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Workplace Safety and Insurance Board

First Quarter 2013 Report to Stakeholders

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ONTARIO

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

1. Quarter in Review

Highlights of our performance for the three months ended March 31, 2013 compared to the three months ended March 31, 2012.

The following MD&A should be read in conjunction with our unaudited condensed interim consolidated financial statements and accompanying notes as at and for the three months ended March 31, 2013.

Financial highlights for the three months ended March 31, 2013 compared to the three months ended March 31, 2012:

- Comprehensive income was $795 million compared to $768 million reflecting $722 million of net investment income corresponding to a 4.5% return on investments reflecting strong public equity returns along with strong operating performance.
- Our unfunded liability decreased $702 million to $13,359 million and our Funding Ratio improved by 2.4% to 57.5%.
- Premium revenues increased $108 million or 11.1% reflecting $85 million attributed to higher insurable earnings reflecting continued strengthening economic conditions and $28 million reflecting the 2.5% increase in average premium rates announced in 2012, partially offset by $5 million attributed to interest and penalties, other income, Schedule 2 administration fees and net employer incentive programs.
- Benefit payments decreased $65 million or 9.2% reflecting improved recovery and return to work outcomes for injured workers, as well as fewer new lost-time injuries.
- Administration and other expenses, before allocation to benefit costs, decreased $15 million or 7.2% due to $22 million of lower termination benefits and $1 million of other items, partially offset by $8 million of higher bad debt expense.

Continued improvements in operating performance. Many of the 2012 trends continued in the first quarter of 2013. Focused case management and health care continued to help injured workers return to work and recover faster, with less permanent impairment. Financially, the WSIB continues on the path to sustainability as evidenced by $163 million of Core Earnings reflecting both increased premium revenues coupled with lower benefit payments.

Decrease in new claims. The number of Schedule 1 registered claims and allowed lost-time claims, has been decreasing for more than a decade. This trend continued in the first quarter of 2013 as allowed lost-time claims decreased by 7.2% or 690 claims, compared to the first quarter of 2012. Once claims are registered, we continued to make accurate eligibility decisions quickly. During the first quarter of 2013, 92.0% of Schedule 1 eligibility decisions were made within two weeks, compared to 87.9% in the first quarter of 2012.

Improved recovery and return to work. We continued to have more success in helping injured workers mitigate their wage loss. In the first quarter of 2013, the average loss of earnings entitlement at lock-in was 48.7%, compared to 51.5% in the first quarter of 2012. More importantly, 92.0% of all injured workers were able to return to work at no wage loss within 12 months of their injury.

Focused health care investments. We continued to invest in early, appropriate and specialized health care. Overall, fewer claims and improved recovery led to a 12.7% decrease in the number of paid health care claims and a $10 million or 7.7% decrease in health care costs.

Appeals modernization. We modernized our appeals program effective February 1, 2013. The changes support service excellence and will ensure that workers and employers are able to proceed with their appeals in a timely manner.

Benefit payments. Benefit payments decreased by $65 million or 9.2% reflecting a reduction in the number of new claims and continued improvements in recovery and return to work outcomes.

Employer classification reform. In January 2013, Mr. Stanley released a discussion paper and began accepting submissions from stakeholders. Public consultations were held in April 2013, engaging stakeholders across the Province of Ontario (the "Province") and getting their input and ideas, which will be used to inform Mr. Stanley's final report.

- External providers expense decreased $2 million or 11.8% primarily due to lower claim volumes as a result of fewer lost-time injuries in recent years and a more targeted approach to return to work.
- Non-economic loss awards decreased $9 million or 42.9% reflecting a decrease in the number of injured workers eligible for non-economic loss awards due to fewer lost-time injuries in recent years, as well as improved focus on health care in the early stages of injury.
- Other benefit costs decreased $4 million or 50.0% the primarily due to a decline in claimants eligible for supplementary benefits under older legislation.

Claim administration costs

Claim administration costs represent the allocation of overhead costs relating to the administration of claims and were $109 million compared to $125 million, a decrease of $16 million or 12.8% primarily due to lower administration expenses.

Changes in actuarial valuation of benefit liabilities

The changes in the actuarial valuation of the benefit liabilities are as follows:

	Three months ended March 31	
(millions of Canadian dollars)	**2013**	**2012**
Changes in actuarial valuation of benefit liabilities	196	(10)

Changes in the actuarial valuation resulted in an increase in the benefit liabilities of $196 million compared to a decrease of $10 million reflecting an increase in the benefit liabilities of $158 million resulting from refinements to our methodology for determining the cost of claims liabilities and $48 million due to changes in mortality assumptions. The refinements to our methodology were implemented in December 2012.

Administration and other expenses

Administration and other expenses, before allocation to benefit costs were $193 million, a decrease of $15 million or 7.2% as noted below:

	Three months ended March 31			
			Change	
(millions of Canadian dollars)	**2013**	**2012**	**$**	**%**
Salaries and short-term benefits	91	95	(4)	(4.2)
Long-term benefit plans	45	38	7	18.4
Amortization	6	6	-	-
Bad debts	10	2	8	100+
Communications	2	3	(1)	(33.3)
Equipment and maintenance	12	19	(7)	(36.8)
Facilities	10	10	-	-
New systems development and integration	5	2	3	100+
Termination benefits	6	28	(22)	(78.6)
Other	6	5	1	20.0
	193	208	(15)	(7.2)
Claim administration costs allocated to benefit costs	(109)	(125)	16	(12.8)
Total administration and other expenses	**84**	**83**	**1**	**1.2**

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For the Record: Family doctors remain at the centre of care for injured workers

We wish to clarify a statement attributed to Chair Elizabeth Witmer that incorrectly suggests the WSIB will no longer deal with family doctors. This was found in a recent article in the Daily Commercial News, which has since been corrected with an apology from the editor, covering a speech given to the Ontario General Contractors Association (OGCA) Symposium.

The article incorrectly stated:

Witmer says the WSIB will no longer deal with family doctors to treat cases.

Clarification:

Family doctors remain at the centre of care for injured workers and the WSIB continues to engage them -- that has not and will not change.

The WSIB does have a network of specialty assessment and treatment services across the province for workers with complex injuries that can be a helpful resource for family doctors. These expert medical providers interact with a worker's family doctor and are a key part of our efforts to improve health outcomes for injured workers. But the role of family doctors is unchanged and central to injured worker care.

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Enhanced narcotics management for injured workers

The WSIB is enhancing the way it manages cases for injured workers who have been prescribed narcotics (opioids) for non-cancer pain. The enhanced approach includes increased oversight of how narcotics support treatment goals, including improvement in function, quality of life, and safe and sustained return to work (RTW).

Narcotics strategy

The WSIB has developed a Narcotic strategy, which includes a graduated approach to narcotic management, with the goal of appropriate narcotic therapy for injured workers. The strategy includes new decision-support tools for WSIB clinical staff and enhanced WSIB physician discussion with prescribing doctors.

Effective February 16, 2010, following a new injury or recurrence, the WSIB will initially only allow prescriptions for short-acting narcotics for a maximum of 12 weeks. Long-acting drugs will not be allowed during this period since there are other milder drugs available to workers for pain relief. After 12 weeks of ongoing narcotic use, WSIB clinical staff will review the worker's case regarding the ongoing use. Workers with serious injuries or those with occupational diseases are excluded from this new approach.

WSIB drug benefit program

The WSIB began enhancing its drug benefit program in 2007. Based on that work, the WSIB formed a Drug Advisory Committee composed of external experts to provide recommendations on how best to manage the drug benefit program. At the same time, the WSIB also began identifying trends in the use of prescription narcotics (opioids) by injured workers.

The trends show that 40 per cent more workers have been prescribed narcotics compared to 10 years ago. There have also been 100 per cent more narcotic prescriptions over that same time. Since 2006, the doses prescribed by physicians have also increased.

The WSIB approach to narcotic therapy is based on two key principles:

- Authorization of narcotic (opioids) for workers should support treatment goals that include improvement in function, quality of life and safe and sustained return to work.
- A graduated approach to guide authorization of prescribed narcotics for the management of non-cancer pain that is consistent with best practice.

Our goal is appropriate pain management. When used appropriately, narcotics should improve a worker's function and quality of life, and support a safe and sustained return to work.

Q&A

See our Q&A for more information.

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Update: OxyContin®/OxyNeo®

Toronto: March 13, 2012 - The Workplace Safety and Insurance Board (WSIB) has replaced OxyContin with OxyNeo as one of the drugs that can be prescribed for workers who are injured on the job.

Prior to making this change, the WSIB's Drug Advisory Committee reviewed available data on OxyNeo and noted that it has the same active ingredient as OxyContin and is similar in efficacy and adverse effects.

"The WSIB wants to make sure workers are getting the best medical care and providing coverage for OxyNeo as a replacement for OxyContin is an important part of helping workers recover while reducing the risk of addiction or other complications," says WSIB Vice President of Health Services Dr. Donna Bain.

The WSIB is working with the medical, pharmacy and worker communities to assist workers in this transition. Workers are advised to visit their physician to obtain a new prescription for OxyNeo as new supplies of OxyContin are no longer being manufactured.

The WSIB recognized the dangers of long-acting narcotics like OxyContin more than three years ago and took action to help prevent inappropriate narcotic use. The WSIB's Narcotics Strategy limits the use of these drugs in the first weeks following an injury.

"We recognize that long-acting narcotics are necessary for some workers," says Bain. "We will continue to closely monitor the use of OxyNeo and other narcotics used as part of a worker's treatment and recovery."

The WSIB has also partnered with specialty clinics like the Centre for Addiction and Mental Health (CAMH) to provide help for workers who do become addicted to narcotics. "Our goal is appropriate pain management," says Bain. "When used appropriately, narcotics should improve a worker's function and quality of life, and support a safe and sustained return to work."

For background on the WSIB's approach, read our Narcotics Strategy.

The WSIB is an independent trust agency that administers compensation and no-fault insurance for Ontario workplaces. We are committed to delivering what matters to the workers and employers of Ontario: fast, accessible service and fair benefits at a fair price. The WSIB provides wage loss benefits, medical coverage and help getting back to work - the best possible outcome following an injury on the job.

For further information, please contact:

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WORKPLACE SAFETY AND INSURANCE BOARD

APPEALS RESOLUTION OFFICER DECISION

CLAIM:

OBJECTION BY:

WORKER:

EMPLOYER:

HEARING LOCATION: Kitchener

DATE: February 14, 2013

ATTENDEES:

Worker:

Worker Representative: Mr. Richard Fink, Fink and Bornstein

Employer:

Interpreter:

ISSUE

The worker's representative, on behalf of the worker, has appealed the case manager's decisions of February 13, 2012 and January 24, 2012. The case manager has concluded the worker is not entitled to loss of earnings benefits beyond April 10, 2012 as suitable modified work was made available to the worker. In addition, the case manager has concluded that the worker has recovered from the occupational incident of January 18, 2012.

HOW THE ISSUE ARISES

On January 18, 2012, this then 39 year old male machine operator was pulling a boot off a press and injured his left shoulder and neck. He was diagnosed with left shoulder strain and treatment was provided conservatively.

By February 2, 2012, the worker was diagnosed with a left shoulder rotator cuff suspected tear and a cervical strain.

The worker attended the Regional Evaluation Centre (REC) on February 14, 2012. He was discharged with a left acromioclavicular joint strain, left rotator cuff strain and left neck strain. It was noted that the worker should experience a full recovery within six to eight weeks. The REC recommendation was for no further investigation including any MRI that had been previously

booked. They also suggested that the worker undergo a cortisone injection of the left AC joint along with active therapy for approximately six weeks two to three times weekly to improve the worker's range of motion.

It was noted that the worker had returned to modified employment four hours per day and it was recommended that the worker increase his activities of one hour per day per week to returning to his full schedule.

The worker underwent an MRI examination in April 2012 which noted a moderate supraspinatus tendinosis with no focal rotator cuff tear. It was noted to have a prominent enthesophyte which abutting the superior aspect of the supraspinatus tendon.

The worker was then seen by the orthopaedic surgeon in July 2012 who suggested the worker undergo steroid injections for therapeutic and diagnostic purposes.

Following a review of the MRI, the worker was diagnosed with a chronic subacromial impingement syndrome and rotator cuff tendinopathy. The attending surgeon suggested that the restrictions provided by the Regional Evaluation Centre (REC) should continue on a permanent basis.

The case manager has concluded that the worker has recovered from the occupational injury and noting the results of the MRI, suggested that the worker's ongoing difficulties were related to the non-occupational bone spur identified by the MRI examination of April 3, 2012.

The worker's representative has objected to the closure of loss of earnings benefits subsequent to April 10, 2012 after the worker was provided with a layoff notice from the employer indicating they were not able to accommodate any permanent restrictions.

The worker's representative has requested a continuation of loss of earnings benefits and this issue is now before the Appeals Services Division for further consideration.

AUTHORITY

The worker's representative's appeal will be considered in light of Operational Policy Document 18-03-02 - Payment and Reviewing LOE Benefits (Prior to Final Review).

EXHIBITS

For reference, the employer's representative provided a physical demands profile for injection moulding machines on the fourth floor. This was accepted for the record.

ASSESSMENT OF THE EVIDENCE

The worker provided oral testimony under oath. provided testimonial evidence on behalf of the worker. The worker's representative made oral submissions on behalf of the worker. The employer's representative made oral submissions on behalf of the employer.

The worker confirmed that he arrived in Canada in approximately 2006 following a normal period of schooling in Albania and working with his father on the family farm.

He states he arrived in Canada and performed janitorial work for approximately two years until beginning his employment with the employer in April 2008 as a machine operator.

The worker denied any prior problems associated with the left shoulder before the incident of January 18, 2012.

The worker described in detail the nature of his pre-accident occupation as a machine operator. It was ascertained that the worker was involved in making pull-over rubber boots for military use. He states that he would pull the boot once completed out of an injection moulding machine which was at or above the shoulder level. He would also be required to clean out the mould using his fingers and air hose. He states the cycle time was approximately 115 seconds per boot.

He does believe the work was above shoulder level in nature and the weights associated with the footwear were established to be approximately six pounds per boot.

He stated he had been working approximately three weeks prior to the incident on the extra large boots which were heavier in nature and required more force to pull off.

He does confirm attempting to return to modified employment with the employer, indicating he was provided with painting duties. He does confirm stopping work in April 2012 as a result of a layoff.

