



SBCI UPDATE

July 2014

NEWSLETTER

MESSAGE FROM THE CHAIRPERSON

This is my first message to you as Chair of SBCI. My name is Carolyn Bastien and I became Chair at the May 2014 Board meeting. I am Surintendante des affaires at Conseil scolaire catholique Providence. I am honoured to accept the role of Chair and my objective is to lead SBCI in its continued development of services.

The Co-operative's Annual General Meeting was held on April 11 and Deidre Pyke was elected to fill the place vacated by Anna Sequeira. Deidre is Manager of Health, Safety & Disability at Upper Grand DSB. We welcome Deidre to our Board.

Anna stepped down from SBCI's Board after 10 years of dedicated service. We are all indebted to Anna's passion for helping SBCI in all ways. Thank you, Anna. I would also like to thank Lynda Coulter for her service as chair of the board for the last 2 years.

In the last Newsletter, Lynda announced that Mary Anne Daniels had joined SBCI to provide case management advice to school boards. I am very sad to inform you that Mary Anne passed away in early May as a result of complications following minor surgery. We at SBCI extend our deepest condolences to Mary Anne's family.

One of the main projects that SBCI staff is working on at present is to complete the Absence Study covering school board staff's absences over the 3-year period to August 31, 2013. This is proving to be a major task, primarily because of the variations in the data that we received from boards. We are planning to have the results completed by mid-summer, and will then

begin on the 2013-14 Absence Study report.

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 bastcaro@cscprovidence.ca or (519)948-9227 X230.

Carolyn Bastien
Chairperson

HEAD INJURIES AND RETURN TO WORK MANAGEMENT RESOURCES

Head injury claims are becoming more prevalent in the workplace. According to the 2012 WSIB Statistical Report - Schedule 2, the percentage of WSIB allowed lost time claims for injuries to the head increased from 5.9% to 7.9% from 2008 to 2012. During the same period, concussions and intracranial injuries doubled from 1.5% to 3.0%. For 2012, the leading body part characteristics for injuries to the cranial region consisted of concussions to female Secondary and Elementary school teachers and counsellors in the 45-49 age group category.

Head injury cases are often difficult to manage, particularly from a return to work (RTW) perspective as the post-accident symptoms, treatment and capabilities are not widely understood; are difficult to assess; and effective resources are not readily available. As a result, these cases often result in prolonged recovery and lost time from the workplace, attracting significant claim costs.

In early 2012, the WSIB established the Program of Care (POC) for Mild Traumatic Brain Injuries (MTBI). The

objective is to provide timely evidence-based quality of care, promote safe, timely and sustainable RTW, and to assist in the return to best possible pre-injury function and quality of life. The MTBI POC is available for cases within one year post-date of injury and utilizes education, cognitive rehabilitation and manual mobilization therapy interventions. Reports are to be issued to the WSIB and the employer following the initial assessment, beginning of treatment, during RTW planning and at discharge. Treatment

IN THIS ISSUE

MESSAGE FROM THE CHAIRPERSON	1
HEAD INJURIES AND RETURN TO WORK MANAGEMENT RESOURCES	1
WSIAT DECISION #923/13 SUMMARY	2
EXPANDING WSIB ENTITLEMENT FOR STRESS?	2
WSIAT UPDATE.....	3
ATTENDANCE SUPPORT CLIENT GROUP.....	3
NEW LEAVES OF ABSENCE ADDED TO ESA 2000	3
CHANGES TO SICK LEAVE AND MOVING FORWARD WITH ATTENDANCE SUPPORT	4
WORKPLACE INSPECTION INITIATIVE IN ONTARIO SCHOOLS	5
SBCI BOARD OF DIRECTORS	5
DATES OF BOARD MEETINGS	5
SBCI STAFF	5

providers are located across Ontario and consist of Physiotherapists, Chiropractors, Occupational Therapists and Psychologists. Referrals are generally initiated by the WSIB Case Manager (CM) or treating Health Care Practitioner and can also be requested for consideration by the employer through the CM. In our experience, knowledge about the MTBI POC is limited within and outside of the WSIB and requires employer intervention to drive the referral of appropriate cases.

