

2012-14 Benefits Policy Review: Summary of Key Stakeholder Feedback and Policy Revisions

Introduction

Following extensive stakeholder consultation, the WSIB has developed new and revised policies as part of its Benefits Policy Review. Specifically, a new Pre-existing Conditions policy and a new Determining Permanent Impairments policy were developed and policies related to Permanent Impairment, Recurrences, Work Disruptions, and Aggravation Basis were revised. The final policies will ensure clarity, transparency and fairness - and give decision-makers the tools to make more consistent decisions. These new and revised policies will come into force on November 1, 2014.

The WSIB undertook an open and transparent policy consultation over the past two years as part of developing these policies. There were two written submission periods, seven days of public hearings across Ontario and several discussion sessions with stakeholder groups. A wide range of worker and employer stakeholders provided written submissions and attended the sessions. Stakeholder input was carefully considered and informed significant changes to the final Pre-existing Conditions policy, and in many cases was incorporated into the other policies under review.

Background

In spring 2012, the WSIB released its 2012-2013 Policy Agenda, announcing its intention to engage in consultations on four benefits policy areas: aggravation basis, recurrences, permanent impairments and work disruptions.

The WSIB selected independent chair, Jim Thomas, to lead the consultations. During the course of the consultations, the challenges associated with “work-relatedness” and adjudicating claims involving pre-existing conditions became a focus of stakeholder submissions. As a result, although outside of the consultation's initial scope, Thomas addressed this issue at length in his Final Report, which was released in June 2013. In particular, Thomas recommended that the WSIB develop a new policy on pre-existing conditions to fill a policy gap that he found exists in Ontario. Unlike all other Canadian jurisdictions, the WSIB does not have a specific policy that assists decision-makers when working with claims that involve pre-existing conditions.

The WSIB accepted Thomas' recommendation to develop a new policy to address pre-existing conditions which provides guidance to decision-makers and participants in the system about how to draw the work-related/non-work-related line. The draft Pre-existing Conditions policy, along with the other draft benefit policies, was publically released for consultation in November 2013.

This document highlights key stakeholder feedback the WSIB received regarding each draft policy and outlines the primary revisions that resulted.

Pre-existing Conditions: New Policy

Core Policy Elements

As noted by Thomas and as set out in legislation, the WSIB must draw a line between compensable work-related and non-compensable non-work-related injuries/diseases to preserve the integrity and fairness of the system.

To accomplish this, the draft Pre-existing Conditions policy defined “pre-existing condition”, provided guidance for determining work-relatedness and described the affects a pre-existing condition may have on ongoing entitlement to benefits. These core policy elements have been retained in the final Pre-existing Conditions policy.

Revisions

While the core elements of the draft policy have been retained, significant changes have been made to address feedback from worker and employer stakeholders.

Entitlement: Worker stakeholders expressed concern that the intent of the draft policy was to limit/end entitlement due to pre-existing conditions. The policy now explicitly states that entitlement will not be denied simply due to the existence of a pre-existing condition and makes clear that after initial entitlement is established, ongoing entitlement may only be affected where it is shown that the pre-existing condition is impacting the worker’s ongoing impairment.

Workers’ Compensation/Legal Principles: Worker stakeholders requested that the policy specifically reference “merits and justice” and “benefit of the doubt” principles to ensure they are appropriately considered during decision-making. While these principles apply to all decision-making and are addressed in standalone policies, they have been included in the final policy. This will ensure that the merits and justice of each case will be considered, and where the line between the impact of a work-related injury/disease and the impact of a pre-existing condition is unclear, the worker will be given the benefit of the doubt and benefits will continue.

Worker stakeholders also enquired whether the draft policy reflected the “crumbling skull” and “thin skull” legal principles. Though the draft policy was consistent with these principles, they were not expressly included. The final policy now specifically references these two principles and outlines how “thin skull” is applied.

Definition of Pre-existing Condition: Both worker and employer stakeholders felt that the definition of “pre-existing condition” was unclear, particularly given similar concepts/definitions are contained in existing WSIB policies. The final policy clarifies that the definition of “pre-existing condition” includes similar concepts/definitions found in existing WSIB policies, including asymptomatic conditions. While worker stakeholders opposed including asymptomatic conditions in the definition, the new definition makes it clear that such conditions may only impact entitlement if they become symptomatic post-injury and impact the ongoing impairment.

Work-Relatedness Test: Both worker and employer stakeholders indicated that the “significant contributing factor” (SCF) test should be included in the policy, arguing it is established in WSIB practice as well as Workplace Safety and Insurance Appeals Tribunal (WSIAT) and court jurisprudence. The SCF test has been included in the final policy, requiring that the work-related factor be a significant cause of the ongoing impairment for entitlement to continue.

Impact

Up until now, the WSIB and WSIAT have taken pre-existing conditions into consideration as a regular and necessary part of decision-making. However as there has been no policy on this topic, decisions have been made on a case-by-case basis.

The new policy will provide guidance in decision-making and aims to provide clarity and consistency to outcomes for both workers and employers. It is intended to protect workers by setting a fair threshold for when benefits may end. The policy prohibits the WSIB from ending ongoing benefits simply because a pre-existing condition may be present or impacting the area of injury. Instead, the WSIB will continue ongoing benefits until the significance of the pre-existing condition is so great that it overwhelms the significance of the work-related injury/disease. This must be supported by clinical evidence.

