WSIB 2012 Benefits Policy Review Consultation

Submission

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Submission to the WSIB 2012 Benefits Policy Review

Introduction

The importance of putting proper resources into the initial decision making process of workers' compensation boards has been emphasized by Prof. Terrance Ison, one of the leading writers on Workers' Compensation law in Canada. If you make thoughtful well-reasoned decisions at the initial level, you will not need to rely so much on the appeals system.

This is even more important now because the WSIB has experienced a significant increase in the number of appeals leading to a significant backlog at the appeals branch. While policy changes are under consideration to speed up the handling of that backlog, it currently takes more than one year to get from a negative Case Manager decision to a hearing at the Appeals Branch. It takes an even longer period of time after that to get to a hearing at the Workplace Safety & Insurance Appeals Tribunal.

Trying to survive without income and without recognition of their injuries for a period of years has huge consequences for injured workers when they are wrongly cut off benefits. Injured workers sink into frustration and poverty; family relations deteriorate; they are often forced to give up their homes; and long term psychological consequences develop. It is very important to get the decision making right the first time.

Meredith and the Principles of Workers' Compensation

The founding principles of Ontario's workers' compensation system were laid out in the Final Report of Sir William Meredith to the Ontario legislature on October 31st, 1913. The Meredith Principles remain an important starting point for any consideration of workers' compensation law and policy today. We believe that it is important not only to acknowledge them but to list them. In our appendix we have provided a copy of the paper entitled "***The Meredith Principles – Economic or Humanitarian?"*** This was a submission to the recent WSIB Funding Review by Professor Robert Storey of the School of Labour Studies and the Department of Sociology at McMaster University. Professor Storey's paper provides a useful review of these principles in the context of the debate that was going on at the time. They are:

- No fault
- Employer pays
- Injured workers receive benefits for as long as their disabilities last [also referred to as security of payment]
- Collective liability
- Public system with independent board
- Non-adversarial

Recommendation

1. These policies should not only acknowledge the founding Meredith principles but should specifically state them.

In this submission, we will highlight the important principle of the independent board administering the workers' compensation system. Professor Storey explains in his paper that both labour and employer representatives wanted to ensure that the proposed Board or Commission for workers' compensation should be outside of politics and should be as independent as the judiciary. He explains how Chief Justice Meredith did not want this new Board relegated to the task of administering important decisions that were made by the legislature and he recommended an independent, autonomous Board.

Independence is a very important principle from a judicial perspective as well as from the perspective of public administration. Our workers' compensation system is a surrogate for the courts and a very important part of Ontario's judicial system. The WSIB must provide justice and be as fair and impartial as the judicial system. It follows that the interpretation of the legislation to policy development must not be directed by political concerns. We welcome this policy review as an opportunity to ensure that the policy reflects the legislation.

At the end of his paper, Professor Storey cites other references to Meredith's concern for the independence, integrity and humanity of the Board that he was proposing. Professor Storey argues that this Meredith principle was intended to stand up to any group in society (at that time it was the Canadian Manufacturers Association) who believes that they should get what they want because they are the most economically powerful and they are the ones who pay for the system.

In his recent report Funding Fairness, Professor Harry Arthurs characterizes the current workers' compensation debate as one between the Meredith Principles and the 'insurance model' of workers' compensation[1]. The insurance model is a corporate approach to workers' compensation. The Chief Executive Officer

[1] Funding Fairness, A Report On Ontario's Workplace Safety And Insurance System, Queen's Printer for Ontario, 2012, page 12, http://www.wsib.on.ca/files/Content/FundingReviewFundingFairnessReport/FundingFairnessReport.pdf

determines the strategic direction for the corporation which is then implemented. Many observers saw the change in the name from Workers' Compensation Board to Workplace Safety & Insurance Board as signalling a shift from a system based on the Meredith Principles to an insurance model. However, Professor Arthurs observed that if the legislature wanted the WSIB to behave like an insurance company it must do much more than change the title. It would need to reconfigure the entire Act. The Ontario WSIB remains a workers' compensation system based on the legislation founded on the Meredith principles.

A successful consultation process will contribute to maintaining the independence of the Board and advise the WSIB of the importance of ensuring that there is legal rigour in the development of the WSIB policy with full consideration of the legislation and the Meredith principles.

Recommendation:

2. The workers' compensation board was established to be an independent Board, a surrogate for the courts, and must provide justice and be as fair and impartial as the judicial system. The interpretation of the legislation for policy development must not be directed by political concerns.

As Meredith stated in his Final Report:

> *Half measures which mitigate but do not remove injustice are, in my judgment, to be avoided. That the existing law inflicts injustice on the workingman is admitted by all. From that injustice he has long suffered, and it would, in my judgment, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but of what is the least he can be put off with; or if the Legislature were to be deterred from passing a law designed to do full justice owing to groundless fears that disaster to the industries of the Province would follow from the enactment of it.* [2]

Context and Environment:

As noted in the Consultation Discussion Paper, the best policy reviews take place within an environment with key characteristics and features that are known and understood by all those involved in the consultation process. The

[2] Sir W. R. Meredith, Final Report, October 31, 1913, page 22.
http://www.awcbc.org/common/assets/english%20pdf/meredith_report.pdf

Discussion Paper identifies changing worker demographics, an increase in the age of workers and an increase in the average age of retirement as part of the context of this review.

However, at present there are other factors in operation that are significantly affecting WSIB adjudication. In this submission we wish to flag some of these factors in the environment. There is evidence that these factors are significantly changing WSIB decision making without any change in WSIB Operational Policy. Thus, they are compromising Meredith's principle that the workers' compensation system should be administered by an independent public board.

At the same time that WSIB adjudicators are grappling with the impact of changing demographics and age factors and age of retirement on their decision-making, they are also working in an environment where their employer is alleged to be in a financial crisis. The viability of the workers' compensation is questioned, external auditors are critizing the Board for paying excessive compensation, and the WSIB is explicitly taking steps to reduce its expenditures, including benefits for injured workers.

WSIB Strategic Plan:

The WSIB's Framework for Policy Development and Renewal, Consultation Report, January 2012, identifies six principles which will guide future policy development at the WSIB[3]. The third principle is:

> *"Policies will respect the WSIB's Strategic Direction"*

This raises the question 'what are the strategic directions that must be respected?' The WSIB's Strategic Directions document outlines some of the challenges facing the WSIB[4]. It lists them in an environmental scan. Under the heading "Economic Outlook" the strategic direction lists "Value for Money Audit." In this section it refers to the 2010 VFMA on the Adjudication and Claims Administration (ACA) program. This is also known as the 'KPMG Report on Adjudication' which is available on the Board's website. The WSIB Strategic Directions document comments on the KPMG Report:

> "*while making a number of positive observations about the ACA Program, the VFMA was also critical of the WSIB in a number of key areas. Recommendations have been addressed by several initiatives in the 2012 priorities."*

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[3] Framework for Policy Development and Renewal Consultation Report, WSIB, January 2012, page 3, copy provided; http://www.wsib.on.ca/files/Content/PolicyFrameworkFrameworkforPolicyDevelopmentandRenewal/FrameworkForPolicyDevelopmentAndRenewal.pdf

[4] Strategic Plan 2012-2016: Strategic direction, WSIB, copy provided; http://www.wsib.on.ca/en/community/WSIB/ArticleDetail?vgnextoid=039171346daa5310VgnVCM100000469c710aRCRD

The WSIB has said that the current policy development work must respect the Board's Strategic Plan and Strategic Direction. In the Strategic Directions document the Board has said that its 2012 initiatives are addressing criticisms made by the KPMG Report. It is therefore important to look at some of these criticisms.

