



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



**R**oger Daltry when asked about his tendency for knuckles in earlier days said, ***“I liked to fight, still do” - Words For Advocates to Live By***

In 1985 I was working for the Ontario Public School Trustees Association where one of my jobs was to read and write case summaries of decisions released by the new Workplace Safety and Insurance Appeals Tribunal. The Tribunal was established as an independent specialized Tribunal to hear WCB appeals (now WSIB). It has been referred to as the Supreme Court of workers compensation.

At the time I remember getting a headache reading those early decisions, like the 75-page Tribunal decision of a sewing machine operator who developed a repetitive strain injury. These early cases established the legal DNA that would guide future Tribunal decision makers. Looking back 30 years ago, I never would have imagined that years later that I would be making law and representing electrical workers. So to all you brothers and sisters who took a 2-week show-me call and ended up staying 30-years, you understand that *fate* and *luck* are interwoven.

This early grounding in workers compensation law gave me insights into how the WSIB system works, or more correctly, should work. Unfortunately, often times, that's not what happens when claims are registered and adjudicated. Too often claims are rejected, while WSIB decision makers fail to acknowledge or follow the sound legal reasoning of Tribunal decisions regarding the interpretation of evidence, policy, and more importantly, the legislation.

**WSIB Not Bound by Legal Precedent, but Policy**

Most workers don't realize but the WSIB was granted an exemption in the

*Workplace Safety and Insurance Act*, and is not bound by legal precedent. Strictly speaking that means the WSIB can ignore Tribunal decisions, notwithstanding their precedential value, even though WSIB tells the stakeholder community that they strive for administrative consistency. One would think that "consistency" means following a correct interpretation of the law?

One gospel trumpeted at the WSIB is adherence to WSIB policy. The Operational Policy Manual (OPM) consists of 2 binders containing hundreds of policies intended to inform and guide WSIB decision making. In fact, Tribunal decision makers are also compelled to follow WSIB policy unless doing so would lead to an illogical or absurd result.

To our many members that had their claims denied, you'll appreciate the phrase ***“never let the facts get in the way of a good smear.”***

**Member Testimony & Co-worker Statements**

Lately I have argued cases where our members evidence (testimony) was crucial to a favourable outcome, in which the employer submitted co-worker statements repudiating a members alleged work injury, often times attributing the injury to outside activities, such as baseball, hockey or snowmobiling. Sometimes there were prior sports injuries, but the members had no residual disability.

In a recent Tribunal hearing (which we won), a member was an apprentice at the time of his compensable back injury working at the Brampton Co-Gen job site. It took 6-years before we finally resolved his dispute whether he sustained a permanent impairment of his low-back. The Brother who I personally like was a poor witness and historian. I even meet with him twice prior to

the hearing to prepare him for the questions I would ask him in my examination-in-chief.

**Weak Witnesses, Poor Facts, Negative Outcome**

Generally speaking, witnesses are not allowed to refer to notes when they are testifying, unless to refresh their memory on a certain detail or fact. It is expected that workers will testify to the best of their recollection of events and details. It is my general expectation that no one knows the facts and circumstances of a case better than an injured worker. If you don't know what went down in your own life, and at work, how are you going to convince an Appeals Resolution Officer or Tribunal Vice-Chair?

Recognizing that some people are just poor witnesses - sketchy testimony where credibility is crucial, particularly in relation to a controversial injury, can result in disaster. A poor witness is just as bad as lousy facts. And if both are present, the best representative cannot make a silk purse out of a sow's ear.

**Lineman's Credibility Attacked Based on Co-worker Statements**

December 13th was another battle royal at the Tribunal in which a lineman claimed to have injured his shoulder from climbing and working off hydro poles in October 2010. The employer alleged the worker hurt his shoulder playing baseball and submitted 3 statements from co-workers who confirmed this version of events. Interestingly, the member worked in a physically demanding job from September 25, 2010 until October 6, 2010 without evidence of a shoulder problem at work, which one would naturally expect would be evident if he was injured playing baseball.



Never one to accept bald statements for the truth they assert, I contacted these co-workers to probe a little deeper regarding their cryptic 1-2 sentence statements that were lacking in detail. Surprisingly, one witness said he never said the lineman injured his shoulder playing baseball, and the other stated "I know where this is headed" in apparent reference to the Hall investigating the claim. The other statements submitted by the employer were double hearsay, and didn't merit any further attention. None of these witnesses were called to testify at the Tribunal, which are de novo hearings (fresh). The employer in a cheeky reply said that it was up to Mr. Majesky to call "his brothers," even though these were employer recruited witnesses.

### Legal Standard When Assessing Credibility of Witnesses

While we are still awaiting a Tribunal decision in the lineman case, I think it worth reviewing how the Tribunal assesses the credibility of interested witness. In Tribunal *Decision 3480/00* the panel stated in part:

The assessment of the credibility of interested witnesses has been discussed as follows in the following decision of the British Columbia Court of Appeal, *Faryna v. Chorney* (1951), 4 W.W.R. (N.S.) 171, (which was quoted with approval by the Ontario Court of Appeal in *Phillips v. Ford Motor Co.*, [1971] 2 O.R. 637):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to any examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person

would readily recognize as reasonable in that place and in those circumstances.

Another case the union cites is found in Tribunal *Decision No. 1023/01* which deals with the assessment of credibility:

Unsupported testimony from a party to an appeal can decide a case only where, after careful deliberation and consideration of such testimony in context with other evidence, the Panel is satisfied that it is probable the testimony is true. Keeping in mind the personal financial interest of any party of any appeal, the Panel must determine

the credibility of an interested witness, as this worker is, and conclude whether his testimony is consistent with the surrounding probabilities.

As we start a new year, it is my resolution to acquire new knowledge and skills and become an even better advocate on behalf of the membership. From your end, please report your injuries promptly and remember, an ***Injury to One, Is an Injury to All.***

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## Health & Safety Slogan Contest

The Health & Safety Committee are a pro-active group of members that bring important information to our monthly Health & Safety & Union meetings.

Since the inception of the Health and Safety or the Occupational Health & Safety Act in 1978 our committee debates all issues relating to workplace health and safety issues.

We are looking for eye catching stickers for our tool boxes and hard hats.

Our members are creative and we look forward to seeing your submissions.

Please submit your slogan before May 31, 2014 to The Health & Safety Committee, 1377 Lawrence Ave.

East, Toronto, ON M3A 3P8 or on-line at [www.ibew353.org](http://www.ibew353.org) and click on Health & Safety Slogan Contest.

There will be prizes awarded for the best slogan!