He states subsequent to his layoff from employment, he has looked for suitable work in factories, shops and restaurants. He states he has had approximately two to three interviews but is unable to secure any form of employment. He states that he has begun an English as a Second Language program through an adult learning centre and has been at it approximately two weeks, three hours per day.

He states that his present condition renders his left shoulder incapacitated, that he is not able to do anything with his left arm. He states that on occasion, the pain will radiate into his neck and head and he is presently only on home exercises approximately 20 to 25 minutes per day.

He states that his physician has recommended he continue with physiotherapy three times a week but is unable to pay for this treatment.

was called on behalf of the worker. He states he was the manager of the worker at the time of the accident and confirmed that the worker was working on a moulding machine making rubber boots.

He has confirmed the job duties as described by the worker indicating it is a stand-up position and the worker would be required to de-mould boots. He states the extra-large boots would be located slightly above shoulder level and confirms the movement as described by the worker.

He does confirm that the employer has shut down this operation and modified it.

He states the cycle time would be approximately two minutes and the worker would be required to clean out the injection mould with his hand using an air hose with a button operated nozzle. He does confirm that this is a heavy job.

The worker's representative submits that the REC does mention that the worker experienced a strain and only provided a prognostic indication of a recovery in six to eight weeks. He notes the results of the MRI and the opinion provided by the treating specialist does not support the contention that the worker had recovered from the occupational injury.

He notes that the worker has been diagnosed with rotator cuff tendonitis and questions the opinion provided by the case manager. He suggests that the case manager has not provided any clinical evidence or reference to support their conclusion and in essence, the opinion of a lay person has outweighed the clinical opinion provided by the attending physicians.

He notes that the attending specialist has suggested the worker's shoulder difficulties are related to the worker's injury and supports a causal connection between the occupational incident and the ongoing tendinopathy documented on record.

He notes that the worker continues to experience ongoing difficulties to the present time and suggested the worker should be entitled to a continuation of loss of earnings benefits.

The employer's representative submits that the ergonomic reporting on record does not identify any risk factors associated with an onset of shoulder difficulties. He notes the clinical documentation on record and supports the conclusion of the WSIB and submits that the worker is not entitled to continuation of benefits.

The worker was provided a detailed job description in the demonstration as confirmed by the witness. It would appear that the worker would have been working at or above shoulder level in performing the regular activities associated with his job as a machine operator.

The most recent clinical documentation available on record is dated December 3, 2012 with which the attending physician does provide clinical reasoning for the onset of the worker's difficulty and also suggested the worker does present with ongoing restrictions as described by the REC which are limited left shoulder elevation, lifting, reaching and handling material.

I am in agreement with the worker's representative's opinion that the opinion of lay person cannot outweigh that of the orthopaedic surgeon who has, in fact, treated and examined the worker.

As such, the balance of evidence does fall in favour of the worker pertaining to the development of the permanent impairment and requirement of permanent restrictions for the left shoulder condition.

It is noted that the employer has not been able to provide modified work to the worker beyond April 10, 2012 when the worker has demonstrated through the documentation submitted to the record that he has continued to look for modified employment elsewhere in the community.

To his credit, the worker has engaged in an English as a Second Language program and continues in an effort to increase his transferable skills to offer to a potential employer.

The period which the worker was offered modified employment was reviewed by the worker's treating surgeon. In the report of December 3, 2012, the physician noted that the worker would have been capable of employment on a full-time basis in February 2012 as the modified work offered to him involved no use of the left shoulder or arm. He also specifically speaks to the period of light work between January 24, 2011 and February 7, 2012 and noted that the light work offered to the worker involved no use of the left arm and therefore the worker should be capable of performing the modified work offered by the employer.

As such, the modified work offered by the employer would not produce a necessity for the worker to remain off work. The worker did leave the country for an extended period of time and therefore would not be entitled to benefits while out of the country as the worker was not on any benefits that would produce an ability for the WSIB to provide the worker with any period of time which would be considered as a vacation.

The worker is therefore entitled to a restoration of loss of earnings benefits noting his continued search for modified employment and engagement in the English as a Second Language program. Clearly, the clinical documentation on record does support that the worker needs continued modified employment resulting from the permanent restrictions as outlined by the treating orthopaedic surgeon. Operations are instructed to make arrangements necessary for the worker to be provided with work transition benefits to facilitate a return to gainful employment.

CONCLUSION

Having reviewed the evidence on record, and considered the testimonial evidence and submissions made, the following judgement is provided:

The clinical documentation on record does support the worker's ability to return to the modified work offered by the accident employer. It is noted that any offer of modified employment ceased effective April 10, 2012 and full loss of earnings benefits are restored to the worker from that time to the present time and continuing.

The worker is not entitled to loss of earnings benefits during the period he exited the country to attend to family matters.

The worker is entitled to work transition benefits to facilitate a return to suitable employment.

The worker's representative's appeal is granted in part.

Dated February 26, 2013

Appeals Resolution Officer
Appeals Services Division
/910803/sd

(4)

Worker Name:
Claim Number:
Report Date: *June 13, 2013*

ANALYSIS

This therapist hereby makes opinions to job suitability based on:

i. Physical Demands Analysis (PDA) dated June 5, 2013
ii. Most updated restrictions provided
iii. This therapist's observation, measurement and trial of hand control of the dock stocker during the work trial in April and May, 2013.

Firstly, this therapist will compare each of Mr. 's restrictions to the physical demands of the job.

I. Worker's Restrictions

- No lifting floor to waist over 22.2 lbs.
- No lifting waist to shoulder over 19 lbs.
- No lifting overhead over 15.5 lbs.

Job Demands of General Warehouseman (modified) as listed in the PDA:

- Lifting up to 22 lbs. inclusive from floor to 35"
- Lifting up to 19 lbs. inclusive between 35" and 60"
- Carrying up to approximately 10 feet up to 22 lbs. inclusive
- "...ask for assistance for lifting/ moving all items greater than weight restrictions" as indicated on page 4

Note: Manager of Claims and Rehabilitation stated, "We also advised Mr. M that we would further assist him by providing him a helper when he requested assistance".

This Therapist's Comments:

Job duties are within the Worker's Restrictions.

2. Worker's Restrictions

- Avoid repetitive gripping / gripping exceeding 15 kg of pressure

Job Demands of General Warehouseman (modified) as listed in the PDA:

- Occasional handling / gripping
- No gripping force exceeding 10 lbs. and no gripping over an occasional level
- Worker may grip dock stocker controls but essential duties are push/ pull force not grip force

Therapist's Comments:

i)Operation the dock stocker: The dock stocker controls are operated by pushing / ~~pulling force with the right upper limb~~. The contact point is a lever handle. Worker is recommended to practice the strategy of holding the handle with curled fingers and a light open hand position instead of a firm grip.

ii) Consolidating products: Consolidating products involves the application of different types of grips (hook grip, power grip, and palm down or up grip). Lifting / carrying is rated at an occasional level in the PDA; occasional is defined as 0 – 33% of the workday according to the Dictionary of Occupational Titles. Gripping was also rated at an occasional level in the PDA.

"Repetitive" is not clearly defined, however. Yet, if we assume "avoid repetitive gripping" means "avoid frequent gripping", then the job duty involving consolidating products based on PDA are within the Worker's restrictions.

3. **Worker's Restrictions**

- Repetitive pushing/pulling or pinching with right wrist

Job Demands of General Warehouseman (modified) as listed in the PDA:

- Pushing/pulling up to a frequent level with right; under 1 lb. force (sustained and initial); sustained up to approximately 10 minutes
- PDA did not identify the requirement of pinching with right wrist.

This Therapist's Comments:

- PDA writer commented that "Pushing/pulling is indicated up to a frequent level within the PDA, however, this is a required movement of the arms and not the wrists (as no gripping required with push/pull) thereby eliminating any wrist requirement and only needing force application by the shoulder musculature".
- This therapist assumes that the PDA writer refers to the above activity of pushing/pulling the handle of the dock stocker with the right upper limb. Based on this assumption, this therapist has a different understanding of the needs:
  - This therapist agrees that pushing/pulling can be performed without wrist movements. From an ergonomic point of view, this therapist supports that pushing/pulling should be performed using larger muscle groups. However, regardless of the amount of force used, a pushing/pulling action *would* transfer a certain amount of force through the wrist. As well, although it is possible to perform this action with the wrist in a fixed position, these repetitive push/pull movements could involve some amount of wrist movement unless one wears a splint to physically restrict this movement.

- It is this therapist's understanding, based on job site observations through the work trial, that the handle of the dock stocker with the right upper limb is controlled by upward pulling, downward pushing, as well as pushing away and pulling towards the Worker. The force was measured at 2 to 3 lbs. in each direction.
- Because pushing/pulling is required at a frequent level involving force through the wrist, this therapist recommends that Mr. should take intermittent breaks and engage in mini stretches. During the work trial, this therapist recommends that Mr. should monitor the symptoms in his right wrist and take breaks as needed. This therapist is not specifying the frequency of when or how often he should take breaks, because the intensity of discomfort can vary throughout the day (beginning of the work day versus end of the work day).

- With respect to pinching with right wrist, this therapist can relate this demand possibly to manual lifting/carrying of cases or boxes of products with wrist pressing against the box. This can be avoided using a different technique and arm posture in lifting.
- In conclusion, the job is considered suitable with accommodation of intermittent breaks. Note: accommodation for breaks was not indicated in the letter from the employer or PDA report. It is recommended that this accommodation be clarified with the employer.

4. **Worker's Restrictions**

Avoid vibration exposure.

Job Demands of General Warehouseman (modified) as listed in the PDA:

No exposure to vibration was identified.

This Therapist's Comments:

Job duties are within the Worker's Restrictions

SUMMARY

The job position of a General Warehouseman (modified) at is suitable with accommodation – intermittent breaks are required while operating the dock stocker.

Worker Name:
Claim Number:
Report Date: *June 13, 2013*

This concludes the Functional Work Capacity Evaluation Addendum with Mr. Please do not hesitate to contact this therapist directly if you have any questions or concerns.

Registered Occupational Therapist
College Registration #:

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WORKPLACE SAFETY AND INSURANCE BOARD

APPEALS RESOLUTION OFFICER DECISION

CLAIM:

OBJECTION BY: **The worker**

WORKER:

EMPLOYER:

HEARING **LOCATION:** TORONTO, Ontario
DATE: November 16, 2011

ATTENDEES:

- Worker:
- Worker Representative: Richard Fink, Fink & Bornstein
- Interpreter (Cantonese):
- Witness:
- Observer: Appeals Medical Consultant

ISSUE

The worker representative, on behalf of the worker, is requesting entitlement to full loss of earnings benefits from May 21, 2010 on the basis that the identified objective of Retail Sales Person and Sales Clerk was not suitable. The representative is requesting entitlement to full loss of earnings benefits on the basis that the worker is unemployable.

HOW THE ISSUE ARISES

On February 2, 2007 this worker while working as a machine operator, she developed pain in her right thumb after pushing a heavy mould and also hit her thumb in the process. The worker was originally diagnosed with right thumb subluxation at scaphulnar joint. The case manager accepted the claim as there was sufficient evidence to support that the worker's injury arose out of and in the course of her employment.

As a result of the worker's right thumb injury, the worker required medical restrictions of no use of right thumb and required left hand duties. The employer was able to accommodate the worker until April 27, 2007 until which time the employer did not have any other duties available. The worker was therefore referred for Labour Market Re-entry (LMR) services. Based on the

various assessments, the chosen objective was Retail Sales Person and Sales Clerk NOC6421 with potential earnings of $10.25 per hour or minimum wage.

The worker was referred for LMR services on July 18, 2008. The LMR plan consisted of ESL training, academic upgrading training program, Customer Sales associated training program and a 4 week job search training program. The worker completed the LMR plan in May 2010.

The case manager reviewed the worker's loss of earnings benefits and determined that the worker had the necessary training and skills to pursue employment in the identified SEB and was considered capable of earning $10.25 per hour. This would have restored the worker's pre-accident earnings of $9.28 per hour. The case manager determined that the worker was no longer entitled to loss of earnings benefits subsequent to May 21, 2010.The case manager outlined the full particulars of the decision in the correspondence dated May 17, 2010.

The worker objected to this decision, as a result, the worker's file was referred to the Appeals Branch for further consideration.

AUTHORITY

WSIB Operational Policy documents:
18- 03-02 Payment of loss earnings benefits
19-03- 03 Determining suitable determining suitable employment business and earnings

EXHIBITS

The worker gave oral testimony with the assistance of the Cantonese interpreter. The worker representative gave an oral presentation. Ms , the worker's sister gave sworn testimony.

The worker's testimony with the assistance of a Cantonese interpreter:

The worker testified that she is currently 61 years of age. Her education from Vietnam is Grade 6 level. She left school s a teenager.

The worker testified that she arrived in Canada in November 1987 and started to work in April 1988. She could not recall the name of the employer and but that it was a plastic factory and she worked on the assembly line producing parts and that it was a heavy job.

She was asked about the tests to evaluate her English skills but she could not recall them. She testified that she did not learn any English while she participated in the program. She has difficulty with her memory.

Her family doctor is Dr Phong and has been for a number of years. She completed the LMR program in 2009 and as soon as her benefits were discontinued she went to look for work. She looked for work as a garment machine operator, and in sales. However she was never hired because of her poor English skills and her age. She also looked for work in the Chinese community but was unsuccessful. She looked for 10-20 jobs per week. She had her younger sister keeps a list of her job search efforts.

The worker representative was questioned as to why she cannot get hired in the Chinese community and was told that her age was a factor. She also has a speech impediment.

She lives with her parents. Her father is 90 years of age and her mother is 86 years of age. Because of her right hand injury she has difficulty cleaning the house and also cooking. Her father does the shopping. The worker testified that she does not speak any English to anyone and only speaks Cantonese.

Ms testimony:

Ms testified that she is the worker's younger sister. She testified that her sister was born with congenital defects in particular a short tongue deformity. She has trouble speaking fluently in any language.

She testified that during her English testing during the psycho-vocational testing program, she was there with her sister and was a translator. However while her sister attended school, her sister attended on her own. She also testified that she started looking for work shortly after WSIB benefits were discontinued and she stopped attending school.