The KPMG Report on Adjudication:

In our submissions to the WSIB about this KPMG report, we noted that, unfortunately, KPMG has overstepped the appropriate boundaries of value for money audits and strayed into proposing extensive policy and legislative changes. This is well beyond the role, or proper duties, of an independent auditing agency. For example, in their report, the KPMG states;

> "*The lack of clarity and simplicity in the rules undermines administrative efficiency and makes it difficult to bring finality to a claim.* ***This creates a "faint hope" moral hazard****."*[5] (emphasis added)
>
> *The WSIB Stakeholder environment includes a large representative community…This has driven* ***stakeholder demands that have resulted in a broadening of the WSIB mandate to address limitations in other areas of public policy****, such as employment and disability policy, and the broader labour policy challenges associated with an aging workforce. This* ***expanded mandate creates a social dependence*** *that makes it more* ***difficult to bring closure to individual cases****."*

This analysis raises several concerns. There is no acknowledgement that the mandate for workers' compensation is prescribed by the legislation. There is a suggestion that the scope of compensation has been expanded beyond what it should be and needs to be pushed back. There is no acknowledgement of Meredith's principle that the Board is and should be independent of political and economic powers.

The KPMG Report reflects a pre-occupation with bringing "finality to a claim," bringing "closure to individual cases" and does not acknowledge Meredith's principle that there should be security of payment for injured workers as long as the disability lasts.

The term "moral hazard" is extremely stigmatizing for injured workers. It dates back to the 17th century and was widely used by English insurance companies by the late 19th century. This usage of the term carried negative connotations,

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[5] 2010 VFMA on the Adjudication and Claims Administration (ACA) Program, KPMG, page 14, copy provided;
http://www.wsib.on.ca/files/Content/VFMA2010VFMAfullreport/VFMAReportFINAL2011-08-30.pdf

implying fraud or immoral behaviour, usually on the part of an insured party.[6] The suggestions that injured workers are prone to fraud, and that their representatives have manipulated the system to broaden compensation and create social dependence are not the subject of an auditor's judgment. They are political viewpoints that are entirely without foundation.

The KPMG Report looks at the Aggravation Basis Policy that is the subject of the current review. It states:

> *"Contrary to this intent, application of this **policy has extended beyond the acute period of work-related disability**. This has provided for entitlement to **benefits for relatively minor work-related injuries** which are considered to have aggravated a pre-existing condition … This **results in WSIB payments continuing beyond what was envisioned by the policy. The Policy should be revised**."* [7]

The KPMG Report comments on the Recurrences Policy that is the subject of the current review. It states:

> "*Similar to the challenges with the Aggravation Basis Policy, this policy can **give rise to an expansion of entitlement** by covering increased symptoms related to the aging process."*

An important part of the context of this policy review is the Auditors' political opinions that injured workers are getting more benefits than they should be getting, and that benefits should be limited through a change in policy, and the apparent acceptance of that opinion by the WSIB's management.

Recent WSIB Claims Statistics:

The allegations by organizations such as KPMG that workers' compensation entitlements have been expanded and benefits are too generous should be considered in conjunction with recent statistics published by the WSIB. These statistics also indicate significant recent changes in injured worker benefits.

For example, the authors of the KPMG Report note a substantial increase in the denial of initial entitlement to workers' compensation[8]. They report that the Board denied 11.3% claims in 2010 compared to 2009, when the Board only denied only 7.9% of claims. This represents close to a 50% increase in the rate of denial of initial entitlement.

The WSIB's 2nd Quarter 2012 Report to Stakeholders compares the April to June period for 2012 to the same period of time in 2011. The report notes that Loss of

[6] Wikipedia; http://en.wikipedia.org/wiki/Moral_hazard
[7] above, note 5, page 23, copy provided.
[8] ibid, page 22, copy provided.

Earnings benefits decreased by 11.2% ($31M). It also reports that Non-Economic Loss Awards decreased by 25% compared to the same period a year earlier[9].

These statistics confirm a significant reduction in initial entitlement to workers' compensation, Loss of Earnings benefits and Non-Economic Loss benefits without any change in WSIB Policy. This confirms the tremendous impact of the discussion of WSIB funding and the Ontario Auditor General's criticisms of WSIB spending, including overly generous benefits. Employers are now calling the system "cash for life" although the statistics suggest otherwise. This raises the question of whether the current WSIB can be said to embody Meredith's principle of an independent public Board.

We hope that this Policy Review will re-introduce the legal rigour and analysis that is necessary for the proper development of workers' compensation policy and will ensure respect for the Meredith principles and the legislation.

Recommendation

3. This consultation process should advise the WSIB of the importance of ensuring that there is legal rigour and discipline in the development of the WSIB policy with full consideration of the legislation and the Meredith principles.

Recent Injured Worker Poverty Statistics:

The current drive to reduce benefits and services for injured workers is made publicly palatable by stigmatizing injured workers as potential liars and by allegations of generous benefits, overcompensation and a 'cash for life' system.

The reality for injured workers is quite different. The injured worker community has long argued that the workers' compensation system is failing. We watch people fall through the cracks of the supposed safety net and are forced into poverty by the very policies that are supposed to protect them. The Ontario Network of Injured Workers Groups (ONIWG) conducted a survey of people who have a permanent impairment from work.

The 2010 survey of injured workers and poverty published by ONIWG found:[10]

- Before injury, 89% were employed full time; after injury 9%
- Nearly one in five lost their homes after injury

[9] 2nd Quarter 2012 Report to Stakeholders, WSIB, page 10, copy provided; http://www.wsib.on.ca/files/Content/QuarterlyReports2012Q2Report/2ndQ2012StakeholderReport.pdf

[10] Injured Workers and Poverty Survey 2010, Ontario Network of Injured Workers Groups, http://www.injuredworkersonline.org/Documents/2010_Injured_Workers_PovertySurvey_Summary.pdf

- Nearly one quarter had moved in with family or friends at some point after their injuries
- One in five injured workers could no longer afford a car
- Food bank use rose from 5 to 77 people after work injury
- 20% reported an overnight hospital stay within the last 12 months (most because of the work injury) compared with 7% for the general population of Canadians
- Over half had not been able to afford medications in the past 12 months
- 57% of injured workers in the study were unemployed

This is the context in which the injured worker community must respond to the changes proposed by the WSIB.

The Distraction of Scientific Proof:

One of the four stated objectives for this policy review is that policies "should reflect modern medical adjudicative approaches that could lead to better decision-making." We believe that it is important to comment on the role of medical evidence in the decision making process. We caution against "over-medicalizing" the workers' compensation decision making process.

We have provided two discussion papers by Law Professor Terrence Ison, which we commend as useful analyses of the workers' compensation decision making process. One is entitled "Administrative Law – The Operational Realities."[11] The second is entitled "Statistical Significance and the "Distraction of Scientific Proof."[12]

In the "Distraction of Scientific Proof," Professor Ison discusses Chief Justice Meredith's determination to have an inquisitorial system, even for appeals, to save disabled workers and their dependants from the problems that are inherent in the adversary system that is in use in our courts.[13]

He also talks about the phrase "objective medical evidence." In adversarial proceedings, it can often mean unbiased, which is not objectionable. However, in inquisitorial proceedings such as workers' compensation, the expression is commonly used to mean that the conclusion in the medical opinions depends on symptoms or other facts described by the patient to the physician and which the physician can not corroborate outside of the patient's word.

