DOCUMENT C

CHAIR'S RESPONSE TO ODAP
2004 PUBLIC CONSULTATION

FEBRUARY 2005

I. Introduction

The Report of the Chair of the Occupational Disease Panel ("the Report") recommends guidelines for the use of legal principles and levels of evidence to govern policy development and adjudication of occupational disease claims by the Workplace Safety and Insurance Board. It also recommends a process for future policy development.

The draft Report was released for public discussion in the summer of 2004. The general public was invited to attend open meetings held across the province and/or submit written briefs. The deadline for briefs was initially set as September 30, but briefs that arrived after the deadline were also accepted.

In all, 96 oral presentations and 77 written briefs were submitted.
Many of these submissions recommend changes to the Report.

In this document, which I have entitled "Chair's Response to the ODAP Public Consultation, 2004", I summarize the stakeholders' recommended changes to the Report and explain why I have accepted, or not accepted, stakeholders' recommendations. I also direct a number of other recommendations and observations to the Board of Directors as a result of issues that were raised during the public meetings but were not dealt with in the Report.

Several points about the format of the Report should be noted before getting into the substantive recommendations.

Initially, the draft Report noted where labour and employer stakeholders held dissenting views on the recommendations. Dissenting views and/or alternative text supplied by the stakeholders were appended to the draft Report. These were included in the draft Report so that the public could have a ready reference to dissenting viewpoints. Many of the stakeholder presentations during the consultation open meetings reiterated the stakeholder views contained in the appendices. In some cases, the stakeholders' submissions expanded their dissenting views. Since these dissenting positions are, by and large, dealt with in this document, I did not feel it was necessary to continue to attach the alternative texts to the Report and therefore they do not appear in the final version.

Secondly, a number of stakeholders felt that it was difficult to identify what was actually being recommended in the draft Report. I agree that it was a bit confusing. I should have made it clear in the draft Report that I am recommending that the Board adopt the report *in total* so that it can be operationalized into WSIB policy to serve as a guide to adjudicators. Adoption of the Report will also provide a touchstone for this and future Boards for determining specific occupational disease policies. To eliminate the confusion that I created in the first draft I have removed all use of different fonts to make it clear that I am recommending adoption of the entire text.

II. Views of Stakeholders (Brief Summary)

Before getting into the specific issues it is useful to briefly summarize the main concerns of the stakeholders.

Employers question the use of the "significant contribution" test to determine whether or not an occupational disease claim can be allowed. Their other major concerns relate to cost implications; apportionment of benefits; the interpretation of section 119(2) of the Act; standards for the scheduling of diseases; funding mechanisms; and how future policy ought to be developed.

Labour is primarily concerned with the recommendations relating to levels of evidence and scheduling. They also disagree with the recommendations for future policy development.

A number of community groups representing injured workers also attended the public meetings and made presentations primarily relating to issues around individual compensation claims.

III. Significant Contribution

ODAP Report

The draft Report recommends that "the statement of legal principles expressly adopt the same test that the courts apply and at the same time acknowledge the link between the Appeals Tribunal's 'significant contribution' test and the 'material contribution' test [used by the Supreme Court of Canada]."

The leading case which establishes the "material contribution" test is *Athey v. Leonati* in which the Court indicated that:

***** "... causation may be established where the defendant's negligence 'materially contributed' to the occurrence of the injury.

***** A contributing factor is "material" if it falls outside the *de minimis* range.

***** It follows that the plaintiff does not need to prove that the defendant was the sole or even the primary or predominant cause of the injury. If the defendant was part of the cause of the injury, he or she is liable, even though his act, alone, was not enough to cause the injury."

Noting that the Appeals Tribunal has adopted the significant contribution test, the Report states that: "It is now generally, although by no means universally, accepted that the WSIB should follow similar rules for establishing causation to those used by the common

law courts." The Report also states that the "significant" and "material" contribution tests should be considered equivalent.

Views of Stakeholders

Many employers strongly oppose this recommendation. For example, The Canadian Manufacturers and Exporters submission states that:

> We maintain that for multi-causal conditions, the test for causation should be the primary contribution test where there is scientific evidence for causation...a higher standard should apply to determine entitlement as full compensation is granted under the workers' compensation system. [Emphasis in original.]

The CME brief goes on to state that importing

> ... a tort test into a "no fault" system ... is inconsistent with the principles outlined in Meredith ... inherently unfair to employers and individuals not covered by the workers' compensation system [and] also undermines prevention within and outside the WSIB system …The use of the Athey decision is an inappropriate application of common law principles [because] ... Athey dealt with an injury, not a disease, case. As well, the Athey decision was based on an apportionment system, not a full compensation system. Lastly, and most importantly, the use of a tort test, based on the Athey decision, will move occupational disease policy towards a 'tort' based or "negligence" based system of law, and away from the 'no fault' systems of workers' compensation ...

Another brief from an employer representative[1] states:

> Since the Court's decision concludes that 25% contribution to the cause of an injury is outside the *de minimus* range, what exactly is the upper extreme of the *de minimus* range? ...Wouldn't the exact range of *de minimus* have to be defined in order to apply the principle as a matter of policy?

This brief goes on to say that the

> Supreme Court decision on *Athey* hinges on the facts presented in the lower court, namely, that there was a pre-existing spinal weakness that was pushed over the edge into a disc herniation by the negligence of the defendant. Both the pre-existing condition and the accidents had to be present for the injury to occur, the Supreme Court ruled, but the accidents are held completely responsible because their 'push' was seen to be material to actualizing the herniation. How would this be applied in cases of disease? How would one know, for example, that a worker's lung cancer was contributed to by both cigarette smoking and inhalation

[1] Bruce Conard, Vice President Environmental and Health Sciences, Inco Limited. Dr. Conard was also a member of the ODAP.

> of a chemical in the workplace and not caused solely by cigarette smoking alone? [Emphasis in original.]

