped in recent years. Although many injured worker representatives asserted that this was because, in recent years, the WSIB has adjudicated in ways that have narrowed entitlement, WSIB officials indicated that their concerted and successful efforts to return workers to work have resulted in this serendipitous financial outcome. It is my understanding that similar financial improvements have occurred in other jurisdictions as a result of improvements in returning workers to work.

If the WSIB is convinced that the benefits entitlement regime is too expensive, what can it do about it? If the WSIB were to reach this conclusion and was satisfied that the only remaining solution to a funding problem is by narrowing benefits entitlements, the time might have come for the WSIB to make its case to the government and ask for legislative change. The legislative process is the appropriate vehicle for addressing changes in entitlement that would be substantial enough to impact the cost structure.

Summary of Chapter 2: Principle-based Approach to Benefits Policy Reviews

Recommendation #1

The road to future benefits policy reform would be easier if the WSIB were to adopt a principle-based approach to undertaking those reforms based on the following:

a. Benefits policies must be grounded in the Act and its fundamental objectives
b. Reforms must reflect and be consistent with the Meredith Principles
c. Where appropriate, benefits policies should respect common law doctrines and established jurisprudence
d. Benefits policy reforms are an opportunity to bring WSIB policies and appeals decisions into alignment
e. Benefits policies should produce outcomes that are reasonably consistent with civil courts
f. Policies should not fetter adjudicative discretion
g. Benefits policies should promote and enhance the integrity of the Workers' Compensation system
h. The WSIB should use a benefits policy review to ask whether the line is being drawn in the right place from a work-relatedness, and not a cost perspective

Chapter 3: Elements of Clear and Effective WSIB Policies

The start of a systematic cycle of policy reviews is an ideal opportunity to reflect on what a sound and effective policy should look like and include. Many stakeholders commented in general terms on what they felt should be the ingredients of a good policy. It is perhaps useful to set the context for the substantive chapters that follow by suggesting a framework within which benefits policies should be written.

1. Purpose and Definition Clauses

It is my understanding that this now is standard drafting practice with the WSIB, but for greater certainty, it is worth mentioning that everyone who commented on the format of the policies felt that a purpose clause is an important starting point. Why does this policy exist? What is it trying to do? Where there are legislative or regulatory provisions that are particularly important or unique to this particular policy, perhaps they should be set out or referenced.

The front-end of a policy also is an opportunity to set out definitions so that everyone knows what the WSIB means when it uses words such as 'recurrences', 'permanent impairments', etc.

2. Guidelines and Tests

A policy should be restricted, where possible, to the "what" questions. A policy on work disruptions should describe the guidelines or the tests to be applied in determining whether a work disruption is compensable. Benefits policies describe matters such as what needs to be so in order to establish the relationship between the work and the disability, how to determine benefits when a work relationship is established, etc. The role of administrative practices documents, on the other hand, is to provide the toolkit that tells adjudicators how to apply the guidelines or test. I appreciate that there is not a bright line between policies and administrative practices documents, but if policy writers keep in mind that the policies are the tests and the practice documents describe how to apply the guidelines or test, the line should be reasonably consistent across all policies.

As referred to earlier in this report, benefits policies must be written in ways that cannot fetter the discretion of adjudicators without legislative authority. For instance, setting specific timeframes or quantum of benefits, unless supported by a legislative provision, should be avoided.

Consistent with this division between policy tests and administrative practices toolkits, if examples are helpful ways of bringing clarity to a concept, perhaps they should be limited to administrative practice documents as much as possible.

3. Plain Language

There are many experienced representatives and adjudicators who are so knowledgeable about WSIB policies that the terminology and acronyms have become everyday parlance. As someone who has been quite involved in WSIB matters some time ago, but perhaps not as directly involved in WSIB issues until recently, I confess to

encountering some challenges understanding some of the policy language without spending a significant amount of time re-reading complex phrases. It made me appreciate how unapproachable many of the current policy formulations must be to less experienced representatives, let alone the workers and employers who are directly affected by the policies.

I would hope that policy writers might take this to heart and in drafting revised policies, strive for plain language where possible. And, apart from WSIB and WSIAT, which presumably are acronyms that stand on their own, avoiding the use of a myriad of other acronyms would be a step in the right direction.

4. Combining Policies on Similar Topics

Some benefits policies have a degree of complexity that result in many inter-related policies on the same topic. Good examples within the scope of this review are the policies on permanent impairments and a number of quite similar policies on various types of work disruption. Many stakeholders suggested that the work disruption policies could be brought together as a single work disruption policy with variations as necessary to cover the different kinds or causes of work disruption. No one seemed to suggest something similar for permanent impairments. It is likely that greater clarity and consistency could be achieved if the work disruption policies were brought together into one policy document.

5. What are Appropriate Policy Topics?

Policies translate broad legislative enabling provisions into tests and guidelines that enable adjudicators and stakeholders to understand how to apply the legislative provisions to particular workplace situations or injured worker circumstances. The WSIB appears to have no shortage of policies (except perhaps pre-existing conditions, which is the subject of the next chapter). The requirement for a new policy should be closely scrutinized and there should be good reasons for introducing a new one. For instance, a policy should not simply repeat the requirements of the Act, nor should they be developed to fill procedural or process gaps.

Summary of Chapter 3: Elements of Clear and Effective WSIB Policies

Recommendation #2

A framework for benefits policies should include the following:

- Purpose and definition clauses
- Guidelines and tests – the “what” questions. Administrative practices documents should house the “how” ones
- Use of plain language
- Combining policies on similar topics
- Limiting policies to topics that matter

Chapter 4: Pre-existing Conditions

No topic received more attention during this consultation process than did the role that pre-existing conditions should play in adjudicating claims, both generally, and under the recurrences, aggravation basis and permanent impairment policies. Because of the prominence of this issue throughout the consultation process, and its importance and relevance to a large component of benefits adjudication, I have decided to devote a chapter to it notwithstanding that this was not, at the outset, the primary purpose of this consultation. I indicated this was my intention when I presented my preliminary findings to stakeholders on February 19, 2013, and I concluded that there would be general support amongst the stakeholder community for including this chapter.

If the WSIB decided to develop a policy on pre-existing conditions, nothing else in this report would have more positive impact on adjudicative certainty and clarity. It is a gap in WSIB benefits policies. Ontario would appear to be the only jurisdiction that does not have a specific policy on how to adjudicate claims where pre-existing conditions are present. From the very outset of this process, the WSIB emphasized the challenges they face in adjudicating claims where pre-existing conditions are present. It is a challenge that has become more acute because in recent years the WSIB appears to be taking pre-existing conditions into account when determining entitlement to benefits at least under the recurrences, permanent impairment and aggravation basis policies.

The adjudicative challenge is this. The Workers' Compensation system is expected to compensate for impairments that result from workplace accidents. Pre-existing conditions and pre-existing impairments normally are viewed as conditions and impairments that do not have their origins in the workplace but instead are the result of non-work factors such as degeneration or prior injuries. When workplace and non-workplace factors are present, questions arise as to how to adjudicate them in ways that are fair to the worker and preserve the integrity of the system. The WSIB should not be compensating for situations that are the result of non-workplace conditions or impairment. But, the line between the medical consequences of the workplace accident and the non-workplace conditions or impairments is far from clear.

This is an enormously challenging and complex topic. Every jurisdiction in Canada is grappling with how to adjudicate claims where pre-existing conditions are present. Even though this consultation process did not start by including this policy topic, the presentations and submissions have assisted in shedding some light on how to develop a pre-existing conditions policy. I expect I cannot do justice to all the issues that are inherent in adjudicating claims where pre-existing conditions are present. I am not the policy writer here. My assignment is to offer advice to the WSIB based on what I heard and read. I expect that policy writers will find that some pieces are missing when it comes to developing the policy, should the WSIB decide to do so.

There is a useful starting point. That starting point is to distinguish between initial entitlement adjudication and subsequent adjudication that takes place sometime after the workplace accident. When evaluating a claim at the stage of initial entitlement, as a general rule, most would agree that pre-existing conditions should not limit entitlement. A pre-existing condition, which the policy should define, may be symptomatic or not but in either case it did not prevent the worker from performing his or her normal job duties and responsibilities before the accident. It has been long established in personal injury litigation that one takes one's plaintiff as one finds him/her. Applying this *Thin Skull*

Doctrine to initial entitlement claims would mean that compensation should not be limited or denied because the worker brought to the adjudication a pre-existing condition. It should also mean that if a worker with a pre-existing condition takes longer to return to the pre-accident state than others, compensation should not be terminated because the worker's disability impacted him or her for a longer period of time because of the pre-existing condition. There may well be some limits to this description of the role of the pre-existing condition as an initial claim progresses.

Subsequent adjudications in the three relevant policy areas that are captured by this consultation process will necessarily involve the passage of time since the initial adjudication. There are more opportunities for intervening events to occur. There is the potential for deterioration or degeneration of the worker's condition. A pre-existing condition is a medical condition. Determining the cause of a worker's inability to work or level of permanent impairment where a pre-existing condition is present is first and foremost a task that should be assigned to a medical professional. What I did not learn through this process is the extent to which the medical profession is able to offer meaningful assistance in answering the causation question. They can identify the presence of pre-existing conditions and can express an opinion on whether the amount of degeneration is mild or severe. Whether they can offer substantiated opinions on questions such as the relationship, if any, between the current level of degeneration and the accident or the nature of work performed by the worker is less clear. My assignment did not include exploring these areas. I did not talk to or hear from any medical professional.

