NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 07-063
File: 07-113-4
July 3,2007

BACKGROUND

On January 10th, 2007 my office received a complaint from an individual (the "Complainant") who felt that his personal information had been improperly used and/or disclosed by the Workers' Compensation Board of the Northwest Territories and Nunavut (W.C.B.). The Complainant had received a report from the W.C.B.'s Review Committee Registrar which was a nine page decision regarding an appeal he had filed.

The report included what he felt was "personal and confidential medical information related to my work related injury as well as confidential medical information which included the diagnosis and medication for two unrelated conditions I was also being treated for". A copy of the report containing this information, he said, was forwarded to him as well as to his former employer. The Complainant denied having signed a consent form agreeing to allow this information to be disclosed to the former employer or otherwise agreeing to allow the employer access to the information. Further, he says he was not notified that the WCB would be disclosing his personal and confidential medical information to his employer.

THE PUBLIC BODY'S POSITION

In order to properly assess the matter, I asked for and received from the Public Body a copy of the report referred to in the Complainant's complaint for reference. I also posed a number of questions to the public body which I asked them to respond to, as well as asking them to provide me with their view of the matter.

1. Is there any specific provision in the Workers' Compensation Act which requires that the employer receive a copy of the decision of the Review Committee?

The public body advised that there was, in fact, no specific provision which required the

W.C.B. to give employers copies of such decisions. They did, however, point out that s. 77.1 of that Act governs confidentiality and provides, in part, that the disclosure of worker information may be made to persons directly concerned and in accordance with the *Access to Information and Protection of Privacy Act.* Specifically, that section provides as follows:

> 77.1 (1) Any information respecting a worker, a dependant or an employer obtained by a person under this Act is confidential and may only be disclosed under the authority of the Board
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> a) to the persons directly concerned;
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> b) to agencies or departments of the Government of the Northwest Territories, the Government of Canada or the government of a province or territory; or
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> c) in accordance with the *Access to Information and Protection of Privacy Act*
>
> (2) No person shall disclose any information obtained under this Act respecting a worker, a dependant or an employer except in accordance with subsection (1).

The public body further stated that the W.C.B., as a quasi-judicial body, is bound by the rules of natural justice. Given this, as well as an employer's interest in the outcome of a decision, they say an employer is considered to be a party to a review and is, therefore "a person directly concerned". In this case, they took the position that certain medical information on the Complainant's file was relevant to the appeal being heard and, therefore, it was necessary to refer to that evidence in its decision.

2. Are there precautions taken to ensure that personal information not related to the specific injury or illness is not disclosed? If so, what are those provisions? Are those provisions set out in writing?

In answer to these questions, the W.C.B. indicated that in the context of a worker's claim generally, precautions are taken to ensure that employers and others do not have access to unrelated medical information on a workers' file. They say that such information would be

vetted from a workers' file before disclosure was provided to the employer. That being said, however, they also said that generally speaking the employer is copied on all correspondence on a worker's claim file and may have access to relevant information related to the claim. They further stated that information provided by a worker in submissions to the Review Committee may form part of the record of the decision which is provided to an employer as a party to the review.

The WCB pointed me to their policy handbook, and in particular policy #7.01 entitled "Access to Information in Claim Files". Section "C" of that policy reads, in part, as follows:

> In matters under review or appeal an employer or a worker ...may request and may receive access to relevant medical and non-medical information in his/her worker's claim file. The employer's request for access must identify the specific issue(s) subject to review or appeal.
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> In other matters, an employer may request access to relevant medical information in an employee's claim file. The WCB will notify the worker of the request and will allow the worker 30 days to object to the release of medical information. If the worker objects, the Manager of Claims Services, NWT or Nunavut Operations, in consultation with the Medical Advisor, may grant the employer access, deny the employer access, or allow restricted access. The WCB may provide the employer with a summary of relevant medical information.
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> The worker's prior approval is not required for the employer to access non-medical information. The WCB shall notify the worker that information was accessed by the employer.

