FINK & BORNSTEIN
PROFESSIONAL CORPORATION
BARRISTERS & SOLICITORS

Vol. 19 No 1

Workers' Compensation Newsletter

The Conventional Wisdom:

Over the past two years, The Ministry of Labour has hired 200 more safety inspectors to enforce ergonomic and other safety standards throughout Ontario. Additionally, inspectors appointed under 65 Ontario Statutes, other than the *Workplace Safety and Insurance Act* and *Occupational Health & Safety Act*, are now cross-appointed to also stick their nose into health and safety infractions. The stated goal of the Minister is to reduce lost time accidents by 20% between 2004 and 2008. (Presentation of the Assistant Deputy Minister to the Canadian Bar Association, October 26, 2006).

A Contrarian Opinion:

The Ministry of Labour believes that between 2003 and mid-2006 there have been 9,100 fewer accidents per year, representing a 10% reduction in that period. My submission is that there has been no *real* reduction in accidents in the past year, 3 years or 6 years, that in fact the opposite is true, there has been an increase in accidents. Furthermore, that the initiatives of the Ministry of Labour and the Workplace Safety and Insurance Board have so far been ineffective. This article will also opine the reasons for the Government's failure and what could be done to correct the problem.

(All statistics used in this article are derived from the 2005 WSIB Statistical Supplement; the 2005 WSIB Annual Report; the 2001 WSIB Annual Report, and Statistics Canada Information on line. All percentages have been rounded to the nearest complete percent.)

The WSIB's Accident Statistics are not all they seem. At first glance, Lost Time accidents have declined from 107,407 in 2000 to 92,727 in 2005. If one adjusts the

Steven Mahoney, WSIB Chair

2000 statistics to reflect the increase in Board premiums (reflecting increased numbers of worker employed, ie. at risk), further adjusted for the overall increase in wages in Ontario, the decrease of accident frequency for the past six years is 27%. At page 9 of the 2005 WSIB Annual Report, the Board crows that prevention is their first fundamental, and progress in prevention is being made.

I ask our readers to consider the following proposition: if the number of accidents is truly decreasing, then shouldn't the number of serious accidents also be decreasing? In other words, how would it be possible to have reduced the accidents causing no permanent disability, and not as well the accidents leaving a worker with a permanent disability? Are we only witnessing a decline in inconsequential accidents? Is it possible that Ontario employers could be successful preventing small accidents but not big accidents concomitantly? Furthermore, if accidents are being prevented with the correlation that workplaces are safer, one might expect that those workers who are permanently disabled would have less debilitating injuries, in other words, the overall severity of the injuries would decline.

(Continued on page 2)

New study finds:

Young, Inexperienced Workers Primarily Responsible for Construction Accidents in Ontario

Four professors from the Universities of Toronto, Saint Mary's, and Waterloo managed to extract over $250,000 from the WSIB to study the events and conditions leading to work injuries from physical, operational and psycho-social points of view; and to understand how these factors might lead toward or prevent accidents in the future. The academics surveyed 911 workers who had at least one work accident in the previous 3 months.First off, the researchers note that although Ontario is a world leader in safety standards and safety results, boasting one of the lowest fatality rates in the world, there are still 30 deaths per year in construction, half of which were from falls, and probably 600 near-misses. They note that solving engineering issues had in the past helped decrease accidents but now only 10% of accidents were due to technical deficiencies, and that the remaining accidents were likely the fault of management.It's not surprising the researchers would assume that Ontario work accidents are primarily management's fault, given the Ministry of Labour view that by hounding Ontario industry with 300 prowling inspectors, accidents can significantly reduced. The researchers list 20 factors that have, in past studies, been found to prevent

(Continued from cover)

Fatalities:

The easiest place to check this proposition out may be with regard to fatalities. Fatalities have declined from 125 in 2000 to 104 in 2005. The problem with fatality statistics is that there are, fortunately, too few of them to gain an accurate picture of workplace accident statistical trends. Accordingly, each year the number of fatalities goes up and down. So for instance, at the time of WSIB Chair Mahoney's address to the Canadian Bar Association on November 21, 2006, 2006 fatalities had already surpassed the number of 2005, making fatality statistics a marker worth considering, but not altogether reliable.

NELs: A Clearer Window into Accident Statistics:

A better window to view what is happening to accident frequency comes from the Board's statistics regarding Non Economic Loss (NEL) Awards. Board Policy 18-05-03 states: "Workers who have a work-related permanent impairment are eligible for non-economic loss (NEL) benefits. To rate permanent impairments, the WSIB uses a prescribed rating schedule, the report from a NEL medical assessment (if one is conducted), and all relevant health information in the claim." In my experience, 99 out of a 100 times, a medical exam precedes a NEL determination, and 95 out of 100 times the NEL percentage is derived from entering the measurements and diagnosis determined by the NEL examing doctor into a computer program that produces a percentage NEL award, which is further translated into a monthly or lump sum payment to the injured worker.

The NEL doctors are picked by workers, generally at random, from a list of private doctors who have not been associated with the claim. NEL awards are about as objective a determination as the WSIB ever makes. Thus, from a statistical point of view, we have a near-perfect means by which to determine the quantity of serious accidents which occur each year, and the ability to compare how serious, overall worker injuries have been year to year.

In the past 6 years, adjusted for premium and average Ontario wage increases, the number of NELS award have increased by **6%**. However, more importantly, adjusting for Board premium and Ontario wages, severe NELs (40-100% NEL ratings) have **increased** by **31%** between 2000 and 2006; while moderate NELs (20-40%) and minor nels (5-20%) have **increased by 10% and 14%** respectively. It is only the minute NELs (0-5%) which have **declined**. Even adjusting for the epidemic in mental health disorders gripping the workforce, the only conclusion that can be drawn is that since the number of NELs are increasing, so are the number of workers being seriously injured each year, and they are being injured more severely.

