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Workers' Compensation Newsletter

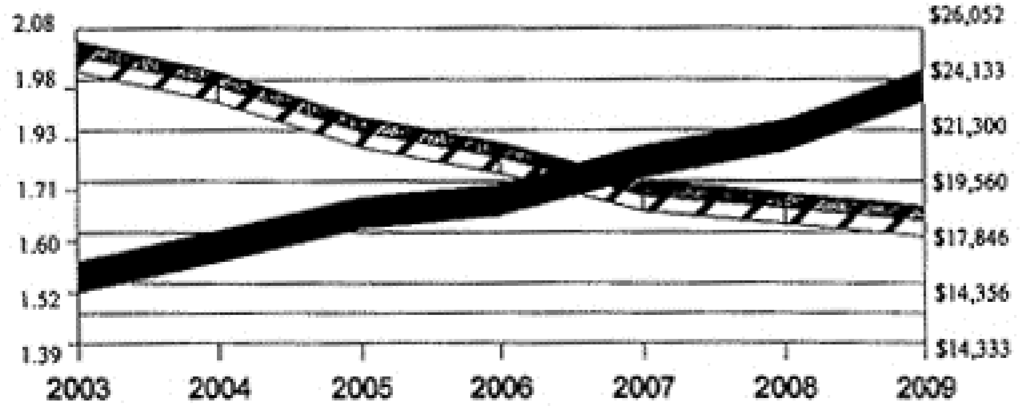
Ontario Workers' Compensation Severely Broken-

Royal Commission Required.

The Workplace Safety and Insurance Board will be $9 billion dollars in debt by next year, 2009, (less than a billion shy of its all time record). Its expenditures are exceeding its revenues by nearly a billion dollars annually. The recent cost of living increases, to injured workers, cost the Board $2.3 billion alone. If something drastic isn't done soon, Ontario will soon have the highest premiums in North America, with a Workplace Safety and Insurance Board debt (unfunded liability) so high our employer clients' grandchildren will be paying the cost of today's injuries, 50 years from now.

The Board's fix for these problems, announced in March this year, was to induce employers to reduce accidents by 7% annually, revamp the claims adjudication process, and to achieve an investment return on assets of 7%. The Board's June Monthly Monitor shows that accidents are only down by 1.8% this year, and with the way the stock market is performing (where the Board has 75% of its $12 billion in assets invested in equities) they'll be lucky to obtain any return. Board Revenue in auto and manufacturing is in decline. Furthermore, revamped adjudication is nothing more than the proverbial reshuffling the deck chairs on the Titanic. The Liberal government is afraid to act, because it neither wants to antagonize the labour movement nor the Province's industrial base, which is already under severe stress.

Every time the Labour Minister is questioned in the House about the WSIB, he shields himself from interrogation with the fact that the Workplace Safety and Insurance Board is an arms length agency. (While the Labour Minister can't involve himself in the management of any specific claim, there is not a policy passed by the Board that doesn't go through his office.) Notwithstanding the Labour Minister must, in the same spirit as exemplified by his current strategy of deflection, appoint an expert Royal Commission to suggest amendments to the Workplace Safety and Insurance Act, and the Regulations and Policies thereto.



Number of WSIB Work Accidents (Lost Time Injury Rate)

Average Claim Costs

Fink and Bornstein would suggest the following changes to the legislation, should a Royal Commission commence:

1. All Benefits, except medical, paid to all injured workers be limited to a specific number of months, depending on the severity of the injury.

2. Injured workers to have a Charter of Rights, enabling them to access any vocational rehabilitation training or opportunity; or any medical treatment opportunity within a wide range of reasonableness, at WSIB expenses.

3. Experience Rating be abolished and replaced by an incentive program, that rewards employers for improving their health and safety practices and results.

4. The current work obligations by both workers and employers be abolished.

5. A worker's right to re-employment be dealt with by an adjunct to the Human Rights Commission solely.

6. Employers of an injured worker receive a monetary incentive to re-employ an injured worker at a job that would not otherwise be available.

7. The unfunded liability to be retired by 2020.

The remainder of this newsletter article will discuss why these changes are required and explain their operation in greater detail.

COMPENSATION BENEFIT MAYHEM

What are the facts:

Everyone has seen at least one injured worker who has been way over compensated for his injuries e.g. collecting full benefits while working for cash, over exaggerating the extent of disability, taking advantage of the system by demonstrating no motivation to work, etc. The public sees the problem in isolation, but the Board's own statistics bear witness that over compensation is rapidly expending:

-in the last 5 years there have been 27% less injuries, but those who are injured have received 68% more benefits, (not accounting for wage inflation of 6% during this period). The WSIB has not one shred of evidence that those being injured are being injured more severely, to account for this disparity. One would think the opposite: if there are less injuries, then the workplace must be safer and those being injured are suffering less initial trauma.

-Ontario has the highest cost per claim in Canada by 30% and the lowest frequency of accident by almost the same amount.

-there was a 10% increase in 100% disabled workers in 2006-2007

-the awards for second injury and enhancement fund (experience rating cost relief for an employer, when there are pre-existing conditions are prolonging a worker's claim) are up 100% in the past 10 years, and now encompass 33% of all lost time claims. Increasingly, the Board is paying for disabilities that have less and less to do with the accident itself.