[11] Canadian Journal Of Admin. Law & Practice, 22 C.J.A.L.P.316, 2009.
[12] Canadian Bar Review, Vol. 27, No 1, p. 119, 2008.
[13] above, page 23.

Prof. Ison states that an adjudicator who rejects a medical opinion because it is not "objective" has made three erroneous assumptions at law;

1) that the evidence of the injured worker should be disbelieved unless it is corroborated,
2) that any medical opinion based on the evidence of the injured worker should be discarded;
3) that if any question relating to the etiology of a disability can't be answered without evidence from the injured worker, then that question should be answered in the negative.

Professor Ison points out that such a rule of exclusion of medical opinion because it is not "objective" is incompatible with one of the rationales for the original establishment for workers' compensation boards, i.e.; that adjudicators should admit a broader range of evidence than would be admissible in the courts. The adoption of such an exclusionary rule for non-objective medical evidence is more restrictive than the courts in the admission of evidence. It is also an example of the stigmatizing of injured workers that we will return to later in this submission. The belief that injured workers may be lying, without any evidence to substantiate it, means that claims should not be allowed without some external verification.

Professor Ison also notes the expression "scientific proof" is often used interchangeably with objective medical evidence and he observes wisely that "nowadays, "scientific proof" is commonly available for opinions on diagnosis, but commonly unavailable for opinions on etiology."[14]

Professor Ison explains that in an "inquisitorial system there is no burden of proof on a party. A conclusion must be reached, regardless of whether there is a firm basis for a conclusion either way. In some cases, it may only be possible to reach a conclusion by intelligent guess work, usually described as drawing reasonable inferences from the circumstances."[15]

This is consistent with the comment made in the presentation to this review by Gary Newhouse and Michael Green that, at some point, the decision maker must have a brain and use it. It is not possible to design a system of rules and policies that will decide all cases without exercising intelligent judgment. WSIB decision making is not a task that can or should be performed by robots.

Professor Ison warns against the over-medicalization of the workers' compensation decision-making process. He notes the danger of making the doctors into adjudicators. He describes how the adoption of criteria such as "objective medical evidence" and "scientific proof" are legal errors that establish a bias against the value of information obtained from the patient/injured worker.

[14] ibid, page 26.
[15] ibid, page 34.

He notes the danger of creating an expectation of scientific proof for matters such as 'causation' when in fact such proof does not usually exist.

In October 2011, the WSIB prepared some draft policies and discussion papers on a number of topics, including recurrences. We request that these draft policies should be made public and should be put on the table as part of the context of this review. They represent a significant amount of thinking by the WSIB on this issue and demonstrate some potential problems.

Recommendation:

4. The WSIB's October 2011 draft policies and discussion papers on recurrences, aggravations and work disruptions should be made public and should be put on the table as part of the context of this review.

In the October 2011 draft policies, the term "objective medical evidence" is used as a requirement. It is important to consider what is meant by the expression "objective medical evidence" because it has been frequently used by the WSIB. In our casework, we often encounter initial adjudication decisions at the WSIB which deny entitlement on the ground of a lack of objective medical evidence.

In 2001, we noted increased reliance by the Board on the concept of objective medical evidence and a more frequent use of the lack of such evidence as a reason for denying a claim. We wrote to the Director of the Benefits Policy Branch to ask if the Board has a definition of "objective medical evidence" and several other questions.[16]

Dr. Catherine Painvin, the director of the WSIB's Clinical Services Branch, responded to our letter. Her answer was "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." Dr. Painvin also went on to state "I agree with you that diagnostic tests should not be the only evidence to consider when making a decision." She also noted that the adjudicator is the decision maker and must consider all of the information available.

It is a great concern to see a resurgence of the use of the expression "objective medical evidence" both as a reason for claims denial as well as in WSIB policies when there is no definition of the term or legal justification for elevating its weight in the decision-making process.

[16] A copy of that letter and the Board's response dated May 2001 was provided to the Review at our presentation.

Recommendation

5. The WSIB should not over 'medicalize' the workers' compensation decision-making process. Over reliance on doctors makes the doctors into adjudicators. Adoption of criteria such as "objective medical evidence" and "scientific proof" are legal errors that establish a bias against the value of information obtained from the injured worker. Do not create an expectation of scientific proof for matters such as 'causation' when such proof does not usually exist.

A "Refresher" on Historical or Institutional Memory: Ignoring Weiler and Jackson

The current emphasis on establishing a "threshold" for permanent impairments suggest a departure from the wage loss model engineered by Professor Weiler in his 1980 report "Reshaping Workers' Compensation in Ontario". Professor Weiler criticized the old pension system for doing 2 things in one; that is, it confounded the issue of permanent impairment (physical or psychological) with the loss of working capacity or wage loss.

The system he designed was going to lead to a sharp demarcation between non economic loss (the NEL award, as it became known) and the issue of lost earnings. Prof. Weiler said: "There is no necessary correlation between a particular form of physical impairment and the percentage of wages lost."[17] The legislation and policies were built on this demarcation. The current idea of a "threshold for permanent impairment" and the associated idea that only certain impairment levels can lead to wage losses is not consistent with Weiler's dual award system. Consulting the 'fathers' of legislation is often useful to understand its purpose, and we invite revisiting what Prof. Weiler had intended.

The WSIB scenario writers propose ideas that were ultimately rejected by the Jackson report. In his first discussion paper of January 1996, Minister Without Portfolio Cam Jackson did muse about the ideas behind the case above case examples.[18] He mused about changing from "significant" to "predominant" contribution.[19] He mused about "apportionment of compensation.[20] He mused about continuing entitlement for a strain or a sprain.[21] He mused about a

[17] Paul Weiler, Reshaping Workers' Compensation in Ontario, 1980, p. 57.
[18] New Directions for WC Reform: A Discussion Paper, January 1996.
[19] p.17.
[20] p.17
[21] p.34

threshold level of permanent impairment before a wage loss would be compensated.[22]

However, these ideas in Jackson's discussion paper were abandoned in the final report ("New Directions for Workers' Compensation Reform, June 1996). The new Act did not reflect these ideas! It is important to re-invigorate the Board's lost institutional memory to remind the organization that the case examples do not reflect the intention of the law they are supposed to apply.

Recommendation:

6. This consultation process should re-invigorate the Board's lost institutional memory to remind the organization of the issues in the Weiler Reports and Jackson Reports because the concern raised by the WSIB in the case scenarios do not reflect the intention of the law the WSIB is supposed to apply.

[22] p.35

Recurrences

The Current Policy

We agree with the discussion paper that decisions of the Workplace Safety & Insurance Appeals Tribunal can provide useful guidance for the adjudication of these cases.

The current *policy* on recurrences is not problematic from our perspective. The current *practice* with respect to adjudication of recurrent claims is problematic because it appears to be interpreted more restrictively in recent years. We would like to provide you with several case examples from our own experience.

Recommendation

7. The current policy on recurrences is not problematic. The current practice with respect to adjudication of recurrent claims is problematic because it appears to be interpreted more restrictively in recent years.

Please note that unlike the WSIB's apocryphal fictional scenarios, the case examples used in this submission are real.

