

A Workers Compensation Manual For Trade Unionists



**Compendium of WSIB Articles by Gary Majesky
IBEW 353 Executive Board Member, 2011-2026
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COMPENDIUM OF WORKERS COMPENSATION ARTICLES FOR MEMBERS & UNION REPRESENTATIVES

Author, **Gary Majesky**

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341 Years on the Tools

A Study on Barriers Injured Veteran Electricians Face When Retrained by WSIB for New Careers as Electrical Estimator or Inspector

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



In August 2014 the membership and union leadership were alerted to an emerging problem that injured workers are having with WSIB. Many Injured electricians are being pigeon holed into new careers as *Electrical Estimator* or *Electrical Inspector* because WSIB believes this is a quick easy transition, often times with little retraining except for a code book refresher course for Inspectors. The nub of the problem rests with Work Transition Specialists who do not understand the real world our members inhabit, and instead are heavily influenced by NOC codes (National Occupational Classification) that WSIB uses to determine Suitable Occupations. NOC codes are a Dictionary of Occupational Titles and at best a thumb nail sketch of various jobs. The NOC codes are devoid of any intelligible information regarding real-world skill sets, training and experience that are required, but they do list a Certificate of Qualification (C of Q) in a licensed trade as a gate-way skill.

Local 353 commissioned a study to investigate the WSIB return to work program, and found the current system appears to fail when it comes to offering viable career alternatives for injured veteran electricians. The study, authored by Gavan Howe, looks at occupational injustice through the lens of occupational identity in the distinct social community of electricians, and the difficulties experienced by trades people making career changes.

Due to unique personal, social, and organizational factors involved, veteran electricians who suffer debilitating occupational injuries or illness face significant barriers to getting hired into alternative occupations, specifically two occupations WSIB suggests they qualify for: *Electrical Estimator* and *Inspector*. This study investigated how is it that expert, veteran electricians who can longer be an electrician due to illness or injury remain unemployed or underemployed, sometimes for as much as seven years post-injury?

The study was aimed at finding out about the transition an injured electrician goes through when moving from work with their hands to work with their minds. This involved a review of 19 electrical workers who have been injured and are attempting or have succeeded in making the transition to an inspector or electrical estimator.

On Transition to Electrical Estimator Role

All study participants, save two, noted the extreme difficulty they faced in finding gainful employment as an estimator. It takes six things: attitude, skills, experience, flexibility, constant retraining, early experience with computers and office work. If any were

offered a junior estimating position, the pay was noted as being \$15 an hour, not \$40 per hour they were paid as electricians.

The majority of junior electrical estimator positions posted on various web sites ask for at least three years of experience in addition to other skills in order to be considered as a junior estimator. One of the key barriers for veteran electricians becoming employed as a junior estimator is the standard requirement for three years of experience as an electrical estimator. For a 50-year-old electrician who has never worked in the office, how likely is it they will be hired in order to secure the required three years of prior estimating experience?

NOC 2234 [Estimator] makes no mention of the fact that this is a time sensitive role or the significant and proven computer skills required. Estimated bids must be comprehensive, accurate, detailed, and delivered on time. An bid error can have a serious financial impact on a company, which is why young men and women hired today as junior estimators have advanced computer skills, enjoy office work, and can work well with deadlines. Veteran electricians face questions related to age, health, and computer skills and proficiency, as well as the required three years' experience and on-the-job training required to be considered for a junior estimator role.

On Transition to an Inspector Role

Contrary to the WSIBs perception that the single most important skill to becoming an inspector is a C of Q, the reality is quite different. For veteran electricians who have never been stewards, health & safety representatives, or dealt with Ministry of Labour stop work orders and enforcement issues, there are varied requirements in order to perform the tactical and strategic work of inspector. Skills and experience the typical electrician would not possess.

Critically important, but missing in the WSIB transferrable skill analysis, is the need for inspectors to be well versed and current on a wide range of legal, law enforcement, regulations, and guidelines that play a significant role in an inspectors daily workload, so too when considering new recruits. The need for strong communication skills, and a wide range of knowledge of many different types of electrical construction, installation, and repair are also required, as are strong interpersonal and management skills.

Veteran electricians who have transitioned to inspector are highly skilled, experienced, and have managerial experience to be able to deal in a dynamically complex world inspecting job sites, issuing work orders, and stop work orders, while dealing with difficult situations.



In reality, many veteran electricians lack the most important skills and experience to become an inspector, considering the WSIB discounts or fails to consider, because they do not understand the electrical industry, our members, and believe the inspector job is a seamless transition for veteran injured electricians.

A glaring problem is NOC 2264 [Inspector] because it makes no mention of the 309A or 309D license required for this role, nor do WSIB Work Transition Specialists understand the distinction between different licenses, different trade sectors or work experience that members have. The WSIB considers all electricians to be the same. Nor does the inspector NOC mention the wide range of transferrable skills required, such as electrical contracting experience and knowledge of all types of electrical installations. Further, there is no mention of computer, communications, management, interviewing, report writing, relationship building, negotiations, dispute resolution, training, occupational and safety, or risk education and awareness, along with soft and hard skills to be an inspector.

For a veteran injured electrician to become an inspector, is like winning a lottery.

341 Years on the Tools will be used to support member appeals who have been denied adequate retraining and suffered loss of earnings benefits. On the political front, our study will inform the WSIB and Members of Ontario Legislature of the glaring problems with the WSIBs retraining of veteran injured electricians.

Finally, as the 353 workers compensation representative, I have a responsibility and duty to champion this issue. As an Executive Board member, I believe we need an industry solution, and that means the IBEW and the Electrical Contractors should investigate ways and means to return veteran injured electricians back into the field, in some capacity, instead of throwing valuable workers on the scrap heap.

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Victoria Day

The Statutory Holiday will be observed on Monday, May 18, 2015. If your employer asks you to work on this day, you must be paid double time for working on this holiday!

Pension & Benefits Information Seminars by

IBEW 353 South Union Hall, 1377 Lawrence Ave East, Toronto, 9:00 am to 11:30 am

SATURDAY, MAY 23, 2015

RETIREE INFORMATION SEMINAR: designed for retired members or their survivors, to learn about their benefit coverage with IBEW Local 353.

OCTOBER 17, 2015

RETIREE INFORMATION SEMINAR: designed for retired members or their survivors, to learn about their benefit coverage with IBEW Local 353.

NOVEMBER 7, 2015

BENEFIT INFORMATION SEMINAR: designed for active members to learn about their benefit coverage under the IBEW Local 353 Group Benefit Plan.

NOVEMBER 21, 2015

PRE-RETIREMENT SEMINAR: designed for active members who are looking to retire within the next six months and require information on pension options, benefit coverage changes and life insurance entitlements.

*Please register by calling TEIBAS at 416-637-6789
or by email: members@teibas.com.*

Spouses are welcome to attend. Seating is limited.



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General Rule – Workers Not In Course of Employment When Travelling to/from Work, However, There are Exceptions - When Being Paid, Driving Company Trucks & Performing Activities That Benefit the Employer



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

Over the past year I have received numerous inquiries from members, stewards and Business Reps. whether a member has a viable WSIB claim when injured while traveling to and from work?

Often times this involves a slip and fall outside of the workplace or a Motor Vehicle Accident (MVA). One member was on a public street 10 ft. from the jobsite entrance when he was struck by a car turning a corner. Another member was working at the CNE and crossing Strachan Ave. one morning and lost his footing after stepping on a street car track, fell, and broke his wrist. These cases involve the application of the **boundary rule** and these members were not in the course of employment because they had not entered the jobsite.

It is important to understand the circumstances necessary to attract WSIB coverage for a worker who is injured while traveling to and from work. There is less controversy when workers are driving to and from work in a company van when they are involved in a MVA, being paid travel time (not just mileage), or performing a task that is reasonably incidental and a benefit to the employer, regardless whether they are being paid.

Both WSIB policy and the case law confirms workers are generally not in the course of employment when traveling to and from work, however, there are exceptions.

Law & Policy

In this regard, *Operational Policy Manual* Document No. 15-03-05 entitled "In the Course of and Arising Out of – Traveling" provides in part;

Policy

As a general rule, a worker is considered to be in the course of the employment when the person reaches the employer's premises or place of work, such as a construction work site, and is not in the course of employment when the person leaves the premises or place of work.

Guidelines

Travel on employer's business - When the conditions of the employment require the worker to travel away from the employer's premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown. The mode of travel may be by public transportation or by employer or worker vehicle if the employment requires the use of such a vehicle. However, the employment must

obligate the worker to be traveling at the place and time the accident occurred.

Proceeding to and from work

The worker is considered to be "in the course of employment" when the conditions of the employment require a worker to drive a vehicle to and from work for the purpose of that employment, except when a distinct departure on a personal errand takes place en route.

"In the course of employment" also extends to the worker while going to and from work in a conveyance under the control and supervision of the employer.

As the policy suggests, the general rule is that a worker is not considered to be in the course of his or her employment while traveling to or from the workplace. The policy does provide however, that there are certain exceptions to this rule and indicates that a worker would be considered to be in the course of his or her employment "when the conditions of the employment require a worker to drive a vehicle to and from for the purpose of that employment, except when a distinct departure on a personal errand takes place en route". Another exception to the general rule involves situations where a worker is traveling to and from work "in a conveyance under the control and supervision of the employer".

The Tribunal has considered the issue of workers being injured in the course of traveling to and from the workplace on a number of occasions. *Decision No. 547/87* for example, sets out the general compensation rule for traveling to and from work, which is similar to that in OPM Document No. 15-03-05, and states:

The general compensation rule is this: A worker is not considered to be in the course of employment while traveling to or from the workplace. However, if traveling is part of the employment service provided by the worker to the employer, or if the travel is reasonably incidental to the service provided by the worker, then an injury sustained while traveling will be compensable. There must be something about the traveling that lends an occupational flavor or characteristic to the activity beyond the normal activity of commuting to and from work – for example, a situation where the conditions of the employment require a worker to use his own automobile or to travel away from the employer's place of business.

The logic behind the general rule for traveling is that a worker, while traveling to and from work, is essentially exposed to the same general



risks as any member of the driving public. While the worker would not be driving were it not for the employment, this somewhat tenuous link is not sufficiently significant, according to the general rule, to bring a worker within the course of employment (see for example *Decision No. 165/96*).

In *Decision No. 165/96* the Vice-Chair outlined the test for determining whether a worker is in the course of employment, concluding it is “essentially a work-relatedness test” that is flexible and considers a number of factors:

In the course of employment

As both representatives pointed out, the basic rule in compensation law is that a worker is not in the course of employment when travelling to or from a work site. However, there are exceptions to that general rule. Counsel for the Applicant pointed out two of the exceptions involving travel under the control or supervision of the employer and travel as a requirement of the employment, when the worker is obliged to be travelling at the place and time the accident occurred. The logic for the general rule appears to lie in the theory that a worker, while travelling to and from work, is essentially exposed to the same general risks as any member of the driving public. While the worker would not be driving were it not for the employment, this somewhat tenuous link is not sufficiently significant, according to this general rule, to bring a worker within the course of employment. In our view, the test employed for “course of employment” is essentially a work-relatedness test - a relatively flexible test which involves an examination of a number of factors. . .

Over the years, the question has arisen whether receipt of the downtown parking allowance, mileage, or for instance, when an employer provides a worker with a gas card, places the member in the course of employment? That answer is NO, because it falls short of the “arising out of and in the course of employment” test, and seen as more of a benefit, as opposed to a work-related activity.

Some recent examples highlight the myriad situations that arise. A member was working the midnight shift when a concern arose whether they were allegedly sleeping on top of a ladder, and sent home.

Driving home, the member was in a MVA, but not traveling their usual route. The member in this case was not in the course of employment, notwithstanding the member left work early under some dubious circumstances.

Another member who drove a company van, but was also responsible for driving several crew members to and from the jobsite each day, was at his residence one morning, when he climbed out of his company truck, planted his foot awkwardly, fell and broke his leg. He was going to get his lunch, and a drill from his garage that he was bringing to the jobsite. Yes, he stored some tools and materials at his home. WSIB denied the claim and an appeal is pending because the member was given a company truck which is a benefit to the employer. Looking closely at the work related test, the member was driving co-workers to and from the jobsite, which was sanctioned by the employer. And finally, at the moment the accident happened he was exiting the company vehicle (mobile workplace), and performing a task reasonably incidental to his job (obtaining a drill).

More recent examples involve members traveling to jobsites using their personal vehicles when they are involved in an MVA, regardless whether they are North and East members traveling to the South jurisdiction, or conversely, South members traveling to the North or East jurisdictions when they are involved in an MVA. They are essentially caught in the same net that workers are not generally considered to be the in course of employment when traveling to and from work.

It’s important to understand that workers are not in the course of employment the moment you open your eyes in the morning, even if you are mentally focused on how you’re going to plan and go about your work day. Please note that this article **does not** address other policies and case law regarding jobsites in multi-story buildings, or workers who must use public conveyances (malls) to get to their jobsite, or walking to/from the jobsite parking lot when they slip and fall.

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Pension Gifts

The following pensioners are invited to the South Unit Membership meeting at the Union Office, 1377 Lawrence Avenue East, Toronto on February 8, 2018 at 7:00 p.m. to receive their pension gifts:

Paolo Angelucci, Stacy Barnes, John Chubey, Kestutis Jasaitis, Gerald Kirkpatrick, Wilfred Morozs, Tom Phillips, Renato Rossl and Don Wilson.

Family Day

The Statutory Holiday will be observed on Monday February 19, 2018.

If your employer asks you to work on this day, you must be paid double time for working on this holiday!

Discomfort Survey Results

Purpose

IBEW contacted the Occupational Health Clinics for Ontario Workers (OHCOW) to conduct a health and musculoskeletal discomfort/symptom survey of its membership. The objective was to provide a snapshot of various classifications experiencing pain and discomfort for action priorities. The focus of the survey included basic demographics and musculoskeletal discomfort in various body parts, assessment of level of discomfort, and frequency of discomfort.

Results and Analysis

The survey yielded a number of key findings. Results of the discomfort survey for male and female, full-time, part-time, and other workers reporting in various classifications are presented in this report. Most of the respondents with respect to classifications came from ICI (81.3%) followed by High Rise (9%). Respondents working for (more than 10 years) were the biggest reporting group (58.2%) followed by 3-6 years group (10.7%) and less than 6 months (10.4%) and so on.

MUSCULOSKELETAL HEALTH

- Have you, in the last 12 months, sought a health care professional's advice about pain in any of these parts of the body? *(response rate 100%)*

Neck	72 (22.9%)	Wrists/Hands	98 (31.1%)	Hips/Thighs	50 (15.9%)
Shoulders	99 (31.4%)	Lower Back	119 (37.8%)	Knees	111 (35.2%)
Elbows	51 (16.2%)	Upper Back	49 (15.6%)	Ankle(s)/Feet	66 (21.0%)

- Did you take any time off in the last 12 months because of problems that you believe to be work related, with any of these parts of the body? *(response rate 100%)*

Neck	18 (5.7%)	Wrists/Hands	29 (9.2%)	Hips/Thighs	11 (3.5%)
Shoulder(s)	30 (9.5%)	Lower Back	41 (13.0%)	Knees	39 (12.4%)
Elbow(s)	10 (3.2%)	Upper Back	13 (4.1%)	Ankle(s)/Feet	23 (7.3%)

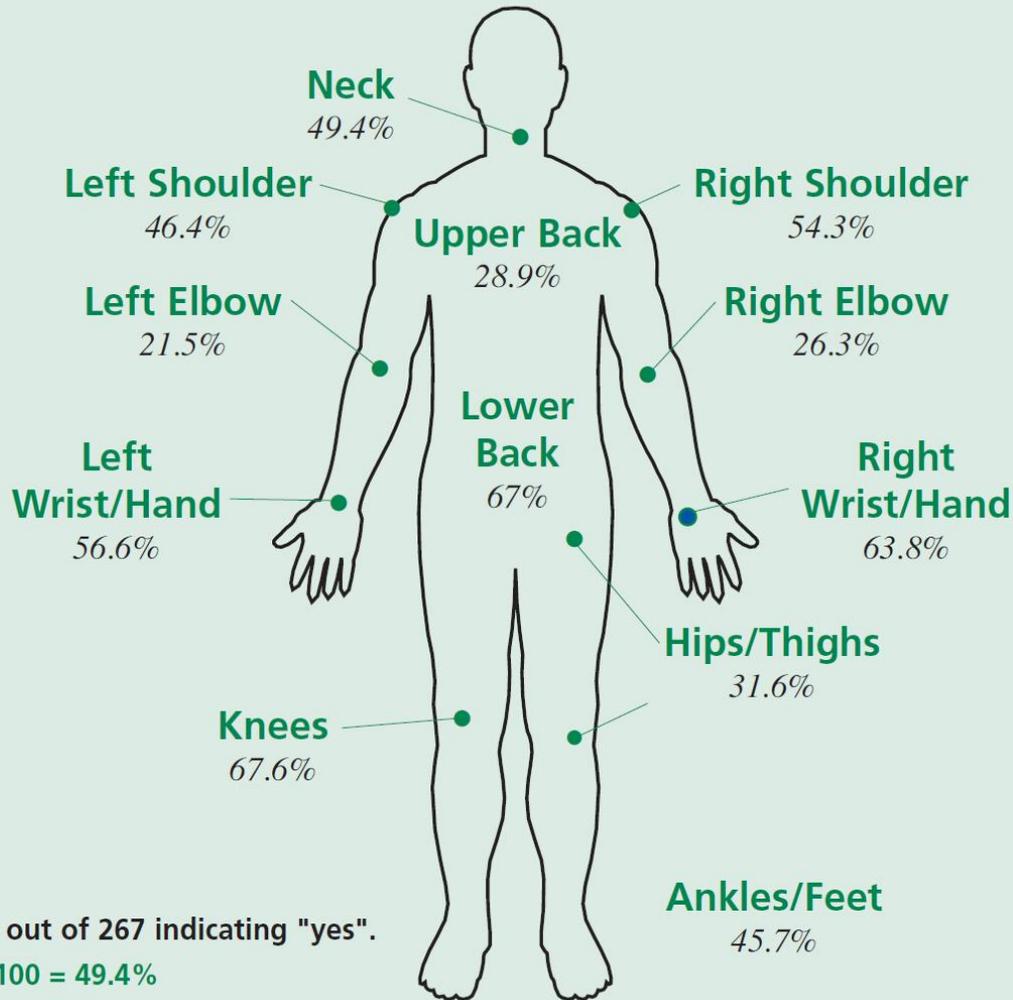
- If YES, did you report to the company? *(response rate 52.1%)*

Yes	79 (48.2%)	No	85 (51.8%)
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- Was it reported to the WSIB? *(response rate 52.4%)*

Yes	65 (39.4%)	No	100 (60.6%)
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Have you at any time during the last 12 months had trouble (such as ache, pain, discomfort, numbness) that you believe to be work related, with any of these areas of the body?



Example:
Neck – 132 out of 267 indicating "yes".
 $132/267 \times 100 = 49.4\%$



Special Thanks

To all our members, volunteers, and everyone who took part and made our April 23rd 2005 Occupational Health Clinic a great success!

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OHCOW, Toronto Office
Workplace Safety and Insurance Board



Tribunal Allows Achilles Tendonitis Appeal. Injury Caused by Excessive Walking, Climbing, Working off Ladders, Carrying Heavy Materials, Which Places Stress on Feet/Ankles

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



It seems that foot and ankle injuries that arise from repetitive squatting, climbing, working off ladders, and activities that cause tensile loading of the foot and Achilles tendon are frequently denied by WSIB. Typically because there are non-work related risk factors such as age, obesity, and seronegative inflammatory disorders and that the job demands pose no positional risk of injury.

In 2010, the union successfully argued a Tribunal appeal involving a members entitlement to Plantar Fasciitis (PF), which was allowed on the basis that the work risk factors were a likely and probable causal factor, such as excessive walking on hard surfaces, considerable climbing, ongoing lifting and carrying heavy items to be installed in awkward settings (see *Decision No. 544/10*). The member worked for a downtown university

Building on this earlier case law, another electrician employed at the same downtown university recently won a Tribunal appeal (see *Decision No. 1762/17*) granting entitlement for Achilles tendonitis (AT), which the WSIB denied because the condition was deemed age related, a pre-existing sports injury (hockey), nor were the job demands deemed to be a significant contributing factor in the development of AT.

The Board denied the claim because there were minimal risk factors to develop Achilles tendonitis in relation to the electricians' job demands, and most importantly, the condition is typically the result of sports injuries such as sprinting, playing tennis, where there is excessive loading on the feet and ankles.

Members who attend hearings nod approvingly when I refer to them as "industrial athletes." Most would agree with this characterization, because of the physical demands working in the trade often times involves heavy work, such as distribution, where working with 750 mcm is "like wrestling with a python."

The Board commissioned a medical report from Dr. Kanalec who opined that the worker had been employed by his employer since 2007 without any mention of a change in job duties. In addition he worked for several years without any symptoms, suggesting the worker was habituated to the job demands. There was also no information regarding the worker's body habitus, BMI or lower extremity biomechanics, pes planus versus pes cavus (flat footed or high arch). His job tasks likely vary from day to day including time required for ambulation, ladder work, squatting, stairs etc. Finally, there was no description of his shoes or whether they are fit properly.



The workers testified that on average he walks upwards to 12 km/day in order to get to the 200 different buildings scattered throughout the downtown university campus. He emphasized that his works boots are not designed for that kind of walking, even though he started using orthotics after his feet became sore. The workers testimony including the following with respect to his duties:

- The worker had worked for 23 years prior to working with the employer and did not have any issues with his feet, nor did he have any prior injury to his right foot.
- The workplace has a policy that prefers walking over driving. While there are four trucks available they are shared amongst all the 100 plus trades employees.
- There are over 200 buildings in the geographic area of the campus that vary in size, however the majority are over four stories high.
- While there are elevators in the buildings some are small in size which means that he had to climb stairs with materials for jobs, for instance when carrying a ladder over 6 feet or scaffolding.
- The worker received his work assignments from his Lead Hand in the morning at the office, walked to his work assignments, and walked back to the office at the end of his shift.
- The worker carried materials and tools for each job in pouches (one on each side) with an approximate weight of 30 to 50 lbs. for



his tool pouch. He generally carried approximately six electrical ballasts with him with an approximate weight of 20 to 30 lbs. On occasion he also carried a ladder under his arm, which required him to put both pouches on one side of his body.

- The worker walked, on average, over 12 kilometers a day in steel-toe boots (CSA green triangle patch that indicates sole puncture protection and a protective toecap) and did frequent stair climbing. The worker estimated his walking at 70% of his seven hour work day, which included stair climbing which he approximated was 5 to 10%.
- His work required frequent reaching and moving around to perform electrical work as obstacles were generally in the way. Also, he was frequently required to stand on a ladder or other furniture to perform his job. This meant he was "extending and overextending his feet." He approximated that he used a ladder approximately 10% of his work day. He further approximated that he worked on uneven surfaces approximately 3% of his work day.
- The worker does not sit down during his work, rather he is generally always moving or standing.
- The worker's duties required him to squat, kneel, and crouch approximately 5% of the time, particularly for low level work or in tight spots.
- His job duties haven't changed. He described the primary activity that placed stress on his feet as walking with the secondary being work on the ladder.
- The jobs were always different but the activities were always the same.
- At home the worker said he did not perform strenuous activities, describing his activity as watching TV and relaxing, as well as putting ice packs on his feet.

In granting the members appeal, the Tribunal Vice-Chair ruled:

I prefer the worker's testimony and Dr. Wong's opinion over that of Dr. Kanalec who only had the Physical Demands Description to review in considering the worker's job duties. I do not find the hockey represented a risk factor, noting the worker testified he has played shinny hockey with a group of friends for the past 15 plus years for 1 ½ hours every Saturday from October to April; he has only injured his right wrist while playing hockey, not his right foot. The worker testified that Dr. Wong has been his family physician for over 18 years, and [his GP] did not indicate there were any pre-existing problems.

Regarding Dr. Kanalec's opinion, I give it low weight as he did

not have a thorough understanding of the worker's physical job duties, he did not examine the worker in person, his opinion was not supported by the medical reporting, and he had "limited information" before him. All that was before Dr. Kanalec was the PDA. In that respect, I note the "Board's Adjudicative Advice Initial Entitlement (Disablement) document, which is not binding on the Tribunal but is intended for use by the Board's front line adjudicators.

The document states:

... significant detail around the work performed including the mechanics of how it was performed and the nature of the injury the worker has incurred must be secured. The primary source of the nature of this information should be the worker and the treating physician(s). Written job descriptions do not always effectively capture the sequence of tasks and extent of the activities.

I accept the worker's testimony on his duties and find that it is internally consistent and consistent with the contemporaneous reporting around the time of the accident. Further, his testimony regarding his job duties was consistent with his family physician's understanding of the job duties. In addition ... Dr. Kanalec suspected that there may be non-work exposures but did not examine the worker in person. In any event, I find that these suspected non-work factors are not confirmed in the medical reporting ...

Further, Dr. Kanalec suspected "age-related tendon changes." However, these suspected "age-related tendon changes" are not supported by any of the worker's medical documentation; further Dr. Wong did not note any pre-existing problems for the worker ...

Mr. Majesky also provided for my consideration *Decision No. 1428/09* in which the Vice-Chair reviewed medical literature and noted a general consensus that Achilles tendonitis is associated with "excessive physical activity and, in particular sporting activity, which results in excessive repetitive overload of the Achilles tendon." The Vice-Chair found the worker, who worked on a ship, was required to "be on the move throughout the ship and required frequent walking, ladder climbing and stair climbing." In coming to my decision, I note my finding that the worker in this appeal also performs substantial physical activity in the performance of his job duties.

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WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Important Information – Understanding WHY Registered Apprentices are Paid Journeyman Wage Rate When Injured and Paid WSIB Loss of Earnings Benefits

When registered apprentices are injured in the course of employment, they are treated differently in terms of how WSIB calculates their pre-injury wage to pay Loss of Earnings Benefits (LOE). An apprentices' loss of earnings is based on the Journeyman wage rate at the time of accident.

This provision does not apply to "pre-apprentices" or "OYAP" students, helpers, etc. Only registered apprentices with a Ministry Apprenticeship Contract.

When a worker is a registered apprentice as defined in Operational Policy 12-04-13, the usual rights of calculating the short-term rate and long-term rate (LRT) earnings basis average earnings do not apply.

Operational Policy 18-02-08 and Reg. 175/98 require that registered apprentices be paid the average earnings of a journeyman. Once established, earnings remain the same for the life of the claim with no recalculation. Therefore, any seasonal or intermittent employment patterns of the journeyman should be considered at the initial determination of earnings.

Historically, the Board has used the journeyman wage rate to determine the earnings paid to an injured apprentice. The methodology was straightforward, particularly in a unionized setting.

Rationale in Using Journeyman Earnings for Apprentices

The original principle how apprentice earnings are calculated, notwithstanding some grousing in the employer community, was predicated on the belief that using the apprentices' actual earnings may not fairly reflect their future loss of earnings. With great respect, that principle has not changed since its inception, nor in dispute.

Board of Directors, Minute, September 7, 1990

The historical background to how apprentice earnings are calculated is found in WCB Board Minute #7(a), (ii), September 7, 1990, pg. 5393, which states:

The amount of average earnings on which the benefits of apprentices and learners are calculated is not the figure that is determined under s. 43(1) to (5). Rather, it is the amount that the employer was paying a journeyman or full-time worker employed by the employer in the same trade as that in which the worker was working when injured.

If the employer has no such journeyman or full-time regular worker, the average earnings are determined from the average earnings of a journeyman or full-time worker employed in the employer's locality in the same trade.

WSIB Policy 12-04-13 – Apprentices

An apprentice is a person who is formally registered in a Ministry apprenticeship program under a signed contract of apprenticeship ("a registered training agreement") in accordance with the Building Opportunities in the Skilled Trades Act, and is receiving training and instruction in a trade, through or from an employer, that is required as part of the program.

Apprentice Earnings Excluded from Long-Term Recalculation

When a worker is a registered apprentice as defined in Operational Policy 12-04-13, the usual rights of calculating the short-term rate and long-term LOE term rate do not apply.

Union Litigated Non-Registered Apprentices

Over the years I have litigated several important cases regarding non-registered apprentices at the time of a work-related injury. The first case the union argued, and won, involved a Low-Rise member. There were great challenges when Local 353 transitioned this large unorganized sector into union membership and in compliance with their myriad obligations including registering apprentices with the Ministry. Decision No. 749/03, a leading case, noted the significant challenges Local 353 experienced in transitioning this newly organized sector, and one of many reasons low-rise electricians opted to join the IBEW. In Tribunal Decision 1970/05, the Panel did not recognize a member's apprentice status because he became a registered apprentice many months after the compensable work accident:

We are cognizant of the fact that in Decision No. 749/03 a different Panel of this Tribunal held that exceptional circumstances exempted the worker in that case from the requirement that he be registered under the TQAA in order to be considered an apprentice for the purposes of Operational Policy Document #01-02-08. In that case, the Panel ruled as follows:

It appears that the only reason why the worker was not registered under the TQAA was as a result of administrative delays. All of the relevant parties in this case considered the worker to be an apprentice at the time of his accident. Both the worker and the employer described the worker as an "apprentice electrician" on their respective reports of accident. The JAC also considered the worker as one of the apprentices falling under their jurisdiction as testified by Mr. McBride, the then Director of the JAC. Mr. McBride testified that the JAC endeavours to complete and forward to the Ministry the contracts of apprenticeship within 90 days. The worker's contract of apprenticeship was not signed and forwarded to the Ministry until May 2001. There are, however, good reasons for the lengthy delay between the worker's registration with the JAC in February 2000, and the ultimate date of registration under the TQAA. The worker was one of about 300 new apprentices that suddenly fell under the JAC's mandate following the organizational drive to unionise the low-rise sector. Mr. McBride had a staff of three, including himself, to process these apprentices in addition to their regular duties. As he testified, some of the formalities were not always adhered to in a timely manner due to staffing issues. In our view, the only reason why the worker was not registered under the TQAA was as a result of administrative and clerical delays, well explained by Mr. McBride. For all intents and purposes, the worker, the employer and the JAC considered him to be an apprentice at the time of his accident. He was even earning the third term apprentice rate and his hours worked as of November 1998, were counted as part of his apprenticeship. We therefore find that based on the merits and justice of this case, the worker was an apprentice at the time of his accident on December 4, 2000.

Given the exceptional circumstances that existed in this case, it is not necessary for us to comment on the reasonableness of the Board's policy definition of an apprentice or whether the worker's apprenticeship started at the time of hire with the accident employer or at the time that he registered with the JAC. We find that by the time of his accident on December 4, 2000, he was an apprentice.

[23] We would make the following comments with respect to the above-noted decision. First, the Panel's conclusion in Decision No. 794/03 rests on its finding that at the time of the accident, the worker in that case was registered as an apprentice with the JAC. In the instant appeal that is not the case. The worker in the case now under appeal did not register with the JAC until February 4, 2002, that is, almost one year after his accident. Second, and with respect to the Panel in Decision No. 794/03, we are of the view that strictly applying the definition of "apprentice" set out in the Board's Operational Policy, as this Tribunal is mandated by subsection 126(1) of the WSIA to do, does not lead to "an absurd or unfair result that the WSIB never intended." In our view, the intention of drafters of the Board's Operational Policy on apprentices intended that in order to take advantage of the enhanced income replacement benefits provided for under that policy, a worker must be properly and formally registered under the TQAA as an apprentice. Such registration not only allows the Board to make consistent and informed decisions as to who qualifies as an apprentice, but it enhances the purposes of the TQAA that the apprenticeship trade be formally regulated and properly monitored.

Writing this article reminded me of my exchange 25-years ago with Martin McBride, the past Director of the Joint Apprenticeship Council (JAC), when I advised him that he will be called as a witness to testify. He wanted to send his girl Friday, which I nixed. He said, I have to check with my principals (GTECA) whether he can appear as a witness. I reminded him that he is a compellable witness, and I will issue a summons for him to appear and testify. Martin McBride attended and testified as a subject matter expert on apprenticeship. As I anticipated, he was a stellar witness.

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JUNIOR NCS
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JOURNEYPERSON WIREPERSONS
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SENIOR NCS
 Cameron Legge, Harsimranjit Singh

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Arising Out of and in the Course of Employment An Injury is not an Accident

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



The law is very complicated, even in claims that involve straight forward accidents, in which the worker was engaged in some work related activity when an accident/injury happens. Leaving aside delayed reporting and proof of accident disputes, a slip, bang, awkward twist, or injuries where there is some form of single episode trauma are usually clear cut. And that includes gradual onset injuries (i.e., repetitive strain injuries) due to the physical demands of your job.

However, there are workers who suffer injuries at work but there is no mechanism of injury (i.e., accident). For example, a worker is walking along and his leg gives out. Or a worker who has a stroke at work. The fact an injury happened at work does not necessarily make the injury work related. This has been the subject of a rigorous analysis by the Tribunal in a number of cases under the heading - **An Injury Is Not an Accident.**

Was The Bomb Set at Work or Home?

Take for example a stroke, the fact the bomb (injury) blew up at work, does not mean the stroke is work related. Conversely, the fact the bomb (injury) blew up at home, does not necessarily break the chain of causation that the injury is work related, particularly if the bomb was set at work. A few years ago I argued an appeal where our member suffered a knee injury at work, which the WSIB denied, and subsequently his knee blew up while on vacation in Cuba. The Orthopaedic Surgeon concluded the knee injury in Cuba resulted from work injury while crawling on a roof, and installing pot lights under a soffit, even though the members' disability did not fully manifest until he was on vacation.

In an appeal currently before the Tribunal a member at the end of his shift was leaving work and lifted his leg to descend a flight of stairs, when he felt something snap in his knee and he fell down a few steps, holding onto a railing. At this point he was on his ass, in excruciating pain, and was helped to his vehicle. He was clearly in the course of employment when the incident happened (re time, place and activity test), however, the WSIB ruled the act of descending stairs, and feeling a pop before the fall was not a work related accident. This highlights the challenge in determining whether this was a work related accident, and the chicken and egg debate whether the knee pathology resulted when the worker heard a pop as a result of a routine activity (i.e., lifting his leg), or from the trauma of a spontaneous slip/fall down a few steps? What's not in dispute, the member needed help to get to his car, was driven home, then sought emergency health care.

The Law & Policy

Section 13(2) of the *Workplace Safety & Insurance Act* states that,

if an accident occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown. Likewise, if an accident arises out of a worker's employment, it is presumed to have occurred in the course of employment unless the contrary is shown. Board Operational Policy Document No. 15-02-01 provides a definition of accident, as does the WSIA. There are two branches of accident defined in the legislation and policy:

Chance event: An identifiable unintended event which causes an injury. An injury however, is not a chance event.

Disablement: Includes:

- A condition that emerges gradually over time
- An unexpected result of working duties.

Section 43 of the *WSIA* describes when a worker will be entitled to be paid benefits for loss of earnings ("LOE benefits). It states that a worker who has a loss of earnings "as a result of the [compensable] injury" is entitled to LOE benefits for the time period and in the amounts described in that section of the Act. Section 33 of the *WSIA* states that a worker who sustained a compensable injury is entitled to "such health care as may be necessary, appropriate and sufficient as a result of the injury."

Thus to decide whether a worker is entitled to LOE benefits and health care, it is necessary to decide whether the worker sustained a compensable injury (i.e., a personal injury by accident arising out of and in the course of employment). The wording of section 13 of the *WSIA* requires not only a finding that there was an "accident" that arose out of and in the course of employment, but also a finding that the worker sustained an "injury" as a result of that accident. It is a two-part test.

Routine Physical Activities - Walking or Descending Stairs not Accidents

In situations where a worker suffers an injury after merely leaning forward from a squatted position is routinely challenged because this activity is argued to be a normal everyday activity and not a "chance event" or identifiable unintended event. This was addressed in Tribunal *Decision No. 900/06* which found that a normal everyday activity of turning on stairs was not an identifiable unintended event, and therefore it was not a "chance event" accident as defined in legislation and policy.

In a similar vein, I once represented an OPP Constable who suffered a disc herniation after exiting his cruiser at the Whitby OPP Detachment, and crumpled to the ground. The issue under consideration, was the act of twisting to exit the car an accident; an activity that millions of people



perform daily without incident? I won that Tribunal appeal because an occupational physician documented the shear forces the human spine experiences when a person twists in a drivers' seat to exit a vehicle.

Union Has Won Appeals Arising from Squat or Dismounting Ladders

Another frequent source of controversy involves members arising from a squat and their knee pops causing immediate excruciating pain, or when dismounting a ladder they suffer a knee injury. The union has won these appeals even though the workers activities involve routine physical activities, because the mechanical stress applied to the knee is not normal. For instance, when arising from a squat, 3 times the workers weight or Body Mass Index is transmitted through the knee when arising from a squat. Most individuals can tolerate the mechanical loading on the knee, however, it is a tremendous force, particularly if you're up and down all day installing receptacles or performing other low level work.

Similarly, when dismounting a ladder usually involves a twisting motion of the knee with one foot planted, while the worker pivots and turns. Again, lateral twisting transmits stress through the knee (meniscus), because this is not a natural motion or articulation of the knee joint. Most meniscus (cartilage) injuries result from twisting activities e.g., skiing, tennis, soccer, where there is some sudden twisting of the knee, typically with one foot firmly planted. The union has won every appeal involving members who suffered a knee injury after dismounting a ladder. However, in my experience, WSIB decision makers tend to be blind to the micro motions that give rise to knee and other injuries, which is an important part of the work injury analysis that needs to be reported to the WSIB.

Tribunal Analysis, Did Injury Arise out of Employment

As has been discussed in a number of Tribunal decisions, the presumption of entitlement deems the question that a decision maker must ask, "has it been shown that the resultant injury did not arise out of the employment." Instead of asking

whether the injury arose out of the employment. Essentially, if something occurs in the course of employment, at work, the incident is presumed to have arisen out of the employment and is compensable, unless the presumption can be displaced.

Even if an incident happened at work, the focus turns to whether a precipitating event caused the injury. As the Tribunal Vice-Chair noted in *Decision No. 900/06*:

A worker simply placing their left foot down on a step and then turning to go back up to get a forgotten item is not, in and of itself, a chance event [accident]. Turning on stairs, even abruptly, is a fairly normal occurrence. It is not, in my view an "identifiable, unintended event" but is rather part of a normal, everyday activity. That the worker suffered an injury while performing this normal maneuver or activity is not disputed. The [WSIB] policy document provides, however, that the "injury itself is not a chance event."

By way of analogy, in my view it would be difficult to establish for an office worker that reaching for a telephone or for a pencil on one's desk that leads to neck or back pain is a work accident. While the incident occurred at work, the simple act of reaching in that way could hardly be stated to be an "unintended event" that led to an injury.

If this seems complicated, it is; that's WHY members need to call me first before making statements to WSIB. In my experience, WSIB Eligibility Adjudicators typically do not scrutinize a workers accident history with a view to teasing out details that would validate a workers claim, and instead, are more likely to characterize the activity as an every-day routine event and deny a claim.

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Obligation to Report Injuries Trumps Fear of Layoff And WHY Does the WSIB Ignore the Occupational Health & Safety Act



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

In our March 2015 newsletter I discussed the law surrounding “An Injury is Not an Accident” because a number of claims were being rejected when members reported they were walking along at work when they fell without any provocation, slip or misstep. Or alternatively, they were descending stairs or ladder when their knee gave out. In these claims there was no accident, just an injury.

Knee Injury Descending Slippery Scaffold Stairs

To my dismay two brothers recently contacted me after their claims were denied by WSIB. In the first claim the member was descending scaffold stairs when his knee gave out. English is not the members’ cradle tongue and he required the assistance of an interpreter when he spoke to WSIB. I seem to recall that he mentioned to me that the scaffold was wet, and his foot slipped which triggered the knee injury. However, the Eligibility Adjudicator used a form of Q & A that I believe was misleading, by getting the member to agree there was no traumatic accident. During my investigation, I drilled down a little deeper and the members’ evidence confirmed there was a slight twisting injury after his foot slipped, but this was not traumatic. Even though the first link in the chain of causation was a very slight twist, it set things in motion.

Ruptured Calf Tendon after Walking up Hill

In the other claim a member just completed his shift and upon leaving work he climbed a grassy hill with a 15 degree incline to get to the parking lot. While walking up the hill a calf tendon ruptured without any slip or fall. A claim was registered with WSIB, and once again the Eligibility Adjudicator adopted a point-in-time analysis focusing solely on the fact the member was engaged in a routine activity of daily living e.g., walking. Walking is not considered an accident, even though the member suffered an injury while leaving work. His claim was denied because there was no accident.

When I spoke to the member, I explained the point-in-time analysis was unduly restrictive, because the bomb may have been set at work, but blew upon leaving work. I asked him to describe what he did at work a couple days prior. He explained the work was close to the ground, and instead of repetitively kneeling and squatting, he used a mechanics seat, with coasters, to skitter about the floor. He would get up and down at least 40 times per day, and propel the mechanics seat, by extending his legs, and using his legs to pull himself to the next work area. It seemed obvious to me that his body was unaccustomed to this physical activity, and was likely a significant contributing factor giving rise to the tendon rupture.

The lesson members and stewards must take away is to look beyond a point in time when a disability/injury becomes

complete or manifests, and consider what a worker was doing in the hours and days leading up to an injury. And don’t discount minor tweaks such as a slight twist or slip when you plant your foot on the ground, or ladder rung, but didn’t fall.

Delayed Registration of WSIB Claims

There are several cases pending where members failed to report their injuries to the WSIB. While they initially reported and documented an incident to the employer, there was a failure to submit a claim to the WSIB. Further complicating matters was the failure to inform the employer they sought medical attention, saw specialists, and might require surgery. Once a worker seeks health care they are obligated to tell the employer and WSIB.

In each instance the member feared a layoff as the work situation was tightening up, and felt a WSIB claim would create unnecessary attention which fostered a claims avoidance behaviour. Unfortunately, layoffs were issued, and the members’ WSIB claims were contested or deemed untimely. My last month’s article explained that injured workers may have re-employment rights which may temper an employer’s decision to layoff, affording an injured worker some additional protection.

Section 22(1) and (3) of the *Workplace Safety & Insurance Act* stipulates the time limit to submit a claim:

22(1) A worker shall file a claim and 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.

Injuries Must Be Reported ASAP, But Law Says Within 6-months

Under the law once a worker becomes aware of a work related injury the reporting clock starts ticking which obligates a worker to file a claim within 6 months, pursuant to section 22 of the *WSIA*. However, as I explained to one member, that does not mean you have a 6-month grace period to sit on your hands, because there is an expectation that injuries must be reported immediately.

Board policy also echoes the statutory requirement to file claim within 6 months of an accident. In contrast, the criteria contained in Board policy regarding the time limits to file a claim in disablement



cases (i.e., gradual onsets) provides that the 6 month deadline begins from the date the worker reports the disablement as work-related. This protects workers from the time limits when there is no firm diagnosis, or medical opinion on work causation.

In all claims the onus is on the injured worker to submit and register a WSIB claim and you cannot contract out of this legal obligation because you reported the work injury to the employer or doctor.

WSIB Ignores Occupational Health & Safety Act

Local 353 has a dispute with WSIB whether their decision makers possess core competencies regarding the *Occupational Health & Safety Act*, typically in connection to whether a work site or suitable work is covered by and in compliance with the OHSA industrial or construction regulations. I find this ironic because WSIB is the organization that certifies joint health and safety representatives in Ontario.

It is illogical for WSIB to feign lack of jurisdiction regarding health and safety issues that arise in a claim, when the Board is mandated to promote health and safety in workplaces.

Furthermore, section 3 of the *Workplace Safety & Insurance Act* deals with injury and disease prevention and applies to workplaces governed by the *Occupational Health & Safety Act*, and the employers and workers to whom that Act applies.

The Board is further mandated by section 4 to promote health and safety in workplaces and to promote public awareness of occupational health and safety. The Board educates employers and workers about occupational health and safety to foster commitment to occupational health and safety among workplace parties.

Finally, section 4 also mandates the Board to develop standards for the certification of persons who are required to be certified for the purposes of the *Occupational Health and Safety Act*, and to certify persons who meet the standards, as well as develop standards for the accreditation of employers who adopt health and safety policies and operate successful health and safety programs, and accrediting employers who meet the standard.

Simply, the IBEW disagrees with the Board's explanation that they have no jurisdiction, lack authority or competencies to consider occupational health and safety issues that arise in a workers claim.

In my opinion, reminding callers to "have a safe day" is a hollow gesture if WSIB decision makers lack basic health and safety competencies to inform their decision making, or refuse to exercise their jurisdiction and consider evidence regarding regulatory compliance issues under the *Occupational Health & Safety Act* when deeming a workplace or suitable work safe. Otherwise, call yourself the Workplace Insurance Board.

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Sweetheart's Dance

Saturday, February 13, 2016

The Sweetheart's Dance will be on Saturday, February 13, 2016 at the Hilton Toronto/Markham Suites located at 8500 Warden Ave.

Included in the ticket price is a buffet dinner with wine, dessert and one complimentary cocktail drink. The cost is \$80.00 per couple and \$40.00 per single, Apprentices Only cost is \$20.00 per single \$40.00 per couple. Parking is included and parking passes will be issued with the tickets. Tickets will be on sale after Monday, December 14, 2015 at all 4 union halls.

- Registration at 5:30 pm • Cocktails at 6:00 pm
- Opening Doors at 6:45 pm • Dinner at 7:00 pm
- Raffle draw at 8:30 pm • Dancing: 9:00 pm to 1:00 am

Coffee and sandwiches will be available at midnight.

Please call the hall at 416 510-3530 and register with Jennifer or submit on-line through the LU 353 web page:

<http://www.ibew353.org>. Click on Committees then click on Social Events. Limited seating available!

Ticket sales deadline is January 22, 2016 after which the ticket price increases to \$100.00 per couple and \$50.00 per single. No Ticket sales at the event.

The hotel group rate will be \$139.00 + applicable taxes for this event. Book your room before January 8, 2016 to guarantee this rate. For room reservations please call the Hilton Toronto/Markham Suites directly at 905-415-7608.

Keep an eye on the Social Events page for the latest updates.

Terry Fischer,

Social Committee Chairman

Sweetheart's Dance

Saturday, February 13, 2016

Member's Name: _____

Card #: _____

Phone #: _____

of Adults: _____

Email: _____



Understanding Asbestos Related Lung Disease – And the Legal Principles Used in Adjudicating Occupational Disease Claims



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

As reported in 353 social media, and union meetings, my office has received the largest influx of asbestos claims since I started working at the Hall in 1998. It was assumed that once asbestos was banned from use in Ontario in the late 1970s, there would be an immediate reduction in asbestos related disease claims. The problem, simply, is asbestos related health issues are long term latency diseases that will not morphologize for 3 to 5 decades after exposure.

Delayed onset of asbestos lung disease in part explains the dismissive attitude of some supervisors who don't appreciate the inherent risk when members learn there is asbestos on a job site. The fact asbestos doesn't result in immediate illness, gives cold comfort to some, however the medical reality is far different.

During a three-month period over summer and fall (2014), I received 4 mesothelioma, 3 asbestosis, and 4 pleural plaques claims. The age cohort involves members age 65 and older who worked in the industry from the 1950s to 1990s. What is also evident based on my discussions with members is they are not aware of the clinical distinction between different asbestos pathologies, and assume they are all the same. They are also unfamiliar with the legal principles that apply.

Entitlement to Compensation for Asbestos Related Diseases

There are legislative presumptions codified in various provincial statutes that govern compensation for occupational disease in all the provinces, but there is significant variation between provinces with regard to many issues.

Asbestosis is the only disease presumed to be related to work involving exposure to asbestos in Alberta, while mesothelioma is also included in the legislation of four provinces. Lung cancer, cancer of the larynx and gastro-intestinal cancers are targeted by legislation and policy of some provinces but not others. Ontario and Newfoundland provide for irrebuttable presumptions in the case of asbestosis and, this is also so in Ontario with regard to mesothelioma, if very specific conditions of exposure and latency are met.

Legal Framework of *Workplace Safety and Insurance Act, Schedules 3 & 4*

(Irrebuttable Presumption)

Occupational diseases are referenced in Schedule 3 or 4 of the *WSIA*, including asbestosis, and these regulations define whether a worker suffers from and is impaired by an Occupational Disease.

The inclusion of various occupational diseases under Schedule 3 of the *WSIA* regulations has legal and administrative implications. The *WSIA* legislation states:

If the worker at or before the date of disablement was employed in any process mentioned in the second column in Schedule 3 and the disease contracted is the disease in the first column of the Schedule set out opposite to the description of the process, the disease shall be deemed (presumed) to have been due to the nature of the employment unless the contrary is proved.

In essence, this means if you worked in construction (listed industry), and develop a listed disease it is presumed you acquired the disease through work.

Overview of Various Asbestos Related Pathologies

In my discussions with members they are surprised to learn there are several types of asbestos disease (pathologies) which electricians may develop, each having a different clinical, functional, and medical course. They include:

Pleural Plaques: this pathology is generally viewed by the American Society of Thoracic Surgeons to be a benign pathology, typically without pulmonary complications (shortness of breath). It is usually discovered in a routine x-ray or CT scan in which calcified shadows are revealed on the diagnostic scans. The calcification of bodies in the lungs is the human body natural defence mechanism to envelop or cocoon asbestos fibres which become calcified deposits. This is also referred to as scarring of the lung. While technically inert, pleural plaques indicate prior exposure to asbestos, and workers so diagnosed, are at a higher risk for developing asbestosis or mesothelioma.

Asbestosis: is a chronic inflammatory and fibrotic medical condition affecting the parenchymal tissue of the lungs caused by the inhalation and retention of asbestos fibers. It usually occurs after high intensity and/or long-term exposure to asbestos (particularly in those individuals working on the production or end-use of products containing asbestos) and is therefore regarded as an occupational lung disease. People with extensive occupational exposure to the mining, manufacturing, handling, removal or disturbing asbestos fibers are at risk of developing asbestosis. Sufferers may experience severe dyspnea (shortness of breath) and are at an increased risk for certain malignancies, including lung cancer but especially mesothelioma.



Asbestosis specifically refers to interstitial (parenchymal) fibrosis from asbestos, and not pleural fibrosis or plaquing.

Mesothelioma - (or, more precisely, **malignant mesothelioma**) is a rare form of cancer that develops from cells of the mesothelium, the protective lining that covers many of the internal organs of the body. Mesothelioma is most commonly caused by exposure to asbestos. The most common anatomical site for mesothelioma is the pleura (the outer lining of the lungs and internal chest wall), but it can also arise in the peritoneum (the lining of the abdominal cavity), the pericardium (the sac that surrounds the heart), or the tunica vaginalis (a sac that surrounds the testis).

Most people who develop mesothelioma have worked in jobs where they inhaled or ingested asbestos fibers, or were exposed to airborne asbestos dust and fibers in other ways. Unlike lung cancer, there seems to be no association between mesothelioma and tobacco smoking, but smoking greatly increases the risk of other asbestos-induced cancers.

Signs and symptoms of mesothelioma include shortness of breath due to pleural effusion (fluid between the lung and the chest wall), chest wall pain and constitutional signs such as unexplained weight loss. The diagnosis may be suspected based on chest X-ray and CT scan findings, but must be confirmed either by examining serous effusion cytology or with a biopsy (removing a sample of the suspicious tissue). A thoracoscopy (inserting a tube with a camera into the chest) can be used to acquire biopsy material, and allows the introduction of substances such as talc to obliterate the pleural space (a procedure called pleurodesis), preventing more fluid from accumulating and pressing on the lung. Despite treatment with chemotherapy, radiation therapy or sometimes surgery, mesothelioma carries a poor prognosis.

No Legal Requirement to Register WSIB Claim for Exposure

There is no requirement or mechanism to register and establish a WSIB claim for workplace exposures, particularly when there is no immediate injury or disease. Under the *Workplace Safety and Insurance Act* ("WSIA") there must be a work related injury in order for a claim to be established and Loss of Earnings paid.

Exposures Reported on the Construction Exposure Incident Report (CEIR)

The WSIB, in conjunction with construction industry stakeholders, developed a **Construction Exposure Incident Report Form** that should be completed if there has been an unexpected workplace exposure where there is no lost time or no illness. The trigger in registering an occupational disease claim includes exposures (e.g., fumes) when a worker experiences an illness or adverse reactions that requires treatment (such as diagnostic tests, medication or ongoing treatment and assessment).

To all the members who brought to my attention your recent asbestos exposures, **you are to be commended** for your diligence, because asbestos is no laughing matter. And when it does become an issue in your workplace, the precautionary principle of zero tolerance is the safest approach.

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Pension Gifts

The following pensioners are invited to the South Unit Membership meeting at the Union Office, 1377 Lawrence Avenue East, Toronto on Thursday, January 8, 2015 at 7:00 p.m. to receive their pension gifts:

Ken Ball, Philip Brook, Ercole Cifa, Edward (Wayne) Gillespie, Frederick (Gord) Kreick, Roy Robert, Tony Salvaggio, Robert A. Scott, Giovanni Trombino, Neil Valentine, Barry Bassett, Manuel Cordeiro, Rick Crowhurst and George Mitas.



Carpal Tunnel Syndrome – A Primer on Work Related CTS and Dealing With Typical Challenges Employers & WSIB Raise in CTS Claims

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



Carpal Tunnel Syndrome is a common medical condition that many electricians develop. However, CTS also impacts the general population, even workers whose jobs do not involve risk factors for developing hand/wrist disorders. Pregnant women are also at elevated risk for developing CTS.

A frequent challenge when adjudicating CTS claims is the fact many members work in a multi-employer environment. This invites controversy because the most recent employer, usually the accident employer, will argue the member had only been with the company several weeks or months, and the work performed was not sufficiently repetitive, nor did it involve repetitive and forceful gripping and squeezing. These objections are intended to cause a proof of accident dispute.

In my experience members often times experienced nuisance CTS symptoms for months, maybe years, but eventually the condition becomes worse and they start dropping tools or coffee cups, notice pain when performing certain tasks, muscle wasting in the hands, or pain that awakens them at night, which is a classic CTS symptom.

Two Types of Injuries Recognized in Law

It is important to understand that there are two types of accidents recognized under the law. Often times workers get confused whether their injury is work related in the absence of single episode trauma (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 defined in the law.

- a) a chance event occasioned by a physical or natural cause, and
- b) disablement arising out of and in the course of employment

While it is easy to identify the obvious injuries where there is some identifiable mechanism of injury, at least half (50%) of the injuries that electrical workers experience are related to repetitive work such as kneeling, climbing, carrying materials, overhead work, pushing & pulling.

Chance Events (single episode trauma)

Chance event accidents are much easier to identify because there is usually some causal event. So long as the worker reports an injury promptly and seeks medical attention, these claims are less problematic in terms of proof of accident. However, some members push their luck by failing to report, and then the employer fights the WSIB claim

because there was a delay in reporting, and a dispute regarding Proof of Accident.

Disablement (gradually emerging injuries)

Disablements under the law are injuries which emerge gradually, and are usually related to the physical demands performed in a workers job. These claims can be controversial because most workers, and employers, have not made the causal link between certain physical demands and an injury.

Often times employers will tell a worker “*you don’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 injuries that emerge gradually. Repetitive Strain Injuries (RSI) fall into this category. In disablement claims there may not have been a specific or identifiable 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, who often times tell the worker they don’t have a *bona fide* work injury. Remember, the WSIB adjudicates claims, not employers.

Opinion of Dr. Zvi Margaliot, Renowned Expert in Hand/Arm Disorders

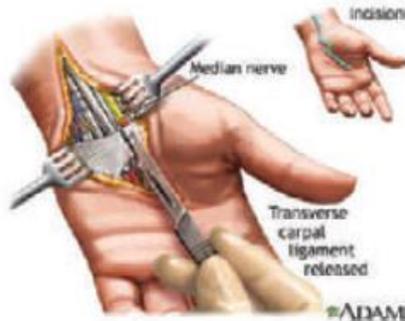
In 2009 I represented a member who had a dispute whether his CTS was work related. I asked Dr. Margaliot who assesses injured workers at the WSIB Hand & Wrist Specialty Clinic to review the L.U. 353 Electrician Ergonomic Research Study and provide his opinion whether the job demands of an electrician are medically compatible with the development of CTS. In Tribunal *Decision No. 1804//10*, Dr. Margaliot’s opinion was quoted:

I am happy to answer the question in the general case based on review of the attached *Physical Demands Description and Electrician Ergonomic Study*, which you had kindly provided, describing the specific tasks that an electrician is required to perform. Although there may be other contributing factors, including systemic diseases such as diabetes mellitus, it is my opinion that highly repetitive, manual work such as pulling wire, repetitive or sustained forceful grip and sustained use of vibrating and power tools would be considered a material contributing factor to the development of focal compression neuropathy, including carpal tunnel syndrome or cubital tunnel syndrome.



CTS Symptoms and Clinical Verification

In most CTS claims I deal with there are classic symptoms such as numbness & tingling, nocturnal hand/wrist pain that awakens you at night, loss of grip strength, and muscle wasting. Typically a CTS diagnosis will be made by the Family MD after a physical examination. However, an EMG (electro diagnostic study) conducted by a neurologist will confirm a CTS diagnosis.



Mechanism of Injury in CTS Claims (Gradual Onset)

Based on numerous CTS claims I have processed and litigated, a CTS injury is typically defined as a repetitive strain injury involving job tasks that require “repetitive” and “forceful” gripping and squeezing involving your hands, wrists and pulling with your arms. Most electricians have a healthy diet of these activities, whether pulling and bending wire, terminations, connections, and using manual and power tools. All of these tasks recruit repetitive and forceful gripping and squeezing.

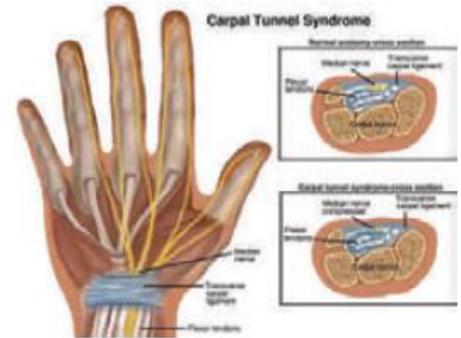
Typically CTS is a gradual onset injury, with symptoms increasing in tempo over a period of time until they result in persistent complaints e.g., nocturnal numbness and hand pain that awakens you. This is often accompanied by loss of grip strength, tingling and numbness in the hands, and other electric shock type sensations when squeezing and gripping hand held tools, pulling wire, and making connections or terminations.

Date of Accident, Usually Date of First Medical

When a medical condition emerges gradually over time, then becomes bothersome to the point you seek medical attention, will require careful analysis. The fact you had CTS symptoms for several years, but didn't seek medical attention until recently or require modified duties, is important evidence because the date of accident (and accident employer) is usually the date when a worker first sought medical attention for CTS. Often times members don't know what the underlying problem is in the absence of a medical diagnosis, so how can they relate this to work? Conversely, it is equally important for members to provide their doctors with information regarding the physical demands of their job to inform the health professionals understanding of a potential work-related cause (visit my website for information www.ibew353.org/wsib).

Typically the current employer will object that they are not responsible for the members CTS injury, and shift the blame on previous contractors, which is a classic chicken and egg debate. The argument is rebutted

by confirming the member performed regular duties and didn't require health care until recently. Although a member may have experienced subjective CTS complaints, the fact is the condition was likely sub-acute, undiagnosed, and the CTS disability or impairment did not become a problem until recently. However, in some instances, members may have sought medical attention while working for prior contractors.



The WSIB will also question the pathogenesis (cause) of the members CTS, and conclude that due to the short period of time the member worked for the current employer, the condition did not arise out of and in the course of employment with the current employer.

How to Complete a Form 6, Workers Report of Injury:

When submitting a CTS claim to WSIB, you must complete a *WSIB Form 6, Worker Report of Injury*, and describe the mechanism of injury. The following can be used and modified:

My job as an electrician requires repetitive and forceful hand, wrist and forearm movements in the use of hand held manual and power tools. I constantly use screw drivers, pliers, wire cutters and knives in order to install electrical devices, and to cut and strip wire. Hand held tools require a significant grip force and repetitive wrist movements. Hand held tools are an essential requirement of my trade, and depending on the particular job, I can be doing this all day long. Pulling wire and cables is a regular job demand, and often times there is considerable resistance depending on the pull. Depending on the thickness of the wire/cable, considerable force is required to bend, strip and make electrical connections. Again, these tasks involve repetitive and forceful hand, wrist and forearm movements, usually in awkward postures. In consultation with my health professional, I believe the physical demands of my occupation was a significant contributing factor in developing Carpal Tunnel Syndrome. I have no outside hobbies or other non-compensable factors (diabetes) to account for my CTS symptoms.

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Appeal Allowed - Low Rise Foreman Broke Leg While At Home, After Exiting Company Truck to Fetch a Drill and His Lunch

By: Gary Majesky, WSIB Consultant & Executive Board Member



The following case summary illustrates the policies and law when adjudicating whether a worker is in the course of employment while travelling to or from work. As a general rule, workers are not in the course of employment while travelling to or from work. However, there are exceptions for workers that have mobile work stations (service trucks) or drive a company truck as part of their employment. A recent appeal considered whether a foreman was in the course of employment before heading to work.

On November 16, 2017 a low-rise foreman walked to his company truck which was parked at the end of his street. The member entered the truck and drove to the front of his house where he exited the vehicle in order to go into his house to retrieve items that he had forgot (drill & lunch). As he stepped out of the truck, he tripped on the curb in front of his house and fell. He injured his left knee, and was diagnosed with a fractured left knee.

Reason's Claim Was Denied

The Eligibility Adjudicator determined the accident did not arise out of and in the course of employment, as such, initial entitlement for the left knee injury was denied. The following reasons were cited for denying the claim:

- I note that the injury occurred at 6:40 am, which is before the start of your work shift. I took into account the fact that you pick up other employees before you arrive to the job site, however, you confirmed that you had not yet left your property to pick up these employees.
- The injury occurred at the curb in front of your house, this location is not part of the employer's premises, as it is neither owned nor maintained by your employer, nor is it an approved worksite.
- At the time of the injury you were leaving your company vehicle to retrieve items from your house. While I acknowledge that you were retrieving items in preparation to leave for work, this is an activity that every worker must perform in order to go to work each day, and as such, I cannot consider this to be an assigned work duty or a reasonable act within the scope of your job.
- As I cannot establish that this injury arose out of or occurred in the course of your employment under Policy 15-02-02, I cannot establish that a personal work-related injury has occurred. Per Policy 11-01-01, as there was no personal work-related injury, I cannot allow entitlement to benefits in your claim.

Union Arguments

As noted in our statement of facts, the worker is a foreman and provided with a company truck which is used to pick up and deliver materials, as well as pick-up other workers that he drives to the various jobsites.

On November 16th, as the worker was exiting his company truck at his residence, he misstepped exiting his company truck, fell, causing a complex left leg fracture below the knee.

The worker and union take the position that the worker was in the course of employment at the time of the injury. Given his unique responsibilities, and requirement to use the company truck, he does not fall under the typical limitation / prohibition that a worker enters the course of employment once they arrive at the job site or place of work.

The union relies on *Decision 165/96* that outlined the test for determining whether a worker is in the course of employment, concluding it is "essentially a work-relatedness test" that is flexible and considers a number of factors:

The basic rule in compensation law is that a worker is not in the course of employment when travelling to or from a work site. However, there are exceptions to that general rule. Counsel for the Applicant pointed out two of the exceptions involving travel under the control or supervision of the employer and travel as a requirement of the employment, when the worker is obliged to be travelling at the place and time the accident occurred. The logic for the general rule appears to lie in the theory that a worker, while travelling to and from work, is essentially exposed to the same general risks as any member of the driving public. While the worker would not be driving were it not for the employment, this somewhat tenuous link is not sufficiently significant, according to this general rule, to bring a worker within the course of employment. In our view, the test employed for "course of employment" is essentially a work-relatedness test - a relatively flexible test which involves an examination of a number of factors including:

1. The nature of the activity performed by a worker at the time of the accident;
2. The relationship of the specific activity to the worker's normal employment activity or routine;
3. Any personal aspect to the activity which gave rise to the accident;



4. The nature of the risk associated with the activity - i.e. whether primarily an employment related risk or a public risk;
5. Employer control or supervision of the activity;
6. The time of the accident - i.e. whether within or outside working hours;
7. The location of the accident - i.e. whether on premises controlled by the employer or on public premises;
8. The type of equipment or tools involved in the accident - i.e. whether it was equipment supplied by the employer;
9. Specific remuneration (if any) for the activity at the time of the accident; and
10. Contribution to the injury by the activity of the employer or co-worker(s).

While no one factor will normally be determinative of the issue, a consideration of all of the factors may allow a panel to determine the overall character of the activity - whether primarily work-related or primarily personal.

Appeal Resolution Officer Decision

As per Policy 15-03-06, titled Travelling, as a general rule, a worker is considered to be in the course of the employment when the person reaches the employer's premises or place of work, such as a construction work site, and is not in the course of employment when the person leaves the premises or place of work. However, Policy 15-03-06 also specifically states that a worker is considered in the course of employment when the conditions of employment require the worker to drive a vehicle to and from work for the purpose of employment. The exception to this policy is when the worker makes a distinct departure on a personal errand while enroute.

Based on the information on file, I am persuaded to accept the worker is required to drive the company vehicle to and from work for the purpose of his employment. I make this determination based on the information provided in Mr. Majesky's submission, as well as the worker's statement as noted in Memo # 4. I have also taken into consideration that the employer confirmed that the worker has a company truck, and takes it to and from work. For these reasons, I accepted the criteria in Policy 15-03-06 have been met in order to consider the worker in the course of employment when he entered his company vehicle at 6:40 am on November 16, 2017.

Although I accept the worker was in the course of employment when he entered his company vehicle, it must also be determined whether the worker took himself out of the course of employment when he stopped and exited the vehicle at his house. As noted above, the exception to policy 15-03-06 is when the worker makes a distinct departure on a personal errand while enroute.

As noted in Memo #4, the worker stated that he stopped in front of his house to pickup personal items from inside the house. It was when the worker exited the company vehicle to go in the house that the worker fell and injured his left knee. Although Memo #4 indicates the worker needed to obtain personal items, it is not indicated in this memorandum what the items were.

In determining whether the worker's stop at home is considered a distinct departure on a personal errand, I find it significant to identify what the items were that the worker stopped for. The only information on file that identifies the items is found in Mr. Majesky's submission. In this submission, the worker states that he stopped at his house to pickup both his **lunch** and a **drill** that he would need for work that day. As one of the items was a drill that the worker stated he would need in order to perform his work duties, I am not persuaded that his stop at home supports a distinct departure on a personal errand.

The definition of accident under policy 15-02-01 includes a chance event, which is an identifiable, unintended event which causes an injury. In this case, the worker related a left knee injury to a specific incident of falling while exiting his company vehicle. For these reasons stated above, I find the worker was in the course of employment at the time of the accident, and that all policy conditions in order to allow initial entitlement have been met.

My Closing Thoughts

This decision does not mean members driving company vehicles have WSIB coverage 24/7. However, it instructs workplace parties and decision makers to examine the circumstances surrounding a work injury and whether a worker has re-entered the employment sphere. The key factor in this appeal was the member obtaining a drill in his garage, which brought the member back into the course of employment.

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Civic Holiday

Civic Holiday Statutory Holiday will be observed on **August 6, 2018**. If your employer asks you to work on this day, you must be paid double time for working on this holiday!



Update on CEIR Reports, Failure to Report Timely Injuries & Legal Obligation to Cooperate in an Early & Safe Return to Work

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



This month I want to review three issues that all union representatives, workers and supervision need to a refresher.

In order to document periodic exposures that construction workers experience, the WSIB, in conjunction with construction industry stakeholders, developed a **Construction Exposure Incident Report** that should be completed if there has been an unexpected workplace exposure where there is no lost time and no illness.

Conversely, the trigger in registering an occupational disease claim is when a worker has experienced an illness, usually an occupational disease requiring treatment (e.g., diagnostic tests, medication or ongoing assessment).

CEIR Reports Sent to WSIB

Periodically I receive batches of Construction Exposure Incident Reports (CEIR) that members complete at work when there has been an unexpected workplace exposure. They typically give these to a Business Rep who forwards these to my office and I ship these off to the WSIB.

Members have complained they're not receiving feedback from WSIB. However, my October newsletter describes the administrative problems plaguing WSIB.

In response to member complaints this past summer, I contacted the Director of Occupational Disease whose department manages the CEIR program. What a pleasant surprise to receive the Director's call while she was at the airport ready to board a plane. She was upset when I told her that our members are not receiving "acknowledgement letters" nor is CEIR information readily accessible on the new WSIB website. The Director thought it was available, but good luck finding it. I certainly didn't. What also concerned me was a WSIB Case Manager failed to respond to my concerns regarding the status of the CEIR program.

CEIR Acknowledgement Letters

In the past when WSIB received a CEIR exposure form, an acknowledgement letter was sent to the employer and worker, providing an incident number for future reference. The WSIB keeps exposure information on behalf of workers and employers in a database so it can quickly be retrieved by a WSIB decision maker if there is a future illness. However, there is no time line when WSIB acknowledgement letters are issued, and furthermore, the WSIB has restructured its operations and there are problems with the current service delivery model.

Please bear in mind that the union would not be aware of any WSIB follow-up because there are privacy issues, and furthermore, no authorization to legally represent members since these are not claims. I have been assured WSIB is cataloging the CEIR forms, but there are delays in sending acknowledgement letters to workplace parties.

No Legal Requirement to Register WSIB Claim for Exposure

It is important to clarify that an exposure is not an accident or injury as those terms are defined under the law in the *Workplace Safety and Insurance Act*. Consequently, there is no requirement to register a WSIB claim for workplace exposures, particularly when an exposure does not cause an immediate injury or disease. Under the *Workplace Safety and Insurance Act* ("WSIA") there must be a *work related injury* in order to register a WSIB claim. Simply, an incidental exposure to asbestos, fumes or particulate matter is *not* an injury under the law, because the morphology of any occupational disease, for instance asbestos lung disease, takes decades to develop, if at all.

Failure to Report Timely Claims

To those members who submit timely WSIB claims, thank-you. However, there are too many members who fail to report injuries and then submit untimely WSIB claims for myriads reasons. Often times after a layoff. Typically, members don't want to cause friction with the employer, and worry they'll be on the next round of layoffs. It's amazing how the membership have a universal belief that there are employment ramifications in filing a WSIB claim.

However, this workplace culture is not an excuse when you ultimately submit an untimely WSIB claim many weeks, months or years after an injury. When members are late entrants into the WSIB system, the typical adjudicative response is to deny the claim because they can't establish "proof of accident." And by the way, reporting to your foreman does not discharge your legal obligation to submit a WSIB claim. I've heard the plaintive wails of members that my employer or health care professional didn't submit the paperwork to the WSIB.

Let me be very clear, although health professionals and employers must submit WSIB paperwork, it is the worker who has the legal obligation to submit a timely WSIB claim. Often time's members are stoic and continue working and many months later or when surgery is necessary, this prompts the registration of a WSIB claim.



Time Limits to File Work Injury Claims

Under section 22 of the *Workplace Safety and Insurance Act*, there is a 6-month time limit to submit claims for chance event injuries, however, a delay in reporting an injury 1-2 weeks later, has been sufficient reason for WSIB to deny your claim.

There are two reporting clocks under WSIB policy and case law. Chance events, which are single episode trauma claims require a claim to be filed within 6-months from the date of accident/injury. These claims are easily identified because there is an identifiable or discrete mechanism of injury i.e., tripped, stumbled, fell, lifted, banged, carrying, resulting in an immediate cause/effect injury. But don't think the 6-month time limit is a grace period or license to delay filing WSIB paperwork.

The other branch of accident is disablement, which are gradual onset injuries. Repetitive strain injuries (RSI) and cumulative trauma disorders (CTD) are typically gradual onset injuries and the reporting clock starts ticking once the worker knows the injury is work related. Sometimes the clinical focus is on diagnosis, before the question of causation can be determined (work relatedness).

WSIB Research Recognizes Under-Reporting Problem

In 2013, the WSIB hired Prism Economics and Analysis to investigate under-reporting. Their report *Workplace Injury Claim Suppression* made a number of important findings that ultimately led to an amendment to the *Workplace Safety & Insurance Act* making it a prosecutable offence for employers to induce or pressure a worker to not submit a WSIB claim. But claim suppression is not a one-way street, because the research findings identified worker complicity:

Worker Under-Claiming:

Based on the research literature, 20% is a plausible estimate of the proportion of likely compensable, work-related injuries or illness for which workers do *not* submit claims. Both higher and lower estimates can be supported.

However, there is more support for a 20% estimate. The research literature suggests employer inducement is sometimes a factor. However, other factors behind worker under-claiming include: avoiding a reputation for carelessness, perceptions about the time required to claim compensation benefits, uncertainty about eligibility, perceptions that the injury or illness is not severe, and preference for other forms for income support, such as sick leave plans or wage continuation.

Case Law, Early & Safe Return to Work

Another catch-22 for members is modified work. Sometimes members don't return to work after an injury and believe they have a valid medical reason to be absent from work. That's when things go sideways. It's important that your treating health professionals be

made aware if modified work was offered, because WSIB will call the physiotherapist or doctor and ask "are you aware that modified work was offered to your patient?" When the health professional says NO, you're toast and WSIB will deny LOE benefits.

Also bear in mind that employers and workers are legally obligated to cooperate and remain in contact as part of the Early and Safe Return to Work process. In reviewing the legal authorities, there is settled jurisprudence where a finding that modified work offered by an employer is suitable has potentially significant and far-reaching consequences for a worker's entitlement to benefits. Generally, a worker who refuses suitable work is not entitled to **LOE** benefits (see *Decision 2189/14*).

In *Decision 759/12*, a Tribunal Vice-Chair ruled:

Even if the work offered by the employer had not been suitable, the worker would not have been entitled to **LOE** benefits. The worker failed to co-operate in ESRTW. Non-co-operation can lead to a reduction of suspension of benefits. The ramifications of non-co-operation had been explained to the worker in a letter from the Board. Co-operation in ESRTW is more than seeking and following medical advice and treatment. Communication between employers and workers is a key to successful ESRTW.

In *Decision 1961/07*, a Tribunal Vice-Chair ruled:

The employer offered modified work. The worker expected the job to be perfect from the first day. However, Board Operational Policy Manual, Document No. 19-02-02, provides that the employer is obligated to commit to a process to return the worker to suitable available work. Both the worker and the employer are obligated to work towards identifying a suitable job. The worker had concerns about some of the features of the job.

There are several situations where a worker is unable to return to modified duties (surgery) even though suitable work has been offered by the employer. These are "level of disability" disputes. Often times WSIB robotically rules the work is suitable. My advice is to attempt the modified work and see what happens. I'm not talking about poking your nose in the door, then skedaddling. You need to try the modified work and allow for some give and take before concluding the modified work isn't suitable. The best scenario is an employer saying "we don't have modified work for the worker."

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WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Understanding Chronic Obstructive Pulmonary Disease – And Whether Members Can Submit an Occupational Disease Claim with WSIB

In my experience when a member submits a WSIB asbestos lung disease claim, the Board often flags a concurrent COPD diagnosis. In my experience, the WSIB will adjudicate entitlement in each disease claim separately, however, they will not double count the pulmonary impairment for the two different diseases. If a member seeks my assistance in registering a COPD claim, it is important to have a pulmonary function test (PFT) in order for WSIB to evaluate the degree of lung/breathing impairment. Sometimes, members come to me with a standalone COPD claim.

A few years ago, the union won a Tribunal appeal for a retired member whose permanent impairment award for COPD was reduced because he was a former smoker see *Decision No. 619/20, 2020 ONWSIAT 1273 (CanLII)*. There is a body of case law that concludes it is improper to apportion a permanent impairment and attribute the pulmonary impairment to smoking. In the above cited case, the Vice-Chair ruled *“The appeal is allowed. The worker is entitled to his full 40% permanent impairment award for his COPD ... with no offset for his smoking history.”*

In a work-related COPD claim, the work environment must be a significant contributing factor in developing COPD. Typically, construction workers are exposed to respirable dust, fumes and/or chemicals while working in the Ontario Construction Industry which is ubiquitous in new construction.

The legal question that must be answered is whether your working career as a construction electrician was a significant contributing factor in the pathomorphology of COPD? There may be other non-work-related factors that caused or contributed to your COPD, but the legal test is whether your Ontario work exposures were also a significant contributing factor, even in the presence of non-working factors (e.g., genetics, pre-existing conditions, smoking, etc.).

As background, the WSIB has a list of occupational diseases that they recognize as potentially work related. The list includes respiratory disorders related to acute or chronic workplace exposures. COPD is one of the occupational diseases they recognize, which is adjudicated on the basis of years of exposure, and evidence that the work environment presented risk of exposure to respirable dust, fumes and/or chemicals.

Over the years I have assisted many working and retired members diagnosed with COPD in registering WSIB claims where the condition was causally related to working in construction. Some of these members had other non-work-related factors that contributed to developing COPD, such as smoking, pre-existing conditions e.g., asthma, family history, and genetics, however, under the law, if a workers employment contribution was also a significant contributing factor in the development of a disease, their claims will be allowed.

Law & Policy

Occupational diseases are adjudicated under Section 2(1) and Section 15 of the Workplace Safety and Insurance Act and by Regulation in Schedules 3 and 4 of the Act.

If a disease is not listed in the Schedules and a relevant policy has not been developed, entitlement to WSIB benefits and services is determined on the real merits and justice of the individual claim. It must be established that it is more probable than not that the circumstances of a worker's employment and

exposure history significantly contributed to the development of the medical condition being claimed.

Tribunal Medical Discussion Paper (COPD)

The Workplace Safety and Insurance Appeals Tribunal has produced a Medical Discussion Paper on Chronic Obstructive Pulmonary Disease that was written by Dr. Dildar Ahmad, Emeritus Professor of Medicine, University of Western Ontario. Dr. Dildar is a Respirologist, and expert in pulmonary disease and heart and lung transplants.

The Tribunal commissions Medical Discussion Papers to provide information on medical issues. Each Paper is written by a recognized expert in the field selected by the Tribunal, and each expert is asked to present a balanced view of the current medical knowledge on the topic. Written for the benefit of workplace parties and lay adjudicators in Tribunal appeals, the Medical Discussion Papers are not peer reviewed.

Medical Discussion papers do not necessarily represent the views of the Appeals Tribunal or any particular Vice-Chair or Panel, however, they provide an independent assessment of the current state of epidemiology, particularly injury/disease onset, causative factors, and therapeutic options for different injuries or illnesses. Below, I have quoted several passages from Tribunal's COPD Medical Discussion Paper:

Attributing COPD to occupation:

In a worker who has never smoked and who has developed COPD in the absence of other lung disease, workplace exposure to dust is a possible causative factor. The level of exposure determines the degree of risk. Given the variety of agents that have now been reported to cause COPD, it cannot be assumed that occupational exposure to an inhaled substance is free from risk.

Occupation and COPD

Tobacco smoking is the primary cause; and increasing evidence indicates that occupational and environmental exposures influence the course of this disease. The importance of occupational exposures as a risk factor was observed by Fletcher and other epidemiologists in 1950. In 2002, the American Thoracic Society published a statement that attributes COPD to occupational exposure in 15-20% of cases. Thirty percent of this group were nonsmokers. Normally the rate of lung function declines with advancing age. After the age of 30 the FEV1 (Forced Expiratory Volume) declines by about 30ml a year in nonsmokers and about 40ml a year in smokers. The data suggests that risk of occupational exposures add an extra 7-8 ml/year.

