SBCI UPDATE

December 2016 *NEWSLETTER*

MESSAGE FROM THE CHAIRPERSON

My very best wishes to everyone for the holiday season and have an enjoyable, safe and healthy 2017.

SBCI has issued a recent announcement, to the effect that the SBCI Board of Directors has approved a 2½% increase in fee level for 2017. However, the fees to participate in the Assistance Program will remain unaltered for 2017.

We have just received notice that Chubb Insurance is increasing the premium rates for the workers' compensation excess loss insurance by 2%.

As soon as the school board year is over, SBCI's staff work to create an Annual Report on member boards' Workers' Compensation and H&S achievements. We have 57 of these to compile and write, and the last ones have just been completed. Ideally, our staff meets with school board people to present the findings and to discuss improvement opportunities. These meetings have begun and will continue in the New Year.

At the same time, SBCI staff has been compiling the data for inclusion in the 2015-16 Absence Study. These studies will be issued early in the New Year, followed by in-depth Annual Reports for our Attendance Support customer school boards.

I want to take the opportunity to congratulate Melissa Hewit and Lindsay Tonelli for their role in the 2016 Parklane User Group meeting. The feedback from attendees was excellent in all respects. Well done!!

I wish all the SBCI staff a restful holiday season, and thank everyone for their efforts over the past year.

If you have any questions, comments or ideas regarding the Co-operative, please give me a call or send me an email. Our aim is always to improve the services that we provide to you. I can be reached at jamie.gunn@granderie.ca or (519)756-6301 X281142.

CRITICAL INJURY REGULATION – REVISED MOL INTERPRETATION

Critical Injury Regulation - Ontario Reg. 834/90 - The legal definition of a critical injury has not changed, being: "an injury of a serious nature…". However, how the Ministry of Labour is interpreting the definition of a critical injury has changed in some important ways.

For the purposes of the Act and Regulations, a critical injury means an injury of a serious nature that incurs one or more of the following:

- Places life in jeopardy
- Produces unconsciousness
- Results in a substantial loss of blood
- Involves the fracture of a leg or arm but not a finger or toe
- Involves the amputation of a leg, arm, hand or foot, but not a finger or toe
- Consists of burns to a major portion of the body
- Causes the loss of sight in an eye

The Ministry's revised interpretation is as follows:

- the fracture of the foot or the ankle may constitute a critical injury
- the fracture of a single toe does not constitute a critical injury, but the fracture of more than one toe may constitute a critical injury
- the fracture of the hand or the wrist may constitute a critical injury
- the fracture of a single finger does not constitute a critical injury, but the fracture of more than one finger may constitute a critical injury

It is important that employers err on the side of caution and report critical

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injuries or injuries that may be considered critical under the new interpretation. Failure to report critical injuries or potentially critical injuries may result in charges under the Occupational Health and Safety Act

These changes are effective as of October 2016. If you have any questions about your school board's program, please contact your SBCI Health & Safety Specialist or Consultant.

H&S INFORMATION REQUIRED TO BE POSTED IN THE WORKPLACE

With 2016 coming to an end, it is a great time to make sure that Health & Safety information is posted in your school board/workplace.

Employment Standards in Ontario:

- Under the Employment Standards Act, 2000 (ESA), employers are required to display the most recent version of the Minister of Labour's poster.
- Download free copies of the poster by visiting Ontario.ca/ESAposter.

Health & Safety at Work: Prevention Starts Here

- Under the Occupational Health and Safety Act (OHSA), all provincially regulated workplaces must display this poster.
- Printed colour posters are available in English and French from Service Ontario free of charge or can be downloaded in English, French and 15 other languages.

Occupational Health and Safety Act

- Under the Occupational Health and Safety Act (OHSA), employers are required to post a copy of the Occupational Health and Safety Act in their workplaces.
- The act is available online for free.

Health and Safety Policy

- The OHSA also requires employers to prepare and review, at least once a year, a written occupational health and safety policy, and to develop and maintain a program to implement that policy.
- The policy must be posted in the workplace.
- The Guide to the Occupational Health and Safety Act has detailed information about how to prepare a health and safety policy.

Workplace Violence and Workplace Harassment Policies

- The OHSA also requires employers to prepare and review, at least once a year, workplace violence and workplace harassment policy/policies and to develop and maintain programs to implement those policies.
- The policy/policies must be in writing and posted in the workplace.
- The MOL's guideline entitled Workplace Violence and Harassment: Understanding the Law includes examples of workplace violence and workplace harassment policies.

Joint Health and Safety Committees Members

- In workplaces where the employer is required to establish a joint health and safety committee, the employer must also post the names and work locations of the committee members in a conspicuous place.