Recognizing the gap in available resources, SBCI has embarked on a project with our French language member school boards to develop a Head Injury Guidebook to assist all of our members to manage head injury cases effectively. The Guidebook will establish best practices and provide resources and tools to assist school boards with the medical management and RTW management of head injury cases and is expected to be available in the final quarter of 2014.

If you have any questions, please do not hesitate to contact Dave Kersey at SBCI ext. 246 or email dave@sbc.org or Kelly Melanson at ext. 239 or email Kelly@sbc.org.

WSIAT DECISION #923/13 SUMMARY

In a recent favourable WSIAT decision, a school board was found not in breach of its re-employment obligations under the WSIA. Significant potential re-employment costs were to apply if the school board was found in breach.

In the circumstances of this case, a 40-year-old custodian injured his back while lifting a garbage bag of asphalt, and he received LOE benefits. For the following month and a half, medical documentation suggested the worker was unfit for any work duties. Through the use of video surveillance, the employer discovered the worker had been driving and performing modified duties, even though he said he could not. The worker was terminated for the abuse of sick leave. On appeal, the worker was seeking extended LOE benefits, and seeking to show the employer breached its re-employment obligation in the shift offered to the worker and in the termination of the worker for the abuse of sick leave.

In the decision, partial LOE was approved for one month. Video surveillance and worker testimony showed the worker was fit for modified duties on a graduated basis. Inconsistencies were found between the worker's report of his functional abilities to his doctor, and his actual functional abilities. Little weight was given to the medical documentation in the decision, as it was based solely on the worker's false self-reports to his physician, and not objective medical evidence.

It was determined that the employer did not breach its re-employment obligation when offering modified work on the afternoon shift to the worker. The afternoon shift was determined to be suitable, as it was a practical way to ensure accommodation. It was also determined the employer did not breach its re-employment obligation in the termination of the employee for abuse of sick leave, as the termination was not the result of the compensable injury, but rather labour relations issues, specifically the fraudulent use of sick leave by the worker.

In this case, the employer called witnesses to explain its return to work program and its past practice in terminating employees for abuse of sick leave. The employer's termination of their employee was considered to be "stringent" for his abuse of sick leave but was not found to be related to his WSIB claim. The employer's detailed records and the testimony of witnesses were key to a successful outcome in this decision.

The Vice Chair discussed that in cases where contradictory evidence is presented by the parties, assessing the credibility of interested witnesses needs to be looked at from the standpoint of what testimony fits within the probable version of events. The credibility of interested witnesses cannot solely be determined by personal demeanor, but rather on the probable version of events. In some cases, different versions of events may be presented without loss of credibility to witnesses, due to individual shading or individual perspectives on what has occurred. In other cases, witness credibility can suffer, as certain versions must be seen as more plausible than others and, even when allowing for individual shading, cannot all be true.

The decision shows that in some cases medical documentation may be given little weight where a worker is not candid with their doctor. Where a worker is reporting functional abilities that are inconsistent with actual functional abilities, the resulting medical documentation may be determined to be unreliable or given little weight in the decision of a case.

In addition, the decision shows that in cases where the functional abilities of a worker are in question, video surveillance may be used as evidence to show a worker is capable of work duties. It is important to remember in these cases however, that video surveillance shows only a snapshot of a worker's functioning levels and not the complete picture. When using video surveillance as evidence, WSIB OPM Policy #11-01-08 needs to be followed, which permits video surveillance to be used as evidence if there is an issue in dispute and if the decision maker is presented with information to support the investigation of an issue. In determining whether video surveillance is reasonable, the history of the worker, the circumstances surrounding the injury, and the reporting of the injury, should be considered to determine if unusual circumstances exist. Consideration should also be paid to whether new information is yielded at the beginning of the surveillance investigation, to determine whether the continuation of surveillance is appropriate.