The brief of the Employers' Advocacy Council also opposes using the significant contribution test but goes on to state that if the

> "Athey Tort Test" is the test to be applied to Occupational Disease Claims [then] the whole thing should be applied including apportionment, which is currently being applied to certain occupational disease claims (viz. hearing loss claims and COPD).

The Council also submitted that the WSIB has a legal requirement to undertake an economic impact analysis of the recommendations in the Report.

Labour representatives support formal adoption of the significant contribution test. For example The Office of the Worker Advisor submitted that:

> Injured workers – who gave up their right to sue as part of the historic compromise – should not be required to meet a causation test that is more onerous than that which is used under the common law. The formal adoption of the significant contribution test and the recognition of its equivalence to the material contribution test will ensure that this principle is respected.

Citing several decisions of the Appeals Tribunal, the Office of the Worker Advisor's brief goes on to state:

> It is therefore clear from the case law that the language of the statute itself requires that causation be determined in a manner at least as generous as common law. Imposing a causation test that is more onerous than the one used at common law constitutes a significant narrowing of the scope of entitlement that would be available were they able to sue at common law. It is our position that adopting a causation test more restrictive than that used at common law is therefore inconsistent with the Act and consequently exceeds the Board's authority under the statute.

Discussion and Conclusions

How can two groups of stakeholders take such widely divergent views as to what the law is? The answer, in my view, is that this is not a dispute about what the law actually says. It is a dispute over its fairness and the consequences of its application.

To labour, formal recognition of the significant contribution principle culminates a long effort on their part to seek compensation for workers where the workplace was a contributing factor but not the sole cause. Employers are concerned about fairness in cases where they could be held 100 per cent responsible for an expensive compensation claim that may not have been primarily caused by a workplace. Employers are also

concerned about the enthronement of a principle that, in their view, would add significant costs to the system. There was no submission from employers that claimed that the test would be unlawful.

One employer representative with formal credentials in compensation law participated in the public consultation. In his oral presentation L. Liversidge stated that the WSIB system had already established principles of causation similar to those enunciated in the Supreme Court's Athey decision (referred to above). He submitted that:

> In fact under the workplace safety and insurance system, Athey-type cases have been adjudicated in a like way of Athey ... for the last thirty or forty years. In this respect the ... system was well ahead of the Supreme Court of Canada in establishing principles of causation.

In other words I believe that he is saying that the significant contribution test or some version of it (e.g., "the thin skull principle") is embedded in existing compensation law.

This issue then becomes - what *are* the consequences of formally recognizing the significant contribution test?

For example, Dr. Conard, also speaking for employers, states that such recognition would place a difficult evidentiary burden on the system, as it would have to sort out and weigh various causal factors. In my view this is indeed a difficult burden but it is not a new one as it is already borne by the current compensation system. Adopting formal guidelines for evaluating evidence, as recommended in the Report, will assist in this process, not impede it.

The Employers' Advocacy Council submits that if the significant contribution test is imported from tort law then the concept of "apportionment", an integral part of tort law, should also be imported. Employers would then be held responsible only for their share of what caused a disablement. Some employer submissions note that benefits for hearing loss and COPD are already subject to apportionment in the WSIB system.

I have reviewed legal opinions on apportionment from the three main parties involved with this process (labour, employers and the WSIB). While the issue is not completely cut and dried, all of the legal opinions seem to agree that apportionment is not legal under the current Act. With respect to hearing loss and COPD, I am advised by Board staff that the Board does not consider this to be apportionment of benefits. When calculating the non-economic loss (NEL) benefit the Board pays a NEL benefit for the work related permanent impairment.

What other aspects of tort law could seep into the WSIB system as a result of formally adopting the significant contribution test and what would the consequences be?

I quote at length from Mr. Liversidge's oral presentation because I believe that he best summarizes the employers' case.

> In tort, an evidentiary burden must be proved or disproved by the parties involved. As workplace safety and insurance is an inquisitorial process and not an adversarial one, the investigative process is to a large degree out of the control of the individual employer – and rightly so. However an avoidance of a discovery type and intrusive type of a tort liability inquiry scheme in workplace safety and insurance is only possible when the system by design departs from the process required from the tort liability scheme. While the ODAP report suggests that there is no burden of proof on either party in the WSIB system this remains true ... The onus is on the Board to establish an employment linkage. Without this onus the system spins apart. If employers are expected to compensate workers for occupational diseases where there is only a tenuous relationship to the employment, employers must be provided with the same intrusive, investigatory powers as we see in the tort system to explore non-occupational links. This would be a mistake. Establishing a clear burden [on the WSIB] to establish causality ensures legal fairness and this cannot be removed.[2]

In my view the recognition of *one* aspect of tort law, the significant contribution test, places no onus on the system to recognize other aspects of tort law. The Athey test has been more or less in effect for some years now and this has not led to any obvious pressures for the importation of other aspects of the law of torts. Its use does not undermine the Board's duty in law to establish the facts, nor does it alleviate the Board's responsibility to establish clear causation by workplace exposure before granting a claim. It is a test for determining when causation has been established. It is not a key to removing or minimizing causation in the equation.

Could the WSIB Board adopt a "primary or predominant contribution" test? The Act specifies that a worker is entitled to benefits if he was impaired by a disease that is due to the nature of any employment in which the worker was engaged. Apparently, there has been very little judicial determination of the term "due to the nature of employment". However, the Appeals Tribunal (as noted above) and the courts in some other provinces have adopted "significant" or "material" contribution as the appropriate test to determine if a disease arose from "the nature of employment". The legal advice I have received, and accept, is that if the WSIB Board of Directors formally adopted a "primary contribution test" under the current Act, this would be subject to legal challenge that would likely succeed.

