2014 WSIB Benefits Policy Review

Submissions on WSIB Draft Benefits Policies

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Representing injured workers without charge since 1969

Introduction

Injured Workers Consultants is a community legal clinic that has been providing legal advice and representation to the injured worker community in Ontario without charge since 1969. In addition to individual representation, our mandate includes participation in the development of law and policy reforms.

For reasons which we explain in this submission, it is our position that the draft policies must be withdrawn and the consultation process stopped. The draft policies are evidence of the WSIB's institutional bias in favour of reducing costs and they are inconsistent with the law.

We have participated in many policy discussions with the WSIB and its predecessor the WCB over the past 45 years. In these discussions, the workers compensation board has attempted to balance the positions of employers, labour and injured workers, the requirements of the legislation and the principles of fairness in administrative justice.

In recent years there has been a marked change in the approach of the WSIB towards policy development. In our view, the recent changes in the WSIB appeals process did not respect the principle of fairness in administrative justice. The changes were directed at reducing the number of in person hearings which inevitably produced in an increase in the denial rate for injured workers' appeals.

The proposed changes in benefits policies also make no attempt to balance the necessary policy considerations. These draft policies are crafted to reduce the benefit costs of the WSIB without regard to the fundamental legal principles of our workers compensation system. In our daily casework we have seen the concepts in these draft policies put into practice by front line decision makers for the past three years. This has contributed to the doubling of the caseload of the Workplace Safety and Insurance Appeals Tribunal. Enshrining these concepts in official policy will accelerate that process.

As many organizations told the Jim Thomas consultation process, the current policies in these areas are 'just fine.' As Mr. Thomas noted, this is a good reason to leave them alone:

> Unless there are good reasons for not doing so, the starting point should be to assume that a benefits policy that has been in place for many years most likely is drawing the line roughly in the right place. If the WSIB has been accepting recurrence claims for many years using a well-established recurrences policy, a benefits policy review should presume that the underpinnings should continue to apply, absent some change in circumstances. That is certainly the stakeholder reaction to the four policies under consideration in this review. Most stakeholders felt the policies as written were "just fine." They had useful suggestions to improve them, make them clearer, or easier to understand. But no one

> fundamentally disagreed with the spirit and intent of the four policies under review. This would seem to be consistent with my view that there should be a going-in presumption of validity – of the approximate correctness of where the work-relatedness line has been drawn."[1]

If approved, these draft policies will limit benefit entitlement in a manner that is inconsistent with the provisions of the legislation and the fundamental principles of workers compensation. The reality is that WSIB decision makers are not familiar with the legislation; they rely on the Board's policies and the training they receive from the WSIB. Their role is to decide cases in accordance with the policies they are given. If the Workplace Safety and Insurance Appeals Tribunal provides the same deference to these policies, injured workers will be forced to rely on the judicial review process to seek a proper legal interpretation of the legislation. This process takes many years and is inaccessible to most injured workers. We have therefore called on the WSIB to withdraw these proposed changes. They are not necessary and will do great harm to injured workers and their families.

Origins of the Policies

These policies are not rooted in the recent report of the Jim Thomas consultation. Premier McGuinty appointed Mr. I. David Marshall on December 16, 2009, as the new President and CEO of the WSIB with a mandate to reduce the benefits of injured workers. When his appointment was reviewed by a committee of the legislature, Mr. Marshall explained his job:

> I'm going to challenge our team as to how much we can do down that path, whether we can reduce our rate of long-term beneficiaries by half. What would that do to our income stream? [2]
>
> …
>
> My commitment is to develop a plan with my team and with consulting stakeholders that brings us to a fully funded position within a reasonable amount of time. I still have to figure out how soon we can do that. That plan will have measurable benchmarks. It will say that we have to hit this rate of return, that we have to reduce duration by this amount by this date in order to meet the plan ... However, it's going to have some tough, tough proposals in it. I mean, you can't recover this amount of money without some sort of pain some-where in the system. … We are taking it very seriously. It's in my letter. I don't get any bonus unless I can meet this target. It's a very clear target, and we're going to get there. I'm confident that we will. [3] (Emphasis added.)

The "letter" Mr. Marshall is referring to is his appointment, signed by Minister of Labour Peter Fonseca, at a salary of $400,000 a year plus a performance incentive payment of up to 20% to reduce the unfunded liability and improve administrative efficiency. In our view, this direct personal financial incentive for the CEO to reduce benefits to injured

[1] Benefits Policy Review Final Report, Jim Thomas, Independent Chair, May 2013, page 7.
[2] Hansard, Standing Committee on Public Accounts, 24 February 2010, page 481
[3] ibid, page 490.

workers creates an institutional bias. This cost reduction bias has led the WSIB to create draft benefit policies which disregard the fundamental legal principles of benefit entitlement in the legislation.

In December 2010 the government made amendments to the workers' compensation Act that changed the fundamentals of the funding system. Schedule 21 of Bill 135, an omnibus financial bill:

- required the Board to maintain a fully funded account with additional reserves
- deleted the current clear requirement that any insufficiency of funds will be corrected by a raise in the employer rates
- deleted the safety net of a provincial loan to the workers compensation system

This made it clear to injured workers who will pay to improve the funding level of the WSIB. During the committee hearings, MPP Peter Tabuns raised the concern that a move to full funding will create pressure to reduce injured workers benefits:

> Mr. Peter Tabuns: Can you tell me now that the regulations that will come forward will protect all injured workers from any reduction in their benefits?
>
> Mr. Nick Robins: The legislative amendments that are proposed to the Workplace Safety and Insurance Act do not contain any provisions that would negatively affect workers' benefits.
>
> Mr. Peter Tabuns: And that's the opinion of the government, that workers will be fully protected?
> Interjection.
>
> Mr. Peter Tabuns: Nodding is not adequate. I need someone to speak up.
>
> Ms. Leeanna Pendergast: Yes, Mr. Tabuns. Yes.
>
> Mr. Peter Tabuns: So if, in fact, it's found that there are financial problems with the WSIA, the government will ensure that the changes that are needed are not going to be done on the backs of workers. Is that correct?
>
> Ms. Leeanna Pendergast: That's correct, Mr. Tabuns. Full funding will not be achieved on the backs of injured workers.[4] (emphasis added)

Despite the assurance of the government's representative, the proposed policies will implement the downward revisions to the benefits structure and reduce the WSIB's benefits cost on the backs of injured workers.