In Case of Injury Poster (Form 82)

- Under a regulation of the Workplace Safety and Insurance Act, 1997 (WSIA), employers are required to display the "In Case of Injury" Poster (Form 82) prominently in their workplace.

- This poster is provided free of charge to employers directly by the WSIB. Employers can get the poster online or by calling the WSIB at 416-344-1000 or 1-800-387-0750.

For more information, please see the link below.
https://www.labour.gov.on.ca/english/atwork/posting_training.php

WSIB MENTAL STRESS CLAIMS – GROWING PRESSURE FOR CHANGE

The Ontario Government and the WSIB are coming under increasing pressure from labour groups and the media to make changes to the existing legislation and WSIB policy to expand entitlement in mental stress claims beyond those that fit the present legislation and policy criteria for “Traumatic Mental Stress”.

At the moment, entitlement to WSIB benefits for mental stress is limited by the wording in section 13(4) and 13(5) of the Workplace Safety and Insurance Act which reads as follows:

“(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.

(5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer’s decisions or actions related to the worker’s employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.”

The WSIB Operational Policy # 15-03-02 dealing with Traumatic Mental Stress provides that “a worker is entitled to benefits for traumatic mental stress that is an acute reaction to a sudden and unexpected event arising out of and in the course of employment and the event must be:

- Clearly and precisely identifiable
- Objectively traumatic

- Unexpected in the normal or daily course of the worker's employment or work environment."

In the policy document are listed examples of sudden and unexpected traumatic events including the following:

- Witnessing a fatality or horrific event
- Witnessing or being the object of an armed robbery
- Witnessing of being the object of a hostage taking
- Being the object of physical violence
- Being the object of death threats

The WSIB has received some claims for mental stress which do not meet the criteria for traumatic mental stress under the legislation and policy but are based on a claim of gradual onset chronic mental stress related to the person's job duties. The WSIB has usually denied these claims but a few of these claims have been allowed at WSIAT when the claimant has raised an argument with reference to Section 15 the *Canadian Charter of Rights and Freedoms (the "Charter").* WSIAT has found in three cases that subsections 13(4) and a portion 13(5) and the related WSIB Traumatic mental stress policy infringe the worker's right to equality as guaranteed by Section 15(1) of the *Charter* and the infringement is not justified by section 1 of the *Charter*. In WSIAT Decisions 2157/10, 1945/10 and 665/10 entitlement has been allowed for WSIB benefits for chronic mental stress.

In WSIAT Decision # 665/10 a panel dealt with a claim from a Child Protection Worker who developed a mental stress condition as a result of dealing with a high volume of difficult cases involving children who were victims of physical and sexual abuse or at least risk of abuse. The panel found that the legislation as it exists creates a distinction between workers with physical disabilities and workers with certain types of mental disabilities. The fundamental question is: can that difference in how certain injured workers are treated be justified under Canadian law. The panel who heard this case found that it could not and justified its conclusion with reference to the following at paragraph 36:

"Specifically we find that: 1) people with a mental disability are at historical disadvantage; 2) the relevant subsections act to exclude chronic mental stress injuries from entitlement; 3) the purpose and the effect is to treat those with psychological problems resulting from chronic mental stress differently from those with an acute mental stress disability and from those with a physical disability; 4) these provisions create a disadvantage by perpetuating stereotypes concerning the veracity of mental disability; 5) these provisions act to hamper the return of workers with mental disabilities to meaningful employment and deny them the rights afforded other injured workers; 6) there is no good reason or explanation for the different treatment afforded those with disabilities arising from chronic mental workplace stress and those with workplace disabilities; and 7) the distinction is substantively discriminatory against injured workers who develop a mental disability over time and under the pressure of chronic stress."

Now that there have been three cases where entitlement has been allowed for WSIB benefits for chronic mental stress there is increasing pressure for change. Injured workers groups have sent a submission to the Ontario Ombudsman complaining about the unequal treatment given to injured workers with mental health conditions. There have been a number of articles in the Toronto Star with a similar theme. Ron Ellis, the former Chair of WSIAT was quoted in the Toronto Star as saying that the WSIB has the right and obligation to apply the provisions of the *Charter* and should be allowing more cases for chronic mental stress as a matter of routine.

At the moment, each case is being dealt with on an individual basis and C*harter* arguments are being raised in each relevant case at WSIAT one by one. Injured worker groups would like to see a change in the legislation and WSIB policy soon. If entitlement is expanded to allow claims for chronic mental stress then it will have a financial impact on employers and the WSIB system as a whole. The WSIB and the Ontario Government may have an estimate of the potential cost impact due to a change in entitlement but they are not discussing it publicly.