IWC Case Example #1: Hanan

Hanan (who joined us in the presentation at your hearing) had experienced a pre-accident non-compensable left knee injury which kept her off work for a couple of weeks. She returned to work with no problems. Later, she fell at work and landed on both knees. The WSIB accepted the claim for the knee injuries and approved permanent work restrictions relating to standing, squatting, kneeling, etc. One would have expected a non-economic loss or permanent impairment assessment to follow, however the case was never referred for that. This example will come up again in our submissions on permanent impairments.

The injured worker was eventually able to return to work after the injury. However her right knee, the one which was <u>not</u> previously injured, continued to deteriorate. At the age of 48, the injured worker required right knee replacement surgery. Her surgeon explained that the injury accelerated the arthritic process in the knee requiring a knee replacement at a much younger age than what normally would be expected. The WSIB refused to accept further entitlement for a recurrence for the knee surgery. The WSIB concluded that this is not a recurrence or deterioration because of the presence of advanced osteo-arthritis in the knee, which is part of the aging process.

In this example, the natural aging process is a factor to be considered in the adjudication of the claim but it was elevated in importance to become a barrier to compensation, despite a supporting medical opinion from the treating specialist who stated that the condition is work-related. The presence of advanced osteo-arthritis is part of the aging process but it has blinded the decision maker to the existence of supportive medical evidence which should have allowed the claim.

IWC Case Example #2

In this case, the injured worker experienced a compensable soft tissue shoulder injury. After some lost time with loss of earning benefits, she returned to modified duties. She performed modified duties for approximately 3 years when her shoulder condition flared up in the same area as the original injury. Her doctor recommended surgery.

The WSIB denied entitlement to the surgery as a recurrence of the original compensable injury on the basis that "the condition was age-related." The injured worker in this case was 39 years old. Once again, the age factor was seized as a reason for denial that prevented proper evaluation of the evidence and the weighing of the significance of the workers' relatively young age, compared to the fact that she had a prior compensable injury to the same location of her shoulder that required modified duties for 3 years.

IWC Case Example #3

In this case, the worker suffered a compensable back injury and loss of earnings benefits were paid for some lost time. The injured worker returned to her regular job but experienced difficulties performing her regular duties. After about 5 or 6 months of attempting to perform her regular duties with difficulty, she experienced a flair-up of back pain in the same location and had to stop work.

The WSIB denied entitlement for the recurrence of the compensable back condition and gave two reasons;

1. She returned to her regular job.
2. There is no objective medical evidence.

Here we see factors which may be relevant to consider, but became a barrier. The adjudicator did not weigh these factors against the significance of the original injury, the fact that the worker had experienced difficulties since returning to work, and had only been back at work for 5 or 6 months before the condition reoccurred.

IWC Case Example #4

As a general concern, we often see an over emphasis on seeking continuity of complaint in recurrence cases. On this point, we would like to refer to the WCAT *Decision No. 15A* from 1986 that was provided in our Appendix. In that case, the worker said that his back condition persisted following a 1965 compensable accident, although from 1967 to 1982 he only saw a doctor 3 times and complained to no one but his wife.

The Tribunal Panel noted that lack of continuity of complaints does not always lead to a conclusion that the workers accident related problems have disappeared:

> *"If the worker is stoic, or has kept his problems to himself, there may be lack of continuity of complaint without disappearance of the back problem. Therefore, when the Workers' Compensation Board or the Appeals Tribunal is confronted with a situation where a worker testifies that his back problem has been continuous since the accident and the evidence discloses a lack of continuity of complaint, one must conclude either that the workers' testimony as to the ongoing back problems is not to be believed or, alternatively, the worker is telling the truth and has been stoic about his problem. Thus, a finding as to the workers' credibility is often crucial in deciding the issue."* [23]

If the policy is going to refer to factors such as the continuity of complaint and medical treatment, we believe the Policy should also acknowledge conditions can be sustained in the absence of complaints and treatment.

Comments on the Recurrences Discussion Paper

With respect to the legislative basis for paying workers' compensation benefits for recurrences, there is a note on page 8 of the paper that the Board has, through policy, interpreted s.13 of the Act to mean that additional benefits may be paid later in the claim. We would also add that further benefits are provided in the legislation under s.53(6) which provides that, in an event of a recurrence, the earnings basis for a claim would be the higher of the earnings at the time of the original accident or the earnings at the time of the recurrence. Benefits for loss of earnings in the case of recurrences are firmly established by the legislation.

Regarding how the policy might be revised, we would advise the Board not to throw it out, but to build on it. The considerations from the WSIAT decisions are helpful to guide adjudicative reasoning. As others have noted, Ontario now has a large body of Appeals Tribunal decisions and workers compensation law could now be taught with casebooks and case studies like other areas of law.

[23] WSIAT Decision No. 15A; http://www.wsiat.on.ca/Decisions/198586%5C15A_86.PDF

As demonstrated in our case examples, flagging considerations such as aging, or a return to one's regular job, or continuity of complaint, should not be elevated to a level of greater importance than medical opinion. Decision makers must be given proper instructions and training in weighing the evidence.

It is important to be aware that by listing criteria in a policy the WSIB may be, in effect, creating barriers to entitlement. For example, in the Board's 2011 Draft Recurrence Policy, it requires the worker to establish "a **significant** deterioration of the original work-related injury" and also that there is "**sufficient** medical evidence" to link the recurrence to the original claim.

When properly explained, qualifiers such as significant can become guides to adjudicative reasoning. For example, the "significant contribution" principle of legal causation that has been developed in the WSIAT jurisprudence. However, the introduction of qualifiers such as "significant" or "sufficient" or "marked" can also bring subjective terms into the decision making process and introduce a threshold that, in a mass adjudication process like the WSIB, becomes a reason to deny claims. Such a denial is not supported by the legislation.

Recommendation

8. Decision makers must be given proper instructions and training in weighing the evidence. Factors, such as aging, return to one's regular job, or continuity of complaint need to be weighed with the other evidence in each case, not used as easy reasons to deny a claim.

On the subject of barriers to entitlement, an interesting feature of the 2011 Draft Recurrence Policy indicates that a zero NEL rating means that the worker is unlikely to have any further loss of earnings from the original injury. This is opposite of the current recurrence policy which provides specifically that a recurrence may be accepted in cases where there has been a zero NEL rating. We have seen no explanation for this reversal in the 2011 draft Policy.

Aggravation Basis

The Current Policy

The current *policy* is not problematic. The current *practice* illustrates some problems. The problem in practice is that the decision-makers are ignoring the guidance given by the policy for determining whether there is a pre-accident impairment.

Recommendation

9. Decision-makers need to heed the guidance given by the current policy for determining whether there is a pre-accident "impairment" as opposed to a mere "condition".

By alleging that there is a pre-accident impairment and accepting the claim on an aggravation basis, the door is opened to limiting entitlement to benefits (such as closing benefits before the injured worker is able to return to work). When a case is accepted on an aggravation basis, it is common to see loss of earnings benefits terminated before the worker is able to return to work on the ground that the worker has recovered to his or her pre-accident state. This fits well with the Board's strategic emphasis on reducing benefit costs and bringing finality to individual claims.

IWC Case Example #5

The worker has pre-existing "conditions." These are degenerative changes in the spine and spinal stenosis or a narrowing of the spinal canal, a congenital condition. Prior to the accident, the worker had no symptoms of back problems. The injured worker was unaware of either condition. They showed up in an MRI after a workplace back injury.

