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Fink & Bornstein Professional Corporation

Workers' Compensation Newsletter

FINK & BORNSTEIN SUCCESSFULLY DEFENDS PARALEGAL IN BOARD PROSECUTION

Recently, Fink & Bornstein lawyer Alan McConnell successfully defended a licensed paralegal charged under the *WSIA* with knowingly making false and misleading statements to the Board. Our client strenuously denied the charges and retained us to help clear her name.

The paralegal was charged with two counts of violating s. 149(1) of the *WSIA*. The section reads:

> **149.** (1) A person who knowingly makes a false or misleading statement or representation to the Board in connection with any person's claim for benefits under the insurance plan is guilty of an offence.

The first thing to notice about the section is the opening words that speak of "a person". This is obviously broad enough to cover lawyers, paralegals, doctors, or rehabilitation workers. It is most often used against workers or employers.

On the other hand, the language in s. 149(2) is quite different:

> **149.** (2) A person who willfully fails to inform the Board of a material change in circumstances in connection with his or her entitlement to benefits within 10 days after the change occurs is guilty of an offence.

Notice how this requirement is focused on a "person" failing to inform regarding "his or her" entitlement to benefits. This subsection would seemingly not be available to the Board for use against paralegals or lawyers in the practice of their profession.

The paralegal in our case was charged while representing a worker claiming benefits from the Board. The prosecution alleged that the paralegal made false or misleading statements or representations to the Board at an ARO Hearing and in the weeks leading up to the hearing. The prosecution alleged that the paralegal stated or represented that the worker was disabled and unemployable, *knowing* that this was not the case.

In representing her client, the paralegal relied upon numerous reports from doctors, specialists, a psychiatrist, rehabilitation workers, vocational assessment reports and prior decisions by claims adjudicators in the case. She felt that her client had a good case.

The prosecution relied largely on video surveillance evidence. After receiving anonymous tips that the worker was actually working, the Board retained an investigation company to conduct surveillance. The surveillance covered a period of 10 days in various locations. During that 10 day period, the paralegal was seen on the video a few times in the presence of the worker, including at a residence under renovations.

The Crown sought to show from video evidence that the paralegal knew the worker's physical condition allowed him to be capable of

employment and was at variance with statements or representations she made on his behalf. The Crown specifically alleged that based on the video surveillance, the paralegal knew the worker was working at his pre-injury job or that he was not unemployable.

While the Crown focused on statements by the paralegal at the ARO Hearing, it was also the prosecution's position that in the weeks leading up to the Hearing, the section was violated because even though the paralegal was silent, by simply staying as counsel on the file, the paralegal was making a false and misleading "representation". It was argued that by simply walking into the WSIB offices on the day of the ARO Hearing, the paralegal was making a false and misleading representation.

One of the difficulties faced by the Crown in the case was that during the visit to the residence where renovations where taking place, the video did not actually show the paralegal being present while the worker was working. The paralegal insisted that she had no idea he was working. Similarly, on other occasions during the surveillance when the paralegal was present with the worker, the video did not actually show the paralegal witnessing the worker engage in physical movements, which the Crown alleged supported the view that he was not disabled or unemployable.

The Justice of the Peace rightly pointed out that the prosecution had to prove *mens rea* in order to secure a conviction. The question was: did the paralegal "knowingly" make false statements? Specifically, was there knowledge or intention on her part? The burden on the prosecution was to prove each element of the offence. The Justice explained that this was a heavy burden as the prosecution had to prove that the paralegal knowingly made false statements. The court found that the prosecution had not presented any direct evidence of this and was asking the court to infer or surmise this from the circumstances. The JP concluded that it could not make the inference and found the paralegal not guilty.

An interesting aspect of this case was the interaction between the ARO hearing the appeal and the Board's investigators. In the week or two leading up to the ARO hearing, a senior Board investigator had telephone conversations and a meeting with the ARO. During these discussions, the ARO was advised by the investigator that the Board had an ongoing investigation, which included surveillance of the worker and paralegal, with respect to false statements made on the claim. The ARO agreed to make sure the upcoming Hearing was recorded and personally delivered a copy of the tape to the investigators. The ARO never disclosed the meeting or telephone conversations with the investigator to the worker or paralegal prior to or at the hearing. The transcript of that Hearing was then used by the Crown as part of the case against the paralegal.

Mr. McConnell challenged the actions of the Board investigators arguing that the ARO and Hearing had been corrupted in the process and that this constituted an abuse of process and a violation of the Charter of Rights and Freedoms. In the first trial of the matter, the Justice of the Peace agreed partially with our argument and ruled inadmissible the statements of the paralegal at the ARO hearing. However, the first trial was later ruled a mistrial for unrelated reasons, necessitating a second trial. At the second trial, the Justice of the Peace denied our Charter motion.

