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Workers' Compensation Newsletter

*Report from the **Fink and Associates** Seminar of July 23, 1997*

Repetitive Strain Injury - The Ghost That Haunts 200 Front St.

"North America is in the midst of a RSI epidemic" - the *Toronto Star,* April 15/95

"RSI plagues female musicians" - the *Globe and Mail,* July 29/97

Several years ago Dr. Pitner and his colleagues looked for micro-organic evidence of disease or damage in victims of Repetitive Strain Injury (RSI), particularly musicians, and could find none. Dr. Devlin, a physiatrist at Toronto's Mount Sinai Hospital, speaking at the *Fink & Associates* Seminar, noted that the Australian experience with RSI indicated that the disease reached epidemic proportions when time off was compensated for and waned when it was not. In a study of telephone operators working in a state with generous WCB coverage, a large incidence of RSI was reported. Operators in a state with restricted coverage, working on the same machines or on machines of a lesser ergonomic design, had a very small incidence. These and other studies led Dr. Devlin to conclude that RSI is a social phenomenon and not a medical lesion.

The Ontario Experience

Corporate Data Services of the Ontario Workers' Compensation Board did a detailed study of the incidence of Repetitive Strain injuries in Ontario. In 1994 there were 5033 cases of RSI accepted, illustrative of a steady increase over the 1,587 claims in 1984. In 1994 RSI represented 4% of all claims. More importantly, they constituted 7% of all claims made by women workers that year, in contrast to 2.7% of claims for men. The average days lost for such a claim were 64, nearly double that of other claims, each claim costing $6091 in 1995.

Old - "Safe".

The "Metal Fatigue" Theory

There were no known reports of RSI affecting stenographers working on typewriters prior to 1980, and yet RSI among computer key board operators is legion. Julie Grossman, a physiotherapist speaking at the Seminar, suggested that usage of a keyboard was more intense due to the number of applications a computer contains. Furthermore, she postulated that the uniform application of typing at a keyboard that does not require non-keyboard corrections to text or paper removal, makes the keyboard a more intense experience. This is the "metal fatigue" theory of human anatomy. Each limb has only so much give and take in it, and therefore at some point the limit is exceeded and it cracks. Dr. Devlin pointed out that in reality it has been shown that heavy use of a joint actually strengthens it and prevents injuries. Older lawyers remember secretaries who spent long

New - "Unsafe".

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hours steadily banging away at old IBM Selectrics without suffering "metal fatigue" in their arms. There are no studies to indicate that 5 minute breaks from keyboarding will defeat RSI injuries. The "metal fatigue" theory ranks with the "unresolved problems at death causing ghosts to appear" theory, and is equally plausible. RSI is a "ghost" that haunts Compensation Boards across North America.

Carpal Tunnel Syndrome is to Repetitive Strain, what Bats are to a Haunted House

Carpal Tunnel injuries are among the more common forms of a RSI, and at first glance the most easily identifiable. If tracking down RSI is like proving or disproving that a ghost has entered your home, a carpal tunnel complaint would be more akin to having at least an observable bat flying around. Carpal Tunnel Syndrome (CTS) as a disease entity got its start in the 1950s when Dr. Phalen observed that swelling of the wrist caused by pregnancy, diabetes, tenosynovitis (swelling of the tendon sheaths) etc. produced reproducible features on clinical examination (Phalen's test). Secondly, interference with the median nerve passing through the carpal tunnel could also be observed through nerve testing. Phalen however stated that a work related cause of Carpal Tunnel would be most unusual.

Ontario's Experience with Carpal Tunnel

21% of repetitive strain injuries, and thus 1% of all work injuries in Ontario in 1995 were from CTS according to Corporate Data Services of the WCB.

Research Professors in Michigan Invent Industrial Carpal Tunnel

Professors Armstrong and Silverstein of the University of Michigan "discovered" work related carpal tunnel syndrome. Workers at a seat cover factory who used their hands repetitively had more symptoms consistent with CTS than those who didn't. The same observation was present at a turkey boning factory. Dr. Norton Hadler has criticized these studies because of their small sample size and because no EMG testing was done of the complaining workers to further prove that they indeed had CTS. Hadler believes that industrial related Carpal Tunnel is a myth. Interestingly, in a later study when Prof. Silverstein attempted to introduce ergonomic changes into the work place in order to reduce Carpal Tunnel instances, the reverse happened. Prof. Silverstein postulates that the increased awareness of the problem through the introduction of work modifications may have caused a greater number of workers to come forward with their CTS complaints! One problem with proving that ergonomic improvements reduce Carpal Tunnel is that most research is private and proprietary to the industrial company which is benefiting from the research. Thus the public and scientific community are kept in the dark.

The Exorcist

An alternate explanation for Armstrong and Silverstein's observations is that if you set traps for ghosts and spend time talking about ghosts, more inhabitants of a house will come to believe that they are in fact sharing their residence with a ghost. Robert Verlinga, an ergonomist who spoke at the Fink & Associates Seminar, made it clear that the application of ergonomics at the workplace is scientifically validated for making decisions on production design for comfort and efficiency, but is not a foolproof guarantor that a particular job function performed by a particular worker will not result in a complaint of a repetitive strain injury. In answer to a question about warm up exercises, Dr. Devlin commented that the placebo effect (sugar pills in medical research studies always reduce the disease and its effect for a time, based on human belief), is a powerful influence on the outcome of Repetitive Strain syndrome whether or not the proposed cure has any scientifically proven effect - sort of like an exorcist.

Ghost Busting at the Appeals Tribunal

The manner in which the *Workers' Compensation Appeals Tribunal* and Hearings Branch of the Workers' Compensation Board have dealt with Carpal Tunnel injuries and Repetitive Strain in particular, discussed below, is a further illustration that the law in this area more resembles "ghost busting" than it does the application of medical legal principles.

In WCAT Decision 630/94, a report from Dr. Vaughn Bowen, a plastic and orthopaedic surgeon at Toronto Hospital and hand disease specialist is quoted as follows:: "it must be remembered that CTS is very common and there are many cases that are not etiologically related to the work place. . . The kind of occupations that tend to be related to CTS are repetitive jobs that involve a lot of activity from the finger flexor tendons and particularly when these are associated with flexion of the wrist. A job in which the patient is working with the wrist and hand in an unnatural position, particularly in flexion, is also a risk factor. Other factors that are of importance is the amount of exposure, the number of hours per day at the activity and also the number of days per week are also likely related. The use of vibrating tools might also be related." In this case, the WCAT panel ruled against the worker because her symptoms did not develop until she was on layoff 4 years after doing the repetitive work.