The specific targets for benefit reduction policies were identified in the 2011 value for money audit of claims adjudication report by KPMG, long before the Board approached

[4] Hansard, Standing Committee on Finance and Economic Affairs, Monday 6 December 2010

Jim Thomas. KPMG candidly reported that the WSIB told it what areas of policy to review and why (cost reduction):

> The audit focused on five key decision making functions, representing the highest impact areas of adjudication.
>
> …
>
> Assess a number of issues such as…Adequacy of resources, information and systems to support cost effective and efficient decisions.[5]
>
> …
>
> [The new system should] maximize program efficiency and minimize program costs[6]
>
> …
>
> …the VFMA undertook a detailed analysis of five key decision points in the life of a claim. These decision points were selected by the WSIB for review based on their complexity, associated cost factors and critical importance in the adjudication process…[7] (All emphasis added.)

Four of the five new benefits policies were prescribed by the KPMG report:

> RECOMMENDATION #7: WSIB should immediately address the following policies negatively impacting on return to work and recovery outcomes. The WSIB should review and revise the following policies:
>
> Aggravation Basis Entitlement
> Work Disruptions
> Recurrences
> Assessing Permanent Impairments
> [and others.]
>
> Management Response: WSIB agrees with the recommendation. These policies will be included in the policy priorities for 2011/2012.[8]

The draft policies clearly predate the Jim Thomas consultation. It appears that the Thomas consultation was little more than an exercise to create the appearance of neutrality and fairness. The direction and goals were already set.

An Independent Legal Opinion is Needed

In his May 2013 report, Jim Thomas' recommendations recognized the importance of respecting the legislation and the fundamental common law doctrines and the established jurisprudence:

> The principles I believe could give rise to a common ground approach to WSIB benefits policy reforms are the following:

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[5] KPMG Report to WSIB, Value for Money Audit of Claims Adjudication, 2011, page 4.
[6] ibid, page 17.
[7] ibid, page 20.
[8] ibid page 59.

> 1. Grounded in the Workplace Safety and Insurance Act, 1997: Benefits policies must be grounded in the fundamental objectives of the Act and must be consistent with the intent of the Legislature as discerned from the language of the Act…
>
> 3. Respecting common law doctrines and established jurisprudence: While the Meredith Principles are foundational ones they are not the only source of guidance to benefits policy writers. Civil law and judicial reviews can offer assistance. For example, the Thin Skull Doctrine is a well-established doctrine that flows from personal injury litigation law – you take your victim as you find him/her.[9]

These recommendations fit well with the WSIB's Framework for Policy Development and Renewal which provides that "the research and analysis phase of policy development will include but not be limited to … legal implications."[10]

However, the WSIB has not released any legal opinion about the validity of the proposed policy changes. In light of the concern noted above that the terms of the CEO's contract (i.e., the bonus) create an institutional bias of the WSIB, **the consultation process should proceed no further until the Minister of Labour obtains an independent legal opinion on the question of whether the proposed policies are consistent with the legislation, the fundamental common law doctrines, and the established jurisprudence.**

A Cost Analysis is Needed

In light of the fact that these policy changes are driven by the WSIB's efforts to reduce costs, one would expect to see a cost analysis in the consultation documents. In fact, a cost analysis is required by the WSIB's own policy development process. The WSIB's Framework for Policy Development and Renewal requires that "the research and analysis phase of policy development will include but not be limited to, the following areas: … Direct and indirect costs and savings."[11]

However, the WSIB says that no cost analysis has been done. In light of the concern noted about the institutional bias of the WSIB, an independent cost analysis must be done. **This consultation process should be stopped until the Minister of Labour obtains a proper and independent analysis of direct and indirect costs and savings related to these policies as required by the WSIB's own policy development framework.**

[9] Benefits Policy Review Final Report, Jim Thomas, Independent Chair, May 2013, page 4.
[10] WSIB's Framework for Policy Development and Renewal, page 10.
[11] Page 10.

Pre-Existing Conditions 11-01-xx

We will start with this policy since it contains the overarching theme of all of the policy revisions, and since the problematic aspects of this policy reappear in the other draft policies. For reasons which shall be explained, we submit that the draft policy is illegal, made for a purpose inconsistent with the act, and should be withdrawn. If the Board feels it must have a pre-existing conditions policy, then it would be appropriate for the policy to adopt the longstanding approach, the significant contributing factor test.

False Foundations

First of all, it must be said that the explanatory paper "2012-2013 Benefits Policy Review Pre-existing Conditions," which accompanied the draft policy, grossly misrepresents all aspects of its content. The paper starts by claiming that the "impetus for change" came from the stakeholder submissions to the Thomas consultation many of which addressed pre-existing conditions. No doubt many submissions did address pre-existing conditions, but this is because the WSIB had already begun its current and ongoing practice of reducing benefits based on pre-existing conditions. To state that the impetus came from stakeholders or Thomas is misleading; it started with the WSIB's own change in practice (that is, adjudicating in advance of policy reform).

The explanatory paper also misconstrues both the WSIAT jurisprudence and the state of other provinces. In fact, the draft policy is more restrictive of entitlement than almost all of the other provinces sited in the discussion paper. Even Nova Scotia, which has an explicit legislative direction to apportion benefits, takes a less restrictive and more balanced approach than the draft policy.[12] Nova Scotia policy allows that

> Where the WCB determines that a non-compensable factor was only a latent weakness or susceptibility and there is no evidence: (a) that it had any impact on the worker's pre-injury earning capacity; or (b) that it would have progressed to produce loss of earning capacity without the occurrence of the compensable injury, it will be considered that the entire extended loss of earnings can be attributed to the compensable injury and EERBs [extended earnings replacement benefits] will be paid without apportionment under Section 10(5) of the *Act*.[13]

The explanatory paper also makes it appear as if the longstanding Tribunal approach, the significant contributing factor test, is unsettled and elicits "variation in outcomes." This is simply not the case.

