

***Yukon Workers' Compensation Act***  
**Subsection 105.(1) Research Series:**  
**Expansion of the Meaning of Disability**

Commissioned by the Yukon Workers' Compensation  
Health and Safety Board of Directors in preparation  
for the 2003 *Workers' Compensation Act* Review

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**Yukon *Workers' Compensation Act*  
Subsection 105.(1) Research Series:**

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## 1.0 Introduction

The Yukon Workers' Compensation Health and Safety Board is responsible for the administration of the *Workers' Compensation Act*. Subsection 105.(1) of the *Workers' Compensation Act* requires that a review of selected concepts embodied in the *Act* be initiated no later than January 1, 2003. The concepts identified for consideration include:

- (a) expansion of disability, within the meaning of the Act
- (b) the effectiveness and appropriateness of the board administering both the *Workers' Compensation Act* and the *Occupational Health and Safety Act*
- (c) the use of deeming
- (d) the effect of retirement on entitlement
- (e) the role and use of indexing of benefits
- (f) the method and limitations on calculating the maximum wage rate
- (g) the role and effectiveness of the workers' advocate
- (h) the adequacy of the system for spouses

This paper presents the results of the review undertaken by Vector Research in respect of concept (a), expansion of disability, within the meaning of the Act.

The main methodology employed in the study was a document review. The analysis contained in this paper is fundamentally from a public finance perspective; the absence of discussion about the psychological and sociological impacts of worker injury and disability is not intended to diminish the importance of those impacts to workers, employers and their families.

The remainder of this research paper consists of four sections. The next section (2.0) presents some background on the meaning of disability. Section 3.0 describes the meaning of disability in the Yukon context. Section 4.0 contains a discussion of disability and occupational diseases from an interjurisdictional point of view. Section 5.0 considers the issue of work-related disabilities *vis a vis* insured health services. The paper concludes in Section 6.0 the identification of some key issues thought to warrant further discussion.

## 2.0 Background on the Meaning of Disability

All provincial and territorial jurisdictions in Canada founded their systems of workers' compensation on a common set of principles. Outlined in 1913 by Ontario Chief Justice William Meredith, the principles define the compensation relationship between injured workers and employers. The principles put forward by Meredith, while of proven durability, were nonetheless a product of the times. Meredith's recommendations incorporated lessons learned during the industrialization of Europe

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in the latter half of the 19<sup>th</sup> century, especially Germany. For the purposes of this research paper on the “meaning of disability”, this historical context is important for two reasons.

The first reason is that because the founding principles for workers’ compensation are common to all jurisdictions in Canada, all have been attempting to address a similar set of issues around the meaning of disability. Thus, the question of which injuries, diseases and illnesses should be considered compensable is not unique to the Yukon.

The second reason is that when Meredith outlined his principles 90 years ago, workers were relatively more likely to be employed in factories, mills and mines than they are today. Workers at that time were typically performing heavy labour in hazardous conditions. Injuries suffered in the performance of heavy labour tends to be physically obvious or, acute -- lacerations, broken bones, severed limbs and the like. Acute injuries allow for clear determinations of whether an injury was sustained while undertaking a work-related activity; there is a high degree of correlation, or causality, between the injury and the work.

Thus, a presumption of causality came to be embodied in systems of workers’ compensation in Canada. By design, the payment of workers’ compensation benefits requires that the cause of the injury be directly attributable to a worker’s employment. This requirement is captured in the Yukon *Workers’ Compensation Act* in section 101.(1).<sup>1</sup> In order for a disability to be considered ‘work-related’ (and therefore compensable) it must “aris[e] out of and in the course of the employment of a worker.”<sup>2</sup> In summary:

“Workers’ compensation systems were initially conceived primarily in terms of compensating workers for acute injuries sustained in the workplace, and so the requirement of a causal link between the work and the injury did not pose much of a problem.”<sup>3</sup>

Undeniably, however, the workplace and the nature of work have undergone major transformations over the last 90 years. The share of economic output generated by service-based industries has increased relative to manufacturing and resource-based industries. Jobs once characterized as ‘hard labour’ have given way to jobs which make use of new technologies including robotics and personal computers.

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<sup>1</sup> According to Esther Shainblum et. al., similar legislative requirements are found in other jurisdictions. See *Multicausality and Non-traditional Injury* published in *Workers’ Compensation: Foundations for Reform* edited by Morley Gunderson and Douglas Hyatt, 2000, page 61.

<sup>2</sup> Section 101.(1), *Workers’ Compensation Act*, S.Y. 1992, c. 16.

<sup>3</sup> Esther Shainblum et. al. *Multicausality and Non-traditional Injury* published in *Workers’ Compensation: Foundations for Reform* edited by Morley Gunderson and Douglas Hyatt, 2000, page 62.

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Traditional worker roles have been altered by new methods of organization and production.<sup>4</sup> While acute injuries still occur in the workplace, chronic disabilities which can have multiple causes, complex interactions and long latency periods are now relatively more prevalent.

In the context of workers' compensation, the meaning of the word 'disability' was, in an earlier time, quite limited to mean the result of an accident which was acute in nature. That is, the length of time between a worker's exposure to a hazard and the manifestation of physical effects was short; the worker was said to have suffered an acute injury.

