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Fink & Bornstein Professional Corporation

Workers' Compensation Newsletter

The 2012-2013 Benefits Policy Review of the Workplace Safety Insurance Board

The WSIB Proposed Policies regarding Aggravations, Permanent Impairments and Pre-existing Conditions (hereinafter referred to as the "Proposed Policies") have effectively imposed "fault" into the Workers' Compensation System of Ontario. By rejecting the Appeals Tribunal's jurisprudence of "significant causation", the common law doctrines of the "thin skull rule", and the "but for" tests, the Proposed Policies seek to remove entitlement for injuries where underlying degenerative conditions are playing a role in the causation of the impairment.

"Fault" goes beyond negligence. Take the example of an injured worker who reaches to push a product into a shelf (an actual example of a "minor injury" taken from page 2 of Proposed Policy 11-01-15) and suffers a partial rotator cuff tear in the process. Let us assume the partial tear leaves the worker with an impairment in so far as his pre-accident rotator cuff, which was subject to degenerative change, is now permanently symptomatic. Proposed Policy 11-01-15, in combination with page 2 of Proposed Policy 11-01-xx "Pre-existing Conditions", directs the Board Case Manager to terminate benefits when "the work-related injury **ON ITS OWN** would not likely result in a similar level of impairment."

The "fault" that the Board is transcribing in the Proposed Policies, in order to limit benefit entitlement, is the "fault" of the injured worker's body. If the injured worker's underlying degenerative condition or mental condition is the reason at "fault" for a sprain injury not recovering in the same time frame as a human body or mind not subject to such degenerative changes, then entitlement is terminated within the usual healing time of such an injury set upon the perfectly healthy body.

These Proposed Policies are in contravention of the *Workplace Safety and Insurance Act*, the Regulations Under the *Act*, numerous precedents from the Supreme Court of Canada, the Canadian Charter of Rights and Freedoms, and the *Ontario Human Rights Act*, as follows.

The Supreme Court of Canada in the decision Pasiechnyk v. Saskatchewan (Workers' Compensation Board) [1997] 2 SCR 890 (Appendix 1), states that the Workers' Compensation system is a historic trade off of the right to sue in return for no fault benefits. It notes that while the damages that can be obtained from tort are higher than the Workers' Compensation plan, it is positive in its overall effect.

In the last 20 years there have been no statutory increases in the benefit entitlements of injured workers in Ontario, yet the level of general damages awarded in personal injury cases have been increasing. Appendix 2 is a Chart of chronic pain awards from the Courts. The general damages for pain and suffering awarded by the Courts are now ten times what the *Workplace Safety and Insurance Act* would

award. However, the Proposed Policies will increase that differentiation by a factor of 50 times.

Take a worker, a welder, earning $600 per week gross, who suffers a cervical (neck) strain in a simple slip and fall at work. Several WSIAT decisions have considered accidents as "minor" insofar as loss of time from work or significant disability is not expected- objectively individuals slip and fall every day in Ontario without suffering any significant effects. (See Decisions 685/12 and 1311/13) However, in this example his/her doctor opines that the worker has restrictions that limits his/her ability to weld over the longterm, and the worker has underlying degenerative changes in his cervical spine. The worker's employer is unable to provide modified work.

The Official Disability Guidelines (California) currently employed by the Ontario WSIB (albeit without any legal authority, and generally done negligently), estimates that the time loss from manual work on account of such an injury, a neck strain, to be 21 days (See Appendix 3).

The Proposed Policies dictate that the WSIB must discontinue benefits, in this example, after 21 days by having heed to the Proposed Policy dictum contained at page 2 Policy 11-01-xx: "Benefits continue until the work related injury/disease on its own would not likely result in a similar level of impairment." Minor neck strains in the absence of degenerative changes do generally resolve quickly, but in this example did not. However in this scenario, according to the Proposed Policies, the injured worker would receive a total of $1,200.00, even if the injured worker missed one year of work and continued to suffer from neck discomfort for years afterwards, though he/she was entirely asymptomatic before the event.

In contrast a person subject to common law who suffers a minor slip and fall while shopping and also missed one year of work, plus ongoing symptoms would receive $50,000.00 to $100,000.00 in general damages from the Courts. Additionally the person would receive $24,000.00 NET for lost wages, which in total is up to 100 times more than the injured worker would receive. Please see Appendix 8, Mr. Paternak's legal opinion letter dated January 3, 2014.