I submit, logically, that the actual number of serious and non-serious lost time injuries must be increasing each year in tandem, but accident reporting is being skewed by some employers. The drop in lost time claims reported to the Board reflects fewer claims being reported, not fewer claims occurring.

Board Benefits Rising Exponentially:

There are other statistics pointing in the same direction, although not so precise as the NEL statistics. If accidents are decreasing, the one statistic every employer has to scratch his/her head over is WSIB benefit costs. After adjusting for increases in premiums and wages, these have **risen** by **40%** in the past 6 years. While the Board's current excuse for the rise is health care costs, which have doubled over the same period of time, health care remains at only approximately 10% of total benefits. The Board has been studying the rise in health care costs for the past 8 months, but has yet to produce a report.

Assuming the entire benefit increase is for something more than just providing injured workers with greater access to morphine, one would think that a greater expenditure on health care would increase worker's health and thereby decrease the amount of benefits which would otherwise be expended. However, going back to the NEL statistics, if more workers are being injured, and being injured more severely, then the increase in benefit costs would be expected, whether benefit entitlement by the WSIB has become more or less lax.

No Lost Time Accident Statistics Confirm the Fallacy of Fewer Injuries:

In the event Ontario employers are indeed fradulently reporting fewer "lost time" accidents, the trend may show up in a different frequency of "no lost time" vs " "lost time" accidents. If employers don't bother suppressing "no lost time" claims because such claims have little financial penalty, one would expect a smaller decrease in "no lost time" accident frequency.

Bingo! While "lost time" accidents between 2000 to 2006 declined by 27%, "no lost time" accidents declined by only **18%**. A lower decrease, because fewer "no lost time" claims are swept under the carpet or "lost time"accidents have been transformed to "no lost time". I don't suppose anyone can believe Ontario employers have managed to decrease non-serious "no NEL award" lost time accidents, but haven't done quite so well in preventing in non-serious "no NEL award" no lost time accidents. While it is possible that some NEL awards are given to "no lost time" claims, experience shows that workers with a significant disability will almost invariably lose at least one full day of work.

Smaller Employers and Industry Variations:

One hypothesis to account for the large under-reporting of lost time claims would be that it is the small employers in the new economy that are flying below the WSIB's radar. The service sector is one of the fastest growing parts of the Canadian economy. While much of the service sector, such as financial institutions are exempt from WSIB coverage, 2005 still saw 71,000 WSIB claims registered from this sector. The decline of WSIB claims registered in the Service Sector is far less than in the rest of covered industries: a **12%** decrease from 2001 to 2005 for small service sector companies and only a **5.0%** decrease for large service sector employers (over 20 employees), adjusted for increases in service sector employment and wages. This could be taken to mean that the service sector has made less progress in reducing accidents; or doesn't hide accidents quite as much as other sectors, so the decrease in accidents is not as inflated; or that this sector has been under reporting accidents for years so trends are skewed; or that smaller firms are now under reporting accidents more often. I don't know which is accurate.

It is however counter-intuitive that small service sector employers would be doing a better job in preventing accidents than

The Myth Continues:

The Board's New Proposed Return to Work Policies:

In October 2006, the WSIB proposed a second set of new Board Policies in designed to compel employers to return injured workers to work. The first edition of the policies from the Spring of 2006 was widely panned by employers. The WSIB has no statistical evidence that the current policies are not working, or that the new policies will save the Board more money in benefits than it will cost them to further police employers. The Board's chief actuary has told me none of these things really matter if he can get just one more injured worker back to work.

The WSIB is extremely committed to these new policies, because it makes them look and feel that they are doing something about compensation benefit escalation (40% in the past 6 years), and compliance will cost employers a hundred times more out of their pockets, than it will cost the Board. Unfortunately, the Board's soft underbelly is workers who are incapable of almost any type of work, with or without job prospects from the accident employer, and adjudicators who are confused as to what to do about them.

1. The WSIB is planning to incorporate into the *Workplace Safety & Insurance Act*, the obligations under the *Ontario Human Rights Act*. These obligations are very onerous. For further reference please refer to Page 3 of WSIB Operational Policy 19-02-07. Employers have to provide job restructuring and retraining, as well as modification of facilities and work stations. The *Ontario Human Rights Act* requires monies to be spent by employers on job modifications up to the point of making the company insolvent, although the WSIB's chief policy wonk says the Board will not cause employers to have to go to quite that extreme.

2. If a Worker injures himself in a car accident after the work injury, the Employer must accommodate those disabilities. Thus, the Employer now takes on obligations that have absolutely nothing to do with work.

3. Under Operational Policy 19-02-02-Page 11, the WSIB can still kybosh an Employer's return to work plan, as not being sustainable. In other words, the WSIB can tell an Employer that even though the work offered to the injured worker is suitable, if the Board doesn't think that it is a long-term gain for the Worker, it can take the Worker out of the plan and put him in an expensive LMR Plan.

4. The penalty for Employer non-compliance is one year of benefits, plus the cost of the LMR Plan. These penalties can easily exceed $75,000.00, per infraction, particularly in construction.

5. Under Operational Policy 19-02-06, the Board can make decisions regarding levying of penalties, based on employers' past behaviour in other claims. This is again repeated at Page 3 of Policy 19-02-07, and is a very dangerous policy for employers. Failure to accommodate a worker in one claim will lead to loss of credibility with regard to further claims with each bad behaviour identified by Adjudicators (who generally are unfit to make such high quality judicial type Decisions).

6. Under Operational Policy 19-02-06-Page 5, employers must accommodate workers even before initial entitlement is accepted. Penalties can be made retroactive against the Employer for failing to accommodate, prior to notice that the claim has been accepted. Penalties for behaviour during a time that there is uncertainty as to whether there is an obligation in the first place, runs counter to British Common Law tradition over the past 800 years.

