L. A. Liversidge, LL.B.
Barrister & Solicitor, Professional Corporation

WSIB Communicable Illnesses Policy Consultation

Presented to:
WSIB Policy and Consultation Services

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5000 Yonge Street, Suite 1901, Toronto, ON M2N 7E9
Tel: 416-986-0064; Fax: 416-590-9601; E-mail: lal@laliversidge.com

WSIB Communicable Illnesses Policy Consultation

A. Opening Commentary

1. Thank you to the WSIB Consultation Secretariat for the opportunity to comment on the Board's "**Draft Operational Policy, 15-03-15, Communicable Illnesses**" ("Draft Policy").

2. As succinctly set out in the Board's web-based announcement, "Communicable illnesses policy consultation," based on the Board's accumulated institutional experience of dealing with communicable illnesses through SARS (2003), H_1N_1 (2009) and most notably and recently COVID-19 (2020), the Board has acquired a significant level of institutional expertise.

3. The Board's introductory preamble is repeated, with portions highlighted:

> The COVID-19 pandemic was an unprecedented event for Ontario's workplace safety and insurance system, both in terms of the speed with which it arrived in Ontario and the spread of the virus in the population. We responded quickly, in part, by implementing steps to support timely, transparent and consistent decision-making in COVID-19 claims. This allowed us to move swiftly to provide people who contracted work-related COVID-19 with wage-loss benefits, health care, and help getting back to work.
>
> Early in the pandemic, we created an adjudicative approach document for initial entitlement in COVID-19 claims and made it available to the public on our website. **We have a long history of adjudicating communicable illness claims that includes other previous global outbreaks, such as SARS and H1N1. Our approach with COVID-19 largely reflected our general approach to these claims.**
>
> Almost three years has passed since the Ontario government declared a provincial emergency related to the COVID-19 pandemic. **In that time, we have adjudicated tens of thousands of COVID-19 claims, overcome numerous adjudicative challenges, and learned many lessons**.
>
> Drawing on both our history of adjudicating communicable illness claims and our recent COVID-19 claims' experience, we have developed a draft communicable illnesses policy for consultation. The draft communicable illnesses policy reflects:
>
> - Our current practice, as **this policy is not a change in direction, but rather provides detailed and clear guidance about how entitlement in communicable illness claims has been and will continue to be adjudicated**.
> - Examples of the types of employment settings and employment-activities that may have increased risk (e.g., hospitals, patient care).
> - Feedback and questions from stakeholders throughout the COVID-19 pandemic (e.g., immunization status).

4. This response to the Board's Draft Policy will assess the legal framework set out, and identify any drafting shortcomings with appropriate and relevant suggestions.

B. A comment on the initial urgency of a WSIB COVID-19 adjudicative template

1. In March 2020, with the recognition of a national emergency, the Ontario WSIB acted with appropriate urgency.

2. Due to the urgency, the Board was unable to deploy its usual practice of seeking external stakeholder input through consultation on a broad scale. The circumstances simply did not permit the deployment of that normal practice. For this reason, since this is the stakeholder public's first opportunity to engage on this important issue, the Board's current consultative exercise is particularly important.

3. At the outset of the development of the WSIB's COVID-19 policy initiative in March 2020, upon direct request, I did have the opportunity to present some advice and commentary. I have included the text of an email sent to (then) WSIB Chair Witmer on March 22, 2020.

4. Those comments remain relevant to this exercise, although they were commenting on issues surrounding the then proposed "**Adjudicative Approach to 2019 Novel Coronavirus**."

5. As a result of those comments, the Board adjusted its approach and re-drafted the document, which served as adjudicative guidance during the duration of the COVID-19 emergency.

6. I point out that some of the problematic language referenced in my March 22, 2020 email set out in the **WSIB March 2020 Draft Document**, specifically the requirement for a greater risk of contracting the illness in the workplace than the risk experienced by the general public (**March 2020 Draft Policy, page 4**, under the heading "**Community-acquired communicable illnesses**)," reappears in the current (2023) Draft Policy. I will address this element later in this response.