Her sister would go to various employers and ask for employment, pick up business cards and give the cards to her to create a job search list. She searched from February 2011 to present. The list is only up to August 2011 as she has not had time to complete the list.
She also helps out her sister and parents with household chores.
She testified that her family doctor is well aware of her sister's mental disability and trouble speaking and difficulty with comprehension.

ASSESSMENT OF THE EVIDENCE

Suitability of identified objective NOC 6421 Sales Person/Sales Clerk

I have reviewed all of the evidence on record, oral testimony and oral presentation given at the hearing. I also considered the Applicable WSIB Operational Policy Document and relevant legislation. In assessing all of the evidence on file, I am satisfied that the identified objective of Retail Sales Person/Sales Clerk is not suitable. In reaching this decision, I noted and accepted the following:

According to the worker's testimony and the results of the psycho-vocational assessment, the worker completed a grade 6 level of education in Vietnam under a Vietnamese speaking educational system. She left school at the age of 12 and went to work. She had not returned to school in any capacity prior to the workplace accident of 2007.

The worker arrived in Canada in the winter of 1981 and within a few months started working for the accident employer in April 1982. This was her first and only job in Canada. She was employed as a machine operator for the accident employer. Prior working experience was limited to working in what she described as a "herb store" as a helper.

During the worker's participation in LMR services, the worker was administered several tests and the results of the test revealed the following:

Verbal IQ - Borderline – 0.1 percentile
Performance IQ - 10th percentile – below average
Full scale subtest IZ 1st percentile – Borderline

The psychological vocational assessment indicated that the test results were compatible with the worker's educational vocational history. On page 11 of the report, it stated the following:

> *"All testing suggests reading, pronunciation, sentence comprehension, written spelling, arithmetic computation and reading composite scores at the borderline performance range. On the non verbal portion of the CAPS her scores were noted at the below average range in spatial relations with borderline scores in numerical ability, perceptual speed and accuracy and manual speed and dexterity.....Based on the above assessment, Ms would likely be best suited for on the job for fairly routine duties. She has very limited English conversational skills and is functionally illiterate and has very low numeracy. As such, she would require ESL training as well as substantial upgrading of her math and English for any occupations requiring these skills"*

> *"Suggested occupations were for direct placement of with a period of on the job training. Ms could in principle consider some occupations within the following minor group areas providing they are with her physical restrictions. Security guard, Retail Sales Clerk and other elemental service occupations."*

The recommended SEB chosen was Retail Sales Person/Sales Clerk. The LMR plan was to consist of 62 weeks of ESL and academic upgrading, followed by an 8 week Customer Service training program, a 4 week job search training program as well as a 12 week special work placement to allow the worker experience in the field following completion of the training activities.

Throughout the worker's participation in the LMR program, the reports identify that the worker was trying but not making any progress.

According to the LMR report dated August 2009 on page 5 it stated the following:

> *"Ms LMR programming continues to make slow but steady progress. While the overall progress continues to be behind schedule, we have until November 30, 2009 to provide her with as much upgrading as we can by this time. However it may be that she is not able to learn at the required levels for the next phase of the training program (Customer service training program) so we will need to reassess at the time to see if the school believes that she will be able to move forward into that program and when."*

According to the LMR report dated November 3, 2009 on page 2 it stated the following:

> *"Ms started at the earliest language benchmark in English so while she has made some progress through this time, her overall progression is still quite negligible.*

According to memorandum #28 dated January 12, 2010; the case manager stated the following:

> *"The worker will progress to the next intervention of Customer Service program, however, she will continue with the upgrading at the same time. The worker's participation and co-operation continue to be exemplary and the worker is keen to develop her language skills."*

Although the LMR plan was to consist of a work placement, due to the lack of significant progress in her English and upgrading skills this prevented the worker from qualifying for one. According to the report dated March 23, 2010 on page 2 of the report it stated the following:

> *"The client has been in the English as second language program and then in academic upgrading program with the same provider for some time and she has struggled with these programs and was never able to achieve the independent levels required to be viable choice for a work placement".*

On page 3 of the report, it stated the following:

> *"Her current tested levels are between Grade 2 and Grade 3 levels, but it appears to be as high as she can attain but she wants to continue in her studies and remain in school. It should be also noted that she began her programming at the most basic levels of ESL so that she made slow but steady progress and the school has never questioned either her commitment or her motivation throughout. "*

According to the Career Assessment student program report dated April 2010 on page 3 under subheading Challenges it stated the following

> *" has speech problems and memory attention problems. She could not progress far because she was unable to remember old concepts, which mean she could not build on foundational skills to learn more complicated material."*

According to description for NOC 6421 Retail Sales Person and Sales Clerk, the aptitudes required for this objective is a general learning ability. This worker according to the psycho vocational testing, is mentally challenged and of borderline intelligence.

The educational requirements for this objective is least some high school education and or on the job training or experiences. In this case, the worker does not have the educational requirements and did not qualify for a work placement and does not have any work experience in this field.

Under the main characteristics of the objective NOC 6421, the worker does not have the general ability, lacks the learning, verbal ability as well as the numerical ability. She also does not possess the clerical perception required and methodical interest in computing.

The worker representative disagreed with the LMR closure report on Page 3 indicating that the worker was employable since she was provided academic upgrading and a four week job search. He maintains that due to the worker's limited English skills, they were unable to communicate with the worker and therefore communicated with the worker's sister. The worker did not qualify for a special work placement due to her limited English skills and upgrading.

According to the worker's family doctor, Dr Fung in his report date October 18, 2007 he stated the following:

> *"I would like to give some background information. Ms has been my patient on and off since 1983. At the time she was 32 years old. Now she is 57. .....She was diagnosed with having a genetic disorder with abnormal chromosome. .....She has below normal intelligence and mentally challenged individual. She was only able to finish grade 2 in Vietnam. She is not able to read or write neither English nor Chinese She is able to speak simple Cantonese with me and does not have enough IQ to reason things and grasp difficult concepts. In a nutshell, she seems to be able to follow instructions and lacks of the ability to organize and comprehend consequences of events."*

In a further report dated July 10, 2010 Dr Fung reported the following:

> *"Her injury at work in 2007 was her right thumb. The bone scan showed persistent focus of general uptake within the first CMC joint. She has limited movement of her right thumb CMC joint with pain. She still has deformity at the right thumb CMC joint. She had difficulty holding onto objects in the right arm."*

He also reported about her genetic disorder with abnormal chromosomes and congenital heart condition. And furthermore, the worker's reason for not proceeding with the right thumb surgery was due to her heart condition.

> *"Together with her age of 59, the above pre-existing conditions and her inability for her to use her right thumb she is not ready and unable to secure employment. "*

Following completion of the LMR program, and the closure of WSIB benefits in May 2010, the worker proceeded with self directed job search activities. She personally contacted many employers and kept their business cards. Given her lack of writing skills she provided the business cards to her sister and her sister documented the job search list which was submitted to the claim file.

In assessing all of the evidence, I am satisfied that the worker does not have the necessary skills to obtain employment as a Sales Person and Sales Clerk. The worker was unable to complete all the aspects the recommended LMR plan. Given her lack of progress in ESL and upgrading skills she was not given the required work placement as recommended by the psycho-vocational testing. The worker lacks the work experience in this objective and given her borderline intelligence, basic English skills and her difficulty in communicating even in Chinese she would even be unable to work in her local community as a Sales Person. For the reasons outlined above I am satisfied that the NOC 6421 is not suitable for the worker.

I also considered the worker representative's request for full loss of earnings benefits from May 2010 on the basis that the worker is unemployable. I considered the worker's right thumb impairment which has resulted in the need for permanent restrictions. At the time of the accident the worker was a long term employee for the accident employer (25 years) and worked as a machine operator for the entire period. Following the accident, the worker attempted to return to work however, the employer was not able to permanently accommodate her with suitable employment. Although the worker was provided the opportunity to participate in LMR services,

she was unable to make any significant gains given her borderline intelligence level, and limited English skills.

Although the worker has non compensable medical conditions that predate the accident, these conditions did not prevent the worker from being able to perform her pre-accident job for 25 years as a machine operator with the accident employer. The evidence supports that the worker co-operated fully with the accident employer in returning to modified work and with LMR services and even job searched for several months with no success. If it were not for the workplace accident, the worker more likely than not would have continued to perform her pre-accident job as a machine operator for the accident employer until retirement age.

I am satisfied that the worker's right thumb injury significantly contributed to the worker's wage loss subsequent to the accident. I therefore find it reasonable to conclude that it is highly unlikely that the worker will be able to locate alternate employment with another employer and be able to restore her pre-accident earnings. I therefore find the worker competitively unemployable. As such, the worker is entitled to the payment of full loss of earnings benefits from May 21, 2010 to age 65 (September 2015).

CONCLUSION

The worker's objection is granted.

The identified objective of Retail Sales Person/Sales Clerk NOC 6421 is not suitable.

The worker is entitled to the payment of full loss of earnings benefits from May 21, 2010 to age 65 on the basis that the worker is unemployable. (less benefits received from other sources if any).

DATED November 29, 2011

(Ms)
Appeals Resolution Officer
Appeals Branch

DOCUMENTATION MEMO

Memo #: 999 (6a)

To: FILE

MA (Couns. Psy), MCVP, RRP, CRS, Work Transition

From: Specialist
Wkr Name:

Claim #:
Date: 17-Feb-12

SO Reconsideration Meeting

WTS, CM and WT Manager met with IW and IW's representative, Mr. Fink on February 17, 2012 for the reconsideration meeting. IW's representative indicated that IW's typing speed is slow as he is currently typing at 5 words per minute and IW should be at 11 words per minute. According to IW Rep, IW is therefore he is not meeting the goal in order to be a Dispatcher.

Mr. Fink also indicated that although IW is willing to cooperate and has been putting forth his best effort, he will still be unemployable at the end of the training due to the following reasons:

- IW has low aptitude as per IW Rep based upon results of Psycho-Vocational Assessment completed
- IW is functioning between Grade 6 to Grade 10 level depending upon the subject
- IW's Rep believes IW will need Grade 12 completion to become employable in Dispatch. WTS reviewed and determined that Grade 12 "may be required"
- IW Rep believes that IW does not have adequate education
- IW's age will be a barrier to finding employment
- IW Rep believes that the labour market for Dispatch is not viable.

IW Rep indicated that he would like to see IW deemed unemployable to age 65 years and be paid full LOE. CM indicated that she is unable to do that as IW's NEL for this claim is only 20%. IW did agree with moving forward with the WT Plan but will be appealing the process.

February 17, 2012

Work Reintegration

"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".

– David Marshall, President and CEO, Workplace Safety and Insurance Board

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wsib cspaat ONTARIO

Chronic Pain Disability

Claims	
Application Date	This policy applies to all decisions made on or after June 1, 2006, for all accidents.
Published	14-Oct-2009
Subject	Disabilities|Impairments Resulting from Accidents
Title	Chronic Pain Disability
Document No.	15-04-03

| Policy | Guidelines | References |

Policy

The WSIB will accept entitlement for chronic pain disability (CPD) when it results from a work-related injury and there is sufficient credible subjective and objective evidence establishing the disability.

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Guidelines

Exception

Not all claims involving persistent pain are adjudicated according to this policy. If pain is predominantly attributable to an organic cause or to the psychiatric conditions of post-traumatic stress disorder or conversion disorder, the worker will be compensated pursuant to the WSIB's policy on that organic or psychiatric condition. If, however, the chronic pain arises predominantly from psychological sources (other than post-traumatic stress disorder or conversion disorder, see 15-04-02, Psychotraumatic Disability) or undetected organic sources, the pain will be considered for compensation purposes under the CPD policy.

Eligibility criteria

For a worker to qualify for compensation for CPD, the following conditions must exist, and must be supported by all of the indicated evidence:

Condition	Evidence
A work-related injury occurred.	A claim for compensation for an injury has been submitted and accepted.
Chronic pain is caused by the injury.	Subjective or objective medical or non-medical evidence of the worker's continuous, consistent, and genuine pain since the time of the injury, AND a medical opinion that the characteristics of the worker's pain (except its persistence and/or its severity) are compatible with the worker's injury, and are such that the physician concludes that the pain resulted from the injury.

Condition	Evidence
The pain persists 6 or more months beyond the usual healing time of the injury.	Medical opinion of the usual healing time of the injury, the worker's pre-accident health status, and the treatments received, AND subjective or objective medical or non-medical evidence of the worker's continuous, consistent and genuine pain for 6 or more months beyond the usual healing time for the injury.
The degree of pain is inconsistent with organic findings.	Medical opinion which indicates the inconsistency.
The chronic pain impairs earning capacity.	Subjective evidence supported by medical or other substantial objective evidence that shows the persistent effects of the chronic pain in terms of consistent and marked life disruption.

Definitions

Chronic pain disability (CPD) is the term used to describe the condition of a person whose chronic pain has resulted in marked life disruption.

Chronic pain is pain with characteristics compatible with a work-related injury, except that it persists for 6 or more months beyond the usual healing time for the injury.

Usual healing time is defined as the point in time, following an injury, at which the worker should have regained pre-accident functional ability, or reached a plateau in physical recovery.

Marked life disruption - Because pain is a subjective phenomenon, marked life disruption is the only useful measure of disability or impairment in chronic pain cases. Marked life disruption indicates the effect of pain experienced by the worker and the effect on the worker's activities of daily living, vocational activity, physical and psychological functioning, as well as family and social relationships.

There must be a clear and distinct disruption to a worker's life, but there is no particular requirement for this disruption to be either major or minor. The disruption in the worker's personal, occupational, social, **and** home life must be consistent, though the degree of disruption in each need not be identical.

The presence of "and" in the statement "social, occupational, **and** home life" suggests that all 3 must be present. However, there is no requirement that all 3 aspects of a person's life must be disrupted **to the same degree.**

Initially, the fact that the worker has not returned to employment may be an indication of marked life disruption, the assumption being that other components of the worker's life are disrupted as well. As the 6 month period progresses, the decision-maker is obliged to obtain evidence of disruption to each part of the worker's life - personal, occupational, social, and home.

A disruption to a worker's occupational life is also considered to exist if a worker has returned to employment, that has been modified to accommodate the CPD.

The following list of typical expected disruptions of functional abilities due to chronic pain is to be used when assessing the extent to which a CPD is affecting a worker's life.

Marked life disruption - vocational aspects

- The type and the duration of work may be restricted totally or to a limited degree, i.e., modified duties or part-time work only may be possible.