7. The Board can levy penalties both under s. 40 and s. 41, of the Act, if the types of behaviour are multi-faceted, such as not communicating with the worker and then terminating the worker. Penalties can exceed $100,000.00.

There are other problems, not the least of which is that there are no time limits to the obligation, overstepping of the Board's legal jurisdiction etc. Rather than our firm wasting more type, we invite our readers to contact the Chairman of the Board and the Ministry of Labour.

Baseball, Hockey and Gardening:

Leisure Activities not inconsistent with chronic pain?

The Result of Videotape Evidence:

The problem with the admissibility and usefulness of videotape evidence concerning injured workers engaged in activities not consistent with their entitled work disabilities, is the problem with the Board's entire chronic pain strategy. To confront the fifteen year epidemic of chronic pain disability, the WSIB has adopted an adjudicative strategy predicated on early return to work.

Repeatedly, based on published operational policies, Board Doctors and adjudicators will pronounce a worker to have an organic disability in order to adjudicate benefits' entitlements with a blind eye to the psychological disturbance the worker is suffering. That way it is easy for adjudicators to match organic restrictions with job descriptions, and send the claim off to the archives.

Only a half-hearted effort is made by the Board regarding management and treatment of chronic pain. It is the psychological aspect of even obvious organic conditions which confounds the return to work strategy itself, leaving the Board later, after appeals, to pick up billions of dollars in benefit and drug costs for morphine. To deal with chronic pain requires a level of skill and dedication that rehabilitation adjudicators do not possess. Thus, when employers send in videotape of workers demonstrating activities which exceed the stated disability, adjudicators are left perplexed.

A classic example is the May 10, 2006, WSIAT Decision 350/06. While not stating how the information came to light, it was found out that the injured worker was playing hockey as a goaltender, while at the same time professing that the

Young, Inexperienced Workers *(Continued from cover)*

accidents, of which only one is not management's responsibility.

•a safety culture to effect the deployment of management policies and practices;

•a safety management system;-safety needs to play an integral role in the business' s organizational characteristic and not be considered time consuming and a costly, isolated program;

• attention to accident reporting, statistics and equipment;

• participation of workers in safety responsibility and decision making;

• hiring practices which emphasize a set of conscious attitudes toward safety;

• positive reinforcement for desired safety behaviour;-motivation in other areas of work performance through measuring;

• quality of work leading to promotion, salary increases etc.;

• supervisors who have a strong personal emphasis on safety;

• managers who regularly discuss safety and do thorough accident investigations;

• availability of safety equipment;

• perception of risk in the workplace;

• work pressures such as pace and overload;

• seniority, skill level, qualifications, intelligence and job knowledge of the workers;

• fatalism based on a lack of control over being safe;

• safety audits;

• low worker turnover;

• small employers pass more risk control onto their workers and have more accidents.

Surprisingly, what the researchers found was that it wasn't management that was playing a major role in work accidents but the younger, more mobile work force.

Notwithstanding the researcher's finding that construction supervisors have a significant number of psychological symptoms, from having to perform their trade and supervise at the same time, generally, safety problems do not lie with supervision.

Attitudes towards safety were stronger, the older the worker. The older the worker and the more construction experience, the more leadership, job safety, safety consciousness, conscientiousness, and appreciation of management's effort there was. Younger workers complain of more physical symptoms related to their work.

The more time a worker spends with an employer, the more their safety awareness and involvement increases - this was the most important factor. Workers with an employer for less than one year, or who have been with many employers have a negative attitude towards leadership and safety supervision.

The median time spent in construction by workers surveyed was 14 years, but the median time spent with their current employer was 2.5 years, and most had 2 employers in the past 3 years.

Apprentices have more job stress than journeyman, worse attitudes to safety, and have more accidents. Non-union workers and supervisors had more stress on the job. There was no practical safety difference between workers who sat on a safety committee versus those who did not.

These researcher professors, for the first time in their careers, met head on the reality of what constructors have been saying for the past 5 years: "yes we can improve, but we are doing a good job now, the problem lies with the workforce." Unfortunately, this reality still does not seem to have enlightened the denizens of the Universities Toronto, Waterloo and St. Marys, because they came up with some solutions that for the most part missed the mark:

• the establishment of common safety and prevention programs amongst contractors;

• consistent safety cultures to be shared by employers, in other words contractors can't really be separate and competitive entities, but should be the non-autonomous divisions of "Safety Ontario";

• contractor safety programs should focus on young, and short term workers;

• employers should employ workers for a longer term;

• the unions should help and make certain that the above takes place;

While it's one thing for construction contractors to share best practices with their industry, it is quite another thing for them to have a shared culture imposed on them, or to somehow think one contractor wants his safety program exactly copied by his competition.

If a safer workplace is a more efficient workplace, why help your competitor get a leg up? And when is it a good idea for the construction industry to adopt a socialist partnership with the trade unions regarding management deliverables? How much training exactly can an employer afford to spend on an employee whom they expect to employ for only a few weeks? If the Union hiring hall is sending short-term employees over, how come they aren't trained by the Union?

The key finding the researchers failed to focus on, was that young and mobile workers had far more physical complaints than older "steady eddie" workers. This is the opposite of what I would have intuitively thought having played hockey in my twenties and then in my fifties. What this shows is that generally the younger workforce is not only poorly disciplined but is softer and less motivated. It would help if the Unions, the WSIB, and the school system stopped mollycoddling students who are about to enter the work force.

The Result of Videotape Evidence:

(Continued from page 3)

degenerative disc disease in his back was preventing him from returning to work as a construction labourer. When the hockey skills came to light the adjudicator shut off benefits.

