



Understanding Permanent Impairment Non-Economic Loss Award's and The Union's Fight to Overturn Reduced NEL Awards Because of Pre-existing Conditions



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Under the law, workers who suffer injuries that result in a physical and/or functional loss are entitled to a permanent impairment (P.I.) or Non-Economic Loss award (NEL). The list of anatomical injuries is lengthy, however, let's focus on two common injury pathologies.

There is a mandatory requirement under section 189 of Ontario Regulation 175/98 for the WSIB to use the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition (AMA Guides) in determining whether a worker has an assessable permanent impairment. This is also reflected in WSIB Policy 18-05-03, in which AMA Guides are the prescribed rating schedule in determining a permanent impairment for different body parts or systems.

Mandatory NEL Award for Meniscal Tear (knee)

Workers often suffer knee injuries, tear a meniscus, and undergo surgery (meniscectomy). They often consolidate a good recovery and resume work and sports activities. However, a torn meniscus, including a meniscectomy, should result in an automatic permanent impairment award (Non-Economic Loss award) under the AMA Guides.

Under the law there are two criteria that are factored into a NEL award. The first criteria is the physical loss (pathology) associated with a knee injury. The second criteria is an assessment to determine a functional loss by documenting range of motion measurements (ROM). Simply put, there is a mandatory P.I. for compensable knee meniscectomy as defined (and legislated for WSIB purposes) by the AMA Guides to Permanent Impairment, see Tables 37 & 40.

Mandatory NEL Award for Compensable Disc Herniation

With respect to the lumbar spine (low back injuries), there is a mandatory requirement to recognize a Permanent Impairment for structural abnormalities of the spine, such as compensable disc herniation's, including disc bulges and annular tears, as defined (and legislated for WSIB purposes) by AMA Guides. The P.I. assessment also considers whether there is a neurological component to the low back injury, including radiculopathy, often referred to as sciatica, when there is nerve root impingement.

Table 53 of the AMA Guides provides for an impairment rating for degenerative changes and disc herniation. Impairment in Category IIC is described as "unoperated with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with *moderate to severe*

degenerative changes on structural tests; includes unoperated hemiated nucleus pulposus with or without radiculopathy" (emphasis added)

The Law and Policy

Injuries sustained on or after January 1, 1998 are governed by the *Workplace Safety and Insurance Act* (WSIA). Entitlement to a NEL award is provided for in Sections 46 and 47 of the WSIA. Section 47 deals with NEL determination and states as follows:

47(1) If a worker suffers permanent impairment as a result of the injury, the Board shall determine the degree of his or her permanent impairment expressed as a percentage of total permanent impairment.

(2) The determination must be made in accordance with the prescribed rating schedule (or, if the schedule does not provide for the impairment, the prescribed criteria)...

The WSIA defines "impairment" and "permanent impairment" as follows in section 2 of the Act:

"impairment" means a physical or functional abnormality or loss (including disfigurement) which results from an injury and any psychological damage arising from the abnormality or loss;

"permanent impairment" means impairment that continues to exist after the worker reaches maximum medical recovery.

The rating schedule that must be used is prescribed in section 18 of *Ontario Regulation 175/98* that states:

18(1) The American Medical Association Guides to the Evaluation of Permanent Impairment (third edition revised) as it read on January 14, 1991 is prescribed as the rating schedule for the purposes of subsection 47(2) of the Act.

(2) The criteria prescribed for the purposes of subsection 47(2), for impairments not provided for in the rating schedule, are the criteria in the listings in the rating schedule for those body parts, systems or functions which are most analogous to the conditions of the worker.

Use of the third edition of the AMA Guides is also called for in WSIB policy. *Operational Policy Manual* Document No. 18-05-03 (18-Jul-2008) states as follows:



Rating schedule. The prescribed rating schedule is the American Medical Association's Guides to the Evaluation of Permanent Impairment, 3rd edition (revised), (the AMA Guides). If a type of impairment is not listed in the AMA Guides, the WSIB considers the listings for the body parts, systems, or functions which are most similar to the worker's condition. [emphasis added]

Board policy Document 18-05-03 (Assessing Permanent Impairment) echo's the statutory provisions.

WSIB Cannot Stop Workers From Returning to Work

In my experience, there is considerable confusion regarding Permanent Impairment (NEL awards). Some believe it is a career death sentence and they are no longer allowed to work in the trade. Let's clear the air, the WSIB cannot prevent an injured worker from returning to pre-injury duties. If that was true, over 3,500 members would not be working right now.

Conversely, many members have suffered permanent impairments after a work injury that has impacted their ability to continue working in the electrical trade. In some instances these members have difficulty remaining employed through the hiring hall. The electrical trade can be inhospitable to workers who cannot perform overhead work, bend, kneel, lift, twist, carry materials, climb ladders, or in awkward postures. Even steadies are not immune from this reality.

Years ago Kal Jakonen told me you don't knee each corner out to have difficulty performing the pre-injury job, meaning a left and right shoulder injury, plus both knees. He was right, because you can have considerable difficulty with just one corner injured (shoulder, elbow, wrist or knee injury).

Too often I receive decisions where WSIB rules a member fully recovered from a knee injury, even though they had surgery (menisectomy), which prompts an appeal. Last year a member contacted me advising he required knee replacement surgery. Turns out he had a knee injury, including surgery, twenty years earlier (2000). He recovered from surgery and returned to work and sports activities. Years later (2020) he was diagnosed with post-traumatic arthritis which is directly related to the earlier work injury, but sadly, no P.I. NEL award was granted. He and many others did not realize how this might impact the years later.

In 2013 the WSIB created more problems when they introduced policies mandating that all P.I. decisions (NEL awards), factor out any pre-existing degenerative pathology. Under the law, the Workplace Safety and Insurance Appeals Tribunal is mandated to apply WSIB policy, but there is now a split among Tribunal Vice-Chairs whether the Board's policies delimiting pre-existing conditions is consistent with the AMA Guides. This is an important issue, and I have argued several appeals hoping to add to the body of case law overturning the Board's policies.

Local 353 Challenging WSIB Pre-existing Condition Policy

Local 353s position aligns with the analysis in *Decision No. 2701/16* and *Decision No. 3382/18* which carefully considered WSIB Policy 18-05-03, including the legislative scheme which mandates the use of the AMA Guides. After a robust analysis, the Vice-chairs concluded the AMA Guides are introduced by several chapters setting out the theoretical underpinning of its system of rating. The rationale of the system is founded on the evaluation of "impairment", not disability or medical condition, as explained in the introductory chapter entitled Concepts of Impairment Evaluation. The Vice-Chairs conclude for similar reasons that an asymptomatic pre-existing condition should not be deducted or factored out when determining a NEL rating.

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