3. Does the Registrar of the Review Committee have training in ATIPP?

The WCB advised that no such training was provided to the Registrar of the Review Committee who is, presumably the person responsible for composing the written decisions of the committee, but that there were two ATIPP Co-Ordinators within the WCB who provide

advice and assistance to the WCB in these matters. There was no indication as to whether or not these Co-Ordinators routinely vet the written decisions of the Review Committee before they are disseminated.

The board did provide me with a copy of its Review Committee Procedural Guidelines which are dated August 17th, 2005. Paragraph 3.1.10 of those guidelines provides specifically the information which should be included in a written decision as follows:

> ~ the background of events leading to the request for review
> ~ a statement of the issues
> ~ a reference to the relevant legislation and policy
> ~ appellant's submission,
> ~ Review Committee's discussion
> ~ the decision and its justification

The guidelines also provide that a copy of the decision is to be provided to the Appellant, the employer (if the appellant is the worker), the worker (if the appellant is the employer), the appellant's representative (if any), the Review Committee's file and the Corporate Secretary/General Counsel of the WCB.

4. Are there any consents for the use and disclosure of information obtained from Claimants when they make an application for WCB benefits?

The public body responded that no such consent is obtained. A Worker's Report of Accident is completed by Claimants and this record contains an acknowledgment in small print that personal information is collected for the purpose of the administration of the *Act.*

Specifically, the form which the worker signs includes the following:

> This will authorize the board and boards of review to obtain or view, from any source whatsoever, including records of physicians, qualified practitioners or hospitals a copy of records pertaining to examination, treatment, history and employment of the undersigned.

After the signature line, the following statement appears:

> Any personal information, as defined by the *Access to Information and Protection* of *Privacy Act* requested herein is for the purpose of administering the *Workers' Compensation Act* and is authorized by the Act.

By way of further explanation, they also indicated that worker information is considered to be confidential and is only shared with an employer in certain circumstances. No one else is entitled to receive worker information. They confirmed that the Complainant's file contains no specific consents other than the acknowledgment contained in the Worker's Report of Accident.

THE COMPLAINANT'S POSITION

The Complainant, in responding to the submissions made by the public body makes the following arguments:

1. At no time was he ever advised that any of his medical information would be shared with his employer or any other person. He says he was not afforded the opportunity to object to the disclosure nor did he knowingly consent to the release and/or disclosure of his personal and confidential medical information given to the WCB. He feels that some of the information in the report which was provided to the employer refers to specific medication prescribed to him for an unrelated ailment which was contained in an outpatient form filled out by his doctor. It is his position that neither the medical condition for which he was taking the medication, nor the fact that he was on such medication was relevant to the specific injury which he had reported to the WCB.

   The Complainant also indicates that there was reference to another prescribed drug and medical condition in his medical history. He feels that this information was not only misinterpreted, but was, again, irrelevant to the specific complaint which was before the Review Committee.

2. The Complainant also feels that the Review Committee outlined in its decision letter conclusions which were in direct contradiction to findings previously made by the Board that his previous medical problems were unrelated to his current injury and that, by including this erroneous information in the decision letter that was also shared with his employer, the WCB exacerbated the wrongful disclosure in that the information disseminated was erroneous.

3. The Complainant felt that the manner in which the Review Committee chose to refer to bits and pieces of his medical history painted a slanted and, in his view, inaccurate picture of his medical concerns and that the conclusions reached were not at all a reflection of his true state of health.

4. The Complainant suggested that the Worker's Application for Benefits/Report of Accident or Injury Form on his file had been altered by someone other than himself after it was submitted to the WCB. He says that when the form was originally completed, it was completed by administrative staff in his employer's office who asked him questions and then wrote his answers. He also says that the form was altered after he signed it. For this reason, he says, the acknowledgment contained in the form is questionable.

5. Finally, the Complainant states that he is concerned about why the WCB Review Committee would include so much personal and confidential information in the decision letter which they knew would be shared with his employer. He feels that such letters should contain only a statement of the finding (i.e. whether or not benefits are reinstated) and what policies were considered in the decision, without including all of the factual background information.