An important lesson learned from the case concerns the use of video surveillance. Great care must be taken when reviewing video as the tapes can be unintentionally misleading. The same care must be taken with written reports from investigators on their surveillance activities. The placement of photographs and the text used can be unintentionally misleading. In this case, some Board representatives thought the written report with photographs actually showed that the paralegal had witnessed the worker performing his

pre-injury work. This was not the case. The lesson learned is the need to listen carefully to your client's explanation of videos, watch the tape closely, and compare the written text and photographs with the tape. A quick review of photographs and video evidence can be misleading.

The other major lesson learned from the prosecution for paralegals and lawyers advocating before the Board, is the Board's willingness to make use of prosecutorial powers against professionals, who they believe are abusing the system. The Board maintained the prosecution after a mistrial and through a second trial. There were approximately 15 days of trial overall!

How do we comply with section 149(1) of the *WSIA*: It is Simple - Do not knowingly make false or misleading statements or representations to the Board. This is also prohibited by the *Rules of Professional Conduct.* If you know that your client's physical or mental capabilities are better than previously stated, you cannot state or represent otherwise to the Board. If your client insists that you argue something you know is false, then you must try to prevent it, and if that cannot be done, you must remove yourself from the record forthwith in accordance with the *Rules*. Just to complicate things a little more, it is important to keep in mind that those same *Rules* require legal professionals to be on guard against becoming the dupe or tool of an unscrupulous client. A final level of complication arises if you become aware that you have unknowingly done something that, if done knowingly, would have misled or deceived the Board. The *Rules* say you should disclose the error or omission and try to rectify it, subject to the other *Rules* which require you to maintain the confidentiality of all information about your client acquired in the course of your professional relationship. When hit with this issue – seek independent legal advice!

By: Alan G McConnell

Process Changes, Policy Updates: Important Developments, and Significant Changes at the WSIB of Ontario

How a perversion of the law has partly led the Board to reduce benefits by 43% in three years.

The net profit of the WSIB has increased 1000% in the past 4 years, moving from an operating loss of $228 million to an annual surplus of $795 million in 2012, with 2013 looking even better. The gross profit is equally rosy.

The funding ratio of the WSIB in 2012 was 57.5%. If the First Quarter Report of 2013 is any indication of the funding ratio for 2013, the Board will be very close to its legislated obligation to reach a 60% funding ratio this year, instead of the 2017 mandate.

But for billions of dollars of charges the Board has taken for:

a) future WSIB employee benefits;
b) occupational disease claim entitlements for exposures that haven't even yet occurred, let alone diseases that have become manifest; and
c) charges for past claims even though the Board has cancelled and reduced thousands of LOE entitlements in 2011, that had previously been made permanent to older workers. (See pages 6 and 7 of the 2012 Fair Practices Commission Annual Report);

the WSIB would be closing in on its funding ratio requirements not due until 2022.

All of this is occurring even though the Board is only receiving 4.5% return on investment, this year rather than its projected 6%. The positive financial news is on account of increased income from increased employer assessments,

employment levels, and the astounding 43% decrease in annual paid benefits to injured workers between 2010 to 2013.

The Board attributes the decrease to, as it puts it on their website, "right sizing benefit costs". More particularly the 2013 First Quarter Report states the following:

1. improved recovery and return to work outcomes (p.4); and

2. Focused case management and health care:

a) allowing a faster return to work with no permanent impairments (p.4);
b) fewer accidents (p.4); and
c) a decrease in NEL awards due to fewer lost times and improved health care (p. 8).

(See Item 1 - First Quarter Report pgs. 4 & 8)

As the following discussion will illustrate, the Board has made it their number one priority to terminate and/or minimize benefit entitlements, rather than assist injured workers; and to carry out this lower benefit objective without full regard to the law, policy or medical knowledge. Each WSIB "right sizing" strategy is discussed and dissected below.

1. The Myth of Focused Health Care Management - The Case of Mr. T.

The WSIB method of operation for improved health care can be summarized as follows:

* ignore the advice of family doctors;
* limit narcotic use to 12 weeks;
* rely on Regional Evaluation Centres, grateful for WSIB patronage, for medical diagnostics; or
* better still rely on Case Manager common sense and/or the California Disability Guides to curtail entitlement, most often pointing to pre-existing conditions as the cause of disabilities.