Occupational environments are risk factors for COPD. However, this risk is less than that of smoking. Selected occupational agents are listed below.

Gases: Sulphur dioxide and ammonia

Minerals: Coal, silica, silicates, asbestos, oil mists, Portland cement and manmade vitreous fibers.

Metals: Welding fumes, cadmium and vanadium.

Organic dusts: Cotton, grain dust, wood endotoxins

Smoke: Internal combustion engine exhaust, environmental tobacco smoke and fine smoke.

Coal: Coal miners have been more thoroughly investigated than other occupational groups. This is because of the enormous number of workers previously employed in this industry, and the potential influence of their investigations on early recognition of pneumoconiosis as a specific and early identifiable illness. Most studies have identified a greater effect of coal dust in younger workers compared to older miners.

Other mineral dusts: Several studies, cross-sectional and longitudinal have shown a relationship between hard rock miners exposed to silica dust and the development of COPD especially in gold miners.

Asbestos: In animal studies exposure to asbestos causes pulmonary fibrosis of small airways. A number of human studies have been reported that show an excess prevalence of airflow obstruction, but there are no large studies of ventilatory function abnormalities of asbestos-exposed populations, hence the clinical significance of asbestosis is uncertain.

Vapors Fumes and Dusts: Welding fumes can cause COPD when combined with smoking the effect is additive. In some welders who are non-smokers COPD can arise from exposure to welding fumes only.

Cadmium: Cadmium is used in production of alloys and other settings. Exposure to cadmium can cause COPD.

Organic dusts: Cotton dust was the first agent to be recognized as a cause of COPD.

Grain and wood dust: Grain and wood dust is known to cause COPD with an accelerated fall in FEV1.

Toluene diisocyanate: Toluene diisocyanate can cause COPD with an exposure of 2 ppb with a fall in FEV1 of approximately 10 ml/year.

Nuisance dusts: Nuisance dusts exposure to a wide variety of nuisance dust can cause COPD (19). Since the American Thoracic Society statement was published there have been a number of studies that support occupational exposures as important risk factors for COPD. In a Swedish longitudinal study of mortality data on 300,000 construction workers, those who were exposed to mineral dust had a higher mortality rate (20). In a third National Health and Nutritional Examination Survey, a significant risk for COPD was found in workers of the following occupations: manufacturing involving plastic dust, leather, rubber and textiles; manufacturing; food products manufacturing; transportation and trucking; automotive repair; agriculture; construction; office cleaning services; health care and beauty care.

In an Australian study, exposure to biological dust was responsible for increased risk for COPD in women more than men. A recent study it was showed that COPD in men who were exposed to occupational fumes had an accelerated loss of lung function of approximately 10 ml/year.



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New Members

APPRENTICE LOWRISE RESIDENTIAL

Santo Cali

APPRENTICE LINEPERSONS

Nolan Campbell, Michael Ferretti, Jacob Gignac, Caleb Wurzer

APPRENTICE WIREPERSONS

Malachi Ashby, Cody Calvert, Benedetto Carpico, Daniele D'Amario, Eduard Domasov, Carson Gillon, Dillon Hodgson, Michael Lima, Steven Sacco, Robert Scerni, Kyle Taylor, Michael Anderson, Harrison Ceschia, Alden Claret, Chyle Claret, William Fleming, Jean Pierre Hudson, Loghan Hudson, Jonathan Jackman Phillip, Tristan Monssen, Balkarn Nagra, Connor Ogle, Hunor Papp, Alex Rahaman, Shaheem Rajabali, Andy Stanulescu, Cristiano Travassos

JOURNEYPERSON LOW RISE RESIDENTIAL

Zachary Evans

JOURNEYPERSON LINEPERSONS

Cory Fair, Scot Merrick

JOURNEYPERSON WIREPERSONS

Curtis Cooke, Edward Corbett, Rouny Guerrero, Patrick Kizito, Joseph Tasos

SENIOR NCS

Richard Bowling, Michael Vittas

UTILITY PERSONS

Jareer Abarnoosh, Patrick Barry, Kloe Gauthier Paquette, Lisa Goodeve, Marcus Lopez, Victor Ogumah, Alyse Osiel, Nicholas Peeters, Ali Turkmen

JOURNEYPERSON UPGRADES

Ioanis Antoniou, Darryl Carey, Peter Charron, Campbell Fisher, Mitchell France, David Kremaszanka, Tomi Leppala, Brendan McDonald, Marcus Morana, Lucas Passarella, Jason Pilakowski, Michael Sheffit, Noah Spencer, Adam Watters Steele

PENSION GIFTS

The following pensioners are to receive their pension gifts:

Rob L. Bell, Danny Cheung, Tony De Sousa, Sirous Ghassemi, Alfred Jantos, Yakim Jovanovski, Alexander Kadunov, Paul Kerswill, Gary King, Douglas McMahon, Vladimer Melikian, David Russell, Frank Schiavone, Chris Speirs, Daniel Spizarsky, Larry Townes, Alan G. Valler and John Van Oostwaard.



Tribunal Case Law - Arising Out of and in the Course of Employment Injured on Unpaid Lunch or Coffee Breaks



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

With the influx of new members over the years, including our veteran members, a timely reminder is in order regarding your entitlement to workers compensation when injured on coffee or lunch breaks.

In 2020, I reported on a decision (Decision No. 698/20), where a member broke his leg early one morning getting out of a company truck parked in front of his house to fetch a drill and his lunch. The Tribunal ruled the member was in the course of employment even though he was not on the clock, nor being paid. This decision is applicable to members who drive and take home company vehicles after finishing work. All other workers, which is the vast majority of our membership are not in the course of employment until they reach the job site, or parking lot, if that parking lot is controlled by the employer. The fact members receive a parking travel allowance does not place them in the course of employment.

This month I want to review the case law when workers are injured on coffee and lunch breaks. Workers do not need to be paid during these times in order to be considered in the course of employment. There are several WSIB policies decision makers use to determine whether a worker is in the course of employment:

- Accident in course of employment - Time, Place & Activity test
- Accidents on/off employer's premises
- Traveling

The following cases illustrate that workers are in the course of employment in unique and varied circumstances when injured on a coffee or lunch break.

Decision No. 678/02 (Vice-Chair McIntosh-Janis)

Previous Tribunal decisions have consistently held that the fact that a worker is on an unpaid lunch break is, by itself, not determinative of the issue of whether that worker is in the course of his employment during the lunch break. It is only one of the factors involved in weighing and balancing the employment features of the situation with the personal features and is part of the totality of the event.

In my view, in circumstances involving travelling employees having lunch on the road is incidental to their employment especially where the purpose for their being in the area is related to their employment.

Notwithstanding the fact that he was on an unpaid lunch break at the time, I do not consider that the worker made a distinct departure from his employment.

Decision No. 1786/06 (Vice-Chair Marifiotti)

On my consideration of the evidence and, in particular, the nature of the worker's employment, I am satisfied that the accident did arise out of and in the course of employment.

I accept that it is not uncommon for workers to cross the street to obtain food for trips as the employer provides no facility for this. This custom was clearly related by all of the testimony at the hearing.

Furthermore, I am satisfied that the employer was well aware of the custom activity. The employer did not provide any information that, in my view, would contradict that the custom was authorized by the employer.

The crossing of the street to get food for the train trip is an activity reasonably incidental to the workers employment. There are no food facilities provided by the employer and no opportunity to obtain food while on the train.

It is the nature of the work environment that required the worker to cross the street and obtain food for the train trip. While the worker rests and prepares for the train arrival, the employer retains authority over the worker and his activities, which, in my opinion, are reasonably incidental to the employment.

Decision No. 1484/04I (Vice-Chair Kenny)

The workers lawyer argued the workers activity of going for lunch was reasonably incidental to her employment - that it was not a personal errand or activity in that it was needed for health reasons. She also noted the employers break policy meant that no employee could work more than five consecutive hours without receiving a meal break:

I am satisfied that, given the nature of the workers work and the practices associated with her employment, having lunch was an activity that was reasonably incidental to her employment. As stated in Board Policy, when the conditions of the employment require the worker to travel away from the employers premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown. Having lunch would not have been a personal errand. It was an activity that was reasonably incidental to her employment. As indicated in Tribunal *Decision Nos. 1785/02 and 62/94*, taking a lunch break at a restaurant close to the next jobsite will normally be an activity that is reasonably incidental to the employment of employees whose conditions of employment require them to travel away from the employers premises.

Majesky Note – Going to a strip bar and guzzling 4 beers, would not be in the course of employment.

Decision No. 1785/02 (Vice-Chair Kenny)

As indicated in Tribunal decisions, the premises rule is generally applied to trips going to and from work when a worker takes a lunch break at a location off the employers premises. This is because the duration of an off-premise lunch break and the freedom of movement the worker has during such a lunch break usually removes a worker from the activities associated with his/her employment, as well as from the risks the employer controls.



However, this general rule with respect to off-premises injuries does not usually apply to workers who are normally expected to work away from the employer's premises. For such workers, the journey to such off-premises work is part of the service for which the worker is employed. Accordingly, workers whose conditions of employment require them to travel away from the employers premises are considered to be in the course of employment continuously except when a distinct departure on a personal errand takes place. Because such workers are considered to be in the course of employment continuously when they travel away from the employer's premises, acts such as eating meals during the hours of employment are usually considered to be reasonably incidental to that employment. If, however, there is a distinct departure from the employment trip for personal reasons, this may take the worker out of the course of employment.

Decision No. 744/03 (Vice-Chair McCutcheon)

In *Decision No. 585/93* the Panel considered a case where the plaintiff, a driver of a garbage truck, stopped on his route to have lunch at a restaurant and slipped in the washroom of the restaurant. In finding that the plaintiff was in the course of employment, the Panel reasoned as follows:

We find that, given the nature of the plaintiff's employment, it was impractical to return to the employer's depot for lunch. The reality of the job situation dictated that the two workers eat lunch en route. The Plaintiff's trip to the washroom occurred while making a regular lunch stop. The routine followed by the two workers was, in our view, an efficient use of their time and was made in accordance with the limited discretion granted to these workers by the employer.

As can be seen from the above-noted cases, there are situations when a worker who is injured during an unpaid lunch break is found to be in the course of employment. While each case has different fact situations, in general the cases are consistent that a worker injured during the lunch break while on the employer's premises is in the course of employment, unless the worker was involved in "horseplay" at the time of the accident or a distinct departure by visiting HR Block. The cases also confirm that a worker who is injured during a lunch or washroom break while travelling off the employer's premises is generally considered to be in the course of employment unless he or she deviated from the most direct route or is solely on a personal errand.

Decision No. 2296/08 (Vice-Chair Butler)

The Vice-Chair in this case had to decide whether a worker who left the job site by foot with his friend, co-worker, supervisor and foreman, for lunch at the nearest restaurant and was in the course of employment when he was injured off the job site while walking directly back to the job site:

Ultimately, I find the worker's need for sustenance and the satisfaction of that need to **not** be a "distinct departure on a personal errand." I accept Mr. Majesky's submissions that eating lunch is not a "personal errand." I do not find that eating lunch is any more a personal errand than using washroom facilities. These activities are not a matter of choice, they are matters of necessity in our everyday existence. The only matter of choice may be where to eat and what to eat, not having to eat. The worker testified that by noon he is "very" hungry. Evidently a construction electrician

would be very hungry after a busy and hard morning's work. Food is a necessity of life.

I do not consider the fact that the worker opted not to eat his already prepared bag lunch on October 11th to be critical in this decision. The worker and GT decided to eat at the **nearest** restaurant, a pub, as an alternative to the mundane bag lunch. I do not consider that GT's paying for the lunch for his "friend" and not being reimbursed for it by the employer is critical in this decision.

For these reasons, I find that the worker was in the course of this employment on October 11th when, after eating lunch at the nearest restaurant and on his way back to the job site, he stepped on the manhole cover, fell into the manhole and injured his back. The worker has initial entitlement for a back condition resulting from an accident on October 11th.

In *Decision No. 698/20*, the Vice-Chair who heard the employers appeal regarding a member who broke his leg existing his company truck early in the morning, made an obiter comment when the worker testified that in addition to fetching a drill in his garage, he also grabbed his lunch in the house.

Decision No. 698/20 (Vice-Chair Dimovski)

There was also some dispute whether the drill was for personal use or belonged to employer. As such, there is a question of credibility that has been raised as the retrieval of a drill used in construction is something that would likely not be considered a personal errand. I do not address this issue as I am satisfied that retrieving his lunch while in the course of employment (proceeding to work) is not a personal errand. In this regard, I have relied on Tribunal decisions which have specifically addressed and supported that lunch or coffee breaks are incidental to employment. In particular, I rely on *Decision No. 1999/18* which supports such breaks are not a distinct departure from employment. I find the act of stopping the company van on his way to work to obtain the worker's lunch whether at his home or at a fast food restaurant is seen reasonably incidental to his employment. *Decision No. 1999/18* relied on a review of the Tribunal's developed case law on the subject and followed it. The Vice-Chair wrote, in part:

Taking a break for necessities of life, including the need to use the bathroom while travelling, does not take a worker out of the course of employment. Such would not constitute a distinct departure, and nor would going for coffee. I thus find that the above-referenced decisions well-explain the applicable law, and I adopt the analysis to this case.

In this appeal, there was no dispute that the worker had stopped his van in a rushed fashion to retrieve his lunch as he had to proceed to work before his shift started. This activity, in and of itself, is not a personal errand but an activity incidental to employment. As a result, I find that the worker did not take himself out of employment at the time of his injury

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Epidemiological and Environmental Investigations by the Centre for Disease Control Indicates there is Probable Evidence of Fecal Source Transmission of COVID-19

By: Gary Majesky, WSIB Consultant & Executive Board Member & Chris Paul, Business Representative

On September 8, 2020, the Office of the Chief Medical Officer of the Centers for Disease Control and Prevention (CDC) published a COVID-19 Science Update regarding Fecal Source Transmission.

The first peer-reviewed study involved a meta-analysis of SARS-CoV-2 stool testing and the potential for fecal-oral transmission. The second study investigated probable evidence of fecal aerosol transmission of SARS-CoV-2 in a high-rise building, published in the *Annals of Internal Medicine* (September 2020).

Fecal Aerosol Transmission

The fecal aerosol study has particular relevance for construction workers who frequently use shared washroom porta-toilets with other workers. This has been a frequent source of frustration, and health and safety complaints for years due to overflowing and unsanitary conditions.

The primary mitigation strategy against COVID spread has been frequent hand washing, PPE (masks), safe distancing, and other measures to prevent surface transmission of COVID and aerosol transmission through tiny droplets that stay airborne and inhaled by other persons. The prevention focus has been to disrupt virus transmission where Worker A, contracts the virus from Worker B.

Waste Water & Toilet Reservoirs for COVID

However, the implications of both studies (*van Doorn et al. and Kang et al.*), according to the CDC indicates that some COVID-19 patients shed SARS-CoV-2 RNA in stool for weeks after symptom onset, and inhalation of bioaerosols containing the virus might play a role in COVID transmission. An editorial note to the *Kang et al.* study adds to the growing evidence that wastewater plumbing systems might be reservoirs for SARS-CoV-2 and other pathogens. While hand hygiene is critical in preventing fecal-oral transmission (via contact with respiratory mucosa), improving bathroom ventilation, and periodically running faucets to ensure u-trap water are not dried out, particularly in high-rise buildings, might also help prevent transmission.

There is little disagreement regarding ramped up COVID protocols on job sites, and the presence of hand washing stations. In fact, several contractors tasked injured workers to build wash basins to be used on jobsites. However, there remains one large elephant in the room in terms of fecal aerosol transmission – the Johnny on the Spot or portable toilet. Not only are they often unsightly, unsanitary, and overflowing, we can add to that list a potential source of COVID transmission.

COVID Transfer Rate Greater, In Spite of Social Distancing

In 2020, the *Journal of Infection* published a letter from the British Infection Association regarding “The role of the environment and pollution in the prevalence of COVID-19.” It recognized many efforts have been made to reduce direct contacts (person to person) and personal hygiene, unfortunately, we are still seeing the prevalence of this disease worldwide. Now this question arises, why still in some regions is the COVID-19 transfer speed greater despite the implementation of a social distance plan?

It notes the environment around us is fraught with contaminants and surfaces that can unintentionally expose the human to the virus. Therefore, to investigate the prevalence of coronavirus, it should be more attentive to environmental pollution. Environmental pollutants may play a significant role in the COVID-19 spread include air pollutants, sewage, polluted water, and waste, which their role in indirect expansion of the virus should be considered.

Researchers demonstrated that chances of contracting the coronavirus increases in air containing particular matter concentrations due to their very small size, easily penetrate to the lower respiratory tract and as a result, they can carry the coronavirus directly into the alveo and tracheobronchial region.

COVID Can Survive 9-days In Fecal Sewer Reservoirs

Another important way for virus transmission is sewer systems. The urine and stool of a patient can enter the virus into the sewer network and cause it to release. A study by *Weber et al.* 2016 explained that the Severe Acute Respiratory Syndrome-CoV could stay viable for about 4 hours in the stool. *Tang et al.* 2020 reported that the coronavirus could survive 9 days in the fecal and sewer systems. Thus, with knowledge of this issue, during the toilet flushing, urinary and fecal aerosols can carry the virus and infect the ambient air. If personal hygiene is not good, the situation will get worse. Persons who have tested positive for COVID-19 should use a separate toilet.

From the beginning of the COVID-19 outbreak scientists at CDC and around the world have been working to identify sources of transmission and started to examine fecal aerosols which were implicated in a very large SARS outbreaks in Hong Kong.

Let's Err on the Side of Clean Washrooms

With health scientists and infectious disease specialists sounding the alarm that the third COVID wave is here, we must be guided by the Precautionary Principle that Justice Archie Campbell espoused when he investigated Ontario's SARS outbreak in the hospital health care



sector. One of his chief findings was “we cannot wait for scientific certainty before we take reasonable steps to reduce risk.” And when dealing with “serious infectious disease outbreaks, we must follow the precautionary principle and err on the side of caution.”

As we move towards mass vaccination and herd immunity, please remain vigilant, get tested and wear PPE. All employers and every union representative MUST pay attention to unsanitary washroom and toilet facilities because the medical science suggests fecal aerosol transmission is a probable factor in spreading COVID-19.

Clean washrooms are not just sound policy for the health, safety, and dignity of all construction workers, it’s absolutely necessary during a pandemic.

In Solidarity,

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Brother Tom Leduc

It is with sadness that we inform our membership of the sudden passing of Brother Thomas Edward “Tom” Leduc.

Brother Leduc passed away suddenly at his home in Waubaushe on Friday, March 26, 2021 at the age of 72.

Brother Leduc was unapologetically IBEW through and through. He took his job seriously and always had the best interest of his local members at heart.

Tom worked all over Canada and the U.S. so much so that he earned the nickname “Suitcase”. He always had one packed over the thirty years he was on the tools and was welcome in any local he visited.

Tom dedicated fifty years of his life in active service to the IBEW, serving as President, Trustee, and for nearly a decade before his retirement as Business Manager of Local 1739.

Whether behind the desk or visiting members on job sites, Tom was proud of his home Local 1739 and encouraged brotherhood and family values.

Brother Tom has taken his last dispatch and in so doing leaves behind loved ones to remember him and a lasting impression in the minds of members that he touched along the way.

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PENSION & BENEFITS VOTE SPECIAL CALLED MEETING APRIL 18, 2021

At this years Special Called Meeting the recommended benefit and pension plan changes (outlined inside this newsletter) are, for the most part, items that members were unable to vote on in 2020. Have your say on them by participating in this years virtual Special Called Meeting. This will be the first time in IBEW Local 353’s history that benefit plan recommendations will be voted on electronically!

The Special Called Meeting will take place by Zoom on Sunday April 18, 2021 starting at 8:00 a.m.

Eligible members can participate by registering with the union no later than Friday, April 16th at 4:30 p.m.

There are two steps in the registration process:

1. Visit the IBEW Local 353 website at ibew353.org and click on the MEMBER LOGIN on the top right hand corner of the page.
2. Complete the electronic form and input your credentials to verify your eligibility.

Members are being asked to submit their questions ahead of time so that they can be answered at the meeting. There is a place right on the registration form to do this.

After registering, all eligible voters will receive an email containing a secure code and password to vote on the recommendations through Simply Voting.

Spread the word!

A copy of the presentations from Eckler and Canada Life are available on the secure side of our website at www.ibew353.org

HAVE YOUR VOTE COUNT - YOUR FUTURE DEPENDS ON IT



COVID-19 Pandemic – Can Workers Submit WSIB Claims and Will They will Be Allowed If You Become Infected? It Depends on the Route of Acquisition

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



Understanding the law and history of past microbial pathogen cases is a good starting point. Members understand the frustration in dealing with WSIB to get claims approved for straight forward work injuries, particularly when there is a pre-existing condition. Now factor in the unique epidemiology of COVID-19, and this will create a significant hurdle in getting WSIB claims approved. Here's WHY.

The WSIB website states "the nature of some people's work may put them at greater risk of contracting the virus, for example those treating someone with COVID-19. Any claims received by the WSIB will need to be adjudicated on a case-by-case basis, taking into consideration the facts and circumstances." Clearly the message is geared to front line health care workers.

Under the law, the *Workplace Safety & Insurance Act* ("WSIA") recognizes injuries resulting from single episode trauma, as well as gradual onset injuries. The Board also accepts occupational disease claims when there is a relationship between the disease and work exposure, either immediate or long term latency (some cancers, asbestosis etc.).

Therefore, if a worker contracts COVID-19 and there is a strong probable nexus/relationship that the worker likely acquired the disease from work, then a WSIB claim should be submitted. The claim would also be adjudicated on its merits.

The Law and Policy

The definition of accident in section 2 of the WSIA includes a disablement arising out of and in the course of employment. Board Policy 15-02-01 defines disablement to include a condition that emerges gradually over time or an unexpected result of working duties. For entitlement to be allowed, the decision-maker must examine the nature of the work (environment), the nature of the injury (disease) and the relationship between the nature of work and injury. It is important to understand that accident and injury is broadly defined and includes diseases.

Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. The standard of proof in workers' compensation proceedings is the balance of probabilities.

There is a statutory presumption contained under Ontario Regulation 175/98 of the *Workplace Safety and Insurance Act*. Schedules 3 and 4 give legal recognition to a link between specifically listed occupational diseases and the corresponding work processes and occupational setting. Asbestos related lung disease falls under Schedule 4, and includes asbestosis and mesothelioma, however, Meningitis, SARS, H1N1, and COVID-19 are not listed. That does not mean these cannot be work related in certain circumstances, but there is no legal presumption they arise out of and in the course of employment, and must be adjudicated on the merits and justice of each claim.

Past History as a Guide

Fifteen years ago a LU 353 member developed meningitis which is a bacteria that lives in the nose and throat and spread from one person to another by contact. It can spread easily through everyday behaviours, including coughing & sneezing, sharing drinks & eating utensils, kissing and living in close quarters.

The question arose whether the meningitis was contracted through work because the member was working on a TTC subway project and there were thousands of people who commute using TTC and one of these people *may have* infected the member. My review at the time centered on the fact that this was a speculative possibility with respect to work causation which fell short of the evidentiary standard of the balance of probabilities.

Around the same time there was a Deputy Fire Chief who contracted meningitis and died. His WSIB claim was allowed because the Fire Chief had attended a public ceremony and shook the hand of a person who had meningitis. It was determined that the Fire Chief was in the course of employment, and shaking the hand of a person during a public ceremony was deemed work related because the "route of acquisition" of the bacteria could be established. It was more probable, than not, that the Fire Chief contracted meningitis through work. These two scenarios draw an important distinction between a *speculative* and *probable* work related nexus.

Member Contracted Gastroenteritis at Ashridges Bay (sewage plant)

In *Decision 526/04*, a member who has been a foreman and steward on many jobs was working at a Toronto Waste Treatment building where treated human waste biosolids were loaded onto trucks. The issue under appeal was whether an electrician acquired gastroenteritis



as a result of exposure to human waste biosolids in the workplace in February 2001.

The employer was represented by Justice William Lemay, who in 2015 was appointed to the Ontario Superior Court of Justice. He argued the WSIB correctly concluded that the member's exposure was more likely, than not, related to his food preparation habits at home, and not work related.

The member testified he was installing light fixtures in a building where treated human waste biosolids were loaded on to trucks. He was accidentally exposed to water spray used to clean biosolids from the truck loading area. He became ill on February 23, 2001. On February 25, he attended a hospital emergency department with symptoms of fever and chills, poor appetite, diarrhea, vomiting and dehydration. Stool tests were negative for Salmonella, Shigella, Yersinia, Campylobacter, Escherichia coli D157 and Clostridium difficile. His doctor diagnosed gastroenteritis.

The only protective equipment provided was coveralls and gloves, and showers. The plant manager told WSIB that "there was no history of truck drivers getting sick." The employer's witness testified that the sewage sludge was tested two times per day for bacteria. If it did not meet Ministry of Environment guidelines, the sludge was sent back for further treatment. The sludge was not tested for viruses, but stored anaerobically for 20 days.

Because the issue under appeal involved a complex medical question of causation, the Tribunal selected Dr. Donald Low as the Tribunal appointed medical assessor for this appeal. Dr. Low was a Professor of Medicine and Microbiology at the University of Toronto where he was Head of the Division of Microbiology in the Dept. of Laboratory Medicine and Pathology. In addition, he was Chief to the Toronto Medical Laboratories and Mount Sinai Hospital Department of Microbiology, a shared laboratory serving over 10 hospitals in the greater Toronto area.

An interesting side note, Dr. Low became a familiar face to the Canadian public during the 2003 SARS crisis and was also the lead microbiologist during the SARS epidemic and instrumental in taming the microbial outbreak, which led to infectious disease protocols that have since been adopted world-wide. Dr. Low answered several questions set out in an interim decision, and opined:

[15] I think it is quite possible that the employee was exposed directly to contaminated material via the oral route when he was splashed at work. The fact that the biosolids had undergone treatment does not mean that they were still not infectious to humans. Even if testing of the biosolids had coliform counts that fell below those within the regulations (<2,000,000 FC/gram of solids), they may still contain viable bacteria, viruses and/or

parasites that can cause disease when directly inoculated into a person's mucosa.

The fact that a patient had a negative stool culture for known pathogens does not mean that the patient did not have an infectious cause of his gastroenteritis. There are numerous types of viruses and parasites which are able to cause gastroenteritis that would not be detected by routine microbiological techniques. It is also possible that the causative pathogen may not have been detectable at the time of the testing. Routine testing for enteric pathogens is not a 100% sensitive or specific.

... I have looked at the interim report and my opinion would be that it is possible that the employee could have contracted a food borne pathogen outside of the workplace, but this is unlikely given the information that has been provided. In my opinion the most likely source of this person's illness is the workplace.

In her judgement allowing the members claim, the Tribunal Vice-Chair concluded:

Section 13 of the *Workplace Safety and Insurance Act* provides that a worker who suffers a personal injury by accident arising out of and in the course of his employment would be entitled to benefits under the insurance plan.

I find that the worker was accidentally exposed at work to water spray contaminated with biosolids, that is, treated human waste, at some time during the period of February 19 to 23, 2001. He became ill with gastroenteritis on February 23, 2001.

The issue to be determined is whether the workplace exposure to biosolids contributed in a significant or material way to the development of the medical condition in question. It is well accepted in workers' compensation law that the test for determining whether a causal relationship between the work and the injury exists, is that of significant or material contribution. A material contribution need not be the sole contribution, but must be more than a minimal contribution. Causation need not be determined with scientific precision. Medical experts ordinarily determine causation in terms of certainties, but the law requires a lesser standard. It is the function of the trier of fact to make a legal determination of the question of causation, using a "robust and pragmatic approach", where there is medical uncertainty with respect to causation. Reasonable inferences may be made from the primary facts of the case. Causation is determined on a balance of probabilities, or applying the benefit of the doubt where the evidence is equally weighted. However, a finding of causation may not be made based on mere speculation or evidence of a possibility, rather than a probability.¹

¹ See the judgement of the Supreme Court of Canada in *Snell v. Farrell*, [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73; *Laferriere v. Lawson* [1991] 1 S.C.R. per Gonthier J.



WORKPLACE SAFETY & INSURANCE

The Vice-Chair relied on the medical evidence submitted by IBEW LU 353, and Dr. Low, an expert in medical microbiology, infectious diseases who was of the opinion that the worker's exposure to biosolids was the most likely source of the gastroenteritis. There was a close temporal connection between the hose spray incident and the development of severe gastroenteritis and concluded that the worker's gastroenteritis resulted from accidental exposure to human waste biosolids.

Legal/Medical Challenges in Establishing Work Related Causation

The above analysis serves to highlight the complexity in establishing causation even when there is a likely and probable work association. These cases also set out the inherent evidentiary challenges when dealing with microbial pathogens, such as COVID-19, and in particular the "route of acquisition." In every WSIB claim there must be a causal work connection that rises above a mere "speculative possibility."

Transmission of COVID-19

As members and citizens living through a global pandemic, all of us have been following developments of COVID-19 from when it first emerged in Wuhan, China. Medical experts recognize the virus has an incubation period/time lag before people may develop symptoms. Initially infected travelers were suspected carriers of COVID-19, but now public health officials acknowledge evidence of community transmission.

LU 353 members, in fact all workers, who are still going to work are worried and scared since many Countries, Ontario and 48 USA States, notably New York, Illinois, and California have declared a State of Emergency. Boston was the first major city to shut-down the construction industry, along with enormous parts of the economy. That means we are dealing with a national and global pandemic, and not a simple workplace hazardous environment, and therein lies the inherent challenge in establishing a work-related connection.

Health & Safety Vigilance Paramount

Going forward, it is important for members still at work to be aware of anyone on site who has tested positive for COVID-19, and ordered to stay-at-home, quarantined or hospitalized, including self-isolation. This is a workplace health and safety issue that must be disclosed in health and safety meetings between labour management representatives. Open and free flowing information is paramount, and failing to disclose or hiding behind a veil of secrecy, or privacy laws is unacceptable.

Lesson's From SARS Outbreak

Workers and unions should also follow the recommendations of Justice Archie Campbell who investigated Ontario's SARS outbreak in relation to workers in the hospital health care sector. One of his chief findings was "we cannot wait for scientific certainty before we take reasonable steps to reduce risk." And when dealing with "serious

infectious disease outbreaks, the health-care system must follow the precautionary principle" and err on the side of caution. Although Justice Campbell was tasked with investigating how hospitals managed SARS, his findings are sound and good public policy readily applicable to other employment settings.

A recent example is a TTC mechanic in the Duncan Shop who was diagnosed with COVID-19 after traveling abroad. Once the employer was alerted, the 170 employees at the shop, members of ATU Local 113, were sent home to self-isolate, and special cleaning measures and disinfection were enacted, with particular attention to high-touch areas.

Should I File A WSIB Claim

Unless there has been a positive COVID-19 case reported in your workplace, I do not recommend filing a WSIB claim at this time. However, members should submit a *WSIB Construction Incident Exposure Report (CEIR)* if you believe you may have been exposed to COVID-19 because someone at your workplace is suspected or infected with COVID-19. This includes indirect contact by touching communal surfaces, materials and tools in the workplace. The purpose of the CEIR is to gather information about the exposure while it is readily available, should a worker become ill in the future.

In order to have a viable WSIB claim there must be a work injury or disease. An exposure to COVID-19 is not an injury, therefore, you should not submit a WSIB claim until you get sick.

If a previously exposed member develops COVID-19 and there was an infected worker in the workplace, I recommend that you file a WSIB claim. There will certainly be questions regarding work relatedness and causation based on the above legal analysis, and a strong adjudicative reflex to deny COVID-19 claims because the virus is ubiquitous and now transmitting in the general community. The route of acquisition how you contracted COVID-19 will be a key issue in all WSIB claims. The situation is exacerbated because clinicians recognize COVID-19 is hardy virus that can live on surfaces for upwards to three days.

To summarize, the difficulty here is considerable because we are dealing with a microscopic pathogen that you cannot see or detect, including a latency/incubation period before someone may develop COVID-19 symptoms. In the meantime, until job sites are shut-down, members should submit CEIR reports, and exercise your right to refuse under the *Occupational Health and Safety Act*. It is also important to involve a Steward, Business Representative and notify the Hall. Please visit the IBEW Local 353 website for information (www.ibew353.org) and on social media.

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Tribunal Allowed Member Appeal for Trigger Thumb, Cubital Tunnel Syndrome & Permanent Impairment for Carpal Tunnel Syndrome

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



I have published articles on the causal relationship between the physical demands of an electrician's job, which habitually recruits repetitive gripping and squeezing and the development of hand disorders and neuropathies. The most frequent is carpal tunnel syndrome (CTS), followed by trigger finger/thumb, and cubital tunnel syndrome.

Dealing with WSIB can be a frustrating experience for members, myself included, because notwithstanding well documented medical literature and case law regarding a strong causal relationship between the development of hand neuropathies and the job tasks of electrical workers – decision makers frequently rule there is nothing inherently repetitive about the job because job tasks change throughout the day.

In rebutting this nonsensical analysis, I refer to our Electrician Ergonomic Research Study and point to the numerous photo's. Leaving aside the "tool list" it doesn't matter what branch of the Brotherhood you work in, because the key anatomical tool of the trade is your hands. In each and every photo members are using manual or power tools, pulling and stripping wire, and making terminations. The evidence is irrefutable – just open your eyes.

In a recent Tribunal appeal, *Decision No. 1170/18*, an electrician employed at a downtown university developed CTS in 2010. His claim was initially allowed, but the WSIB ruled he fully recovered post-operatively, and did not suffer a permanent impairment. They also ruled the member's cubital tunnel syndrome and trigger thumb were not work related because of a delayed onset. He subsequently underwent two surgeries for trigger thumb and remained symptomatic.

The WSIB exploited the opportunity ruling the members' ongoing hand symptoms were related to the non-compensable cubital tunnel and trigger thumb, and not CTS.

In our legal submissions the union cited a medical report from the family MD, and a medical opinion from Dr. Zvi Margalio, a renowned hand specialist who treats injured workers at a WSIB Hand Specialty Clinic. Years ago I solicited Dr. Margalio's opinion whether the job demands of an electrician represents a risk factor in the development of hand disorders. In formulating his opinion, he reviewed our Electrician Ergonomic Research Study which has been quoted in numerous Tribunal decisions, and is considered determinative. In Tribunal Decision No. 1804//10, Dr. Margalio's opinion was quoted:

I am happy to answer the question in the general case based on review of the attached *Physical Demands Description and*

Electrician Ergonomic Study, which you had kindly provided, describing the specific tasks that an electrician is required to perform. Although there may be other contributing factors, including systemic diseases such as diabetes mellitus, it is my opinion that highly repetitive, manual work such as pulling wire, repetitive or sustained forceful grip and sustained use of vibrating and power tools would be considered a material contributing factor to the development of focal compression neuropathy, including carpal tunnel syndrome or cubital tunnel syndrome.

In the most recent appeal, Vice-Chair Goldman quickly zeroed in on the adjudicative flaws in denying the member's claim. She noted "the Case Manager recognized that there were risk factors for both diagnoses associated with the duties of an electrician." However, "due to the delayed onset of symptoms, the new diagnoses cannot be causally linked to the worker's job duties."

The Appeal Resolution Officer relied on the Board's medical consultant opinion, where Dr. Kanalec, stated the following:

There are risk factors for the development of trigger thumb with the duties of electrician(s) which would include repetitive gripping grasping with the hands and thumb against resistance however this gentleman has not been working for quite some time. Risk factors do exist for the bilateral trigger thumb with respect to job duties of electrician however there has been a significant temporal lag based on him not working post bilateral CTS to explain symptom onset. The bilateral triggering is not related to bilateral CTS.

The cubital tunnel syndrome is not related to bilateral CTS condition but there are risk factors for the development of this condition with respect to the general duties of an electrician, such as repetitive flexion extension of the elbow against resistance as well as prolonged flexion or levering of the elbows during certain jobs however the only problem in this case is that the symptoms came on later, him being off work without any further work exposures of significant.

In essence, WSIB decision makers ruled that the delay in the onset of cubital tunnel syndrome and trigger thumb broke the chain of causation between the work duties, notwithstanding the members evidence that his CTS was initially worse, but once his CTS symptoms settled post-operatively, his other hand issues were more noticeable.

Vice-chair Goldman in allowing the members appeal focused on the issue of medical compatibility and the member's ongoing symptomology ruling:



Based on the medical evidence I find that the worker's trigger thumb condition and cubital tunnel syndrome are compatible with the accident history. As noted above Dr. Kanalec opined that there were risk factors for the development of trigger thumb and cubital tunnel syndrome associated with the duties of an electrician. The worker testified that he had ongoing numbness and tingling in his thumb prior to seeking medical attention for this condition. At the time he reported a disablement injury the most severe symptoms were associated with CTS. I am persuaded by the worker's testimony that he experienced symptoms associated with his thumb and elbow throughout this period, and that the symptoms deteriorated with time causing him to seek medical attention after the bilateral CTS release surgeries. I also note the proximate nature of the areas of injury. The medical article provided by the Tribunal's Medical Liaison Office indicates that trigger thumb as described in the article, tender lump in the palm; swelling, catching or popping sensation in the finger or thumb joints, pain when bending or straightening the finger, correspond to the worker's description of his symptoms some time before he sought medical attention for his conditions.

In the present case the worker cubital tunnel syndrome cannot be considered idiopathic (cause unknown), since clearly the injuries forces have been identified. In coming to my finding that the worker has not fully recovered from his carpal tunnel injury and that his impairment is permanent, I have taken into consideration the fact that the worker's carpal tunnel condition has persisted for a number of years, and that despite physiotherapy and surgery, has failed to resolve. I can only conclude that the impairment is permanent, and that, consequently, the worker is entitled to a NEL award for bilateral CTS impairment.

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Join our Ski Team

We are organizing a ski trip for IBEW 353 members and their families to Arcs Extreme in France on April 6-14, 2019.

Price is \$2,644.73 per person tax included, based on double occupancy.

It includes the round trip airfare from Toronto to Lyon Airport with one stop over in Amsterdam, ski lifts, classes, gourmet food, open bar and non-ski activities.

Please contact Mike Kwiecinski at Mirekkwiecinski225@gmail.com or call (905) 531-5149 by September 15, 2018 if you are interested.

New Members

APPRENTICE HOUSEWIREMEN

Vito Auciello, Julian Baccarella, Michael D'Amico, Timothy Lalone, Anthony-Michael Mastrangelo and Christopher Tomlinson.

APPRENTICE LINEMEN

Peter Allison, James Cochrane, Joseph Johnson, Kendall Mackenzie and Jordan Perry.

APPRENTICE TECHNICIANS

James Bullock, Quincy Guevara, Yousef Iguilem, Anastasia Kastanis-Malloy and Jacob Pearce.

APPRENTICE WIREMEN

Alex Arseneau, Cameron Cerant, Adam Chaplin, Riley Crough, Stefan D'ippolito, Jason Dipasquale, Mark Dobranowski and Derek Fulcher.

APPRENTICE WIREMEN

Kevin Grayston, Jeeva Jeevaratnarajah, Wiktor Kownacki, Jordan Lentze, Jabriel Minawi, Michael Rocks, Brent Wilkinson, Patrick Wojtowicz, Alexander Wuzynski and Edress Zamani.

GROUNDMEN

Michael Kent and Tyrel Kerr.

JOURNEYMEN HOUSEWIREMEN

Russell Decicco and Geoffrey Gordon.

JOURNEYMEN LINEMEN

Nick Araujo and Robert Davidson.

JOURNEYMEN WIREMEN

Lucas Scarlett, Kenneth Sheardown and Yuriy Yamchshikov.

SUBSTATION MAINTENANCE

Natasha Logan

TECHNICIAN

John Van Maren

JOURNEYPersons UPGRADE

Tariq Baksh, Martin Barber, Michael Bastarache, Todd Blouin, Mark Cameron, Troy Carson, Matthew Coates, Ryan Grassl, Kevin Hernandez, Daniel Korman, Stuart Mackinnon, Scott Mckenzie, Tyler Midghall, Joanna Palma, Steve Sirizzotti, Jordan Smith, Chris Sorichetti, Jessie Sousa, Brendan Tanaka, Cristopher Tarangco, Jonathan Telesca, Kyle Ward and Michael Weidenfelder.



Understanding the Nuts & Bolts Whether You have a Viable Occupational Noise Induced Hearing Loss claim (deafness), and the Steps to Follow in Registering a NIHL Claim

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



Deafness claims are a frequent health issue I deal with, because members need guidance and assistance in submitting claims to the WSIB.

Members come into my orbit after an audiologist tests your hearing (audiogram) and advises you have suffered hearing loss, and recommends submitting a claim to the WSIB.

When members contact me, I tell them it is my practice before an Occupational Noise Induced Hearing Loss claim is submitted to the WSIB, that my first step is to review the audiogram to determine whether you have a viable NIHL claim pursuant to WSIB Operational Policy 16-01-04 and section 2(1) and 15 of the *Workplace Safety and Insurance Act*.

When members enter the WSIB system without first allowing me an opportunity to review their hearing test, including any potential anomalies in their audiogram, legal problems invariably arise. You may be unaware, but deafness claims are classified as an Occupational Disease by the WSIB.

WSIB Policy When Adjudicating Work Related Deafness Claim

Please note that there are four key factors the WSIB considers when adjudicating Occupational Noise Induced Hearing Loss claims:

1. Whether there is sufficient hearing loss averaged across 4 frequencies (500, 1k, 2k, and 3 k hertz) with a minimum of 22.5 dB in each ear. There is a higher threshold for a permanent impairment.
2. Is the audiometric profile (slope of graph) consistent with Noise Induced Hearing Loss (characteristic notch at higher frequencies)?
3. Applying the Presbycusis factor, which is an age related off-set for workers age 60 and over, the WSIB subtracts 0.5 dB for each year a worker is over age 60.
4. Whether the hearing loss is symmetrical or asymmetrical (one ear worse than other)?

WSIB Operation Policy 16-01-04 states

Hearing loss in workers occupationally exposed to hazardous noise is an occupational disease (under s. 2(1) and s. 15 of the *Workplace Safety and Insurance Act*) which is peculiar to and characteristic of a process, trade or occupation involving exposure to hazardous noise in Ontario.

Guidelines - Description of the condition

Noise-induced hearing loss (NIHL) is a permanent loss of hearing in both ears resulting from sensorineural (inner ear) damage due to prolonged, continuous, hazardous noise exposure.

Entitlement

Workers with occupational NIHL that is sufficient to cause a hearing impairment may be entitled to benefits. Entitlement to health care and rehabilitation benefits begins with a hearing loss of 22.5 dB in each ear when the hearing loss in the 4 speech frequencies (500, 1000, 2000, and 3000 Hertz) are averaged.

The following is persuasive evidence of work-relatedness in claims for sensorineural hearing loss:

- **continuous exposure to 90 dB(A) of noise for 8 hours per day, for a minimum of 5 years, or the equivalent, and**
- **a pattern of hearing loss consistent with noise-induced sensorineural hearing loss.**

A presbycusis (aging) factor of 0.5 dB is deducted from the measured hearing loss (averaged over the 500, 1000, 2000, and 3000 Hz frequencies) for every year the worker is over the age of 60 at the time of the audiogram. The hearing loss that remains after the presbycusis adjustment is then used to determine entitlement to benefits.

Entitlement to health care and rehabilitation benefits is available when the adjusted hearing loss is at least 22.5 dB in each ear.

Typical Noise Exposure that Electricians Experience

Most electricians age-50 and older were exposed to hazardous noise when working with ramset guns in the early part of their working career, or working in proximity of others that did. Hazardous noise was ubiquitous in most construction environments, including industrial plants, and the sources of acoustic trauma include exposure to high velocity drills, saws, diamond core drilling, compressor rooms, generators, heavy equipment, miscellaneous power tools, working next to other noisy trades (tin knockers and labourers), fire alarm testing, general construction, and noise from manufacturing plants and related manufacturing processes, etc.

Another consideration is that members in the early part of their working career did not wear hearing protection, and in later years, used inadequate PPE, such as foam ear plugs.



Members Should Document Noise Exposure

One of the challenges in submitting a deafness claim is documenting your work history and noise exposure. This is a daunting task trying to recollect 35-50 years of historical noise exposure. In fact, in most instances it is impossible.

To assist, the union will generate your work history based on our hiring hall records of contractors you were dispatched to over the years. However, I instruct members to jot down on a separate piece of paper any jobs that were particularly noisy. For instance, some members worked in bottling, car or stamping plants, and these were noisy places to work, particularly if the plants were operational. We've had members work in cement factories where large steel balls the size of bowling balls turned inside a long cylindrical steel tube that rotated and crushed and pulverized the limestone aggregate. Or members who worked at the airport near the jets.

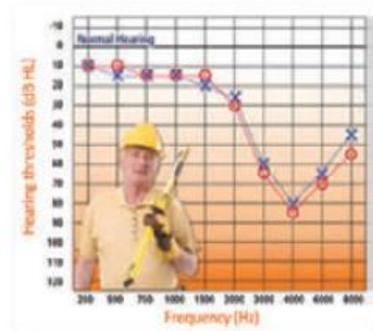
In my experience, most members experienced workplace noise over their working career, and since deafness is a gradual process, they are unaware they have a problem, until the wife, or kids pester dad that he can't hear, and the TV volume is on high. Then the light goes off to get a hearing test, which confirms a hearing loss, and then I start receiving calls for advice.

If Hearing Loss Severe, an ENT Assessment Is Required

For a worker to have a viable NIHL claim they must have a minimum of 22 dB in each ear to qualify for hearing aids and batteries. In my opinion, that's the prize in a deafness claim.

Often time's members have significant hearing loss. For instance, if the hearing loss is greater than 25 dB in one ear, and 35 dB in the other,

you may be eligible for a permanent impairment award, which attracts a small payment. I'll also recommend the member be referred to an Ear Nose and Throat (ENT) specialist because the WSIB will require an assessment by a specialist.



Necessary Documents to Submit NIHL Claim

When submitting a NIHL claim to WSIB, you need to complete a NIHL application (2 pages). You'll also need to attached a copy of your audiogram (hearing test), which is typically 1-page. And the union will prepare a work history. All these documents should be submitted together when registering a deafness claim with WSIB.

Please note that the WSIB is tasked with making adjudicative decisions, and you'll have to let the process unfold to see what they ultimately decide. Unfortunately, there is a 6-month delay due to a backlog of deafness claims before your file is reviewed and a decision made.

Remember, be sure to send me a copy of your hearing test (audiogram) by fax or email attachment (PDF file), and I'll provide you with my opinion whether you have a viable Occupational NIHL claim, and we'll get things rolling from there.

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353 Retirees' Computer Club

The Retirees are pleased to announce the formation of a computer club that will be focusing on Apple products. The monthly sessions will be of a casual drop-in nature, far removed from the typical classroom format and will be conducted in an environment of open discussions, workgroups and presentations.

Topics will cover the use of iPhones, iPads, MacBooks, iMacs and Apple TV. Learning

how these devices interact with each other will result in a more enjoyable experience for our members.

No registration is required at this time; just bring your own personal Apple devices with you. For those who currently do not have an Apple product, there will be devices available for sharing.

When: First Wednesday of every month

Time: 10:30 am to 12:30 pm

Where: West End Training Centre, 3185 Orlando Drive, Mississauga, ON.

Looking forward to you joining our friendly group and enjoying a coffee with us. All 353's retired members, members' spouses/partner and unemployed members are welcome!

In Brotherhood,

William O'Halloran & Len Zawaski



Common Pitfalls & Problems When Members Break Teeth in the Course of Employment - Beware – WSIB Must Approve Dental Claim Before Treatment



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

That's right, members frequently break teeth when they are struck in the face, typically after pulling on something with their pliers, when the pliers slip flying backwards hitting your mouth.

Most workers don't know that WSIB expects to receive a Dental Form from the dentist documenting the damaged teeth, and await approval before proceeding with dental work completed.

Dentists Averse to Dealing With WSIB

Since Dentists do not fall under the *Canada Health Act*, they have tremendous latitude in deciding whether they wish to offer their dental services to an injured worker, usually on the basis of the administrative hassle dealing with the WSIB, and secondly, the fee schedule.

Members who have broken teeth at work notice immediately the disinclination that dentists have for dealing with WSIB, who usually steer the worker onto the union benefit plan, versus workers compensation.

It All Boils down to Peso's

If you run a restaurant, are you going to give customers a free bowl of soup? Conversely, when you work for your employer, do you expect to be paid next week? In my experience problems arise when workers proceed with emergency dental treatment, pay upfront, usually cash or credit card, then seek reimbursement from WSIB. Health Professionals, such as Dentists, according to the law, cannot charge the patient. When these situations occur, WSIB expects the Dentist or Dental Surgeon to reimburse the patient, and WSIB will pay the health professional directly based on their fee schedule.

A decade ago, I had a case that was adjudicated by the Ontario Dental Association, because in order for the members' dental bill to be paid, the Dental Surgeon first had to reimburse the patient, and be reimbursed based on the WSIB dental fee schedule. And any costs not covered by the WSIB cannot be charged to the patient (extra billing). Getting that money to flow back to the patient is like water running uphill.

Dentists are not obligated to treat patients without being paid, and in my experience, want to see the colour of your money when they provide dental services. If you have a regular dentist, they'll also know that you



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have a good union dental plan, and bill Great-West Life for dental care. However, most dental injuries, such as a chipped or broken teeth, do not require emergency surgery and WSIB expects to receive a Dental Estimate (Form 0278) before your dentist proceeds with dental work.

Each case is unique, however WSIB does recognize that certain emergency dental treatment can be provided without first getting WSIB approval, but the paperwork must be submitted without delay.

The average member is surprised to learn that WSIB will not reimburse Great-West Life when they submit any dental costs not covered by GWL, and told by WSIB that unpaid dental costs are a form of co-pay, which will not be covered.

WSIB Policy – Dental Injuries

OPM 17-03-03 (Dental Entitlement) sets out the WSIB policy regarding dental entitlement, including the circumstances of emergency



treatment. In all claims, a **Form 0278** must be submitted before proceeding with dental work.

OPM 17-03-01 (Health Care Fees), also sets out the Board's general authority to set and pay health care fees, as well as penalties for late submission of health care accounts.

Most dentists will be aware a patient has broken their teeth as a result of a work accident. And in fairness, they know they are obliged to submit a Dental Estimate Form to the WSIB. And that's when a dental claim goes off the rails.

In some respects, I understand the disinclination in the dental community to accept and treat injured workers who have suffered dental injuries which are to be paid by the WSIB. Firstly, WSIB may not cover 100% of the cost, and secondly, the dentist is prohibited from extra billing. From the dentists' perspective, WHY should they subsidize the patient for services they render?

It is at that precise moment when the member has three choices. Submit Estimate to WSIB (often unaware or ignored), Pay by Visa or Debit Card (highly unlikely), or submit an invoice to the union insurance carrier/GWL (bingo!).

For members who suffer work related dental injuries, you do have coverage by WSIB, but the proper paperwork must be submitted. If you pay out of pocket, WSIB WILL NOT reimburse the patient directly, upon receipt of a paid invoice for dental services rendered as this is prohibited under the law (s. 33(5)). Nor are Dentists allowed to extra bill above the WSIB dental fee schedule.

It seems to me WSIB equates a dental expense submitted to our union insurer (GWL) being analogous to the patient paying the dentist directly. That is wrong. How is a dentist invoice any different when the union seeks reimbursement for physiotherapy or chiropractic treatment when a claim was denied, and we seek health care costs after we win an appeal? Frankly, I don't see the distinction.

My position is the WSIB is obligated to reimburse our insurance company (Great-West Life), to the extent permitted by the WSIB dental fee schedule, and remit to the dentist any additional fee's that were not covered by the union's third party insurer.

Section 33 of the *Workplace Safety & Insurance Act* sets out the statutory framework regarding an injured workers right to health care, and the prohibitions and limitations on workers paying for their treatment:

Entitlement to health care

33 (1) A worker who sustains an injury is entitled to such health care as may be necessary, appropriate and sufficient as a result of the injury and is entitled to make the initial choice of health professional for the purposes of this section.

Arrangements for health care

(2) The Board may arrange for the worker's health care or may approve arrangements for his or her health care. The Board shall pay for the worker's health care.

Same

(3) The Board may establish such fee schedules for health care as it considers appropriate.

Penalty for late billing

(4) If the Board does not receive a bill for health care within such time as the Board may specify, the Board may reduce the amount payable for the health care by such percentage as the Board considers an appropriate penalty.

Prohibition

(5) No health care practitioner shall request a worker to pay for health care or any related service provided under the insurance plan.

No right of action

(6) No action lies against the Board to obtain payment of an amount greater than is established in the applicable fee schedule for health care provided to a worker. No action lies against a person other than the Board for payment for health care provided to a worker.

Bottom line, be sure your dentist submits a Dental Form to WSIB before proceeding with dental work. If your dentist refuses to deal with the WSIB, which is not unheard of, call me for instructions. At the end of the day, you should not have to pay for teeth broken in the course of employment, which is no different than treating a work related broken arm.

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Many Workers Fail to File WSIB Claims for Various Reasons, However, Ignorance How to Submit a WSIB Claim, and Fear of Layoff, Are the Main Reasons - There Are Three Disability Insurance Systems



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

There are three insurance schemes workers can submit disability applications. Equally important, they are typically not stackable benefits, except in very limited circumstances. The three schemes are WSIB, Canada Pension Plan Disability, and third party insurers (Canada Life, Manulife, Sun Life etc.).

Government plans are governed by legislation as in the case of CPP-D and Workers Compensation, or a plan document when there is a private insurance disability provider.

Not long ago when a member was in receipt of Long Term Disability benefits from Canada Life, and they received CPP-Disability benefits, Canada Life would deduct, buck-for-buck, the CPP-D benefit. A couple of years ago our Benefit Plan Trustee's changed that practice so now members in receipt of LTD benefits no longer have their CPP-D benefit clawed-back. This was a great decision. However, WSIB still has a buck-for-buck offset if an injured worker is granted CPP-D benefits.

CPP-D Applicants Must Have Severe & Prolonged Disabilities

Bear in mind, there is no universal eligibility standard or criteria among the three disability schemes. In CPP-D claims, an applicant's disability must be "severe" and "prolonged" as those terms are defined in law.

Private Third Party Insurance (STD & LTD)

In third party disability insurance claims, there are usually two phases of eligibility. During the short-term disability period, which is typically 24-30 months, an applicant must be disabled from their own occupation. When a STD claim transitions to long-term disability, or LTD, the eligibility bar rises and a claimant must be disabled from any occupation, short of selling pencils and peanuts in the street. It is during this transition that many disabled persons no longer meet the eligibility criteria for LTD benefits.

In workers compensation cases the compensation board only recognizes, and compensates, for work related injuries and disability, whereas CPP-D includes all disabilities and injuries regardless of etiology (e.g., MVA, work related, congenital, personal injury, etc.). Most third party disability insurers in their plan document stipulate they do not cover MVA related injuries because the first insurer of record is the private auto insurer (e.g., LU 353/Canada Life). I recommend members pay for enhanced wage loss protection from your auto insurer,

or else you might only receive \$450 per week should you get injured in an MVA. The extra coverage is not expensive.

When injured workers are in receipt of full Loss of Earnings benefits from WSIB, I discuss with members the downside risk by applying for CPP-D benefits because this results in an automatic dollar-for-dollar offset from their WSIB benefits. There is another consideration, because WSIB cannot deduct the entire CPP-D benefit if it was granted for non-work related health reasons. They can only deduct a pro-rated portion of the CPP-D related to the work injury. This is called apportionment.

Furthermore, there is no legal requirement for injured workers to apply for CPP-D, but some do because WSIB denied the claim and they needed money. If a worker is granted CPP-D, their CPP benefits at age-65 will adjusted even though the worker did not work for years and no CPP payroll deductions were made.

Depending on circumstances, I will encourage injured workers to apply for CPP-D once their WSIB Loss of Earnings benefits are locked-in at 72-months from the date of injury, which is a statutory requirement under 44(2) of the *Workplace Safety and Insurance Act*. The financial benefit or advantage to the injured worker is they can collect full WSIB benefits, and CPP-D without the offset after their WSIB LOE benefits are locked-in.

CPP-D & Minimum Qualifying Period (MQP)

However, there is one important wrinkle. When these disabled workers retroactively apply for CPP-D several years after they last worked, their claims are subject to the Minimum Qualifying Period (MQP) under the Canada Pension Plan legislation and regulations.

Very simply, if a worker was injured and disabled in June 2014, which is the last time an employer made CPP contributions to the workers account, but they applied for CPP-D in September 2020, Service Canada, who adjudicate CPP-D claims will determine whether the claimant met the eligibility criteria of having a "severe" and "prolonged" disability in June 2014, and not when they applied in 2020.

The CPP legislation and regulations stipulate that a worker must satisfy the eligibility criteria of a disability that is "severe" and "prolonged" within 24 months from when CPP contributions were last made to the workers account. This is the MQP.



Another issue that arises is doctors and claimants assume all health issues that developed after the MQP will be considered when CPP-D adjudicates their application. Claimants may have developed heart ailments, or other physical disabilities including mental health issues after the MPQ, however, any medical conditions diagnosed after the MQP will not be taken into consideration when assessing whether a claimants disabilities are “severe” and “prolonged.”

Two (2) Years of Retro Payments for Late Entrant CPP-D Applicants

In addition, there is another legislative quirk. Workers who retroactively apply for CPP-D and the claim is allowed, a claimant is only entitled to 2-years of retroactive CPP-D benefits from the date they applied for CPP-D.

Psych Injuries Present Unique Challenges - Level of Disability

In my experience, psychiatric/psychological injuries can be difficult to adjudicate because there is a tendency by insurers to characterize these as “illnesses of convenience” in the absence of pathology to correlate symptoms. They don’t say that, but they think it.

A psychiatric diagnosis is made by a mental health professional who will document the DSM diagnosis, treatment, mental status examination, medication, prognosis for return to pre-accident work, return to work in a modified capacity, and prognosis for return to work in any capacity.

Another important piece in determining a person’s level of psychological disability is the Global Assessment Function scale (GAF). Mental Health Professionals will also document the patient’s GAF.

Can Claimant Return to Work, Even Part-time

Finally, and this is very important. CPP-D will also investigate and draw inferences from the medical documentation whether a claimant is capable of performing any kind of remunerative work, including an elemental service occupation, even part-time work. They are not focused on the pre-injury job or a full-time work. As soon as there is an indication that a claimant has the residual capacity for any kind of remunerative work, and can work part-time 8-12 hours per week as a gas station attendant, cashier or customer service representative, the CPP-D application will be denied.

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Journeypersons Upgrades June 2022

Anthony Aiello, Daniel Alves, Alexander Atlija, Jesse Balkovec, Stanislav Barchuk, Brodie Beaudry, James Bellemore, Nicholas Brown, Matteo Campea, Nathan Carr, Christopher Cenic, Ryan Clarke, Adrian Coombs, Marcelle Costa, Lorenzo D’alessandro, Chris Dames, Marc Di Fonzo, Nicholas Digirolamo, Sebastian Distefano, Jacob Doyle, Evan Flanagan, Susan Flanigan, Cole Francis, Carmine Gentile, Mihalis Hatzipavlou, Alec Holtby, Abdullah Hossain, Edwin Huamani Cuevas, Nickolas Hull, Matthew Imola, Jonathan Laidlaw, Timoni Langoya, William Liladrie, Charles Magyari, Mazen Malawi, Adam Mazzotta, Carter Mcghie, Colin Mclean, Thomas Miles, Joshua Minawi, Luca Minchella, Brendan Mitchell, Leonard Moreira, Simon Nicholas, Carly Nodwell, Lucas Paglia, Dusan Rados, Anthony Saccon, Narinderpal Sandhu, Matthew Shea, Matthew Shmorgun, Mathew Tibaut, Adam Tobe, Ryan Trepanier, Domenic Trimboli, Christian Wachna, Cameron Webb-Pantaleo and Danny Wong.

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Legal Implications When Injured Workers Are Disciplined or Terminated

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



I frequently receive inquiries from injured workers whether an accident employer can terminate them for cause. Some members are under the false impression that an accident employer cannot terminate an injured worker. If you believe that, please recalibrate your thinking, because they can terminate an injured worker for cause, and if an injured worker loses their job due to culpable misconduct, this can and will impact an injured workers ability to collect Loss of Earnings (LOE) benefits under the *Workplace Safety and Insurance Act*. It's that simple.

There is also the added dynamic in which employers' ramp up discipline for myriad infractions, including safety, to build a progressive discipline case, then ultimately rely on a culminating incident to justify a termination. In my experience, a layoff is always preferable, because a termination will limit a workers ability to collect loss of earnings benefits from workers compensation.

Another emerging problem is when injured workers request a "medical layoff" in the belief this is a clean way to sever the employment relationship. However, a worker requested medical layoff will impact an injured workers ability to collect workers compensation benefits, as several members working in Alberta have discovered. So be careful, and read the fine print on "medical layoff" forms because it clearly states this may impact your ability to collect workers compensation benefits.

In essence, when an injured worker is terminated for cause, this is considered a non-compensable "intervening event" unrelated to the compensable injury, therefore, LOE benefits cannot and will not be paid pursuant to section 41 of the *Workplace Safety and Insurance Act* ("the WSIA").

Case Law Regarding Terminations and Entitlement to Benefits

The following Tribunal case summaries highlight the inherent challenge facing decision makers when adjudicating appeals where injured workers are disciplined and terminated by an accident employer:

- **Decision No 1601/08** in which the injured worker's employment was terminated due to misconduct related to a complaint against him of sexual harassment. The Vice-Chair found that

the employment was not terminated solely due to misconduct, but rather that the compensable back condition had also been a factor in the termination of his employment, and the worker was awarded LOE benefits subsequent to his termination.

- **Decision No 2540/08** which concluded that the worker's termination was due to an employment situation which was not related to the compensable injury and over which the Tribunal had no jurisdiction. The worker was not entitled to LOE benefits because his loss of earnings did not result from the compensable injury.
- **Decision No. 2035/00** which found that when workers are dismissed from suitable modified work at no wage loss for just cause, the workers must be deemed to have taken themselves out of the workplace through their own actions, and a loss resulting from such actions will not be compensable in the absence of other relevant circumstances. Such a loss cannot be said to be a result of a compensable workplace accident. In that case, the worker was dismissed for just cause, having repeatedly violated the employer's rules concerning break time and leaving work early. The worker was not entitled to further benefits or services.
- **Decision No. 2093/08** which concerned a worker who had returned to modified work but had his employment subsequently terminated. The Vice-Chair agreed with *Decision No. 2035/00* in that workers who are not experiencing a wage loss and are fired for just cause are deemed to have taken themselves out of the workplace through their own actions, and a loss resulting from such actions is not compensable.
- **Decision No. 655/08** which found that an injured worker who was performing modified work had brought about the termination of his employment by walking off the job, and because of personality conflicts with management and co-workers, rather than because of his injury. The worker was not entitled to further LOE benefits.

A common theme in these decisions is that where an employers' reasons for terminating an injured workers employment are not related to the work injury, the worker will usually not be entitled to LOE benefits for the period subsequent to the termination. In particular, where there has been a determination that the termination was for



just cause, the worker will usually not be entitled to further LOE benefits, except for medical treatment e.g., injury related surgery.

In **Decision 2520/08**, a case where I was the representative, a Local 353 lineman was terminated when he went AWOL and failed to contact his employer for 1-week. Although we won the appeal, the employer filed a reconsideration of that decision, and another Vice-chair disagreed with the earlier ruling but did not overturn the decision for technical reasons. However, the Vice-chair did review the relevant provisions that governs the payment of LOE benefits in section 43:

43 (1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,

- (a) the day on which the worker's loss of earnings ceases;
- (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
- (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
- (d) the day the worker is no longer impaired as a result of the injury.

Section 43 states, a worker is entitled to payments under that section when he/she has a *loss of earnings as a result of the injury* (emphasis added). The focus of the analysis therefore in any case involving a claim for LOE benefits is whether the worker has a loss of earnings as a result of the compensable injury. The reconsideration Vice-Chair concluded:

When an injured worker is terminated from employment, the question arises as to whether the ensuing loss of earning is a result of the injury or some other reasons... In my view, it

is beyond the scope of the Tribunal's legislative authority to import common law wrongful dismissal principles under section 43 of the WSIA, which is only interested in deciding whether a worker's loss of earnings is the result of the injury. The Tribunal is a specialized body dealing with workplace safety and insurance law matters, it is not a specialized body mandated to decide whether a worker has been terminated for cause or not... As noted by Decision No. 567/09, the key question in determining whether the worker has a loss of earnings "arising from" the injury is whether the compensable injury played a role in the termination of the worker's employment.

To summarize, members must be mindful and stay off the discipline radar because you leave yourself exposed to legal complications with WSIB. Obviously, the union will grieve unjust discipline that doesn't rise to a just cause standard, particularly members who are targeted for zealous enforcement of the rules or differential treatment that is suggestive of *anti-injured worker animus*. As many injured workers can attest, their workplace is at times politically charged and interactions with management like the dance of the scorpions. But understand this important point, the WSIB is not the court of competent jurisdiction to adjudicate labour relations issues (grievances), particularly when it involves an injured worker. That remains the domain of the grievance procedure and labour board.

As the Holiday Season approaches, I want to thank-you for your continued support and wish you, your family and loved ones, a safe and enjoyable holiday.

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Pension Gifts

The following pensioners are invited to the South Unit Membership meeting at the Union Office, 1377 Lawrence Avenue East, Toronto on Thursday, December 11, 2014 at 7:00 p.m. to receive their pension gifts:

Michael Lawrence and Emanuel Lamendola.



WSIB Myth - A Driving Restriction On a Functional Abilities Form (FAF) Only Valid if A Doctor Notifies the Ministry of Transportation – Medical Suspension

By: Gary Majesky, WSIB Consultant & Executive Board Member



In the mosh-pit of workers compensation a frequent controversy arises whether an injured worker has a driving limitation (restriction). The WSIB Functional Abilities Form or FAF asks health professionals whether there is a restriction in taking public transit or driving. When a doctor ticks (Ø) the box indicating a driving restriction, typically due to mobility or medication side effects, the howls start whether the doctor notified the Ministry of Transportation of a medical suspension. Usually the employer rep barks “did your doctor report your license suspension to MTO?”

Over the years I have dealt with many representatives, including WSIB decision makers who accept as gospel that a FAF driving restriction is only valid if a medical licence suspension was processed. With great respect that position is misinformed. Hopefully, the following information gives you a better insight into medical license suspensions and how this potentially impacts injured workers.

Physicians' Duty to Report Patients

In Ontario the law requires that physicians report patients who, in the opinion of the physician, may be unfit to drive for medical reasons. The mandatory reporting requirement for physicians is found in Section 203 of the Highway Traffic Act. The requirement states:

- Every legally qualified medical practitioner shall report to the Registrar the name, address and clinical condition of every person sixteen years of age or over attending upon a medical practitioner for medical services, who, in the opinion of such medical practitioner is suffering from a condition that may make it dangerous for such person to operate a motor vehicle.
- No action shall be brought against a qualified medical practitioner for complying with this section.
- The report referred to in subsection (1) is privileged for the information of the Registrar only and shall not be open for public inspection, and such report is inadmissible in evidence for any purpose in any trial except to prove compliance with subsection (1). R.S.O. 1980, c. 198, s. 203.

Similar provisions are in place for optometrists to report visual conditions (s. 204), which have been in place since 1968.

What Conditions to Report

The Canadian Medical Association also publishes the “*Physician's Guide to Driver Examination*” to assist physicians in determining which conditions may make it dangerous to drive safely. The guide is available from the Canadian Medical Association.

How the Ministry Determines Licence Status

The Ministry considers the details of the individual's clinical condition reported by the attending physician, using guidelines established by the Canadian Medical Association, and advice from the Ministry's Medical Advisory Committee, whose members are experts in the fields of neurology, cardiology, psychiatry, endocrinology, ophthalmology, internal medicine, substance abuse, geriatric medicine and physiatry. The ministry relies on information provided on this form to help identify individuals who are at significant risk so that immediate action to suspend the licence of any individual reported to have a chronic or deteriorating condition that is likely to impair judgement or psychomotor skills or to be experiencing recurring or unexplained episodes of loss of consciousness.

If an individual is reported to have a clinical condition that is well controlled and the individual is under physician care, the ministry generally does not suspend the licence. Where stability may be questionable, the ministry may request follow-up medical information to confirm stability or request the individual undergo a driving examination or other appropriate assessments.

Tribunal Case Law Regarding Driver License Suspension

In a noteworthy decision, Vice-chair Dan Revington, and former Tribunal Counsel for a number of years, addressed the issue of driver's licence suspension in *Decision No. 1672/18*:

[48] In his submissions the employer's representative has stressed that the worker's allegation about being unable to drive was doubtful because the worker's doctor had not suspended the worker's driver's license. I assume the employer's representative is referring to section 203(1) of the *Ontario Highway Traffic Act* (R.S.O. 1990 c. H.8). Section 203(1) requires “every legally qualified medical practitioner” to report to the Registrar of Motor Vehicles the “name, address and clinical condition of every person sixteen years of age or over attending upon the medical practitioner for medical reasons who, in the opinion of the medical practitioner, is suffering from a condition that may make it dangerous for the person to operate a motor vehicle.” Section 14 of *Ontario Regulation 340/94* and section 47 of the *Ontario Highway Traffic Act* authorize the suspension or cancellation of a driver's licence where a report under section 203 has been received.

[49] I do not agree that it was necessary for the worker's driver's licence to be suspended for there to be a finding she was



restricted from driving her standard transmission vehicle during her recovery from her workplace injury.

[50] Every year thousands of Form 8s are submitted to the Board by health professionals. Each Form 8 has a box that may be ticked to indicate if the injured worker has restrictions on his or her functional ability to operate a motor vehicle. While it is true that a report submitted pursuant to section 203 of the *Ontario Highway Traffic Act* would be evidence that supports a finding that the worker could not drive, in my view submitting such a report is not a prerequisite to finding the worker has restrictions that make her unable to drive to accept modified work. The fact Dr. McCrae did not make a report under section 203 of the *Ontario Highway Traffic Act* does not negate that his opinion provides medical support for the worker's inability to drive her vehicle during the period of time at issue.

Hopefully this article exposes the myth that a driving restriction isn't valid unless your Physician reports a medical licence suspension to the MTO. As you can see, that isn't the case, and feel free to distribute and rely on this information if you are dealing with a similar issue in your workplace.

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Working at Heights & WHMIS Training

Working at Heights certification is now required prior to being eligible for Dispatch. Please call Cindy in the Education department at (416) 510-5259, to book a seat in the next available daytime class. This training is **NOT available to Apprentices or Low-Rise members or members who are currently working.**

Working at Heights Training will be offered to *out of work members* at the following times:

Toronto Training Centre – Mondays at 8:30am
Mississauga Training Centre – Wednesdays at 8:30am
Oshawa Training Centre – 1st and 3rd Thursdays at 8:30am
Barrie Training Centre – 3rd Thursday at 8:30am

Working at Heights Refresher Training will be offered to *out of work members* at the following times:

Toronto Training Centre – Tuesdays at 11:00am
Mississauga Training Centre – Thursdays at 11:00am
Oshawa Training Centre – 2nd and 4th Wednesday at 11:00am
Barrie Training Centre – 4th Thursday at 11:00am

WHMIS Training will be offered to *out of work members* at the following times:
Toronto Training Centre – Tuesdays at 8:30am
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Oshawa Training Centre – 2nd and 4th Wednesday at 8:30am
Barrie Training Centre – 4th Thursday at 8:30am





Early & Safe Return to Work is a Legal Requirement Under the Law, But Members Need to Understand Some Basic Concepts Regarding their Rights & Obligations After They Are Injured



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

A frequent controversy is whether an injured worker can return to work immediately after an injury. In most instances members are able to perform modified duties the day after an injury. However, some members cannot, not cleared by the treating health professional to return to work on modified duties, even though the employer is offering taxi service to/from work, modified duties in the office, and more frequently, work-at-home.

In spite of these aggressive return to work tactics, there are many instances when workers are not fit and totally disabled. Recently, a large contractor told an injured member who was not cleared to return to work that “your doctor doesn’t know what he’s talking about.” As a general principle, I always err on the side of the treating health professional, since they went to medical school, assessed and treated the injured worker. I also advise members they should follow the advice of your doctor because you have a legal obligation to cooperate in health care, which means follow the doctors’ directions.

Law and Policy

It is codified in both the Workplace Safety and Insurance Act, and WSIB policy that the workplace parties must cooperate in an Early and Safety Return to Work (ESRTW). Furthermore, it is expected that an employer will cooperate in bringing an injured worker back to work. It is also expected that an injured worker will attempt and try the modified work, and if there are problems, the parties are obliged to continue to search for alternate modified duties. Failing a successful return to work in which the workplace parties have demonstrated and exhausted all options at finding suitable and productive work, an injured worker’s claim for LOE benefits paid by WSIB is more credible.

In my experience, employers act as though they are the WSIB and demand an injured worker return to work. All employers are motivated to prevent a lost time claim, and presume a worker is able to perform some form of suitable work.

Work-at-Home Analysis/Objection

Pre-Pandemic, it was easier to rebut work-at-home scenario’s, but COVID-19 has changed the employment landscape. Today it will be more difficult to rebuff modified duties at home reading blueprints, as-builds, etc. Again, this turns on a workers capacity to function i.e., pain, medication side effects, cognition, mentation, etc.

Prior to COVID-19, I challenged work-at-home arrangements, but the dynamic has changed since the Pandemic struck because 95% of WSIB employees are now working remotely from home, as is the Workplace Safety and Insurance Appeals Tribunal. Ditto for banks, insurance companies and many governments employees.

When this issue arose in the past I adopted the following rationale when the WSIB and employers peddled at-home concocted modified work. The union relied on a decision from a past Director of the WSIB Construction Sector, regarding Work-at-Home. He stated:

The work must be safe, productive, consistent with the IW’s functional abilities, and to the extent possible, restores their pre-injury earnings.

When considering if an offer of work is safe, WSIB staff would review whether the work poses a health or safety risk to the worker (e.g., should not cause re-injury or a new injury), to co-workers, or to third parties. Staff must also consider whether the work is performed at a worksite that is covered by either the *Occupational Health and Safety Act* (OHSA) or the *Canada Labour Code*, and the worker has the functional ability to travel safely to and from the proposed worksite. A worker’s permanent home is not covered under the OHSA or CLC.

We also discussed the definition of suitability in terms of whether the work is ‘productive’. Productive work is work that the worker has or is able to acquire the necessary skills to perform, and whose tasks provide an objective benefit to the employer’s business.

In terms of an injured worker reviewing safety manuals (either at home or work), this would not be considered ‘productive’ under the definition of suitable work as it does not provide an objective benefit to the employer’s business. I explained that while reviewing the manuals may help to enhance the worker’s knowledge of health and safety, it does not in itself permit the IW to acquire new skills, generate revenue or increase business efficiency.

Case Law, Early & Safe Return to Work

In reviewing the legal authorities, there is settled jurisprudence where a finding that modified work offered by an employer is suitable has potentially significant and far-reaching consequences for a worker’s entitlement to benefits. Generally, when a worker who refuses suitable work **LOE** benefits are denied or reduced (see *Decision 2189/14*). In *Decision 759/12*, a Tribunal Vice-Chair ruled:

Even if the work offered by the employer had not been suitable, the worker would not have been entitled to **LOE** benefits. The worker failed to co-operate in ESRTW. Non-co-operation can lead to a reduction or suspension of benefits. The ramifications of non-co-operation had been explained to the worker in a letter from the Board. Co-operation in ESRTW is more than seeking and following medical advice and treatment. Communication

is a key to successful ESRTW. In this case, the worker failed in this responsibility on numerous occasions. He did not remain in contact with the employer despite repeated attempts by the employer to reach him, nor did he contact the employer after receiving letters from the Board and being advised to do so by his nurse case manager.

Workers Reliance on Treating Family MD in ESRTW

In *Decision No. 1601/05*, Vice-Chair McCutcheon, now Chair of the Workplace Safety and Insurance Appeals Tribunal addressed the issue of a workers desire to obtain the family physician's opinion regarding his fitness to return to work because of significant pain. The initial ER physician had cleared the worker for modified duties, but the worker wanted to be assessed by his Family MD. The Vice-Chair ruled:

In summary, after initial treatment at the hospital, the worker continued to experience significant pain and wanted to see his family physician before returning to work. He communicated this to his employer. I find this was entirely reasonable, given the serious nature of the accident. The worker then saw his family physician, who recommended two to four weeks off work. On April 14, 2003, the worker returned to modified duties, less than two weeks after the accident. In a case such as this, the worker's time off from work gave him time to recover from the initial severe pain he experienced following the accident. I find that the worker did not fail to cooperate with ESRTW or health care, and acted reasonably in following his doctor's recommendations. The ARO correctly decided that the worker was entitled to benefits for the period in question.

Another common controversy that arises is when a worker is advised by the doctor to remain off work for 1-2 weeks after an injury. In response, WSIB Adjudicators focus on the functional abilities outlined on page 2 of the Form 8 or Functional Abilities Form to override the treating health professionals' medical opinion to remain off work. WSIB then concludes the modified work is suitable and within the medical/functional limitations that were documented. In challenging these decisions I refer to *Decision No. 2222/05* whenever a member's claim for Loss of Earnings benefits is denied:

Cooperating in ESRTW does not mean that the worker has to attempt to return to modified work before he is medically capable of doing so. For that reason the WSIA and the consequent Board policy provide that a worker is entitled to LOE benefits during that phase if he cooperates in health care measures. A worker can be able to lift certain weights, sit and stand for some time and still not be medically capable of working even at light duties. Such was the case here. The worker cooperated in ESRTW efforts by following the recommendations of his family doctor who assessed him regularly during the period in question and documented his situation. See also *Decision Nos. 1601/05* and *2024/10*.

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"A" members dues are \$57.00 per month. Each member is responsible for the payment of their dues.

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- A – G January 1st, April 1st, July 1st and October 1st**
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- Q – Z March 1st, June 1st, September 1st and December 1st**



Tribunal Rules In Members Favour that He was Entitled to Benefits After Not Returning to Modified Duties in the Pre-Fab Shop Even Though the Contractor Offered Modified Work

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



Over the past 25-years I have witnessed a lot of changes at the WSIB, and sadly, the trend line is not positive. At one time, the Board had investigators on staff who were dispatched to gather outstanding information, and statements from witnesses that were invaluable. The Board also had ergonomists and work site analysts, typically health professionals who visited workplaces to evaluate whether the modified work was suitable, and if not, what changes were necessary. These support services are long gone and in its place are Return to Work Specialists (RTWS), who visit workplaces and coordinate return-to-work interventions. No offence to the Board, the current RTW process is lacking, deliberately so. The following case, *Decision No. 358/22*, discusses important legal concepts regarding an Early and Safe Return to Work (ESRTW).

Member Ruptured Anterior Cruciate Ligament

On November 29, 2019 a member was employed as a foreman working for a large electrical contractor when he pushed a transformer in place using his left leg and felt a pop in his left knee.

His knee injury claim was allowed, but surgery to repair an ACL rupture was delayed until June 26, 2020 because of COVID. He was paid full LOE benefits from June 26, 2020 to September 8, 2020, inclusive.

RTWS Concluded Suitable Work Was Offered

The Board referred the file to a Return to Work Specialist (RTWS) and a teleconference meeting occurred between the workplace parties on September 8, 2020. The RTWS determined that the essential duties of the worker's pre-injury job exceeded the worker's physical limitations, however, the RTWS concluded that the employer offered alternate work in the Pre-Fab shop that did not require heavy lifting or prolonged standing, walking or stair climbing. The RTWS confirmed the modified work provided by the employer was suitable for the worker's restrictions but the worker declined the alternate work to focus on strengthening his leg.