In any case of tracking down the extent of disability in a degenerative condition, doctors, primarily have to rely on the reporting of the worker. Many studies have proven that outside and inside influences such as availability of benefits, pre-disposing psychological problems and work and home life, have huge impacts upon how an injured worker mediates his back condition.

Although computerized functional ability evaluations will identify workers making less than full effort, it still remains to be seen whether that lack of full effort is on account of subconscious psychological dysfunction (compensable), or malingering (non-compensable), or even somewhere in between (usually compensable). Thus in Decision 350/06, the adjudicator and the Appeals Resolution Officer said: "If you can play hockey goalie, you must be able to go back to construction."

All the ususal hurdles an employer faces when confronting an adjudicator with video tape are present in Dec. 350/06:

The Result of Videotape Evidence:

(Continued from page 4)

• the worker played goal only three times in two years, at least according to the worker, or maybe the Board and the employer just happened to only catch him in only a few games. Who can determine the actual number of contests played? If he only played three times, what is the big deal - maybe the rest of the year he had bad pain?

• the worker claims he was a standup goaltender, meaning he didn't have to "flop down or splay his legs" - in other words he was not exerting himself much as a standup goalie;

• he played in only in recreational tournaments;

• the physiotherapist said physiotherapy was more demanding than goaltending - in other words the doctors told him to stay active.

As someone who has played recreational hockey for too many decades to count, I have never seen a goalie who wasn't flopping around the ice like a beached whale at several intervals during the game. I read this decision to my hockey team at the bar after my Wednesday night game, and they considered it hilarious, but granted we had already consumed some alcohol.

The Appeals Tribunal put the worker back on benefits, albeit with the caveat that the worker is to give up life between the posts. But the question remains: could the worker yet return to being a labourer, not to mention perhaps play hockey defense? Given that the back and the mind are connected, how does one really know?

WSIAT Decision 539/05, released on November 2, 2005, involved a worker who was caught on videotape doing vigorous gardening for over an hour per day on the four days observed. Dr. Kirwin, the worker's physiatrist said he was surprised the worker was able to lift 30 pounds while gardening, but still convinced the worker had chronic pain although not to the extent the worker reported.

Half the advocates employed at the Ontario Legal Aid Clinic, Injured Worker Consultants, showed up to represent the worker, claiming it was not reasonable for the accident employer to employ a "videotape strategy".

The WSIAT panel after referring to management/labour arbitration cases that both allowed and rejected videotape evidence, decided instead to apply Board Policy and past WSIAT jurisprudence, and to allow into evidence the videotape on the grounds it was authentic, as well as relevant and probative to the issues before them: did the worker have chronic pain and could he perform the light modified work offered by the employer? The WSIAT Panel concluded, "that not without some doubt" the worker did have chronic pain. However, no benefits flowed to the worker, as the Panel found that worker was exaggerating his disability, and by unreasonably refusing modified work, he was disqualified.

The reader will want to compare this decision with an Appeals Tribunal Decision of 1987, 668/87. Video showed the worker to be apparently in no pain while lifting heavy packages. The Panel said this cast serious doubt upon the accuracy of the medical reports and the worker's credibility. Credibility, after all, is a key ingredient in a case of chronic pain or even joint degeneration, in a determination as to whether the disability is trivial or serious, because the conclusion is very much reliant on what the worker otherwise reports to his physicians.

It is proven that measures which disrupt the delivery and quantity of benefits reduce the demand for benefits. A threat that the employer may be following the injured worker around with a camera helps.

More importantly, the Workplace Safety and Insurance system is supposed to minimize the effects of the injury and disability, not merely tighten the flow of benefits. To deal with psychological and motivational aspects involved in an injury requires intensive, early, and dedicated resources applied to the 5,000 or so annual cases of chronic pain in Ontario. The current WSIB system is light years removed from such a strategy, so we suggest employers get out the video equipment.

Worker's Loss - Employer's Gain?

Final FEL and LOE Determination:

Fortunately for most employers the final Future Economic Loss (FEL) award or Loss of Earnings (LOE) award, that pays the worker a wage loss pension starting from the 5th or 6th year of the claim to age 65, is beyond the liability period in either the NEER Plan or CAD-7. However, we advise employers to still have some input in these matters, as they are ultimately paying for these awards. Additionally, proposed changes to employer Return to Work obligations will mean that the employer penalties for non co-operation will incorporate wage loss projections. Finally, the Minister of Labour is currently contemplating changing the legislation in regards to the deeming of an injured worker's future earnings, which will cost the WSIB (and hence employers) hundreds of millions in extra benefits. This paper will look at the issues of timing and deeming the amount of money the worker is imputed to be able to earn, thus forming the basis upon with the final monthly wage loss award is based.

For those not familiar with the process, recall that a worker who can't return to work with his/her accident employer will be paid a weekly pension until age 65 comprised of 85% of net of the difference between what he/she is deemed to be able to make in the future, usually after some retraining, compared with what the worker actually made at the time of injury. This determination is usually made 6 years after the date of injury, called a "lock-in".

In a WSIB Appeals Resolution Officer (ARO) decision of September 21, 2006, the auto assembly worker had been deemed by the Adjudicator to be able to earn $27.18 per hour as a purchasing agent, when the case was reviewed some 6 years after the injury for a final "lock in" award. This deemed amount of earnings was almost equal to what she earned as an automotive assembly worker ($27/hr.), thus she was entitled to no permanent LOE pension. The worker produced a report from Work Return's John Sheard, a professional vocational rehabilitation

(Continued on page 7)

(Continued from page 2)

large employers, given that most of the Board's initiatives in preventing accidents are aimed at large employers. However, this same trend carries over to the Construction Industry. Between 2001 to 2005 there was a **11.2%** decrease in claims registered with the WSIB for small firms (under 20 employees), adjusted for increased employment levels and wages, but only a **6%** decrease, adjusted, for large firms.