(See Item 2 - For the Record, Enhanced Narcotics Management for Injured Workers, and Update: Oxycontin/ OxyNeo)

The Chairman of the WSIB was recently reported to have stated that the WSIB no longer deals with family doctors. The Board issued a press release denying the accuracy of this statement. What the Chairman probably meant to say, was that the WSIB no longer heeds the advice of family doctors regarding the degree of disablement of injured workers. This is what the WSIB refers to as "focused" health care- that is to send the worker to a Regional Evaluation Centre (REC) that are appreciated of WSIB funding, or better yet, since there are no longer WSIB internal doctors to obtain medical clarification from, let the Case Manager make up his/her own medical prescriptions for the degree of disablement or attribution of disablement for the injury.

The case considered in the Appeals Resolution Officer decision regarding Mr. T. is a perfect example. The Board's REC found that the worker had significant impairments in his shoulder, but "predicted" he would recover in six to eight weeks. Even weathermen today couch their prediction of showers as a percentage. Surely predicting the 3:00 PM weather at 9:00AM, is as equally dicey as predicting the resolution of a partially torn rotator cuff. But the REC's know they are there to be optimistic, else wise what good are they to the Board, who seek benefit entitlement minimization.

When the worker did not recover according to the reporting from the worker's family physician, the Case Manager undertook her own interpretation of the worker's Magnetic Resonance Imaging Studies (MRI's). Unfortunately the Case Manger's understanding of the MRI's was gleaned from her degree at the WSIB School of Radiology (recognized throughout the WSIB at 200 Front Street), leading to her conclusion that the worker's problem was a pre-existing bone spur, not the work accident. All benefits were closed for one year.
The Appeals Resolution Officer chose to follow

the prescription of the worker's treating orthopaedic doctor over that of a "lay person" Case Manager. This is an important legal precedent for future disputes, but remains an outlier proposition at the WSIB.

(See Item 3 - Appeals Resolution Officer Decision of Mr. T. dated February 14, 2013)

2. The Return to Work Paradigm: Turning the Screws - The Case of Mr. M.

The key factors in the WSIB's Work Transition Plans regarding return to work with the accident employer are as follows:

* Employers and workers must be compelled to co-operate in the return to work process;

* As a rule of thumb, every worker is capable of modified work; and

* The legislative requirement of co-operation by workers and employers to return to employment, is to be transmogrified when necessary to create unsustainable employment, or jobs that pay only lip service to physical restrictions.

The physical restrictions for this worker, Mr. M., who sustained a ligament tear was to avoid **repetitive** or forceful gripping. The employer had no work for him other than to operate a fork lift (dock stocker), which required the worker to continuously hold (grip) a handle to activate the forks. The Board's Occupational Therapist, who is on a 'job by job' contract with the WSIB, knows the Board's operative directives as above. Unsurprisingly, the Occupational Therapist points out that the forklift only requires "light" gripping. (Please see Item 4 - Functional Work Capacity Evaluation Addendum of Mr. M. dated June 13, 2013, pages 3-6). Disturbingly, the Occupational Therapist then interprets the restriction prohibiting "repetitive" gripping, to be the equivalent of "frequent" gripping. Next the Occupational Therapist proposes that the worker take micro breaks during the course of work, which will turn the gripping aspect from "frequent" to "occasional". Viola, therefore the dock stocker job is no longer "repetitive". The frequency and duration of these breaks is unstated in the Occupational Therapist's Report, and later at an oral presentation at the Return to Work Meeting she can't define the break duration either.

It is therefore left to the worker, who is suffering from pain due to the repetitive gripping from his job duties throughout the day, to balance the duration of breaks he takes with his looming termination from work, and consequential WSIB entitlement cancellation, with his pain. Not to mention, that Mr. M. is working with his employer who no longer wants him at work in the first place if he cannot go back to a semblance of his old employment duties.

The WSIB Case Manager refused to assign a number for a reasonable duration and frequency of the breaks the worker is required to take. This is because the Case Manager's assignment is to facilitate a return to work only, and are completely oblivious to the issue as to whether the job in reality is suitable or sustainable.

3. Work Transition Plans Gone Astray

Modus Operandi:
- Deem injured workers capable of securing alternate work based upon the outlined retraining plan being completed, and ignore the reasonable possibilities of employment, in determining future wage loss entitlement.

The WSIB's recent 2012 Financial Statement indicates that the decrease in benefits paid is primarily on account of better "return to work outcomes". I wanted to know whether the re-employment results of Labour Market Re-Entry/ Work Transition Programs, where workers are assisted in returning to work in the general labour market, when the accident employer cannot rehire them, have improved in the last 10 years. So, I

asked the Board's Administrative Vice President that very question.

In correspondence back from the WSIB's Vice President, Mr. Slinger, he pointed out that in 2009 return to successful work outcomes following a return to work plan (Work Transition Plan/WTP) were 36%. But in 2012, the outcome had improved to 69%. However, the statistic is skewed on two counts.