Section 15(1) of the Canadian Charter of Rights and Freedoms states that: *"Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination..."*

How can a Workers' Compensation scheme be seen in a "positive" light, giving injured workers 'equal protection under the law or benefit' when it severely discriminates against injured workers in comparison to accident victims injured outside of work. The injured worker's claim to benefits under the Proposed Policies is bereft of any principles approaching a common law doctrine of entitlement.

The Board's Proposed Policies have perverted the meaning of the Supreme Court's 2012 Decision of *Clements v. Clements*, 2012 SCC 32, as a rational to set aside the significant causation test of the WSIAT; by implementing a rule of thumb, that in the case of a minor accident in the presence of a degenerative condition, the work accident will never play a significant role in a resulting permanent impairment; and that in the case of any accident with an underlying degenerative condition, a permanent impairment is more likely the result of the degenerative condition.

The "but for" test adopted by the Supreme Court in "Clements", in no way extends to the interpretation the WSIB has afforded it. An excellent discussion of what the "but for" test means, is contained in the Article: *"Common Sense Returns to Causation - Clements v. Clements"*, By Shantona Chaudhury dated October 2, 2012 (Appendix 6). At Page 3 & 4

of the Article, it states:

"The Court in Clements emphasizes that "the "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury."

"In other words, the so-called 'robust and pragmatic approach' has no on/off switch. It is not a test or a doctrine that applies only to certain cases; it is the approach to take in 'but for' causation..."

> ***"Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any evident, inevitable.***
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> *"An inference of causation is rebuttable. This is not a reversal of the burden of proof, since the initial burden of persuading a court to draw the inference still lies with the plaintiff. But once the inference has been drawn, prima facie causation has been established, and in the absence of more persuasive evidence adduced by the defendant to displace that inference, a finding of causation with follow.*

The Court reminds us that the plaintiff's burden is not to prove that the defendant actually caused the loss; it is to provide that s/he probably caused the loss. Thus, if the circumstances suggest a probable (i.e. over 51%) link between the negligence and the injury, a finding of causation should follow. The SCC's declaration that causal inferences usually flow "without difficulty" may hint that the amount of proof demanded by courts till now has sometimes been excessive - closer to scientific precision than to a 'balance of probabilities'.

The WSIB's Proposed Policies make it a rule of law that pre-existing degenerative conditions are presumed, and in cases of minor accidents are definitively accepted, as the cause of an ongoing disability, whereas the Supreme Court of Canada states that a party disputing the accident as the cause of the disability must demonstrate that something other than the accident is as likely or more likely to have caused the injury. In some circumstances the degenerative condition may meet this criteria, but the Proposed Policies make this proposition a "general rule of thumb" and have departed from the dictum of the Supreme Court of Canada. The WSIB has produced not a shred of medical evidence, in relation to the many degenerative conditions that come before it, to support the Board's presumption.

The WSIAT has been using the significant causation test primarily on the basis that if both the work accident and the underlying degenerative condition have played a significant role in the outcome of the disability, but it cannot be said that the degenerative condition renders the accident as trivial to the outcome, then pursuant to the "benefit of doubt", entitlement must be accepted.

The Supreme Court of Canada calls for a robust approach on causation, noting science on causation issues are not conclusive. In the Article, Appendix 7, entitled: *"Causation in the Law of Negligence: Where are we now? Where are we going? Clements v. Clements; Ediger V. Johnston,* at Page 271 it references Clements v. Clements. More specifically in Clements v. Clements, paras. 38-64 (B.C.C.A.) it states:

""Robust and pragmatic" and "common sense inference" are code words from the SCC to the courts below. They aim to correct a specific problem, which is the tendency of some courts to treat causation

differently from other fact-finding exercises. This tendency is understandable: because causation is so often a battle of the scientific experts, judges are not entirely at ease finding causal connections based on circumstances without the comfort of a supporting expert opinion. They assume that since causation questions can sometimes be answered more or less conclusively, they should always be answered more or less conclusively. But this approach is wrong. Not only does it give insufficient weight to indirect evidence, it effectively raises the standard of proof for causation to something more than a 51% balance of probabilities. It also displays a touching but misplaced faith in the ability of "science" to provide conclusive answers. Science is ever-changing , and a causal link proven today might be disproven tomorrow or vice-versa. This does not mean that we should stop using the best available science to guide our decisions; but it does mean that we should be cautious about requiring a "proven" scientific basis for causation in a legal context. It is the job of the judge, not the "science", to answer the causation question based on the totality of the evidence in the case. Judges might be imperfect; but then again, so is science.