The 2005 CAD-7 Experience Rating Results for construction show 113 firms averaging CAD-7 penalties of between $69,068 to $233,044. To rate such a large penalty, the firms would need to be over 50 employees. So while many large firms may be oblivious to the Ministry's safety initiatives (but not necessarily, see the comments below regarding "Experience Rating"), in my opinion the better performance by small construction firms is more a reflection of greater under-reporting than better health and safety.

WSIB Chair Mahoney: *"You may Say He's a Dreamer, But He's Not the Only One"*:

Recently, appointed Chair Mahoney, in an address to the Canadian Bar Association on November 21, 2006, stressed a reduction in accidents as the major initiative that will occur under his watch, and further, that accident reduction is the only way to rein in skyrocketing WSIB benefits. The same position has been taken for the past 8 years by numerous WSIB presidents, chairmen; Labour Ministers and Labour Ministry Officials, and yet the escalating NEL and Board benefit statistics are ample proof that the safety initiatives, costing Ontario employers hundreds of millions of dollars annually, are ineffective. I will deal with each of the Board's accident reduction programs in turn to illustrate why the WSIB and Labour Ministry are barking up the wrong tree.

Advertising:

The point of past and present advertising (current WSIB TV ads come to mind) regarding safety, assumes that accidents are caused by employer and employee recklessness and such behaviour can be changed by media persuasion. There are no statistics on whether this assumption is true. However, we **estimate** (the MOL doesn't keep stats) that there are less than 900 successful prosecutions of employers and workers annually for health and safety violations resulting in injury, yet there are over 90,000 lost time claims (not much greater than 1% of serious accidents are caused by significant employer neglect). Past advertising campaigns by the Board have produced no measurable results. The Government's "Stop smoking campaigns" have reduced consumption of tobacco, but the cost of this effort has been massive in comparison to past efforts regarding health and safety, meanwhile tobacco sales in Canada continue to be worth many billions of dollars.

Safety Groups:

Safety Groups are like minded employers who come together to improve their safety practices. If there are decreases in the members' performances, rebates on assessments paid are provided by the WSIB. Too often, Safety Groups are like Alcoholics Anonymous. The participants are all off alcohol, and meet to re-enforce their abstinence, but for every alcoholic coming to the group, there are 2 more getting hooked. Hence alcoholism remains on the rise in Ontario, and so are accidents.

Inspectors:

The Ministry has been increasing the number of inspectors since 2004, and by 2007 there will have been a 200% increase in their numbers. In the meantime, the Board has increased the number of Workwell auditors as well. However, the effectiveness of the Minister's expanded police force is questionable, if they don't know what the criminal behaviour is that they are looking for, and exactly where the criminals reside.

Consider the following questions: if a machine lacks guards up to Ministry standards, but has not been responsible for a single injury for 20 years, will guarding prevent accidents? Is an employer, with a good accident record for 5 years but two or three lost time claims in one year, worthy to be designated by the Ministry for the "Last Chance List" - the scarlet letter of an unsafe employer? If an employer has dozens of accidents but thousands of employees, should it also be placed on the "Last Chance" list?

Large employers are most prone to inspectors, inspections, prosecutions, and other penalties. And indeed the larger the target, the more arrows the Ministry of Labour and the WSIB will sling. But the fact is that larger employers, particularly in manufacturing, are leaving the Province of Ontario for China (where 16 mining deaths and hundreds of amputations per day occur), and are being replaced by small enterprises in all types of industry.

The Minister recently announced that inspectors will now perform ergonomic assessments. Are there reliable statistics that ergonomic modifications reduce accidents? None that this author knows of. It makes sense for hospitals and industry to introduce more and better scissors' lifts to lift the weight of patients and product.

But if an employee is stressed, prone to character disorders, overworked, depressed etc., if he/she doesn't injure his/her back by lifting, isn't he/she going to inevitably do it anyway by other means - say a minor fall? Isn't the problem thereafter, really a benefits issue, and not a safety one?

WSIB Experience Rating:

For large employers, the NEER and CAD-7 are cause for both cost control and for accident prevention. Given the millions of dollars in penalties collected in these plans, either some employers aren't paying attention, or accidents happen sporadically in any environment, so that experience rating inevitably, becomes a process of three good years followed by a bad year. Additionally, one unresolved innocuous claim attracts so much in benefits, that an employer with a good, long-term, safety record, can appear to be an unsafe employer for a short period of time, attracting not only a penalty but also placement on the Minister's "Last Chance" list.

For small employers experience rating is too minor to be important.

A Very Different Approach:

All the Ministry and Board initiatives will prevent some accidents, but in my opinion, they are neither cost-effective nor particularly salutary. The Board needs to identify each and every accident caused by defective safety practices and implement a remedy. There are 900 individuals in the Province who witness every WSIB industry covered work accident - claims adjudicators. The Adjudicative Practice Directive tells adjudicators that they must picture the

(Continued on page 7)

Smoke & Mirrors

(Continued from page 6)

circumstance of every injury in their mind, particularly repetitive strain injuries, before allowing the claim. Unfortunately, adjudicators are barely able to cope with managing the after-effects of a claim let alone the cause. Indeed, much of the **40%** increase in benefits paid in the last six years rests with the Board adjudication level.

The fact that the Board only ran a $90 million deficit in 2005, has everything to do with the greater than **10%** returns the Board made on the 70% of its assets invested in stock market entities, and should not be seen as "the answer" to escalating benefits. In the meantime, the Ministry is contemplating **increases** in worker benefit entitlement, no rate increase was taken in 2006 and the stock market "party" will not continue indefinitely.

The Minister wants to include independent operators within Board coverage. How exactly will the Minister monitor the safe work practices of one-man operations, or introduce to them "Early Safe Return To Work" plans?