This decision also quotes one other doctor to say that up to 50% of Carpal Tunnel cases are of unknown causation. The rational adopted by the WCAT here is that since the worker can't prove there's a ghost through proximal timing of work and symptoms, there must not be a ghost. But what if Carpal Tunnel appears at the same time work is being performed. If the house seems to shake at the same time the observance of a ghost is reported do we have proof a ghost exists?

A Whole Lot of Shaking Going On

The answer to this question is contained in WCAT Decision 53/94. The worker spent 3 hours per day peeling potatoes and carrots along with other chores related to cooking for a boat crew. The Compensation Board Doctor, Dr. Gergley, Dr. Renaud a noted rheumatologist, and Dr. Goulet, a physiatrist, all stated that "the work of a cook is not work of repetitive movements since it varies in time and space" and did not support the claim.

The Intelligent Witness

In WCAT Decision 53/94, Dr. Vaughn Bowen's paper is again quoted by the WCAT panel, but not on the topic that many cases are not work related, but reference is made to Dr. Bowen's opinions only in regards to pregnancy, arthritis, and repetitive flexion at work being a cause of CTS. A Workers' Health Clinic doctor said the claimant's CTS was from cooking. The WCAT Panel decided for the worker because: (a) the CTS had no apparent cause other than work; and (b) the worker was "intelligent, articulate, truthful and consistent". In other words, if the house shakes and a ghost is immediately reported by an intelligent, articulate, truthful and consistent observer, there must have been a ghost.

The Slings and Arrows of Outrageous Fortune

The same existential reasoning "I exist therefore I am" applies in the case of Repetitive Strain causing back disability. In WCAT Decision 673/96, a nurse's aid was awarded benefits on account of having to lift mentally ill patients over the years. Quoting from 2 medical discussion papers by Dr. Gertzbein and Dr. Harris (orthopaedic surgeons) that twisting, bending and lifting can cause tears in the intervertebral disc, the WCAT Panel concluded that this must have happened to the worker's discs over time even though there had been no evidence of an accident, or that the worker's discs were in fact torn.

Weightlifters and Landscapers

Yet another example of "if a' exists therefore b' " reasoning is contained in WCAT Decision 237/96, regarding bone chips in the elbow. The perpetrator is a distinguished orthopaedic doctor, Dr. Stewart Wright. The worker was a landscape gardener for 2 years (during the summers), and before that worked in a factory in Portugal. Dr. Wright wrote: " I would suggest that the degenerative changes in this worker's elbow are likely related to overuse over many years. I would feel that any activity which involved excessive load of his upper extremities would be sufficient to accelerate the symptomatology and quite likely the course of the disease process. This is the type of scenario which I have seen previously in athletes such as weightlifters whose symptoms continue to worsen as they continue lifting heavy weights."

This again is the "metal fatigue" theory of human anatomy. But how does Dr. Wright know what the "breaking point" is of the elbow joint? Perhaps practicing weight lifting for 10 years at an Olympic level, or throwing curve balls for 6 is obviously enough, but where does Dr. Wright draw his inspiration for 2 years of seasonal landscaping? There is constant legal confusion at WCAT and the Board between the symptoms appearing at work, (which is a highly noticeable point because use of the particular joint is integral to maintaining the employment relation); and the symptoms being caused by work. The latter is compensable but the former is non-compensable. This confusion arises when compensation judges attempt to pin down the existence of a ghost without adequate scientific proof, particularly when the adjudicators themselves have seen ghosts as illustrated in a statement made to this lawyer recently at a hearing: "I was working in the garden yesterday and a day later my back was killing me".

Welding After "Metal Fatigue"

Three other WCAT Decisions should be noted. Decision 689/94 states that rheumatoid arthritis is not normally compensable. Decisions 193/94 and 11/94 both state that if the diagnosis is Repetitive Strain then the condition should improve when the worker is removed from the job. This is a very important precedent for employers because long term repetitive strain disability could be classified as chronic pain, if it doesn't improve after the worker is removed from work. Chronic pain disability under the new Workers' Compensation law has strict limits on entitlement to benefits. However, why a RSI would improve, if the adjudicator already accepted the metal fatigue theory in granting entitlement, is beyond understanding. Once a metal part is broken, it does not come back together short of welding.

Anatomy of a Loss

Our office made an "all out attempt" to reduce the costs to an employer of a bilateral Carpal Tunnel disability. An ergonomist reported to our office that a sewing operator would have possibly injured her left wrist in a sewing operation because the left wrist was guiding the material into the sewing machine, but not her right hand. An ergonomist was employed, as our law firm attempted to bypass the trap of trying to prove a ghost doesn't exist when other doctors claim it does.

At the Hearings Branch, the report of the ergonomist was dismissed because the ergonomist did not see the worker doing the job herself - the ergonomist relied on an associate to help prepare his report. Additionaly, the worker spent 5% of her time folding sheets (a job not referred to in the report) and the ergonomist could not say at exactly what point carpal tunnel will occur. The worker developed a bilateral problem in the right wrist within 2 months of a Carpal Tunnel diagnosis in her left wrist. The job in fact placed very little stress on the right wrist. Even after having an operation to "cure" her Carpal Tunnel, following a positive EMG (nerve conduction test), the worker's condition deteriorated. All these points lead to the inescapable conclusion that the worker didn't have work related Carpal Tunnel in the first place, a conclusion which escaped the WCAT and the Appeals Officer.

The case went to the Appeals Tribunal in Decision 822/96, where the Panel completely ignored the ergonomist's report for no stated reasons, and ruled that since the employer could not prove the carpal tunnel problem was as a result of menopause, notwithstanding the worker is menopausal, no relief could be afforded the employer. This again is a fall back to the reasoning: noises at night equals ghosts in the attic, and ignore any scientific evidence. This failure of the carpal tunnel operation upon the worker in this case also buttresses a point made by Dr. Devlin at the *Fink & Associates* Seminar - EMG testing is not particularly reliable because the quality of the testing is poor, and over-reading the results is a common occurrence. Any employer has a great deal of reason to be skeptical when a worker is diagnosed with work-related CTS.