It is difficult to imagine a policy on pre-existing conditions that does not include somewhere in the policy or administrative practices, the kinds of questions one would expect a medical professional to answer. For instance, if the adjudication of subsequent claims turns on medical opinions, can the medical professional not only describe the degree of severity of the pre-existing condition but compare it to the degree that was present before the accident? Is it possible to determine whether the workplace accident has continued to produce residual impairment? Does the type of work and number of years that a worker has performed that work bear a relationship to the pre-existing condition being present? Has the workplace accident aggravated the pre-existing condition?

What if it turns out that the medical profession cannot answer questions beyond determining the degree of severity of the pre-existing condition? What if all the other causation questions are impossible to answer? Can the WSIB's policy on pre-existing conditions fill the medical causation gap with adjudicative tests or guidelines? For instance, as was mentioned many times throughout the consultation process, WSIAT decided early on to establish the test of asking whether the workplace accident was a significant contributing factor to the resulting impairment. WSIAT concluded that the workplace accident did not need to be the sole factor or even the majority factor. WSIAT has decided many hundreds of appeals using this test.

In developing a policy on pre-existing conditions, it would seem to me that a sensible approach would include a review of how WSIAT has applied the significant contributing factor test to determine whether it might assist adjudicators in deciding subsequent claims where multiple factors are present. Both sets of stakeholders referred to Tribunal decisions 72 and 915, which are the leading ones on the significant contributing factor test. I would think that any test that can contribute to greater clarity in drawing the line

should be given serious consideration by WSIB. In reviewing those decisions, the objective might be to determine whether WSIAT has developed suitable criteria for defining "significant", the kinds of medical questions that WSIAT asks, and other possible aids to adjudication.

Some worker representatives took the position that a pre-existing condition should never be taken into consideration because once a workplace accident occurs, all subsequent impairment flows from it. The *Thin Skull Doctrine* never ceases to apply. Surely, one can imagine circumstances where the pre-existing condition "swamps" the workplace factor, making it no longer a significant one in comparison to the non-workplace one. And at the other end of the spectrum, the mere fact that a pre-existing condition is present should not lead automatically to a conclusion that the workplace accident has ceased to be a significant contributing one.

What about the potentially large number of cases in between the ends of the spectrum? When is enough enough? Perhaps a review of WSIAT decisions might offer some assistance in developing criteria to apply in attempting to answer this question. What I find somewhat intriguing is the fact that the WSIB has been adjudicating these types of cases for many years and has been able to arrive at decisions where pre-existing conditions have been present. These claims did not go unresolved because the WSIB lacked a written policy on pre-existing conditions.

If the WSIB believes it now requires a policy on pre-existing conditions because it has concluded that the work-relatedness line is being drawn in the wrong place, from what I heard, it would assist stakeholders to have a clearer and better understanding of why WSIB believes the pre-existing condition work-relatedness line is being and has been drawn incorrectly. If one were to apply the principle that policies should be presumed to be valid unless there are good reasons that rebut that presumption, what is missing here are the reasons to explain or justify the change. It would appear from reviewing the submissions on pre-existing conditions that what is being asked for here goes beyond clearer guidance for adjudicators. It is guidance to support a different way of taking into account pre-existing conditions.

I believe the above observations can be summarized as follows:

1. There are compelling reasons for the WSIB to develop a policy on pre-existing conditions. It is a gap that should be filled.

2. A policy on pre-existing conditions should distinguish between initial and subsequent claims adjudication.

3. There are no absolutes. The mere presence of a pre-existing condition should not be sufficient to terminate benefits. Nor can it be said that pre-existing conditions should never be a factor in determining eligibility for benefits.

4. A test could assist in drawing the line. WSIAT has used the significant contributing factor test for decades. The WSIB should review how that test has been applied to appeals involving pre-existing conditions and consider whether there are criteria imbedded in that test that might usefully be

incorporated into the policy.

5. Medical assessments are extremely important sources of information on causation where pre-existing conditions are present. The WSIB should consider how or whether to include the role of the medical assessor in the policy.

6. If the WSIB is seeking to draw the pre-existing conditions work-relatedness line in a different place than it has done in the past, the WSIB should provide a clearer work-relatedness explanation as to why it wishes to do so.

Summary of Chapter 4: Pre-existing Conditions

Recommendation #3
The WSIB should develop a new policy on pre-existing conditions to fill a policy gap that exists when adjudicating claims involving pre-existing conditions. I would propose that the policy cross-reference the other benefits policies to which pre-existing conditions might apply.

Recommendation #4
The new policy should distinguish between adjudication of initial entitlement and adjudication of cases that occur subsequently. When adjudicating claims involving initial entitlement, as a general rule, pre-existing conditions should not limit entitlement.

Recommendation #5
The policy should reference the importance of obtaining a medical opinion based on causation questions that a medical professional should be asked to answer. An administrative practices document should set out the kinds of questions that should be asked.

Recommendation #6
The WSIB should undertake a review of how WSIAT has applied its significant contributing factor test with a view to (a) considering whether the adoption of the test of significant contributing factor would provide greater clarity in adjudicating claims involving pre-existing conditions and (b) determining if there are criteria or guidelines in those appeals decisions that could assist adjudicators where multiple factors are present.

Recommendation #7
The policy should reflect the reality that there is a range of degrees of pre-existing conditions. There will be cases where the degree is so severe that the workplace factor no longer is significant. There will be cases where the mere presence of a pre-existing condition is insufficient to be the cause of the impairment.

Recommendation # 8
Because the WSIB has been adjudicating these types of cases for many years and now appears to be seeking a different guideline or standard that would have the effect of narrowing entitlement, the WSIB should provide reasons to explain why it now is seeking a different approach or interpretation.

Chapter 5: Recurrences

Explanatory Note for the Four Benefits Policies Under Review

In this and the following three chapters, I focus on the advice to the WSIB that might assist policy writers in adjusting the four benefit policy areas within the scope of this consultation process. The chapters on recurrences, permanent impairments and aggravation basis should be read together with the advice I am offering the WSIB with respect to developing a pre-existing conditions policy because many of the adjudicative challenges that WSIB officials identified in these three policy areas arise because of the difficulties they encounter sorting out the work and non-work-related factors.

I have attempted to keep these chapters relatively brief by focusing on the key issues that stakeholders and the WSIB raised during the consultation process. As I indicated earlier in this report, most stakeholders felt the policies were fine. Apart from comments on the role of pre-existing conditions in adjudicating claims within these policy areas, their suggestions to improve the clarity or ease of application of the policies were more along the lines of fine-tuning than fundamental changes.

Recurrences

A recurrence means a recurrence of a work-related injury or disease. It occurs after an initial injury for which entitlement was granted. Something happens later on to cause the original injury to recur. It could happen as the result of an insignificant new accident, at work or elsewhere. It could just happen without any new accident. To establish a recurrence claim it must be shown that there is a sufficient connection between the current condition and the original injury to establish a connection to the work. If there is a significant new work-related accident, it is not treated as a recurrence. Instead, a new claim is established.

The policy has not been substantially revised since 1998. The adjudicative policy "test" to identify a recurrence is to "confirm that there is clinical compatibility between the original injury or disease and the current condition, or a combination of clinical compatibility and continuity." Guidelines are set out to assist adjudicators in establishing clinical compatibility and continuity. The policy outlines different degrees of information gathering for recurrences that occur within six months of the last return to work, those that happen between six months and three years, and those that happen after more than three years have passed since the last return to work.

Apart from the issue of contributing factors in adjudicating recurrences claims, stakeholders would seem to be of the view, which I share, that all the pieces required for recurrences adjudication are there. The starting point is establishing clinical compatibility. Without it, there is not a recurrence. It is a new claim if it comes from a work-related incident. If there is clinical compatibility, that finding alone may be sufficient, particularly in cases where the passage of time since the last return to work date is relatively short. An investigation into a recurrence claim might well include determining whether or not there might have been an intervening event. But, the cornerstone of the policy is based on establishing clinical compatibility using the adjudicative guidelines in the current policy.

When should continuity become a factor? The policy as written does not appear to require it in all cases ("*or*, a combination of clinical compatibility and continuity"). Later on in the policy, under the heading "New Accident", there is reference to insignificant new accident + compatibility + continuity = recurrence, so the policy is not entirely consistent in this regard. One could well imagine that if there has been a significant passage of time between the recurrence and the last return to work date, there is a greater opportunity for other factors or events to have intervened. There will be situations where clinical compatibility alone is not sufficient. Some evidence of continuity may be required, even though I appreciate the position taken by some worker representatives that this might disadvantage the stoic worker who never complained. To require continuity in all cases when there is a clear connection between the original disability and the one being claimed as a recurrence would seem to be excessive and unnecessary.

I appreciate that the conclusion one might draw from this advice is that it leaves it to the adjudicator to decide when to require continuity evidence and when to rely solely on clinical compatibility. I would expect there would be clear cases on both sides – cases that easily can be decided on clinical compatibility alone and ones that cannot be sustained solely on clinical compatibility without establishing continuity. There will be grey zone cases that are judgment calls where the passage of time perhaps has been several years and other factors or circumstances may have occurred in the intervening period of time. To attempt to go further in defining a precise line runs the risk of fettering the discretion of adjudicators who should be determining the cases on their real merits and justice.

Some stakeholders commented on the aspects of the policy that describe how to draw the line between a recurrence and a new claim. The policy is quite clear on the need to establish a new claim if there is a significant new work-related accident. I do not think policy changes are warranted to better clarify the line between a recurrence and a new accident claim. It may assist adjudicators if the policy included a definition of *insignificant* accident.