This is a relevant and important topic and we will keep you informed of significant developments.

RETURN TO WORK (RTW) PLANNING - LESSONS LEARNED FROM WSIB HEARING

SBCI recently participated in a hearing before the WSIB's Appeals Services Division that heard a worker's appeal of the denial of ongoing Loss of Earnings (LOE) Benefits after August 9, 2011. As part of the worker's appeal he argued that the school board had failed to provide a formal offer of modified work, and as a result, he should be entitled to full ongoing benefits.

The worker, a custodian, was originally injured in January 2011 and was provided with modified duties following his accident. He continued performing modified duties until early May 2011 when he went off work due to a flare-up of his compensable injury. He was deemed partially impaired by mid-May 2011, but did not return to work. The WSIB paid full LOE from May 3 to 19, 2011 followed by partial LOE until June 21, 2011. The worker was subsequently granted LOE benefits to August 9, 2011 in an earlier ARO decision. LOE beyond that date was denied as the worker was considered unfit to work due to a non-occupational medical condition.

The evidence within the WSIB file indicated that the non-occupational health issues prevented the worker from returning to work through 2011 and 2012. At some point he was cleared to return to modified duties and the school board arranged a meeting in March 2013 to discuss RTW options. The worker attended the meeting but left prematurely due to complaints of pain. As a result, a

formal RTW plan was not discussed. Several additional meetings were attempted through 2013 and 2014, however they were also unsuccessful. Concerns related to the worker's medical condition were raised and the workplace parties agreed that clarification of the worker's abilities (in relation to his compensable and non-compensable conditions) would be obtained. Again, no formal discussions regarding the duties that would potentially be performed were discussed. The picture was further clouded by a serious non-compensable injury in late 2014 that resulted in a significant injury that necessitated emergency surgery and months of hospitalization and physical rehabilitation.

By mid-2015 the parties again met to discuss RTW and it was agreed that the worker would undergo a functional abilities evaluation (FAE) to determine his abilities to perform his custodial duties. The FAE showed that the worker did not possess the ability to do any but a few minor non-essential duties, due in large part to ongoing restrictions related to his non-compensable injury. The worker disputed these findings and provided additional medical information that indicated that he had significant restrictions related to his non-compensable injury of 2014.

At the hearing the worker testified that he had many problems with the modified duties that he performed after the original accident. He indicated that at the subsequent RTW meetings between 2013 and 2015 that the school board never offered him any modified duties. He downplayed his medical conditions that led to his early departures from several of the meetings.

His union representative testified that she had significant concerns about the worker's medical issues and level of pain at the RTW meetings. She confirmed that worker had to leave the meetings due to his degree of pain. She also indicated that the school board did not offer specific RTW plans at the various meetings that were held during 2013 to 2015. She did acknowledge that the union did not feel that the worker was medically fit to RTW during much of this period.

The custodial supervisor testified that after the original accident the worker was provided with a formal RTW plan and program. As a result of ongoing complaints that he had in relation to the duties, he was moved to a different school where it was easier to accommodate the worker. After additional complaints about that school, he was moved again to another school where he remained until he went off work after his flare-up. The supervisor confirmed that the worker was given several ergonomic tools and other accommodations to allow him to continue performing modified duties. He testified that it was his understanding that the subsequent RTW discussions from 2013 onwards were using the previous modified duties as the starting point for any RTW discussions.

The school board's WSIB disability case manager also testified at the hearing. She provided significant detail from the school board's Parklane System outlining her various attempts to organize various RTW meetings and the delays she experienced either from the worker or the union. She confirmed that the starting point for RTW discussions was the duties he had previously been given. She did confirm that a formal offer of modified duties was not provided at the various meetings as the opportunity to do so never arose due to either the worker's premature departures from the meetings or the indications that he was medically unfit to work.

The concern for SBCI and the school board after the hearing was the potential risk for the allowance, in full or in part, of the worker's appeal based on the fact that no formal RTW plan was offered either verbally or in writing at the various RTW meetings between 2013 and 2015. This left the potential for the payment of possible partial LOE benefits if the WSIB ARO determined that the worker was co-operative in the RTW process over this three year period.

In post-hearing discussions with the school board, the importance of ensuring that a formalized written RTW plan is presented to an injured worker at all RTW meetings (whether in new claims or longstanding ones) was emphasized as a means of limiting the potential risk of exposure to LOE benefits, especially when there are significant breaks in the return to work chain.