Loss of Earnings benefits were initially allowed, but they were terminated after the MRI on the basis that the ongoing symptoms were alleged to be a result of the pre-existing conditions, and that the worker had recovered from the compensable back strain. The injured worker was not recovered to the point of being able to return to work. She had been doing the same job for 10 years prior to the accident without any symptoms of back problems.

The current policy does well at explaining what is a pre-accident impairment, however, apparently we need more explanation of what is not a pre-accident impairment. The policy would also benefit from a discussion of asymptomatic conditions. It would also be an appropriate place for an explanation of the thin skull principle. As explained carefully by the WCAT in *Decision No. 915* and other leading cases. It is also an appropriate place for the Board policy to

explain the significant contribution principle of legal causation which underlies workers' compensation.

Recommendation

10. The current policy on Aggravation Basis should explain what does not constitute a pre-accident impairment and include a discussion of "asymptomatic" conditions.

11. The policies should explicitly adopt the "*significant contribution test"* as developed by the Tribunal. *Decision No. 915*[24] clearly outlines the founding principles of adjudication: the accident must only be one of the factors;[25] the words disability "results from" has a different meaning that "is caused by";[26] the thin skull doctrine;[27] and predisposition is not a bar to compensation.

The WSIB scenarios imply that every worker is a "crumbling skull" suffering from an age related degenerative disability and unlikely to complete their working life. However, age is a condition, not a disability. There is a difference between a degenerative illness that is producing a gradually increasing disability or physical impairment, such as ALS, multiple sclerosis or some forms of cancer, and the normal aging process that may never significantly affect the activities of daily living. The comment that the mechanics of the incident might not have aggravated the condition implies that we should not compensate for minor accidents that might not have harmed 'the average worker.' In this example, the incident did cause a permanent aggravation, and that is why it is compensable.

The challenges identified in the WSIB's case scenarios are reminiscent of an exchange between Sir William Meredith and Mr. Frank Wegenast, representing the Canadian Manufacturers' Association that is documented in the transcripts of the Meredith Commission:

> Wegenast:
> *Take a man who has been earning two dollars a day. You pay him as if he is incapacitated, we will say, one dollar a day. Now, he gets that till he is sixty-five, seventy-five or eighty years old. In the natural course of things he would not have earned two dollars a day for all that time. He might have been killed or otherwise injured. What the employer would be asked to do under a non-contributory scheme would be to insure that man not*

[24] Pensions Leading Case, WCAT Decision No. 915, http://www.wsiat.on.ca/Decisions/1987%5C915.pdf
[25] p.100
[26] p.99
[27] p.101

only against the result of occupational injury but also against non-employment for the rest of his days, against accident from any other reason, against old age, and against invalidity.

The Commissioner:
You have injured the man; why should all these problematical things enter into it, that he might possibly 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.[28]

[28] Sir William Ralph Meredith, Interim Report on Laws Relating to Liability of Employers to Make Compensation to Their Employees for Injuries Received in the Course of their Employment Which are in Force in Other Countries (Toronto, 1912) Minutes of Evidence, 6 August 1912:75.

Work Disruptions

The Current Policies

We agree that there is room to simplify the existing policies. It is true that there are a lot of policy documents with repetitive content which could be cut down into one or two policies perhaps with a distinction for short and long term disruptions.

> **Recommendation**
>
> **12. The Work Disruption policies could be simplified into one or two policies, perhaps with a distinction for short and long term disruptions.**

However, we must caution against substantive changes that will result in benefit denials or cutbacks. As we will discuss, we object to the sentiments which form the impetus for these policy reviews, namely the notion that these policies give injured workers an "advantage" over non-injured workers, and the related fiction of compensating injured workers for economic circumstances. KPMG wrote:

> ***Work Disruption Policies (15-06-01 to 15-06-05)*** *The intent of these policies is to address situations where injured workers are disadvantaged in the labour market because of their work-related impairment. In practice, these policies can act to the advantage of an injured worker over a non-injured worker. For example, in cases of strike, lockout or seasonal layoff, where many non-injured workers would remain off work awaiting a recall, injured workers are entitled to receive full LOE benefits.*[29]

We strenuously object to the sentiment that these policies could give injured workers "an advantage" over non-injured workers, as claimed by KPMG. We also take issue with the related notion that these policies expand coverage due to economic circumstances.

1. The simple fact is that in times of economic hardship, injured workers always fare worse than non-injured workers.

Statistics consistently show that persons with permanent disabilities (which is what we're talking about here when we talk about injured workers) are already at a disadvantage in securing employment. That is, the unemployment rate for persons with disabilities is always significantly higher than the general population.

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[29] KPMG. WSIB Adjudication & Claims Administration (ACA) Program Value for Money Audit Report, pg. 28.

We know that injured workers face additional discrimination from employers when seeking employment. The KPMG Value for Money Audit Report on Labour Market Reintegration reported that only 50% of workers were employed at 18 months after completing their LMR plan.[30] That means that of the workers who actually received and completed retraining from the Board, half were still unable to secure employment.

Even though it is illegal, we know employers often ask workers if they have work injuries and just simply won't hire the ones who say yes. Some employers look for gaps in a worker's resume that could indicate injury. If a worker comes in to apply for a job wearing a wrist brace or carrying a cane, the employer doesn't even have to ask.

Employers resist hiring injured workers partly to avoid the 'hassle' of having to provide accommodations, but also because of experience rating. Under experience rating, employers see injured workers as a risk. They are perceived as being at higher risk of recurrence or new injury, and employers do not want to chance a surcharge or loss of rebate. The situation is only worse in tough economic conditions when there are more than enough able-bodied workers to choose from.

2. It must be recognized that injured workers are often ineligible for other wage loss benefits that non-injured workers may qualify for in times of work disruption. For example, a worker who has been off work recovering from injury may not qualify for the EI that his colleagues will receive during their seasonal layoff.

Or let's take the example of an injured worker who is recovering in hospital while his workplace is on strike or lock out for two weeks. That worker is not going to get strike pay. He is not going to be able to do anything to bolster his income during that time period. Is it fair that the worker should miss his mortgage payment that month because his LOE was stopped for the 2 weeks of a strike? Remember too, that LOE is not a full wage loss replacement; it is 85% of net earnings, so that worker is already taking a financial hit.

3. Finally, it is important to recognize that the existing policies on work disruption already represent a step down from the original policy.

The KPMG report falsely warns that the current work disruption policies have expanded coverage beyond what was originally intended. In actuality, the original policy was more inclusive than its current incarnation. The original policy called for the provision of further benefits to workers who were in *accommodated* work, while the present policy narrows this to workers who require a *high degree*

[30] KPMG. WSIB Labour Market Re-entry (LMR) Program Value for Money Audit Report, December 3, 2009, pg.23

of accommodation. There has been no expansion of coverage; the current policy actually narrows the scope of the original policy by adding the qualifier that the work be highly accommodated, a concept which we will soon discuss in more detail.

Comments on the Discussion Paper – highly accommodated and employability

The Thomas Discussion Paper highlights the concept of being "highly accommodated" and it also appears in the October 2011 draft policy. We caution that relying on whether a worker is in highly accommodated work to determine entitlement to further benefits is too narrow and will result in the unfair exclusion of many workers from benefits.

A worker may have only minor accommodation at work, but may never be able to find another job where that accommodation will be provided. Let's take the example of a worker who sorts widgets into buckets. This worker has a shoulder injury that prevents her from lifting the buckets onto the cart after they have been sorted – a small but necessary part of the job. The employer has accommodated this worker by having a co-worker who operates a machine nearby do the lifting. Lifting the buckets may only represent a small portion of the work – the worker is not "highly accommodated", but a new employer isn't going to want to hire two people to do this job – they are going to hire the person who can do the whole job.