The Tribunal test is widely recognized as settled law. Variation in outcomes is overwhelmingly the result of factual determinations, which is how a good legal test should operate. The two decisions cited in the paper, for instance, which purportedly demonstrate a "variation in outcomes" actually turn on the facts. There is no difference

[12] *Workers' Compensation Act* 1994-5, c.10, s.10(4).
[13] Policy 3.9.11R1 – Apportionment of Benefits, s.5.2.

in interpretation of the test. *Decision No. 1109/4* found that ongoing entitlement was not in order because the work injury was not a significant contributing factor to the worker's pre-accident impairment (not condition). The worker had been missing a couple days from work each month as a result of the impairment and was obtaining regular medical treatment before the work injury. In *Decision No. 2083/99*, the worker was entitled to a permanent disability award because her work accident made a significant contribution to her permanent impairment. There were discrete periods of impairment related to specific incidents, but no permanent disability prior to the work accident.

These two decisions demonstrate a consistent approach that is in line with both current policy and the tort law "thin skull" doctrine. The decisions follow the distinction set out in current Policies 14-05-03 and 08-01-05, which distinguish between a pre-accident impairment and a pre-accident condition.

They are also in line with the thin skull doctrine. The case with no entitlement was a "crumbling skull"; the worker had a symptomatic condition that would have required surgery regardless of the work injury. The case with entitlement was a thin skull: the worker may have been pre-disposed to injury, and this may have contributed to the severity of the resulting disability. However, she may never have developed the impairment, but for the work accident.

Mr. Thomas recognized that the WSIB and the Appeals Tribunal have been addressing pre-existing conditions for many years:

> In developing a policy on pre-existing conditions, it would seem to me that a sensible approach would include a review of how WSIAT has applied the significant contributing factor test to determine whether it might assist adjudicators in deciding subsequent claims where multiple factors are present. Both sets of stakeholders referred to Tribunal decisions 72 and 915, which are the leading ones on the significant contributing factor test. I would think that any test that can contribute to greater clarity in drawing the line should be given serious consideration by WSIB.[14]

It was evident to Mr. Thomas that the WSIB was seeking to change the current longstanding approach in order to restrict entitlement:

> Recommendation #8
> Because the WSIB has been adjudicating these types of cases for many years and now appears to be seeking a different guideline or standard that would have the effect of narrowing entitlement, the WSIB should provide reasons to explain why it now is seeking a different approach or interpretation.[15]

[14] Jim Thomas "WSIB Benefits Policy Review Consultation Process: Report to the President and CEO of the WSIB". May 2013, p.13.
[15] Jim Thomas "WSIB Benefits Policy Review Consultation Process: Report to the President and CEO of the WSIB". May 2013, p.18.

The draft policy directs attention to whether the resulting impairment is more severe than expected from the accident, whether the disability continues beyond the usual recovery period for such injuries and whether the change in the worker's ability to perform the pre-accident work is more than what was expected from the accident. All of these factors eliminate compensation for the thin skulled injured worker. Compensation will cease at the point where a young, healthy worker would be expected to have recovered. This denies injured workers compensation on the basis of an individualized assessment of their disability, a principle affirmed by the leading Supreme Court of Canada decision in Martin & Laseur.[16]

Since the WSIB and the Jim Thomas Report have both endorsed the Meredith principles, we must also point out that the policy is not consistent with those principles:

> A just compensation law based on a division between the employer and the workman of the loss occasioned by industrial accidents ought to provide that the compensation should continue to be paid as long as the disability caused by the accident lasts …. [17]

The Draft Pre-existing Conditions Policy is Illegal

In our view, the draft policy is a drastic departure from prior practice which will lead to a substantial narrowing of entitlement. The WSIB has provided no explanation for this change, contrary to Jim Thomas' recommendation. Our review concludes this change has been undertaken with the sole goal of reducing benefits expenditures. There is no doubt that this draft policy would accomplish that (improper) cost reduction goal.

We must question, however, the WSIB authority to make these changes in light of the legislation. We submit that the proposed policy is illegal for the following reasons:

1. **The draft policy limits entitlement for workplace injuries in a manner that is inconsistent with the WSIA:**

Under the WSIA, a worker is entitled to benefits if he or she sustains an injury/illness by accident arising out of and in the course of his or her employment. The Act also contains presumptions of work-relatedness: an accident arising out of employment is presumed to have occurred in the course of employment and vice-versa.[18] There is no express statement of the degree of causation required, nor is there any provision for apportionment of benefits. The legislation has been interpreted as not requiring that the work be the sole cause, but that it is one of the significant contributing factors to the illness or injury.[19]

As noted earlier, the significant contributing factor test was created to guide decision making in accordance with this legislation, and it has served this purpose well for many

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[16] *Nova Scotia* v. *Martin; Nova Scotia* v. *Laseur*. [2003] 2 S.C.R. 504
[17] *Final Report*, Toronto, 1913, Sir William R. Meredith, Chief Justice of Ontario, page 15.
[18] *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A, s. 13(2).
[19] Workers' Compensation Appeals Tribunal, *Decision No. 915*

years. The draft policy explicitly rejects this approach and instructs that the decision maker consider the impact of the pre-existing condition rather than the whether the work injury significantly contributes to the impairment.