Fortunately for the school board, the WSIB ARO found that the original modified duties provided to the worker were suitable and allowed for him to work within his physical deficits. The ARO found that the worker had significant post-accident non-work related changes in his physical abilities that affected his availability for work after August 9, 2011. In terms of his compensable injury, for which he received a NEL award, the ARO found that he was partially disabled and fit to participate in a RTW with the school board at no wage loss after August 9, 2011.

BC SUPREME COURT OF CANADA CASE AND THE STANDARD FOR JUDICIAL REVIEW OF TRIBUNAL DECISIONS

On June 24, 2016 the Supreme Court of Canada (SCC) released its decision regarding a BC workers' compensation case: *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority* (the "Fraser" decision).

The basic facts of the case are that seven workers who worked at the same hospital laboratory contracted breast cancer and the concern arose that the cancers may have been caused by the workplace. Three of the workers made a claim to the BC Workers' Compensation Board.

A scientific study was done which concluded that there were hazardous exposures at the work site relevant to breast cancer, but no definite causal link between these breast cancer cases and the workplace could be made. In addition, there were reports of two doctors, both specialists in occupational medicine. These doctors

were unable to support the claims. There was no expert evidence which was supportive of a causal link.

The BC Workers' Compensation Appeals Tribunal (WCAT) allowed the claims for these three workers stating that scientific proof was not necessary. The WCAT was satisfied that there was enough evidence for WCAT to be able to infer that the workplace probably caused the cancer.

The case went up through the courts on an application for judicial review. The SCC issued a decision upholding the WCAT's decision.

Privative Clauses:

Many workers' compensation statutes contain a "privative clause" which is a clause stating that the workers' compensation board/ tribunal has broad based decision making powers.

Supervisory Powers of the Courts:

Nevertheless, the courts retain supervisory powers over boards/ tribunals, and the courts are willing and able to intervene in the event of certain types of errors. Court decisions, over time, have led to the creation of a body of law on curial deference and related matters. Curial deference means, in essence, that higher up decision makers should give wide margin to the triers of fact. The BC WCAT was the trier of fact in the Fraser case.

In the Fraser decision, the SCC affirmed that the applicable standard of review requires curial deference, absent a finding of fact or law that is patently unreasonable. In essence, the question the courts should consider is: was there evidence capable of supporting the finding of fact at issue? If so, the decision was not patently unreasonable. In addition, the SCC held that the presence or absence of expert opinion evidence is not determinative of causation. Causation can be inferred. In the Fraser decision, the SCC held that the Tribunal relied upon other evidence which was capable of supporting a finding of a causal link between the workers' breast cancers and the workplace.

Workplace Safety and Insurance Act:

The Ontario *Workplace Safety and Insurance Act* (WSIA) contains a "privative clause" at section 118: "(1) The Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise….(3) An action or decision of the Board under this Act is final and is not open to question or review in a court." The Ontario WSIA's privative clause is much like that of the BC Workers' Compensation Act.

Conclusion:

The SCC's decision in the Fraser case serves to emphasize that the standard of review by the courts for workers' compensation cases in those provinces where the legislation contains a strong privative clause, such as BC and Ontario, remains a very high standard of review. For the courts to intervene the decision of the trier of fact must be patently unreasonable. There would have to be virtually no evidence to support the decision before the courts would intervene.

The WSIAT's Annual Report for 2015 states that the WSIAT "has released over 69,000 decisions, but only once has a final decision of a court quashed a Tribunal decision." The Fraser decision signals that the WSIAT's record is unlikely to take a downward turn in the future.

From time to time, Ontario school boards are dissatisfied with a WSIAT decision and are interested in making an application to the courts for judicial review. The Fraser decision shows that it will be a rare case where the facts will make such an application worth the time and expense. Before embarking on a judicial review application, school boards should consider alternative solutions such as settlement, reconsideration request, and/ or a complaint to an ombudsperson.

IMPROVE POSTURE IN THE CLASSROOM AND WORKPLACE

October was Global Ergonomics Month.

It can take about 15 years for your body to show the effects of bad posture and awkward positions. By the time kindergarten students are in post-secondary school, poor posture when sitting, awkward carrying of heavy backpacks and stresses on the body from playing video games, using mobile devices, and long hours on the computer may begin to show up as aching muscles or joint pain. Teaching students how to prevent musculoskeletal disorders (MSD) early on could prevent them from a lifetime of pain or discomfort.

MSDs are the number one type of work-related lost-time claim reported to the Workplace Safety and Insurance Board in Ontario. These are injuries and disorders of the musculoskeletal system, including the muscles, tendons, nerves and spinal discs. They can develop as a result of ongoing exposure to such things as repetitive work, forceful exertions such as heavy lifting, pulling and pushing, and awkward postures that can affect the bones, joints, ligaments and other soft tissues. The good news is that MSD hazards can be eliminated or reduced by following some straightforward ergonomics principles.