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"Project Twinge" - 36% of Claims Studied are Irregular

Fraud at the Workers'Compensation Board

by Richard Fink

Brian King, former President of the Worker's Compensation Board stated at a news conference four years ago, that 5% of the claims made at the Workers' Compensation Board are outright fraud. King's estimate understates the actual situation. According to a secret study conducted in 1994 by Peat Marwick (KPMG), 36% of second claims made by supposedly injured workers are "irregular", a word denoting activity of misrepresentation but not necessarily containing all the elements to prove criminal fraud. From 1980 to November 1993, this amounts to 33,400 claims totalling $240 million, and KPMG indicates that this is only the tip of the iceberg: "Therefore, the total exposure to irregular claims will likely be higher than the estimate..."; p.8

More shocking is the revelation that groups including organized crime are submitting "irregular" claims on an organized and repetitive basis, although KPMG go out of their way to state there is not a centralized source co-ordinating the irregular activity.

Hundreds of millions dollars have been fraudulently extracted from the Compensation Board by single instance claimants but KPMG was never permitted to enter phase II of its study of WCB fraud, to catalogue further theft. Part I of this secret study of WCB fraud , code named Project Twinge, was obtained by the law firm of Fink and Associates one year after application. The study was released only after direct intervention by WCB Chairman Glen Wright, who seems at least to be interested in doing something about fraud. Recently, the WCB put out tenders to contract private investigators.

If all of the above doesn't turn the reader's stomach, KPMG states that 50% of the irregular claimants were still receiving money from the WCB as of 1993. Little has been done to date to stop the bleeding even though KPMG states: "Information in (the) WCB's possession is sufficient to allow the identification of irregular claims and to justify a more comprehensive investigation and review of questionable claims."

93 doctors billed the Compensation Board in excess of $100,000 in fees related to WCB claimants during the 28 month period from August 1991 to November 30, 1993. Three doctors were specifically targeted as aiding and abetting "irregular claims".

Finally, KPMG concludes that the lack of accurate, complete and appropriate information is hampering the WCB in aggressively pursuing and preventing irregular claims. Without this documentation - investigation, deterrent and prevention actions cannot be effective. Without a known risk of being caught and penalized, fraud will remain rampant at the WCB.

Some of the WCB fraud has been aided and abetted by Compensation Board employees. The last time Fink & Associates publicly stated this fact, Richard Fink was reported to the Law Society and threatend with a libel and slander suit by the chief lawyer of the WCB. Nevertheless, recently Fink reported to the Board's fraud department an instance of a former Board employee using confidential material taken from the Board concerning the accident cost experience of employers.

After a year long investigation the Board stated there was nothing they could do! Chairman Wright has stated that from now on, rather than allowing fraudulent staff to merely resign, he was going to prosecute them. But what about all the past crime?

WCB legislation and Guidelines have been beefed up with authority and protocols for stemming fraud, but little is being accomplished that the public knows about. And if the public is not informed of the efforts and successes in fraud prosecution, what good is it - where is the deterrence? Recently Chairman Wright had Aetna Insurance Co. conduct another private study to see what can be done about fraud.

Aetna will sample claims to identify if "irregularities" are continuing. Aetna will produce a list of "flags" which will be used to scrutinize existing claims to determine which claims are fraudulent. Included in the sample are the "irregular" multiple claims highlighted by KPMG. Again our firm has started the arduous process of requesting the Board to release the study to our office. *Plus ça change, plus c'est la même chose.*

Repetitive Strain Injury

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Date of Accident

Decision 822/96 also comments on what test should be used in determining the date of accident for repetitive strain injuries. This is important because employer reinstatement obligations are 2 years from the date of accident and NEER plan obligations are for approximately 3 years. The earlier the disability the less liability for the employer. The WCAT stated that the first day the worker sought medical treatment, wherein the doctor indicated there may in future be a work disruption, is the first day of accident.

A Last Resort

Litigating RSI is a last resort. If a sizable segment of the population believe ghosts exist, then they exist, whether proven scientifically or not. A far better approach is to utilize treatment programmes such as those of the *Health Recovery Clinic* and a graduated return to regular duties, coupled with a determined effort to have the Compensation Board appropriately "monitor" the claim. If people believe in ghosts, why not engage in chasing them away, or move into a new house if that's the cheapest solution?

WCB Reform of Chronic Pain: What's In It for Employers?

Section 13(1) of the Workers' Compensation Reform Act, scheduled to be passed by December, 1997, allows the Compensation Board to limit benefit and rehabilitation entitlement to workers suffering a chronic pain disability subsequent to a work accident.

Since the *Workers Compensation Appeals Tribunal* recognized chronic pain as a disease entity over 10 years ago, the Compensation Board has been determinedly attempting to contain worker entitlement for chronic pain by adopting restrictive entitlement criteria; limiting treatment to 4 weeks at Community Clinics; initiating stringent return to work programmes; etc. All these measures have failed as chronic pain proves an elusive entity, allowing workers to restore benefits through appeals.

Chronic pain has its causation in factors removed from the injury itself: character deficiencies; pre-existing vulnerability to mental illness; desire for financial reward; desire for family support; unhappiness with the job environment; etc. To effectively cope with such an intricate disease entity, the adjudicators of the Compensation Board would by necessity have to be highly skilled and have the necessary resources (time).

Timely and individually tailored treatment programmes which separate out those who need assistance from those who are consciously exaggerating would have to be developed and carefully monitored. The politically appointed crew who have been running the WCB for the past 10 years could not possibly implement such programmes. Generally, chronic pain claimants are at first under-compensated and then over-compensated.

To rectify this situation the following measures have been put forward as new Compensation Act Regulations defining exactly what benefits will be available to chronic pain sufferers:

1. In the case of a back strain a worker will be expected to return to light work within 7 weeks and heavy work within 16 weeks.

2. Light work is defined as "work activities involve handling of loads of 5 kilograms but less than 10 kg". Heavy work is "work activities involve handling loads more than 20 kilograms".

3. A WCB nurse case manager will decide what constitutes light work or heavy work, as well as what constitutes a sprain as opposed to some other more serious form of injury.