I asked the Board's actuary whether he knows how many extra employees per year will be returned to work under the Board's new draconian return to work policies. He said he didn't care even if it was only one more worker. Cost effectiveness doesn't appear to be a big issue with either the Board or the Minister of Labour, but nevertheless Ontario manufacturers are in a do or die relationship with operating costs, of which health, safety and WSIB costs are very much in the mix.

So if benefits costs and NELs head in the same direction in 2006 as they were going in 2005 and for the 5 years previous to that, the Minister of Labour and the WSIB might want to consider the following:

If adjudicators were properly trained, experienced and resourced, they could make a determination on each injury before them whether the cause relates to a deficiency in health and safety and then follow up to make certain that the problems were corrected. Incidentally, in this scenario, they would also be much better situated to deal with benefit entitlement as well. If the safety situation did not correct, they could lower the boom.

Not only should Adjudicators keep track of the companies, but also, the individuals behind the companies and family members. Too often, unsafe practices are committed by the same individual, but operating under different corporate names. Rather than spending tens of millions of dollars on suspect advertising and safety groups, how about a campaign to encourage workers injured on the job, whose claims are not forwarded to the Board, to come forward and register with the Board.

Conclusion:

Why has the Minister chosen the current route to reducing accident costs? The institutions for the current Health and Safety initiative were already in place when the sitting government took over, and needed only be expanded. For instance, the Ministry of Labour had 50 inspectors with a template for intervention but now there are 250 inspectors using a similar but expanded template. Experience rating has been around for 30 years, the Board needed only toughen it up and send the results over to the Ministry for further corrective penalization.

Tackling the Adjudicative culture at the WSIB is a mammoth task. Bright, energetic and determined adjudicators are drummed out of the WSIB by a corporate, bureaucratic "don't rock the boat" culture. Claims Managers have even less adjudicative experience than adjudicators. The WSIB directors are the "pins" left standing after waves of new idea "bowling balls" full of spins and shimmies have come rolling down the WSIB "laneways".

The safety initiative of the Minister of Labour has avoided confrontation with WSIB administrative problems. Instead, by telling employers they will save money by being safer, and workers they will have less accidents with 300 Provincial inspectors, all parties are induced to accept the status quo. I submit the Minister's current euphoria is temporary.

Final FEL and LOE

(Continued from page 5)

expert, who opined that the worker could only earn $12.00 per hour as she had no experience in the field of purchasing agent. The ARO accepted the fact the worker could currently only earn $12.00 per hour but that years into the future may be able to earn $15.00 per hour, and thus set the LOE weekly pension as the difference between $15.00 and $27.00 per hour.

In an Appeals Resolution Officer decision of September 2006, the worker was deemed capable of being a department supervisor in 1990. He was therefore entitled to a $0 FEL award as he could still earn his pre-accident wage. The worker was unable to find a supervisor job due to the recession and little experience. He therefore started his own business where he never earned more than minimum wage. When the final review of his FEL wage loss pension came up many years later, Sheard at Work Return was of the opinion the worker would never be able to work as a supervisor, as he had been too long out of the manufacturing work force. The ARO said the result of the final FEL review is bound by the first FEL review, and the worker was stuck at $0 pension. This is a recurring problem for the WSIB. Workers are deemed as elemental workers capable of making $8.00/hour at the first review, and months later are deemed able to make $12.00 per hour at the final "lock in" review, decreasing their pension benefits by half. In many cases, the worker is earning much less than $12.00 per hour, if anything at all.

In Appeals Tribunal (WSIAT) Decision 178/06, the final FEL review took place in September 1997, but then the worker was given more training in 2001. The worker's FEL however, as ruled upon by the WSIAT, was based on what he could earn in 1997, which was an $8.00 per hour part time store clerk.

In WSIAT Decision 1238/06, the Board used the maximum wage for an assembler to set the worker's final LOE pension: $20.00 per hour, he therefore got no LOE pension. However the worker started work as an assembler at $8.50 which he was actually making at the time of the LOE "lock in", and was up to $9.50 at the time of the WSIAT hearing. The Tribunal used $9.25 per hour, to set his LOE pension, effectively awarding the worker $350.00 per week.

In WSIAT Decision 2016/04, the worker was laid off years after the final FEL review. The worker received a $0 award from the adjudication level. The Appeals Tribunal Panel changed the deemed earnings from his actual earnings prior to layoff to a much lower amount that he was likely to earn post-layoff, on the basis that

(Continued on page 10)

Multiple Chemical Sensitivity: A Multiplicity of Dilemmas

Multiple chemical sensitivity (toxins in the air at work, often not exactly known or appreciated, leave the exposed worker incapacitated to continue employment), along with reflex sympathetic dystrophy, fibromyalgia, chronic fatigue syndrome, sick building syndrome etc. are all diseases left over from the last decade and still leave the medical and scientific community in a state of scepticism. Whether in the presence of scientific certainty or not, the workers' compensation system must determine entitlement to benefits for these conditions as well as a host of other occupational diseases and contaminants, not yet fully understood. It is my submission that both the Board itself and the Appeals Tribunal (WSIAT), as the final arbiter of entitlement, are making a muddle of the situation.

WSIAT Decision 458/96 issued in December 1999, allowed a claim by a worker for contracting Multiple Chemical Sensitivity (MCS). However, the Decision left many unanswered questions about MCS. MCS entitlement was allowed as an aggravating factor to a pre-existing disposition to breathing problems. The Tribunal Decision does not provide answers as to whether MCS could be allowed as condition on its own or as to what scientific basis are undefined toxins aggravating or causative?

The psychological aspects of this disease were mentioned but not commented on by the Tribunal. The test for acceptance of a compensable disease when scientific proof falls short was stated by the Tribunal as: a balance of probabilities using a robust and pragmatic approach.