Firstly, the figures include both workers returning to their accident employer and those that go through a Labour Market Re-Entry Training Program (with no opportunity of returning to the accident employer). Secondly, in 2008 before the WSIB kept similar statistics for Work Transition, most workers returned to their accident employer outside of participating in any form of Work Transition Plan and were not accounted for in the statistics.

No doubt the Board's increased efforts to pull workers and employers together has saved benefit costs, and the perverse aspects of same are discussed elsewhere in this article. But the more important question for injured workers is the abominable results of Work Transition Plans, where workers are being directed to employment outside of their place of accident employment.

The number of workers successfully completing a LMR/ WTP and finding employment in 2003 was 35%, according to the 2004 Deloitte Value for Money Audit. In 2012, the best statistic from the information provided by Vice President, Mr. Slinger, was 41% are employed. However both subject statistics are probably inflated, as they may include the "employable" and not actually employed. Also, no adjustment to the statistics are made with passage of time: i.e. how did the employed injure worker fair 5 years after program completion?

The best illustration of the Board's obliviousness to re-employment prospects is the case of Ms P. Ms. P worked 20 years in a factory feeding a machine. Her thumb got caught in the machine in 2007, dislocating it. She suffers from chromosome damage and is mentally challenged. Notwithstanding she is mentally challenged and speaks little English, the Board's captured Service Providers, who understand that the Board expects all injured workers to be capable of retraining and re-employment, thought that she could "in principle" obtain a job in retail sales after a year of English upgrading. What does "in principle" mean? "In principle" I can play for the Toronto Maple Leafs, I can skate and shoot and know the rules of hockey. But what about "in reality"? I'm 62 years old.

The Case Manager received numerous correspondence from the family doctor, that the worker was mentally unable to work in retail sales. Also the Case Manager received progress reporting from the Service Provider that Ms. P's progress in English upgrading was minimal, **all of which were entirely ignored**.

The Appeals Resolution Officer's Decision overturned the Case Manager, on the basis that retail sales positions require near high school completion. Secondly that the worker's mental deficiencies (while pre-existing) did not prevent her from doing her factory employment and therefore do not discount her benefit entitlement - a tacit recognition of the thin skull rule.
(Please see Item 5 - Appeals Resolution Officer Decision of Ms. P. dated November 29, 2011)

Currently this case is before the Ontario Small Claims Court seeking damages for legal costs and punitive damages, on account of the Board's alleged malicious adjudication of the claim.

In another case, (See Item 6a - WSIB Memo No. 999 dated February 17, 2012) the Case Manager ruled that the worker's NEL wasn't large enough for the injured worker to be considered unemployable, denigrating factors such as age, socioeconomic background, and skills. This is another instance of malicious adjudication we are contemplating judicial action on. Because the Board is applying a legal maxim, all claimants with NEL's under 60% are employable (ie. benefit

right sizing), which does not adhere to adjudicating in accordance with an unbiased discretion, in accord with its mandate in the legislation or WSIB Policies.

David Marshall, President and CEO of the WSIB has said the following:
"*The WSIB's priority is to provide injured workers with a sound assessment and if needed, high quality credible training that will - to the best of our ability - equip them to return to work*".

While the quotation is a useful subtext to appeals, it is a directive that is often not followed. (Please see Item 6b - Work Reintegration Statement of David Marshall)

4. The case of Mr. P: What focused case management is the WSIB talking about, other than to deem workers fit for work as soon as possible?

The adjudicative directives at play in WSIB health care are:

* Deny Chronic Pain Disability (CPD) whenever possible, by stating the problem is from a pre-existing or co-existing factor. For example: there is an organic impairment, or the worker is still seeing friends and therefore could not possibly have marked life disruption, etc.;

* Avoid chronic pain treatment whenever possible and ignore Board Policy 15-04-03 that requires the Board to provide treatment during a preliminary chronic pain vulnerability phase; and

* Deny a deterioration in a condition, when the condition is founded upon degenerative conditions.

On February 2, 1998, Mr. P., a 45 year old male assembly worker strained his back at work when his foot slipped. Mr. P. received a 17% NEL for his lower back. He then had a recurrence in July 2008, when the modified work duties he performed were altered to require more bending and twisting. Mr. P. stopped work completely on September 29, 2010.

On May 17, 2011, Mr. P. was sent to a Level A Multidisciplinary Health Care Assessment. There was a delay of 7.5 months, from the date he stopped working completely. The diagnosis was lumbar spondylosis and depression. The Multidisciplinary Assessment Centre suggested treatment at a Functional Restoration Program.