7. The text of my March 22, 2020 email follows:

From: L.A. Liversidge
Sent: March 22, 2020 2:18 PM
To: Diane Weber; Elizabeth Witmer
Subject: FW: Adjudicative Approach Document - Covid-19
Attachments: Adjudicative Approach to 2019 Novel Coronavirus.pdf

Elizabeth and Diane:

I am writing about the recent pre-release of the WSIB document, **Adjudicative Approach Document: Novel Coronavirus (COVID-19) Claims**. It is my opinion that notwithstanding the directive that decisions will be based "*on the merits and justice of the case*," it is my opinion that the Board's planned approach may easily be interpreted in a legally incorrect manner and may well serve to deny allowable cases that upon appeal, will be allowed. **In these trying and urgent times, delays in securing individual justice must be avoided at all costs**. If the Board is no make an error, that mistake in my view must be towards extending not denying entitlement. That said, WSIB policy can be developed that ensures fair, swift and just entitlement. I provide this analysis with that objective in mind. I recommend the paper be re-drafted to make it much clearer.

I have concerns with respect to the following elements of the March 20, 2020 document:

Guidelines

Determining Entitlement

Claims for COVID-19 may be considered work-related where the following is established:

1. the nature of the worker's employment created a risk of contracting the disease to which the public at large is not normally exposed; and

Where the nature of the worker's employment creates a risk of contracting the disease to which the public at large is not normally exposed, and the worker's COVID-19 condition is confirmed, this will generally be persuasive evidence that the work made a significant contribution.

It is the words "*to which the public at large is not normally exposed´* that are problematic. Since the public at large is at present at great general risk of being exposed to and being infected by COVID-19, this infers that the workplace must represent a special or inordinate risk. This is not legally correct. The correct and exclusive standard is whether the employment represented a significant contributing factor. While the paper mentions this core guiding principle, there is no need to qualify it by concurrently requiring that the employment create a greater risk to which the public is not normally exposed.

I will explain.

If somebody in the workplace is a known carrier of COVID-19 and an employee likely had contact with them and then gets COVID-19, WSIB entitlement should be extended, whether or not the employment risk is greater than the general public. The Board must assess the actual and specific risk, not the general risk. If the co-worker is a KNOWN carrier then the worker's exposure at work would be a significant contributing factor. I refer to **W.S.I.A.T. *Decision No. 2970/16* (February 27, 2017)**:

> **[8] In determining whether a worker has entitlement for an occupational disease, however, the Tribunal generally considers whether the workplace exposures made a significant contribution to the development of the claimed condition. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, Decision No. 280. Whether the risk contribution is more than "beyond that faced in the community at large" is not part of the legal test used by the Tribunal to determine work relatedness of a disease.**
>
> **[9] Also of note, the statutory presumption set out in section 13(2) does not apply to an injury by disablement. See, for example, Decisions No. 268 and 42/89.**
>
> **[10] The Board's position was that the worker developed a communicable disease such as a cold or flu. The Board's position was that since the worker's symptoms could have developed anywhere the worker could not satisfy the standard of proof noted above. As noted by the ARO, "multiple potential sources of infection may exist at work and at home which creates challenges in establishing when work-relatedness when determining entitlement".**
>
> **[23] The employer noted the worker could have been exposed elsewhere outside of work. The employer indicated there was a public outbreak in the community. The worker denied this and the employer was unable to establish she was exposed to an environment other than work which would have exposed her to a similar risk for illness. There is more evidence to support she was exposed to an elevated risk in her workplace environment. Dr. Naidoo agreed and related her illness to her workplace. Therefore, I find the worker has initial entitlement for her respiratory illness. In conclusion, I am satisfied that the worker's exposure at work was a significant factor in her development of a respiratory condition and consequent loss of earnings. I accept Dr. Naidoo's views and find also, there was no other probable cause.**

Decision No. 58/17 (excerpt below) does indicate that one would need to look at the risk of the workplace versus the risk of the community at large. However, the analysis in ***Decision No. 58/17*** is at odds with that in ***Decision No. 2970/16 (above)*** which states that "**Whether the risk contribution is more than "beyond that faced in the community at large" is not part of the legal test used by the Tribunal to determine work relatedness of a disease."**

However, when we put the principle in ***Decision No. 58/17*** together with that in ***Decision No. 490/99***, i.e., there must be an identifiable injuring process or causal connection, it becomes clear that the standard is an identifiable injuring process or causal connection at work. This is confirmed by ***Decision No. 844/17*** **(April 6, 2017)**, below. Thus, the fact that the worker works in the same building as a person who has COVID-19 is not enough to render the work environment a more significant contributor than the community at large, there must be some direct exposure or causal connection to that person that would make the work environment a more significant contributor (i.e., direct contact). Therefore, it is evidence of direct exposure that is defining.