The other adjudicative challenge that surfaced many times in presentations and submissions on the recurrences policy is how to adjudicate recurrences claims where pre-existing conditions are present. In the pre-existing conditions chapter I suggested that a pre-existing condition should not be a bar to initial claims entitlement, nor should it bar entitlement in subsequent adjudication unless the medical evidence discloses that it has rendered the work-relatedness insignificant. If that concept found its way into a policy on pre-existing conditions that was cross-referenced to the recurrences policy, perhaps it would provide for more consistency in adjudicating these claims.

I understand that the advice I am offering to the WSIB requires adjudicators to exercise judgment and discretion, which brings with it the potential for inconsistent outcomes depending on who adjudicates a claim. The line between setting specific standards and tests to ensure consistency, on the one hand, and offering a broader set of guidelines, on the other, invariably is a very fine one. Complex cases never have been and never will be easy. But, adopting the advice set out above would, in my view, go some distance towards clarifying how to adjudicate recurrences claims.

Summary of Chapter 5: Recurrences

Recommendation #9
A revised policy on recurrences should focus on establishing clinical compatibility as the primary guideline that connects a recurrence to the original injury/disease. Evidence of continuity may be required in situations where clinical compatibility alone is not sufficient, but both clinical compatibility and continuity are not prerequisites in every case.

Recommendation #10
The recurrences policy would provide for more consistent adjudication if the WSIB were to include a definition of an *insignificant* accident.

Recommendation #11
If the WSIB develops a policy on pre-existing conditions, the provisions that apply to subsequent adjudication should be referenced in this policy.

Chapter 6: Work Disruptions

In Chapter 3, I recommended that the WSIB adopt the almost-unanimous suggestion that all work disruption policies be brought together into one policy. Work disruptions happen in the workplace and are caused or motivated by circumstances that, on their face, have nothing to do with Workers' Compensation. They include layoffs decided upon by the employer, and strikes and lockouts arising out of labour disputes. I think it is important to say this at the outset of a comprehensive work disruptions policy because the starting point should be a clear understanding that these are circumstances that affect all employees in the workplace to which the work disruption applies.

Accepting this starting point, the question that follows is why should there be a policy on work disruptions if the inability to work is driven by a cause that is independent of the injury? A work disruption results in a loss of earnings. It is a loss of earnings that all workers experience who are caught up in the work disruption. The main reason for the loss of earnings is the fact that the workplace has been disrupted. Workers no longer are at work and the employer no longer is paying wages, regardless of whether the work disruption is a layoff, a strike or a lockout.

The reason there is a set of WSIB policies on work disruptions stems from the fact that included in the group of workers who are off work because of a work disruption may be workers who are receiving WSIB benefits, are workers who may be performing modified work, or otherwise have a connection to the WSIB. Is there something about their WSIB relationship that would set them apart from other workers? Although the immediate cause of their loss of earnings is not WSIB-related, are there circumstances unique to the injured worker that would justify continuation of or entitlement to WSIB benefits?

By way of a preliminary matter, a few employers suggested that if workers are off work and receiving loss of earnings benefits when the work disruption occurs, those benefits should be suspended for the duration of the work disruption because, in effect, the cause of their loss of earnings has shifted from their workplace injury to a non-compensable work disruption event. In effect, a compensable cause has been replaced with a non-compensable one. The Act sets out the requirements for establishing entitlement to loss of earnings benefits and once the causation tests have been met, they result in benefits irrespective of what the employer might have been able to provide by way of earnings, which in any event, the injured worker would have been unable to secure because of the work-related injury.

It is difficult to follow the entitlement storyline through the current suite of policies. Consistent with my view that it would be desirable to write policies in ways that most readers could easily comprehend, I would suggest that the WSIB start by describing the story – the approach to entitlement – as simply as possible. The current policies contain a number of tables and charts that I am sure are useful aids to adjudication. But in my view, they would be much more understandable and accessible if an easy-to-understand entitlement framework were developed.

For instance, when an injured worker who has in the past been receiving WSIB benefits but now is employed and is swept up by a work disruption, what is it about the injured worker's circumstances that would suggest that he or she be treated differently than the rest of the workforce? That is the starting point – the first question that I think needs to

be asked. Is there something about the injured worker's situation compared to all the others caught up in the work disruption that would warrant special treatment?

One way of beginning to answer that question is to consider the nature of the work disruption and the affect it has on the entire workforce. For instance, if everyone accepts the work disruption as something they just live with – and normally would not look for alternative employment, perhaps there is a presumption (rebuttable) that the same should be said for the injured worker. For example, if there is a seasonal layoff that happens every year and everyone accepts this loss of earnings as in effect, part of the terms and conditions of employment, is an injured worker in any different situation than his or her colleagues? Everyone expects to return to their pre-work disruption employment. Everyone accepts the loss of earnings flowing from the work disruption.

There may be circumstances unique to the injured worker that would constitute an exception to this guideline. There may be reasons for treating the injured worker differently. For instance, the injured worker may want to take steps to replace the earnings lost due to the work disruption regardless of whether or not the others choose to wait it out. If so, there may be factors such as ones set out in the current policy – e.g. being in the early phase of recovery or receiving active health care treatment that would disadvantage the worker compared to others. But, these should be treated as exceptions to the guidelines that would apply to a situation where the workforce generally is not going to look for alternative work arrangements.

The current policy focuses on employability. Perhaps a better approach would be to say that the work disruptions policy sets out the guidelines to be used in determining whether an injured worker is disadvantaged in comparison to others because of his or her WSIB-related circumstances. That is what is required for the work disruption reason for loss of earnings to be replaced by a WSIB-related reason. Is the worker disadvantaged to such an extent that it would be reasonable to provide benefits to him/her notwithstanding the fact that the loss of earnings was triggered by a non-WSIB situation.

If so, when and in what circumstances might an injured worker be disadvantaged because of his WSIB-related situation? Most often, it will be situations where the injured worker seeks alternative employment, which will tend to be work disruptions that are of a longer-term duration. It seems to me, and to many others who made submissions on this point, that the question adjudicators should ask is not whether the worker generally is employable, but, consistent with return-to-work policies, is the worker able to return to work in his or her pre-work disruption job or suitable employment with a new employer in the general labour market.

If the answer to this question is "yes" – the worker is able to return to the pre-work disruption job or take on suitable employment elsewhere – it would be reasonable to conclude that the worker is not disadvantaged because of his WSIB-related situation compared to others. If "no", it would support a claim for entitlement to benefits under the work disruptions policy.

Perhaps this approach would remove or cause the WSIB at least to re-think the somewhat troublesome concept of determining "highly accommodated" as a basis for establishing entitlement during a work disruption. Instead, as part of determining whether the injured worker could return to his or her pre-work disruption employment, the nature of the accommodation would be part of the investigation.

The current suite of work disruption policies has a very large number of specific provisions that either were not addressed by stakeholders or were approached in only the most general of ways. Matters such as bumping, labour market re-entry services, re-employment and co-operation obligations, benefits from other sources, recall dates for short-term layoffs, health care monitoring, and availability of other employment are some of the topics that are covered in the current suite of policies and are not addressed in this report. Consistent with my suggestion that one presumes that long-standing policies should be considered to be approximately correct and noting that this suite of policies have not been reviewed or altered since their inception in 2003, I would anticipate that WSIB policy writers would find ways of incorporating these concepts within the overall policy framework that I have described in this chapter.

Summary of Chapter 6: Work Disruptions

Recommendation #12
A revised policy on work disruptions should consolidate the policies as much as possible and describe a story that is as easy as possible to understand.

Recommendation #13
The policy should provide that entitlement to benefits during a work disruption should depend on reaching a conclusion that there is something about the injured worker's situation compared to others in the work disruption that warrants special treatment.

Recommendation #14
The fact that a work disruption occurs while a worker is receiving benefits should not affect entitlement to benefits.

Recommendation #15
An adjudicative guideline that could be applied to all work disruption situations would be to ask whether the worker is disadvantaged in comparison with others because of his or her WSIB-related circumstances.

Recommendation #16
Rather than focusing on "highly accommodated", a more appropriate test might be to ask whether the worker is able to return to work in his or her pre-work-disruption job or suitable employment with a new employer in the general labour market.

Chapter 7: Permanent Impairments

The WSIB's policy manual contains a suite of policies that describe how to adjudicate permanent impairment awards. It describes the circumstances in which a worker with a permanent impairment may be eligible for non-economic loss benefits. The first step in the process is determining the point in time when a worker reaches maximum medical recovery. There is a policy that describes how to do this. It is at that point that the WSIB determines a worker's permanent impairment based on all the health-related information in the claim file. The phrase "permanent impairment" is defined in the Act to be "any permanent or functional abnormality or loss (including disfigurement) which results from the injury, and any psychological damage arising from the abnormality or loss".

The degree of permanent impairment is expressed as a percentage of total permanent impairment of the whole person. Where possible, a rating schedule is used. There is a policy that describes how to calculate non-economic loss benefits and another that describes the procedures to follow when there is a request for a redetermination of a non-economic loss benefit.

Stakeholders did not offer many comments on most aspects of the permanent impairment policies summarized above. Similar to my comments on the suite of work disruption policies, it might make them easier to understand if there was an overarching policy that described the story of how permanent impairments are adjudicated. All the components are there in the existing policies. What is missing is the sequencing and chronology of events.

