



Improper and Illegal Reductions in Non-Economic Loss Awards (NEL Permanent Impairment Awards)



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

Recently, I have received a number of calls regarding a Class Action Law Suit that has been filed against WSIB in connection to the Board's approach in off-setting (discounting) NEL awards because of pre-existing conditions.

This legal action is being spear-headed by Richard Fink, a lawyer who practices workers compensation law.

For our members' edification, my office has been active on this issue for over a year, when I first flagged the NEL Departments new practice in relying on Operational Policy 18-05-05 to discount NEL awards for pre-existing conditions.

Ironically, I had case conferenced with Richard Fink six months ago, and at that time he had a different view whether the Board's practice was permissible under the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition. Needless to say, I have a number of appeals going forward which are now before the Tribunal and WSIB Appeal Services Division.

The essence of our legal challenge is the NEL clinical rating specialists are misapplying OPM 18-05-05, which is a policy that deals with the **"Effect of a Pre-existing Impairment."** The union argues this policy is not applicable to workers who have asymptomatic "pre-existing conditions" because these terms are not synonymous.

The union is arguing that these pre-existing conditions (degenerative pathology) were asymptomatic prior to our members compensable accident/injury, did not cause them any limitation, require treatment, including medication, job modifications or lost time in the 2-years prior to their work related injuries.

Therefore, our members did not have a pre-existing impairment as that term is defined in OPM 14-05-03 (Second Injury Enhancement Fund relief) and OPM 11-01-05 (Aggravation Basis). We're arguing that by mischaracterizing the pre-existing condition (pathology) as a pre-existing impairment, distorts in an entirely illegitimate manner, the principle of predominate cause and the legal definition of a pre-existing impairment as defined in Policy and Tribunal Decisions.

During a recent radio show I was discussing the WSIBs new draft policies on pre-existing conditions, and read on-air excerpts from *Decision No. 204/14*, in which a Tribunal Vice-chair in a NEL quantum dispute identical to the one our members are experiencing, concluded that the worker did not have a pre-existing impairment within the meaning of Board policy, and hence the workers NEL award cannot be reduced pursuant to OPM 18-05-05, which is the same rationale I am arguing in member appeals.

While researching case law for my legal submissions, I found a gem when I read *Decision No. 63/98R*, in which a Vice-Chair hearing a reconsideration appeal where a worker challenged a prior Tribunal decision that purports to discount the worker's benefits due to an underlying condition concluded that this constitutes an error in law. However, it was the evidence of the Board's General Counsel and Vice-President, Legal Services, Paul Holyoke, whose submission caught my attention where he stated:

Mr. Holyoke noted that the Workers' Compensation Act does not contemplate the "discounting" of a worker's benefits to account for a pre-existing condition. In describing the legal significance of such conditions, he wrote:

The issue of how pre-existing conditions are handled in the worker's compensation/workplace safety and insurance system is quite complex in its details. The general principles, however, are well-established.

The "thin-skull" principle, which holds that one takes a worker as one finds him or her, is a cornerstone of the worker's compensation (and workplace safety and insurance) system. Both the Board and the Appeals Tribunal have consistently stated that, in order for an injury to be work-related, the work need not be the sole cause of the injury. The test that has routinely been applied by the Appeals Tribunal is to inquire whether work was a significant contributing factor to the injury by accident. Although the Board has never formally adopted this test, it has applied a similar approach since the Workers' Compensation Act first came into force in 1915.

If a worker has suffered a personal injury by accident arising out of and in the course of employment, the Act requires the Board to provide benefits for the consequences that 'result from' the injury. If a consequence 'results from' the injury, nothing in the Act permits the Board to reduce the benefits to account for any non-work related factors that may have combined to contribute to that consequence. If the accident is found to be work related, the worker is entitled to the full benefits provided by the statute for any consequence that results from the accident. If the accident is not work-related, the worker may not receive benefits under the statute.

In all my legal submissions to the WSIB and Tribunal, I have argued that the union's analysis is validated by reference to these Tribunal decisions (*Decision No. 204/14*, *Decision No. 530/05*, & *Decision No. 63/98R*), which supports the union's position that the Board has erred in its interpretation and application of OPM 18-05-05 by improperly discounting the workers NEL award for pre-existing conditions.



Finally, the union argues that the WSIB has engaged in decision making that it knows or ought to know is illegal and improper, as argued by Richard Fink, in his Ontario Superior Court application regarding the offset (discounting) of pre-existing conditions from NEL awards.

There can be no more clearer and compelling evidence to overturn the Board's decision to discount NEL awards for pre-existing conditions than that provided by the Board's own General Counsel.

In essence, the Board has fundamentally changed its approach to pre-existing conditions by executive fiat, and calculating NEL decisions in a totally illegitimate manner, without the policy or legislative authority to legitimize what the Board is currently doing.

The Board's current policy consultation now underway involves a suite of draft policies that address the issue of pre-existing conditions, and the direction the Board is headed. However, at this point in time these changes have not been adopted or minuted by the Board of Directors of the WSIB. Therefore, in the absence of executive authority, WSIB management appears to have shifted the internal decision making paradigm in anticipation of future policy changes. Unfortunately, that approach does not lend itself to procedural fairness, because NEL decisions are being made without the proper legal and policy authority to do so.

Let me end by saying that the union believes the Board has committed an error in law, with respect to the improper and illegal offset of NEL awards for pre-existing conditions, as outlined in the Vice-Chair's reasons found in *Decision No. 63/98R*. The battle continues, so please feel free to forward me copies of your NEL awards which I will review and file objections and appeals, if necessary.

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- You'll be prompted to provide personal information and:
 - Plan number 51189
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Sign up once and return any time. All you need to remember is the user name and password you've selected!

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