-there has been a 40% increase in lost time claims, compared to no lost time claims in the past 10 years. Similarly there has been a 40% increase in the number of no lost time claims, that become lost time in the past 10 years. This points out that either the injuries are more serious, a doubtful proposition, or more likely that more workers are choosing compensation benefits rather than employment, and that the Board's compulsory return to work strategy is running out of steam.

-in the construction industry, the cost of loss time injuries have been rising by 16% per year over the past 5 years, to a whopping $59,000.00 per lost time claim. The WSIB does not know why this has occurred, whether it's the health care system or the types of injuries. This article will carefully explain what's behind this, but suffice it to know this cost is making Ontario a more expensive place to live and work.

-the average number of days lost per claim has risen 82% between 1998 to 2005, and is the highest in Canada and two times the rate of Alberta, an important point to remember when causes of the current malaise are discussed below.

-**THE MOST IMPORTANT STATISTIC:** there has been a 53% increase in psychiatric awards, in the last 10 years.

-the Board adjudicators are now delaying timely return to work, insisting workers need more time to heal;

Why is this happening?

WSIB Administration:

The Board is proposing that the current industry sector Adjudication Teams will be replaced by:
-initial entitlement adjudication;
-short term claims adjudication; and
-long term claims adjudication, including all claims from before new procedures are adopted.

Long term claim adjudicators will be smarter.
In the short term: adjudicators will speak to workers and workplaces earlier about a return to work (at least once in first 6 months). Adjudicators will try to start a Labour Market Re-Entry within 6 months. New computer systems will track claims; remind adjudicators what tasks need to be done in each file; and allow all adjudicators access to the claim file and communicate with other staff.

The Hearings Branch of the WSIB substantially overturns about 4,000 adjudicative decisions annually, and the Appeals Tribunal another 2,500. That's 6,500 errors in the face of 90,000 lost time claims annually. Not a great percentage of consumer product satisfaction, but the Board's products are injured workers' lives, a somewhat more nuanced item than say, computer monitors being sold at Future Shop. The adjudicative staff of the Board, in my experience, does a better job than the adjudicative staff of disability management insurance companies. But once the Board staff is confronted with psychological issues, or an unrealistic appraisal of the chances of an injured worker securing a job at the wages the Board is proposing, WSIB adjudication is, as one Hearings Officer put it to me, "a black hole".

But more importantly beyond deficiencies in adjudicative training, experience and qualified management, the WSIB's adjudicative environment as established by the current Workplace Safety and Insurance Act is an injured worker "race to the bottom", from which little good can result, compelling many adjudicators to either resign or become resigned.

The Injured Worker Race to the Bottom:

At least 90,000 injured workers in Ontario annually who suffer a lost time injury, must ask themselves a very important question at least once: "is work with my accident employer something I am going to continue to pursue?". If the only consideration for an injured worker in finding an answer to this question was whether the employer can

accommodate the physical repercussions of the injury, then the workers' compensation system in Ontario would not be in its present predicament.

However much more goes into a worker's mind in answering the "to work or not to work" question such as: concerns about work satisfaction in the current work environment; pre-existing personality and anxiety disorders that are exacerbated by the injury experience, causing the worker to decompensate as a fully functioning adult; overwhelming fear of becoming impoverished by being disabled in a competitive work environment in and outside the current employment; a desire for revenge (seeing the injury as an assault for which large retribution is deemed justified); a desire for sympathy after a hard life, etc..

If Workers' Compensation legislation monetarily rewarded injured workers for healthy behaviour e.g. improve yourself medically and vocationally; rather than paying more benefits for more invalidism, the Board would not be $10 billion dollars in debt, nor even $1 million.

The current legislation compels adjudicators after 6 years from the date of injury, to deem what earnings an injured worker can earn, and pay the difference between the preaccident wage and the deemed wage, as a weekly tax free payment. An injured worker, prone to depression, anxiety, and neurotic behaviour whether for valid reasons, or even at least reasonably perceived reasons, is going to take himself further <u>down the path of invalidism for strictly rational economic purposes</u>. Injured workers hear and see from others (coworkers, lawyers, consultants, doctors, family members, drinking buddies) what is available in the workers' compensation system, and how to achieve the maximum result.

If the current workers' compensation scheme in Ontario was not in fact disintegrating completely under the current type of legislative regime, then the political philosophies regarding human behaviour of Hobbes, Locke and all of Western thought that people rationally maximize their economic interest, would surely have to be revised. The fact that only approximately 12,000 injured workers per year run afoul within the current system, is a testament to the good work ethic of employers, workers, and WSIB staff in Ontario.

<u>Proposed Legislative Amendment No. 1:</u>
A scheduled fixed benefit wage loss regime:

According to the percentage of the whole person disability (currently framed as a NEL award), an injured worker would receive so many months of benefits. So for instance, less than a 5% award whole body disability (carpal tunnel in one hand) would be 1 year of benefits; 10% (a minor back injury) would be 2 years; a 60% NEL (loss of an entire arm), would result in an award for life, etc.. This award would be paid whether or not the worker returns to work, and would not be increased whether or not the worker returns to work.