Two issues surfaced during this consultation process. The first was raised by the WSIB and was described in my July 2012 Discussion Paper as a permanent impairment threshold. The proposal, as I understand it, was to establish threshold criteria to achieve greater consistency in determining whether a permanent impairment exists. Once a worker's maximum medical recovery point has been reached, and before the degree of permanent impairment is determined, both of which adjudications are covered by policy, how should adjudicators determine whether there is a permanent impairment that should be evaluated?

The word "threshold" suggests a minimum requirement that must be met in order to pass the threshold test. If the WSIB believes there is a policy gap in determining whether a permanent impairment exists and is seeking, for instance, a minimum degree of impairment to become the threshold, this would seem to fail the test of not fettering an adjudicator's discretion. On the other hand, if what the WSIB is seeking are criteria that would be used to determine whether there is a permanent impairment and believes that the definition in the Act is insufficient, it may well be the case that including some adjudicative criteria could be helpful.

The other issue around which there were numerous comments from stakeholders is the role, if any, that pre-existing conditions should play in the determination of a permanent impairment award. There is a policy that describes how the WSIB determines the degree of permanent impairment which has resulted from the work-related injury in circumstances where there is a pre-existing impairment to the same area of the body. Pre-existing impairments are not defined in the Act but the policy on aggravation basis defines a "pre-accident impairment" as "a condition which has produced periods of impairment/illness requiring health care and has caused a disruption in employment

(although the period of time cannot be quantified, a decision-maker may use a one to two year timeframe as a guide)".

If the new injury affects the same area of the body as the non-work-related pre-existing impairment, the rating to be used in calculating non-economic loss benefits is reduced by the rating for the pre-existing impairment to arrive at a "net" rating for the work-related impairment. If the pre-existing impairment is not measurable, the WSIB rates the total area's impairment and reduces the rating depending on the severity of the pre-existing impairment: minor – no reduction, moderate – 25% reduction, and major – 50% reduction.

As I understand it, in recent years, the WSIB has expanded the above discounting provision beyond pre-existing impairments to include pre-existing conditions, using the same minor – moderate – severe discount calculation. Worker representatives took the position that this is not something the WSIB should be doing. Their arguments go beyond whether it is fair to do so. They take the position that it is illegal for the WSIB to reduce the amount of a permanent impairment award by subtracting from it a proportion caused by a non-work-related pre-existing condition. They argue that reducing permanent impairment awards because of pre-existing conditions is not something the WSIB can do by way of policy. They observe that other jurisdictions that factor pre-existing conditions into permanent impairment awards do so within legislative frameworks that permits this to happen. They conclude that if the WSIB feels it should reduce a permanent impairment award by factoring in the non-work-related pre-existing condition from the rating, the WSIB needs to seek legislative change to do so.

The role of pre-existing conditions in the adjudication of permanent impairment awards is a variation or perhaps a continuation of the approach to subsequent adjudication of pre-existing conditions claims that I discussed in the chapter on pre-existing conditions. Does a time come in the life of a claim where the workplace accident and the pre-existing condition both are present and are contributing to the worker's ongoing impairment – particularly a permanent impairment? If so, is it reasonable and lawful for the WSIB to assess the severity of the pre-existing condition and adjust the rating to reflect the degree to which the non-workplace pre-existing condition is causing the worker to experience a permanent impairment?

On the surface, there are arguments that could be raised in support of either approach, leaving aside the legality of doing so. A permanent impairment award should be made where the impairment arises out of and in the course of employment. If other factors are contributing to the impairment and they are non-work-related, should the WSIB be responsible for compensating for them? On the other hand, if the workplace accident happened to a worker with a pre-existing condition in the same area of the body as was injured, and if the WSIB is supposed to take workers as it finds them, didn't the entire train of events that resulted in a permanent impairment start with the workplace accident? If it had not happened, the argument goes, there would be no need for a permanent impairment award.

Consistent with a reasonable interpretation of the WSIB's mandate, if it were possible to determine what amount of a permanent impairment is caused by the workplace accident and what part is the result of a non-work-related pre-existing condition, the permanent impairment award should reflect the degree of permanent impairment that is work-related. To argue otherwise is to disregard the core mandate of the WSIB. What is not

at all clear from the submissions and presentations is whether it is possible to allocate or divide up a permanent impairment into work-related and non-work-related percentages. The determination of the extent of the pre-existing condition most likely will be made some time after the accident, after maximum medical recovery has been reached. Did the accident contribute to the deterioration of the pre-existing condition? At the time of assessing the worker for a permanent impairment award, is the pre-existing condition worse than it was before the accident? If so, is this because of the aging process or because of the accident or a combination of both?

If the WSIB is confident that there are ways of answering these kinds of questions, I believe that stakeholders would want to know the reasons why the WSIB now is seeking this change in policy. The WSIB historically has adjudicated permanent impairment awards without factoring in pre-existing conditions. If it now believes it should be doing so, what has changed to cause the WSIB to reach this conclusion? And if it has reached this conclusion, is the WSIB confident that it has the legal authority to support this policy change?

I am not concluding that the WSIB cannot incorporate pre-existing conditions into permanent impairment awards. It is consistent with the WSIB's mandate to compensate for the work-related component of a permanent impairment. I am questioning whether it is possible to do so. Does this bring greater clarity and certainty into the adjudication of permanent impairment awards or does it instead raise a number of medical causation challenges that may make the adjudication of these claims even more difficult and perhaps uncertain?

Summary of Chapter 7: Permanent Impairments

Recommendation # 17
It is not appropriate to establish a specific threshold to use in determining whether a permanent impairment exists. It may be helpful for the WSIB to include criteria that might be used to make this determination.

Recommendation #18
A revised policy suite on permanent impairments should include a policy or section that describes how the various elements of permanent impairment adjudication fit together and tell a story, similar to recommendation #12 on work disruptions.

Recommendation #19
It is consistent with the WSIB's core mandate to determine the degree of a permanent impairment that is work-related. Whether it is possible to do so or whether it will introduce greater adjudicative uncertainty is a question that the WSIB should consider carefully.

Recommendation #20
If the WSIB decides to reduce permanent impairment awards by factoring in degree of severity of pre-existing conditions, it should advise stakeholders of its reasons for doing so and be able to demonstrate that it has the legal authority to do so.

Chapter 8: Aggravation Basis

The WSIB established a separate aggravation basis policy in 2005. Prior to that date, the aggravation basis policy was part of the Second Injury and Enhancement Fund (SIEF) policy. Aggravation basis claims arise where a worker who already has a pre-accident impairment experiences a minor work-related injury or disease to the same body part or system. Entitlement to benefits is granted on an aggravation basis and only for the acute episode, stopping at the point that the worker returns to the pre-accident state. The policy is described as having a goal of limiting entitlement to the injury that is work-related.

As I noted in my July 2012 Discussion Paper, the underlying principle that seems to be in play here is a version of the *Thin Skull Doctrine.* It is the *Crumbling Skull Doctrine.* The worker already has a pre-accident impairment that limits the range of work that the worker can perform. So, a goal or purpose of the aggravation basis policy is to provide guidelines for adjudicating claims where there already is a pre-accident impairment with a view to limiting entitlement to the acute period only.

That is not the only goal. The aggravation basis policy used to be housed within the SIEF policy suite because employers are granted cost relief in the case of aggravation basis claims. The theory, as I understand it, is that employers should be encouraged to hire workers with impairments. They will not be inclined to do so if they have to shoulder the costs of paying for full loss of earnings and other benefits where a worker with a pre-accident impairment loses time from work because of a relatively minor workplace incident. Employers can claim relief from such claims from the Second Injury and Enhancement Fund.

The consultations did not raise many concerns about this policy. I think it is open to the WSIB to ask whether a separate aggravation basis policy is required should the WSIB decide to include a new policy on pre-existing conditions. To some extent, there is a similarity in the way in which the WSIB would adjudicate claims where there are pre-existing conditions and those where there are pre-accident impairments. In both situations, the intent is to provide benefits to assist the worker in returning to a pre-accident state. If it is a pre-existing condition situation, the pre-accident state would be returning to the pre-accident job or suitable occupation. If there is a pre-accident impairment, it is returning the worker to the situation he or she was in before the event that aggravated the pre-accident impairment. Should the WSIB look favourably on this suggestion, the goal would be to place the concepts in a different policy without losing the content and intent of the aggravation Basis policy.

In particular, if the WSIB were to accept the recommendation to house the benefits entitlement component of the aggravation basis policy in a pre-existing conditions policy, it would be important not to lose sight of the linkages to SIEF. My suggestion that the aggravation basis policy be eliminated does not carry with it any express or implied suggestion that any of the concepts that underlie the aggravation basis policy be changed or eliminated. This includes maintaining the same relationship as exists now between the entitlement provisions of the aggravation basis policy and the ability of employers to gain cost relief under SIEF.

Summary of Chapter 8: Aggravation Basis

Recommendation # 21

The content of the current aggravation basis policy is sound. Should the WSIB decide to develop a policy on pre-existing conditions, there would be opportunities to bring the concepts within the aggravation basis policy into the pre-existing conditions policy, provided that the concepts are maintained and in particular, the linkages to SIEF are made.

Chapter 9: Advice on Future Consultation Processes

The second part of my mandate was to provide advice to the President about how future consultation processes might be conducted where the significance of the policies under review would warrant a stakeholder consultation process. I am pleased that my mandate included this aspect, which goes beyond giving advice on the specific policies under consideration in this review process. Organizations thrive on continuous improvement and often, continuous improvement comes from being willing to critically assess, evaluate and learn from past experiences. In doing so, the negatives can be as important as or more important than the positives.

