

# **Disclosure of Board files: access and privacy issues**

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## 1. Introduction

The Workers' Compensation Board collects, produces, maintains and discloses a vast amount of information. A 1996 Investigation Report of the Information and Privacy Commissioner of British Columbia stated:

The WCB undertakes a staggering amount of disclosure. ...Virtually every department of the WCB engages in some form of disclosure.(2)

The Board undertakes far more disclosure now than it did at the time of the last Royal Commission Report.(3) This disclosure occurs:

- in the ordinary course of business pursuant to the *Workers Compensation Act* and the policies of the Board;
- on appeals to the workers' compensation review board and the appeal division;
- pursuant to requests and orders under the *Freedom of Information and Protection of Privacy Act*;
- in response to authorizations or disclosure provisions in other statutes;
- in compliance with court orders and subpoenas; and
- in the course of police investigations into criminal matters.

While requests for disclosure cover virtually all information maintained by the Board, this paper concerns disclosure of information contained in Board claim files pertaining to workers and Board assessment and prevention files pertaining to employers. This represents most of the disclosure made by the Board, and presents most of the difficulties around disclosure.(4)

At the time of the Tysoe Royal Commission, the primary issue around disclosure was whether workers would be given access to information in Board claim files which pertained to them. That issue has now been substantially resolved, but other issues have arisen:

- workers' opposition to employers' broad rights of access to information in claim files;

- employers' opposition to release of information in assessment and prevention files to people other than the employer to whom the file pertains;
- workers' and employers' concerns that the Board has information pertaining to them which is not disclosed to them;
- workers' concerns that inappropriate personal information is being maintained in claim files pertaining to them.

These issues raise competing interests of freedom of information, protection of privacy, confidentiality, natural justice and fairness, the needs of the inquiry system, and administrative cost and delay. The Board's disclosure provisions have gone through three distinct phases, which reflect different balancings of these interests:

- until 1981, the Board had a policy of non-disclosure, which made the needs of the inquiry system and confidentiality the predominant interests;
- from 1981 until 1993, the Board developed a policy of almost full disclosure, in accordance with the common law doctrine of natural justice and fairness;
- since 1993, the *Freedom of Information and Privacy Act* has resulted in a balancing of greater rights of access with greater protection of privacy.

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## 2. History of Disclosure Provisions

### 2.1 The *Workers Compensation Act*

The *Act* has always given the Board broad powers to collect information from workers, employers, physicians and others.<sup>(5)</sup> Further, the *Act* has always provided that officers of the Board and any other persons authorized to make an examination or inquiry shall not divulge any information obtained under the *Act*, except in the course of their duties or under the authority of the Board.<sup>(6)</sup> In 1995, section 95(1.1) was added to the *Act* and provides that if information in a claim file is disclosed to anyone other than the worker, that person shall not disclose the information except with the consent of the worker, or in compliance with another statute, a subpoena or court order, or for the purpose of preparing a submission under Part 1 of the *Act*. Section 95(2) creates an offence for people who violate this section.

The *Act* does not contain provisions which provide for access to or disclosure of information maintained by the Board, except that the workers' advisers and employers' advisers are entitled to "access at any reasonable time to the complete claims files of the board and any other material pertaining to the claim of an injured or disabled worker...".<sup>(7)</sup>

Finally, in accordance with the broad discretion granted to the Board, the *Act* contains no provisions for the removal of information from Board files.

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### 2.2 Disclosure of Board Files Prior to 1981

Prior to 1981, the Board had a policy of non-disclosure of information in Board files. This policy was based on the Board's interpretation of what is now section 95(1) of the *Act*.

#### 2.2.1 1966 - Tysoe Report

The Tysoe report stated that the provisions of section 76 of the *Act* (now section 95(1)) "are such that undoubtedly much that is on a Board file must not be disclosed to a workman or to anyone else, other than the Compensation Counsellor".

The Tysoe report noted that, while some labour unions sought the elimination of section 76, the medical profession strongly opposed disclosure of medical reports given to the Board, including reports provided by a worker's own doctor.

The Tysoe report noted doctors were concerned that, in some cases, disclosure of medical reports would be detrimental to a person's care; doctors might lose patients' business if the patients saw their doctors' reports; and, disclosure of reports might require doctors to take extra time to explain their reports to their patients.

Mr. Justice Tysoe commented:

Time and time again I was told that if the report was going to be seen by anyone but me, the doctor would not feel able to be as completely frank as he would like to be. Such complete frankness on the part of doctors is, in my opinion, essential to the compensation process, and nothing should be done to endanger its expression.

I am in complete sympathy with the doctors' feelings, and I think they must be respected.(8)

With regard to the disclosure of non-medical evidence Mr. Justice Tysoe stated, "I am in complete accord with the Board's view that it must protect its sources of information." In response to complaints by labour about the WCB's policy of non-disclosure Tysoe responded as follows:

In support of the position it has taken, labour has appealed to the rules of natural justice, and it has contended that the non-disclosure of what it complains offends against those rules. There is, of course, no doubt the Board, where it acts in a judicial or quasi-judicial capacity, is subject to the rules.

I do not propose to get into the very large subject that is embraced in the term " rules of natural justice. " It is sufficient for me to say that I have not been referred to any case, nor am I aware of any, in which it has been intimated or from which it can properly be inferred that natural justice as it applies to the administration of the workmen's compensation scheme requires that a man in a position of a workman claiming compensation is entitled to see such things as medical reports and statements of evidence of non-medical facts, which the Board has in its possession, let alone that he is entitled to know the identity of the Board's informants.(9)

Thus, Mr. Justice Tysoe put primary significance on the needs of the inquiry system and the confidentiality of doctors and other people who supplied information to the Board. However, he noted this policy of non-disclosure of evidence "carries with it a very heavy responsibility", and the Board must ensure that evidence which is unfavourable to a worker's claim is subjected to "the closest and most critical check and scrutiny by *competent* persons on the Board staff." [emphasis in the original]

Subsequent to the Tysoe Report, the Board reviewed its disclosure policy several times.