Another concern is that at first glance, the idea that significant contribution is "more than *de minimis*" could make it seem to be interpreted as just a "little bit more than a little bit" and that does not sound like very much! However, I do not believe that this is the intention of the test. The test rests on the word "significant". Webster's dictionary defines "significant" as "having or likely to have influence or effect: IMPORTANT, WEIGHTY".[3]

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[2] This is based on unedited transcript where I have occasionally taken the liberty of correcting obvious errors.

[3] Webster's New Collegiate Dictionary (1976) Use of upper case in original.

The question has been raised as to what the upper limit of *de minimus* would be. Would it be 25 per cent as identified by the Supreme Court or some other number? The Report deliberately avoids equating "significant" with a certain percentage. Any chosen number would be arbitrary and lead to fruitless debate as to whether a certain causal factor achieved a numerical threshold or not. The meaning of the word "significant" is what should be the guide in each case. This will ensure that the door is *not* open to awards based on tenuous, trivial or speculative workplace factors.

To illustrate, I draw attention to a submission I received as part of the public consultation. It was from an individual indicating that her claim for an occupational disease had not been accepted. She enclosed a copy of the letter that she received from the WSIB in early 2004. It states in part:

> If the disease is not listed in the Schedules, and a relevant policy has not been developed, the decision is based on the real merits and justice of the individual case. It is necessary to establish that the employment in the instance caused the worker's disease.
>
> There must be satisfactory proof that the accident or disablement happened as reported and *a clear and causal connection* between the exposure and disablement the worker is claiming. [Emphasis added]

Employers have raised two other important issues concerning the significant contribution test, both of which relate to cost. The first issue concerns what, if any, additional cost burden the test may impose on the system and whether or not the Act requires an evaluation of this before the test can be adopted. The second issue is the much broader question of whether there should be fundamental changes to how occupational disease claim awards are funded.

The Employers' Advocacy Council submitted that it

> believes an economic impact analysis is required. Section 161(2) of the *Workplace Safety and Insurance Act* reads: "The Board should evaluate the consequence of any proposed change in benefits, services, programs and policies to ensure that the purposes of this Act are achieved".

The purpose clause of the Act referred to in the Council's brief, states that "The purpose of this Act is to accomplish the following in a financially responsible and accountable manner". Part 4 of the purpose clause states: "To provide compensation and other benefits to workers and to the survivors of deceased workers".

While the Employer's Advocacy Council brief refers to an economic analysis of the Chair's Report as a whole, the part of the Report that clearly is of concern is the recommendation for the recognition of the significant contribution test. Is the Board

obligated by statute to conduct an economic impact analysis of this recommendation before accepting and or rejecting it?

In my view the answer is "no" for two reasons. First, the Act imposes a duty on the Board to "evaluate" the consequences of various things. It does not define "evaluate". Conducting an "economic impact analysis" would be an option open to the Board with respect to its evaluation of the Report, but this is clearly not mandated in the Act. Second, it is the contention of the Report that formal adoption of the significant contribution test by the Board is simply an affirmation that the Board's own current practices are in accordance with the law. If a cost impact study were indeed to show that the significant contribution test has resulted and/or will result in additional claims being allowed, the Board could hardly decline to comply with the law because it was too costly to do so.

But even if the Board is not legally obligated to carry out an economic or cost impact study, what about the cost issue? Is the significant contribution test resulting in more costs to the WSIB and will its formal recognition add further to costs?

When I wrote the ODAP report, I took the view that since "significant contribution" has been accepted *de jure* by the Appeals Tribunal and *de facto* by the WSIB that its cost impact, if any, would have already occurred. Thus, I reasoned that formal recognition of what already exists could not, by definition, have any additional material impact.

Having sat through some eight days of public meetings on these issues I have come to have a somewhat different perspective.

At these meetings, worker representatives stressed repeatedly that they do not believe that the WSIB consistently applies the significant contribution test. I was told over and over again by labour representatives that the Board denies occupational disease claims on the basis of *any* evidence pointing to non-occupational factors and that claims were only allowed where there was "irrefutable" scientific evidence of workplace causation.

Since employer representatives strongly oppose formal adoption of the "significant contribution" test partly on the grounds that this will lead to new costs, they too obviously do not believe that the test is currently in wide use.

At least on the basis of these *perceptions*, employers and labour agree that even though "significant contribution" has been formally endorsed by the Appeals Tribunal, it has either not been implemented at all, or not implemented consistently, at the WSIB. If these perceptions are in fact correct then it is possible that formal adoption and consistent application of the test could well result in a higher claims acceptance rate.

During the course of preparing this report I examined the most recent information available on occupational disease costs. The data show that the number of cancer claims has risen significantly in the last few years and that the proportion of claims accepted has also been increasing. Based on only a few years data it is impossible to tell whether this

trend arises from more effective advocacy, broader application of the significant contribution test or newly available scientific evidence linking certain cancers to workplace conditions or some combination of these factors.

However I recommend that monitoring of occupational disease costs should be a priority of the WSIB whether or not it formally endorses the legal principles section of the Report. If these costs continue to escalate, as they have in the last two years, the Board should consider alternative strategies to cope with them.

This leads to the last point to be dealt with in this section. This is the broad concern expressed by some labour and employer representatives that the current system, which treats the financing of occupational disease costs no differently than it does for other workplace injuries, may not be sustainable in the long run because it cannot achieve fairness to both workers and employers. Mr. Liversidge summarized this view.