Under section 43(1) of the *Workplace Safety and Insurance Act*, a worker who has a loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision No. 2474/00*, held that under section 43(1), a causal relationship between the injury and wage loss is a condition precedent to the payment of LOE benefits. A refusal of suitable work is not necessarily an act of non-cooperation, but it may lead to a conclusion that the worker's loss of earnings does not result from the injury.

Members Evidence and Testimony

The worker testified and his attention was drawn to a number of FAF's from the physiotherapist and he indicated that he never saw the completed FAF forms from the physiotherapist. The worker indicated that the physiotherapist never discussed returning to work or modified duties with him. According to the worker, the physiotherapist would fill out the forms and send them in and he never saw them. The worker acknowledged a Return to Work meeting between the parties on September 8, 2020. The worker indicated that the meeting was over the telephone and not an in-person meeting. The worker also indicated that just prior to the Return to Work meeting, he was at the office of Dr. Yee, his orthopedic surgeon, for another assessment. The worker testified that Dr. Yee conducted a physical examination of his left knee, as he always did. The worker testified there was a discussion with Dr. Yee about his return to work and provided him with a note in that regard. Dr. Yee stated that within a couple of months, he would reassess the worker again. He indicated that Dr. Yee always reminded him that it would take up to six months for him to recover before he would be able to return to work and that it would take up to a full year for a complete recovery. The worker testified that Dr. Yee gave him the note on September 8, 2020, indicating two months off before the next assessment. According to the worker, when he was seen again two months later by Dr. Yee, he convinced the doctor that he wanted to return to work as the doctor still wanted him off.

According to the worker, Dr. Yee advised him that if WSIB needed further information or detail about his knee condition they should call him. The worker testified that he advised the Case Manager to contact Dr. Yee if they needed further information regarding his recovery and the timing of his return to work. The worker testified that there was no communication between the physiotherapist, and the surgeon, Dr. Yee.

Submissions from Mr. Majesky

Mr. Majesky submitted that it is the worker's position that notwithstanding the RTWS opinion, the modified work offered on September 8, 2020 was not suitable. He submitted that it is the worker's position that (a) it was not sedentary and (b) a lot of the Pre-Fab work mirrored the worker's pre-accident electrical work. Mr. Majesky submitted that the worker was never cleared by his orthopedic surgeon to commence modified duties and that is why



the worker is requesting LOE benefits. Mr. Majesky noted that for the first years of his employment with the accident employer, the worker was in a position of responsibility as a foreman.

Mr. Majesky submitted that the worker brings experience, responsibility and value to the employer. Mr. Majesky noted that despite the worker being injured in November 2019 during the pandemic, he continued to go to work taking Tylenol #3 medication, 2 tablets in the morning and 2 tablets in the afternoon. This he submitted speaks to the worker's work ethic as a stoic worker and speaks positively regarding his cooperation in the early and safe return to work pre-operatively.

In essence, Mr. Majesky submitted that the orthopedic surgeon is the gatekeeper in terms of the worker's return to work, both modified and regular duties. He also noted that the Board did not seek a medical opinion from other sources or liaise with the orthopedic surgeon in arriving at its decision. Nor was there an opportunity for the RTWS to visualize the shop, materials to be used, and the duties that the worker would actually perform.

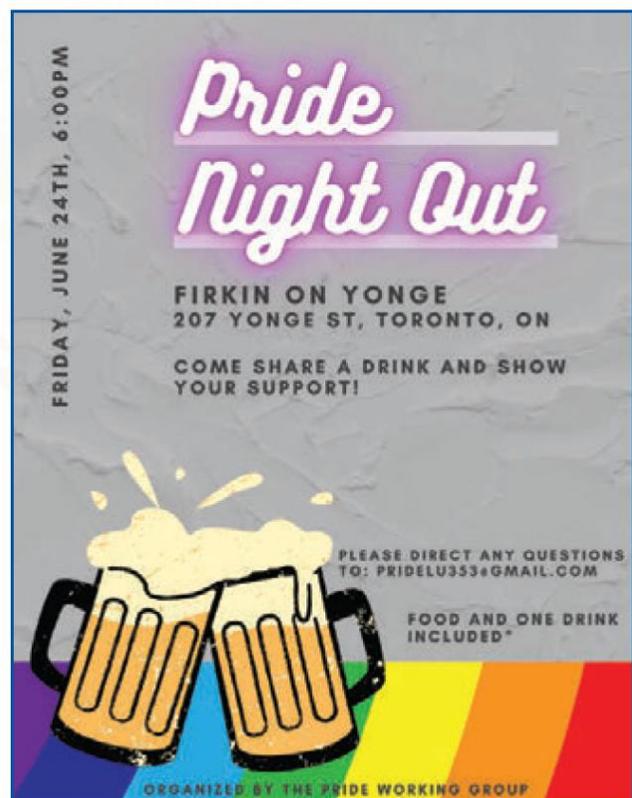
Discussion and the decision

For the reasons that follow, the Panel is satisfied that the worker does have entitlement to LOE benefits from September 9, 2020 to October 19, 2020. While the law [WSIA] emphasizes an early return to work, the return to work must be suitable and safe, an overly hasty return to work may not always be the best long-term solution for the workplace parties. In the Panel's view, the modified job offered in the telephone meeting of September 8, 2020 was not clearly delineated. The Panel notes that the job offered was not provided in writing, and there was no onsite visit to support the telephone meeting so as to ensure that the job offered was well understood by the parties. The worker testified under oath, that the type of job duties to be performed in the Pre-Fab shop were not detailed in order to support the suitability of the job offered. In addition, the Panel noted that the worker's orthopedic surgeon did not authorize the worker to return to work until he was reassessed within two months of that date.

In conclusion, the Panel is satisfied that the worker co-operated in his health recovery program by having reconstructive surgery for a completely torn ACL. He participated in treatment and consulted regularly with Dr. G. Yee, his orthopedic surgeon. The worker also remained in contact with his employer during his absence from work. In summary, the Panel is satisfied that the worker co-operated in his early and safe return to work and therefore entitled to LOE benefits from September 9, 2020 to October 19, 2020.

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Reporting Wages & Earnings to WSIB

Base Rate + Vacation Pay (10%) + RSP = Earnings Basis



By: Gary Majesky, WSIB Consultant & Executive Board Member

A frequent source of controversy and confusion when injured workers, and accident employers submit claims to the WSIB is what to report in terms of earnings?

A common misconception among our employers, members and some Board personnel is that the Earnings Basis for the purpose of calculating LOE benefits is the base rate. Some believe it's the entire wage package.

In fact, both approaches are misinformed because the Board recognizes the following as insurable earnings for the purposes of calculating both the short and long term LOE benefit rate. However, the exact dollar amounts will vary depending on the sector or agreement a member is working under. I've used the May 2015 ICI journeyman wage rate to illustrate the Earnings Basis formula when reporting to WSIB:

Base Rate	\$41.49	per/hr
Vacation Pay	\$4.78	(10% paid hourly on every cheque)
RSP	<u>\$1.24</u>	(RSP earnings, ask union for authority)
	\$47.51	Hourly Wage Reported to WSIB

In 2000, I was involved in a WSIB Appeal whether our unique RSP contribution was earnings or a benefit, and therefore, included in the Earnings Basis formula when calculating an injured workers hourly wage.

To be sure our RSP provision is unique and resulted in an appeal because the WSIB initially concluded our RSP contribution made on behalf of members was a "registered retirement savings plan", therefore, a benefit. However this was not the case, but rather, the contributions are made to a "retirement savings plan", not registered under the *Pension Benefits Act*. Since the RSP contribution was not vested nor locked in and members can request withdrawals from the funds at any time upon his or her request, it was concluded that the RSP was deemed earnings.

The WSIB's rationale was the IBEW LU 353 retirement savings plan contributions did not meet the relevant requirements under Section 25 of the *Workplace Safety and Insurance Act*, and are to be considered earnings. Section 25 excludes benefit and pension contributions which are not considered earnings for the purposes of calculating an injured workers loss of earnings benefits.

Apprentices Earnings Based on Journeyman Wage

For apprentices the Board uses the Journeyman wage rate to calculate the LOE benefit rate pursuant to Operational Policy 18-

02-08 - Exceptional Circumstances. There is also no requirement or authority to conduct a long term earnings recalculation for apprentices. Consequently, it is very important that apprentices "document" on the **Form 6, Workers Report of Injury** that they are an apprentice, and print their TQAA, Ministry Apprenticeship Contract # (and not the JAC reference #), as these are entirely different.

Apprentices Treated Differently / Calculating the Earnings Basis

WSIB decision makers are well aware of the special provisions for calculating the benefit rate of apprentices by using the Journeyman Wage Rate, but often times this is overlooked. The authority is found in Operational Policy 18-02-08, Determining LOE Benefits in Exceptional Cases:

Apprentices

For workers who are apprentices, the decision-maker determines the average earnings by using the average earnings of a journeyman employed by the employer in the same trade as the worker.

If the employer did not employ a journeyman in the same trade as the worker, the worker's average earnings are determined by using the average earnings of a journeyman employed in the same geographical area as the employer and employed in the same trade as the worker.

Once established, the average earnings remain the same for the life of the claim, with no recalculation.

The antecedent authority to the special treatment of *Students, Apprentices or Learners* took place on January 18, 1991 when Regulation 951 of the Act was amended. The Board explained in a February 1991 Policy Report that:

In a situation involving an apprentice or learner, the compensation rate is based on an amount equivalent to that which the employer is paying a journeyman or full-time worker at the time of accident. If the employer has no such worker for comparison, the earnings of a journeyman or full-time worker in the same trade and working in the same locality are used.

This approach was the subject of a review by the WSIB titled *Types of Workers: Students, Apprentices, and Learners*, which outlined the special rules for dealing with claims of students, apprentices, and learners. The Question and Answer section provided clarification, and states:



Definition (Who is an apprentice?)

- Registered under the *Trades Qualifications and Apprenticeship Act* (specified construction trades) or the *Apprenticeship and Certification Act* (all other trades).
- Signed a contract of apprenticeship for training and instruction in a trade, through or from an employer (see Policy 12-04-13, Apprentices).

Coverage (Are all apprentices covered by the WSIB?)

- No, only those who have a contract of apprenticeship with an employer whose business is covered under the *WSIA* either compulsorily, or by registering for coverage by application.
- Coverage is provided during the work placement but not during classroom courses.

Calculating Earnings (How are pre-injury average earnings calculated for apprentices?)

- Based on the average earnings of a typical journeyman employed by the employer at the time of the accident and in the same trade as the apprentice, even if it is higher than the apprentice's actual wages.

When are pre-injury average earnings adjusted for apprentices?

- Once established, the average earnings remain the same for the life of the claim, with no adjustment.

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24%

Need help deciding on treatment

20%

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10%

Skeptical of doctor's recommendation

7%

Don't understand diagnosis

4%

Unknown diagnosis

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- Seeking medical advice
- Searching for a specialist
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¹ Best Doctors data, 2013.



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Electric Shock and Injuries That Can Result

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



Journal of Occupational & Environmental Medicine – August 2005, Vol 46, No.9

(Overlooked Diagnosis in Chronic Pain: Analysis of Survivors of Electric Shock and Lightning Strike)

This peer reviewed research study addressed two central causative mechanism of injury after electrocution. At page 893, the research study highlights the effects of electrocution.

The medical study also highlighted the myriad injuries that may be less obvious than presenting burns and Cardiac Arrhythmia, which refers to a group of conditions that cause the heart to beat irregular, too slowly, or too quickly. There are several categories of arrhythmia, including: Bradycardia, or slow heartbeat. Tachycardia, or a fast heartbeat. Irregular heartbeat, also known as a flutter or fibrillation:

...

Likewise, variability of the symptoms after electric shock injury has been found in neuropsychological and psychological, orthopedic fractures, neurological, ophthalmological, gastrointestinal, endocrine systems, and muscle contractions caused by electrical shock so severe that the spasms broke bones, even at low voltages. Massive muscle contractions caused by nerve stimulation or direct triggering of striated muscles can cause ruptures, ligamentous tears, fractures, and joint dislocations.

The findings of this article show that disc disruptions occur in a significant number of lightning strike and electric shock survivors. The proposed mechanisms for the cause of these disrupted disc are the severe muscle contractions, which can cause broken or dislocated bones and can also cause hyperextension type injuries. Additional proposed mechanisms are the secondary injuries that occur when a patient is propelled from the injury site by lightning, or electric shock or trauma from falls from a ladder or other elevation as the result of losing consciousness, or being dislodged by the lightning strike or electric shock...

Several years ago, a member brought me his claim involving an electric shock injury that also resulted in a fall from a ladder. His injury occurred while he was in the non-union sector, prior to being organized. The worker reported the following accident history:

I was going to wire a light, my foreman went down and turned off the breaker, he came up and told me it was off and to go ahead. I grabbed the wire burned my hand, it held me there for a few seconds and I fell off the ladder about four steps.

The worker sustained burns and contusions from the fall from the ladder. He also developed a very unique problem, that being several bothersome pimples on his gums. On subsequent dental examination the worker was diagnosed with Tori which is a form of benign bone eruption. After a detailed investigation and review of prior dental records, it was determined he never had this condition which only emerged after the electric shock. The WSIB denied his dental injuries being related to the electric shock accident.

In preparing the case for appeal, I referred the member to the Occupational Health Clinics for Ontario Workers (OHCOW) and Dr. Kerin provided an opinion that the bone fragments were likely the result of either two scenarios. There was trauma when the worker fell to the ground from the 4th ladder rung with evidence of other dental damage i.e., chipped tooth.

The other reason why the worker may have sustained these Tori (bone fragments erupting from his jaw), was the unique physiological response when the body is electrocuted. While the WSIB medical consultant ruled there was no medical connection between a burned left hand and the dental injuries, Dr. Kerin's opinion addressed the causal relationship much more convincingly:

[Mr. Electrician] was involved in a serious electrocution injury when he sustained significant burn injuries to his left upper limb, especially left hand, and also dental injuries as per dental history including eruption of a bone spicule immediately following the electrocution injury.

Electrocution injuries cause skeletal muscle contractures of varying degree including muscles of mastication which cause severe clenching of the teeth. Whether it was the clenching of teeth or as a result of trauma from falling from a ladder, probably 6 feet up in the air, is unclear.

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Emerging Labour Arbitration Case Law, Mandatory Employer Surveillance Testing for COVID-19

By: Gary Majesky, *WSIB Consultant & Executive Board Member* & Chris Paul, *Business Representative*

C COVID-19 has created tension in some workplaces because of mandatory employer surveillance testing. All levels of government, Medical Officers of Health, infectious disease specialists, and the medical community all support testing, particularly industry sectors deemed essential, and where workplace outbreaks are occurring. However, one union grieved arguing the employers unilateral COVID testing is invasive and only reasonable in circumstances where an employee is symptomatic.

In recent arbitration decision between Caressant Care Nursing & Retirement Homes (CCNR) v. Christian Labour Association of Canada (CLAC), Arbitrator Dana Randall dismissed a union grievance in December 2020 in connection to COVID testing.

The grievance challenged the reasonableness of a unilaterally imposed policy requiring all staff at the nursing Home to be tested for COVID-19 every two weeks. Essentially, the Employer took an Ontario government request or recommendation for retirement homes and converted it into a mandatory requirement, the elements of which are as follows:

1. All staff are to participate in ongoing COVID-19 surveillance testing conducted by nasal swab.
2. Testing will be done every two weeks and include all individuals working in the retirement home.
3. Medical accommodations will be addressed on a case by case basis.
4. A refusal to participate in the testing would result in the employee being held out of service, until such testing was undertaken.

Abbreviated Agreed Facts

- In or around March 2020, CCRH implemented a PPE policy requiring all staff to wear masks.
- In addition to this requirement to wear masks, CCRH also required all staff and management to change their clothes and shoes at the beginning and end of their shifts.
- On or around May 19, 2020 CCRH arranged for the EMS to come into the home and conduct COVID testing of all residents, staff and management. All residents, staff and management complied.
- On June 17, 2020 CCRH management hosted a “Huddle” meeting for staff wherein they advised staff that bi-weekly COVID testing would be conducted and proof of having the test done would need to be provided to management.

- On June 24, 2020 CCRH management held a Huddle meeting wherein they advised staff that COVID testing was a directive set out by Ontario Health.
- Staff that participated in the testing were paid for one hour of work and parking fees were waived at the hospital.
- Several staff members communicated their unwillingness to participate in the surveillance testing. On or around July 3, 2020, management at CCRH advised staff that if they chose not to comply with the surveillance testing policy they would be required to don full PPE for the entirety of their shifts.
- No positive cases of COVID-19 among staff, management and residents have been identified in CCRH to date.

Evidence of Grievor(s)

One of the grievor's did not object when EMS conducted COVID-19 nasal swab tests in the entire CCRN Home on May 26, 2020. Even though it was uncomfortable, she agreed to the testing because it was being done on all staff, residents and management in order to determine if anyone in the building had COVID-19 at the time.

The reasons for the grievor's refusal are that she considered the bi-weekly testing to be invasive, it was painful, and caused her nose to bleed, testing is indefinite, and does not accomplish what it is purported to accomplish in that it only indicates that you don't have COVID-19 at that moment in time of testing, and residents are not being tested along with the workers.

The grievor submitted that the Employer's policy was over broad and only reasonable in circumstances where an employee is symptomatic.

The employer's evidence in addition to the various measures taken by the Employer to control the spread of the virus, outlined the rationale for surveillance testing. Put simply, the surveillance testing “is an important tool”, recognized by both medical professionals and the Ministry, in controlling and tracking outbreaks.

Case Law Relied on By Parties

The parties argued this matter in the context of KVP (see KVP Co. Ltd. And Lumber & Sawmill Workers' Union, Local 2537 (1965), 16 L.A.C. 72 (Robinson). And, more specifically, the Union's argument is guided by the Supreme Court of Canada's endorsement of KVP in CEP Local 30 v. Irving Pulp & Paper Ltd., 2013 SCC 34, which was an alcohol testing case.



KVP holds that a rule introduced by the employer without the Union's assent will give rise to discipline only if the rule meets the following criteria:

1. It is consistent with the collective agreement;
2. It is reasonable;
3. It is clear and unequivocal;
4. It was brought to the attention of the employee(s) affected before the employer attempts to act on it;
5. Where the rule is invoked to justify discharge, the employee was notified that a breach of the rule could result in discharge, and;
6. The employer has enforced the rule consistently since its introduction.

Arbitrator Randal noted that criteria 3-6 were not contested, and had no doubt that the policy is clear and unequivocal. However, he found that the consequence for an employee's failure to participate in testing: being held out of service, is disciplinary and therefore attracts the KVP analysis. In addition the policy has a generous accommodation provision. Challenges to the nasal swab are addressed on a case by case basis. One employee, who could not tolerate the nasal swab, was deemed in compliance with the policy by taking a throat swab. The Employer's policy allowed employees to be tested by third parties, outside working hours with compensation for same.

The union's central submission is that the policy, at its core, is an unreasonable exercise of management rights. While acknowledging that COVID is both a serious and significant matter, the Employer's powers to manage the rights of employees have limits and those limits have been breached. The union relied on CEP, Local 30 v. Irving Pulp & Paper Ltd. The Supreme Court endorsed KVP and particularly the requirement that a policy be consistent with the collective agreement and be reasonable. The majority found that the employer could only impose a rule with disciplinary consequences if the need for the rule outweighs the impact on employee's privacy rights.

The thrust of the Union's case is the Employer's policy, which mandates a nasal swab every two weeks, is both an intrusion on their privacy and a breach of their dignity. Arbitrator Randal agreed that having a swab stuck up your nose represents both of those things and certainly more so than merely undergoing a breathalyzer test. The Union submitted the employer has to provide a compelling justification against which the intrusion can be weighed, which the Union argued was missing.

Arbitrator's Decision

Arbitrator Randall noted the Union's reliance on drug and alcohol testing cases is a reasonable starting point for the analysis – weighing the privacy breach against the goals of the policy – clearly controlling COVID infections is not the same as monitoring the workplace for intoxicants and I so find. Intoxicants are not infectious. COVID testing reveals only one piece of information: the employee's COVID status. Being intoxicated is culpable conduct, testing positive is not.

But, most importantly, while the privacy intrusion is arguably comparable, in both cases, the factors to be taken into account in order to determine the weight to be given to the need for COVID testing as compared with drug and alcohol testing, is not. COVID is novel, thus its name. Public health authorities are still learning about its symptoms, its transmission and its long-term effects.

What is known is that it is highly infectious and often deadly for the elderly, especially those who live in contained environments.

In my view, when one weighs the intrusiveness of the test: a swab up your nose every fourteen days, against the problem to be addressed – preventing the spread of COVID in the Home, the policy is a reasonable one. While the Home did not have an outbreak, I agree entirely with the Employer that, given the seriousness of an outbreak, waiting to act until it happens, is not a reasonable option.

I would say something similar with respect to the Union's submission that the policy would be reasonable or, at least, more reasonable if the test was only triggered by an employee being symptomatic. Dr. Anthony Fauci has this to say about that:

If you just test people who are symptomatic, you're going to miss a very large contingent of the spread of the infection in the community.

For these reasons, I am dismissing this grievance.

In Solidarity,

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Pension Gifts

The following pensioners are to receive their pension gifts:

Craig Barfield, Gerard Bleau, Jeffery Bond, Peter Campbell, Chit Cheung, Kevin Dillon, Christian Gagnon, Daniel Gravelle, Adam Jedrzejewski, Vlado Kolich, Michael Mahon, Richard Rayment, Ted Szwec, Slawomir Wlodarczyk.



Workers Who Suffer a Serious Adverse Reaction to an Employer Compulsory COVID Vaccination Need to Submit WSIB Claims

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



The COVID-19 yin yang struggle continues between workers and employers. The most recent flash-point is adverse reactions to vaccines. One member huffed he'll buy personal life insurance notwithstanding Local 353 members have life insurance which pays \$150,000 and explained in the TEIBAS benefit booklet.

When the COVID pandemic started, WSIB did not introduce new COVID policies, but clarified how COVID claims would be adjudicated. Essentially, WSIB has relied on standard adjudication policies (decision making) used to adjudicate musculoskeletal and occupational disease claims.

In April 2021, Ontario's Workplace Safety and Insurance Board ("WSIB") published helpful new information regarding eligibility for WSIB benefits in the case of a COVID-19 vaccine reaction. Workers who are vaccinated because it is a compulsory part of their employment may be eligible for WSIB benefits:

- In order to be deemed to be compulsory, immunization will generally have to be required pursuant to a workplace rule or policy, or instigated by the employer using some element of coercion (e.g., threat of termination of employment, job changes, or other penalties).
- Expected reactions to a COVID-19 vaccine may include fever, chills, pain at the injection site, fatigue, and headaches. These symptoms will not generally constitute an adverse reaction for the purposes of WSIB entitlement. Rather, it is where the reaction is serious and unexpected – including, for example, where medical treatment beyond first aid is required and/or the reaction causes the employee to be absent from work for more than a few days – that the threshold will be met. In other words, an adverse reaction will usually be one that rises to the level that it should be reported to a local public health unit.

In July 2021, WSIB tabled its response to COVID Frequently Asked Questions. One of the questions addresses how the WSIB will deal with a "serious adverse reaction" to a COVID vaccine and whether this would constitute an allowable claim. For a worker to have an allowable WSIB claim their injury or disease must arise out of and in the course of employment. That applies to all claims. It's the law.

What is considered an adverse reaction to a COVID-19 vaccine?

An adverse reaction is a serious unexpected reaction to a vaccine. For example, if the reaction requires medical treatment beyond first aid and/or requires absence from work for more than a few days. This

indicates the reaction – in its severity and/or duration – has gone beyond the common mild expected reactions from immunization (fever, chills, pain at the injection site, fatigue and headaches which should resolve on their own in a few days).

If you received a vaccine as a compulsory part of your employment and experienced an adverse reaction, you may be eligible for WSIB benefits.

Expected reactions to a COVID-19 vaccine, per public health guidance, may include fever, chills, pain at the injection site, fatigue and headaches which should resolve on their own in a few days. These **do not** generally constitute an **adverse reaction** for the purposes of entitlement to WSIB benefits. An adverse reaction is a serious, unexpected reaction to a vaccine.

When determining whether a reaction to a COVID-19 vaccination is work-related, the WSIB considers:

1. Whether the **vaccination was a compulsory part of your employment**. A vaccination will generally be a compulsory part of your employment if your employer has a rule or policy that requires employees to be vaccinated or if your employer uses some element of coercion for vaccination (e.g. threat of termination of employment, job changes or penalties).
2. Whether the **reaction is adverse, e.g. serious and unexpected**, such as if the reaction requires medical treatment beyond first aid and/or requires your absence from work for more than a few days, this indicates that the reaction – in its severity or duration – has likely gone beyond the expected reaction from vaccination.

Is COVID Vaccination a Compulsory and/or Mandatory Part of the Your Employment

If you received a COVID-19 vaccine as a **compulsory part of your employment** and experienced an **adverse reaction**, you should report this to your employer and file a claim so the WSIB can determine if you are eligible for benefits.

Employer Will Not Bear Claim Cost for Adverse Reaction to COVID Vaccination

Of note, where an employer is made aware that a vaccination received by an employee as a compulsory part of their employment has triggered an adverse reaction, the employer is obligated to report the injury or illness to the WSIB. That said, even if the employee's claim for benefits is accepted, the costs associated with COVID-19 vaccination claims will



not be allocated at an employer. Nor will it show as an incident against their records, or affect their premium rates.

Examples of Employer Compulsory Rules on COVID Vaccination

The recent clarifications provide that entitlement may only be granted for adverse reactions to vaccines that are a compulsory part of employment (employers are not required to report if the vaccination is not a compulsory part of employment). From the WSIB's perspective, a vaccination is a compulsory part of employment if the employer has a rule or policy that requires employees to be vaccinated or if the employer employs an element of coercion for vaccination. Examples of coercion provided include "job changes" or other penalties for unvaccinated employees.

If the vaccination is a compulsory part of the employment, the WSIB will then consider whether the worker experienced an adverse reaction that is more than a normal side effect of vaccination, as defined by public health guidance. The FAQ provides that a reportable adverse reaction includes:

- the types of events that should be reported to a local public health unit,
- a requirement for medical treatment beyond first aid, and
- an absence from work for more than a few days.

The WSIB also clarified that employers will not bear the costs associated with COVID-19 vaccination claims so no incident will be shown against the employer's record and there will be no impact on premium rates.

Email from Bro. Glen Berry (Retired Member & Loving it)

Hi Gary. I always look forward to your article but this months was especially interesting because of similar experiences (Hazard Assessment Forms). Many, many years ago I hopped down off a baker scaffold. The platform was only 2 or 2 1/2 feet off the ground but when I landed there was a pain in my right knee that literally took my breath away. It only lasted a minute or 2 and then all was normal so I assumed that I had pinched a nerve

or something similar so I never mentioned it even though the contractor was right there in the room. Years went by with no issues and then I stepped down off a 4' ladder and the knee just exploded. Off to an orthopod who told me I had a torn cartilage and it needed to come out. It would never heal and if it wasn't removed the joint would become arthritic and essentially destroy itself. Before the date of my surgery it started to feel a lot better so back to the family doctor who told me that if I could deal with it to leave it alone because after the surgery every step I took would hurt. The orthopod forgot to tell me that part. When I asked about the arthritic issue old Doc Skory told me yes it would happen but I might get lucky and something would kill me first. Here we are 40 plus years later still going strong with only a slight twinge now and again.

I worked for a large contractor at the Granite Club. This would have been prior to 1972. One day at coffee the sub foreman handed out a 3 page document to everyone. It was a list of safety rules we were all to follow but the last page was a release that forever let the contractor off the hook regardless. When he came to collect I informed him as politely as circumstances required that I would not be signing. Down to the office he went and when he returned his exact words were "what would you say if I told you that your employment here was conditional on you signing this?" and my response was "If I were you I'd be keeping my Tuesday nights open because you and I will be going to an Executive Board meeting "Back down to the office."

In the meantime, the rest of the crew gathered around and wanted to know what the fuss was about. When I explained that if the contractor or anyone else did something negligent and I ended up in a wheelchair I wasn't going to accept the pittance WSIB would offer, I wanted the opportunity to sue for enough to live decently. The entire crew trooped down to the office and demanded their forms back. You can imagine how long my job lasted which was a pity as I was only a mile from home. Keep up the good work!

Gary Majesky

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Pension Gifts

The following pensioners are to receive their pension gifts:

Dari Gricnik, Robert Kaval, Kenneth Macfadyen, Dave Mackie, Michael Magnifico, John Nitsopoulos, Akbar Otcheldiev, David Perry, Jerome Rudson, John Scioli, Frank Spencley, Joe Ulisse, Joseph Vidic and Jacek Winiarek.



WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Contractors Tell WSIB Worker Temporarily Laid-off to Invoke Temporary Work Disruption Policy and Deny LOE. However, Union Audit Discovered Most Contractors Don't Pay Benefits and WSIB Cannot Deny Paying LOE.

WSIB Legislation Mandates Accident Employers Pay Injured Workers Benefits & Pension Contributions for 1-year if off work and receiving LOE Benefits.

The union is continually battling the WSIB to pay Loss of Earnings (LOE) to injured workers who are issued a Temporary Layoff by the accident employer. The Board, and employers use the WSIB Temporary Work Disruption to justify the denial of LOE.

The union has litigated many decisions with a 100% success rate at the Workplace Safety and Insurance Appeals Tribunal regarding how the Hiring Hall works when injured members register their names at the hiring hall after a layoff, and why this constitutes good evidence that a member is seeking employment in their labour market, regardless whether work is available or that they are injured. The wise men and women at the Tribunal have rejected the phony WSIB/Employer argument and sided with the union.

Thank goodness, the WSIB Recurrence (REO) Team based in Ottawa that was mandated to adjudicate a worker's entitlement after a layoff was disbanded. The REO crew came up with many screwball interpretations WHY a member could not be paid LOE after a layoff, which WSIB Appeals Resolution Officers embraced. These decisions are now being made by individual WSIB Case Managers, who have adopted all the REO Team Rationale, so the problem persists.

In my opinion, WSIB decision makers frequently do not adhere to a plain reading of the law, or applying the "modern principle" to statutory interpretation. In Decision No. 229/23, Tribunal Chair, R. McCutcheon canvassed the Principles of Statutory Interpretation, and the courts affirmation of the modern principle of statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In Vavilov, the majority of the Court affirmed the modern principle of statutory interpretation, reasoning in part as follows (at paragraphs 118-121):

This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be

resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law – whether courts or administrative decision makers – will do so in a manner consistent with this principle of interpretation.

Worker Falls Under Exemption of Temporary Work Disruption Policy

A key union argument in Temporary Work Disruption disputes is the worker's documented work/functional limitations at the time of layoff, and the physical demands of the pre-injury job of an electrician; is evidence that the worker falls under the general exception found in the Temporary Work Disruption Policy (OPM 15-06-02). Simply, the work injury is a barrier in obtaining and maintaining employment with another electrical contractor in order to mitigate their loss of earnings.

The WSIB generally maintains the loss of earnings (LOE) benefits the worker was receiving at the start of a temporary work disruption. Workers are entitled to additional LOE benefits when evidence indicates:

- the worker would seek new employment in the general labour market to attempt to restore his/her loss of earnings during the temporary work disruption (i.e., if he/she was not injured), and
- the work-related injury/disease impacts the worker's ability to earn income through new employment.

Unfortunately, the WSIB seems impervious to reason, even when there is a body of case law that supports the union's position. However, we now have another excellent argument that will haunt accident employers who say one thing regarding a Temporary Layoff, but contravene the Principle Agreement by not paying the members benefits. They can't have it both ways.

Record of Employment States Layoff – Shortage of Work

It has become a reflex for the Contractors and WSIB to characterize the layoff as a "temporary Layoff" to invoke the application of Policy

15-06-02. In most instances, the WSIB contacts employer, and obtains ex post facto statement from a Health & Safety Rep that the worker will be recalled in three (3) months, even if the ROE says "shortage of work."

Principal Agreement, Temporary Layoffs

Had the accident employer truly intended to issue a Temporary Layoff and recall the worker, the employer would have made benefit and pension remittances to the Toronto Electrical Industry Benefit Administrative Service (TEIBAS) pursuant to the Principal Agreement (CBA) Clause 1000, Health & Welfare:

It is agreed that the Contractors may put Employees on temporary layoff provided that Health & Welfare contributions at the rate of one hundred and fifty (150) hours X \$4.46 per month are paid. Such employees would be eligible for recall to their last Employer only and would be eligible for EI benefits.

It seems employer Health & Safety Reps conveniently overlook this important issue. The Temp Layoff argument is now in the appeal stream, and we'll see whether the WSIB recalibrates its approach to accepting employer statements that the layoff was temporary, and stop denying LOE benefits when injured workers are laid-off.

Employers Must Contribute to Injured Worker Benefits for 1 Year

Members working under a stand-alone collective agreement, sometimes discover while in receipt of full WSIB benefits, the accident employer failed to contribute to their health and welfare benefit and pension, as required by law.

Section 25 of the Workplace Safety and Insurance Act, sets out the wages and employment benefits an accident employer is legally obligated to pay, which is for the first year if a worker is off work that entire time. **An employer's obligation to pay a worker's benefits is 1 year.**

However, this does not apply to Multi-Employer Benefit Plans i.e., members covered under TEIBAS. However, it does apply to all Local 353 stand-alone collective agreements e.g., University of Toronto, CHUBB, CNE, City of Toronto, Troy Fire, with one notable exception. When signatory contractors are hired by these organizations to perform contracted work, 353 members are working under the terms and conditions of the Principal Agreement.

In a leading case, with many intervenors, Tribunal Vice-Chair Sutherland, in Decision 855/03 confirmed that benefits under section 25 of the Workplace Safety and Insurance Act, includes health and welfare benefits, and pension contributions.

WAGES AND EMPLOYMENT BENEFITS

Employment benefits

25. (1) Throughout the first year after a worker is injured, the employer shall make contributions for employment benefits in respect of the worker when the worker is absent from work because of the injury. However, the contributions are required only if,

Multi-employer benefit plans

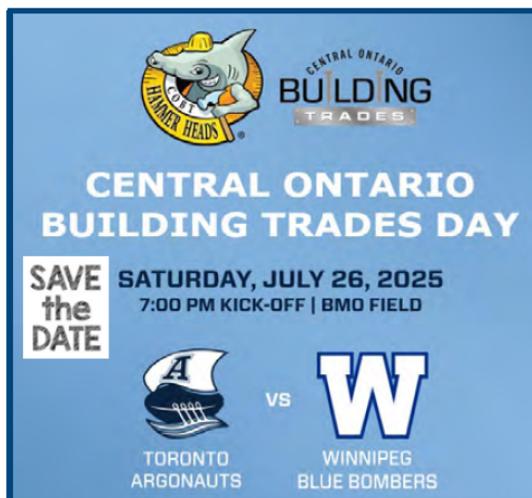
(4) Subsection (1) does not apply to an employer who participates in a multi-employer benefit plan in respect of the worker if, when the worker is absent from work because of the injury during the first year after it occurs,

Definition

(7) "contributions for employment benefits" means amounts paid in whole or in part by an employer on behalf of a worker or the worker's spouse, child or dependent for health care, life insurance and pension benefits...

My article this month, and April 2025, demonstrates that employer Health and Safety Reps are not in your corner, particularly when you are injured at work and on a WSIB claim. They may be nice people you must deal with, but be careful, because they are not looking out for your legal and financial interests, and cannot serve two masters – Employer & Worker. The union is in your corner. Don't forget that.

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Exploitation by Invitation, How Members are Surrendering Their Right to Workers Compensation by Blindly Signing End of Shift Hazard Assessment Forms That No Incident or Injury Happened at Work



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

This month's article is a wake-up call to prevent members from falling into an employer trap that will cause problems when filing a WSIB claim.

Several contractors have introduced a *hazard assessment form* for members to sign off when leaving work. One of these contractors fought the over-50 clause under the Principal Agreement and were successful at arbitration several years ago. Are you getting the picture?

Recently a member dismounted a ladder at work and missed the last rung, which caused his right leg to fall unnaturally. When his foot landed on the ground, he jarred his right knee. There was some initial discomfort which settled soon after. Upon leaving work, he and other workers were asked to sign a form whether they had an incident or accident that day. He reported "no" as he did not have acute symptoms and did not consider this a reportable accident.

When he left work, he did not have troubling knee symptoms, nor were immediate supervisors available to report anything as crews on different floors left work at the end of the work week. The member thought what happened was inconsequential. However, when he got home his knee symptoms increased in tempo, and through the evening, which prompted him to seek urgent care the next day, a Saturday. He told the ER doctor what happened at work the day before (Friday). A WSIB claim was registered, adjudicated, and denied by WSIB as there was no proof of accident, a decision bolstered because he signed a *hazard assessment form* that he did not suffer a work-related incident or injury.

The WSIB decision stated:

The employer has submitted a job hazard assessment form for the shift, where you signed off indicating that you were fit to work before your shift started. It then confirms that you signed off after your shift indicating no incidents or injuries occurred, and no hazards were encountered. There was no mention of your incident or injury, nor any pain associated with your right knee.

Noting that you signed off on the hazard assessment noting no injury occurred [that day] I am unable to establish proof of accident, and I am unable to establish that you suffered a personal injury while in the course of employment.

In my line of work, we call that an admission against your legal interests. Most members are familiar with how to report injuries, notwithstanding some claim avoidance behaviour, because when you attend Safety and Orientation sessions and job box talks, reporting injuries is one of the talking points.

There is no excuse for failing to submit a timely WSIB claim, even if you feel this will result in a layoff or cause workplace friction. The most common excuse "I thought it was minor and would go away."

It's no secret most electrical contractors have a health and safety department and well documented policies and expectations regarding the reporting of injuries. There is also a legal requirement under the *Workplace Safety and Insurance Act* to submit a claim within 6-months of an injury. While the law says 6-months, the expectation to formally report is the day of, or 1-week at most, at which point adverse inferences will be made regarding "proof of accident."

Obviously, some work injuries are acute and others involve bumps, scrapes and niggly strains. In the above case, the member suffered some initial discomfort which settled soon after.

The union has argued WSIB claims must be adjudicated on the merits and justice, and evidence of an injury requires a fulsome review of all the evidence. Key issues to consider are whether an accident/injury exists, witnesses, date worker stopped working, delay in seeking medical care, was there a reasonably consistent accident history, was there an outside work intervening event that broke the chain of causation between the work incident and need for medical care the next day.

It's important to bear in mind that many work-related injuries do not become disabling at work, but afterwards, which does not diminish the work-related causal relationship. Using the ticking time bomb analogy, the bomb was set at work, but blows up at-home. In my experience, many injuries do not become complete until hours or days later. That does not mean the chain of causation between the work injury and disability has been broken because you did not have acute symptoms when you left work.

Since 50% of the work injuries members suffer are not the result of single episode trauma, but related to the physical demands of your job, workers often times fail to conceptualize a work injury with respect



to causation. That's one reason WHY these *hazard assessment forms* are a predatory tactic that preys on the good nature of hard-working members.

The union has argued the employer *hazard assessment form* is a mischievous tool that has nothing to do with worker health and safety, nor is it a requirement under the *Workplace Safety and Insurance Act* and policy. Its sole purpose is to get construction workers to make admissions against their legal interests when they suffer an innocuous work-related incident/injury. This is compounded because construction workers are stoic by nature and "ouches" related to bangs, scraps and strains are a regular part of a construction workers daily life. Nor should a *hazard assessment form* displace a robust inquiry that is a required when adjudicating claims.

The fact a member's knee symptoms didn't flare until he left work is not sinister, and to his credit, he sought health care the next day and reported to the attending ER physician what happened. This too is good evidence that must be given weight. However, the member's signature

that he didn't suffer a work injury or incident at work does create a problem - Is first evidence, best evidence?

From a practical perspective, if members reported every bump, scrap or ouch at work that didn't cause them to stop work and seek health care, the job site would grind to a halt, and the only thing produced is nuisance paperwork. Perhaps the union should be more aggressive on these jobsites and force mandatory reporting of each innocuous incident or transient injury? I'm certain the employer and general contractors would take notice. Wouldn't this be another black mark that union labour is less efficient than non-union? I may ask Brother Les Carbonaro to add a section in the Stewards Manual "how to put toothpaste back in a tube."

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Thanksgiving

Is a Statutory Holiday to be observed on Monday October 11, 2021. If your employer asks you to work on this day, you must be paid double time for working!



Failure to Report Work Injuries an Ongoing Problem – Usually Because Members Believe They’ll Be on the Next Round of Layoffs or They Don’t Want to Financially Harm The Employer with WSIB

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



In my experience members often times engage in economic calculus whenever they are injured. Essentially members weigh the costs (i.e., consequences), if they submit a WSIB claim, voice concern about a health and safety issue or assert their rights under the collective agreement. There is a general consensus that filing a WSIB claim will result in a layoff.

It saddens me when members roll the dice and later on undergo surgery because of a work related shoulder, back or knee injury, which may end their career as an electrician. They are emphatic that “I was injured at work” but I must advise them you did not register a WSIB claim, therefore, for all intents and purposes you *do not* have a work related injury. Here’s WHY.

Law and Policy

Under the law (legislation & policy), claims should be registered immediately, particularly if a worker reported and sought health care for an injury. Section 22 of the *Workplace Safety and Insurance Act*, stipulates claims must be reported within 6-months at the latest.

22(1) A worker shall file a claim and 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.

The criteria contained in Board policy with respect to the time limits to file a claim in chance event cases provides that a claim must be filed within 6 months of an accident. In contrast, the criteria contained in Board policy with respect to the time limits to file a claim in disablement cases provides that in disablement claims the 6 month deadline begins from the date the worker reports the disablement as work-related.

Two Different Reporting Clocks (WSIB)

Most workplace parties are surprised to learn that there are two reporting clocks. One for chance event accidents, which are single episode trauma claims and require a claim to be filed within 6-months from the date of accident/injury. These claims are easy to identify because there is an identifiable or discrete mechanism of injury e.g., tripped, stumbled, fell, lifted, banged, or pulled/pushed resulting in an immediate injury. Even though the legislation says 6-months, the expectation is to report and register a claim immediately.

The other branch of accident is disablement, which are typically gradual onset repetitive strain injuries (RSI) and cumulative trauma disorders (CTD). The mechanism of injury is often times the physical demands of your job, a concept many employers do not understand.

Extension of Time Limits to File Claims

Policy Document No. 15-01-03 stipulates that the Board will allow an extension of time for filing a claim where there are “exceptional circumstances”, including:

- Compelling personal reasons
- The worker may have been unable to understand the time limit
- Whether the worker reported the accident to the employer, health professional, or co-workers.

Like all Board policies, this policy is subject to the merits and justice provisions of the Act and Board policy.

Worker Has Positive and Legal Obligation to Report Injuries

When members attend Safety and Orientation sessions when starting work with a new contractor, reporting injuries and incidents is one of the talking points. This constitutes notice that as a worker you were advised to report ALL injuries. I’ve stopped counting the number of signed S & O forms employers send to WSIB whenever a member delayed in submitting a WSIB claim. Delay in reporting claims usually become “proof of accident disputes.”

Case Law, Discoverability

There is some wiggle room in disablement claims (i.e., gradual onset injuries) when there has been no diagnosis so the health professional can make an informed judgement whether the injury is work related. In these situations the union can rely on the principles or rule of discoverability to extend the time limits on filing a claim. In *Decision No. 1830/09*, the Vice-Chair noted the principles of discoverability that have been endorsed by the Supreme Court of Canada at paragraph 23 as follows:

The Supreme Court of Canada applied and upheld the discoverability principle in *Peixeiro v. Haberman*, [1977] 3 S.C.R. 549. The Supreme Court stated in *Peixeiro* (supra) that the discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue, by providing that time limits do not begin to run until it is reasonably discoverable that the person had a cause of action.

In *Decision No. 1454/08* the Vice-Chair considered the provisions of Board policy in the context of disablements, and at paragraph 24 stated:



Board policy reflects the position recognized by the Courts, that a limitation period cannot run against a person until the person knows of the facts to which the time limit applies. A disablement is an injury that occurs gradually over time. It is very difficult to know when and whether it has been caused by a workplace activity, because that relationship is not necessarily clear. Board policy provides that the time limit runs from the time that a worker reports his injury as work-related to his health professionals, employer or the Board. That is a reasonable approach to determining when a worker is sufficiently aware that the injury may be work-related to establish a start-date for the time limit.

There is a profound irony when members fail to submit timely WSIB claims for fear of a layoff, because an injured worker may have re-employment rights under section 41 of the *Workplace Safety and Insurance Act*, and Ontario Regulation 85/08, [Re-employment Obligation in the Ontario Construction Industry](#).

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WSIB Practices

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WSIB Swat Team Investigates Employer Failure to File and Register Claims

Being on the front line I see first-hand the shenanigans when it comes to reporting injuries to the WSIB. Way too often members call me a year after an injury and tell me my knee still hurts and I was injured at work 12 months ago. My foreman knew, and I went to the hospital that day. When I ask if a WSIB claim was registered, the answer frequently is I reported it to the doctor and my employer. Or they tell me they're going for shoulder surgery and were injured 18 months ago at work and everyone knew I fell backward off a ladder. Sadly there are members who fail to submit a WSIB claim, hoping this gesture will inoculate them from a layoff and curry influence with the contractor because they are a team player.

Members Fail to Register Claims

Right off the hop, these members have a problem. I tell them you don't have a WSIB claim. A claim should have been registered when they were injured and saw a health professional. Then the reply, my employer and doctor should have filed the WSIB paperwork because they knew I was injured. In fact, under the law, the worker has the responsibility to file a WSIB claim and cannot contract out that responsibility to health professionals or the employer, notwithstanding that an employer has a legal obligation to automatically submit a WSIB claim when a worker seeks health care for an injury. With great respect, it is difficult for an accident employer to feign ignorance when a member is taken to a hospital from the job site, but they do, which is the subject of my article.

Law States, Claims Must be File within 6 Months

Section 22 of the *Workplace Safety and Insurance Act* states a worker MUST file a WSIB claim within 6 month; otherwise, a claim is untimely and will not be adjudicated.

Claim for benefits, worker

22 (1) A worker shall file a claim as soon as possible after the accident that gives 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 the disease.

Contractor Incident/Accident Report

Members frequently complete a contractor accident or incident report when someone has a reportable injury, regardless whether it

is minor or serious. However, employer incident reports does not mean WSIB paperwork was completed or submitted. Nor do I accept member ignorance that they didn't know to report an injury and tell their employer. Most members have attended numerous Safety and Orientations sessions when they start with a new contractor or project. They even sign-off after the 2 or 3 hour session that they will report incidents and/or injuries. That creates a positive obligation for the worker to report.

Member Was Misled to Break the Law

In January 2024, a High-Rise member got injured coming down a ladder and twisted his knee, suffered instant pain, and within minutes swelling to the point he could barely walk. He reported the injury to his Foreman and lead hand. This happened in afternoon and he went to the shack and sat down to fill out paperwork. **The foreman called the Health and Safety Rep and made him aware of the injury. The member was told he would be given modified work and not to claim WSIB.**

The member contacted me after he was laid-off in April 2024 because he was still on modified duties. I looped in Eddy Alves, the High-Rise Rep, and we got the contractor to bring the member back to work while I dealt with WSIB. It was evident a WSIB claim was not submitted, and the contractor's position was "the member said he had recovered." Very convenient, but this didn't align with the facts.

Employer Said – Don't Claim WSIB

We submitted a WSIB claim. Clearly proof of accident was not in dispute because it was reported, plus the member sought health care after the injury, received physio, and the employer provided modified duties until the layoff. When the member submitted a WSIB claim 3 months after his work injury, I instructed him to add a paragraph from his email to me on his Form 6, Workers Report of Injury, because it documented the time line of events, including an incriminating statement from the accident employer Health & Safety Rep "not to claim WSIB." This statement was like the sword of Damocles hanging over the employers head, because is triggered a WSIB Regulatory Compliance Investigation.

This employer response was not uncommon in the electrical industry and perhaps the reason WHY contractors no longer report workplace injuries to IBEW Local 353. I have heard our signatories are advised not to inform the union when members are injured, even critically

injured. I don't have a smoking gun letter from the Contractors Association, however, in a recent case, a large signatory said "we don't know who the point of contact is in the union" which is total nonsense. Besides, the member's finger was partially amputated. All a contractor has to do is FAX the Form 7 to Local 353. Some may think I'm biased, but explain to me why out of 700 signatories, there is only one contractor that sends the union an Employer Report of Injury, Form 7? God bless that one (1) contractor.

Employer Failure to Submit Claims Is Illegal

Under the Workplace Safety and Insurance Act, and amended in 2015, section 22 now makes it a prosecutable offence to discourage, prevent, influence or induce a worker to withdraw or not submit a WSIB claim.

Some contractors play stupid, including Foreman, who feign ignorance, that a member was injured. Fortunately most signatories are honest and compliant with their WSIB reporting obligations. However, we have more than a few bad actors. The law states:

Prohibition, claim suppression

22.1(1) No employer shall take any action, including but not limited to the prohibited actions set out in subsection (2), in respect of a worker with the intent of,

- (a) discouraging or preventing the worker from filing a claim for benefits under section 22; or
- (b) influencing or inducing the worker to withdraw or abandon a claim for benefits made under section 22.

(2) For the purposes of subsection (1), the following actions are prohibited:

1. Dismissing or threatening to dismiss a worker.
2. Disciplining or suspending, or threatening to discipline or suspend a worker.
3. Imposing a penalty upon a worker.
4. Directly or indirectly intimidating or coercing a worker with threats, promises, persuasion or other means.

Administrative penalty

(3) An employer who contravenes subsection (1) shall pay the prescribed amount to the Board. This payment is in addition to any penalty imposed by a court for an offence under section 155.1.

WSIB Regulatory Compliance Investigation Team

Most people are unaware the WSIB has its own internal police force (Special Investigation Branch), and these investigators often times are retired police officers from municipal, provincial and/or federal law enforcement agencies (e.g., horsemen). They coordinate and conduct surveillance and investigations of workers and employers. A statistic I was told, 80% of their investigations involve employers.

There is also a Stakeholder Compliance Investigation Unit who probe, among other regulatory compliance issues, an employer's failure to submit WSIB claims. In fact, the above cited case is now under active investigation. What's the lesson and take away? These are prosecutable offences, and the fines levied on employers can be very expensive.

History Lesson

Twelve plus years ago Local 353 underwent a WSIB audit to determine whether the union had properly classified employees and paid the appropriate WSIB premiums. Leaving aside that Unions, Circuses, and Arenas are exempt and do not have a mandatory legal obligation to pay WSIB premiums for workers, we do. For 1-week, the WSIB auditors stationed themselves in the 1377 Lawrence Ave boardroom pouring over the union's books of our Education, Administration and field operations (Business Reps and Organizers). Plus, our union Controller was at their beck and call.

Local 353 runs a straight business operation. We play by the WSIB rules. However, any contractor that is now, or may in future be the subject of a Stakeholder Compliance Investigation for failing to properly report WSIB claims, you are in for an uncomfortable experience. The last thing any employer wants is the CRA or WSIB probing your books. Karma's a bitch.

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Fighting, Horseplay and Larking – Policy 15-03-11 How WSIB & Employers Use This Policy to Deny Claims

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



There is a WSIB Policy, OPM 15-03-11 that states “workers who sustain a personal injury as a result of participating in a fight, horseplay or larking at work are generally not entitled to LOE benefits”.

This should come as no surprise, because violence (fighting) in the workplace falls under Bill 168 now known as Section 32 of the Occupational Health and Safety Act (Ontario) which became law in June 2010, and represents a significant change in how, and to what extent, both workplace violence and workplace harassment are regulated in Ontario.

Over the years, I have argued appeals where members engaged in behaviour that escalates into physical confrontation, and someone gets hurt. Leaving aside that fighting at work can result in termination of your employment, it comes as a shock when one of the participants gets injured and files a WSIB claim, only to be told they took themselves out of the course of employment, even though they were injured at work.

Fighting at Work a Serious Breach

The policy does state if a fight results solely over work, the claim may be accepted if the injured worker was not the aggressor, did not provoke the fight, or was an innocent bystander. Aggressors and participants, however, take themselves out of the course of employment, and are not entitled to benefits for injuries sustained in confrontations.

Turning now to horseplay and larking, this typically involves some act of tomfoolery (buffoonery, mischief, nonsense, monkey business). A common controversy involves playing games, such as football and injuring yourself running into a wall or falling. Although these incidents take place at work, you take yourself out of the course of employment when engaging in non-work related activities.

Employer Alleged Foreman Drove Forklift Recklessly, Without Permission

In a recent appeal, I dealt with a novel case involving a foreman who was working at a car plant during a Christmas shutdown when he hurt his shoulder after trying to reposition a forklift tine that dislodged after driving the forklift from the plant to the employers site trailer at the end of the shift to complete paperwork.

The employer argued that the foreman was engaged in horseplay and larking that created added peril due to driving a forklift at high speed, and that he was unauthorized to use the forklift for personal transportation. They contended that the foreman chose not to walk to the site trailer, and as such he broke the chain of employment. The employer rep furnished an affidavit from the construction manager to support the employer’s position.

Foreman Was a Car Plant Veteran

The union argued in its submission that the foreman was not speeding, was well aware how to appropriately use a forklift given his myriad certificates and training, was in a position of responsibility and trust, nor disciplined, as alleged. The union contended that the foreman had been at the car plant for a number of months and had regularly used the forklift to move tools and materials from the site trailer to the crews working in the plant.

Foreman Allegedly Disciplined (Verbally)

The employer argued the WSIB should deny the claim as the foreman was engaged in an unsanctioned activity which removed him from the course of employment. I often invoke the mantra that “documentation trumps conversation” and this is one of those labour relations situations because the employer alleged the worker’s supervisor provided a verbal warning two days previous to the accident. The employer argued that the foreman was “absolutely not required” to drive a forklift and that there was a “walking policy” in place. However, no such policy was ever produced.

Driving a Forklift Tantamount to Horseplay

The nub of the employer’s argument was the foreman “chose” to drive a forklift for personal convenience over rough terrain at a high speed. The contention was that given that the tines were uncocked and the worker did not have consent or authority to drive a forklift, that this was tantamount to horseplay.

The employer submitted evidence of the duties of an electrical foreman, which involved responsibility for supervising and coordinating the workings at the job site. This was consistent with the union’s position that the foreman was required to complete documentation at the site trailer to perform his job.

No Prior Issues Involving Use of the Forklift

A factual discrepancy arose regarding the length of time the foreman worked onsite, as the employer alleged he was there for only four days. However, the foreman had been there for several months and the Appeals Resolutions Officer (ARO) found it instructive that there had been no previous issues regarding the use of the forklift during that time frame. Finding in favour of the foreman, the ARO concluded the foreman would have been responsible for ensuring safety, tools and materials used by his crew.

In addressing the employer’s allegation of excessive speed, the ARO concluded there was no evidence to suggest that the employer was



concerned about the speed of the forklift to the extent they placed governors on the machinery. Since the quickest speed of the forklift was approximately 18 km per hour, it was determined that the uneven terrain would likely be more responsible for the fork being dislodged.

Completing Paperwork at Site Trailer Part of Foreman's Job

Finding in favour of the member, the ARO ruled the foreman:

may have chosen to use the forklift rather than walk; however, he had been there for a period of 14 hours and was traversing to the site trailer to complete paperwork, a necessary function of his employment. There is no relevance to the speculation that the foreman took himself outside the course of his employment. Given that argument, he certainly would have placed himself back in the course of employment when he attempted to repair the tire which had fallen off.

The ARO dismissed another specious argument that the foreman's work zone was restricted to the plant area, finding the nature of his duties, as

confirmed by the employer, make it logical to conclude that he would be in different areas as required to carry out his job.

The fact the foreman chose to utilize a forklift certainly did not remove him from his employment, nor a departure from employment practices which broke the chain of causation. The ARO also noted that the foreman immediately reported the incident, sought immediate medical attention, and returned to appropriate work until the date of surgery.

What's the take-away? This appeal demonstrates the extent some employers will go to fight a members' WSIB claim, and in the process, disparage the reputation of a car plant veteran with a solid gold reputation for hard work, meeting deadlines, ensuring job site safety, and making his employer money.

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IBEW Local 353 Scholarships

Officers' Scholarship Award (10 @ \$300.00 each)

Terms and Conditions

- Open to members of IBEW Local 353 and their immediate family. (spouse or dependent children)
- Enrolled in a full time publicly funded Canadian University or College for the current academic school year.
- Must be entering the second year or higher, of a full-time program leading to a degree, diploma or a certificate
- Include with the application supporting documentation; acceptance letter, tuition receipts, etc.
- Candidates are required to send the detailed information as outlined above, the completed application form, along with an essay on the following topic:
 - o The media has successfully bombarded Canadians with an "Anti-Union" message; so much so that, before having any firsthand experience with unions, Canadians have a negative impression of who Unions are and what the benefits are of belonging to a union. What must Unions do to overcome the "Anti-Union Message" and educate Canadians, and specifically young persons on the benefits of belonging in a Union?
- Acceptable applicants will be entered into a lottery and scholarships awarded via random draw

President's Scholarship Award (1 @ \$1,000)

Terms and Conditions

- Applicant must be an IBEW 353 member
- Must submit an essay describing "How the union has affected our quality of life and wellbeing of my family"
- Must be enrolled in a publicly funded Canadian University or College leading to a Degree --or--
Enrolled in a full time (30 weeks or more) program at a publicly funded Post Secondary Institution leading to a diploma or certificate (must include course description/curriculum)
- Include with the application supporting documentation; acceptance letter, tuition receipts, etc.
- Applicant must submit a resume with emphasis on the following volunteer activities:
 - o Social conscience
 - o Political activism

- o Dedication to the Labor movement
- o Leadership quality
- o Valuing integrity and honesty over prosperity
- o Community activism or service
- o Human rights

Business Manager's Scholarship Award (1 @ \$2,000)

Terms and Conditions

- Applicant must be an IBEW 353 member
- Applicant must submit an essay describing how the union has affected our quality of life and wellbeing of my family
- Enrolled in a publicly funded Canadian University leading to a degree
- Applicant must include course description/curriculum
- Include with the application supporting documentation; acceptance letter, tuition receipts, etc.
- This scholarship is limited to the following areas of study:
 - o Labour Law
 - o Human Rights
 - o Political Science
 - o Labour Study
- Other areas of study may be considered at the sole discretion of the selection committee:

Member may apply for Business Manager or President Fund as well as officer's fund. Successful recipients of the Presidents and Business Managers Scholarships will be determined by the Scholarship Committee. All scholarships will be awarded in the applicant's name.

Applications received after December 31, 2016 and incomplete applications will be disqualified.

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WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Understanding the Law and How to File WSIB Claims for Hand and Finger Joint Arthritis Common Mistakes Regarding Work Related Causation

The union recently won a Tribunal appeal for a member who suffered a work aggravation injury that rendered symptomatic his Carpometacarpal Osteoarthritis (CMC).

For 35-years this north member worked primarily on industrial jobs, typically heavier distribution installations. Prior to becoming an electrician in the late 1980s, he worked at the Collingwood shipyards. The member's hands became symptomatic in 2018, which he attributed to hard work, but his symptoms progressed. He was working at OPG when the Pandemic struck and had difficulty accessing health care during the lock-down.

Arthritis Is Not Work Related

This case illustrates some important facts members need to be mindful of when they develop hand/finger arthritis. As a general rule, arthritis is considered a non-compensable pre-existing condition that is not work-related. It's a topic I have extensively reported on and in many appeals.

The basic legal assumption when dealing with pre-existing degenerative pathology (e.g., osteoarthritis, degenerative disc disease/DDD, or acromioclavicular joint arthritis) is the arthritis is considered to be idiopathic, and non-work related. There are exceptions e.g., post-traumatic arthritis.

Hands Are Anatomical Tools

There is little doubt that electricians habitually use their hands regardless of what sector they work in (ICI, Residential, Traffic, & Line sectors). Flipping through the 71 page Electrician Ergonomic Research Study every photo (over 100), members are using their hands, including awkward non-neutral postures, although some tasks require more force and grip strength. I frequently argue an electrician's hands are their "anatomical tools."

Fifteen years ago, we appealed a WSIB decision that his finger/wrist arthritis was not related to repetitive gripping, squeezing, using manual and power tools, and pulling wire. However, the WSIB allowed initial entitlement for the member's injury on the basis that he aggravated the pre-existing non-compensable hand/wrist arthritis after he felt a snap in his hand/wrist while forcefully bending wire in an electrical panel. That was considered to be an accident i.e., single episode trauma. However, the union also pursued another theory of causation that there was a causal relationship between the worker's wrist/thumb osteoarthritis and his job as an electrician.

Union Lost Appeal in 2009

In Decision 2299/09, the union argued the alternative theory of causation, that the worker's hand injury was causally related to repetitive gripping and use of manual and powers tools over 35 years in the electrical trade, including pipe bending, pulling wire, and working in severe weather conditions. The Panel ruled:

[33]The Panel appears to have conflicting medical evidence with respect to the role played by employment in heavy work in the etiology (cause) of osteoarthritis. In a paper prepared for the Tribunal by Dr. Marvin Tile, (Osteoarthritis) he stated, at page 21 of his paper:

Individuals that do heavy work are no more likely to develop OA than those that do sedentary work; however, the heavy work may render the joint more symptomatic, creating the impression that osteoarthritis is more common in these workers.

[34] On the other hand, Mr. Majesky has submitted a research paper which presents a different conclusion. This paper, entitled "Grip Strength and the Risk of Developing Radiographic and Osteoarthritis," (Chaisson et al., Arthritis and Rheumatism volume 42 Number 1, January 1999) is contained in Case Record. The Chaisson study summarizes the research findings with respect to the odds ratios for a risk of incident hand osteoarthritis by maximal grip strength. Based on these findings, the conclusion of the Chaisson study was stated as follows:

Conclusion: Men with high maximal grip strength are at increased risk for the development of OA in the PIP, MCP and thumb base joints, and women, in the MCP joints. No association was found between maximal strength and incident OA in the DIP joints of man or women.

Report of the Tribunal Medical Assessor, Dr. E. Badley

[35] In a report dated December 2010, Dr. Badley provided her medical opinion and began by identifying the worker's condition as osteoarthritis of the scaphotrapeziotrapezoidal (STT) joint, which is a wrist joint just below the base of the thumb. She noted that STT osteoarthritis is considered in some studies to be a part of arthritis at the base of the thumb, most usually at the first carpalmetacarpal joint. She noted that there was very little epidemiological research relating to osteoarthritis of the wrist joints. Dr. Badley provided the following advice to the Panel:

Osteoarthritis is one of the most frequent chronic health conditions in the population with prevalence ranging from 29 to 76% identified by x-ray changes. However, the prevalence of symptomatic OA is somewhat less with estimates of less than 10%.

The major risk factors for OA are age, ethnicity, genetics/family history-with relatively few candidate genes identified to date, nutrition and sex, away being most common in women.

Acute joint injuries confer a high risk of later development of OA in the injured joint. "Repetitive and excessive joint loading accompany specific physical activities have also been associated with increased risk of OA in the stressed joint. In principle heavy work could be a risk factor for OA either via repetitive loading or joint injury".

Lack of Good Quality Research

[40]Dr. Bradley stated: "there is no good quality review of the relationship between heavy work and OA of the hand." Her literature search concluded that the quality of the studies which had been done was poor for assessing the possibility of causal relationships.

Aggravation of Pre-existing Arthritis Allowed

In Decision 770/24, Vice-Chair Gordon who heard the members appeal in September 2024 addressed some familiar medical and legal themes, and concluded the worker had entitlement to work aggravation of bilateral carpometacarpal (CMC) osteoarthritis:

[22] It is important to note that the claim being advanced is that the work-related duties contributed to the aggravation of underlying carpometacarpal (CMC) and metacarpophalangeal (MCP) osteoarthritis. At the hearing of this appeal, the worker's representative confirmed that the issue was aggravation, not causation, of the arthritic condition.

[23] In this case, the Medical Discussion Paper, entitled "Common Conditions of the Hand and Wrist", written by Dr. Herb von Schroeder, MD, MSc, and dated October 2022 was included in the case materials for this appeal. I found this Paper to be useful and have relied on the opinions of the author with respect to the cause of CMC osteoarthritis and the impact of work relatedness to OA diagnoses. As with all conditions that have a multifactorial cause, a rational decision regarding the relative contribution of work activities towards the disability must be based on a careful analysis of the forces on the hand in the workplace, and the duration of those activities measured in years.

Work Activities Can Aggravate Osteoarthritis

[24] From the above, I understand that while osteoarthritis is likely not causally related to work, a personal work-related injury may become superimposed on that underlying condition making it symptomatic and that a careful analysis of the forces placed on the hand in the workplace is required in determining the contribution of occupational factors in the onset of complaint. I accept the opinion of Dr. von Schroeder, as he is an expert in his field and based his opinion on his practical experience, and medical literature and studies.

[25] Firstly, I have considered the June 7, 2023, opinion of the Occupational Health Assessment Program (OHAP) medical consultant, Dr. Abouali, which addresses the issue of whether the worker's job duties contributed to the onset of the bilateral CMC osteoarthritis as follows:

The worker is a 59-year-old electrician and his regular duties involve pulling/bending/ terminating cables constantly with the aid of screw drivers, pliers, wire cutters, knives, drills and handheld manual and power tools. The worker first noticed the symptoms about 2-3 years ago but did not think it was work-related, so he did not tell any coworker, did not report to his employer at that time. Nor did he seek medical treatment. The worker was laid off by his employer in October 2020 and has been unemployed since then, but the pain and symptoms did not subside forcing them to seek medical attention in July 2021. The worker has been assessed by rheumatology, physiatry and neurology and all agree the worker has CMC osteoarthritis as seen on radiographs. While Dr. Wilkins noted there may be some evidence of mild carpal tunnel syndrome, these findings were mild. Dr. Jahangirvand found no evidence of carpal tunnel syndrome. Clinically, the worker did not have a positive Phalen's or Tinel's. Given the examination findings, it is my opinion the worker's clinical presentation is most in keeping with CMC osteoarthritis. Given the job duties described include use of the bilateral thumbs for pulling/bending/terminating cables this increased manual load had likely contributed to the onset of CMC osteoarthritis.

Tribunal Vice-Chair Conclusion

[26] I find that it was Dr. Abouali's opinion that the worker's clinical presentation was most in keeping with CMC osteoarthritis and that the work duties had likely contributed to the onset of CMC osteoarthritis. I accept the opinion of Dr. Abouali, as she's a specialist in orthopedics and had the opportunity to review both the worker's medical records and the submissions of the worker's representative respecting the physical demands of an electrician.

[27] I also have the specific opinion of the worker's rheumatologist, Dr. Salituri, that the worker's job duties represented a risk factor to render his CMC osteoarthritis symptomatic. Dr. Salituri's opinion was contained in a typed response to the worker representative letter dated June 10, 2024, which solicited Dr. Salituri's opinion as to whether the physical demands of the job description provided by the worker represent a risk factor in rendering CMC osteoarthritis symptomatic. Dr. Salituri's response to the representative's letter included her clinical records which outline the initial and ongoing treatment for CMC osteoarthritis and generalized hand/finger complaints. I also accept the opinion of Dr. Salituri, as she is a specialist in rheumatology and had the opportunity to directly examine the worker prior to providing any opinion as to causation.

Remember, work did not cause osteoarthritis, but can aggravate it.

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Low-Rise Foreman Wins Important Tribunal Appeal. Member Broke His Leg Exiting a Company Truck Parked in Front of his House to Get his Lunch & Drill for Work

By: Gary Majesky, WSIB Consultant & Executive Board Member



In October 2018 I published an article that a Low-Rise Foreman won his appeal at the WSIB Appeal Services Division who ruled the member was in the course of employment when he exited his company van that he parked in front of his house to obtain his lunch and a drill for work. The first appeal recognized the act of obtaining a drill placed the worker in the course of employment when he exited his company truck and stepped awkwardly on the curb, fell and broke his leg below the knee.

The employer disagreed that a worker who was not physically at work, was not being paid, could have a viable workers compensation claim after he broke his leg getting out of his company truck that he parked in front of his house.

The employer with the assistance of the contractors association appealed the decision to the Workplace Safety and Insurance Appeals Tribunal. In July 2020 we argued the appeal via tele-conference hearing since in-person oral hearings were cancelled during the COVID-19 lockdown. These hearings are somewhat awkward when parties are not in the room at the same time, but the hearing process works when experienced parties are involved.

In a precedent setting case for constructions workers who drive company vehicles, the Vice-Chair in *Decision No. 698/20* reviewed the appeal history noting:

The ARO reversed the Board's decision and allowed initial entitlement to benefits. After concluding the worker was required to drive the employer's vehicle to the construction worksite, the ARO then considered whether the worker had been injured while performing a personal errand taking him out of the course of employment as opposed to performing an activity associated with his employment. The ARO determined the worker was not on a personal errand when he stopped his vehicle to go inside his home.

[17] The worker testified he received a vehicle when he was made a foreman, most foremen had a company vehicle at their disposal. He was provided a full sized van with a roof rack which carried all sorts of things, i.e. ladders and tools. The employer paid for the van's insurance, gas and maintenance. At the time of his injury, the worker noted he lived 35 minutes away from the construction worksite (FH) he had worked on for some time. He noted if he had to pick up the van from the employer's premises and then drive to FH his commute time to the worksite would have been significantly longer. Given this, the employer allowed him to keep the van near his home. He only used the van for company business and he did not park the vehicle on his driveway as

there was no room for it. The worker also noted he was out of the house by 7 am so he could pick up a worker and be at the construction site by the start of his shift at 7:30 am. The worker was not paid until he started his shift.

[18] The employer's lawyer briefly argued that utilizing OPM Document No. 15-03-05 the worker was not in the course of his employment until he reached his construction site since none of the exceptions listed in the policy were met. The employer's representative submitted there was no employer supervision of his driving, no written policy pertaining to using the van and thus he argued the worker was not using the van as an employee.

[19] In *Decision No. 83/19*, the Tribunal stated that a broad liberal interpretation should be used in assessments like these, which allows compensation to be provided to as many workers in as many circumstances as the legislative scheme will reasonably permit. *Decision No. 83/19* is noteworthy because it has attempted to set out a new straightforward approach to assessing travelling cases than the approach developed in *Decision No. 165/96*. In obiter, the Vice-Chair in *Decision No. 83/19* addressed the relevant policy more broadly, and its applicability to construction workers more particularly, rejecting the approach taken in *Decision No. 165/96*. The Vice-Chair wrote:

[146] In summary, the submissions on behalf of the parties revealed that the development of the Tribunal's case law has led to variations in the approach to whether a worker is in the course of employment when travelling away from the employer's premises. I prefer the approach that applies the clear terms of the relevant policies in a straightforward manner, with more consistent results. The multi-factorial approach set out in *Decision No. 165/96* and followed in other decisions has led to inconsistent results over time and has unintentionally given rise to arbitrary distinctions based upon field of employment. For example, sales representatives and community support workers are more likely to be found to be in the course of employment while construction workers and landscapers are not found to be in the course of employment in similar circumstances. I find that a straightforward application of Board policy would yield more consistent results than the application of the ten factors listed in *Decision No. 165/96*, an earlier decision adjudicated under different legislation. I have adopted the approach which is based upon a large and liberal interpretation which best achieves the objects of the WSIA. As noted above, the courts have recognized that the interpretation of workers' compensation regimes should adopt an approach that results in broader coverage, in the absence of legislative direction to the contrary. [emphasis added]



[20] With *Decision No. 83/19*, there is an attempt to depart from the Tribunal's usual approach in determining whether a construction worker is in the course of employment in "traveling cases". The recent divergence in approach set out in *Decision No. 83/19*, however, is more relevant for construction workers who are passengers travelling in a company owned vehicle than it is for this particular worker who as a foreman drove the company van to his worksite. As such, I am satisfied that the worker's circumstances are clearly addressed by the policy and I agree with *Decision No. 83/19* that a straightforward application of Board policy is warranted in these circumstances.

[21] Whether this worker proceeded to the worksite from his home or picked up the van from the employer's premises, whether he was formally tasked with this duty or permitted to do so with the employer's acquiescence is immaterial because once he entered the van with the intention of proceeding to work he became a worker in the course of employment. In particular, this worker comes within the ambit of OPM Document No. 15-03-05 under the exception of "proceeding to and from work" as the policy notes the worker is considered to be "in the course of employment" when the conditions of the employment require a worker to drive a vehicle to and from work for the purpose of that employment, except when a distinct departure on a personal errand takes place enroute." As such it is not relevant whether he was paid or not for driving or that he was given the benefit of parking the van near his home. Rather, once he entered the van that November morning, he was driving it with the intention of proceeding to the construction worksite he had worked at for some time with tools and material stored in that van provided to him to be used for the purposes of the employer's business and the worker's job duties. P's testimony did not suggest that the van had been provided to the worker for personal use. It was a van which the worker as foreman needed on the job site and otherwise to perform work in relation to the employer's business and as such I find the conditions of employment required the worker to drive a vehicle to and from work for the purpose of that employment. As the driver of that van, therefore, I find the circumstances in which he was in possession of the van during the relevant time for this appeal comes within the exception "proceeding to and from work".

[22] I note the employer emphasized that there was no supervision of the van by the employer since there was no written policy on the use of the van among other things. Aside from the clear language set out in the policy, the traditional approach set out in *Decision No. 165/96* provides that the ultimate test in assessing such circumstances involves determining whether a worker was engaged in an activity of employment as opposed to an activity which is personal in nature. For the reasons set out above, in spite of the lack of written policy etc., I find that the worker drove the van on November 16, 2017 for a work-related purpose.

The central question is whether the worker made a distinct departure from his journey for a personal errand.

[28] I note that that the worker indicated he was also retrieving a drill left in his house. He did not initially report to the Board that he

was retrieving a drill. There was also some dispute whether the drill was for personal use or belonged to employer. As such, there is a question of credibility that has been raised as the retrieval of a drill used in construction is something that would likely not be considered a personal errand. I do not address this issue as I am satisfied that retrieving his lunch while in the course of employment (proceeding to work) is not a personal errand. In this regard, I have relied on Tribunal decisions which have specifically addressed and supported that lunch or coffee breaks are incidental to employment. In particular, I rely on *Decision No. 1999/18* which supports such breaks are not a distinct departure from employment. I find the act of stopping the company van on his way to work to obtain the worker's lunch whether at his home or at a fast food restaurant is seen reasonably incidental to his employment. *Decision No. 1999/18* relied on a review of the Tribunal's developed case law on the subject and followed it. The Vice-Chair wrote, in part:

Taking a break for necessities of life, including the need to use the bathroom while travelling, does not take a worker out of the course of employment. Such would not constitute a distinct departure, and nor would going for coffee. I thus find that the above-referenced decisions well-explain the applicable law, and I adopt the analysis to this case.

[29] In this appeal, there was no dispute that the worker had stopped his van in a rushed fashion to retrieve his lunch as he had to proceed to work before his shift started. This activity, in and of itself, is not a personal errand but an activity incidental to employment. As a result, I find that the worker did not take himself out of employment at the time of his injury.

[30] In any event, even if I considered the retrieval of any items at his home was a personal errand, I am satisfied that the worker was still in the course of employment when he sustained his injury as he was injured while in the course of exiting his vehicle. Given the mechanism of injury, I am satisfied that his injury occurred before he transitioned from driving towards the worksite and leaving the company van to make his way towards his home. In this regard, even if I accept there was a break in employment to obtain the worker's lunch on the basis that this was a personal errand I cannot recognize the worker was injured while he was on a personal errand because his transition from a work-related pursuit (proceeding to work) into a personal errand had been not been fully completed at the time of his injury as he was still in the process of exiting the vehicle at the time of the accident. Therefore, I find the worker was in the course of employment at the time of his left knee injury and thus his injury arose out of employment. As a result I confirm the worker is entitled to benefits under the WSIA for the left knee injury. Accordingly, I deny the employer's appeal.

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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



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

This 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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WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Workplace Harassment, Stress, Mental Health Complications & Return to Work Barriers – Redress under the Occupational Health & Safety Act

Lately I have received member complaints regarding workplace harassment. Most complaints are related to bad boss behaviour. We can agree construction workplaces are not a university debating society where workers are equals, relationships civil, and you have a say in how work is organized. Over the past 30-years the electrical industry has changed with an influx of more enlightened foreman. However, the trade still has screamers, vulgarians, and people who practice worker maltreatment that harkens back to a past era. Fortunately, many contractors have evolved their business practices, but some still cling to old ways.

In my experience the usual culprits are not the folks at head office, but in the field. That's where abusive and harassing behaviour frequently originates. Unfortunately, injured workers seem to bear the brunt of caustic comments, snide innuendos and unnecessary scrutiny only because they are injured and performing modified work. I could write a book on the litany of harassing conduct.

The union deals with many workplace issues, so it's important union representatives and members understand Ontario's current workplace harassment law so you are informed on the mechanism, and how to seek a resolution when you or co-workers are being harassed.

Bill 168, now known as Section 32 of the Occupational Health and Safety Act (Ontario OSHA) that became law on June 2010, and represented a significant change in how, and to what extent, both workplace violence and workplace harassment are regulated in Ontario. Unions traditionally grieved harassment under a collective agreement but these grievances were often difficult or amounted to drawing a line in the sand. When I was arbitrating on the Grievance Settlement Board (1989-1995), harassment grievances were characterized as the "garbage can" because a worker could not articulate a grievable issue elsewhere under the CBA or the evidence tenuous. Times have changed, and technology has also played a role because workers surreptitiously record employer interactions. So too employers, but there are limits. Whether you work in a union or non-union workplace, s. 32 of the OSHA stipulates there is legal obligation that employers in all Ontario workplaces have a statutory requirement to develop and maintain a harassment policy.

What are the requirements for Ontario Employers?

Employers must prepare a policy with respect to workplace harassment, and develop and maintain a program to implement the policy. Employers must provide information and instruction to workers on the contents of the policy and program.

The workplace harassment program must include measures and procedures for workers to report incidents of workplace harassment and set out how the employer will investigate and deal with incidents or complaints.

These requirements help employers, supervisors and workers to recognize and deal with workplace harassment promptly, before it escalates into possible workplace violence. An important consideration is that Health and safety inspectors cannot investigate, resolve or mediate individual cases of workplace. Nor does OSHA require an employer to assess the risk of workplace harassment. However, the union has a key and prominent role in such matters.

Workplace harassment means

Engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome. Workplace harassment may include bullying, intimidating or offensive jokes or innuendos, displaying or circulating offensive pictures or materials, or offensive or intimidating phone calls.

OHSA - Extended Definition of Workplace Harassment

Section 32 of the Ontario Occupational Health and Safety Act (Ontario OSHA) broadened and extends the definition of workplace harassment beyond what is presently covered under the Ontario Human Rights Code. The Human Rights Code has long prohibited harassment in the workplace based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status, or disability.

Traditionally, harassment that was based on other, non-protected grounds was not actionable, unless the employer had extended additional protection by way of policy or it had agreed, as part of the collective bargaining process with a union, to incorporate broader protection in a collective agreement. Bill 168 changed this because it requires employers to treat harassment based on non-protected grounds in the same manner as harassment based on Code-protected grounds.

Harassment Complaints Must First Be Raised Internally

The purpose of Section 32 (OSHA) is that all Ontario Employers must have a Harassment Policy in place, including a process and mechanism to address workplace harassment when it arises. As the Ministry of Labour points out, this falls under the Internal Responsibility System (IRS), which means workers MUST first bring their concerns forward to the employer for investigation and resolution. However, it is crucial for members to involve the union, either a steward or business representative, even if you are an injured worker, because the union has the ability to file a grievance and enforce unacceptable workplace conduct when warranted.

