The Liversidge *e*-Letter

An *Executive Briefing* on Emerging Workplace Safety and Insurance Issues

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WSIB Benefits Policy Review:

Integrating the Board and the Appeals Tribunal (Actually, it's remarkably easy!)

After 27 years, its time for the Board and Appeals Tribunal to play on the same field

I have always been of the view that triggering dynamic law reform was the Tribunal's most important attribute

While the Appeals Tribunal has in fact been a catalyst for some pretty significant changes to the law (and by "law" I mean both policy and the statute), most of that was in its early years. The statutory changes of 1998 (Bill 99) represent the last (and for that matter – the first) real instances of significant legislative reforms being linked back to the Tribunal (although there have been some policy influences in later years). At that time the statutory adjustments related to reemployment provisions (the current s. 41(10) - "rebutting the presumption") and s. 13(4) - excluding entitlement for mental stress (other than post-traumatic stress).

The last time the Appeals Tribunal influenced legislative reform was over 15 years ago

In the 1st case, the statute was amended such that the Tribunal's interpretation prevailed over the Board's. In the 2nd, the Tribunal's approach on mental stress was trumped by a statutory amendment and stress was excluded from coverage (other than post-traumatic stress).

However, the process was much less than what it could and should have been

Agree or disagree with the final results, undeniably the Tribunal set in motion some significant legislative reform. (I must add that these reforms exposed some deep faults in the Board's policy stewardship of the day, which translated into some concurrent statutory changes there as well. While more on this is relevant to the current discussion it will have to be deferred to another day. Bottom line: The overall process was not nearly as legitimate as it could (or should) have been. Although, I hasten to add, a legislative debate ensued and full public committee hearings were called, allowing stakeholder participation, something we have not seen in recent years at all.)

Since, the Tribunal really hasn't triggered much noteworthy WSI law reform, but that as well is a story for another day. (While certainly the Tribunal ensures a fair process for individual appellants, and while that is nothing to sneeze at and is vitally important, a central purpose of the Tribunal process was to contribute to a dynamic law reform process. I have always thought, in the long-term, that is the most important role. I will come back to this theme at a later time.)

WSIB should integrate Tribunal decisions into its decision-making processes

All of this came back into focus during one of my appearances before **Jim Thomas, Chair of the Benefits Policy Review**. I was suggesting that the Board should integrate Tribunal decisions into its decision-making and policy review protocols.

I was asked – *what if the Tribunal is wrong?*

Mr. Thomas posed an interesting and important question to me – *what if the Tribunal is wrong?* That *is* a great question. I wish to be clear – I do not subscribe to any suggestion that the Tribunal is always right. Far from it. Percentage wise, the Tribunal probably doesn't get it "right" any more than the Board does on individual cases, which is to say, both are right in the vast majority of cases decided (except pretty much all of the cases that end up at the Tribunal are 'hard cases' and it is those the Board has the most trouble with).

But a better question is – *what if the Tribunal is right?*

More to the point though, I do not support the thinking that an issue is rightly decided because the Tribunal says so. This is not the "*Workplace Safety and Insurance Supreme Court*". The Tribunal *is* fallible. Very much so. So, Mr. Thomas' question is a very important one indeed. But, before I get to it, and I will, let me answer a better one that was not asked – *what if the Tribunal is right?* I was suggesting that the decision-making and policy development process at the Board would benefit with some integration with the Tribunal. As today's headline suggests, I think this is actually remarkably easy to achieve.

The Tribunal's approach to "aggravation basis" cases

Let me explore the Tribunal's approach to one of the core issues within the mandate of the **Benefits Policy Review** – "*allowance on an aggravation basis.*" As said in **The Liversidge *e*-Letter** November 23, 2012 issue:

The fundamental policy question is not new

The question the Board is trying to answer is an age-old one - *when does the Board's responsibility start and end in the face of pre-existing conditions?* These considerations are well and best articulated in an early leading decision of the Appeals Tribunal 26 years ago. **W.C.A.T. *Decision No. 32* (June 3, 1986), 2 W.C.A.T.R. 1**, addresses the issue as follows:

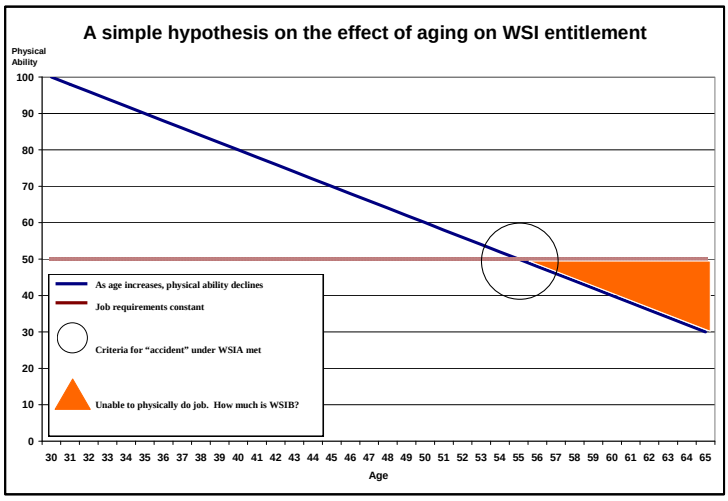
To take a clear case: if a worker has an entirely symptom-free back before a strain at work and suffers continuous agonizing back pain from the point of the strain incident onwards, it seems a reasonable conclusion that it is more probable than not that the strain was at least a significant cause of the pain even assuming an underlying degenerative disc condition.