For the injured worker, tacking on a psychiatric disability may increase the payment by a few years, but never by a few decades. The question the injured worker must ask under this proposed fixed benefit regime is: what am I going to do for money after the award ends. The injured workers best actions are: 1) stay with the accident employer, and/or 2) get well; and/or 3) get retrained. If the injured worker decides that the best bet is to maximize illness, then the system for people in the Province whose lives are a failure, for a multitude of reasons well removed from any work accident is in place: Ontario Disability Benefits (Welfare).

A scheduled wage loss system is not a race to the bottom as is the current income loss system, it's a race for survival, which is the situation for all workers, healthy or not in the Canadian economy.

<u>Vocational Rehabilitation and the Board's Labour Market Re-entry process:</u>

Only 41% of workers sent for vocational rehabilitation by the WSIB are employed afterwards. This includes those who are employed by their accident employers. 62% of workers are employed within 18 months of completing vocational rehabilitation but again this includes work with the accident employer. The percentage of those employed who are not so fortunate as to be re-employed by their old employer is information so scandalous the Board won't divulge it.

Of those employed after vocational rehabilitation 74% are employed in the area for which they were trained. Therefore the success rate of WSIB vocational rehabilitation is 41% including workers employed by their former place of work. The cost of this fiasco in 2006 alone was $112.7 million in wage benefits paid to injured workers and a shocking $135.5 million paid to the parties charged with retraining the injured workers, plus hundreds of millions of dollars in wages injured workers have lost, and the further WSIB benefits they are appealing for.

I was told by the Labour Minister's assistant in 1989 that the Board's proposed and new vocational system, called Labour Market Re entry was going to solve the problem of workers accentuating their disabilities in the face of such poor prospects for re-employment. In point of fact the LMR system too many times is a point of manipulation used by adjudicators to lower the benefits of a worker by deeming employment where none could be reasonably obtained. So rather than adjudicating what is a rehabilitation plan in the best interest of the injured worker, the adjudicator's goal is what is in the best short term interest of the

WSIB. A $1 million lawsuit launched by our firm against the Board, concerns this issue in part.

Proposed Legislative Reform 2:
Injured workers to have a Charter of Rights enabling them to access any vocational rehabilitation training or opportunity; or any medical treatment opportunity within a wide range of reasonableness.

The current LMR system is in the Board's best interest and not the workers'. It should be the other way around. Since workers have only a limited time on benefits under my first proposed legislative reform, they should have the best in both vocational and medical rehabilitation. Let the workers take responsibility for choosing their course of action. Let the Board not turn down any request within reason.

Health Care and the WSIB Opium Den:

-Health care costs paid to injured worker's doctors, clinics, pharmacists, hospitals, etc. increased by 10% in 2006
-From 2003 to 2005 health care costs rose from $345.9 million to $409.8 million
-The WSIB pays out $83 million per year for drugs of which half are for narcotics. At this rate and assuming $2000.00 per year for narcotics per injured worker, Ontario would have 41,500 narcotic addicted injured workers residing in the Province
-narcotic use has doubled in the past 10 years
-drug benefits are the third most costly item for WSIB behind doctors and hospitals
-drug costs for the age group 45-55 is 60% higher than the remaining age groups
-the median time a prescription for narcotics is made to an injured worker is now 14 days after an accident, but it was 60 days in 2002; there's been a 22% increase in dosage in the past 3years.
-the earlier a narcotic is prescribed to an injured worker the longer the worker will be on compensation.

Clearly there is a narcotic epidemic among injured workers. This represents the following factors:
a) physicians find that a prescription for narcotics is a quick fix for pain complaints;
b) injured workers who fixate on their pain for a variety reasons, not all related to compensation benefits, demand narcotics from their doctors;
c) a sizeable segment of the injured worker combine narcotic intake with other substance abuse and psychiatric issues.

Once an injured worker is consuming sizeable narcotic intake their ability to return to any form of remunerative employment is compromised. While the WSIB is working for a means to turn down the narcotics tap, the bottom line is that a workers' compensation system that rewards workers who profess and prove the greatest mental disability, by giving them the most money is moving towards a completely drug addled worker population.

Experience Rating:

The labour movement and the Toronto Star have been on a mission since February 2008 to eliminate experience rating. For the Toronto Star, news that employers who have suffered a fatality also received a rebate for good safety performance, sold newspapers. For the labour movement the goal is to remove employers from workers' compensation litigation. Without experience rating there would be no opposition to accident claims or benefit costs by employers. Do employers show up at hearings when Employment Insurance benefits are contested: no, because there is no economic incentive. Removing employers from the equation is a means to increase the amount of benefits paid to injured workers.

Howard Hampton, leader of the NDP, made the following points in a speech in the legislature regarding experience rating this year:
-$2 billion was paid out in rebates to employers in the past 10 years which should have been used better to fund benefits
-employers push injured workers to come back to work too early to save experience rating dollars;
-employers hide injuries
-there is peer pressure among workers to hide injuries to obtain performance bonuses
-there is no proven reduction in fatalities or serious injuries proven by experience rating.