If the harassing conduct is directed to injured worker, it may invoke an anti-injured worker animus argument which can be grieved and also brought to the attention of the WSIB for investigation. In my experience, WSIB is not generally inclined to address workplace harassment of injured workers and assert they are not the court of competent jurisdiction to adjudicate these issues under the OSHA. Since each worker has varying resilience to harassment, some workers may develop a psychological reaction and become emotionally unwell while for others it's like water off a duck. A few years ago I wrote an opinion that is worth sharing:

While I was not immediately convinced of a prima facie harassment complaint, one must always be on guard for intonation and inflection versus looking at words on paper or devoid of context. Leaving aside whether the supervisor behaved inappropriately, I was not convinced the comments to the worker (e.g., pussy, working slowly, cockroach) trend toward egregious behaviour one sees at the extreme end of the foul language spectrum. I explained to the member the comment "working slowly" has been a supervisory anthem since the first days of the industrial revolution. I agree some language supervisors' use is

improper, but members also use salty language, and profanity is a two-way street.

More importantly, unionized workplaces are captured by the "obey now, grieve later" principle that is a labor relations rule requiring employees to follow a management order even if they believe it violates a collective agreement, and then address their concerns through the formal grievance process. This principle applies to harassment and ensures that work continues uninterrupted while the grievance is processed, but there are exceptions, such as for unsafe or illegal orders.

Times are different now. Workers demand to work in a "safe workplace" free of harassment. But I remain concerned about potential overreaction and sensitivity to coarse language that even on its face may be improper but easily characterized as shoptalk not uncharacteristic of a construction workplace. One female member told me "we work in construction, maybe the member should find another career." There is also settled arbitral case law regarding salty language in the workplace, and whether such language will attract judicial notice when this language is placed in the context of the norms, customs and practices of a particular workplace environment (e.g., construction).

Some members may develop a mental health issue (depression, anxiety) they believe is a work-related psychological injury. In my opinion, unwelcome comments would not be considered objectively traumatic as that term is defined under the WSIB Traumatic Mental Stress policy, as these unpleasant comments are not "life threatening" notwithstanding the member's vulnerable or frail spirit in dealing with unwelcome comments. Clearly, these situations require redress through the Workplace Harassment Policy of the contractor.

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PENSION GIFTS

The following pensioners are to receive their pension gifts:

Julius J. Baranyi, Roy Baldasti, Andrew Bynoe, Cyprian Craigwell, Petre Dogarescu, Richard J. Franchuk, Douglas F. Harlow, Ron A. Lambert, Goran Milanovic, Bohdan Nowosad, Rick A. Postma, James J. Rigas, Colin D. Saunders, Bijan Sepanloo, Jorge Schulhoff, Brian E. Sutcliffe, Kazimierz Trytek, Paul M. Verheggen, Dimitrios Vorvis

New Members

APPRENTICE LINEPERSONS

Wyatt Mckinnon, Kyle Strachan Mccallum, Cameron Tuck

APPRENTICE TECHNICIAN

Massimo D'Ignoti

APPRENTICE WIREPERSONS

Naukaran Singh Aneja, Ieuan Colwill, Raad Darweesh, Matteo Defelice, David Harper, Leah Johnston, Edison Liu, Anthony Machado, Paul Macneal, Luigi Madarang, Alihaidar Mirzaei, Bryce Nixon, Majuraj Sivachandran, Anthony Torres, Justin Trotter, Hailey Vachon, Lexie Wrozyna, Keyano Young

GROUNDPERSONS

Darrin Camilleir, Ronald Snelling

JOURNEYPERSON WIREPERSONS

Henry Chen, Zi Xi Chen, Kyle Fabian, Eric Hoang, Patrick Minnick, Ian Simpson, Stephen Sotomayor, Duane Veno

SENIOR NCS

Salvatore Inserra

UTILITY PERSONS

Lucas Aldona, Enrico Alphonso, Lorenzo Berlingieri, William Dicks, Cole Eddy, Gavin Ireland, James Lawson, Briggs Richardson, Sheldon Teabo, Carson Trevisani

JOURNEYPERSON UPGRADES

Bryan Betts, Philip Bucaro, Dawson Budway, Clarence Doe, Jason Fisher, Lucas Fortella, Seungwook Kim, Riley McMullen, Harrison Mense-Dietrich, Andrew Michalicka, Julian Morey, Abdullah Patel, Daniel Robinson, Joseph Spina, Amos Stevens, Brandon Stevenson, Michael Szczesny, Riley Walker, Daniel Walters, Xazel Westall

Interac e-Transfer

Just a reminder to members using the e-transfer option for event payments. Please indicate the event you are paying for under the description/message. This will help Office staff to identify the event and enter the amount in the appropriate funds.

FROM	TO
Bank Account	IBEW Local 353
	etransfer@ibew353.org
AMOUNT	MESSAGE
\$0.00	Member's Name &
(Fill in the amount)	Number, Event Name



Heart Attacks Usually Not Work Related, However There Are Circumstances in Which a Cardiac Event Might be Allowed. Strokes Are Entirely Different and Not Work Related

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



In my experience workers who suffer heart attacks usually have clinical evidence of myocardial disease, either undiagnosed until the first cardiac episode, or some documented past cardiac history.

In many instances, the worker was asymptomatic until they suffer a cardiac event at work. Heart attacks are the proverbial ticking time bomb case, in which the bomb was not set at work, but blew up at work. This is usually on a background of arteriosclerotic heart disease (ASHD), which is a thickening and hardening of the walls of the coronary arteries. This is a potentially serious condition where arteries become clogged with fatty substances called plaques, or atheroma.

Our working membership spans the entire age spectrum from age-18 to 70-plus. The younger a worker, the less likely they would fall into an age group statistically at-risk for a cardiac event, however, one also has to consider a workers body habitus (BMI- Body Mass Index), whether they're a smoker, have high blood pressure, and/or suffer from other systemic diseases. It is worth noting that obese workers may have good heart health compared to persons with a perfect weight to height BMI who may have coronary issues.

Injury Not an Accident Analysis

A frequent controversy that arises when a worker suffers an injury at work is whether there was a work related accident, even minor, that rose out of and in the course of employment. Many workers, and workplace parties, naturally assume that a fall from a ladder, or some spontaneous incident while walking or climbing stairs implies there was a work related accident. After all, the worker is crumpled up on the ground, fell off a ladder or down some stairs, therefore, it's difficult to reconcile HOW this isn't a work related accident?

However, there is a line of Tribunal cases that addresses "an injury is not an accident." In all WSIB claims there must be an accident.

For instance, a worker walking down a hallway, turns, and collapses injuring his/her knee. Since it happened at work, the natural assumption is the worker suffered a work related knee injury. However, the legal analysis turns on whether the activity giving rise to the spontaneous fall was a natural bodily function (bipedalism) or was there a clearly identifiable accident (mechanism of injury). Clearly walking isn't an accident, even though the worker suffered an injury after falling while walking. However, slipping on ice and twisting your knee, or tripping on a pipe is a provocative work related accident. In all injury claims, the details are important.

Where Bomb Blows Up (Injury) Not a Key Factor in Establishing Causation

Another example is a worker on a ladder who falls because he/she suffered a non-work related syncopal episode (fainted/blacked out). Since the fainting spell is not work related, there was no accident even though the worker may have sustained injuries after falling off a ladder.

Taking this analysis further, a worker suffers a stroke at work, and is disabled by the residual effects of a stroke. The fact a stroke or heart attack happens at work, does not necessarily make the stroke and resulting stroke complications (disability) work related. These fall under the rubric of non-compensable ticking time bomb cases. In other words, the bomb was not set at work, but merely blew up at work. The fact the bomb blows up at work does not necessarily make this a work related injury covered under the *Workplace Safety and Insurance Act*.

Conversely, sometimes the bomb (injury) is set at work, but doesn't blow up at work, but at home. The phrase I use is the work related disability became complete outside of work. This can arguably be a viable claim regardless where or when the disability manifests because work was a significant contributing factor in the pathogenesis of the workers injury. Thus, the location where and when a workers disability manifests or becomes complete requires careful analysis with respect to causation (work relatedness).

WSIB Policy – OPM 15-03-10 (Heart Conditions)

Arising out of and in the Course of Employment

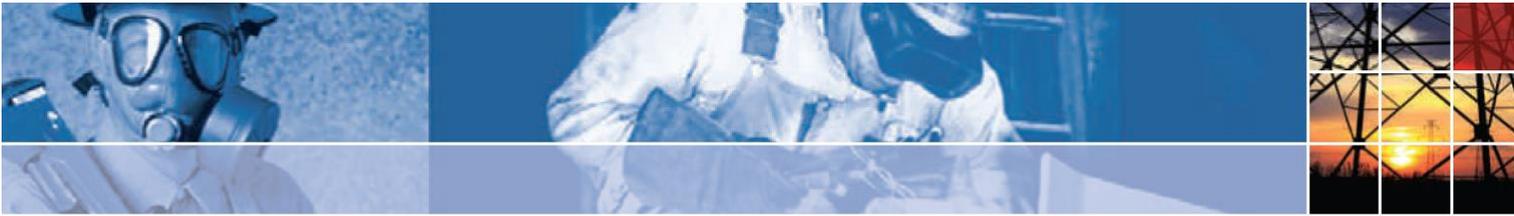
It is noteworthy that the Board has a policy on heart conditions. *Operational Policy Manual (OPM) Document #15-03-10, "In the Course of and Arising out of – Heart Conditions"* states that the Board accepts claims as work-related when a causal relationship is shown between the cardiac condition and an accident at work or the cardiac condition is established in a disablement "arising out of and in the course of employment."

The policy further states that when entitlement is established there will be no limitation of ongoing entitlement so long as the subsequent condition is related to the work-related cardiac condition or unusual physical exertion for the individual and/or acute emotional stress with no significant delay in the onset of symptoms.

Under OPM 15--03-10, WSIB accepts claims as work related when:

- a causal relationship is shown between the cardiac condition and an accident at work,

or



- the cardiac condition is established as a disablement "arising out of and in the course of employment."

Guidelines - The WSIB accepts entitlement for cardiac conditions under **any** of the following circumstances:

- traumatic injury, either penetrating or non-penetrating injuries to the chest wall
- electric shock producing irregular cardiac rhythm
- inhalation of smoke and various noxious gases and fumes, e.g., fire fighters, and
- complication of treatment for a work-related injury, e.g., anesthesia with an interval of hypotension, hypoxia or cardiac arrest.

NOTE - When entitlement is established under the above points for a cardiac condition, there will be no limitation of ongoing entitlement as long as the **subsequent** condition is related to the work-related cardiac condition, or

- unusual physical exertion for the individual and/or acute emotional stress with no significant delay in the onset of symptoms.

NOTE - This instance is allowed on the basis of aggravation of a pre-existing non-work-related condition. When entitlement is established, the condition has stabilized, and a permanent disability/impairment evaluation has been conducted, further entitlement will not be granted for a **subsequent** cardiac condition unless there is a new work-related occurrence, which merits allowance under a new claim.

Temporary disability/impairment

In most instances, claims for cardiac conditions are considered on the basis of aggravation of a pre-existing condition, usually arteriosclerotic heart disease. When a claim is accepted under this category for a heart condition, entitlement includes full benefits for wage loss and health care.

Significant Contributing Factor Test

In order for a worker to be entitled to benefits for an injury, the Tribunal applies the "significant contribution" test. Under that test the workplace injury need not be the sole cause of the worker's condition, as long as it is a "significant contributing factor." In *Decision No. 280*, the Panel defined "significant contributing factor" as follows:

A "significant contributing factor" is a factor of considerable effect or importance or one which added to the worker's pre-existing condition in a material way to establish a causal connection

As one can see, there are circumstances when a heart attack has a work related causal connection. But generally, they are not work related.

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New Members

APPRENTICE LINEMEN

Ryan Blundell, Joey Danis, Todd Jenkins and Andrew Noble.

APPRENTICE TECHNICIAN

Cody Macarthur

APPRENTICE WIREMEN

Cody Barr, Nicholas Beaulne, Matthew Bianconi, Alexander Blumberg, Daniel Clairmont, Jesse Deacon, Joseph Doyle, Think Duong, Luke Emslie, Noah Fuligni, Ryan Gordon, Dawson Green, Joseph Hart, Hidar Hidari, Shane Hunter, Beshoy Labib, Yander Martinez Pinilo, Salvatore Milione, Stefan Mizdrak, Kurt Mlynek, Conner O'neil, Nicholas Parks, Michael Pilafov, Kyle Spataro, Fabian Viana, Joshua Watts, Dalton Youngwolff and Ewan Terrell.

GROUNDMEN

Ryan Brown, Alexander Dawson, Luis Fernandes and Tyler Wheeler.

JOURNEYMAN HOUSEWIREMAN

Francesco Cozzolino

JOURNEYMAN WIREMAN

Edlir Dedelli

MACHINIST

Brian Snoddon

RESIDENTIAL HIGHRISE JOURNEYMEN

Christopher Pacheco, Joao Palma and Jeremy Ratte.

SS MAINTENANCE TECHNICIAN

Andrain Williams

TECHNICIAN

Justin Payne

UPGRADE JOURNEYPersons

Tyler Ashton, Stefan Berry, Jason Bradley, Steven Comparelli, Daniel Coniglio, Daniel Fonseca, Kevin Gonzalez Molina, Audi Gorgis, Brenden Gronkowski, Avinash Hiranman, Justin Huffman, John Jensen, Justin Kahnert, Cesar Looor and Kyle Lucas, Kyle Martin, Julian McNaughton, Andrea Naccarato, Marco Nicolosi, Kevin O'Brien, Bryce Petterson, David Pipka, Michael Primerano, Andre Ramrattan, Michael Riley, Ruen-Meviel Robregado, Stephen Scowcroft, Mackenzie Sutherland, Sebastian Wagner and Bradley Wilson.



Electrical Workers at Risk for Developing a Hernia, or Aggravating a Pre-Existing Hernia - Understanding How WSIB Adjudicates Hernia Claims

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



A frequent injury that electrical workers experience are hernias. Not all hernias are work related, but in my experience the vast majority of abdominal and groin hernias are the result of physically demanding work tasks.

In every hernia claim submitted to WSIB there must be a work related strain or trauma that causes the hernia in order for a claim to be allowed. In most stances members can recall when they felt a strain, and the emergence of an abnormal lump or burning sensation indicating a hernia.

Sometimes members have poor recollection of an injury, but visit their doctor for assessment who then diagnoses a hernia. If you submit a WSIB claim and cannot identify a specific strain (e.g., pushing, pulling or lifting), and tell WSIB that your hernia is work related because your job is physically demanding – WSIB will deny your claim. WSIB does not recognize hernia claims that are gradual onset injuries (repetitive strain injuries). There **MUST** be a precipitating mechanism of injury that can be identified.

Over the years I have represented members who developed a hernia after climbing a 50 ft. vertical ladder to an overhead crane (Redpath Sugar), or shoveling gravel for a trench to lay some PVC pipe.

There are also many members who were diagnosed with hernias but never had surgery and continued working. The pathogenesis of the original hernia may be unknown or not work related, but they engage in strenuous work which aggravates the pre-existing hernia, leading to emergency surgery.

Adjudicating Hernia Claims

Decision-makers may allow claims for work-related hernias if there is information on file confirming the diagnosis. A decision-maker may consult with WSIB clinical staff to assist in making this determination. In most instances, there isn't a dispute regarding the work performed by the member giving rise to a hernia, however, some employers muddy the waters and tell WSIB that there was no stress or effort involved in a wire pull. Typical arguments put forward in disputing workers hernia claims are the size of wire or a tugger was used.

A frequent source of adjudicative controversy is when members have a pre-existing hernia that is aggravated by work. If members aggravate a pre-existing hernia, and opt for elective surgery, WSIB does not allow the claim for health care or loss of earnings benefits.

Conversely, if a member requires *emergency surgery* because they suffered a work related aggravation of a pre-existing hernia, then the claim is allowable. That's what happened last year when a member working at the Honda plant for a 3-day shut-down aggravated a pre-existing hernia, was laid-off, then went to the hospital over the weekend where he was diagnosed with an incarcerating hernia that led to emergency surgery. Dr. Ian Soutter, General Surgeon at Southlake Health made the following observation in his consultation report:

This 35-year-old electrician was seen with an incarcerating umbilical hernia. He has had an umbilical hernia present for some time a year or 2 and it has been mildly symptomatic, but always easily reducible. He recently was doing quite a bit of heavy work, pulling a heavy cable and yesterday had very painful upper abdomen and umbilicus with a tender, non-reducible hernia. He came to the emergency department here where under sedation he did have reduction of the hernia. He was in quite a bit of pain and received quite a lot of morphine and other narcotics, but eventually he was comfortable enough to be discharged home. He apparently got home and was walking up the stairs when the hernia came out again and re-incarcerated and he ended up coming back to the emergency department last night, where again he was given ketamine and the hernia was reduced. He, again, apparently had quite a bit of pain after this and required quite a bit of narcotics and because of this, I was asked to see him in consultation.

Law and Policy

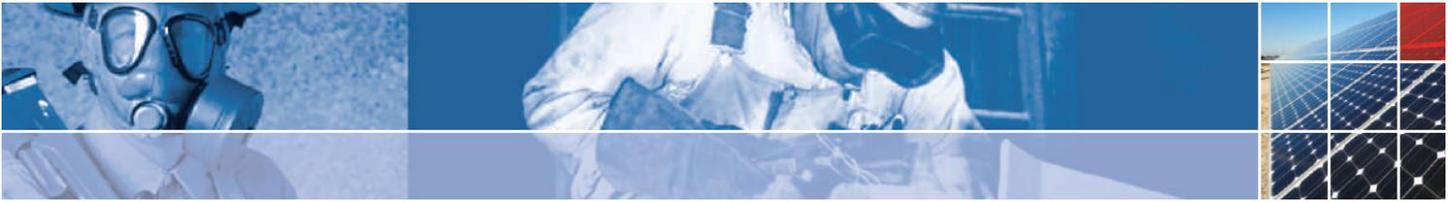
Hernia entitlement is currently adjudicated under Operational Policy Manual, or OPM 15-04-08, and states "If a specific work-related muscular effort or incident causes or aggravates a hernia, workers are entitled to benefits." The Policy states:

Initial health care

The WSIB pays initial health care benefits to workers if their work causes a hernia, or aggravates a pre-existing, work-related, or non-work-related, hernia.

Elective surgery

If a worker's pre-existing, non-work-related hernia is aggravated through work and the worker elects to have it repaired, decision-makers do not allow benefits for surgery and related lost time *unless* one of the entitlement criteria (described following) for emergency repair are met.



Emergency surgery

Decision-makers allow benefits for emergency surgery for both work-related and non-work related hernias aggravated by work if the hernia is:

- incarcerated (irreducible), or
- strangulated (incarceration with compromised blood supply), or
- associated with, or is apt to cause, rupture of the bowel wall.

In Tribunal *Decision 1411/08*, the Panel adjudicating a hernia claim under an earlier policy OPM 03-03-15, did not allow the appeal, because the worker's surgery was elective, not emergency, therefore, it did not meet the entitlement criteria for emergency repair. Although the policies are different, they have the same language regarding "emergency surgery."

There is settled case law on the question of what a significant contributing factor might be that was considered in Tribunal *Decision No. 280, 6 WCAT 27*, where the Panel concluded:

A "significant contributing factor" is a factor of considerable effect or importance or one which added to the worker's pre-existing condition in a material way to establish a causal connection.

The Panel also quoted with approval a passage from Tribunal's *Decision No. 652/87, 10 WCATR 75*:

This case raises the issue of the distinction between disabling symptoms appearing as the result of the impact of employment on a pre-existing degenerative condition which symptoms may be fairly taken as reflecting a compensable exacerbation or acceleration of a pre-existing condition, and the disabling symptoms appearing as a result of the impact of employment on a pre-existing degenerative condition which symptoms may be fairly taken as merely *evidence* of the disabling nature of the pre-existing condition.

Finally, there is settled jurisprudence in Tribunal case law regarding aggravation of pre-existing conditions, see *Decision No. 1592/01*, at para 21:

It is now commonplace in Tribunal case law that for entitlement to succeed on an aggravation basis, one must be satisfied that the work duties or a work incident changed the natural course of the underlying condition.

My advice to members and union representatives, work from the theory that there is a probable work related contribution when electrical workers develop a hernia, and don't be surprised when employers object.

Gary Majesky

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New Members

APRENTICE HOUSEWIREMEN

Owen Crawford, Frank Gallant, Joshua Zandarin, Anthony Renzone, Sepehr Sadeghi, Loretto Dicristofaro and Brad Oliveira.

APRENTICE LINEMEN

Jeffrey Sheardown, Nathan Kelly, Brandon Tizzard, Brandon Marsh, Ronald Belanger and Rory McDowell.

APRENTICE TECHNICIAN

Karen Papatheodorou

APRENTICE WIREMEN

Elyse Copland, Jeffrey Jackson, Daniel Ferri, Joshua Kalbhenn, Bryan Calquinhas, David Garvie, Mohamed Kabbara, Antonio Katava, Daniel Di Nardo, Christopher Fuller, Simon Jones, Noah Kalverda, Thomas McCulloch-Birimcombe, John Saunders, Victor Jimenez, Matt Niemi, Eric Ly, Wilson Mach, Gennaro Morganelli, Omer Tiraei, Matthew Gouveia and Lukas Marcek.

GROUNDMEN

Jeff Carter and Wayne Parsons.

JOURNEYMEN HOUSEWIREMEN

Tyler Dingli and Luigi Ricca.

JOURNEYMEN LINEMEN

Ronald Brightman, Jamie Ruddell and James Atcheson.

JOURNEYMEN WIREMEN

Anthony Carlson, Cody Thorne, Lim Kuoch and Bojan Bukovcic.

RESIDENTIAL JOURNEYMEN WIREMEN

Kiarash Moghaddam, Hamed Rahimi and Sean Tullo.

TECHNICIAN 1

Andrew Blanchard.

TECHNICIAN 2

Mathew Quesnel.

JOURNEYPersons UPGRADE

James Debrofski, Lee De Wire, Jeffrey Larkin, Ian Leonard, Richard Willis and Parnell Wright.



Tribunal Case Law - Arising Out of and in the Course of Employment

Injured on Unpaid Lunch or Personal Breaks Mobile Workstations (Company Trucks)

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



As a general rule, a worker is considered to be in the course of the employment when the person reaches the employer's premises or place of work, such as a construction work site, and is not in the course of employment when the person leaves the premises or place of work.

However, many members drive service trucks and sustain injuries after a MVA, or slip and fall in restaurant's, including Tim Horton's, but often times are encouraged by the employer to file claims with the auto insurer, and not WSIB. MVAs in the course of employment are clearly work related, however, the WSIB requires the injured worker to sign an "Election Notice" that they elect to claim WSIB benefits, or alternatively, pursue a third party action (sue another insurer). Be forewarned, this is an irrevocable decision.

Previous Tribunal decisions have consistently held that the fact that a worker on an unpaid lunch break is, by itself, not determinative of the issue of whether that worker is in the course of his employment during the lunch break. It is only one of the factors involved in weighing and balancing the employment features of the situation with the personal features and is part of the totality of the event.

Travelling employees having lunch on the road is an activity incidental to their employment, as the following decisions confirm, especially where the purpose for the worker being in the area is related to their employment.

Notwithstanding the fact employees may be on an unpaid lunch break at the time of an injury, unless there is a distinct departure to attend to personal business (e.g., going to H & R Block, banking, or shopping) workers are considered to be in the course of employment when on lunch and rest breaks. *WSIB policy 15-02-02 – Accident in the Course of Employment*

recognizes that attending to "personal needs" such as going to the washroom or eating, are biological activities that must be fulfilled, and therefore incidental to one's employment.

Decision No. 1786/06 (Vice-Chair Marifiotti)

On my consideration of the evidence and, in particular, the nature of the worker's employment and operations, I am satisfied that the accident did arise out of and in the course of employment.

I accept that it is not uncommon for workers to cross the street to obtain food for trips as the employer provides no facility for this. This custom was clearly related by all of the testimony at the hearing.

Furthermore, I am satisfied that the employer was well aware of the custom activity. The employer did not provide any information that, in my view, would contradict that the custom was authorized by the employer.

The crossing of the street to get food for the train trip is an activity reasonably incidental to the worker's employment... There are no food facilities provided by the employer and no opportunity to obtain food while on the train.

It is the nature of the work environment that required the worker to cross the street and obtain food for the train trip... While the worker rests and prepares for the train arrival, the employer retains authority over the worker and his activities, which, in my opinion, are reasonably incidental to the employment.

Decision No. 1484/041 (Vice-Chair Kenny)

The Respondent's lawyer argued that Ms. Ryan's activity of going for lunch was

reasonably incidental to her employment - that it was not a personal errand or activity in that it was needed for health reasons. She also noted that Ms. Ryan's employer's break policy meant that no employee could work more than five consecutive hours without receiving a meal break...

I am satisfied that, given the nature of the worker's work and the practices associated with her employment, having lunch was an activity that was reasonably incidental to her employment. As stated in Board Policy, when the conditions of the employment require the worker to travel away from the employer's premises, the worker is considered to be in the course of the employment continuously except when a distinct departure on a personal errand is shown. Having lunch would not have been a personal errand. It was an activity that was reasonably incidental to her employment. As indicated in *Tribunal Decision Nos. 1785/02 and 62/94*, taking a lunch break at a restaurant close to the next jobsite will normally be an activity that is reasonably incidental to the employment of employees whose conditions of employment require them to travel away from the employer's premises.

Decision No. 1785/02 (Vice-Chair Kenny)

As indicated in Tribunal decisions cited by the parties, the premises rule that is generally applied to trips going to and from work is generally applied when a worker takes a lunch break at a location off the employer's premises. This is because the duration of an off-premise lunch break and the freedom of movement the worker has during such a lunch break usually removes



a worker from the activities associated with his/her employment, as well as from the risks the employer controls. However, this general rule with respect to off-premises injuries does not usually apply to workers who are normally expected to work away from the employers premises. For such workers, the journey to such off-premises work is part of the service for which the worker is employed. Accordingly, workers whose conditions of employment require them to travel away from the employer's premises are considered to be in the course of employment continuously except when a distinct departure on a personal errand takes place. Because such workers are considered to be in the course of employment continuously when they travel away from the employer's premises, acts such as eating meals during the hours of employment are usually considered to be reasonably incidental to that employment. If, however, there is a distinct departure from the employment trip for personal reasons, this may take the worker out of the course of employment.

Closing Thoughts

While the law and policy seem reasonably clear, that does not mean the WSIB will side with the injured worker, because I have argued appeals where the Board ruled the member was not in the course of employment re lunch break. However, decision-makers are directed to take into account the nature of the work; nature of the work environment; and the customs and practices of the particular workplace. To all our members who drive a service or company truck, your company vehicle is often times your principal employment tool, so don't get lulled into thinking that because your employer gives you a truck and gas card, there is a shared risk. Bottom line, if you have an MVA during work hours its work related.

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COBT Baseball Tournament

Local 353 entered two teams in the Central Ontario Building Trades Baseball Tournament at Coronation Park on Saturday, May 31, 2014. Our team in the "B" Division won against Sheet Metal 30 but lost to LIUNA 506 and Elevators 50. Our team in the "A" Division rocked the tournament with one loss to the Plumbers/Steamfitters 46 and wins against the Elevators 50 and Gowing Contractors. Team "A" took revenge in the semi-finals against the Plumbers/Steamfitters and then took the final game over the Elevators for the Division Championship.



Team A



Team B



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,

(Sal) Salvatore Maltese
 (705) 790-6947
 Business Representative
 Electrical Power Systems Construction Association (EPSCA)
 North & East, LCA LVLIII, MHFA

Social Committee Update

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



WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Understanding How WSIB Calculates An Injured Workers Short and Long Term Loss of Earnings Benefits and Strategies to Maximize your Long Term LOE Rate

A frequent complaint I receive from members who have a WSIB claim relates to the Long Terms Earnings recalculation. One member in particular always engages me in Intellectual Jujitsu, and alleges everything the WSIB does is illegal. Recalculating an injured workers LOE benefit rate is entirely legal under the Law and Policy, and impacts workers who are non-permanent employees who have variable earnings, and different employers. Workers hired from a union hiring hall are deemed contract workers, even if they have been steadily employed by a contractor.

Prior to 1998, the WCB used an injured workers earnings on the day of injury to calculate and pay benefits. However, when Bill-99 was introduced and proclaimed into law on January 1, 1998, the Workplace Safety and Insurance Act allowed for both a short term and long term LOE benefit rate. A gift to construction workers from the Common Sense Revolution and Premier Mike Harris.

Law and Policy - Policy 18-02-02 - Short Term Average Earnings

Short-term average earnings are the worker's earnings from the accident employer and all other employment at the time of the injury based on four (4) weeks earnings prior to the date of injury. Short Terms Loss of earnings (LOE) benefits are paid for the first 12 weeks following the injury based on the short-term average earnings. This Policy has been periodically updated since 2002, and most recently in 2024, but essentially unchanged.

Guidelines - First 12 weeks

In the majority of cases, workers will receive LOE benefits over a consecutive period of time and in some cases, the worker may receive LOE benefits for less than 12 weeks, return to work at no wage loss, and then experience a recurrence of the work-related injury. In these cases, the WSIB restarts LOE benefits using the relevant short-term average earnings. The short-term average earnings are used to pay LOE benefits over 12 cumulative weeks.

Law and Policy - Policy 18-02-04 - Long Term Recalculation 13th Week

Long-term average earnings are generally based on employment earnings in the 24 months before the work injury, but this period can be shortened (see below). Earnings includes with the accident employer, other employer, EI benefits, and concurrent employment (e.g., part-time job).

LOE benefits are paid based on the worker's long-term average earnings from the beginning of the 13th week of LOE benefits. The purpose of this policy is to outline when and how a recalculation to long-term average earnings is conducted for workers in non-permanent employment. Workers with large gaps where they were unemployed will see a decrease in their LOE benefit rate.

Guidelines - 13th Week of LOE Benefits

Non-permanent employment is employment where a worker is hired for a specific period, or for a temporary period through a union hiring hall. Workers in non-permanent employment include contract workers, seasonal or cyclical workers, temporary agency worker or Hiring Hall.

Earnings for a worker in non-permanent employment typically fluctuate as the worker moves from job to job, has periods of unemployment, or experiences periods of higher or lower earnings. Therefore, it is likely that a worker's long-term average earnings will be different than the short-term average earnings. WSIB believes it is unfair to continue paying a worker's loss of earnings (LOE) benefits based on the short-term average earnings, and the decision-maker automatically refer the workers file to be recalculated by a payment specialist to determine the long-term average earnings. Sometimes WSIB fails to conduct the recalculation, and later on realizes their error and conducts a retroactive LOE recalculation.

Head on a Swivel - Strategies to Shorten Recalculation Period

Often times the WSIB spends little time on the details and exercises its authority to shorten a recalculation period (less than 24 months), when it is convenient. However, this can lead to a worker being undercompensated.

The policy authority is found in Policy 18-02-04, which also sets out the how the Board calculates the long term LOE benefit rate, and how to shorten the recalculation period. Policy 18-02-04 states:

Recalculation period Long-term average earnings for these workers are generally based on employment in the 24 months before the injury.

To simplify the process of gathering the worker's past earnings information, the 24-month period may be either extended to include the two full calendar years before the injury, plus the current year up to the date of injury, or shortened to the full calendar year before the

injury, plus the current year up to the date of injury, provided that the worker's employment pattern is accurately reflected. If the decision-maker extends/shortens the recalculation period, the decision-maker may have regard to the worker's seasonal or cyclical work pattern.

Policy 18-02-04, also outlines the non-earnings period to be excluded from the long-term recalculation period:

Non-earning periods excluded from recalculation

Non-earning periods that are not part of the employment pattern are factored out of the recalculation period. These periods may include:

- parental/maternal leaves
- unpaid periods of injury or illness
- periods of injury or illness for which the worker receives long-term disability benefits
- periods of injury or illness for which the worker receives workplace insurance benefits*
- or benefits from another insurance plan
- periods of full-time schooling
- periods of incarceration
- periods on social assistance benefits
- unpaid leaves of absence (elder or childcare – see Employment Standards Act)
- strikes/lockouts
- unpaid periods of absence due to jury duty, spouse's or children's illnesses, funerals, dentist or doctor appointments.

Scrutinize the Recalculation Decision for Errors

In my experience, too many WSIB recalculations are conducted by shortening the recalculation period because it was convenient for the Board, but resulted in the workers LOE benefit rate being reduced. Had the WSIB conducted a 24-month recalculation and used all earnings, instead of a truncated (shortened) recalculation period, the workers LOE benefit would have been higher.

Workers also need to scrutinize WSIB Case Manager and Payment Specialists decisions because they often do not exclude periods of time that should be subtracted, for instance, a member was hospitalized for 4 months during the recalculation period and WSIB did not subtract this period from the recalculation period resulting in the worker being undercompensated.

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Toronto Marlies VS Syracuse Crunch

Central Ontario Building Trades Day

Coca-Cola Coliseum

Saturday, April 5 @ 4pm

Electronic tickets will be available on **Monday, March 10, 2025**.
There is a limit of 4 tickets per member.

For electronic tickets, please email your name, card number, phone number and email address to: events@ibew353.org

With the purchase of every ticket, \$5 will be donated to the COBT's Hammer Heads





Lung Cancer In Workers With Clinical Evidence of Asbestos Exposure Are Allowable Claims Under WSIB Policy 16-02-13

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



So far in 2018, two members have passed away due to mesothelioma, which is an asbestos related cancer of the pleural lining of the lung. Mesothelioma is an end-stage occupational disease in workers with a documented history of asbestos exposure. If you worked in construction, and are diagnosed with mesothelioma, there is a presumption the disease is work related.

Standards for Occupational Disease Scheduling

There are two occupational disease schedules contained under Ontario Regulation 175/98 of the *Workplace Safety and Insurance Act*. Schedules 3 and 4 give legal recognition to a link between occupational diseases and the corresponding processes. In each Schedule, the disease is listed in Column 1 and the corresponding process (occupational setting) is listed in Column 2.

Asbestos related lung diseases fall under Schedule 4, and includes asbestosis and mesothelioma, however, lung cancer is not listed.

Law and Policy - Presumption

The inclusion of various occupational diseases under Schedule 3 and 4 of the WSIA regulations has legal and administrative implications. For instance, the *WSIA* legislation states:

If the worker at or before the date of disablement was employed in any process mentioned in the second column in Schedule 3 or 4, and the disease contracted is the disease in the first column of the Schedule set out opposite to the description of the process, the disease shall be deemed (presumed) to have been due to the nature of the employment unless the contrary is proved.

If a worker was employed in a process set out in either Schedule 3 or 4, and contracts a disease specified in the Schedule, the disease is presumed to have occurred due to the nature of the workers employment unless the contrary is shown. This is referred to as presumptive legislation.

Why are the Scheduled Diseases Significant?

Schedule 3 contains a list of thirty diseases for which WSIB will pay benefits if you prove you have the disease and you worked in a process listed next to that disease. You will not receive benefits if either WSIB or your employer proves the disease did not arise from your work. For example, WSIB or the employer can argue that the workplace exposure to a substance was not long enough to be significant, or that other factors such as smoking were responsible for the disease.

SCHEDULE 4

OCCUPATIONAL DISEASES (DEEMED UNDER SUBSECTION 15 (4) OF THE ACT)

	Description of Disease	Process
1.	Asbestosis	Any mining, milling, manufacturing, assembling, construction, repair, alteration, maintenance or demolition process involving the generation of airborne asbestos fibres
2.	Primary malignant neoplasm of the mesothelium of the pleura of peritoneum	Any mining, milling, manufacturing, assembling, construction, repair, alteration, maintenance or demolition process involving the generation of airborne asbestos fibres
3.	Primary cancer of the nasal cavities or of paranasal sinuses	Any process at the Copper Cliff sinter plant of Inco Limited
4.	Primary cancer of the nasal cavities or of paranasal sinuses	Any process in the Port Colborne leaching, calcining and sintering department of Inco Limited that was practised before January 1, 1966

Schedule 4 contains a list of only 3 diseases which are directly applicable to electrical workers. To receive benefits for diseases listed in Schedule 4, you only need to prove that you have the disease and that you were employed in the listed work process (ICI construction & maintenance). However, lung cancer is not listed in Schedule 4.

Pleural Plaques Evidence of Asbestos Exposure

So how does one establish that you are an asbestos worker? An important clinical marker of asbestos exposure is found in imaging studies that reveal the presence of pleural plaques.

Although Pleural Plaques are viewed by the American Society of Thoracic Surgeons to be a benign pathology, typically without pulmonary complications (shortness of breath). It is usually discovered in a routine x-ray or CT scan in which calcified shadows are revealed on the diagnostic scans. It has been explained that calcification of asbestos bodies in the lungs is the human bodies' natural defence mechanism to envelop or cocoon asbestos fibres which become calcific deposits. In several Tribunal decisions, this has been referred to as scarring of the lung. While technically benign, pleural plaques are clinical evidence of past asbestos exposure, and workers so diagnosed are at greater risk for developing other asbestos diseases such as asbestosis or mesothelioma.



Lung Cancer In Asbestos Workers

Recently I submitted a claim for lung cancer, which was allowed. The claim reminded me of a members case 10-years ago who was diagnosed with lung cancer and passed away. He was a friend of my father's, and profoundly upset that Dr. Bernstein, the former head of Cancer Care Ontario, did not believe his lung cancer was causally related to asbestos exposure. Dr. Bernstein, contacted me early one morning and explained that attempting to link the lung cancer to past asbestos exposure was problematic. He used the analogy of a man falling from a 10-storey building and said the asbestos contribution to the man's death was akin to a breeze as he hurtled to the ground. Simply, the man's cause of death was not from the gust of wind on the way down, but blunt force trauma.

Upon receipt of Dr. Bernstein's opinion, I realized we had a problem which I explained to the member, who pleaded "if the union does not fight for me, who will?" He didn't understand that whenever there is a dispute regarding causation, and whether a disease or injury is work related, decision makers' focus on the opinions of treating doctors, especially specialists, and evidence based medical science (epidemiology).

At that moment, I had an epiphany. Why should the union be the gatekeeper and decide whether the members lung cancer claim should proceed. That's not to suggest we take forward every case regardless of merit. Let the WSIB make the decision whether there is a causal relationship. Much to my surprise, the WSIB allowed the members lung cancer claim, under Operational Policy 16-02-13.

Under Policy 16-02-13, Lung Cancer in asbestos workers is accepted as an occupational disease under sections 2(1) and 15 of the *Workplace Safety & Insurance Act* as peculiar to and characteristic of a process, trade or occupation.

Entitlement Criteria

Based on medical studies, lung cancer claims are favourably considered when the following circumstances apply:

- there is a clear and adequate history of at least 10 years occupational exposure to asbestos, and
- there is a minimum interval of 10 years between first exposure to asbestos and the appearance of lung cancer.

Claims which do not meet these guidelines will be individually judge on their own merit, having regard to the intensity of exposure and other factors peculiar to the individual case.

However, the fact an electrician may have worked in construction does not automatically mean they are presumptively "asbestos workers" pursuant to Ontario Reg. 175/98. And therein lies the challenge, because not every lung cancer claim is asbestos related and the pathogenesis (cause) is typically multi-factoral. On the other hand, if a member has been diagnosed with pleural plaques, which many members have because I have filed many occupational disease claims for them, then they are *de facto* asbestos workers.

I often tell members, usually from an older age group, that there is no bag of money for registering a pleural plaque occupational disease claim with WSIB. However, if they do develop asbestosis, mesothelioma, or lung cancer later on, we can reopen the claim in the future.

And contrary to Hollywood movies celebrating bucket lists, it's my experience that once you receive a troubling diagnosis one's focus is on treatment, coping with loss of health, and running to endless doctors' appointments. Before signing off, did you know that actor Steve McQueen and musician Warren Zevon died from mesothelioma?

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SATURDAY, JULY 28, 8PM



Tickets will be available in June.

Victoria Day

is a Statutory Holiday to be observed on Monday, May 21, 2018. If your employer asks you to work on this day, you must be paid double time for working!



COVID-19 Pandemic – Understanding the Law When Dealing with Microbial Pathogens & Whether There is a Work Related Connection - The Route of Acquisition is Difficult to Establish

By: Gary Majesky, WSIB Consultant & Executive Board Member



Understanding the law and jurisprudence is a good starting point when dealing with microbial pathogens is potentially work related. Members understand the frustration in dealing with WSIB to get claims approved for straight forward work injuries, particularly when there is a pre-existing condition. Now factor in the unique epidemiology and community transmission of COVID-19, and this creates a significant evidentiary hurdle in getting WSIB claims approved. Here's WHY.

The WSIB website states "the nature of some people's work may put them at greater risk of contracting the virus, for example those treating someone with COVID-19. Any claims received by the WSIB will need to be adjudicated on a case-by-case basis, taking into consideration the facts and circumstances." Clearly the message is geared to front line health care workers.

Under the law, the *Workplace Safety & Insurance Act* ("WSIA") recognizes injuries resulting from single episode trauma, as well as gradual onset injuries. The Board also accepts occupational disease claims when there is a relationship between the disease and work exposure, either immediate or long term latency (some cancers, asbestosis etc.).

The Law and Policy

The definition of accident in section 2 of the WSIA includes a disablement arising out of and in the course of employment. Board Policy 15-02-01 defines disablement to include a condition that emerges gradually over time or an unexpected result of working duties. For entitlement to be allowed, the decision-maker must examine the nature of the work (environment), the nature of the injury (disease) and the relationship between the nature of work and injury. It is important to understand that accident and injury is broadly defined and includes diseases.

Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. The standard of proof in workers' compensation proceedings is the balance of probabilities.

There is a statutory presumption contained under Ontario Regulation 175/98 of the *Workplace Safety and Insurance Act*. Schedules 3 and 4 give legal recognition to a link between specifically listed occupational diseases and the corresponding work processes and occupational setting. Asbestos related lung disease falls under Schedule 4, and includes asbestosis and mesothelioma; however, Meningitis, SARS,

H1N1, and QCOVID-19 are not listed. That does not mean these cannot be work related in certain circumstances, but there is no legal presumption they arise out of and in the course of employment, and must be adjudicated on the merits and justice of each claim.

Past History as a Guide

Fifteen years ago a LU 353 member developed meningitis which is a bacteria that lives in the nose and throat and spread from one person to another by contact. It can spread easily through everyday behaviours, including coughing & sneezing, sharing drinks & eating utensils, kissing and living in close quarters.

The question arose whether the meningitis was contracted through work because the member was working on a TTC subway project and there were thousands of TTC commuters and one of these transit patrons *may have* infected the member. My review at the time centered on the fact that this was a speculative possibility with respect to work causation which fell short of the evidentiary standard of the balance of probabilities.

Around the same time there was a Deputy Fire Chief who contracted meningitis and died. His WSIB claim was allowed because the Fire Chief had attended a public ceremony and shook the hand of a person who had meningitis. It was determined that the Fire Chief was in the course of employment, and shaking the hand of a person during a public ceremony was deemed work related because the "route of acquisition" of the bacteria could be established. It was more probable, than not, that the Fire Chief contracted meningitis through work. These two scenarios draw an important distinction between a *speculative* and *probable* work related nexus.

Member Contracted Gastroenteritis at Ashridges Bay (sewage plant)

In *Decision 526/04*, a member who has been a foreman and steward on many jobs was working at a Toronto Waste Treatment building where treated human waste biosolids were loaded onto trucks. The issue under appeal was whether an electrician acquired gastroenteritis as a result of exposure to human waste biosolids in the workplace in February 2001.

The employer was represented by Justice William Lemay, who in 2015 was appointed to the Ontario Superior Court of Justice. He argued the WSIB correctly concluded that the member's exposure was more likely, than not, related to his food preparation habits at home, and not work related.



The member testified he was installing light fixtures in a building where treated human waste biosolids were loaded on to trucks. He was accidentally exposed to water spray used to clean biosolids from the truck loading area. He became ill on February 23, 2001. On February 25, he attended a hospital emergency department with symptoms of fever and chills, poor appetite, diarrhea, vomiting and dehydration. Stool tests were negative for Salmonella, Shigella, Yersinia, Campylobacter, Escherichia coli D157 and Clostridium difficile. His doctor diagnosed gastroenteritis.

The only protective equipment provided was coveralls and gloves, and showers. The plant manager told WSIB that “there was no history of truck drivers getting sick.” The employer’s witness testified that the sewage sludge was tested two times per day for bacteria. If it did not meet Ministry of Environment guidelines, the sludge was sent back for further treatment. The sludge was not tested for viruses, but stored anaerobically for 20 days.

Because the issue under appeal involved a complex medical question of causation, the Tribunal selected Dr. Donald Low as the Tribunal appointed medical assessor for this appeal. Dr. Low was a Professor of Medicine and Microbiology at the University of Toronto where he was Head of the Division of Microbiology in the Dept. of Laboratory Medicine and Pathology. In addition, he was Chief to the Toronto Medical Laboratories and Mount Sinai Hospital Department of Microbiology, a shared laboratory serving over 10 hospitals in the greater Toronto area.

An interesting side note, Dr. Low became a familiar face to the Canadian public during the 2003 SARS crisis and was also the lead microbiologist during the SARS epidemic and instrumental in taming the microbial outbreak, which led to infectious disease protocols that have since been adopted world-wide. Dr. Low answered several questions set out in an interim decision, and opined:

[15] I think it is quite possible that the employee was exposed directly to contaminated material via the oral route when he was splashed at work. The fact that the biosolids had undergone treatment does not mean that they were still not infectious to humans. Even if testing of the biosolids had coliform counts that fell below those within the regulations (<2,000,000 FC/gram of solids), they may still contain viable bacteria, viruses and/or parasites that can cause disease when directly inoculated into a person’s mucosa.

The fact that a patient had a negative stool culture for known pathogens does not mean that the patient did not have an infectious cause of his gastroenteritis. There are numerous types of viruses and parasites which are able to cause gastroenteritis that would not be detected by routine microbiological techniques. It is also possible that the causative pathogen may not have been detectable at the time of the testing. Routine testing for enteric pathogens is not a 100% sensitive or specific.

... I have looked at the interim report and my opinion would be that it is possible that the employee could have contracted a food borne pathogen outside of the workplace, but this is unlikely given the information that has been provided. In my opinion the most likely source of this person’s illness is the workplace.

In her judgement allowing the members claim, the Tribunal Vice-Chair concluded:

Section 13 of the *Workplace Safety and Insurance Act* provides that a worker who suffers a personal injury by accident arising out of and in the course of his employment would be entitled to benefits under the insurance plan.

I find that the worker was accidentally exposed at work to water spray contaminated with biosolids, that is, treated human waste, at some time during the period of February 19 to 23, 2001. He became ill with gastroenteritis on February 23, 2001.

The issue to be determined is whether the workplace exposure to biosolids contributed in a significant or material way to the development of the medical condition in question. It is well accepted in workers’ compensation law that the test for determining whether a causal relationship between the work and the injury exists, is that of significant or material contribution. A material contribution need not be the sole contribution, but must be more than a minimal contribution. Causation need not be determined with scientific precision. Medical experts ordinarily determine causation in terms of certainties, but the law requires a lesser standard. It is the function of the trier of fact to make a legal determination of the question of causation, using a “robust and pragmatic approach”, where there is medical uncertainty with respect to causation. Reasonable inferences may be made from the primary facts of the case. Causation is determined on a balance of probabilities, or applying the benefit of the doubt where the evidence is equally weighted. However, a finding of causation may not be made based on mere speculation or evidence of a possibility, rather than a probability. (See the judgement of the Supreme Court of Canada in *Snell v. Farrell*, [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73; *Laferriere v. Lawson* [1991] 1 S.C.R. per Gonthier J.)

The Vice-Chair relied on the medical evidence submitted by IBEW LU 353, and Dr. Low, an expert in medical microbiology, infectious diseases who was of the opinion that the worker’s exposure to biosolids was the most likely source of the gastroenteritis. There was a close temporal connection between the hose spray incident and the development of severe gastroenteritis and concluded that the worker’s gastroenteritis resulted from accidental exposure to human waste biosolids.

Legal/Medical Challenges in Establishing Work Related Causation

The above analysis serves to highlight the complexity in establishing causation even when there is a likely and probable work association.

These cases also set out the inherent evidentiary challenges when dealing with microbial pathogens, such as COVID-19, and in particular the “route of acquisition.” In every WSIB claim there must be a causal work connection that rises above a mere “speculative possibility.”

Transmission of COVID-19

As citizens living through a global pandemic, all of us are following developments of COVID-19 from when it first emerged in Wuhan, China. Medical experts recognize the virus has an incubation period/time lag before people may develop symptoms. Initially infected travelers were suspected carriers of COVID-19, but now public health officials acknowledge evidence of community transmission.

LU 353 members, in fact all workers, who are still going to work are worried and scared since many Countries, Ontario and 48 USA States, notably New York, Illinois, and California have declared a State of Emergency. Boston was the first major city to shut-down the construction industry, along with enormous parts of the economy. That means we are dealing with a national and global pandemic, and not a simple workplace hazardous environment, and therein lies the inherent challenge in establishing a work-related connection.

Health & Safety Vigilance Paramount

Going forward, it is important for members still at work to be aware of anyone on site who has tested positive for COVID-19, and ordered to stay-at-home, quarantined or hospitalized, including self-isolation. This is a workplace health and safety issue that must be disclosed in health and safety meetings between labour management representatives. Open and free flowing information is paramount, and failing to disclose or hiding behind a veil of secrecy, or privacy laws is unacceptable.

Lesson's From SARS Outbreak

Workers and unions should also be mindful of the recommendations of Justice Archie Campbell who investigated Ontario's SARS outbreak in the hospital health care sector. One of his chief findings was “we

cannot wait for scientific certainty before we take reasonable steps to reduce risk.” And when dealing with “serious infectious disease outbreaks, the health-care system must follow the precautionary principle” and err on the side of caution. Although Justice Campbell was tasked with investigating how hospitals managed SARS, his findings remain good public policy applicable to every employment setting.

Should I File A WSIB Claim

At this time, I recommend members should submit a *WSIB Construction Incident Exposure Report (CEIR)* if you believe you may have been exposed to COVID-19 because someone at your workplace is suspected or infected with COVID-19. This includes indirect contact by touching communal surfaces, materials and tools in the workplace. The purpose of the CEIR is to gather information about the exposure while it is readily available, should a worker become ill in the future.

In order to have a viable WSIB claim there must be a work injury or disease. An exposure to COVID-19 is not an injury, therefore, you should not submit a WSIB claim at this time.

To summarize, the difficulty in establishing a viable WSIB claim is considerable because we are dealing with community transmission of a microscopic pathogen that you cannot see or detect, including a latency/incubation period before someone may develop COVID-19 symptoms. In the meantime, members should submit CEIR reports, and exercise your right to refuse under the *Occupational Health and Safety Act*. It is also important to involve a Steward, Business Representative and notify the Hall. Please visit the IBEW Local 353 website for information (www.ibew353.org) and on social media.

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Pension Gifts

The following pensioners are to receive their pension gifts:

**Anton Boychuk, Shaun Cox, Frank DeSousa, Patrick Doyle,
William Finnerty, Jim Klingelstein, Stephen Magladry, Manuel Marques,
Alistair Maule, Terry O'Brien, Raymond Ramos and Randy Richards.**



Musculoskeletal Symptoms Among Electricians - Occupational Research by Hunting et al Reported in the American Journal of Industrial Medicine Aligns with Local 353 Research



By: Gary Majesky, WSIB Consultant & Executive Board Member

This month I want to review a research study whose results mirror many of the occupational findings that Local 353 has documented over the years. Unfortunately there is no legislative presumption that if you work in construction certain musculoskeletal injuries are deemed work related.

Some occupational diseases, including asbestos related lung disease are captured by presumptive provisions in the *Workplace Safety and Insurance Act* and schedule 3 of the regulations, but not physical injuries.

A study by a research team led by Dr. Hunting investigated the presence of musculoskeletal symptoms among electricians in order to evaluate the role of cumulative trauma disorders (CTD) among electricians in IBEW Local 26, Washington D.C. Three hundred and eight (308) apprentices and journeyman participated in the study, with a majority being young individuals (under age-30).

The survey highlighted that: 1) low back discomfort is common in young construction workers, and resulted in medical care, missed work, or light duty for almost 35% of participants; 2) neck discomfort is also very common requiring doctor visits or work modification for almost one quarter of the participants; these construction workers continued to work with symptoms that are classified as a CTD; and 4) history of injury is correlated with the subsequent musculoskeletal symptoms.

Chronic musculoskeletal stress resulting from strained postures or repetitive, forceful movements can cause chronic musculoskeletal conditions such as tendinitis, epicondylitis, carpal tunnel syndrome, and low back pain. These and similar conditions are known collectively as cumulative trauma disorders (CTDs), and frequently studied among manufacturing workers.

Musculoskeletal disorders from both acute and chronic stress also cause considerable disability in the construction industry, where work is strenuous and workers typically handle heavy materials and experience both static and dynamic postural stresses. While the study found many of these strains and sprains were acute in nature, undoubtedly many were the result of chronic physical stresses. Other investigators and L.U. 353 research prepared by the Occupational Health Clinics for Ontario Workers has also identified considerable symptom prevalence of pain, aching, stiffness, burning, numbness, or tingling consistent with the findings in the *Hunting* study.

The *Hunting* study noted the majority of study participants were relatively young and worked a median of 5 years in the electrical trade. The distribution by ethnicity was 71% white, 25% black, and 4% other minority groups. Ninety-eight percent were male. Participants

reported **Most Frequent Symptoms** in the Lumbar Spine/Back (157/308 = 51%), and Hand/wrist (144/308 = 47%)

Proportion of IBEW Study Participants with CTS, by Various Definitions (N – 308)						
	Neck No. (%)	Shoulder No. (%)	Forearm/Elbow No. (%)	Wrist/Hands No. (%)	Back No. (%)	Knee No. (%)
Symptoms occurring 3 times, or lasting >1 week	116 (38)	89 (29)	47 (15)	144 (47)	157 (51)	103 (33)
Symptoms occurring once per month, or lasting > 1 week, no traumatic injury	49 (16)	35 (11)	21 (7)	73 (24)	64 (21)	49 (16)

Participants were also asked whether specific activities made their symptoms worse, and if so, which activities. For about two thirds of the symptoms across all bodily locations, the symptoms were exacerbated by work, and in particular by tasks such as lifting, working overhead, and working with hand tools.

The study participants noted the “most serious or troublesome” were injuries to the lumbar spine/back (27%), knee (15%), and hands/wrist (14%).

In my experience high quality research on its own will not result in a worker’s compensation claim being allowed because claims are adjudicated on the individual facts and merits. However, there is a body of epidemiological research that our members’ aches, pains and injuries are strongly associated with the physical demands of the electrical trade.

Why is this important? Members need to be mindful that work injuries can result in two ways. There are acute injuries (tripped, stumbled, fell or struck) in which there is an immediate cause and effect work injury, and on the other hand, gradual onset injuries where the job demands represent the mechanism of injury. Too often members fail to make the work related connection that their daily job is the mechanism of injury in the absence of single episode trauma.

The *Hunting* study also confirms that young electricians are also susceptible and prone to cumulative trauma disorders related to the job even though there is a bias that younger workers are more resilient to injury. Over the years I’ve also heard outrageous arguments that the longer a worker is exposed to physical labour their bodies become habituated to strenuous physical work and less prone to injury, but our Local 353 research suggests the opposite. When in doubt submit a WSIB claim and call the union.

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Improper and Illegal Reductions in Non-Economic Loss Awards (NEL Permanent Impairment Awards)



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

Recently, I have received a number of calls regarding a Class Action Law Suit that has been filed against WSIB in connection to the Board's approach in off-setting (discounting) NEL awards because of pre-existing conditions.

This legal action is being spear-headed by Richard Fink, a lawyer who practices workers compensation law.

For our members' edification, my office has been active on this issue for over a year, when I first flagged the NEL Departments new practice in relying on Operational Policy 18-05-05 to discount NEL awards for pre-existing conditions.

Ironically, I had case conferenced with Richard Fink six months ago, and at that time he had a different view whether the Board's practice was permissible under the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition. Needless to say, I have a number of appeals going forward which are now before the Tribunal and WSIB Appeal Services Division.

The essence of our legal challenge is the NEL clinical rating specialists are misapplying OPM 18-05-05, which is a policy that deals with the **"Effect of a Pre-existing Impairment."** The union argues this policy is not applicable to workers who have asymptomatic "pre-existing conditions" because these terms are not synonymous.

The union is arguing that these pre-existing conditions (degenerative pathology) were asymptomatic prior to our members compensable accident/injury, did not cause them any limitation, require treatment, including medication, job modifications or lost time in the 2-years prior to their work related injuries.

Therefore, our members did not have a pre-existing impairment as that term is defined in OPM 14-05-03 (Second Injury Enhancement Fund relief) and OPM 11-01-05 (Aggravation Basis). We're arguing that by mischaracterizing the pre-existing condition (pathology) as a pre-existing impairment, distorts in an entirely illegitimate manner, the principle of predominate cause and the legal definition of a pre-existing impairment as defined in Policy and Tribunal Decisions.

During a recent radio show I was discussing the WSIBs new draft policies on pre-existing conditions, and read on-air excerpts from *Decision No. 204/14*, in which a Tribunal Vice-chair in a NEL quantum dispute identical to the one our members are experiencing, concluded that the worker did not have a pre-existing impairment within the meaning of Board policy, and hence the workers NEL award cannot be reduced pursuant to OPM 18-05-05, which is the same rationale I am arguing in member appeals.

While researching case law for my legal submissions, I found a gem when I read *Decision No. 63/98R*, in which a Vice-Chair hearing a reconsideration appeal where a worker challenged a prior Tribunal decision that purports to discount the worker's benefits due to an underlying condition concluded that this constitutes an error in law. However, it was the evidence of the Board's General Counsel and Vice-President, Legal Services, Paul Holyoke, whose submission caught my attention where he stated:

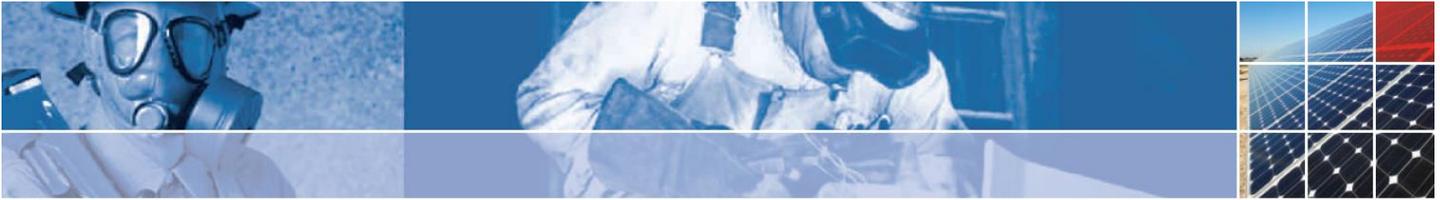
Mr. Holyoke noted that the Workers' Compensation Act does not contemplate the "discounting" of a worker's benefits to account for a pre-existing condition. In describing the legal significance of such conditions, he wrote:

The issue of how pre-existing conditions are handled in the worker's compensation/workplace safety and insurance system is quite complex in its details. The general principles, however, are well-established.

The "thin-skull" principle, which holds that one takes a worker as one finds him or her, is a cornerstone of the worker's compensation (and workplace safety and insurance) system. Both the Board and the Appeals Tribunal have consistently stated that, in order for an injury to be work-related, the work need not be the sole cause of the injury. The test that has routinely been applied by the Appeals Tribunal is to inquire whether work was a significant contributing factor to the injury by accident. Although the Board has never formally adopted this test, it has applied a similar approach since the Workers' Compensation Act first came into force in 1915.

If a worker has suffered a personal injury by accident arising out of and in the course of employment, the Act requires the Board to provide benefits for the consequences that 'result from' the injury. If a consequence 'results from' the injury, nothing in the Act permits the Board to reduce the benefits to account for any non-work related factors that may have combined to contribute to that consequence. If the accident is found to be work related, the worker is entitled to the full benefits provided by the statute for any consequence that results from the accident. If the accident is not work-related, the worker may not receive benefits under the statute.

In all my legal submissions to the WSIB and Tribunal, I have argued that the union's analysis is validated by reference to these Tribunal decisions (*Decision No. 204/14*, *Decision No. 530/05*, & *Decision No. 63/98R*), which supports the union's position that the Board has erred in its interpretation and application of OPM 18-05-05 by improperly discounting the workers NEL award for pre-existing conditions.



Finally, the union argues that the WSIB has engaged in decision making that it knows or ought to know is illegal and improper, as argued by Richard Fink, in his Ontario Superior Court application regarding the offset (discounting) of pre-existing conditions from NEL awards.

There can be no more clearer and compelling evidence to overturn the Board's decision to discount NEL awards for pre-existing conditions than that provided by the Board's own General Counsel.

In essence, the Board has fundamentally changed its approach to pre-existing conditions by executive fiat, and calculating NEL decisions in a totally illegitimate manner, without the policy or legislative authority to legitimize what the Board is currently doing.

The Board's current policy consultation now underway involves a suite of draft policies that address the issue of pre-existing conditions, and the direction the Board is headed. However, at this point in time these changes have not been adopted or minuted by the Board of Directors of the WSIB. Therefore, in the absence of executive authority, WSIB management appears to have shifted the internal decision making paradigm in anticipation of future policy changes. Unfortunately, that approach does not lend itself to procedural fairness, because NEL decisions are being made without the proper legal and policy authority to do so.

Let me end by saying that the union believes the Board has committed an error in law, with respect to the improper and illegal offset of NEL awards for pre-existing conditions, as outlined in the Vice-Chair's reasons found in *Decision No. 63/98R*. The battle continues, so please feel free to forward me copies of your NEL awards which I will review and file objections and appeals, if necessary.

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IMPORTANT BENEFIT INFORMATION

Statistics showed that only a low amount of eligible Local 353 Members are registered on the Great West Life GroupNet website. There are many advantages to using this service and members are encouraged to register. Access to your group benefits information has never been easier with Great-West's GroupNet for Plan Members.

Register once and you'll connect to a world of secure, user-friendly services - available online, any time!

- Sign up for Direct Deposit Claim Payments - Claims paid directly into your bank account.
- Check your dental care balance and the date of your next eligible checkup.
- Access expanded coverage information quickly and easily.
- View your claim status and Explanation of Benefits for the past 24 months.
- Check when you're covered for new glasses or contacts.
- Complete and print personalized claim forms.

Visit the Health & Wellness Site for:

- In-depth information on diseases, conditions, drugs and treatment options.
- Interactive health and wellness tools, including the Personal Health Risk Assessment.

Sign up now at www.greatwestlife.com

REGISTRATION IS SIMPLE AND SECURE

Follow these steps to register and log in for the first time:

- Visit www.greatwestlife.com
- Click GroupNet for Plan Members
- Click Register Now
- You'll be prompted to provide personal information and:
 - Plan number 51189
 - Member's 7 digit Great West Life ID number
- Follow the registration instructions to choose your own user name and password.

Registration will be confirmed in writing by posted mail.

Sign up once and return any time. All you need to remember is the user name and password you've selected!

ON LINE BANKING

"A" Members Monthly Dues \$39.70

"BA" Members Monthly Dues \$22.00

- Log onto your own bank website
- Add – IBEW Local Union 353 DUES to list of payees
- Account Number is the Member's Card #, followed by last 4 digits of the Member's SIN#



Confronting the Myths & Workplace Prejudice Whether Injured Workers Are Allowed or Prohibited from Working Overtime

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



Over the years members and Business Representatives ask me to clarify whether injured workers are allowed or restricted from working overtime, or alternatively, can injured workers be scheduled to work premium pay shifts.

In my experience, overtime is a source of controversy for injured workers. However, the simple answer is Yes an injured worker can work OT, so long as the work you're performing is suitable, meaning modified and within your medical/functional limitations. However, an employer does not have to create a modified job on the overtime shift, and that fact is important to bear in mind. If there is suitable work available by virtue of the work/job tasks being suitable on the OT shift, an injured worker should be given the opportunity.

It's no secret that many employers and supervisors will take the position "if Gary is injured and on modified duties, how can he work overtime?" They see this as contradictory and counterintuitive. From my perspective, being denied OT is a form of discrimination particularly when it is not contrary to an injured workers Functional Abilities Form (FAF).

Moreover, working OT is not against the law, or stipulated in the *Workplace Safety and Insurance Act*. Simply, there is no statutory stipulation that restricts an injured worker to working a 37 1/2 hr/week or whatever work week you're scheduled (e.g., 4/9s, 40/wk, etc). Even though there is no legal prohibition that restricts an injured worker from working OT, real world prejudice tends to rear its head, often times well intended, and that's what injured workers are up against.

In my opinion, working OT, so long as you're performing work within your medical & functional abilities should not attract an adverse inference regarding the genuineness and legitimacy of your injury ("Gary is a piece of work, he says he's injured but wants to work overtime").

Once the workplace parties cut through the political posturing, there is one overarching caveat. The employer is not obligated to provide an injured worker with modified/suitable work if it is not available during the OT shift. Mind you, the employer is obliged to make meaningful efforts to coordinate and plan work so that an injured worker can enjoy the bounty that able bodied electricians are enjoying.

When the other lions (able bodied OT workers) start snarling and growling while feasting on the OT, the injured lion may not be able to fight back. There is a Darwinian, survival of the fittest aspect to this.

From my perspective, put your maw into the body cavity and eat and gorge with the other lions, assuming they give you seat at the table and

let you share in the bounty. You may find that it isn't the employer who objects to an injured worker working OT, but your coworkers.

Distribution of Overtime (injured worker not offered OT)

Often times an employer's immediate response when overtime surfaces is they don't want the injured worker to suffer further injury or frustrate their medical recovery in the belief that overtime is medically contraindicated.

WSIB Law & Policy Silent on Overtime

Under the *Workplace Safety and Insurance Act*, and related WSIB policies, there is nothing that limits or circumscribes a members' ability to work overtime, or for that matter, an employer's obligation to offer suitable work during OT.

More importantly there is no remedial mechanism under the law for WSIB to enforce the equitable distribution of overtime in relation to injured workers. Respectfully, overtime is a labour relations issue, and WSIB is not the court of competent jurisdiction to deal with this matter.

Generally, when an injured worker submits a Functional Abilities Form (FAF) it delineates their medical precautions, and typically there is no reference to hours of work, unless the health professional stipulates part-time hours, which is a graduated return to work. If you are on a graduated RTW, and not working fulltime hours, you can forget about OT.

Is Suitable Work Available during Overtime

If an injured worker can identify OT jobs that they can perform, which are within your medical precautions, then I see no reason WHY an injured worker would not be offered this opportunity.

However, it is important to document, in writing, what overtime job tasks that you believe you can perform, but speak to and involve your steward and Business Representative. The knee jerk reaction of most employers is it's counterintuitive for an injured worker to work overtime because this represents an intolerable risk for re-injury.

However, one could make the same argument about working a 40 hr. / wk, yet no one, particularly the WSIB, ever makes that argument.

Identifying Suitable OT Work vs Employer Creating a Modified OT Job

Injured workers should formalize their request to work overtime in writing, including the job tasks you can perform. This will allow you to rebut an employer response that they are being forced to create a



modified OT job. What you're advocating is being assigned suitable work that exists during OT, which doesn't require any significant effort to coordinate or cobble job tasks together.

At the end of the day the employer will likely argue there is no suitable work available during overtime or under the mistaken belief that they are being forced to create an OT job, when this is merely a *job carving* exercise.

Injured workers often times have a hostile experience when on an active WSIB claim, consequently, the last thing an accident employer wants to do is reward an injured worker by offering overtime.

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Canada's Wonderland

IBEW 353's annual summer picnic will be at Canada's Wonderland on **Saturday, July 20, 2019**. The cost will be **\$25.00** per person. This includes the entrance fee, park rides and a buffet luncheon. For members with a season pass, the cost of the buffet luncheon will be **\$10.00** per person. These prices are for members and **their dependants only**. Guest passes are available at a cost of **\$50.00** per person or **\$20.00** per person for the meal only.

Registration and payment is available at all four union halls starting May 1st, 2019. Age two (2) and under are free. Three (3) years of age and up requires an entrance ticket. Parking is \$22.00 per car (paid by the member).

In order for you to pick up your tickets on the day of the event by 12:00 noon sharp, you must bring your paid receipt.

Note: IBEW 353 kiosk will be open from 9:00am to 12:00 noon sharp and is located between the berms in front of the park entrance turn stiles. **Members arriving after 12:00 noon are on their own.**

Website: www.canadaswonderland.com

Absolutely No Refunds!

Please keep an eye on the events web page for the latest event updates.

**Canada's Wonderland
Saturday, July 20, 2019**

REGISTRATION DEADLINE: July 12, 2019

In order for you to pick up your tickets on the day of the event by 12:00 noon sharp, you must bring your paid receipt.

Member Name:

Members Card & Daytime Phone

of People in your Group

Absolutely No Refunds!



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



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

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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New Members

APPRENTICE CABLE SPLICER

Andrew Beattie

APPRENTICE HOUSEWIREMAN

Robert Bada

APPRENTICE LINEMEN

Ryan Stover and James Sutherland.

APPRENTICE TECHNICIANS

Eric Dejesus and Peter Pappas.

APPRENTICE WIREMEN

Mustafa Alameddine, Mitchell Ball, Zachary Braithwaite, Clayton Burley, Tevin Campbell, Sean Diamond, Clarence Doe, Andrew Laruffa, Oscar Ludzik, Brent Nash, Krishanth Parasuraman, Andrew Pasquini, Eric Polesel, Andrew Ransom, Robert-Adam Silvani, Gurpaul Singh, Andre Stewart, Jean-Yves Watts and John Zinni.

JOURNEYMAN LINEMAN

Bradley Tracy

JOURNEYMEN WIREMEN

Froillan Andavias, Ryan Mcdonald, Mirko Nicoletti, Kyle Norton, Matthew Pietrantonio, Adam Smith and Ilker Turgut.

JOURNEYPerson UPGRADES

Andres Amalte, Justin Cautius, Daniel Lee Dobson, Matthew Favret, Shawn Lant, Michael Oliver, David Proulx, Marc Sampogna and Dillon Xavier.



Tribunal Allows Members Post-Concussion Syndrome Appeal. The Union Rebutted WSIB Rulings The Member Recovered, Was Uncooperative and Did Not Suffer from Depression and Anxiety



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

In September 2020, I got a call from an apprentice who was injured in November 2017 after he hit the back of his head on a gate and suffered a concussion. I represented this same member in 2015 when he was a pre-apprentice after a head injury (Concussion) and was laid-off the next day because the accident employer alleged there were performance issues. I found the timing of the layoff suspicious, and made written submissions to the WSIB.

Pre-apprentice Roughed Up After 1st Work Head Injury

At that time, the employer wrote WSIB and said Mr. Majesky agreed that he was not proceeding with the re-employment issue. Anybody who has dealt with me knows employers don't speak for me or the union. This same employer in other member claims historically alleged they were substandard performers, and disputed their history of injury. Fortunately, I paper up, and my submissions were on file in the 2015 claim and part of the Case Record materials at the hearing.

When the member hit his head in November 2017, he was a 22 year old apprentice and unable to return to work and suffering from post-concussion syndrome symptoms. The employer provided at-home modified duties which the member performed. The WSIB then halted the work-at-home modified work. The case record also confirmed he cooperated with all health care and medical assessments at the WSIB Trillium Neurology Program who diagnosed post-concussion syndrome.

Apprentice Had 4 Head Injury by Age-22

The medical record also confirmed this young member suffered four (4) head injuries by age-22. Two were non-work related, the last two were work related (2015 & 2017). The earlier head injuries occurred while playing basketball when he fell backwards and whacked the back of his head on the ground. The other while playing hockey when he got his bell rung.

He was last seen in September 2019 at the WSIB Speciality Clinic who anticipated a full recovery. However, there was no further contact with the WSIB and when the pandemic struck in March 2020, and they kept paying him LOE benefits. In August 2020, a new WSIB case manager popped up and started the push push hurry up routine. I was not representing the member at the time when his case went sideways. The member ultimately reached out for help, but it was too late.

Failing to Cooperate with WSIB Assessments

The WSIB alleged the member failed to cooperate in a WSIB health assessment, which carries a stiff penalty (LOE benefits terminated). They also concluded he didn't seek health care for 1-year (SEPT 2019 to AUG 2020), which overlapped when the pandemic struck in March 2020.

In September 2020 the WSIB arranged for the member to undergo a Functional Abilities Evaluation, but he was unable to wear a mask. Masks were now mandatory, particularly in health care settings. The member told WSIB that he had an adverse reaction and suffered anxiety attacks when he wore one. The member testified this only became a problem after his last head injury, because when working he wore respirators and N-95 masks at work prior to his injury and this wasn't a problem. WSIB ruled the member was uncooperative and terminated his LOE benefits. The inference, from my perspective, was the member was making a political statement (honk, honk, think Freedom Convoy).

Law Society Concussion Symposium

The member was also diagnosed with depression and anxiety, which is very common in Mild Traumatic Brain Injury cases according to the Tribunal Medical Discussion Paper, MTBI (Concussion). These findings mirrored a Concussion Symposium the Law Society held in 2022 that I attended for Legal Practitioners, Insurers and Judges, facilitated by Dr. Charles Tator, Neurologist and Director of the Canadian Concussion Centre.

No Test or Bio Markers Exist to Confirm a Concussion

Several key take-ways from the Symposium. There is nothing 'mild' about brain injuries and that the use of the term "mild traumatic brain injury" should stop. This term is used by the WSIB and Tribunal. The other key finding is there are at this time no biomarkers or tests that prove the diagnosis of concussion e.g., MRI or blood test. The diagnosis of concussion or post-concussion syndrome depends on a knowledgeable doctor or health professional and a compliant patient. In other words, the diagnosis remains the judgment and providence of the treating health professional.

This is where the case went off the rails because WSIB, as they typically do, wanted objective clinical findings i.e., imaging results to confirm the diagnosis, when in fact, that's a straw man argument. According to the medical literature, Persisting Concussion Symptoms (PCS) can also include Depression, Anxiety, and PTSD Behaviour Changes. On this front, the member had a textbook case of Persisting Concussion Symptoms, with Depression and Anxiety. Everything lined up.

A Young Members Dreams Were Shattered

Ask yourself, how do you think this affected a member who had no income, was a late entrant and denied Canada Life and CPP-Disability benefits, and lived off of \$100,000 he saved to buy a house after working long hours as an apprentice. Two-years later, his home ownership savings dwindled from \$100k down to \$35k. When I prepped the member for the hearing, I discovered other hidden gems about his character. Loving parents raised him. He saw the same Family MD since birth. He was a baseball umpire, played sports (hockey & baseball) and was a



musician whose band played shows locally. Most importantly, this you man's life was turned upside down by a work accident and he was being told by WSIB there was nothing wrong with him and he recovered. No matter my instructions, the kid always complied.

The WSIB Appeals Resolution Officer denied the members appeal concluding:

1. The worker was non-compliant and did not book (or confirm) the WSIB directed medical assessment, as required by WSIB.
2. The worker was non-compliant and did not participate in a WSIB directed medical assessment.
3. The worker was fit for pre-injury duties on February 17, 2020.
4. The work-related injury fully resolved by February 19, 2020, with no evidence of a permanent impairment.
5. There is no ongoing entitlement to a work-related psychological injury.

In *Decision No. 129/23*, the Tribunal found in favour of the member ruling:

As confirmed in a decision dated November 27, 2020, the accepted diagnoses under the claim related to the head injury include: post-traumatic chronic disequilibrium; physiologic tinnitus; post-concussive syndrome; and chronic migraines. For reasons provided below, we are satisfied that the worker has entitlement to a NEL determination for the compensable head injury.

While we acknowledge that the worker missed the speciality neurological assessment in November 2020, which would have clarified the status of his injury, we note there was no attempt to send the worker for further assessment especially closest to the time of the ARO decision. The Board recognized there was no evidence of treatment by Dr. Temis which it accepted as meaning the injury had resolved. In the case materials however there is reporting which documents that the worker continued to be treated by Dr. Temis. The Board did not follow up with Dr. Temis to understand the basis of her reporting. As a result, we relied on the uncontested medical reporting in the case materials which supports the worker had ongoing head/concussive injury beyond the February 2020.

As there is no medical information to contradict Dr. Temis' reporting, and as the worker's testimony about an ongoing injury was reflected in Dr. Temis' reporting, we are satisfied that the worker's post-concussive injury persisted beyond February 2020, resulting in a permanent impairment. Accordingly, we find the worker has entitlement to a NEL determination [permanent impairment].

The ARO concluded that there was no continuity evidence to support the worker's depression had been ongoing since onset occurred after the 2017 workplace accident.

In contrast to the ARO's conclusion, we are satisfied that the evidence in the case materials supports there was no non-compensable intervening event but rather an ongoing continuity of complaint of the worker's psychological condition since the workplace accident. In the report dated December 23, 2020, Dr. Temis wrote that the worker's "anxiety/depression" had "worsened as the time from the concussion passes". We rely on this report as it was provided by a physician who had treated the worker during the relevant period.

Furthermore, in a report dated December 28, 2022, Dr. Borushok (Ph.D., C. Psych) noted the worker had commenced treatment since

January 2021 for "Persistent Depressive Disorder with Persistent Major Depressive Episode with Anxious Distress" resulting from the workplace injury. We rely on the reports of Dr. Temis and Dr. Borushok as they treated the worker during the relevant period under review and there is no contrary medical evidence to support the worker's compensable psychotraumatic disability had resolved by February 2020.

The Board ultimately concluded that the worker was non-compliant because he refused to wear a mask at a scheduled functional capacity evaluation (FAE). In a Trillium Health Partners report dated November 23, 2020, an Occupational Therapist wrote:

Upon attending the assessment, the worker advised that he is not capable of wearing a mask due to reported anxiety and claustrophobia. Due to hospital policy regarding the Covid 19 pandemic and the wearing of masks, we could not proceed with this assessment. A message was left for the Case Manager today advising of the reason this FAE was not completed. This FAE will be placed on hold until further direction is received from WSIB.

In the decision dated November 27, 2020, the Board concluded that there was no evidence to support he could not wear a mask and thus his failure to do so was an act of non-compliance. The Board found that there was no "clinical medical evidence on file that prevents you from wearing a face mask. You do not have entitlement to a work related medical condition that prevented you from wearing a face mask under this claim". Using the report dated August 19, 2019, the Board concluded that he could have returned to modified duties by November 18, 2019, with a full recovery by February 19, 2020. As there was no offer of suitable modified work in November 2019, the Board ceased providing him LOE benefits when he could have returned to his pre-accident job on February 19, 2020.

The worker testified that the inability to use a mask was rather related to his anxiety. In the report dated December 23, 2020, Dr. Temis noted there was a link between the worker's treatment and his anxiety involving face masks. She wrote:

Another roadblock is mask wearing. This is mandatory in order to interact with others, go to appointments or do any outside activities. Wearing a mask causes [the worker] great anxiety. There is no way to determine if this is due to his head injury as masks were never used prior to the spring of 2020. The psychiatrist might be able to reduce [the worker's] anxiety surrounding his mask aversion.