DISCUSSION

The Workers' Compensation Board was created to ensure the safety, protection and good health of workers. It is created by and operates pursuant to the statutory authority of the *Workers Compensation Act* and its foremost priority is preventing workplace accidents and

occupational disease. In the case of an injury or a disease, the WCB provides workers with wage compensation and rehabilitation. The WCB derives its revenues entirely from employer assessments and investment income. Assessment rates for various classifications of employers are set based on the claims record of the sector or classification of employer.

Both the employer and the employee have a legitimate interest in the outcome of decisions made by the WCB. In the case of employees, the decisions made can affect their financial well-being and their ability to return to the work force. Although the effect of WCB decisions on employers is less direct, decisions made by the Board do, none the less, have an impact on employers as well. As stated by David Flaherty, then the Information and Privacy Commissioner of British Columbia, in an investigation report released by him on March 31st, 1996:

> I recognize that employers in the workers' compensation system have legitimate information needs. To presuppose that information in a claim file is not accessible to an employer at some appropriate point, due to the privacy rights of the worker, denies a fundamental aspect of a compensation system. Employers have a legitimate interest in information about the status of a claim, for example, at any given point in time. They pay the full costs of work-related injuries. The costs of such an injury and the course of rehabilitation is charged against the employer's specific classification. Employers are often involved in the rehabilitation program of the workers through programs such as graduated return to work or retraining. They must be able to anticipate and plan for prolonged and perhaps unanticipated absences of workers due to lingering injuries. The wage rate that is paid to any worker may place upward pressure on employer assessments. Thus, employers have an interest in knowing how the WCB derives the wage rates that it is paying workers.

By its very nature, the Workers Compensation Board collects a staggering amount of personal information about individuals who find themselves having to seek compensation for workplace injury and illness. Despite this, it does not appear that the organization has taken the step of outlining in any detail the scope of what might be collected in the course of

a claim investigation or how, specifically, that information might be used. It seems to me that, in light of the very sensitive nature of medical records, and the fact that the WCB will often have very detailed medical histories on file, it is not unreasonable to expect them to be more specific and up front about how that information might be used and to whom it might be disclosed.

It is well established that, in the case of an administrative tribunal process, such as that involved in a review under the *Workers' Compensation Act,* the rules of natural justice require that all parties have access to all relevant information in order to allow them to participate fully in the proceedings. As I understand it, employers are specifically given status under the *Act* to pursue and oppose appeals regarding claims and have interests which can be adversely affected by a decision in favour of a worker. If they choose to participate, it is fairly well settled that the rules of natural justice require that they have disclosure of all the relevant information. In my opinion, this position is supported by the *Access to Information and Protection of Privacy Act*. Section 3(2)(c) of that Act provides that:

> (2) This Act
>
> > c) does not limit the information otherwise available by law to a party to legal proceedings;

I accept that the review and appeal processes provided for in the *Workers' Compensation Act* are "legal proceedings", and, therefore, that the employer who decides to participate in a workers' appeal has the right to appropriate disclosure for the purposes of addressing the appeal. I question, however, whether that same right exists if the employer chooses not to involve itself in the review or appeal procedure.

Assuming that the employer does become involved, the question then becomes what is appropriate disclosure and this, perhaps, is where the issue really lies in this case. In this particular case, it is clear that there is a difference of opinion between the Complainant and the Review Committee about the relevance of some of the information which was before it

in the review process. The Review Committee clearly thought that much of the background medical information they had was relevant to the issue on appeal. The Complainant disagrees and takes the position that all of the information regarding his previous medical difficulties is completely unrelated to the injury which was the issue before the Review Committee. The relevance, or otherwise, of the information and the interpretation of the information before the Review Committee is beyond my jurisdiction. These are issues to be determined on further appeal.

That being said, the complaint here is that information which was in the possession of the public body was transferred in some detail (properly interpreted or not) to the Review Committee's written decision which was then provided to the employer as well as to the Complainant. So the question then becomes how much information, particularly sensitive medical information, should be included in these decision documents, knowing that the decision will be shared with an employer and that, once in the hands of the employer, the board loses control over how that information is further used and disclosed. Would it not be sufficient, as suggested by the Complainant, simply to provide the employer with a statement indicating the outcome of the appeal and very generally the reasons for the decision, without including the analysis of all of the evidence received and considered by the committee?