Let me start with the positives – and there were many in this process. I believe that stakeholders took this process seriously from the outset. Framing the scope of the consultation process in an early-on Discussion Paper seemed to set a useful backdrop for the consultations that followed. The WSIB's willingness, at my request, to prepare case scenarios on the four benefits policy areas prior to the hearings contributed to greater clarity on what the WSIB might be seeking from the review process. While some stakeholders were critical of the hypothetical nature of the case scenarios, it is my view that they helped to make the adjudicative challenges come alive and I would think this could be a practice that the WSIB might want to include in future consultation processes as a matter of course. Whether or not they should be real-life examples or hypothetical is for the WSIB to decide.

Posting all documents including the Discussion Paper, case scenarios, submissions, policies from other jurisdictions and a casebook of WSIAT and other decisions seemed to be well received by all stakeholders. The hearings were designed to be as informal as possible so that there could be as much dialogue as possible between the Chair and presenters. The number of days of hearings and their locations seemed to strike a reasonable balance. Providing all stakeholders with a preview of what I might include in my report to the President, as I did on February 19, 2013, followed an approach taken by Professor Arthurs in his funding review. The session was well attended and, I believe, well received.

In reflecting on the issues that might benefit from further thought as the WSIB moves ahead with future consultations, the following merit attention:

1. The Nature and Extent of WSIB Involvement in the Consultation Process

Consultation processes are ways of securing stakeholder input when important policies that affect workers and employers are reviewed. They are WSIB policies. The WSIB's adjudicators are in a good position to describe what they believe is lacking in the current policy or what could be improved in a revised one. It was for this reason that early on in the process, I met with senior WSIB adjudication officials to gather their views on the four benefits policy areas. Those meetings provided me with the WSIB perspectives that I included in the Discussion Paper.

It was at my request that the WSIB prepared case scenarios describing the challenges they encounter adjudicating complex cases. They were the first to surface the significant policy gap around how to adjudicate cases where there are pre-existing conditions. I

believe that in any benefits policy review, it should be for the WSIB in the first instance to identify what they think should be included on the reform agenda and the reasons for seeking changes to the existing policies.

I would be surprised if stakeholders did not agree with this assignment of initial responsibility. When I met informally with some of them soon after taking on this assignment, many of them asked why the WSIB was revising these four policy areas which, many stakeholders felt were not in need of review. They felt the policies generally were working well and questioned why these would be priority considerations by the WSIB. Several actually commented that if the WSIB felt it important to undertake this review, it was up to the WSIB to explain what areas, in the WSIB's view, needed attention.

Providing the rationale for a benefits policy review is one important role for the WSIB to play in a benefits policy review process. I do not think it should be their only role. Throughout the process, I sought assistance from the WSIB's policy division and invariably found all policy staff more than willing to provide assistance, undertake research, and ensure I had the information I needed to conduct the consultations and prepare this report. The WSIB's consultation secretariat did a remarkable job of keeping stakeholders informed about hearing dates, timelines for submissions, and ensuring that all relevant materials were posted on the WSIB website. The consultation secretariat, in my view, has established very strong and positive relationships with a wide cross-section of members of the stakeholder community. This went a very long way towards ensuring that the consultation process went smoothly.

After the conclusion of the hearings process, I met several times with senior WSIB officials, including the Chair, President and other senior executives to discuss what I was thinking and to learn how it would be received by the WSIB should it find its way into my report. In no way did I feel that this compromised my position as an independent chair. In fact, what it allowed me to do was to describe first-hand what I was hearing and learning and as a result, I believe I have been able to produce a report that not only is not a surprise to the WSIB but is a report they will be able to implement. I appreciate that it always will be a judgment call as to how close a connection an independent chair should have with senior WSIB officials. I am absolutely confident that doing so in this instance has resulted in an actionable report.

2. Establishing the Conditions and Context for a Successful Review Process

If benefits policies should be presumed to be drawing the work-relatedness line approximately in the right place and if they have been in place for many years, a benefits policy review should not take over a year to complete. The process should be more along the lines of a fine-tuning exercise than an overhaul. This review process started well before I was asked to chair the consultation part of it. I understand that the reason I was asked to chair the consultation process was because of stakeholder concerns that pre-dated the start of my assignment. The concerns centred around the following:

1. A belief in the minds of most worker representatives that the WSIB already had drawn a narrower work-relatedness line than the one they were accustomed to experiencing and were adjudicating claims on that basis; and

2. A further belief or view that the WSIB's "new" policies were motivated solely by cost considerations, as evidenced by the fact that most of the policies under review had been the subject matter of a Value for Money Audit review – a review that recommended narrower approaches to adjudication

As I indicated at the beginning of Chapter 2, Workers' Compensation benefits policy reform is an extraordinarily challenging undertaking. As one who has been part of previous failed attempts at benefits policy reform, I can imagine a scenario where the WSIB might conclude that the work-relatedness line is being drawn in the wrong place and might proceed to change it by adjusting its adjudicative practices. Those changes might well be driven by a work-relatedness concern that arises in an environment where benefits policy reforms have not happened for decades. It could be a desire to protect and ensure the integrity of the system by taking a path of least resistance. Formal declarations of intentions to draw the work-relatedness line differently are almost guaranteed to generate vociferous backlash from the worker communities.

WSIB officials indicated to me that in their view, the changes introduced in recent years have been motivated by a strong desire to get it right. They believe that there have been many circumstances where the only explanation for the worker's inability to return to work or for the extent of his or her impairment is a non-work-related pre-existing condition. If that is the case, the system is paying for benefits that are not the system's responsibility. That is why, in the WSIB's view, the line needs to be re-drawn.

Whatever the motivation, it is difficult to avoid the conclusion that the way the changes occurred did not foster a positive environment for this consultation process. It led to many stakeholder questions around the WSIB's true reasons for making the changes. It became more difficult to have what would have been more productive conversations around the work-relatedness considerations of factoring in pre-existing conditions instead of focusing on the WSIB's motivation in making the changes.

It is for these reasons that I thought it would be helpful to propose some principles that should drive future benefits policy reforms. What if the WSIB followed those principles in seeking changes to existing policies or a new policy on pre-existing conditions? Would it have made enough of a difference to setting a positive context for reform?

What if the WSIB had stated several years ago that it believed it was compensating for situations that were not work-related and that it was going to seek a change in policy or the development of a new policy to address those situations? Absent a much improved environment than seems to exist now, one might be safe to assume that there would be strong and vocal worker resistance to the idea. Under what circumstances could the WSIB raise its concerns in ways that would allow for reasoned and thoughtful stakeholder input? Channeled properly, the worker and employer stakeholder communities can be an enormously helpful resource that has much to contribute to a discussion and debate on benefits policy reforms.

If, several years ago, the WSIB had decided a policy change was required, and was aware that the consequences of the policy change were to re-draw the work-relatedness line in ways that would narrow entitlement, could the WSIB have perhaps issued a discussion paper or a document that set out the nature of the change that the WSIB was seeking, the reasons for seeking that change in policy and evidence that the changes being sought reflected and were consistent with the principles set out in Chapter 2? I

am not suggesting that this would be required every time the WSIB decided to revise any of its benefits policies. I am suggesting it is something the WSIB would do if it concluded that the policy change would impact on benefits in a material way.

At the risk of repeating some of the contents of Chapter 2, the discussion paper I am imagining here is one that demonstrates that the proposed change is grounded in the Act and is consistent with the Meredith Principles. The discussion paper would, where appropriate, describe how the proposed changes would be consistent with common law practices. The paper would set out the extent to which the subject matter has been addressed by appeals decisions, and if so, the implications of taking those decisions into account.

The most important element of the discussion paper would be the description of the way in which the re-drawing of the line is being recommended for work-related and not cost reasons. Has a practice arisen over the years whereby the WSIB is compensating for situations that were just accepted as work-related but upon closer scrutiny, fail that test? For instance, I heard during the course of meetings with WSIB officials that it has become standard practice for a group of workers who had previously established WSIB claims to automatically claim benefits during an annual seasonal shutdown by the employer. The basis of the claims flowed from the work disruption policies but the circumstances around the automatic filing of those claims brought into question whether the WSIB, in allowing these claims, was going beyond its mandate and perhaps bringing into question the integrity of the system. If the solution to this issue required a policy change (and it is not evident that this in fact was the case here), there might well be good arguments that the WSIB could put forward in support of seeking to re-draw the line for work-related and not cost reasons.

I appreciate that developing a discussion paper that includes the above elements is not a simple task. It requires a great degree of thought, time and effort. It is a document that will be closely scrutinized by the stakeholder communities and undoubtedly will be the subject of criticism and debate. But, inevitably, that will happen regardless of whether or not there is a discussion paper, as this current process overwhelmingly demonstrated. What a discussion paper process does is establish in the first instance an open and transparent approach to policy reform in those relatively rare situations where the policy reviews go well beyond seeking clarity and certainty, and instead have the potential to impact on entitlement.

The purpose of a discussion paper is to document the organization's policy reform intentions and do so in a way that facilitates and invites stakeholder comment and input. The scope and nature of a stakeholder consultation process will depend on the magnitude of the anticipated change in policy. If policies are presumed to be approximately correct because they have been in place for many years, one might conclude that it would be a rare situation that would require the kind of process that happened here. In the normal course, in those infrequent situations that would give rise to a discussion paper, perhaps the presumption should be that stakeholder input would come from written submissions, absent a compelling reason to hold a hearing.

