

# **Justice for victims of occupational disease**

## **An Act to amend the Workplace Safety and Insurance Act**

### **Explanatory note:**

This explanatory note does not form part of the Bill proposing amendments to the Workplace Safety and Insurance Act (WSIA); it is written to provide context for the proposed amendments.

The Occupational Disease Reform Alliance has provided a submission to the Government requesting that four amendments be made to the WSIA that were based on generally accepted adjudicative and scientific principles. These four demands are reflected in the amendments written below and include:

1. Granting entitlement for occupational diseases when the workplace incidence exceeds the community level,
2. Applying the proper legal test for causation (i.e., significant contributing factor),
3. Expanding the list of presumptive diseases contained in Schedules 3 & 4 of O. Reg. 175/98, and
4. Recognizing the effects of multiple exposures.

The basis for implementing these amendments to the WSIA is briefly explained herein.

Significant contributing factor test has been utilized by the Workplace Safety and Insurance Appeals Tribunal as well as the WSIB and codifying this adjudicative principle is long overdue. In doing so, it was necessary to provide definitions for the terms “balance of probabilities” and “significant contributing factor” to ensure the consistent application and interpretation thereof. The addition of the test for causation to the WSIA is meant to ensure fair adjudication for all claimants and will be added to section 15 of the Act.

Dr. Paul Demers report, *Using scientific evidence and principles to help determine the work-relatedness of cancer*, was commissioned by the Ministry of Labour, Training and Skills Development (MLTSD) and information regarding the combined exposures effect was part of the mandate provided. Part 3 of that report discusses the role of multiple exposures noting that assuming an additive effect unless there is evidence of synergism (i.e., a multiplicative effect) is used by the American Conference of Governmental Industrial Hygienists, WorkSafeBC, and the MLTSD in O. Reg. 833. Given that this is a generally accepted scientific principle and workers are exposed to multiple substance that can work together to cause an occupational disease, then adopting that scientific principle into legislation is the next logical step and is included in the amendments to section 15 of the WSIA.

Expanding the list of presumptive diseases was also a recommendation in the report from Dr. Demers specifically stating that, “*The WSIB should update and greatly expand the list of presumptions regarding cancer in Schedules 3 and 4 to reflect the current state of scientific*

*knowledge*”. Dr. Demers also recommended using the International Agency for Research on Cancer (IARC) information for inclusion in the Schedules. This recommendation is reflected in the amendment to section 161 of the Act.

Additionally, the report from Dr. Demers discussed clusters and the need to recognize claims from new or emerging hazards (see Part 4, Challenge 4) which can be reflected by the increase incidence of disease at a workplace compared to the community. This type of observational science has been employed for centuries and used to determine causal relationships with cancers experienced by chimney sweeps by Percivall Pott in 1775, for example. Compensating for these types of cases, or any claims for that matter, shouldn't be dependent on scientific studies; a robust and pragmatic approach is required to determine causation as noted by the Supreme Court of Canada in *Snell v. Farrell*. Amending section 15 of the WSIA to reflect this adjudicative and scientific principle eliminates any confusion as to how evidence of this nature should be interpreted by decision-makers.

### **Amendments to the WSIA:**

Section 2 is amended by adding the following definitions:

“balance of probabilities” in the context of entitlement under this Act means that it is more likely than not that the injury, disease, or condition has a workplace causal connection.

“significant contributing factor” is equivalent to the material contribution test used by the courts and while the precise contribution cannot be numerically quantified as that would simply be arbitrary, it must fall outside the *de minimus* (trifling) range which means that it is more than a trifling or speculative factor.

Section 15 is amended by adding the following subclauses:

#### **Test for causation**

**15(2)(a)** Work need not be the sole, primary, or even the predominant cause to grant entitlement. Causation is to be determined using the balance of probabilities, applying section 119(2) where appropriate, to determine that work is a significant contributing factor in the onset of the worker's disease or condition. Decisions of this nature can be informed by science, but scientific conclusions must not be substituted for the legal determinations made under this Act.

#### **Effect of multiple exposures**

**15(2)(b)** All exposures must be considered, and their interaction will be assumed to be additive unless there is evidence of a synergistic effect.

**Workplace disease rate**

**15(2)(c)** When the rate of a particular disease in the workplace exceeds that of the surrounding community, this will be considered persuasive evidence of a workplace causal connection for the purpose of granting entitlement in a claim.

Section 161 is amended by adding the following subclause:

**161(3)(c)** to ensure that Schedules 3 and 4 in O. Reg. 175/98 are up to date by annually reviewing the International Agency for Research on Cancer (IARC) information for substances classified by them as Group 1 (known carcinogen) and 2A (probable carcinogen) to make the appropriate additions to the list of scheduled diseases in the regulation. Where IARC notes that there is *sufficient evidence* (Group 1) and lists target organs those substances should be considered for Schedule 4 and at the very least included in Schedule 3. Probable carcinogenic substances (Group 2A) and their target organs should be included in Schedule 3 or at the very least have a policy developed to address that substance and the associated diseases.