Over time, the meaning of the word 'disability' has expanded to include afflictions which are longer term in nature, or chronic. The term 'chronic' refers to the longer span of time over which exposure to a hazard was experienced. Because the word injury implies a short period of time between exposure to a hazard and the manifestation of physical effects, the terms 'disease' and 'illness' are typically used in association with chronic disabilities instead.

**Table 1: Disability Parsed**

DISABILITY	
ACUTE disability (injury)	CHRONIC disability (disease/illness)
Examples: <ul style="list-style-type: none"> <li>• lacerations</li> <li>• broken bones</li> <li>• severed limbs</li> <li>• burns</li> <li>• post-traumatic stress</li> <li>• death</li> </ul>	Examples: <ul style="list-style-type: none"> <li>• silicosis</li> <li>• white finger disease</li> <li>• hearing loss</li> <li>• heart disease</li> <li>• musculoskeletal disorders</li> <li>• cancer</li> <li>• mental illness</li> <li>• chronic pain</li> <li>• chronic stress</li> <li>• sprain and strain</li> <li>• soft tissue injury</li> <li>• multiple chemical sensitivities</li> <li>• repetitive strain injuries</li> <li>• environmental illnesses</li> </ul>

In summary, there are two main types of disability, acute and chronic. An acute disability is commonly referred to as an injury and chronic disabilities tend to be known as diseases and illnesses. Table 1 above presents an interpretation of how the word 'disability' can be parsed in the context of workers' compensation. Examples of injuries associated with acute disabilities and the diseases and illnesses associated with the chronic disabilities are also listed in Table 1.

As described above, the nature of work and workplaces have evolved during the last century with a corresponding increase in the incidence of chronic disabilities relative to acute disabilities. Thus, the increasing incidence of chronic disabilities has resulted in pressure to expand the meaning of disability.

Now, recollect that a requirement for a linear causal link between the work and the injury is embedded in the general design of workers' compensation systems in

<sup>4</sup> See Morley Gunderson's paper *Workers' Compensation in the New World of Work* (published in *Workers' Compensation: Foundations for Reform* edited by Morley Gunderson and Douglas Hyatt, 2000) for an extensive discussion of the changing nature of work in Canada.

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Canada. Chronic disabilities -- which tend to be non-linear in terms of causality (i.e., they have multiple causes, complex interactions and long latency periods) -- do not readily fit the workers' compensation mould since it is often difficult to attribute disability to work-related factors.

At the same time as the issue of the meaning of disability for workers' compensation purposes has itself become chronic, the structural requirement for a linear causal link between the work and the injury has remained static. In consequence, disabilities which are not acute injuries represent a serious dilemma for systems of workers' compensation. Before further describing the dilemma faced by workers' compensation boards in Canada, a couple of examples which delineate the difference between acute and chronic disabilities are perhaps in order.

First, consider worker A, a carpenter, who has suffered a fall from a scaffold while affixing siding to a building which has resulted in a broken arm. The cause of the worker's injury is clear as it occurred in a specific place at a definite moment in time in the course of a work-related activity. In such an example, there is little room for debate as to the cause of the injury and whether it is work-related and compensable.

In contrast, consider worker B, a project manager, who is suffering stress to a degree that it is causing a loss of capacity to meet their occupational demands. Suppose that stress is being experienced by worker B at home, at work and also from a lengthy daily commute between home and work. With three apparent sources of stress and given that stress from one source can compound stress from another source, it is difficult to determine what portion is attributable to just work-related factors. As a result, the causal link between the disability (stress) and the work is not so clear. Without a clear causal link there is much room for debate as to the cause of the injury and whether it is work-related and compensable; the attribution of the disability to work-related factors is central to the debate.

Recall from earlier in this paper that the phrase 'arising out of and in the course of employment' is used to describe the requirement that the cause of the injury be directly attributable to the worker's employment. Without clear attribution between the cause of a disability and work, it becomes difficult to demonstrate that a disability has 'arisen out of and in the course of employment'. Thus, the phrase 'arising out of and in the course of employment' has in practice become a gate through which all compensation claims must pass. A feature of many chronic disabilities is multi-causality; they are caused by factors and hazards found in the course of working and in the course of living everyday life.<sup>5</sup> The result is that unlike acute disabilities, not all chronic disabilities are allowed passage through the gate.

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<sup>5</sup> Note that multi-causality is not by itself necessarily a bar to compensation but that multi-causality can make it difficult to attribute sufficient cause to the workplace in order for a disability to be considered compensable.

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Now, to return to the dilemma faced by workers compensation boards' in respect of expanding the meaning of disability, consider the impacts of different positions of our figurative gate. If the gate is swung open and only loose attribution between a disability and an individual's work is required, the compensation system risks paying compensation for disabilities for which the system has not been funded. The financial health of an entire compensation system could be placed at risk beyond what was contemplated at the time assessment premiums were collected.

Conversely, if the gate is swung closed and rigid attribution between a disability and an individual's work is required, the compensation system risks denying compensation benefits to which a worker is entitled. In this case, the integrity of the compensation system is at risk according to the terms the historic compromise between employers and workers.

In summary, the dilemma faced by worker's compensation boards in Canada with regard to the meaning of disability is one of how to position the gate such that the financial risks are balanced with workers' rights to compensation. To further illustrate, consider the two views on the compensability of chronic stress presented in Table 2 below.

