



## There Are Two Types of Injuries Recognized Under the Law - Chance Events & Disablements. Workers Must Submit a Claim Within 6-months, Otherwise the WSIB Can Deny the Claim Because it was Untimely



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**T**his month I want to discuss the importance of filing timely WSIB claims, and the risk members face by failing to submit WSIB claims. Two members failed to submit WSIB claims when they were injured and delayed reporting for over a year. Claims were eventually submitted, but denied for different reasons.

A member working at Chrysler in Brampton hurt his elbow (tennis elbow/epicondylitis) after digging 2 ½ feet into hard ground to locate conduit and repair a damaged cable feeding wires to the plant security systems. There was some verbal reporting with head office regarding an injury, but no WSIB paperwork was submitted until 18 months later when the member was scheduled for elbow surgery. The employer denied he worked on the tools claiming he was a supervisor. The member submitted a WSIB claim which was denied because there was no proof of accident. The appeal was also denied by an Appeal Resolution Officer (ARO) at the WSIB Appeal Services Division, and his final appeal was heard at the Workplace Safety and Insurance Appeals Tribunal, and allowed.

In another claim a member tore a tendon in his arm after lifting a bundle of 1" conduit and carrying it 40 meters on his shoulder. When he dropped the bundle off his shoulder onto a lift he felt a tear and pain in his arm. By morning break his arm was black and blue. The member knew he injured his arm, but did not report the injury, seek health care, nor submit a WSIB claim for personal reasons (maintain peace with employer, matrimonial discord, plus young children). He continued working until he suffered a gradual onset shoulder injury two years later. By this time he could not continue working regular duties and contacted the union. A claim was filed for the old tendon tear in his arm, plus the new shoulder injury. WSIB denied his claim, but an ARO allowed the gradual onset shoulder injury as related to the physical demands of his job, but not the tendon tear in his arm (proof of accident). The tendon tear appeal was heard at the Tribunal and denied as a Disablement injury.

### Law and Policy

All WSIB claim are adjudicated under the Workplace Safety and Insurance Act. Subsection 2(1) defines an accident to include a Chance Event or Disablement arising out of and in the course of employment. The terms Chance Event and Disablement are confusing to the average worker.

- (a) a wilful and intentional act, not being the act of the worker,
- (b) a chance event occasioned by a physical or natural cause, and
- (c) disablement arising out of and in the course of employment; ("accident")

Section 22, subsections (1) and (3) sets out the time limit to submit a claim:

22(1) A worker shall file a claim as soon as possible after the accident that gave rise to the claim, but in no case shall he or she file a claim more than six months after the accident, or in the case of an occupational disease, after the worker learns that he or she suffers from a disease.

(3) the Board may permit a claim to be filed after the six-month expires, if in the opinion of the Board, it is just to do so.

### Two Types of Injuries Recognized Under Law

Members need to understand that under the law there are two types of injuries that are recognized. Often time's workers get confused whether their injury is work related in the absence of single episode trauma (e.g., tripped, fell, lifted something, banged into an object, etc.). Section 2 of the *Workplace Safety and Insurance Act (WSIA)*, defines the two types of accident recognized in law.

While it is easy to identify obvious injuries where there is an identifiable accident or mechanism of injury, at least half (50%) the injuries Local 353 members experience are related to repetitive work such as kneeling, climbing, carrying materials, overhead work, pushing & pulling, and/or reaching to shoulder height and above. Working in awkward postures and outside the safe ergonomic working zone are an added factor.

The range of physical injuries that frequently arise are meniscus (knee), rotator cuff, ligaments and joint degeneration (shoulder), lateral or medial epicondylitis (elbow/forearm), lumbar spine (disc), cervical strain (neck). There are other injuries such as Carpel and Cubital Tunnel which are hand/arm neuropathies and associated with repetitive gripping, squeezing, pushing or pulling which are risk factors in the medical literature.

### Chance Events (single episode trauma)

Chance event accidents are much easier to identify because there is usually some causal incident or accident. The drill jammed and torqued, fall off ladder, pulling wire and hurt shoulder, lumbar spine etc. So long as the worker reports an injury promptly and seeks medical attention, these claims are less problematic from a proof of accident perspective.