Marked life disruption - physical aspects

- constant, unremitting pain
- pain upon movement or use of the "painful body part"
- specific activities aggravate pain

- sitting, standing, and walking are limited to short periods of time
- walking is limited to short distances
- restricted bending and lifting
- difficulty getting out of bed in the morning due to stiffness and pain
- sleep regularly disturbed by pain: difficulty falling asleep, premature awakening, repetitive awakening
- sleeping medication is required to initiate sleep
- change in appetite or weight (increase or decrease)
- increased or constant tiredness
- feeling of unsteadiness when standing
- dizziness
- headaches.

Usual healing time

Decision-makers determine the usual healing time based on the following information which includes but is not limited to

- clinical reports from the treating health professional(s)
- specialists' report(s), where appropriate
- reports from agency(ies) providing treatment and/or evaluation, (e.g., Regional Evaluation Centres)
- information from the worker on his/her medical impairment
- external, evidence-based medical/scientific guidelines on disease and injury-specific impairment and treatment, and
- the opinion of WSIB clinical staff, if obtained.

Decision-makers consider

- if recent clinical reports indicate any change in the worker's medical impairment, and
- if the worker is currently receiving or will receive treatment that is likely to improve the worker's medical impairment, see 11-01-05, Determining Maximum Medical Recovery (MMR).

Once the usual healing time is determined, decision-makers should record this information in the file as a reminder when conducting future file reviews.

Summary of necessary conditions and evidence

The following information should also be consolidated in memo form in the claim file

- worker's name and claim number
- background
- treatment
- benefit status
- is the injury work-related? **(yes/no)**
- is the chronic pain caused by the injury? **(yes/no)**
- has the pain persisted beyond the usual healing time? **(yes/no)**
- has the pain persisted for 6 or more months beyond the usual healing time? **(yes/no)**
- is the pain inconsistent with organic findings? **(yes/no)**
- does the chronic pain impair earning capacity? **(yes/no)**
- conclusion/remarks.

If there is reason to suspect that the worker's usual healing time is prolonged by other factors, e.g., age, diabetes, etc., an opinion will be obtained from a WSIB medical consultant to assist in the adjudicative process.

Running of the 6 month period

If the worker reports experiencing pain beyond the usual healing time (confirmed by medical reports and information obtained directly from the worker, etc.) but medical reports do not readily reveal an organic explanation for the severity of the pain, the 6 month period (the potential "chronic pain" period) commences from the date the healing

The 6 month period has two principal goals

- to allow for treatment (if facilities are available) of a pain condition to avoid chronicity, and
- to allow an appropriate period for the investigation as to why the worker appears not to have recovered completely (through specialist examinations, investigations by the health professional, traditional physiotherapy treatment, etc.).

Medical consultative appointments or treatment programs do not interrupt the passing of the 6 month period **unless, and until, a positive and firm diagnosis** of an organic condition or the psychiatric conditions of conversion disorder **or** post-traumatic stress disorder is made during that period. Similarly, the possibility of such a finding does not interrupt the 6 month period.

Treatment

Early referral for treatment during the "potential chronic pain" phase is essential. Where possible, treatment incorporating the methods of behavioural therapy is preferred although it is recognized that there is not a sufficient capacity in the province to provide treatment for all workers with pain disabilities/impairments.

WSIB Medical consultant opinion

Based on the determination of the usual healing time and information available on file, the decision-maker initiates the running of the 6 month period. However, within the first month of the 6 month period, the decision-maker may refer the file to a WSIB medical consultant to obtain confirmation of the usual healing time and an opinion on the general compatibility of the pain with the original work-related injury (aside from persistency/severity).

The decision-maker may also request an opinion to ensure that the appropriate clinical investigations are being conducted. The 6 month period continues to run during referrals to a WSIB medical consultant.

Establishing marked life disruption

Through conversation with the worker, it may be possible to determine the effect the pain is having on the worker's activities, but decision-makers should not ask detailed questions about the worker's personal life.

A social work report should not be necessary for establishing the presence of a marked life disruption during the 6 month period, as sufficient information should be on file.

A social work report is necessary only if

- the worker is to be assessed for permanent impairment for a CPD, and the report will assist in determining the degree of impairment, or
- there are inconsistencies in life disruptions (personal, vocational, social, family) and the decision-maker and the WSIB medical consultant agree that a social work assessment would provide clarification.

The running of the 6 month period is not interrupted by this referral.

Disability/impairment during the 6 month period

When determining a worker's level of disability/impairment during the 6 month period, the decision-maker must consider both the medical reports of organic findings and the worker's subjective experience of pain. For example, although a medical report may indicate that a worker is partially disabled/impaired from an organic standpoint, the combination of the organic findings and the degree of pain experienced may render a worker totally disabled/impaired.

Labour market re-entry

If labour market re-entry services would be helpful during the 6 month period, the worker should be referred regardless of medical status.

Permanent disability/impairment

It is expected that workers who have reached the 6 month point beyond the usual healing time have been thoroughly investigated and conventional medical modalities have been

attempted. Therefore, workers who meet the entitlement criteria of this policy are considered to have reached maximum medical recovery (MMR) and, as such, are eligible for either a PD assessment or a non-economic loss (NEL) determination, see 15-04-04, Chronic Pain Disability Rating Schedule and 18-05-11, Assessing Permanent Impairment Due to Mental and Behaviour Disorders. However, decision-makers must look to the general principles for determining MMR to ensure that individual differences are considered in each case, see 11-01-05, Determining Maximum Medical Recovery (MMR).

Fibromyalgia syndrome

Workers diagnosed with fibromyalgia syndrome will be considered for compensation benefits under the CPD policy.

Characteristics include

- chronic diffuse pain of unknown aetiology attributable to either undetected organic condition or psychogenic sources
- the presence of "tender points" in predictable, and usually symmetrical, locations
- fatigue and sleep disorders.

With the exception of the "tender points", these characteristics are those usually seen in individuals with CPD, and the recommended treatment is identical to that recommended for individuals with CPD. Because of this, fibromyalgia syndrome is recognized as a variant of CPD and workers who are disabled/impaired by fibromyalgia may be eligible for benefits under the CPD policy or the psychotraumatic disability policy, see 15-04-02, Psychotraumatic Disability as follows.

Effective dates

- Workers diagnosed as having fibromyalgia or fibrositis (resulting from a work-related injury) **for periods between November 30, 1976 and March 26, 1986** are considered for benefits in accordance with the WSIB's policy for psychotraumatic disability.
- Workers diagnosed with fibromyalgia syndrome for periods **before March 27, 1986, and extending beyond March 27, 1986** may choose one of two options:

  - continue to receive benefits under the psychotraumatic disability policy for periods after March 27, 1986, **OR**

  - be considered for benefits under the CPD policy for periods after March 27, 1986.

- Workers diagnosed with fibromyalgia syndrome or fibrositis **on or after March 27, 1986** are considered for benefits under the CPD policy.

The retroactivity date of March 26, 1986 applies only to that portion of the whole-person pension that is attributable to the CPD. A worker's impairment of earning capacity arising from the organic condition and/or the psychiatric conditions of post-traumatic stress disorder or conversion disorder is fully retroactive to the date of the accident or onset of the disability, whichever is later, see 15-04-04, Chronic Pain Disability Rating Schedule.

Somatoform pain disorder

As the clinical presentation of an individual with a diagnosis of somatoform pain disorder is virtually identical to that of an individual said to have CPD, cases of somatoform pain disorder are considered for entitlement under the CPD policy instead of the psychotraumatic disability policy.

Diagnostic criteria - As published in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*, (DSM-IV), the diagnostic criteria for somatoform pain disorder are

- preoccupation with pain for at least 6 months and, **either**
- an appropriate evaluation that uncovers no organic pathology or pathophysiologic mechanism, e.g., a physical disorder or the effects of injury to account for the pain, **or**
- when there is related organic pathology, the complaint of pain or resulting social or occupational impairment is grossly in excess of what is expected from the physical findings.

Post-traumatic head pain

Cases of persistent disabling head pain following relatively minor head trauma where there are no objective findings should be considered under the terms and conditions of the CPD policy.

Application date

This policy applies to all decisions made on or after June 1, 2006, for all accidents.

Document history

This document replaces 15-04-03 dated July 18, 2008.

This document was previously published as:

15-04-03 dated June 1, 2006

15-04-03 dated March 15, 2005

15-04-03 dated October 12, 2004

03-03-05 dated August 22, 1990.

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References

Legislative authority

Workplace Safety and Insurance Act, 1997, as amended

Section 13(1)

Workers' Compensation Act, R.S.O 1990, as amended

Section 4(1)

Workers' Compensation Act, R.S.O. 1980, as amended

Section 3(1)

Minute

Administrative

#9, September 18, 2009, Page 477

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DOCUMENTATION MEMO

Memo #: 97

8

To: FILE
From: Case Manager
Wkr Name:

Claim #:
Date: 15-Jun-12

FILE REVIEW

DOB: 15APR1952

DOA: 02FEB1998

ACCIDENT HISTORY:
On 02FEB1998, this then 45 year old male assembly operator reported an injury to his right elbow, left hip and low back due to the repetitive duties of his job (pushing containers and using a power air gun for a couple of hours per day). The back injury was directly attributed to a specific event on the same day when the worker was pushing a box and his foot suddenly slipped, jerking his box.

Initial entitlement was accepted for right elbow tendonitis and low back strain.

NEL: 17% Was granted as a permanent impairment was identified for the low back only.

PERTINENT INFORMATION:
- Worker RTW on 27MAY1998 in modified duties and remained in suitable modified duties until 28JUL2008 when he re-injured himself.
- He then RTW again on 28SEP2008 on modified duties @ 4 hours/shift.
- He stopped working again as of 29SEP2010, when he experienced an increase in pain

- 72 Month Lock in was 02FEB2004. At the time of the lock-in, the worker was employed in suitable sustainable work. Worker did not have re-employment rights.

REO CLAIM OF 28JUL2008:
On 28JUL2008, the worker moved to a new job in the new plant. He had no sitting privileges and prolonged standing was involved. This new job caused exacerbation of prior back claim.
DX: Spinal stenosis, low back strain and disc protrusion.
REO was allowed as an exacerbation of prior low back injury.

REO CLAIM OF 29SEP2010:
Worker claim entitlement to further benefits following a change in level of impairment on 29SEP2010. REO was allowed as the worker had a significant temporary deterioration from his NEL level as evidenced by the medical reports. LOE was re-instated as of 29SEP2010.

REVIEW OF REC REPORT DATED 17MAY2011
Worker was referred for a Level A Multidisciplinary health care assessment.

DX:
Work Related: Lumbar Strain with chronic mechanical back dominant pain pattern and left S1 root syndrome.

Non Compensable: 1. Lumbar Spondylosis
2. Depression

Prognosis: Worker has reached MMR in the sense that the facility-based musculoskeletal rehab will not result in any meaningful symptomatic or functional improvement.

Recommendations:

1. Referral to FRP to provide worker with strategies to cope with pain control and depression.
2. Worker should discuss possible future epidural injections with Dr. Friedlander

Permanent Restrictions:
Prolonged standing, prolonged walking, prolonged sitting, repetitive bending and heavy lifting.

REVIEW OF FRP COMPRESHENSIVE ASSESSMENT REPORT DATED 29AUG2011
Diagnostic Impression:

- 1. Pain Disorder associated with both psychological factors and a general medical condition (chronic) – mechanical low back pain referred down the leg.
- 2. Adjustment Disorder with mixed anxiety and depressed mood.

Recommendations:

1. Worker to attend group based treatment at the FRP.
2. Weaning off of Tylenol #3 and Cyclobenzaprine should be considered during the FPR program.

REVIEW OF FRP DISCHARGE REPORT DATED 27JAN2012
Worker was scheduled to start group tx on 12SEP2011. However, worker did not attend. Discharge was completed in January 2012 as worker did not attend and appointment was not rescheduled.

RETURN FROM NEL
Claim was referred to NEL for a Re-Determination. However, NEL did not accept referral as the referral DX of Disc Bulge L4-5 was not directly attributable to the work-related injury.

REVIEW OF CLAIM #_____

ACCIDENT HISTORY:

On 15AUG2008, the employer sent in a letter indicating the worker had suffered a recurrence. Worker was transferred from Aurora to Newmarket plant because of restructuring. They indicated the worker was provided with suitable modified work but worker indicated the duties were not suitable.

A new claim was established under claim # The WREO7 indicates that the company moved, and modified duties had been provided to the worker for the past 10 years and these duties had always been deemed to be suitable. Worker claimed that although he worked in modified duties, he was always in discomfort but able to deal with it until this time (July 2008)

On 28JUL2008, worker stated he tried a job which he thought he could do. He got his chair to sit down because he could not stand for too long in one spot. The team leader indicated he could not have the job because it was a stand up job. He was unable to do that job. This caused an increase in pain and this new claim was established.

*** In Memo #51A, the CM at the time, amalgamated claim # into claim # Under Bill 187, worker would have been eligible for benefits under the prior claim (#) because medical evidence (as per M #63) did confirm a deterioration from the NEL level.

Claim # should not have been amalgamated into claim # . There was an even that occurred on 28JUL2008 which caused an increase in pain resulting in time off work. There was a job change and the job provided was not suitable for the worker. The job change was confirmed by the worker and the employer.

As such, Claim # was re-established, recognizing that the new claim would also establish the worker's re-employment rights for an additional 2 years.

Claim # was to be finalled and all payments from 29JUL2008 were to be transferred to the new claim.