In 1950, the WSIB was advised that this kind of limitation on benefits is illegal. In the Royal Commission Report on the Workmen's Compensation Act, Mr. Justice Roach rejected this practice as not authorized by the Act. He gave the example of a diabetic worker who suffered a minor injury to his toe. His diabetic condition aggravates the injury and the whole foot must be amputated. The Board told Justice Roach that the worker would only receive half the award normally given for the loss of a foot because the loss of the foot was partly caused by his pre-existing diabetic condition. Justice Roach said:

> In my opinion, such a policy is not authorized by the Act… All workmen are entitled to the full protection of the Act without any discrimination based on their physical condition. One or two illustrations will show why this must be so.
>
> Two workmen are struck on the head by a falling object. One suffers a fracture of the skull, the other does not. The one who was injured was found to have a thin skull. Obviously, he should not be penalized on that account.[20]

2. The draft policy abdicates the thin skull doctrine, and treats all thin skulls as crumbling skulls.

The thin skull doctrine is a longstanding principle of tort law which has been adopted in the workers' compensation jurisprudence. The draft policy explicitly rejects the principle: "Benefits continue until…the work-related injury/disease on its own would not likely result in a similar level of impairment." Under the thin skull doctrine, you take your victim as you find him; a tortfeasor is liable for the injuries even if they are unexpectedly severe owing to a pre-existing condition.[21] In the workers compensation context, this means that compensation is payable even if the injury is prolonged or worsened by other factors:

> 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 pre-disposing 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. [22]

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[20] *Report on the Workmen's Compensation Act, 1950, Ontario, Honourable Mr. Justice Roach* page 46.
[21] *Athey v. Leonati* [1996] 3 R.C.S. 458 at p.473 (SCC).
[22] Workers' Compensation Appeals Tribunal, *Decision No. 915, page 101*

A crumbling skull is an exception to the thin skull rule which states that a tortfeasor only need restore a plaintiff to his original position, not a better position. The tortfeasor is still liable for the injury or acceleration of the condition that it caused, but need not compensate the plaintiff for the effects of the pre-existing condition that would have happened anyway. In a crumbling skull case, damages would be reduced if there was a material risk that the pre-existing condition would have affected the plaintiff in the future regardless of the negligence.[23] As noted, there is no provision in the WSIA for apportionment or reduction of benefits.

Under the draft policy, all workers are treated as crumbling skulls. A worker can be cut off benefits once he or she reaches the normal healing time, even if the injury is prolonged by previously asymptomatic conditions that the worker did not even realize she had, and that may never have become symptomatic but for the work accident. As noted, this is not consistent with legal principles, and Tribunal jurisprudence:

> …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.[24]

In tort cases, the reduction in damages for a crumbling skull appears to be significantly less severe than what is contemplated by the draft policy. Page 2 of the draft policy would see an end to benefit entitlement even while the work injury continues to make a significant contribution to the ongoing impairment. In contrast, in tort cases where there is a crumbling skull (not a thin skull where there is no reduction), damages have been reduced by less than half for symptomatic pre-existing conditions.[25]

3. The draft policy places limits on entitlement that are at odds with the remedial nature of the WSIA

The restrictive approach to the policy stands at odds with the purpose of the WSIA as remedial legislation. As noted above, the draft policy represents a significant and unprecedented reduction to benefit entitlement for injured workers in Ontario. This violates the directive that as remedial legislation, the WSIA should be given "fair, large and liberal interpretation as best ensures the attainment of its objects."[26] The WSIA itself also contains provisions that favour the worker in cases of uncertainty – s.119(1), the "merits and justice" principle and s.119(2), commonly referred to as the "benefit of the doubt" provision.

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[23] *Ibid.*
[24] *Decision No. 482/07* as quoted in *Decision No. 1237/13* at para.34.
[25] See for example *Zacharias v. Leys*, 2005 BCCA 560, *Bouchard v. Brown Bros. Motor Lease Canada Ltd*. (2012) BCCA 331, or *Lesniak v. Mississauga (City of)*, (2002) CanLII 22270 (ON SC).
[26] *Legislation Act* 2006, c. 21, Sched. F, s. 64 (1).

4. The draft policy does nothing to address Mr. Thomas' concern that separating work and non-work factors may not be possible.

The draft pre-existing conditions policy, and indeed all of the draft benefits policies, claim to be aimed at carving non-work related factors out of entitlement. In his final report, Mr. Thomas noted that this may be an impossible feat given the current limits on medical knowledge. We concur with this observation, and note that the draft policies have done nothing to address this issue. The draft pre-existing conditions policy limits entitlement even when the work injury continues to make a significant contribution to the ongoing impairment. This approach assumes the pre-existing condition is responsible, essentially giving the "benefit of the doubt" to the pre-existing condition rather than the worker. In our submission, this is the wrong approach, and it is in fact the opposite of the way in which the Tribunal has resolved such issues.

In *Decision No. 1237/13*, the Tribunal allowed entitlement for a permanent aggravation of a pre-existing previously asymptomatic condition. The Tribunal notes that the suggestion that the pre-existing

> condition might have deteriorated even if the worker had not been working is purely speculative. Stating that the worker's job activities accelerated an osteoarthritic process leading to a permanent aggravation is a fact.[27]

It is also notable that seemingly "objective" indicators of pre-existing conditions may not in fact be indicative of impairment. In the case of back injuries, for example, it is well recognized that radiological findings do not correlate well with pain and disability.

> "Any discussion of back pain is often dominated by the term "Degenerative Disc Disease." This is an inappropriate phrase because what is being described is usually not a disease but normal aging change. A better description would be "age related" change. This normal process produces typical x-ray and CT or MR changes which are commonly misinterpreted by physicians as being evidence of something abnormal.
>
> …
>
> There is no convincing evidence that these changes which are so obvious on the x- ray or scans cause pain. In most people who have back pain in the presence of aging change, the pain is the result of ligament or muscle strain and not because of the age change seen in the x- ray."[28]

> "Over the last two decades it has become clear that the lumbar spine shows increased MR abnormalities with increasing age in asymptomatic individuals. More recently and most importantly, it has become clear that these changes are not predictive of current or subsequent disability."[29]

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[27] Para. 42.
[28] *Back Pain*, Discussion paper, The Workplace Safety and Insurance Appeals Tribunal, Revised 2003, Dr. W.R. Harris, Dr. J.F.R. Fleming, Dr. Stanley D. Gertzbein
[29] ACC and back injuries: the relevance of pre-existing asymptomatic conditions revisited; P.A. Robertson, O.R. Nicholson, The New Zealand Medical Journal, 27 May 2011.

Symptoms (and other clinical findings) are a much better indicator of the level of disability:

> There is an extremely high incidence of abnormalities seen in spine imaging in people of all ages who have no symptoms. Evaluation of a patient with back pain and its possible relationship to work activity or injury requires thorough evaluation of the history and physical findings by a physician experienced in back problems and cautious in the interpretation of all the patient's imaging studies.[30]

It would be consistent with the medical evidence, then, to compare the worker's functioning and symptoms prior and post work injury accident, rather than simply focusing on radiological evidence. This is consistent with the current policy on pre-existing impairments, Policy No. 18-05-05.