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### 2.2.2 1974 - Decision No. 63 - the Inquiry System and Non-Disclosure (10)

In Decision No. 63, the Commissioners affirmed the Board's practice regarding claim files: an employer would not be provided with copies of documents received from a worker (including the worker's application for compensation) and a worker would not be supplied with copies of documents received from an employer (including the employer's report of an injury).

The decision expressed concerns that providing copies of these documents might cause unnecessary distress to workers to no useful purpose, and might harm the employment relationship between the worker and the employer. The decision also said fuller disclosure might seriously reduce the inflow of information from workers and employers to the Board, and could interfere with the Board's ability to obtain information from independent witnesses.

This decision emphasized the nature of the inquiry system, and said significantly increased disclosure would lead to the abandonment of that system and "a reversion to the adversary system". However, the decision recognized that an inquiry system needs checks against error or arbitrariness.

The decision said where it appeared to an adjudicator following investigation that a claim should probably be denied, the adjudicator should, before reaching a decision, ensure the worker was aware of the issues and was given a proper opportunity to present any relevant information or argument. If the employer was protesting a claim, the adjudicator should follow the same procedure with the employer. However, in neither case would the adjudicator give the worker or the employer copies of information in the claim file; rather, the adjudicator would supply "a paraphrase of sufficient information to identify the issues".

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### **2.2.3 1975 - Decision No. 119 - Medical Information(11)**

In Decision No. 119, the Commissioners affirmed that the Board would disclose "objective" medical information on the claim file to the worker, but not medical reports or opinions. However, the Board would provide those reports on request to the worker's treating doctor, who could then disclose them to the worker.

This decision said the Board's approach to disclosure began with the general principle that "any information on which governmental decisions are based should be made available unless there are policy reasons for keeping it confidential."

The decision then set out several policy reasons for restricting disclosure of medical opinions, including a concern that increased disclosure would result in a loss of accuracy and frankness in those reports. As in Decision No. 63, the Commissioners rejected any move toward the adversary system and "the procedural conceptions developed by lawyers".

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### **2.2.4 1975 - Item No. 168 - Court Approval(12)**

Item No. 168 in the *Workers' Compensation Reporter* notes that a party to a civil action in the Supreme Court of British Columbia had issued a subpoena to obtain all medical reports and other information in a Board claim file. The Board challenged the subpoena. The trial judge struck out the subpoena and upheld the Board's decision not to produce the reports and information, stating, "the principle on which non-disclosure is based ... is so important that it ought not to be interfered with."

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### **2.2.5 1979 - Decision No. 303 - Summaries of Claim Files(13)**

In Decision No. 303 the Commissioners said the policy of non-disclosure of claim files involved a contest between two opposing values: "the right of a citizen to know what facts have been gathered about him or her by any administrative agency; and the need of administrative agencies to receive the most complete and pertinent information on which to base decisions." To balance these values, the Commissioners decided, where an appealable decision was made and a request for disclosure received, the Board would provide a summary of the information on the claim file to the worker and the employer. These summaries would "generally include all material relevant to the issue being appealed", although "some discretion will be exercised". Since claim files, and particularly the medical information, pertain only to workers, the decision said "a summary prepared for a worker will not be supplied to the employer" and "summaries for employers will necessarily be abridged".

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## **2.3 Disclosure of Board Files from 1981 to 1993**

From 1981 to 1993, the Board moved to a policy of virtual full disclosure of information in claim files, once an appealable decision had been made. This was a result of the 1981 court decisions in *Napoli*.

### **2.3.1 1981 - the *Napoli* Decision and the Requirements of Natural Justice(14)**

In *Napoli*, the worker appealed, to the board of review and then to the Commissioners, a Board decision which denied him an increase in his disability award. On these appeals he was given a summary of his claim file in accordance with the directive in Decision No. 303. The summary did not include copies of the relevant medical reports and opinions. After losing both appeals, the worker challenged the Commissioners' decision in court. He argued the Board's refusal to disclose the medical documents on his claim file had impaired his ability to establish his appeal. Both the Supreme Court and the Court of Appeal said the provision of summaries by the Board was not adequate. They said the hearings before the board of review and Commissioners were quasi-judicial, and the rules of natural justice required quasi-judicial tribunals to disclose any relevant information they received. Since both the board of review and the Commissioners had the worker's file but had not disclosed it to him, the Court found they had failed to comply with the requirements of natural justice in this case. The Courts said these tribunals must disclose the complete file to the worker, including the medical reports.

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### **2.3.2 1981 - Decision No. 338 - a Change in Board Policy(15)**

Several months after the *Napoli* decision, the Commissioners issued Decision No. 338 in response to that court decision, giving workers access to the complete claim file once a valid appeal was commenced.

The directive also gave the employer access to information in the claim file which was "relevant" to the issues under appeal. The decision said this was "a compromise between the right of a worker to have the information on his file kept confidential and the right of an employer to disclosure under the rules of natural justice."

The Commissioners said there would be no disclosure prior to the initial adjudication of a claim as that would result in delays, and "one of the prime objects of the initial adjudication process is speed". The Commissioners acknowledged that disclosure at the appeal level would cause delays and complexities but said, "as only a very small minority of cases enter the appeal system, the potential harm to the system as a whole is much reduced". The Commissioners noted that court decisions referred to a need for disclosure only on appeals.

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### **2.3.3 1983 - Decision No. 370**

#### **- Disclosure of Related Claim Files(16)**

#### **- Disclosure of Assessment and Prevention Files**

In Decision No. 370, the Commissioners expanded the access given in Decision No. 338 to include disclosure of other Board claim files pertaining to the worker which were relevant to the issues under appeal, even though no appealable decision had been made on those other files. As well, for the first time, a policy directive addressed disclosure of industrial health and safety (now prevention) files and assessment files. It said the Board would grant disclosure of those files subject to the same conditions set out in Decision No. 338, with certain modifications: a valid appeal had to be commenced before disclosure would be provided; disclosure would be granted to people recognized by the Board as having status to participate in the appeal - which

would normally include the employer's workers and their union on industrial health and safety matters, but not on assessment matters; and disclosure would include a copy of all documents in the file which were "relevant to the issue under appeal".