Mr. P. went for a Functional Rehabilitation Program (Chronic Pain treatment facility) Assessment on August 29, 2011 (3.5 months delay), which diagnosed the worker with: pain disorder, mechanical back pain, and adjustment disorder, and therefore recommended treatment. The daily treatment was to begin September 12, 2011, on five days notice to the worker. The worker did not attend, as he lives 70 miles from the Hospital treatment centre and neither transportation nor overnight accommodation was discussed, let alone offered. No further treatment was arranged, as the Case Manager made a ruling that since the worker missed his appointment he was not entitled to another one.

Treatment of injured workers at chronic pain treatment centres is down 50%, in the past 18 months. The WSIB assiduously avoids offering this treatment as it is a tacit recognition of chronic pain's existence.

The worker requested that his physical condition be considered worse under his 1998 claim, and thus he be paid wage loss benefits. The Case Manager ruled that the increased symptoms were secondary to his underlying degenerative changes, not the responsibility of the work accidents, and Chronic Pain Disability. (Please see Item 8 - WSIB Memo dated June 15, 2012) Chronic Pain Disability was not accepted, because the worker already has a 17% organic NEL Award. All further entitlement was ended.

In Mr. P.'s case, the WSIB, by pointing to degenerative disc disease as the culprit, has diminished the application of the "thin skull rule" and avoided responsibility for treating the worker. For the Board, too often "focused case management" is to provide no health care, and ignore the medical reporting.

(The reader is recommended to read the Report of Jim Thomas to the CEO and President of the WSIB, May, 2013, released in July 2013, which discusses the thin skull rule, its legal significance and the avoidance by the WSIB to apply it, in detail.)

Chronic Pain Treatment is still to be made available to chronic pain sufferes with organic disability as the organic NEL's are "holistic"; and in accordance with CPD Policy. The WSIB ignores this.

The WSIB pays no heed to the WSIB Policy that chronic pain treatment should be made available to those who have organic disability as well as to those who don't (Please see Item 7 - Operational Policy No. 15-04-03: Chronic Pain Disability published October 14, 2009), and within a year of the accident.

Mr. P. was snookered by the Board's logic, notwithstanding all the medical reports in his file (of which there are 5), and all the medical specialists (of which there are 4), are in agreement that Mr. P. is in far worse condition and not employable since the recurrence and subsequent events, needs treatment and has Chronic Pain Disability! An Appeals Resolution Officer Decision is pending.

5. The Debasement of the office of Appeals Resolution Officer

In 2009 the Appeals Resolution Officer's were allowing over 29.1% (approximately) of the appeals before them (See Item 9).

That figure was reduced to 28.5% by 2013. (Please see Item 10 - the 2012-2016: Strategic Plan: Measuring Results - Q1 2013 Report) I have seen no evidence that the decisions of Case Managers are of greater merit and therefor bear less scrutiny, born out not just by my observation, but the fact the reversal rate of WSIB decisions at the Appeals Tribunal has remained constant.

However I do see evidence that the Appeals Resolution Officers have either been directed, or feel obliged by the "belt tightening morality" preached at the WSIB, to deny more claims. Evidence of this is the secret memo distributed to Appeals Resolution Officer's in 2010, on how to deny loss of earnings (LOE) benefits to injured workers who can't find employment. Most of the directions given are contrary to well established vocational rehabilitation precepts, or the concept of determining a case on its merits.

The following are the most blatant examples in the secret memo to Appeals Resolution Officer's, which tells them (Italics are the words in the Board's direction to ARO's):

a) *Older workers are not prejudiced in finding employment, because of the Ontario Human Rights Code, and many employers prefer older workers.*

In actual fact, unemployment rates among older workers is higher than middle aged workers, and proving an employer is discriminating in its hiring practices on account of "age" under the *Human Rights Act* would be most difficult.

b) *Workers with low NEL Awards are always employable.*

This is a fettering of discretion addressed elsewhere in this article.

c) *It is not necessary to have Grade 12 education for a job that requires basic literacy skills, as the worker can rely on past experience. Carefully consider if it is the worker's fault that their WSIB upgrading process did not achieve Grade 12.*

While there are some employment opportunities that can be conducted by the disabled illiterate population (such as bus driver), most entry level positions in menial light employment require considerable computer skills and the ability to digest the written information that comes with it. (such as a cashier at a furniture store).

d) *Geographic location should never be a barrier if the worker was able to obtain employment before the accident and further skills training after the accident in his geographic area.*

e) *Try as best as possible to ignore non compensable disabilities by focusing on:*
- post accident deterioration as a cause for unemployment;

- Canada Pension Plan Applications, that point to these non compensable disabilities as the reason for unemployability; and

- any psychological reasons, if the WSIB has not recognized psychological conditions.