> Compensating occupational disease is not a debate about creating cost. The costs exist. [It is] a debate about who absorbs those costs, employers directly or collectively, workers directly or collectively or society at large ... Almost a quarter of a century ago Professor Weiler released his first very influential report which as most people know set out the policy for some of the most influential changes and reforms of the Ontario workplace safety and insurance scheme since [its] inception ... He addressed every leading issue facing the system at the time including the then and now perpetual dilemma of compensation for occupational disease ... He observed that the Ontario workers' compensation system was essentially established for compensation for injury arising from traumatic injury. A system funded 100 per cent by employers for injury arising out of employment made sense, was internally consistent and workable. [In the case of occupational disease] the system no longer maintained the same internal consistency. The need to establish an employment causal link, essential in a 100 per cent employer funded regime, was recognized by Weiler to be an impossible task ...[4]

The ODAP terms of reference did not include funding. I bring it up here because it is a long-standing issue and it was raised a number of times in both labour and employer submissions. My own view is that the search for a new funding formula that somehow spreads the occupational disease costs across a broader base and is therefore accepted as fair by all stakeholders, particularly employers, may be just as elusive as other aspects of occupational disease policy have proven to be.

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[4] In his first report Weiler stated that "Industrial disease bids fair to be the major battleground of the next decade, exposing serious questions about the viability of workers' compensation", ("Reshaping Workers' Compensation for Ontario" 1980). However, Weiler did not recommend a new funding formula. While his first preference was to deal with industrial disease through a universal disability system, he also recommended that the Board make more active use of schedules and where that was not possible, he recommended a framework for case by case adjudication that is not dissimilar from that recommended in the ODAP Report. ("Protecting the Worker from Disability: Challenges for the Eighties" 1983)

Nonetheless I do recommend that the Board take thought on the issue of funding formulas and consider asking WSIB staff to prepare a paper on the subject, which could be circulated, for public comment.

IV. Benefit of the Doubt

ODAP Report

The last part of the legal principles section of the Report cites section 119(2) of the Act which creates a statutory benefit of the doubt provision. It says:

> If, in conjunction with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue should be resolved in favour of the person claiming benefits.

The Report states that this provision relates to "issues" not to the final discussion and may apply each time there is an issue for the decision-maker to decide.

Views of Stakeholders

Employers dissented from the interpretation of section 119(2) of the Act in the Report. Their comment, which was included in Appendix G2 of the draft Report, is that this interpretation "implies that a claim is decided in favour of the claimant when one or more facts upon which that claim hinges and that may as likely as not be true are deemed to be true ... This interpretation [incorrectly] expands s.119(2) ...

The Canadian Manufacturers and Exporters brief states that the Report's interpretation "could result in the application of the benefit of doubt to an ever-increasing number of sub-issues resulting in an artificial and mechanical approach to adjudication. Such an approach would have the effect of increasing entitlement beyond what is intended by the statute." It recommends that the Report clarify what is an "issue" for purposes of s.119(2).

The Employer's Advisory Council submitted that: "The WSIB policy branch, provide an interpretation of s.119(2) as it pertains to the adjudication of Occupational Disease. Our concern is that the proposed interpretation of s.119(2) contained in the draft report may have the effect of applying the benefit of doubt to an ever increasing number of sub-issues which may in fact require decision-makers to tally the 'score' of the contentious issues on which they base their decision."

The Office of the Worker Advisor supports the interpretation offered by the Report and further recommends that the statement of legal principles should recognize that the same interpretation ought to apply to claims under the Workers' Compensation Act.

Discussion and Conclusions

During the drafting of the Report there was no discussion or suggestion that s.119(2) had heretofore applied only to the final decision and that the Report's interpretation would therefore expand the original meaning. It was, and still is, my view, which is supported by WSIB legal staff, that the interpretation in the Report correctly expresses the intended meaning of the provision. Had the Legislature intended that the benefit of the doubt provision apply only to the final decision presumably it would have inserted the word(s) "claim" or "final decision" instead of "issue".

Employers seem to be concerned that advocates will exploit this clause by parsing a compensation claim into a number of "issues" each designed to attract the use of s.119(2) thereby accumulating a series of decisions in favour of the claimant that could predetermine or heavily influence the final outcome. I believe that Board adjudicators are fully capable of preventing, should it be necessary, the use of s.119(2) to distort the adjudication process. Nonetheless I have redrafted the benefit of the doubt section of the Report to recommend that the WSIB clarify what constitutes an "issue" under s.119(2).

With respect to labour's suggestion I recommend that the Report's interpretation also apply to a similar clause in the *Workers' Compensation Act*.

Concerning the Employers Advocacy Council's recommendation that the WSIB "policy branch" provide an interpretation, I can only say the interpretation in my Report *was* drafted by WSIB staff.

The other sections of the legal principles part of the Report, "burden of proof" and "standard of proof" are generally supported by the stakeholders.

V. Role of Evidence

ODAP Report

The second major section of the Report deals with how evidence ought to be used for policy making and adjudication.

The introduction to this section states in part:

> Evidence regarding occupational disease claims may come in different forms including for example, factual employment history, medical diagnosis of the disease, disease aetiology, exposure estimates, exposure-response information through studies on workplace populations, third party observations and anecdotal reports. It is important that all relevant evidence be gathered prior to scheduling entries or developing policies and prior to claim adjudication. Equally important, not all evidence is necessarily accorded equal weight. The decision-maker or

> policy analyst must evaluate each piece of evidence to establish where it fits in the continuum of relevance and validity.
>
> ... In drafting disease policies or entries of Schedule 3 or 4, the primary evidence that is considered is scientific findings.
>
> In contrast, the adjudication of individual claims may require consideration of a number of other types of evidence including employment history, hygiene exposure assessment, third party observations and anecdotal reports, as well as scientific evidence.
>
> Most often, medical or scientific evidence is used to establish work-relatedness. At times however, this evidence may be weak or conflicting. There are, as well, other types of evidence that may be available ... such as a cluster of cases [or] evidence from the worker, employer and/or other persons in the workplace.
>
> It should also be pointed out that establishing causation for a disease does not have to be done with scientific certainty. Rather, the causal link between workplace and disease must be established using the legal standard, which is based on the balance of probabilities taking into account all of the evidence.
>
> ...That said, it must also be said that mere speculation is not enough to establish entitlement under the WSIA.
>
> The statement of legal principles should make it clear that the WSIA requires that a disease be work-related before benefits may be paid ... [and] the evidence must demonstrate some credible or plausible connection between the employment and the disease.