**Table 2: Two Views on Chronic Stress**

<p>"In fact, it is questionable whether workers' compensation programs should compensate conditions such as chronic stress or chronic pain at all. Undoubtedly there are instances in which such conditions are work-related and do incapacitate workers. Policymakers must, however, balance benefits against costs. Society does not possess unlimited resources with which to address all of its members' ills, and choices must be made. Until medical science advances to the point at which it is possible to diagnose accurately conditions such as occupationally related chronic stress, workers' compensation programs should probably choose not to cover them."</p>	<p>"In principle, the issue of chronic stress is simple to resolve. Under the [Ontario] <i>Workers' Compensation Act</i>, a worker who suffers a disability "arising out of and in the course of employment" is entitled to compensation. If it is medically determined that someone suffers a disability from chronic stress and if the adjudication and appeals process determines that this stress arose out of and in the course of employment, then it should be compensable. In practice there may be considerable difficulty in estimating the extent of the disability, or how much was due to workplace factors or whether there were pre-existing conditions. Yet these problems apply, to a greater or lesser degree, with many other sorts of claims and they should not detract from the principle that workplace disabilities should be compensated."</p>
<p>Source: Terry Thomason, <i>The Escalating Costs of Workers' Compensation in Canada</i>, published in <i>Chronic Stress: Workers Compensation in the 1990s</i>, C.D. Howe Institute, 1995, p. 45.</p>	<p>Source: Andrew Stritch, <i>Homage to Catatonia: Bipartite Governance and Workers' Compensation in Ontario</i>, published in <i>Chronic Stress: Workers Compensation in the 1990s</i>, C.D. Howe Institute, 1995, pp. 168 and 169.</p>

### 3.0 The Meaning of Disability in the Yukon Context

A Yukon worker's entitlement to compensation is described in rather straightforward terms in subsection 3.(1) of the Yukon *Workers' Compensation Act*: "a worker who suffers a work-related disability is entitled to compensation..."<sup>6,7</sup>

As we have already seen, the phrase work-related "means a disability arising out of and in the course of the employment of a worker".<sup>8</sup> With regard to the meaning of "disability", it is defined in section 101.(1) of the *Workers' Compensation Act* as follows:

"disability in respect of worker means a work-related incapacity, as determined by the board, including post-traumatic stress, a permanent impairment, or a worker's death."<sup>9</sup>

The meaning of disability is further defined in the YWCHSB's Policy Statement CL-40 (1993):

"A disability is the limiting, loss or absence of capacity of an individual to meet occupational demands."<sup>10,11</sup>

In addition to the compensation statute and Policy Statement CL-40, the comprehensive meaning of disability in the Yukon context is also currently defined by several other policy statements, including:

- CL-15 (1993): White Finger Disease (hand-arm vibration exposure)
- CL-21 (1993): Heart Cases
- CL-25 (1993): Back Claims
- CL-26 (1993): Hearing Loss
- CL-31 (1993): Cumulative Trauma Disorders (e.g, repetitive strain injuries)
- CL-47 (1994): Pre-Existing Conditions

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<sup>6</sup> Subsection 3.(1), *Workers' Compensation Act*, S.Y. 1992, c. 16.

<sup>7</sup> It is important to note that the 1993 recasting of the Yukon *Workers' Compensation Act* introduced a significant change in the terminology used to describe eligibility for compensation benefits in the Yukon. Under provisions of the 1983 version of the *Act*, eligibility for compensation required that a worker suffer an "injury or death by accident arising out of and in the course of employment" while the 1993 version of the *Act* requires that a worker suffer a "work-related disability." [emphasis added]

<sup>8</sup> Section 101.(1), *Workers' Compensation Act*, S.Y. 1992, c. 16.

<sup>9</sup> Section 101.(1), *Workers' Compensation Act*, S.Y. 1992, c. 16.

<sup>10</sup> *Policy Statement CL-40: Disability*, Yukon Workers' Compensation Health and Safety Board, July 1993.

<sup>11</sup> By way of further illustration, disability is defined in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (fourth edition) as "an alteration of an individual's capacity to meet personal, social or occupational demands, or statutory or regulatory requirements, because of an impairment."

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Diagram 1 on the following page summarizes a spectrum of disabilities according to their degree of compensability in the Yukon. The disabilities listed in the top circle consist of acute disabilities which are clearly compensable under the current legislation and policy. The bottom circle includes chronic disabilities which are not currently considered compensable. The disabilities listed in the middle circle, like those in the bottom circle, are chronic in nature.

What separates the middle circle chronic disabilities (a) from the bottom circle chronic disabilities (b) is that, under current YWCHSB policy, the middle circle chronic disabilities may qualify for compensation while the bottom circle disabilities do not. In terms of the gate analogy introduced earlier in this paper, the gate may swing open for middle circle disabilities depending on the circumstances of a given disability. Bottom circle disabilities face a closed gate.

Diagram 1 also demonstrates that the clearly compensable disabilities in the top circle are those for which the cause of the disability can be clearly attributed to a workplace activity. Bottom circle disabilities (not compensable) are those for which it is most difficult to attribute the cause of the disability to a workplace activity.<sup>12</sup>

### 4.0 Interjurisdictional Comparisons: Meaning of Disability

As noted in an earlier section of this paper, the question of which injuries, diseases and illnesses should be considered compensable is not unique to the Yukon. As workplaces and the nature of work continue to evolve over time, pressure continues to build around expanding the meaning of disability. Thus, the “meaning of disability” is very much a current issue in many jurisdictions.

