



## Will I still Get Workers Compensation or Am I Just Old? WSIB Draft Policies Most Regressive in 25 Years



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

For the past 2 years I have written extensively about the WSIB's efforts to deny more member claims on the basis of pre-existing conditions (i.e., degenerative or age related pathologies). This isn't a new WSIB strategy because they frequently engage in this chicken and egg debate whether a workers injury caused the degenerative pathology. In practice, that is not the correct legal test in terms of framing the issue of causality. Generally speaking, we don't argue the injury caused the arthritis, but was superimposed on the degenerative condition thereby rendering it symptomatic. That is an entirely different way of framing the issue of causation, and one the WSIB instinctively opposes.

What became obvious to me is the WSIB has become more zealous in their approach citing the presence of pre-existing condition to deny injury claims. Then in November 2013 the WSIB released a suit of draft policies dealing with issues such as Recurrences, Determining Permanent Impairment, Work Disruptions, Aggravation Claims, and the Effects of Pre-existing conditions. These policies will have a drastic effect on worker's ability to collect compensation for a work-related injury/disease. The underpinning theme throughout all the policies is the perception that workers are being compensated for symptoms more related to the natural aging process rather than the work-related injury.

There is universal consensus among all unions that the draft policies are regressive and designed to deny more claims on the basis that your work injury didn't cause your disability, because this was your destiny (getting old). Not a word of a lie, because WSIB has used that very rationale in a members claim.

Recently I was asked to sit on the Advisory Committee of the Occupational Health Clinics for Ontario Workers (OHCOW) and our first

project was to convene a Prevention Partners Forum on March 29, 2014 titled **"Will I Still Get Compensation or Am I Just Old?" – New Directions Affecting the Scope of Workers Compensation in Ontario.**

I had the honour of facilitating this Forum where we heard from Alex Farquhar head of the Ontario Workers Advisor (OWA), Maryth Yachnin, a lawyer from Injured Accident Victims Group of Ontario (IAVGO), and other labour representatives heavily involved in workers compensation. The consensus was clear; the proposed policies are a disaster for injured workers and give the WSIB the policy tools to deny more claims.

On February 28, 2014 a multi-union alliance, which includes the Ontario Provincial Building & Construction Trades Council, issued a letter to Elizabeth Witmer, Chair of the Workplace Safety and Insurance Board. The union alliance stated that the draft policies will have an adverse impact on workers, employers, short- and long-term disability plans, Ontario Disability Support Program (ODSP), Employment Insurance (EI) and the entire health-care system in Ontario.

The union's argued that the draft policies will lead to an exponential increase in appeals (we're already there), including legal and Charter challenges. The main criticism is the draft policies focus on ways to deny or limit entitlement especially in situations where a worker may have a pre-existing condition, and directs decision-makers to ignore the long standing accepted "significant contributing factor" test, adopted by the Workplace Safety and Insurance Appeals Tribunal, and Supreme Court of Canada. In Ontario, a "significant contributing factor" analysis is used to determine whether a worker's injury or condition is compensable. This test focuses on whether the work itself made a

significant contribution to the worker's injury (disability), in which work need not be the sole contributing factor to the injury (disability), so long as the work makes more than a de minimus or trifling contribution to the injury, workers are entitlement to compensation.

These draft policies drastically depart from the principles espoused by an Ontario Royal Commission, headed by Sir William Meredith, who in 1914 proposed a remedy: a *historic trade off* in which workers gave up the right to sue their employers for a guaranteed protection from loss of income regardless of fault (no fault system).

Meredith's report led to the first Workers Compensation Act in Canada, and in 1915, Ontario's *Workers Compensation Act* was proclaimed into law, based on the five Meredith Principles:

1. **No-fault compensation**, in which workplace injuries are compensated regardless of fault, and the worker and employer waive the right to sue.
2. **Collective liability**, so that the total cost of the compensation system is shared by all employers.
3. **Security of payment**, with a fund established to guarantee that compensation will be available for injured workers when they need it.
4. **Exclusive jurisdiction**, with all compensation claims directed solely to the compensation board.
5. **Independent board**, that is autonomous and financially independent of government or any special interest group.

Now, 100 years later, the Ontario Government is allowing these far reaching policies to go forward, without an impact study before



implementation. The IBEW supports the labour alliance position that the WSIB abandon these proposed policy changes. Instead, efforts should be directed at developing overarching adjudicative policies to assist decision-makers in determining work-relatedness that focuses on the workplace accidents material contribution to the disability. These proposed policy changes in fact do the opposite, which is an attempt to diminish the work contribution to the disability and create a disposable workforce. A concept we know only too well in Local 353.

The IBEW has a long tradition of political engagement, so it seems odd that while we're in the midst of a minority Ontario Government injured workers would be the focus of this frontal attack. Minority governments in the past produced great improvements to protect worker rights. Take for example the NDP/ Progressive Conservative efforts in the 1970s which saw Premier William Davis introduce the first *Occupational Health & Safety Act*, and a Royal Commission on Asbestos, whose findings were implemented, and asbestos banned from use. Then in the 1980s, the NDP/ Liberal Accord which introduced Pay Equity and Employment Equity legislation, as well as the creation of an independent appeal body to deal with worker compensation appeals – Workers Compensation Appeals Tribunal (WCAT). My father's 1986/87 **Majesky/Minna Report**, also ushered in major legislative reforms so injured workers received the legal right to Vocational Rehabilitation (retraining).

If past minority governments introduced legislation that advanced worker rights - WHY in 2014 are Ontario workers getting screwed when we should see progressive legislation and policies introduced that enhances the WSIB system? Good question, but don't expect Tim Hudak to champion the cause, and in fairness, the Liberals have allowed this to go forward.

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