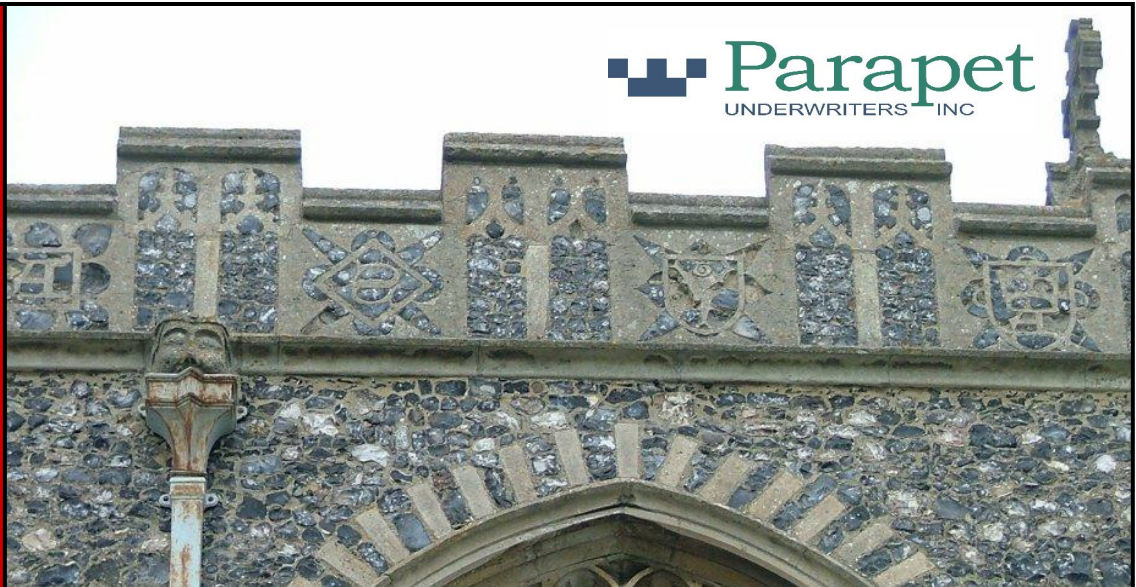


XSCOMP© Communiqué

December 2008

The purpose of this Communiqué is for self-insured employers and Parapet to share information and experiences.

The theme of our sixth edition is claims management.



If you have a potentially high cost claim including a claim for soft injuries ...

READ ON

By David Brady*

In cases where there is a likelihood of a costly loss of earnings ("LOE") WSIB claim, it is very important to have detailed information concerning entitlement and return to work issues.

For Schedule 1 employers, high cost WSIB claims will directly impact experience rating rebate and surcharge results.

For Schedule 2 employers, high cost claims are self-insured. Schedule 2 employers pay all of the claim costs plus a substantial WSIB administration fee.

Effective claims management must be proactive. Employers must clearly understand why the WSIB Claims Adjudicator has made an entitlement decision in favour of the Worker. If the Claims Adjudicator's decision is unclear, ask for clarification. If the employer is not satisfied with the response, appeal.

Section 58 of the *Workplace Safety and Insurance Act* provides employers with access to worker WSIB files. Subsection (1) states:

"If there is an issue in dispute, the Board shall, upon request, give a worker's employer access to such documents in the Board's file about the claim as the Board considers to be relevant to the issue and shall give the employer a copy of those documents."

When employers either do not understand or do not agree with the Claims Adjudicator's decision, there is an issue in dispute. This issue will have to be formalized into an Objection to the decision. Submitting an Objection is the pre-condition for the exercise of the employer's right to file access and the WSIB's obligation to provide it.

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WSIB claim file access includes access to the worker's medical information. Section 59 of the Act allows the worker to object to the employer receiving his or her medical information. The section goes on to provide a process where the Workplace Safety and Insurance Appeals Tribunal will decide whether access is granted or not.

In almost all cases, the Tribunal rules in favour of the employer because to do otherwise would unfairly disadvantage employers in the appeal process.

Employers are advised to question ongoing entitlement particularly with respect to soft tissue injuries. These types of cases also are often difficult to deal with, with respect to returning injured workers to work. These claims are, by definition, high cost claims and can only be effectively managed if the employer asks for WSIB file access.

There are two additional things employers should be aware of.

1. When the employer exercises its right to request file access and it receives the worker's health records from the WSIB, no subsequent request is necessary for file updates.

As the WSIB receives further information, this information will be shared with the employer. File access lasts as long as the issue in dispute remains unresolved.