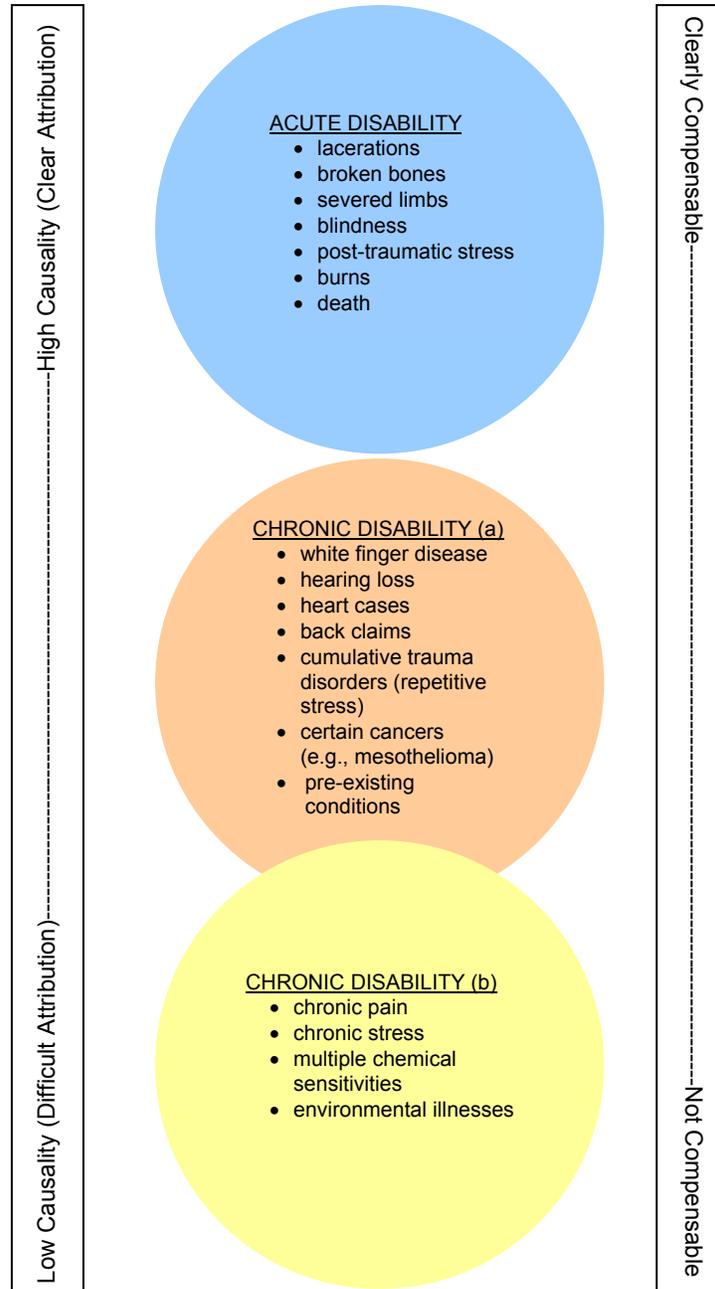
Under provisions of the 1993 version of the Yukon *Workers' Compensation Act*, eligibility for compensation requires that a worker suffer a work-related disability as opposed to an injury or accident. As was shown in Table 1, the term disability includes both acute disabilities (injuries) and chronic disabilities (diseases and illnesses). This approach stands in contrast to that used in other jurisdictions where workplace “accidents” are distinguished from “occupational or industrial diseases”.<sup>13</sup> As a result, the interjurisdictional discussion which follows is in the context of occupational disease rather than disability. Further, many jurisdictions consider “stress” to be a separate form of occupational disease. Accordingly, the interjurisdictional aspects of stress will be discussed separately below.

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<sup>12</sup> It is worth noting that current compensation fund accounting practices anticipate the possibility that additional future claims for chronic disabilities will be found compensable. Since 1997, YWCHSB Policy Statement FN-13 has required that an Unknown Disabilities Component be included in the Yukon compensation fund's Potential Liability and Asset Replacement Reserve. The Unknown Disabilities Component includes “enhanced disabilities or occupational diseases”.

<sup>13</sup> *Workers' Compensation Occupational Disease and Occupational Stress Legislation and Policies - 2002*, Association of Workers' Compensation Boards of Canada, 2002, page 97.