We acknowledge that the Board has addressed several circumstances in which the worker did not appear to co-operate with treatment. In regards to his refusal to wear a mask however, we are satisfied that it was not due to some sort of political statement against wearing masks during the pandemic, but rather, arose out of his anxiety. In this regard, we rely on Dr. Temis' December 2020 report and an Ambulance Report dated May 11, 2022. In the latter, the following was recorded:

PT and staff at the cardiac clinic had a disagreement about PT not being willing to wear a surgical mask while in the clinic. 911 Called. On arrival of EMS PT found sitting outside in front of this office on a rock. PT is having anxiety and is hyperventilating. PT is able to slow his breathing down and calm down when coached to do so.

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Under New Government Law Employers Will Face Prosecution and Fines for Suppressing or Dissuading Injured Workers in Filing WSIB Claims - (Bill 109)

By: Gary Majesky, WSIB Consultant & Executive Board Member



In May 2015, the Ontario Government introduced Bill 109, *An Act to amend various statutes with respect to employment and labour*. One of those statutes is the *Workplace Safety and Insurance Act* ("the WSIA").

The Standing Committee on Justice held hearings in November 2015 on a wide array of amendments to Ontario labour laws, but one provision in particular will have far reaching implications for injured workers and employers.

Under the new law, employers who engage in claims avoidance behaviour, suppress and fail to report injury claims will be prosecuted. Local 353 has the advantage in dealing with the entire electrical industry, who for the most part play by the rules, file claims, and use the WSIB policies to their advantage.

However, there are some contractors whose behaviour and organizational culture is geared to avoiding WSIB claims and steering members onto union disability benefits. In some instances, the member is complicit in not filing a WSIB claim, which I refer to as "Exploitation by Invitation."

Leaving aside a member's job security calculus whether to file a WSIB claim, the proposed amendments will be a rude awakening for employers who fail to report accidents and injuries.

As the person responsible for litigating our members WSIB claims, I see claim histories where the failure to report an injury years ago impacts my ability to establish a medical relationship between a current medical problem and an unreported injury. This falls under the heading "**not reported, does not exist.**"

The following amendments to Section 22, of the WSIA will encourage compliance with claims reporting:

- 22.1 (a) (1) No employer shall take any action, including but not limited to the prohibited actions set out in subsection (2), in respect of a worker with the intent of,
- (a) Discouraging or preventing the worker from filing a claim for benefits under section 22, or

- (b) Influencing or inducing the worker to withdraw or abandon a claim for benefits made under section 22.

22.1 (2) For the purposes of subsection (1), the following actions are prohibited.

1. Dismissing or threatening to dismiss a worker.
2. Disciplining or suspending, or threatening to discipline or suspend a worker.
3. Imposing a penalty upon a worker.
4. Directly or indirectly intimidating or coercing a worker with threats, promises, persuasion or other means.

Curbside Adjudication

A common tactic I encounter is employer curbside adjudication. In this scenario there is a tendency for employers to act as though they are the decision maker whether a worker suffered an injury that arose out of and in the course of employment. The classic example is "**you didn't have an accident**" in the absence of single episode trauma, however, there was a gradual onset repetitive strain injury or cumulative trauma disorder. In these instances the employer is acting as a medical authority on the issue of medical compatibility and causation, but acting outside their scope of knowledge, and conflicted by a personal financial motive.

In my experience, these tend to be lopsided situations involving vulnerable members who are either recent immigrants, financially insecure (who isn't), or lack the political sophistication to deal with complex legal and medical matters. Unfortunately, some members are willfully compliant and surrender their rights on the theory they may curry influence and favour with the employer. All too often I hear the plaintive wail and buyers' remorse for failing to file a WSIB claim and the explanation "*Gary, you know how it is out there...if you're injured, you have a target on your back and will on the next round of layoffs.*"

Claims Abandonment

Another grey area are claims which are properly registered in compliance with the WSIB rules, however, once registered, that next



problem relates to claims abandonment. This results when a worker fails to submit a **Form 6, Workers Report of Injury**, or stops submitting other requested information so the WSIB can adjudicate a claim for ongoing benefit entitlement. When this happens, the WSIB deems a claim abandoned.

A typical reason for claim being abandoned is the worker failed to act with due diligence and ignored their legal obligation to submit paperwork to the WSIB. Although some workers are lackadaisical regarding reporting, there are ample instances where I suspect jiggery pokery (meaning trickery, hocus pocus, fraud) as the underlying reason WHY a workers claim was abandoned.

Under the new law if an employer facilitates claims suppression by encouraging or offering inducements to an injured worker to thwart ongoing adjudication of a WSIB claim, this too is a punishable offence.

Fortunately, most members and employers treat their WSIB reporting responsibilities seriously, but the new law will force every employer to hit the reset button and reassess their organizational policies and practices to ensure they are in compliance with their reporting objections.

Next month I will review the WSIB's new Administrative Guideline for authorizing worker surveillance and referral to the Regulatory Services Division for investigation. The Guideline Document outlines the tell-tale signs of fraud, and serves as a reminder to any member who runs a side business while on WSIB benefits.

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Sweetheart's Dance

Saturday, February 13, 2016

The Sweetheart's Dance will be on Saturday, February 13, 2016 at the Hilton Toronto/Markham Suites located at 8500 Warden Ave.

Included in the ticket price is a **buffet dinner with wine, dessert and one complimentary cocktail drink**. The cost is **\$80.00 per couple** and **\$40.00 per single**, Apprentices Only cost is **\$20.00 per single \$40.00 per couple**. Parking is included and parking passes will be issued with the tickets. Tickets will be on sale after Monday, December 14, 2015 at all 4 union halls.

- Registration at 5:30 pm • Cocktails at 6:00 pm
- Opening Doors at 6:45 pm • Dinner at 7:00 pm
- Raffle draw at 8:30 pm • Dancing: 9:00 pm to 1:00 am

Coffee and sandwiches will be available at midnight.

Please call the hall at 416 510-3530 and register with Jennifer or submit on-line through the LU 353 web page: <http://www.ibew353.org>. Click on Committees then click on Social Events. Limited seating available!

Anyone on a restricted diet can be accommodated with a minimum of two weeks notice prior to the event.

Ticket sales deadline is January 31, 2016 after which the ticket price increases to \$100.00 per couple and \$50.00 per single no exceptions.

No Ticket sales at the event, should you show up at the event without your receipt or tickets paid you will be charged \$100.00 per ticket no exception.

The hotel group rate will be \$139.00 + applicable taxes for this event. Book your room before January 8, 2016 to guarantee this rate. For room reservations please call the Hilton Toronto/Markham Suites directly at 905-415-7608.

Keep an eye on the Social Events page for the latest updates.

Terry Fischer,
Social Committee Chairman

Sweetheart's Dance

Saturday, February 13, 2016

Member's Name: _____

Card #: _____

Phone #: _____

of Adults: _____

Email: _____



Trauma & Inflammatory Arthritis – Communication Technician Win’s Tribunal Appeal Recognizing Hand Injury Triggered & Exacerbated Psoriatic Arthritis

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



Claims involving arthritis are always controversial because the development of osteoarthritis and degenerative disc disease (DDD), according to the case law and medical research, is caused by many factors, but unrelated to work.

Routine Imaging Tests Unmask Arthritic Pathology

Frequently when members undergo imaging studies coincidental degenerative or arthritic findings are flagged in X-rays, CT, or MRI scans. WSIB denies these claims because the arthritic pathology did not result from a work injury. Assuming a member's arthritis was asymptomatic at the time of injury, we frame the theory of causation and argue the work injury did not cause the arthritis, however, the work injury was super-imposed on an asymptomatic pre-existing condition, thus rendering it symptomatic.

Inflammatory Arthritis Medically Distinct

However, inflammatory arthritis is a medically distinct condition compared to typical wear and tear arthritis common in the general population. Inflammatory arthritis is generally classified into seropositive and seronegative groups based on the presence of a rheumatoid factor.

Under the rubric of seropositive inflammatory arthritis is rheumatoid, lupus, scleroderma; and under the seronegative heading is ankylosing spondylitis, psoriatic arthritis and inflammatory bowel disease.

In 20-years representing 353 members, I had one inflammatory arthritis case (scleroderma), which was allowed based on a member's exposure to silica. Critically important, the cause of rheumatoid arthritis is unknown. However, factors considered important in its development include genetics, immunological and environmental factors in which there is little clinical correlation to a work causal relationship. More importantly, the role of trauma in the development of rheumatoid arthritis has not been proven, and there is no evidence in the literature to help understand the role of trauma in the perpetuation of rheumatoid arthritis, although stress may aggravate the immune response, but this is tenuous.

Inflammatory Arthritis Not Accident Related

Another example is ankylosing spondylitis, which is an inflammatory arthritis of the sacroiliac joints and spine which occurs more in men, and usually begins in the late teens or early twenties. The etiology and pathogenesis (cause) remains unclear, but a strong genetic component is evidenced. Several other genes have also been associated with

ankylosing spondylitis, but a role for trauma has not been proven.

Turning now to psoriatic arthritis (PsA), which is a condition associated with psoriasis. A recent Tribunal decision reaffirmed the cause of psoriatic arthritis is unknown, but genetic, immunologic and environmental factors are implicated in both the etiology and pathogenesis of the condition. Again, genetic factors are considered the most important.

Communication Technician Sustained an RSI Hand Injury

This brings me to Tribunal *Decision No. 1120/18*, and the appeal of a Communication Technician who performed work with cable and wire, and sustained what is commonly described as a "Repetitive Strain Injury" ("RSI"). The member was assessed by Dr. Margaliot, a highly respected expert in hand arm disorders, who also assesses injured workers in a WSIB Specialty Clinic. He described what happened to the worker as "cumulative trauma" arising out of the "repetitive forceful pinching required by his job as a cable puller and installer."

The Board accepted entitlement for left index finger tendonitis arising out of the repetitive and forceful gripping performed, and the member returned to ostensibly modified duties. Subsequently the member developed right hand symptoms arising from his repetitive duties notwithstanding purported job modification. The member received a 2% Non-Economic Loss award recognizing a left hand permanent impairment.

Since the member could not perform his pre-injury job and was laid-off by the employer, he was sponsored in a "Drafting Technologist" program by WSIB. However, due to problems using his hands, he was unable to continue. The Board ruled the member's right thumb injury recovered with no permanent impairment and concluded the psoriatic arthritis was unrelated to his work injuries. Tribunal Vice-Chair Josefo made the following findings of fact in granting the member's appeal for psoriatic arthritis:

As I consider this issue, it is necessary to refer to several assessments conducted upon the worker by hand specialist Dr. Margaliot. The diagnosis of Dr. Margaliot was "persistent left index finger MCP joint pain due to highly repetitive nature of his work."

Dr. Margaliot also opined that the worker may have a "stenosing tenosynovitis of the left index finger and a component of cumulative strain injury to the radial collateral ligament of the



index finger MCP joint.” Dr. Margaliot, even that early, with this initial assessment, concluded that the worker would “require permanent restrictions in order to avoid repetitive forceful gripping and pinching with his left hand.”

This leads me to my view that what is at times somewhat casually described as an “RSI” injury can, despite that casual nomenclature, have real and serious consequences for an individual. Pursuant to Dr. Margaliot’s assessment, the worker suffered some significant degree of injury to his left hand.

Dr. Margaliot addressed the worker’s right hand, diagnosing a “ligamentous sprain injury of the CMC joint of his right thumb caused by repetitive heavy cable pulling.” Dr. Margaliot hoped that the worker’s symptoms would “resolve over time.” Unfortunately, the worker was found to have exacerbated his right thumb injury. In a report dated May 1, 2013, Dr. Margaliot also made reference to the psoriatic symptoms which were then beginning to manifest and opined as follows:

There is some concern this may represent psoriasis. In which case, some of the patient’s hand symptoms may be related to the early onset of psoriatic arthritis exacerbated by the repetitive nature of his work.

Ultimately, the worker was referred to rheumatologist Dr. B. Florica for treatment for his psoriatic arthritis. In a report dated May 21, 2013, Dr. Florica confirmed that the worker likely had psoriatic arthritis. In a report addressed to Mr. Majesky dated December 7, 2015, Dr. Florica, in what I find is a nuanced and cautious opinion, nevertheless links the worker’s psoriatic arthritis to his working activities.

A number of Tribunal decisions have over the years considered entitlement for psoriatic arthritis. In those decisions, the Panel or Vice-chair relied upon medical evidence. A number of those decisions were authored before the Tribunal’s “Trauma and Inflammatory Arthritis” Medical Discussion Paper was prepared in September 2008 by well-known rheumatologist and Professor of Medicine Dr. D. Gladman. Indeed, in some of the previous Tribunal cases Dr. Gladman served as a Tribunal assessor, see Decision No. 230/9712. The “Trauma and Inflammatory Arthritis” Medical Discussion Paper, reviewed in 2013 by Internist Dr. A. Weinberg, a Tribunal medical counsellor, is deemed to be a still current discussion of trauma and inflammatory arthritis. The MLO Discussion Paper makes clear that the cause of it is unknown, yet further discussed that:

Genetic, immunologic and environmental factors are implicated in both the etiology and pathogenesis of the condition.

The Discussion Paper offers detailed information pertaining to the development of psoriatic arthritis, as follows:

Few studies have reported the occurrence of arthritis and lysis of the finger joints following physical trauma in patients with

psoriasis. Notably, a retrospective study revealed that 9% of patients with psoriatic arthritis compared to only 2% of patients with RA experience acute illness or trauma before the onset of their arthritis. A traumatic event prior to the diagnosis of psoriatic arthritis was reported in 24.6% in a large cohort of patients with psoriatic arthritis. Patients who developed their arthritis following physical trauma were similar to those who developed PsA without a history of trauma. It is proposed that trauma-induced arthritis represents a deep Koebner phenomenon therefore suggesting that trauma plays a role in the development of psoriatic arthritis.

Of course, psoriatic arthritis is an autoimmune condition. Yet unlike rheumatoid arthritis, as explained by Dr. Gladman in the Discussion Paper referenced above and as opined by the worker’s treating rheumatologist Dr. Florica, there is a cause and effect linkage between psoriatic arthritis and some workers who sustain trauma. Obviously, not every worker who sustained a RSI type of trauma will develop psoriatic arthritis. Yet, in some cases a statistically significant number have been shown to develop such a condition. That led Dr. Gladstone to opine, again, that “trauma plays a role in the development of psoriatic arthritis.”

There is no doubt that the worker suffered trauma from the work-injuring processes. As described above, Dr. Margaliot makes that clear in his various reports. Genetics likely played an important role in the worker’s development of this condition. Yet, as discussed near the outset of these reasons, a significant contributing factor need not be the sole significant contributing factor. Moreover, as it is well known, one significant contributing factor does not cancel out another, so long as each factor is considered to be significant in causing or contributing to the development of the condition.

In this case, based upon the reliable medical opinions from the worker’s treating specialist physicians, which are consistent with the Tribunal’s Discussion Paper on the subject, I am convinced beyond the balance of probabilities that the work injuring process was, albeit not the only, significant contributing factor to the workers development of psoriatic arthritis. Accordingly the worker has entitlement for this condition.

One final comment. Once psoriatic arthritis starts, it is not restricted to the original injury site, but can flare-up in any bodily joint, which causes a level of disability and impairment far greater than expected. This often results in the appearance of the sausage toe or fingers because of swelling.

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Tribunal Rules Member Entitled to LOE Benefits After Suffering a Psychological Injury - Member Was Disciplined for Using a Cell Phone at Work While Awaiting a Text Msg. From Job Site Health & Safety Rep Regarding a Meeting

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



In April 2016 I was in the Dominican Republic attending my brother's wedding when I received a call from Jeff Irons regarding an urgent situation involving a member working at the MARS candy bar factory job site.

I learned the member had a close call when a fork lift driver, with forks raised, almost hit her zoom boom, which startled her. The member was tethered to the lift and experienced a maladaptive response to the incident. In the ensuing days, the member felt emotionally unwell, and consulted Shepell regarding next steps.

I was informed the member was going to be disciplined for using a cell phone at work in violation of the employer's policy. She was waiting for a text message from the MARS Health and Safety Rep to discuss the near miss incident and was caught glancing at her cell phone. The MARS Health & Safety representative had encouraged workers at the safety and orientation meeting to bring any job site health & safety issues to her attention.

There were various versions of what purportedly transpired, but the fork lift diver was disciplined on the day of the incident, and sent home. When the incident happened, the General Contractor H & S Rep was nearby and came over to investigate and was verbally accosted by the bricklayer who drove the fork lift. This altercation then drew the immediate attention of the MARS H & S Rep who was nearby giving a tour of the facility when she heard a verbal confrontation. Contrary to the OSHA, the IBEW contractor later testified they did not have a designated H & Rep and deferred to the General & client in matters of health and safety.

The contractor was concerned about the members cell phone use and advised the union a meeting was being organized to discuss discipline however, the member felt the meeting was not structured in such a way to ensure her psychological safety, and felt the meeting was an inquisition of the incident in which she was blameless. The member was given the option of a layoff and did not return to work.

In the days and weeks that followed, the member's condition evolved initially from acute stress in response to the fork lift incident, into PTSD. All of this was medically documented and not in dispute.

The WSIB Traumatic Mental Stress Dept. adjudicated and allowed the members Acute Stress/PTSD claim. Initially the WSIB granted LOE benefits for 4 weeks, claiming it was a 4-week job, then extended entitlement to 8-weeks. The union objected to these decisions on the basis that if a worker is injured and cannot return to work because of

an injury, there is no basis in law or policy to limit the duration of LOE entitlement. The same rules apply to physical and psychological injuries.

WSIB then initiated a re-employment inquiry to determine whether there was a re-employment obligation, and concluded that the member severed (quit) her employment by initiating a layoff, notwithstanding the ROE noted "shortage of work." Consequently, there was no re-employment obligation. Flowing from that decision the Traumatic Mental Stress Dept. rescinded LOE entitlement concluding the member severed the employment relationship therefore, her loss of earnings was not related to the injury, but an employment labour relations matter.

This is an important detail because it underscores the fact that if an injured worker is terminated, quits or loses their job for just cause, they will not be entitled to LOE benefits. Section 43 of the *Workplace Safety & Insurance Act*, and case law are clear that a workers loss of earnings must be related to the injury for benefits to be paid.

To the member's credit, she followed my instructions as I pulled the levers and set the table as the union appealed the decision to deny LOE benefits. First and foremost, the member continued to engage the employer and WSIB in documented conversations regarding her willingness to perform suitable/modified work. Notwithstanding the member accepted a layoff, the union argued that the worker and employer repatriated the employment relationship and engaged in an Early and Safe Return to Work (ESRTW), which is a requirement under the law and policy.

Tribunal Hearing

At the Tribunal hearing the member testified about the events surrounding the incident, medical treatment, and the discipline meeting. In a strange twist of fate while the member was testifying, I observed the employer general manager using her cell phone during the hearing. This prompted an objection, as the employer called no witnesses and I was concerned the employer had a live feed with persons who should have been present to testify. It was ironic because the employer was going to reprimand our member for cell phone use at work, yet engaged in a similar act in front of three Tribunal panel members during a hearing. These moments are a gift from heaven.



The following are highlights from Tribunal Decision 2799 18, where a Tribunal Panel made the following ruling:

As noted above, the issue before the Tribunal is the worker's entitlement to LOE benefits. Under section 43(1) a worker who has a loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision No. 2474/00* held that under section 43(1) a causal relationship between the injury and wage loss is a condition precedent to the payment of LOE benefits. A refusal of suitable work is not necessarily an act of non-cooperation, but it may lead to a conclusion that the worker's loss of earnings does not result from the injury. Section 43(2) operates to reduce a worker's benefits where the worker refuses suitable employment. Thus, a worker who refuses suitable employment at no wage loss is not entitled to LOE benefits because the loss of earnings is not caused by the injury, but caused by the refusal of the suitable employment.

In our view the medical evidence, opines that the worker was unable to work as a result of the compensable injury of April 7, 2016, as per the report of Dr. Atrie dated April 15, 2016. The next medical opinion of Dr. Lo and supervising Dr. Wadhwa does not specifically set out any restrictions or return to work recommendations; however, it is significant in that it provides a diagnosis and continuing treatment plan. The worker was next seen by her family physician Dr. Weiss who recommended a start date of May 9, 2016 for a return to work with restrictions. The medical evidence indicates, in our view, that the worker had an acute stress disorder causally related to the incident of April 7, 2016. We take from the medical evidence as a whole that the worker was totally impaired and not able to return to work until May 9, 2016, in accordance with the restrictions set out by Dr. Weiss in the FAF, and further, that these restrictions were applicable for the period of May 9 to May 31, 2016, as there were substantially similar restrictions in the FAF of May 31, 2016. We find then, that the worker was totally impaired up until May 9, 2016, and from May 9 to 31, 2016 she had restrictions associated with her compensable injury for return to work.

The employer's representative also questioned the severity of the accident and the worker's actions following the workplace accident of April 7, 2016, ostensibly in relation to the worker's lost time. It is not in dispute that the worker has entitlement for traumatic mental stress (TMS) arising out of the April 7, 2016 workplace injury, rather, what is in dispute is whether the worker is entitled to LOE benefits from April 13, 2016 to May 31, 2016 as a result of the workplace accident.

Pursuant to section 43(1), entitlement to LOE benefits arises when there is a loss of earnings as a result of the workplace injury. We do not accept the employer's representative's submissions, which we understand largely to mean that the worker's entitlement to LOE in this case requires a consideration of the severity of the accident; rather, the issue to be decided is whether the workplace injury significantly contributed to the worker's loss of earnings.

We are satisfied based on the evidence before us that the workplace injury made a significant contribution to the worker's loss of earnings for the period of April 13, 2016 to May 31, 2016. In coming to this finding, we accept the worker's testimony that while she attempted to return to work for a few days after the accident on April 11 and 12, the symptoms from her compensable TMS increased over time. We find this is consistent with the medical reporting discussed above, which confirms the development and clarification of the worker's psychological condition over time.

Further, in accepting that the worker did not actually lay off and indeed that the parties and Board were cooperating and participating in ESRTW, we have reviewed the ESRTW efforts and conclude there was no offer of suitable modified work during the relevant time frame. Rather, we find it likely that no suitable modified work could have been offered to this worker with the accident employer from April 13, 2016 to May 31, 2016, as a result of her TMS, as a result of her compensable injury and sequelae.

We acknowledge the employer's representative made submissions on placing less weight on the worker's testimony because of her background (i.e. as a union activist and instructor in first aid and mental health advocate) and high level of education. We do not accept this submission as it appears to be speculative and not supported by the balance of the evidence. Indeed, we have placed considerable weight on the worker's testimony, which we find to be consistent with the balance of the medical evidence before us regarding the worker's compensable condition during the subject period. We found the medical evidence before us to be reliable and consistent, and in particular it noted that the worker had an incident on April 7, 2016 from which she sought treatment, was prescribed medication and treatment, and was diagnosed with a mental health condition. The medical evidence that we have considered in coming to our decision did not note any concerns with respect to exaggeration or validity.

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WSIB Practices

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Post-Traumatic Stress Disorder – And The Ignorance Some Employers Display When Workers Suffer A Life Threatening Accident and Develop a Psychiatric Condition and Insist they Return to Work

This month I want to review a case where a signatory contractor displayed a disregard for the mental well-being of an employee who personally witnessed and suffered an objectively traumatic life threatening injury in the course of employment.

Accident History

The member was injured in October 2021, while working as a journeyman lineman (Power Line Technician) for the accident employer, when he and a co-worker were involved in an electrical explosion while working on a high voltage switch - 27,600 v.

One worker was unconscious and on fire, while the other co-worker who was also burned, put out the flames.

Union Was Involved Since Date of Accident

Joey Vandenbos was the boots on the ground Line Rep who serviced members employed by IBEW signatories in the Power Sector, while I prepared a 6-page opinion letter, with instructions, dated November 7, 2021. My review summarized the accident history, registering a WSIB claim, whether the accident was objectively traumatic under the law, review of the Tribunal Medical Discussion Paper on PTSD, and Return to Work Considerations when Workers have mental health issues. Most importantly, the workplace parties are to be guided by the opinions of treating medical professionals in terms of diagnosis, treatment and the timing of return to work.

Joey Vandenbos, who investigated the critical incident, was concerned the member was suffering from psychological trauma (flashbacks, ruminating behaviour, etc.), which the member described in his email to me:

I experienced bad burns. I've been having trouble dealing with all this. I feel pressure from my workplace to go on modified duties along with questions every day when I will be returning to full duty ... I constantly have this on my mind. At first, I thought I was just burnt and would be fine just to return to work. As the days have passed this has gotten worse. I feel really down ... not being able to work, being a dad, carry out my responsibilities as a husband. I constantly have this one my mind. I have trouble sleeping and find myself zoning out during conversations and thinking about the incident. I've had constant headaches every 4-6 hours, I'm taking prescriptions for that and pain in my hand. My eyesight was messed up for days but after some drops and a follow up it's gone back to normal.

Employer Appeal

Counsel for the employer appealed the WSIB decision that allowed entitlement to Traumatic Mental Stress as well as the WSIBs decision to pay Loss of Earnings benefits:

Our client is objecting to ongoing entitlement after November 11, 2021. The worker flatly refused to consider any of the return-to-work options offered by our client. Further, there is no evidence that the worker considered other employment options outside his trade.

The file reflects that the worker was granted traumatic mental stress benefits and has been off ever since. The employer submits that the worker should have pursued return-to-work opportunities available to him with the employer or pursued other opportunities outside of our client. There is no evidence that he was permanently incapable of working in any capacity.

Summary of WSIB Decision Under Appeal

- Worker reported working on an electrical box with a partner while it was raining. There was a sudden flash and explosion causing an electrical arc flash of 27,600 volts which resulted in burns to his face, eyes and right hand
- The claim was initially allowed for second degree burns (face, eyes and right hand) and including health care and LOE benefits from October 27, 2021, to November 11, 2021, when the case manager determined the worker had recovered from the physical injuries.
- The worker saw their doctor on November 11, 2021, and was diagnosed with Acute Stress Disorder and Post-Traumatic Stress Disorder. Although the burns have healed, he continued to experience insomnia, flashbacks, nightmares and increased anxiety. Counselling was recommended and the medical opinion was they remain off work.
- The worker's incident was deemed to be objectively traumatic as defined under the traumatic mental stress policy. Entitlement was allowed for ongoing health care benefits as well LOE benefits from November 11, 2021, onward.

Accepted Diagnosis

Soon after the accident, the member began to experience a maladaptive psychological response to an objectively traumatic accident that arose out of and in the course of employment as documented by the union in its investigation. The Board also accepted the diagnosis of Post-Traumatic Stress Disorder (DSM5) – unchanged and corroborated by psychometric and clinical observation. Major Depression Disorder, Moderate with Anxious Distress, Moderate (DSM5)

unchanged, as corroborated by psychometric and clinical observations.

Law and Policy

Traumatic Mental Stress – OPM 15-03-02

A worker is entitled to benefits for traumatic mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment.

A worker is not entitled to benefits for traumatic mental stress that is a result of the employer's employment decisions or actions.

Guidelines – Sudden and Unexpected Traumatic Event

In order to consider entitlement for traumatic mental stress, a decision-maker must identify that a sudden and unexpected traumatic event occurred. A traumatic event may be a result of a criminal act, harassment, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member, or others.

In all cases, the event must arise out of and occur in the course of the employment, and be:

- clearly and precisely identifiable
- objectively traumatic, and,
- unexpected in the normal or daily course of the worker's employment or work environment.

Mental Health Services

The member lived in a small community in Kawartha Lakes where access to mental health services was difficult. After eight (8) months of treatment by a psychologist who was part of a Family Health Team, the psychologist went on leave. The member found another clinic whose practice was in Clinical and Forensic Psychology and funded by the WSIB Community Mental Health Program.

It is noteworthy that the member was never cleared by his treating health professionals for over 2 ½ years to participate in an Early and Safe Return to Work on the basis that he remained acutely sensitized to triggers that rendered him unsafe and unfit to return to pre-injury or any type of employment.

Mental Health Services

The member lived in a small community in Kawartha Lakes where access to mental health services was difficult. After 8 months of treatment by a psychologist who was part of a Family Health Team, the psychologist went on leave. The member found another clinic whose practice was in Clinical and Forensic Psychology and funded by the WSIB Community Mental Health Program.

It is noteworthy that the member was never cleared by his treating health professionals for over 2 ½ years to participate in an Early and Safe Return to Work on the basis that he

remained acutely sensitized to triggers that rendered him unsafe and unfit to return to pre-injury or any type of employment.

WSIB Made the Right Decision

In most instances, the union appeals decisions made by the WSIB. But often times, they get it right, as they did in this case.

Employer Has Right to Object

While an employer has a right to object and appeal WSIB decisions, as do workers, it is sad that an IBEW signatory lacked empathy and understanding of an injured workers psyche that resulted from a serious workplace accident. The employer knew the worker was psychiatrically disabled yet persisted with demands that he return to modified work causing more stress and anxiety.

Worker Will-Say Statement

Fast forward, in April 2023, a line worker was killed in the course of employment (same employer). The worker knew this brother and out of respect for a fellow Powerline Technician (lineman) he attended the funeral home to pay his respects. At the funeral home, he saw his supervisor, who greeted him and said "how's your vacation."

Then in or about December 2023, the employer requested the worker return client keys that were in his possession. He attended the employer facility where his employee locker was located to return the "keys" and get his tools that were in his employee locker. When he opened his locker, all his personal tools were gone. He asked where his tools were, but didn't get a straight answer. The employer has a master key for all employee lockers.

The following personal tools were missing: Milwaukee-framing wrench, Klein-screwdriver, larger Klein-blue handle linesman pliers, Buckingham Skinning Knife, Fargo speed wrench 9/16 and ¾, Penta socket/tool, Ratchet ¾ end, Fr harness style Rain suit-jacket and bib AGO Brand, Fr Coveralls – non insulated AGO brand, Jacket skinning tool for primary U/G cable.

The worker believes his tools were taken as a form of retribution for not returning to work after his accident, which the employer persistently raised in numerous communications notwithstanding they knew he was off work because of a work-related psychological condition (Post Traumatic Stress Disorder).

Let's Raise the Bar on Human Decency & Respect

I've said this before. No contractor wishes harm on any employee. However, an employer's behaviour once a workers compensation claim is registered seems to bring out the worst behaviours and tunnel vision that every worker can return to work after an injury. In my opinion and experience, this is a pervasive problem. I see too many cases where members have surgery and the Employer tells WSIB there is a no lost time claim, and the WSIB sadly buys into this fiction. All too often members ask "Mr. Majesky, what should I do?" My answer, listen to someone that went to medical school and has a license to practice medicine. The brother in my article returned to work in June 2024 with another Line Contractor and refused to return to the accident employer.

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Understanding the Law Regarding the WSIB Construction Re-Employment Provisions After Workers Submit an Allowable Claim

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



Many members are under the impression that if they suffer a work related injury and performed modified duties they are automatically protected by the re-employment provisions of the *Workplace Safety and Insurance Act*, and Ontario Regulation 35/08, Re-employment in the Construction Sector. Unfortunately, they are mistaken.

If a member suffers a work injury and performs modified duties, which is referred to as an Early and Safe Return to Work (ESRTW), and then transition back to regular duties, the re-employment provisions have not been triggered, nor apply. However, if an injured worker is performing modified duties and are laid-off, then the union pursues re-employment and makes submissions the workers falls under the exemptions under the WSIB Work Disruption Policy.

In my experience most members do not miss time after a work injury and the worker and employer are compliant with their legal obligation to cooperate in an Early and Safe Return to Work (ESRTW). This means an employer offers suitable modified work, and the worker attempts to perform modified duties.

Re-employment Does Not Apply

If a member was injured, performed modified duties and then cleared for regular duties and afterwards is laid-off, then they are not covered by the WSIB Re-employment provisions.

Does the Worker Meet the Unable to Work Threshold – OPM 19-05-02

A common situation that I encounter is a members' WSIB claim is allowed, they did not lose time, performed modified duties, then transitioned back to regular duties. In these situations the re-employment provisions **have not** been triggered.

Conversely, if a member lost time from work after an injury and WSIB paid LOE benefits, this would trigger the re-employment provisions. However, members often times confuse missing time from work where the employer paid them as being analogous to WSIB recognizing lost time. It is not.

It should come as no surprise that employers know how to side-step any ongoing WSIB liability, including re-employment, when a member has been injured in their employ.

Does Injured Worker Meet the Unable to Work Threshold in OPM 19-05-02

I realize most members have their own definition of unable to work but WSIB Policy defines "unable to work" which is a condition precedent for the Re-employment obligation to apply in an injured workers claim. More importantly, performing modified duties does not trigger the statutory re-employment provisions found in section 41, of the *Workplace Safety and Insurance Act*, and Ontario Regulation 35/08, Re-employment in the Ontario Construction Sector, and Operational Policy Manual 19-05-02.

WSIB Policy defines "unable to work" in determining whether an injured worker has actionable re-employment rights pursuant section 41 (8)(10)(11) of the *WSIA* as follows:

Unable to work

A worker is considered unable to work, if, because of the work-related injury/disease, he or she:

- Works less than regular hours, and/or
- Requires accommodation/modified work that pays, or normally pays, less than his or her regular pay.

OPM 19-05-02 - Re-employment Obligation

Construction employers are required to offer to re-employ their injured construction workers who have been *unable to work* due to a work-related injury/disease. A construction employer's obligation to re-employ begins when it is notified that an injured construction worker is medically able to perform:

- the essential duties of his or her pre-injury job
- suitable construction work, or
- suitable non-construction work

If an injured worker is cleared for regular duties some employers will lay-off the injured worker once they are cleared for regular duties. However, smart employers will continue to employ the injured worker to verify they can perform the pre-injury job without suffering a recurrence.



One for the Record Books, 10-years Representing a Member

Some members have quick interaction with the union. Not so in my universe particularly when members never recover from a work injury and there is ongoing WSIB interaction and appeals. Although the duration of each claim varies my involvement spans months, years, even decades. Recently, a member that I have represented for over 10-years said to me after receiving his 2nd Tribunal decision “you’re not waiving the white flag.” The Tribunal Vice-Chair issued a favourable ruling granting partial LOE benefits based on the members ability to earn minimum wage, at part-time hours, but concluded the WSIB failed to rule on an issue, consequently she did not have jurisdiction to deal with an issue the union had consistently raised. The WSIB is masterful when it comes to administrative fragmentation which frustrates workers who are forced to play adjudicative ping-pong. After 30-years, I know how to stay out of the sand traps and keep a members case in play, but you have to stay sharp because the thoroughness of the WSIB inquiry process and information gathering has deteriorated over the years

which has impacted the quality of decisions that are released. In my opinion, this was no accident but engineered.

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WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Two Tribunal Decisions Address The Circumstances When WSIB Claims Can Be Reopened After a Claim is Locked-In After 72-Months, Under Section 44 of the Workplace Safety & Insurance Act – It's Great Making Law

Many members have received WSIB Non-Economic Loss Awards (NEL), which recognizes they have a permanent impairment after a work injury. Permanent Impairments are rated using the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition (AMA Guides). Under the law, claims are locked-in 72 months after the date of injury, pursuant to section 44(2) of the *Workplace Safety and Insurance Act* which came into effect on January 1, 1998. Soon after the introduction of the new law, stakeholders and the Board realized the law did not allow the WSIB to reopen claims after the 72-month lock-in. In 2007, the Ontario Government introduced amendments to the WSIA, that expanded the circumstances when a workers locked-in claim could be reopened. The two recent Tribunal decisions, which IBEW 353 won, are related to a "Significant Permanent Deterioration" and "Significant Temporary Deterioration."

Bill 187 introduced s. 44(2.1)(e) that allows the Board to review a worker's LOE benefits if the worker has suffered a significant deterioration that, in its opinion, is likely to lead to a redetermination of his or her degree of permanent impairment under s. 47. In addition, Bill 187 added s. 44(2.1)(f), that permits the Board to adjust LOE benefits if the worker suffers a significant temporary deterioration (i.e. worsening) in his or her condition related to the injury.

Member Suffered Knee Injury in 2002

In *Decision No. 1221/25*, a member suffered a work related knee injury in 2002, and had knee surgery (arthroscopy) because of a meniscus tear. The surgical procedure was a meniscectomy, which under the AMA Guides, 3rd Edition, results in an automatic Permanent Impairment Award. In 2002, the WSIB failed to process a NEL award for his left knee, as mandated by law.

Medical Literature Links Progression of OA After Meniscus Injury

Fast forward to 2018, and the member's left knee was now exquisitely symptomatic, due to the progression of post-traumatic osteoarthritis (OA) as a result of the 2002 knee injury. The medical literature recognizes the relationship between a torn meniscus and meniscectomy, which alters the biomechanical structure of the knee, and hastens the onset of OA. The Tribunal Medical Discussion Paper, *Knee Conditions & Disability*, authored by Dr. John Cameron, Orthopaedic Surgeon states:

... In the long term, studies have shown an increasing percentage of knees with acute meniscal tears, especially those requiring early surgery and/or ACL repair will develop radiographic signs and symptoms of knee osteoarthritis.

Drs. Ogilvie-Harris and Lloyd, in their publication, *Personal Injury, A Medico-Legal Guide to the Spine and Limbs* address Late Complications and functional implications stating:

The meniscus performs a useful and vital function within the knee. Removal of the meniscus will change the function of the knee joint. The increased wear and tear of the articular surface will lead to premature osteoarthritis. Between 20 and 40% of patients will show signs of osteoarthritis after 10 years, and approximately half of these patients will have significant signs and symptoms. As time after meniscectomy increases, there would be a further increase in the incidence of osteoarthritis. The functional effects of osteoarthritis will depend on the patient's occupation and other activities: the greater the degree of physical activity, the greater the effects. Between 10 and 20% of patients having a meniscectomy will require operative reconstructive procedures for the osteoarthritis in the distant future (i.e., post-traumatic osteoarthritis).

Member Stopped Working March 2020, Because of Knee, Not COVID

In 2020, the member stopped work in March 2020, coinciding with the Pandemic. The member had worked for the employer since 1988, and was a valued employee. The owner asked him what he wanted to do, and he said, I need some time off for my knee to heal and he took a voluntary layoff. The members knee

didn't get better, and he applied for Canada Life Short Term Disability benefits, but by this time, he had not worked in 5 months, and was ineligible for union benefits (late entrant). The union Benefit Dept said this sounds like WSIB, speak to Majesky.

Four Separate Appeals Were Required

I soon discovered WSIB failed to process a NEL award for his left knee injury (not the first time), that required surgery, prompting me to request WSIB to recognize a retroactive permanent impairment, which they denied. This led to a domino effect and administrative ping pong, as the Board erected a series of straw man arguments. We won the 1st appeal, however, when WSIB processed a NEL award, they ruled the OA did not arise from the work injury but considered is a pre-existing degenerative condition, which prompted another appeal that the Board apportioned, illegally, on the basis the members knee OA was non-compensable, and the union argued was post traumatic OA, as per the medical authorities above. The union won this appeal.

In July 2022, the member underwent left knee replacement surgery which WSIB retroactively allowed, after the union won the appeal that the knee OA was work-related. However, instead of paying LOE benefits from August 2020, WSIB ruled he was entitled to LOE benefits from July 2022, the date he had left knee replacement surgery (arthroplasty). At the Tribunal, the union argued the member was entitled to full Loss of Earnings benefits from the date of a significant deterioration which was in August 2020, that coincided with an MRI of the left knee that confirmed the advanced state of OA, and knee replacement was the only option.

Think about the injustice baked into the WSIB system, when there were 4 instances where the WSIB either failed to process a NEL award, and then made decisions that resulted in 3 separate appeals. The member returned to work in December 2022, but did not receive any money for two years and lived off his savings. The WSIB also ruled the members layoff in March 2020, was a COVID layoff and the union argued it was a medical layoff that coincided with COVID.

Tribunal Recognized the Systemic Injustice

The Vice-Chair understood the administrative roadblocks the WSIB erected, ruled

Having reviewed the Case Record and the worker's testimony, I agree with Mr. Majesky's submissions. Prior to the March 2020 layoff, the employer had assisted him with his knee problems by providing what amounted to modified work, with apprentices doing the heavier work while he supervised. I find it more likely than not that, with his knee issues, that it would have been only a matter of time before he would have been unable to perform any work, other than desk work, which the employer had indicated was not available.

In terms of when there was evidence of a significant deterioration in his compensable condition, while the worker had complained of knee problems earlier in the year 2020 and was being provided with modified work, the first objective medical evidence substantiating that a significant deterioration had occurred is contained in the MRI dated August 28, 2020. Following the MRI, the orthopaedic surgeon he consulted in October of 2020 was of the view that he required a total knee replacement. The surgery occurred on July 14, 2022. This meets three of the four criteria (the need for surgery, clinical evidence, and job change impacts) to establish that a significant deterioration occurred. The worker therefore experienced a significant deterioration in his compensable condition, the first objective evidence of which is the MRI dated August 28, 2020.

The worker therefore is entitled to LOE benefits for the temporary deterioration in his compensable left knee condition from August 28, 2020, to July 14, 2022.

Hand Arm Vibration (HAVS) Claim

In the late 1990s, I was introduced to a member working at Petro-Canada, after a health and safety issue blew up and a group of members descended to 1377 Lawrence claiming they were industrial guinea pigs and exposed to hazards chemicals used in the refinery process. He was an outspoken, intelligent and respected tradesman who worked on industrial jobs, and a rebel, just the kind of trade unionist my father liked. I soon learned he did not suffer fools or attend Business Manager obedience school.

In 2016 he entered my orbit regarding a long standing Raynaud's diagnosis (20 years). As background, HAVS was previously referred to as White Finger Syndrome and Raynaud's and has been widely researched. The member was assessed at St. Michael's Hospital in their Occupational Disease Dept that specializes in assessing HAVS, where they conduct a Cold Immersion Test that examines blood flows through small blood vessels of your hand, and Digital Plethysmography and Arterial Peripheral Doppler Study, to assess skin/finger blood flow at room temperature, and after the fingers have been put into very cold water and records blood pressure using a Doppler ultrasound instrument. He then submitted a WSIB claim for HAVS and it was allowed, including a NEL award recognizing a permanent impairment.

How WSIB Adjudicates HAVS Claims

The WSIB adjudicates HAVS as an occupational disease under Operational Policy 16-01-09 as a medical condition that affects workers who use hand-held vibratory tools. HAVS primary affects workers who use hand-held vibratory tools. The components of HAVS may be vascular, neurological, and/or musculoskeletal. While it has been known since the beginning of the 20th century that vibration affects the hands and arms, it was not until 1983 that scientists agreed on the definition of HAVS that includes circulatory, nervous, and musculoskeletal systems.

The member claimed his HAVS was worsening, and in 2022, he was reassessed at St. Michael's Hospital, and the results were submitted to WSIB and they increased in HAVS NEL rating which was rated 9% in 2016, and 17% in 2023.

Member Statement Regarding Employment at Gold Mine – September 25, 2023

I picked up a job at a gold mine up north. All was fine for a while until the cooler weather set in. Blanched my fingers on two separate days, then asked for a layoff explaining that as I stated on my start up forms, I suffer from HAVS and cannot work outside in the cold. They agreed to give me a medical layoff at the end of my two-week tour of duty. The following day, I once again blanched a couple fingers, and I was put in the tool crib for the last two days. One of the biggest problems that I had was the contractor did not have gloves to fit me. Everything was tight and cut off the circulation. I wear XXL and XXXL depending on the type of gloves. Finally, they supplied tig gloves (thin leather) with cotton liners. Nice gloves, no grade 5 cut rating as required for electricians, and NOT waterproof. Went through 3 sets one morning before freezing my hands and before going into the tool crib. With the medical layoff, I think it is time to stop working and apply for WCB loss of earnings benefits for the winter and preserve what feeling I have left in my hands.

WSIB Ruled Symptoms Not HAVS Related

In October 2023, the member requested that the Board pay Loss Earnings Benefits, which they denied. WSIB ruled his problems were related to Carpel Tunnel Syndrome, not HAVS, which is ironic, because the member submitted a CTS claim, which the WSIB allowed. The Board then pivoted, ruling his hand symptoms were from cervical spine degenerative disc disease (DDD). The Board also ruled that there was a grievance, and that they were not the court of competent jurisdiction to deal with a labour relations matter. Finally, the Board claimed the member did not suffer a permanent worsening of his HAVS condition, therefore, they could not pay Loss of Earnings benefits because his claim was locked in.

The Tribunal hearing was on April 11, 2025, the same week I had surgery to remove a colon tumour on April 8th, which was benign.

Tribunal Ruling HAVS Temporary Deterioration

In *Decision No. 395/24*, a precedent setting HAVS decision, the Tribunal allowed the members Temporary HAVS Deterioration appeal:

At the start of the hearing, Mr. Majesky indicated that the worker's position had changed. He no longer sought a finding that his condition had permanently worsened. The worker now only seeks a finding that he is entitled to LOE

benefits from September 13, 2023, on the basis that he suffered a temporary deterioration of his condition that forced him to stop working as of September 13, 2023.

The evidentiary question before me in this appeal is whether the evidence demonstrates that in September 2023 the worker suffered a significant temporary deterioration in his HAVS. The Board's decision-making focussed to a large extent on the October 2019 HAVS Specialty Program assessment and the June 2023 HAVS Specialty Program reassessment. The Board found that the June 2023 reassessment did not show deterioration. However, given the withdrawal of the worker's claim for a NEL redetermination – that is, a permanent worsening – those two medical assessments provide only background medical information for the issue before me. While these assessments describe the worker's accepted condition, they are not highly relevant to the issue of whether he suffered a significant increase in symptoms in September 2023. What is relevant to the issue of a September 2023 temporary deterioration is the evidence from that period and immediately thereafter.

The main evidence about the claimed deterioration in September 2023 is the worker's testimony. I found that the worker testified in credible detail and his evidence was in keeping with the surrounding probabilities. I found his evidence broadly credible.

The worker testified about the job he started in September 2023. The work was in a northern location at a gold mine. It was outdoor work. He stated the work was done on rotations in and out of the site. He did the first rotation without difficulty because temperatures remained warm. On his second rotation, the first week was also warm and he did not have any significant symptoms. However, the weather changed. It got significantly colder. He began having difficulties with his fingers and hands. The worker stated that he started having blanching of his fingers.

The worker testified that by September 10, 11 and 12, 2023 he was having significant and steadily increasing blanching and numbness symptoms; by September 13, 2023, he could no longer work. In testifying about his condition, the worker explained that as the blanching of his fingers gets worse with increased cold exposure it is accompanied by profound numbness, affecting his functional abilities with his hands.

In addition to the worker's testimony, the employer confirmed that as of September 13, 2023, the worker was placed on medical leave and tends corroborate that the worker reported to the employer the difficulties he was having with his hands.

Given that I accept the worker's testimony, I find that the worker did suffer a significant temporary deterioration starting September 10, 2023, which forced him to stop work on September 13, 2023. The facts, on my findings, are congruent with some of the policy requirements for evidence of a significant deterioration: there is evidence that persuades me the worker experienced a change in his functional abilities, and there were "job impacts."

I have considered the fact that the symptoms the worker experienced when his hands were exposed to cold were entirely expected, given comments in the June Specialty Program report as well as the Tribunal's Medical Discussion Paper "Hand-Arm Vibration Syndrome" prepared by Dr. R. House (August 2010, revised June 2018 and April 2024). I have considered the meaning of the words "significant deterioration in his or her condition that is related to the injury;" these words describe the triggering requirement for the application of section 44(2.1)(f). I can find no reason to construe these words narrowly. A deterioration may manifest as an increase in symptoms, or a change in the underlying condition itself, or both. In this case, given the nature of the condition, the deterioration in September 2023 was primarily one of an increase in symptoms. The increase was significant: the worker lost most useful function in his hands, and it was enough to force the worker to stop working. In noting this, I accept the worker's testimony that this type of job paid very well and he had every incentive to remain on the job if he was able; there is no reason to believe the worker would have left the job had he been able to continue.

Accordingly, for the above reasons, I find that as of September 13, 2023, the worker was suffering a significant temporary deterioration in his HAVS condition which caused him to stop working that day.

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Time to Heal After Surgery WHY Are Electricians Back to Work after Surgery & Losing their Re-employment Rights Under the Law?

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



There is a double standard when members suffer personal injuries *versus* work related injuries, and I'm referring to recovery time after any surgical procedure involving fractures, hernias, including arthroscopic repair of the knee and shoulder injuries.

WSIB vs GWL – Same Injury, Different Outcome

Let's look at a puzzling situation, because we have two members with the same injury. One suffers a right wrist displaced commuted fracture at work after falling off a ladder; the other electrician has an identical wrist injury, but slipped and fell at home. Each member is diagnosed with a complex high risk fracture because there is orthopaedic concern for bone non-union that requires Open Reduction Internal Fixation surgery to install hardware (pins, plates and screws) so the bones are in correct anatomical alignment. Each is discharged home after surgery and told not return to work until reassessed in the fracture clinic (usually 7-14 days after surgery, and ongoing). Each is in severe post-operative pain and heavily medicated (e.g., Oxycodone, Oxycodone, and Percocet – 9 tabs/day).

The member with a work injury is immediately visited at home by the employer Health & Safety Representative who provides modified work to be performed at home (i.e., As-Builds, read Health & Safety Manual). The member is told they can work at their own pace in-bed or the kitchen table, and not to worry because the employer will continue paying them for their lost wages after surgery. The reality is the member is in a diminished mental and physical capacity and incapable of making an informed decision when they sign the employer's "return to work plan" - nor did

they have the benefit of consulting with a union or legal representative concerning their rights. When their claim is established, the WSIB makes some perfunctory calls to the employer, who they call first, then the worker.

Members Falsely Report "no lost time"

The employer says there was no lost time, even after surgery because they offered and provided modified work. The worker, also being a good team player, tells WSIB there was no lost time. In fact, the member on their Worker Progress Reports sent to the WSIB reaffirms there was no lost time, reporting they did modified work, even though they swear to me that they were in no mental or physical shape to perform any work for at least one week or longer after surgery. One member said, I'm left handed, I broke my left wrist, so how could I even do the As-Builds which required me to use my left hand to write?

In contrast, the member who had the slip and fall at home will apply for union disability benefits through Great-West Life, but they have an entirely different experience. First, they will be at home recovering from a serious injury, then involved at some point in aggressive physiotherapy, and likely absent from work for 3 to 12 months after the at-home injury.

This begs the question, WHY is there differential treatment between these two electrical workers? And furthermore, what are the implications to injured workers?

Let me examine two additional cases, one involving a member who tore his left distal bicep tendon at work, requiring surgery to repair and re-attach the tendon at the elbow. The other an electrician

who suffered a complex ankle fracture in two places that required surgery to install hardware. In both instances, the workers were offered modified work right after the injury. Both employers reported to the WSIB these were no lost time claims.

Recovering From Surgery, Report the Lost Time

The electrician who recently fractured their ankle was given As-Builds by the employer to work on at the kitchen table and told not to worry if no work was done (do as much as possible). Yet this member was bed-ridden and immobile post-operatively, could not shower for six (6) days after the injury, even though there was a shower in the ensuite bathroom, nor able to ambulate around the house or the few stairs to answer the door when the employer came calling. The worker in this case suffered a high risk ankle fracture due to the potential for non-union of one of the ankle fractures.

Why Ignore Usual Healing Times

Leaving aside that members routinely make admissions against their interests to the WSIB that they returned to work right after surgery, the reality is quite different when I probe the situation. In my experience, WSIB decision makers seem quite indifferent and ignore their own "usual healing times" when investigating claims because certain types of injuries, particularly post-operative recovery times, are well known. This begs the question, since when did electricians become super-human X-MEN that spontaneously recover from surgery like Wolverine?

The common explanation that our members offer is they were just obliging the employer and did not want to harm their employment



relationship once they recovered, but this soon becomes an exploding cigar for injured workers – *KABOOM!*

Typically, the WSIB will rule that the workers recovered from their work injuries, as they did in the above cases. In other words there was no residual permanent impairment nor entitlement to a Non-Economic Loss award pursuant to sections 46 and 47 of the *Workplace Safety and Insurance Act*, and Operational Policy 18-05-03 (Assessing Permanent Impairment). Therefore, each worker was forced to go back to work and appeal the WSIB decision.

In each claim when an injured worker is laid-off, I file a re-employment submission with WSIB that there was a re-employment breach, pursuant to section 41 of the *WSIA*, and Ontario Regulation 35/08 (Re-employment in Ontario Construction). The rationale is that our members did in fact suffer lost time after an injury, and often times continue to have ongoing limitations related to their work injuries that

impedes their ability to be competitively employable in their pre-injury job.

Re-employment Rights Triggered after 1-Day Lost Time

Injured workers get a rude awakening when WSIB issues a decision denying there was a re-employment breach stating there is no evidence the member was **“UNABLE TO WORK”** or worked at less than the pre-injury wage. Under the law, the trigger in activating your re-employment rights as an injured worker is a lost-time claim, even 1-day, but not including the day of injury. Unfortunately, most injured workers believe a 1-day lost time claim will cost their employer, so they play along. However, in reality, employers are not charged a lost-time frequency against their WSIB account for the first week (7-days) after an injury. It’s not whether you missed work a day here and there, but whether WSIB recognized the lost time, which is an important distinction.

What does this mean to injured workers? Frankly, you are trading away your re-

employment rights under the law by misrepresenting that you were fit and able to perform suitable work after surgery. When you do receive a layoff (ROE) that you thought wouldn’t happen, usually weeks after the WSIB rules you are fully recovered, you are surprised when you assert your re-employment rights under the law, and learn that by returning to work the day after surgery this is used against you. It also suggests you suffered a trifling injury. This is what I call exploitation by invitation.

More troubling is that some members are engaged in Health & Safety home study while “high as a kite” on pharmaceutical medication. There is a section regarding “fit for duty” and not reporting under the influence of any sort of drug. Personally, I find this deeply offensive, what say you?

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Thanksgiving Day

Statutory Holiday to be observed is on Monday, October 13th, 2014. If your employer asks you to work on this day, you must be paid double time for working on this holiday!

Dues Increase effective January 1st, 2015

1. At the IBEW International Convention which was conducted in Vancouver, British Columbia in September 2011, the delegates approved amendments to Article IX of the IBEW Constitution.
2. The amendments require an increase in dues for “A” Members of \$1.00 per month, effective January 1st, 2015 and the increase will be applied to the Per Capita Fund.

Basic Dues will be as follows: “A” Members - \$40.70



Understanding the Law Regarding Your Right to Choose Your Treating Health Professional - Your Duty to Cooperate in WSIB Directed Medical Assessments – And Employers Obligation to Pay the Ambulance Invoice

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



A frequent member inquiry relates to the selection of a treating health professional. Section 33 of the *Workplace Safety and Insurance Act* (WSIA), codifies a workers right to select the treating physician. It's a right given under law, so don't give this up!

In most instances a worker will attend their Family MD's office, or registered health professional, such as a physiotherapist or chiropractor, who also have the authority to submit a Form 8, Health Professionals Report to WSIB.

In urgent care situations, EMS (ambulance) will take you to the nearest admitting hospital. Notwithstanding your right to choose your treating physician, common sense dictates that you should continue being followed by the hospital specialists (e.g., fracture clinic), until you recover and are discharged as a patient. Unfortunately, a number of members do not have a Family MD, so you're hostage to whomever is available at a medical clinic. However, if you suffer a work injury, it helps to have one health professional coordinate treatment and provide continuity of care.

Right to Select your Health Professional

33. (1) A worker who sustains an injury is entitled to such health care as may be necessary, appropriate and sufficient as a result of the injury and is entitled to make the initial choice of health professional for the purposes of this section.

Who Pays the Ambulance Invoice? (the Employer)

Some of us have likely received an invoice in the mail after an EMS call to our home, or if you've been taken from work via ambulance. Hospitals and Ministry of Health guidelines stipulate the patient receives the invoice (\$45) for a hospital admission by EMS. Although a hospital invoice will be sent to an injured worker (patient), section 38 of the *WSIA* set out an employers' obligation to pay for transportation to a hospital or physician. If you receive an ambulance invoice, please forward this to your employer for payment.

Transportation to hospital, etc.

38. (1) At the time an injury occurs, the injured worker's employer shall provide transportation for the worker (if the worker needs it) to a hospital or a physician located within a reasonable distance or to the worker's home. The employer shall pay for the transportation.

Obligation to Co-operate in WSIB Medical Assessments

Section 13(1) of the *WSIA* stipulates that a worker who sustains an injury in an accident arising out of and in the course of employment is entitled to benefits. However, injured workers are also legally obligated to co-operate in health recovery initiatives as set out in section 34(1).

Another source of controversy arises when WSIB directs an injured worker to attend an assessment at one of their Specialty Clinics, even though an injured worker is being assessed and treated by their own General Practitioner and/or Specialist.

Notwithstanding an injured workers right to select their own treating health professional, you still have a legal obligation to attend WSIB coordinated medical assessments and/or treatment programs. Many WSIB Specialty Clinics are staffed with top-notch specialists, who may recommend surgery, however, ultimately, it is your right to be followed by the physician/specialist of your choice.

Moreover, injured workers also have the right to elect or decline surgery, which is not tantamount to non-cooperation. Clearly, your decision should be informed, and predicated on some rationale, such as fear of infection, etc. Please note that in February 2016, a member underwent routine CTS surgery, and sadly, passed away within 48 hours due to a sepsis infection, in which the cause of death was in all probability materially related to a work injury. But for the work related CTS, he wouldn't have underwent surgery. That's the reason hospitals request each patient sign a consent form acknowledging the risks associated with surgery.

Reduction in LOE Benefits for Non-co-operation

An injured workers obligation to participate and co-operate in WSIB directed medical assessments, is set out in sections 34 and 35 of the *WSIA*:

Duty to co-operate

34. (1) A worker who claims or is receiving benefits under the insurance plan shall cooperate in such health care measures as the Board considers appropriate.

Failure to comply

(2) If the worker fails to comply with subsection (1), the Board may reduce or suspend payments to the worker under the insurance plan while the non-compliance continues.



Board request for health examination

35. (1) Upon the request of the Board, a worker who claims or is receiving benefits under the insurance plan *shall submit to a health examination* by a health professional selected and paid for by the Board.

Failure to comply

(2) If the worker fails to comply with subsection (1) or obstructs the examination without reasonable cause or excuse, the Board may reduce or suspend payments to the worker under the insurance plan while the non-compliance or obstruction continues.

The duty to co-operate is also reinforced in Policy Document No. 22-01-03, *Workers' Co-operation Obligations* (12-Oct-2004) which provides in part as follows:

A worker who is receiving benefits under the insurance plan, or who is entitled to do so, is required to:

- provide the WSIB with any information necessary to adjudicate the claim co-operate in health care measures the WSIB considers appropriate *undergo an examination by a health professional selected and paid for by the WSIB*

Worker non-co-operation - Notice of non-co-operation

It is important to note that non-cooperation attracts serious penalties, particularly the denial of LOE benefits. Even though there are safeguards in place so a worker is warned of the consequences, and given an opportunity to comply, if the WSIB determines that a worker is not co-operating, the decision-maker notifies the worker of the:

- obligation to co-operate
- finding of non-co-operation, and
- consequences of this finding (i.e., the reduction and/or suspension of benefits).
- Notice is given verbally (if possible), and confirmed in writing *in every case*.

Employer Requested IME's

Employers also have a right to request an injured worker attend an employer requested Independent Medical Examination (IME), which is paid for by the employer. Although this happens infrequently, employers do have this right, subject to certain stipulations, found in section 36 of the *WSIA*.

Employer request for health examination

36. (1) Upon the request of his or her employer, a worker who claims or is receiving benefits under the insurance plan shall submit to a health examination by a health professional selected and paid for by the employer.

Objection

(2) Despite subsection (1), the worker may object to undergoing the examination or to the nature and extent of the examination requested by the employer. The worker shall notify the employer of his or her objection.

Request to Board

(3) Within 14 days after receiving the worker's objection, the employer may request that the Board direct the worker to submit to the examination and, if necessary, that the Board determine the nature and extent of the examination.

Decision final

(4) A decision of the Board under this section is final and is not appealable to the Appeals Tribunal.

Failure to comply

(5) If the worker does not comply with a direction of the Board made under subsection (3), the Board may reduce or suspend payments to the worker under the insurance plan while the non-compliance continues. 1997, c. 16, Sched. A, s. 36.

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Alcoholics Anonymous

A closed AA service meeting will be available at 1377 Lawrence Ave. East 8pm every Friday night. All Alcoholics welcome.

Victoria Day

Victoria Day is a Statutory Holiday to be observed on **Monday, May 22, 2017**. If your employer asks you to work on this day, you must be paid double time for working!



Workers Do Not Have the Right to Sue for Injuries in Workplace Accidents and Are Captured by the Historic Bargain (no fault workers compensation system)

By: Gary Majesky, WSIB Consultant & Executive Board Member



This year I received several claims where members were injured in various accidents and wanted to sue their employer. In a recent case a trench collapsed because of alleged inadequate shoring, while the member was in the trench. In another, a member was in a new house under construction when the stairs collapsed causing the worker to fall 15 feet onto the basement concrete floor. Or the accident where a load of drywall fell over landing on the member. In each claim the member was in the course of employment and suffered serious injuries.

In some instances the employer did not follow health and safety procedures, and orders were written by the Ministry of Labour (MoL), with charges pending under the *Occupational Health & Safety Act*. In other situations, the employer was not responsible for the accident, but another trade who failed to properly install the stairs, or loaded the drywall haphazardly, that caused the accident. There was also the bizarre case of a member in a porta-toilet when it was struck by a forklift driven by another tradesperson. It's important for members to understand that the MoL, and by extension, the Crown, has jurisdiction and prosecutorial discretion to file charges, and not the union.

In some claims, the accident employer seeks transfer of costs asserts they were not responsible for the accident, but another employer. It is important to understand that transfer of costs to another employer does not impact the injured workers rights and entitlements to benefits under the WSIA.

Members, and family members, frequently tell me that "they want to sue the employer" which prompts my reply that the law, generally, prohibits the workplace parties from opting out of the *Workplace Safety and Insurance Act*, or sue a third party because they are captured by what is referred to as the "historic bargain" which has been the cornerstone of our workers compensation no-fault system since its introduction in 1915.

There are limited exceptions on the right to sue, such as MVAs, but when the first *Workmen's Compensation Act* was introduced, workers gave up the right to sue for mandatory no fault coverage for industrial accidents.

The WSIA in turn removes the right of workers to sue their employers for workplace injuries and provides for benefits paid for, directly or indirectly, by their employer. The statutory scheme created the general principle that workers injured on the job are to be compensated through the WSIA and not in the courts.

When workers are employed by a contractor, your right to bring a civil action against your employer for damages due to personal injury arising from an accident or occupational disease is presumptively taken away by Section 28(1) of the WSIA.

In accordance with the scheme of the WSIA, and "the historical bargain" referred to above, this bar on civil actions applies even if the cause of the injury was the negligence of the Employer, such as a failure to perform and follow proper safety protocols.

The Ministry of Labour

The MoL enforces the *Occupational Health and Safety Act* (OHSA) and its regulations. The purpose of the Act is to protect workers from injury and illness in the workplace. After a serious accident, the MoL will commence an investigation, and even visit you in the hospital, assuming you are not in a diminished physical or mental capacity to respond to questions.

What is the MoL's roll in the event of a serious workplace injury?

Under the OHSA, the employer must contact the MoL immediately after a worker is critically injured while at work. Generally, an investigation begins right away but may take up to a year to complete.

Once the investigation is complete, the MoL's Legal Services Branch will assess whether charges are appropriate against workplace parties such as employers, supervisors or workers, or other parties outside the workplace. The MoL has one year from the date of the accident to lay charges under the OHSA.

Before charges are laid, the MoL will not discuss the details of its investigation except as required or permitted by law. It is important to emphasize, that the Crown (MoL) has prosecutorial discretion whether to lay charges.

When is the MoL's investigation report available?

The MoL's investigation report is available after the MoL's Legal Services Branch has completed its review and determined that charges are not warranted under the OHSA. If charges are laid, the investigation report is available after court proceedings have been completed. To obtain a copy, a request should be made to the MoL's Freedom of Information and Privacy Office @ (416) 326-7786.



If charges are laid, will the MoL advise worker of the court date?

The MoL representative will let you know when charges are laid and will provide you with the name and telephone number of the prosecutor. You will also be notified when the matter is scheduled to go before the courts.

Can the Worker or Family Sue – Rights of the Worker

As a general matter, Ontario's workers' compensation system, as set out in the *Workplace Safety & Insurance Act*, provides for comprehensive, no fault compensation to workers for injuries suffered in the course of employment. Section 28(a) of the WSIA states:

Certain rights of action extinguished

29. (1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following person in respect of the worker's injury or disease

1. Any Schedule 1 employer
2. A director, executive officer or worker employed by any Schedule 1 employer.

Spouses and Dependants

The same bar on civil actions also extends to family members. Section 26(2) of the WSIA provides that:

Entitlement to benefits under the insurance plan is in lieu of all rights and action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer [emphasis added]

This section is intended to take away the right of a "worker's survivor, ...spouse, child or dependant" against the workers employer.

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SUB PLAN SUBMISSIONS

Effective immediately, **ONLY** pdf, jpg and tiff attachments can be emailed to sub@lu353.ca. Also, revised SUB PLAN forms are available at www.ibew353.org, select FORMS.

New Members

APPRENTICE HOUSEWIREMEN

Nathan Cabral, Gian Luca Del Core, Giancarlo Gutta, Antonio Napoli and Rahmish Noori.

APPRENTICE LINEMAN

Cody Munford

APPRENTICE TECHNICIANS

Joseph Nguyen and Jerry Rajcoomar.

APPRENTICE WIREMEN

Adrian Altomare, Francesco Amantea, Alisha Arnold, Daniel Bailey, Adriano Baldassarra, Beau Brunelle, Adam Buonfiglio, Alexander Carson, Justin Daniels, Erik Dodds, Austin Ellis-Callow, Tyler Fraser, Patrick Gendron, Lucas Godberson, Jimmy Huynh, Joseph Latour, David Lazure, Andrew Magee, Matthew Marino, Kevin Martini, William Morin, Dalton Mount, Mathew Nesbitt, Justin Papaiani, Wesley Smith, Michael Sparks, Alexei Terekhov, Myles Thomas and Jordan York.

GROUNDMEN

Matthew Feinig, David Lewis and Nicolas Maraschiello.

JOURNEYMAN HOUSEWIREMAN

Philip Fera

JOURNEYMEN WIREMEN

Bryan Furtado and Bryn Palmer.

RESIDENTIAL HIGHRISE JOURNEYMEN

Sean Akel, Anthony Papa and Victor Pereira.

TECHNICIAN LEVEL 1

Roel Rodillas

UPGRADE JOURNEYPersons

Julia Brady, Brandon Brown, Evan Brown, Dustin Buyting, Mark Chapple, Kevin Collin, Jeffrey Cook, Julian Del Bel, Kevin Doherty, Julian Dubicki, Cristin Eby, Aaron Feldman, Joseph Fundytus, Michael Grech, Cullen Hackett, Kevin Harvey, Jonathan Heaslip, Jeremy Hilliard, Brandon Hood, Adam Johnstone, Daniel Kasiram, Jason Khan, Bryan Lopes, Mario Manuel, Kolter Marles, David Mathews, Dustin Maybroda, Justin Morris, Mudassar Munir, Kyle Pacheco, Fabian Perez-Gonzalez, Jerome Quiazon, Luke Regeling, Steve Rosario, Matthew Saric, Tyler Saunders, Ryan Secord, Tyler Short, Alexander Silis, Benjamin Somerville and Denzel Stewart.



Most Injured Workers Return to Work - Even With a Permanent Impairment (NEL Award). This Is a Legal Mine Field When Members Suffer Another Work Injury or Receive 2nd NEL Award



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

Our members are resilient and hardworking, even injured workers. Most members return to work after a back, knee, or shoulder injury, even when they don't fully recover and have a permanent impairment recognized by WSIB. If you are a career electrical worker odds are you'll have another injury, sometimes the same area of injury (e.g., lumbar spine or shoulder).

This is a legal swamp for some workers because their 2nd WSIB NEL award may be rated 18%, and lower than an earlier NEL award of 22%. WSIB will rule the member has recovered to their previous level of disability and can return to work, even though the member is in treatment, takes medication, and the treating health professional(s) have not cleared the worker for regular duties. In the Board's view, 22% minus 18% means the member is 3% better, therefore, the workers loss of earnings is not related to the most recent work injury. The Board's linear thinking sounds rational, but it is legally flawed.

Tribunal Decisions Final

The *Workplace Safety and Insurance Act*, section 123(4), states that the Appeals Tribunal's decisions are final. Nevertheless, section 129 gives the Tribunal the discretion to reconsider a decision if the Tribunal considers that it is advisable to do so. Reconsiderations, however, are rarely granted.

A reconsideration is different from an appeal. Unlike an appeal of a Board decision, a party must provide a good reason for a Tribunal decision to be reconsidered. A reconsideration will not be granted because a party disagrees with the decision and wants to re-argue the case. Other than a reconsideration, the only other option for having a Tribunal decision changed is to file an application for Judicial Review in the Superior Court of Justice.

Union's Position on Board's Reconsideration Request

I have an active appeal for a member who won his Tribunal appeal after a 6-year battle. The WSIB filed a motion for a reconsideration of *Decision 744/21*. Although Tribunal decisions are final, employers, workers or the WSIB can seek a reconsideration, which I have done in the past.

The Board filed a reconsideration application which is now before the Tribunal to determine whether the Board's request passes the threshold test. The union takes the position the Board's request for a reconsideration does not, on the facts of this case, pass the threshold test for a reconsideration. The union argued the Board is re-litigating the same issue, which was the subject of an earlier reconsideration application, with similar factual contours, in *Decision 1167/13R*, where the Board asserted the decision was contrary to applicable legislation and policy.

The union argued the doctrine of *res judicata* stands for the need of finality in litigation, and court actions, but not proceedings before arbitrators or other administrative tribunals, such as the labour board, or the Workplace Safety and Insurance Appeals Tribunal, although such bodies seldom depart from a previous decision between the same parties on the same issue. Furthermore, if the Board believed there was an error of law in *Decision 1167/13R*, they should have sought a Judicial Review of the decision, but did not.

Tribunal Case Law – Zero NEL Awards

In written arguments the union referred to *Decision No. 325/06*. The Vice-Chair in that case adjudicated a similar issue and concluded that rather than focusing on whether the workers condition is below his NEL award, the question which ought to be answered is whether the worker's compensable injuries made a significant contribution to his loss of earnings. Put simply, was the workers loss of earnings due to his compensable injury:

Section 43 of the *WSIA* provides that a worker is entitled to LOE benefits when he or she has a loss of earnings as a result of the compensable injury. The worker testified that when he returned to work in June 2000, he performed modified duties for about a month, and then returned to his regular job. In 2002, he had no LOE award. Thus, rather than focusing on whether the worker's condition deteriorated below the level of his NEL award in March and May 2002, the question which ought to be answered is whether the worker's compensable injuries made a significant contribution to his loss of earnings i.e., was his LOE due to the compensable injury.

In *Decision No. 2338/11*, another Panel concluded that it is not necessary under section 43 of the *Workplace Safety and Insurance Act* or Policy that a worker must be below his NEL impairment level (%) to find entitlement to LOE benefits:

The Panel agrees with the submissions of Ms. Marquardt that policy does not require a finding that the worker is below the NEL when considering the question of whether or not a worker has entitlement to LOE benefits for the recurrence. We agree with the analysis set out in *Decision No. 325/06*. In that decision, the Vice-Chair addressed the question of entitlement to LOE benefits where it had not been shown the worker was below his NEL. The Vice-Chair stated:

In deciding the issue of whether the worker ought to be granted further LOE benefits in March and May 2002, the ARO appears to take the position that Board policy requires that one must establish a significant deterioration in one's NEL level before LOE benefits can be granted. The ARO did not refer to any specific policy document,



nor was I able to locate such a provision when reviewing the policy deemed applicable by the Board in this case. Indeed, this approach may be appropriate in considering temporary benefits under the pre-1997 Act. Given that a NEL award recognizes a functional loss and does not compensate a worker for a wage loss, one would not expect there to be a direct link between entitlement to LOE benefits and the establishment of a significant deterioration in a NEL award. Section 43 of the WSIA makes no such mention of a NEL deterioration for LOE purposes and the temporary benefit analysis as done herein, is not appropriate under section 43 of the WSIA.

Board Sought Reconsideration of Earlier Decision

In *Decision No. 1167/13*, the Tribunal adjudicated a worker's claim who suffered a low back injury in 2009. He was assessed with a 22% rating for permanent impairment. However, he had a 24% NEL award for low back impairment from a previous accident. As a result, there was no increase in the NEL award. The worker appealed a decision of the Appeals Resolution Officer denying ongoing LOE benefits.

The Tribunal concluded the ARO appeared to take the position that Board policy required a significant deterioration in the worker's NEL level before LOE benefits could be granted. The Panel agreed with the analysis in *Decisions No. 325/06* and *2338/11* that it is not necessary to show that the worker's condition is below his NEL level in order to grant LOE benefits. Rather, it is necessary to show that the worker's loss of earnings during the period in question was the result of the compensable injury. The Panel found that the 2009 accident was a significant contributing factor to the worker's loss of earnings, and the worker was entitled to ongoing LOE benefits.

The WSIB filed a reconsideration application in *Decision 1167/13* on the grounds that there was an error of law, in that the decision was contrary to the applicable legislation and policies. The Tribunal ruled the Board's reconsideration application did not meet the threshold test and the application was dismissed.

In Another Member Appeal, Tribunal Vice-Chair Agreed

In a recent Tribunal appeal, a member has battled WSIB since 2014. It's a complex case. The Vice-Chair in *Decision 1189/21* commented that a NEL rating after a second compensable accident is not necessarily evidence of whether there is a continuing injury from the second accident:

The implications [and] analysis of *Decision Nos 1167/13* and *1167/13R*

Mr. Majesky also submits that in order to be entitled to benefits under the 2009 claim, it is not necessary to show that the worker is below the NEL level from the prior injury. He states that the fact that the Board concluded that the worker's 2009 lumbar spine injury resolved without an increased NEL award does not mean the worker did not have a work-related loss of earnings. He refers me to paragraph 22 of *Decision No. 1167/13* which states:

We agree with the analysis in *Decision No. 325/06* and *Decision No. 2338/11* and agree that it is not necessary to show the worker's

condition is below his NEL in order to find he has entitlement to LOE benefits. What must be shown is that the worker's loss of earnings during the period in question was the result of the compensable injury. The question to be addressed is whether the worker's compensable injury made a significant contribution to his loss of earnings, i.e., was the worker's loss of earnings due to the compensable injury? As noted on June 1, 2010, the worker advised that the job placement employer through the LMR services offered him a position.

In *Decision No. 1167/13R* the Reconsideration Vice-Chair denied the Board's request for reconsideration of *Decision No. 1167/13*. From my review of *Decision Nos 1167/13* and *1167/13R*, that worker had had two low back injuries, the first in 1995 and the second in 2009. The worker was referred for NEL assessments after both accidents. As a result of the 1995 accident the worker was granted a 24% NEL award for the low back. After the 2009 accident his low back impairment was assessed by the NEL assessor at only 22%, therefore the worker was granted a zero NEL award. The Board then denied ongoing LOE entitlement under the 2009 claim because the worker was not below his NEL level. The Panel in *Decision No. 1167/13* then granted LOE benefits based on its finding that the worker had a continuing loss of earnings as a result of the 2009 injury.

I agree with the finding in *Decision No. 1167/17R* that a lower NEL rating after a second compensable accident is not necessarily conclusive evidence of whether there is continuing injury from a second accident. Other factors might have affected the assessments.

Given the specific requirement of section 43(1)(d), I also agree with the implication of *Decision No. 1167/13R* and with the Board's submissions for the purposes of that Decision that there must be an ongoing injury for LOE to be payable under a claim. While it is not necessary for there to be a NEL award, or for the injury to be at MMR, there must at least be an ongoing temporary compensable injury or impairment if there is no determination of an ongoing permanent impairment.

Union Argued Board's Application Lacks Merit

The union's position in the Board's Reconsideration Application in *Decision 744/21* is the Board's argument is based on a factually incorrect premise that the member had returned to his pre-accident level of impairment by the end of February 2019. To accept that conclusion, the Board is disregarding the principals of an evidence-based inquiry, and ignoring the medical opinions of qualified and experienced clinicians whose expertise they rely on at the Board's Specialty Clinics.

This is a good example of the legal mine field workers face, particularly claims involving prior NEL Awards.

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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 continue 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 decision 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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TOBE HERTZOG
 COMMITTEE PRESENTS

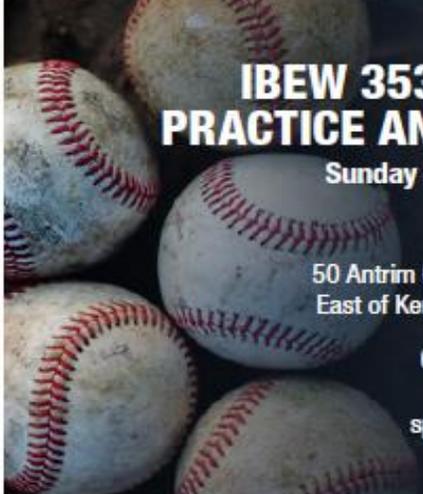
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Sunday June 23 at 11:00am

Glamorgan Park
 50 Antrim Cres., Scarborough, ON
 East of Kennedy Rd. South of 401

Contact Sean Smith
 (905) 926-9065
 spadesof7@hotmail.com



WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Local 353 Members Not Entitled to Severance Pay Under the Employment Standards Act - AND - Many Members Unaware They Don't Have Seniority and Whether Their Dispute Falls under The Collective Agreement or Workplace Safety and Insurance Act

In my May 2025 newsletter article, I reviewed Temporary Layoffs and Clause 1000 of the Principal Agreement. Two situations this month highlighted WHY members need a tutorial on their rights and obligations under the Employment Standards Act, Collective Bargaining Agreements (Principal Agreement & Residential Agreements) and the Workplace Safety and Insurance Act.

The December 2024 Newsletter which was not mailed to members due to the Canada Post strike, contained a Tribute article in honour of Bro. Joe Fashion, who passed away, and was the longest serving Business Manager of Local 353. A passage read:

Fashion An Early Proponent of Seniority

In the 1960s, Joe was a member of the Local 353 Seniority Committee that went to Chicago and looked into their seniority plan. Upon returning, Fashion and the Committee recommended adoption of the plan. Many years later, Joe conceded to me it's not as easy as it sounds and, as well as the Building Trades in general, do not have a seniority system that is common in other collective agreements.

ESA - Hiring Hall Workers Not Entitled to Severance / Termination Pay

When Cam Commandant was a Business Rep, a dispute arose at Jacobs Catalytic, regarding our members entitlement to severance pay pursuant to the Employment Standards Act, 2000. Under Ontario Regulation 288/01, a construction employee is not entitled to termination pay. A construction employee is defined as having "the same meaning as in Ontario Regulation 285/01." The Local 353 grievance did not proceed because the language in the ESA is clear and unambiguous that construction workers from a Hiring Hall are not entitled to severance and termination pay. In *Jacobs Catalytic Ltd. vs. LIUNA Local 1089 (2006CanLii37514)*, arbitrator Albertyn ruled on a similar fact grievance:

In an industrial or commercial establishment, the Grievors would have been entitled to termination and severance pay, some financial recognition of their very long service. In construction, where high mobility is the norm, where employees work effectively out of the union hiring hall rather than for any particular employer, where they work on projects which have a specific limited duration, and where continuous employment is far from the norm, severance pay is generally not paid, nor anticipated. That is why, in the Employment Standards Act, 2000, there is a specific exemption from the payment of

severance pay and termination pay in the construction industry. This case is unusual in that the Grievors' employment is from a construction union hiring hall, ostensibly in the construction industry, with the rules which apply in that industry, but with a high level of employment stability, more akin to what one would experience in an industrial establishment and under a different collective agreement. I therefore understand their sense of outrage after 25 and 30 years of loyal and regular work to be told they were to leave later that same day, and then to leave without any compensation for the loss of their jobs.

