New WSIB Benefits Policies

Backgrounder

On October 1st 2014 the WSIB announced that its Board of Directors had approved 8 new benefits policies that will come into effect on November 1, 2014. There will be no more consultation, the WSIB claims it has already engaged in the longest consultation process in its history.

Like all WSIB policies, benefit decisions made under them can be appealed through the usual appeals process. Like all WSIB policies, the Appeals Tribunal (WSIAT) is bound by these policies. Like all WSIB policies, an argument can be made that they should not apply if they are not consistent with the legislation. And like all WSIB policies, that argument almost never succeeds.

History of the WSIB's new benefits policies

2009

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?***[1]
>
> *…*
>
> *My commitment is to develop a plan …* ***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".*[2] *(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

[1] Ontario. Legislative Assembly. Standing Committee on Public Accounts. Hansard. 24 February 2010, p. P-481
[2] Ibid, p. P-490

payment of up to 20% to reduce the unfunded liability and improve administrative efficiency.

2010

In December 2010 the government made amendments to the Workplace Safety and Insurance 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 that they 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: 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".***[3] *(emphasis added)*

2011

The specific targets for benefit reduction policies were identified in the 2011 value for money audit of claims adjudication report by KPMG. Most of the new benefits policies were prescribed by the KPMG report:

> RECOMMENDATION #7: WSIB should immediately address the following policies…
> 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.[4]

[3] Ontario. Legislative Assembly. Standing Committee on Finance and Economic Affairs. Hansard. 6 December 2010, p. F-260

[4] KPMG. WSIB Adjudication and Claims Administration (ACA) Program Value for Money Audit Report. Toronto: KPMG, 2011. p.59

In 2011 the WSIB showed LIWAC (Labour Injured Worker Advisory Committee) a set of proposed benefits policies that it was proposing to implement without full public consultation. The WSIB was strongly criticized for this.

2012 – 2013

The WSIB published a Policy Agenda in the spring of 2012, engaged the services of Jim Thomas to hold public consultations and he reported back in June 2013. In fall 2013 the WSIB published a set of draft benefit policies and invited submissions on the draft policies.

2014

The WSIB received submissions on the draft policies until the end of April 2014. The draft policies were roundly criticized by injured worker, labour and employer organizations.

On April 1, 2014, WSIB CEO David Marshall gave a speech to the C.D. Howe Institute, a conservative think tank in British Columbia. Describing how he has achieved an historic transformation of Ontario's workers compensation system, he stated:

> *"We concluded pretty quickly that we didn't have a revenue problem so much as we had a serious expense problem."*

Despite the assurance of the government's representative to MPP Peter Tabuns, the proposed policies will implement reductions to the benefits structure and reduce the WSIB's benefit costs on the backs of injured workers.

General approach in the WSIB's new benefits policies

The theme in the new benefit policies is to get decision makers to 'look to deny' by questioning work relatedness every step of the way. The main way this is achieved is by repeatedly raising the issue of pre-existing conditions. Since the human body begins to deteriorate from about age 20, it is always possible to speculate that this may be a factor in any disability.

Until now, our workers' compensation system has been based on legal principles. These are rational principles that can be applied by reasonable people – as opposed to medical or scientific principles. Concepts like "causation" have not been given to the doctors to decide on the basis of scientific certainty.

The new policy approach rejects the legal principles and tries to 'medicalize' the decision making process. This reflects the argument expressed by the Canadian Manufacturers' Association more than one hundred years ago to Sir William Meredith at the Royal Commission 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. Meredith said:

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> *"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."*[5]

Under the legislation, there is a presumption of work relatedness. If someone gets injured or ill at work, it is presumed to be work related. 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.[6] Causation is a legal decision, not a medical decision that must be made on scientific proof. Remember how many decades it took for medical science to agree that cigarette smoking causes cancer?

The new policy basically rejects this approach, considering whether work made a significant contribution to the injury, and instructs that the decision maker consider the impact of the pre-existing condition on the work injury.

The thin skull doctrine is a related principle of tort law which has been adopted in the workers' compensation jurisprudence. Under the thin skull doctrine, you accept your 'victim' as you find him: a worker is compensated for her injuries even if they are unexpectedly severe owing to a pre-existing condition. 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."* [7]

The new pre-existing condition policy explicitly rejects the thin skull principle by introducing the concept of a pre-existing condition overwhelming the work injury. It says: "To determine if a pre-existing condition has overwhelmed the work-related injury/disease, decision-makers consider whether … the work-related injury/disease on its own would cause a similar level of impairment." This suggests that benefits

[5] Ontario. Commission on Laws Relating to the Liability of Employers to Make Compensation to their Employees for Injuries Received in the Course of Their Employment. Hearings transcript. Toronto: Queen's Printer, 1912-1913.
[6] Workers' Compensation Appeals Tribunal. *Pension Assessment Appeals Leading Case: Decision No. 915.* Toronto: WCAT, 1987 p. 101
[7] WCAT, *supra*, p.101

are to stop when the work-related injury/disease on its own would not likely result in a similar level of impairment.

The Appeals Tribunal has pointed out that this kind of reasoning is pure speculation. 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.*[8] *"*

The 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 are just speculation, guesswork, that give the decision maker the tools to eliminate compensation for the thin skulled injured worker.

The result of the new approach will be that 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 (the chronic pain case).[9]

This is not the first time the WCB has ignored the thin skull principle. In 1950, the WCB was advised that this type 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."*[10]

[8] Workplace Safety and Insurance Appeals Tribunal. *Decision No. 12371/13*, para. 42

[9] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (WCB) v. Laseur*. [2003] 2. S.C.R. 504

[10] Ontario. Commission on the Workmen's Compensation Act. Report…Hon. Wilfred D. Daniel. Toronto: King's Printer, 1950. p. 46

The concept of a 'crumbling skull' is an exception to the thin skull rule. A worker is to be compensated for the injury or acceleration of the pre-existing condition, but not for the impairment by the pre-existing condition that would have happened anyway, regardless of the work injury. Although it not expressly stated, under the new policy all workers are, in effect, 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 non-symptomatic conditions that the worker did not even realize she had, conditions that may never have become symptomatic but for the work accident. 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.*[11]

The new policy confuses the issue by abandoning long standing the distinction in WSIB policy between pre-existing conditions and pre-existing disability or impairment. In the current SIEF Policy 14-05-03 the Board makes clear distinction between a pre-accident disability or impairment, and a pre-accident condition.

A "pre-accident disability" is defined as a condition which has produced periods of disability in the past requiring treatment and disrupting employment. A pre-existing condition on the other hand, is defined as an underlying or asymptomatic condition which only becomes manifest post accident, like a thin skull. The Policy states "In a claim where there is a pre-existing condition but the worker is symptom-free at the time of the work-related accident there is no limitation of benefits throughout the period of temporary disability."

That is good, but that is not the policy that the decision maker will look at. The decision maker will look at the new "Pre-existing conditions" policy. And a different decision will result from the new policy. The new policy allows the WSIB to claim that although you have not recovered, you have recovered from the effects of the work injury and are now disabled by your pre-existing deteriorating condition. The decision maker is told to speculate, based on whether the impairment is unexpectedly severe, or continues beyond the expected recovery period.

Now that everything is a pre-existing condition, everything and anything may lead to early termination of compensation. Remember what Mr. Marshall said to the government committee about his job?

"I'm going to challenge our team … whether we can reduce our rate of long-term beneficiaries by half. What would that do to our income stream?"

[11] *WSIAT Decision No. 482/07* as quoted in *Decision No. 1237/13* at para 34