It remains a legal mystery as to how a temporal relationship between exposure and disease somehow moves a scientific possibility into the realm of legal probability. In a review of the subsequent decisions by the Appeals Tribunal in determining entitlement to Multiple Chemical Sensitivity, I will explain what I see as a major flaw in Tribunal decision making.

In the last year, the WSIAT has taken another run at trying to tie down how best to adjudicate claims for MCS, issuing Decisions 548/04, 1678/04, and 2227/05.

In Decision 548/04, the worker claimed asthma-like symptoms and headaches caused primarily by fumes emanating from a photocopy machine. Interestingly, the WSIB doctor approved the claim as a temporary irritation compatible with smells and irritants. I was not otherwise aware that MCS is at all recognized by the WSIB itself. The worker however was seeking longer term benefits.

The worker obtained evidence from Dr. Armstrong, an expert in environmental medicine, stating the work environment was causing the worker's body to react, by aggravating a pre-existing asthma condition. Dr. Armstrong cited ozone, nitrous oxide and isopar as emanating from photocopiers, and that the worker's blood sed rate was abnormal. The WSIAT Panel considered Tribunal Discussion Papers from Dr. Tarlo, and Dr. Weinberg, both respirologists, whose opinions were that environmental sensitivity is not scientifically accepted as a physical problem, but is perhaps an manifestation of chronic anxiety. In other words, while there is some scientific support for MCS, it is not a scientifically proven entity which would cause the Tribunal to accept MCS as a disease on the "balance of probablities", the accepted legal standard for proof and acceptance.

The Courts, recent amendments to Board policy, and the Appeals Tribunal all state that entitlement to occupational disease can be allowed in the absence of scientific certainty. But in what circumstance is there enough certainty to overcome the gaps in science?

The Tribunal in Decison 589/04 citing Decision 545/96, listed 6 factors to consider when the scientific and medical evidence does not in itself point to a probability of injury:

1) extent of exposure
2) genuineness of symptoms
3) temporal connection
4) other potential contributors
5) improvement with removal
6) non-compensable psychological problems

In other words, their six points mean that if you had a lot of exposure, without any alternative explanation for the disability, it pretty well must be the exposure. It's not entirely clear in my mind why a lot of exposure to something which only possibly causes a disease is somehow more likely to have caused the disease than a little exposure, when one doesn't know for certain if any amount of the exposure causes any disease. One can understand why if arsenic is poisonous, taking a lot of arsenic is bound to kill you. However, with the proposition that aspirin from a scientific point of view possibly stops brain clots: is taking a bushel full of aspirin a definite prophylactic for brain aneurism?

The worker's claim was denied on the basis that the photocopier fumes were of a low level, the worker could tolerate other fumes, and if the problems were psychological, the worker had other psychological issues. In other words, she didn't have a lot of exposure and there was another explanation. The scientific gap was not bridged.

Decision 1678/04 was released on April 25/06. In this case, the worker suffered from what was termed as "sick building syndrome". A contaminated work atmosphere was the prime suspect for causing the worker headaches, breathing problems, and rashes, which continued even following removal from work. It was the worker's evidence that she was exposed to dust from carpets and fibreglass previously in the building, although air sampling studies were generally within *Occupational Health and Safety Act* Guidelines.

Dr. Given, a respirologist on behalf of the employer, stated that "Environmental Sensitivity" is not universally recognized scientifically. The WSIB's doctor blamed cigarette smoking for the worker's condition.

(Continued on page 9)

(Continued from page 8)

The Panel found that on the balance of probabilities, the dust caused the worker's symptoms, but did not comment on whether the worker's continuing problem was from "Environmental Sensitivity". The Panel cited the oft-repeated legal principle, that where scientific proof of causation is lacking, a robust and pragmatic approach is needed to turn a scientific possibility into a legal probability. To do this the Panel was impressed by the amount of dust on the worker's building floor, and that symptoms commenced with the start of work on that floor.

The Panel cautions that a scientific speculation or mere possibility does not constitute legal probability. But I ask again, how does a scientific possibility, which has failed to be proved by epidemiological studies of exposure and incidence as physiological explanations, gain credence as a probability, just because one individual was exposed to a lot of dust?

The Appeals Tribunal released Decision 1678/04 three days before Decision 2227/05, which is probably more than a coincidence, as a general discussion of important decisions takes place at the Tribunal prior to their release. In this case, an autobody repairman developed peripheral neuropathy, breathing problems and headaches following exposure to dust and chemicals.

The Tribunal commissioned Dr. Kravcik, an internist, to help them as a medical assessor. His opinion was that MCS is an "extremely controversial" diagnosis and more likely the worker was having a panic disorder, which is a variant of MCS described in the literature (although this is really saying the condition is all in the worker's head). A psychiatric medical assessor employed by the Tribunal, cast cold water on the panic disorder scenario, instead suggesting depression or an adjustment disorder. The worker's Environmental Specialist physician was convinced the worker had MCS from work.

The WSIAT Panel stated that a physiological explanation for MCS was nothing more than a possibility, and went on to develop a theory that the exposure to dust and chemicals was a temporary physical irritation that later manifested itself into a permanent psychiatric psychosomatic problem.

Regarding MCS, four Appeals Tribunal decisions later, we advocates are left with scientific possibilities that can sometimes be legal proof depending on the quantity of exposure. Or perhaps we are left with different types of scientific possibilities: "mere possibilities or just a hypothesis", which can never be legal possibilities, and "attractive possibilities" which just need the right individual circumstances to tip them over into probability.

In my respectful opinion, the problem with WSIAT's determination of MCS as in many other occupational diseases, is the laziness of the Panels. The Panel is the lay expert on disease and should conduct itself accordingly, whether at the start of the Appeal the individual Panel members know anything about any particular disease or not. Granted it's a lot of work to study the epidemiological papers themselves and compare them, to learn biology, and then make a decision whether the scientific knowledge that exists is strong enough to leap over the gaps.