The draft policy approach reflects the argument expressed by the Canadian Manufacturers' Association more than one hundred years ago to Sir William Meredith at the Royal Commissions hearings. They protested that Meredith's proposed workers' compensation system would compel employers to insure a workman against all the conditions of life including old age:

> "You have injured the man, why should all these problematic things enter into it, that he might have been injured in some other way if he had not been injured in that way? The man was alright until he got hurt in your establishment."[31]

We agree with Meredith's position. Meredith's position explains why s.43 of the WSIA states that loss of earnings benefits continue until "the worker is no longer impaired as a result of the injury."

To add insult to injury, the proposed policy incorporates an extremely broad definition of what constitutes a pre-existing condition. In addition to capturing processes that may be simply part of normal aging, the policy allows the 'condition' to be diagnosed at any point in time. This is a more restrictive approach to benefits than that taken even in the most conservative American jurisdictions.[32] The explanatory paper claims that in allowing for the diagnosis of a pre-existing condition to be made after the workplace injury, "decision-makers are not required to enter into the 'prudent person' analysis, but rather, would rely on clinical evidence, and if necessary, a clinical opinion, that supports that the condition did exist prior to the workplace injury/disease."

That makes it sound like the WSIB is being more objective, and perhaps more "fair." In reality, though, use of the prudent person test, the more benefit-restrictive of the two identified American approaches, would be less benefit-restrictive than the approach the WSIB has actually chosen. If adjudicators had to use the prudent person test, they would not be able to cut benefits to workers who were asymptomatic prior to work injury.

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[30] supra, note 28

[31] hearings transcript

[32] The John Henry Kaiser Family Foundation. (2012). *Health Insurance Market Reforms: Pre-existing Condition Exclusions.* Menlo Park, CA: The Henry J. Kaiser Family Foundation.

Aggravation Basis 11-01-15

The explanatory paper that accompanied this draft policy indicated that "no substantive changes" were required to the current policy. Despite this statement, the draft policy does, in our view, contain substantive changes that significantly and improperly narrow the scope of entitlement.

Current policy 11-01-15 defines "aggravation:"

> An aggravation is the effect that a work related injury/illness has on the pre-accident impairment requiring health care and/or leading to a loss of earning capacity.

The draft policy defines "aggravation:"

> Aggravation: the temporary effect that a work related injury/disease has on a pre accident impairment requiring health care and/or leading to a loss of earnings.

Current policy 11-01-15 states:

> Permanent Impairment
> In some cases workers never return to the pre accident state. If there is a permanent worsening of the pre-accident the decision maker may determine that the work related injury/illness has permanently aggravated the pre-accident impairment … the worker may be entitled to a non-economic loss benefit.

The draft policy states:

> Decision makers are responsible for limiting entitlement in claims allowed on an aggravation basis…Nor should a claim allowed on an aggravation basis result in a permanent impairment.

The draft policy restriction of entitlement for permanent aggravations represents a huge shift from the prior approach, and one that is not supported by the law or the medical evidence.

Again, the restriction against permanency is a departure from the thin skull principle and the legislation. The worker is entitled under the legislation to compensation for the results of the work injury, including loss of earnings and impairment. There is no bar for workers with pre-existing impairments. Section 43 of the WSIA states that loss of earnings benefits continue until "the worker is no longer impaired as a result of the injury." This means that a worker who remains unable to work as a result of a permanent aggravation to her pre-existing condition is entitled to ongoing loss of earnings.

A review of Tribunal jurisprudence reveals many cases where workers have suffered permanent aggravations of pre-existing impairments. [33] Even Brigham and Roth, despite their anti-compensation animus, acknowledge that aggravations can be permanent: "if a factor permanently worsens the pre-existing medical condition or impairment, there is a permanent aggravation." [34] It is also notable that other Canadian jurisdictions also recognize that aggravations can be permanent.[35]

The other insidious change apparent in the draft aggravation basis policy is the removal of the word "significant." The current policy applies only to significant pre-accident impairments," while the draft policy has no such qualifier. Under the draft policy's permissive criteria of "pre-existing impairment", a worker who saw a chiropractor for maintenance treatments for degenerative disc disease would have his entitlement limited to "temporary" aggravation only following a lifting accident, even if he had no lost time prior to the accident and was unable to return to pre-accident employment after the injury.

We are also concerned that the explicit direction in the draft policy to limit entitlement will only exacerbate the ongoing adjudication errors that routinely occur under the current policy. We often see cases where a worker is cut off benefits on the basis that he has returned to his "pre-accident state." This happens without any inquiry into whether the worker has in fact recovered, and in many instances despite medical evidence of ongoing incapacity that clearly did not exist pre-accident. These decisions are made simply on the basis of standard healing times, without regard to the worker's actual status or medical evidence.

We fear the draft policy does nothing to correct this problem and will in fact lead to its expansion. The draft policy states that entitlement ends when the worker returns to pre-accident state, but provides no guidance as to how this to be determined beyond stating that a worker's clinical status will be monitored. Despite the emphasis put on the need for "objective medical evidence" and "clinical evidence" elsewhere in these draft policies, there is no such requirement in this policy, which seeks to limit entitlement.

The draft policy restricts compensation provided by the current aggravation basis policy in a manner that is not supported by the legislation and does nothing to alleviate current adjudication errors. As such, we recommend that it be withdrawn.

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[33] See for example, *Decision No. 2225/11*; *Decision No. 1876/11*

[34] Brigham and Roth. (2004). "Apportionment Analysis" The Guides Newsletter, July/August, p.2.

[35] See for example: WorkSafe NB Policy No. 21-101; Saskatchewan Workers' Compensation Board 6.12 Pre-Existing Conditions – Section 49 (POL01/2000); Manitoba WCB Policy 44.10.20.10, Pre-Existing Conditions.

Recurrences 15-03-01

As with Aggravations, the explanatory paper downplays the significance of the changes with the draft policy. Again, these changes will narrow entitlement.