October was Global Ergonomics Month, an initiative held annually to raise awareness of ergonomics and MSD hazards. The goal is to eliminate these hazards and prevent injuries. The internationally recognized month is a great opportunity for educators to engage with students and parents on the importance of good posture and ergonomics, as well as identifying MSD hazards in classrooms, homes and workplaces.

Quick tips to improve posture in the classroom:

- Encourage students to "sit square in the chair" rather than in a twisted position or sitting with their feet tucked under them. Knees should be at or slightly below the hips, with thighs parallel to the floor.

Their backs should be straight with both feet flat on the floor.

- When sitting on the floor, children can take a few minutes to practice straightening out their backs and sitting tall.
- When standing in a line, stand straight and tall.
- Students should be sitting at least an arm's length away from any screen and it should be at eye-level, with the top of the screen level with the students' foreheads. Make sure their heads are straight and not looking up or down at the screen. Adjust the screen by raising or lowering it.
- Encourage short stretch breaks every 30 minutes.
- Find ways to reinforce good posture every day.

Resources

For more information and activities on posture and ergonomics hazards, visit the Live Safe! Work Smart! website and the Ministry of Labour's MSD web page.

FORMS WITHOUT SIN

As many of you are probably already aware, CUPE has raised the issue of SBCI receiving SIN on Forms, without the worker's consent. Over the past month, we have noticed the efforts of numerous school boards that have been sending in their Forms with the SIN suppressed. We understand the administrative task of doing so can be tedious and time consuming and we have been working to formulate a solution that we believe will resolve this issue as seamlessly as possible.

We are pleased to inform you that Parklane Systems has introduced a new feature to its software that will allow you to print/PDF forms *without* SIN. This feature will be accessible for all Forms that normally include SIN – namely the Form 6, the Form 7 and the Form 9. In order to have access to this feature, you will need to run the most recent update of the Parklane Version 12 software. You can obtain this update on the Parklane Forum (https://www.parklanesys.com/forum/). If you are not responsible for running software updates, this request will need to be redirected to your IT department. Should you have any additional questions regarding this new feature, please do not hesitate to contact Lindsay Tonelli at lindsay@sbci.org.

It has also been brought to our attention that the worker's SIN is being populated into the worker reference number field, specifically on the Form 7. Although this isn't an extremely widespread issue, we do ask that you double check this field before submitting your forms. Finally, for those of you continuing to redact manually, we have been receiving Form 7s with redactions made only to the first page. This is a reminder that the worker's SIN can be found on the top, right corner of **all four pages** of the Form 7. We ask that you please ensure the worker's SIN is completely redacted before submitting the form. Thank you.

DATES OF BOARD OF DIRECTORS MEETINGS

February 3, 2017
March 3, 2017
April 7, 2017 (AGM)
May 12, 2017

SBCI BOARD OF DIRECTORS

Carole Audet
Ronald Bender
Judi Goldsworthy
Jamie Gunn (Chair)
Janice McCoy (Vice-Chair)
Deirdre Pyke
Maura Quish
Roger Richard
James Rowe
Mary Lynn Schauer

STAFF

Brian Brown, Chief Executive Officer
Lynn Porplycia, Chief Operating Officer
Raazia Haji, Manager, Actuarial Department
Joe Huang, Actuarial Analyst
Justin Lee, Actuarial Analyst
Gary Stoller, Actuarial Consultant
Christopher James, Senior Claims Manager & Lawyer
Figen Dalton, Claims Manager
Dave Kersey, Claims Manager
Mary Luck, Claims Manager
Kelly Melanson, Claims Manager
Robert Orrico, Claims Manager
Susan Postill, Claims Manager
France Germain, Health & Safety Consultant
Michelle Montgomery, Senior Health & Safety Specialist
Louise Ellis, Director Attendance Support Services
Kathleen Gratton, Attendance Support Consultant
Anna Sequeira, Attendance Support Consultant
Zahra Haji, Manager of Finance
Karen Bertrand, Accounting Clerk
Erin McLennan, Manager, HR and Administration
Lily Li, Executive Assistant
Melissa Hewit, Manager, Data Management
Sylvie David, Bilingual Data Management Assistant
Micheline Desjardins, Bilingual Data Entry Clerk
Audrey O'Connor, Data Entry Clerk
Lindsay Tonelli, Bilingual Data Management Assistant
Rana Khalaf, IT Manager
Anwar Khalil, Programmer/Analyst
Gavin King, Programmer/Analyst