Injured Foreman Wage Reduced to Journeyman

Recently a member who was a foreman contacted me regarding a gradual onset shoulder injury. I provided him my opinion in writing how to proceed and register a WSIB claim. He contacted approx. 1 month later that there was a dispute because his employer had changed his pay rate from Foreman to Journeyman. Notwithstanding the member was dealing with me regarding a WSIB claim, he was advised that "the employer cannot do that." There was an exchange of emails between the member and employer and he was ultimately laid off. I was not provided or privy to the details of their communication, and was concerned that the member believed his rights were covered by the collective agreement. Clearly whoever was whispering in his ear thought so.

Although a WSIB claim was pending, but had not been adjudicated, I was concerned the member, and whoever was advising him failed to understand that the members employment and loss of earnings fall under the Workplace Safety and Insurance Act. Furthermore, I was also worried that the member believed the change in his pay rate (foreman to journeyman) was a constructive dismissal.

I explained to the member even though his WSIB claim had not been adjudicated, the Board would retroactively adjudicate his entitlement to benefits, including Loss of Earnings. It was evident to me the employer was aware the worker required modified duties. Frequently, there are employment disputes between injured workers and accident employers if a worker is disciplined and/or terminated for cause. Those issues must certainly be grieved because the Board is not the church or the court of competent jurisdiction regarding your employment.

However, when an injured worker has a dispute about their rights and obligations under the Workplace Safety and Insurance Act, the first person they should talk to is me because the overarching principle of the Workplace Safety and Insurance Act and Policy, is the

workplace party's obligation to cooperate in an Early and Safe Return to Work. Furthermore, if there is Loss of Earnings (partial or total), that too falls under the jurisdiction of the WSIB. If a member heeds the advice of someone who told them an employer can't change their job title and pay rate, they are ill informed and causing economic and legal harm to a member.

The Law Regarding - ESRTW

It is a requirement in both the legislation and WSIB policy that the workplace parties, in other words workers and employers, cooperate in an Early and Safety Return to Work (ESRTW). Furthermore, it is expected that an employer will cooperate in bringing an injured worker back to work. It is also expected that an injured worker will attempt and try the modified work, and if there are problems, the parties are obliged to continue to search for alternate modified duties. Failing a successful return to work in which the workplace parties have demonstrated and exhausted all options at finding suitable and productive work, an injured workers claim for LOE benefits paid by WSIB is more credible.

What is Modified Work

Modified work is any suitable work that is within the functional abilities of an injured worker. It does not have to be pre-injury work, or the same job site.

Union Advised Member

I explained to the member that although his WSIB had not been adjudicated when he had conversations with the employer, these conversations took place, and the employer was aware he was injured, and provided modified duties. It was clear the dispute was about wages, and his status as an injured worker brought his employment with the accident employer within the scope of the Workplace Safety and Insurance Act, and the Early and Safe Return to Work provisions of the Law and Policy.

A dispute over wages, which may have prompted the layoff, can easily be construed as a deemed quit. Or the member severed the employment relationship. Any wage loss that may have resulted in terms of the wage difference between a Foreman and Journeyman would be subject to the WSIB statutory formula of 85% of an injured workers NET pay, as well as the cap on pre-injury insurable earnings.

Payments for loss of earnings

43. (1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,

- (a) the day on which the worker's loss of earnings ceases;
- (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;

- (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
- (d) the day on which the worker is no longer impaired as a result of the injury. 1997, 16, Sched. A, s. 43(1).

Payments where co-operating

(3) The amount of the payment is 85 per cent of the difference between his or her net average earnings before the injury and any net average earnings the worker earns after the injury, if the worker is co-operating in health care measures and,

- (a) his or her early and safe return to work ...

Union Opinion to Member

I advised the member that his wage loss as an injured worker (foreman to journeyman) does not fall under the Principal Agreement, and instead, the Workplace Safety and Insurance Act. At this time, we do not know what position the employer will take, but the member did load the employer's gun. Even if the accident employer does not articulate and take the position that the member declined suitable work, with a wage loss, the WSIB certainly can.

A word of caution to all members. Please don't swim alone in the Killer Whale Tank, and wait until you speak to the union person responsible for WSIB, instead of bouncing around and speaking to other union representatives (Rep Shopping).

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PENSION GIFTS

The following pensioners are to receive their pension gifts:

Tony Alonzi, Josef Armatowicz, Paul A. Bilawski, Mike Chimienti, Reginald F. Cook, Nikolai Danilov, Paolo Delplavignano, Robert Dewar, Geraldo Figueira, Craig S. Hretsina, John Kiparisas, Brian Mahon, Gary A. Reed, Roman Rybak and Minqin Si.



WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

High-Rise Slab Workers & Gradual Onset Lumbar Spine Injuries – Understanding When Ticking Time Bomb Injuries Are Set at Work – But Blow-up At Home or At Work Performing A Minor Task Like Bending Over

This month we need to have a serious conversation because many members who work on the SLAB in the High-Rise sector fail to appreciate or understand that the physical demands of SLAB work is often the root cause of a gradual onset lumbar spine injury. Typically, their attention is distracted from this reality, when their low-back disability "becomes complete" when performing an innocuous task such as:

- Bending over to pick-up a tape measure
- Bent over to reach into the trunk of a car to grab a jug of windshield fluid
- Bent over to pick up an infant child in a crib
- Bent over to pick up a puppy
- Got up from a rocking chair
- Bent over to pick up a hat that blew off leaving church

There are more scenarios that I could add to this list, which I have litigated over the years. In some cases, the member already had a registered WSIB claim, including permanent impairment (NEL award), in others, their low back was symptomatic from the physical nature and fast pace of working SLAB. The High-Rise veterans know what I am talking about.

Ticking Time Bomb Case Law

In my practice, I coined the expression "Ticking Time Bomb Cases." This means the "work injury" or bomb was set at work, and may have blown up at home performing a routine activity of daily living such as bending over to pick up a puppy, infant in a crib or jug of windshield fluid in the trunk of a car. Sometimes the back injury blows up at work performing a simple task of bending over to pick-up a tape measure.

In each of these cases, and many others, the WSIB uses a point in time analysis and ruled the worker suffered a non-work-related personal injury or non-compensable intervening event that broke the chain of causation between the "work injuring process" in other words SLAB and the onset of a lumbar spine of injury. The WSIB does not contextualize the general nature of your job and whether this was a significant contributing factor in the onset of a lumbar spine injury, and instead focuses on a specific incident as the accident.

In Tribunal Decision No. 1415/20 or 2021 ONWSIAT 177 (CanLII), a 50-year-old member worked for the employer as an electrical journeyman, and reported having sustained a neck injury on August 22, 2017. He reported that, on August 22, 2017, he felt sudden pain in his neck and upper back area when he looked up and to the right. The WSIB denied the claim, because the reported mechanism of injury (looking up) is not an accident. The Tribunal Panel concluded otherwise and allowed the claim on the basis that the injury (ticking time bomb) was set at work performing heavy overhead work in an electrical room for 3 weeks prior to his neck injury becoming complete:

[20] Other decisions such as Decision No. 239/17 and Decision No. 971/11 followed a similar understanding of policy and definitions of an accident. In these cases, the worker may have experienced an injury in the course of employment; however, without an identifiable injuring process, the Tribunal decision-makers found that the employment was not a significant contributing factor to the injury.

[21] We agree with the definition of an accident as expressed in the case law above and find that the act of looking up and turning a head in an everyday fashion, in and of itself, would not constitute a work-related

injuring process; and therefore, we find that such an activity cannot be considered an "accident" as defined under the applicable statutes and policy.

[22] However, we observe that, subsequent to the Eligibility Adjudicator's September 6, 2017, decision, Mr. Majesky, the worker representative, submitted that the mechanism of injury in this case, in other words, the injuring process, was the worker's duties leading up to August 22, 2017, specifically the three weeks prior to August 22, 2017. Accordingly, the worker representative submits that the worker should be granted entitlement to a neck injury on a disablement basis. He submitted that the manifestation of the worker's acute pain on August 22, 2017, was simply a "let go" moment. This view of the accident history, a disablement resulting from the work duties, continued to be the position of the worker and his representative at the time of the hearing.

The worker testified that, in July and August 2017, after his work transfer, he was responsible for outfitting an electrical room, which involved the installing of transformers and pipes/conduit through the ceiling. He testified that the pipes ranged from 1 to 4 inches in diameter and were 10 feet long. He testified that the pipes weighed from 10 to 35 pounds, with the majority of work requiring the heavier pipes. He also noted that he installed electrical panels at about eye level. The worker testified that 70 to 75% of the work was performed overhead while he stood on a scissor lift.

[25] The worker testified that he experienced some aches soon after transferring into the construction side of the business, first in his legs and then shoulders. He testified that he was not concerned, nor did he complain at the time because he thought the aches were to be expected, noting that he had been unaccustomed to the heavier work. He thought that he simply needed to "push through" the aches. The worker testified that, on August 22, 2017, he had actually assigned the overhead and physical work to the apprentice who was working with him, due to the aches, and he (the worker) performed the cutting duties on the ground. The worker testified that at the end of the shift, he brought the foreman over to the work area to show the completed work, and as he looked up and turned his head to the right, to look at the apprentice, he felt excruciating pain in his neck and dropped to the ground. He testified that he was face down on the concrete in pain for about 30 minutes and then with assistance from his apprentice, he was able to get to the parking lot in order to wait for his ride to medical care.

Insignificant Incident vs Significant New Accident

The WSIB routinely fails to make this distinction. See for example Tribunal Decision 27109 or 2009 ONWSIAT 443 (CanLII), where an electrician with a work-related back condition arose from a rocking chair at home and suffered a recurrence of his low-back injury. It is worth noting that the WSIB Recurrence Policy has changed over time, but it still makes a distinction between an insignificant new incident versus a significant new accident. The WSIB ruled that arising from a rocking chair was a new accident. The Panel concluded otherwise:

[18] The Panel finds that on December 30, 2006, the worker suffered a recurrence of the injury to his low back of March 28, 2005. This recurrence occurred in the worker's home when he was getting up out of a rocking chair. The Panel finds that this incident was not a significant

new accident as described in Board policy. Rather, we find that it was an insignificant event of daily living which nevertheless precipitated a recurrence of the worker's chronic low back condition.

Mechanism of Injury – Disablement/Gradual Onset - Slab

Too often after reading a member's email, it is apparent they experienced a gradual onset lumbar spine injury that is causally related to the physical demands of performing SLAB work which would represent the mechanism of injury; and an injury that arose out of and in the course of employment. Often confusion arises because the member focuses on a routine activity of daily living (see above list), when they seek health care, sometimes at a hospital, and tell the health professional the activity they performed when their low-back injury became complete, or in other words "blew up." They omit telling the health professional what they were doing at work in the days, weeks and months before their low-back injury became complete and were noticing increasing symptoms prior to an innocuous let-go incident e.g., bending over.

WSIB Looks to Deny Claims

High Rise Slab workers are an easy target when the first medical report, as well as the member document on their Form 6, Workers Report of Injury that their back injury is the result of a piddly activity such as bending over. A distinction has to be made between genuine at-home work injuries where the worker was lifting a bag of cement, pushing/pulling a lawnmower, or some activity that is a significant new injury versus insignificant incident.

MSK Symptoms Among Electricians & Role of Cumulative Trauma Disorders

In a study published in the American Journal of Industrial Medicine 25:149-163 (1994) – Researchers Examined the Musculoskeletal Symptoms Among Electricians. The study is referred to as Hunting et al. The results mirror IBEW Local 353's own Electrician Ergonomic Research Study, 2006 that was published to inform health professionals, judges and adjudicators on the physical demands of an electrician's job across all sectors (Industrial, Commercial, Institutional, Line, Traffic, High Rise & Low Rise Residential, and Communication).

The research team led by Dr. Hunting investigated the presence of musculoskeletal symptoms among electricians in order to evaluate the role of cumulative trauma disorders (CTD) among electricians in IBEW Local 26, Washington D.C. Three hundred and eight (308) apprentices and journeyman participated in the study, with a majority being young individuals (underage-30).

The survey highlighted that:

- 1) low back discomfort is common in young construction workers, and resulted in medical care, missed work, or light duty for almost 35% of participants;
- 2) neck discomfort is also very common requiring doctor visits or work modification for almost one quarter of the participants; these construction workers continued to work with symptoms that are classified as a CTD;
- 3) history of injury is correlated with the subsequent musculoskeletal symptoms.

Electrician Ergonomic Study Excerpt – High-Rise Slab

Local 353 Research indicates that static lumbar flexion is considered a risk factor for low back disorders. Chengalur et al. (2004) reported that awkward posture is strongly associated with low back injuries, while static posture and compression are good risk factors for low back injuries. Workers who maintain static lumbar flexion for prolonged periods of time also experience high rates of low back disorders (Olson et al., 2004). Cheung et al. (2003) wrote that prolonged static loads may cause disc degeneration by limiting transfer of nutrients and wastes from the spinal discs. As such, occupations with cumulative loading have increased injury risk (Marras, 2003).

A Physical Demands Description completed for the high-rise residential sector of electrical workers revealed that workers maintain a flexed trunk posture for more than 50% of their job. When examining slab work individually, a worker maintains a flexed posture for more than 90% of the task. Informal questioning of high-rise electricians on site revealed that workers could be placed on slab for months and even years. Slab workers are therefore working in a prolonged static posture.

The Law - Disablement (gradual onset injuries)

Under the law, Disablement injuries that emerge gradually are usually related to the physical demands habitually recruited in a worker's job. These claims can be controversial because many workers, and employers, have not made the link between certain physical duties and an injury. A fall off a ladder is simple to understand i.e., single episode trauma.

Often 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 recognizes disablements, which are gradual onset injuries. In disablement situations there may not have been a specific accident or single episode trauma, but there is certainly a work injury related to the physical demands of the job.

Risk Factors For Lumbar Spine Injury Working On SLAB

It is important that all members, but in particular High-Rise members recognize the risk of musculoskeletal injuries when working SLAB. The SLAB is no longer the Gulag where immigrant workers toil away. They are certainly still present, but there is a whole new generation of High-Rise member working SLAB that are intelligent, educated, and articulate. Many like working SLAB in spite of the fast pace, brutal physical nature of the work and constant friction with the other trades, and the need to pour cement.

Each High-Rise member I have represented had an epiphany when they spoke to me about their lumbar spine injury after I presented the evidence to them and explained the law. I hope this article recalibrates our High-Rise members understanding of the risks associated with working SLAB. This article should also be posted on every High-Rise jobsite.

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PENSION GIFTS

The following pensioners are to receive their pension gifts:

Lawrence Bell, Larry Caulfield, Stephen Cherry, Sean Davidson, Dennis Falcioni, Howard Frellick, Roger Goleniec, Gary Gordon, Ken Jones, Paul Lindley, Andrew Maksymiuk, Bruce McKenna, Mohammad Mohajeri, Murray Moravac, Andre Oelmann, John Quinn, Hassan Shateri, Jorge Teles, John Tulloch and David Vallat.



WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

High-Rise Member Working Slab – Wins Important Tribunal Decision That Recognizes the Positional Risk of Lumbar Spine Injuries

It has been a 20 year wait, but we finally won an important Tribunal decision for members working Slab in the High-Rise sector. This decision will help all members who work Slab and piggybacks on the article I wrote in July 2025 about lumbar spine ticking time bomb injuries for members who on the Slab.

In *Decision 744/25* a Tribunal Panel heard an appeal from an apprentice working in High-Rise that was denied by a WSIB Appeals Resolution Officer. The ARO made the following findings:

1. The worker has no entitlement for multi-level disc bulging, mild degenerative changes and mild bilateral foraminal changes.

The June 19, 2023, compensable accident did not worsen, exacerbate or aggravate a pre-existing condition.

Background

The worker was 22 years old on the date of the hearing. He was 19 years old in 2022, when the accident employer hired him as an apprentice high rise electrician.

The worker was 20 years old on June 19, 2023—the accepted date of accident that is relevant to this appeal. As indicated above, the compensable accident consisted of a disablement. The worker was piping a stairwell. He bent down to pick up a roll of duct tape from his bag on the floor, when he felt a twist followed by upper and lower back pain.

The WSIB granted the worker initial entitlement for upper and lower back strain, but it declined to grant entitlement for the additional diagnoses that are the subject of this appeal.

The definition of “accident” in section 2 of the Workplace Safety and Insurance Act includes “a disablement arising out of and in the course of employment.” Policy 15-02-01 defines “disablement” as “a condition that emerges gradually over time” and “an unexpected result of working duties.” The second definition means an accident that is an unexpected result of working duties and cannot be classified as a chance event because the injuring process is not sufficiently discrete (*Decision Nos. 1672/04, 2009 ONWSIAT 150, and 2018/17, 2018 ONWSIAT 32*).

Pre-Accident Evidence

The worker testified that his back was “perfect” before the June 2023 accident. He testified that he was able to perform the regular duties of an apprentice electrician, including “slab” work, without the need for any modified duties or accommodation. The worker explained that slab work includes installing conduit pipes in new high rise construction projects. He testified that he had been performing slab work for the accident employer leading up to the June 2023 accident, and that this work was fast paced (“very rushed job”, “hard push”), and involves significant periods working in awkward positions. (We will describe the worker’s pre-injury physical work demands further, below.)

The June 19, 2023 Accident

The worker testified that on the date of accident, and for some time before the accident, he and a partner were fitting conduit pipe through spaces that also contained rebar. He explained that this step occurs prior to the pouring of

concrete around both rebar and conduit. The worker testified that the conduit pipe came in 10-foot lengths, which had to be fed up through the rebar from one person below to a helper on a ladder. The worker testified that there are two types of conduit: Coreline and PVC, with the latter being much less flexible and therefore much more difficult to push up through the rebar, requiring the worker to “really jam” the conduit up. He testified that the accident employer had him working both types of conduit.

The worker testified that he was performing this pushing up of conduit or pipe to his partner when he stopped to pick up a roll of duct tape from a bag on the floor. He testified that the accident employer directs its workers to use duct tape to keep poured cement from entering the conduit, so that picking up duct tape from floor level was a routine task.

The worker also testified that he would spend hours continuously flexed forward, in order to tie the conduit to the rebar at ground level.

The worker testified that on the date of the accident, as he bent to pick up the roll of duct tape, he felt a pull on the left side of his lower back. He testified that he froze for a moment, because of the shock of feeling an intensity of pain he had never experienced before. He testified that he then rose to stand when he felt pain in his midback that was so intense, he found it difficult to breathe.

The worker testified that he immediately reported the accident to the accident employer, but that he was initially “brushed off”. He testified that as it was near the end of the day, he stopped working and simply waited until the day’s end to go home.

The employer representative submits the worker’s symptoms must have arisen due to a non-work-related injury, since the accepted mechanism of injury for the June 2023 accident does not involve any compression. We will later discuss an OHCOW report that finds that spinal compression is an occupational risk from slab work.

The worker testified that Dr. Saeed has been his family physician for his whole life. We find Dr. Saeed’s October 26, 2023 report is important as it both supports the claim that the worker’s back was asymptomatic before the June 2023 accident, and that it did not cause the worker any impairment pre-injury. The report also supports a “thin skull” approach to this appeal, by inferentially referencing to either the abnormality identified in the September 2023 MRI report, or the neural anomaly identified in Dr. Sahota’s October 2023 report. We will return to the thin skull doctrine in our analysis, below.

The Thin Skull Doctrine

Policy 15-02-02, “Pre-existing Conditions” states that the “thin skull” and “crumbling skull” doctrines apply to the WSIB and WSIAT. The policy also states that a pre-existing condition is not a bar to entitlement.

Law & Policy

Policy 15-02-03 explicitly lists degenerative conditions as fitting the description of a pre-existing condition. Similarly, it mentions “underlying or asymptomatic” conditions which only become manifest post-accident. We find that the worker’s degenerative changes to his spine, and possibly a neural anomaly identified by Dr. Sahota, likely fit the policy definition of pre-existing conditions and we find that the worker’s condition was asymptomatic and only became manifest following the work injury.

OHCOW Electrician Ergonomic Study

In addition, the case materials include a document dated August 18, 2006, entitled "Electrician's Job Demands Literature Review – Low Back (Slab)" by kinesiologist J. Yorke. On the same date, the same author completed another document, this one entitled "High Rise Residential Task Analysis". The worker representative explained that on behalf of his union employer, unrelated to this particular claim in the appeal before us, he had commissioned these works from the Occupational Health Clinics for Ontario Workers "OHCOW". This submission is consistent with notes on both documents indicating that each work was supervised by OHCOW ergonomists, including Dr. S. Naqvi. Henceforth, we will refer to these documents as the OHCOW Papers.

Ergo Analysis of SLAB Work

Consistent with the worker's testimony and the brief job description above, the OHCOW Papers define "slab work" in the high-rise residential electrical work sector as mainly involving "installing conduit and securing it to rebar via metal ties. The papers indicate that injury can occur in relation to slab work from "continuous application of a load" and from "repeated loading" over time.

The OHCOW Papers states that research supports "that static lumbar flexion is considered a risk factor for low back disorders" due to "awkward" and "static" posture. The papers go on to state the following:

A Physical Demands Description completed for the high-rise residential sector of electrical work revealed that workers maintain a flexed trunk posture for more than 50% of their job. When examining slab work individually, a worker maintains a flexed posture for more than 90% of the task. Informal questioning of high-rise electricians on site revealed that workers could be placed on slab for months and even years. Slab workers are therefore working in a prolonged static posture.

We find that the worker's testimony agrees with the survey mentioned above, in that he was working continuously performing slab work as described for months prior to the June 2023 accident.

The OHCOW Papers describe a task called "Slab Work – ground". We note that one of the tasks mentioned here is to "[t]ie conduit to rebar with wire", being a task that the worker testified to performing in abundance leading up to the June 2023 accident. The papers go on to state that "[o]ver 90% of task is completed with a flexed spine. A flexed spine has a decreased ability to withstand shear and compressive forces, increasing the risk of a spinal injury."

Ergonomic Analysis Finishing – Switches & Plugs

The worker had testified that after the June 2023 accident, the worker was assigned for about two months to finishing work. The OHCOW Papers include a task called "Finishing – switch & plug install" that appears to correspond well with the worker's description of his assigned finishing work. The paper states that "[o]ver 50% of task (installing plugs) is completed with a flexed spine (lumbar & cervical). A flexed spine has a decreased ability to withstand shear and compressive forces, increasing the risk of a spinal injury."

Tribunal Decision Allowing Appeal

We accept the employer representative's submission regarding juvenile degenerative disc disease. We also note, however, that the worker representative is not claiming that the June 2023 accident caused the degenerative changes identified in the MRI study. Rather, the worker is claiming that those degenerative diagnoses—multi-level disc bulging, mild degenerative changes and mild bilateral foraminal changes, were asymptomatic before the accident, and symptomatic afterwards, and that there is no other explanation for this change other than the accident made a significant contribution to this development. We find this submission to be supported by the OHCOW Papers. It is also supported by Dr. Saeed's

October 26, 2023 report that states that the "changes in [the worker's] MRI were there but problem started only as a result of his work injury." We were not directed to any medical opinion that contradicted Dr. Saeed directly on this point, other than the mere description of the worker's degenerative changes to his back being listed under the non-occupational category of diagnosis in the May 2024 SPEC report. In a sense, we agree with the May 2024 report that the degenerative diagnoses are non-occupational because they were not caused by the June 2023 accident. But the test before us is whether the worker's job duties in this disablement injury made a significant contribution to the worker degenerative changes becoming symptomatic. We find, on a balance of probabilities, that it did. In addition to Dr. Saeed's opinion, we find from the OHCOW Papers that slab work in particular loads the spine in such a way as to make such a contribution. We find that the worker's "abnormal" back, as described by Dr. Saeed, was on a balance of probabilities, likely more susceptible to such loading, so that the worker experienced symptoms despite his young age.

For the above reasons, we grant the worker entitlement for the multi-level disc bulging, mild degenerative changes and mild bilateral foraminal changes to his upper and lower back.

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Upcoming Events

Annual Sweetheart's Dance
February 14

Playtime Bowl & Entertainment
March 14

PENSION GIFTS

The following pensioners are to receive their pension gifts:

William Austin, Jerry Bilous, Wilfred Childs,
Scott Davidson, Agostino Dimarsico, Richard
Elz, Joseph Guyatt, Arthur Morris, Michael
Newell, Mark Schienbein, Sean Sutcliffe,
Matthew Taylor, John Thompson



Supreme Court of Canada (SCC) Has Ruled Quebec Employers have a Duty under the Province's Workers Compensation Legislation to Reasonably Accommodate Those injured In the Workplace – Even Though that Duty Not Expressly Mandated by the Workers Compensation Statute

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



On February 1, 2018 the Supreme Court of Canada issued its long awaited decision in connection to an appeal from the Court of Appeal for Quebec.

The issue in this Supreme Court case is whether the employer's duty to reasonably accommodate someone with a disability, a core and transcendent human rights principle, applies to workers disabled at their workplace.

The appeal involved the disability rights of an injured worker (victim of employment injury), who requested that the Quebec workers compensation board (CSST), and his employer, had a duty to accommodate him pursuant to the Quebec Charter of Rights and Freedoms (the "Charter"). Injured workers in Quebec, as in Ontario, are protected by provincial human rights legislation, however, an employer's duty to accommodate an injured worker with a disability is not expressly imposed by the provincial workers compensation legislative scheme.

Both Quebec and Ontario share the same problem, as do other provincial jurisdictions, because the provincial workers compensation scheme contains no specific language around "duty-to-accommodate": nor do they enforce the duty to accommodate provisions found in their respective provincial human rights legislation. In their Reasons for Judgement, the Majority of the Court held:

Like all Quebec legislation, the Act should be interpreted in conformity with the Quebec Charter. The duty to reasonably accommodate disabled employees is a fundamental tenet of Canadian and, more particularly Quebec labour law. Since a core principle of the Charter is the duty to accommodate, it follows that this duty applies when interpreting and applying the provisions of Quebec's injured worker legislation. There is no reason to deprive someone who becomes disabled as a result of an injury at work of principles available to all disabled persons, namely, the right to be reasonably accommodated. An injured worker's rights and entitlements under the Act must therefore be interpreted and implemented in accordance with the employer's duty to accommodate an employee disabled by a workplace injury. An examination of the Act's goals and policies as well as the entitlements it sets out – such as reinstatement, equivalent, or suitable employment – reflect a statutory scheme that clearly anticipates that reasonable steps will be taken to assist the disabled worker in being able to work if possible ...

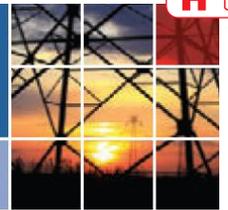
Implementing this duty in light of the Charter does not disrupt the carefully calibrated duties and relationships that are set out in the [workers compensation] Act. It merely requires a more robust approach to the implementation of the rights of disabled workers by the CSST and CLP, and by necessary implication, the employer. It ultimately means that the CSST [Quebec workers compensation board] and the CLP [Quebec Labour Tribunal] have the exclusive remedial authority to impose measures on the employer to do whatever is reasonably possible to accommodate the disabled worker's individual injury.

In Ontario, we have the same problem as in Quebec, because the WSIB pays lip service to human rights principles, and in particular, the duty to accommodate. However, the WSIB does not exercise their jurisdiction, nor compel an accident employer to accommodate injured workers short of an undue hardship. In essence, the WSIB asserts they are not the court of competent jurisdiction with respect to reasonable accommodation of a disabled injured worker. In the event of a dispute, injured workers are told they can file an application at the Ontario Human Rights Tribunal and seek justice from the wise men, and women, up the street.

This contradiction is frustrating because return to work is a tenant and codified in the Ontario *Workplace Safety and Insurance Act*, and Board Policy, yet the WSIB will not force accident employers to fulfill their human rights obligation to accommodate a disabled injured worker.

That does not mean Ontario employers do not provide suitable or modified work to injured workers, but they do so for an entirely different reason. Employers are less motivated by a duty to accommodate, instead, their behaviour is driven by the WSIB experience rating system, and claim costs. Once employers are outside their WSIB cost window, the employment relationship usually ends with the issuance of an ROE stating "shortage of work."

Legal representatives across Ontario anxiously awaited the release of the Supreme Court decision, which opens the door to new legal arguments we will be raising at the WSIB that accident employers have a duty to reasonably accommodate disabled injured workers. I anticipate the WSIB will likely resist and find some reason to stall and maintain the status quo, however, the worker community will be pushing the WSIB to seize its jurisdiction so an injured workers human rights as disabled person are enforced, subject to the undue hardship standard developed at the Ontario Human Rights Tribunal.



The Supreme Court decision has put the WSIB on notice that accident employers have a duty to accommodate injured workers. This will likely involve appeals, but at some point we anticipate the Tribunal, and the WSIB, will recognize their jurisdiction around an accident employer's duty to accommodate an injured worker. Nor should this be too complex and undertaking, because the WSIB, and Tribunal, have ample experience administering the re-employment provisions of the Workplace Safety & Insurance Act.

Update Non-Economic Loss Awards (NEL)

My January article alerted members that the WSIB has revised its policy and will no longer offset NEL awards for pre-existing conditions. NEL awards are permanent impairment awards for either a physical and/or mental injury. This move was prompted by a strong worker rep lobby, class action lawsuit, and a Toronto Star investigation.

Over the past month, I have received numerous calls and emails from members asking what's going on because they are puzzled, and don't know what it means. The simple answer, WSIB improperly, and illegally, offset NEL awards because of pre-existing conditions when injured workers originally received a NEL award.

Injured workers who received reduced NEL awards are now receiving cheques in the mail, and a letter of explanation WHY this is happening. My advice, deposit the cheque in the bank. And when the WSIB decision letter arrives, don't fall for the explanation that *"As part of the WSIB's commitment to excellence, we are always checking to make sure that we apply our policies consistently and fairly"*.

Trust me, they didn't wake-up in a cold sweat, and decide to be charitable. The change came about because we collectively in the worker community fought and didn't relent until the WSIB retreated.

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Alcoholics Anonymous

A closed AA service meeting will be held at 1381 Lawrence Ave. E. at 8pm every Friday night.

Good Friday

The Statutory Holiday will be observed on Friday, March 30, 2018.

If your employer asks you to work on this day, you must be paid **double time** for working on this holiday!

Pension Gifts

The following pensioners are invited to the South Unit Membership meeting at the Union Office, 1377 Lawrence Avenue East, Toronto on March 8, 2018 at 7:00 p.m. to receive their pension gifts:

Thomas Bell, Dominic Gitto, Jerzy Kot, Joe Levy, Frank Osborne and Eric Tomberg.

IBEW Local 353 "Design a Sticker" Contest

Attention: To All Members with an Artistic Flair

Local 353 is looking for new and innovative designs for stickers and is looking to get you, the members, involved. Put your talents to work and design an IBEW Local 353 sticker that will blow our socks off.

The contest runs from February 1, 2018 to May 1, 2018. Send your submissions to recordingsecretary@lu353.ca and include your name, card number, phone number and email address.



Surveillance of Injured Workers Raises Credibility Issues that are Compounded When Members Advertise their Side Hustle on Social Media, Including Voice Greeting & Emails Addresses Advertising your Electrical Contracting Business

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



Over the years, and recently, I deal with cases where workers have been the subject of surreptitious surveillance, either initiated by an employer or the WSIB. In the past, I have successfully rebutted this evidence. In one case, the WSIB surveilled a member who was seriously disabled. The surveillance showed the member in a hockey arena who stood up to clap when a kid scored. However, the video also showed he placed his cane on his forearm in order to clap and needed his cane to move about. They also followed the same member when he drove from Hamilton to a Toronto Hospital to visit a dying friend. Again, nothing earth shattering.

Union Contractor Hired Uncleared Workers off the Street

Recently, I had two cases where video surveillance was an issue. In one case it involved a worker who was injured in 1993, and the employer placed him under surveillance in 1995, at which time he was seen playing soccer. The same employer in 1998 placed the same worker under surveillance again, which showed him working on a new build residential house. There were adverse inferences, and in fact, his credibility was an issue in a 1998 Tribunal hearing.

What I found odd after drilling down into this case was the 1993 accident employer, an IBEW contractor, hired uncleared workers to work on high-rise projects. In fact, when Bob Gill and Glenn McDougall visited these job sites in the early 1990s, the employer sent the uncleared workers home. It was a regular cat and mouse game. When this same member was surveilled in 1997 for a 2nd time, he was on a WCB work placement, and the contractor told WCB "all he does is drive around to job sites in a company car." Very quickly he moved into the field working on houses. Then during the 1997 low-rise organizing blitz, he became a member of Local 353.

WSIB Initiated Surveillance of Member

Fast forward to 2008, this member suffered another back injury lifting a heavy coil of wire from a truck. Afterwards, the contractor closed the business and the member was on WSIB benefits as he could not perform his pre-injury job. In 2013, the WSIB placed him under surveillance and concluded he was less disabled than he claimed. The private investigator surveilled him at the airport pre-boarding and moving his luggage, Casino Niagara going up stairs without assistance, grocery shopping, and shoveling 1" of fluffy snow. But the coup de grace was visiting a home with tools and material and coming out a few hours later.

Tarnished Credibility Impacts Reliability of Doctor's Opinion

The member's credibility was tarnished, which impacted the reliability of what he told doctors about his symptoms and function. Consequently, little weight was given to the doctor's opinions as they were likely deceived. In *Decision No. 1189/21*, Tribunal Vice-Chair noted:

Mr. Majesky submits that there are objective medical findings from numerous clinicians that support the worker's claim. I accept that there is clear investigative evidence that the worker has degenerative low back findings and I have accepted that he has a permanent impairment as a result of 1993 accident. However, on review, the medical reporting of the extent of his disability after 2009 is reliant on the workers subjective reporting of his pain complaints and his restrictions, and in particular on reports that the worker has an antalgic gait and walks with a cane. The videotape evidence demonstrates that was not the case.

What I found troubling was the WSIB knew in 1993 that the member did not have an electrical license. This was flagged in several reports from 1993-2013 that he was unlicensed. I argued, how can the WSIB, whose mandate is safety, conclude an injured worker can return to pre-injury electrician duties when they are unlicensed? In *Decision No. 1189/21*, the Tribunal Vice-Chair commented:

Mr. Majesky refers me to the provisions of the *Ontario Colleges of Trades Act* which imposes a regulatory requirement on both a person doing electrical work and their employer to ensure that only persons who are licensed to work as electricians may do so. This submission raises legal and policy issues that might need to be addressed if the context were different.

There's an expression, you'll reap 100% failure for the things you don't ask for. In spite of the surveillance challenges, the member did have lumbar spine surgery in 2019, which WSIB denied was related to his 1993 injury. Conversely, I felt there was a genuine claim of entitlement which we argued at the Tribunal. The Vice-chair agree with the union's position that the members back surgery was related to his 1993 back injury, in spite of 25-years of spirited denials.

Social Media, Greed and Poor Judgement

In another case, a member suffered a head, neck and shoulder injury. His graduated return to work plan was work 4-days, with 1-day off each week to rest. On his rest day, the employer hired a private investigator



and orchestrated a sting operation. The employer discovered a social media post where the member advertised his electrical services installing pot lights. A prospective home owner contacted him to visit their home, on his rest day, which he did. This house call was a set-up, with hidden cameras and mic's. He was observed climbing a chair and using his cell phone light to illuminate areas where the home owner wanted pot lights installed. The member said sure, no problem – and quoted \$1200 – CASH! There was another house call with a phantom home owner who needed electrical work. Same outcome.

I stumbled across the surveillance evidence after reviewing his WSIB claim file, which the employer's legal counsel sent to WSIB. I've known this member since 1998, and successfully represented this young man twice. In fact, I like him, because even when injured he produces like an able bodied worker. Rest assured when I discovered the surveillance, I wrote the member and expressed my concern because my reputation, and that of IBEW Local 353 is not negotiable. Whenever I represent people I cannot be used as a tool or dupe. In a recent employer appeal, the WSIB Appeal Resolution Officer relied on the employer's video surveillance and rescinded the members entitlement to a permanent impairment (NEL award), ruling he had fully recovered. The AROs rationale mirrors the Tribunal Vice-chair in the above case.

Law & Policy, Surveillance

Under Policy 22-01-09, the WSIB has a duty to hear, examine, and decide issues under the *Workplace Safety and Insurance Act* or the *Workers' Compensation Act* (the Act), and may use surveillance to gather evidence for this purpose.

A director in Regulatory Services must approve the use of surveillance in every case. Surveillance involves discreetly observing one or more subjects. It may also involve the use of audiotape, video, film, and/or photographs.

When there is an issue in dispute, the parties have full access to the surveillance recording and/or the transcript. However, if an inquiry by the operating area, or the Regulatory Services/ Legal Services investigation is underway, access will not be granted until the inquiry or investigation is completed.

Under Policy 11-01-9, **Visual and Audio Recordings** sets out the process for introducing surveillance evidence.

Authenticity - Audio/visual recordings

The WSIB only accepts recordings that are accompanied by a signed statement from the author:

- setting out when (date and time) and where the recording was made, and
- confirming that the recording was not altered, and is a true representation of its subject.

If evidence is received that does not meet these guidelines, the WSIB returns the evidence to the sender and asks that it be authenticated and re-submitted.

The WSIB may ask the author to attend a hearing to establish the recording's authenticity through cross-questioning.

Weighing the evidence

WSIB staff must exercise caution when determining the weight to give information revealed in recordings, recognizing that:

- audio/visual recordings make a dramatic impact on the viewer, and
- in general, recordings may be selective, i.e., information relevant to the issue in dispute, such as when a worker rests or experiences pain, may not be recorded.

Evidence from audio/visual recordings is considered in conjunction with all other evidence.

Decision-makers may request a health examination if the portrayal of a worker's physical capabilities is inconsistent with health care reports in the claim file.

Review of evidence by workplace party

The workplace party who is the subject of surveillance, or the representative, is given the opportunity to review the information and provide an explanation.

Members frequently ask me WHY is my claim denied when others scam the system. My reply. The vast majority of injured workers are honest and have been treated shabbily by the workers compensation system. An illuminating statistic, 80% of WSIB regulatory compliance issues relate to employer breaches and financial malfeasance and not worker fraud.

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NextGen Committee

The NextGen Committee is looking for input from the membership on the implementation of a mentorship program for our local.

We believe it is necessary for us as a union to try to promote IBEW culture and strong unionism. In the foreseeable future we know that there is going to be a surge in apprenticeships, so let's get ahead of the game on this one.

If you have any interest, knowledge, or experience to share please connect with us.

Please email us at NextG@ibew353.org

In Solidarity Always,

Tim Shilson, NextGen Chairperson
The NextGen Committee



WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Contractors Tell WSIB Worker Temporarily Laid-off to Invoke Temporary Work Disruption Policy and Deny LOE. However, Union Audit Discovered Most Contractors Don't Pay Benefits and WSIB Cannot Deny Paying LOE.

WSIB Legislation Mandates Accident Employers Pay Injured Workers Benefits & Pension Contributions for 1-year if off work and receiving LOE Benefits.

The union is continually battling the WSIB to pay Loss of Earnings (LOE) to injured workers who are issued a Temporary Layoff by the accident employer. The Board, and employers use the WSIB Temporary Work Disruption to justify the denial of LOE.

The union has litigated many decisions with a 100% success rate at the Workplace Safety and Insurance Appeals Tribunal regarding how the Hiring Hall works when injured members register their names at the hiring hall after a layoff, and why this constitutes good evidence that a member is seeking employment in their labour market, regardless whether work is available or that they are injured. The wise men and women at the Tribunal have rejected the phony WSIB/ Employer argument and sided with the union.

Thank goodness, the WSIB Recurrence (REO) Team based in Ottawa that was mandated to adjudicate a worker's entitlement after a layoff was disbanded. The REO crew came up with many screwball interpretations WHY a member could not be paid LOE after a layoff, which WSIB Appeals Resolution Officers embraced. These decisions are now being made by individual WSIB Case Managers, who have adopted all the REO Team Rationale, so the problem persists.

In my opinion, WSIB decision makers frequently do not adhere to a plain reading of the law, or applying the "modern principle" to statutory interpretation. In Decision No. 229/23, Tribunal Chair, R. McCutcheon canvassed the Principles of Statutory Interpretation, and the courts affirmation of the modern principle of statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In Vavilov, the majority of the Court affirmed the modern principle of statutory interpretation, reasoning in part as follows (at paragraphs 118-121):

This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be

resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law – whether courts or administrative decision makers – will do so in a manner consistent with this principle of interpretation.

Worker Falls Under Exemption of Temporary Work Disruption Policy

A key union argument in Temporary Work Disruption disputes is the worker's documented work/functional limitations at the time of layoff, and the physical demands of the pre-injury job of an electrician; is evidence that the worker falls under the general exception found in the Temporary Work Disruption Policy (OPM 15-06-02). Simply, the work injury is a barrier in obtaining and maintaining employment with another electrical contractor in order to mitigate their loss of earnings.

The WSIB generally maintains the loss of earnings (LOE) benefits the worker was receiving at the start of a temporary work disruption. Workers are entitled to additional LOE benefits when evidence indicates:

- the worker would seek new employment in the general labour market to attempt to restore his/her loss of earnings during the temporary work disruption (i.e., if he/she was not injured), and
- the work-related injury/disease impacts the worker's ability to earn income through new employment.

Unfortunately, the WSIB seems impervious to reason, even when there is a body of case law that supports the union's position. However, we now have another excellent argument that will haunt accident employers who say one thing regarding a Temporary Layoff, but contravene the Principle Agreement by not paying the members benefits. They can't have it both ways.

Record of Employment States Layoff – Shortage of Work

It has become a reflex for the Contractors and WSIB to characterize the layoff as a "temporary Layoff" to invoke the application of Policy

15-06-02. In most instances, the WSIB contacts employer, and obtains ex post facto statement from a Health & Safety Rep that the worker will be recalled in three (3) months, even if the ROE says "shortage of work."

Principal Agreement, Temporary Layoffs

Had the accident employer truly intended to issue a Temporary Layoff and recall the worker, the employer would have made benefit and pension remittances to the Toronto Electrical Industry Benefit Administrative Service (TEIBAS) pursuant to the Principal Agreement (CBA) Clause 1000, Health & Welfare:

It is agreed that the Contractors may put Employees on temporary layoff provided that Health & Welfare contributions at the rate of one hundred and fifty (150) hours X \$4.46 per month are paid. Such employees would be eligible for recall to their last Employer only and would be eligible for EI benefits.

It seems employer Health & Safety Reps conveniently overlook this important issue. The Temp Layoff argument is now in the appeal stream, and we'll see whether the WSIB recalibrates its approach to accepting employer statements that the layoff was temporary, and stop denying LOE benefits when injured workers are laid-off.

Employers Must Contribute to Injured Worker Benefits for 1 Year

Members working under a stand-alone collective agreement, sometimes discover while in receipt of full WSIB benefits, the accident employer failed to contribute to their health and welfare benefit and pension, as required by law.

Section 25 of the Workplace Safety and Insurance Act, sets out the wages and employment benefits an accident employer is legally obligated to pay, which is for the first year if a worker is off work that entire time. **An employer's obligation to pay a worker's benefits is 1 year.**

However, this does not apply to Multi-Employer Benefit Plans i.e., members covered under TEIBAS. However, it does apply to all Local 353 stand-alone collective agreements e.g., University of Toronto, CHUBB, CNE, City of Toronto, Troy Fire, with one a notable exception. When signatory contractors are hired by these organizations to perform contracted work, 353 members are working under the terms and conditions of the Principal Agreement.

In a leading case, with many intervenors, Tribunal Vice-Chair Sutherland, in Decision 855/03 confirmed that benefits under section 25 of the Workplace Safety and Insurance Act, includes health and welfare benefits, and pension contributions.

WAGES AND EMPLOYMENT BENEFITS

Employment benefits

25. (1) Throughout the first year after a worker is injured, the employer shall make contributions for employment benefits in respect of the worker when the worker is absent from work because of the injury. However, the contributions are required only if,

Multi-employer benefit plans

(4) Subsection (1) does not apply to an employer who participates in a multi-employer benefit plan in respect of the worker if, when the worker is absent from work because of the injury during the first year after it occurs,

Definition

(7) "contributions for employment benefits" means amounts paid in whole or in part by an employer on behalf of a worker or the worker's spouse, child or dependent for health care, life insurance and pension benefits...

My article this month, and April 2025, demonstrates that employer Health and Safety Reps are not in your corner, particularly when you are injured at work and on a WSIB claim. They may be nice people you must deal with, but be careful, because they are not looking out for your legal and financial interests, and cannot serve two masters - Employer & Worker. The union is in your corner. Don't forget that.

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The poster is for the Central Ontario Building Trades Day event. At the top, it features the logo for 'CENTRAL ONTARIO BUILDING TRADES' with a cartoon character holding a hammer. Below this, the text reads 'CENTRAL ONTARIO BUILDING TRADES DAY'. To the left, a box says 'SAVE the DATE'. The event is scheduled for 'SATURDAY, JULY 26, 2025' at '7:00 PM KICK-OFF | BMO FIELD'. At the bottom, it shows a matchup between the 'TORONTO ARGONAUTS' (represented by a logo with the letter 'A') and the 'WINNIPEG BLUE BOMBERS' (represented by a logo with the letter 'W').



Tribunal Rules In Member's Favour on Two Issues. Member Did Not Return to Work After An Injury and off Work 11 days. Member also Received a COVID Layoff and Was Not Fully Recovered. WSIB Denied Loss of Earnings Benefits



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

A member was denied Loss of Earnings (LOE) benefits for two periods when he was off work after the work injury and following his doctor's direction when he could start modified work, which was on September 11, 2020. The WSIB denied LOE benefits ruling the employer offered suitable work. On March 3, 2021, while still on modified duties, the member was laid-off for shortage of work (COVID related). The WSIB ruled the member was almost recovered and not entitled to LOE benefits.

Under section 43(1) a worker who has loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision 2474/00, 2004 ONWSIAT 1381* held that under section 43(1) a causal relationship between the injury and wage loss is a condition precedent to the payment of LOE benefits. A refusal of suitable work is not necessarily an act of non-cooperation, but it may lead to a conclusion that the worker's loss of earnings does not result from the injury. Section 43(2) operates to reduce a worker's benefits where the worker refuses suitable employment. Thus, a worker who refuses suitable employment at no wage loss is not entitled to LOE benefits because the loss of earnings is not caused by the injury, but caused by the refusal of the suitable employment.

Testimony

The worker described his accident of September 1, 2020. He was on a pile of conduit and fell backwards injuring his low back and right knee. He left work and went directly to the doctor. While he attended a walk-in clinic he noted this is his normal practice and typically sees one doctor, Dr. Atwell, whom he had been seeing for 20 years or so. On that day he saw Dr. Atwell. He was prescribed pain killers and had an x-ray. There was a discussion about returning to work and the worker indicated he was in too much pain to work and the doctor agreed. Later that same day he was contacted by the employer and offered light work and he confirmed the employer offered to drive him back and forth to work. He declined as he and his doctor had determined he was in too much pain to work. He also noted he experienced episodes of dizziness. When he next saw his doctor on September 8, 2020, he believes he would have mentioned the offer of light work but the advice remained the same.

When he returned to work he was placed on a sitting job doing light assembly work at a bench. The doctor on September 12, 2020, completed a Functional Abilities Form (FAF) clearing him to return to modified work.

The worker noted he was a Master Electrician and light assembly work would not normally be part of an electrician's job. The worker remained on modified work doing light assembly work at bench level until March 2021 when he was laid off.

Registered with Hiring Hall

When he was laid-off he knew the knee was getting close to full recovery. He also knew he had an appointment with the "Lower Extremity Specialty Program" on April 8, 2021. He anticipated that he would at that time be cleared to return to work. He explained the hiring hall practice. It was a first in, first out type of process. That is, when you registered for work you would get called only after all those who registered before you received a placement. He knew the length of the call list and knew from experience that it would take a while before he would get a call for work. Knowing that, and knowing he was close to full recovery and anticipating he would be cleared to return to full duty work on April 8, 2021, he registered with the union early in March [2021] and did not indicate he had any restrictions. He did so as to mitigate the length of time he would be without work. When questioned by the Panel what he would have done if he had received a union hall placement prior to April 8, 2021, he indicated that he would have refused the placement as he was still under formal restrictions from the specialty clinic.

There is no dispute that modified work was offered on the day of the accident. The employer confirmed the verbal offer in a letter dated September 1, 2020.

The employer representative submitted the modified duties would accommodate the worker's restrictions of difficulty walking, sitting and standing.

Recognizing Time to Heal After Injury

The worker's representative Mr. G. Majesky noted a line of Tribunal decisions that establish that workers should not be penalized for following the advice of their doctors in good faith. He cited *Decision Nos. 825/18* and *2479/06*. In addition, he referenced the Board's Adjudicative Support Document "Recognizing Time to Heal – Assessing Timely and Safe Return to Work" which noted at times rest is the appropriate treatment modality.

The Board's Adjudicative Support Documents are created by the Board to assist decision makers in their adjudication. The documents have had various names including Adjudicative Advice and now called Administrative Practice Document.

The Panel has considered the Adjudicative Advice Document "Recognizing time to Heal – Assessing Timely and Safe Return to Work" – November 2005 and note the document confirms that in some cases rest is the appropriate treatment. The document states:



It is recognized that there are cases where “rest” is an appropriate form of treatment and required in order to speed recovery and facilitate a successful return to work. This should be determined based on an assessment of the nature and degree of the injury in each case.

The Impact of Pain

The document goes on to comment on the affect pain may have on the level of disability, particularly in the early stage of recovery.

The International Association for the Study of Pain defines pain as an unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage. Acute pain is a protective process against further damage, usually with a known local cause.

We cannot ignore the impact of pain on an individual and on their functional abilities, especially in the early stages of recovery.

The Panel agrees that the Board has the ultimate authority under Section 118 to determine the fitness for returning to work and the level of impairment. However, in the Panel’s view this decision cannot be made in a vacuum or in an arbitrary manner and must have consideration for the relevant medical reporting. This is especially true in light of a recent Judicial Review by the Divisional Court of Tribunal Decision *Ferreira v. WSIAT 2019 ONSC 3437* (*Ferreira*) ruled that the decision maker erred in not accepting the medical documentation on file. We are in agreement with Tribunal Decision No. 1193/21 that the court decision referenced above does not mean that the Board and by extension the Tribunal must in all cases accept the medical opinion on file but rather the medical opinion must be weighed as to relevance and credibility.

We accept the worker’s testimony that despite Dr. Atwell working within a walk-in clinic he was for all intents and purposes the workers family doctor over a period of twenty years. He would therefore have a good understanding of the worker, his medical history and tolerances along with some knowledge of his job duties.

It is clear that the doctor’s opinion was for the worker to remain off work, rest and take painkillers. The Form 8 also indicates that the worker was unable to bend/twist, climb, kneel, operate heavy equipment stand and walk. From the above limitations the Panel concludes the worker was significantly disabled.

We rely on the doctor’s own reporting, the Administrative Advice document “Recognizing Time to Heal – Assessing Timely and Safe Return to Work” regarding the need for rest and the affect of pain during the acute stage of recovery as well as Tribunal jurisprudence that notes workers should not be penalized for good faith following the advice of their doctors (see Decision No. 133/21).

Restrictions Impact Employability

We are satisfied that the worker with the above restrictions could not perform the full job duties of a Master Electrician. We further find the worker had these restriction as imposed by Dr. Tomescu from January 28, 2021, until seen again on April 8, 2021.

The Panel finds the worker was disadvantaged in securing work and mitigating his loss of earnings for the period from March 4, 2021, to April 8, 2021 ... It seems prudent and forward thinking of the worker to get his name on the hiring hall list as quickly as possible. The ARO mentions that the worker did not seek employment in other fields during the period under review and suggested that this was required under the policy. We disagree and rely on Tribunal Decision No. 2392/17 that in practical terms it is unlikely the worker would have been able to secure work in the greater labour market as a bench level assembler:

In our opinion, when the worker was laid off on May 30, 2013, he was receiving medical treatment for his injured back and was in the “early phase of recovery” from that injury. He was also receiving active health care treatment, including physiotherapy, for a period of eight weeks pursuant to a recommendation by a Board authorized REC facility. The report from that facility was quite clear in indicating that the worker required further treatment as well as extensive accommodation in future employment over an eight-week period. Those restrictions included limited lifting, no prolonged sitting/standing/walking, 10-minute breaks every hour and work pacing. In our opinion, had the worker presented himself to his Hiring Hall as requiring employment with those restrictions, it is highly unlikely that any employer would have been prepared to employ him, even on a short-term basis. This is particularly so since, in the worker’s employment field, short-term contracts are not unusual. In our view, the worker’s situation, from May 30, 2013, to August 13, 2014, falls squarely within the parameters of the following statement from the Board policy:

In practical terms, these workers could not be expected to conduct a job search, and the likelihood of another employer hiring them with these clinical restrictions is low.

Of interest, the above decision, *Decision No. 2392/17* involves the same employer where the representatives that appeared before that panel were the same as in the present appeal. The scenario was also similar involving a layoff from work while on modified work. We find Decision No. 2392/17 to be on point. We find it unlikely that an employer would hire, for a six-week period, a Master Electrician with the restrictions delineated for bench level light assembly.

Accordingly, the worker has entitlement to LOE benefits until he returned to work on September 12, 2020, and from March 4, 2021, to April 8, 2021.

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Understanding the Legal & Medical Concepts of Traumatic Mental Stress & PTSD after Workers Witness an Objectively Traumatic Accident In the Course of Employment

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



Electricians get hurt, bleed, and suffer the same injuries as every other worker even though there is a stoicism and culture among construction workers that they are ten feet tall and bullet proof. Members also develop and suffer from psychological issues, which can also be work related in some cases.

In my experience, members can develop mental health issues (e.g., depression & anxiety) after an injury because they cannot perform their job, experience wage loss, unable to engage in activities they did before they were hurt, including reduced libido. These claims fall under the WSIB Psychotraumatic Disability Policy, however, the use of the word *traumatic* in the policy name is misleading, because the policy has nothing to do with traumatic injuries.

However, there is another category of psychological injury that the WSIB adjudicates under its Traumatic Mental Stress Policy, specifically, Acute Stress and Post Traumatic Stress Disability (PTSD) which can develop after a worker witnesses or experiences an objectively traumatic situation at work.

For instance you may be present when a colleague falls, is crushed, electrocuted, or seriously burned after an arc flash. This year we've had two critical incidents where members were seriously burned. One was one ICI electrician, the other a Powerline Technician in the Line Sector.

In addition to the life threatening injuries these two brothers suffered, several co-workers developed an acute stress reaction and felt emotionally unwell after these incidents, and were unable to continue working. The symptoms the co-workers experienced included loss of sleep, poor appetite, ruminating behaviour, cognitive issues, inability to focus, hyper-vigilance, visual & auditory cuing, and a general emotional malaise.

Simply, these members were suffering from what clinicians refer to as acute stress which precedes PTSD. Since construction and electrical work exposes our members to positional risk of serious injury, it is important for members to understand that traumatic mental stress can be work related if the circumstances meet the following WSIB policy criteria.

Law and Policy

WSIB Policy 15-03-02 defines "sudden and unexpected traumatic event" as follows:

Policy

A worker is entitled to benefits for traumatic mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment.

Guidelines Sudden and unexpected traumatic event

In order to consider entitlement for traumatic mental stress, a decision-maker must identify that a sudden and unexpected traumatic event occurred. A traumatic event may be a result of a criminal act, harassment, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member, or others. In all cases, the event must arise out of and occur in the course of the employment, and be:

- Clearly and precisely identifiable
- Objectively traumatic, and
- Unexpected in the normal or daily course of the worker's employment or work environment.

This means that the event

- Can be established by the WSIB through information or knowledge of the event by co-workers, supervisory staff, or others, and
- Is generally accepted as being traumatic.

Acute reaction

An acute reaction is a significant or severe reaction by the worker to the work related traumatic event that results in a psychiatric /psychological response. Such a response is generally identifiable and must result in an Axis I Diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

An acute reaction is said to be immediate if it occurs within four weeks of the traumatic event. An acute reaction is said to be delayed if it occurs more than four weeks after the traumatic event.

In the case of a delayed onset, the evidence must be clear and convincing that the onset is due to a sudden and unexpected traumatic event, which arose out of and in the course of employment.

The four elements that must be shown in order to establish a claim for mental stress under s. 13 (5) of the *Workplace Safety and Insurance Act* are as follows:

1. There must be a sudden and unexpected traumatic event;
2. The event must arise out of and in the course of the worker's employment;
3. The worker must suffer mental stress that is an acute reaction to the event; and
4. The mental stress must not result from the employer's decisions or actions relating to the worker's employment.



Tribunal Medical Discussion Paper on PTSD

It's also important to understand some basic medical concepts when dealing with Acute Stress and PTSD. When we litigate traumatic mental stress claims we often refer to the Tribunal's PTSD Medical Discussion paper authored by Dr. Diane Whitney, a psychiatrist. It provides a good summary of the morphology of acute stress and PTSD (psycho-pathology).

Trauma: For PTSD to develop, the person must have suffered or witnessed an event that involved actual or threatened death or serious injury to self or others. According to Diagnostic Statistical Manual IV (DSM IV) the person's response must have included intense fear, helplessness or horror. Thus, there is now a subjective aspect to the trauma with the emphasis being shifted from the severity of the trauma to the person's reaction to the trauma in this version of the DSM.

Symptom Clusters: There are 3 symptom clusters according to DSM IV, which define Post Traumatic Stress Disorder. The clusters are re-experience traumatic event, avoidance & emotional numbing and increased arousal. The symptoms must be present for at least one month and cause significant distress and/or impair functioning.

The traumatic event is **re-experienced** in 1 or more of the following ways:

- Recurrent & intrusive distressing recollections and dreams of the event
- Acting or feeling as if the trauma were reoccurring
- Psychological distress and/or physiological reactivity when exposed to cues that resemble an aspect of the traumatic event

Post-Traumatic Stress Disorder Avoidance of stimuli associated with trauma and a general numbing of responsiveness indicated by 3 or more of the following:

- Avoidance of thoughts, feelings or conversation associated with the trauma
- Avoidance of activities that will arouse recollection of the trauma (places or people)
- Inability to recall an important aspect of event
- Markedly diminished interest in significant activities
- Feelings of detachment
- Restricted range of mood
- Sense of foreshortened future

Symptoms of increased arousal as indicated by 2 or more of the following:

- Difficulty falling or staying asleep
- Irritability or outbursts of anger
- Difficulty concentrating
- Hyper-vigilance
- Exaggerated startle response

PTSD Subtypes				
Time				
Trauma	Duration ≤ 1 Month	1-3 Months	3+ Months	Onset after 6 months
	Acute Stress Disorder	Acute PTSD	Chronic PTSD	Delayed Onset PTSD

[Fig. 1: PTSD Subtypes]

It's important to understand that sensory exposure to what you witnessed at work is in the mechanism of injury in psychological injury cases, and includes what you saw, heard, and/or smelled. You may have witnessed a worker crushed by machinery, lying limp and unconscious, watched them take their last breath as the life force leaves their body, heard a worker scream in pain, or the sound of an explosion (arc flash), including the smell of burned flesh, all of which can leave an indelible mark on the human psyche.

If you have been involved in a critical workplace accident, and feel psychologically unwell, you should see your Family MD, and report that you witnessed a critical incident at work. Each person will react differently, but as a precaution, I recommend that you see a health professional because acute mental stress and PTSD can progress without proper assessment and treatment. We've come a long way over the years, and there is no shame if you've suffered a psychological reaction to an objectively traumatic workplace injury.

Twenty-five years ago when I represented police officers there was a tremendous stigma for cops to report mental health issues for fear they'd be issued a "rubber gun." Now emergency responders, which includes police, fire, and EMS are protected by presumptive legislation codified in the *Workplace Safety and Insurance Act*, because if they are diagnosed with Acute Stress and PTSD it is presumptively assumed to be work related, unless proven otherwise.

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Pension Gifts

The following pensioners are to receive their pension gifts:

Anton Boychuk, Shaun Cox, Frank DeSousa, Patrick Doyle, William Finnerty, Jim Klingelstein, Stephen Magladry, Manuel Marques, Alistair Maule, Terry O'Brien, Raymond Ramos and Randy Richards.



WSIB Practices

Gary Majesky, WSIB Consultant & Executive Board Member

Tribunal Rules in Favour of Members Trigger Finger Claim. In A Career Spanning 35 years, Bro. Clark Bergey, Always Filed WCB/ WSIB Claims Because It Was The Right Thing to Do

I seldom mention a member's name, however, this month is an exception. Bro. Clark Bergey first entered my orbit in 2001, when he developed gastroenteritis, a potentially life threatening condition with rapid dehydration after biosolids were splashed on him while working in a sewage treatment plant.

The WSIB ruled he got ill because of his food preparation habits. The Tribunal retrained Dr. Donald E. Low, MD, FRCPC, Microbiologist-in-Chief, Toronto Medical Laboratories/Mount Sinai Hospital and Professor, Department of Laboratory Medicine & Pathobiology and Medicine, University of Toronto, to provide an opinion whether Bro. Bergey illness was work-related. Dr. Low's concluded that in all probability, Bro. Bergey's illness was work related since virus and bacteria are still present after sewage is treated. Dr. Low was also the lead microbiologist during the SARS crisis in 2003, where his hospital protocols for dealing with infectious disease outbreaks were adopted worldwide, and during the COVID Pandemic.

It's not often a member's appeal at the Workplace Safety and Insurance Appeals Tribunal becomes a leading case (Decision 526/04), but the Bergey decision addressed a unique question regarding causation, and in particular, the "route of acquisition" when workers are exposed to microbiological pathogens in the course of employment.

In a recent precedent setting case (Decision 1409/24) a Tribunal Panel ruled in favour of Bro. Bergey's Trigger Finger claim on two important issues (delay and causation):

Background and History

The worker has been an electrician for over three decades. He was usually hired through the union hiring hall but also as a "name-hire". The worker testified that he spent approximately 25% of his career, from 2001 until 2014, as a foreman. The worker stated that he has filed approximately 20 claims with the WSIB; the Tribunal appeal materials contained information from 17 claims.

Union Benefit Rep Said Contact Majesky

The worker testified that shortly thereafter he attended his union hall seeking to apply for short term disability benefits for the surgery and post-surgical recovery period. He stated that the clerk at the union hall suggested the condition might be work-related and recommended he speak with his now-representative. The worker spoke with Mr. Majesky on or about April 18th, as recorded in correspondence on file dated April 19, 2023, encouraging the worker to submit a claim for benefits. The worker completed and filed a Form 6, Worker's Report of Injury/ Disease, dated April 24, 2023; the worker related his trigger finger condition his work duties on a disablement basis.

[10] The worker's claim was denied by decision letter dated May 5, 2023, on the basis that the worker failed to file the claim within six months of the injury first occurring or first diagnosis.

Onset of Trigger Finger

[11] Notwithstanding the denial, the Board referred the worker's case for review by a physician at the Occupational Health Assessment Program (OHAP). Dr. R. Shafer, a physician at OHAP, prepared an opinion report dated July 3, 2023; that report is discussed below.

[23] The worker first noted stiffness and swelling of his right hand in May 2022, sought medical advice from his family physician Dr. Wheler in June 2022, and first received treatment from Dr. Zec in September 2022. The evidence on file is consistent with the worker's testimony that those medical professionals did not enquire as to whether his employment duties were a factor in the development of his hand condition. A report prepared by Dr. Zec, dated November 4, 2022, following the injection performed on September 7, 2022, indicates: "He reports he has been using his hands quite a bit recently at work and wonders if this is related to incomplete resolution of his symptoms."

[24] This comment, in the Panel's view, does not constitute "reporting the disablement as work-related" in the meaning of Policy Document No. 15-01-03 "Workers' Requirement to Claim and Consent" since the worker was merely wondering if it was work-related.

Majesky Recommended File WSIB Claim

[25] Indeed, from the worker's testimony which is again consistent with the documentary evidence on file, the worker attended the union hall office seeking assistance to claim short-term disability benefits through a private insurance. It was only at this time that the worker was informed he should speak to his present representative, who encouraged him to file a claim with the WSIB.

[26] The Panel notes that, once he was informed he could file a claim with the WSIB he did so diligently and without further delay. The Hearing Panel notes that although the worker has filed a number of claims with the WSIB over the years, this is the first claim which arose on a gradual onset basis.

[36] We therefore now consider the merits of the worker's claim for benefits for tenosynovitis and "trigger finger" of the right hand.

[37] For the reasons which follow, we find that the worker has initial entitlement to benefits for tenosynovitis of the right hand because we find that there is evidence of a causal link between his employment duties and the development of tenosynovitis. In making this determination, we rely principally on the medical evidence on file.

Tribunal Medical Discussion Paper – Hand & Wrist Injuries

[38] The Tribunal's Medical Discussion Paper "Common Conditions of the Hand and Wrist" provides the following description of tenosynovitis:

Tendonitis and tenosynovitis are terms that are used to define pain along tendons and their compartments (sheaths), respectively. An enthesopathy refers to pain along a tendon as it inserts into bone.

They represent injury or inflammation. These conditions frequently arise around the wrist, and they can be one of the most common issues found in factory or assembly line workers. The etiology may be associated with exposure to new or unusual work, such as returning to work after absence or sudden strain or increasing the intensity or speed of a task. It can occur after localized blunt trauma. Symptoms may include constant pain, aching or shooting pains up the arm, swelling, creaking tendons (crepitus) and restriction of movements. The pain results in restricted motion and weak grip strength.

Trigger Digit (Stenosing Tenosynovitis)

A trigger finger or trigger thumb is characterized by clicking, locking, limited motion, and pain at the base of a digit in the palm. It is due to impingement of the flexor tendons as they glide through the first tendon sheath (the A1 pulley.) The exact etiology is yet to be identified, but has been associated with swelling or fraying of a flexor tendon and inflammation of the tenosynovium. The A1 pulley may thicken (hypertrophy) and tighten with age and overuse. A nodule may be felt at the pulley as the patient attempts to move the digit. It occurs in about 3% of the population. The condition is age-related, especially in the fifth and sixth decades of life. It is more common in women, in patients with diabetes mellitus (10% of diabetics), and with osteoarthritis of the small joints of the hand. It has been associated with carpal tunnel syndrome and has a slightly higher incidence after carpal tunnel release surgery. It is attributed to repetitive work or heavy gripping, including in sports, but occurs with similar frequency in nonworkers. Diagnosis is made with physical examination. Differential diagnosis includes Dupuytren's contracture, a genetic thickening within the palm resulting in static finger flexion deformity.

Repetitive Gripping Can Cause Trigger Finger

[39] In Decision No. 184/18, 2019 ONWSIAT 228, an independent medical assessor retained by the Tribunal, orthopaedic surgeon Dr. T.S. Axelrod, provided the following insights into the connection between workplace gripping and "trigger finger":

Trigger fingers, in the vast majority of patients, occurs as a result of degenerative changes within the flexor tendons that occur with aging. There is a small subset of patients that develop this condition due to repetitive gripping in the workplace.

[40] The Hearing Panel notes that the worker's employment duties generally required gripping a number of different tools.

Risk Factors in Electrician's Job

[41] Most especially, however, we note that in 2022 and 2023 the worker was working on the re-wiring of a large public utility facility which required pulling thick, heavy cable from spools. The cable came in two diameters; the "small cable" was one-inch in diameter, the "large cable" was two-inches in diameter. The "large cable" weighed over a pound per foot. Moreover, the worker testified that because the cables are formed of multiple copper strands and are delivered on large spools they retain a "memory" of their winding on the spools and "want to pull back". The worker noted that because each spool contained 50 meters of cable, they needed several and it could take days to unspool enough to reach the electrical room where he would "terminate the cable" (connect all the copper strands to the terminals of various sensors).

[42] In short, during the period in question, immediately prior to the onset of his right-hand trigger finger, the worker was engaged in work which required near-constant gripping and pulling heavy cable which lasted multiple consecutive workdays. We find that this work was a

significant contributing factor to the development of stenosing tenosynovitis of the right hand.

WSIB Occupational Health Assessment Report (TF Work-Related)

[43] In making this determination, we rely in particular on the opinion of Dr. R. Shafer, of the WSIB's Occupational Health Assessment Program, dated July 4, 2023. Dr. Shafer's report contains the following salient opinion which is consistent with the medical evidence outlined in the Medical Discussion Paper and by Dr. Axelrod and considers the specifics of the worker's employment:

The exact cause of trigger finger has not been firmly established in the literature; however, several factors have been identified as potentially increasing the likelihood of trigger finger developing, such as one's sex, age, and certain health problems, such as diabetes and rheumatoid arthritis. Occupations and hobbies that involve repetitive hand use and prolonged gripping, such as with the use of handheld tools, have also been implicated in the development of trigger finger. The worker's job duties, as outlined above, involving frequent bilateral hand use, with repetitive gripping and pinching tasks, would likely subject the hands and flexor tendons to considerable recurrent strain, and would be considered a significant occupational risk factor for the development of trigger finger, especially when performing these tasks for a prolonged period of time, such as in the case with this worker. Given that the worker is right hand dominant, this may explain why his initial symptoms were on the right side (RD4), and due to the need to compensate for this condition, he relied more heavily on his left non-dominant hand, which precipitated a similar process on that side (LD2). This Physician does acknowledge that the worker would appear to have ended his employment with the AE in July 2022, before the diagnosis of left sided trigger finger; however, this does not negate the fact that, for many years, both hands were exposed to similar workplace exposures, as noted above, and following the onset of trigger finger in the right hand, which is well documented on file, he experienced persistent complaints which ultimately prompted surgical management.

In addition, it is relevant to note that there is no other clear non-occupation factors, injuries, or inciting event to account for the onset of the worker's bilateral hand symptoms, as well as no indication the worker was symptomatic prior to employment with the AE. The worker has a history of prior injuries to the right hand, but this does not involve the digit affected by trigger finger, and therefore, is likely non-contributory. Furthermore, the worker's medical history does not appear to be significant for any underlying conditions or non-occupational factor that would predispose him to the development of stenosing tenosynovitis/trigger finger. As such, is it this Physician's opinion that, on the balance of probabilities, it may be reasonably concluded that the worker's job duties as an Electrician is likely to have been a significant contributing factor to the diagnosis of RD4 and LD2 trigger finger.

[44] The Hearing Panel finds that there is a causal connection between the worker's right-hand condition and his employment duties, and we find that he has initial entitlement to benefits for the right hand.

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Understanding The Causes of Trigger Finger & Trigger Thumb and the Role Repetitive Gripping, Squeezing & Pulling Plays In Developing This Injury

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



This month I want to discuss a frequent hand injury electrical workers experience that is best characterized as cumulative trauma disorder (CTD) or repetitive strain injury (RSI). Trigger finger and trigger thumb are common hand injuries that members frequently develop. The endemic physical demands of the electrical trade no matter what branch of the brotherhood you work in exposes members to the risk of a hand or finger injury because there is repetitive, forceful and rigorous use of the hands when working. This may sound rhetorical, but an electrician's hands are their anatomical tools.

What is Trigger Finger

It is a condition that causes pain, stiffness, and a sensation of locking or catching when you bend and straighten your finger. The condition is also known as "stenosing tenosynovitis." The ring finger and thumb are most often affected by trigger finger, but it can occur in the other fingers, as well. A common sensation is a "snapping" or "locking" condition of any digits of the hand when opening or closing.

How do I get Trigger Finger

Trigger finger occurs when the affected finger's tendon sheath becomes irritated and inflamed. This interferes with the normal gliding motion of the tendon through the sheath.

Can Trigger Finger Heal On its Own

Often times, if the condition comes on suddenly after a particular activity, it will go away on its own. If the condition has become painful and caused finger stiffness, persisted for longer than six weeks, or if the patient is diabetic, surgical treatment is usually needed.

What Causes Trigger Finger

Risk factors for trigger finger include diabetes, rheumatoid arthritis, and repetitive movements. A corticosteroid (cortisone) injection around the affected tendon usually relieves the symptoms of trigger finger. Although the etiology (cause) of trigger finger may be multi-factorial, there is a strong occupational connection in workers that use their hands. Electrical workers fall into this category.

Can I file a WSIB Claim for Trigger Finger

The simple answer is yes. Trigger finger is typically a gradual onset repetitive strain injury that WSIB defines as a disablement injury. However, some workers develop a trigger finger after a crush injury or single episode trauma. In my experience cumulative trauma from repetitive gripping and squeezing is the most common cause when electricians develop trigger finger.

Law and Policy

Subsection 2(1) of the Workplace Safety & Insurance Act defines an accident to include a chance event or disablement arising out of and in the course of employment.

- (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")

Trigger Finger Case Law

My research confirms that there are no construction worker trigger finger cases however, the case law does provide ample insight into work related causation and the role systemic diseases may play (diabetes or rheumatoid arthritis). Another clinical observation in the medical reports is trigger finger often occurs in the presence of carpal tunnel syndrome, which is another type of stenosing tenosynovitis that develops as a repetitive strain injury.

In Decision 713/95, a Panel heard an appeal from a worker who claimed they developed trigger finger 18 months after performing work activities they alleged caused the condition. The Panel requested the assistance of a Tribunal Medical Assessor who are experts in their field of medicine to answer a few questions. Dr. Douglas was retained and offered the following opinion:

Trigger finger displays difficulty in flexion and has a tendency to lock in the flexed position ... The locking itself is uncomfortable to painful in the given case. It is sometimes accompanied by an audible snap. A mass is usually palpable at the site of the trigger on the tendon sheath at the base of the affected digit.

Trigger finger, DeQuervain's Disease and carpal tunnel syndrome are all types of stenosing tenosynovitis, and patients with one condition are more likely to have one of the others ... The surgery for release of the carpal tunnel could play no part in the development of trigger finger.

It is very difficult to definitely link the development of a finger trigger to the events of a year and half before. With his history of carpal tunnel syndrome this man was more likely to develop a trigger finger than the average person. If one assumes the exciting cause of this was trauma leading to tenosynovitis, one would expect that when the assumed exciting cause was removed that the trigger finger tendency would be lessened and the situation would improve. This is commonly seen when patients develop a trigger finger which settles down completely.



with no other treatment than rest. ... it is not likely that a trigger finger would show no triggering at the time of a presumed cause ... then develop a year and a half after.

In Decision 1649/03 a worker who operated a spray gun developed trigger finger. His job involved taping, sanding and spray painting with a spray gun. The worker estimated that the spray painting component of his job occupied about 90 percent of a typical work day. When the worker developed pain at the base of his right thumb, the employer took him off the spray painting duties and offered him sanding, taping and some staining duties:

In a report dated May 27, 1998, Dr. S.K. Silverberg, internal medicine specialist, documented his findings following an examination of the worker and opined that the worker suffered from tendonitis of the right thumb. Dr. Silverberg related the condition to "more than 30 years of flexing the right thumb to paint with a spray gun at work". He injected the worker with Cortisone and advised that the worker should not return to duties that involved the spray gun.

In a report dated December 15, 1999, Dr. Kovacs understood that the Board had granted entitlement for the right thumb and that the Board denied entitlement for the left thumb. Dr. Kovacs advised:

[The worker] has an exacerbation of flexor tenosynovitis involving both thumbs. His history entails doing repetitive work, using both hands, especially during sanding and taping, as part of his job. I believe that his flexor tenosynovitis of both thumbs is likely secondary to the repetitive work he did with his hands, as part of his job. I would think that he should be entitled to Workmen's [sic] Compensation benefits for flexor tenosynovitis of both hands, rendering him totally disabled at the present time. Each flexor tendon sheath of the thumbs was infiltrated with corticosteroid again today. I have recommended that he be fitted with a resting thumb splint and to continue with Celebrex.

...

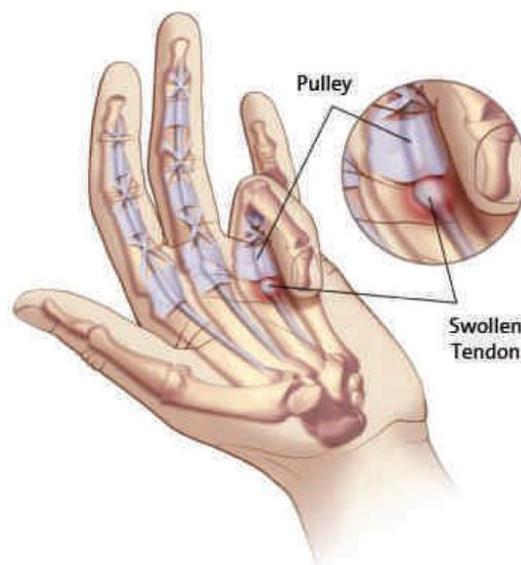
I am satisfied that the preponderance of evidence before me establishes that the worker's left thumb tenosynovitis or "trigger finger" meets the statutory definition of accident under the "disablement arising out of and in the course of employment" branch of the definition. The only countervailing medical opinion is the opinion of Dr. Germansky, a Board Medical Consultant who found no information to support a causal relationship between the left thumb disability and work duties.

Closing Comments

If you have been diagnosed or there is clinical suspicion that you have trigger finger, it is important that you advise your doctor that your job involves repetitive gripping, squeezing, and pulling. These job demands would represent a significant contributing factor in developing trigger finger. Sadly, some WSIB decision makers struggle and fail to understand the work duties of an electrician. That's WHY it's important that you load your gun and bring ergonomic studies to show your health professional so they understand what you do at work, and that you're

hands are constantly being used when using manual or power tools, pulling wire, material handling and most job tasks.

When arguing appeals, I frequently point to our Electrician Ergonomic Research Study and tell the Panel that in every photo there is one common theme. Electrical workers are constantly using their hands. It's obvious but some members are not good communicators, and therein lies half the problem. Members should visit the unions website or email me and I'll forward you the information to show your health professionals. Many clinicians have a vague notion of what your job entails, including WSIB decision makers.



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2020 Annual Award Buffet Brunch

Service Award/Pin Recipients

(Initiated in 1945, 1950, 1955, 1960, 1965, 1970)

Wednesday April 19, 2020 at 10am - 2pm

Parkview Manor Banquet Hall
 55 Barber Greene Rd., Toronto

RSVP Grace at (416) 510-5262 by April 1, 2020



Trigger Finger, Multiple Digits – Different Dates of Onset, But Causally Related to Repetitive Gripping and Squeezing – A Path Forward for Members with Hand Injuries

By: Gary Majesky, WSIB Consultant & Executive Board Member



In my June 2020 article – *Understanding The Causes of Trigger Finger & Trigger Thumb and the Role of Repetitive Gripping, Squeezing & Pulling Plays In Developing This Injury*, I explained how this hand injury is work related in most instances. However, there are many members who develop multiple triggering digits that emerge over time, and for those members who move around and work for different employers, or may be unemployed between jobs when a trigger digit is diagnosed, adjudicative controversy arises.

Every WSIB claim must have a worker, employer, work injury and a medically compatible diagnosis that the injury arose out of and in the course of employment.

This month's article explores how LU 353 has tackled complex trigger finger claims where members have multiple trigger digits that emerge at different times, which is complicated because they worked for other employers, or were unemployed when a trigger digit was diagnosed.

In gradual onset claims, like trigger finger, the Board uses the date of first medical as the date of accident. Accident employers object to these claims because no injury was reported to them by the worker, who may no longer work for the contractor. Now we're in the realm of proof of accident.

This scenario is more common as I discovered in a complex trigger finger case when a member presented with 10 trigger digits that emerged on different dates based on the date of first medical, plus different employers over time or was between jobs (unemployed) when a trigger digit was diagnosed.

