# Under the Law, Secondary Consequence Injuries – Are Injuries That Arise Due to Physically Compensating for A Work Related Injury. You Injure Your Right Arm/Shoulder and Rely on Your Left Arm Which Becomes Symptomatic

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

This month I want to discuss a frequent situation that workers experience after suffering a work related injury to their knee, shoulder, lumbar spine, etc. For instance, an electrician develops golfer or tennis elbow (lateral or medial epicondylitis) and in order to continuing working, whether regular or modified duties, they are more reliant on the opposite limb, which I refer to as "contra-limb" that becomes symptomatic.

Under the law, and policy, there is a legal path forward because in *Decision 496/17*, a case that involves a Local 721 Ironworker, who played one season with the Toronto Maple Leafs in the early 1980s, the Tribunal referred to Operational Policy Manual (OPM) document 15-05-01, which addresses injuries "Resulting from Work-Related-Disability." OPM 15-05-01 states:

> Workers sustaining secondary conditions that are causally linked to the work-related injury will derive benefits to compensate for the further aggravation of the work-related impairment or for new injuries.
>
> **Injury resulting from work-related injury**
>
> Entitlement for any secondary condition is accepted when it is established that a causal link exists between it and the work-related injury. The development of a left knee disability/impairment due to an increased dependency following a work-related injury to the right knee is an example.

## No Presumptive Legislation for Musculoskeletal Injuries

In my experience, members often assume that all their aches, pains and injuries are a natural consequence of working in the trade. Intuitively, that makes sense, but there are legal and medical hurdles regarding causation before WSIB will accept that electricians' musculoskeletal injuries arose out of and in the course of employment.

Establishing entitlement for gradual onset injuries is complicated and requires considerable effort to persuade decisions makers that the theory of causation is a result and consequence of an electricians physically demanding trade.

It is worth bearing in mind that there is no presumptive legislation that recognizes the physical injuries construction workers experience are causally related and attributable to the endemic physical demands of their trade, and presumed to have arisen out of and in the course of employment.

Presumptive legislation does exist for asbestos related lung disease and a few other occupational diseases. For instance, the *Workplace Safety and Insurance Act* was amended to recognize a list of cancers that Fire Fighters develop which are presumptively assumed to be work related. Presumptive legislation for Post-Traumatic Stress Disability (PTSD) was also enacted for emergency responders, such as Police, Fire and EMS, and presumed to be work related, unless proven otherwise. It is worth noting that these statutory amendments were introduced by the previous Liberal Government. So much for *"burn the Witch (Wynne), I want buck a beer."*

Bear in mind there is no presumptive legislation that automatically recognizes an electricians musculoskeletal injuries arose out of and in the course of employment, but there is a legal path forward when workers develop contra-limb injuries when they over-compensate for a work related injury on the opposite side. Typically this involves workers who overuse or are more dependent on their opposite limb e.g., hand, wrist, elbow, shoulder, knee, to compensate for a work related injury on the opposite side. This also includes an alteration to your body mechanics in terms of how you move at work or activities of daily living.

Another important consideration is contra-limb and secondary consequence injuries must be supported by the medical evidence, and in particular, the opinion of a health professional(s) who supports the theory that there is a causal relationship between an original work injury and the emergence of symptoms on the opposite side.

The Tribunal Medical Discussion paper *Symptoms in the Opposite or Uninjured Leg*, notes that the one of the principal preconditions for an injured leg leading to problems in the opposite leg are an ongoing antalgic gait for an extended period of time, probably more than one year.

Tribunal Case Law has generally held that the test to be met is whether the compensable injury was a significant contributing factor in the development of the secondary condition.

Vice Chair McCutcheon, in Tribunal *Decision No. 2062/01R*, set out the accepted Tribunal Case Law on the issue of significant contributing factor. She set out the following:

> The Tribunal has an extensive line of decisions addressing the appropriate standard for causation. The test that developed has been referred to as the "significant contribution" test.

> Although the test for causation is well established, the application of the test may often be less than straightforward, depending on the facts of the individual case. The potential complexity of the issue is demonstrated by the volume of legal discussion this topic has generated in Tribunal decisions, as well as decisions of the courts at various levels. The Supreme Court of Canada found it necessary to review and clarify the principles of causation, including the "thin-skull" principle, in *Athey v. Leonati*, [1996] 3 S.C.R. 458. As Mr. Dillon noted, Tribunal decisions have applied the principles set out in *Athey* and adapted them to the workplace safety and insurance context. See, for example, *Decision Nos. 1386/03* (November 30, 2004), *1645/99R3* (June 8, 2004), *1963/99R* (October 31, 2000).

Vice Chair McCutcheon went on to state:

> In order to establish entitlement, it is not necessary to show that the workplace injury was the sole contributing factor, or even the predominant contributor. The workplace injury need only be a cause of the disability, providing that it makes more than a *de minimis* contribution. Even though the Tribunal uses the language of a "significant" contribution, Tribunal decisions illustrate that the test embodies the "material" contribution test developed in tort law. See for example, *Decision Nos. 832/91* (October 7, 1992), *Decision Nos. 228/02R* (January 20, 2004) and *1645/99R* (October 31, 2000). The use of the word "significant" is not intended to connote a higher standard for establishing causation in workplace injury cases.

Before signing off, I want to share my frustration that some members are failing to report work injuries, for whatever reason, and when they are laid-off for shortage of work, they tell me they were injured at work and want to file workers compensation (WSIB) claims. Would you submit a claim to your auto insurance company 6 months after you had an car accident, and perhaps failed to report that MVA to an auto collision center? In addition, section 22 of the *Workplace Safety and Insurance Act*, stipulates the worker must file a claim within 6 months. Leaving aside that there are different reporting clocks for single episode trauma versus gradual onset injuries, delay in reporting and registering WSIB claims inevitably leads to proof of accident disputes.

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