The Commissioners noted that restricting disclosure to documents in a prevention or assessment file which were "relevant" to the appeal differed from disclosure of claim files. They said the reason for this lay in the "differing nature of claims and assessment and industrial health and safety files. In the Claims Department, a separate file is maintained for each injury suffered by one claimant. There is no one file for a claimant which covers all his injuries. In the other two departments, however, there is one file for each person or company which comprises his whole history with the Board."

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#### **2.3.4 1985 - the *Daigneault* Case - Court Ordered Production(17)**

In *Daigneault*, a personal injury case not involving the Board, the Supreme Court of British Columbia ordered the Board to produce documents in a claim file to the parties to the legal action. The Court said production may be refused if a document is privileged, but section 95 of the *Act* does not establish an absolute privilege with regard to Board documents. The Board argued for the need to maintain confidentiality. However, the Court said confidentiality was to be decided "by a balancing of the interests of the public". The judge continued, "I am not satisfied that the public interest in relation to the purpose and function of the Workers' Compensation Board outweighs the public interest in the proper administration of justice." For this and other reasons, the judge ordered production of the Board's claim file.(18)

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#### **2.3.5 1987 - Ombudsman Recommendations**

In July 1987, the Ombudsman of British Columbia issued a Public Report on the Workers' Compensation System.(19) The Report recommended that workers be given access to their Board claim files at any point in time, but an employer should not have access to material in a claim file which was judged to be both "irrelevant and prejudicial" to the worker.(20)

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#### **2.3.6 1987 - Decision No. 410 - Equal Access after an Appealable Decision(21)**

In October 1987, the Commissioners expanded the Board's disclosure provisions for claim files, but not in accordance with the Ombudsman's recommendations. Decision No. 410 gave both the worker and the employer access to the complete claim file once an "appealable decision" had been made, even though no appeal had been filed. The Board dropped the relevancy test for employers' access to claim files, and gave employers and workers the same rights of access to claim files.

Regarding the relevancy test, Decision No. 410 said experience had shown it was virtually impossible for any person to determine in advance of an appeal which information the actual decision-maker would consider relevant to its disposition.

Regarding equal access to claim files, the decision said it appeared that the compromise discussed in Decision No. 338 regarding different disclosure for workers and employers "does not comply with the rules of natural justice." The decision noted the Board had sought the legal advice of a distinguished jurist on this point.

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#### **2.3.7 1993 - the *Brand* Decision - Challenge to Employers' Access(22)**

In 1993, three workers judicially challenged the employer's right, on the employer's assessment appeals under section 39(1)(e) of the *Act*, to obtain disclosure of the claim files pertaining to the

workers and, in particular, the medical records in those files. The workers argued those records were confidential and they had a right of privacy in respect of them.(23)

The judge said it was necessary to balance the competing interests of privacy with the principles of natural justice which favoured disclosure. The judge concluded, "the policy considerations in favour of privilege must give way to those in favour of natural justice and that the disclosure to AQH [Angus Qually Consultants Ltd. - a firm retained by the employer] of the Petitioner's full files for purposes of a s. 39 appeal must be upheld."

Thus, the judge dismissed the workers' case and found the Board's disclosure policies "constitute a rational approach to the balancing of the interests involved and do not sacrifice the interests of workers unnecessarily." The judge noted that the *Freedom of Information and Protection of Privacy Act* had just come into force, but she made no comment on the effect of this new legislation on the issues in question.

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### **3. 1993 - The *Freedom of Information and Protection of Privacy Act* [FIPPA](24)**

In 1993, FIPPA was enacted. This statute had a significant impact on the Board's disclosure policies.

The purposes of FIPPA are "to make public bodies more accountable to the public and to protect personal privacy" by providing greater rights of access to the records of public bodies, while preventing the "unauthorized collection, use or disclosure of personal information by public bodies".(25)

FIPPA has broad application and applies to all "records" of a public body, which includes, "books, documents, maps, drawings, photographs, letters, vouchers, papers, and any thing on which information is recorded or stored by graphic, electronic, mechanical, or other means, but does not include a computer program or any other mechanism that produces records".

FIPPA puts responsibility on public bodies to act in accordance with its purposes. Section 6 of FIPPA says the head of a public body "must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely".

FIPPA also provides for the appointment of an Information and Privacy Commissioner [IPC] who has a range of powers, and may conduct investigations and audits to ensure compliance with the *Act*, make orders, and comment on the implications for access to information or for protection of privacy of systems used by public bodies for collecting, storing, analyzing, and transferring information.

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### **4. Current Board Policies on Disclosure of Board Files**

The Board amended its disclosure policies to comply with FIPPA. As well, the Board has made several subsequent amendments to these policies pursuant to decisions of the IPC. The policies are found in the three policy manuals of the Board.(26)

These policies all refer to the *Freedom of Information and Protection of Privacy Act* and point out that FIPPA differentiates among personal information, information relating to third party business interests and other types of information in the possession of the Board. The three policy manuals set out a number of common principles including that, until advised otherwise by the Information and Privacy Commissioner, openness prevails as far as possible and exceptions to access should be narrowly construed. Each policy manual then sets out different guidelines for the particular files it concerns.

The current policies are lengthy and will not be reproduced here. The following is a summary of important provisions.

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## 4.1 Claim Files

### 4.1.1 Disclosure to Workers and Employers

Items #99.00 - #99.90 in the *Rehabilitation Services and Claims Manual* contain the relevant policies. There are two relevant time periods for disclosure - before and after an appeal is commenced.

Prior to an appeal being commenced by either the worker or the employer, a worker is entitled to disclosure of the claim file pertaining to him or her at any time, subject to the privacy requirements of FIPPA. This means any personal information in the claim file which concerns another person may be severed prior to disclosure to the worker.