On the other hand, if the symptoms disappear a short-time after the strain incident and do not reappear for a long period of time then in the face of an underlying degenerative disc problem it would seem equally reasonable to conclude that it is more probable than not that the previous strain incident was either a symptom of the underlying condition - an incident of temporary aggravation - or not related to it at all, and, therefore, not a significant factor in the subsequent disability.

I left out the most important quote from *Decision 32*:

Defining the question is not difficult, the difficulty lies in answering the question in the face of medical science's lack of understanding of the causes of degenerative disc disease and its progression.

While that remains true, 27 years of Appeals Tribunal decision-making lends some assistance. Remember from the last issue, the policy problem can be illustrated as:



Chair of the Benefits Policy Review was able to decide these cases as Vice-Chair of the Tribunal

I drew Mr. Thomas' attention to the fact that as a Vice-Chair of the Appeals Tribunal *he* was able to answer these questions in individual cases based principally on the facts. For example, see *Decisions 829, 198, 1009/87* & *1220/87*, all of which were in the Tribunal's early days. A conclusion was reached in each case, sometimes allowing, sometimes denying an employment connection.

A review of a few Tribunal decisions on point

Lets look at some Tribunal decisions dealing with this.

***Decision No. 652/87*; 10 W.C.A.T.R. 75**

The Nature Of The Case

This case raises the issue of the distinction between disabling symptoms appearing as the result of the impact of employment on a pre-existing degenerative condition which symptoms may be fairly taken as reflecting a compensable exacerbation or acceleration of the pre-existing condition, and disabling symptoms appearing as a result of the impact of employment on a pre-existing degenerative condition which symptoms may be fairly taken as merely evidence of the disabling nature of the pre-existing condition.

. . . .

This Panel is satisfied that in the circumstances of this case it is right to recognize that the disability from which the worker is suffering arises from the degenerated condition of her cervical and lumbar spine and not from her employment. The symptoms of pain generated in this case by very light assembly work is merely evidence of the existence of a pre-existing non-compensable condition which prevents the worker from working.

Significance: Getting back to the chart in the panel opposite, this case seems to fit with the grey/orange triangle. Even the tough cases can be reasonably decided.

Decision No. 2501/08

(c) Law and policy

[22] Compensation legislation generally recognizes that a worker can have entitlement to benefits where the workplace aggravates a pre-existing condition.

[28] In making that determination, Tribunal decisions have looked at the causal impact of a work-related injury/illness on the pre-existing condition. I note the following discussion in the Tribunal's ***Decision No. 754/99* (April 28, 1999)** in which the Vice-Chair stated that the question to be asked in assessing the impact of a pre-existing condition on permanent impairment is this:

…[I]t is my view that the issue in this case is not whether the worker "returned to his pre-accident condition", but rather ***whether the accident … made a permanent and significant contribution to the worker's ongoing back disability***.

[30] Finally, I note a summary of the Tribunal case law in this area, from ***Decision No. 1592/01* (August 31, 2001)**, at paragraph 21:

It is now commonplace in Tribunal case law that for entitlement to succeed on an aggravation basis, ***one must be satisfied that the worker duties or a work incident changed the natural course of the underlying condition***.

Significance: This decision, and the ones relied on, have restated, perhaps more precisely, the approach of ***Decision 32***. If these principles need to be placed into some policy to assist WSIB decision-making, by all means, put them in. I should add that no WSIB decisions, at any level today, analyze these cases in this fashion. As suggested on November 23rd, the Board's main problem is training, staff development and experience. I still hold to that.

Decision No. 2341/08

[28] As I interpret the foregoing discussion, ***the essential requirement for entitlement for an aggravation injury is that there be evidence that a workplace injuring process has, in a material way, advanced the pathology of the pre-existing condition***. If the underlying pathology is materially advanced, this constitutes injury. ***However, merely making an underlying condition painful or noticeable does not constitute injury***. ***It is the change in the underlying pathology that constitutes an injury by aggravation***. The presence of new symptoms may

suggest advancement of the underlying pathology but may also suggest that the underlying condition has become more noticeable because of certain activities. In the end, the medical evidence must determine the outcome.

