



## Pre-existing Conditions are Not Necessarily Pre-existing Disabilities

By: Gary Majesky, WSIB Consultant & Executive Board Member



**L**U 353 has a great health care plan that is well utilized by our members. Reforms to paramedical services allows members to receive up to \$2000 annually towards Chiropractic, Physiotherapy or Massage, but using these benefits carries some downside if a member suffers a work injury that was treated in the recent past.

WSIB is searching for clinical evidence of pre-existing conditions when injured workers enter the system. As soon as diagnostic imaging unmask a physical finding e.g., degenerative pathology that is age *versus* injury related, your claim will be flagged, and entitlement limited or denied. No matter the safeguards written into WSIB policy regarding pre-existing conditions, the adjudicative reflex is to deny entitlement.

### Treatment Records May Be Used

Another source of medical documentation that will be used against injured workers are clinical records when you receive treatment. For instance, if you get a tune-up on your low-back, neck, upper extremities, and have benefited from the union's para-medical services, the WSIB will rely on this evidence to confirm the presence of a symptomatic pre-existing condition.

When injured workers enter the WSIB system, there is supposed to be a robust analysis whether the injured worker had a *pre-existing disability* or *impairment*, and not just the presence of a *pre-existing condition*.

### Pre-existing Condition ≠ Pre-existing Disability

The fact you received treatment prior to a work related injury does not mean you had a pre-accident disability or impairment. However, I'm not convinced WSIB Eligibility Adjudicators tease out these details or make the necessary distinction. In my experience, once the WSIB flags that you received treatment 18-24 months prior to a work injury, they'll view the injured worker as a broken satchel of eggs.

An equally important consideration, regardless whether you have a pre-existing disability or impairment is the nature and seriousness of the new work injury, and whether it is likely to have caused a worsening, or new damage.

We have many members with pre-existing injuries and disabilities that are work and non-work related, but they continue working at the trade. Based on research, and utilization of our benefit plan, a large segment of the membership population has some musculoskeletal injury. However, when you have a new work accident that aggravates a pre-existing condition or disability, you're also entitled to benefits.

When you fall into the category of the working wounded, your claim may need to be adjudicated using Operational Policy 15-02-04 – Aggravation Basis.

The Aggravation Basis policy should be used if a worker received treatment, had tests (e.g., MRI, CT Scan, X-ray), **AND required modified duties or lost time from work because of a pre-existing injury 18-24 months prior to the work injury.**

The Aggravation Basis policy is supposed to provide direction where a minor work-related accident aggravates a worker's pre-accident impairment. The definition of what constitutes a minor, moderate, or serious injury is a frequent source of controversy, typically used to downplay the significance of the new injury and limit a workers entitlement, but also limit an employer's entitlement to Second Injury Enhancement Fund relief (i.e., SIEF).

### Review of OPM 15-02-04 – Aggravation Basis

A **pre-accident impairment** is a condition that has produced periods of impairment/disease requiring health care and has caused a disruption in employment (lost time and/or modified work). Although the period of time cannot be defined, the decision-maker may use a one to two year timeframe as a guide.

A **pre-accident state** is the worker's level of impairment and work capacity prior to the work-related injury/disease.

#### Determining entitlement for aggravation of pre-accident impairment

Entitlement for aggravation of a pre-accident impairment is accepted when the clinical evidence demonstrates a relationship between the pre-accident impairment and the degree of impairment resulting from the accident, and the impairment after the accident is greater than would be expected owing to the pre-accident impairment.

### Ongoing Entitlement

The Aggravation Basis policy bluntly states "decision-makers are responsible for *limiting entitlement* in claims allowed on an aggravation basis. The worker's clinical status is monitored to determine if the worker has reached the pre-accident state. If a worker remains off work after reaching the pre-accident state, the decision-maker discontinues benefits and advises the workplace parties."



## Significant Contribution Test

When a pre-existing condition is identified in a workers claim, it's worth reviewing the appropriate standard of causation. The test developed has been referred to the "significant contribution" test. The Supreme Court of Canada clarified the principles of causation, including the "thin-skull" principle, in *Athey v. Leonati*, [1996] 3 S.C.R. 458.

Under that test the workplace injury need not be the sole cause of the worker's condition, so long as it is a "significant contributing factor" even in the presence of other non-work related factors. In *Decision No. 280*, the Panel defined "significant contributing factor" as follows:

A "significant contributing factor" is a factor of considerable effect or importance or one which added to the worker's pre-existing condition in a material way to establish a causal connection.

## Thin Skull Doctrine When Adjudicating Claims Involving Pre-existing Conditions

The applicability of the common law thin skull principle to worker's compensation was explained in *Decision No. 915* at p. 136, which is the legal test used when a worker has a pre-existing condition.

The thin-skull doctrine also applies in Workers' Compensation cases and for two reasons. One reason is that permitting compensation to be denied or adjusted because of pre-existing or predisposing personal deficiencies would very substantially reduce the nature of the protection afforded by the compensation system as compared to the Court system for reasons that would not be understandable in terms either of the historic bargain or of the wording of the legislation.

**The other reason is that in a compensation system injured persons become entitled to compensation because they have been engaged as workers. They have functioned as workers with any pre-existing condition they may have had. It seems wrong in principle that conditions which did not affect their employment as workers should be relied upon to deny them compensation as injured workers.**

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As you can see, the WSIB is a mine field for injured workers, even though legal protections are written into the law and policy. My advice, be sure to object and appeal any decision whenever WSIB limits entitlement in your claim because of a pre-existing condition.

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