Permanent Impairments: New and Revised Policies

Core Policy Elements

The Permanent Impairment (PI) policy suite guides the payment of non-economic loss (NEL) benefits to workers with PIs resulting from work-related injuries/diseases. The new and revised PI policies provide guidance for determining whether a PI exists, outline when/how pre-existing and other non-work-related conditions should be considered when determining PIs, and clarify how the various PI policies are linked together.

Revisions

While the core elements of the new and revised draft policies have been retained, noteworthy changes have been made to address feedback from worker and employer stakeholders.

Determining Permanent Impairment Policy

Maximum Medical Recovery (MMR): A work-related impairment is considered permanent when it continues to exist after maximum medical recovery (MMR) has been reached. In response to worker stakeholder concerns that usual healing times, rather than clinical evidence, would be used to determine MMR, the final policy stipulates that MMR is based on clinical evidence.

The final policy also clarifies that decision-makers have discretion to determine multiple MMR dates as worker stakeholders raised concerns that waiting for all areas of injury (work-related or not) to reach MMR before a PI is rated would unfairly delay payment of NEL benefits.

Determining the Degree of Permanent Impairment Policy

Thin Skull: The draft policy instructed the decision-maker to factor out both symptomatic and asymptomatic pre-existing conditions that contribute to or enhance the degree of impairment to the same area of the body when determining the degree of work-related permanent impairment. Worker stakeholders argued that the draft policy was contrary to the “thin skull” principle as an asymptomatic pre-existing condition would not have impacted a worker’s ability to work and so should not impact the worker’s benefit. However, NEL benefits are not linked to ability to work. The final policy clarifies this and outlines that the pre-existing condition is only offset when it contributes to the degree of impairment and would have resulted in an impairment rating on its own prior to the injury, reflecting the “thin skull” legal principle.

SCF Test: Worker stakeholders focused on whether the draft policy was consistent with the SCF test. The final policy indicates that the portion of the impairment that is work-related will be assessed even where there are other non-work-related factors contributing to the impairment. This is consistent with the SCF test and ensures that NEL benefits reflect the work-related impairment.

Aggravation Basis: Revised Policy

Core Policy Elements

The revised Aggravation Basis policy outlines that entitlement is considered for the acute phase of an injury when a minor work-related accident aggravates a significant pre-accident impairment.

Revisions

While the core elements of the revised draft policy have been retained, noteworthy changes have been made to address feedback from worker and employer stakeholders.

PI Guidelines: The guidelines addressing situations where there is a permanent worsening of the pre-accident impairment found in the existing policy were removed to streamline the draft policy. These were put back into the final policy as worker stakeholders argued they contained important information that should be retained.

SIEF Guidelines: Employer stakeholders questioned whether the removal of the SIEF guidelines would impact how the SIEF policy is applied. Though, the final policy does not include reference to the Second Injury and Enhancement Fund (SIEF) guidelines, they can be found in the SIEF policy, which decision-makers will still apply when appropriate as per the SIEF policy.

Recurrences: Revised Policy

Core Policy Elements

The revised Recurrences policy outlines how entitlement to benefits is determined when a worker experiences a recurrence of a work-related injury/disease. The primary consideration in making this determination is whether the original work-related injury/disease is clinically compatible with the current condition.

Revisions

While the core elements of the revised draft policy have been retained, noteworthy changes have been made to address feedback from worker and employer stakeholders.

Significant Deterioration: The definition of “significant deterioration” in the draft policy required a measurable change in objective clinical findings. There was a concern that “objective” clinical findings would preclude clinical findings related to more subjective conditions (e.g., psychological conditions) from being considered. This was not the intent of the definition. As a result, “objective” was removed from the definition.

New Incident/Exposure: Worker and employer stakeholders requested that the terms “new accident”, “significant” and “insignificant” be clarified. Additional explanation of the terms “significant” and “insignificant” has been included in the final policy. The term “accident” has been replaced with the terms “incident/exposure” – an “accident” as defined in legislation/policy pertains to work-related events, whereas the terms “incident/exposure” pertain to both work-related and non-work-related events and thus are more appropriate terms for the recurrence context.

Actual Loss of Earnings: Worker stakeholders did not support the requirement for a worker to have an actual loss of earnings to receive LOE, and employer stakeholders, while supportive of the limitations, were cautious about the exceptions. The final policy retains the requirement but provides greater detail around when an exception may be made.

Work Disruptions: Consolidated and Revised Policies

Core Policy Elements

The five existing Work Disruption policies have been consolidated into two policies, one addressing temporary work disruptions and the other permanent work disruptions. The revised policies provide guidance for determining whether a worker’s additional loss of earnings (LOE) during a work disruption results from the work-related injury/disease.

Stakeholder Feedback

While the core elements of the draft policies have been retained, noteworthy changes have been made to address feedback from the worker and employer stakeholders.

Entitlement Following Temporary Work Disruptions Policy

LOE Benefits During Temporary Work Disruptions: Worker stakeholders expressed concern that the existing policy's focus on a worker's general employability was replaced with the requirement that additional LOE benefits only be paid during a temporary work disruption when there is evidence the worker would seek new employment and the injury/disease impacts the ability to do so. The final policy retains this requirement but clarifies how such determinations are made.

Entitlement Following Permanent Work Disruptions Policy

Suitable Occupation (SO): The draft policy provided that the WSIB will identify a SO for all workers claiming entitlement during a permanent work disruption to determine whether additional benefits will be paid. Some stakeholders requested further guidance about how a SO is identified which the final policy provides.