

February 28, 2023

PHIA Statutory Review Committee
P.O. Box 8700
1st Floor, West Block
Confederation Building
100 Prince Philip Drive
St. John's, NL A1B 4J6
phiareview@gov.nl.ca

Dear PHIA Statutory Review Committee:

Re: *Review of Personal Health Information Act*

WorkplaceNL collects, uses and discloses personal health information for the purposes of: adjudication of entitlement to wage loss benefits and medical aids (includes drugs, health care services and devices, and travel); supporting workers and their employers in facilitating early and safe return to work (ESRTW) and workplace accommodations; and, estimating loss of earning capacity and labour market re-entry potential.

WorkplaceNL collects the consent of the worker on the Worker's Report of Injury (Form 6) which also serves as the worker's application for benefits. In addition, under the *Workplace Health, Safety and Compensation Act* (WHSCA) workers, employers, health care providers and hospitals are required to disclose information including personal health information to WorkplaceNL for statutory purposes under the WHSCA.

Workers' compensation services may be initiated on the receipt of either of three reports: the Worker's Report of Injury (Form 6), the Employer's Report of Injury (Form 7) or the Physician's Report of Injury (Form 8/10). All three reports are eventually required; however, ESRTW and coverage for physiotherapy and chiropractic treatments can be initiated on the receipt of either one of these forms. Ironically, the worker's Form 6 (express consent) is often the last report received by WorkplaceNL, even though the worker may already be availing of WorkplaceNL's ESRTW and health care coverage services. WorkplaceNL's policies permit workers to avail of certain services immediately following injury as the research demonstrates that early intervention with treatment and ESRTW support is the most effective way to return injured workers to work in a safe and timely manner.

Health Care Services Designation

WorkplaceNL is specifically designated in s. 4(1)(o) as a custodian under the *Personal Health Information Act* (PHIA), although it could have been covered as a *board, commission or agency* through s. 4(1)(d). The introductory language of s. 4 of PHIA states:

“In this Act, “custodian” means a person described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with the performance of the person’s powers or duties or the work described in that paragraph: ...”

The fact that WorkplaceNL is designated separately as a custodian suggests a broader application of PHIA than that for the agencies, boards and commissions listed in s. 4(1)(b). However, “health care” in s. 2(1)(h) does not include the services performed by WorkplaceNL, although it includes services paid for by WorkplaceNL. This means that the definition of “health care” may be at odds with WorkplaceNL’s designation as a custodian. For example, the implied consent underlying the “circle of care” in s. 24 of PHIA refers to the *provision of health care*. As referenced above “health care” does not include all of WorkplaceNL services, even though WorkplaceNL collects personal health information to perform these services. This means that some of WorkplaceNL’s services which are provided prior to the collection of the worker’s consent may not be covered in the “circle of care”.

Custodians do not have to obtain express consent for the collection, use and disclosure of personal health information within the circle of care; custodians may rely on implied consent within the circle of care where individuals do not expressly indicate otherwise. It is arguable that WorkplaceNL requires a similar provision to support the services it offers to workers prior to receiving their express consent through the Form 6. This can be achieved under PHIA as it is currently written by designating the services provided by WorkplaceNL as health care services in the regulations.

Section 39

Section 39 of PHIA states in part:

“(1) A custodian may disclose personal health information without the consent of the individual who is the subject of the information
(a) for the purpose of determining or verifying the eligibility of the individual to receive health care or related goods, services or benefits provided under an Act of the province or of Canada and funded in whole or part by the government of the province or of Canada; ...”

Although included in the first part of this provision, WorkplaceNL is excluded from this provision by virtue of the requirement “*and funded in whole or part by the government of the province or of Canada*”. WorkplaceNL is not funded by the government, but by legislated mandatory assessments imposed upon all employers in the province. WorkplaceNL has a separate fund, known as the Injury Fund, which is not part of Government’s consolidated revenue fund. We are wondering whether the exclusion of WorkplaceNL from this provision was an oversight as it appears to describe WorkplaceNL’s assessment and adjudicative processes.

WorkplaceNL is authorized by s. 62 of the WHSCA to order an independent medical examination where a worker has applied for benefits and there is an issue requiring further medical opinion. In such a case, WorkplaceNL discloses relevant medical information to the assessor to assist in the independent medical process. This would appear to be the very sort of disclosure intended to be covered by s. 39 of PHIA. We would recommend amending this provision to include the words “*or by the Workplace Health, Safety and Compensation Commission*” after the word “*Canada*”.

I trust the above to be in order but should you have any questions, please do not hesitate to contact me directly at 778-1224.

Yours truly,
WorkplaceNL



Rebecca Phillipps
General Counsel and
Corporate Secretary

RCP/pmm