The "role of evidence" section also includes a description of the various kinds of evidence including epidemiology, toxicology, employment, exposure and individual medical history.

Views of Stakeholders

The Canadian Manufacturers and Exporters submits that there should be a

> requirement that the WSIB's Occupational Disease Medical Consultant provide an opinion on each case, thereby ensuring that each claim contains the supporting reasoning that will clearly explain the medical cause/effect that supports the decision-maker. The adjudication standard should not be a unilateral decision by a layperson that may not be qualified to interpret medical evidence.

The Office of the Worker Advisor's brief states that:

> The Draft Report does not, however, state the question that must be considered...any review of the scientific evidence must begin with a review of

> whether it is more likely than not that employment was a significant contributing factor ...

Moving to specific kinds of evidence the OWA states that it cannot

> accept the conclusion of the Draft Report that, "well-conducted epidemiological studies offer the most persuasive evidence of the relationship between exposures and disease" ... No one type of evidence should be given preference over others. Giving precedence to epidemiological evidence ... will make it difficult for workers to obtain entitlement [where] little or no epidemiological studies exist. Workers ... should have their claims adjudicated using the best available evidence, not have them denied because of a lack of evidence.

The OWA believes that the "evidence-based clinical medicine" is the most appropriate approach for dealing with scientific evidence. It also submits that "workplace and industry history" should be a category separate from "individual employment and exposure history".

Occupational Health Clinics for Ontario Workers submit that with respect to the adjudication of individual claims the Report's wording "adjudication of individual claims *may* require consideration of [employment history etc.]" ought to be changed to "*should* require".

With respect to the OWA recommendation concerning evidence-based clinical medicine, the CME submits that the role for evidence based-clinical medicine should be limited to identifying areas where the WSIB needs to seek out expert medical advice.

Discussion and Conclusions

The CME recommends that the WSIB's medical consultant provide an opinion in "each case". Currently medical consultants do provide opinions on cases where they are required. I believe that a requirement for medical consultants to be used in every case would add expensive and unnecessary bureaucracy to the process.

The Office of the Worker Advisor believes that adoption of the Report will mean that occupational disease claims will not succeed unless there is persuasive epidemiological evidence. This is clearly not the intention of the Report. It does state that not all evidence may be granted equal weight. However, various sections of the Report make it clear that all evidence must be considered in the adjudication of a claim. Nowhere is it stated or implied that an individual claim must fail if it cannot be supported by solid scientific evidence. Moreoever, the Report does not recommend or suggest that there is or should be a "hierarchy" of evidence in the adjudication of a claim.

With respect to "evidence-based clinical medicine" advocated by the OWA I observe that the purpose of this section of the Report is to describe various kinds or types of evidence.

"Evidence based clinical medicine", as I understand it, is not a *type* of evidence but rather a *method* for gathering it and as such would not fit in this section of the Report.

I agree with OHCOW's recommendation with respect to the adjudication of individual claims and I have replaced the word "may" with "should" in the appropriate section of the Report.

VI. General and Specific Causation

ODAP Report

The Report sets out and recommends the use of the "Bradford Hill criteria".

Views of Stakeholders

The Office of the Worker Advisor is concerned that simply following the Bradford Hill criteria could result in scientific methodology and standards being substituted for legal ones. It submits that the Report should qualify its recommendation with respect to the Bradford Hill criteria with wording originally submitted by worker representatives to the ODAP, which is as follows.

> The epidemiological projects [the Bradford Hill] framework was meant to judge began from a skeptical, negative assumption regarding their research hypothesis. The Bradford Hill consideration originated as a device for considering when it would be permissible to make the "leap" from skepticism to a positive finding of an association between exposure and disease. In the workers' compensation context, however, this framework must be used in accordance with the legal principles underlying the proper adjudication of claims. As discussed above, that means approaching competing hypotheses from a position of neutrality and making a determination on the balance of probabilities. Decision-and- policy makers must avoid using the Bradford Hill considerations as a checklist of skepticism rather than a tool for comparison.

Employers' submissions generally supported the presentation of the Bradford Hill criteria.

Discussion and Conclusions

I believe that the Report places the Bradford Hill criteria in a clear and appropriate context that requires no further qualification.

VII. Specific Causation

ODAP Report

This section of the Report deals with the application of scientific data to an individual claim particularly where such data is incomplete, contradictory or does not exist. It states in part:

> Where there is no clear evidence of a relationship between exposure and outcome, either due to limitations associated with study design or lack of statistical power, the adjudicator can look to individual subgroups identified in the studies or special circumstance within the claim that may be similar to those identified in the studies. In instances where conflicting evidence exists between studies, the decision-maker must review in detail each study to decide if all studies should be accorded equal weight...
>
> If conflicting evidence is found to be equally weighted for and against a relationship between exposure and outcome, then the decision-maker must seek out other information to determine if the individual's exposure pattern is consistent with the individual's disease.
>
> Where there is no research concerning the relationship between exposure and outcome, it must not be assumed that there is no relationship between the work exposure and disease outcome.
>
> ... Other important sources [include] the worker, the workers' representative or survivors, the employer(s) or their representative(s) and health care professionals involved in the care of the worker. [Also] there is no scientific evidence with a direct bearing on the claim; there may still be information from the research literature or scientific tests that can be usefully applied to the claim. While not intended for this purpose, it is still possible to use some principles of the Bradford Hill criteria ...

Views of Stakeholders

The Canadian Manufacturers and Exporters object to the paragraph concerning conflicting evidence "as vague and ambiguous".

Labour representatives also raise questions. The OWA submits that "in accordance with the inquisitorial nature of the system recognized in the statement of legal principles, all available evidence should be gathered prior to making a decision."