Or, it could be something even simpler – an injured worker is accommodated by being allowed two extra breaks per shift. Is a new employer going to hire the worker when he says he needs to take extra breaks?

Large employers often have light work positions that they keep for their injured workers. They may not necessarily appear to be accommodations because the job is simply made to be suitable, but the worker may not be able to find a comparable job in the broader labour market.

So instead, we need to look at employability -- whether the worker, considering his/her skills and personal characteristics, as well as his/her impairment and restrictions, will be able to find suitable and sustainable work. If the answer is no, that worker should be entitled to benefits.

The Thomas paper suggests that the WSIB feels that the definition of employability is too broad, but we disagree. The definition is quite clear. Given the disadvantaged position of injured workers in finding employment, it is only just to look at employability broadly, at the whole person, in determining entitlement to further benefits.

Comments on the WSIB October 2011 Work Disruptions Issues Paper and Draft Policy 15-06-01

The October 2011 WSIB Issues Paper identifies the KPMG Value for Money Audit (and its erroneous conclusions) as the impetus for changing the work disruptions policies. The Paper recounts KPMG's assertion that the policy is used to expand coverage for economic circumstances, and discusses the need to "ensure that the policy concepts are not being applied more broadly than was originally intended."

For reasons explained earlier, these are not valid concerns. The systemic discrimination injured workers face in the labour market means that economic circumstance can never really be separated from the work injury. And really, there has never been an instance that we can recall where a policy was applied too broadly; however, it is often the case that a policy is applied too narrowly, which is the real danger here.

We caution against the use of the qualifying words found within the draft policy that will inevitably be used to deny benefits. We have already discussed the problem with focusing on "highly accommodated" which appears again in the draft policy.

We have similar concerns with the use of the qualifier "significant" within the draft policy. It appears in a couple of places...significant expense, and the significance of the work related impairment and associated accommodation requirements. Significance can be a subjective term – its inclusion here serves to complicate rather than simplify the policy. More importantly, we foresee adjudicators simply ruling that the accommodation or injury is not significant enough to warrant benefits. It will become an easy reason to deny.

Recommendation

13. Given the difficulty injured workers face in securing employment, the work disruptions policy needs to be broad and flexible. Do not use any qualifying words including "highly" or "significant" to narrow the application of the policy.

14. The proper question in work disruption cases is whether the worker is employable in a 'real life' situation[31], looking at characteristics of the whole person and determining whether that worker is likely to obtain sustainable, suitable work.

[31] The 'real life' test originates in *Villani v. Canada (Attorney General)* (C.A.), 2001 FCA 248, [2002] 1 F.C. 130. *Villani* factors, personal characteristics that affect employability in the actual labour market, are widely cited in the adjudication of Canada Pension Plan Disability benefits.

Permanent Impairments Policy

The Current Policy

The quality of the permanent impairment policy has been on a downward slide since shortly after its inception, much to the dismay of injured workers. Contrary to the KPMG report and the WSIB administration's perception, the adoption of the AMA Guides for the permanent impairment rating system was already a step down from its original vision.[32] At the outset, the WSIB commissioned a comprehensive study of non-economic loss, which took place from 1988-1991. We have provided copies of the research documents for your information.

This research study employed a survey of injured workers and the general population with the aim of measuring loss of enjoyment of life in the rating of NEL awards. The WCB survey found that the NEL values for both respondent groups were higher than the AMA Guides PI values. The WCB projected annual NEL costs of $100 million based on the AMA Guides, $270 Million based on the survey results values, and $170 Million based on modified survey result values. Although the WCB administration recommended using the modified survey results[33], the decision was made to use the significantly cheaper AMA Guides.

Almost all of the injured workers we see are dissatisfied with the level of the NEL they are awarded, invariably finding that it minimizes, and fails to capture the true extent of, their loss. The median NEL award in 2010, the last year for which statistics are available, was about 12%.[34] When applied to the base amount, this amounts to a relatively inconsequential award of roughly $6,000. Note that the statistics quoted above from the 2012 WSIB Second Quarter Report state that NEL awards have been reduced by 25% compared to the same period in 2011.

In the past few years, the Board has strayed even further from the initial vision by curtailing the use of independent examiners. For the NEL process to be, and be seen to be, independent from the Board, the WCB had adopted Prof. Weiler's recommendation that examinations were to be conducted by independent doctors. Now, most assessments are done by "NEL clinical specialists" employed within the Board.

It is most unfortunate to see that despite this review, the Board has already gone ahead and implemented major changes to the adjudication of permanent

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[32] See IWC's letter (attached) "Why the KPMG Report on WSIB Adjudication is So Upsetting" of December 13, 2011, page 6-7.

[33] Report on Non Economic Loss Research Project, WCB Research & Evaluation Branch, June 7, 199, attached to file "Di Santo to Bd re NEL report and recommendations May 27, 1991.pdf"; copy provided.

[34] Statistical Supplement to the WSIB Annual Report, 2010.

impairments. The WSIB disclosed documents to the Legislative Standing Committee on Government Agencies that show that a major change in adjudication policy has already taken place, prior even to this review's commencement. In our casework, we are seeing how these changes are penalizing injured workers. The attached documents[35] are drastically altering the way pre-existing conditions are deducted from the NEL permanent impairment rating as the Board furthers its cost-cutting agenda. They are treating 'conditions' as 'impairments', which we discuss in more detail in the section that follows.

From a procedural point of view, these changes have bypassed the regular policy consultation process and this very inquiry. An admittedly "more aggressive approach"[36] is already in effect before your inquiry has even begun.

These changes were instituted by way of semi-secretive methods that bypass the role of the Board of Directors in policy control, as envisioned by the 1980 Weiler report. Professor Weiler advocated a strong policy-making role for the board of directors, so that it would lead the research and development of policy.[37] Now policy is in the hands of the CEO, the person responsible for the financial health of the system. The potential for a conflict with the law is significant. The fact that this inquiry was set up by the CEO and it will report to him is telling of who is in charge of policy development now.

The "more aggressive approach" further shows that the new WSIB administration under Mr. Marshall is bent on "cutting costs at all costs" while only superficially endorsing the Meredith and Weiler principles. The statistics cited earlier in this submission, such as the increased denial rate, are clear evidence of these cuts.

Mixing Conditions and Impairments: Using Oranges to deduct from Apples

The previous policy reduced NEL awards only for pre-injury **measurable permanent impairments**. If they were not measurable, they could be approximated, but had to be permanent impairments. Examples of this were pre-existing amputations, or pre-injury rated permanent impairments. In these cases, the new NEL was reduced accordingly. The NEL system is extremely precise and reproducible; every degree of range of motion is measured for precision.