It should go without saying that ultimately, the WSIB is responsible for its policies. WSIB policies, first and foremost, are intended to assist WSIB adjudicators in determining entitlement to benefits. The WSIB is responsible for the integrity of the system. Those responsibilities include determining when the integrity of the system is being challenged

or brought into question. At the same time, the WSIB must count and depend on establishing and maintaining a positive and constructive working relationship with employer and worker stakeholders. It is for this reason that the WSIB should continually seek the best ways of involving and engaging stakeholders in making changes that will impact them.

Building and maintaining relationships is a two-way street. If the WSIB adopts a more deliberate, proactive approach, one where policy development and operations are aligned, stakeholders should be prepared to participate, to offer their best thinking on the issues, and to engage in constructive and healthy dialogue, as they very capably demonstrated once this process got going. One cannot rewind the tape, but if the WSIB had implemented a discussion paper approach when it decided to re-draw the work-relatedness line in situations where pre-existing conditions arise, would worker stakeholder opposition have been less intense? I would hope so, because that is what one should expect from a good working relationship. Given the importance of ensuring a vibrant Workers' Compensation system, I do not think it is too much to expect. Mutual commitments are critical to making this work.

I appreciate that for some there may be a lingering question around what might trigger the need for a discussion paper-type process. Where should the line be drawn between minor policy revisions or adjudicative practice changes that occur in the normal course of business and more significant ones that might require variations of a discussion paper process. The WSIB has established a number of Advisory Committees to involve its stakeholders with quarterly formalized opportunities to meet with senior WSIB officials. It might be possible for the WSIB to use these Committees as a sounding board in order to determine the anticipated level of interest and extent of that interest in participating in a review of a particular policy.

The WSIB's Framework for Policy Development and Renewal sets out a systematic method for reviewing all policies on a periodic basis and includes the potential for consultations to occur at various times, depending on the nature and extent of the policy changes under consideration. I believe that Framework paints a very clear and compelling picture of how policies should be reviewed and revised. The suggestions I am putting forward in this chapter are intended to build on and supplement that Framework in those relatively infrequent but potentially very challenging areas where material changes are anticipated.

Summary of Chapter 9: Advice on Future Consultation Process

Recommendation #22
Most of the features of this consultation process appeared to work well and be supported by the WSIB and the stakeholder communities. They would appear to be a solid foundation for future reviews where a consultation process is required.

Recommendation #23
The WSIB's involvement in the consultation process must be clearly defined from the outset. That includes assuming initial responsibility for describing what the WSIB is seeking from the review, and the active and solid support and commitment of senior WSIB officials as happened in this process.

Recommendation #24
If, in future benefits policy review processes, the WSIB reaches a conclusion that it needs to re-draw the work-relatedness line, it should provide stakeholders with a discussion paper that sets out the work-related reasons for seeking such a change and invite stakeholders to participate in a consultation process around the discussion paper before proceeding to implement the desired changes.

Recommendation #25
If the WSIB adopts the approaches described in this chapter, it is incumbent on stakeholders to respect and acknowledge the legitimacy of this process and bring to the consultation process the wealth of knowledge they possess.

Recommendation #26
The WSIB should use its Advisory Committees as vehicles for ensuring openness, transparency and no surprises going forward. In particular, where the WSIB intends to change a benefits policy in ways that will have material impact on stakeholders, it should raise this intention with its Advisory Committees.

Chapter 10: Concluding Comments

This process started out as a means of involving stakeholders in consultations around four benefits policy areas that the WSIB has decided to review and revise. It ended up quite differently. What I have learned and I hope everyone also has learned along the way is that much more is at stake here then adjustments to the four policy areas, as helpful as they might be to achieving greater consistency and clarity. What became apparent to me, almost from the outset, is that this consultation process has surfaced the challenges inherent in taking on benefits policy reforms.

Benefits policy reform is not for the faint of heart. It requires courage to ask the difficult questions that need to be asked by an organization that is responsible for ensuring the integrity of the Workers' Compensation system. It demands that the WSIB take pains to set the context for future benefits policy reform processes, drawing from the lessons learned and perhaps the suggestions I have included in this report. It depends for its success on creating an environment of openness and transparency and prior notice when the WSIB believes policy changes are required.

If those ingredients are present in future reforms, I believe the WSIB should be able to find ways of managing those processes without requiring an independent chair every time a substantial change in benefits policy is up for discussion. If the WSIB adopts the principle-based approach set out in Chapters 2 and 9 and if stakeholders support and engage with the WSIB in applying those principles to future reform processes, there are many starting points for engaging stakeholders in productive consultations that should be capable of being self-managed.

I arrive at this conclusion for several reasons. Firstly, when the conversations moved beyond questioning motives, invariably they were constructive and productive. WSIB stakeholders have an enormous wealth of information and experience to bring to the table. Secondly, if the issues reside inside the existing policies, the likelihood of major disagreements on fundamental points of principle is relatively low because the policies have been in place for a long time and there should be a presumption that they are "roughly right". There ought to be a shared goal of seeking adjustments that will make them easier to understand and capable of more consistent adjudication.

Thirdly, if the WSIB agrees to work within the policy framework set out in Chapter 2 and the advice on future consultations outlined in Chapter 9, the conditions I encountered at the beginning of this process should not recur in the future. I would hope that the WSIB and its stakeholders would take advantage of Advisory Committee meetings to explore together how the lessons learned from this process could best be implemented. The best way to reach common ground is to talk to each other. This report might usefully serve as a catalyst for those discussions.

Finally, I cannot say enough about the quality of the resources that the WSIB made available to me throughout the entire process. Kate Lamb, Diane Weber and Angela Powell assisted me from the outset, provided all the policy support one could hope for and ensured that the entire consultation process moved along smoothly. The Chair of the WSIB and the President and CEO took an active interest in this process and ensured that I had all the support I needed to carry out this assignment. Senior officials within the WSIB's operations division ably educated me on the issues they encounter adjudicating

claims in the four policy areas. I am indebted to many officials within the WSIB and I thank them for their involvement, their time, and their willingness to share with me the incredible knowledge base they possess.

Jim Thomas
May 2013

APPENDIX A – Consultation Participants

- Bruce Swartz
- Canadian Manufacturers and Exporters
- Canadian Union of Public Employees – Local 79
- Canadian Union of Public Employees – Ontario Division
- Canadian Vehicle Manufacturers' Association
- Carpenters' District Council of Ontario
- Cathie Baker
- Cathy Wright
- Cecilia Rodriguez
- Construction Employers' Council
- Disabled Workers Complex Case Workers Inc.
- Ed Taylor
- Edward South
- Eugene Lefrancois
- Federally Regulated Employers – Transportation and Communication
- Fink & Bornstein
- Gerald Landry
- Greg R. Brown
- Hamilton and District Injured Workers Group
- Hamilton Community Legal Clinic
- Hugh Graham
- Industrial Accident Victims Group of Ontario
- Injured Workers' Consultants Community Legal Clinic
- Injured Workers Outreach Services
- Kevin Jones
- Kim Mahoney
- London and District Injured Workers Group
- Maher Mourad
- Margery Wardle
- Masoud Kurimi
- Mechanical Contractors Association of Ontario
- Michael Pietra
- Michele McSweeney
- Michael S Green and Mr Gary Newhouse
- Office of the Employer Advisor
- Office of the Worker Advisor
- Ontario Business Coalition
- Ontario English Catholic Teachers' Association
- Ontario Federation of Labour
- Ontario Legal Clinics' Workers Compensation Network
- Ontario Mining Association
- Ontario Network of Injured Workers Groups
- Ontario Nurses' Association
- Ontario Trucking Association
- Ottawa and District Injured Workers Group
- Patricia Sameluk

- Police Association of Ontario
- Provincial Building and Construction Trades Council of Ontario
- Richard R Hudon
- Schedule 2 Employers' Group
- School Board Co-Operative Inc.
- Sheri Jalava
- Tammy Zagorodny
- Thunder Bay and District Injured Workers' Group
- Tom Sanderson
- Toronto Workers' Health and Safety Legal Clinic
- United Food and Commercial Workers, Canada

APPENDIX B - Framework For Policy Development And Renewal

1. Executive Summary

In his 1913 report, Justice William Meredith outlined a trade-off in which workers relinquish their right to sue in exchange for compensation benefits. Meredith advocated for no-fault insurance, collective liability, independent administration, and exclusive jurisdiction. These principles have provided the foundation of all subsequent workers' compensation acts in Ontario.

This Framework is intended to convey the purpose and authority of WSIB policy, outline the approach to policy development and review, and describe the consultation process. It is designed to provide guidance for decision makers and transparency for stakeholders. WSIB policies will comply with the legislative requirements of the *Workplace Safety and Insurance Act, 1997* (WSIA) and current regulations.

The following principles will guide policy development at the WSIB:
Policies will be grounded in the fundamental objectives of the Act (the purpose clause) to satisfy legal requirements.
Policies will provide clear direction to workers, employers, WSIB staff, Workplace Insurance and Safety Appeals Tribunal (WSIAT) and all others who use the policies.
Policies will respect the WSIB's strategic direction.
The WSIB will take into consideration stakeholder expectations and consult on new and/or substantially revised policies.
Policies will be fair, practical, and effective to ensure that they can be applied with timeliness, transparency and consistency.
Policies will be fiscally responsible and ensure the long-term sustainability of the system.

The policy development process will be formalized to include the following steps:

- Issue identification
- Research and analysis
- Initial stakeholder input
- Policy drafting
- Public consultation
- Policy approval
- Implementation
- Evaluation and review.

The WSIB will establish an annual Policy Agenda, which will include an identification of priorities for the following years. The overall Policy Agenda will be refreshed as necessary at a minimum of once a year.