W.S.I.A.T. *Decision No. 58/17* (January 16, 2017)

> **[13] The Board's Eligibility Adjudicator's decision memo refers to an Adjudicative Support Document entitled "Work-Related Communicable Illness". This document states that everyone is at risk for getting a cold or flu. As such, colds and flus are generally considered community-acquired illnesses that are not due to the nature of any particular employment. The document further states that in order for a communicable disease, such as the cold or flu, to be compensable, it must be established that employment made a significant contribution to the risk of contracting the illness, beyond that faced in the community at large.**

W.S.I.A.T. *Decision No. 490/99* (August 7, 2001) states:

> **[62] …The fact that one can catch a disease at work as well as in a non-work environment is not sufficient to trigger entitlement. There must be an identifiable injuring process or causal connection. It is not sufficient to say that a disease could be in a hospital and therefore a possible source of infection for the worker. In fact, we find it less likely that the worker would contract - at random - such a virus at work because it is there she would be practicing structured and institutional hygiene requirements (constant hand washing as well as gowns/gloves where required).**

W.S.I.A.T. *Decision No. 844/17* (April 6, 2017) states:

> **[17] The Tribunal has considered cases involving colds and exposure for those who work in the health care system on prior occasions. Tribunal Decision No.648/14 allowed a worker's appeal in that regard. Tribunal Decision No. 1365/14, which addressed an employee of a nursing home, also allowed an appeal by a worker, thus granting initial entitlement. Recently released Tribunal Decision No. 58/17 also allowed a worker's appeal in similar circumstances. Again, in these cases, the usual question of causation and/or "significant contribution" was considered. Again, just because the condition involves what is often referred to as the "common cold" does not mean that any different legal principles apply.**

I suggest that there is no legal requirement for the employment to represent a special risk beyond that of the general public. If there is such a risk, such as in health care facilities, that can be interpreted in the context of a "more probable than not" analysis, allowing a reasonable conclusion in those cases that there was an employment exposure even in the absence of a specific identified exposure. In other words, in those cases, a general exposure would be sufficient.

I would suggest that the policy document be redrafted to make this clearer.

8. As mentioned, the Board accepted the advice and adjusted the March 2020 document accordingly, officially publishing the revised Adjudicative Approach Document on March 23, 2020. The phrase "*the nature of the worker's employment created a risk of contracting the*

disease to which the pubic at large is not normally exposed," in the revised (official) document no longer was an essential requirement for entitlement. Instead, such circumstances, when present, were correctly viewed as facts expediting entitlement, particularly where no direct exposure evidence was available. The phrase became in operation a *de facto* factual presumption (albeit, not a legal presumption as understood in the context of the WSIA). The Board's revised approach was consistent with the normal significant contribution test.

9. Of course, we now have exactly three (3) years accumulated experience and expertise in dealing with these cases.

10. Through the evolution of the Board's experience, the Board has been able to hone its institutional expertise. This is reflected in the Draft Policy. The Board's outreach is timely. Thoughtful consideration can be applied in a calmer non-emergency environment.

11. In this response, I will comment on the Draft Policy section by section. First, I will summarize key legal points which arise from relevant Appeals Tribunal decisions on point, which provide a suitable analytical template to apply in these types of cases.

C. The bottom-line legal test for entitlement

1. The cases discussed in my March 22, 2020 email (above), along with **WSIAT *Decision No. 47/22* (January 18, 2022)**, a recent WSIAT communicable disease case, present a helpful analytical template for these types of cases.