No one in the legislature stood up to defend experience rating. However a study by the Institute of Work and Health demonstrated that employers reduced injuries and made greater efforts to re-employ injured workers because of experience rating. Co-incidentally accident rates have declined precipitously with experience rating.

To counter the negative experience rating publicity the WSIB announced it would not pay experience rating rebates to employers who incurred a fatality that was the fault of the employer. Now employers find themselves both being prosecuted by the Ministry of Labour and the WSIB for negligence. The fault and negligence provisions for worker injuries, that was taken out of workers' compensation in 1917, have now been added back in. While the Board says it will pay experience rating for those employers found not guilty of Occupational Health and Safety Act violations, those prosecutions can easily take 5 years, while experience rating runs from 2.5 to 4.5 years, so the Board must make a finding of fault in the interim.

In the meantime NEER and CADVII experience rating plans have been mutated into a meaningless nightmare for most employers. For any employer under 200 employees there is very little rebate left to be obtained because the unfunded liability component of employer payments to the WSIB

(over 30%) has been taken out of the formula. Second injury fund relief, now amounting to 33% of all claim costs has been removed from the experience rating formula, so that only 25% of an employer's premium is left to develop rebates.

For the small employer the penalties for a sprain injury that requires the worker to enter a LMR plan, that does not receive full second injury fund relief is financially devastating. A construction employer of 20 employees will receive a penalty of $300,000.00 for such a claim over 5 years, and can't continue operating. A manufacturing client of 110 employees paid a $34,500.00 surcharge for 1 claim that lasted one year. Just as employers who are at fault for a death will receive no rebate, perhaps an employer who is not at fault for a sprain injury should receive no penalty?

The Board has appointed an actuarial firm, Morneau Sobeco, with experience in PEI and the Northwest Territories (each about the industrial size of Orillie) to study Ontario experience rating and make short and later long term recommendations. It is not clear whether it is the Board's agenda to use experience rating as a revenue grab to make up for its annual $1 billion shortfall in revenue over expenses, or to try and paper over the bad publicity experience rating has generated.

At any rate employers should expect a 5 year claim window as opposed to the current 3 year window, a change which will make return to work even more onerous for small employers.

All disability plans are experienced rated by insurance providers. These experience rating programs are for insurance purposes. Those consumers of the disability plans, that consume more in benefits, eventually pay more. The disability plan formulas are hidden from the consumer: because the disability insurance plan company says you can buy the plan or not, but this is your price. The Board's experience rating plan was originally formulated for the same purpose: rebate or penalize employers beyond what their individual rate group assessment gradations could provide collectively, for the good or bad performance of an individual firm. The WSIB experience rating is now seen by the Board as a behaviour modification system: heavily penalize employers who have injuries and then don't immediately return those injured workers to modified work. All employers who receive a rebate will undergo a Safety Workwell Audit by the Board's new validation unit.

Ontario workers' compensation has turned Ontario employers into sheltered workshops for the disabled. This is all well and good when the economy is expanding but when it is contracting, it's a drag on corporate profits and efficiency, that employers and the Province cannot afford. The Board may tell employers that the Board paid out $3.3 billion in benefits in 2006, but the system has cost employers many billions more, if one factors in the cost of employing less than fully productive disabled workers.

<u>Proposed Legislative Reform 3:</u>

Abolish Experience Rating, Create Safety Incentive, but only if a fixed and scheduled benefit regime is established.

Many accidents are not caused by external events such as a fall, but by internal causes such as bending over and suffering a disc injury. Many more accidents are not caused by employer negligence, such as when a worker disobeys known safety practices. So why are employers given penalties under CAD VII and NEER in both circumstances? If injured workers claim that their back disability has led to morphine addiction, chronic pain and depression why is an employer penalized when none of this outcome is in the employer's control? If the reason for rewarding employers with lower rates is too achieve equity for safe employers and encourage others to become safe why not have a system that provides rebates for those that prove conformance to safety standards and improve their accident performance over time, say a five year average.

<u>Proposed Legislative Reform 4:</u>

75% of the Ministry of Labour inspectors (currently there are approximately 250 of them) be assigned full time to work with Board Adjudicators to assist and cajole employers who have either suspicious injuries, too many injuries, or injuries of account of negligence, to improve their health and safety practices.

An adjudicator is supposed to understand the exact mechanics of each injury before paying out benefits. Under the Board's new adjudicative procedures due out by February, 2009, the initial claim adjudicators are supposed to identify unsafe work practices for each injury and alert the Ministry of Labour inspectors as to their occurrence for further action. However these same adjudicators will receive little training. Why not have the Ministry of Labour inspectors work along side the adjudicators and nip unsafe practices in the bud, wherever and whenever they occur? At the moment Ministry Inspectors hang out primarily with large employers where some violation or other, along with a free cup of coffee, can always be located.