In one legal submission, the union noted the worker attributed the onset of his musculoskeletal hand symptoms to a 30-year history of repetitive gripping and squeezing when using manual and power tools and pulling wire. In essence, this is a gradual onset cumulative trauma disorder (CTD), and a disablement under section 2(1) of the *Workplace Safety and Insurance Act*.

An Appeals Resolution Officer allowed one digit, but when the union requested the WSIB extend entitlement to the other digits, based on medical compatibility, the Board denied the members multiple trigger digits on the basis they pre-date the Date of Accident in the claim that was submitted and could not be adjudicated under this claim. Some trigger digits were diagnosed when the member was unemployed. This led to inquiries whether multiple claims had to be submitted, as suggested by the WSIB Policy Branch. The union took the position the pathogenesis of the workers left and right-hand triggering digits is causally related to the endemic physical demands associated with performing an electrician's job for 30 years.

The union filed an appeal and cited *Decision No. 964/22*, where a Tribunal Vice Chair quoted as authority *Decision 184/18*, in which both cases that dealt with Trigger Finger. In *Decision No. 184/18*, the Vice Chair referred the workers' file to a Tribunal Medical Assessor who are well respected specialists in their area of medical speciality. Dr. Axlerod, an orthopaedic surgeon was selected. In his opinion based on his experience, as well as noting the medical literature, he postulated there is a causal nexus between repetitive gripping and squeezing and Trigger Finger:

"Having said that, there is clear evidence in the medical literature of a correlation between carpal tunnel surgery with the subsequent scarring that can occur from this surgery and the development of trigger fingers, and there is also a clear correlation between workplace duties that require forceful gripping through repetitive straining of the hand to make a forceful grip, which can cause the development of flexor tenosynovitis and with that subsequently the trigger fingers."

The Board in denying several digits in the members left and right hand also took the position the worker was not working when these digits were first documented medically, thus, there was no temporal or work-related connection to these digits.

In *Decision No. 184/18*, Dr. Axlerod was also asked to discuss the significance, if any, of a delay of approximately two years between the last work exposure to forceful gripping and the manifestation of trigger finger symptoms, in the context of what is known about the worker's medical conditions and exposures. He opined:

It is my opinion that the delay of approximately two years and the last work exposure to forceful gripping and the manifestation of symptoms of trigger finger symptoms is not unusual. In a situation where somebody has repetitive trauma to the flexor tendons, that is, with forceful gripping, carrying, lifting, and repetitive use of the digits, micro damage can occur to the flexor tendons. This is the initiation of a degenerative condition, which will worsen over time. Therefore, I do not believe that the delay of two years between the last work exposure and the development of the trigger fingers is at all significant in this Worker's case.

Dr. Axlerod was also asked if he could provide any further medical information, that would be helpful to the Vice-Chair and parties in this appeal? He stated:

To answer this question, I would like to state the following:

Trigger fingers, in the vast majority of patients, occurs as a result of degenerative changes within the flexor tendons that occur with aging. There is a small subset of patients that develop this condition due to



repetitive gripping in the workplace. The onset of the symptoms from the workplace gripping can be delayed for some period of time as, in my opinion, is seen in this worker

Responding to the union's inquiry, Dr. Ronald Wallman, the members hand specialist, in a report dated April 28, 2023, agreed there is a work relationship between the members whose job involves the vigorous and aggressive use of his hands as an electrician and the pathogenesis of triggering digits. Furthermore, Dr. Wallman also addressed the question of delayed onset stating:

I do agree with Dr. Axlerod's postulate there can be a delay of upwards of 2 years between the last work exposure and development of triggering fingers.

The union's argument rebutted the Board's decision to place more weight on non-compensable factors giving rise to trigger finger, and specifically, that the worker had been employed by other employers or had not been working when other trigger digits were diagnosed and treated (e.g., LD4, LD5, RD1, RD3, RD4, RD5).

Finally, the union also relied on the following authority as noted in numerous decisions of the Tribunal see *Decision No. 83/19*, a decision of Vice-Chair R. McCutcheon:

The Tribunal also applies section 64 of the *Legislation Act, 2006*, which provides that an Act shall be interpreted as being remedial and shall be given such fair, large, and liberal interpretation as best ensures the attainment of its objects. With regard to the large and liberal interpretation that applies to workers' compensation legislation, I note the findings of the Alberta Court of Appeal in *Shuchuk v. Alberta (Workers' Compensation Board)*, 2007 ABCA 213 (CanLII):

Generally, the Act is to be given a broad liberal interpretation, which allows compensation to be provided to as many workers in as many circumstances as the legislative scheme will reasonably permit. This is consistent with the purpose of the Act, which is to provide workers with a broad range of compensation, including instances when tort law would leave them without a remedy: *Buckley*, at para. 52. Absent clear legislative direction to the contrary, the workers' compensation scheme should, at a minimum, provide compensation to those situations that would result in compensation under traditional tort law. Any interpretation of the legislative and policy regime that does not give effect to this principle is unreasonable.

In a recent decision, the Board allowed the members multiple triggering digits as being causally related to the physical demands of his electrician trade. A battle that took several years, and will likely to be appealed by the employer. Which means the union will have to defend the win.



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Understanding The Legal & Medical Reasons WHY Documented Knee Injuries Are Allowed, But When Osteoarthritis Is Discovered in an MRI or Post-operatively, Surgery Is Denied by WSIB



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

I have written a number of articles regarding common injuries electrical workers experience (shoulder & spine) where a pre-existing condition (arthritis) results in a workers claim being denied. This month, I'll focus on knee injuries.

Knee injuries are common in the trade, and often times involve a twisting injury dismounting a ladder, getting into a squat, or rising from a crouch when a snap is felt. Pain and swelling quickly follow. Clearly these injuries arose out of and in the course of employment, and typically a WSIB claim is allowed.

However, if the knee symptoms persist and an MRI reveals degenerative knee pathology, or an orthopaedic surgeon's post-operative report describes a degenerative meniscal tear, WSIB will terminate ongoing entitlement.

Tribunal *Decision #926/19* is a good example how we challenge these decisions. This case involved a 37-year old electrician with a past history of documented work related knee injuries, including surgery. In January 2016 this journeyman was walking over some uneven tarps and ground and twisted his knee. An orthopaedic surgeon suggested he undergo an arthroscopic procedure to repair the damaged knee. WSIB denied entitlement to a torn meniscus on the basis that the original diagnosis was an acute knee strain and the MRI findings indicated a degenerative tear. The Tribunal Panel in its reasons concluded:

[15] The worker testified that he started as an apprentice technician at the age of 24 and became a fully licensed electrician in 2009. The worker testified that he was always engaged in sports such as hockey, baseball and golf as an adult. Notwithstanding his participation in sports and a demanding career as an electrician, the worker has a history of previous injuries to both his left and right knee.

[16] In 2011 the worker injured his right knee while at work. In that accident, the worker was at a worksite working as a supervisor and was conducting a "walkabout" when he stepped down into a floor depression and onto a pipe, thereby twisting his right knee. He was sent for an MRI which also showed that the worker had suffered a horizontal meniscal tear. The worker, despite the injury and symptoms, continued to work. However, due to his symptoms it was recommended that he undergo an arthroscopic procedure. The procedure was performed on June 1, 2012.

[17] Following the procedure in 2012, the worker was off work for several weeks and he testified it took several months for his knee

to completely heal. Once the worker was well enough to return, he resumed all his regular duties and he again took up his recreational sporting activities including hockey, baseball and golf, and he did so with no impairments whatsoever.

The Medical Evidence

[23] The medical opinions in this case are set up in two reports and a medical consult note. The first report was prepared by the Board's Consultant, Dr. Stevens, who came to the following conclusions:

I have reviewed the material provided and have reviewed the specific questions posed.

1. In my opinion, based on the mechanism of injury (MOI) and accident history, the work-related diagnosis for the right knee is acute right knee sprain.
2. The MRI of the right knee performed on 20 Jun16, 5 months after the DOI, showed a horizontal meniscal tear involving the posterior root, posterior horn, and body of the medial meniscus which extends to the inferior articular surface and a tiny joint effusion. In my opinion, the horizontal meniscal tear is not related to the MOI and accident history as horizontal meniscal tears are typically degenerative in nature and the posterior horn of the medial meniscus is the commonest area for degenerative tears as described above. The tiny joint effusion is not related to the injury and is likely a consequence of the degenerative meniscal tear.
3. In my opinion, the recommended right knee scope (surgery date not available yet) is not related to the workplace injury of 25Jan16 and therefore, not the responsibility of the claim as the surgery is proposed for a torn degenerative medial meniscus.

[24] The worker submitted a report from the family physician, Dr. Khosla. Her report provided the following opinion:

Meniscal tears most commonly occur with take out twisting of the knee while that same foot is planted on the ground. However older patients may develop a minimal tear with little or no trauma.

[The worker] had a right knee arthroscopy and partial medial meniscectomy in June 2012. The consult note dated Oct 15th 2012, from his surgeon at the time (Dr. Chris Anthony) states that [the worker] was still having some discomfort post-surgery but felt he could resume back to his regular duties at work. [The worker's] right knee pain returned acutely In January 2016 after a twisting injury of his right leg while it was planted, walking on uneven ground at work.



It is difficult to delineate whether the tear occurred due to age or work, as the tear could have been present before the date of injury. However, given the acuteness of the symptoms and the mechanism of the injury, it is probable it was related to the injury in January 21, 2016. If the tear was present beforehand and [the worker] was asymptomatic, the twisting injury in January of 2016 could have aggravated the underlying tear.

[26] The final piece of medical evidence that was before us with respect to the right knee was the WSIAT Medical Discussion Paper, *Knee Conditions and Disability* prepared in August of 2013 by Dr. John Cameron and Dr. Marvin Tile. This discussion paper was provided to all parties in the case materials. The relevant portions of the paper stated:

There are two general types of meniscal tears; acute tears which usually occur in younger people after trauma, and degenerative tears, which typically occur in older people with minimal or no trauma.

Acute Meniscal Tears in young people may be isolated or associated with complex ligament injuries. These tears are usually longitudinal and in substance. If symptomatic and at the periphery, these tears may be amenable to repair. These tears as noted on MRI and at arthroscopic surgery, usually have longitudinal or radial patterns. A fully displaced tear may displace into the center of the joint, such as a bucket handle, and may cause the joint to lock. Radial tears may continue to evolve and progress to become a parrot beak tear.

Degenerative tears, usually in older people, are often associated with osteoarthritis. It is often difficult to determine whether the symptoms are due to the meniscal tear or the associated arthritis. These tears are usually horizontal, flap or complex types. They are found on a high percentage of MRIs in people with known osteoarthritis of the knee. There is no relationship to a history of trauma. As in all meniscal tears, they may cause symptoms of pain, locking, giving way and/or swelling or they may be asymptomatic. It is often difficult to distinguish the symptoms associated with the osteoarthritic knee from those of the degenerative meniscus.

[32] Dr. Rosenfeld, the orthopaedic surgeon consulted by the worker, has suggested a procedure to deal with the tear to alleviate the worker's symptoms. Dr. Rosenfeld's note implied that the tear may be work-related but he does not specifically opine on the issue. What is most significant about Dr. Rosenfeld's report was that it confirmed that the symptoms of knee pain were likely related to the tear as these symptoms could be alleviated by the surgery. Thus, if the accident rendered the tear symptomatic, as opined by Dr. Khosla, then the surgery by necessary implication would be related to the accident as well.

[34] The worker testified that prior to this twisting knee injury he had no symptoms of pain or discomfort in his right knee. The

worker acknowledged that he had experienced a previous injury in 2011 which was also caused by a twisting traumatic event and it was successfully treated by an arthroscopic procedure. The worker also testified that he had consistent pain and discomfort since this twisting incident which resulted in his doctor ordering an MRI in March of 2016 and which was not actually scheduled until June of 2016. We find that the worker was a credible witness on his own behalf.

[35] The nature of the tear was likely because of the natural degenerative process in the worker's knee. We accept the opinion of Dr. Stevens in that regard, as it was consistent with the Tribunal Medical Discussion Paper on knee injuries, referenced above. Dr. Khosla also acknowledged that the tear could be degenerative.

[36] The mere fact that the tear was degenerative, however, does not end the inquiry into causation. The Panel must consider the impact of the accident on the worker's preexisting condition. Decision No. 652/87 raises the issue of the distinction between disabling symptoms appearing as the result of the impact of employment on a pre-existing degenerative condition. In one way, these symptoms may be fairly taken as reflecting a compensable exacerbation or acceleration of a pre-existing condition. Alternatively, the disabling symptoms appearing as a pre-existing degenerative condition may be fairly taken as merely evidence of the disabling nature of the pre-existing condition. It is between these two possibilities that the Panel must decide.

[41] We make our finding on causation in part on the basis that we prefer Dr. Khosla's opinion that the mechanism of the accident could have exacerbated or made symptomatic the pre-existing condition. Dr. Stevens, in his report, did not consider this theory. He simply relied on the initial diagnosis which was made before the MRI was undertaken, that the worker suffered a simple knee strain. Dr. Khosla did provide a reasoned and compelling basis to establish a relationship between the accident, the degenerative tear and the symptoms that the worker was experiencing. Furthermore, Dr. Khosla, as the worker's treating family physician, and having examined the worker on a more frequent basis, would have been in a better position to comment on the progression of the worker's right knee meniscal tear condition.

[44] We conclude, therefore, on a balance of probabilities, that the symptoms that the worker experienced in his right knee were caused by the accident of January 25, 2016, in that the accident rendered the worker's pre-existing condition symptomatic.

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



Roger 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 and click on Health & Safety Slogan Contest.

There will be prizes awarded for the best slogan!





A Member Asked The Assistant Business Manager, Are Workers Covered by WSIB When They Work from Home?

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



A member recently contacted the union and asked the Assistant Business Manager (Nino DiGiandomenico) whether members are covered by WSIB when working from home?

There is no specific WSIB Policy for Working-at-Home, however, there is another policy (see below) and an extensive number Tribunal decisions on injuries arising out of and in the course of employment. Periodically, I've published articles on unique situations when workers are not injured on a jobsite (e.g., foreman who broke leg exiting company truck in front of his house early one morning, injured on lunch breaks, MVA driving company truck).

Generally speaking, the vast majority of electrical workers are employed on job sites and customers facilities, consequently, work-at-home is not a viable arrangement for electrical contractors.

In the past when injured workers were unable to attend work or commute to/from the accident work site to perform modified duties, employers are aggressive in trying to minimize a lost time claim by offering suitable work-at-home which is the ulterior motive for an aggressive Early and Safe Return to Work (ESRTW). WSIB will often times encourage and allow this arrangement.

Over the years many 353 members have been assigned modified work-at-home duties. Typically these are concocted jobs to avert or minimize lost time claims (WSIB). In addition, a lost time claim and unable to work also triggers other entitlements under the law such, as re-employment.

After an accident employers frequently offer modified work, such as As-Builds, review blueprints and take-offs at the kitchen table, and their favourite go-to concocted job "watching health & safety videos at home." Historically, these situations very questionable, particularly if a member had surgery and the workers cognitive abilities, and mentation are impaired by pain and medication.

In the past, I have objected to WSIB decisions where they conclude work-at-home self-study is safe and suitable, and in particular, that "the work was productive to the employers business as employers often require their workers to complete safety occupational training." With great respect, health and safety training is not paid work, and if it is, it may involve a 2-3 hour session, yet some employers will have a member complete IHSA health & safety modules for upwards to two months, for example, a case involving a member who had severed his finger, which was later amputated after an infection set-in.

There is no provision in the collective bargaining agreement or *Workplace Safety & Insurance Act* that workers be paid for taking training courses. Furthermore, there is no evidence that employers pay workers to take an IHSA course for weeks on end. Put simply, this is predicated on a false premise that at-home study of health & safety manuals is productive work that benefits an employer's bottom line.

Work-at-Home Analysis/Objection

When this issue arose in the past, I adopted the following rationale when the WSIB, and employers, peddled at-home modified work. The union quoted a decision from Dennis Dillon, past Director of the WSIB Construction Sector, who articulated his concerns in another LU 353 member case regarding Work-at-Home. Respectfully, those concerns have been echoed by other decision makers, including Appeal Resolution Officers (AROs).

Director Dillon interceded because the employer representative escalated their concerns with the WSIB chain of command arguing the merit and bona *fides* of a Work-at-Home modified job. Director Dillon replied:

The work must be safe, productive, consistent with the IW's functional abilities, and to the extent possible, restores their pre-injury earnings.

...

When considering if an offer of work is safe, WSIB staff would review whether the work poses a health or safety risk to the worker (e.g., should not cause re-injury or a new injury), to co-workers, or to third parties. Staff must also consider whether the work is performed at a worksite that is covered by either the *Occupational Health and Safety Act* (OHSA) or the *Canada Labour Code*, and the worker has the functional ability to travel safely to and from the proposed worksite. A worker's permanent home is not covered under the OHSA or CLC.

...

We also discussed the definition of suitability in terms of whether the work is 'productive'. Productive work is work that the worker has or is able to acquire the necessary skills to perform, and whose tasks provide an objective benefit to the employer's business.

...

In terms of an injured worker reviewing safety manuals (either at home or work), this would not be considered 'productive'



under the definition of suitable work as it does not provide an objective benefit to the employer's business. I explained that while reviewing the manuals may help to enhance the worker's knowledge of health and safety, it does not in itself permit the IW to acquire new skills, generate revenue or increase business efficiency. [emphasis added]

Pandemic Changed the Employment Universe

While work-at-home was a novel arrangement for some injured workers, the ground shifted in March 2020 with the arrival of the COVID pandemic.

Many government and private sector businesses made arrangements for workers to work-at-home. Organizations such as the Workplace Safety and Insurance Board (WSIB) and the Workplace Safety and Insurances Appeals Tribunal had upwards to 90% of their staff working from home.

It would be illogical that work-at-home would be considered illegal or that workers would forfeit their right to statutory workers compensation coverage because of the location where work is performed (employers' place of business vs. at-home). In addition, the WSIB and Tribunal are mandated to administer the *Workplace Safety and Insurance Act*, and any issues that arise under the law and policy.

Accident in the Course of Employment, Policy 15-02-02

It is helpful to consider and review WSIB policy 15-02-02, Accidents in the Course of Employment, which sets out the adjudicative framework in deciding whether a worker is in the course of employment.

Policy

A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to **place**, **time**, and **activity** indicate that the accident was work-related.

Guidelines

In determining whether a personal injury by accident occurred in the course of employment, the decision-maker applies the criteria of **place**, **time**, and **activity** in the following way:

Place

If a worker has a fixed workplace, a personal injury by accident occurring on the premises of the workplace generally will have occurred in the course of employment. A personal injury by accident occurring off those premises generally will not have occurred in the course of employment. If a worker with a fixed workplace was injured while absent from the workplace on behalf of the employer or if a worker is normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

Time

If a worker has fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.

If a worker does not have fixed working hours or if the accident occurred outside the worker's fixed working hours, the criteria of place and activity are applied to determine whether the personal injury by accident occurred in the course of employment.

Activity

If a personal injury by accident occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to (related to) the employment, the personal injury by accident generally will have occurred in the course of employment.

If a worker was engaged in an activity to satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment. Similarly, engaging in a brief interlude of personal activity does not always mean that the worker was not in the course of employment. In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as:

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

In determining whether an activity was incidental to the employment, the decision-maker should take into consideration:

- the nature of the work
- the nature of the work environment, and
- the customs and practices of the particular workplace.

Application of criteria

The importance of the three criteria varies depending on the circumstances of each case. In most cases, the decision-maker focuses primarily on the activity of the worker at the time the personal injury by accident occurred to determine whether it occurred in the course of employment.

If a worker with fixed working hours and a fixed workplace suffered a personal injury by accident at the workplace during working hours, the personal injury by accident generally will have occurred in the course of employment unless, at the time of the accident, the worker was engaged in a personal activity that was not incidental to the worker's employment.

The decision-maker examines the activity of the worker at the time of the accident to determine whether the worker's activity was of such a personal nature that it should not be considered work-related.

Tribunal Case Law, In the Course of Employment

In *Decision 1721/10*, a Tribunal Panel addressed a number of issues surrounding an educational worker who arrived at the employer's premises well before the normal start time and whether the workers activities at the time of injury can be considered in the employment sphere versus personal sphere. The Panel's analysis found at paragraphs [35] ... [39], [50], [53] ... [55] addresses the interpretation of in the course of employment, and the Time, Place, Activity test in determining whether an injury is work related, concluding that there must be either a direction from the employer or a clear indication of a substantial benefit being received by the employer as a result of a workers activities. The Panel's analysis also reviewed Larson's American treatise on Worker's Compensation because of the importance of time, place and activity in the Larson analysis of the meaning of course of employment, an insight which appears to have influenced WSIB policy.

In *Decision No. 1432/12*, the Vice-Chair in a section 31, right to sue application under the *Workplace Safety and Insurance Act* reviewed *Decision No. 845/10* which lists some of the criteria often considered when determining whether an individual was in the course of employment at the relevant time. The Vice-Chair at paragraph [32] also reviewed the "order of predominance" test in determining work relatedness, concluding at paragraph [35] that the worker' actions at the time of injury were reasonably incidental to his employment:

While no single factor will normally be conclusive in deciding whether a worker was in the course of his employment, a number of factors are normally considered, including:

1. Whether the employer derived a benefit from the activity performed by the worker.
2. Whether the worker was paid by the employer for the activity.
3. Whether the accident occurred while the worker was using equipment or materials supplied by the employer.
4. Whether the risk to which he would normally be exposed in the course of his employment.
5. Whether the activity was a result of instructions received by the employer.
6. Whether the accident was a result of instructions received by the employer.
7. Whether the accident occurred during the worker's normal working hours or overtime hours.
8. Whether the activity was reasonably incidental to the worker's normal employment duties.

Majesky Closing Comments

Over the years I have represented many workers who have been injured in slip and fall accidents on job site parking lots, MVA driving company vehicles, injured on lunch or breaks, or outside regular working hours.

Although WSIB policy lists three criteria used to adjudicate whether a worker was in the course of employment when they were injured (Time, Place, Activity), the weight given to each can vary, but the primary overarching factor is Activity. Therefore Place is less important in determining work relatedness.

Furthermore, if an employer permits and facilitates a worker to work remotely from home, the Place criteria is of less significance versus the Activity factor. Moreover, when work-at-home is sanctioned by the employer, there is no dispute that the injury is work related or that the injury arose out of and in the course of employment. Even if a worker suffers an accident while working at-home, they are in the course of employment because the activity they were performing was related to their employment.

Work-at-home workers may also suffer injuries. For instance, if the work-at-home employee slips and falls when they were washing the car, they are not in the course of employment because they were engaged in an activity that is not reasonably incidental to their employment and outside the employment sphere.

Conversely, if you're working from home and trip over an extension cord, or missed a step and fell descending stairs to go to the washroom, a worker is still in the course of employment because the WSIB is a "no-fault" insurance scheme. Injuries going for a bathroom or lunch break do not take the worker outside the employment sphere. Having lunch (sustenance) is an important factor that allows workers to have energy to work and is considered part of the employment sphere.

Another important concept to bear in mind is the application of the no-fault principles that WSIB operates under, which applies to all accidents on jobsites, and by extension, work-at-home injuries.

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The Challenges Being Paid Loss of Earnings Benefits by WSIB When Injured Workers Are Performing Modified Duties, Then Laid-off Because of a Shortage of Work, Including COVID-19 Temp Layoffs

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



Many years ago the WSIB introduced a Work Disruption Policy, in fact two (short term and permanent) that applies whenever an injured worker is laid-off. The policy is an effective tool for the WSIB, and employers, in denying Loss of Earnings benefits to injured workers who are laid-off on the basis that the workers loss of earnings is not related to the work injury, but an employment situation. The unfairness is obvious because in spite of a layoff for a shortage of work, the injured worker often times cannot perform the pre-injury duties without accommodation. How many new employers will accommodate an injured worker from the Hall, when they have enough challenges accommodating their own injured workers?

WSIB Recurrence Team Adjudicates Layoff Claims

Whenever an injured worker is laid-off and seeks LOE benefits from WSIB, claims are adjudicated by the WSIB Recurrence Team (REO). More often than not, they rule the worker can find work in the general labour market, in spite of physical limitations related to the work injury. Or if they were doing “take-offs” they can find employment as Estimators. When the COVID pandemic struck, we had many injured workers on modified duties, or a gradual return to work who sought LOE benefits from WSIB, but were told their loss of earnings is not related to their injury, but the pandemic.

The union has objected to the denial of LOE benefits on the basis that many COVID decisions were contrary to the law and policy that guides all decision making regarding a workers entitlement to LOE benefits after a work disruption.

Furthermore, the Ontario Government did not suspend the provisions of the Workplace Safety and Insurance Act, or the Board’s operational policies during the COVID-19 State of Emergency.

However, senior WSIB management decided that injured workers who are performing a modified job will not be paid LOE benefits because of a COVID-19 temp layoff. This edict was posted on the WSIB website. Yet in all the hoopla surrounding COVID, WSIB failed to consider that swaths of the electrical industry were deemed essential, and we still had members working.

Worker Falls under Exemption of Temporary Work Disruption Policy – OPM 15-06-02

Upon further investigation, the union discovered that the WSIB website, under the COVID-19, stated the Work Disruption Policy is still applicable. In other words, the WSIB is obligated to follow its policy in determining whether the injured worker will be paid full LOE benefits whenever there is layoff.

Obviously, each claim is unique, but it’s important to consider an injured workers work/functional limitations and the physical demands of the pre-injury job to determine whether they fall under the general exception found in the Temporary Work Disruption Policy (OPM 15-06-02). This is an important part of the analysis because injured workers are usually limited in mitigating their loss of earnings and obtaining employment through the hiring hall because of work injury limitations. In many instances, a members loss of earnings is reconnected to the compensable injury and remains a barrier in obtaining work as an electrician, and/or earning income with a new employer. The Policy states:

The WSIB generally maintains the loss of earnings (LOE) benefits the worker was receiving at the start of a temporary work disruption. Workers are entitled to additional LOE benefits when evidence indicates:

- the worker would seek new employment in the general labour market to attempt to restore his/her loss of earnings during the temporary work disruption (i.e., if he/she was not injured), and
- the work-related injury/disease impacts the worker’s ability to earn income through new employment.

OPM 15-06-02 Entitlement Following Temporary Work Disruptions also states:

The work-related injury/disease impacts the worker’s ability to earn income through new employment. To make this determination, the decision-maker may consider factors such as the following:

- Is the worker involved in WSIB approved active health care, which requires frequent absences for treatment of the work-related injury/disease?
- Was the worker on a graduated return to work plan?
- Was the worker performing suitable work that does not exist in the general labour market (i.e., similar work not performed at other companies)?

Worker Meets Unable to Work Threshold – OPM 19-05-02

The WSIB also defines “unable to work” in Policy 19-05-02:

A worker is considered unable to work, if, because of the work-related injury/disease, he or she:

- Works less than regular hours, and/or
- Requires accommodation/modified work that pays, or normally pays, less than his or her regular pay.

Collective Bargaining Agreement (CBA) - Union Hiring Hall – 50/50 Name Hire

Often times WSIB will probe where on the out-of-work list an injured worker sits to support the decision that there is no work available



through the union. However, the injured workers legal obligation is to mitigate their loss of earnings by seeking work, not whether work is immediately available through the hiring hall.

Leaving aside most injured workers cannot perform the full scope of pre-injury duties because of injury limitations, it is unrealistic for an injured worker to be dispatched to another contractor because a new employer expects a fully functional electrician, nor are they obligated to accommodate a new hire.

In addition, the WSIB does not understand the 50/50 name hire provisions under Section 7, of the Principal Agreement, which is another path to employment, which injured workers would typically be unable to avail themselves unless healthy. Section 700(a) states:

The contractor agrees to hire and employ only members of the IBEW on all electrical work. When hiring through the Local Union office, the Contractor shall be entitled to name hire up to fifty (50) percent of the IBEW members, including foreman.

LU 353 Members Do Not Have Seniority or Service under CBA

When it comes to layoffs, the WSIB does not understand that our Contractors have a broad latitude to downsize their workforce without regard to a members length of service, because there is no seniority clause in the CBA.

An equally important consideration is accident employers have the discretion to maintain the employment of injured workers who are in modified jobs or in the re-employment phase of a claim when downsizing the workforce without the encumbrances typically associated with seniority or bumping rights found in many other non-construction collective agreements.

Case Law, Decision No. 2392/17

In Tribunal Decision No. 2392/17, an apprentice suffered a back injury and was laid-off by a large IBEW contractor. The key issue before the Tribunal was the concept of an injured workers employability after a layoff. The Panel focused on the fact the member was still in treatment, and one of the few decisions that discusses the union hiring hall and whether another contractor would conceivably hire the injured worker:

[11] The Panel finds that the REC report viewed the worker as being partially disabled from performing the full duties of an apprentice electrician for approximately eight weeks from the date of assessment, June 23, 2014. We note that the worker reported to his local Hiring Hall as ready to return to full duties on August 13, 2014, within the eight week period anticipated in the REC report. The Panel infers from that report that the worker was not capable of seeking employment through his local Hiring Hall as a fully functional worker during the eight weeks of the anticipated recovery and physical therapy recommended in the REC report. The Panel finds therefore that, while the worker may have been capable of performing the material handling job he performed pre-injury with the accommodations allowed by the accident employer, the worker was

not capable of presenting himself to his Hiring Hall as fully able to work without restrictions. Consequently, in our opinion, the worker was not capable, during the period from May 30 to August 13, 2014, of performing the full duties of an apprentice electrician.

[12] In her submissions on behalf of the employer, Ms. McCullough argued that there was no significant accommodation of the worker's duties following the workplace injury, and the worker was able to continue doing his pre-layoff job during the period in issue. Hence there was no justification for providing the worker with LOE benefits when his employment was terminated. However, in the Panel's opinion, that submission fails to consider the criteria for determining entitlement after a general layoff found in Board policy.

[13] Policy applicable to an injured worker who is subsequently the object of a "general" layoff is found in Document No. 15-06-01 of the Board's Operational Policy Manual. That policy document contains the following stipulations:

The WSIB may provide a worker who is unable to continue working due to a work disruption, and whose employability is affected by his/her work-related impairment/disability and associated clinical restrictions, with [Insurance Plan benefits]. Indicators that a worker's employability is clearly affected include, for example, that the worker:

- is in the early phase of recovery and
- is receiving WSIB-approved active health care treatment on a frequent basis i.e. physiotherapy three times a week

In practical terms, these workers could not be expected to conduct a job search, and the likelihood of another employer hiring them with these clinical restrictions is low. [emphasis added]

[14] In the view of the Panel, the facts of the present case fall squarely within the Board's policy. In our opinion, when the worker was laid off on May 30, 2013, he was receiving medical treatment for his injured back and was in the "early phase of recovery" from that injury. He was also receiving active health care treatment, including physiotherapy, for a period of eight weeks pursuant to a recommendation by a Board authorized REC facility. The report from that facility was quite clear in indicating that the worker required further treatment as well as extensive accommodation in future employment over an eight-week period. Those restrictions included limited lifting, no prolonged sitting/standing/walking, 10 minute breaks every hour and work pacing. In our opinion, had the worker presented himself to his Hiring Hall as requiring employment with those restrictions, it is highly unlikely that any employer would have been prepared to employ him, even on a short-term basis. This is particularly so since, in the worker's employment field, short-term contracts are not unusual. In our view, the worker's situation, from May 30, 2013 to August 13, 2014, falls squarely within the parameters of the following statement from the Board policy:

In practical terms, these workers could not be expected to conduct a job search, and the likelihood of another employer hiring them with these clinical restrictions is low.

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Workplace Harassment, Stress, Mental Health Complications & Return to Work Barriers – Redress under the Occupational Health & Safety Act

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



Most construction workplaces are not genteel debating societies where workers are equals, relationships civil, and you have a say in how work is organized. Some supervisors are more sophisticated and manage employee relations in a more enlightened manner. However, I often hear complaints about worker maltreatment that harkens back to a past era. Fortunately, many contractors have evolved their business practices, but some still cling to old ways.

In my experience the usual culprits are not the guy at head office, but in the field. That's where abusive and harassing behaviours mostly manifest. Unfortunately, injured workers seem to bear the brunt of caustic comments, snide innuendos and unnecessary scrutiny only because they are injured and performing modified work. I could write a book on the litany of harassing conduct.

The union deals with many workplace issues, so it's important that members understand Ontario's current workplace harassment laws so you are informed on the mechanism, and how to seek a resolution when you or co-workers are being harassed.

Bill 168 now known as Section 32 of the *Occupational Health and Safety Act* (Ontario OHSa) became law on June 15, 2010, and it represents a significant change in how, and to what extent, both workplace violence and workplace harassment are regulated in Ontario.

What are the requirements for Ontario Employers?

Employers must prepare a policy with respect to workplace harassment, and develop and maintain a program to implement the policy. Employers must provide information and instruction to workers on

the contents of the policy and program.

The workplace harassment program must include measures and procedures for workers to report incidents of workplace harassment and set out how the employer will investigate and deal with incidents or complaints.

These requirements help employers, supervisors and workers to recognize and deal with workplace harassment promptly, before it escalates into possible workplace violence.

An important consideration is that Health and safety inspectors cannot investigate, resolve or mediate individual cases of workplace harassment. Nor does OHSa require an employer to assess the risk of workplace harassment. However, the union has a key and prominent role in such matters.

Workplace harassment means

- Engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.

Workplace harassment may include bullying, intimidating or offensive jokes or innuendos, displaying or circulating offensive pictures or materials, or offensive or intimidating phone calls.

OHSa - Extended Definition of Workplace Harassment

Section 32 of the Ontario Occupational Health and Safety Act (Ontario OHSa) broadened and extends the definition of workplace harassment beyond what is presently covered under the Ontario Human Rights Code. The Human Rights Code has long prohibited harassment in the workplace based on race, ancestry, place

of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status, or disability.

Traditionally, harassment that was based on other, non-protected grounds was not actionable, unless the employer had extended additional protection by way of policy or it had agreed, as part of the collective bargaining process with a union, to incorporate broader protection in a collective agreement. Bill 168 changed this because it requires employers to treat harassment based on non-protected grounds in the same manner as harassment based on Code-protected grounds.

Harassment Complaints Must First Be Raised Internally

The purpose of Section 32 (OHSa) is that all Ontario Employers must have a Harassment Policy in place, including a process and mechanism to address workplace harassment when it arises. As the Ministry of Labour points out, this falls under the Internal Responsibility System (IRS), which means workers MUST first bring their concerns forward to the employer for investigation and resolution. However, it is crucial for members to involve the union, either a steward or business representative, even if you are an injured worker, because the union has the ability to file a grievance and enforce unacceptable workplace conduct when warranted.

If the harassing conduct is directed to an injured worker, it may invoke an anti-injured worker animus argument that we can bring forward to the WSIB for investigation. Since each worker has varying resilience to harassment, some workers may develop psychological reaction and become unwell emotionally while for others it's like water off



a duck. In these situations, I must be involved to coordinate WSIB interventions. In a recent case I wrote an opinion that is worth sharing:

While I was not immediately convinced that the harassment was egregious, one must always be on guard for intonation and inflection versus looking at words on paper or devoid of context. Leaving aside whether the supervisor behaved inappropriately, I'm not convinced these comments to the worker (e.g., pussy, working slowly) trend toward the gross egregious behaviour one sees at the extreme end of the foul language spectrum and I explained to the member that the comment "working slowly" has been a supervisory anthem since the early days of the electrical industry. True the language was improper and must stop however, the member cannot stop working and observe the labour relations process unfold from the sidelines. He should return to work in the meantime since the union and employer are addressing the issue, but critically, the abusive foreman is no longer on site.

To the member's credit, he has been very honest and forthcoming and analyzed the political and cultural dynamics of his workplace with considerable introspection. But I remain concerned about potential overreaction and sensitivity to coarse language that even on its face may be improper, but can surely be alibied as shop-talk not uncharacteristic of a construction workplace environment. I have not raised this, but there is settled arbitral jurisprudence regarding salty language in the workplace, and whether such language will attract judicial notice when this language is placed in the context of the norms, customs and practices of a particular workplace environment (i.e., construction).

Furthermore, I have given consideration to whether there is a potential anti-

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Member Name:		
IBEW Membership Number:		
Phone Number:	Home:	Cell:
Number of adults attending:	No Charge	
Number of children under 16 attending:	x \$5.00	Total Enclosed:

injured worker animus argument in connection to the comments made to the member once he was injured, but I'm not convinced the conduct rises to a standard where an Appeals Resolution Officer or Tribunal Vice-Chair would conclude such animus exists towards the injured worker.

At the end of the day, these particular unwelcome comments would not be considered **objectively traumatic** as that term is defined under the WSIB

Traumatic Mental Stress policy, as these unpleasant comments are not "life threatening" notwithstanding the member's vulnerable or frail spirit in contending with unwelcome comments. Clearly, this is a situation that requires redress through the Workplace Harassment Policy of the contractor.

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Mental Health Problems as Secondary Conditions to Work Injury Including Traumatic Mental Stress

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



An important debate is taking place at our 353 union meetings regarding the need to adopt a Canadian Standards Association policy on Psychological Health and Safety in the Workplace. It's a motherhood and apple pie issue, but I really have some concerns regarding the lack of core competencies among the workplace parties to deal with these matters.

In my practice I deal with a lot of mental health issues, which incidentally, can be work related either as secondary consequence injury or due to traumatic mental stress i.e., witnessed/experienced a horrific life threatening event or act of violence. In my experience there is a lack of sophistication in many construction workplaces even though many of us have personal experiences with mental health in our own families, communities and among friends. Whether it is depression, anxiety, or myriad other issues such as addiction, which includes drugs, alcohol, as well as sexual disorders, you begin to see the enormity of the issue.

This month I wish to bring into focus Mental and Behavioural Disorders because the WSIB has long recognized that an injury can take place to the mind as well as the body. The problem areas arise in cases in which there is a claim for a psychological reaction to an accident, a psychological reaction to non-physically injuring events at work, or the real or perceived pain resulting from a physical injury. These cases deal with highly subjective areas that are not susceptible to exact, reproducible scientific standards.

In dealing with psychological disabilities, the standard classification system used to

adjudicate mental health is derived from the American Psychiatric Association publication, Diagnostic and Statistical Manual of Mental Disorders, 4th edition, (DSM-IV).

Psychotraumatic Disability

The WSIB has developed policies regarding entitlement for what is referred to as "psychotraumatic" disability. It is unclear why the WSIB used this phrase in referring to mental disorders that result from a compensable accident or the sequelae of accidents. The phrase itself is not defined and it seems to imply the requirement of a traumatic incident as a causative force. As can be seen in the Board policy, this is clearly not the case. Where a mental disorder results from the sequelae of an accident, it will be compensated even though it is quite unlikely that any part of the accident/injury is "traumatic" in the normal sense of the word. However, it is not unusual to see a claim denied, particularly at the initial levels, on the grounds that the accident was not "traumatic".

Although the word "Psychotraumatic" is undefined, the Board policy outlines clinical entities that are not consistent with terminology used in the DSM-IV, which is odd because the WSIB requires a DSM-IV diagnosis to consider psychological entitlement. The most prevalent diagnoses are anxiety disorder, depressive disorder, conversion disorder, psychogenic pain disorder, obsessive compulsive disorder, simple phobia, hypochondriasis, post-traumatic stress disorder, and psychological factors affecting physical condition. But this list is not exhaustive.

Of course, establishing that one of the above-mentioned mental disorders is present is not sufficient for entitlement to be granted. The question of causation must first be addressed. Indeed, if any other mental disorder, with the obvious exception of malingering, can be shown to be causally related to the accident or its sequelae, there does not appear to be any reason why entitlement would not be granted.

It is commonly accepted that some people do not react as well as "normal" people would to various life events. However, when determining whether an accident or its sequelae (i.e., consequence) caused a mental disorder it is important to look at the question of causation in the individual case.

WSIB Policy Psychotraumatic Disability

The current WSIB policy has changed very little since a major revision in 1982. The policy now outlines the general entitlement criteria for a Psychotraumatic disability if the disability "is attributable to a work-related injury or a condition resulting from a work-related injury...providing the Psychotraumatic disability became manifest within 5 years of the injury, or within 5 years of the last surgical procedure."

The policy specifies Psychotraumatic disability may be established when the following circumstances exist or develop:

- Organic brain injury secondary to:
 - Traumatic head injury
 - Toxic chemicals includes gases
 - Hypotoxic condition, or



- Conditions related to decompression sickness
- As an indirect result of a physical injury:
 - Emotional reaction to the accident or injury
 - Severe physical disability, or
 - Reaction to the treatment process
- The Psychotraumatic disability is shown to be related to extended disablement and to non-medical, socio-economic factors, the majority of which can be directly and clearly related to the work related injury.

In every WSIB or third party private insurance claim, a mental health diagnosis must be provided by either a psychiatrist or psychologist in order for the claim to be adjudicated and accepted. Even though your family doctor may diagnose depression or anxiety and prescribe psychotropic

medication, unless they are certified mental health care professionals, their diagnosis will not be sufficient to allow a claim.

This is frustrating because Psychiatrist services are covered and paid for under OHIP, but good luck finding one when you need one. The waiting lists are horrendous, and the maladaptive mental health episode may have worsened or abated by the time you see a psychiatrist. That leaves workers and the public reliant on psychologists, whose services are not covered by OHIP, but are more readily accessible. So how does an ill or injured worker suffering wage loss self-fund the cost of mental health care services when incapacitated, including the cost of preparing medical reports, which insurers frequently request, but don't pay? It is a complex issue that I deal with frequently, and fortunately, our union leadership has funded my requests for

supportive psychiatric reports, when needed.

Looking to the future, if we want to make our workplaces psychologically healthier, we need to ensure our drug program covers most commonly prescribed drugs used in treatment, including a mechanism that links members with accessible, affordable and timely psychological services. More importantly, we need to be pragmatic and focus on the basics while dispelling mental health stereotypes' and the tendency for premature psychiatric labeling. The worst of these systemic behaviours, particularly among insurers, is that mental health problems are illnesses of convenience, because the disorder cannot be imaged on diagnostics, such as an MRI

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REMINDER

Just a reminder for unemployed members, we offer WHMIS and FALL PROTECTION every Tuesday at the Toronto Training Centre, and every Thursday at the Mississauga Training Centre, starting at 8:30am.

Christmas & New Year's Office Hours

NORMAL OFFICE HOURS: MONDAY TO FRIDAY 7:30 a.m. – 4:30 p.m.

Monday	Tuesday	Wednesday	Thursday	Friday
Dec. 23, 2013 7:30 – 4:30 p.m.	Dec. 24, 2013 CLOSED	Dec. 25, 2013 CLOSED	Dec. 26, 2013 CLOSED	Dec. 27, 2013 7:30 – 4:30 p.m.
Monday	Tuesday	Wednesday	Thursday	Friday
Dec. 30, 2013 7:30 – 4:30 p.m.	Dec. 31, 2013 7:30 – 11:30 a.m.	Jan. 1, 2014 CLOSED	Jan. 2, 2014 7:30 – 4:30 p.m.	Jan. 3, 2014 7:30 – 4:30 p.m.

Principal Agreement recognized holidays for Christmas and New Year's Day are as follows:
 Wednesday, December 25, 2013; Thursday, December 26, 2013 and Wednesday, January 1, 2014



Workers' Compensation vs. Private Disability - Reporting Strategies To Avoid Problems When Claim Is Not Reported Properly

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



It's frustrating when members claim to have suffered a workplace injury, but their actions and statements on private insurance forms suggest otherwise.

Political Grief Submitting WSIB Claims

Dealing with the workers compensation board (WSIB) and employer hostility aimed at workers who make workers compensation claims can be a major aggravation. As a result of the political aggravation many workers are tempted to not bother pursuing WSIB benefits for work related disabilities. Instead, claims for private disability payments are made.

The longer a worker waits to report a work injury claim, the more difficult it is to establish all of the facts necessary to support the claim. This is particularly true when it comes to verifying the existence of a disabling injury. A delay in reporting will also cast doubt on the honesty of the worker was well. This creates even more difficulty in establishing the history of the claim. Submitting claims after a layoff are equally problematic.

Failure to File WSIB Claim For Fear of Layoff

Over the years I have written articles and dealt with many members who claim to have been injured at work. There is no question many members believe that filing a WSIB claim will result in a layoff when the next chop takes place. One cannot argue with real life experience, particularly in an industry where members have no seniority, and employers are obliged to provide one hours' notice re shortage of work. I've used the term economic calculus to describe the considerations members make when deciding whether to file a WSIB claim.

In my experience, members will avoid submitting a WSIB claim and apply for union disability benefits from Great-West Life (GWL) because a buck is a buck no matter the source of money, but fail to consider how their legal rights and entitlement will be affected later on. Buyer's remorse aside, members' actions can be very prejudicial down the road and trying to convert a GWL claim into WSIB claim is like putting toothpaste back in a tube.

Tell Coworkers & Employer You're Injured

In a recent case a member claimed to have suffered a work related arm injury, but entered the union disability stream before speaking to me. When I investigated the alleged injury, it was clear the member suffered a final let-go incident at work while drilling. Furthermore, in speaking to the co-workers on site who worked with the injured member, they described a hard working electrician. They also recall he was able to perform his job in the weeks and days leading up to the work injury,

and distinctly remember that on the date of injury he complained about hurting his arm, and was unable to perform his job afterwards.

When the member first sought medical attention on the day of injury the health professional did not record that the patient reported a work related injury. Instead, there was reference to a non-work related injury a month earlier, notwithstanding testimony from coworkers, injured member, and employer who all confirmed he did not have any limitations or disability until the work related injury.

It's important that members consistently report work injury claims to health professionals and on insurance forms. If you don't, your statements at a later date can and will be used against you.

Unfortunately when the member completed his union disability application which asks you and your health professional whether this is a work related injury, they both ticked the box No. The member submitted a WSIB claim, but it was denied because there was no proof of accident.

Tell Health Professional If Injury Is Work Related

Health professionals are like a parish priest and I encourage members tell the doctor whether an injury is work related, or suspected. Even if the member doesn't submit a WSIB claim for fear of layoff, embedded in your physician's clinical notes is exculpatory evidence that you suffered a work injury. Those clinical notations carry significant weight in appeal hearings whether a member suffered a work related injury.

When members tell their health professional they got hurt in a fight or slipped on stairs at home, this breaks the chain of causation that you suffered a work related injury.

Complainers Do Better Than Strong Silent Types

Working in a unionized industry does not mean you should surrender your rights because you fear a layoff. Any accident, or any onset of pain associated with work should be reported to the employer and recorded in writing even if medical attention is not required at the time. At the very least, co-workers should be informed about the accident or onset of pain. If you're working with work related pain that is not disabling at the moment, you should make co-workers and the employer aware of the ongoing pain and the related cause of pain to work. When it comes to compensation, complainers almost always do better than the strong silent types.

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CASE LAW ON COMMON DISPUTED ISSUES & MAJESKY OPINION LETTERS



June 8, 2024

Mike Slaght
Business Representative
International Brotherhood of Electrical Workers
Local Union 353
1377 Lawrence Avenue East
Toronto, Ontario
M3A 3P8

Dear Brother Slaght:

**RE: Can Accident Employers Layoff Injured Workers?
WSIB Re-employment Law and Work Disruption Policy
Understanding the Myths, Law, Policy and WSIB Practices**

Last week you asked for my opinion because a number of members, specifically injured workers, are seeking clarification on their rights after a layoff. This is a complex situation with many moving parts depending the facts, which I have discussed below. I have over the years published articles on re-employment and work disruptions (layoffs) that union representatives and members need to be acquainted.

Under the *Workplace Safety and Insurance Act (WSIA)*, there is a re-employment scheme that covers constructions workers. However, the criteria are different from the re-employment provisions that cover workers in all other sectors (public, manufacturing, retail, etc.) found in section 41 of the WSIA. Let me address a common myth.

Q1. I was injured with ABC Electric, can the employer give me a layoff (ROE)?

A. An electrical contractor can lay off a worker who submitted a WSIB claim in the past 2 years. The fact a worker suffered a work injury does not trigger the re-employment provisions under the WSIA and Board Policy.

In my experience, when the work situation is plentiful, and we have a small out of work list, members are less concerned whether they have re-employment rights. Now that there is a slowdown in the construction industry, and an out-of-work list of 700 members, there is more interest in re-employment rights.

The fact that an injured worker may have been injured during the past two years, and performed modified duties, prompts calls to Business Reps, and me, that they cannot be laid-

**RE: Can Accident Employers Layoff Injured Workers?
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off. Again, that assumption is incorrect. In addition, for the Re-employment provisions to be triggered under Ontario Regulation 35/08, *Reemployment in the Construction Sector*, WSIB Policy 19-05-02, stipulates a worker must have been unable to work.

The *Unable to work* threshold crystalizes when the worker was not able to perform his/her pre-injury duties, **and** was paid WSIB Loss of Earnings Benefits for at least one day. Often times accident employers will pay an injured workers lost wages after an injury, but that is not the same or analogous to the WSIB paying LOE benefits. Many members are quite content with the employer paying them. But down the road, this becomes a significant barrier whether the re-employment obligation was triggered under the law.

Let's assume an electrical contractor has a re-employment obligation to an injured worker, because the worker was "unable to work" as per the definition I described and below. These claims are adjudicated by the WSIB Recurrence Team. One of the first criteria to be established is did the accident employer hire electricians after the injured worker was laid off. Please bear in mind that if other electricians have been laid-off, working short weeks, etc., re-employment will not be triggered.

Conversely, if an accident employer did hire electricians after an injured worker was laid-off, that's a different situation. In fact, I have current case where the accident employer hired apprentices, journeypersons, and name hire after the layoff. Ironically, on the very day they laid-off an injured worker, the accident employer requested a journeyperson from the Hiring Hall. There is the odd contractor with a slippery reputation and may have hired uncleared workers, which is prohibited under our collective bargaining agreements. That too creates a false picture whether the accident employer hired workers from the hiring hall.

In addition, the WSIB in 2011 introduced a Work Disruption Policy, in fact two (Short Term and Permanent Work Disruption Policy) that applies whenever an injured worker is laid-off by an accident employer. The policy is an effective tool for the WSIB, and employers, in denying Loss of Earnings benefits to injured workers who are laid-off on the basis that the workers loss of earnings is not related to the work injury, but an employment situation.

The unfairness is obvious because in spite of a layoff for a shortage of work, the injured worker often times cannot perform the pre-injury duties without accommodation nor are they dispatchable to a new employer. How many contractors will accommodate an injured worker from the Hall, when they have enough challenges accommodating their own injured workers?

WSIB Recurrence Team Adjudicates Layoff Claims

Whenever an injured worker is laid-off and seeks LOE benefits from WSIB, claims are adjudicated by the WSIB Recurrence Team (REO). More often than not, they will rule the worker can find work in the general labour market, in spite of physical limitations related to the work injury.

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The union takes the position that the general labour market is our 700 signatory electrical contractors and by registering on the Hiring Hall out-of-work list they are seeking employment in the general labour market. There is an extensive number of cases and settled case law at the Workplace Safety and Insurance Tribunal that an injured worker who registers with the Hiring Hall after a layoff, is *de facto* seeking employment in the general labour market. The problem is the WSIB is no longer bound by case law, thanks to Bill 99 which was introduced by Premier Mike Harris in 1997.

The WSIB REO Team is famous for ruling an injured workers Loss of Earnings is related to an employment situation, and not work injury, notwithstanding a new contractor would not hire or keep them employed if dispatched from the Hiring Hall.

The union has appealed and won every work disruption decision when the WSIB has denied paying LOE benefits. See attached Work Disruption Articles.

Does Worker Fall Under Exemption of Temporary Work Disruption Policy – OPM 15-06-02?

The WSIB generally maintains the loss of earnings (LOE) benefits the worker was receiving at the start of a temporary work disruption. Workers are entitled to additional LOE benefits when evidence indicates:

- the worker would seek new employment in the general labour market to attempt to restore his/her loss of earnings during the temporary work disruption (i.e., if he/she was not injured), and
- the work-related injury/disease impacts the worker's ability to earn income through new employment.

OPM 19-05-02 - Re-employment Obligation

Construction employers are required to offer to re-employ their injured construction workers who have been unable to work due to a work-related injury/disease. A construction employer's obligation to re-employ begins when it is notified that an injury construction worker is medically able to perform:

- the essential duties of his or her pre-injury job
- suitable construction work, or
- suitable non-construction work

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Operational Policy 19-05-02

Re-employment Obligation in Construction Industry – Threshold and Duration

Construction employers are required to offer to re-employ their injured construction workers who have been unable to work due to a work-related injury/disease.

A construction employer's obligation to re-employ begins when it is notified that an injured construction worker is medically able to perform:

- the essential duties of his or her pre-injury job
- suitable construction work, or
- suitable non-construction work.

Following notification, the employer must offer to re-employ the injured worker in the first job that becomes available that is consistent with the worker's medical ability to return to work.

The employer's offer of work must take into account its obligation to accommodate the work or the workplace to the needs of the worker, to the extent that the accommodation does not cause the employer undue hardship.

In all cases where the worker is medically able to perform some type of construction work, an employer who has more than one construction job available must offer to re-employ the worker in the construction job that is most similar in nature and earnings to the one the worker had on the date of injury.

The employer's obligation to re-employ continues until the earliest of:

- two years from the date of injury
- one year after the worker is medically able to do the essential duties of the pre-injury job
- the date the worker declines an offer of work, or
- the date the worker reaches age 65.

Operational Policy 19-05-03

Compliance with the Re-employment Obligation – Construction Sector

At a construction worker's request, or on its own initiative, the WSIB ensures that construction employers have fully complied with their obligation to offer to re-employ their construction workers who, as a result of a work-related injury/disease, have been unable to work.

The WSIB is committed to assisting small construction employees, i.e., those that employ 20 or fewer workers, in meeting their re-employment responsibilities.

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If a construction employer terminates an injured construction worker's employment within 6 months of having re-employed him or her, the WSIB presumes that a breach of the re-employment obligation has occurred. Employers can rebut the presumption by showing that the termination of the worker's employment was not caused in any part by:

- the work-related injury or disease
- treatment for the work-related injury or disease, or
- the claim for benefits.

There are a number of other instances—generally involving a failure by the employer to offer appropriate work when it is required to do so—whereby the WSIB may find an employer in breach of its obligation to re-employ.

If the WSIB determines that a breach of the re-employment obligation has occurred, it may penalize the employer by:

- levying a re-employment penalty on the employer, and/or
- pay the injured worker LOE benefits.

Majesky Closing Comments

As you can see, there are many moving parts whether an injured worker can be laid-off and receive Loss of Earnings Benefits from the WSIB. If your first contact with me is after a layoff, expect that your claim to be paid LOE benefits will be denied by WSIB, as well as a long wait before there is a resolution to an appeal. In the meantime, you will need to make plans how to pay your bills and put food on the table.

Fraternally yours, ***not thoroughly proofread***

Gary Majesky
Workers Compensation Legal Counsel, IBEW Local 353
Director, LU 353 Non-Profit Center
Executive Board Member
Office Tel # (416) 510-5251

GM/tj

Copy: All Local 353 Business Representatives

CASE LAW ON COMMON DISPUTED ISSUES & MAJESKY OPINION LETTERS



August 13, 2025

Attention, Ticha Albino, LU 353 Human Rights Rep

**RE: Member Diagnosed, Idiopathic Generalized Epilepsy (age of onset, early 20's)
Layoff OZZ Electric, Duty to Accommodate Disability
Majesky Opinion and Go Forward Instructions**

Business Representative, Brian Ware, contacted me late in the day on Friday March 31, 2023 and wanted to talk to me about a member who was laid-off at OZZ, and he mentioned you had a medical condition, and did not elaborate. We had a fulsome discussion. I also received your voice message on the same date, end of day, where you mentioned you spoke to Brian Ware about your condition.

On Saturday March 31, 2023, I called you and we spoke at length about your recent layoff at OZZ Electric, and that your new General Foreman, spoke to you when you were coming out of the trailer and mentioned "you're missing too many days."

You advised that in the past you reached out to key personnel in OZZ's Health & Safety and Human Resources Departments, however, they no longer seem interested in keeping the channels of communication open. In the past there was formal communication between the workplace parties in relation to your health issue (i.e., epilepsy).

Background & History

As background, you are a 40-year old journeyman electrician and a Local 353 member for 9-years. You have worked for OZZ Electric for 5-years, until your recent layoff for "shortage of work" which you believe is related to your disability (epilepsy), which is a protected ground under the Ontario Human Rights Code.

Good Work Habits

You claim to have a good work record with OZZ in terms of your production, performance and work habits, nor have you been disciplined for work related culpable misconduct. Except for epilepsy related absences, you arrive at work early each morning, don't leave work early and have not been formally disciplined for alleged work related offences.

Epilepsy Diagnosed at Age-18

You confirmed that you were diagnosed with epilepsy at age-18, and remain under the care of a neurologist. Notwithstanding a 20-year history of non-compensable epilepsy, you perform the essential job demands of an electrician without accommodation, however, your treating physician does recommend that you work with somebody (i.e., not alone). It is my understanding that this has not been a problem in the past.

Total Absences Annually

You informed me that your annual epilepsy related absences are approximately 18-24 days over the course of a year due to epilepsy events that happen at home, plus lost time for one or 2 days before you can return to work. Included in the annual total are other health episodes (e.g., flu).

Employer Aware of Workers Disability

As discussed, the employer, OZZ Electric, is aware you have epilepsy, and despite missing time from work they continued to employ you for 5-years. In addition, you have experienced epileptic seizures at

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work in the past. You had a seizure at work 2 years ago, and more recently, two seizures in one day while installing risers at a Mount Sinai Hospital jobsite. I understand that your partner knew you had this condition, and these seizures while at work prompted OZZ to request that you obtain a medical clearance letter from your Family MD and/or Neurologist before allowing you to return to work. Which you did.

In the past, you have applied for union disability benefits, but noted Short Term Disability benefits do not pay sufficient money, so you continue working.

Diagnosis -Generalized Nocturnal Tonic Clonic Seizures

You confirmed that you have been diagnosed with *Generalized Nocturnal Tonic Clonic Seizures*, which is one of several different types of epileptic seizures people may experience. In terms of medication, you take 3 Kepra pills in the morning, and 4 Kepra pills at night, plus 2 Aptiom pills. Generally, you didn't experience any medication side effects that impact your activities of daily living or ability to work.

Whenever you experienced a seizure at work, or when you may pose a danger to the general public, your Neurologist is legally obligated to inform the Ontario Ministry of Transportation, who will issue a medical license suspension for upwards to 6 to twelve months, until you are cleared to resume driving a motorized vehicle. Whenever your driver's license is suspended for medical reasons, you take public transit to the jobsite.

The Employer's Duty to Accommodate in Ontario

Under the Human Rights Code, employers and unions, have a duty to accommodate the needs of people with physical, mental, psychosocial disabilities to make sure they have equal opportunities, equal access and can enjoy equal benefits.

In my opinion, based on information you presented, the union has not been involved in your interactions with OZZ in relation to your disability and epilepsy related absences. As a bargaining unit member, it is important to involve your union when you have a disability and require accommodation re lost time (days).

Employers and service providers have an obligation to adjust rules, policies or practices to enable you to participate fully. It applies to needs that are related to the grounds of discrimination. This is called the duty to accommodate.

Innocent Absenteeism

Innocent, or non-culpable, absenteeism occurs when an employee is, for reasons outside their control, not able to work. For example, an employee who cannot perform or fulfill their work duties due to illness or injury are absent for non-culpable reasons.

Culpable Absenteeism

Conversely, culpable absenteeism relates to those absences for which employees can be held accountable. Failure to attend work without notifying the employer, lateness for work or leaving early and abuse of leave are examples of culpable absences.

The goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to

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accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

Ontario Human Rights Code - Epilepsy as a Disability

A handicap is any degree of physical disability caused by bodily injury, birth defect or illness [Part II, Section 10(1-a)] under the Code. This includes epilepsy.

Elements of Undue Hardship Defense

The essence of your accommodation relates to your "work absences" that re due to epilepsy, and on an annualized basis is approximately 18-24 days.

In my opinion, this represents the essence of your complaint that your employer has a duty to accommodate your absences because of your disability pursuant to the Code.

The Supreme Court of Canada has said that, "one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment". The cost standard is therefore a high one. Costs will amount to undue hardship if they are:

- quantifiable;
- shown to be related to the accommodation; and
- so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.

This test will apply whether the accommodation will benefit one person or a group.

The costs that remain after all costs, benefits, deductions and other factors have been considered will determine undue hardship.

All projected costs that can be quantified and shown to be related to the proposed accommodation will be taken into account. However, mere speculation (for example, about monetary losses that may follow the accommodation of the person with a disability) will not generally be persuasive.

The financial costs of the accommodation may include:

- capital costs, such as the installation of a ramp, the purchase of screen magnification or software
- operating costs such as sign language interpreters, personal attendants or additional staff time
- costs incurred as a result of restructuring that are necessitated by the accommodation
- any other quantifiable costs incurred directly as a result of the accommodation.

Concerns may arise about the potential increase in liability insurance premiums by the perceived health and safety risks of having persons with disabilities on particular job sites. Increased insurance premiums or sickness benefits would be included as operating costs where they are quantified, such as actual higher rates (not hypothetical), and are shown not to be contrary to the principles in the *Code* with respect to insurance coverage. Where the increased liability is quantifiable and provable, and where efforts to obtain other forms of coverage have been unsuccessful, insurance costs can be included.

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The Law & Policy

There is not from my reading of the law and policy, a mechanism under the *Workplace Safety and Insurance Act* to surcharge employers for maintaining the employment of disabled workers. In addition, the WSIB (workers compensation scheme) is a no-fault system going back to the historic bargaining when the first *Workman's Compensation Act* was introduced in 1915.

My review of Tribunal case law indicates most of the seizures are post-traumatic in nature after workers suffer a work-related head injury.

Section 13(2) of the *Workplace Safety & Insurance Act* states that, if an accident occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown. Likewise, if an accident arises out of a worker's employment, it is presumed to have occurred in the course of employment unless the contrary is shown. Board Operational Policy Document No. 15-02-01 provides a definition of accident, as does the *WSIA*.

Tribunal Analysis, Did Injury Arise out of Employment

As has been discussed in a number of Tribunal decisions, the presumption of entitlement deems the question that a decision maker must ask, "has it been shown that the resultant injury did not arise out of the employment." Instead of asking whether the injury arose out of the employment. Essentially, if something occurs in the course of employment, at work, the incident is presumed to have arisen out of the employment and is compensable, unless the presumption can be displaced.

Even if an incident happened at work, the focus turns to whether a precipitating event caused the injury. As the Tribunal Vice-Chair noted in *Decision No. 900/06*:

A worker simply placing their left foot down on a step and then turning to go back up to get a forgotten item is not, in and of itself, a chance event [accident]. Turning on stairs, even abruptly, is a fairly normal occurrence. It is not, in my view an "identifiable, unintended event" but is rather part of a normal, everyday activity. That the worker suffered an injury while performing this normal maneuver or activity is not disputed. The [WSIB} policy document provides, however, that the "injury itself is not a chance event."

By way of analogy, in my view it would be difficult to establish for an office worker that reaching for a telephone or for a pencil on one's desk that leads to neck or back pain is a work accident. While the incident occurred at work, the simple act of reaching in that way could hardly be stated to be an "unintended event" that led to an injury.

Epilepsy and Driving in Ontario

As discussed, you confirmed that you had your driver's license suspended at least twice for medical reasons (i.e., epilepsy).

In accordance with the Ontario *Highway Traffic Act*, the Ministry of Transportation makes all decisions about driver's licenses in Ontario. In the province, physicians are required under law to report anyone over 16 who they believe is not able to safely drive. These reports go to the MTO whether you have a driver's license or not.

When the report is received, the MTO will review the information and make a decision about the status of your driver's license. The MTO might ask for more information or suspend your license without the need

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for further evidence. If this happens, your license will be reinstated when conditions are met and when the appropriate medical information is received, reviewed, and approved.

You may drive with a seizure disorder in Ontario, if:

- medication appears to have prevented your seizures AND:
- you have been free from seizures for 6 months and your medication does not impair your consciousness (e.g., it doesn't cause drowsiness), or cause poor coordination or muscle control.
- your physician believes you are a conscientious patient who will take your medication responsibly and follow all the physician's instructions carefully.
- you are under regular medical supervision and your physician believes you will report to him/her immediately should any further seizure(s) occur.
- you have seizures only during sleep or immediately upon awakening (nocturnal seizures) and it has either been 6 months since your last seizure OR if you still have seizures, the pattern has been consistent for at least 1 year.
- you have simple partial seizures and it has either been 6 months since your last seizure OR if you still have seizures, the pattern has been consistent for at least 1 year; you also must have favourable assessment from a treating physician or neurologist, no impairment in your level of consciousness/cognition, and no head or eye deviation.
- you have been seizure-free for at least 6 months, but had a seizure after decreasing medication under your physician's advice and supervision. You may drive once you have resumed taking your previous medication at the prescribed dosage.

Majesky Opinion & Instructions

Under the law, unions and employers have a legal obligation under the Code to accommodate disabled persons, short of an undue hardship.

In my opinion, your recent layoff for shortage of work appears to be a Trojan horse for the employer's anticipated argument of excessive innocent absenteeism. However, your absences need to be reviewed within the context of the arbitral authorities and Human Rights decisions regarding the *threshold or standard* for what constitutes tolerable disability related absences and whether this constitutes an undue hardship within the context of your employment with a large electrical contractor that employs hundreds of electricians.

In my opinion, the union should file a grievance that the employer discriminated against a disabled employee, and knowingly breached the Duty to Accommodate a disabled worker.

The union should investigate and ascertain the employer's position in terminating your employment and not accommodating your absences (innocent absenteeism) when you are absent because of epilepsy sequela.

The union needs to investigate and ascertain the employer's position whether they are claiming an undue hardship, because you are absent approximately 20-24 days per year because of epilepsy sequela.

As a courtesy, I undertook to summarize the issues in dispute and have referred your file to Business Manager Lee Caprio, and Ticha Albino, the Local 353 Human Rights Rep.

My involvement was strictly to gather the facts and develop an Action Plan that may assist the union in determining what role, if any, the union can play in your recent layoff from OZZ Electric.



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Finally, I have attached an addendum summarizing the case law regarding non-compensable pre-existing conditions (i.e., seizures or syncope episodes) that may cause a worker to have an accident in the course of employment. This analysis is important because as part of the undue hardship defense, an employer can rely on insurance costs to rebut the duty to accommodate. Insurance costs are one of several factors to consider whether the duty to accommodate is an undue hardship. In my opinion, if you suffered a seizure at work that lead to an accident and injuries, the employer would, if the claim was allowed, likely receive 100% Second Injury Cost Relief (SIEF). This would blunt the employer's contention that insurance costs are an undue financial hardship. There are many moving parts to whether workers who suffer a non-compensable seizure at work have entitlement to a work injuries, however, the analysis is the framework how a seizure related claims may be adjudicated.

Subject to the generality of the foregoing my opinion is offered without prejudice. I also reserve the right to amend my position upon receipt of additional information that further informs my understanding of the members claim.

Fraternally yours, ***not thoroughly proofread***

Gary Majesky
Worker's Compensation Legal Counsel, IBEW Local 353
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GM/jb

Addendum Case Law – Pre-existing Non-Compensable Condition Causes Accident

A similar issue was addressed in *Decision No. 228/14*. That appeal involved a worker who had injured his left knee at work and the employer requested 100% SIEF relief, taking the position that the only possible cause of the tendon rupture was the worker's pre-existing developmental/congenital condition. In *Decision No. 228/14* the Vice-Chair noted:

I agree with the reasoning of the Vice-Chair in *Decision No. 526/08* and accept that 100% SIEF relief may be granted when it is established that the pre-existing condition "precipitates or triggers the injury". The example given in Board policy is that of a worker who sustains injuries after falling as the result of an epileptic seizure. The Vice Chair in *Decision No. 228/14* granted the employer's request for 100% SIEF relief noting:

[27] As indicated above, the facts in the current appeal are very similar to those in *Decision No. 211/1*. Reviewing the mechanics of the incident, there is no suggestion that the worker was involved in any traumatic event; rather, his left leg "buckled" as he was descending a ladder. As the worker acknowledged in Memo #5, he did not trip, slip nor was there any other external or intervening factor which led to his leg buckling and the subsequent fall.

[28] The Board's Dr. Kim, in his memo of June 4, 2012, confirmed, after reviewing the medical information on file, that the worker's pre-existing congenital/developmental condition of patella alta can predispose one to a patellar ligament rupture.



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[29] In my view, the facts of this case, justify the granting of 100% SIEF relief I find, on a balance of probabilities, that this prior non-work-related condition was the cause of the injury and therefore the employer is entitled to 100% SIEF relief.

[25] The employer in this appeal has the evidentiary burden of establishing its case on a balance of probabilities. The employer must establish it is more likely than not that a prior non-work-related condition was the cause of the worker's accident. There must be evidence to support that position and it cannot be based solely on speculation.

[27] On November 16, 2011 the worker sustained multiple injuries when he fell off a roof while working. Three of the co-workers who were with the worker at the time of the accident provided written statements in which they indicated, in essence, that they saw and heard nothing other than the worker rolling off the roof onto the ground. None of the witnesses saw the worker start to fall and whether he fainted or fell and hit his head becoming unconscious. The available medical evidence suggests that, at best, there is a possibility that the worker's fall may have been caused by a fainting/syncopal episode. The available evidence does not suggest the worker was ever treated for any prior seizure-related conditions. As noted above, the employer must establish its case on a balance of probabilities. In my view, the employer's position that the worker's injuries were caused by a prior non-compensable condition is primarily speculative and not established on the balance of probabilities. As such, I find that 100% SIEF relief would not be applicable.

[28] As noted in OPM Document No. 14-05-03, determining the quantum of SIEF relief to be granted in a particular case involves determining both the medical significance of a pre-existing condition and the severity of the accident. The medical significance of a pre-existing condition is to be classified as either minor, moderate or major. The policy does not define these terms and indicates only that the medical significance of a pre-existing condition "is assessed in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person". For the reasons noted above, I have concluded that the employer has failed to establish that there was a pre-existing condition which caused the worker's accident. The employer's representative did not make any submissions on the issue of whether there was a pre-existing condition which enhanced/prolonged the worker's recovery from his injuries. The extent of the worker's injuries and the period of recovery are consistent with the mechanics of the accident recognized as compensable by the Board.

In *Decision No. 1183/16*, a Panel Chaired B. Kalvin, analyzed injuries that follow a seizure or syncope episode where categorized into four groups or line of decision.

[13] There is a substantial body of Tribunal jurisprudence dealing with cases in which a worker has suffered a syncope episode in the workplace. In some instances, benefits have been claimed for the syncope or seizure condition itself, whereas in others, such as in the present case, benefits were claimed for injuries following and resulting from the loss of consciousness. The Tribunal's jurisprudence is summarized and analyzed in *Decision No. 1361/16* as follows:

Tribunal jurisprudence

There are several Tribunal decisions that have considered entitlement for injuries that follow after seizure or syncope (fainting) episode. I have categorized these decisions into four groups.

(a) Work-related seizure or syncope episode

Some Tribunal decisions, upon consideration of the evidence, conclude that the seizure or syncope episode was, on a balance of probabilities, a result of a work-related injuring process (such as

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exposure to chemicals). In these cases, both the seizure / syncope and ensuing injuries are held to be compensable (see for example *Decision Nos. 336/06, 347/07, 2348/14, and 1955/15*). In these cases, it is generally considered that the seizure / syncope episode is a compensable chance event caused by work-related factors.

(b) Application of the presumption

In other cases, the cause for the seizure or syncope episode remains unknown. In some of these cases, Panels and Vice-Chairs apply the statutory presumption (section 13(2) of the WSIA) which provides that where the accident occurs in the course of the worker's employment, it is presumed to have arisen out of the employment. Where there is no evidence regarding the cause of a worker's seizure to rebut the section 13(2) presumption, the presumption is applied and a finding is made that the worker has entitlement for the injuries flowing from the accident (see for example *Decision Nos. 1683/13, 418/09 and 413/07*). Mr. Barnes submits that the facts of the current case fall into this category because no definitive diagnosis explaining the cause of the worker's seizure / syncope episode has been identified.

(c) Entitlement where the seizure or syncope is unrelated to employment

Alternatively, Mr. Barnes submits that the facts of this case fall into another category of Tribunal decisions wherein the cause of a worker's seizure / syncope episode is found to be unrelated to work but entitlement to injuries sustained following the episode are compensable. In *Decision No. 366/14*, the Panel found that while it was more likely than not that the worker's pre-existing non-compensable health condition caused his fall from a ladder at work, that finding did not preclude initial entitlement. The Panel found that a worker is not disentitled to benefits even if it is shown that a non-compensable pre-existing condition caused or contributed to the injury. The Panel found that the issue is whether the workplace made a significant contribution to the accident. In the case before them, the Panel found that the fact that the worker was on a ladder for work-related purposes at the time of the syncope episode played a role in the injuries he sustained.

His injuries would not have been as severe had he not fallen from a ladder. The Panel found that Tribunal case law supports a conclusion that workers are entitled to benefits for injuries arising from such accidents even though they are not entitled to benefits for the underlying condition. In *Decision No. 1814/05*, a worker on a scoop tram fainted and suffered facial injuries when he struck his face on a rock as he fell to the ground. The Panel granted entitlement for the facial injury because the seriousness of the injury was due to the fact that the fall occurred on a rock.

(d) No entitlement

Finally, in the fourth category of decisions, entitlement for injuries following a seizure syncope episode is denied where the seizure / syncope is not work-related and there is no "added peril" in the workplace. *Decision Nos. 464/11 and 2538/11* denied entitlement for spontaneous falls in the workplace caused by a seizure unrelated to the employment. In these cases it was held that there was no "added peril" such as the operation of heavy machinery or a fall from a height to make the injuries work-related.

Decision No. 178/09 also questioned some of the Tribunal jurisprudence on fainting. It found that the application of the s. 13(2) presumption was troubling because it contrasted with how the Tribunal assesses other injuries in which the cause is not easily identified. It held that some cases seem to treat fainting as a separate injury as opposed to a symptom of an injury. *Decision No. 178/09* noted that in accordance with the WSIA, a worker must establish that he or she has a personal injury by

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accident and that the injury by accident arose out of and in the course of employment. The Panel opined that a non-work-related fainting episode causing an accident takes a worker out of the employment context. Fainting in itself is not a chance event. Nevertheless, based on the facts of that case, the Panel granted entitlement for the worker's injuries caused in a truck roll-over because there was another incident after the worker began feeling faint. The worker started feeling unwell and as a result attempted to stop on the highway shoulder. In the midst of his attempt to stop the truck, the ground underneath the truck collapsed, which constituted a chance event.

With respect, I disagree with the applicant's submission that the presumption applies in this case because there is no definitive medical diagnosis to explain the cause of the worker's seizure / syncope episode. While there is no definitive medical explanation, the standard of proof in workers' compensation cases is the balance of probabilities. A definitive diagnosis is not necessary to rebut the presumption. In this respect, I agree with the comments of *Decision No. 178/09* that the presumption should not be applied just because the cause of a seizure / syncope episode is not easily identified. With the presumption, the question becomes whether it has been shown, on the balance of probabilities, that the worker's seizure did not arise out of his employment. The presumption may be rebutted based on evidence that satisfies the balance of probabilities. The evidence to rebut the presumption does not have to be "definitive."

In the facts before me, there is a persuasive opinion from a specialist in occupational medicine, Dr. Razavi, that the worker probably had a complex partial seizure that may be related to cerebrovascular disease. His opinion references various medical investigations. There is also no evidence of any work-related cause for the worker's seizure. In my view, Dr. Razavi's opinion relating the worker's seizure to cerebrovascular disease is sufficient to rebut the presumption. On the balance of probabilities, the seizure the worker experienced on February 12, 2014 did not arise out of his employment.

I find, however, that the facts of this case fall into the third group of cases described above. While the worker's seizure was not related to his employment and the worker has no entitlement for his seizure disorder, the physical injuries arising out of his motor vehicle accident are compensable. In this case, the worker suffered his seizure during the course of his regular duties while operating a tractor trailer on the highway. In essence, the operation of a tractor trailer on the highway was an employment-related "added peril." The extent of the worker's injuries was causally related to the work environment. As noted by Mr. Barnes, the chance event in this case can be described as the multiple collisions that the worker had with inanimate objects before his truck came to a stop on the side of the highway.

I appreciate the concerns expressed in *Decision No. 178/09* regarding the application of the presumption in fainting cases and treating fainting as a separate injury as opposed to a symptom of an injury. I agree that care should be exercised in the application of the presumption, which, as held earlier, does not require definitive proof that the accident did not arise out of employment. The standard of proof in rebutting the presumption is the balance of probabilities. Nevertheless, I am persuaded that the majority of Tribunal decisions have found that entitlement for injuries flowing from a seizure / syncope episode may still be granted even where the seizure / syncope episode is not employment-related *if* there is an "added peril" in the workplace. Entitlement may be granted for such injuries if the employment significantly contributed to such injuries when the seizure / syncope episode occurred.

[15] We agree with and adopt the approach set out in *Decision No. 1361/13*. We find that the facts of the present case fall into category "c" set out in that decision, namely, where the seizure or syncope is unrelated to employment. In such circumstances, while presumption that the seizure or

**RE: Member Diagnosed, Idiopathic Generalized Epilepsy (age of onset, early 20's)
Layoff OZZ Electric, Duty to Accommodate Disability
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syncope arose out of employment is rebutted, and seizure itself will not be a compensable condition, other injuries sustained in an ensuing accident will be compensable if the evidence shows that the worker's duties amounted to an "added peril." In the present case, the fact that the worker was driving a forklift during the course of his employment when the seizure and accident occurred is sufficient, in our view, to satisfy the requirement that there be an element of added peril related to the claimant's duties at work. Accordingly, we find that the worker is entitled to benefits for injuries he sustained in the accident at work on July 22, 2013.

CASE LAW ON COMMON DISPUTED ISSUES & MAJESKY OPINION LETTERS



When WSIB Adjudicates Members Claims After A Layoff, They Do Not Understand the Union Hiring Hall Process, When Members Seek Loss of Earnings Benefits

Tribunal Case Law – Hiring Hall

In *Decision No. 669/21*, Vice-Chair I. MacKenzie in reviewing the Board's temporary work disruption policy addressed how a union member who puts their name on the IBEW Local 353 hiring hall list constitutes evidence of alternate employment.

The worker is also claiming entitlement under OPM Document No. 15-06-02, "Entitlement Following Temporary Work Disruptions". This policy provides for the payment of LOE benefits if a work-related injury impacts the worker's ability to earn income through new employment. The WSIB may pay additional LOE benefits when both of the following criteria are met:

- Evidence that the worker would seek employment to restore his loss of earning during a temporary work disruption, if he had not been injured; and
- the work-related injury impacts the worker's ability to earn income through new employment.

In determining the first criteria, the Policy requires looking at the context of layoffs in the worker's industry. In the worker's industry, when a worker is laid off he or she puts his or her name on a union hiring hall list for alternate employment. I find that this is evidence to support that but for the work injury the worker would have sought employment. I now turn to the second criteria of whether the worker's work injury impacted his ability to earn income through new employment.

...

The worker's representative submitted that, in the absence of suitable work, the worker's functional restrictions adversely impacted his employability as an electrician. He submitted that therefore the worker's loss of earnings is connected to his compensable knee injury. He submitted that the LOE benefits should continue until the worker returned to work. He stated that this date was unknown, but could be determined by looking at the employer's records. The representative referred me to *Decision No. 2392/17*.