2. The eventual Board policy on communicable illness must be consistent with the following core principles and approaches:

- "In determining whether a worker has entitlement for an occupational disease, however, the Tribunal generally considers whether the workplace exposures made a significant contribution to the development of the claimed condition" **(W.S.I.A.T. *Decision No. 2970/16* (February 27, 2017), para. 8)**.

- Whether the risk contribution is more than "beyond that faced in the community at large" is not part of the legal test used by the Tribunal to determine work relatedness of a disease (**W.S.I.A.T. *Decision No. 490/99* (August 7, 2001) para. 62**).

- The fact that one can catch a disease at work as well as in a non-work environment is not sufficient to trigger entitlement. There must be an identifiable injuring process or causal connection (**W.S.I.A.T. *Decision No. 844/17* (April 6, 2017) para. 17**).

- ". . . the usual question of causation and/or "significant contribution" was considered. Again, just because the condition involves what is often referred to as the "common cold" does not mean that any different legal principles apply" (**W.S.I.A.T. *Decision No. 47/22* (January 18, 2022), para. 21**).

3. Three core principles emerge from these cases.

4. *One*, the normal significant contribution test applies to communicable illnesses. *Two*, there must be an identifiable employment related injuring process. *Three*, the requirement for an employment risk beyond that faced in the community at large is not an appropriate part of the legal test upon which entitlement turns.

5. With respect to the third point, as noted earlier, the presence of such evidence assists in establishing a significant contribution. The absence of such evidence though is not a bar to entitlement.

6. I analyzed available WSIB Appeals Resolution Officer (ARO) decisions available on the legal research website CanLii, notably **ARO Decision 20210007 (June 21, 2021)**, **ARO Decision 202110015 (July 24, 2021)**, **ARO Decision 20220004 (December 2, 2021)**, and **ARO Decision 20220059 (May 29, 2022)**. All of these decisions effectively applied the significant contribution test.

D. A clause-by-clause analysis of the Draft Policy

1. I respectfully present three overriding concerns. *One*, the Draft Policy is somewhat needlessly wordy, which distracts from its potential clarity. *Second*, and relatedly, many redundant phrases are used and repeated, such as "*but are not limited to*," which offer no adjudicative or policy guidance, and effectively render meaningless the forthcoming list which follows such a statement. *Three*, as set out at the end of this document, I suggest that additional legal analysis on the part of the Board would be beneficial.

2. From page 1 of the Draft Policy:

> **Entitlement criteria**
> In deciding whether a worker has initial entitlement to benefits for a communicable illness, a decision-maker determines whether:
> - the worker contracted a communicable illness
> - the worker contracted the communicable illness while in the course of employment, and
> - the communicable illness arose out of the worker's employment, in that the employment made a significant contribution to contracting the communicable illness.

LAL Comment:

- This is the essence of the policy and is an appropriate set of criteria.
- The Draft Policy is appropriately organized to follow these core elements.

3. From page 2 of the Draft Policy, with respect to the reasons for an exception to laboratory or clinical evidence of current infection:

> Legitimate reasons include, but are not limited to:
> - the period of illness is short-lived (i.e., 24 - 48 hours)
> - the worker cannot access or does not qualify for diagnostic testing, and
> - laboratory confirmation is not available for the communicable illness.

LAL Comment:

- The use of "but are not limited to" nullifies the importance of the three bullets which follow.
- The essential point it seems, is this - if circumstances render the securing of a test impossible, as opposed for example to being inconvenient, the requirement for a test is waived *by necessity*.
- Clearly, the Board has a sense as to what would constitute a reason that is not legitimate (or else the entire section is redundant and moot).
- It would be helpful if the Board attempted to articulate these illegitimate reasons. Otherwise, little or no adjudicative guidance is presented.
- The point that I believe the Draft Policy is attempting to advance is this: An exception will be granted if a test cannot be obtained. An exception will not be granted if a test could have been obtained but was not.

4. From page 2 of the Draft Policy:

> In the absence of laboratory or clinical evidence of current infection, a decision-maker will determine whether the worker has or had at the relevant time a specific communicable illness based on the available evidence including, but not limited to:
> - a laboratory test to detect a previous infection (e.g., antibody test)
> - the worker's presentation (i.e., signs and symptoms) and whether it is compatible with the signs and symptoms of the communicable illness established to exist in the workplace
> - the diagnostic criteria for the communicable illness, and
> - the advice or opinion of a medical consultant.