MC REVIEW OF 30AUG2011:

MC reviewed current claim on 30AUG2011 (M #46) and the following recommendations were made:

1. The imaging and clinical findings to do not point to significant new or ongoing pathology. The pain, however is persistent and quite disproportional to the actual clinical diagnosis and findings. This worker appears to qualify for CPD criteria medically.
2. There is no diagnosable psychological condition related to the claim injury. The worker does have pain and distress sequellae, but these do not constitute a psychological condition for entitlement consideration. The GP has not been treating any psychological issue nor have any been identified. Pain catastrophyzation has been noted by a number of assessors but no major psychological disturbance or symptoms have been identified by the treating practitioners.
3. The worker's left him pathology has pain and dysfunction that would overlap with those arising from the low back. Without details and clinical assessments of the hip, it is more difficult to apportion these effects of the low back and the hip pathology.
4. The worker appears to have function that is below his prior NEL level. This would, however, be a global assessment of his functioning that would reflect the CPD consideration rather than just the low back condition. The MMR for this can be considered as of 30SEP2009.
5. The LOI is likely partial. However, the restrictions appear to be more than those prior to the claim injury with limitations in bending, twisting and lifting and significant restrictions in duration of standing and sitting

RECOMMENDATIONS:

1. NEL Re-Determination was requested but refused by NEL as they did not accept referral as the referral DX of Disc Bulge L4-5 was not directly attributable to the work-related injury. The MRI shows degenerative changes only and pre-existing conditions such as ostheoarthritis in hip and lumbar spine are present. Therefore, given that there was no significant permanent deterioration, it is evident the worker returned to same level of functioning as that of the time of NEL assessment. Worker is therefore not entitled to any further benefits. LOE benefits will be extended for 4 weeks from date of this memo in order to allow the worker an opportunity to mitigate loss of benefits.
2. Memo in Claim # states that claim # was to be finalled and all payments from 29JUL2008 were to be transferred to the new claim. However, this did not occur. Given, that the injury of 29SEP2010 should have been accepted as a REO and not as a new claim under claim # . LOE payments have indeed been paid under the correct claim #.
3. Given the pre-existing conditions and worker's current organic NEL of 17%, deny entitlement to CPD as criteria has not been met.

4. Noting the objection forms submitted to this claim by the worker's representative, referral to Appeals is in order. Noting that the representative has passed away, call worker to advise that referral will be made in his name until such time that he chooses another representative, if he chooses to do so.

CALL TO WORKER

Called worker at and left message. I called the worker's wife, at and discussed the decision with her. She was not happy that the above decisions were made. I advised her that I would provide them with a letter detailing the decision. I also advised that I have received the objection forms complete by the worker's former Rep. I will therefore refer the file to the Appeals area.

We discussed the fact that the worker's Rep, Donna Jackson, has passed away. Mary advises that they are currently looking for a new Rep. I advised her that, once they secure one, to please provide us with the authorization forms and information so that the new Rep may be added to the file. She understood and agreed to do so.

(9)

wsib
cspaat
ONTARIO
& Insurance Board

Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Siège social :
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21ème étage
Toronto, Ontario M5V 3J1

VIA ELECTRONIC MAIL

August 23, 2013

Ashleigh Burnet,
FOI Access Specialist, Privacy Office
(416) 344-4771 (416) 344-5560
Email / Courriel: ashleigh_burnet@wsib.on.ca
TTY/ATS : 1-800-387-0050
1-800-387-0750 (ext. 4771)

Fink & Bornstein
466 Dupont Street
Toronto ON M5R 1W6

Attention: Richard Fink

Dear Mr. Fink:

RE: FIPPA Access Request

Thank you for your email of August 9, 2013 seeking access to 2009 and 2010 Appeals Branch statistics regarding the number of appeals received and resolved. In February 2012, Ms. Slavica Todorovic provided you with the number of resolved appeals; however, the breakdown is as follows:

	Appeals Received	**Appeals Resolved**
2010	10,629	9,111
2009	9,391	9,041

On August 15, 2013, you requested the percentage of resolved appeals allowed/allowed in part and the percentage of appeals resolved in twelve months, as outlined in the Measuring Appeals chart for the 2012-2015 Strategic Plan: Measuring Results Q1 2013 report. The breakdown is as follows:

	% of Resolved Appeals Allowed/Allowed in Part	**% of Appeals Resolved in 12 Months**
2010	26.8%	88.9%
2009	29.1%	89.9%

Please feel free to contact me if you have any questions or require further information.

Yours truly,

Stakeholder Relationship and Service Excellence

Worker and employer index scores have held steady since Q1 2012. Results indicate that the majority of employers and injured workers continue to be satisfied with the programs and services that they receive.

In Q1 2013, 63% of workers and 76% of employers were satisfied with the claims process, and 71% of workers and 81% of employers were satisfied with the service they received regarding claims. For account management, 77% of employer's satisfied with the account management process and 82% satisfied with the service they received.

The WSIB modernized its appeals program effective February 1, 2013 and we continue to develop appropriate measures for the new process.

MEASURING APPEALS SCHEDULE 1 & 2

Appeals	Q1 2013	Q2 2013	Q3 2013	Q4 2013
# of Appeals Received	1,933			
# of Appeals Resolved	3,328			
% of Resolved Appeals Allowed / Allowed in Part	28.5%			
% Appeals Resolved in 12 months	77.3%			

Appeals Branch Support Document - Determining Employability

FACTORS TO CONSIDER WHEN ADDRESSING A WORKER'S LEVEL OF EMPLOYABILITY FOR THE PURPOSES OF PAYING LOSS OF EARNINGS (LOE) BENEFITS

An injured worker may face challenges in his or her efforts to reintegrate back into the workforce, either with the injury employer or with another employer. Some of the more common barriers to a worker's successful reintegration into the workforce are as follows:

- Age, if the worker is considered to be an "older worker"
- Physical restrictions that are work-related, non-work-related, or both
- Secondary non-organic conditions (i.e., in addition to an organic injury, the worker may have either a work related or non-work related psychological condition)
- Post-injury conditions
- Limited education levels
- Limited English language skills
- Geographic location (e.g., living in small community with less employment opportunities than a more urban city)
- Labour relations issues between the worker and employer that may be impeding a successful return to work
- Limited Canadian work experience

When considering possible return to work barriers, it is important to understand to what extent these are true barriers (or just perceived barriers) and if the barrier(s) are temporary or permanent. What if anything has been done/can be done to mitigate the impacts to allow the worker to be more successful in reintegrating back into the workforce. Although this information may be on file, it is also important to discuss the matter with the worker to fully understand his or her perspective of why something is a barrier(s) and how it is impeding his or her successful return to work.

The following questions may be helpful when determining a worker's level of employability.

1. Age
   - The fact someone is an "older worker" (generally 55+ years) is not necessarily a barrier to employment. Ontario's workforce is aging with more and more people working well beyond the age of 65. Also, the *Human Rights Code* was changed on December 12, 2006 to remove the mandatory retirement age at 65.
   - If the concern is that an older worker cannot compete in the general job market with non-injured workers who are younger, consider if that is the case for the particular SEB that has been chosen for the worker. Are these jobs typically only performed by younger workers, or is the age demographic mixed? What experience/skills does the worker

bring to a potential employer and would such experience/skills give the worker a reasonable opportunity to compete with other job candidates, despite the age issue?

- If the concern is that an older worker may not have the physical stamina to sustain employment that is fairly physical, determine just how physical is the work in the chosen SEB. Some jobs require significant physical labour (e.g., construction, manufacturing), but others do not (e.g., retail sales, food services and other customer service operations).
- In some cases, it may be appropriate to inquire if the worker has retired or is thinking about retiring from the workforce. If the worker had planned to stay in the workforce, confirm if the worker is/was planning to continue working full time, or change to part-time, seasonal or casual employment.

2. Physical Restrictions

- Well documented and objective physical restrictions are critical to determining return to work issues, especially job suitability.
- Review if the physical restrictions are truly permanent or likely to be permanent, or could there be further improvement; are the restrictions medically substantiated or are there self-perceived restrictions causing a barrier; are the physical restrictions compatible to the diagnosed injury/illness.
- In addition to the physical restrictions, review what other factors may be playing a role. For example, are medications presenting a barrier? If so, can they be changed or taken at different times? Are the medications used for long term pain management or meant for an acute phase or a flare up?
- To what extent are medications used for non-work-related conditions? If they were used prior to the work-related injury, they should generally not be a barrier now.
- The quantum of the NEL award(s) is not an indicator of employability. However, a moderate to significant impairment should be quantified by a higher NEL award. In cases where the NEL is low and there are few other barriers to employment, it may be difficult to substantiate or support that someone is totally unemployable.
- If the chosen SEB is appropriate, then the work-related injury itself should no longer be a barrier to employment. The appropriate SEB should be within the worker's functional restrictions and the worker should be capable of working in the SEB.
- If you determine that the selected SEB or LMR plan was inappropriate, you are not limited to accepting the SEB and concluding the worker is unemployable. You may request a further LMR assessment, or a new or revised LRM plan as part of your decision. Other options may include a referral for an FAE, PTP or REC assessment (please ensure the referral criteria is met before directing a referral) to clarify restrictions, capabilities, etc. to help you adjudicate the appeal.

3. Education
   - Although employers generally prefer grade 12 as a minimum education level, many jobs are held by workers who do not have a grade 12 diploma, and may even have language barriers. Some workers may have completed most high school courses or the equivalent, but do not have a grade 12 diploma if they are short a few credits. Consider to what extent is a grade 12 diploma critical to the chosen SEB, and does the worker have other skills and abilities to overcome the lack of a grade 12 diploma (e.g., may not have Grade 12 math but math is not a requirement for a customer service position).
   - Most job descriptions outline the optimal education level but they also have a disclaimer that says "or related experience". It may be helpful to review to what extent the worker's related experience could assist the worker to compete for the jobs in the chosen SEB, and was there/is there an opportunity to enhance the related experience to benefit the worker in work reintegration efforts.
   - If the LMR plan failed, assess the reasons why it failed. Was the worker sufficiently supported during the process? Was it due to the worker's difficulty in being an adult learner, or other reasons (e.g., lack of regular attendance, lack of motivation)?

4. Lack of English Language Skills
   - Not all SEBs require the same degree of fluency in the English language. Whether lack of English language skills (oral and/or written) is a barrier to employment and to what extent will depend on the SEB chosen. However, although complete fluency of the English language is generally preferred, it is not always a prerequisite to securing and maintaining employment.
   - If the worker was successful in getting different jobs with different employers in the past, this should suggest that they have been able to manage to find and sustain employment despite their limited English language skills. If they are not able to do so post-injury, review the reasons why not.
   - Inquire if the worker has access to employment opportunities within their own ethnic community without the need for English language upgrading and what efforts have been made to secure work within their specific community. If they were successful in getting jobs before, have they canvassed their ethnic community for jobs now?

5. Geographic Location
   - Injured workers who live in remote areas or in small communities may face additional challenges in obtaining employment. Although the total number of jobs and variety of jobs will be less than in a more urban community, there may still be a number of jobs that the worker can pursue.
   - Review the distance to nearby towns and what would be a reasonable distance for the worker to travel. Objectively validate the distance to the nearby towns, their size and who are the major employers that are likely to hire for the chosen SEB. It may also be helpful to understand the mode of transportation that is available to the worker and other citizens to reach these towns (car, car pool, public transportation). Did the worker travel

In his prior jobs and/or is it a practice for the citizens of that community to travel to a nearby town for employment?

- If there are jobs in the chosen SEB in the geographic location but no openings at one particular time, consider if these jobs are available at different times in the year. For example, there may be less opportunity for certain jobs during the summer months because they are filled by summer students, but once the students return to school, there are more vacancies. Also, some jobs are seasonal in nature creating a greater demand in certain months of the year. Some jobs may be available on a casual or part-time basis, which could then lead to full time employment. Inquire to what extent the worker has considered/pursued casual or part-time employment as a way of getting into the market place, or with a particular employer.
- Review if travel or the commute to the potential workplace is actually a barrier. If a worker is able to arrange and attend numerous medical appointments and/or LMR retraining, but he or she is unable to look for work or travel to get to any job, this should be addressed. In general, it is the employee's responsibility to get to the workplace. If this is being considered a barrier, determine if it is necessary to ask whether it is demonstrably related to the work injury or some other reason.
- Consider if the person moved after the injury and, if so, what impact does this have on his or her ability to find work? Although the WSIB respects that a worker has the right to choose his or her residence, the choice to move to a distant (e.g., out of province) or remote community where there are limited job opportunities will be factored into any determination of the worker's employability.

6. Non-Work-Related Conditions Present Pre/Post Accident

- The *Human Rights Code* requires the Board to have regard for any non-work-related condition when considering accommodation for a work-related injury, but the *Workplace Safety and Insurance Act* requires the Board to compensate the worker for the work-related condition only. Therefore, it is important to consider any pre/post non-work-related conditions and then determine to what extent is the worker unemployable due to the work-related condition.
- For pre-injury non-work-related conditions, consider if these conditions have deteriorated, to what extent and what is the impact to the worker's ability to work or seek work.
- For post-injury non-work-related conditions, consider if the worker could have worked in the chosen SEB if not for the post-injury condition.
- Often the presence or absence of Canada Pension Plan (CPP) disability benefits can be useful evidence of the extent of a worker's impairment and ability to work, but recognize that the CPP scheme has different criteria for "unemployable". Has the worker applied? What was the result? Obtain and review the CPP application. The physician's portion of the application should outline the nature of disability(s) and may provide information regarding the extent the contributing factor is or is not the work injury.
- Although conditions such as non-work-related depression or other psycho-social issues are considered in the determination of the SEB, these conditions should not be the

predominant reason a worker is found to be unemployable. Consider the extent of these conditions prior to the work-related injury and what impact, if any, did they have on the worker's ability to work and/or find employment. If the worker has a history of these conditions, but was able to work and/or seek employment in the past, he or she should be able to do so again. Also, consider to what extent is the worker proactively managing these conditions to lessen their impacts to employment (e.g., medication, counselling, drug or alcohol recovery) and if not, why not.

- Consider that non-organic conditions are generally not permanent; recovery is possible with appropriate treatment.

7. Full time/Part-time Employment and Temporary/Permanent Employment
   - A worker may not be able to sustain full-time employment, but this does not mean that the worker is permanently unemployable. Consider if the worker may be able to do part-time work, and if he/she can increase his/hers hours of work over time from part-time hours to either more part-time hours or to full time hours.
   - If the worker's medical status requires further clarification and/or may change over the longer term following additional treatment, consider concluding that the worker is presently unable to work but that his/her status should be reviewed again at a later date (e.g., following a pending NEL assessment or re-assessment, elective surgery, completion of counselling or psychotherapy). This affords opportunity for additional review(s) in those cases where the worker's condition is likely to improve rather than prematurely locking in LOE benefits.