In the existing policy, to confirm a recurrence, the WSIB must confirm there is clinical compatibility with the original injury, or a combination of clinical compatible and continuity of complaints. The draft policy only mentions clinical compatibility. This begins the exclusion of the injured worker's evidence from consideration.

In the draft policy, the list of indicators of continuing symptoms is shorter than the current policy because it cuts out the following indicators from the current policy:

- that the injured worker has complained to supervisors or co-workers on an ongoing basis since the injury;
- that the worker has experienced a lifestyle change since the original injury such as being unable to participate in household duties, social or recreational activities.

In our experience, when an injured worker reaches maximum medical recovery and returns to work after a compensable injury, it is not unusual to discontinue ongoing medical visits because the family doctor can offer no further improvement. As a result there may not be a chain of medical visits to confirm the ongoing symptoms, but there are other indicators that should be considered by asking the right questions of the injured worker. Removing these considerations from the policy indicates that the WSIB is not interested in the evidence of the injured worker.

The new draft policy seeks to limit entitlement by adding the requirement to prove significant deterioration with "a measurable change in objective clinical findings." The introduction of subjective, vague, and indefinable qualifiers such as "significant" "marked", "measureable", and "non-maintenance" into the draft policy overcomplicates the decision making process and provides excuses, not reasons, for cutting benefits.

Both the new significance requirement and the objective clinical findings are inappropriate limitations on entitlement. The draft policy gives the need for surgery as an example of a deterioration that is significant enough to qualify as a compensable recurrence. Given that the vast majority of injuries and illnesses for which compensation is paid do not require surgery, this sets the threshold to get compensation for a recurrence at a ridiculously, and illegally, high level.

The requirement for measured change and objective clinical findings is legally flawed and leads to incorrect decisions. According to esteemed Law Professor Terence Ison:

> When an affirmative medical opinion has been rejected because it lacks "scientific proof" or "objective medical evidence," this usually means that the consequential decision was wrong in law.[36]

He explains why rejecting medical opinions for lack of "objective medical evidence" is incorrect:

> …any adjudicator who rejects a medical opinion because it is not "objective" has made three erroneous assumptions of law:
>
> - At least with regard to the symptoms of an injury, or other facts necessary for a medical opinion, evidence of the claimant is inadmissible (or should be disbelieved) unless it is corroborated;
> - Any medical opinion that is based on such evidence of the claimant is inadmissible, or should be discarded; and
> - If any question relating to the existence, diagnosis or etiology of a disability cannot be answered in the affirmative without evidence from the claimant, that question should be answered in the negative.
>
> Adopting any of these rules of exclusion is clearly illegal, unless such a rule is specifically prescribed by statute. It follows that a "medical" report based only on the lack of "objective" medical evidence is not a medical opinion at all. It is an erroneous opinion on a question of law and therefore inadmissible." [37]

There are many cases where a marked deterioration exists in the absence of objective clinical findings. By their very nature, conditions such as chronic pain disorder do not have objective findings. The most prominent indicators of deterioration are often subjective in nature, such as increased pain or reduced activity tolerance.

Professor Ison also notes that discounting a medical opinion based on a lack of objective evidence is overly restrictive and inconsistent with the original rationale for creating a compensation board (i.e., that it be less rigid than the courts):

> Such a rule of exclusion is also incompatible with one of the rationales for the original establishment of workers' compensation boards, and some other social insurance bodies – that adjudicators should admit a *broader* range of evidence than would be admissible in the courts. The adoption of such an exclusionary rule by any board would make it *more restrictive* than the courts in the admission of evidence.[38]

The WSIB itself admittedly has no definition of "objective medical evidence." We refer you to the letter of May 2, 2001, from Dr. Catherine Painvin, Director of Clinic Services Branch of the WSIB, to Orlando Buonastella of our office:

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[36] Statistical Significance and the Distraction of "Scientific Proof" Canadian Bar Review, Vol. 27, No 1, p. 119, 2008 at p.148.
[37] Ibid. at p. 140-141.
[38] Ibid at p.141.

> "…Does the Board have a definition of "objective medical evidence"? No, the WSIB does not have such a definition…What factors are considered as objective medical evidence"? I agree with you that diagnostic tests should not be the only evidence to consider when making a decision…"[39]

We are also concerned that the new policy's intent to limit recurrences to cases where there is evidence of marked deterioration will essentially punish some workers who make good faith attempts to return to work. Under the draft policy, workers who attempt to return to work but then are unsuccessful, either because they have returned too soon before healing, or the work aggravates the injury, or the work is unsustainable, will be precluded from further benefits. These cases are often adjudicated as recurrences and generally the recurrence is not caused by marked deterioration. Precluding entitlement for recurrences in these cases stands in contrast to the Board's longstanding push for early return to work.

In addition, the policy's new requirement for actual wage loss to qualify for LOE benefits following a recurrence is illegal. Section 53(6) of the legislation states:

> When a worker becomes entitled to payments for a loss of earnings arising out of an accident in respect of which he or she previously received benefits under the insurance plan, the worker's average earnings (for the purpose of calculating the amount payable for the loss of earnings) are the greater of,
>
> (a) his or her average earnings at the date of the accident; or
>
> (b) his or her average earnings when he or she was most recently employed. 1997, c. 16, Sched. A, s. 53.

The policy requirement for actual wages is inconsistent with the legislative direction that the higher wage be used for recurrence earnings. Section 43, which authorizes LOE, also does not require real earnings, instead referring to what a worker is "able to earn."

The current policy states that where an injured worker was assessed for a 0% NEL rating and has a recurrence after the 72 month limit on benefits reviews, the worker may still be eligible for further loss of earnings benefits. If it is determined that the injured worker may likely have a permanent impairment, the WSIB may make a new permanent impairment determination. This is completely absent from the draft policy. Since WSIB decision makers operate only on the basis of policies and without reference to the legislation, the WSIB has effectively eliminated these benefits without any change to the legislation.

In light of its illegality, we recommend that the draft Recurrences policy be withdrawn.

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[39] Copy appended to submission.