LAL Comment:

- The phrase "but not limited to" as earlier noted, offers no adjudicative guidance.
- Frankly, the list appears quite situationally exhaustive as drafted and need not be qualified with the "but not limited to" proviso.

5. From page 2 and 3 of the Draft Policy:

> Factors to consider when gathering and weighing the evidence related to potential work-related and non-work-related exposures to the communicable illness include, but are not limited to:
> - the route of transmission of the communicable illness (e.g., contact, droplet, airborne, oral)
> - the opportunities that existed for exposure to and transmission of the communicable illness both inside and outside of the worker's employment, including contact with persons known to have or suspected of having the communicable illness (e.g., coworkers, patients, friends, family members)
> - the frequency, duration, and types of potential exposures to the communicable illness (e.g., protected vs. unprotected , direct vs. indirect), and

LAL Comment:

- I raise issue again with the "but are not limited to" qualifying phrase.
- The list appears quite inclusive and need not be diminished with the qualifier.

6. From page 3 of the Draft Policy:

> (The key characteristics of a sample of communicable illnesses that occur in Ontario can be found in the Appendix.)

LAL Comment:

- The Appendix has been reviewed.
- It is recommended that the Board cite the medical source or medical authority for the content of each column for each item of the Appendix.
- Otherwise, upon review or appeal, at the Board or the WSIAT, a party may well question the standards set out with rebuttal medical evidence.
- That rebuttal evidence may acquire a higher than warranted deference if the eventual decision-maker is unable to objectively assess the comparative calibre of the Board's criteria against any rebuttal evidence.
- Presuming that the Board has sound authority for its list, it is prudent for the Board to establish that demonstrable authority.

7. From page 3 of the Draft Policy:

> The inability to identify a specific work-related contact source for the worker's communicable illness does not mean the worker did not contract the communicable illness from exposure occurring in the course of employment. In the absence of a specific work-related contact source, the decision-maker must determine the issue of whether the communicable illness was contracted by the worker while in the course of employment after weighing all of the available relevant evidence.

LAL Comment:

- Respectfully, the above statements offer no adjudicative direction and are effectively redundant, and of no value in a policy directive document.
- The statements add nothing to the overarching instructions set out on page one under the heading "Entitlement criteria."
- It is recommended that this paragraph be excised from the Draft Policy.

8. From page 3 of the Draft Policy:

> **Determining whether the communicable illness arose out of employment**
> A worker's employment will have made a significant contribution to contracting a communicable illness when the decision-maker is satisfied that:
> - the employment placed the worker at an increased risk (i.e., increased likelihood) of contracting the communicable illness as compared to the risk experienced by the general public during ordinary or routine activities of daily living, and
> - the communicable illness was contracted by the worker from exposure that occurred in the course of their employment as a result of the identifiable increase in risk.
>
> The worker's employment will generally not have made a significant contribution to contracting the communicable illness when these conditions are not met.

LAL Comment:

- This element, which is the core eligibility element, is problematic for either lack of clarity, an incorrect expression of the proper legal test, or arguably both.
- As written, it appears that the adjudicative direction is that an essential condition precedent is that the employment must present a greater risk than the risk experienced by the general public.
- If this is the intended rendering, respectfully, for the reasons earlier cited, it is an incorrect reading of the law.

- Moreover, and significantly, these conditions are at odds with the general "**Entitlement criteria**" (Draft Policy, page 1).

- Yet, it is unclear if it is the intent of the Board to require a special eligibility for communicable illness beyond the significant contribution test.

- The next section of the policy (also from page 3) reads:

> In determining whether the worker's employment made a significant contribution to the contraction of the communicable illness, the decision-maker considers both the risk factors that are associated with the worker's occupation or job as well as the individual circumstances that led to the worker contracting the communicable illness.

LAL Comment:

- This is an appropriate legally correct criterion, but one that appears to be at conflict with the earlier requirement for an employment risk greater than the community risk.

- As I set out earlier:

  Three core principles emerge from these cases.