Prior to an appeal being commenced, an employer has a much more limited right of access to information in a claim file. Following the introduction of FIPPA, the Board still gave an employer access to the complete claim file once an appealable decision was made. However, in 1996 the IPC found this was in contravention of FIPPA. As a result, prior to an appeal being commenced, an employer now is entitled to information about the claim file only on a "need to know" basis.(27)

Once an appeal is commenced on a claim file, the worker and employer are entitled to full disclosure of the claim file and to information in any other claim file pertaining to the worker which is relevant to the issues in dispute. This entitlement is provided for in #99.00 and #99.31 of the *Rehabilitation Services and Claims Manual*, and reflects the requirements of natural justice as set out above in the *Napoli* case and Decision Nos. 338 and 410.(28)

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### 4.1.2 Disclosure to Others

The *Rehabilitation Services and Claims Manual* also contains disclosure guidelines regarding:

- Disclosure to Public or Private Agencies (#99.50), including;
  - Legal Matters (#99.51)
  - Other Workers Compensation Boards (#99.52)
  - The Canada Employment and Immigration Commission (#99.53)
  - Canada Pension Plan (#99.54)
  - Ministry of Social Services (#99.55)
  - Police (#99.56)
  - Government Employees Compensation Act (#99.57)
- Information to Other Board Departments (#99.60)
- Media Enquiries or Contacts (#99.70)
- Insurance Companies (#99.80)
- Disclosure for Research or Statistical Purposes (#99.90)

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### 4.1.3 Removal or Correction of Information in Claim Files

Section 28 of FIPPA says that if a public body will use personal information about an individual to make a decision about that individual, "the public body must make every reasonable effort to ensure that the information is accurate and complete".

Section 29 of FIPPA says that a person "who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information".

Policy items #99.23A and #99.23B in the *Rehabilitation Services and Claims Manual* provide that unsolicited information which is clearly irrelevant or found to be inaccurate does not

become part of the file. If the unsolicited information is accurate and relevant or potentially relevant, it is put in the claim file. The worker is informed and has an opportunity to comment and complain to the Board.

Since June 1996, policy item #99.35 has set out a procedure for complaints regarding file contents. Only where personal information is irrelevant to the claim does the Board permit the deletion or removal of the information from the claim file. A person objecting to the accuracy of file information is allowed to place on the file statements or material to rebut the statements to which there is an objection; however, the alleged inaccurate information is not removed from the file, unless it is determined to be irrelevant.(29)

Workers can apply to the adjudicator or the manager of the service delivery location to have material removed from the claim file. In addition, the Board's Ombudsman reports that some workers make their complaints to him - either because their complaint was not resolved elsewhere, or they were very offended by the information in their file and did not want to discuss it with the adjudicator.

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#### **4.1.4 Method of Disclosure**

Once a worker or employer is entitled to disclosure, one copy of the file will be provided on request to the individual or their representative. Since May 1, 1993, there has been no charge for that copy. As well, the person may inspect the file personally at one of the Board offices on request. In addition to a copy of the paper part of the file, if specifically requested, a copy of any tape recording of an inquiry interview conducted by the claims adjudicator will be provided.(30)

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### **4.2 Assessment Files**

#### **4.2.1 Disclosure to the Employer and Others**

*Assessment Policy Manual* No. 10:20:10 contains the relevant policies. An employer or independent operator is entitled to a copy of their "assessment record" at any time.

People other than the employer (third parties) are entitled to certain information about a firm (employers and independent operators) including: clearance letters which set out whether a firm is registered with the Board and whether its account is in good standing; information about contractor liability under section 51 of the *Act*; claims costs statements; and the classification and basic assessment rate for the firm. The policy sets out certain exceptions to third party disclosure.

In a 1994 matter, the IPC ordered the Board to disclose information in an assessment file, including a firm's assessment rate adjusted by its experience rating, to a third party, contrary to Board policy. The Board is in the process of changing the relevant policy in response to this decision. This will increase third party access to employer assessment information.(31)

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#### **4.2.2 Removal of Information in Assessment Files**

While the assessment policy contains provisions for a person to object to the disclosure or non-disclosure of information, it has no procedures for an employer to request that personal information be removed from the assessment file.

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## 4.3 Prevention Files

### 4.3.1 Disclosure to the Employer and Others

The *Occupational Safety and Health Division Policy and Procedure Manual* No: 1.3.6 contains the relevant policies for prevention files. Employers are entitled to disclosure of the Board's prevention file pertaining to them subject to an exception dealing with protecting the confidentiality of individuals who make complaints or provide information about alleged unsafe or unhealthy working conditions. This exception is designed to protect informants from harassment, disciplinary action or even dismissal, which also could impact negatively on the Board's enforcement activities.(32)

Third parties are entitled to a considerable amount of disclosure about other firms, including inspection reports and orders, repeat orders, closure orders, and some sanctions and penalties. The policy provides for some exceptions to third party disclosure.

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### 4.3.2 Removal of Information in Prevention Files

Like the assessment policy, prevention policy provides for people to dispute disclosure or non-disclosure of information in prevention files, but there are no procedures for an employer to request that personal information be removed from the file.

## 5. Disclosure on Appeals

### 5.1 Appeal Disclosure - Generally

Appeals by workers or employers on claims matters are heard first by the Workers' Compensation Review Board and then by the Appeal Division. Appeals on assessment and prevention matters are heard only by the Appeal Division. Both the Review Board and the Appeal Division are quasi-judicial bodies, and must comply with the requirements of natural justice in their appeal procedures. This includes the disclosure requirements of natural justice. On claims appeals, disclosure of the claim file is made to the worker and employer on request once an appeal is commenced. Since an appeal is a "proceeding", this disclosure is not subject to the protection of privacy provisions in FIPPA.(33)

As noted above, Board policy puts some restrictions on disclosure of information in assessment and prevention files. However, on an assessment or prevention appeal, the Appeal Division must decide whether or not to disclose all of the information in the assessment or prevention file pursuant to the requirements of natural justice. Therefore, it is possible that an employer or other party to an appeal might obtain personal or confidential information from an assessment or prevention file that otherwise would not be disclosed.