2. When an employer receives the worker's health records, there is a strict duty of confidentiality. None of the health information obtained from the WSIB can be shared with anyone except for the purposes of the WSIB appeal. If the information needs to be shared with a third party (for example, to obtain an independent medical opinion) the health information must be anonymized. Section 59(6) states:

"The employer and the employer's representatives shall not disclose any health information obtained from the Board except in a form calculated to prevent the information from being identified with a particular worker or case."

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If you have any questions about obtaining access to a WSIB file or about any related issues, please contact us at Parapet Underwriters Inc.

**Causation is again ruled a key issue:
An Appeals Resolution Officer of the Workplace Safety and Insurance Board
rescinds benefits due to a pre-existing condition**

By Pierre Grégoire, B.C.L

An important decision rendered by an Appeals Resolution Officer (ARO) of the Ontario Workplace Safety and Insurance Board (WSIB) recently upheld an employer's objection to payment of benefits on the basis that the worker's ongoing problems resulted from a pre-existing condition rather than compensable injury. As a result, benefits paid out over a five-year period were rescinded.

Although the ruling on this claim is open to appeal through the Workplace Safety and Insurance Appeals Tribunal, its findings are significant for employers with these types of cases, as it establishes some of the conditions under which claims for recurrent benefits may be denied and/or overturned.

The worker had sustained a lower back soft tissue injury (lumbar strain) in late fall 1999, for which he sought and received loss of employment (LOE) benefits. At the time of the injury, he was in his late 30s. He returned to work gradually and then full-time in early 2000, but sought recurrent entitlement later that year.

In early 2001, the worker was informed that the initial claim had been allowed on the basis of aggravation of a pre-existing condition, and it was judged that he had returned to pre-accident capacity. As it could not be established that further problems were the result of the compensable injury, recurrent entitlement was denied. The worker then retained counsel to appeal.

Meanwhile, as the worker failed to participate in early and safe return to work efforts, the employer released him in November 2002.

But, by early 2003, the worker was successful in having the 2001 decision overturned with a ruling of "permanent impairment as a result of the injury" and was granted ongoing entitlement for LOE benefits.

In an effort to assist return to work efforts, the worker was scheduled for a Functional Capacity Evaluation (FCE) in early 2005. He missed the appointment and his LOE benefits were stopped (but later reinstated when he claimed he had not been advised of the appointment). When the FCE was eventually completed, it revealed he had not made a full effort even to return to work though he had shown a level of fitness within medical precautions, and both MRI and EMG results were normal.

The worker refused to co-operate with return to work activities even though the employer advised that it had work available for him with the precautions and at no wage loss. Accordingly, in mid-2005, his LOE benefits were suspended and his subsequent claim for chronic pain disability (CPD) denied. He appealed both decisions.

Earlier this year, the WSIB ARO considered both the employer's objection to the 2003 decision to grant recurrent LOE benefits - and all subsequent entitlement - and the worker's objection to the discontinuation of the LOE benefits in 2005 and the denial of CPD.

The ARO noted that the accident mechanics were not those of a severe accident and the objective investigations "ruled out any significant accident-related injury to the spine." In examining the medical evidence, the ARO found that "there was no active inflammatory process affecting the spine as a result of the compensable injury."

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**An updated version of Parapet's *First Report Form* is available for download at:
www.parapet.ca/xscomp/For_Insureds.html**

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And, although the worker denied having had any prior problems, results of a CT scan shortly after the injury indicated the worker had a pre-existing and ongoing mechanical low back issue that did not stem from – nor was it made worse by – the compensable accident. Rather, the underlying condition “likely prolonged [his] recovery from the compensable soft tissue injury.” After examining the results of all tests immediately following the accident, the doctor simply recommended that the worker be careful about his activities and wear a lumbar belt.

The ARO also determined that the adjudicator who overturned the 2001 denial of recurrent benefits did not rely on adequate evidence as to what tasks the worker was performing prior to the claim of recurrence.

ⁱ MRI = magnetic resonance imaging
ⁱⁱ EMG = electromyogram, a test to detect abnormal muscle electrical activity


If you have a worker’s compensation story that you wish to share with us, we would be happy to hear from you. Please do not reveal the worker’s name. If we publish your story, we will also omit your name and the name of your employer.

The Parapet Team

How to Report a Potential XSCOMP® Claim

To report a potential XSCOMP® claim, simply fill in and send the *First Report Form*, along with the *WSIB Form 7*, to Parapet either by email, fax or mail. We will acknowledge receipt of your notification of a potential claim within 48 hours.

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