4. Chronic pain will be defined as (i)pain which persists beyond the "usual recovery time" (see 1. above) and (ii)pain for which there is insufficient evidence to indicate that a physical abnormality or loss related to a compensable injury or disease is the cause of the pain.

5. Workers with potential chronic pain will be treated by "health professionals", at the discretion of the WCB nurse case manager, before symptoms arise, to prevent chronic pain.

6. Chronic pain sufferers will be entitled to participate in a pain management programme.

7. After completing the pain management programme, the chronic pain worker will be entitled to two follow-up additional stress management or biofeedback sessions focused on maintaining a prompt return to work.

8. There will be no entitlement to chronic pain treatment after 12 months.

9. There will be no entitlement to any benefits - health care or money, after the treatment is completed.

10. Employers have to provide chronic pain sufferers with their old or comparable suitable work.

11. The Pain Management Programme must include a physician, a psychologist, and a physiotherapist who have specialized training.

12. Stress management, relaxation training and biofeedback must be part of the programme.

13. The pain management programme cannot last longer than 4 weeks.

14. The effectiveness of the programme will be evaluated according to scientific standards.

15. Guidelines on healing times (entitlement period) and treatment will be extended for multiple recurrences.

These proposed Regulations are supposedly based on the recommendations of experts who the Board secretly commissioned in September 1996. The names of the experts are secret. A copy of the secret report was obtained under a Freedom of Information Act request by our office on July 28, 1997.

The proposed Regulations conflict serverely with the following actual recommendations of the experts:

1. Disabilities should not be divided into organic (real) and chronic pain (mental) categories. Rather, pain from all sources should receive expert treatment, evaluation and limited entitlement.

2. The ultimate goal of medical

rehabilitation efforts is to substantially improve functioning rather than a return to pre-accident work.

3. The loss of employment opportunities through no fault of the chronic pain sufferer (ie. a layoff) should not be held against him/her. (Treatment will fail if suitable work is not available)

4. Treatment should start at the outset of the disability, not when chronic pain is identified by guideline.

5. There should be formal assessment phases as a disability continues, with a goal setting process.

6. Programmes have to be individualized to meet the needs and problems of individualized workers. The programme should be staged into segments lasting up to 12 weeks. There has to be an intense follow-up phase.

"Keep It Simple Stupid"

This is the new motto of the Workers' Compensation Board. Pigeon hole workers into categories, and put in place brief time categories of entitlement. Although this motto will initially delight employers, companies should be aware of the mid-term dangers facing a Compensation System that is patently unfair to workers, and in reality to employers themselves who are sending this agency $2.6 billion every year in order to rehabilitate and fairly compensate what is generally a loyal Ontario work force. Consider the following:

A. Length of Treatment:

The Compensation Board is suggesting 4 weeks versus the Experts' 12 weeks. Section 33(1) of the Compensation Reform Act states a worker is entitled to all necessary health care. Section 33(8) states it is the Compensation Board which is the final arbiter of what is "necessary". When the WCB is in violation of the recommendations of its own experts there are bound to be legal challenges on the basis that the Board's decisions have not been on the "real merits and justice of the individual case".

To suggest that what needs to be done in 12 can be done in 4 is an attempt by Board bureaucrats to undermine the entire policy.

B. Diagnosis:

If the treatment and entitlement protocols are patently unfair, doctors will do their utmost to label the condition of their patients to be something other than chronic pain. If the system is abusive to injured workers, Adjudicators hearing appeals will bend over backwards to accommodate the opinions of doctors. Workers themselves will reach for repetitive strain syndromes (not so rigidly controlled) and recurrences as a way to skirt the draconian chronic pain measures.

C. Appeals:

Workers who are cut off benefits before they receive treatment can't be expected to have their appeals dealt with before the 12 month treatment deadline, and thus have no entitlement to chronic pain rehabilitation. This is probably contrary to the Canadian Charter of Rights, and obviously contrary to common sense.

Criminals who commit rape and murder are let out of jail after 10 years and given a second chance. After 11 weeks, workers who fail to shake off most of the lingering effects of a back strain will forever be terminated from benefits. A second chance at treatment, if the first was screwed up is never afforded. This is preposterous.

D. Nature of Back Disabilities

The effects of a back strain wax and wane. Minor permanent job modifications and adjustment for bad days are conditions that 90% of employers can accommodate. Once a worker is labeled with "chronic pain", none of this need be performed. The difference between available light work (7 weeks benefit allowance) and moderate work (8 weeks of benefit allowance) is more than the difference between lifting 5 vs. 10 kilograms. How the all knowing nurse case manager, coming out of the obstetrics ward of the recently government closed Wellesley Hospital, is going to judge this independently is beyond belief. Rigid bureaucratic solutions are no solution.

E. No Appropriate Assessment Process is Proposed

Rather than looking at a worker specifically and trying to work out a rational goal oriented treatment process, nurse case managers will perform more WCB cookie cutter determinations thus perpetuating the collosal waste created by the $100 million WCB Community Clinic programme. How the Board will be able to treat chronic pain to prevent it is still a total mystery.

F. Long Term Follow Up Is Lacking

Although the WCB promises to allow tenders for clinics wishing to treat chronic pain, it is known that negotiations with hospitals, who have failed to run successful programmes in the past, are already underway. Historically the WCB has been profoundly oblivious to the need to help injured workers slowly work their way back to productive lives, but rather will either over or under-compensate.

Conclusion:

The Government is right on to limit benefits and treatment when chronic pain arises. Maybe the Compensation Board is correct not to follow all the recommendations of the secret panel of "experts" but how about following common sense? A chronic pain treatment programme should be therapeutic not punitive. The treatment programme must have time to co-ordinate with the workplace and to look at what factors there are causing problems.

Second Injury & Enhancement Fund Relief Can Stretch 3-Year Window

Is Your Company Eligible for a Retroactive NEER Adjustment?

By Elinor Bornstein

NEER Policy

For purposes of calculating lifetime costs of accidents with respect to the NEER rating, the Board has established a"three-year window" during which costs and cost relief can be applied to the Employer's account, with a cut-off date of September 30 of the third calendar year following the accident. Under the NEER Plan, this is felt to be a reasonable period for an accurate estimation of the appropriate cost for each claim.

Beyond this date, the claims are no longer considered under the NEER Plan, and no cost consequence will impact upon an Employer. Therefore, if the claim attracts greater costs than those estimated, after the closure of the "three-year window", these costs are not included in the Employer's Neer account. Likewise, if any relief is granted to the Employer after the Neer closure, the Employer does not obtain the benefit of that relief.