8. Job Search
   - Job search activities are an indicator of a worker's potential success in securing work. If there is evidence of unsuccessful attempts at securing work, were the attempts appropriate, and over what period of time? If there were any barriers to looking for work/securing work, did the worker attempt to mitigate the consequences of those barriers, or seek help from the Board? Did the worker take advantage of other services that may have been available in the community (e.g., Employment Canada, free ESL training at local schools, job search clubs) and if not, why not?
   - Consider if the worker is looking for jobs in the SEB or something closely related. If the worker has been out of the workforce for a long period of time, or has been employed by one employer for a long period of time, consider if the worker has been provided with short-term job search training. If this has not been provided, this could be part of your decision.
   - You may wish to explore if the worker should be looking for casual or part-time employment as a way of entering the market place and working towards full-time employment. Many employers, particularly small employers, may be more likely to hire on a casual or part-time basis, but this can allow the worker an opportunity to get some work experience in the SEB while looking for full-time employment, either with that employer or another employer.

(12)

WORKPLACE SAFETY AND INSURANCE BOARD

APPEALS RESOLUTION OFFICER DECISION

CLAIM:

OBJECTION BY: **Worker**

WORKER:

EMPLOYER:

HEARING **LOCATION:** Toronto
DATE: March 19, 2013

ATTENDEES:

Worker:

Worker Representative: Richard Fink

Employer:

Employer Representative:

Interpreter: Mandarin –

Observer:

ISSUES

1. Loss of Earnings Beyond January 16, 2012
2. Suitability of Modified Work

HOW THE ISSUES ARISE

The worker was employed as a production operator and had been with the accident employer since 1999. She reported experiencing symptoms in both hands on May 20, 2010 and she was diagnosed with bilateral carpal tunnel syndrome (CTS)

The worker was offered modified duties but did not accept the employers offer and her benefits were terminated. The worker has objected to the limitations in her benefit entitlement.

The workers entitlement is limited to bilateral CTS.

AUTHORITY

18 03 03
18 03 02

TESTIMONY OF MS

The worker provided her testimony in English although there was an interpreter available to assist the worker as needed. The worker is currently in English school which she started December 10, 2012. She does not use her hands at school. She has help from one of her friends.

She brushes her teeth once a day and does this for 2 minutes. She combs her hair once a day for about 5 minutes per day. She does laundry once per month. She has help putting the clothes in the machine and this takes about 5 to 10 minutes. She removes the clothes and puts them in the dryer which takes about 5 minutes and takes them out of the dryer and she folds the clothes which take 10 to 20 minutes to fold clothes. The worker takes 30 to 40 minutes once a month to do laundry and cannot do this more frequently.

The worker does not do any cooking. She makes instant noodles and she puts the water in the stove but only one cup full and then puts the noodles in the bowl. If her husband is home he does this but if she is by herself she has to do this. She only does this once or twice a month.

She does not do any cleaning or vacuuming. She makes the beds and once a month she strips the beds and helps her husband put the sheets on the bed.

She went back to work in December 2010 and she worked about 5 weeks in total. She did different jobs. The first job she did was visually checking the parts. She had to take the piece and hold the part and lay it on the box. The worker did this job for about 1 to 2 weeks and the part weighed only a few ounces. She did this on a part time basis.

The parts handled were about 3 inches long and about one inch wide minimal weight. The worker had trouble doing this job and she had pain in both arms and hands. She could not even do this job for even a few minutes and she stopped because her hand was swollen and burning.

She did not work again until November 23, 2011 when she met with the employer and WSIB to try to find a job that she can do. They found her another job. The parts were laid out on the desk and she had to slide them toward her and look at the parts and separate the parts into two different piles as there were left sided parts and right sided parts. The weight of the part was negligible. The worker had problems as she has to slide the parts and she tried the job for one minute and could not even do it.

The worker has not been using hands since 2010 but they are not getting any better.

The worker has looked for work worked at stores but she could not find a job that did not require any use of her hands.

She is taking medication muscle relaxants and also medication for her nerves. She has depression and has problems sleeping at night due to her pain. She is not seeing a Psychiatrist.

The worker confirmed that she saw Dr. Margaliot in 2012 and she had not been working and told him that her pain was worse.

She sees a specialist for her hands and last saw him in January 2013.

ASSESSMENT OF THE EVIDENCE

I have reviewed the record and considered the evidence and submissions.

The worker has entitlement in this claim for bilateral CTS and her restrictions include:

- Limited sustained or repetitive forceful or extreme posturing of the wrist to a rare basis
- Limit activites that involve repetitive or stained griping, handling or forceful upper extremity movement to an occasional basis
- Avoid vibration and extreme environments
- Bilateral load handling as well as pushing and pulling within the sedentary physical demand level

The worker has many health complaints in addition to the CTS but these have not been recognized by the WSIB. The workers testimony revealed that she suffers from depression and takes medication for this condition but again entitlement for this condition has not been granted.

The employer has offered the worker modified duties and this has been reviewed and approved by Justine Mayer return to work specialist with the Altum Health who actually saw the job performed in the work setting. Mr. Mayer's has expertise in return to work situations and since neither Dr. Leung nor Dr. Margaliot have this expertise nor has either of them seen the job their opinions are given less weight than Mayers.

Furthermore it is evident that these doctors are relying on information provided to them by the worker who has misled them with respect to the job demands. It is particularly troubling that the worker told Dr Margaliot in March 2012 that she was performing highly repetitive work and that she was worse when in fact she had not been working since 2010. She had only tried the modified work for one minute in November 2011.

The job demands of the end cap job are documented in the claim file and it is noted that this job has no quota and can be done from either a sitting or standing position. The weight of the part is negligible.

The employer was asked to bring the parts to the hearing so that the job could be demonstrated. The parts are small plastic pieces that would be similar in weight to a pen or a small plastic lid. The pieces vary in size but are all very small at most two inches in length. The parts would be brought to the worker and piled in front of her. With arms, wrists and hands

resting completely on the table the parts can be moved using only the fingers very easily. The task entails simply looking at the parts to assess if they are right sided or left sided and then moved into separate piles.

There is no grasping, pinching, force, repetition or turning involved. The effort expanded is extremely minimal. One could perform this job with both arms in a cast using only two fingers. It is difficult to conceive that there would be a lighter less demanding job available in any work place than the one that the employer provided.

The May 30 2012 report from D. Leung diagnosed chronic myofascial pain in the forequarter as the result of repetitive strain and compounding degenerative disc disease with involvement of the lumbar spine and hind quarter as well. Neck symptoms were also documented.

The January 30, 2013 report from Dr Lenung has diagnosed the worker with severe myofascial pain of the upper limbs with cord irritation. She is not able to do work or attend any school

It is noted that the worker has thyroid problems and the CTS could be related to this condition.

The worker has no entitlement for her neck problem or her back problems. These are not work related as these conditions arose after she stopped working.

There appears to be a non organic component to the workers presentation but CPD entitlement has not been granted and there are non work related sources of pain. Psychiatric entitlement has not been addressed.

CONCLUSION

I conclude that the worker remains partially impaired as a result of the CTS condition and that the work provided by the accident employer was suitable and well within the workers restrictions.

It is extremely unlikely that there are any other jobs in existence that would be lighter than the work offered by the employer. The fact that the worker only did the job for one minute before claiming she could not perform this job speaks to her motivation to return to the workforce.

The worker is not entitled to benefits beyond January 16, 2012.

The objections are denied. .

DATED May 1, 2013

Appeals Resolution Officer
Appeals Services Division

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wsib cspaat ONTARIO

Effect of a Pre-existing Impairment

Benefit Payments	
Application Date	This policy applies to all decisions made on or after January 1, 1998, for accidents on or after January 2, 1990.
Published	12-Oct-2004
Subject	Non-Economic Loss (NEL) (Accidents from 1990)
Title	Effect of a Pre-existing Impairment
Document No.	18-05-05

| Policy | Guidelines | References |

Policy

When calculating NEL benefits for workers who have a pre-existing permanent impairment, the WSIB

- rates the area of the body affected by the new permanent impairment
- disregards any pre-existing permanent impairments affecting other areas of the body, and
- factors out pre-existing permanent impairments affecting the same area of the body.

If there is a NEL benefit for the pre-existing permanent impairment, the WSIB calculates a second NEL benefit for the new permanent impairment.

NOTE

The WSIB only combines values when rating multiple impairments eligible for a NEL.

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Guidelines

General

Pre-existing permanent impairments include

- non-work-related impairments
- work-related impairments for which there is a permanent disability pension, and
- work-related impairments for which there is a NEL benefit.

Pre-existing non-work-related impairments

New injury affecting a different area of the body

If a worker has a pre-existing permanent impairment that is not work-related, and a new work-related permanent impairment to a different area of the body, the WSIB rates the work-related impairment on its own.

New injury affecting the same body area

If both impairments affect the same area of the body, and the pre-existing impairment is measurable, the WSIB

- rates the total impairment to the area

- determines the rating for the pre-existing impairment, and
- subtracts the rating for the pre-existing impairment from the total impairment rating to get the rating for the new work-related impairment.

If the pre-existing impairment is not measurable, the WSIB

- rates the total area's impairment, and
- reduces this rating according to the significance of the pre-existing impairment (see pre-accident disabilty in 14-05-03, Second Injury and Enhancement Fund).
  - if minor, there is no reduction
  - if moderate, there is a 25% reduction
  - if major, there is a 50% reduction.

NOTE

A pre-existing impairment is "measurable" or non-measurable" depending on whether it can be rated using the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised). This determination is based strictly on the clinical information available at the time of the work-related injury.

Pre-existing permanent disability pensions

New injury affecting a different area of the body

If a worker suffered an injury before January 2, 1990 which resulted in a permanent disability pension, and then suffers a work-related permanent impairment to a different body area on or after January 2, 1990, the WSIB rates the post-January 2, 1990 impairment on its own.

New injury affecting the same area of the body

If a worker suffered an injury before January 2, 1990 which resulted in a permanent disability pension, and then suffers a work-related permanent impairment to the same body area on or after January 2, 1990, the WSIB

- rates the total impairment to the area, and
- subtracts the permanent disability rating from the total area's rating.

Pre-existing NELs

New injury affecting a different area of the body

If a worker with a pre-existing NEL benefit has a new permanent impairment that affects another area of the body, the WSIB determines the second NEL benefit by

- rating the new impairment independently of the prior impairment
- combining the old and new ratings using the Combined Values Chart (see 18-05-04, Calculating NEL Benefits), and
- subtracting the prior impairment's rating from the combined value.

New injury affecting the same area of the body

If a worker with a pre-existing NEL benefit has a new injury that results in an increased impairment to the same area of the body, the WSIB determines the second NEL benefit by

- rating the total impairment to the area, and
- subtracting the existing NEL rating from the total rating (see 18-05-04, Calculating NEL Benefits).

NOTE

The WSIB may redetermine a NEL benefit if an impairment worsens as a result of a recurrence or deterioration (see 18-05-09, Redeterminations and Recalculations).

New injury to the same and different body areas

If a worker with a pre-existing NEL benefit has a new injury resulting in both an increased impairment to the same area of the body, and a new impairment to a different area of the body, the WSIB determines the second NEL benefit by

- rating the total impairment to the area for which a NEL already exists, and subtracting the pre-existing NEL
- rating the impairment to the different area of the body, and
- combining the above values, using the Combined Values Chart.

Example

In 1993, Mac had an injury to his right knee which resulted in a 5% NEL. In 1998, Mac had another accident, injuring his right knee again and injuring his left elbow. At MMR, the WSIB rates Mac's right knee (in its totality) at 12%, and his left elbow at 6%. To determine the new rating for the knee, the WSIB subtracts the pre-existing 5% from the knee's total rating of 12%. The WSIB then combines the resulting 7% with the elbow's 6% rating. The combined value, 13%, is Mac's second NEL rating.

Occupational disease

For occupational disease claims, a permanent impairment for a non-work-related disease is factored out of a work-related occupational disease rating only if

- the diseases are the same, and
- the pre-existing non-work-related disease is measurable.

Document history

This document replaces 18-05-05 dated June 15, 1999.

This document was previously published as:

6.4* dated January 1, 1998

05-06-07* dated September 4, 1991.

* These documents were replaced by 18-05-05 dated June 15, 1999.

Application date

This policy applies to all decisions made on or after January 1, 1998, for accidents on or after January 2, 1990.

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References

Legislative authority

Workplace Safety and Insurance Act, 1997, as amended

Sections 46, 47

O. Reg. 175/98

Section 18

Workers' Compensation Act, R.S.O. 1990, as amended

Section 42

R.R.O. 1990, Reg. 1102

Section 15

Minute

Administrative

#16, June 14, 2004, Page 370

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2008

NEL re-engineering project initiated in July 2008. The outcome was that, whenever possible, the NEL would be rated using the relevant health information in the worker's file. If there was insufficient information, the worker would be referred for NEL assessment, either at a Regional Evaluation Center (REC) or through a roster physician.

2011-2012

More aggressive approach to the determination of Permanent Impairment (PI) using health information in the worker's file.