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### 5.2 Section 39(1)(e) Appeals

These are assessment appeals which involve disclosure of a claim file to the employer, even though the worker is not a party to the assessment appeal and the appeal does not concern the amount of compensation the worker is entitled to receive.

Under section 39(1)(e), an employer can apply for a "relief of costs" if a worker's disability is "enhanced by reason of a pre-existing disease, condition or disability". This can reduce the assessment liability of the employer, even though it has no effect on the compensation paid to the worker.

Since the question of whether a worker's disability is "enhanced" by other factors is essentially a medical issue, an employer, or its representative, usually will require access to the medical information in the claim file to pursue an application under section 39(1)(e).

Prior to IR P96-006 of the IPC, if a request was made, the Board disclosed a claim file to the employer once the adjudicator had decided the employer would not be granted relief of costs on the claim. The Board considered this was an appealable decision. However, since IR P96-006 and the subsequent change in Board policy, the employer is now required to initiate an appeal under section 39(1)(e) before being entitled to disclosure of the claim file.(34)

Workers have objected to this type of disclosure. The *Brand* case involved disclosure on section 39(1)(e) appeals, and some of the complaints received by the IPC which led to IR P96-006 also concerned disclosure of claim files on section 39(1)(e) matters. Many workers do not want their claim files, especially personal medical reports in the files, disclosed to employers in situations where the employer does not protest the worker's claim and, thus, the worker does not participate in the appeal. However, the *Brand* decision upheld the Board's policy on disclosure, and the IPC pointed out FIPPA does not apply to a "proceeding". Since the Board now requires an employer to file a notice of appeal on a section 39(1)(e) matter prior to obtaining disclosure of the claim file, the disclosure is made in a "proceeding" and is unaffected by IR P96-006 and FIPPA. Nevertheless, it remains a contentious point with workers.

This matter was exacerbated by what are called "Historical section 39(1)(e) Applications".

Employers and consultants are now making section 39(1)(e) applications on claim files going back as far as twenty years. The *Act* and Board policy contain no explicit time limit on these applications. If the Board did not address the relief of costs issue at an earlier point in time on a worker's claim, the employer is still able to pursue the matter with the Board.

The result is that, on any of these historical section 39(1)(e) matters which are now appealed, employers and their consultants can obtain access to claim files going back as far as twenty years. This disclosure occurs even though the employer may never have protested the claim in the past. Workers are upset at this wide-ranging disclosure of personal medical information going back a number of years, while employers say they need access to these files to pursue these appeals.

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## 6. Potential Issues

### 6.1 Workers' opposition to complete disclosure of claim files to employers

As described above, workers have objected to complete disclosure of claim files to employers, particularly on section 39(1)(e) assessment appeals. While IR P96-006 put limits on disclosure of information in a claim file to an employer prior to a "proceeding", an employer can still obtain access to the complete claim file merely by filing an appeal on a section 39(1)(e) matter. Thus, the concerns expressed by workers in both the *Brand* case and in IR P96-006 have not been remedied.

Terence Ison noted that, in British Columbia and several provinces, workers and employers have equal rights of access to claim files; however, in the majority of provinces employers have more limited rights of access or no right of access at all.(35)

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### 6.2 Employers' opposition to release of information in assessment and prevention files to third parties

Employer objections to the release of assessment information resulted in Order No. 22-1994 of the Information and Privacy Commissioner. That order broadened the disclosure previously made by the Board. While the Board is amending its policy to comply with that order, it is likely

employers will continue to oppose the release of information to unions or competitors which they feel may be harmful, either directly or indirectly, to their financial or business interests.

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### **6.3 Workers' and Employers' concerns that the Board is not making full disclosure to them**

Both workers and employers have expressed concerns that, when disclosure is made, they are not being given all the information pertaining to their case. In some cases this is true, in others it is not.

#### **6.3.1 Claim files**

Item #99.30 in the *Rehabilitation Services and Claims Manual* says, "the claim file is the master record for recording all information with respect to a claim. Whatever is done on the claim file and whatever evidence is used in the adjudication process must be recorded or placed on file." However, all the information about a claim is not necessarily on the claim file. In some cases, there may be a delay in placing information on the file. The one master copy of the file can only be in one place at one time. If more than one department is working on a worker's claim during the same time period (for example, the Disability Awards Department, the Vocational Rehabilitation Department and the Review Board may all be working on the same claim during the same period of time), some of the departments may obtain information when the file is in another department. The department which obtains the information may retain that information if it is relevant to their immediate work on the claim, and thus there can be a delay, of possibly months, before the information is placed on the claim file. Eventually this material will be put on the file but, prior to that happening, if the worker or employer obtains disclosure of the file, this information will not be included in the disclosure.

This problem should be remedied when the Board implements its E-file project, which will allow different Board officers to have access to the same file at the same time, which will include the ability to put information on the file electronically from various locations.

There is other information which is never placed in the claim file. For example, the raw data from psychological testing or the personal notes kept by rehabilitation consultants do not appear in a claim file, although this information is summarized into a report which is in the file. However, this original material is not included with disclosure of the file.

In some situations, the file disclosure is complete, even though the worker or employer is not satisfied. Board officers may not document or explain their actions in writing as fully as workers and employers might like. Thus, a worker or employer might think the file disclosure is incomplete, whereas in fact it contains all the information which the Board has about the worker's case.

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#### **6.3.2 Assessment files**

The Assessment Department has a paper file for each firm, and also maintains other information on an electronic file. The employer has access to the paper file and, with a specific request, can obtain the electronic file, but that file is in code and can be difficult to interpret. As well, if there has been collection activity on an account, the Assessment Department will have a collection file, which will be disclosed if the employer makes a specific request for it.

Thus, there is not one master assessment file as there is a master claim file. However, as pointed out in Decision No. 370, claims and assessment matters differ in that a claim file deals with one particular claim for a worker, whereas an assessment record deals with the firm's whole assessment history with the Board.