Even if the organic award is holistic and has itself included chronic pain psychological issues.

f) *Has the worker looked for and been able to obtain part time work. If the worker can obtain this, they can no doubt graduate to full time work.*

(Please see Item 11 - Appeals Branch Support Document - Determining Employability)

The Appeals Resolution Officer Decision dated May 1, 2013, attached as Item 12, is a classic case of the Appeals Resolution Officer formulating a specious argument to avoid entitlement.

The ARO's reasoning was as follows:

- The Doctor's prescription that the worker should avoid all repetitive work is over ruled, because the Board's Return to Work Specialist understands the job being performed better than the doctor, (a non sequitur);

- Because the job is very light, it is therefor not repetitive (a perverse logic discussed in sections of this article above);

- The worker has a psychiatric component;

- The worker only did the job for one minute; and

- The job is the lightest job imaginable.

Our Law Firm once sued the Board for malicious adjudication by an Appeals Resolution Officer, with a resulting satisfactory settlement. In this case, the Appeals Resolution Officer misstated the evidence presented. Subsequently, and conveniently, the Board had lost the transcript of the Hearing. By the Appeals Resolution Officer dismissing the medical opinion, on the pretext the job offered was the lightest job possible, there had been a failure to bring an open mind to the task of judicial decision making and the decision had been made in bad faith.

6. WSIB Utopia-Discounting Non Economic Loss Awards (NEL's)

Non Economic Loss Awards are paid to injured workers when their disability appears to have become permanent in accordance with section 46 of the Act. Ontario Regulation directs the WSIB to employ the AMA Guides to the Evaluation of Permanent Impairment in determining a percentage rating resulting in a monetary value for the award.

The WSIB's Operational Policy No. 18-05-05 published October 12, 2004 (Attached as Item 13) allowed the WSIB to discount NEL Awards made

to injured workers, on account of pre-existing "impairments" that were "measurable". This was done by calculating the clinical impairment before the injury and performing a subtraction. So for instance, if before the accident a worker could only move his knee to 80% of normal and after the accident to 50% of normal, 40% would be deducted from the otherwise allowed NEL. (100 -subtract accident loss {80 down to 50} 30 divided by 50 {total loss} x 100%).

If the impairment was not measurable, then if the Board could define the medical significance of the pre-existing "disability" in accordance with the WSIB's SIEF Policy it could adjudicate an up to 50% NEL reduction for a major pre-existing impairment. But the WSIB wants to employ the SIEF Policies not just for deducting "disabilities", but also "conditions".

Two WSIAT Decisions and one WSIB Operational Policy have further defined what constitutes a pre-existing "impairment" for purposes of a NEL:

1. WSIAT Decision 530/05 dated December 29, 2009, at page 12, states "a NEL award ought not to be reduced unless there is evidence which suggests that the pre-existing condition had an impact on earning capacity". The Worker's shoulder was fully functional before the injury.

2. WSIAT Decision 2546/11 dated April 11, 2013, at page 10 paras. 59-60, indicates that there needs to be medical evidence that the pre-existing condition is playing a role in the disability, in relation to granting SIEF. There is no such medical evidence here.

The WSIB's Operational Policy No. 11-01-15 on Aggravation Basis, defines "pre-accident impairment" as "a condition which has produced periods of impairment/illness requiring health care and has caused a disruption in employment".

In 2012 an unpublished memo written by the WSIB (Item 14 - Orientation), obtained by Gary Newhouse, private solicitor, directed NEL Case Managers to take a "more aggressive approach" to NEL determinations. This began a wholesale discounting of NEL Awards, on the advice of a KPMG Value for Money Audit of 2011 on Claims Adjudication.

The theoretical underpinning of most of the discounting derives from the Board's interpretation that a pre-existing "impairment" is equivalent to a pre-existing "condition", according to the AMA Guides, so as to open up SIEF Policy discounting for "conditions". The WSIB claims that they are bound by legislation to follow whatever is in the AMA Guides. (Item 15 -Letter from WSIB Director of Permanent Impairment dated May 30, 2013). The Board needs to equate a pre-existing "impairment" with a pre-existing "condition" because the Board has no authority to discount a non- measurable pre-existing "condition" from a NEL award, only a pre-existing "impairment". The Board has no definition of a "pre-existing condition" per se, so it needs to use the AMA definition of "impairment" to equate an "impairment" and "condition".

Regulation 175/98 compels the Board to use the AMA Guides Rating Schedule. The Board believes this gives them authority to use the AMA Guides definition of "impairment", to judge when a discount of the NEL Award can be made.