2. Introduction and background

2.1 *Background*

The concept of workers' compensation had its origins in Germany, Great Britain and the United States between the late 1800's and early 1900's. In 1910, in response to concerns about a lack of adequate funding for injured workers and a slow, inequitable court system, the Ontario government commissioned Sir William Meredith to produce a report on workers' compensation.

The Meredith Report[3] outlined a trade-off in which workers relinquish their right to sue in exchange for compensation benefits. The main principles of the Meredith report included:

1. No-fault compensation: Workplace injuries are compensated regardless of fault. The worker and employer waive the right to sue. There is no argument over responsibility or liability for an injury. Fault becomes irrelevant, and providing compensation becomes the focus.

2. Collective liability: The total cost of the compensation system is shared by all employers. All employers contribute to a common fund. Financial liability becomes their collective responsibility.

3. Security of payment: A fund is established to guarantee that compensation monies will be available. Injured workers are assured of prompt compensation and future benefits.

4. Exclusive jurisdiction: All compensation claims are directed solely to the compensation board. The board is the decision-maker and final authority for all claims. The board is not bound by legal precedent; it has the power and authority to judge each case on its individual merits.

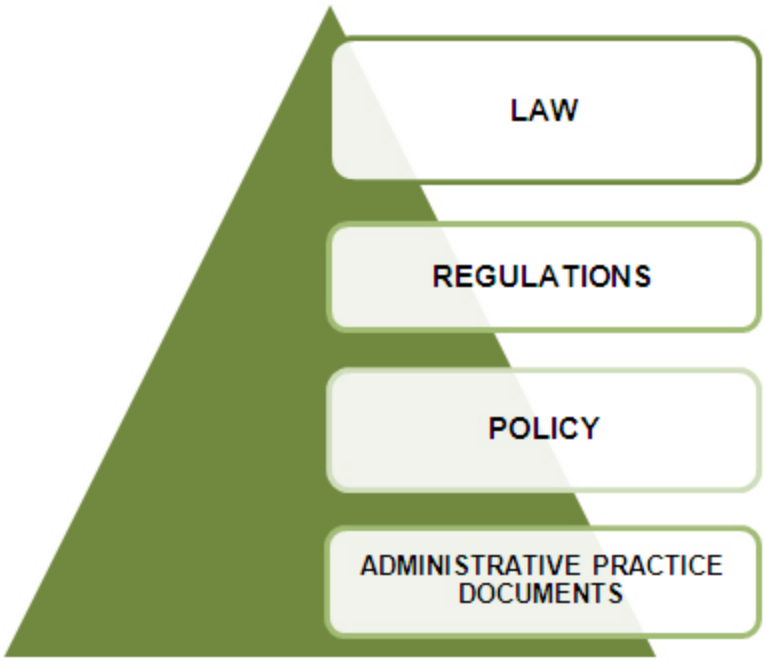
5. Independent board: The governing board is both autonomous and non-political. The board is financially independent of government or any special interest group. The administration of the system is focused on the needs of its employer and worker clients, providing service with efficiency and impartiality.

2.2 Purpose of the Framework

This Framework is intended to confirm the legal foundation and purpose of WSIB policy, outline the WSIB's approach to policy development and review and describe the policy consultation process. The Framework is a demonstration of the WSIB's commitment to clarity, transparency, and quality in the development of Board policies.

2.3 *Hierarchy of WSIB Decision Making*

[3] The Meredith Report, 1913



2.3.1 Law

Ontario's first Workmen's Compensation Act came into effect in 1914 following the completion of the Meredith Report. Since then, a number of Acts have proscribed the legal authority for Ontario's Workers' Compensation Board's decision making. As an administrative tribunal, the WSIB derives all of its powers and duties, explicitly or implicitly, from its governing legislation. The current legislation, the *Workplace Safety and Insurance Act, 1997* (WSIA), applies to workplace injuries and illnesses that occurred on or after January 1, 1998. The WSIB also administers two other acts.

The WSIA clearly specifies that its purpose is to accomplish the following in a financially responsible and accountable manner[4]:

- promote health and safety in the workplace
- facilitate return to work and recovery for workers who have sustained a work-related injury or illness
- facilitate re-entry into the labour market of workers and spouses of deceased workers
- provide compensation and other benefits to workers and survivors.

2.3.1.1 Statutory definitions

The WSIA contains a definition section which defines key terms, such as, "accident" and "occupational disease".[5]

[4] WSIA (1997). S. 1.
[5] WSIA (1998), Section 2. (1).

2.3.1.2 Specific provisions

Where the Act contains a *specific provision*, e.g. loss of earnings benefit to be calculated on "85% of a worker's net average earnings", the WSIB has no authority to deviate from the provision.

2.3.1.3 General provisions

Where the Act contains a *general provision*, e.g. entitlement to health care that may be "necessary, appropriate and sufficient," the WSIB can provide guidance around the meaning of the provision through official WSIB policy.

2.3.2 Regulations

The government and the WSIB have the power to develop regulations. Regulations have the force of law but must be authorized by a specific provision in a statute[6]. Generally, regulations provide specific information, rules or requirements in support of more general legislative provisions[7]. All regulations must be approved by the Lieutenant Governor in Council. Regulations are generally easier for the government to amend than governing legislation. Some regulations are general and therefore require supporting policies to provide clarity for decision makers (e.g. classification rules).

2.3.3 Policy

As a matter of administrative law, the WSIB has the power to develop policies to structure decision-making under its governing statute. Although the WSIA does not contain an explicit statement on general policy-making authority, it does recognize the WSIB's authority to develop policies. For instance, the Act states that the Board is able to develop policies for a number of specific powers.[8]

Policies must be consistent with the existing legislation and regulations. In the event of a conflict, the legislation and regulations prevail.

Further, there may be rare cases where the application of a relevant policy would lead to an unintended, absurd or unfair result. In these cases, a decision-maker may depart from a policy if it can be shown that the case has exceptional circumstances that justify doing so[9,10].

The WSIB creates policy to clarify the meaning and application of general provisions of the Act and supporting regulations and to operationalize strategic directions intended to fulfill its obligations and mandate set out in the WSIA.

WSIB policies serve both internal decision makers and external participants and they are binding on WSIAT[11]. It is recognized that fairness is achieved through the adoption of

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[6] E.g. s. 183 of the WSIA

[7] E.g. approach to calculating the average earnings of apprentices, learners or students is "prescribed" in a regulation made under the authority of s. 53(4) of the WSIA

[8] WSIA (1998). Section 126(1) and Section 148

[9] WSIA s. 119(1). "The Board shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent."

[10] WSIA s.124(1). "The Appeals Tribunal shall make its decision based on the merits and justice of a case and it is not bound by legal precedent."

[11] WSIA s. 126.

policies that are uniformly and consistently applied by all decision-makers within the system. Policy helps ensure that similarly situated workers, survivors and employers are treated the same way. It also helps external participants in understanding the rules that structure WSIB decision-making.

To be official, WSIB policies must be approved and minuted by the President and Chief Executive Officer (CEO) and appear in the *Operational Policy Manual* (OPM) or the *Employer Classification Manual* (ECM)[12] . These policies are posted on the WSIB website.

2.3.4 Time-limited policies

In some limited circumstances, such as legislative or regulatory changes, or major strategic direction change, an immediate change to the policies may be required on a time-limited basis. In such an event, the WSIB will be required to create "time limited policies" to ensure quality in decision-making and consistency in approach.

These time-limited policies carry the weight of WSIB policies. However, they will contain a shorter review period (e.g. 1-2 years) to ensure that they are reviewed and possibly revised in a timely manner.

2.3.5 Administrative Practice Documents

Section 131 (1) of the Act[13] allows the WSIB to determine its own practices and procedures in carrying out its mandate and obligations. Administrative Practice Documents provide guidance on the practical application of a policy. They often set out specific instructions as to how certain aspects of a policy are to be applied in all cases during the individual decision-making process.
Administrative Practice Documents must be consistent with legislation, regulations and WSIB policy. However, unlike WSIB policies, these documents are not binding on the WSIAT. In the event of a conflict, the legislation, regulation or policy prevails.

Further, while these documents do not need to be formally approved by the President/CEO and subsequently minuted, they will require endorsement by the internal policy advisory committee (see s 2.3.6) and approval by the relevant WSIB Chief Officers.

Not all policies have administrative practice documents – the need for such documents is generally assessed by the WSIB at the time of policy development and on an ongoing basis. Beginning with the launch of the 2012 Policy Agenda, any Administrative Practice Documents that are developed in support of new and/or revised policies will be posted on the WSIB website.

2.3.6 Advisory committees

Internal Policy Advisory Committee (IPAC)

Internal WSIB employees are important policy stakeholders since it is their role to implement approved policies. In consultation with key internal stakeholders, Policy

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[12] *What is "policy" for the purposes of s.126 of the Workplace Safety and Insurance Act, 1997*. BOD Minute #8, June 7, 2001, Page 6353.
[13] WSIA s.131(1). "The Board shall determine its own practice and procedure in relation to applications, proceedings and mediation…"

Services will identify key policy issues.

An internal policy advisory committee (IPAC) will be established with representation from each of the WSIB clusters to bring forward the policy issues of the cluster and to help prioritize the policy issues for the Policy Agenda. IPAC will also be used to review draft policies, policy papers and if applicable, discussion papers, prior to being submitted for formal approval.