EXPANDING WSIB ENTITLEMENT FOR STRESS?

On April 29, 2014 WSIAT released decision # 2157/09 where a panel concluded that subsections 13(4) and 13(5) of the *Workplace Safety and Insurance Act* and the WSIB policy dealing with traumatic mental stress (TMS) violated section 15(1) of the Canadian Charter of Rights and Freedoms that guaranteed the worker's right to equality. The panel found that the infringement of section 15(1) was not justified by section 1 of the Charter. There are no limits under the WSIA for entitlement to physical injuries, so why should workers with emotional injuries be discriminated against? In this appeal the panel found that the worker had entitlement to WSIB benefits for mental stress even though on the facts of the case it did not meet the criteria under the *Workplace Safety and Insurance Act* or the

WSIB policy requirements for traumatic mental stress.

The case involved a registered nurse who was considered caring and competent by colleagues but who was systematically yelled at and demeaned by a doctor working in a clinic with her over a period about 12 years. When the issue was brought to the attention of management nothing was done. The nurse began to feel pushed around, discredited, humiliated and generally mistreated. She was diagnosed with an adjustment disorder with mixed features of anxiety and depression which her treating health care providers attributed to workplace stressors. Her claim was denied by the WSIB as it did not meet the criteria under law and policy for traumatic mental stress.

The WSIAT decision has the potential to greatly expand entitlement to WSIB benefits for work related stress beyond those cases where something objectively traumatic has occurred. Under the existing law and policy, entitlement for Traumatic Mental Stress (TMS) is limited to those situations where a worker is exposed to something that is unexpected and objectively traumatic. Examples of allowable situations for traumatic mental stress in the existing TMS policy include things like witnessing a serious motor vehicle accident or being at a robbery or being threatened with serious bodily harm.

If Decision # 2157/09 is widely followed then entitlement to stress in the WSIB system would no longer be limited to situations involving sudden and unexpected traumatic events or as a by-product of a physical injury. It would now include entitlement for chronic work-related stress conditions where it could be shown that work activities or the work environment made a significant contribution to the worker's development of a diagnosed mental health condition. At this stage we do not know if the Ministry of the Attorney General will appeal the decision to Divisional Court or if the WSIB will amend its existing policy on TMS entitlement. For now, school boards should continue to report claims to the WSIB involving traumatic mental stress and other stress related conditions where the worker or his/her union indicates that they wish to make a WSIB claim. It is expected that, for now, most claims that do not involve a situation that is sudden and

objectively traumatic will continue to be denied WSIB benefits and accepted for non-occupational sick leave and LTD entitlement. We will keep you advised of further developments and will monitor the response to this decision at the WSIB and WSIAT. If you have any questions in the interim you may contact chris@sbc.org or your regular Claims Manager at SBCI.

WSIAT UPDATE

The Workplace Safety and Insurance Appeals Tribunal (WSIAT) is dealing with a large backlog of 8,100 active cases. This is significantly higher than its usual case load of around 5,000 active cases. The increased active case load at WSIAT is due to a couple of factors. The first is that WSIAT is receiving a very high volume of appeals from the WSIB that built up at the WSIB in 2012 and 2013. The second is that WSIAT has a shortage of qualified and experienced Vice-Chairs. Many experienced Vice-Chairs are retiring or cutting back from full-time to part-time positions and WSIAT has experienced difficulty attracting new qualified candidates. As a result of the increased active case load it will now take around 12-15 months to get a hearing date after a case is referred to WSIAT.

Ian Strachan, Chair of WSIAT has his appointment end in June 2014. Ian has been Chair of WSIAT since Ron Ellis established WSIAT in 1985. Under the leadership of these two gentlemen WSIAT has established a very good reputation as one of most respected quasi-judicial tribunals in Canada.

ATTENDANCE SUPPORT CLIENT GROUP

Many SBCI Attendance Support members have requested that SBCI establish opportunities for them to learn, share and network regarding their experience in relation to SBCI's Attendance Support Program.

