



New WSIB Policies – Pre-existing Conditions Effective November 1, 2014



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

As a result of the release of the KPMG's Value for Money Audit in 2011, Jim Thomas, Independent Chair, provided a report to the WSIB on the benefits policy review consultation process, with recommendations for policy changes in Ontario to deal with pre-existing conditions.

Since that report, I have been dealing with a tsunami of WSIB decisions where claims are denied or shut-down because a worker has coincidental pre-existing conditions, typically asymptomatic, that the WSIB relies on to deny a claim or limit entitlement. Typically, the WSIB will rule that the worker has recovered from the work injury, and any residual symptomology is related to the pre-existing degenerative pathology, that isn't injury related, but the result of aging.

Historically, we have relied on settled jurisprudence such as Significant Contributing Factor, Thin Skull Doctrine, Sole Cause versus Multiple Cause, Indivisible Injury and other legal concepts when litigating WSIB claims. These legal concepts were never really embraced by WSIB decision makers, but they are the legal principals the Tribunal follows when we argue appeals.

As reported over the past year the WSIB has road tested its new policies through a consultation process, and officially adopted these Operational Policies effective November 1, 2014. However, even before these policies were formally adopted by the WSIB Board of Directors, WSIB Case Manager jumped the gun and denying claims using the pre-existing condition rationale.

Here's How Electricians Get Screwed

From an operational perspective, the volume of disputed claims (objections & appeals) has nearly tripled, and this accords with my own experience in Local 353. This represents the

new normal and I've seen first-hand how unfair the decision making has become. Take for instance the 35-year old electrician who was crushed by a 6,100 lb. transformer, pinned until he could be extricated by EMS, suffered massive whole and upper body trauma and fractures, and was in a medically induced coma for over a week. WSIB has since ruled his ongoing spinal complaints are the result of pre-existing degenerative disc disease, which incidentally was asymptomatic prior to his horrific accident. This is what lay in store for members even in cases of a severe accident, so you can imagine their approach when less traumatic accidents and injuries are involved. The bottom line, many claims are being bounced out of the system.

How it works is straight forward. The WSIB will allow the workers injury claim for a brief period of time, then rule the injury related part of your accident has resolved (healed), and the residual problems the worker is experiencing are not the responsibility of the work injury, but a pre-existing condition. I have actually received decisions where a WSIB Case Manager stated the workers problems are a function of getting old, and this was his destiny.

Here are the new/revised WSIB Policies:

- OPM 15-02-03, Pre-existing Conditions
- OPM 15-02-04, Aggravation Basis
- OPM 15-02-05, Recurrences
- OPM 11-01-05, Determining Permanent Impairment

The Case of the Shrinking NEL Award

The WSIB has also used the pre-existing condition rationale to reduce the percentage (%) rating of Non-Economic Loss awards. NEL awards are granted to workers to recognize a permanent impairment for a residual

physical and/or functional abnormality or loss associated with a work injury. I have filed many appeals in connection to the discounting of NEL awards, and this remains another area of controversy regarding the WSIB's interpretation of the American Medical Association Guides to the Evaluation of Permanent Disability, 3rd Edition, which the WSIB is legally mandated to use when rating impairments.

This is the most important development in Workers Compensation in the past 50 years and I have been meeting with a province wide group of stakeholders to develop our legal strategies in response to the pre-existing condition policies. Policies that will drastically, and fundamentally, erode the legal protections injured workers are supposed to receive from the workers compensation system. And if you think this doesn't affect you because you are a healthy electrician, and never been injured, think again. When members' claims are denied by WSIB the kiosk they will automatically turn to will be our union disability plan. So it's not an abstract concept, and our entire membership is paying the cost to provide disability benefits, where once the WSIB was liable.

Appeal Decision Released - Time to Heal After Surgery

A number of members contacted me after reading my October article regarding WSIB rulings that electricians had returned to work the next day after surgery. In hindsight (usually 20/20) the members now understand they were duped (exploitation by invitation) by agreeing to perform modified work at home, even though they were not medically cleared, in a diminished mental and physical capacity, and heavily medicated. A recent appeal decision provides a good analysis that you will appreciate:

Excerpt from recent WSIB Appeal Decision

The re-employment obligations set out in the *Workplace Safety and Insurance Act* only apply to employers of workers who have been *unable to work* as a result of a work-related injury. Thus, the *threshold* which a worker must cross before he or she can benefit from the re-employment protections is he or she must have been *unable to work* as a result of the work injury.

As noted in memo #8, the employer submitted the worker had surgery on the Sunday and did not lose time from work as they provided work at home and then office work.

I find it difficult to accept the worker was able to perform suitable work immediately following surgery. The information on file supported the worker was taking two Oxycocet every four hours following surgery. The employer's correspondence dated May 8, 2013, noted *the worker had been*

taking medication that was making him drowsy; and the employer provided work from home that would allow him to rest when he felt it necessary without feeling as though he should be alert and working because co-workers were watching.

Although the employer submitted the worker was in full agreement with such an arrangement, that arrangement was not in compliance with WSIB policy. Suitable work means post-injury work that is safe, productive, consistent with the worker's functional abilities, and that, when possible, restores the worker's pre-injury earnings.

Under the definition of safe, the work is to be performed at a worksite that is covered by either the *Occupational Health & Safety Act* or the *Canada Labour Code*. In this case, the employer did not provide work at such a worksite as the worker was not able to travel to such given his medical condition. There was an absence of evidence to support the employer took the appropriate steps to

ensure the *workplace* (home) was safe to the satisfaction of the WSIB, nor had such work arrangement been pre-approved by the WSIB.

I further find issue with productivity. Given the worker was drowsy, taking two Oxycocet every four hours, it would be unlikely that he would be able to perform productive tasks for an entire shift.

Although LOE benefits were not paid to the worker as the employer continued to pay him, I find the evidence supported the worker would be considered *unable to work*, due to the work injury. As indicated in Operational Policy, an employer's decision to pay advances in such circumstances is not relevant to whether a worker has been *unable to work*. The worker has re-employment rights as the threshold issue (*unable to work*) was triggered.

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Dues Increase effective January 1st, 2015

1. At the IBEW International Convention which was conducted in Vancouver, British Columbia in September 2011, the delegates approved amendments to Article IX of the IBEW Constitution.
2. The amendments require an increase in dues for "A" Members of \$1.00 per month, effective January 1st, 2015 and the increase will be applied to the Per Capita Fund.

Basic Dues will be as follows: "A" Members - \$40.70

REMINDER

Just a reminder for unemployed members, we offer WHMIS and FALL PROTECTION every Tuesday at the Toronto Training Centre, and every Thursday at the Mississauga Training Centre, starting at 8:30am.