The three-year cut-off period was felt to be desirable for administrative convenience and finality. The cut-off point has the effect of finalizing the Employers' assessments for that year, as affected by a refund or surcharge, thereby giving certainty to Employers.

The theory behind the "three-year window" is explained in a letter dated September 2l, l993 from the Director of the Revenue Policy Branch which notes that it is unnecessary to continue to carry old claims on an Employer's experience rating record for extensive periods for no justifiable purpose, since the Employer's ability to take remedial action to contain claims costs is very limited beyond a certain stage in the life of a claim (WCAT 59l/94).

The Board's Experience Rating Adjustment Guidelines dated March 8, l993 notes that the "three-year window" is intended to give the Employer sufficient time to mitigate the costs of accidents, while ensuring that the window is short enough to provide a continuing incentive to Employers to promote vocational rehabilitation, return to work and safety on the job. Permitting cost relief granted after the closure of the "three-year window" to be considered in determining NEER refunds or surcharges could have a negative impact on the incentives built into the NEER Plan (WCAT l5l/96).

Board Practice:

Board practice, as outlined in the March, l993 Guidelines, was to refuse to re-open the Neer window after the 3-year cut-off date, in order to retroactively readjust the Neer assessment, with strictly limited exceptions, as follows (WCAT 59l/94) :

A. For All Voluntary Experience Assessments, in General, to Readjust the Most Recent Assessment and up to Five Preceding Assessments:

l. For audited payroll or classification revisions;
2. For retroactive closures of claims;
3. For third party recoveries/transfers;
4. For fraud/disallowance of a claim;
5. For claim overpayments and;
6. **When directed by an Appeal level.**

B. To Readjust the third year of the Neer Assessment:

l. For S.I.E.F. granted on claims before Sept. 30, of the final review year and not fully processed;
2. For computer errors (e.g. cap values on FEL); and
3. For overpayment corrections/fraud adjustments.

C. To Readjust the first and second years of the Neer Assessment:

l. For undue delay/error in processing (e.g. SIEF granted more than 3 months before being processed.)

W.C.A.T. Decision No. 59l/94

Workers' Compensation Appeals Tribunal (W.C.A.T.) Decision No. 59l/94 dated January 9, l995 was the first Appeals Tribunal Decision to direct the Board to retroactively adjust a Neer assessment, in order to incorporate Second Injury and Enhancement Fund Relief of the costs of a claim awarded after the Neer closure for the claim. The Decision was made further to the Board Policy allowing for retroactive adjustments **when directed by an Appeal level.**

Interestingly, W.C.A.T. Decision 59l/94 notes that, according to the case law, the *Workers' Compensation Appeals Tribunal* (the "Tribunal") is the only appeal level which has the authority to direct a retroactive adjustment, other than ones falling within the narrow parameters outlined in the Board Guidelines.

W.C.A.T. Decision No. 59l/94 has the effect of expanding the scope for re-opening the "3-year Neer window", after its closure, to allow for retroactive adjustments of a Neer assessment, beyond the extremely limited circumstances previously recognized by the Board which essentially corrected errors in calculations or processing. The Employer who appealed to W.C.A.T. for this ruling was represented by the law firm of Fink and Bornstein, currently *Fink and Associates*.

W.C.A.T. Decision 59l/94 provides that the" 3-year Neer window" should be opened when warranted, having regard to the **real merits and justice** of a particular assessment appeal. The Tribunal reasoned that the cut-off period in the NEER program is desirable for administrative convenience and finality. However, the NEER Policy should recognize **exceptional circumstances** in accordance with the real merits and justice requirement which the W.C.B. legislation imposes on both the Board and the Appeals Tribunal in rendering decisions.

The Decision notes that when designing its policy on Second Injury and Enhancement Fund Relief, the Board recognized there could be situations fraught with delays which are systemic, and not necessarily the result of any failure by the Employer, the Board or the Tribunal to exercise due diligence. For example, it was conceivable that neither the Employer nor the Board would be aware that S.I.E.F. would apply in a claim, until the Worker's recovery became prolonged. This delay would be inherent in the S.I.E.F. policy. Similarly, delays in obtaining medical access, a possible section 23 medical examination, and 3 possible appeals could prolong the time involved in any S.I.E.F. application. Finally, adjudicative delays could result from an increased number of appeals within the compensation system.

The Tribunal concludes, on page l6 of the Decision:

"...Where an employer has acted with due diligence in investigating a potential SIEF claim and in pursuing such claim, we find that such employer should not automatically be deprived of an equitable remedy simply because of the nature of a worker's disability, systemic delay, and an arbitrary cut off date designed to foster administrative convenience."

The Tribunal stipulates that the following four factors should be considered when it rules on whether exceptional circumstances exist to warrant a retroactive NEER adjustment:

l. whether the employer acted with due diligence in pursuing a SIEF claim after the employer knew, or ought to have known, of a "prolonged" recovery period or "enhanced" disability;

2. the nature of the disability-i.e. whether it involved a long usual recovery period; whether it involved a complex condition which made diagnosis and treatment difficult; or whether the pre-existing condition was unknown;

3. whether systemic delay resulted in a final decision outside the three-year "window"; and

4. the elapsed time between the NEER cut-off date and the final SIEF decision, because a longer elapsed time period could mean a more complex adjustment.

W.C.A.T. Decision 59l/94 found that since the Employer acted with due diligence in pursuing S.I.E.F. relief, once the Worker's chronic pain condition was detected, and a favourable S.I.E.F. Decision was ultimately received from W.C.A.T. less than three months after the arbitrary cut-off date for Neer adjustments, the Employer's Neer assessment should be retroactively adjusted to incorporate the S.I.E.F. Relief of costs.

W.C.A.T. Decisions Subsequent to 59l/94

Subsequent W.C.A.T. Decisions have discussed and followed the principles established in W.C.A.T. Decision No. 59l/94.

A review of the case law indicates that the most important consideration in influencing the outcome of an appeal for a retroactive Neer adjustment will be whether an Employer has met the "due diligence" standard. In other words, the Tribunal will tend to consider whether the Neer cut-off date expired, despite the due diligence of an Employer in pursuing S.I.E.F. Relief of costs.