In *Decision No. 2392/17*, the worker had not put his name on the hiring hall list. The Panel concluded:

In our opinion, had the worker presented himself to his Hiring Hall as requiring employment with those restrictions, it is highly unlikely that any employer would have been prepared to employ him, even on a short-term basis. This is particularly so since, in the worker's employment field, short-term contracts are not unusual. In our view, the worker's situation, from May 30, 2013 to August 13, 2014, falls squarely within the parameters of the following statement from the Board policy:

In practical terms, these workers could not be expected to conduct a job search, and the likelihood of another employer hiring them with these clinical restrictions is low.

In *Decision No. 1867/19*, Vice-Chair P. Allen noted that the Board's Work Disruption does not address the unique hiring practices of trade unions that have a hiring hall:

The work disruption policies do not specifically refer to the circumstances surrounding employment practices through a trade union; however, noting the intent of the hiring practice through a trade union, which involves the temporary layoff of tradespersons between work projects and during work shortages ... In accordance with OPM Document No. 15-06-02, I find that the worker is entitled to full LOE benefits from November 30, 2016 until the date of his surgery on March 26, 2017 for the reasons outlined below:

- **General Labour Market:** The first criterion in OPM Document No. 15-06-02 that decision makers must consider is whether there is evidence that a worker would have sought new employment in the general labour market subsequent to a temporary layoff. The policy states that, in order to make this determination, decision makers should consider whether a worker sought alternate employment during past layoffs. During the hearing the worker testified under oath that he had been laid-off roughly two times in the five years prior to the compensable accident and that on each occasion he sought alternate employment through the union and he simultaneously applied for EI benefits as he was uncertain how long the layoff would last. The worker also testified that this was his regular practice during the 16 years he was a member of the union. Finally, I note that the worker testified that this was the common practice of other members of the same union to apply for EI benefits while also seeking alternate employment through the union. On this basis I find that the worker has met the first criterion under OPM Document 15-06-02.

I should add that I have considered the ARO decision and relied on the January 5, 2017 Memorandum of the Case Manager. This Memorandum advised that the worker typically applied for EI benefits during temporary layoffs and did not seek alternate employment during temporary layoffs. However, I note that I had the benefit of the worker's testimony under oath in which he testified that he typically sought employment through the union and simultaneously applied for EI benefits, particularly in cases where the temporary layoff was going to be longer such as during winter months when work was scarce. I prefer the worker's testimony under oath as compared with a Memorandum summarizing a conversation with the worker as I am unable to determine the context of the discussions that led to the conclusions and statements in the Memorandum.

In *Decision No. 614/17*, a Tribunal Panel B. Burns, B. Davis, and C. Salama, reviewed the unique 50/50 Name Hire provisions of IBEW Local 353, a practice that allows employers to hire one name off the list, and then hire another worker regardless of their position on the hiring hall list:

Shortly after the employer closed, another company took over the employer's projects and offered to hire all the electricians. The company wrote on November 11, 2015, stating that it intended to name-hire the worker as a journeyman electrician, as well as the other electricians who had been working for the employer, starting the next day. Name-hiring is a process where workers are not placed at the bottom of the union hiring hall list but, rather, are hired directly to the company, out of hiring hall order. The company required the agreement of the union to name-hire the electricians.

The worker did not start working for the company until November 23. The Board found that the worker had been name-hired on November 11 but had been unable to start working due to operational issues. However, the Panel found that the worker had not been name-hired on November 11, because it did not have authority to do so at that time. Therefore, it was not clear that the worker had obtained new employment until he actually started working on November 23.

The new company wrote a letter dated November 11, 2015 which stated it intended to offer the worker a position as a journeyman electrician. We find this letter represents the new company's intention, but was not a valid offer of employment or a "name hire." Given the position of journeyman electrician is in the bargaining unit, the new company was not entitled to directly offer the worker a position. It was limited to "name hiring" only up to 50% of the laid off electricians. The new company's letter of November 11, 2015 indicated it wished to "name hire" all four electricians who had worked for the employer, which it could only do with the agreement of the union. There is no evidence in the file to indicate when the actual agreement between the union and the new company to "name hire" 100% of the required electricians

In *Decision 2095/04*, a Tribunal Panel of R. Hartman, B. Wheeler, and A. Grande, commented that it is inherently difficult to apply the ESRTW policy in the context of hiring halls or freelance work of short

duration. In this case, the employer offered the worker, and others, work on another project at a different location after July 28. However, this was not modified work that was accommodated to the worker's restrictions. Rather, it was essentially a new job at another project with the accident employer, which was offered outside the hiring hall context.

While each case involving hiring halls will have its particular facts, the Panel comments from the facts before it that there is an inherent difficulty in applying the letter of the ESRTW policy in the context of hiring halls or freelance work of short duration of the kind illustrated here. The employment was more or less for a fixed term for the duration of a project. The testimony from the worker, F, Z, and C was clear that while either could end the arrangement earlier, when the project was completed, that was the end of that arrangement. Either could enter into new arrangements for subsequent projects if they wished. The difficulties inherent in applying ESRTW obligations in the construction industry appears to have been recognized by the legislative provisions of section 40(3).

In *Decision 1129/02*, a Tribunal Panel of G. Weir, B. Wheeler, and D. Beattie addressed the issue of the appropriate time for a worker to restrict the job search to the union hiring hall, noting the Collective Bargaining Agreement, as well as the IBEW Constitution, prohibits members from performing electrical work for employers who are not signatory to the collective agreement, or non-union. The Panel also commented on the Human Resource Development Canada (EI) directive in effect in the year 2000, building trades unions were exempted from job search outside the hiring hall while collecting EI benefits. The federal government changed this requirement to a more flexible exemption "for a reasonable period of time."

The worker's representative further submitted that it was reasonable and appropriate for the worker to restrict his active job search to the Local rules of IBEW 353, which would not allow the worker to hold trade union status while working on non-union jobs. If he did so, the worker would lose the right to his benefits and pension. It was also noted that approximately 70% of the electrical contractor work was in the unionized sector and was fully available to the worker. Furthermore, the worker was entitled to make cold calls to any non-union company he wished so long as the work was not strictly that of an electrician.

The worker's representative provided post-hearing materials which confirmed that the IBEW held a 100% hiring hall process until 2000, and that the agreements in place at the time prohibited union members from working at electrical construction work for anyone who was not party to the collective agreements.

It was also noted that Human Resources Development Canada also exempted building trades from traditional job search requirements for purposes of Employment Insurance because it was recognized that the normal and regular method of obtaining work was through the hiring hall.

CASE LAW ON COMMON DISPUTED ISSUES & MAJESKY OPINION LETTERS



IBEW 353 Hiring Hall Process, No Seniority Under CBA, No Severance Under ESA, Tribunal Hiring Hall Case Law

The union (IBEW Local Union 353) wishes to clarify that our membership database used in the union hiring hall codes the following regarding a member's status, however, there are other codes for maternity leave etcetera:

- Code 9994, Short Term Disability
- Code 9995, Long Term Disability
- Code 9996, Workers Compensation
- Code 9997, Ill & Injured
- Code 9998, Out-of-Work

Note - For the past 2 years IBEW Local 353 has been developing a new union membership data base and is currently transitioning to a new security enhanced IT infrastructure.

Union Has Exclusive Jurisdiction Over Hiring Hall

It is important to bear in mind that the union, not signatory contractors, has exclusive jurisdiction over the hiring hall and no member can obtain employment without going through the Hiring Hall. Nor can contractors skirt the union hiring hall.

Some construction unions, like Ironworkers Local 721 and Plumbers UA Local 46, have 100% name hire which allows their members to solicit their own work or their contractors to hire any union member they want.

IBEW 353 does not have 100% name hire because we believe it is an insidious practice, and prejudices members who are safety oriented, and adhere to labour standards, and are more easily marginalized and laid off. There is also a greater propensity for claims avoidance behaviour when the union does not control the hiring hall process.

No Seniority or Service Under the Collective Bargaining Agreement

Under the CBA there is no seniority or service provision as those terms are traditionally defined in most collective agreements. That means a Contractor can choose to layoff an electrician with 20-years' service, while keeping employed a recently hired electrician, or conversely, and injured worker. Furthermore, the Contractor is only required to provide the worker with 1-hours' notice at the time of layoff.

Another important detail, IBEW 353 members are not entitled to termination or severance pay under the *Employment Standards Act*. This authority is found in Ontario Regulation 288/01 where a construction employee is not entitled to termination pay. The severance pay exemptions are contained in section 9, which describes the employees who are not entitled to severance pay.

Union Hiring Hall – 50/50 Name Hire & Layoff Provisions of CBA

For the record, electricians employed under the Collective Bargaining Agreement, as well as signatory contractors to the CBA, between the International Brotherhood of Electrical Workers (IBEW) and the Electrical Contractors Association of Ontario (ECAO), are well aware of the following provisions.

Signatory contractors, including Black & McDonald, have the legal ability to name hire electrical workers under Section 7, of the Principal Agreement. Section 7 codifies the 50/50 name hire provision. This provision allows electricians to be name hired by a contractor regardless of their position on the out-of-work list. Section 700(a) states:

- A. The Contactor agrees to name hire and employ only members of the International Brotherhood of Electrical Workers on all electrical work. When hiring through the local union, the Contractor shall be entitled to name hire up to fifty (50) percent of the IBEW members, including Foreman...

Section 700(b) states:

- A. The name hired member must have been on the out of work list for two (2) calendar weeks immediately prior to hiring. This two (2) week condition does not apply to Foremen.

With respect to layoffs, Section 9 (“902”) of the CBA governs layoffs:

903 Employees being laid off shall receive a minimum of one (1) hours’ notice with pay. The Employee shall be allowed to leave the job at the time of notification ...

ESA - Hiring Hall Workers Not Entitled to Severance / Termination Pay

IBEW 353 members are not entitled to severance pay pursuant to the *Employment Standards Act, 2000*. Under Ontario Regulation 288/01, a construction employee is not entitled to termination pay. A construction employee is defined as having “the same meaning as in Ontario Regulation 285/01.” The ESA is clear and unambiguous that construction workers from a Hiring Hall are not entitled to severance and termination pay. In *Jacobs Catalytic Ltd. vs. LIUNA Local 1089*, arbitrator Albertyn ruled:

In an industrial or commercial establishment, the Grievors would have been entitled to termination and severance pay, some financial recognition of their very long service. In construction, where high mobility is the norm, where employees work effectively out of the union hiring hall rather than for any particular employer, where they work on projects which

have a specific limited duration, and where continuous employment is far from the norm, severance pay is generally not paid, nor anticipated. That is why, in the *Employment Standards Act, 2000*, there is a specific exemption from the payment of severance pay and termination pay in the construction industry. This case is unusual in that the Grievors' employment is from a construction union hiring hall, ostensibly in the construction industry, with the rules which apply in that industry, but with a high level of employment stability, more akin to what one would experience in an industrial establishment and under a different collective agreement. I therefore understand their sense of outrage after 25 and 30 years of loyal and regular work to be told they were to leave later that same day, and then to leave without any compensation for the loss of their jobs.

Tribunal Case Law – Hiring Hall

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- the work-related injury impacts the worker's ability to earn income through new employment.

In determining the first criteria, the Policy requires looking at the context of layoffs in the worker's industry. In the worker's industry, when a worker is laid off he or she puts his or her name on a union hiring hall list for alternate employment. I find that this is evidence to support that but for the work injury the worker would have sought employment. I now turn to the second criteria of whether the worker's work injury impacted his ability to earn income through new employment.

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The worker's representative submitted that, in the absence of suitable work, the worker's functional restrictions adversely impacted his employability as an electrician. He submitted that therefore the worker's loss of earnings is connected to his compensable knee injury. He submitted that the LOE benefits should continue until the worker returned to work. He stated that this date was unknown, but could be determined by looking at the employer's records. The representative referred me to *Decision No. 2392/17*.

In *Decision No. 2392/17*, the worker had not put his name on the hiring hall list. The Panel concluded:

In our opinion, had the worker presented himself to his Hiring Hall as requiring employment with those restrictions, it is highly unlikely that any employer would have been prepared to employ him, even on a short-term basis. This is particularly so since, in the worker's employment field, short-term contracts are not unusual. In our view, the worker's situation, from May 30, 2015 to August 13, 2014, falls squarely within the parameters of the following statement from the Board policy:

In practical terms, these workers could not be expected to conduct a job search, and the likelihood of another employer hiring them with these clinical restrictions is low.

In *Decision No. 1867/19*, Vice-Chair P. Allen noted that the Board's Work Disruption does not address the unique hiring practices of trade unions that have a hiring hall:

The work disruption policies do not specifically refer to the circumstances surrounding employment practices through a trade union; however, noting the intent of the hiring practice through a trade union, which involves the temporary layoff of tradespersons between work projects and during work shortages ... In accordance with OPM Document No. 15-06-02, I find that the worker is entitled to full LOE benefits from November 30, 2016 until the date of his surgery on March 26, 2017 for the reasons outlined below:

- **General Labour Market:** The first criterion in OPM Document No. 15-06-02 that decision makers must consider is whether there is evidence that a worker would have sought new employment in the general labour market subsequent to a temporary layoff. The policy states that, in order to make this determination, decision makers should consider whether a worker sought alternate employment during past layoffs. During the hearing the worker testified under oath that he had been laid-off roughly two times in the five years prior to the compensable accident and that on each occasion he sought alternate employment through the union and he simultaneously applied for EI benefits as he was uncertain how long the layoff would last. The worker also testified that this was his regular practice during the 16 years he was a member of the union. Finally, I note that the worker testified that this was the common practice of other members of the same union to apply for EI benefits while also seeking alternate employment through the union. On this basis I find that the worker has met the first criterion under OPM Document 15-06-02.

I should add that I have considered the ARO decision and relied on the January 5, 2017 Memorandum of the Case Manager. This Memorandum advised that the worker typically applied for EI benefits during temporary layoffs and did not seek alternate employment during temporary layoffs. However, I note that I had the benefit of the worker's testimony under oath in which he testified that he typically sought employment through the union and simultaneously applied for EI benefits, particularly in cases where the temporary layoff was going to be longer such as during winter months when work was scarce. I prefer the worker's testimony under oath as compared with a Memorandum summarizing a conversation with the worker as I am unable to determine the context of the discussions that led to the conclusions and statements in the Memorandum.

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Shortly after the employer closed, another company took over the employer's projects and offered to hire all the electricians. The company wrote on November 11, 2015, stating that it intended to name-hire the worker as a journeyman electrician, as well as the other electricians who had been working for the employer, starting the next day. Name-hiring is a process where workers are not placed at the bottom of the union hiring hall list but, rather, are hired directly to the company, out of hiring hall order. The company required the agreement of the union to name-hire the electricians.

The worker did not start working for the company until November 23. The Board found that the worker had been name-hired on November 11 but had been unable to start working due to operational issues. However, the Panel found that the worker had not been name-hired on November 11, because it did not have authority to do so at that time. Therefore, it was not clear that the worker had obtained new employment until he actually started working on November 23.

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In *Decision 2095/04*, a Tribunal Panel of R. Hartman, B. Wheeler, and A. Grande, commented that it is inherently difficult to apply the ESRTW policy in the context of hiring halls or freelance work of short duration. In this case, the employer offered the worker, and others, work on another project at a different location after July 28. However, this was not modified work that was accommodated to the worker's restrictions. Rather, it was essentially a new job at another project with the accident employer, which was offered outside the hiring hall context.

While each case involving hiring halls will have its particular facts, the Panel comments from the facts before it that there is an inherent difficulty in applying the letter of the ESRTW policy in the context of hiring halls or freelance work of short duration of the kind illustrated here. The employment was more or less for a fixed term for the duration of a project. The testimony from the worker, F, Z, and C was clear that while either could end the arrangement earlier, when the project was completed, that was the end of that arrangement. Either could enter into new arrangements for subsequent projects if they wished. The difficulties inherent

in applying ESRTW obligations in the construction industry appears to have been recognized by the legislative provisions of section 40(3).

In *Decision 1129/02*, a Tribunal Panel of G. Weir, B. Wheeler, and D. Beattie addressed the issue of the appropriate time for a worker to restrict the job search to the union hiring hall, noting the Collective Bargaining Agreement, as well as the IBEW Constitution, prohibits members from performing electrical work for employers who are not signatory to the collective agreement, or non-union. The Panel also commented on the Human Resource Development Canada (EI) directive in effect in the year 2000, building trades unions were exempted from job search outside the hiring hall while collecting EI benefits. The federal government changed this requirement to a more flexible exemption “for a reasonable period of time.”

The worker’s representative further submitted that it was reasonable and appropriate for the worker to restrict his active job search to the Local rules of IBEW 353, which would not allow the worker to hold trade union status while working on non-union jobs. If he did so, the worker would lose the right to his benefits and pension. It was also noted that approximately 70% of the electrical contractor work was in the unionized sector and was fully available to the worker. Furthermore, the worker was entitled to make cold calls to any non-union company he wished so long as the work was not strictly that of an electrician.

The worker’s representative provided post-hearing materials which confirmed that the IBEW held a 100% hiring hall process until 2000, and that the agreements in place at the time prohibited union members from working at electrical construction work for anyone who was not party to the collective agreements.

It was also noted that Human Resources Development Canada also exempted building trades from traditional job search requirements for purposes of Employment Insurance because it was recognized that the normal and regular method of obtaining work was through the hiring hall.

CASE LAW ON COMMON DISPUTED ISSUES & MAJESKY OPINION LETTERS



June 29, 2022

Rudy Lucchesi
Organizer/Business Representative
IBEW, Local Union 353

Dear Brother Rudy Lucchesi,

**RE: Religious Accommodation (Turban) vs. Health & Safety (Hard Hat)
Majesky Opinion & Discussion Paper**

In response to your inquiry on June 29th, regarding a Sikh member declining to wear a hard hat and asserting his right to wear a turban and seeking a religious accommodation under the Human Rights Code. This is not a straightforward situation.

It seems according to recent court cases more and more workers are being permitted to ditch hard hats and helmets in favour of religious headgear. An overarching question, who pays when these workers sustain an injury?

Occupational Health & Safety Act Mandates Hard Hats

In Ontario, the requirement for head protection is specified in the construction regulation (O. Reg. 213/91, *Construction Projects*, under the *Occupational Health & Safety Act*). Under this regulation, hard hats are mandatory for all construction workers on the job in Ontario. The hard hat must protect the wearer's head against impact and against small flying or falling objects and must be able to withstand an electrical contact equal to 20,000 volts phase to ground. At the present time, the Ministry of Labour (MOL) also sets the standard of hard hat for compliance with the regulation.

Employers also codify their statutory responsibilities and obligations under the law by adopting health and safety policies that align with their responsibilities under the *Occupational Health & Safety Act* and various statutes.

Turbans versus Motorcycle Helmets

There have been legislative changes in response to religious-freedom legal challenges to motorcycle helmet laws in British Columbia and Manitoba which have been upheld – and turbans (in most cases) can stay on.

In 2018 premier Doug Ford announced Ontario would introduce legislation that would exempt turban-wearing Sikhs from wearing helmets while riding a motorcycle. In October 2018, Ontario joined Alberta, B.C. and Manitoba allowing turban wearing Sikh's to ride motorcycles without helmets.

**RE: Religious Accommodation (Turban) vs. Health & Safety (Hard Hat)
Majesky Opinion & Discussion Paper**

The Ontario government granted the exemption in recognition of Sikh motorcycle riders' civil rights and religious expression.

Reasonable Accommodation Must Be Considered

Bro. Lucchesi, a review of the human rights case law supports the duty to reasonable accommodation to the point of an undue hardship. That means, the employer, and the worker, cannot adopt a perfunctory position that wearing a hard hat is the law. Obey now, or you cannot work.

In my opinion, there must be a conversation between the workplace parties, including the employer, union, and worker whether there is a way to make a religious accommodation.

Take the case of a construction site in Ontario, where a turban-wearing security guard said he could not trade his turban for a hard hat. Under current health and safety laws, Canada-wide, every person on a construction job site is *required* to wear a hard hat.

Nevertheless, more and more workers are refusing to wear hard hats for religious reasons. Faced with this situation, employers, and unions, must try, and honour the term "Reasonable Accommodation." This means they must attempt to reconcile their workers' religious requirements with the other laws they are required to follow.

The union should also play an active role in accommodation disputes and should not contract out of its responsibility to represent its member(s), while being mindful of not automatically adopting the employer's health and safety policy regarding hard hats.

Take the case of a turban-wearing security guard that was before the Human Rights Tribunal of Ontario because chances are workers will win their cases as many human rights decisions have superseded other laws in recent years.

But this was not the case in 1985. That year, the Supreme Court of Canada ruled that a Sikh railway worker was required to wear a hard hat on the job.

But since then, the legal community has taken a harder look at the real implications of exempting people from helmet or hard hat laws. A Chief Justice, in a written ruling, noted that such exemptions from hard hat laws expose workers to negligible risk, there is no cost to employers and, most importantly, no risk to anyone else except the person claiming the right to not wear the hard hat.

Right to Sue for Workplace Injuries Taken Away – Historic Bargain

The rationale that wearing a hard hat doesn't jeopardize anyone else's safety is debatable. However, a worker's decision to discard a hard hat will exclude them from suing anyone in the case of injuries sustained because of that decision, but Ontario workers do not have the right to sue for workplace injuries due to the "historic bargain."

Workers and employers are captured by what is known as the "historic bargain" which has been the cornerstone of the Ontario workers compensation no-fault system since its introduction in 1915. For over 100 years, workers gave up the right to sue for mandatory no fault coverage for industrial accidents.

**RE: Religious Accommodation (Turban) vs. Health & Safety (Hard Hat)
Majesky Opinion & Discussion Paper**

The cost to the rest of society is another matter. The Ontario judge in the recent helmetless rider case who upheld the ticket noted that the cost of treating devastating brain injuries is enormous. So, too, is the burden on family members who lose a loved one – or have them incapacitated – due to a head injury.

Do Employees Who Wear Religious Headwear Have to Use Hard Hats?

Safety comes before religion, but the workplace should not force workers to choose between them.

Under the OHSA, employers must ensure that employees use PPE necessary to protect them from workplace hazards. Under the human rights code, employers must accommodate employees' religious beliefs to the point of undue hardship. These obligations come into conflict when an employee objects to using PPE on religious grounds, for example, when a worker of the Sikh religion won't wear a hard hat.

Forcing the worker to remove his turban and wear the PPE could result in a Human Right complaint for failure to accommodate; but letting him work without adequate head protection would endanger the worker and expose a company to risk of OHSA liability.

When Laws Collide (Human Rights vs. Occupational Health & Safety)

Employers must engage in a balancing act to resolve these dilemmas and ensure compliance with both laws. The line between religious freedom and occupational health and safety can be difficult to reconcile.

Quebec Court Slapped Down Religious Exemption

Quebec is following a different path. A Quebec Court ruled that a religious exemption did not trump the requirement to wear PPE (hard hat), which is contrasted in British Columbia where the province accommodates a religious exemption from wearing PPE (hard hat)

When these situations arise, human rights legislation is pitted against occupational health and safety legislation and employers that accommodate a worker's religious request may be in contravention of health and safety requirements. So, what do you do?

It's clear in human rights legislation that discriminating based on a person's religious beliefs is prohibited. It is also clear in occupational health and safety legislation that employers have a primary duty to provide information, instruction and supervision and take reasonable precautions to protect the health and safety of the worker. Ontario law also requires the use of hard hats on construction sites.

Put simply, employers have the duty of balancing the effort between keeping the worker safe and accommodating religious requests.

Supreme Court of Canada, Electrician vs Canadian National Railway

The primary topic that has received the most attention over the years deals specifically with hard hats and turbans. This has been discussed and evaluated since 1985 in the *Bhinder vs. Canadian National Railway* case where Mr. Bhinder worked as a maintenance electrician in the coach yard for four years. CN Rail changed policy and announced that everyone who worked in the yard would have to wear a hard hat. As a member of the Sikh religion, Mr. Bhinder was forbidden to wear anything over top of his turban and refused to wear the hard hat. Because of his decision, he was fired. He filed a complaint with the

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Canadian Human Rights Commission stating that he had been discriminated against based on his religious beliefs.

The Canadian Human Rights Tribunal found CN had engaged in a discriminatory practice and ordered reinstatement of Mr. Bhinder and compensation for lost wages. The Federal Court of Appeal set aside the decision and referred it back for disposition on the basis that the new rule was not discriminatory. Did the hard hat rule discriminate against Mr. Bhinder on religious grounds? Did the employer have a duty to accommodate short of undue hardship?

The answer to these questions came in December of 1985. The Supreme Court of Canada ruled that the decision to have hard hats worn was a *bona fide* occupational requirement: a rule or requirement that was made in good faith with the intention of achieving its stated business purpose and not as a means of skirting the law. In this case, it was determined that hard hats were a genuine job-related requirement, so there was no discrimination and therefore nothing to accommodate.

This decision has risen on numerous occasions since then and has been consistent when the employer can show that the job cannot be done without the requirement in place. There was a similar case in 2006 where turban-wearing Sikhs applied for an exemption to wearing hard hats and lost in arbitration. They were reassigned to an area where hard hats weren't necessary. Another case arose in 2008 when two mill workers objecting to a mandatory hard hat policy were simply reassigned to a less dangerous part of the mill. Both cases were in B.C. where members of the Sikh religion are not required to wear a helmet while riding a motorcycle. One of the most recent decisions came in 2016 where the Quebec Superior Court ruled against an application to have hard hats exempted for turban-wearing Sikhs at the Port of Montreal.

This is not to say that you don't accommodate, but there are certain factors that need to be taken into consideration. Considerations may include investigating alternative approaches that do not have a discriminatory effect. Employers must consider whether it is necessary for all employees to follow the standard for the employer to accomplish the stated objective, or if group or individual differences could be established. Where employers rely on safety standards to support undue hardship, they must be able to identify the specific hazards the individual or group may be exposed to, and they must provide convincing evidence that the safety concerns outweigh the obligations owed to an individual seeking accommodation based on religious beliefs.

Majesky Closing Thoughts

Bro. Lucchesi, I have reviewed the authorities, and an employer's overarching responsibility is to balance their obligations in upholding and enforcing spirit of the Human Rights Code and the *Occupational Health and Safety Act*. However, if the employer can establish there is a genuine health and safety need because of positional risk of injury, then health and safety prevail over religious accommodation.

I also advised that an Ontario constructor (Ellis Don), employ's Sikh's on jobsites and they wear hard hats over their turban. There has been discussion in different workplaces that Sikh's wear a smaller turban so a hart hat can be worn on top.

The union also has a responsibility to ensure our members human rights are protected in the workplace, as well as their health and safety, which is consistent with the principles and objectives set out in the IBEW Constitution.



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Please also bear in mind an Ontario workers human rights are not governed by the union's collective agreement jurisdiction, which is distinguishable from grievances. For instance, the union has exclusive jurisdiction over the grievance procedure, not the member, and consequently, the union has carriage in bringing grievances forward or declining to do so.

This is distinguishable from a member's rights under the Ontario Human Right Code, because even though the union does not have exclusive jurisdiction of its members Human Rights complaints, it should still assist its members which is consistent with the IBEW Constitution.

In *Weber v. Ontario Hydro*, the Supreme Court of Canada revisited the issue of judicial deference to labour arbitration as a forum of original jurisdiction for the resolution of disputes between organized employees and their employer. The Court denied Mr. Weber access to the courts to pursue claims against his employer based on the common law and alleged violations of the *Canadian Charter of Rights and Freedoms*. The Court adopted a model of exclusive jurisdiction for arbitration over employment disputes arising under a collective bargaining relationship which went far beyond the Court's previous calls for judicial deference and even encompassed employee claims for redress based on violation of their most fundamental individual rights under the *Charter*.

In closing, you may want to discuss this matter with Ticha Albino, the Local 353 Human Right Representative. Subject to the generality of the foregoing, my opinion is offered, without prejudice.

Respectfully submitted by, ***Not Thoroughly Proofread***

Gary Majesky
Workers Compensation Legal Counsel, IBEW Local 353
Director, LU 353 Non-Profit Center
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CASE LAW ON COMMON DISPUTED ISSUES & MAJESKY OPINION LETTERS



Thin Skull Doctrine in Workers Compensation

The applicability of the common law thin skull principle to worker's compensation was explained as follows in *Decision No. 915* at p. 136, which we say, is germane to the issue currently in dispute in this claim:

The thin-skull doctrine also applies in Workers' Compensation cases and for two reasons. One reason is that permitting compensation to be denied or adjusted because of pre-existing or predisposing personal deficiencies would very substantially reduce the nature of the protection afforded by the compensation system as compared to the Court system for reasons that would not be understandable in terms either of the historic bargain or of the wording of the legislation. The other reason is that in a compensation system injured persons become entitled to compensation because they have been engaged as workers. They have functioned as workers with any pre-existing condition they may have had. It seems wrong in principle that conditions which did not affect their employment as workers should be relied upon to deny them compensation as injured workers.

Crushed Skull versus Thin Skull

In *Decision 623/24*, the Panel also noted the difference between what may be characterized as a "thin skulled" versus "crumbling skulled" individual when analyzing legal causation, stating in part the following:

[31] In terms of the categories utilized to determine legal causation, the additional predisposition of individuals to be impaired in excess of what an average individual might be when involved in an accident is often described in terms of the individual being "thin skulled" or having a "crumbling skull". A thin skulled individual is more likely than average to become impaired as a result of an accident. In the case of an individual who is found to have a crumbling skull, the individual's predisposition to impairment is essentially inevitable prior to the accident such that the predisposition to impairment overwhelms and makes insignificant the effect of the accident.

[32] In the present appeal the Panel would characterize the worker as having pre-existing psychological concerns that made her more likely than most individuals to be psychologically injured by a traumatic event. The worker was in the Panel's view "thin skulled" with respect to her potential to develop a psychological impairment as a result of a traumatic incident.

[33] The Panel does not characterize the worker's pre-existing psychological concerns as having been significant enough, or on such an inevitable downward trajectory, such that she fell within the category of individuals who would be considered to have had a "crumbling skull" from a psychological perspective.

Was The Work Injury a Casual Factor in Symptom Onset?

An important part of a work relatedness inquiry is whether the compensable injury was a significant contributing and causal factor in the workers symptom onset, or merely the natural progression of the underlying condition? One of the leading cases that addresses this issue is *Decision No. 652/87*, 10 *W.C.A.T.R.* 75. The Panel, in that case described the issue in the following terms:

This case raises the issue of the distinction between disabling symptoms appearing as the result of the impact of employment on a pre-existing degenerative condition which symptoms may be fairly taken as reflecting a compensable exacerbation or acceleration of a pre-existing condition, and the disabling symptoms appearing as a result of the impact of employment on a pre-existing degenerative condition which symptoms may be fairly taken as merely evidence of the disabling nature of the pre-existing condition.



CASE LAW ON COMMON DISPUTED ISSUES & MAJESKY OPINION LETTERS

Knee Appeals, Pre-existing Conditions e.g., Osteoarthritis (OA) Tribunal Case Law

Decision No. 1795/12:

On the issue of a pre-existing condition, for example, *Decision No. 1354/00* outlines the principles as follows:

It is a well-established principle of compensation law that workers who sustain injuries which aggravate an underlying condition are entitled to compensation benefits for the period of acute disability, and that benefits are payable until the worker reaches his or her pre-accident condition. When the underlying condition has been asymptomatic, and there is a permanent aggravation of the underlying condition, there is no restriction on the payment of benefits. Each case must be decided on its own facts, and requires an assessment of the extent to which the pre-existing condition has been disabling before the accident, and an assessment of whether or not a recovery has taken place to the point that the worker's condition is the same as it was before the accident.

[37] This Decision was cited by the Vice-Chair in *Decision No. 482/07*, with the following comment:

[38] The above quotation and excerpts clearly indicate that, where a worker has a pre-existing, asymptomatic condition which becomes symptomatic as a result of a workplace accident, there is no limitation on the benefits to which the worker is entitled.

[43] The issue before the Panel is whether or not there is a causal relationship between the accident of October 12, 2004 and the subsequent deterioration of the worker's right knee impairment.

[44] In the majority view, this is a case where the principle of a Significant Contributing Factor as enunciated by Supreme Court of Canada Justice Major must be applied.

[45] 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, provides an overview of the authorities and sets out the following general causation principles:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw*, *supra*; see also *R. v. Pinsky* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), *aff'd* [1989] 2 S.C.R. 979.

In *Snell v. Farrell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

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.

[46] The Tribunal's decisions have recognized the common law principles of causation and adapted them to the workers' compensation/workplace insurance context. It is generally accepted that the Tribunal's "significant contribution" test is essentially the same as the "material contribution" test applied at common law.

[47] It is important to emphasize that Mr. Justice Major's criterion for Significant Contributing Factor/material contribution is any factor above the standard of "*de minimus*," that is, any factor above the trivial. In the majority view, the worker's right knee trauma, which caused obvious bruising and swelling, was not a "trivial" factor. There is no evidence before us that the worker's symptoms resulting from the accident of October 12, 2004 ever resolved.

[50] ... There is no proof that the worker's pre-existing osteoarthritis had required significant medical treatment prior to October 2004. There is also no proof that her condition was related to the accident of 1990. At the same time, it is a fact that the worker was able to work full-time at the physically strenuous activity of forklift driver and train driver, the latter job requiring her to lift, load, and unload boxes weighing 50 pounds or more on a regular basis. In our view, these tasks could not be performed with a symptomatic right knee prior to October 2004.

[55] The Panel Majority concludes that the right knee trauma sustained as a result of an accident by chance event arising out of and in the course of employment on October 12, 2004 was a significant contributing factor in the progressive deterioration of the worker's pre-existing osteoarthritis in the right knee. The worker has entitlement for ongoing impairment in the right knee, including entitlement for healthcare benefits and loss of earnings (LOE) benefits resulting from the knee replacement surgery of June 2006. The determination of any additional benefits flowing from this decision is remitted to the Board for adjudication.

Decision 2294/17

The worker in this decision was an electrician. The claim was initially denied re proof of accident. However, on appeal the claim was allowed, but Operations subsequently allowed 2 weeks of LOE benefits. The worker underwent arthroplasty on his injured knee, however, the Case Manager and ARO (2nd ARO decision), concluded the workers underlying knee pathology did not arise from in the course of employment, or a sequela of the compensable accident. A key consideration informing their decision was medical evidence that the worker was symptomatic prior to the compensable injury and had received health care. However, the Vice-Chair came to a different conclusion:

In his submissions, Mr. Johal did not dispute that there was evidence in this case that the worker had pre-existing problems with his left knee. He noted the results of an August 2, 2010 MRI which revealed the following findings:

OPINION: MR Findings reveal:

- Partial tear of anterior cruciate ligament,
- Radial tear of posterior horn of medial meniscus with Grade III meniscal signal changes in posterior horn of medial meniscus,
- Moderate osteoarthritic changes with chondral and subchondral erosions and marrow edema,
- Mild synovial collection,
- Large popliteal bursa cyst,

[20] In his testimony the worker acknowledged that he had issues with his left knee prior to 2010 and had been prescribed Arthrotec to help deal with that pain and discomfort. The review of the ARO's decision of October 26, 2015 suggests that the worker was denied entitlement beyond July 28, 2010 because the ARO was of the view that any problems the worker may have experienced with his left knee after that date were, more likely than not, related to the pre-existing non-compensable degenerative condition rather than the accident of July 14, 2010. Having had the opportunity to consider all of the evidence before me however, I find that I am led to a different conclusion.

[21] 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.

[22] In this case, unlike the ARO, I had the benefit of hearing oral testimony from the worker. In the uncontradicted testimony that he provided at this hearing, the worker indicated that while his left knee condition was symptomatic prior to July 14, 2010, there was a difference in his condition before and after the compensable accident. From 2007 to 2010 the worker experienced occasional left knee pain which he would treat with Arthrotec. For the vast majority of the time between 2007 and 2010 he was pain free and was able to continue performing not only the physically demanding duties of an electrician but also work at his other job with the food distribution company when he was laid off. After the accident on July 14, 2010 however, there was a change in the severity of the worker's left knee condition. After that date he experienced left knee pain on a constant basis and because of the limitations imposed on his ability to walk, kneel and climb, both the union and the food distribution company indicated they would not be able to provide him with any work. This is consistent with a comment from Dr. Heller in his report of February 7, 2011 in which he indicated that "I expect that with or without treatment he will be unable to return to his full climbing and kneeling activities in the long term". It is also worth noting, in my view, that it was not until after the accident in July 2010 that the issue of surgery and a total left knee replacement was raised. I find that given the worker experienced constant left knee pain up to the date of surgery, the left knee had not returned to its pre-accident state of occasional pain.

[23] Once again, there is no dispute in this case that the worker had pre-existing non-compensable degenerative conditions in his left knee. Nor is there any dispute that those conditions were periodically symptomatic prior to July 2010. That being said however, after reviewing all of the evidence before me, and in particular the uncontradicted testimony provided by the worker, I find that the accident of July 14, 2010 aggravated those pre-existing non-compensable degenerative conditions and that by July 28, 2010 the worker's left knee had not returned to its pre-aggravation state. That aggravation continued, at the very least, until June 22, 2011 when Dr. Heller performed the total knee replacement.

[24] The case materials include a Tribunal *Discussion Paper* entitled "Knee Conditions and Disability" (August 2013) authored by Dr. J. Cameron (orthopaedic surgeon). In the *Discussion Paper* it is noted that "a slow onset of swelling is more indicative of an injury superimposed on arthritis or a meniscal tear, with increased production of synovial fluid". In this case, the worker went home and noticed his knee was swollen. The slow onset of swelling would be consistent with a meniscal tear. The problem is also consistent with an injury superimposed on arthritis which the worker also has.

The *Discussion Paper* also notes that “in people over the age of 30-35, a meniscal tear can occur with very little injury”. Thus, the fact that the worker had a minor twist injury could be consistent with a meniscal tear.

[25] While I accept that the non-compensable degenerative conditions in the worker’s left knee likely contributed to the eventual requirement for left knee surgery, I also find, for the reasons noted above, that the accident of July 14, 2010 also made a significant contribution to the need for surgery and as such, I find the worker is entitled to the appropriate health care and loss of earnings benefits relating to that procedure.

Decision No. 2449/15

A panel granted initial entitlement to a knee injury, concluding the workers twisting injury aggravated the workers underlying osteoarthritis (OA). They also accepted the workers knee symptoms did not resolve and resulted in a permanent impairment. The Panel noted that Section 46 provides that the impairment must be the result of the injury, and Tribunal case law establishes that an impairment is the result of a workplace injury where the injury is a significant contributing factor in the development of the impairment. A significant contributing factor is one of considerable effect or importance, it need not be the sole contributing factor (see, for example, *Decision No. 280*):

[16] Dr. Bushuk, the worker’s treating orthopaedic surgeon, has provided several detailed and considered opinions regarding the worker’s ongoing left knee symptoms. His report of April 19, 2013, provides a good summary of his assessment and treatment of the worker’s left knee. In that report, Dr. Bushuk records that the worker has consistently reported continuous pain on the lateral aspect of his left knee since the December 3, 2010 workplace accident. Dr. Bushuk notes that the MRI scan of May 2011 showed some arthritic change in the medial compartment of the left knee as well as a small vertical tear of the medial meniscus. Dr. Bushuk has consistently opined, however, that in his view, the meniscal tear is likely degenerative and, in any event, is not likely the source of the worker’s pain. The meniscal tear aside, however, Dr. Bushuk is nevertheless of the opinion that the worker’s ongoing symptoms are the result of the workplace injury. Dr. Bushuk’s view is summarized in part in his April 19, 2013 report as follows:

Based on what this man advised me his knees were asymptomatic prior to his injury at work on December 3, 2010... His MRI scan of his left knee demonstrated some grade IV arthritic change involving the medial femoral condyle of his left knee. **As a result of the twisting injury to his left knee it would appear that this did flare up his symptoms related to underlying arthritis in his left knee involving the medial compartment and patellofemoral joint. This happens fairly commonly in my opinion.** The small medial meniscus tear that was a 2mm tear seen on the original MRI scan may have been caused by his twisting injury. However, in all probability it was a degenerative type of process and has been there a long time and you are now aware of it because you did an MRI scan of his knee. [emphasis added]

[17] Elsewhere in this and his other reports, Dr. Bushuk explain in more detail, based on an analysis of the clinical findings, why the meniscal tear is not likely to be related to the worker’s ongoing pain. Having explained that the meniscal tear is, in essence, a “red herring,” Dr. Bushuk states clearly that the worker’s ongoing symptoms are the result of the compensable twisting injury aggravating the worker’s previously asymptomatic underlying degenerative arthritis.

[18] As is apparent from the quoted excerpt above, Dr. Bushuk’s opinion is premised in part on the worker’s report that his left knee was asymptomatic prior to the injury. We find that this is an accurate premise. We accept the worker’s testimony that his left knee had not previously caused him any problems. There is no medical evidence from the years immediately preceding the injury that suggests any left knee treatment or lost time due to left knee symptoms.

Decision No. 2545/07

A Vice-Chair granted a workers entitlement for surgical treatment and LOE benefits. The worker was a sales manager and sustained a right knee injury when turning to lift a heavy box. A meniscal tear was initially suspected by the Family MD. The Vice-Chair concluded the worker sustained an injury to her right knee and left home early from work that day, but continued to have problems with the knee even though she returned to work. However, prior to her work injury x-rays which revealed a near collapse of the medial compartment of the right knee secondary to osteoarthritis. Physiotherapy was recommended, and if no improvement, she would be a candidate for osteotomy or a total right knee replacement. In her Analysis, the Vice-Chair concluded:

[12] The complicating factor in this case is that the worker had documented osteoarthritis in her knee prior to her October 2003 injury. There is an x-ray from August 2000, which identifies arthritic changes in her right knee. On the basis of these results, the worker was referred to Dr. Ogilvie. In his report, dated October 4, 2000, Dr. Ogilvie noted that the worker had chronic problems with her knees, with the right worse than the left, and that this had been going on for seven to eight years. Although Dr. Ogilvie indicated that if her problems progressed she may need surgery in the future, at the time he made no recommendations for any treatments or any modifications with respect to her work. There is also another x-ray, dated January 20, 2002, which indicates the worker's osteoarthritic changes in her right knee were unchanged from August 2000.

[13] I note that although the worker may have experienced some pain in her knees prior to October 2003 as a result of her arthritis, there is no evidence that the osteoarthritis interfered with her ability to function at work or in her daily life. Furthermore, the medical evidence of the worker's pre-existing condition does not indicate that the osteoarthritis was progressively increasing, such that it could be concluded that the surgery would have been required regardless of the knee injury.

Although the Board medical consultant, Dr. St. Amand, opined that the total knee replacement was not a consequence of the work injury of October 2003, this opinion appears to be based on Dr. Stephenson's report that the worker had two distinct problems: the meniscal tear and the osteoarthritis. Dr. St. Amand appears to have concluded that the meniscal tear was the only compensable aspect of the worker's condition, and that the temporal relationship of the meniscal tear was not compatible with the osteoarthritis necessitating total knee surgery.

[15] I have also considered the opinion of Dr. Lachowski, dated August 20, 2006. In arriving at this opinion, Dr. Lachowski considered the medical evidence of the worker's pre-existing osteoarthritis. Dr. Lachowski stated:

In my opinion therefore, the meniscal tear, and any compensation issues referable to a meniscal tear, are immaterial to this claim. What is important, however, is the fact that [the worker] sustained an injury to her right knee at work on October 28, 2003. That injury occurred in a knee which unquestionably had underlying and antecedent osteoarthritis. There is no question that an injury can aggravate the symptoms of osteoarthritis, resulting in increased and long-standing pain. In fact, osteoarthritic symptoms are not usually simply a gradually worsening onset of painful symptoms, but much more commonly an episodic onset of symptoms which are frequently preceded by even relatively trivial injuries according to the patient. In [the worker's] case, an injury did occur on October 28, 2003, symptoms ensued, and they never abated. The exact nature of the injury sustained will never be known and is immaterial in any case. [The worker's] symptoms persisted and worsened to the point where she required a total knee replacement.

In my opinion, [the worker] would have eventually required a total knee replacement even if she had not sustained an injury at work, as she had underlying well-documented osteoarthritis of her

right knee. The injury at work appears to have accelerated the need for knee replacement surgery, as [the worker] is quite adamant that her symptoms did not prevent her from working prior to the accident on October 28, 2003. Whether the need for knee replacement surgery was accelerated by one year or five years is impossible to determine, but it is reasonable to assume that the injury at work accelerated the need for a total knee replacement in an at-risk knee with underlying osteoarthritis.

It is, in my experience, not uncommon for a relatively trivial injury to effectively disable a patient with underlying osteoarthritis, and it is not uncommon for those symptoms to persist or worsen despite conservative treatment. An injury to an osteoarthritic knee may not recover over time like an injury to an otherwise healthy knee. It is of course the underlying osteoarthritis that is the important factor in the persistence of the symptoms.

In answer to your question therefore, I believe it is medically probable that the right knee accident of October 28, 2003 was a significant contributing factor to the surgery of September 15, 2004. It is also undeniable that the underlying osteoarthritis in [the worker's] right knee was a significant contributing factor to the surgery of September 15, 2004. I believe it is reasonable to assume that 50% of the need for surgery was contributed by the accident of October 28, 2003, and 50% of the need for surgery was contributed by the underlying osteoarthritis.

[16] In my opinion, it is quite clear that the worker's pre-existing osteoarthritis played a role in the need for a total knee replacement. Dr. Stephenson's comment that the torn meniscus was completely forgotten because of the osteoarthritis leaves no other conclusion.

[17] However, I am also of the opinion that the worker's October 2003 knee injury also was a factor in the need for surgery. I accept Dr. Lachowski's opinion that the knee injury likely aggravated the worker's osteoarthritis and accelerated the need for knee surgery. There is not just a temporal relationship between the workplace accident and the need for the surgery. When viewed in the context of the worker's broader medical history, with diagnostic testing suggesting there was no progression of the osteoarthritis and no significant functional problems prior to the accident, the continuous and progressively worse problems the worker experienced after the accident which lead to a recommendation for surgery within five months of the accident takes on causative significance. In my opinion, it supports the conclusion that the work accident was a significant contributing factor to the need for surgery.

[18] I note *Decision No. 559/91*, which was relied upon by the worker's representative. In that case, the Panel noted that if an injury aggravates and accelerates the progression of the underlying condition, then the resulting disability is a compensable one. The Panel stated that the appropriate question to ask in such a context is whether the worker would likely have required surgery at approximately the same date if he or she had not suffered the compensable aggravation. In the present case, the answer to that question is likely not. There is no evidence upon which to conclude that would have been the case.

CASE LAW ON COMMON DISPUTED ISSUES & MAJESKY OPINION LETTERS



June 29, 2022

Jeff Hussy
Treasurer/Business Representative
IBEW, Local Union 353
1377 Lawrence Avenue East
Toronto, Ontario
M3A 3J1

Dear Brother Hussey,

**RE: When Are Workers In the Course of Employment
Majesky Opinion, Review of Legislation, Policy, and Case Law**

I'm giving you credit for being a sharp young man with a bright future as a union representative. When you ask me a serious question, you are going to get a detailed legal analysis compared to the former Controller who said you start work "when you FOB in at a union building." The Controller's comment had more to do with Canada Revenue Agency rules (e.g., travel, car allowance, etc.), but not whether you are in the course of employment under the *Workplace Safety and Insurance Act*. My opinion applies to your initial question, when are union representatives in the course of employment, which also our members.

The most important consideration is you're not working for a contractor with a fixed start/finish time or job site when you commence work.

I tell my son that if dad dies in an accident regardless of the time of day or day of week (e.g., MVA), be sure they check if I'm wearing my FOB. If so, I was in the course of employment because my car is a mobile workstation. We take calls while travelling, and constantly working.

The WSIB policy whether a worker is in the course of employment involves the application of the *Time, Place, Activity* test. Given the nature of our jobs we can move into the employment sphere, and out again, several times on any given day, including weekends, or evenings.

There is settled jurisprudence that of the three criteria (time, place & activity) the most important consideration is activity. If the activity a worker is engaged in is reasonably incidental to their job, and a benefit to the employer, then a worker has re-entered the employment sphere and in the course of employment. That includes situations where the worker is not on a designated job site, not being paid or working outside the established hours of work. This analysis is typically not applicable for most electricians working in the field, except in rare situations. They are however, in the course of employment when they arrive at work, subject to the worksite boundary rule.

A good example of the boundary issue arises when a member is just outside the construction site hoarding and walking to/from the jobsite and falls, hit by a car, and suffers an injury. In those instances, they are not in the course of employment because they are not at work.

Take the case of the low-rise electrician who broke his leg exiting his company truck early one morning to fetch his lunch, wallet and drill.

**RE: When Are Workers In the Course of Employment
Majesky Opinion, Legislation, Policy, and Case Law**

In 2011, Larry Priestman called me while I was going on vacation because his son (Ken Priestman) was a paramedic in Simcoe County and suffered an injury on his day off. He was at the Elvis convention in Collingwood when a man dropped in front of him and went vital signs absent (VSA). Ken being a paramedic facilitated resuscitation efforts with two off-duty doctors. When the Simcoe County Paramedics arrived, they transferred the patient back into the control of EMS. Ironically, Priestman knew the Simcoe Country EMS crew, and had worked them in the past.

Since the EMS were short hands, Priestman integrated himself as part of the EMS crew even though it was his day off. He performed activities that he would normally perform when he was on duty. They revived the man, and Priestman assisted in carrying the stretcher down some stairs to the Ambulance. While descending the stairs, the stretcher jostled and the load transferred, which resulted in Priestman tearing a bicipital tendon.

Priestman then submitted a WSIB claim which the Board denied on the basis he was off-duty and not in the course of employment. Priestman's union (OPSEU) declined to get involved and said he wasn't in the course of employment. I disagreed and took the case forward (pro bono). Long story short, I won his Tribunal appeal. However, that decision was overturned, and a *de novo* hearing scheduled. There was a blistering dissent from a Tribunal member. We then argued the case a second time, and once again we won the Tribunal appeal. By this time, the Ministry of Health went apoplectic and sought a Judicial Review, but the Divisional Court upheld the Tribunal appeal that Priestman returned back into the course of employment on his day off.

Please read the Priestman decisions because they review the policy and legal principals when a worker is in the course of employment.

If you take the time to read the material I sent you, it will inform your understanding when workers are in the course of employment under the law. Take this opportunity to broaden your skills sets as a union representative.

Case Law, In the Course of Employment

In *Decision No. 1138/12*, the Vice-chair at paragraph [104] discusses an argument raised by the employer regarding the master-servant requirement being a condition precedent before one can conclude on work relatedness, and certainly not the servant-servant scenario that *Decision No. 2329/10* suggests when the Majority concluded "the employer, through the on duty paramedics, exercised control over the situation when they asked him to assist."

Although the language of "master-servant" is now less commonly used, its use in this context illustrated that being in the course of employment must engage the relationship between the employer and the employee.

The Vice-Chair in paragraph [82] also adopted the reasoning found *Decision No. 165/96* that established a multifactorial approach to the question of whether a worker was in the course of employment in deciding whether the circumstances and activities giving rise to the injury are predominately work related or personal in nature.

In *Decision No. 165/96* the Vice-Chair outlined the test for determining whether a worker is in the course of employment, concluding it is "essentially a work-relatedness test" that is flexible and considers a number of factors:

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(d) In the course of employment

As both representatives pointed out, the basic rule in compensation law is that a worker is not in the course of employment when travelling to or from a work site. However, there are exceptions to that general rule. Counsel for the Applicant pointed out two of the exceptions involving travel under the control or supervision of the employer and travel as a requirement of the employment, when the worker is obliged to be travelling at the place and time the accident occurred. The logic for the general rule appears to lie in the theory that a worker, while travelling to and from work, is essentially exposed to the same general risks as any member of the driving public. While the worker would not be driving were it not for the employment, this somewhat tenuous link is not sufficiently significant, according to this general rule, to bring a worker within the course of employment. In our view, the test employed for "course of employment" is essentially a work-relatedness test - a relatively flexible test which involves an examination of a number of factors including:

1. the nature of the activity performed by a worker at the time of the accident;
2. the relationship of the specific activity to the worker's normal employment activity or routine;
3. any personal aspect to the activity which gave rise to the accident;
4. the nature of the risk associated with the activity - i.e. whether primarily an employment related risk or a public risk;
5. employer control or supervision of the activity;
6. the time of the accident - i.e. whether within or outside working hours;
7. the location of the accident - i.e. whether on premises controlled by the employer or on public premises;
8. the type of equipment or tools involved in the accident - i.e. whether it was equipment supplied by the employer;
9. specific remuneration (if any) for the activity at the time of the accident; and
10. contribution to the injury by the activity of the employer or co-worker(s).

While no one factor will normally be determinative of the issue, a consideration of all of the factors may allow a panel to determine the overall character of the activity - whether primarily work-related or primarily personal.

In *Decision No. 1234/00* a Panel was tasked with deciding whether a police officer was engaged in an activity that was directly related to her employment, and in particular, whether she was in the course of employment when she injured her knee in a soccer practice. The Panel at paragraphs [29]...[34] and [38] addresses the issue of Board Policy, Tribunal jurisprudence, merits and justice, and the *Interpretation Act*:

(ii) Board Policy and Tribunal Jurisprudence

[29] Two Board policies are relevant to the case at hand. The first is contained in Operational Policy document No.03-01-02, regarding work-relatedness and the meaning of the statutory phrase "in the course of employment," paraphrased as follows. A personal injury by accident occurs in the course of employment if the surrounding circumstances relating to place, time and activity indicate that the accident was work-related. Regarding "place," the policy indicates that where a worker has a fixed workplace, accidents that occur on the employer's premises will generally be considered to have occurred in the course of employment, while accidents occurring off of the employer's premises will generally not be so considered. However, if the accident occurred off of the premises, it will generally be considered to have occurred in the course of employment if it occurred in a place where the worker might reasonably have been expected to be while engaged in work-related activities.

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[30] Regarding “time,” the policy states that, for a worker with fixed working hours, an accident will generally be considered to have occurred in the course of employment if it occurred during those hours or during a reasonable period before or after work. However, if the accident occurred outside of these hours, the criteria of “place” and “activity” are to be applied.

[31] Regarding the criteria of “activity,” the policy indicates that an accident will generally have occurred in the course of employment if it occurred while the worker was engaged in the performance of a work-related duty or in an activity reasonably incidental to the employment. However, accidents occurring during personal activities may be considered to have occurred in the course of employment depending on the duration and nature of the activity and the extent to which the activity deviated from the worker’s regular employment activities. In determining whether an activity was incidental to the employment, an adjudicator is to consider the nature of the work, the nature of the work environment and the customs and practices of the particular workplace.

[32] The Policy indicates that the importance of the three above criteria varies depending on the circumstances of each case and that, in most cases, an adjudicator is to focus primarily on the activity of the worker at the time of the accident.

[33] In Tribunal *Decision No. 1416/98*, the Vice-Chair set out the following factors in determining whether an activity was reasonably incidental to employment:

- whether the worker was on the premises of the employer
- whether the activity involved something for the benefit of the employer
- whether the activity occurred in response to instructions from the employer
- whether the activity involved the use of equipment or materials supplied by the employer
- whether the risk to which the worker was exposed was the same as the risk to which he/she was normally exposed in the course of employment
- whether the activity occurred during a time period for which the worker was being paid

[34] The Vice-Chair went on to state that these factors would be of assistance in determining whether a worker is in the course of employment, but that no one factor was determinative. We find this a helpful approach to the question of whether an activity was reasonably incidental to employment.

[38] The Panel finds that the fitness policy is relevant in clarifying the scope of the Board’s general policy on work-relatedness. However, we agree that the policy is not determinative, given that the worker was not engaged in an employer- mandated fitness programme. In any event, we note that the policy allows for an adjudicator to consider the particular merits and circumstances of the case and that it is not essential that the fitness programme in question meet all of the enumerated criteria. Similarly, the general work-relatedness policy allows an individualized approach to cases, even to the point of indicating that adjudicators are to place greater emphasis on one of the three criteria, namely, that of “activity.” In light of these aspects of the two policies, we find that the case before us should be determined having regard to the real merits and justice of the case, as mandated by section 4(4) of the Act. We are also cognizant that, pursuant to section 10 of the *Interpretation Act*, R.S.O. 1990, Chap. I.11, the Workers’ Compensation Act is deemed to be remedial legislation and is, therefore, to “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.” [emphasis added]

In *Decision 1721/10*, a Panel addressed a number of issues surrounding an educational worker who arrived at the employer’s premises well before the normal start time and whether the workers activities at

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the time of injury can be considered in the employment versus personal sphere. The decision cites *Decision No. 24F* regarding the inherent confusion concerning the interpretation and application of the arising-out-of-and-in-the-course-of-employment language, and the Supreme Court of Canada's seminal decision in *WCB v. CPR & Noell*. The Panel's analysis found at paragraphs [35]...[39][50] [53] ... [55] addresses the interpretation of in the course of employment, and the Time, Place, Activity test in determining whether an injury is work related, concluding that there must be either a direction from the employer or a clear indication of a substantial benefit being received by the employer as a result of a workers activities. The Panel's analysis also reviewed Larson's American treatise on Worker's Compensation because of the importance of time, place and activity in the Larson analysis of the meaning of course of employment, an insight which appears to have influenced WSIB policy.

(v) Analysis

[35] In claims such as the present one where it is clear that an accident, i.e. a specific incident causing unexpected harm, has taken place, the determination whether the accident arose out of and in the course of employment is an exercise in line drawing. It requires an examination of the factors involved in the accident in order to determine whether those factors were sufficiently tied to the workplace to conclude that the accident arose out of and in the course of employment.

[36] The following was stated about this issue in *Decision No. 24F*:

A source of confusion concerning the interpretation and application of the arising-out-of-and-in-the-course-of-employment language in section 3(1) may be found, the Panel has noticed, in cases where there is no dispute or uncertainty about what happened in the case. In cases of that kind, the question of whether the accident is to be found to have arisen out of and in the course of the employment is often treated, apparently as a matter of convenience, as one question, rather than two. Panels of this Tribunal, for example, have often considered whether or not the "employment nexus" has been "broken" as the basis for answering whether the accident arose "out of and in the course of employment". A classic example of such a one-question approach is the Supreme Court of Canada's seminal decision in *WCB v. CPR & Noell*, [1952] 2 S.C.R. 359. The Court in that case did not feel impelled to answer two separate questions: Did the injury by accident "arise out of"? and, then, Was it "in the course of"? There was no uncertainty about what had happened in that case. The worker went swimming in her off hours while a resident employee at a hotel, dove into a shallow pool and was injured. In those circumstances, the Court treated the arising-out-of question, and the in-the-course-of-employment question, as one question, which it characterized as whether the plaintiff's swimming activities were in the "personal sphere" of activity or the "employment sphere" – another way, presumably, of asking whether the "employment nexus" existed with respect to the accident.

[37] The employment sphere of a worker and the personal sphere of a worker are easy to tell apart at the extremes. The spheres are not so easy to tell apart where they meet and one crosses over to the other.

[38] WSIB policy provides that the determination of work relatedness is one that requires us to take a look at the factors of time, place, and activity.

[39] If an accident takes place during working hours, on the employer's premises, and while the worker is performing work related tasks, there can generally be no dispute that an accident is one that arose out of and in the course of employment. An injury is work-related in these circumstances because of the strong relative degree of control that the employer has compared to the worker in determining the risks that the worker will be exposed to and how the workplace

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is to be organized and managed to deal with the risks that are inherent to the business. These accidents occur within the “employment sphere”.

[40] If the accident takes place outside of working hours, away from the employer’s premises, and while the worker is pursuing personal pursuits there can generally be no dispute that an accident is one that does not arise out of and in the course of employment. An injury is not work-related in these circumstances because of the strong degree of control that the worker has over his or her exposure to risk as compared to the employer. These accidents occur in the “personal sphere”.

[41] It is where the degree of control over activities and risk falls between these two extremes that care is required to draw the line between those accidents that are sufficiently work-related to attract compensation and those accidents that are not sufficiently work-related.

[53] In attempting to determine how to apply the criteria of place and activity to determine entitlement the Panel has referred to Larson’s American treatise on Worker’s Compensation. We have done so because of the importance of time, place and activity in the Larson analysis of the meaning of course of employment. In Chapter 12 of the treatise the following is stated:

Scope

An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.

...

Time and Place Contrasted with Activity Work-relation

The course of employment requirement test work-connection as to time, place and activity; that is it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.

[54] The Panel chooses to refer to the Larson analysis as it is apparent that the WSIB’s policy has either been influenced by the Larson analysis or has been influenced by the same sources as the Larson analysis.

[55] Similar to the manner in which *Decision No. 24F* that was quoted above noting the arising out of and in the course of issues may be considered one issue of employment nexus instead of as two separate issues, the Larson treatise offers the following analysis of the manner in which the elements that together make up the statutory test for entitlement are related to one another:

A “Quantum Theory” of Work-Connection

The discussion of the coverage formula, “arising out of and in the course of employment,” was opened with the suggestion that, while “course” and “arising” were put under separate headings for convenience, some interplay between the two factors would be observed in the various categories discussed.

A few examples may now be reviewed to show that the two tests, in practice, have not been kept in air-tight compartments, but have to some extent merged into a single concept of work-connection. One is almost tempted to formulate a sort of quantum theory of work-connection: that a certain minimum quantum of work-connection must be shown, and if the “course” quantity is very small, but the “arising” quantity is large, the quantum will add up to

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the necessary minimum, as it will also when the “arising” quantity is very small but the “course” quantity is relatively large.

But if both the “course” and “arising” quantities are small, the minimum quantum will not be met.

.....

A somewhat similar balancing-out process is seen in the holding that a borderline course of employment activity like seeking personal comfort or going to and coming from work falls short of compensability if the method adopted is unusual, unreasonable and dangerous, while no such restriction applies to the direct performance of the work.

[56] Note the similarity between the provisions of the last paragraph quoted and the WSIB’s policy on instruments of added peril that is found in OPM Document No. 15-03-03.

[57] The above quote from the Larson treatise deals with the separate elements of “arising out of” and arising “in the course of”. It notes that these separate elements are not just met or not met but that they may be met or partially met in varying degrees and that the strength of one factor can to some extent make up for the lack of strength of another.

...

(d) Activity

...

[69] In the Panel’s view it is the specific activity of the worker at the time of the accident that should be examined in determining the work-relatedness of the worker’s actions. In making this determination the Panel notes *Decision No. 2173/06R2* where in determining whether a custodian at a church was in the course of his employment at the time of an accident that took place outside of the custodian’s regular hours it was the specific activity of the worker at the time of the accident that was the determining factor. In that case the worker had been asked to undertake the activity by the employer but had not been able to complete it during regular work hours. The worker performed outside of work hours was a continuation of the specific job that he had been asked to perform. [emphasis added]

In *Decision No. 1432/12*, the Vice-Chair in a section 31, right to sue application of the *Workplace Safety and Insurance Act* reviewed *Decision No. 845/10* at paragraph [28] which lists some of the criteria often considered when determining whether an individual was in the course of employment at the relevant time. The Vice-Chair in paragraph [32] also reviewed the “order of predominance” test in determining work relatedness, concluding at paragraph [35] that the worker’s actions were reasonably incidental to his employment:

[28] Tribunal *Decision No. 845/10* referenced some criteria often considered when determining whether an individual was in the course of employment at the relevant time. Tribunal *Decision No. 845/10* states in that regard as follows:

[12] The issue in this appeal is whether the worker was in the course of employment when he was seriously injured in a MVA while working in Bermuda.

[13] In *Decision No. 443/87*, the Panel provided the following discussion with regard to a determination of whether a worker was in the course of employment:

While no single factor will normally be conclusive in deciding whether a worker was in the course of his employment, a number of factors are normally considered, including: Page: 7
Decision No. 1432/12 :

1. Whether the employer derived a benefit from the activity performed by the worker.

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2. Whether the worker was paid by the employer for the activity.
3. Whether the accident occurred while the worker was using equipment or materials supplied by the employer.
4. Whether the risk to which he would normally be exposed in the course of his employment.
5. Whether the activity was a result of instructions received by the employer.
6. Whether the accident was a result of instructions received by the employer.
7. Whether the accident occurred during the worker's normal working hours or overtime hours.
8. Whether the activity was reasonably incidental to the worker's normal employment duties.

...

[32] I agree that initially Mr. Ariganello set out with the goal of having dinner, and agreed to tag along with the president of Benmar to Kelly Lake in order to "kill time" while awaiting the president's arranging payment and delivery with Kelly Lake. Yet that changed when Mr. Ariganello entered Kelly Lake. He was not simply walking around the store aimlessly and without purpose. Rather, as the evidence makes clear, he was looking at drills such that he used in the course of his employment, and was also hoping to buy a battery for his drill. Thus, Mr. Ariganello entered Kelly Lake for predominately work-related reasons, not simply to kill time or to tag along. Even if one could argue that there was a mixed purpose in Mr. Ariganello's activity, with going to dinner being initially predominant, the order of predominance changed when Mr. Ariganello entered into the store. The predominate purpose then was related to work activities: looking at drills and attempting to purchase a battery. [emphasis added]

...

[35] His actions were work-related, and were undertaken for the benefit of the job being done. Thus, his actions were reasonably incidental to his employment, notwithstanding his motivation was likely to get the job done quickly so he could go eat. Yet, despite that motivation, the action itself was nevertheless in relation to work and was for a work-dominant purpose at that particular time.

In *Decision 757/07*, a Panel considered whether a police officer who was injured while rollerblading as a form of exercise in order to maintain his physical fitness as a police officer, was engaged in an activity reasonably incidental to his employment. At paragraph [51] the Panel addressed the employers concern that the workers fitness routine was not mandated by the employer, concluding that it's not only mandatory activities which are to be considered in assessing entitlement to compensation. At paragraphs [52] and [54] the Panel referenced Policy 15-02-02 and the importance in considering the nature of the work environment and practices of the workplace, concluding:

[51] The employer's representative has submitted that the worker's fitness routine was not mandated by the employer, and that he was free to do what he wanted. The Tribunal has previously confirmed that it is not only mandatory activities which are to be considered in assessing entitlement to compensation, as that would unfairly limit the scope and thwart the intent of the *Act*. The question of work-relatedness requires us to inquire into the totality of the event. Was the worker's activity reasonably incidental to the employment, or was it a distinct departure from the scope of employment: was it reasonably incidental to employment?

[52] In determining whether the activity was incidental to the employment, OPM Document 15-02-02 indicates that it is important to consider the "nature of the work", the "nature of the work environment", and the "customs and practices of the workplace".

[54] The nature of the work environment was such that the employer encouraged workers to be physically fit in order to meet the rigours of their jobs. The worker testified that from his first day at work, his sergeant in charge encouraged physical fitness. Further, he encouraged workers

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to work out to maintain their fitness on their lunch hours. The worker testified that whenever he began work under a new supervisor, he obtained permission take a double lunch at the commencement of his shift in order to do his physical fitness routine at that time. Documentation from various supervisory personnel indicates that they were aware of and supportive of his routine of taking his break at the start of the shift in order to work out. According to one, this was permitted "so long as he attends the office prior to his workout to determine if any immediate duty requirements exist that may supersede or prevent an early lunch period."

In *Decision No. 1342/98* a Panel considered the issue of a police officer who arrested a person for impaired driving, in which death threats were issued. One year later the worker and several colleagues went to a sports bar following their shift. After driving to their home town, he and a colleague went for a night cap, when the person he arrested 1-year prior came back and shot the worker in the head killing the off-duty police officer. The Panel reviewed what it referred to as an impressive body of American court cases which have equated "arising" with "originating" rather than with "occurring." The Board policy would conflict with those cases. However, the Panel noted that Operational Policy No. 01-01-05 states that, if a general policy does not reasonably apply to the particulars of a case, decision-makers consider the provisions of the Act. This policy quite sensibly provides an override protection in specific instances where generally sound policies cannot reasonably be made to apply. If the real merits and justice lead to the inescapable conclusion that the worker's fatal injury arose out of and in the course of employment, then applying the criteria of time, place and activity would not be warranted in view of the superseding policy on decision making.

[31] In his decision, the Appeals Officer relied on Board *Operational Policy Manual* Document #03-01-02. It states that "a personal injury *occurs* (emphasis added) in the course of employment if the surrounding circumstances relating to **place, time, and activity** indicate that the accident was work-related. The policy goes on to note that in "determining whether a personal injury *occurred* (emphasis added) in the course of employment, the decision-maker applies the criteria of **place, time and activity**. The importance of the three criteria varies depending on the circumstances of each case. In most cases, the decision-maker focuses primarily of the activity of the worker at the time of the personal injury by accident occurred to determine whether it occurred in the course of employment. As the worker in the instant case was socializing in a bar, the Appeals Officer found that this was not a work-related activity.

[32] The Panel notes that this policy is designed to assist decision-makers in evaluating whether an accident occurred" in the course of employment. Such language might reasonably suggest that this policy applies solely when the presumption section of the Act comes into play, as it is the only place in the section that employs the word "occurs". However, the policy does state under "Legislative Authority" that it is section 3(1) (now 4(1)). Therefore, it would appear that, notwithstanding the Board's use of "occur" from section 4(3), it means for this policy to apply to section 4(1).

...
[34] In such circumstances, the Panel believes it appropriate and prudent to consider the direction set out in Board *Operational Policy Manual* Document #01-01-05:

If general policy and guidelines do not reasonably apply to the particulars of a case decision-makers consider the provisions of the Act.

...
[35] In our view, this policy quite sensibly [35] provides an override protection in specific instances where generally sound policies cannot reasonably be made to apply. If we were to find that the "real merits and justice" of this case led inescapably to a conclusion that the worker's fatal injury arose out of and in the course of his employment, then applying the criteria espoused in the "time place and activity" policy would not be warranted or mandatory given the superseding



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policy directive on decision-making. Relying on the “merits and justice” provision of the Act supports the view that policies are guidelines and should not be so strictly applied to unusual fact situations that they exclude coverage in instances which have generally been accepted by the courts. We would also note that Board policy #03-01-02 itself contains flexibility, as the word “generally” appears in a number of places.

Closing Thoughts

Bro. Hussey, the above analysis and authorities sets out the legal framework in determining when a worker is in the course of employment when they are injured. As you can appreciate, the legal analysis distills down to some basic principles.

I think you can extrapolate how this applies to our members, and any other worker, including union business representatives.

You may also be unaware that circuses, arenas and unions are not places of businesses that require mandatory workers compensation coverage for their employees and are technically exempt under the *Workplace Safety and Insurance Act*. However, all excluded employers (e.g., unions) can elect to pay workers compensation premiums, which IBEW 353 does.

Subject to the generality of the foregoing, my opinion is offered without prejudice and I reserve the right to amend my opinion upon receipt of additional information that further informs my understanding of the your inquiry.

Fraternally Yours,

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CASE LAW ON COMMON DISPUTED ISSUES & MAJESKY OPINION LETTERS



Case Law – Tribunal Jurisdiction - Whether Issues Implicitly or Explicitly Before ARO

In *Decision 1144-11*, Vice-Chair G. Dee addressed whether he had jurisdiction to review LOE benefits from August 30, 2010 until June 17, 2013 and concluded that he looked closely at the ARO decision of January 21, 2014 in order to determine if it would be reasonable to conclude that the issues were either implicitly or explicitly before the ARO, but simply not addressed. The Vice-Chair ultimately noted that the worker rep did not identify the issue on the Appeal Readiness Form.

(iii) Analysis - (a) Jurisdiction

[44] I have concluded that I do not have jurisdiction to determine the worker's LOE entitlement from August 30, 2010 until June 17, 2013.

[45] I view this decision as unfortunate but necessary.

[46] The decision is unfortunate as the issues necessary to determine the worker's LOE benefits during this period are the same issues that have been explicitly determined in the ARO decisions of March 31, 2010 and January 21, 2014 and that are before me in this appeal. Those issues are whether the worker is capable of working within the designated SEB or whether she is incapable of performing work.

[47] Given this circumstance I looked closely at the ARO decision of January 21, 2014 in order to determine if it would be reasonable to conclude that the issues were either implicitly or explicitly before the ARO but simply not addressed.

[48] It is clear that the Case Manager's decision of September 15, 2010 was appealed by the worker on October 22, 2010 and an Objection Form was completed as of January 10, 2011.

[49] However, when the matter came to the attention of an ARO in October 2011, at that time it was decided between the worker's representative and the ARO that it was premature to proceed with the appeal.

[50] Following that time and following the LOE decision at the final review of benefits, when the worker's representative completed an Appeal Readiness Form on September 18, 2013 the only decision noted on the form as being ready for appeal was the July 26, 2013 decision. There is no mention of the September 15, 2010 decision. [emphasis added]

[51] I therefore cannot find that the issue of the worker's LOE entitlement between August 30, 2010 and June 17, 2013 was either implicitly or explicitly before the ARO who rendered the January 21, 2014 final decision of the WSIB.

[52] Given the findings contained in this decision regarding LOE benefits that I do have the jurisdiction to determine I can only hope that the worker's entitlement to benefits between August 30, 2010 and June 17, 2013 is determined as expeditiously as possible following the release of this decision.

In *Decision 2899/17I*, Vice-Chair Z. Onen addressed whether an ARO explicitly or implicitly addressed the issue of a worker's entitlement to Carpel Tunnel Syndrome, and by extension, whether the Tribunal had jurisdiction to rule on the CTS issue:

(b) Tribunal jurisprudence

[12] It is well-settled in Tribunal jurisprudence, that in the interest of fairness and effectiveness, the Tribunal takes a broad view of its jurisdiction set out in section 123(1). Tribunal jurisdiction may be

found in the express language of the decision under appeal. Tribunal decisions have also found jurisdiction in the absence of express reference to the issue where the final Board decision is found to have determined the issue by implication or as an included issue.

[13] *Decision No. 90/08I* reviewed the question of jurisdiction and considered a number of past decisions that addressed it. That Panel referred to *Decision No. 1624/04R* which addressed the question of an issue that is implicitly decided by the decision under appeal:

Secondly, it may also at times be necessary, in order to determine an issue that is directly within its jurisdiction, for the Tribunal to consider evidence about an “underlying” related matter. For instance, in order to determine a loss of earnings (LOE) issue, it may be necessary for the Panel to determine facts about suitable and available work, and even about the worker’s co-operation. These are generally understood to be matters that are implicit in a Board decision on the LOE award, and might be found to be within the Tribunal’s jurisdiction even if the language of the appeal application form or of the ARO decision did not refer to them specifically. However a finding of what might be “implicit or “underlying” might depend on the adjudicative history in the specific case.

[14] *Decision No. 90/08I* noted also that in the context of the Tribunal’s broad interpretation of jurisdiction, there is nevertheless room to refer a matter to the Board in the absence of an express decision where the issue is novel, controversial or contentious to provide the Board with an opportunity to consider the issue at the first instance.

Decision No. 1064/13 determined the question of an included issue in the context of the issues of suitable and available employment. The Tribunal Panel noted that the worker’s appeal was specifically objecting to the ARO decision which decided that suitable work was available. At the Tribunal, the worker wanted to include the issue of suitability in the appeal. The Panel decided that the worker’s Notice of Objection for the ARO appeal did not object to suitability nor did the ARO consider the issue. The Panel found the Tribunal did not have jurisdiction to consider the suitability of the employment.

[16] The determination of jurisdiction requires a two-step assessment to determine jurisdiction. The first step is to consider whether there is express language in the Board’s final decision that decides the issue. In the absence of express language, the Tribunal considers whether the issue sought to be included in jurisdiction was implicitly decided, or if it is necessarily included in the issue the Tribunal must decide in the appeal.

[17] In the present case, the Tribunal derives its jurisdiction from the Appeals Resolution Officer decision of July 17, 2014. A review of this decision shows that the ARO expressly decided the issue of ongoing entitlement for ulnar impaction syndrome.

In *Decision 1624 04R*, Vice-Chair E. Smith addressed whether the Board implicitly dealt with an issue, and by extension, whether the Tribunal had jurisdiction over a final decision of the Board.

[36] Secondly, it may also at times be necessary, in order to determine an issue that is directly within its jurisdiction, for the Tribunal to consider evidence about an “underlying” related matter. For instance, in order to determine a loss of earnings (LOE) issue, it may be necessary for the Panel to determine facts about suitable and available work, and even about the worker’s co-operation. These are generally understood to be matters that are implicit in a Board decision on the LOE award, and might be found to be within the Tribunal’s jurisdiction even if the language of the appeal application form or of the ARO decision did not refer to them specifically. However a finding of what might be “implicit” or “underlying” might depend on the adjudicative history in the specific case.

These situations are not exhaustive. They are situations, however, in which a Panel must consider matters that are implicit in the key issue before it. They involve consideration of essential elements or findings necessary to the issue within the Panel's jurisdiction.

In *Decision No 1134 12R* – Vice-Chair S. Netten, noted the question of determining the issue agenda is distinct from jurisdiction and that Tribunal decisions have taken a broad view of the Tribunal's jurisdiction. *Decision No. 2147/01R3* found that the Tribunal has jurisdiction over all preliminary issues or sub-issues, without need for a final decision of the Board on such issues. *Decision No. 1861/10I* similarly found that the Tribunal has jurisdiction, in its discretion, to address sequential issues if its determination on a presenting issue is different from that of the Board.

[5] Questions concerning the Tribunal's jurisdiction over an issue typically arise when a party is seeking to have the Tribunal rule on an issue which was not expressly dealt with in the Board's final decision. In these circumstances, panels have historically taken a broad view of the Tribunal's jurisdiction (see *Decisions No. 638/89I, 78/90I, 241/94, 979/94I2, 257/96R, 304/97R, 99/98I, 1379/98I, 625/98I, 1640/04 and 1257/03*).

As noted in *Decision No. 2147/01R3*, the view that all preliminary or "sub-issues" need not be the subject of a final decision by the Board, in order for the Tribunal to have jurisdiction on the issue, is reflected in Tribunal jurisprudence. The Tribunal has jurisdiction to consider matters that are implicitly decided by, or implicitly before, the Board's final decision-maker. This involves a consideration of the essential elements or findings necessary to the issue which has been explicitly appealed. For example, if entitlement was denied at the Board, the benefits flowing from a successful claim for entitlement were implicitly before the Board but did not have to be decided. *Decision No. 1861/10I* similarly states that "a Panel has jurisdiction, in its discretion, to address sequential issues if its determination on a presenting issue is different from the Board's."

[7] The question of jurisdiction is distinct from determination of the issue agenda. Tribunal jurisprudence has identified additional factors to consider in setting the issue agenda, including consideration of the parties' wishes; complication of proceedings; sufficiency of the evidence; potential to prolong the decision-making process to no practical purpose; merits and justice of the case; whether the issue is novel, contentious or requires special expertise such that it ought to be considered in the first instance by the Board; and whether there has been opportunity for submissions (see *Decisions No. 915I, 535/00I and 2245/05R2*).

WSIAT 1033 18R – Vice-Chair Calvin reconsidered a prior decision after the Board requested a reconsideration of Vice-Chair Calvin's decision who ruled that the ARO implicitly considered the date of accident that the worker was not entitled to LOE benefits in 2008:

[15] ... I find that by not limiting consideration of the issue to LOE entitlement as June 19, 2012, and by considering and ruling on the worker's entitlement to LOE as of December 2008, the ARO implicitly considered whether the accident date should be December 2008. The ARO ruled against the worker on that issue. In other words, I find that the issue of whether the accident or injury date should be changed to December 2008 was implicit in the ARO's decision that the worker was not entitled to LOE benefits as of that date. As noted, the worker's appeal on that issue was allowed for the reasons given in *Decision No. 1033/18*. It is implicit in that decision that the accident date be changed to December 2008.