NEL Process from Claims Referral to Decision Letter

- CM refers the file to the NEL Department
- Claim downloaded into NEL database
- NPC reviews claim file clerical completeness
- File referred to NCS for triage and PI decision
- NCS reviews claim file for clinical completeness and to determine the process for rating (RBF, REC, ROST)
- Incomplete referrals will be returned to SDT for missing information
- RBF-NCS rates file->gives rating sheet to NPC->NPC completes decision letter and sends to WPP-> NPC authorizes payment on PAUT after a five day waiting period-> NPC closes file on NELC
- REC-NPC Clerk refers assessment form and relevant medical to the REC via electronic referral (roster code 01)
- REC submits completed forms within 5 business days of appointment

  and/or ROST (roster codes 2-20)
- To the Roster MD NPC arranges appointment with physician and sends appropriate forms and medical package to roster physician
- Roster physician submits completed forms within 10 business days of appointment
- Once file received from REC or ROST PI is calculated within one week

ROM Considerations

To address the AMA directives already discussed around the issue of ROM validation, the following recommendations have been developed as validity requirements to be considered before using ROM:

1. The ROM findings are reliable in that they are consistent throughout reports. Inconsistencies amongst reports invalidate this criterion as an impairment measure and if inconsistencies exist, disregard the ROM as a rating criterion.
2. ROM findings must reflect the mechanism of the work related injury and the permanent impairment diagnosis. For example, there is a back impairment from a minor injury, there are none to minimal imaging findings and the PI diagnosis is soft tissue in nature, yet the ROM is significantly reduced, disregard the ROM as a rating criterion.
3. Measured findings should be reflected in observed level of function. Should the assessor comment on differences between observed activities and active ROM testing measurement, ROM should not be included as a component of the impairment rating (e.g. cannot flex on examination but fully bends to put on footwear).
4. If medical reports document invalid ROM presentation through submaximal effort or formal validdation testing, disregard the ROM as a rating criterion.
5. If there is no documentation in medical reports of the impact of the work related injury on ROM values or if the ROM values are described as mildly reduced and there are no measurement values in degrees, rate the ROM as normal[3].
6. If there is documentation in medical reports that describes the ROM as moderately reduced and there are no measurement values in degrees, reduce the ROM values by 25% of normal. For example, if the lumbar flexion is described as moderately reduced:
    - *calculate the flexion value as reduced by (25% X 60 degrees[4]) = 12 degrees*
    - *Normal value 60 degrees minus 12 degrees = 48 degrees(value to be used in the PI calculation)*
7. If there is documentation in medical reports that describes the ROM as severely reduced and there are no measurement values in degrees, reduce the ROM values by 50% of normal. For example, if the cervical extension is described as severely reduced:
    - *calculate the extension value as reduced by (50% X 75 degrees[5]) = 37.5 degrees*
    - *Normal value 70 degrees minus 37.5 degrees = 37.5 degrees(value to be used in the PI calculation)*
8. Underlying or pre-existing conditions[6] could be impacting the overall impairment, including ROM. If such conditions are identified, either through diagnostic reports or other medical reports, the overall PI

[3] *The term "normal" within the context of this document refers to the values contained in the appropriate AMA 3rd tables*
[4] *Normal value Table 60 p. 98 AMA 3rd*
[5] *Normal value Table 55 p. 88 AMA 3rd*

percentage should be reduced using WSIB Operational Policy 18-06-05 (mild 0% reduction; moderate 25% reduction; severe 50% reduction).

If there are multiple body areas being rated for PI at the same time and pre-existing conditions have been identified, *only those areas with pre-existing conditions* are to be reduced. The other areas are to be rated in full; all areas of PI are then combined at the whole person level.

9. True ankylosis (total loss of mobility) of the spine from a work related injury is a rare occurrence and should be rated according to the appropriate section of AMA 3rd.

10. Thoracic ROM is not to be considered as abnormal in all planes Thoracic spine ROM is to be rated as abnormal only when it meets the same validity requirements as the cervical and lumbar spines.

[6] *Most common pre-existing conditions of the spine are DDD, degenerative changes of the posterior elements, spinal stenosis and spondylolisis/spondylolisthesis*

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ONTARIO

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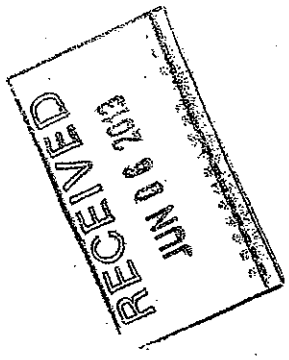
Mr. Richard A. Fink
466 Dupont Street
Toronto ON
M5R1W6



May 30, 2013

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

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Dear Mr. Fink:

RE:

This letter is in response to your correspondence dated May 10, 2013 addressed to Mr. David Marshall, President and CEO of the Workplace Safety and Insurance Board (WSIB). Your letter was referred to me to review your concerns regarding the NEL quantum decision rendered in this case.

Your letter raises concern with regards to our practice of using the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition Revised (AMA Guides) to reduce a NEL benefit to offset the effects of a measurable pre-existing condition. It is your view that there is no authority in Board policy that allows this practice.

Policy Interpretation

When calculating NEL benefits for workers who have a pre-existing condition/impairment, policy document 18-05-05 (Effect of a Pre-existing Impairment) does allow the WSIB to adjust an award by an appropriate amount to reflect the extent of the pre-existing condition/impairment. A pre-existing condition/impairment is "measurable" or non-measurable" depending on whether it can be rated using the AMA Guides.

The AMA Guides define impairment as an alteration of an individual's health status that is assessed by medical means; "disability" which is assessed by non-medical means, is an alteration of an individual's capacity to meet personal, social, or occupational demands. The distinction of the terms "impairment" and "disability" is deliberate to ensure they are separated for the purpose of evaluating permanent impairment.

The definitions of pre-existing impairment and pre-existing conditions provided in the WSIB's Aggravation Basis (11-01-15) and SIEF (14-05-03) policies respectively are intended for the specific administration of these policies. The Aggravation Basis policy establishes a threshold of pre-accident disability - *a condition which has produced periods of disability in the past requiring treatment and disrupting employment*, before it can be considered a pre-existing impairment. As the intent of this policy is to limit entitlement to an injury that is work-related for the acute period of disability, this definition is not considered applicable for calculating NEL benefits.

[redacted]

While pre-existing conditions as defined by the SIEF policy are underlying or asymptomatic conditions which only become manifest post-accident, they typically predispose workers, particularly with moderate or severe conditions, to a higher degree of impairment. As the AMA Guides clearly delineate between impairment (what is wrong with a body part or organ system and its functioning), and disability (alteration of an individual's capacity to meet personal, social, or occupational demands), pre-existing conditions are considered impairments for the purpose of calculating NEL benefits.

As policy document 18-05-05 does not provide a definition of pre-existing impairment, the definition of impairment provided by the AMA Guides is considered the guiding authority for calculating NEL benefits. The legislation compels the WSIB to use the AMA Guides as its rating schedule and, therefore, by extension its definition of impairment for the purpose of evaluating permanent impairment.

We are satisfied that policy document 18-05-05 in conjunction with the AMA Guides does allow our decision makers to adjust a NEL award by offsetting an appropriate amount to reflect the extent of a pre-existing condition/impairment. Our application of the policy is intended to ensure we are only compensating workers for their work-related impairment.

Calculating Measurable Pre-existing Conditions/Impairments

Disorders of the spine including degenerative disc disease are considered "measurable" conditions/impairments as the AMA Guides provide specific rating values for these conditions/disorders.

It is important to note that the evaluation of impairment of the spine involves diagnosis related factors, musculoskeletal (range of motion) and neurologic factors. Under diagnosis related factors, Table 53 of the AMA Guides directs our staff to include in their evaluation the impairment impacts caused by specific disorders of the spine including degenerative disc disease (DDD).

For cases involving non-work-related pre-existing conditions/impairments of the spine where range of motion measurements and/or neurological deficits are not known, the impairment value of the pre-existing condition/impairment is solely derived from the rating values in the AMA Guides, Table 53.

- Claim

On March 10, 2010, this auto mechanic sustained an injury to his low back while moving oil drums with two coworkers. The claim was allowed on an aggravation basis in recognition of pre-existing DDD and entitlement was limited to the acute period of disability resulting from the workplace accident. In a decision by Appeals Resolution Officer dated March 28, 2013, the worker was granted a NEL determination based on the finding that the workplace accident had permanently aggravated his pre-existing condition.

According to the medical evidence in this case, the worker had a history of low back pain related to DDD that predated his work injury of March 10, 2010. An MRI conducted in 2008 revealed DDD of the lumbar spine with multi-level facet joint osteoarthritis with some

hyportrophic changes, particularly at L5-S1. A further MRI done on November 17, 2010 showed severe facet joint osteoarthritis at multi-levels.

In the NEL Clinical Specialist's decision of May 13, 2013, the worker's whole person impairment (WPI) for the low back was evaluated using abnormal range of motion (ROM) measurements and the impairment impacts caused by the worker's pre-existing DDD. Specifically, total abnormal ROM measurements were calculated at 3% and this was combined with the impairment value of 7% (Table 53 IIC of the AMA Guides) that recognizes the worker's medically documented long standing pain and rigidity, associated with moderate to severe degenerative changes. This yielded a 10% WPI for the low back. As the worker's DDD is a measurable pre-existing condition/impairment that has a specific impairment value in the AMA Guides of 7%, this value was subtracted from the 10% WPI rating to arrive at the final NEL rating of 3% for the work-related impairment.

There is well documented evidence in this case of a pre-existing condition/impairment and a direct relationship can be made between the pre-existing condition/impairment and the impairment arising from the accident. There is also a strong likelihood when considering the magnitude of the pre-existing condition/impairment and the mechanism of injury that an increased degree of impairment has occurred, which exceeds the usual, owing to the pre-existing condition/impairment. I find the adjustment made to the NEL quantum appropriately and fairly offsets the impacts of the worker's pre-existing condition/impairment on the work-related impairment.

Thank you for bringing your concerns to our attention. If you would like to discuss this further, you can call me directly at 416-344-2102.

Yours sincerely,

i, Director
Permanent Impairment Program

(16)

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Tel: 416-480-6775 **Fax: 416-480-5990**

August 1, 2013

Richard A. Fink
Fink and Bornstein
466 Dupont Street
Toronto, Ontario
M5R 1W6

Re:
WSIB#:
DOI: March 10, 2010.

Dear Mr. Fink,

I have reviewed the file that you have forwarded to me. In summary this 60-year-old auto repair technician experienced spontaneous onset pain in his back a few days prior to presenting to the emergency department on November 27, 2007. He was experiencing pain radiating to his left knee. He was experiencing some numbness. A CT scan performed on that date, demonstrated a left L3-4 disc herniation in keeping with his symptomatology. By history, this apparently resolved after a few months. He had a recurrence of pain while carrying out the regular duties of his job on March 10, 2010. He apparently had some flares of back pain thereafter. Subsequent investigations including an x-ray of his right hip revealed no abnormalities. X-rays of his lumbar spine on March 11, 2010 demonstrated mild multilevel degenerative disc disease and moderately severe right facet osteoarthritis from L3-S1. An MRI of the lumbar spine on November 17, 2010 demonstrated severe facet joint osteoarthritis at multiple levels. There was no spinal stenosis and no disc herniation. The facet joint changes producing neural foraminal narrowing at multiple levels. He was seen in the back and neck specialty program clinic by Dr. Raj Rampersaud on January 23, 2012. He recommended conservative care. He recommended a flexion exercise program. He recommended permanent restrictions from work that requires standing or repetitive loading in an upright position. He goes on to state that he would be ideally suited for a job that he can perform in a sitting position and that has flexibility of changing positions frequently. He stated that these recommendations are permanent. I understand that this worker is not working and does not have a job to return to. I am not too sure why these restrictions were established. A restriction implies structural harm to an anatomic structure with a specific activity. This man does not have any musculoskeletal pathology it would be seriously harmed by any activity. What he does have is functional tolerance limitations secondary to his report of pain. Ironically, mechanical back pain is often at its worst in the seated position. This reflects the fact that intradiscal pressures are at their highest in the seated position. Rarely, does mechanical back pain of degenerative etiology result in symptomatology that causes impairments and subsequent disability on a permanent basis. Strangely, this man was relatively asymptomatic at the time of his assessment.

Answers to Specific Questions

Re:
WSIB#:

1. 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 grating system of course is a 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.

2. 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.

3. Regarding this workers 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.

4. 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.

5. 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.

6. 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?

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.

7. Is the workers pre-existing back disability " minor"," moderate" or "severe" in relation to the outcome of the workers:
A] current" impairment; and
B] current "disability".

It appears that many words are being interchanged here and not necessarily being appropriately used. As stated, there is a significant difference between impairment, condition as well as disability. The AMA guidelines defines disability as " an alteration of an individual's capacity to meet personal, social or occupational demands or statutory or regulatory requirements as assessed by non-medical means". By history it appears that this individual experienced episodic disability in that he would miss time off work during acute flares of back pain. This reflects the typical natural history of degenerative etiology mechanical low back pain. It can wax and wane on a variable basis for no apparent reason. Given the variability of the natural history a prior history of disability is not necessarily predictive. It is merely an indication that this individual has mechanical back pain of degenerative etiology. This is the sole and obviously major reason for any symptoms, resulting in any impairment and subsequent disability. If he indeed has a current impairment, resulting in the current disability on the basis of his degenerative etiology disease and obviously it is playing a major role.

Unfortunately, this is not a readily quantifiable condition and really is not amenable to the establishment of the pseudo-objective parameters The Board is trying to establish.

I hope this clarifies things.

Sincerely,

Michael H Ford M.D. FRCSC

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Second Injury and Enhancement Fund (SIEF)

Employer Obligations	
Application Date	See application date in policy.
Published	20-Feb-2006
Subject	Accident Cost Adjustments
Title	Second Injury and Enhancement Fund (SIEF)
Document No.	14-05-03

| Policy | Guidelines | References |

Policy

If a prior disability caused or contributed to the compensable accident, or if the period resulting from an accident becomes prolonged or enhanced due to a pre-existing condition, all or part of the compensation and health care costs may be transferred from the accident employer in Schedule 1 to the SIEF.

Both physical and psychological disabilities are included.

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Guidelines

There is no provision in the Act for the Fund to apply to Schedule II employers.

In situations where alcoholism plays a role in the causation of an accident, it is not considered to be a pre-existing condition with regard to the application of SIEF relief.

The objectives of this policy are to provide employers with financial relief when a pre-existing condition enhances or prolongs a work-related disability. It thereby encourages employers to hire workers with disabilities.

Definitions

Pre-accident disability is defined as a condition which has produced periods of disability in the past requiring treatment and disrupting employment.

Pre-existing condition is defined as an underlying or asymptomatic condition which only becomes manifest post-accident.

Adjudication

Entitlement adjudication

In no lost time, lost time, permanent impairment and fatal claims, the decision to extend relief from the SIEF is usually made at the time of entitlement adjudication, or as soon as it is recognized that aggravation of a pre-existing condition is contributing to the cost of the claim.

When reviewing medical and other information present in the claim file, the decision-maker considers whether the information suggests that a pre-existing condition is present and whether it

- contributed to the work-related accident, or
- prolonged or enhanced the work-related disability.

If it is likely that such circumstances exist, a recommendation to apply the SIEF is made, as well as the rate at which to do so.

50% Relief

If there has been an aggravation of a pre-existing condition, or is there is evidence that the disability following the accident has been enhanced because of a pre-existing condition, 50% of the cost of the claim (compensation and health care) is charged to the SIEF.

NOTE

If an employer applies for relief in excess of 50%, and a permanent impairment is not evident, the degree of financial relief is reviewed again when the claim is closed.