2.3.7 Stakeholder advisory committees

Stakeholder advisory committees, such as the Chair's advisory committees, meet regularly to provide advice on strategic issues. The proposed Policy Agenda and key policy initiates will be discussed with these committees. For the purpose of policy development, these committees will function to:

- Provide input on a draft Policy Agenda and identify significant stakeholder policy issues to be considered for the Policy Agenda
- Provide input and advice to the WSIB stakeholder consultation processes
- Provide preliminary advice on possible policy direction prior to broad consultation
- Receive relevant information on policy issues committees

2.3.8 Policy Agenda/Plan

The WSIB will establish an annual Policy Agenda which will include an identification of priorities for the following years. Priorities will consist of policies arising out of:

- Government priorities and legislative/regulatory amendments
- Strategic directions
- Business area requirements
- Significant developments on specific issues (e.g. WSIAT decisions, court rulings, scientific or medical advances)
- Stakeholder input and feedback
- Substantive policy revisions identified through the ongoing evaluation and review

Prior to posting, the Policy Agenda will be approved by the internal policy advisory committee, the WSIB executive committee and shared with the WSIB Board of Directors and stakeholder advisory committees.

3. Policy development and consultation

3.1 Policy development principles

The following principles will guide policy development at the WSIB:

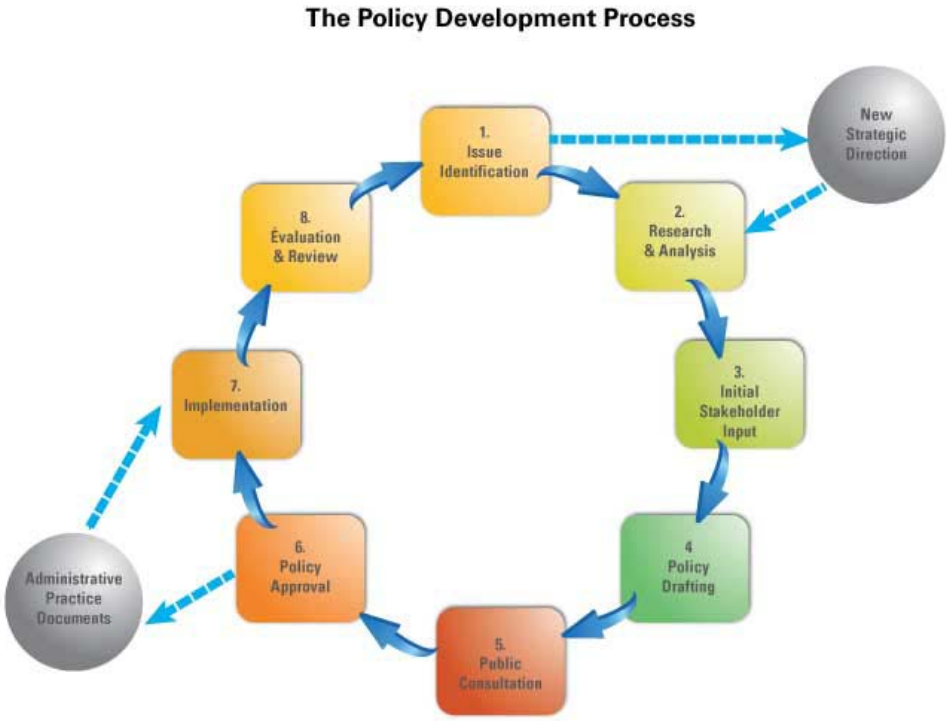
1. Policies will be grounded in the fundamental objectives of the Act (the purpose clause) to satisfy legal requirements.
2. Policies will provide clear direction to workers, employers, WSIB staff, WSIAT and all others who use the policies.
3. Policies will respect the WSIB's strategic direction.
4. The WSIB will take into consideration stakeholder expectations and consult on new and/or substantially revised policies.

5. Policies will be fair, practical, and effective to ensure that they can be applied with timeliness, transparency and consistency.
6. Policies will be fiscally responsible and ensure the long-term sustainability of the system.

3.2 Policy development process

Going forward policy development will follow the process described in the following section. The major steps to be undertaken in the development of new policies or substantial revisions to existing policies include:

- Issue identification
- Research and analysis
- Initial stakeholder input
- Policy drafting
- Public consultation
- Policy approval
- Implementation
- Evaluation and review



3.2.1 Issue Identification

Key policy issues arise from many sources, including:

- WSIB strategic priorities/directions

- Legislative or regulatory changes
- Internal and external stakeholder concerns or recommendations
- Emerging trends, changes or advances in current knowledge
- Appeals and WSIAT decisions
- Environmental and inter-jurisdictional scans
- Judicial reviews
- Value-for-money audits
- Policy and program evaluation recommendations and outcomes
- Ongoing policy evaluation and review
- Policy issues identified will be prioritized in consultation with:
- Internal stakeholders
- WSIB executive committee
- Stakeholder advisory committees

The timing of the policy initiatives will be determined by, among other things, its priority and internal capacity to undertake the work required.

3.2.1 Research and analysis

The extent of the research and analysis of a particular issue will depend on the complexity of the issue. The research and analysis phase of policy development will include but not be limited to, the following areas:

- Environmental scan
- Jurisdictional review
- Legal implications
- Direct and indirect costs and savings
- Impact on employers, workers and/or health care providers, WSIB staff and other potential stakeholders
- Pertinent scientific knowledge and academic literature reviews
- Operational and systems impacts
- Implementation issues
- Potential outcome metrics
- Option identification

During this phase of policy development, policy staff will engage the affected internal stakeholders and may also consult with experts including academics and other key individuals.

3.2.2 Initial stakeholder input

Before determining a preferred approach to policy change, the WSIB may undertake preliminary consultation with stakeholders.

In some circumstances, the WSIB may develop a high level **discussion paper** intended to set out the purpose, issues for discussion and the need for a new strategic direction and/or policies. The discussion paper will not necessarily commit the WSIB to action or implementation but is primarily intended to stimulate broad debate. The discussion paper will be posted on the WSIB website for public comment.

If necessary, the WSIB may also solicit feedback in the form of stakeholder working groups, focus groups or roundtables.

3.2.3 Policy drafting

Based on the research/analysis and if applicable, feedback from the initial stakeholder consultations, the WSIB will draft a new and/or revised policy. For most new policies or substantive policy revisions, a supporting **policy paper** will accompany the draft policy (ies) and be posted on the website for comment.

3.2.4 Public Consultation

In public organizations, such as the WSIB, ongoing consultation and communication with key stakeholder groups is vital to maintaining positive external relations and ensuring an ongoing dialogue with individuals and groups that are most affected by the WSIB's decisions. There is a long-standing tradition of ensuring broad consultation on all major policy initiatives. This practice is vital to identifying major issues and ensuring policies are understood, accepted, and complied with by those impacted by them.

The key stakeholders may vary from policy to policy; they include workers, employers, health care providers, and other government policy makers.

Policy development will generally be facilitated by posting the draft policies and supporting policy papers on the website. In addition, key stakeholders will be notified of upcoming consultations and, when appropriate, meetings will be held. In most circumstances, consultation submissions will be posted on the WSIB website in their entirety.

Timing: Formal public consultation will be generally be for a two - four month period.

3.2.5 Policy approval

Once formal consultation is complete, the WSIB will compile and consider all feedback received through the process. The draft policies will be revised in light of the feedback received.

In rare circumstances where the draft policies have been significantly revised, the WSIB may choose to launch a second formal consultation.

Final policies will be taken to the WSIB President/CEO for final approval and minuting. Minuted policies will be added to the *Operational Policy Manual* or *Employer Classification Manual* and posted on the website.

Timing: The policy finalization and approval will generally be completed in 90 to 120 days.

3.2.6 Proposal to Amend Regulations

Generally, proposals to amend the regulations follow the same approval process as other policies requiring Board of Directors approval. Once approved by the Board of Directors, the proposed amendments are brought forward to the Ministry of Labour by the WSIB Legal Services Division. Legal Services Division works with the Ministry of Labour to obtain approval from the Lieutenant Governor in Council.

3.2.7 Implementation

The implementation phase will be led by the appropriate business area(s) with support from Policy Services. Technical implementation issues will need to be addressed, including the creation or amendment of administrative practice documents or training materials. The WSIB will ensure that their staff is trained to implement a new or an amended policy by the date the policy takes effect.

3.2.8 Evaluation and review

To ensure that policies remain effective and relevant, the WSIB will create a mechanism by which all policies will be tested and subsequently evaluated. This mechanism will be applied to all new and substantively revised policies. Most new policies and substantive policy revisions should be tested for one to three years and subsequently reviewed between three to five years post implementation. Those policies that are to be reviewed may be formally evaluated either independently or as part of a larger program review. Policies which do not achieve the intended outcomes will be revised accordingly, and if substantive change is required, will form part of upcoming Policy Agendas.

Long-standing policies will also be reviewed utilizing this mechanism in order to ensure that the language is current, the policy is appropriately aligned with other policies and the policy continues to have relevance to decision-makers.

For each existing policy being reviewed, a determination will be made whether the policy requires substantive revisions[14], including

- Significant changes in language or intent
- Replacement
- Rescinding.

Policies requiring substantive revisions will be added to the Policy Agenda.

A date for next review of a maximum of 5 years (60 months) from date of minuting will be identified for each reviewed policy where appropriate.

Conclusion

This Framework for Policy Development and Renewal is a demonstration of the WSIB's commitment to clarity, transparency, and quality in the Board policies. It describes how the WSIB will implement its obligations set out in the WSIA, and how it will test the effectiveness of WSIB policy to ensure consistency with its purpose.

[14] Substantive changes are changes that result in one or more of the following:

- Potential financial impact to the compensation system
- Potential impact on benefits or premiums
- Potential impact on entitlement
- Change in policy direction or intent