**Diagram 1: The YWCHSB Spectrum of Disability**



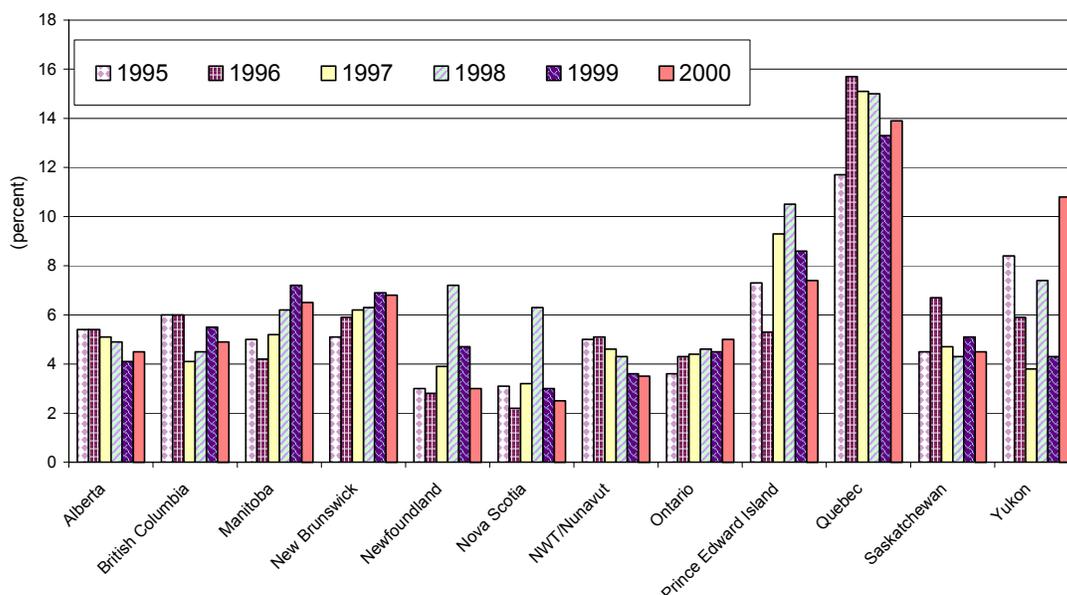
Note: this diagram was developed for illustrative purposes only; it is not an official statement of YWCHSB policy.

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In terms of the scale of compensation claims related to occupational diseases, they make up a relatively small portion of the total number of claims allowed in a given year. As shown in Chart 1 on the next page, the ratio of accepted time loss occupational disease claims to the total number of accepted time-loss claims in the year 2000 ranged from a high of 13.9 percent in Quebec to a low of 2.5 percent in Nova Scotia. In the Yukon, over the six year period 1995 to 2000, the ratio of accepted time-loss occupational disease claims to the total number of accepted time-loss claims ranged from a high of 10.8 percent in 2000 to a low of 3.8 percent in 1997.

The gate represented by the legislative phrase ‘arising out of and in the course of employment’ is an effective policy lever. Alternate views of which occupational afflictions should be considered compensable can readily be translated into practice by changing the position of the gate. As a result, the position of the gate is ever-shifting in various jurisdictions in response to new medical evidence and changing interpretations of the appropriate balance between financial risks and workers’ entitlement to compensation. Two recent examples are presented in Table 3 on the following page.

**Chart 1:** Ratio of Accepted Time-Loss Occupational Disease Claims to Total Number of Accepted Time-Loss Claims - 1995 to 2000



Source: *Workers' Compensation Occupational Disease and Occupational Stress Legislation and Policies*, Table III, Association of Workers' Compensation Boards of Canada, 2002.

### Occupational Disease

The range of occupational diseases considered compensable (or not) in the various jurisdictions across Canada is exceptionally diverse. While the comprehensive cataloguing of the complete range is outside the scope of this paper, Table 4 on the

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following page presents a summary of the number of accepted occupational disease time-loss injuries in all jurisdictions in 2000.<sup>14</sup> The time-loss injuries are presented according to 11 categories of occupational disease common across all jurisdictions.

**Table 3: Two Examples of Recent Changes in the Meaning of Occupational Disease**

<b>Manitoba - Firefighters and Cancer</b>	<b>British Columbia - Chronic Stress</b>
<p>“Bill 5, The Workers’ Compensation Amendment Act, came into force on May 23, 2002. The Bill recognizes the link between exposure to hazards faced by full-time firefighters and certain diseases. Manitoba is the first province in Canada to officially recognize this link.”</p> <p>“Bill 5 amends the WCA to include a rebuttable presumption that if a full-time firefighter employed for a minimum period gets a certain type of cancer, the dominant cause of the cancer is the employment as a firefighter.”</p> <p>“In 2001, the WCB commissioned a review of recent scientific literature dealing with health hazards faced by full-time firefighters. The review confirmed the association between professional urban firefighting and primary cancer of the brain, bladder, kidney, non-Hodgkin’s lymphoma and Leukemia.”</p>	<p>“At present, there is uncertainty around WCB coverage for mental stress. The policy is to provide coverage for acute post-traumatic stress, but not to cover chronic stress. However, some chronic stress claims have been accepted on appeal, creating uncertainty for workers, employers and the entire system. Workers’ compensation systems in most other provinces do not cover chronic stress.</p> <p>This bill [Bill 49, The Workers’ Compensation Amendment Act] clarifies when compensation for mental stress will be provided. WCB will cover stress caused by a sudden and unexpected traumatic event, and stress that results from a compensable injury such as severe anxiety following the amputation of a leg. WCB will not cover chronic stress that is caused by the pressures encountered in daily personal and work life.”</p>
<p>Source: <i>WCB Update</i> (newsletter of the Manitoba Workers’ Compensation Board) Vol. 2, Issue 3 (September 2002)</p>	<p>Source: “WCB Changes Ensure Sustainable Protection For Injured Workers”, British Columbia Ministry of Skills Development and Labour News Release No. 2002SDL0002-000048, May 13, 2002.</p>

