



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INVESTIGATION REPORT

INVESTIGATION I93-037P

WORKERS' COMPENSATION BOARD

November 26, 1993



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

INTRODUCTION

Background of the Complaint

This investigation was initiated as a result of a complaint concerning the Workers' Compensation Board (the Board).

The complainant stated that the Board had collected and disclosed information concerning her sexual life to her employer, and to her former claim representative, in contravention of the Freedom of Information and Protection of Privacy Act (the Act).

The information was contained in a psychiatrist's Non Economic Loss Assessment and cover letter to the Board (the NEL), relating to the complainant's claim for Chronic Pain Disability. The NEL contained information concerning the complainant's medical condition and her sexual life with her spouse.

The Workers' Compensation Act has established a two-track benefit system for workers who suffer permanent consequences because of their workplace injuries. It provides compensation for the permanent impairment (the non-economic loss award for the loss of enjoyment of everyday life) and the future loss of earnings (the economic loss award for the employment impact) which result from the injury.

Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Was the information contained in the NEL "personal information" as defined in section 2(1) of the Act? If yes,
- (B) Did the Board have the authority to collect the personal information, in accordance with section 38(2) of the Act?
- (C) Was the personal information disclosed in accordance with section 42 of the Act?

RESULTS OF THE INVESTIGATION

Issue A: Was the information contained in the NEL "personal information" as defined in section 2(1) of the Act?

Section 2(1) of the Act defines "personal information", in part, as:

recorded information about an identifiable individual, including,

- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

We reviewed a copy of the NEL. It contained the complainant's name together with information about the complainant's medical condition and her sexual life with her spouse.

It is our view that the information contained in the NEL met the requirements of paragraph (h) of the definition of "personal information" in section 2(1) of the Act.

Conclusion: The information contained in the NEL was personal information as defined in section 2(1) of the Act.

Issue B: Did the Board have the authority to collect the personal information, in accordance with section 38(2) of the Act?

Section 38(2) of the Act states:

No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or **necessary to the proper administration of a lawfully authorized activity**. (emphasis added)

The Board stated that to properly make a NEL assessment, and to fairly determine the amount of compensation due to the complainant, collection of the information concerning her sexual life was necessary to the proper administration of a lawfully authorized activity.

The Board referred us to section 42 of the Workers' Compensation Act (the WCA), which addresses NEL assessments. Sections 42(1) and (5), in particular, state:

(1) A worker who suffers permanent impairment as a result of an injury is entitled to receive compensation for non-economic loss in addition to any other benefit receivable under this Act.

(5) The Board shall determine in accordance with the prescribed rating schedule and having regard to medical assessments conducted under this section the degree of a worker's permanent impairment expressed as a percentage of total permanent impairment.

Based on the above provisions of the WCA, it is our view that conducting a NEL medical assessment to determine the compensation due to a worker who has suffered permanent impairment as a result of an injury, is a lawfully authorized activity.

With regard to whether the collection of information concerning a worker's sexual life is "necessary" to conducting NEL assessments, the Board advised us of the following.

The Board stated that when considering the amount of compensation for a NEL award, it is important that a psychiatrist fully assess four areas of functioning, in determining the severity of impairment for the purposes of determining an award in cases of Chronic Pain Disability.

The Board has adopted the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment. These areas are:

- 1) Activities of Daily Living
- 2) Social Functioning
- 3) Concentration, persistence and pace
- 4) Ability to adapt to stress circumstances.

The Board explained that the more comprehensive the examination of these areas, the more accurate the evaluation of the extent of the impairment. Under Activities of Daily Living, the AMA Guides specify this to include activities such as "self care and personal hygiene, communication, ambulation, attaining all normal living posture, travel, non specialized hand activities, **sexual function**, social and recreational activities". The Guides also state that "what is assessed is not simply the number of activities that are restricted but the overall degree of restrictions or combination of restrictions". It is in this context that questions are asked by the physician about a worker's sexual life. It is an aspect of functioning that can be impaired by a worker's injury. If it is impaired, then the worker's award should reflect that impairment in the context of his/her functioning in this and all the other areas examined.

The Board stressed that it is important to understand that this is an extensive evaluation of the impact of the worker's pain on his or her everyday life, and not just his/her work. This allows for compensation for changes from pre-accident levels of functioning. While sexual function may be a more sensitive area that is being assessed, it is no less important than the many other activities being examined to arrive at an award. In short, questions of a sexual nature are necessary to conduct a thorough assessment.

Based on the above, it is our view that the Board had the authority to collect the information concerning the complainant's sexual life, as it was necessary to the proper administration of a lawfully authorized activity, that being, the conduct of a NEL medical assessment to determine appropriate compensation. Thus, the Board collected the complainant's personal information in accordance with section 38(2) of the Act.

Conclusion: The Board had the authority to collect the personal information, in accordance with section 38(2) of the Act.