If and when the insistence on something close to "scientific precision" ceases, it will no longer be necessary to refer to the Snell/Clements view of but for causation as a "robust and pragmatic" or "common sense" approach. It will simply be the but for causation test, properly applied."

The Proposed Policies are based on scientific certainty as to the effects of pre-existing conditions, when such does not exist.

The Proposed Polices result in compensation that is 1% of what a tortfeasor would be awarded for a similar injury. It condemns the injured worker to general welfare, even in the presence of a significant relationship between the work accident and the resulting impairment.

The Proposed Policy changes negates the injured worker's protection under the Charter.

The Supreme Court of Canada in their decision Nova Scotia (Workers' Compensation Board) v. Martin [2003] 2 S.C.R. 504, stands for the proposition that Workers' Compensation Legislation cannot discriminate in the provision of benefits for injured workers suffering from chronic pain disability.

Referring again to the injured worker described above who suffers the neck strain. If he/she goes on to develop chronic pain in the third month of his impairment, inevitably benefits to such chronic pain will be denied under the Proposed Policies. The Board will point to the cause of the condition as emanating from the underlying degenerative condition, firstly because the chronic pain came on after benefits were terminated (chronic pain almost always takes months to arise-see Board Policy on same), and secondly according to the Proposed Policies, the primary cause of disability in a minor accident is always the underlying condition, precluding any causation of chronic pain attributed to the accident itself.

The entire essence of chronic pain, is that the pain is not consistent with the expected results of the physical injury. The Proposed Policies eliminate chronic pain entitlement to a vast section of the afflicted work force.

Let us assume the injured worker has a moderate injury, say a slip and fall that results in a broken finger, and had suffered from a 3 month incident of depression 5 years earlier. Proposed Policy 11-01-xx at page 2 states: "*Benefits continue until the worker's current level of impairment would persist regardless of the work related injury...*" Even though the work accident could be medically found to have triggered the depressive symptoms and chronic pain response, as well as having played a significant role in the chronic pain outcome (insofar as chronic pain would not have

developed but for the injury), benefits for chronic pain would still be denied by the Board pursuant to the Proposed Policies. Chronic pain benefits would be denied because under the Proposed Policy the WSIB is likely to determine that while the work accident triggered the depressive symptoms and chronic pain, the injured worker had depression prior to the work accident and therefore the psychiatric impairment subsequent to the work accident was only present due to the prior depression.

Workers who suffer a broken wrist under the Proposed Policies would get full compensation entitlement until the wrist heals in the absence of a chronic pain response. However workers with remote past psychiatric conditions, a sprained wrist, and post accident psychiatric impairment would get practically no benefits. This is rank discrimination, which not only offends the *Ontario Human Rights Act*, but leaves the entire Ontario Workers' Compensation System open to law suits against it for malicious adjudication and a flood of Charter of Rights entitlement applications to conduct law suits before the Courts.

The value of the crystallization over 25 years of injured workers' rights to compensation (for an accident playing a "significant" role in the impairment outcome), requires a balance between
pre-existing condition and severity of the accident event. While many workers have given up windfall monetary awards from tort litigation, all workers within the Workers' Compensation system receive benefit protection when, "but for" their work accident they would not be suffering from impairment.

Section 13(2) of the *Act*, is a presumption clause that encapsulates the "No Fault" nature of Workers' Compensation in Ontario: "*If it occurs in the course of employment, it is presumed to have arisen out of the course of the employment.*" The "it" is the "accident", but the accident is not just the event. The definition of "accident" in the *Act* includes "disablement". The Proposed Policies create an irrefutable presumption that minor accidents never result in a prolonged disablement, and that in the presence of degenerative changes all disablements are time limited. This is the exact opposite direction of Section 13(2).