The May 2012 documentation from the WSIB released to the Standing Committee on Government Agencies reveals that the Board is now confusing or confounding conditions with impairments. This shows that the Board is already implementing some of the ideas that are currently the subject of this Review, even where they contradict the current policy. The new approach in effect forces

[35] Spine and Pelvis, Permanent Impairment Branch, WSIB, 7 May 2012, p. 3553-3554, copy provided.
[36] Ibid., at p.8 (3540)
[37] p. 129-132

the assessor to measure and deem the immeasurable as "measurable" and then to deduct an arbitrary amount from the NEL measurement. To quote the new "policy":

> *Underlying or pre-existing conditions could be impacting the overall impairment, including ROM. If such conditions are identified, either through diagnostic reports or other medical reports, the overall PI percentage should be reduced using WSIB Operational Policy 18-05-05 (mild 0% reduction, moderate 25% reduction: severe 50% reduction).*[38] (emphasis added)

OPM document 18-05-05 referred to pre-existing impairments; now, the direction is to reduce pre-existing conditions that may not have constituted a permanent impairment. Under the Second Injury Enhancement Fund (SIEF) policy document 14-05-03, reductions only applied to pre-existing impairments. The pre-existing impairment" was considered in terms of the likely clinical rating" that would have occurred pre-injury.[39] Leaving aside the virtual impossibility of fairly "deeming" a pre-existing PI, at least the policy acknowledged that there must be permanent impairment before the work related injury.

The case example that follows demonstrates the new approach of deducting for conditions.

IWC Case Example #6

The injured worker in this example had a NEL already. Since that time, he had suffered decreased mobility (ROM) and symptoms to his bilateral shoulders. The WSIB nurse case manager did a paper review and noted that a recent MRI shows "moderate degenerative changes." A 25% reduction is immediately applied for this pre-existing condition (not impairment) and the NEL percentage is calculated to be smaller than the percentage given at initial determination! In one fell swoop, a recent medical report documenting "moderate degeneration" becomes a pre-existing impairment and is discounted by 25% from the original NEL!

This example comes from a NEL reassessment, but the same policy is applied when making original NEL determinations. Here are some of our deep concerns:

> 1. There is no attempt to address the "significant contribution test." The proper question is whether the work accident significantly contributed to the impairment. It could be that the work accident accelerated the progression of the DDD, or it could be that the DDD was asymptomatic (or mildly symptomatic without affecting work) before the injury and only became a problem for the worker after the accident. That is, the worker

[38] ibid p.3553-3554, step number 8.
[39] P.5

may have had the DDD condition, but it was not an impairment until it was aggravated by the work injury. There is no recognition here that the pre-existing condition must be impairing. The Policy on SIEF does require impairment: "the significance of the pre-accident disability is considered in terms of the likely clinical rating that would have been work-related, having regard for the range of disabilities usually encountered."[40]

2. There is no consideration of whether the pre-existing condition was permanent. That is, the worker could have had pre-injury bouts of back pain, as a large percentage of the population does from time to time. If the bouts of pain were transient, and the pain only became permanent following the work accident, then they did not constitute a permanent impairment

3. The WSIB is comparing apples and oranges here: the pre-existing condition is crassly measured with broad categories on the basis of assumptions rather than evidence, while the AMA guides, which are extremely precise and "measurable," are used to measure the post injury impairment.

Recommendation:

15. The WSIB should revert to the previous practice of discounting NEL awards only for measurable pre-accident impairments. This was clear, practical, consistent and effective, and it makes sense.

IWC Case Example #1: Hanan's story revisited

In Hanan's case, the Board blames her problems on a pre-existing condition and then ignores her evident permanent impairment. Her case is an example of how permanent impairment can get lost in a maze of adjudication:

Hanan suffered a bilateral knee and back injury when she fell on a wet wooden floor in July 2009. The WSIB allowed SIEF relief for the employer, ruling that the accident could be considered "moderate", and the pre-existing condition also "moderate" (particularly the **left** knee since there was no symptomology, medical treatment or lost time for the **right** knee).

Hanan did have a non-compensable injury to the **left** knee before the injury, when she missed a step coming down a set of stairs at a friend's house (but did not fall) in January 2009. She was off work for 2 weeks following that incident and did not require surgical treatment. She was able to resume work with no problems. Even for the left knee, there was no permanent impairment.

[40] (OPM 14-05-03) p. 5.

She did not have any pre-injury symptoms or disability to the **right** knee. It had never bothered her.

Hanan was assessed at the WSIB Knee and Hip Specialty Program at Sunnybrook Hospital. They clearly determined that she would have permanent restrictions as a result of this injury and this was noted in the Case Manager's memorandum on file. Her WSIB approved restrictions are to "avoid prolonged standing, prolonged walking, squatting, kneeling, stair climbing and lifting." One would expect that these would result in a NEL assessment.

The WSIB knows she is now using Wheeltrans, as she cannot use public transit as the knees are not stable, especially the right. The back is also a problem. The WSIB also knows that there was a fire in her building, she was on the 9th floor and she could not take the stairs to exit. The firefighters had to carry her down the stairs. She has been clearly disabled after the injury.

As her condition worsened, her specialist eventually performed knee replacement surgery on the **right** knee, the knee that had no pre-existing impairment or even symptoms. This was done even though her age was relatively young (48). The board denied entitlement to this surgery because there was advanced osteoarthritis. A NEL assessment was never performed even though permanent disability was flagged even before the surgery. Once the decision to deny the surgery was made, her case was essentially closed. Needless to say, this caused a lot of financial hardship and insecurity. She is a single mother and her only support is the church -- precisely the situation Justice Meredith wanted to prevent.

The injured worker's surgeon advised the Board that the surgery was related to the injury by accelerating the arthritic process. Despite the surgeon's opinion, the case manager decided based on his "common sense" that her injury could not possibly lead to surgery.

In our view, the surgery should have been allowed as there was medical compatibility on a significant contribution test; no pre-existing symptoms, treatment, or lost time form work. Having denied the surgery, the NEL entitlement was also overlooked even though a permanent impairment and permanent work restrictions were identified well before the surgery.

In one fell swoop, both the issue of aggravation of a condition and entitlement to permanent disability were tied up together and disintegrated, to the detriment of the injured workers who had to borrow money to pay her rent.

Summary of adjudication problems:

1) No regard was made for the fact that the knee replacement was done on the knee that had no pre-existing symptoms or disability.

2) The question of whether the (moderate, not even minor) injury **accelerated** the osteoarthritis was not asked.

3) There is was no idea of the "significant contribution test. A de-facto "predominant" contribution test is used.

4) The denial of surgery led to an automatic dismissal of permanent impairment, even if this was identified well before the issue of surgery came up.

5) The Board has clear processes in place to ensure that benefits end exactly on schedule (for example, the stoppage of LOE on a worker's 65th birthday), but there is no mechanism to ensure that NEL entitlement is not overlooked and assessments are often forgotten or delayed.

Substituting Estimations for Measurements: Estimating Oranges to Reduce Apples

In a similar vein, it is disturbing to see that the WSIB's "more aggressive approach" includes the development of recommendations on when to depart from the use of range of motion findings under the AMA guides (as per the legislation).[41] The WSIB has recommended that ROM findings be disregarded in a myriad of circumstances. It also describes how to attribute ROM findings that are described but not specifically measured in the medical documentation. It seems outrageous that the Board should be substituting estimations for measurement.

These changes, undertaken with the alleged goal of increasing fairness, consistency, and simplicity are actually making the system more unfair, inconsistent, and complex. How is it fair or consistent to make deductions based on assumptions? How can adding these requirements to discount pre-existing conditions add simplicity?

The WSIB Description of the Adjudication Issues

We disagree with the WSIB description of its adjudication issues. On the permanent impairment threshold, the paper states that "they feel that in the absence of threshold criteria, the approach used to identify and assess whether a

[41] This is evident in the documents released to the Standing Committee on Government Agencies, "Spine and Pelvis 2012" p.p.3553-3554.

permanent impairment exists may vary." We do not see any advantage to establishing threshold criteria. By definition, a threshold is limiting, and would only serve to narrow the system, which is not in keeping with the large and liberal application of this remedial legislation. As we have said, to achieve greater consistency, we recommend that each case be examined for a NEL at a set point in time in the claim. That way, no one will be missed, as we often see now.