Discussion and Conclusions

I believe that this section does provide a reasonably clear statement of how specific causation needs to be determined and that this must occur within the context of the legal

principles which govern the system. Nonetheless, I have redrafted this section of the Report in a way which I hope will meet the concerns expressed by stakeholders.

VIII. Adjudicative Channels

ODAP Report

This section of the Report deals with three issues:
1. the role of schedules;
2. standards for assigning diseases to schedules of policy; and,
3. the use of qualifying criteria in the disease and process columns of the schedules and whether disease can appear in more than one schedule or more than once in a schedule.

With respect to the role of schedules the report recommends that the schedules are not necessarily the preferred or "default" adjudicative channel. Rather, a disease should be entered into the schedules only where the amount of evidence fulfills the scientific standard recommended in the Report. The Report also recommends that the Bradford Hill criteria should play a major role in deciding which adjudicative channel is appropriate for a particular disease.

The Report recommends that a disease be entered into schedule 4 when there is:

> Strong and consistent epidemiological evidence that in virtually every case the disease occurrence linked to a single cause and that cause is associated with an occupation, workplace or work process.

The recommended standard for schedule 3 is:

> Strong and consistent epidemiological evidence supporting a multi-causal association with the disease, one cause being occupation ...Where the disease outcome is common in the general population and is often attributable to non-occupational factors and the work-relatedness of individual claims is often rebutted, it is preferable not to use Schedule 3.

The recommended standard for policy is:

> Strong and consistent epidemiological evidence supporting a single or multi-causal association with disease, one cause being occupation. This category can be used when Schedule 3 criteria are met but the process cannot be defined ... policy affords a more flexible approach for drawing broad guidelines for adjudication [because they] can focus on specific subgroups, levels of exposure and occupational categories to a degree that is not possible in the schedules.

The recommended standard for case-by-case adjudication is “inconclusive evidence as to whether an occupation is a definitive or likely cause of a disease”.

Schedule 3 confers a rebuttable presumption that a disease is work-related. The Report recommends that guidelines be developed as a structured approach to determining whether the presumption is rebutted. However they should not be viewed as a set of “rules”.

Finally, this section of the Report recommends that:

1. Qualifications may not be entered in the “disease” column [of the schedules]. However, exposure limits, but not latency periods may be entered into the “process” column.
2. The same disease may appear in both schedules and more than once in the same schedule. Where a disease appears in both, it is essential that the information contained in the “process” column is sufficiently distinct so that it is clear where a worker’s case should be decided.

Views of Stakeholders

Employer submissions do not question the overall approach adopted by this section but do take issue with the wording of the some of the recommendations. Labour submissions oppose the approach recommended in the Report and present their alternative.

The Canadian Manufacturers and Exporters recommend that the following be adopted as the standards for the use of the schedules.

Schedule 4: “There exists conclusive epidemiological evidence that in every case the disease occurrences are due to a single cause, which is associated with occupational exposure.”

Schedule 3: “There exists strong and consistent epidemiological evidence supporting multi-causal factors for the disease, <u>the primary factor being an occupational exposure</u>.” [Emphasis in original].

The CME also points out that the Report does not discuss “adjudicative binders” even though they were discussed at ODAP meetings and that the Report should contain a recommendation with respect to how they fit into the picture. The CME recommends that existing adjudicative binders be converted to draft policy that would be subject to stakeholder consultation.

Finally, the CME submits that the WSIA be amended to allow latency periods to be entered into the process column of the schedules.

The Office of the Worker Advisor’s brief, expanding on the position submitted by worker representatives to the ODAP, states:

> ... the appropriate threshold standard for scheduling is general causation test of potential significance. The question that should be asked, therefore, is: can the workplace, process, occupation, chemical, etc. be a significant contributing factor in causing the particular disease? If this question is answered in the affirmative, then the process and disease should be scheduled ... [the Office recommends that] more diseases be scheduled [and that] the scheduling of diseases should be commonplace rather than exceptional as is now the case.

The OWA submits that the standard proposed for schedule 4 in the Report diverges from the proposed legal test because it states that:

> the disease have only one cause, where the legal test expressly permits multiple causes as long as employment is a significant contributing factor [and] it requires that the association between the workplace and the disease be established by "strong and consistent epidemiological evidence" and, in so doing, requires that a scientific causation standard be met rather then a legal one.

Following this line of reasoning the OWA proposes that:

> A disease ought to be included in Schedule 4 when the best available general evidence dictates that each case in the defined class would be allowed if properly adjudicated on a case-by-case basis. In other words, there is certainty of adjudicative outcome.

Turning to schedule 3, the OWA believes it should include all diseases and process for which general causation (i.e., potential significance) can be established, but for which the outcome of individual cases ... would not be certain.

Labour also disagrees with the Report's proposed standard for policy and in particular with the use of policy to establish minimum exposure levels or latency periods. They believe that the use of policy ought to be discontinued.

Labour agrees with employers that "adjudicative advice binders" should be dealt with in the Report. While employers would like to see these converted to draft policies, the worker representatives recommend that:

> Adjudicative binders should be used to assemble the best available evidence regarding issues of general causation/potential significance and to provide preliminary analyses that allow decision-makers to determine what research speaks to the specific claim under consideration.

The OWA recommends that the existing policies be converted into the schedules or adjudicative binders.

With respect to case by case adjudication, the Canadian Restaurant and Food Association is concerned that certain types of cases should not be adjudicated at all in the absence of

Board policy. Their brief states: “It is not appropriate, nor is it consistent with the principle and expectations of the WSIA, that front-line WSIB adjudication, without the explicit guidance of the WSIB Board of Directors pioneer disease entitlement determinations.”

