



Helpful Guidance in Registering New Injury Claims with WSIB, When an Injured Worker Has A Previous Permanent Impairment Award (PD or NEL) For a Prior Injury Involving the Same Area of Injury

By: Gary Majesky, *WSIB Consultant & Executive Board Member*



After 20-years representing 353 members, there are over two thousand injured workers who have been awarded Permanent Disability awards by WCB/WSIB and in receipt of monthly Permanent Disability pensions or NEL awards.

PD and NEL awards recognize that an injured worker has suffered a permanent impairment involving either a physical and/or functional abnormality or loss.

In 1990, the WCB legislation changed and the Board no longer processed monthly PD pension awards, and instead, introduced NEL Awards to recognize permanent impairments for injuries that workers sustained in the course of employment.

At the heart of rating permanent impairments, WSIB is mandated by section 47 of the *Workplace Safety & Insurance Act* and Ont. Reg. 175/98 to use the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition, in rating permanent impairments.

We have many members who have continued to work in spite of previous permanent impairment awards recognized by WSIB for myriad injuries (knee, back shoulder, neck, etc.), however controversy frequently arises when they suffer a new injury. Here's WHY.

In spite of a prior PD/NEL award, members are typically performing their pre-injury job without restriction and then suffer a new work injury, either single episode trauma (slip or fall), or a gradual onset injury. That's when things start going sideways. Often times the employer will argue the worker has a pre-existing condition, notwithstanding it was a work related pre-existing condition, and that they are not responsible for the new injury claim or that it is a recurrence of an old injury.

While that analysis has a ring of reasonableness to it, don't fall into this trap, because when you have a new injury, either sudden or gradual onset, you should submit a new claim to WSIB. In my experience, new injuries are not a recurrence of the old injury, but a new injury super-imposed on an old injury. That legal/medical distinction is critically important.

Here's a Good Case Study. Joe Mitchell, who works in the ICI sector suffered a low-back injury in 2005 and was diagnosed with a work related lumbar spine disc herniation in which the WSIB ultimately recognized a 10% NEL award. Since 2007, Joe returned to work as an electrician with different employers and performed the full duties of

his trade. Joe is sore some days, and takes the odd pain pill, but he essentially returned to his pre-injury electrician duties without the need for modified duties. Then in August 2016, Joe lifted a heavy object at work and strained his low back.

Is this a new injury or a recurrence? The correct answer, it's a new accident that arose out of and in the course of employment, notwithstanding a prior work related permanent impairment. The employer may argue it's a recurrence of an old injury and the claim shouldn't be registered against their company. However, the accident employer can seek cost relief under the Second Injury Enhancement Fund (SIEF) fund if the prior injury was a factor that caused, enhanced or prolonged the recovery in the new injury claim.

However, there is a hidden adjudicative trap that lays in wait for injured workers because when they register a new claim for a back or knee injury, WSIB will refer to the physical findings of prior PD or NEL award to determine whether the worker's level of disability is greater, or in other words, has deteriorated from the permanent impairment rating that was previously performed by WSIB.

This is frustrating because you're at home, sitting on the couch, can't walk, in extreme pain, taking medication, and your doctor has advised you to stay at home and rest (sound familiar, call me Aaron Waxman – just kidding). You're obviously worse (disabled), because up until the most recent work injury you were fine and performing your pre-injury job as an electrician or other classification (Communications, GEO, etc.).

And when it comes to pain, that has little currency with WSIB because they say "pain is subjective" and they're looking for "objective physical findings" to determine an injured workers current level of disability, or residual functional capacity. This is the point in time when WSIB will refer to your prior PD/NEL award to check the physical findings. Leaving aside new structural abnormalities (pathology), such as a torn meniscus, disc herniation, or some other anatomical lesion, they will refer to the earlier range of motion measurements that were incorporated in your PD/NEL award. Range of Motion measurements are incorporated in all PD/NEL awards, and represent the baseline in terms of how that body part functioned.

So when you submit a new claim, and had an old PD/NEL award, it is vitally important that your health professional provide current ROM Measurements when they submit a Form 8, Health Professionals Report of Injury/Disease, or Form 26, Health Professional Progress Reports.



If your current ROM measurements are not provided, WSIB will often times rule that you're no worse today than when they assessed you for a NEL award back in 2007, which is frustrating because you can't move, can't work, and for all intents and purposes your health professional considers you temporarily totally disabled.

The following chart is a partial list of the Range of Motion Measurements (ROM) for various body parts that WSIB uses in determining the functional impairment of a physical injury. ROM measurements are used to determine your functional capacity, but also whether you have suffered a physical and/or functional loss in a new injury claim. Simply, ROM measurements are a key factor WSIB considers when determining whether a worker has a residual functional impairment. When you put in a new claim and have an old PD/NEL award, WSIB will not give you a heads-up, but lets you crash first, at which point they'll rule you're no worse today than when you were previously assessed. Please ensure your health professional documents the following ROM Measurements whenever you submit a new injury claim and were previously awarded a PD/NEL award by WSIB.

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Range of Motion (ROM) Measurements for Different Body Parts Used for WSIB Permanent Impairment Evaluation (Abnormal Motion)

NECK & LOW BACK	HIP	SHOULDER	KNEE	ELBOW	ANKLE	WRIST
Flexion	Flexion	Flexion	Flexion	Flexion	Flexion	Dorsi-Flexion
Extension	Extension	Extension	Extension	Extension	Extension	Palmer Flexion
Lateral Rotation Right	Abduction	Abduction	Medial Laxity	Pronation	Eversion	Lateral/Radial Deviation
Lateral Rotation Left	Adduction	Adduction	Lateral Laxity	Supination	Inversion	Medial / Ulnar Deviation
Lateral Flexion Right	Internal Rotation	Internal Rotation	Anterior Laxity			Pronation
Lateral Flexion Left	External Rotation	External Rotation	Posterior Laxity			Supination



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Sunday, September 10, 2017 at 1:07pm

\$60.00 per ticket (limit of 4 tickets per member). Section 130 B, C & D.

Payment can be made at any of the (4) union halls.

353 Retirees' Computer Club

The Retirees are pleased to announce the formation of a computer club that will be focusing on Apple products. The monthly sessions will be of a casual drop-in nature, far removed from the typical classroom format and will be conducted in an environment of open discussions, workgroups and presentations.

Topics will cover the use of iPhones, iPads, MacBooks, iMacs and Apple TV. Learning

how these devices interact with each other will result in a more enjoyable experience for our members.

No registration is required at this time; just bring your own personal Apple devices with you. For those who currently do not have an Apple product, there will be devices available for sharing.

When: First Wednesday of every month

Time: 10:30 am to 12:30 pm

Where: West End Training Centre, 3185 Orlando Drive, Mississauga, ON.

Looking forward to you joining our friendly group and enjoying a coffee with us. All 353's retired members, members' spouses/partner and unemployed members are welcome!

In Brotherhood,

William O'Halloran & Len Zawaski