Is First Evidence, Best Evidence?

Prior Injuries, Pre-existing Conditions, and Statements by Workers

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

Our 353 membership is largely male, and that means we have many brothers who in the past, and continue to be involved in recreational sports whether hockey, baseball, soccer, football, and motorized activities.

Every week I receive claims that on the surface should be clear-cut work injury claims, but because of admissions some members make regarding previous non-work related injuries involving the same area of the body, controversy arises in their WSIB claims. Take for example sports injuries. Quite often, we have members who sustained sports injuries years ago, in which there is well-documented injury and pathology including diagnostics such as MRI and orthopedic consultations.

Over the past year I have dealt with several claims where members had sustained sports injuries years ago. In one claim a member had a shoulder injury after diving into a swimming pool. Another had taken a puck in the leg/knee. And finally, another athlete sustained an ACL knee injury after being clipped in side of the leg playing football.

Although each case involved different levels of medical investigation and treatment at the time of injury, there was one important overarching fact that was misunderstood by members, employers, and particularly, WSIB decisions. Each of these members had returned to work as electricians for years without any evidence of a disability.

As soon as a pre-existing condition is on the radar screen, employers flag this for WSIB who use this information to deny claims on the basis that the pre-existing condition (pathology) breaks the chain of causation between the work injury, and current disability. Often times' physicians will report that there is a prior injury (pre-existing condition), including old work injuries.

The problem however, is the inquiry should not end there, because it is important to apply the WSIB policies and law, when adjudicating claims in the presence of a pre-existing condition. In my opinion the key consideration is whether the worker had a pre-existing ***disability*** or ***impairment***, which is an entirely different consideration versus whether a worker had a pre-existing condition.

Did Worker Have Pre-injury Impairment or Disability?

In denying a workers claim, WSIB often relies on the presence of pre-existing condition(s), whether congenital abnormalities, prior injuries, or aging. While technically correct that these pathologies were pre-existing (non-work related and sometimes work related), WSIB decision makers often times fail to consider evidence that the worker was asymptomatic for many years until a work injury. According to WSIB policy, it is materially relevant if a worker did not require health care or treatment, job modification and performed regular duties prior to the work injury, because this tells us that the worker did not have a pre-existing ***impairment*** or ***disability*** as that term is defined in law and policy. This is all the more compelling when one considers that the pre-existing condition was asymptomatic (quiet, non-troubling), and the member continued with sports activities while working without restriction or complication in a physically demanding occupation.

Work Injury Aggravation of Pre-existing Condition

Notwithstanding the fact that our members sustain new injuries in the presence of old injuries, WSIB decision makers routinely place the onus and blame on the worker's current disability on the existence of an underlying pre-existing condition, yet seem to give little consideration to Board policy, and law, when adjudicating claims in the presence of an asymptomatic pre-existing condition, which only becomes symptomatic after a work injury.

An argument I frequently make in appeal hearings involves the significant contribution test discussed bellowed (***Sole vs. Multiple Factors in Injury Onset***) which addresses the adjudicative challenge so often misunderstood by WSIB decision makers and workplace parties.

Even in situations where a member had a pre-existing meniscus tear in their knee (i.e., torn cartilage) but continued working for many years with this condition without symptomatic or functional difficulties, there is a need to properly frame the issue of causation or causality. For instance, if you sustained a new work related knee injury after dismounting a ladder or arising from a squat/kneeling position that involved a twisting motion and your knee gave out, this is a new work injury, in spite of protests from employers that there was no accident. This includes WSIB decision makers who tend to minimize the significance of a new work injury characterizing the mechanism of injury as an innocuous, and blaming the cause why the workers knee gave out to the pre-existing meniscal tear and not the new work injury.

Even when the WSIB rules the non-compensable pre-existing condition (pathology) is the reason for the worker's ongoing knee disability, the union will argue that there was a compensable aggravation of an underlying asymptomatic condition (e.g., meniscus tear or osteoarthritis), which was rendered symptomatic, and that the work related aggravation never ceased causing a worsening of the symptoms and functionality that ultimately required surgical repair.

Significant Contribution Test (Sole Factor vs. Multiple Factors in Injury Onset)

Often times we are dealing with multiple factors that play a role in a member's disability. In that regard, Tribunal case law has established that the appropriate test for entitlement is whether the workplace activity which is alleged to have precipitated the condition can be demonstrated, on a balance of probabilities, to have contributed significantly to the development of the condition. The fact that other non-compensable factors may also have contributed significantly to the condition will not limit entitlement if it can be shown that the workplace factors also contributed significantly to the condition. To be entitled to benefits for a condition, a worker need not demonstrate that the work activity was the sole factor contributing to the condition. It is enough to show that the work-related factors contributed significantly, regardless of the existence of other factors which might also have contributed significantly. However, this legal analysis is often missing in WSIB decisions.

Legal Standard Regarding Causation & Pre-existing Conditions

The law is helpful in reconciling these chicken and egg debates because there is settled Tribunal jurisprudence that addresses the appropriate standard for causation. The test developed has been referred to the "significant contribution" test. The Supreme Court of Canada found it necessary to review and clarify the principles of causation, including the "thin-skull" principle, in Athey v. Leonati, [1996] 3 S.C.R. 458. The applicability of the common law thin skull principle to worker's compensation was explained as follows in a leading Tribunal Decision No. 915 at p. 136:

> 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.

As you can see the issue of pre-existing conditions no matter the nature or type, including old work injuries, requires special attention when members sustain a new work injury super-imposed on an old injury. My advice, stop loading the employers' gun and making statements that harm your interests. And remember to call or email me, because there is a complex set of policies, and law, that need to be argued in these situations, but often misunderstood and ignored.

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