Draft Policies on Permanent Impairment 11-01-05, 18-05-3, 18-05-09

It is extremely troubling to see that the WSIB is bent on "factoring out" pre-existing conditions from permanent impairment awards in the absence of legislative authority to do so. In the accompanying explanatory paper, the WSIB deceptively describes this substantial departure from prior practice and policy as a "clarification." The prior policy (18-05-05) clearly states that measurable pre-existing impairments are to be deducted from NELs; it does not address conditions, and up until Mr. Marshall's appointment, there was never any subtraction for conditions. To call this a clarification is patently false.

Mr. Thomas recommended that

> if the WSIB decides to reduce permanent impairment awards by factoring in degree of severity of pre-existing conditions, it should advise stakeholders of its reasons for doing so and be able do demonstrate that it has the legal authority to do so.[40]

The WSIB has done neither of these things. In light of the history of these draft policies outlined in our introduction, it is clear that the reason for this change is to reduce costs, the main impetus behind all changes at the WSIB in recent years.

The WSIB does not have the legal authority to reduce permanent impairment awards based on pre-existing conditions. First of all, there is no such direction in the legislation, which specifies only that a worker is entitled to compensation for his or her non-economic loss "if a worker's injury results in permanent impairment."[41] Second, the legislation specifies that permanent impairments are to be determined using the prescribed rating schedule, which is the AMA Guides 3rd edition. There is nothing in these Guides that authorizes the reduction of permanent impairment awards for pre-existing conditions.

And, as we have said before, factoring out pre-existing conditions is not consistent with the common law "thin skull" doctrine or the Tribunal's significant contributing factor test.[42] If a pre-existing condition did not cause an impairment prior to a work injury, then there should be no deduction, even if the work impairment is worsened by the pre-existing condition.

Mr. Thomas also questioned whether it would be possible to determine the degree of the impairment that is work related and suggested it might introduce adjudicative uncertainty. We agree. Even if it were appropriate to do so, it would be very difficult to determine how much of a resulting impairment could be attributed to pre-existing factors.

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[40] P.29
[41] S.46
[42] As the WSIB explanatory paper notes, there is consensus amongst worker and employer stakeholders that the significant contributing factor test is the proper test.

Take for example, the case of a worker with a workplace back injury. At the present time, despite the fact that this draft policy has not been approved, it is common for the WSIB to reduce the NEL award on the basis of radiographic evidence of degenerative disc disease (DDD). Medical research shows that DDD is commonplace and often asymptomatic: "DDD seems to be a normal part of the aging process and not 'smoking gun' evidence of a pre-existing problem."[43]

The presence of DDD can, however, indicate a "thin skull": "DDD can predispose a patient to a painful spinal condition…degenerative discs move abnormally and this property may predispose them to injury in a traumatic event." The resulting impairment from an accident may be more severe because of DDD, but the DDD itself is not the cause of the impairment. A similar relationship exists between osteoarthritis and trauma. Osteoarthritis is common, and can remain asymptomatic, but trauma to a joint can cause it to become symptomatic.[44] If not for the work trauma, there would not have been any impairment.

We also note the practical challenge of factoring out for a pre-existing condition. In accordance with the prescribed rating schedule, permanent impairments are to be measured and rated precisely down to the degree of range of motion. The Board has moved away from this practice recently, and is now more crudely assessing impairments without the use of independent assessors[45]. This recent shift is not consistent with the prescribed rating schedule and thus it is also illegal.

It would be an additional error to crudely subtract 'deemed' pre-existing conditions from NEL awards on the same basis. How many degrees of ROM are lost due to the work injury and how many degrees are due to the pre-existing condition that is "contributing to or enhancing the degree of total impairment" as per the draft policy? This is an impossible exercise in splitting hairs. Even if this factoring out were legal, and we contend that it is not, it is impossible to do with the accuracy that the prescribed rating schedule demands.

As stated earlier, it is our position that the continued focus on objective medical evidence is an error. We see this focus again in the new draft permanent impairment policies, and again, we are concerned that this focus is not consistent with the law and will lead to adjudicative error. We note that conditions such as chronic pain disorder and psychological impairments do not, by their nature, have objective indicators. The differential impact of the new policies on workers with these conditions would be contrary to the *Human Rights Code*.

We are also concerned that the new draft policies approach to MMR will serve to codify the Board's recent practice of cutting workers off benefits before they have healed. As

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[43] C.J. Centeno and J. Fleishman, "Degenerative disc disease and pre-existing spinal pain" Ann Rhuem Dis 2003; 62:371-372 http://ard.bmj.com/content/62/4/371.full

[44] WSIAT Medical Discussion Paper, Osteoarthritis, Dr. Marvin Tile, November 2008.

[45] Spine and Pelvis 2012p.3553

noted earlier, we have noticed a trend in which case managers end benefit entitlement once a worker has reached the usual recovery time, without regard for actual evidence of the injured worker.

The draft policy "Determining Permanent Impairment" notes that MMR can be reached before the usual recovery time or during treatment, and specifies that a clinical opinion can be obtained to assist in determining MMR or usual recovery time. There is no recognition that recovery may be prolonged in some cases. Read together, these statements seem to suggest that MMR can be deemed while a worker is still recovering, particularly if the usual recovery time has elapsed. At this time, if no permanent impairment is expected (particularly if ongoing impairment is attributed to a 'pre-existing condition), entitlement to LOE will end. Why else would a decision-maker require a clinical opinion on usual healing time? Surely the worker's actual condition, as evidenced by his treating doctor's opinions, should guide decision making.

We also object with the 'scare tactic' of introducing a 'downside risk' for injured workers who request a redetermination of their permanent impairment. At p.3 of draft policy 18-05-05 there is a new provision warning injured workers that a requests for a redetermination of their NEL award could result in a cut to their loss of earnings benefits:

> If the NEL redetermination reveals an improvement in the degree of permanent impairment … the improvement is considered a material change in circumstances that may affect entitlement to other benefits and services.

It is also disconcerting that the process for obtaining an independent medical assessment has been removed from the new draft. The current policy on "Determining the Degree of Permanent Impairment" outlines the steps that must be followed in obtaining an independent medical assessment under s.47 of the legislation. The new policy only says that the "WSIB may arrange for a worker to attend an independent medical assessment." The statement that the "WSIB may arrange" appears inconsistent with s.47(4) which specifies that a worker shall select the physician from a roster maintained by the Board. At the very least, the policy should be clarified to reflect the legislative direction that the worker chooses the assessor.