If any employer feels it is not getting full disclosure of all relevant assessment information, there may be two likely causes: the employer did not make a specific request for that particular information or file from the Assessment Department or, as with claim files, the employer is looking for documentation which does not exist on any Board file.

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### **6.3.3 Prevention files**

Like assessments, prevention does not have one master file for each firm. Thus, the primary firm file released on disclosure does not contain all the information about the firm.

Field officers may conduct a number of investigations without transporting the firm files with them, and there may be a delay before the field officer is able to place documents in the appropriate file. The E-file project referred to above will not assist here, as it will not apply to prevention files, at least initially.

Further, there is some information which does not get placed in the prevention firm file, such as accident investigation reports, police reports, lab tests, hearing tests, and personal notes made by field officers during an accident investigation, although a summary of this material may be placed in the file.

Thus, disclosure of the primary prevention file does not necessarily include all information pertaining to the firm.

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### **6.4 Workers' concerns that inappropriate personal information is being maintained in claim files**

The WCB Ombudsman reports that, in the first quarter of 1997, he received nine complaints from workers regarding objectionable personal information in their claim files. While this is a small percentage of all the matters received by the Ombudsman, he says these are usually difficult cases, often involving information which is very personal to the worker or others (usually family members), and often the worker is personally affronted by the information in the claim file. While it appears the Ombudsman is resolving most of these matters, he expects increasing awareness of this issue. The Board policy which allows for removal of information from claim files has existed only since June 1996.

While information which is not relevant to the claim can be removed from the file, it can be very difficult to determine in advance whether certain information is relevant or may become relevant to a worker's claim. Thus, the new policy which allows for removal of information from claim files will undoubtedly give rise to disputes in application.

The implementation of the Board's E-file project may complicate this issue. Currently, the proposed E-file system does not allow information in a file to be destroyed. Rather, information can be hidden so that it does not appear on the file, although it still exists electronically. This raises obvious problems of privacy and access.

One important matter is effective screening of incoming information so that inappropriate information is not put in the file. The Board has been training and sensitizing its own staff to this matter. As well, the Board has been working with the community, and especially health care providers, to try and ensure that the information they submit on a worker's claim is limited to information relevant to that claim, and does not contain irrelevant personal information about the worker or others. However, this is not an easy matter and there may be complaints about the screening of incoming information.

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## 6.5 Appeal disclosure

Disclosure on appeals by the Review Board and the Appeal Division is governed by the principles of natural justice, which is often interpreted to mean that an appeal body must disclose all the information it receives.<sup>(36)</sup> Appeals are "proceedings" and are not subject to FIPPA. Therefore, while FIPPA has the goal of protecting the privacy of individuals, these protections may be completely lost once a matter is taken to appeal, if the appeal body makes full disclosure of all information in the file. As noted earlier, Ontario and other provinces have amended their Workers' Compensation Acts to limit disclosure even on appeals.

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## 6.6 Misuse of information

IR P96-006 noted that several complaints from workers focused on the inappropriate use of information in a claim file by the employer. In 1995, section 95 of the *Act* was amended to limit the use of disclosed information.

The WCB FIPP office said there have been two complaints under the amended section 95, and both were resolved satisfactorily without the need to consider prosecution.

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## 6.7 Administrative resources

As the Information and Privacy Commissioner noted, the Board undertakes a staggering amount of disclosure. Every department reports that the amount of disclosure it makes is increasing, which represents significant resources.

The Records Management Department, which deals with disclosure of claim files, indicates disclosures have increased in the past year from 20,500 to 21,500, with the average number of pages in each disclosure increasing from 100 to 159. On average, this disclosure takes seven weeks, but may take up to twelve weeks on non-priority disclosure.<sup>(37)</sup>

The Assessment Department indicates they currently are dealing with about 2100 requests per year for disclosure, and that number is increasing.

The Prevention Department also indicates significantly increased requests for disclosure, many of which are very time consuming.<sup>(38)</sup>

The WCB FIPP office indicates that, in 1996, it handled 868 new requests for disclosure. That was an increase from 571 new requests in 1995.<sup>(39)</sup> These requests are in addition to the disclosure made by the various departments in the ordinary course of business. Often, a request is made for "everything" in relation to an employer or worker, which requires the FIPP officer to make inquiries of all employees in the Board for any information they possess. Thus, the resources expended on disclosure are not just those of copying and distributing the file, but also the time spent by the Board's FIPP people and other Board employees to search for any other information which may exist, and then to review it in accordance with the privacy provisions of FIPPA.

Resources expended on the disclosure process are paid for out of the accident fund, and represent an increasing cost. As noted earlier, no fee is charged for disclosure of claim files. As well, the disclosure process can produce delays in the adjudication of a matter, including appeals. Thus, the disclosure process raises issues of expense and timeliness, both of which may give rise to concerns about fairness.

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## Appendix A

### 1996 - IPC Investigation Report P96-006 re Disclosure of Claim Files

The IPC received several complaints regarding the WCB's policy of disclosing an entire claim file to an employer for the purposes of an appeal. These complaints raised a number of issues, which the IPC investigated.(40)

In his Report, the IPC noted section 3(2) of FIPPA states:

3(2) This Act does not limit the information available by law to a party to a proceeding.

The relevant law on this point is the principles of natural justice enunciated in the *Napoli* decision. That is, a party to a "proceeding" is entitled to disclosure of material received by a quasi-judicial tribunal. FIPPA does not apply to that type of disclosure.

The IPC disagreed with the WCB regarding when a "proceeding" commenced. The WCB said a proceeding commenced once an appealable decision was made on the worker's file, and the worker and employer were entitled to full disclosure of the worker's file at that point.

However, the IPC found a "proceeding" commences only once an appeal is initiated. Therefore, the IPC found the Board's disclosure policies, which allowed for full disclosure of the worker's file to the employer once an appealable decision was made, were in contravention of FIPPA.