<u>Proposed Legislative Reforms:</u>

<u>5. A worker's right to re-employment be dealt with by an adjunct to the Human Rights Commission solely.</u>

<u>6. Employers of an injured worker receive a monetary incentive to re-employ an injured worker at a job that would not otherwise be available.</u>

Currently if an injured worker who has been employed for longer than 1 year wishes to return to work, the Board will compel him to do so,

and the employer must accommodate the worker if work is available. The exact same provision, less the 1 year proviso, exists in the Ontario Human Rights Act. The only reason injured workers have dual protection is that return to duties with the accident employer is the most cost effective means of dealing with a work accident claim. If Ontario moved to a scheduled disability system, whether the worker returned to work or not would have little impact on accident claims costs beyond the cost of retraining. In these circumstances the failure to re-employ would return to the domain of Human Rights Legislation, where it belongs.

Confronted with an injured worker, most employers would wish to re-employ the injured worker most of the time, because of the skills the injured worker retains. The conflict arises when for various reasons both parties are subject to a "shotgun" marriage against their wills. What good does compelling two unhappy parties to continue with the employment relationship? Only the WSIB profits from this and in the long everyone suffers with lost productivity. If an accident employer does not have a productive job for the injured worker, but would yet provide one if they could afford it, there should be temporary monetary incentives for the employer to provide such work in the hopes that the worker could gain more skills to enable him/her to continue at work even after the monetary incentive expires. This is a workers' compensation system aimed at rehabilitation, and not trying to save employers experience rating penalties, or the Board benefit payments, which savings are not necessarily consistent with successful rehabilitation.

The American Experience:

Medical expenses account for 47% of all workers' compensation benefits paid on average in the United States. This compares with 12% in Ontario. American WCB medical coverage is far more generous than employer health insurance plans.

In the United States permanent disabilities are based on schedules whereby the percentage of loss of bodily function equates to the number of weeks of benefits paid. In New York 100% loss of use of an arm results in 312 weeks of benefits, and 50% loss of use of an arm 156 weeks. In New Jersey a 100% loss of use of bodily function results in 600 weeks of benefits. Therefore one can see that the Ontario system is at least 4 times more generous, where in Ontario a 15% NEL for bilateral carpal tunnel syndrome in a 45 year old work earning $15.00 per hour would, without modified work available, result in 104 weeks of temporary full benefits, and 936 weeks of 40% benefits, the equivalent of 478 weeks, plus a pain and suffering award of $7,500.00. In other words, in Ontario, for less than half of the disability, many workers receive 50% more benefits.

The restricted American workers' benefits came about when between 1984 to 1991 not one compensation benefits insurance company made profit on their workers' compensation business. (The same years Ontario's system first started to bleed red ink) States passed restrictive laws mainly between 1991 to 1996, with California being the last to do so this year. The average American workers' compensation rate is now $1.76 down from the high of $2.16, compared to Ontario's current rate of $2.26.

Conclusion:

Why does Alberta have the lowest Workers' Compensation Rates in Canada? In fact this province is collecting so much in excess premiums over claims costs its returning money to all its employers. Why in 2001 did the average time a worker was off work for an injury in Ontario construction significantly decline, and then increase to the highest levels ever by 2007? The answer to these questions is "money".

In Canada everyone follows the dollar. As a representative of the mining industry stated: "Who is going to stay off work with an injury when you could be earning $100,000.00 a year?" The same held true in construction in Ontario in 2001. The shortage of manpower that year meant that anyone who could even show up to a construction site would be well compensated, and injured worker recidivism so declined. Wages in Alberta approach $100,000.00, and this Province does not have a problem returning injured workers to work. But the overall trend for the past 5 years has been that the benefits under the compensation system are more economically profitable than working. Combine this fact with free narcotics, and a declining economic picture that makes returning to work more difficult, and one is left with an unaffordable and more importantly economically uncompetitive workers' compensation system.

The basic tenants of workers' compensation remain valid: insurance based premiums for employers; no fault benefits for workers to allow them to stand on their own again. The perversion that has occurred is that the warped current experience rating plans have turned rates into a behavioural modification crow bar; and worker benefits into an early retirement slush fund. Please consider and sign our petition, attached.

Legislative Reform 7:
The unfunded liability to be retired by 2020.

2014 is the current date for retiring the unfunded liability. Over 30% of employers' premiums supposedly go into making this happen. Since 2014 was announced nearly 20 years ago I have said this pay down would never happen, and finally the WSIB is about to agree with me. Although the unfunded liability went down to 6.5 billion 6 years ago, this was entirely due to legislative changes that lowered benefits from 90 to 85% of net earnings, and the end of cost of living increases for most injured workers. That in the ensuing 5 years the unfunded liability had not skyrocketed is only because of handsome returns from the stock market and 25% few accidents. This party is over, and without legislative change a 10% increase in assessments is needed even to make 2020.

ARE THE WSIAT AND ARO RIDING THE SAME BUS?