Of final note, it is unfortunate that the process for redeterminations outlined in the current policy has been omitted from the draft "NEL redeterminations" policy. The current policy describes a process for the worker to follow, including a visit to his or her doctor or specialist, and the type of information that is required. Particularly for unrepresented workers, this description is very helpful. The new policy is once again consumed with describing what the Board will not grant entitlement for (pre-existing and non-work conditions) and instead simply notes that the Board will look at "most recent medical findings."

Work Disruptions Policies 15-06-09 and 15-06-10

This is a policy issue that our clinic has little experience with as the injured workers we represent seldom present with work disruption issues. Many of the injured workers that we represent were not able to return to employment due to their permanent workplace injury. However, we are concerned that the policy only agrees with Mr. Thomas pro-forma, but not its essence.

There is no question that the current policy needed some consolidation and better clarity. However, in its "consolidation," the proposed policy is very difficult to understand and hence apply fairly. The new policy creates more barriers for injured workers to access WSIB benefits and assistance after a work disruption.

The policy development takes inspiration from the 2011 KPMG report on Adjudication. That report, made the astonishing assertion that the current policy can act "to the advantage of an injured worker over a non-injured worker."[46] The notion that the WSIB would endorse such a view and accept the KPMG recommendations is, to say the least, highly disturbing. This view is unsubstantiated and ignores the reality that injured workers as persons with disabilities face many barriers to employment. Even in the case of short term disruptions, an injured worker may not qualify for EI benefits, strike pay, or other employment based benefits that may be available to co-workers.

The draft policy on entitlement following permanent work disruptions is both harsh and illegal. There will be no vocational or financial assistance available to the injured worker where the former work is 'deemed' to exist in the general labour market:

> The pre-work disruption suitable work is considered to exist in the general labour market if employees in other companies perform similar work even if there are no current job vacancies in the labour market (i.e. not in demand).

The WSIB will deem an unemployed injured worker who has a permanent impairment, who requires accommodated work, to continue to be fully employed at no change in wages even when the WSIB knows that there is no such work available to the injured worker. This is clearly contrary to s.43(2) of the Act which provides loss of earnings benefits based on the "the net average earnings that he or she earns or is able to earn in suitable and available employment or business after the injury."

Despite its lack of consolidation, the current policy is the only policy that recognizes that an injured worker with a significant impairment and an injured worker working at a significantly accommodated job will find a systemic barrier in obtaining other employment if there is a work disruption. Policy 15-06-02 at p.2:

> Likely exceptions to the general rule:

[46] 2011 KPMG Report on Claims Adjudication, page 22.

> The following factors suggest that the worker's employability is clearly affected by the work-related impairment/disability and associated clinical restrictions and that additional WSIB benefits/services may be in order [after a work disruption]:
>
> 4. The worker requires a high degree of accommodation. (Tasks and work processes have been specifically accommodated for the worker's impairment/disability and are not likely to exist with or be provided by another employer.)
>
> 5. The worker has an impairment /disability that is significant enough that it clearly presents and obstacle to the worker finding alternate employment. (Workers who have more than one work-related impairment/disability may be significantly impaired/disabled due to the combination of their impairments/disabilities.)

These are simple concepts and are not only based in law but are also widely understood as facts. We know and understand that an injured worker with a permanent impairment on a highly accommodated job will be out of luck if the employer lets him/her go. We all understand that a worker with one or more significant impairments will not likely find work after a work disruption and will need the WSIB's help.

Why are these notions not kept in the current policy? Why are these simple principles and this simple language not carried on?

We urge the Board to keep the current policy language. In fact the previous definition of "accommodated work" rather than "highly accommodated work" should be re-instituted as a ground for help under this policy. Injured workers deserve clear and supportive language. The current language is not only convoluted and confusing; it is contrary to the very purpose of the policy, that is, to provide help to injured workers after a work disruption.

This is our principled disagreement with the proposed benefit policy. We will leave it to injured worker representatives who do more work in this area to elucidate on the more complex details it contains.

Conclusions

If approved, these draft policies will narrow benefit entitlement in a manner not intended by the legislation and contrary to the fundamental principles of workers compensation. The Board has the authority to set its own policies, but they must be consistent with the legislation.

We have therefore called on the WSIB to withdraw these proposed changes. They are not necessary and will do great harm to injured workers and their families. For all of the reasons explained above, we strongly urge that these draft policies should be withdrawn.

Respectfully submitted,

Injured Workers' Consultants
30 April 2014.

WSIB Workplace Safety & Insurance Board
CSPAAT Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

May 2, 2001

Orlando Buonastella
Injured Workers' Consultants
815 Danforth Avenue, Suite 411
Toronto, Ontario M4J 1L2

Dear Mr. Buonastella:

Re: Definition of "Objective Medical Evidence"

Your letter of April 11, 2001 to Slavica Todorovic, Director, Benefits Policy Branch was forwarded to me for a reply.

1) **Does the Board have a definition of "objective medical evidence"?**
   - No, the WSIB does not have such a definition. In case of doubt the adjudicator who is the decision-maker would consult the clinicians working at the WSIB, either the nurse case manager or the medical consultant assigned to the team.

2) **Does the Board have a holistic approach to "objective medical evidence"?**
   - The staff at the WSIB will consider all the evidence available in order to make the appropriate decision. I agree with you that we would rely "on a number of factors: any diagnostic test, and the treating health care providers' observations and opinions".

3) **What factors are considered as "objective medical evidence"?**
   - I agree with you that diagnostic tests should **not** be the only evidence to consider when making a decision.

WSIB Workplace Safety & Insurance Board
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4) How does the Board approach "objective medical evidence" in areas that present difficulties for technological tests, such as soft-tissue and psychological impairments?

- The adjudicator who is the decision-maker will consider all the information available, and for complex, controversial issues might seek the clinical opinion of one of the clinicians employed by the WSIB.

I hope that this will address your four questions.

Sincerely,

Dr. Catherine Painvin, *MD, MSc*
Director
Clinical Services Branch
Health Services Division