Sections 119 and 124 of the Act indicate that decisions of the Board are to be based on the merits and justice of the case, and in the case of a question of fact being of equal weight for and against, the determination is to be decided in favour of the worker. These sections of the Act compel the Board to refrain from imposing barriers to entitlement in the presence of pre-existing conditions when the accident has played a significant role. Otherwise medical evidence that points to the work accident as being a significant culprit in the disability will be ignored when there is medical evidence indicating both pre and post accident factors are significant.

The Proposed Policies negate legislative directions to balance the evidence, which is the determination to drop on the worker's side if both (accident and degenerative conditions) are extant. Furthermore these sections of the *Act* (section 119, 124 and 13(2)) indicate that the burden of proof for a worker claiming entitlement are to be of a lesser onus than the common law. The Board's Proposed Policies place upon the worker a burden of proof beyond a reasonable doubt, insofar as he/she, must maximize the severity of the injury and minimize the quality of the pre-existing condition, to receive ongoing entitlement.

Furthermore there are no jurisdictions in Canada that impose a time limit to a period of disablement in the presence of spinal degenerative conditions, no matter what the severity of the injury. Many American jurisdictions have time limits, but their awards are a multiple times more generous than anything gained under Ontario's Workers

Compensation system with the Proposed Policies overlying it.

Non-Economic Loss Awards and Permanent Impairments

Appendix 4 to these submissions is the Fink and Bornstein Newsletter Article (Vol. 27, No. 1, dated August, 2013) which describes why the Board's current practice, (pursuant to its unpublished secret policy "Spine and Pelvis" May 5, 2012 and others) of discounting NEL awards in the presence of pre-existing "conditions" is illegal, as being without Board Policy authority, Ontario Regulation authority or AMA Guide authority. Currently our clients are preparing a class action law suit against the Board, to recover their legal costs for successfully pursuing their appeals to recover the discounted awards, as well as punitive and general damages.

Now the Board is attempting in Policy 18-05-03, to give itself at least the Board Policy authority to deduct for pre-existing conditions. However the AMA Guides must be applied, pursuant to Ontario Regulation 175/98. This Regulation legally trumps the Board Policy. The AMA guides at page 80, Table 53, allow a 2-12% NEL award for the presence of degenerative conditions determined to exist after a work accident. There is nothing in the Guides themselves, that allow for a deduction of these percentages on account of pre-existing condition. More importantly, degenerative conditions in the back almost never result from a work accident. It takes many years for degenerative changes to appear and they are just that, degenerative or even congenital, not traumatic (See WSIAT Medical Discussion Paper "Back Pain" - Appendix 5). In effect, under the Proposed Policies the WSIB will award NEL award benefits for the spine under Table 53, and then Proposed Policy 18-05-03 directs the Board to take the award away. This is a patent violation of the Regulation.

An injured worker with pain, underlying degenerative changes, but no restriction of movement would receive a 0% NEL Award under the Proposed Policies. Even though he/she may have severe restrictions in regard to lifting, he/she will receive no Work Transition Plan assistance after the usual healing time for a back strain, which is a month.

The WSIB does not need the Proposed Policies to maintain its financial integrity. The WSIB Second Quarter Financial results illustrate that in the past 18 months the Board is earning nearly $750 million dollars per year in revenue greater than its expenditures and future benefit expenditure commitments, (once actuarial contingencies for WSIB employee benefit plans, unsubstantiated and undefined future claim costs, and speculative occupational disease liabilities are set aside). The Board is going to hit its legislated funding ratios years early. At least 20 times in the last 8 Board financial statements, the WSIB has stated that their improved financial situation is due to better return to work outcomes. Not once have they stated that their situation is better due to their current ad hoc termination of benefits since January 2011, on account of the presence of underlying degenerative changes.

If it is the goal of the WSIB to eliminate any meaningful compensation to injured workers except for those who have suffered severe blunt trauma, then the Legislature or Courts must open up the right of injured workers to sue in the Courts for damages in the situation of so called "minor" injuries. Employers can watch their WSIB premiums go down and their insurance premiums go up. If in fact pre-existing disabilities in particular cases "swamp" the effects of the accident, then let each case be decided on its merits.

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