At the cost of repeating some of our previous submissions, we disagree with the apparent "difficulty" that eligibility adjudicators and case managers have in dealing with NEL awards. The NEL system has been in place for 22 years. We have closely monitored it and were never aware of any such problems. Prior to the KPMG audit report, there was no mention of these so called problems. These supposed difficulties seem to have arisen in response to the "cost issue" that troubles Mr. Marshall and in his mandate to eliminate the unfunded liability.

Furthermore, the current emphasis on "modern" approaches is problematic. KPMG and the current administration seem to equate "modern" with "private insurance methodology", and "modern" to "technological." But in the drive to become "modern," the basic purpose of the Act of as remedial legislation is lost and the result may be to repeat old mistakes. How modern is it to compare apples and oranges?

The basic fallacy of the approach is to look for a magic button adjudicators can press to solve complex problems, like determining the NEL via updated medical formulas. No such formulas exist. Medical knowledge will continue to develop but reducing it to an adjudicative formula may be impossible. The "apples and oranges approach" in assessing NEL awards currently is a case in point. Rather than magic solutions that will make complex adjudication "easy" and control costs, the approach should be to follow the law and the founding Meredith principles.

At the end of the day, the basic issue is not that complicated: the NEL assessment should be done when it is clear that the injured worker has not recovered to the pre-injury level and is not likely to recover. This is currently referred to as "maximal medical rehabilitation/recovery." At this point, the physical abnormality or loss should be assessed. The entire abnormality should be rated unless there was a measurable pre-injury permanent impairment. What is so difficult about this?

Recommendations:

16. Independent doctors should conduct all permanent impairment examinations. This is necessary for the process to be and be seen to be independent from the Board, as originally intended.

17. There should be an automatic mechanism to ensure that, in every case, a determination of MMR is made and if a permanent impairment is evident, that it be assessed. We find many cases where no there is no NEL referral even when a permanent impairment is indicated. It seems as though they are simply forgotten or overlooked. Just as the system does not forget the date to end benefits, it should remember to implement benefits like a NEL assessment.

18. The WSIB should have a broader look at the NEL system, and should go back to its own 'world class survey' of NEL values conducted between 1988 and 1991 when the NEL system was originally developed.

Concluding Comments

What do you hope or expect that a successful consultation process would achieve?

In a sentence, to bring some *legal discipline* to WSIB policy and decision making. This means adjudication in accordance with the law, including the remedial legislation from which the Board is given its mandate and the legal principles, like the significant contributing factor test, that have been developed to guide decision makers. This means using one's brain and weighing the evidence with the law and the policy, not relying on thresholds and oversimplified categories to discount benefits.

We advocate legal discipline in contrast to the "disciplined decisions" concept employed by KPMG and the Marshall WSIB, and the related concept of "cost-effective decisions", which was in fact the mandate of the KPMG report, as reflected in the 2012-2016 WSIB Strategic Plan.[42] We take issue with the new "aggressive approach" to permanent impairment determinations. We challenge the Board to find in any of Meredith's or professor Weiler's writings the concept of an "aggressive approach" to adjudication of any issue.

Secondly, we hope the consultation will bring some *institutional memory* and *historical perspective* to the Board's adjudication. Reflect on the principles of Meredith and Weiler, the fathers of the legislation. When there is a perceived crisis desperate measures are taken. The crisis mentality can often make people forget history and methodology and principle. In our case, a person with little background in workers' compensation law was chosen to lead the WSIB for a financial goal, dealing with the UFL. The crisis mode has overtaken the Board, leading to rash changes that stand contrary to established legal principles and history.

How might these policies be revised to better achieve the four objectives set out in Chapter 1 of the discussion paper?

Recommendations:

1. These policies should not only acknowledge the founding Meredith principles but should specifically state them.

[42] 2012-2016 WSIB Strategic Plan, p. 4.

2. The workers' compensation board was established to be an independent Board, a surrogate for the courts, and must provide justice and be as fair and impartial as the judicial system. The interpretation of the legislation for policy development must not be directed by political concerns.

3. This consultation process should advise the WSIB of the importance of ensuring that there is legal rigour and discipline in the development of the WSIB policy with full consideration of the legislation and the Meredith principles.

4. The WSIB's October 2011 draft policies and discussion papers on recurrences, aggravations, and work disruptions should be made public and should be put on the table as part of the context of this review.

5. The WSIB should not over 'medicalize' the workers' compensation decision-making process. Over reliance on doctors makes the doctors into adjudicators. Adoption of criteria such as "objective medical evidence" and "scientific proof" are legal errors that establish a bias against the value of information obtained from the injured worker. Do not create an expectation of scientific proof for matters such as 'causation' when such proof does not usually exist.

6. This consultation process should re-invigorate the Board's lost institutional memory to remind the organization of the issues in the Weiler Reports and Jackson Reports because the concern raised by the WSIB in the case scenarios do not reflect the intention of the law the WSIB is supposed to apply.

7. The current policy on recurrences is not problematic. The current practice with respect to adjudication of recurrent claims is problematic because it appears to be interpreted more restrictively in recent years.

8. Decision makers must be given proper instructions and training in weighing the evidence. Factors, such as aging, return to one's regular job, or continuity of complaint need to be weighed with the other evidence in each case, not used as easy reasons to deny a claim.

9. Decision-makers need to heed the guidance given by the current policy for determining whether there is a pre-accident "impairment" as opposed to a mere "condition".

10. The current policy on Aggravation Basis should explain what does <u>not</u> constitute a pre-accident impairment and include a discussion of "asymptomatic" conditions.

11. The policies should explicitly adopt the "*significant contribution test"* as developed by the Tribunal. *Decision No. 915* clearly outlines the founding principles of adjudication: the accident must only be one of the factors; the words disability "results from" has a different meaning that "is caused by"; the thin skull doctrine; and predisposition is not a bar to compensation.

12. The Work Disruption policies could be simplified into one or two policies, perhaps with a distinction for short and long term disruptions.

13. Given the difficulty injured workers face in securing employment, the work disruptions policy needs to be broad and flexible. Do not use any qualifying words including "highly" or "significant" to narrow the application of the policy.

14. The proper question in work disruption cases is whether the worker is employable in a 'real life' situation, looking at characteristics of the whole person and determining whether that worker is likely to obtain sustainable, suitable work.

15. The WSIB should revert to the previous practice of discounting NEL awards only for measurable pre-accident impairments. This was clear, practical, consistent and effective, and it makes sense.

16. Independent doctors should conduct all permanent impairment examinations. This is necessary for the process to be, and be seen to be, independent from the Board, as originally intended.

17. There should be an automatic mechanism to ensure that, in every case, a determination of MMR is made and if a permanent impairment is evident, that it be assessed. We find many cases where no there is no NEL referral even when a permanent impairment is indicated. It seems as though they are simply forgotten or overlooked. Just as the system does not forget the date to end benefits, it should remember to implement benefits like a NEL assessment.

18. The WSIB should have a broader look at the NEL system, and should go back to its own 'world class survey' of NEL values conducted between 1988 and 1991 when the NEL system was originally developed.

Respectfully Submitted November 9, 2012.

Injured Workers Consultants