W.C.A.T. Decision No. 887/95 dated December l2, l995 states that there should not be a rigid definition and application of the "due diligence test" established in W.C.A.T. Decision No. 59l/94, since this would encourage frivolous and routine S.I.E.F. requests by Employers for the sole purpose of obtaining S.I.E.F. Relief of costs prior to the 3-year Neer cut-off date.

However, in the following cases, the Tribunal has focused on a determination of whether an Employer has pursued S.I.E.F. Relief of costs with due diligence:

"Due Diligence" Needs to be Proved

1. In W.C.A.T. Decision No. 93l/95 dated January 24, l996, with respect to the second claim under review, the Tribunal found that there was no due diligence, on the part of the Employer, who first requested S.I.E.F. Relief of costs, 3 months following the Neer cut-off date;

2. In W.C.A.T. Decision No. 443/ 95 dated August 24, l995, the Tribunal found that the Employer did not exercise due diligence by failing to request S.I.E.F. Relief of costs, until less than one month prior to the Neer cut-off date;

3. In W.C.A.T. Decision No. 968/95 dated July 5, l996, there was no finding of due diligence since the Employer, though aware of a pre-existing condition prior to the allowance of the claim, failed to request S.I.E.F. Relief, until l0 months after initial entitlement was granted;

4. In W.C.A.T. Decision No. 19/96 dated June 7, l996, the Tribunal found, in the ll cases under review, that one request by the Employer for S.I.E.F. Relief of costs prior to the Neer cut-off date with no follow-up by the Employer, other than on the Neer cut-off date, did not constitute due diligence by the Employer;

5. In W.C.A.T. Decision No. 967/95 dated July 5, l996, the Tribunal found there was due diligence, on the part of the Employer. The Employer was persistent in pursuing its request for S.I.E.F. Relief of costs, made in the same month the claim was allowed, by requesting file access, making written submissions, and reminding the Board, twice, after having received 3 negative

Decisions from the Claims Adjudicator, to refer its appeal to the Decision Review Branch;

6. In W.C.A.T. Decision No. 887/95 dated December l2, l995, the Employer was found to have acted with due diligence in requesting S.I.E.F. cost relief about 3 months after the Worker's one-year recurrence of disability, and in requesting file access, right after the Board had rendered a negative decision.

The Tribunal, in this case, found that the Board's S.I.E.F. Operational Policy No. 08-0l-05 provides that, irrespective of a request from the Employer, the Adjudicator should promptly consider entitlement to S.I.E.F. Relief, particularly where the evidence suggesting a pre-existing condition is clear and unambiguous. In the case under review, the Doctor's First Report,and another early medical Report noted pre-existing symptoms and problems. Therefore, the Board's failure to consider S.I.E.F. Relief, until the issue was raised by the Employer, was held to be a factor contributing to the untimely S.I.E.F. award. The Tribunal found that the Employer, would not have had any knowledge of a pre-existing condition prolonging the Worker's disability, until it had received medical file access following the Worker's recurrence of disability;

7. In W.C.A.T. Decision No. 2l8/96 dated April 4, l997, the Employer did not request S.I.E.F. Relief of costs, until after the Neer cut-off date for the claim. However, the Tribunal did not find that the Employer failed to act with due diligence, since the Employer had been denied file access, and only the Board was aware of the X-Ray Report indicating degeneration in the neck, prior to the Neer closure;

8. In W.C.A.T. Decision No. 57l/97 dated June l7, l997, the Worker was only off work for two months, and his claim was not re-opened,until he underwent surgery, in the third year of the claim. Therefore, although the Employer did not request file access, until after the Neer cut-off date for the claim, the Tribunal held that there would have been no reason for the Employer to have raised the issue of S.I.E.F. Relief earlier, and that there was, therefore, due diligence, on the part of the Employer.

The Tribunal found that the Board had evidence on which to address the S.I.E.F. issue, prior to the Neer cut-off date, but that fact, alone, would not have warranted a retroactive cost adjustment, without due diligence, on the part of the Employer;

9. In W.C.A.T. Decision No. 151/96 dated March l4, l996, the Employer was found to have acted with due diligence, although it only requested S.I.E.F. Relief of costs, once, in the first year of the claim, and once in the third year of the claim.

Once again, the only knowledge of a pre-existing degenerative condition was with the Board who received a CT Scan Report, after denying the Employer's initial request for S.I.E.F. Relief of costs. The Tribunal found that the Board should have notified the Employer of this CT Scan Report, or revived the Employer's entitlement to S.I.E.F. cost relief . However, no ruling was made, until the Employer renewed its appeal for S.I.E.F. Relief of costs, 2l months later.

"Due Diligence" Test Modified by Pre-Existing Condition

Therefore, the test regarding what constitutes " due diligence" can be relaxed where the Board is plainly aware of the pre-existing condition.

W.C.A.T. Decision No. 151/96 notes that another important consideration in determining whether an Employer has discharged its obligation of due diligence is whether the Employer was actively involved with the Worker's re-employment and rehabilitation, in order to reduce the impact of the injury upon the Worker, as early in the life of the claim as possible.

In the claim under review, the Employer had accomodated the Worker, prior to his work injury. In addition, following the work injury, the Employer made consistent efforts to accomodate the Worker's disability through modified work;

10. In W.C.A.T. Decision No. 426/95 dated July l2, l996, the Employer contacted the Board respecting returning the Worker to modified work. However, the Employer did not contact the Worker personally. The Employer did not appeal an award of 50% S.I.E.F. Relief of costs, until more than one year after receiving file access. In all of the circumstances, the Employer was not found to have acted with due diligence in further reducing the costs of the claim;

11. In W.C.A.T. Decision No. 1055/94 dated January 9, l996, the Employer's due diligence was questionable in that periods of one year and 6 months, respectively, elapsed before the Employer's first request for S.I.E.F. Relief of costs, and second request for S.I.E.F. Relief of costs and file access. In addition, a pension and pension supplement was granted to the Worker subsequent to the Neer cut-off date for the claim. The Tribunal found that, in all of the circumstances, the Employer had not raised the S.I.E.F. issue with the consistency required to justify a retroactive cost adjustment;