Discussion and Conclusions

The wording for Schedule 4 proposed by employers posit, in my view, an impossible standard which, to all intents and purposes, could never be met. For example mesothelioma is listed in schedule 4 because it is caused by air borne asbestos. However, even in this case there are (very rare) occurrences of the disease that cannot be related to asbestos exposure. Under the employers’ proposal, mesothelioma could not be listed in Schedule 4 although virtually no one would question that it belongs there.

The wording, which the employers have suggested for Schedule 3, would rule out any disease that is not primarily caused in the workplace. This is closer to what I believe the standard for Schedule 4 should be. The employer recommendation would seem to expunge from Schedule 3 any disease that could also be caused non-workplace factors. My layman’s opinion is that this would be contrary to intention of the Act. By specifying that a claim must be related to a specific industrial process and that it can be rebutted, the Act clearly contemplates that the diseases listed in schedule 3 may also be caused outside the workplace.

As noted above, worker representatives take an entirely different tack concerning the Schedules. They advocate the general causation test (significant contribution) be used as the standard for the use of Schedule 3 as well as case adjudication. Labour is certainly correct in its view that if this were the standard, scheduling of diseases would be commonplace and from their point of view, that is an understandable objective.

However, in my view, the purpose of the schedules is to make compensation for occupational disease quickly and easily obtainable where it can be clearly established that there is little, if any, doubt that the compensable condition was caused in the workplace. The decision to place a disease and process in the schedules is obviously a completely different thing than the adjudication of a claim. The fact that a disease is not scheduled obviously does not mean that it cannot be compensated. It means that additional steps in the adjudication process may be required before a decision can be made. It is to this process that the causation test applies.

There has been a long-standing debate concerning the standard that needs to be achieved before entering a disease into the schedules. On the whole, the WSIB have been very reluctant to add new diseases, preferring instead the policy route, and this has long been a bone of contention with labour. However, I believe that the WSIB has chosen the correct course of action. If a disease were entered into Schedule 3 simply on the grounds that it *might* be workplace-related, the result would not be quick decisions which the schedules are designed to facilitate. Rather, the result likely would be constant and prolonged rebuttal, thus defeating the original purpose of using the Schedule. This point is

recognized in the Report where it recommends that, where the work relatedness of claims if often rebutted, it is preferable not to use Schedule 3.

With respect to Schedule 4 worker representatives submit that “certainty of adjudicative outcome” (in favour of the claim) should be the standard for entering a disease into Schedule 4. Certainly if one had the foreknowledge that claims for a currently unscheduled disease, would always be accepted for evermore, then entering such a disease into Schedule 4 would seem like a practical step. However, it seems to me that the WSIB could not arrive at a point of such certainty unless it was based on the kind of evidence that has been proposed in the Report as the standard for Schedule 4.

Worker representatives see no role for the policies, which, as noted above they believe should all be converted either into the schedules or adjudicative advice binders. I disagree as well with this recommendation. Clearly the WSIB has come to rely on the policies as a practical and valuable tool for adjudication. Rather than attacking the fact that policies exist at all, I believe that critics would find it more productive to focus on the policies to which they take exception and urge the WSIB to make appropriate changes. The existence of an occupational disease advisory body, which I have recommended, could be helpful in this regard.

Policies have been criticized by stakeholders as being too rigidly applied (labour) and sometimes out of date (employers). I suspect that there may be some truth in both of these criticisms. To the extent that these are problems, the remedy may lie in the occupational disease advisory body that I have proposed which is discussed in the next section of this report. Part of its mandate would be to examine certain existing policies to see where they ought to be updated to reflect new scientific information and, perhaps, to correct for instances where their application may have had perverse results.

Both labour and employers feel that the Report should deal with adjudicative binders in one way or another. Labour submissions seem to recommend that some kind of new adjudicative channel be created based on such “binders” while employers want them folded into the “policy” adjudicative channel. My view is that the few adjudicative binders that have been created do not represent a new approach to adjudication. They are simply a way of organizing information that may assist the adjudication of certain kinds of claims. In future, perhaps more of them will be developed as circumstances warrant. I do not think anything would be served by adding to the Report some kind of guideline with respect to when or how they should be produced.

Finally I wish to deal with the issue raised by the Restaurant and Food Association because I think they have raised a legitimate point. The Association is wrong to suggest that the WSIB could simply decline to adjudicate a case because it had not established a policy. In law the WSIB cannot decline to adjudicate a case. However, it is my understanding that the WSIB *can* initiate a process to review the scientific evidence related to the effects of a certain workplace exposure while at the same time undertaking the adjudication. In this case, the parties to the adjudication would be put on notice that such a review is taking place. This is not a perfect solution, but I believe that such a

procedure would be appropriate in the event of a "leading" claim that related to a relatively common workplace exposure, and I have revised the appropriate section of the Report to reflect this view.

VIII. Future Consultation and Policy Development

ODAP Report

The report recommends that the WSIB establish an advisory committee on occupational disease. Its functions would be to advise the WSIB on occupational disease policy issues. Membership would be drawn primarily from the scientific community. Stakeholder representatives would not be appointed to the committee. Among other things, the committee would approve an annual report on occupational disease issues.

Views of stakeholders

Labour stakeholders essentially would like to see the re-establishment of the Occupational Disease Panel. A discussion of the history of that panel is contained in a background memo that accompanies this report.

The Office of the Worker Advisor brief states that such a body would report directly to the Board of Directors and should be "permanent, independent and tripartite". In addition to ensuring that "scheduling and the development of policy and adjudicative advice occurs on an ongoing basis and that independent input is sought" it would also conduct and publish research, carry out educational activities including funding occupational medicine studies for health professionals, and make "recommendations on new issues and evidence as they arise".