The *Workers Compensation Act* provides for an appeal of a decision of a Review Committee to an Appeal Tribunal. It also provides that the Board must supply the Appeals Tribunal with any documents in the possession of the Board that relate to the matter under appeal. It can make its own decisions on issues under appeal based on a fresh review of the evidence and is not limited to a consideration of the review decision itself. In these circumstances, it may not be necessary for the Review Committee to include the level of detail in their reports that was included in this one. All that is needed is enough detail to allow the parties to determine whether or not an appeal is merited. On the other hand, the more detailed the report is, the easier it is for the Appellant to determine the focus of his appeal. In my opinion, there should be enough detail in the decision to allow the Appellant to know the reasons he was unsuccessful on review but with sensitivity to the amount of personal information being disclosed.

CONCLUSIONS AND RECOMMENDATIONS

In this case, the Review Decision contained a significant amount of sensitive medical information and history. The Review Committee decided that this information was relevant to their decision and felt that their decision should reflect the considerations which went into it. I understand that the Complainant disagrees with the assessment of relevance made by the Committee, but that is an issue for appeal, not for me. The question, really, is how much information should be included in the written decision issued by the Committee. It is important that review decisions contain enough information to allow both the Complainant and the Employer to know the basis of the decision and to assess whether they wish to appeal the matter further. That having been said, however, because these decisions are shared with employers, it is important that the review decisions contain only that information absolutely necessary to the decision being made and that steps be taken to mask, as far as possible, reference to specific medical information. For example, if it is necessary to refer to a previously diagnosed medical condition, it may be more appropriate to refer to it as "a previously diagnosed medical condition" rather than as a specific condition and if it is necessary to refer to medication, it might be appropriate to refer to the use of "prescribed medication" instead of referring to the specific medication prescribed. In this case, I do not think that it was necessary to include as much detailed medical information as was included in the report to explain the committee's position. I therefore make the following recommendations:

1. That the Review Committee Procedural Guidelines be revised and amended to include a caution with respect to the inclusion of detailed medical and/or financial information about the Complainant in their reports, and to provide specific guidelines for wording which will assist.

2. That before decisions are disseminated to the parties, they be vetted by the ATIPP Co-Ordinators for the Workers' Compensation Board to ensure that the least amount of personal information needed is included in the decisions.

3. That the person or persons responsible for writing the Review Decisions be provided

with training in the privacy aspects of the *Access to Information and Protection of Privacy Act.*

Workers who file for compensation as a result of a workplace injury or illness are required to sign a consent which allows the WCB to collect information about them from various sources. They are not, however, asked to consent to the disclosure of their personal information to their employer, nor are they advised of the fact that their personal information may be disclosed to employer. In light of the sensitivity of much of the information which is likely to find its way onto a WCB file, I think it is important to highlight this for claimants and to do so in a way which ensures it is both seen and understood. It is not sufficient simply to say, in small print at the bottom of a long questionnaire, that information will be used for the purposes of administration of the Act. To this end, I make the following recommendations:

4. That the Workers' Compensation Board should notify workers when they file a claim that all of the information that the WCB collects **may** be disclosed to the employer in certain circumstances. This notification should occur prior to the collection of any personal information and should be done in a fashion that is clear and obvious.

5. That the WCB should amend the Report of Injury form that workers are required to sign to indicate the detailed purposes for collecting personal information, the legal authority for collecting it, and the title, business address and business telephone number of an officer or employee of the WCB who can answer the individual's questions about the collection.

6. Personal information on a Claimant's file should not be provided to an employer during a review or appeal unless the employer decides to take an active role in the process and then only on request. When such information is disclosed, it should closely vetted so as to ensure that only relevant information is included and when such a disclosure is made, the worker should be advised that it has been done.

7. That the WCB should give clear and unambiguous notice to all employers involved in a claim process that any information received by them as a result of the process

must be treated as confidential and that any further use or disclosure of the information could result in a fine of up to $5,000.00 pursuant to section 77.1 (2) and 77.1 (3) of the *Workers' Compensation Act.*

Elaine Keenan Bengts
Information and Privacy Commissioner