## Disablement (gradually emerging injuries)

Disablements under the law are injuries that emerge gradually, and usually related to the physical demands of a workers job. These claims can be controversial because most workers, and employers, have not made the link between certain job demands and an injury. WSIB frequently rules an electricians job isn't repetitive, involves different tasks, and my favourite, workers can take rest breaks as needed.

Controversy arises because employers will tell a worker "you didn't have a work injury, because there was no accident." However, that is a very narrow definition of accident, because the law specifically talks about Disablements, which are gradual onset injuries. In Disablement situations there may not have been a specific accident, but there is certainly a work injury. It is important that members not fall into this trap and permit the employer to engage in curbside adjudication – by telling the worker they don't have a *bona fide* work injury and to apply for union disability benefits. Remember, the WSIB adjudicates claims, not employers.

## Case Law, Disablement vs. Chance Event

In denying the members torn forearm tendon as a Disablement injury, the Tribunal reviewed the case law on injuries which emerge gradually over time or an unexpected result of working duties. The Panel referred to *Decision No. 1672/04* that analyzed the distinction between a Disablement involving an unexpected result of work duties and a Chance Event injury:

Further, in my view, the words "an unexpected result of working duties" must be understood to refer to an unexpected result that is not the result of a "chance event" within the terms of the second branch of the definition. Generally, statutory definitions are seen as having discrete meanings. Therefore I understand the definition of accident in the Act to intend that the three branches of the definition are discrete. However, when a worker falls off a ladder, or slips and falls, that event is also an unexpected result of working duties. Therefore I read these words in Board policy to refer to an unexpected result of working duties that is not, otherwise, a chance event. Otherwise, the provisions would be overlapping.

However, it is necessary to give some meaning to the second bullet found in the Board policy definition of a disablement. One possible interpretation is that the second bullet refers to injuries which occur over a short period of work duties, such as a shift, but in the absence of a discrete triggering event. The injuring process on those facts, in my view, is not sufficiently discrete to constitute a chance "event". The injury is not a sudden onset injury. The facts are appropriately adjudicated as a disablement. In any event, the words also have meaning as a descriptor of the type of facts that generally form the basis for a condition that emerges gradually over time, irrespective of whether the time period involved in the injuring process is long or short. The words describe the circumstances under which an injury that arises over time is likely to occur.

When the Tribunal ruled the member did not suffer a Disablement injury, the torn arm tendon was a *de facto* Chance Event injury, and a WESIB claim should have been registered within 6-months from the date of injury. The member's failure to report an injury to his employer, seek immediate health care and file a WSIB claim resulted in a classic proof of accident dispute. The claim was also untimely.

In *Decision 1323/21*, the Tribunal allowed the members appeal, however, the WSIB did not deny the claim because it was untimely, instead, they concluded there was no proof of accident. The Vice-Chair ruled:

In analyzing the issues in this appeal, I have considered the written record, the testimony of the worker and a co-worker, and the submissions of the worker. In this appeal, there is no dispute that the worker had experienced pain in his left elbow; however, the issue before me whether the worker's job duties of September 7, 2016 were a significant and contributing factor to the onset of the worker's left elbow condition. Based on the testimony of the worker and the co-worker, the submissions of the worker representative and the written record, I find that the worker is entitled to benefits for his left elbow condition on account of the worker's work duties on September 7, 2016. I find that the worker's job duties of September 7, 2016 were likely a significant contributing factor in the onset of left elbow pain that the worker experienced on September 7, 2016 for which he subsequently sought medical attention.

I find it frustrating telling members they don't have a valid work injury in spite of plaintive wails that "I was hurt at work." The fact is if you didn't report an injury and file a WSIB claim then these are non-compensable injuries. A frequent excuse for not submitting a WSIB claim is you have a target on your back and will be on the next round of layoffs. That sentiment is a widely held view of members, but unfortunately, it is not an extenuating circumstance to allow the late filing of WSIB claims. How would your auto or home insurer react if you submitted a car accident claim 2-years later but didn't report it to police or collision report center. Or if your house suffered damage in a wind storm in 2019, and you just got around to notifying the insurance company.

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