

UNDERSTANDING AND USE OF WSIAT MEDICAL DISCUSSION PAPERS

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19 February 2020 -- RSI Day

Workers' Compensation in Ontario

- Workplace Safety & Insurance Act
 - Covers all Ontario workers
 - Either WSIB or modified common law employer liability regime
- Workplace Safety & Insurance Board
 - Covers most Ontario workers
 - Coverage by inclusion – insured and self-insured employers
 - No fault benefits for occupational disease and injuries arising out of and in the course of employment
 - Adjudication in accordance with Act and WSIB policies, never settlements
 - Internal appeal
 - Protected from judicial review
 - External appeal to WSIAT

WSIAT 1/2

Workplace Safety & Insurance Appeals Tribunal

- Independent of WSIB, arm's length funding via Ministry of Labour
- Able to set its own practices and procedures (s. 131 & 132)
- Trial de novo rather than a traditional appellate process
- Inquisitorial rather than adversarial proceedings
- Not bound by its own precedents
- BUT bound by WSIB policy, for the most part (s. 126)
- Whole person adjudication – all relevant issues at one time

WSIAT 2/2

- Jurisdiction over most final decisions of the WSIB
- Decides whether individual lawsuits are barred by the Act
- Panel Members = Order In Council (OIC) appointments
- 1 person (58%) or 3 person(42%) Panels (WSIAT Annual Report 2019)
- Written (31%), oral and electronic (69%) processes
- 3,635 cases disposed of in 2019 = 2,684 final decisions, others made inactive or withdrawn
- Strongest level of protection from judicial review
- May reconsider its decisions at any time

Important WSIAT subdivisions simplified

- Office of the Vice-Chair Registrar (OVCR) – admin
- Tribunal Counsel Office (TCO) – legal
- Medical Liaison Office (MLO) – medical subdivision of TCO

Legal representatives and WSIAT

- Much more formal and legalistic than WSIB
- Case Record and Addenda compiled and distributed
- No foreknowledge of Panel member(s)
- No direct contact with Panel outside of hearing, only through OVCR or TCO
- No direct contact with MLO, only through OVCR or TCO

Medical Liaison Office

- Division of the Tribunal Counsel Office
- No direct contact re: individual appeals with legal representatives or Panel members, only through OVCR or TCO
- Organizes medical education events for WSIAT staff and OICs
- Oversees creation and review of WSIAT Medical Discussion Papers
- WSIAT-initiated medical assistance – see WSIAT GUIDE TO MEDICAL INFORMATION AND MEDICAL ASSESSORS
wsiat.on.ca/en/publications/WSIATMedicalGuide.pdf

WSIAT-Initiated Medical Assistance in individual appeals – MLO Officers and Medical Counsellors – Pre-Hearing

- Review the Case Record to identify gaps in the medical record – info then requested through worker rep
- Add relevant Tribunal Medical Discussion Papers to the Case Record
- Add relevant “Supplemental Medical Literature” to the Case Record – MCs only – non-binding
 - MDPs and supplemental literature usually in Addendum 1 or 2
- Identify need for Medical Assessor (MCs only) and then identify and liaise with Medical Assessor if instructed by Panel

Medical Counselors

- Five medical consultants hired by the Tribunal
 - Neurology - Dr. Paul Cooper
 - General Surgery - Dr. John Duff, Chair of Medical Counsellors
 - Psychiatry - Dr. Emmanuel Persad
 - Orthopaedic Surgery - Dr. Marvin Tile
 - Internal Medicine - Dr. Anthony Weinberg
- Doubly removed from Panel and representatives – communicate only through MLO, which communicates only through OVCR or TCO
- Must be impartial and avoid conflicts of interest

Role of Medical Counsellors

- Help reviewing medically complex cases as above
- Help recruiting of Tribunal Medical Assessors
- Help creating and reviewing Medical Discussion Papers
- Lead and support education events on medical topics for WSIAT staff and OICs

Tribunal Medical Assessors (1/2)

- s. 134 allows WSIAT to establish a list of “health professionals” to assist it with individual cases, defined in s. 2 as members of a regulated health profession
- Must be impartial and avoid conflicts of interest
- Called upon in individual appeals to answer questions put by the Panel
- Only the OICs can determine that an assessor is necessary
- OICs also determine the questions to be asked (with or without MLO assistance)

Tribunal Medical Assessors (2/2)

- Provided with a brief of case materials and interim decision on the facts
- Assessor may request additional medical information or testing, or to examine the worker
- The worker must consent to release of any information to the Assessor or to an examination
- Parties have a right to make submissions on the Assessor's report (OHCOW can help)

Issues with Tribunal Medical Assessors

- Right of parties to make submissions on Assessor, materials and questions is unevenly exercised
- Questions of credentialism, fit, currency and issue partiality
- Opinions not binding on OICs, but extremely influential
- Right of parties to adduce reply evidence is unevenly exercised (OHCOW can help Ontario workers)

Medical Discussion Papers

- Intended for lay readers
- May deal with a variety of topics
 - basic (e.g. anatomy)
 - central (e.g. causation)
 - peripheral (e.g. diabetes)
- Available at wsiat.on.ca/en/legalAndMedicalResources/medicalDiscussionPapers.html

Weight of Medical Discussion Papers

NOT policy or binding re: factual issues but VERY influential

- ADVOCATE'S HIERARCHY OF APPROACH

- USE

- To explain anatomy or mechanics
- To support a causal link

- DISTINGUISH

- This case does not fall within the four corners of an apparently damaging MDP statement, falls outside the parameters of the research cited in support of the statement, or is atypical in some identifiable way.
- You may need further medical literature or opinion on issues of general or specific causation – e.g. is the calcification of this tendon properly diagnosed as calcifying tendinitis?

- REFUTE

- E.g. a leg length discrepancy of 5 cm or more is not a valid benchmark for judging whether back pain is the result of a limp or the effect of a leg injury on the opposite leg.
- Medical literature or opinion evidence absolutely required.

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Issues with Medical Discussion Papers

- Not peer reviewed, internal MLO review process only
 - What should the review process be?
- Most are over 10 years old – subject to dated
- Some may be subject to issue partiality (strong commitment to one side or the other of a scientific debate)
- Some statements not properly framed for legal decision making
 - Horse race approach
 - What is the significance of “factors” such as weight or age?
 - occupational AND non-occupational factors
 - Sherlock Holmes approach – the Null Compensation Hypothesis
 - Falsification of all alternative hypotheses
 - Exclusivity
 - Grain of sand approach
 - Turning an objective standard already inherently “corrupted” by incommensurabilities and necessarily subjective judgments
 - RR 2.0
 - Doubling down on uncertainty

Medical Discussion Papers – Two Types

A relatively new (and sensible) division into two groups:

- CURRENT
- ARCHIVED*****

OHCOW Work

- At the request of individual worker advocates and the OFL WCB Committee, several Medical Discussion Papers are currently under review for currency, accuracy and clarity on specific issues raised.
 - Shoulder Injury and Disability
 - Carpal Tunnel Syndrome
 - Dupuytren's Contracture
 - Limping and Back Pain
 - Symptoms in the Opposite or Uninjured Leg

You can help...

- By raising specific issues you identify in WSIAT MDPs.
- By asking for stand-alone reports on these issues if they are not addressed in any of our publicly available material.
- Providing feedback as our material becomes publicly available

Contact your local clinic or ask@ohcow.on.ca