"Due Diligence" Missing Relief Still Granted

12. In the following two cases, due diligence was missing but the Employer was granted relief from the 3-year rule:

(a) In W.C.A.T. Decision No. 93l/95 dated January 24, l996, in the first claim under appeal, the initial Adjudicator awarded 50% S.I.E.F. Relief of costs, in error, instead of 75% S.I.E.F. Relief of costs which was later granted by the Claims Manager. A retroactive Neer adjustment was granted to incorporate the award of 75% S.I.E.F. Relief, having regard to the identified error, even though the Employer did not request increased S.I.E.F. Relief, until after the Neer cut-off date. The Tribunal found that the Board's own criteria for re-opening the Neer window for identified errors had been met;

(b) In W.C.A.T. Decision No. 328/97 dated April 29, l997, respecting the claim designated as "#400", the Employer first requested S.I.E.F. Relief, in the last month of the 3-year Neer window. However, the Claims Adjudicator had failed to address the S.I.E.F. issue, twice, through oversight, in the first year of the claim, and in the second year of the claim, following the finding of the Pension Assessor of a moderate pre-existing condition. The Tribunal found that the Adjudicator's obvious errors resulted in an S.I.E.F. Decision outside the Neer window and constituted exceptional circumstances sufficient to warrant a retroactive adjustment of the Neer Assessment;

In summary, the Tribunal will find due diligence, on the part of an Employer, warranting retroactive cost reduction for an untimely award of S.I.E.F. Relief, where an Employer's initial appeal for cost relief was timely, having regard to the circumstances of the case, and where the Employer made consistent efforts to ensure that its appeal was processed through the W.C.B. Appeal system within the 3-year Neer window. However, other factors may influence the due diligence requirement. The scales could tip in favour of finding of due diligence where the Employer was active in reducing the costs of the claim, for example, by encouraging the Worker to return to modified work.

Where substantial costs, (i.e., a N.E.L. or F.E.L. award) were not included in the final Neer assessment for a claim, an Employer may have to pass a stricter test of due diligence, in order to merit a retroactive Neer adjustment. Conversely, an Employer could be held to a much more lenient standard of due diligence, where the Board failed to exercise its discretion to consider the Employer's entitlement to S.I.E.F. Relief, in situations where only the Board, and not the Employer, could have been aware of potential S.I.E.F. Relief. Finally, the due diligence requirement has been downplayed by the Tribunal, where blatant errors in Board decision-making have been found to warrant a retroactive adjustment of a Neer assessment.

It should be noted that, in W.C.A.T. Decision No. 920/96, a finding of due diligence, on the part of an Employer, was found to warrant a retroactive adjustment to a Neer assessment, to incorporate the W.C.A.T. ruling, on November 7, l996, that a Worker's disability, in l993, should not have been allowed as a new claim but as a recurrence of his disability, in l986, under a prior claim.

The other two important considerations in the granting of retroactive Neer adjustments are the nature of the disability and systemic delay resulting in a final decision outside the 3-year Neer window.

Nature of Disability Important Consideration

The following W.C.A.T. cases, in which the appeal was allowed, comment on how the nature of the disability can impact on an appeal for a retroactive cost adjustment:

1. In W.C.A.T. Decision No. 59l/94 dated January 9, l995, the Worker's claim was for tendinitis of the right arm. However, the Worker developed chronic pain which was not accepted by the Board, until the second year of the claim. The Tribunal found that in cases involving serious injuries or those involving chronic pain, as in the case under appeal, recognition of potential S.I.E.F. claim could take a significant part of the three-year Neer window. Therefore, a retroactive cost adjustment would be required;

2. In W.C.A.T. Decision No. 986/96 dated November 2l, l996, the Worker injured his low back. However, the Worker also suffered from an upper respiratory infection which prevented him from returning to work. Prior to adjudicating the Employer's entitlement to S.I.E.F. Relief, the Board had to conduct investigations and rule on whether the respiratory condition was compensable. The Tribunal found that the complicated nature of the Worker's disability contributed to unavoidable delays in that it required investigation which the Board was not able to undertake quickly enough to meet the NEER deadline for rendering a final determination on S.I.E.F. Relief of costs;

3. In W.C.A.T. Decision No. 967/95 dated July 5, l996, the nature of the disability complicated and delayed the final resolution of the issue of S.I.E.F. Relief of costs since the Board needed to first determine whether to allow the Worker's disability as a recurrence of a disability under a prior claim or whether it constituted a new injury under a new claim;

4. In W.C.A.T. Decision No. 231/96 dated April l0, l996, the Tribunal found that the adjudication of the claim was complicated by a disabling condition which included more than one element. The initial entitlement was for tendinitis of the left wrist. Subsequent entitlement was granted for the left elbow and shoulder. The Worker's condition was complicated by a left axillary lymphadenopathy, and chronic myofacial pain syndrome was also suggested. The Tribunal noted that a serious injury, difficult diagnosis or extended recovery period and treatment could result in a final S.I.E.F. decision outside the three-year Neer window;

5. In W.C.A.T. Decision No. 151/96 dated March l4, l996, mentioned above, the Tribunal found that the nature of the disability influenced the untimeliness of the final determination on S.I.E.F. Relief , since neither the Board nor the Employer could confirm the existence of a pre-existing condition, until degeneration was diagnosed following receipt of a CT Scan, in the second year of the claim;

6. In W.C.A.T. Decision No. 954/95 dated July 5, l996, the Board had to rule on whether a Worker's recurrence following an accident at home, in the second year of the claim was compensable. The Board's ruling to allow the recurrence was not made,until the third year of the claim, and the Employer had no reason to request S.I.E.F. Relief of costs, until then. Therefore, the Tribunal found that the nature of the disability was a factor beyond the normal expectations of the

Board and the Employer which contributed to the lateness of the Decision granting S.I.E.F. Relief of costs.

Systemic Delay a Key Factor

The following W.C.A.T. cases discuss systemic delay resulting in a final Decision outside the 3-year Neer window which would warrant a retroactive cost adjustment:

l. In W.C.A.T. Decision No. 231/96 dated April l0, l996, noted above, the Tribunal found that the primary source of the systemic delay leading to an untimely Decision, was the Adjudicator's initial misapplication of its S.I.E.F. Policy in failing to consider whether a pre-existing condition contributed to the compensable disability. In addition, the Tribunal found that there were other normal delays inherent in the appeal system which contributed to the deferred S.I.E.F. Relief of costs.