100% Relief

Full relief of a claim's cost (compensation, health care, permanent impairment) is charged to the SIEF when

- a prior non-work-related condition is the cause of the accident, e.g., epilepsy
- the wearing of an artificial appliance, either work or non-work-related, is the cause of the accident
- a worker has been placed in industry, or is participating in a WCB sponsored Vocational Rehabilitation (VR) program, and suffers
  - an extension of the original disability through minor accident
  - an accident during an on-the-job training program
  - an accident in a trade school or other type of formal training facility

NOTE

"Other type of formal training facility" may also include a Schedule II training facility.

- a worker is participating in a training and/or assessment program approved by the WCB and the work-related disability is the sole cause of an accident to another employee of the training and/or assessing employer
- a worker sustains injuries while on a work station training program.

Pre-existing condition impact on claims

The policy on aggravation of pre-existing conditions, exclusive of the SIEF policy, applies to both Schedule I and Schedule II claims in which

- a relationship is shown between an underlying condition and the degree of disability arising from the accident
- the period of treatment and recuperation is prolonged due to an underlying condition, and/or
- an increased degree of residual disability occurs, which exceeds the usual, owing to the underlying condition.

Temporary disability

A claim for an occupational injury involving a pre-accident disability is allowed for the acute episode only and entitlement to payment of compensation ceases when the worker's condition has returned to the pre-accident state. In a claim where there is a pre-existing condition but the worker is symptom-

free at the time of the work-related accident there is no limitation of benefits throughout the period of temporary disability.

Pre-existing condition impact on claims

Once only repair

Some claims are allowed for a "once only repair", e.g., strangulated hernia or recurrent shoulder dislocation. Allowance of a claim on this basis recognizes that a work-related accident did occur, but that the resulting treatment and period of disability were due, at least in part, to a pre-existing condition.

Permanent disability

The presence of a pre-existing condition is reflected in any permanent disability award when the degree of residual disability is increased due to an underlying condition. Permanent disability awards to the worker, and cost transfers from the accident employer, Schedule I only, are made considering the medical significance of the pre-existing condition, the severity of the accident, and whether or not the pre-existing condition is measurable.

When the extent of transfer to the SIEF exceeds 50%, the employer receives the benefit of such determination applied to all or part of a claim, depending on individual circumstances.

Measurable pre-existing conditions

If the pre-existing condition is readily measurable, e.g., an amputation, and the impairment of total body function resulting from the new disability is increased beyond the degree usually associated with the disability because of the prior-condition, (e.g., prior amputation or loss of movement in which the pre-existing condition has been, or could have been, rated for a permanent impairment) the following criteria are used in determining the degree of permanent impairment

- the value of the prior condition by itself
- the value of the new condition by itself
- the value of the entire disability
- The enhancement factor (the value of the entire disability less the sum of the value of the prior condition and new condition), and
- the value of the new condition plus the enhancement factor.

Worker award

In every case (except total loss of sight) the award for permanent disability equals the sum of the value of: the new condition by itself plus the enhancement factor.

Employer financial relief

The SIEF is charged with the amount of the enhancement factor: the value of the entire disability less the sum of the values of the prior and new conditions.

Total loss of sight

Worker award

Total loss of sight is defined as "absence of significant useful vision for occupation purposes".

In cases of total loss of sight or enucleation of an eye, when the pre-existing disability was the loss of sight or enucleation of the other eye, for which no award was made, the award equals the total of

- the value of the prior condition by itself
- the value of the new condition by itself, plus
- the enhancement factor.

This also applies if a worker lost the vision of one eye and subsequently damaged the vision of the other eye in a work-related accident.

Employer financial relief

The SIEF is charged with the value of the prior condition plus the value of the enhancement factor. The percentage of relief is determined by comparing the value of the prior condition plus the enhancement factor to the value of the entire benefits.

Multiple factor

Employer financial relief

The SIEF is charged with the amount of the multiple factor: where the work-related disability results in bilateral impairment because of a previous non-work-related injury and the clinical award is increased by half of the lesser disability.

Other Prior Conditions

Worker Permanent Benefits

When the pre-existing condition is not measurable, but creates a pre-accident disability that enhances a residual work-related disability, the worker's benefit for work-related disability may be reduced according to the percentage of disability produced by the pre-existing condition. The application is as follows:

Application to employee award where prior condition is not measurable

Prior condition	Amount of relief
Minor	100% (full assessment)
Moderate	75%
Major	50%

The following applies to a worker's permanent benefits

- No reduction is made if the prior condition was the result of the prior work-related accident, unless a permanent disability award was granted in a previous claim.
- Pre-existing psychological disability is assessed in terms of the limitation that may have been produced by mental illness and/or defects of personality as revealed by the work record and/or social integration of the worker.
- 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.
- If the pre-accident disability based on the foregoing criteria is unreasonable, the benefit is usually based on a medical estimate of the actual disability that might have resulted from the accident.
- The decision to grant an employer relief of some or all of a claim's costs is not influenced in any way by limitations placed on the worker's permanent impairment benefits.

Application to employer costs

Different factors may apply in recommending relief for the employer as compared to what is appropriate for determining a worker's benefit. In determining the amount of financial relief given to an employer, consideration is given to the medical significance of the pre-existing condition and the severity of the accident.

Cases of permanent impairment

If the transfer of costs to the SIEF exceeds 50% the employer receives the benefit applied to all or

SIEF-application to employer costs

Medical significance of pre-existing condition*	Severity of accident**	Percentage of cost transfer***
Minor	Minor	50%
	Moderate	25%
	Major	0%
Moderate	Minor	75%
	Moderate	50%
	Major	25%
Major	Minor	90%-100%
	Moderate	75%
	Major	50%

NOTES

* The medical significance of a condition is assessed in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person. An associated pre-accident disability may not exist.

With psychological conditions, the possibility of prior psychic trauma resulting from life experience could be considered as evidence of vulnerability, and justify recommending relief to the employer, even in the absence of pre-existing psychological impairment.

** The severity of the accident is evaluated in terms of the accident history and approved definitions.

Accident History Components

- mechanics (lift, push, pull, fall, blow, etc.)
- position (kneeling, standing, sitting, squatting, bending, etc.)
- environment (lighting, temperature, weather conditions, terrain, etc.)

Definition - "Severity of Accident"

Minor: expected to cause non-disabling or minor disabling injury

Moderate: expected to cause disabling injury

Major: expected to cause serious disability probable permanent disability

*** The percentage of the total cost of the claim transferred to the SIEF.

Occupational hearing loss

In industries involving noise hazards, the Board encourages employers to have workers undergo audiometric examinations as part of the pre-employment program. If a pre-employment examination took place, the SIEF is applicable and the employer is only charged with the costs of the portion of deafness which is due to employment. The balance is charged to the SIEF.

If a pre-employment audiometric examination did not take place, the employer is charged in ratio by years to the worker's total exposure employment. The balance is charged to the SIEF, based on the premise that prior noise exposure employment contributed to some pre-existing hearing loss.

Vibration induced white finger disease

In industries involving vibratory hazards the employer is charged based on the ratio between the history of prior employment exposure and the years of continuous employment exposure. The balance is charged to the SIEF on the premise that prior exposure to high frequency, rapid acceleration and/of vibratory tools contributes to the development of the disease.

Employer notification

The employer is advised of any decision regarding application of the SIEF at the time of initial adjudication and when a permanent impairment benefit is made.

Once the decision has been made, procedures are initiated to transfer the claim costs to the Fund and the employer is advised of the amount of the transfer.

When the actual cost transfer is processed, the details are included in the employer's next monthly statement. Any subsequent cost transfers are processed as the payments occur and appear on the employer's cost statement for the month in which the payments are made.

There is no minimum dollar value for costs transferred to the SIEF.

Application date

The Board Order of March 25, 1970, provides the basis of SIEF entitlement for all claims processed prior to February 1, 1979, and those re-opened or reviewed subsequent to February 1, 1979.

The SIEF policy approved November 3, 1978, and amended by Board Order April 13, 1982, applies to claims processed on or after February 1, 1979, and those claims processed prior to February 1, 1979, if it is of greater advantage to either worker or employer than the previous policy contained in the Board Order of March 25, 1970.

Document history

This document replaces 14-05-03 dated October 12, 2004.

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References

Legislative authority

Workplace Safety and Insurance Act, 1997, as amended

Section 98

Workers' Compensation Act, R.S.O. 1990, as amended

Section 120(2)

Minute

Board of Directors

#10, April 13, 1982, Page 4959

DAG

July 22, 1983

April 13, 1982

December 27, 1978

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Evidence

- In order to consider SIEF, a **pre-existing condition** must be established; having a prior injury is not sufficient unless a **pre-accident disability** is identified
- Decision-makers should be satisfied that there is evidence to support a pre-existing condition; *this should not be presumed*
- Decision-makers have the right to request employers provide information to justify a request for SIEF if there is no evidence presently on file that a pre-existing condition is present

DETERMINING INJURY/ILLNESS AS PROLONGED/ENHANCED BY PRE-EXISTING CONDITION

- There must be *objective evidence* that it is the underlying condition which is delaying or complicating treatment and recovery
- It cannot be presumed that the underlying condition is causing the delay in cases where there is no recovery at expected recovery time
- Recovery times are simply estimates and can change due to other factors

QUANTUMS

Notes: The Supreme Court of Canada in *Lindal v Lindal* (1981), 2 S.C.R. 629 held that inflation was a factor which could be considered an exceptional circumstance to warrant an increase in the upper limit for non-pecuniary damages.

Inflation is calculated to 2009 pursuant to the Ontario Court of Appeal decision in *To v Toronto (City) Board of Education*, 55 OR (3d) 641, which held that inflation on general damages is to be calculated by comparing the dates of loss.

The inflation is calculated in accordance with the CPI Inflation Factor from http://www.bankofcanada.ca/en/rates/inflation_calc.html.

CASE LAW RE: QUANTUM FOR CHRONIC PAIN SYNDROME

Citation	Date of Loss	Injuries	Damages Assessed	Inflation Adjusted General Damages (2009)
Shaw v Shaw, 2012 ONSC 590, 2012 CarswellOnt 531	2007	Fracture to her right wrist, weakness and numbness in her right hand, reduced range of motion in her right wrist, chronic pain syndrome, carpal tunnel syndrome, post-traumatic stress disorder, major depressive disorder, anxiety disorder	$65,000.00	$67,123.41
McDonald v Kwan, 2010	2000	Whiplash, cervical facet injury, headaches, chronic	$140,000.00 less 30% for	$169,309.25

ONSC 5861, 2010 CarswellOnt 7988		pain syndrome, post-traumatic stress disorder	injuries attributable to subsequent MVAs.	
Watts v Donovan, 2009 CarswellOnt 3051 (Ont Sup Ct J)	1999	WAD II; cervicogenic headaches; post-traumatic vision syndrome including blind spots, dizziness and perception problems; soft tissue injuries to cervical and thoracic spine; chronic pain syndrome; and fibromyalgia.	$95,000.00	$118,024.02
Swain v Moore Estate, 2000 CarswellOnt 1556	1995	Soft tissue injuries to the neck, right shoulder, right hip, ankle and left knee. Chronic pain, post-traumatic stress disorder and fibromyalgia.	$100,000.00	$130,804.60
Scmelich v Lang, 1992 CarswellOnt 3218 (Ont Ct J (Gen Div))	1988	Fractured right clavicle, injury to the left knee and ankle; pain in her shoulder, breast, neck, back, hip, leg and knee; and fibromyalgia and chronic pain.	$40,000.00	$65,028.57

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WSIB Benefits Policy Review Consultation Process

Report to the President and CEO of the WSIB

Jim Thomas

Independent Chair

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On the surface, there are arguments that could be raised in support of either approach, leaving aside the legality of doing so. A permanent impairment award should be made where the impairment arises out of and in the course of employment. If other factors are contributing to the impairment and they are non-work-related, should the WSIB be responsible for compensating for them? On the other hand, if the workplace accident happened to a worker with a pre-existing condition in the same area of the body as was injured, and if the WSIB is supposed to take workers as it finds them, didn't the entire train of events that resulted in a permanent impairment start with the workplace accident? If it had not happened, the argument goes, there would be no need for a permanent impairment award.

Consistent with a reasonable interpretation of the WSIB's mandate, if it were possible to determine what amount of a permanent impairment is caused by the workplace accident and what part is the result of a non-work-related pre-existing condition, the permanent impairment award should reflect the degree of permanent impairment that is work-related. To argue otherwise is to disregard the core mandate of the WSIB. What is not at all clear from the submissions and presentations is whether it is possible to allocate or divide up a permanent impairment into work-related and non-work-related percentages. The determination of the extent of the pre-existing condition most likely will be made some time after the accident, after maximum medical recovery has been reached. Did the accident contribute to the deterioration of the pre-existing condition? At the time of assessing the worker for a permanent impairment award, is the pre-existing condition worse than it was before the accident? If so, is this because of the aging process or because of the accident or a combination of both?

If the WSIB is confident that there are ways of answering these kinds of questions, I believe that stakeholders would want to know the reasons why the WSIB now is seeking this change in policy. The WSIB historically has adjudicated permanent impairment awards without factoring in pre-existing conditions. If it now believes it should be doing so, what has changed to cause the WSIB to reach this conclusion? And if it has reached this conclusion, is the WSIB confident that it has the legal authority to support this policy change?

I am not concluding that the WSIB cannot incorporate pre-existing conditions into permanent impairment awards. It is consistent with the WSIB's mandate to compensate for the work-related component of a permanent impairment. I am questioning whether it is possible to do so. Does this bring greater clarity and certainty into the adjudication of permanent impairment awards or does it instead raise a number of medical causation challenges that may make the adjudication of these claims even more difficult and perhaps uncertain?

Summary of Chapter 7: Permanent Impairments

Recommendation # 17
It is not appropriate to establish a specific threshold to use in determining whether a permanent impairment exists. It may be helpful for the WSIB to include criteria that might be used to make this determination.

Recommendation #18
A revised policy suite on permanent impairments should include a policy or section that describes how the various elements of permanent impairment adjudication fit together and tell a story, similar to recommendation #12 on work disruptions.

Recommendation #19
It is consistent with the WSIB's core mandate to determine the degree of a permanent impairment that is work-related. Whether it is possible to do so or whether it will introduce greater adjudicative uncertainty is a question that the WSIB should consider carefully.

Recommendation #20
If the WSIB decides to reduce permanent impairment awards by factoring in degree of severity of pre-existing conditions, it should advise stakeholders of its reasons for doing so and be able to demonstrate that it has the legal authority to do so.