Is there a difference in the adjudicative/decision making practices between the Workplace Safety and Insurance Tribunal (WSIAT) (the penultimate workers' compensation appeal body) and the Appeals Resolution Officer (ARO)(the last internal WSIB review of decisions by adjudicators)? There are after all, differences of opinion and adjudicative determinations between Ontario's General Court and the Court of Appeal. These differences are almost exclusively to do with issues of law. The Ontario Court of Appeal, and ultimately the Supreme Court of Canada, are the final arbiters as to what statutes and common law precedents mean. Beyond their legal jurisdiction to make a final determination, the country's lawyers, lawmakers and citizens accept the Provincial Courts of Appeals' and Supreme Court's decisions as determinative, because the lawyers on these Courts are generally senior and well respected, prior to their appointment.

By contrast the WSIAT judges are not necessarily senior nor well respected by those who practise in the workers' compensation area of law, nor even all lawyers. Furthermore, unlike the Courts, the WSIAT practice is to hear the entire case of the appellant from scratch, which appeal courts very rarely if ever do. Precious little if any scholarly work has been done to try and come to terms with the different approaches between the WSIAT and the ARO. Part of the reason for this is that legal scholars in Ontario have shown little interest in workers' compensation generally, and the other part is that the decisions of the ARO are not generally published.

As a lawyer who appears before one or the other of these bodies on a weekly basis, I have to ask the question, is the WSIAT appeal just another flip of the coin so to speak , or are there real differences of jurisprudence. If there are differences, is it merely that one body is more employer or worker oriented? Or that one body defers to the medical staff of the Board while the other does not? Or that one body brings something more to the table in intelligence or reasoning ability? Or that there are different philosophies at work, for example in relation to what the proper interpretation of the law or what Board policies mean?

I felt that as I was in a unique position to have collected so many decisions from both bodies regarding the same cases, it would be interesting to investigate for some trend. To do so I reviewed the ARO and WSIAT decisions for 10 cases and picked the four below to report on, as being illustrative of some of the contrasts between the ARO and the WSIAT.

1. Mr. A: WSIAT Decision 451/07

The worker fell 8 feet from a plank onto cement in September 2001, and a year later in August 2002 was hit on the head with a piece of rebar. The worker suffered from severe degenerative changes in his neck which eventually required surgery. The question was whether either or both of the two accidents played a significant role in the surgically treated neck disability.

The ARO denied entitlement. The first reason for denial was that the worker could not recall the exact dates of the injuries. The second reason was that the worker had problems and incidences of neck pain prior to the work accidents. The third was that initially after each of the work accidents the worker received little medical attention, and the fourth was that the worker continued with heavy construction labour for a considerable period after each accident.

The worker's treating orthopaedic surgeon, Dr. Chapman, stated that the accidents constituted a significant force against the worker's neck, and caused the discs in the worker's neck to be compromised and eventually herniate. The ARO stated that if Dr. Chapman was correct, then how is it possible the worker was able to go right on working for a year after such grave physical trauma. Thus, the ARO did not defer to Dr. Chapman's opinion.

By contrast the WSIAT vice chair found that the worker had cognitive mental difficulties with memory, and was stoical (ie. the worker had a personality whereby he suffered pain without complaint, and thus continued to work without medical attention). In terms of the ARO's view that the worker had pre-existing neck

problems, the WSIAT found that the worker's physical condition deteriorated subsequent to the two work accidents, albeit 1 and 2 years after they occurred. The WSIAT vice chair wrote: *"I accept Dr. Chapman's opinion concerning the causal relationship between the rebar incident and the neck injury, since he is well aware of the worker's neck condition, having examined the worker on several occasions and having performed the neck surgery"* (p.15 para. 85)

In my opinion both the ARO and the WSIAT applied the same jurisprudence or in other words had the same view of what the legal test was, being, did the two work accidents play a significant role in making the degenerative condition in the neck worse. Both the ARO and the WSIAT had a very similar view of the facts. The worker had prior neck problems, two accidents, and with the passage of time the neck problems became so intolerable the worker needed surgery. Where the ARO and the WSIAT differed was on the WSIAT finding that the worker was "stoical". The ARO's position was that if the accident was such a big deal how come he didn't stop work right away. The WSIAT's position was that the worker did have an insidious increase in neck pain but tried to "grin and bear it" for as long as he could.

Three things could be happening here to explain the difference:
a) the WSIAT vice chair has more sympathy for injured workers generally;
b) the WSIAT vice chair had a more insightful view of the character of the particular worker;
c) a more rigid opinion was adopted by the ARO, as to how the legal test was to be applied: in other words the AR0's view was that if a worker has an accident the worker must have a disablement in a relatively short period thereafter (barring of course some medical thesis on the latency period it takes for a disc to rupture from point of trauma, which is difficult to construct)

From reviewing other decisions by the same WSIAT vice chair I don't believe reason "a" really holds true. I am of the opinion that what transpired was a little of reason "b" and a lot of reason "c". If one reads the actual WSIAT decision one can't help but notice that the Vice Chair had some sympathy for a worker whose thinking and behaviour was influenced by ineffectual mental processes: ie.: he wasn't the sharpest tack in the box. But I'm not entirely convinced that the ARO would not be aware of this. More importantly, if the road to entitlement is a rigid formula: disability must follow closely on the heels of accident, stoicism or mental dullness on the part of the worker becomes irrelevant. I am of the opinion that "rigidity" explains the difference between the ARO and the Tribunal in 451/07.

