

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

May 28, 2004

An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.

1 page

WSIB Releases Occupational Disease Advisory Panel Report Public Consultation Process Will Be Open Until September, 2004

WSIB Report Will Change How Occupational Disease Cases Are Decided

The WSIB today released its long awaited report of the Chair of the Occupational Disease Advisory Panel ["ODAP"]. While the Board had initially expected to develop a consensus between employer and labour representatives, not only did a consensus not emerge through the process, but, the labour and business camps submitted their own draft reports. As a result, the Chair of the ODAP, at the request of the Chair of the WSIB, has released a draft report which is planned to proceed to the WSIB Board of Directors ["BOD"] later in the year.

WSIB will be consulting on the ODAP Report throughout the Summer, 2004

The ODAP was created in 2001 with the mandate to develop guidelines for the application of legal and scientific principles to be used in disease adjudication policy development and case-by-case adjudication. A consensus between labour and management was not possible, and in fact, both the management and the labour representatives submitted "alternative texts".

The WSIB has released the Chair's Report and will be consulting with the public over the course of the summer. Consultation will be open until September 30, 2004. The Chair of the ODAP will be facilitating consultation meetings throughout the province. The schedule will be released soon.

The Scope of the ODAP Report

Legal Principles: The ODAP Report examines the legal principles behind occupational disease compensation and recommends the official adoption of the common law "material contribution test" as set out in the leading case *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 (S.C.C.). *Athey* advances the proposition that a contributing factor is material if it falls outside the *de minimis* range (beyond a trifle). This means that entitlement may be extended where the employment was only "part of the cause", even if the employment was not the predominant or primary cause of the disease. The "burden of proof" rests neither with the worker or the employer. A decision must be made with the available evidence even if that evidence inconclusive. The "standard of proof" will be on a balance of probability, with

the "benefit of doubt" going to the worker on every issue under consideration.

Role of Evidence: There must be "some" evidence to support an employment relationship. Weak or conflicting scientific evidence will not necessarily mean that an employment link is not present. The ODAP Report notes, "*the inability to identify a specific causal agent in the workplace is not sufficient in itself to deny a claim*".

Future Disease Consultation: The Chair of the ODAP argues the need for an ongoing advisory committee on occupational disease with members drawn primarily from the academic community to advise the WSIB BOD on future changes for the guidelines for legal and scientific principles and approve an annual report prepared by the WSIB on occupational disease policy developments.

In view of the significance of the ODAP Chair's Report, I will be holding a roundtable discussion to provide an executive briefing of the report and to discuss response avenues.

Notice of Roundtable Discussion On WSIB ODAP Report June 16, 2004 9:30 AM – 11:30 AM

The Guild Room
Days Hotel & Conference Centre
6257 Airport Road

The WSIB ODAP Chair's Report very likely will lead to significant adjustments in WSIB occupational disease adjudication policy, with far-reaching funding implications.

This meeting was originally set to address several leading policy issues but in view of the significance of the ODAP Report, the meeting will be limited to a comprehensive legal and policy analysis of the ODAP Chair's report.

Invitations will be e-mailed.