### Chronic Pain

On its own, the issue of chronic pain has been the subject of a significant amount of debate in recent years. Both Nova Scotia and Ontario have recently undertaken extensive reviews on the topic of chronic pain.<sup>15</sup> In most jurisdictions, compensation for chronic pain is limited to rehabilitation and short-term wage loss benefits. Those jurisdictions include Manitoba, Nova Scotia, New Brunswick, Northwest Territories/Nunavut, Saskatchewan and the Yukon. For example, in the Yukon, treatment for chronic pain is considered only when the chronic pain is hindering the recovery of the worker; chronic pain is not directly compensable.<sup>16</sup>

<sup>14</sup> For readers so inclined, detailed descriptions of the occupational disease provisions across jurisdictions in Canada can be found in *Workers’ Compensation Occupational Disease and Occupational Stress Legislation and Policies - 2002*, Association of Workers’ Compensation Boards of Canada, 2002.

<sup>15</sup> See *Chronic Pain: The Functional Restoration Program, Policies and Legislative Provisions* (Background Paper for the Statutory Review Committee), Workers’ Compensation Board of Nova Scotia, September 2001 and *Chronic Pain Initiative: Report of the Chair of the Chronic Pain Panels*, Ontario Workplace Safety and Insurance Board, August 2000.

<sup>16</sup> *Chronic Pain (Discussion Paper)*, Workers’ Compensation Board of British Columbia, October 2002. ([http://www.worksafebc.com/law\\_and\\_policy/consultation/policy/assets/pdf/chron\\_pain.pdf](http://www.worksafebc.com/law_and_policy/consultation/policy/assets/pdf/chron_pain.pdf)).

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**Table 4: Number of Accepted Occupational Disease Time-loss Injuries - 2000**

	Contagious or Infectious Disease	Dermatitis	Allergic Condition/ Allergic Reaction	Hearing Loss or Impairment	Inflammation or Irritation	Poisoning, systemic	Upper Respiratory Conditions	Lower Respiratory Conditions	Pneumoconiosis	Radiation Effects	Occupational Illness, NEC
<b>AB</b>	35	35	26	188	1,141	182	2	19	9	107	45
<b>BC</b>	39	204	7	166	2,302	307	12	50	8	204	156
<b>MB</b>	40	52	1	36	867	121	2	4	2	103	56
<b>NB</b>	24	11	1	40	244	5	-	4	-	-	36
<b>NF</b>	17	9	8	1	95	11	-	7	-	13	34
<b>NWT/Nu</b>	1	1	1	1	10	1	-	1	-	2	3
<b>NS</b>	43	19	12	-	236	9	1	2	1	1	-
<b>ON</b>	252	267	39	55	3,025	625	32	84	10	328	491
<b>PEI</b>	18	16	-	1	75	2	2	6	-	2	31
<b>QUE</b>	346	276	62	660	11,575	392	12	102	21	388	2,735
<b>SK</b>	43	41	12	12	289	130	4	14	2	54	68
<b>YK</b>	4	1	5	3	16	5	1	2	-	2	4
<b>Total</b>	862	932	174	1,163	19,875	1,790	68	295	53	1,204	3,659

Source: Adapted from Table I in *Workers' Compensation Occupational Disease and Occupational Stress Legislation and Policies - 2002*, Association of Workers' Compensation Boards of Canada, 2002, pages 14 and 15.  
Notes: NEC = not elsewhere classified

In Newfoundland and Quebec, workers diagnosed with chronic pain may apply to have their permanent impairment awards adjusted. Awards are generally not granted for pain and suffering. In Ontario and Quebec, a worker's entitlement to a permanent impairment award is assessed according to a mental impairment rating schedule. Wage loss benefits may also be paid in certain circumstances.<sup>17</sup>

### Chronic Stress

Similar to the issue of chronic pain, the issue of chronic stress has also received much scrutiny in recent years. In general terms, stress in a work-related context can be characterized as being of one of two types. The first, often referred to as post-traumatic stress, is the result of a specific and sudden workplace incident. An example of post-traumatic stress is that of a worker who loses a limb in a work-place accident and as a result experiences severe depression. "This type of claim is currently compensable in all of the jurisdictions in Canada so long as the requisite policy or legislative conditions are met."<sup>18</sup>

<sup>17</sup> From *A Review of Workers' Compensation Legislation: Discussion Paper*, Government of British Columbia, Ministry of Skills Development and Labour, June 2002, page 3.

<sup>18</sup> *Workers' Compensation Occupational Disease and Occupational Stress Legislation and Policies - 2002*, Association of Workers' Compensation Boards of Canada, 2002, page 71.

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The second, chronic stress, refers to the psychological impairment caused by mental stimuli acting over time; the very nature of the job is said to be stressful without any specific incident.<sup>19</sup> As shown in Table 5, only a few jurisdictions currently consider chronic stress to be compensable.