2. Mr P.:
WSIAT Decision 204/08

Amongst other issues, the worker was appealing for a full FEL award (a weekly benefit to compensate for wage loss due to disability), and psychological entitlement. The facts of the case were as follows: In 1995 the worker injured his back and received a 7% NEL award in 1997. From 1997 to 1999 the worker received a weekly FEL benefit based on the wage difference between a TIG welder and a general welder. During this period of time the worker in fact worked mainly as a general labourer at much lower wages than a TIG welder. When the final review of the worker's FEL award came up the WSIB did not want to pay the worker the difference between his old job as a Welder and his current employment as a general labourer, which would cost the Board $400.00 per week in WSIB benefits, or $150,000.00 for the life of the claim. So the Adjudicator asked an independent Vocational Rehabilitation Service Provider to come up with a better plan.

The better plan was to train the worker to be a welding inspector. Thereafter the Board told the worker to leave his job, and start schooling to become a welding inspector, thus allowing the Board to pay the worker only $150.00 per week until age 65. After 2 years of schooling to become a welding inspector the worker was found to be illiterate, and told to leave school by the Board, and return to being a general labourer. His final FEL award was thereafter based on his being able to secure work as a general labourer.

The worker took antidepressants in 1999, and was reported as being depressed when seen for a psychovocational assessment in 2001. He began psychiatric treatment in 2004. According to the worker's psychiatrist, the worker's psychological condition got worse the longer it appeared to him his future ability to secure work was growing dimmer. The worker looked extensively for work after leaving school in 2001, but except for a period of a

few weeks which coincided with date of the final FEL review, could not find work. His age (57 at the time of the ARO Hearing), disability, illiteracy, and 2 year absence from the work force were all factors mitigating against finding permanent employment.

The ARO denied psychological entitlement on the basis that the worker's psychological condition did not manifest itself within 5 years of the accident, which is the Board's policy. In fact the ARO found there was no official psychiatric diagnosis until the worker saw the psychiatrist 9 years after the accident. The report of depression from the psychovocational assessment was deemed unacceptable as it was not a "confirmed DSM IV diagnosis".

The worker's appeal for a 100% FEL, unencumbered by a finding that a general labourer's wages should be offset against it, was denied by the ARO because the worker had the physical capacity to work as a general labourer, and the worker had been a general labourer up to the time of being told by the Board to leave employment.

The WSIAT vice chair accepted psychological disability, notwithstanding it occurred after the five year interval. He did so on the grounds that based on the "real merits and justice of the case", the worker's absence from employment was analogous to a brain injury causing an "extended disablement" which is then followed by a psychiatric disability, an exception in the policy to the five year rule for entitlement. The WSIAT vice chair also considered the anti depressant medication prescription and psychovocational observations, which were practically made within the five year limit from the date of injury.

In relation to the 100% FEL the WSIAT vice chair was persuaded by:
-the report from the worker's vocational rehabilitation specialist that the worker had marginal employment prospects;
-the worker's illiteracy and age;
-that the worker lost his only post lmr job 12 days after the day of the final FEL assessment; and that even while working the worker would most likely not be working for long;
-the worker's two year absence from the work force, just prior to the final FEL review, which the Board itself inflicted upon the worker ;
- the worker's extensive job search covering 5 years which turned up nothing.

and granted the worker a 100% FEL award that would cost the Board $250,000.00.

The difference between the ARO and the WSIAT vice chair decision making process and result is most definitely about "rigidity" brought to bear by the former and the flexible approach of the latter. On the one hand the ARO states the criteria and concludes they have not been met, while on the other the WSIAT vice chair observes what really is going on with the worker's life, and concludes that the psychological disability along with unemployability, is inescapably tied together with the consequences of the work related injury and disability.

I must however raise a further question over which decision is correct. "Merits and justice" of the case notwithstanding, is it possible that the correct interpretation of the Workplace Safety and Insurance Act is that it is meant to be "rigidly applied"? Does using a rigid application purposely discount injured workers' benefits, as a trade off for benefit entitlement based not only on workers' compensation being a no fault system, but also a system that almost never discounts benefit entitlement for pre-existing conditions? Or is it that the AROs are almost invariably senior former claims adjudicators, whose job demanded of them for past decades to apply Board policies in a rigid manner, in order to avoid time spent in thinking about the merits of a case, in the presence of a large workload; and to produce a uniform result, which up until recently was the great merit of a bureaucracy.

I believe the answer really lies in the social views of the1980s, which is the time period of the creation of the WSIAT. In this historical period the rights of victims became ever more important in a society that had the resources to recompense victimization. The means by which to interpret the Workplace Safety and Insurance Act changed from rigid to flexible. The unfunded liability of the Board and at Workers' Compensation Boards around the western world rapidly expanded at this time. This genie has never been put back in the bottle in Ontario.

3. Company G: WSIAT Decision 204/08

This case involves the assessment classification of a

company engaged in condominium construction. If a company is solely a land developer for condominium construction (e.g. assembles the land and has it re-zoned) it pays WSIB premiums of 10% of payroll. If the company not only develops the land but also participates in construction of the condominium as a general contractor, its premium is half that amount. While this makes little sense, this peculiarity is only one of many in the Board's classification system.