Issue C: Was the personal information disclosed in accordance with section 42 of the Act?

The complaint concerns disclosure to a) the complainant's employer, and b) the complainant's former representative in her claim with the Board.

Disclosure to the Employer

Under the Act, personal information in the custody or under the control of an institution cannot be disclosed except in the specific circumstances outlined in section 42.

Section 42(e) of the Act states:

An institution shall not disclose personal information in its custody or under its control except,

- (e) for the **purpose of complying with an Act of the Legislature** or an Act of Parliament or a treaty, agreement or arrangement thereunder; (emphasis added)

The Board cited section 42(12) of the WCA as its legislative authority for disclosure to the employer, in accordance with section 42(e) of the Act.

Section 42(12) of the WCA requires the Board to send a copy of the NEL to the accident employer. It states:

- (12) The Board shall send a copy of the medical assessment conducted under subsection (9) to the worker and to the employer who employed the worker on the date of the injury.

In our view, the Board's disclosure of the complainant's personal information to the employer was in accordance with section 42(e) of the Act, for the purpose of complying with an Act of the Legislature.

Disclosure to the Complainant's Former Representative

Injured workers may elect to have a representative of their choosing represent them in claims with the Board. Despite a letter on the Board's file from the complainant dated June 11, 1992, advising that she had replaced her representative, the Board acknowledged that it had faxed a copy of the NEL to the complainant's former representative.

However, in support of this disclosure, the Board stated that the complainant had changed her representative on several occasions, and that the former representative had telephoned the NEL Manager, requesting a copy of the NEL.

We were advised by the Board that it is the responsibility of the Adjudicator to make updates such as a change of representative on the "PARS" computer system. A clerk accesses "PARS" to obtain the address of the representative. In this case, it appears that the computer was not updated in a timely fashion. As a result, a disclosure to the complainant's former representative was made in error.

We examined section 42(b) of the Act with respect to this disclosure. This section states:

An institution shall not disclose personal information in its custody or under its control except

- (b) where the person to whom the information relates has identified that information in particular and consented to its disclosure;

However, we are of the view that the complainant did not identify the personal information and consent to its disclosure to her former representative. In our view, the Board's disclosure of the complainant's personal information to her former representative was not in accordance with section 42(b), or with any other provisions of section 42 of the Act.

Conclusion: The Board's disclosure of the NEL to the employer was in accordance with section 42 of the Act.

The Board's disclosure of the NEL to the complainant's former representative was not in accordance with section 42 of the Act.

Other Matters

During the course of this investigation, the following matters were identified which should be brought to the Board's attention.

Mailing Procedures for NELs

We asked the Board about the manner in which NELs are sent to employers. We were advised that employers' mailing addresses are identified on the computer system. If the employer has designated a named individual for its correspondence on a claim, the Adjudicator will update the system to state attention to this individual and the NEL would be sent, addressed accordingly. Accompanying the NEL is a cover letter reminding the employer of its obligation under the WCA to not disclose the information. Confidential envelopes are not used.

We are concerned that the Board does not use confidential envelopes when mailing NELs to employers, and that where an appropriate official has not been identified, sensitive medical information may be viewed unnecessarily by the employer's staff, eg. individuals responsible for opening and delivering the employer's mail.

Faxing of the NEL

While this complaint did not concern the improper disclosure of personal information through the faxing of the NEL, we nonetheless wish to simply remind the Board of our faxing guidelines, since it is evident from the circumstances of this complaint that the Board has used a facsimile machine to transmit sensitive personal information. Accordingly, we have enclosed a copy of the following documents: "Guidelines on Facsimile Transmission Security, June 1989" and "Update on 1989 Guidelines on Facsimile Transmission Security, June 1990".

SUMMARY OF CONCLUSIONS

- The information contained in the NEL was personal information as defined in section 2(1) of the Act.
- The Board had the authority to collect the personal information, in accordance with section 38(2) of the Act.
- The Board's disclosure of the NEL to the employer was in accordance with section 42 of the Act.
- The Board's disclosure of the NEL to the complainant's former representative was not in accordance with section 42 of the Act.

RECOMMENDATIONS

1. We recommend that the Board take steps to ensure that adjudicators update the information in their computers as soon as they are notified of a change of representative; for example, by sending a memorandum to appropriate staff, i.e. adjudicators and their supervisors to remind them of this procedure.
2. We recommend that the Board use confidential envelopes when mailing out medical information to employers. The envelopes should be addressed to a named officer, where this individual has been identified by the employer. If an officer has not been designated, a generic title should be used, for example, "WCB Claims Administrator".

Within six months of receiving this report, the Board should provide the Office of the Information and Privacy Commissioner with proof of compliance with the above recommendations.

Original signed by: _____
Susan Anthistle
Compliance Review Officer

November 26, 1993

Date
