



Knee Replacement Surgery after Injured Workers Suffer a Knee Injury & Granted Permanent Impairment Award from WCB/WSIB (NEL or PD Awards)

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



In a recent article, I noted we have over two thousand members who have received Non-Economic Loss or Permanent Disability awards from the WCB/WSIB for various injuries to their shoulder, back, knees, etc.

If you have suffered a work related knee injury in the past and were awarded a Non-Economic Loss award, which is a permanent impairment award recognizing that you suffered a physical and/or functional loss; the following information may be useful.

The legal authority in granting a knee permanent impairment is found in section 2 and 47 of the *Workplace Safety and Insurance Act*, which also mandates that the WSIB use the AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition (American Medical Association) when rating impairments.

Knee impairments are rated by reference to Tables 37 (Abnormal Motion) and 40 (Impairment Ratings of the Lower Extremity for Other Disorders of the Knee). Table 40 describes various disorders, in which a torn meniscus, meniscectomy or partial meniscectomy, would attract a mandatory P.I. rating pursuant to the AMA Guides.

Many sports and work related knee injuries may require a routine arthroscopy to repair a torn meniscus (cartilage), including debridement. Often time's members consolidate a decent post-operative recovery and return to work.

However, many years later a member may gradually develop symptoms with the injured knee. These symptoms are typically stiffness and swelling related to post-traumatic arthritic changes because once a meniscus is damaged, there is a biomechanical alteration of the knee joint, which typically hastens the development of post-traumatic osteoarthritis to the point that a partial or total knee replacement may be necessary. Late stage post-traumatic arthritis may take 10-30 years to develop. Moreover, there is an important clinical distinction between osteoarthritis and post-traumatic arthritis, although the pathology looks the same on an imaging scan, the causation triggers are distinct.

It's important for members to realize that a NEL or PD award is a passport back into the WSIB system, particularly when there is a clinical deterioration of the work related injury. When WSIB reopens a knee claim and discovers knee replacement surgery (arthroplasty) is being recommended, they will typically deny that the surgery is related to the original injury, arguing the knee pathology is age, and not injury related.

However, there are important legal principles that the WSIB fails to consistently apply, but plays lip service, such as the "significant contributing factor" test. The Supreme Court of Canada reviewed the principles of causation in *Athey v. Leonati*, [1996] 3 S.C.R. 458. Major J., speaking for a unanimous Court, provided an overview of the general causation principles:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a fire ignited in a wastepaper basket is ... caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

In my experience, WSIB decision makers routinely ignore the significant contributing factor test when adjudicating entitlement, whereas the Tribunal's decisions have recognized the common law principles of causation and adapted them to the workers' compensation/workplace insurance context.

To deny additional WSIB benefits on the grounds that future deterioration of the worker's compensable impairment was the result of the normal aging process would be to apply, in an entirely illegitimate manner, the principle of predominate cause. As a consequence, members must be on guard when WSIB decision makers apportion benefits between the age factor and the accident factor. Blaming your ongoing problems on getting old is a common WSIB tactic that must be challenged.

There is another group of members I have discovered over the years who coasted through the WCB/WSIB system and should have been awarded a permanent impairment award, but were not, particularly knee injuries where they underwent a partial or total meniscectomy.

In the absence of a NEL or PD award, the member should still seek a retroactive permanent impairment award on the basis that there was an administrative oversight by the WCB/WSIB. I have caught many of



these errors which occur because the member was flying blind without seeking legal assistance and assumed, incorrectly, everything was okay.

There is another scenario that sometimes arises when a member suffers a work related knee injury in which the knee was previously asymptomatic. After an imaging study (X-ray or MRI scan) and assessment by an Orthopaedic Surgeon, the specialist advises the patient has late stage osteoarthritis and needs a partial or total knee replacement.

When the WSIB receives medical reports after a minor twisting injury that the worker requires a knee replacement, they will shut-down the claim ruling the knee replacement surgery did not arise out of and in

the course of employment because the arthritis is not related to the compensable injury.

It is now well settled in Tribunal case law and in Board policy that a pre-existing condition, in and of itself, is not a bar to the receipt of benefits. Where a compensable accident aggravates a pre-existing condition, a worker is entitled to receive benefits until the condition returns to its pre-aggravation/pre-accident state, including knee replacement surgery.

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Black & McDonald's crew at the Enfield Project

By: Salvatore Maltese, *Business Representative*

Black & McDonald's crew working at the Enfield Project with the 500/230kV expansion to the Clarington Switchyard. 3,000MW of Power being brought into the eastern part of the Greater Toronto Area.



Back row Left to Right: Darin Brown, Matt Zwetsloot.

Front row Left to Right: Pete Scaffidi, Dennis Tremblay, John Murphy, Trent Legault, Junior Williams, Tom Murphy, John Scollard, Jason Taylor, Troy Thompson, Bryon Leahy, Phil Jordan, Larry Mason, Scott Milsom, Roland Paquette, Christian Gagnon.

Fraternally Yours,

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Social Committee Update

Please note that the tickets for our Annual Kids Winter Party at NEB's Funworld has sold out.