Interestingly the AMA Guides never specifically defines what a "condition" is. The AMA Guides do state the following: " 'impairment' is what is wrong with a body, a body part, or organ system and its functioning; 'disability' is the gap between what the individual can do and what the individual needs or wants to do". The Board interprets this to mean that a degenerative "condition" is the same as an "impairment", because neither are a "disability". The WSIB has however left out the AMA prescription regarding "functioning", but I will return to that omission below.

The reason the Board needs to pervert the medical and AMA definition of "impairment" to include the concept of "condition", is because to discount non measurable pre-existing "conditions" the Board must rely on the SIEF policy. If there is a major SIEF type pre-existing disability, the Board can deduct 50% of the NEL, and 25% for a "moderate" pre-existing condition. The SIEF policy definition for deduction does not mention "impairment" but only "disability" and "condition" (see item 17). The WSIB wants to deduct not just for "disabilities", but for "impairments". So consider the example of the injured knee referred to above. The knee had pre-existing arthritis in it from a prior football injury and had a 20% reduction in movement before the work injury. Performing the math necessary to do the deduction based on measurement is routine. But if the worker's knee was 100% functional before the work injury, notwithstanding he had underlying arthritis, is that an "impairment"? The WSIB says yes, the pre-existing arthritis is an "impairment" because it is a physical defect. Next it says because a "condition" is the same as an "impairment" it can deduct from the NEL up to 50% of the otherwise granted NEL award, according to the SIEF Policy which deals in deductions for "conditions".

First of all, the football player's arthritis doesn't even meet the AMA definition of "impairment", because there is no decrease in "functioning", noting that "functioning" and not just a physical defect, is part of the definition.

I asked Dr. Michael Ford, an often published and one of Canada's most senior Orthopaedic Surgeons posted at a teaching hospital, whether medical science can equate "conditions" with "impairments". I asked Dr. Ford the following question:

"The WSIB considers a pre-existing "condition" the same as a pre-existing "impairment". Also enclosed are pages 1, 2, 6 and 7 from the AMA guides which discuss impairments. In the medical sense are pre-existing degenerative changes, which are asymptomatic an "impairment" both in accordance with the wording in the AMA guides and in general medical parlance?"

Dr. Ford's reply was as follows:

"A "condition" is in fact not a medical term. A condition is a very vague nonspecific term and can be applied to just about anything. Someone can have an impairment [an alteration of an individual's health status that is assessed by medical means] which is very distinct from a condition. One can have non-insulin-dependent diabetes. This can be called a "condition". It is not necessarily associated with an impairment. Again, the presence of degenerative changes on imaging studies could potentially be called a condition. It is not necessarily associated with an impairment. There is no possible way that these two terms, condition/impairment could possibly be equated. Also, if an individual is asymptomatic then it is highly unlikely that they are going to have an impairment. This is both in accordance with the wording in the AMA guides and in general medical parlance."
(See Item 16 - Dr. Ford's Medical Report dated August 1, 2013)

Secondly, if the WSIB is relying on the published SIEF Policy, (See Item 17 - WSIB Operational Policy No. 14-05-03 published February 20, 2006) which does not require a pre-existing "disability" to award Second Injury Fund Relief for a pre-existing condition, why is the Board not also employing its secret policy our firm obtained under the *Freedom of Information Act* (Item 18 - "Evidence" and "Determining Injury/Illness as Prolonged/Enhanced by Pre-Existing Condition)as it states it does. The Board's secret SIEF policy requires both a pre-existing disability plus objective medical evidence that the underlying medical condition is delaying recovery to grant SIEF.

In the recent discounted WSIB awards regarding NEL's I have observed, the WSIB has not once had "objective" medical evidence that the pre-existing condition was delaying recovery. In one

case, the Board discounted a shoulder NEL by 50% due to underlying osteoarthritic changes, which medically has absolutely nothing to do with a torn rotator cuff, (except perhaps in the mind of the NEL Adjudicator who received her medical knowledge from "Who Knows Where" University).

In regards to NEL's given for the lower back, the WSIB often cannot deduct anything for simple degenerating disc disease because it is a "minor" pre-existing condition, and under the SIEF and NEL policies, a minor condition results in a zero deduction. Unsatisfied, the WSIB has determined that it can "measure" degenerative disc disease. So to give an example, the NEL Guides award 7% for degenerative disc disease. (See item 21- Table of the Guides) The WSIB awards the worker the 7% for degenerative disc disease, and then deducts the 7% from the award, on the basis that the presence of degenerative disc disease preceded the accident and it is somehow "measurable". This led me to ask myself the following questions:

i) Is degenerative disc disease measurable in quantities of minor, moderate, and major?

ii) Does degenerative disc disease ever get worse following an accident? If it does not, not one injured worker will ever again get the award prescribed in the AMA Guides for disc degeneration!