The IPC said, prior to an appeal being commenced by the worker or employer, the WCB should share information in the worker's file with the employer only on a "need to know basis".(41)

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## Appendix B

### 1994 - IPC Order No. 22-1994 - re Disclosure of Assessment Files

In 1994, the Information and Privacy Commissioner conducted an inquiry into a request by a union for access to certain assessment records of two employers.

The Board determined it should not disclose the experience-rated assessment rate nor the total assessments charged and collected from the employers, as this was financial information supplied in confidence to the WCB which could significantly affect the competitive position of the employers. However, the IPC ordered the Board to disclose that information to the union, pursuant to FIPPA.

As well, the employers objected to disclosure of their total claims costs charged for assessment rating purposes, but the IPC also ordered the Board to disclose that information to the union.

The employers challenged the decision of the IPC in the Supreme Court of British Columbia.

While the judge did not agree with all of the reasoning of the IPC, the judge agreed with the final conclusion and dismissed the judicial review.(42)

## Footnotes

1. This is one of several briefing papers prepared by the Policy and Regulation Development Bureau. The purpose of the papers is to provide background information on issues that may be the subject of examination by the Royal Commission. The papers are not submissions to the Royal Commission nor were they prepared at the request of the Royal Commission. The papers do not purport to cover all the issues the Commission or others might raise about a particular subject. The general nature of the papers means they cannot include detailed discussion of all the issues. The papers refer to sources of additional information where known. There has been no attempt to exhaustively research all the issues. The papers do not include recommendations for resolving issues, although they may discuss alternative ways of dealing with an issue, particularly where other jurisdictions have dealt with similar matters.
2. INVESTIGATION REPORT - INVESTIGATION P96-006, *An Investigation into the practices of the WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA with respect to disclosing personal information about injured workers to employers*, March 31, 1996 - David H. Flaherty, Information and Privacy Commissioner of British Columbia. [hereafter referred to as IR P96-006]
3. *Commission of Inquiry - Workmen's Compensation Act, Report of the Commissioner*, The Honourable Mr. Justice Charles W. Tysoe (1966).
4. Important and difficult issues also arise concerning other information maintained by the Board. For example, in Order No. 54-1995, dated September 19, 1995, the Information and Privacy Commissioner conducted an inquiry into a request for the qualifications of a particular vocational rehabilitation consultant employed by the Workers' Compensation Board. The WCB had refused to disclose this information. The Information and Privacy Commissioner found the Board was authorized to refuse to disclose the information in dispute. In Order No. 158-1997, dated April 10, 1997, the Information and Privacy Commissioner conducted an inquiry into a request by an employee of the WCB for "any and all information the employer has pertaining to discipline investigations, meetings and discussions" about the employee. The WCB had disclosed some but not all of the information the employee was seeking. The Information and Privacy Commissioner criticized the Board for failing to perform its duties under FIPPA to determine whether certain information could be severed and the remaining information released. He ordered the Board to perform its duties and review the records in dispute.
5. The Board acts on an inquiry model. For example, sections 71(8) and 88 of the *Act* give the Board and its officers broad powers to investigate accidents, inspect work places and documents, examine the books and accounts of every employer, make examinations, require and take affidavits or declarations, administer oaths, affirmations and declarations, and make any other inquiry it considers necessary. Very similar powers have been included since the 1917 *Act*.
6. Section 95(1) of the current *Act*. The *Act* has contained this provision since 1917.
7. This is found in Section 95(3) of the current *Act*. This type of disclosure first appeared in the 1954 *Act*, with complete access provided to the Compensation Counsellor. This was expanded in 1968 to include the Compensation Consultant, and in 1974 to include the Employers' Advisers. In 1985 the Compensation Counsellor and Compensation Consultant were replaced with the Workers' Advisers, and the section was amended accordingly.
8. *Supra*, footnote 3 at 327.
9. *Supra*, footnote 3 at 329.

10. Decision No. 63, (1973-74) 1 Workers' Compensation Reporter 264.
11. Decision No. 119, (1975-76) 2 Workers' Compensation Reporter 103.
12. Item No. 168, (1975-76) 2 Workers' Compensation Reporter 261.
13. Decision No. 303, (1979-84) 5 Workers' Compensation Reporter 24.
14. *Re Napoli and Workers' Compensation Board* (1981), 121 DLR (3d) 301 (BCSC); 126 DLR (3d) 179 (BCCA).
15. Decision No. 338, (1979-84) 5 Workers' Compensation Reporter 109.
16. Decision No.370, (1979-84) 5 Workers' Compensation Reporter 172.
17. *Daigneault v. Qually* (unreported) New Westminster Registry No. C830053, Date of Judgment May 24, 1985.
18. The Board now routinely discloses claim files for the purpose of litigation if it has the authorization of the worker or a court order.
19. *Workers' Compensation System Study - Public Report No. 7*, Ombudsman of British Columbia July 1987.
20. *Ibid.* Recommendations Nos. 2 and 4.
21. Decision No. 410, (1984-91) 6 Workers' Compensation Reporter 65.
22. *Brand v. British Columbia (Workers' Compensation Board)*, (unreported) [1993] B.C.J. No. 2330, Vancouver Registry No. A932031, Judgment filed November 15, 1993 (BCSC).
23. The employer's representative had obtained approximately 400 claim files from the Board to review under section 39(1)(e).
24. R.S.B.C. 1992, c. 61, as amended by S.B.C. 1993, c. 46 and Schedules 1, 2 and 3, as amended by the instruments referred to at the end of each such Schedule.
25. Section 2 sets out the purposes and section 3 sets out the scope of FIPPA. FIPPA applies to all records in the custody or control of a public body, which includes the Workers' Compensation Board. Part 2 of FIPPA (sections 4 to 25) sets out the Freedom of Information provisions, with exceptions. Part 3 of FIPPA (sections 26 to 36) sets out the Protection of Privacy provisions. With regard to freedom of information, FIPPA grants people a right to access to any record in the custody or control of a public body, with exceptions including: Policy advice or recommendations; Legal advice; Disclosure harmful to law enforcement; Disclosure harmful to the financial or economic interests of a public body; Disclosure harmful to individual or public safety; Information that will be published or released within 60 days; Disclosure harmful to business interests of a third party; and Disclosure harmful to personal privacy. With regard to the protection of privacy, FIPPA contains provisions on: Collection, Protection and Retention of Personal Information by Public Bodies; and, Use and Disclosure of Personal Information by Public Bodies.  
As part of its efforts to meet its obligations under FIPPA, the Board has a FIPP office which deals with requests and complaints under FIPPA in regard to Board files. If an issue is not resolved at this level, the person can take their complaint to the Information and Privacy Commissioner. The Board also has a FIPP contact person in each department, who deals with FIPP requests and assists the Board's FIPP office.
26. The Rehabilitation Services and Claims Manual, the *Assessment Policy Manual*, and the *Occupational Health and Safety Division Policy and Procedure Manual*.
27. *Supra*, IR P96-006, footnote 2. See Appendix A for a summary of this report of the IPC.
28. To claim compensation for an injury or disease, a worker completes and signs a Form 6, Application for Compensation. Prior to FIPPA, the Form 6 was silent on disclosure of information in the claim file. The Form 6 has been amended and now states, above the place for the worker's signature, "I acknowledge that the Board may disclose information