To that end, SBCI has organized an Attendance Support (AS) Client Group as a forum to build upon our members' knowledge, expertise and skill in maintaining compliance in Best Practices and legal requirements related to Disability Management, Attendance Management and Wellness.

Since its launch in September 2013, SBCI has facilitated three AS Client Group webinar meetings and one conference call. Client group members contribute to the agenda to ensure areas covered are topical and relevant.

SBCI looks forward to hosting further AS Client Group meetings via webinar and in person, where possible, to encourage ongoing networking opportunities in a mutually supportive environment.

NEW LEAVES OF ABSENCE ADDED TO ESA 2000

On April 29, 2014, the Ontario Legislature passed Bill 21, the *Employment Standards Amendment Act (Leaves to Help Families), 2014*. Royal Assent was given on the same day. Bill 21 amends the *Employment Standards Act, 2000* (the "Act") to add three new job-protected leaves of absence effective October 29, 2014 - family caregiver leave, critically ill child care leave and crime-related child death or disappearance leave.

The most significant change that will be of concern to employers is that both the new family caregiver leave and the new critically ill child care leave will permit employees to take the leaves in periods of less than a full week. This may create scheduling difficulties for employers should an employee be in the unfortunate position of needing to make use of the leave.

FAMILY CAREGIVER LEAVE

Employees will be entitled to up to eight weeks of leave per calendar year to provide care or support to specified family members (not including aunts, uncles, nieces, nephews or cousins, but including the potentially broad category of "a relative who is dependent on the employee for care or assistance"), where a qualified medical practitioner has issued a certificate stating that the family member has a "serious medical condition."

Employees are not required to take the leave in complete weeks and no minimum period of service is required before employees become entitled to take this leave. Employees must notify their employer in writing of their intent to take the leave, and employers are entitled to request copies of the medical certificate. "Serious medical condition" has not been

defined; however, the Bill does state that it can include chronic or episodic conditions.

CRITICALLY ILL CHILD CARE LEAVE

Employees will be entitled to up to 37 weeks of leave to provide care or support to a critically ill child of the employee. The leave is not required to be taken in complete weeks. To qualify for the leave, the employee must have been employed by his or her employer for at least six consecutive months.

In addition, the child in question must meet the definition of "critically ill" - i.e. his or her baseline state of health has significantly changed and his or her life is at risk as a result of an illness or injury. Whether a child meets this definition is to be determined by a qualified medical practitioner, who is required to provide a certificate which states that the child is critically ill requiring the care or support of one or more parents and sets out the period in which the care or support is required.

Employees intending to take this leave must provide their employer with both notification in writing as well as a written plan that sets out the weeks in which the leave will be taken. If requested, the employer is entitled to a copy of the medical certificate qualifying the employee for the leave. Changes in the plan's timelines must be made known to the employer in writing, and are permissible only in the event that all of the requirements of the section remain met. The Bill also contains further provisions regarding extending the leave, limitation periods, and courses of action to take in the event that more than one child is critically ill or a child dies.

CRIME-RELATED CHILD DEATH OR DISAPPEARANCE LEAVE

Bill 21 creates a new category of leave of up to 52 or 104 weeks for the disappearance or death of a child that is a result of a crime. "Crime" is defined as an offence under the *Criminal Code*, except as prescribed. In order to be entitled to the leave, an employee must have been employed by the employer for a minimum of six consecutive months.

Employees will be entitled to up to 104 weeks of absence in the case of a child's death, commencing the week the child dies, if the death of the employee's child is

the probable result of crime. In the case of a disappearance due to a probable crime, employees will be entitled to 52 weeks of leave, commencing the week the child went missing. The Bill contains further provisions in the event that a missing child is found dead or alive or it is probable that the parent or child is involved in the crime.

Employees must advise their employer in writing of their intent to take the leave and provide a written plan of when they intend to take the leave. The leave is generally required to be taken in a single period, subject to limited exceptions.