  One, the normal significant contribution test applies to communicable illnesses. *Two*, there must be an identifiable employment related injuring process. *Three*, the requirement for an employment risk beyond that faced in the community at large is not an appropriate part of the legal test upon which entitlement turns.

  With respect to the third point, as noted earlier, the presence of such evidence assists in establishing a significant contribution. The absence of such evidence though is not a bar to entitlement.

- It is recommended that if the Board does not intend to establish a higher threshold for entitlement than the significant contribution test, that this section be reworked.

- If the Board does intend to establish a higher threshold for entitlement than the significant contribution test, it is recommended that this section be reconsidered for the reasons set out.

9. From page 4 of the Draft Policy:

> **Community-acquired communicable illnesses**
> Communicable illnesses, such as influenza, the common cold, and COVID-19 are highly transmissible and can be prevalent in the general population. In-person interactions that can easily spread these communicable illnesses are a part of everyday life and occur both inside and outside of employment (e.g., in the home, community, and public settings). Outside of a public health emergency, in-person interactions at work with colleagues, customers, clients, or others, generally do not place the worker at a greater risk of contracting one of these communicable illnesses than the risk experienced by the general public. Therefore, a worker who contracts one of these communicable illnesses in the course of employment is generally not entitled to benefits unless the worker's employment increased their risk of contracting the communicable illness in some additional way. For example, the worker contracts the communicable illness while performing a job duty that subjected them to an exposure risk in excess of the norm, such as delivering health care to a person known to have the communicable illness.

LAL Comment:

- This section is the difficult part.
- I respectfully present that the legal test set out in the body of this section, i.e., the need for a greater risk than the general public, is not a correct reading of the application of the significant contribution test.
- As written, the Draft Policy will be subject to review and likely will be held to be contrary to the WSIA.
- The WSIB lacks the administrative authority to *de facto* over-ride the eligibility requirements set out in the WSIA. In effect, this section purports to do this.
- Instead of a requirement of a greater risk than the general public, the Board should focus on guidance to assist in establishing the presence or absence of an employment related injuring process. This is clearly the intent of Appendix A.
- It is also respectfully presented that the presence or absence of a public health emergency, in the context of this section, does not change the basic eligibility criteria under the WSIA, unless statutorily prescribed. Of note, the WSIA was not amended during the COVID crisis. Cases were decided through the basic significance contribution entitlement test. They will continue to be so decided.
- The Board is aware however that during COVID there was an active and influential political campaign taken to the floor of the Ontario legislature for distinctive legal treatment for COVID cases. A special COVID presumption amendment was often suggested (see for example, Private Members' Bill, Bill 191 introduced May 19, 2020).
- As the Board established a reputation for fairly deciding COVID cases, this bud did not bloom.

- In the event that Board policy curtails otherwise allowable communicable diseases, introduction of a broader communicable disease presumption amendment is foreseeable if not certain.

- It is respectfully suggested that the Draft Policy be reconsidered with a renewed focus on establishing clearer guidance on establishing an employment related injuring process in a manner consistent with the WSIA as currently drafted and the significant contribution test as currently understood and applied.

E. The need for a more comprehensive legal analysis to be developed and presented by the WSIB

1. The Draft Policy process would have benefitted from the development and public release of a comprehensive legal analysis containing a review of the historical adjudicative and policy treatment of communicable disease cases.

2. While the Board asserts its acquired expertise through SARS, H_1N_1 and COVID, the fruits of that experience have not been articulated and have not been shared.

3. This academic level paper would be an essential companion piece to the Draft Policy, and provide authority and analysis for the positions the Board advanced.

4. As the pubic emergency has passed, and as the exigent circumstances of COVID-19 no longer exist, the Board has the luxury of time, an extravagance it lacked three years ago.

5. It is strongly recommended that the process commence afresh with the development and release of an academic level legal analytical paper addressing the meaning and application of the significant contribution test as it has been applied to communicable illness claims. This paper would assess the law, the policy and most importantly, the plethora of Appeals Tribunal cases that have considered this issue.

6. I consider this to be an essential albeit so far missing component to this exercise.

I would be pleased to discuss this paper with the Board.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

L.A. Liversidge
March 28, 2023