from my claim to my employer for purposes of appeal, or may disclose such information to others in accordance with the law, including the *Freedom of Information and Protection of Privacy Act*. I authorize the Board to disclose information from my claim to the designated advocate of my union or similar association."

29. In IPC Order No. 124-1996, which concerned a request by a person for the WCB to correct personal information on the Board's claim file pertaining to that person, the Information and Privacy Commissioner stated: There is no requirement in section 29 that a public body must correct personal information. However, it should do so where facts are clearly incorrect. The statutory obligation on a public body is to annotate the information with the correction that was requested and not made. A public body cannot correct someone's opinion; it can only correct facts upon which an opinion is based. Annotations and corrections should be apparent in the file, but public bodies have discretion to make administrative decisions about how they will annotate. [INQUIRY RE: *The Workers Compensation Board's application of section 29 of the Act (correction of personal information)*, September 12, 1996, Office of the Information and Privacy Commissioner].
30. Disclosure of claim files involving sexual assault and/or sexual harassment is administered separately by the Sensitive Claims Unit, and is subject to different disclosure procedures.
31. Order No. 22-1994, September 1, 1994, Office of the Information and Privacy Commissioner. See Appendix B for a summary of this case.
32. The Board employs officers who inspect places of employment to determine whether the employer is complying with its regulations. However, it is only practicable for the Board to inspect a small proportion of the total number of workplaces in a year. To make the most effective use of its resources, the targeting of inspections to the place where they are really required is crucial. Information received from a worker or other person concerning unsafe conditions at a worksite is a vital way in which the Board can prevent accidents before they occur rather than acting on the basis of accidents that have already occurred. However, persons with information may be discouraged from providing it to the Board if their identity cannot be kept confidential.
33. As noted above, this is provided for in #99.00 and #99.31 of the Rehabilitation Services and Claims Manual, and is pursuant to the requirements of natural justice.
34. After IR P96-006 limited the disclosure available to employers of claim files, there was a dramatic increase in the number of appeals filed on section 39(1)(e) matters, presumably so the employers' consultants could obtain access to the claim files to determine whether or not to pursue the applications. Many of the appeals were subsequently withdrawn.
35. Terence G. Ison, *Workers' Compensation in Canada*, 2nd edition (1989), at 202. While the Board relies on the principle of natural justice to justify full disclosure of worker files to employers on appeals, the principles of natural justice can be superseded by clear statutory language to the contrary, as exists in some other provincial Workers' Compensation Acts. For example, section 71 of the Ontario Workers' Compensation Act provides that, where there is an issue in dispute, "the Board shall grant the employer access to copies of only those records of the Board that the Board considers to be relevant to the issue or issues in dispute." The section further provides that, before granting the employer access to medical reports and opinions under the above provision, the Board shall notify the worker of the medical reports it intends to disclose and the worker is permitted to make written objections. The Board then decides whether to withhold or disclose the medical reports, and the worker and employer have 21 days

in which to appeal the Board's decision before any information is released. This has resulted in numerous appeals to the Workers' Compensation Appeal Tribunal about what is a "medical" report, whether medical information in non-medical documents is protected by this provision, what information is "relevant" in the particular case, and whether the Board can sever part of a document before disclosure. These appeals on disclosure issues delay any appeal on the substantive issue in dispute on the claim.

36. However, there are court decisions which indicate that the requirements of natural justice must be balanced with other interests, and full disclosure is not always required.
37. The 1996 budget for the Records Management Department was not available at the time this paper was completed. That budget would not include the time of claims officers and adjudicators in reviewing disclosure requests.
38. The Assessment Department and Prevention Department each indicate that one-half of a full time person is devoted to dealing with disclosure requests, and that does not include the time of other Board employees in those departments in searching for information, or the cost of copying and mailing the information.
39. The 1996 operating cost for the FIPP office was approximately \$395,000, which does not include the cost of the FIPP contact people in each department, the time spent by other Board employees searching for information, and the cost of copying and mailing the information.
40. The Executive Summary of the decision set out the issues as: one concern is that information about a worker which is not directly relevant to the appeal may be disclosed to the employer; several complaints expressed concern that sensitive information about third parties may be released with the claim file; other complaints center on the worker's assumption that the information in the claim file is privileged; several complaints concern the fact that the only notification they received regarding the disclosure of their claim file came after-the-fact; and several complaints raised questions about the safeguards in place to protect the information in a claim file once it has been disclosed to an employer.
41. The Report of the IPC noted this includes information which is necessary for the initial adjudication and administration of a claim. The report stated, "This type of disclosure is typically in the form of verbal information from the adjudicator to the employer regarding when the worker is expected back to work, what the basic injury is, what caused the injury (so the employer can take remedial action in the workplace), and whether the worker will need light duties upon return to work."
42. Unreported. Vancouver Registry No. A942824, date of decision November 27, 1995 (BCSC).