

THE CSST'S NEW TABLE OF MAXIMUM CONSOLIDATION PERIOD: WHISTLING IN THE WIND!

By JEAN BEAUREGARD

MUCH HAS BEEN AND CONTINUES TO BE WRITTEN ABOUT APPLICATIONS FOR COST-SHARING UNDER SECTION 329 OF AN ACT RESPECTING INDUSTRIAL ACCIDENTS AND OCCUPATIONAL DISEASES (THE "AIAOD").

ART. 329 IN THE CASE OF A WORKER ALREADY HANDICAPPED WHEN HIS EMPLOYMENT INJURY APPEARS, THE COMMISSION MAY, ON ITS OWN INITIATIVE OR ON THE APPLICATION OF AN EMPLOYER, IMPUTE ALL OR PART OF THE COST OF THE BENEFITS TO THE EMPLOYERS OF ALL OF THE UNITS.

ANY APPLICATION UNDER THE FIRST PARAGRAPH MUST BE FILED IN WRITING BY THE EMPLOYER BEFORE THE EXPIRY OF THE THIRD YEAR FOLLOWING THE YEAR OF THE EMPLOYMENT INJURY, AND STATE THE REASONS FOR THE APPLICATION.

THE PURPOSE OF THIS PROVISION, WHICH IS REGULARLY USED BY EMPLOYERS, IS TO COUNTERBALANCE THE CONSEQUENCES OF THE "THIN-SKULL THEORY" TO ELIGIBLE CLAIMS, AS WITHOUT IT, THE COSTS OF A WORKER'S PERSONAL CONDITION WOULD BE BORNE BY THE EMPLOYER.

Before discussing the new table proposed by the CSST, let us recap the principles governing applications for such cost-sharing:

1. The existence of a handicap.

A worker will be considered handicapped within the meaning of section 329 where, at the time that the work related injury occurs, he has a physical or psychiatric deficiency which deviates from a biomedical standard, and which has effects on the mechanism causing the work related injury or on the consequences of the injury.¹

In proposing this definition, the Commission des lésions professionnelles does not regard personal conditions normally found in individuals to be deficiencies, only those considered to be abnormalities. Furthermore, the case law assesses whether the identified condition is abnormal by comparing it with the condition normally found in persons of the same age as the worker at the time of the event.²

¹ *Municipalité Petite-Rivière St-François and C.S.S.T., Québec-Nord*, (1999) C.L.P. 779;

² *Sodexo Canada inc. v. Racine*, C.L.P. 149700-32-0011, May 9;

2. Determine the impact of the handicap on the occurrence of the work related injury by assessing the nature of the handicap, the scope of its contribution to the mechanism causing the injury, and finally, the scope of the accident itself.³
3. Determine the impact of the handicap on the intrinsic elements of the work related injury by considering the period of consolidation and the effect of the handicap on permanent impairment or functional limitations.⁴

Until April 2007, one of the tools used by the CSST was a table developed in 1985 which took into account the **average** period for the consolidation of the most frequent work related injuries. It was a very partial inventory of work related injuries and was originally intended as a tool for managing compensation claims.

In May 2007, the CSST adopted a new analytical grid called the "Table des durées **maximales** de consolidation aux fins de l'application de l'article 329 de la LATMP" (Table of maximum consolidation period for the application of section 329 of the AIAOD).

This new policy significantly changed the manner in which the CSST considered employer's applications.

As its name indicates, the policy refers to a new concept of "**maximum** consolidation period", as opposed to the old grid which dealt with "**average** consolidation period". The policy was not implemented without some difficulty and protest, until the Commission des lésions professionnelles recently ruled on its true effect.

EFFECT OF CSST POLICY

The policies of the CSST are not law. The CSST may not impose its interpretation of the law on courts and tribunals under the pretext of an administrative management policy.

Indeed, courts and tribunals are bound by the law, and not by a claim management policy.⁵

As for the effect of this policy and the proposed mathematical formula, the Commission des lésions professionnelles states as follows:

[Translation] *Cost-sharing is an exercise which cannot just be based on specific and uniform mathematical formulae. Such cost sharing must take into account all the specific circumstances of a case and aim to distribute the costs fairly, with the ultimate purpose of ensuring that the worker's employer only assumes the costs related to the work related injury and that it be relieved totally or partially of the costs related to the pre-existing handicap.*⁶

On the whole, the commissioners have not given a preponderant effect to this new table in their decisions.⁷

THE CONCEPT OF "CHRONICITY"

The entire table is based on the premise that an injury, such as for instance a lumbar sprain, becomes chronic after a certain period of time, since chronicity is often a function of the intensity of the pain that disables the worker.

For the CSST, the period prior to the chronicity is viewed as the maximum period for the consolidation of the injury since the goal, from a medical standpoint, is to prevent the chronicity of the injury.

Therefore, the acceptable time period for consolidation of the injury is defined as the period occurring prior to the period of chronicity determined for such injury. Thus, any period which is in the 90th percentile (for example: 84 days for a lumbar sprain) would be an acceptable period for the maximum consolidation period.

However, the use of the concept of "chronicity" to set the maximum acceptable consolidation period is far from having an unanimous support within the Commission des lésions professionnelles.⁸

³ *Entreprise de travaux Common Itée*, C.L.P. 126468-72-9911, March 31, 2000, M. Lamarre;

⁴ *Société de coopérative agricole des Appalaches*, 340820-03B-0802, February 3, 2009, Robert Deraiche, Commissioner;

⁵ *Automobiles Perron Chicoutimi inc.*, C.L.P. 345748-02-0804, January 6, 2009, J.Grégoire;

⁶ *Groupe Axxys Amiante National*, C.L.P. 315773-71-0704, July 15, 2008, Sylvie Arcand;

⁷ *Société de coopérative agricole des Appalaches*, op. cit. p. 24;

⁸ *Supra* note 7. p. 25;

Thus, Commissioner Clément, who is now the president of the Commission des lésions professionnelles, has asserted that the application of the new table based on the concept of "chronicity" cannot be accepted since the evidence presented to him has neither convinced him of the relevance of this concept, nor that the concept of "maximum consolidation period" should be accepted as the measure for the application of this table.⁹

CONCLUSION

As we have seen, fortunately the future does not look bright for the CSST's new policy.

While acknowledging the research work done by its authors in updating the old table, the Commission des lésions professionnelles neither recognizes its mandatory effect nor its usefulness as a guide given the premises on which it is based.

For the Commission des lésions professionnelles:

[Translation]

"(48) Ideally, the tribunal should compare the consolidation period rendered necessary for a work related injury in the case of a worker in a "normal" state with the consolidation period observed for the same worker taking into account his handicap. In practice, this is often impossible, which is why the tribunal must find a method which comes as close as possible to reality.

(49) To this end, at first blush, the concept of average consolidation would seem more appropriate.

(50) The normal consolidation period should be analyzed concretely taking into account the seriousness of the work related injury.

(51) Thus, a lumbar sprain normally may take an average of six weeks to get better, although some only take one week while others take 20. One must attempt to determine the normal consolidation period of an injury taking into account the specific circumstances of its appearance.¹⁰"

(Author's emphasis)

One can therefore conclude that, while a large amount of work went into conceiving and developing this table, it is not a tool that can be used to calculate an apportionment of costs on a mathematical and objective basis.

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⁹ *Glaxo, Smith, Kline, Biologicals*, C.L.P. 334462-03B-0711, June 23, 2008, J.-F. Clément, Commissioner;

¹⁰ *Supra* note 9;

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