For the purposes of both the Critically Ill Child Care Leave and the Crime-Related Child Death or Disappearance Leave, "child" for the purposes of this leave includes a child, step-child, foster child, or a child who is under legal guardianship, and who is under 18 years of age.

EMPLOYMENT INSURANCE

Employees entitled to take these types of leaves may also qualify for benefits under the Employment Insurance or other federal government grants.

Employees would be best advised to consult directly with Service Canada about their potential benefit entitlements during the period of the leave.

As noted at the outset, the new leaves of absence will come into force on October 29, 2014. Employers will need to consider how to integrate the new leaves into existing leave entitlements available to employees under the organization's policies and contracts, including collective agreements.

Taken from: Three New Leaves of Absence Added to the *Employment Standards Act, 2000* Effective October 29, 2014; Hunter, A; Gallagher Healy, J

http://www.hicksmorley.com/index.php?name=News&file=article&sid=2145&catid=6&utm_source=FTRNow&utm_medium=Email&utm_content=APR%2B30%2B2014&utm_campaign=ftrnow_Bill_21_ESAA_20140430

CHANGES TO SICK LEAVE AND MOVING FORWARD WITH ATTENDANCE SUPPORT

The Ministry of Education's changes to sick leave plans reinforce that school boards should continue implementing Attendance Support Programs. There are several clear benefits and recent supports for doing so as outlined by the Ministry of Education and case law.

First, the Ministry of Education issued *The Road Ahead: A report on continuous improvement in school board operations* on September 13, 2013. In this report the Ministry noted that Attendance Support continues to be a "key improvement opportunity" for Ontario school boards. The report stated, "In addition to promoting the well-being of staff, attendance support programs are intended to increase management capacity, reduce unnecessary costs related to absenteeism, and support student achievement with a healthy work culture and consistent staff attendance." It is important to note that this report was issued by the Ministry *during* the time frame of the current and various Memorandums of Understanding (MOU's) related to the new sick leave plan.

Second, an arbitration award was issued on February 3, 2014 supporting Thames Valley DSB's Attendance Support Program (ASP) which addresses innocent absenteeism in a supportive and non-disciplinary manner. Following a grievance from several of its unions regarding the school board's Attendance Support Program, the Ontario Arbitrator stated, "I find that the Board's ASP... is in compliance with the unions' collective agreements and with the Ontario *Human Rights Code*..." and, "The unions undertake that, so long as the ASP is not unilaterally amended by the Board, they will not allege (singly or otherwise) that the written terms of the ASP are unreasonable, violate any existing provision in any applicable collective agreement, or violate applicable legislation." It is important to note as well that this arbitration Award and the hearings took place *during* the time frame of the current MOU's.

Third, management rights were clearly outlined in a 2012 decision involving a grievance of York University's Attendance

Management Program (AMP). The Arbitrator stated, "It is well established that employers have a legitimate interest in monitoring and controlling both culpable and non-culpable absenteeism, and that an employer has a management right to establish an [AMP] unilaterally."

Despite the challenges school boards have experienced while navigating through the changes to sick leave plans, these recent and clear items provide support to move forward with Attendance Support Programs. While many school boards are currently doing so, we encourage all Ontario school boards to comply with Ministry recommendations and case law principles to establish Attendance Support Programs.

Please call our office if you would like our assistance. SBCI can work with your school board to collaborate with all key stakeholders to ensure your program is developed and implemented in a manner that is compliant with Ministry recommendations, collective agreements, legislation, case law, and best practices.

WORKPLACE INSPECTION INITIATIVE IN ONTARIO SCHOOLS

From September 9, 2013, to October 31, 2013, Ministry of Labour (MOL) inspectors conducted Phase Two of an enforcement initiative to promote health and safety in the Ontario education sector. The ministry focused on schools with woodworking shops, science labs and technological education labs, and other kinds of shops (e.g., auto body, construction and manufacturing).

This most recent initiative was the second phase of the education sector inspection initiative continuing from the earlier Phase One which was conducted from September 2011 to June 2012.