Significance: This case as well addresses the grey/orange triangle in the chart. While this and the earlier cases advance some sound adjudicative principles, they don't make the "hard case" an "easy case".

Decision No. 1212/11

[57] As indicated above, OPM Document #11-01-15 states that entitlement is awarded on an aggravation basis when a relatively minor accident aggravates a significant pre-accident impairment. In the present case, the worker suffered a minor accident in 2004 – kneeling for 2 hours. I note that Dr. Spiers, her family physician, reported on the Form 8 in October 2004 "pre-existing condition aggravated by work".

[58] The worker clearly has a significant pre-accident impairment. . . .

[59] Given the worker's history of a severe, on-going right knee condition, which in her doctor's opinion was aggravated by kneeling in 2004, I find that initial entitlement was correctly allowed on an aggravation basis.

Significance: Even recent decisions turn on their individual facts. There is no adjudicative magic. WSIB policy cannot be viewed as an adjudicative "cookbook". If that's the expectation, this process will fall short.

Do these cases help?

Most certainly. But, the Board doesn't pay much attention to Tribunal decisions. If no one at the Board reads them, these cases add nothing to WSIB decision-making.

How to integrate Tribunal decisions with WSIB decision-making – a very simple suggestion

As the **Benefits Policy Review** consultation was getting off the ground, I suggested that the Board create a series of "casebooks" for each topic being considered. To their credit, they managed to do just that and a list of relevant cases is found on the **Board's Consultation Secretariat's** webpage. All of the preceding cases in fact came from that list.

So, here's the suggestion – for *every* WSIB policy, simply provide links to WSIAT and WSIB Appeals Resolution Officer decisions (they are now also online) that assist in interpreting the policy.

This ever so simple mechanism creates an internal discipline within the Board to find applicable cases (as clearly they are able to do). And, it makes it easier for WSIB decision-makers to understand and apply certain adjudicative principles applied in analogous cases, enhancing both consistency and staff development.

It is simple to implement, easy to maintain, flexible, ensures evolving jurisprudence is not ignored, avoids the need for policy to envision every potential fact scenario, eliminates the need for fictional examples, and above all, ensures thoughtful analysis in each case. And, after 27 years it finally serves as a formal introduction of the Tribunal to the WSIB's day-to-day business. As far as the **Benefits Policy Review** exercise is concerned, in my opinion, that's all that is required at this time. This one small simple step would have some profound impacts over time.

What if the Appeals Tribunal is wrong?

Now, back to the question posed to me – *what if the Tribunal is wrong*? I don't have the space to give this question justice (pun intended) so forgive the shorthand which follows. What follows is not so much about individual cases as it is about analytical themes.

Before 1998 "*what if the Tribunal is wrong*" was easily answered, at least process wise, as it was a threshold question. This is how the *Workers' Compensation Act* read in those days (those of us around at the time will always refer to this as s. 86n, but by the time the WCA was put to pasture, it was s. 93(1)):

Determination of issues by Board

93.(1) Where a decision of the Appeals Tribunal turns upon an interpretation of the policy and general law of this Act, the board of directors of the Board may in its discretion review and determine the issue of interpretation of the policy and general law of this Act and may direct the Appeals Tribunal to reconsider the matter in light of the determination of the board of directors.

So, "*when the Tribunal was wrong*" (in the eyes of the Board), the WCB Board of Directors was required to act. The Board was the gate-keeper. It had to review a case, hold a hearing or receive submissions (s. 93(2)), eventually give reasons (s. 93(3)) and if called for, issue a directive to the Tribunal to reconsider a decision. I really don't have space for a full history of this section, but it was only put into operation a couple of times (even though Prof. Paul Weiler, the architect behind it, figured it would be used rather routinely), and never really clarified the big question, "*who has the final say?*" In fact, the Board soon just outright abdicated its role, stopped reviewing Tribunal cases, and just ignored it. *Too bad*. A very effective and direct law reform mechanism was never allowed to fully mature.

The question is now flipped – it is now *"what if the Board is wrong?"*

The legal relationship between the Board and the Appeals Tribunal changed in 1998. Now, the Tribunal is required to apply Board policies (WSIA, s. 126 (1)). If though the Tribunal is of the view that a Board policy "*is inconsistent with, or not authorized by, the Act*" the Tribunal must "*refer the policy to the Board for its review and the Board issues a direction*" (WSIA s. 126(4)) within 60 days with reasons (WSIA, s. 128(8)). So, now the Tribunal is part gate-keeper.

Big picture disputes attract a big picture process

So, while the mechanics and the process has changed, the essence remains this – *big picture disagreements attract a big picture process*. While high level worry about the Board or Tribunal "*getting it wrong*" is important, there are processes designed to deal with that (and others that the Board could develop as a means for policy development – but more on that another day). ***But, so far, the Board hasn't put its mind to sorting out what to do when the Tribunal is right. That is a more productive place to start.***