In these above referenced decisions. 548/04, 1678/04, 2227/05, and others, the Appeals Tribunal Panels seem to be adding up the medical opinions on both sides as in: three for and three against, and then considers the quantity of exposure as the tie breaker. Rather than employing doctors to help the WSIAT Panel members understand what the scientific situation is so the Panel can make a conclusion itself, the Panels employ Medical assessors to do the scientific survey, and report back their conclusions to later be counted up with those of the worker's, employer's, and WSIB's doctors.

When it comes to interpreting scientific studies for the purpose of weighing the strength of scientific proof, Medical doctors and their conclusions are ill-suited to be counted like hockey pucks entering the net. For medical doctors, the WSIAT's assessors, things are either scientifically proven or they are not. Legal niceties, like a robust and pragmatic approach to discuss entitlement in order to perhaps mediate decisions around middling scientific possibilities, are poppycock to scientists, and are best left to the legal and adjudicative community to decide.

Decision 429/02 which dealt with benzene exposure possibly causing multiple myeloma cancer, repeats the same error. Here the WSIAT Panel added up all the doctors (including the Panel's own) who thought benzene did not cause multiple myeloma, versus all the doctors who thought it might, and went with the **majority** of doctors, without ever dissecting the biology and epidemiological studies themselves. This manner of decision making explains why there is no reference in WSIAT decisions to procuring dichotomies between strong scientific possibilities and weak ones, leading to different WSIAT results. It also remains uncertain whether there is a category of scientific knowledge called "attractive possibility" that may exist somewhere between "mere possibility" and "scientifically proven", which may in some circumstances, lead to entitlement.

So instead, to turn possibility into probability, the individual's circumstances, which are nothing more than the Panel's sympathy for less than ideal working conditions, are employed to tip the balance. Where was the Panels' scientific proof, in any of these MCS cases, that dust or chemicals below legal thresholds, cause any irritation at any point of exposure to the respiratory system, beyond an occasional sneeze? The six factors employed by the WSIAT are helpful in determining the significance of the contribution, but they should not be turned into a proxy for a scientific determination by Panels who should but may not understand scientific statistical levels of confidence. The Panel should be conversant enough with the relevant science itself to state that either there is sufficient scientific evidence, without formulating scientific proof, or there is not.

Final FEL and LOE

(Continued from page 7)

in between his final FEL and layoff his condition had deteriorated. On one hand this decision makes sense, in so far as after the layoff the worker had a huge income loss, but on the other hand, the deterioration in his condition which opened up the FEL had nothing to do with the loss of earnings.

In Appeals Tribunal Decision 1134/04, the WSIAT states that the Board should not use a **deeming** of the best possible wage, but what is the average wage that the worker could be expected to earn given the total picture of the worker's ability.

In Appeals Tribunal Decision 308/02, the WSIAT used the average wage for the designated employment category, rather than the **maximum** wage in the NOC Canada employment catalogue. The Tribunal Panel stated that a fully experienced worker with the particular worker's abilities would not reach the maximum. The WSIB, on the other hand, had used a much higher designated wage for a fully experienced worker, on the basis if he could do the job to start, he could do the job indefinitely and his wages would rise with time and experience.

The Panel in WSIAT Decision 2132/03, more or less adopted the reasoning of Decision 308/02 above, but leaned towards accepting what the worker was actually earning at the time of the FEL determination, which was the employment category's average wage, rather than what might be earned in the future. However, WSIAT Decision 1951/05 took the approach that what the worker was earning at the time of the final FEL determination should not be used, because it was not realistic that the worker could continue in that higher paid industry due to his disability. Rather, a lower figure was chosen, as being reflective of the employment category the Board originally thought the worker could achieve.

In Appeals Tribunal Decision 2452/03, the Panel based the worker's final FEL on the proposed LMR plan whether or not the worker successfully completed it.

For the worker who does not return to work with the accident employer, and for whom some six years after the injury either a final FEL or LOE has to be awarded until age 65, what should be the future point in time used to deem (guess) how much the worker should be able to earn, and on what basis should this estimate be made?

The cases, both from the Appeals Resolution Branch and the Workplace Safety and Insurance Tribunal seem to suggest that the proper time to consider the worker's possibilities is the day of the final review, but that the history and prospects of the worker up to the day of the hearing should be considered in order to moderate the deemed earnings amount to reflect the probable future reality over the next few years, rather than an optimistic possibility perhaps decades into the future. Currently before the Labour Minister is a proposal to simply use whatever the worker is or can earn on the exact day of the final review. This would be very costly.

FINK & BORNSTEIN
PROFESSIONAL CORPORATION
BARRISTERS & SOLICITORS

The *Fink and Bornstein Workers' Compensation Newsletter* is published quarterly by **Richard Fink**
466 Dupont Street,
Toronto, Ontario.
M5R 1W6.

Telephone:
(416) 537-0108

Fax:
(416) 537-1604.

www.finklegal.com

The contents of this publication are copyright and reproduction in whole or in part by any means is forbidden without the written permission of ***Fink and Bornstein***.

SUBSCRIPTION REQUEST FORM

FIRM ______________________________

CONTACT NAME ______________________________

STREET ADDRESS: ______________________________

CITY: ____________ PROVINCE: ____________ POSTAL CODE: ____________

Please find enclosed our cheque or money order in the amount of $80.25 ($75.00 + $5.25 GST) for a one year subscription to the Fink and Bornstein Workers' Compensation Newsletter.

Mail to: *Fink and Bornstein, Barristers and Solicitors,* 466 Dupont St., Toronto, Ontario M5R 1W6