Employer views are summarized in the Canadian Manufacturers and Exporters submission, which rejects the idea of a permanent consultation group. It recommends that "future consultation be determined on an as-needed basis [with the existing Consultation Advisory Group] either provid[ing] the members or recommend[ing] members for service on ad hoc panels created to consult on the specific issue". Recommendations would be reviewed by the Consultation Advisory Committee, which would refer them to the WSIB with "additional commentary or revisions".

The OWA disagrees with the employer proposal because the

> need for oversight, research and policy development is constant and ongoing and cannot be met by *ad hoc* panels [which] would be unable to engage in the strategic planning required to ensure the systematic, regular and timely review required. The Board's reliance on outdated policies is already a huge problem ...

The OWA supports the ODAP Chair's observation that there is a need for an "ongoing process that plays an oversight role in the area of occupational disease policy and has access to the WSIB Board of Directors". However, it opposes the Chair's proposal because it would not involve stakeholder representation or be "transparent"; it would lack

resources; and it would encourage "the application of a scientific rather than legal causation test".

The Canadian Manufacturers and Exporters oppose the model put forward by worker representatives. In support of their position, they cite the Chair's concerns that "aside from its proposed size and cost [the labour model would] parallel the occupational disease policy and research responsibilities that are carried out within the [WSIB]. This could lead to wasteful duplication and possibly dysfunctional 'competition'".

However, the CME does not support the Chair's proposed body because it would be permanent and it would not include stakeholders.

Dr. Conard, an ODAP panel member, submitted another alternative. He suggests that there are three distinct phases in occupational disease policy development and that a consultative process should be individually tailor-made for each of these phases.

The first phase is that of deciding which issues will receive priority attention. This would be done by a permanent group representing a broad cross section of stakeholders. The second phase is one which "analyses all relevant information and determines an action that will improve the situation in a fair manner". This would be done by various groups of independent experts on an issue-specific basis. The third phase "communicates the action envisioned and checks to make sure that all the benefits and impacts have been satisfactorily accounted for before action is implemented". This phase would heavily involve a group from the stakeholder community, which would be different from the phase one priority setting group. Dr. Conard's brief does not indicate whether it would be a permanent or *ad hoc* group.

Discussion and Conclusions

First I wish to deal with the employers concern about setting up any kind of permanent body. I believe that this concern may stem from the history of some "permanent" bodies, created in past under the auspices of the WCB/WSIB, that were perceived, by employers, to have developed independent agendas that strayed from original mandates and conflicted with stakeholder interests. Indeed this is always something to watch out for. However, the body proposed in the Report could not develop its own "life" independent of the WSIB as it would have no permanent staff or budget. This makes it very easy for the WSIB Board of Directors to take corrective action should such a body overstep or stray from its mandate.

In my view it is important that this body have "permanence" in order to promote continuity and consistency. Recommendations from here-today-and-gone-tomorrow *ad hoc* bodies can be too easily dismissed and forgotten when found inconvenient however valid they may be. Moreover, a permanent structure, with relatively long term appointment terms for its members, means that these advisors to the WSIB stay on to live with the consequences of their recommendations. This encourages responsibility and accountability.

Both labour and employers have criticized the proposed composition of this body. Labour would like to see legal interests represented and employers do not believe that any one group of experts can be expected to handle all of the complex questions that could be put before this body.

I agree with both of these views. Membership in the body should not be limited to scientists alone. In particular, its chair should have a background in the policy and legal issues that surround occupational disease. With respect to the employers' point, I see this body as maintaining coordinating and policy advisory functions but being free to take advice from expert *ad hoc* panels that it would create. I have amended the wording in the Report to reflect these two points.

Worker representatives recommend that this body be a well-funded institution, at arms length from the Board, with a broad mandate and be under tripartite governance. What they recommend is very similar in nature to the Occupational Disease Panel which was created in 1987 and disbanded in 1998. Aside from cost and the issue of whether tripartite governance is actually workable (which I will get to in a moment) I believe that this proposal is flawed for another reason. The WSIB must maintain its own "in house" professionals to deal with occupational disease issues. It would be irresponsible, if not illegal, for the Board of Directors to delegate this function to an outside "independent" agency. But if labour's option were accepted, there would be two groups of professionals within the WSIB ambit both with a mandate to advise the Board on occupational disease policy. If disagreements arise, and they surely will, the environment will quickly become competitive and adversarial, thus helping to maintain occupational disease policy development in a state of gridlock.

The recommendation in the Report avoids this scenario because while the proposed body would have some direct assess to the WSIB Board of Directors, and would receive independent advice from *ad hoc* panels, its day to day functioning would be integrated with the WSIB staff. While it and the staff will disagree from time to time, the proximity and interdependence mandated by this proposal should facilitate a relationship that is more or less harmonious and, hence, productive.

Worker representative and employers are at one when it comes to advocating stakeholder representation on whatever kind of occupational disease advisory body may be created. It is hardly surprising that this would be so. The recent history of the WSIB has been to maximize stakeholder consultation in policy development with the apparent view that consultation is a give-and-take process that will eventually lead to consensus. The problem however is that "consultation" has a different meaning for the various parties involved. As noted, for the WSIB, "consultation" is a path to consensus. But stakeholder representatives are accountable to their respective organizations, not the WSIB. Despite what the Report states in the "burden of proof" section, i.e., that the system is meant to be inquisitive not adversarial, in an overall sense the workers' compensation system in Ontario is adversarial, often bitterly so. It is inevitable that this atmosphere has pervaded bipartite and tripartite exercises, be they formal institutional creations or *ad hoc* advisory

bodies because for stakeholders, “consultation” is simply a tool for implementing their own agenda and/or blocking that of others.

None of this is to say that stakeholders should not be consulted on occupational disease policy issues. Under my proposed model, the Board would be free to adopt any number of avenues for consultation. But, consultation should be just that – a canvas for viewpoints but not devolvement of control over policy advising and let alone policy making.

Accordingly, I stand by my recommendation that stakeholders not be included as members of proposed occupational disease advisory body.