**Table 5: Interjurisdictional Comparison of Chronic Stress Compensability\***

Alberta	<ul style="list-style-type: none"> <li>• compensation for chronic stress provided if:               <ul style="list-style-type: none"> <li>○ there is a confirmed diagnosis under the American Psychiatric Association's <i>Diagnostic and Statistical Manual of Mental Disorders</i>;</li> <li>○ the work-related events or stressors are the predominant cause of the injury;</li> <li>○ the work-related events are excessive or unusual in comparison to the normal pressures experienced by the average worker in a similar occupation; and</li> <li>○ there is objective confirmation of the events.</li> </ul> </li> </ul>
British Columbia	<ul style="list-style-type: none"> <li>• compensable forms of stress include:               <ul style="list-style-type: none"> <li>○ stress caused by a sudden and unexpected traumatic event; and</li> <li>○ stress that results from a compensable injury such as severe anxiety following the amputation of a leg</li> </ul> </li> <li>• stress that is caused by the pressures encountered in daily personal and work life is not compensable.</li> </ul>
Manitoba	<ul style="list-style-type: none"> <li>• definition of accident/occupational disease excludes stress except as an acute reaction to a traumatic event</li> </ul>
New Brunswick	<ul style="list-style-type: none"> <li>• definition of accident/occupational disease excludes stress except as an acute reaction to a traumatic event</li> </ul>
Newfoundland and Labrador	<ul style="list-style-type: none"> <li>• legislative definition of injury covers stress only where it results from an acute reaction to a sudden and unexpected traumatic event and to exclude stress due to labour relations issues</li> </ul>
NWT/Nunavut	<ul style="list-style-type: none"> <li>• claims for workplace stress are considered on a case-by-case basis</li> </ul>
Nova Scotia	<ul style="list-style-type: none"> <li>• definition of accident/occupational disease excludes stress except as an acute reaction to a traumatic event</li> </ul>
Ontario	<ul style="list-style-type: none"> <li>• mental stress is compensable in respect of situations where there is an acute response to a sudden and unexpected traumatic event arising out of and in the course of employment</li> <li>• mental stress due to the employer's employment decisions does not entitle a worker to benefits</li> </ul>
PEI	<ul style="list-style-type: none"> <li>• definition of accident/occupational disease excludes stress except as an acute reaction to a traumatic event</li> </ul>
Quebec	<ul style="list-style-type: none"> <li>• stress is compensable if the worker can show a relationship between the illness and the work or a risk in the work</li> </ul>
Saskatchewan	<ul style="list-style-type: none"> <li>• compensation for chronic stress is specifically allowed for as a matter of policy where clear and convincing evidence is provided that the work stress was excessive and unusual; routine industrial relations actions taken by the employer are considered normal and not unusual</li> </ul>
Yukon	<ul style="list-style-type: none"> <li>• post-traumatic stress considered compensable under legislation; current practice is to assess all other stress-related claims on a case-by-case basis</li> </ul>
Sources: Adapted from <i>Policy Overview Consultation Document: Mental Stress</i> , Workers' Compensation Board of British Columbia, May 2002, pages 2 and 3 ( <a href="http://www.worksafebc.com/law_and_policy/archived_information/policy_discussion_papers/assets/pdf/mental_stress.pdf">http://www.worksafebc.com/law_and_policy/archived_information/policy_discussion_papers/assets/pdf/mental_stress.pdf</a> ) with additional information from: <ul style="list-style-type: none"> <li>○ "WCB Changes Ensure Sustainable Protection For Injured Workers", British Columbia Ministry of Skills Development and Labour News Release No. 2002SDL0002-000048, May 13, 2002.</li> <li>○ <i>Comparison of Workers' Compensation Legislation in Canada 2002</i>, Association of Workers' Compensation Boards of Canada, 2002.</li> </ul> Note: * as at May 2002	

<sup>19</sup> *Policy Overview Consultation Document: Mental Stress*, Workers' Compensation Board of British Columbia, May 2002. ([http://www.worksafebc.com/law\\_and\\_policy/archived\\_information/policy\\_discussion\\_papers/assets/pdf/mental\\_stress.pdf](http://www.worksafebc.com/law_and_policy/archived_information/policy_discussion_papers/assets/pdf/mental_stress.pdf)).

### 5.0 Work-Related Disabilities and Insured Health Services

A sub-issue related to the meaning of disability stemming from the 1999 Yukon Workers' Compensation Act Review concerns work-related disability in the context of insured health care services. The issue was stated at that time as follows:

*Further in the context of 'scope of disability', some stakeholders expressed concern that some injuries sustained in the workplace may 'fall through the cracks' given that they are not considered to be within the scope of disability defined in the Act, and yet, because they occurred in the workplace, they may not be covered by the Yukon Health Care Insurance system. The Task Force Recommends that this issue also be addressed as part of the 'scope of disability' discussion held during the next review."*

Under current Yukon practice, medical aid (or, health care services) received by workers in respect of compensable workplace disabilities is paid for by the YWCHSB. For example, if a worker received health care services from the Whitehorse General Hospital for the treatment of a work-place injury, the cost of those services would be recovered from the YWCHSB. This arrangement reflects the fact that in the Yukon, as in all jurisdictions, injured and disabled workers were receiving health care services paid for with compensation assessment premiums long before publicly-funded health care systems were established across Canada in the 1960s.<sup>20</sup>

In constitutional terms, workers' compensation is a provincial and territorial responsibility. The provision of health care services is also the responsibility of the provinces and territories. Unlike workers' compensation however, health care services must be supplied in accordance with a set of five principles which apply across the country (as outlined in the *Canada Health Act*). Among the principles are requirements that the provision of health care services in each province and territory be comprehensive, universal and accessible.