Enforcement initiatives are part of the MOL's Safe At Work Ontario compliance strategy. Although these initiatives may be announced in advance, individual workplaces are not. Initiatives raise awareness of workplace hazards and promote compliance with the OHSA and its regulations.

Inspectors' findings may affect the frequency and level of future inspections

of individual workplaces. Inspectors may also require employers to connect with external health and safety service providers, such as SBCI, for compliance assistance and training.

The goal of this initiative was to:

- continue to raise awareness of hazards in the education sector
- encourage employers to identify and control hazards
- address non-compliance with the OHSA and its regulations through appropriate enforcement action
- deter non-compliant employers, and
- enhance occupational health and safety partnerships

Almost 400 workplaces were inspected in the school systems, including:

- elementary schools (grade 7 and 8) with woodworking shops
- secondary schools with technological education labs and shops (i.e. auto body, construction, and manufacturing courses), and science labs

Inspectors issued 1,739 orders during this initiative. The top 3 orders issued were:

Failure to take all reasonable precautions in the circumstances to protect workers from hazards, such as:

- exposed moving parts on machines
- poor housekeeping and maintenance, and
- unsafe ladders and a lack of guardrails

Failure to maintain equipment and materials, such as:

- guarding devices on equipment
- lifting devices, and
- personal protective equipment

Failure to comply with information, labelling and training requirements under the Workplace Hazardous Materials

Information System (WHMIS) Regulation, such as:

- failure to affix workplace labels on hazardous materials (e.g. chemicals)
- a lack of current Material Safety Data Sheets on hazardous materials, and
- unsafe use and storage of hazardous materials

Of the 1,739 orders issued, employers were required to comply with 163 or 9.4 per cent of the orders immediately while the inspector was on site.

As of March 2014, 90% of all the orders have been complied with.

If you had an inspection done and have any questions or if you need to improve your health and safety program elements please contact your SBCI health and safety specialist.

SBCI BOARD OF DIRECTORS

Carolyn Bastien (Chair)
Ronald Bender
Lynda Coulter
Judi Goldsworthy
Jamie Gunn
Janice McCoy
Deirdre Pyke
Maura Quish (Vice-Chair)
Roger Richard
Mary Lynn Schauer

DATES OF BOARD MEETINGS

August 11, 2014
October 3, 2014
November 7, 2014
December 12, 2014
February 6, 2015
March 6, 2015
AGM – April 10, 2015
May 8, 2015

SBCI STAFF

Brian Brown, Chief Executive Officer
Lynn Porplycia, Chief Operating Officer
Wendy Achoy, Chief Actuary
Raazia Haji, Actuarial Analyst
Joe Huang, Actuarial Analyst
Shawn Tang, Actuarial Analyst
Andy Xu, Actuarial Student

Christopher James, Senior Claims
Manager & Lawyer
Figen Dalton, Claims Manager
Darlene Iwaszko, Claims Manager
Dave Kersey, Claims Manager
Mary Luck, Claims Manager
Kelly Melanson, Claims Manager
Robert Orrico, Claims Manager
Kira Locke, Paralegal Co-op Student
John Bryden, Director, Health & Safety
Services
France Germain, Health & Safety
Consultant
Jennyfer Payeur, Health & Safety
Specialist
Louise Bellamy, Financial/IT Coordinator
Karen Bertrand, Accounting Clerk
Erin McLennan, Executive Assistant
Lily Li, Executive Assistant
Melissa Hewit, Supervisor, Data
Management
Sylvie David, Acting Data Management
Supervisor
Audrey O'Connor, Data Entry Clerk
Sean Szaloczi, Data Management Assistant
Julia Barrasso, Attendance Support
Practice Leader
Byron Franson, Attendance Support
Consultant
Kathleen Gratton, Attendance Support
Consultant
Shoba Thomas, Attendance Support
Consultant
Rana Khalaf, Manager, IT Applications
Patrick Gani, Senior Analyst Programmer
Gavin King, Programmer/Analyst
Anwar Khalil, Contract
Programmer/Analyst