This Decision follows the reasoning in W.C.A.T. Decision No. 59l/94 that there are potential delays inherent in the S.I.E.F./NEER system which would not necessarily be the fault of the Board, Worker, Employer, or a representative, that would result in a final S.I.E.F. determination outside the 3-year Neer window. The Tribunal, in this Decision, recognizes that a systemic delay warranting a retroactive cost adjustment can encompass both normal delays which are inherent in the system and delays resulting from some Board wrongdoing;

2. In W.C.A.T. Decision No. 151/96 dated March l4, l996, the Tribunal accepts the definition of systemic delay as that which was beyond the Employer's control and which would make compliance with a three-year NEER window exceedingly difficult;

3. Likewise, W.C.A.T. Decision No. 660/97 dated June 30, l997 notes, on page 8, that in W.C.A.T. Decision No. 59l/94, the case involved a number of systemic delays over which the Employer had no control;

4. In W.C.A.T. Decision No. 346/96 dated October 29, l996, the Tribunal found that there was unreasonable systemic delay by the Board in refusing to consider increased S.I.E.F. Relief, despite having all the relevant information respecting the role of the non-compensable conditions, which deprived the Employer of additional S.I.E.F. Relief prior to the Neer cut-off date;

5. W.C.A.T. Decision No. 954/95 dated July 5, l996, noted above, found that systemic delays by the Board, including the Adjudicator's failure to refer the Employer's request for S.I.E.F. Relief to the Board Doctor for 6 months, and failure to render a Decision respecting S.I.E.F. Relief prior to the last month of the Neer window, were responsible for the final S.I.E.F. Decision outside the Neer window.

The dissenting opinion in this case noted that since there was no unreasonable delay by the Board, beyond the normal adjudicative delays, and since a pension was granted after the Neer cut-off date, no retroactive cost reduction should have been granted to the Employer. However, the majority opinion correctly follows the principle of systemic delay outlined in W.C.A.T. Decision No. 59l/94;

6. W.C.A.T. Decision No. 7l6/96 dated December 3l, l996 found there was no systemic delay which precluded a Decision on S.I.E.F. Relief of costs being made within the Neer window. The Tribunal reasoned that unless Board procedure went outside the normal processes or was flawed, a re-opening of the window would not be appropriate. Although the case under appeal involved lengthy delays, they did not result from flaws in the system, or unusual factors, or extraordinary circumstances weakening or faulting the system.

The reasoning in this Decision deviates from the principle and definition of "systemic delay" established in W.C.A.T. Decision No. 59l/94, and followed in later Decisions;

7. In W.C.A.T. Decision No. 224/96 dated April l0, l997, respecting Claim MA, the Tribunal found there was systemic delay by the Board in arranging a pension examination which led to the delay in delivering a Decision respecting S.I.E.F. Relief of costs. Respecting Claim ME, the Tribunal found there was systemic delay inherent in the appeal system, of 4 months in granting file access, and of 9 months, in arranging a hearing date leading to a final S.I.E.F. after the Neer cut-off date;

8. W.C.A.T. Decision No. 649/96 dated April 30, l997 grants 50% S.I.E.F. Relief of the costs of the claim, and a retroactive Neer adjustment to incorporate the award, on the basis that delays in the administrative and adjudicative system were the major factor in the rendering of the Decision after the Neer closure for the claim.

A review of the case law indicates that retroactive adjustments to a Neer Assessment have been granted, when the *elapsed time between the Neer cut-off date and the final S.I.E.F. Decision* has exceeded 3 months, as in W.C.A.T. Decision No. 59l/94. In various cases, the elapsed time has amounted to 5 months after the Neer cut-off date (W.C.A.T. Decision No. 57l/97), 7 months after the Neer cut-off date (W.C.A.T. Decision No. 649/96), one year after the Neer cut-off date (W.C.A.T. Decision no. 2l8/96) and l7 months after the Neer cut-off date (W.C.A.T. Decision No. 224/96, claim of ME), depending, inter alia, on what level of appeal made the final determination on S.I.E.F. Relief of costs.

Revised Policy on Adjustments

The Board has adopted a Revised Policy and Guidelines on Adjustments to Neer Refunds and Surcharges effective January l, l997 which can be summarized as follows:

l. The Board will adjust the final Neer refund or surcharge:

(a) In the case of a Board error, for a period of one year after the final review;

(b) For errors in processing (i.e., typographical, computer generated, or

failture to process or act upon decisions) if the adjustment is requested by an Employer and the Employer is aware of the error, on or before September 30th of the fourth year after the accident year;

(c) For retroactive adjustments affecting classification and assessable earnings;

(d) As required by court judgement or when a W.C.B. or W.C.A.T. Decision reverses a Decision to allow entitlement to a claim; or

(e) For revisions to cost or assessment data.

2. Where an Employer has not disclosed necessary information to the Board, a retroactive debit adjustment may be made for up to 5 prior assessment years;

3. The Board will adjust the final Neer refund or surcharge as far back as required for fraud or where the Board had not received the year end reconciliation at the time that a provisional assessment was levied.

Every Decision made pursuant to this policy must be made according to the real merits and justice of the case.

This change in policy and guidelines should not prevent the continued application of the W.C.A.T. case law, as outlined above.

Note the provision, from the Guidelines, above, that the Board will adjust a final Neer refund or surcharge, in the case of a Board error, for one year after the final review.

In addition, as noted in W.C.A.T. Decision No. 218/96 dated April 4, l997, on pages 5-6, " there are no provisions in the Neer plan or policies which preclude retroactive adjustments,....simply guidelines which the Experience Rating Section is currently following." Furthermore, the Tribunal notes, on page 7 of the Decision: "The Board, while it continues to apply a much stricter standard, has also not challenged, nor addressed, this approach. We therefore adopt the *Decision No. 59l/94* criteria."

Finally, the updated Policy and Guidelines state: "In most cases, revisions to cost or assessment data not available on or before September 30 for the final review do not result in an adjustment to the final NEER refund or surcharge. The following guidelines explain exceptions to this rule."

This statement does not assert that the guidelines intend to encompass all possible exceptions to the rule.

Unfortunately, we will have to continue to appeal to the Workers' Compensation Appeals Tribunal, when justice demands a retroactive adjustment to a Neer Assessment to incorporate cost relief granted outside the 3-year Neer window.

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