In order to be comprehensive, health insurance plans must insure all medically necessary health services. Universality requires that all insured persons in the province or territory must be entitled to public health insurance coverage on uniform terms and conditions. Lastly, accessibility necessitates that access by insured persons to medically necessary hospital and physician services must be unimpeded by financial or other barriers, such as discrimination on the basis of age, health status or financial circumstances.

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<sup>20</sup> Note that in certain areas, the range of health care services paid for by the Yukon Workers' Compensation Board is broader than that available under the Yukon's Insured Health Services system. For example, the YWCHSB pays for vocational rehabilitation services, orthotics and some medications which are not normally supplied by the Insured Health Services system.

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All of this is to say that the terms of the *Canada Health Act* do not permit the exclusion of health care services on the basis of a disability occurring in the workplace. In other words, the fact that a non-compensable disability occurred in the workplace does not disqualify someone receiving medically necessary health services. Medically necessary health services in the Yukon are provided on uniform terms and conditions, unimpeded by financial or other barriers.

On the basis of the preceding, it does not seem likely that an acute injury sustained in the workplace could ‘fall through the cracks’. As was discussed in section 3, acute injuries are the most likely to be compensated of all disabilities given their inherently high degree of causality between the injury and the workplace. Similarly, acute injuries, because of their traumatic and physically obvious nature, are also likely to fall within the meaning of ‘medically necessary health services’.

With regard to chronic disabilities, the *Canada Health Act* sets out a minimum standard of health care services both in terms of volume and quality. The Yukon, through its Chronic Disease Program, provides financial assistance over and above the minimum national standard. Financial assistance is provided for drugs, medical and surgical supplies and other medically necessary items to individuals suffering from approximately 80 chronic diseases and disabilities.

As a result, it is not fair to say that Yukon workers who suffer non-compensable chronic disabilities cannot, *prima facie*, access health care services in relation to their disability from the Yukon Health Care Insurance system. While each circumstance of chronic disability will have its own unique characteristics, it is not immediately clear, without the benefit of a disease-by-disease comparison between the compensation and health care systems, how a chronic workplace disability could ‘fall through the cracks’.

To phrase it another way, just because one system considers a given disability ineligible and another system does not automatically consider the same disability eligible, it does not necessarily point to a deficiency in either system. The insured health care system, while funded through a broadly-based tax system, also struggles with finding an optimal balance between financial costs and the provision of an appropriate array of medical services. All publicly-funded health services programs operate in the face of similar public policy constraints.

## 6.0 Issue Identification: Meaning of Disability

There is no doubt that the issues which surround the question of which injuries, diseases and illnesses should be considered compensable are exceptionally intricate. Notwithstanding the intricacy, it is an emerging area in workers’ compensation administration in Canada. As chronic disabilities continue to become more prevalent

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as a result of changes in the workplace and the nature of work, compensation claims for chronic disabilities are also likely to continue to grow.

At the same time as chronic disability compensation claims are likely to continue to grow, the risk of not focusing attention on these issues will also continue to grow. The risks which accompany a wait-and-see approach are three-fold. The first risk is that the YWCHSB will find itself in a similar situation as the Ontario Workplace Safety and Insurance Board did in the late 1980s and early 1990s. Described as being “sucked into a policy vacuum left by the WCB’s inaction”<sup>21</sup> the Ontario Board saw the Ontario Workers’ Compensation Appeal Tribunal expand the definition of compensable injury to include both chronic pain and chronic stress.<sup>22</sup>

The second risk inherent in a wait-and-see approach is that paramount legislation, such as the Charter of Rights contained in section 15 of the Canada’s *Constitution Act (1982)* can impose an alternate definition of disability. Workers’ compensation boards across Canada are already well apprised of Charter paramourcy in the context of the termination of compensation benefits upon remarriage of a surviving spouse.

The third risk relates to a possible result of excluding disabilities such as chronic stress from coverage under workers’ compensation in the form of tort.<sup>23</sup> Under the terms of the historic compromise between business and labour outlined by Meredith, workers gave up their right to sue for damages as a result of workplace disabilities. If certain disabilities are held to be strictly outside the realm of workers’ compensation, it presents the possibility that claims in respect of those disabilities are actionable in tort.<sup>24</sup>

In conclusion, the ‘meaning of disability’ is a subject area which bears close monitoring. In addition, there is a need to ensure that sufficient regulatory and policy flexibility is in place. It will likely be easier for the YWCHSB to position itself sooner rather than later to be able to respond to new medical evidence while at the same time maintaining an appropriate balance between compensation fund financial considerations and workers’ entitlement to compensation.

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<sup>21</sup> Andrew Stritch, *Homage to Catatonia: Bipartite Governance and Workers’ Compensation in Ontario*, published in *Chronic Stress: Workers Compensation in the 1990s*, 1995, page 154.

<sup>22</sup> Terry Thomason, *The Escalating Costs of Workers’ Compensation in Canada*, published in *Chronic Stress: Workers Compensation in the 1990s*, 1995, p. 44.

<sup>23</sup> See *Compensation for Chronic Stress: A Briefing Paper*, Workers’ Compensation Board of British Columbia, February 1998, page 8.

<sup>24</sup> Some readers may be familiar with this possibility in respect of *Yukon v. Yukon Workers’ Compensation Health and Safety Board* (January 18, 1996) unreported S.C. No. 95-A0223 (Yukon Supreme Court).

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