To answer this quandary further questions were put to Dr. Ford, and he replied as follows:

" Is degenerative disc disease measurable?"

"There are radiologic features consistent with degenerative disc disease seen on plain film, CT scan and MRI. These features are slightly different depending upon the imaging modality. They can be loosely graded in terms of mild, moderate or severe. This grading system of course very subjective and is subject to significant inter-rater variability. It should be made clear, however, that there is very little correlation between these pseudo-measurable parameters and impairment. There is very poor correlation between these changes and the presence of symptomatology."

" Can a physician measure the difference of what degenerative disc disease the worker had 2 years preceding the non-economic loss award, that is before the work accident occurred in March 2010, versus the non-economic loss being awarded in approximately April 2013?"

"This would require that the worker had similar imaging studies done on or about March 2008. This worker had imaging studies done in November of 2007. It was a CT scan. The imaging study in 2010 was an MRI. One cannot compare apples to oranges. Again, it is a moot point as there is no correlation between imaging studies in symptomatology or any associated impairment."

" Regarding this worker's particular case we have some imaging results, which we have enclosed for you. Is there a way of measuring the difference in the workers degenerative condition or impairment, between the imaging results and 2007 those in 2008 and those done subsequent to the accident in 2010?"

"Please see my answer to question 2."

"Furthermore is degenerative disc disease generally a progressive condition? If it is, would it progress on its own accord over the course of several years. Can the progression be measured?"

"In general, degenerative changes are usually progressive with time. The rate and extent of progression is incredibly variable between individuals. Again there does not seem to be any good correlation between the extent of degenerative change and the presence or absence and severity of symptoms."

(See also WSIAT Decision 637/13 p.6)

"Could you please advise us as to whether trauma to the back in some circumstances can cause an

acceleration of the degenerative changes in the back? If so, could those changes be measured?"

"There have been several studies published looking at those individuals who have incurred a severe trauma to the spine, resulting in fractures. There does not seem to be, on a reliable basis, any accelerated degenerative changes in proximity to the fracture. Degenerative etiology change is just that. It is secondary to age and genetically determined events. We do not see individuals developing gray hair or more wrinkles because of" trauma". This is a similar situation. The Alberta Twin Study clearly shows the incredibly strong influence of genetics in the development of MRI changes that we associate with degenerative etiology changes. In many of the twins studied there were markedly disparate occupations, and yet MRIs were incredibly similar."

(See Item 16 - Dr. Ford's Medical Report dated August 1, 2013)

By legislation, older workers who naturally have more degenerative changes in their bodies, have their NEL awards discounted by up to 65% The Board's policy is a double discounting not envisioned by the Act.

Chronic Pain judgements from the Courts in personal injury claims, are allowing the plaintiffs pain and suffering awards of between $60,000 to $169,000 (Item 19 - "Quantums"), which are 8-10 times more than injured workers would receive for the same loss of functioning, by way of a NEL. While the *WSIA* is conceived as a trade off of the right to sue for no fault benefits, when does the discrepancy become so unreasonable that it is unconstitutional.

If an injured worker in a personal injury case would receive $100,000.00 in General Damages for Chronic Pain Disability, but under the *WSIA* the Board awards a $2,000.00 Chronic Pain NEL because it deducted 80% of the CPD NEL on account of childhood abuse (without pre-accident symptoms), does that not render the reasonable trade off a sham?

The Board's adjudication strips workers of 70% of their NEL awards, under a medical fiction that degenerative conditions can be measured. The WSIB believes that accidents can routinely produce degenerative disc disease themselves, that can be measured before and after, is of doubtful medicine and legality. The Board's equating of "impairment" and "condition" is also of doubtful medicine and legality. The amount of NEL awards paid by the WSIB are down by 54% ($88 million in 2011 to $48 million projected for 2013).

In Jim Thomas' Policy Review Report to the President and CEO of the WSIB of May 2013, he questions at pages 28 and 29 (Item 20 - WSIB Benefits Policy Review Consultation Process) whether the Board has either the legal or medical authority to be deducting portions of the workers' NEL's.

Everyone of these NEL decisions must be appealed to the end degree, even though they may only be worth a few hundreds of dollars.

To see the Items referred to in this Newsletter, please visit our website at: www.finklegal.com

If you would like to discuss Workers' Compensation Law and/or Wrongful Dismissal Matters, please contact Fink & Bornstein Professional Corporation the first Consultation is at no charge.

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