The controller of the company produced for the Board corporate records for a company that did the general contracting and the land developing, and gave evidence that both were engaged in various projects together. The corporate records showed that there was a similarity of directors but not of actual ownership. The ARO: wrote: *"Mr. K's allusion to "the same entity" that owns this employer and others is not evidence of control. There is actually no information about this other entity even though the employer has had ample opportunity to disclose all of the relevant facts. The employer can't say they did not understand what had to be produced to demonstrate association. They were represented by a lawyer who has been practising WSIB law for about 30 years. With respect to the comments about equity holdings it is entirely possible to have an equity interest in a joint venture or partnership without having a controlling interest.*

I am not persuaded by the evidence before me that Company G. is associated with any other employer for purposes of the Regulation. There are no doubt business relationships present. What is missing is the evidence to demonstrate that control of this employer is in the same hands as control of the other employers. Absent this association I am unable to conclude that the land developing activities carried out by Company G. are being done by a builder of condominiums."

The ARO first had a bone to pick with myself, who has been a vociferous critic of his past decisions, to his director; and secondly was raising the bar for standard of proof of control, by demanding witnesses attend from all corporate entities.

At the WSIAT hearing the Vice Chair ruled that since the Board's Regulations and Policies considered two employers "associated" if shares of both entities were in part owned by the same person, then once the employer established that one "associated" entity did the land development and the other the general contracting, the criteria for obtaining the lower assessment rate was met. The shareholder register was produced at the WSIAT hearing. It was not produced at the ARO hearing as it was felt the evidence of the controller on this point would be sufficient. This was because the test for associated company status is not absolute "control" by the same entity, but "strains of common ownership" and direction between the two.

Beyond the fact that the ARO required a high level of evidentiary proof of common control, which again illustrates the rigid application of Board policy, the ARO level of decision making can be very much prejudiced by the parties that attend. The same ARO, until his retirement heard 50% of all revenue appeals. Some revenue decisions arriving to Appeals from the revenue branch adjudicators are plainly mistaken, but more often appeals brought by myself and other lawyers, who have a large employer based practice, are on the borderline of legitimacy. This ARO simply lacked the patience to entertain various legal challenges that would delete revenue from the Board's coffers, an opinion shared by many of my colleagues about this same ARO. The same problem of impatience could occur at the WSIAT, but I believe it is far more rare, because the tenor of the WSIAT's direction from senior management demands a more professional demeanor.

4. Ms. R.:
WSIAT Decision 1656/05

The worker claims to have injured her shoulder by placing plastic caps on a glass test tube shaped bottle with the help of a machine. The WSIB sent out an ergonomist to view the job. The ergonomist concluded that if the worker did the job as it was described by the employer, then there would not have been undue strain placed on the shoulders of the worker. The Board's own doctor reviewed the file and was also of the opinion that the claim was without merit.

The WSIAT vice chair reversed the ARO's decision and gave the worker benefits on the following basis:

-the worker did not have shoulder pain prior to starting the plastic caps job
-the worker complained of pain a

few days after starting the plastic caps job
-the worker's doctors say she has rotator cuff tendonitis
-the Board ergonomist concluded that if the worker did the job the way the worker explained and not the way the employer explained, then the job posed a risk factor
-the WSIAT vice chair stated that even if the worker did the job the way the employer demonstrated the worker would still have to raise both elbows to shoulder height or just above shoulder height. The Vice Chair wrote: "this would require abduction of both shoulders to a degree which the ergonomist recognized as constituting risk for injury when done repeatedly".

The WSIAT vice chair moved into the role and specialty of "ergonomist". Nowhere did the ergonomist ever say that there was any risk factor to the worker if she did the job as described by the employer, because even if the worker did move her elbows to shoulder height, there was so little force being applied to place the cap in the bottle, that the shoulder was in no danger of injury. The WSIAT vice chair determined that any job requiring elbows at shoulder height was a risk factor.

In this case the WSIAT vice chair could have yet determined the case without playing ergonomist by simply believing the worker's version of the job. However the test tube cap job was demonstrated at the hearing, including the parts and machinery which were assembled on the hearing room table. Although not referred to in the decision, having myself represented the employer, the manner in which the worker demonstrated the job made very little sense, as did other portions of her testimony. The WSIAT vice chair overcame her deficient testimony by saying a great deal of time had passed, and overcame her non sensible job description by moving himself into the role of ergonomist.

This case illustrates that for the WSIAT the opinion of the Board's own doctor does not carry more weight than any other medical professional weighing in on causation. Secondly, AROs almost never place in a decision their own views whether on the subject of ergonomics, medicine, and only rarely even on the law. Although Ontario Courts have recognized that specialty tribunals such as WSIAT have the expertise to make medical determinations that would be precluded in a Court of law, the courts haven't yet stated such tribunals can substitute their own ergonomic views for those of the ergonomic expert, without some ergonomic opinion evidence in support of their own views. Too often the WSIAT Vice Chairs overstep this boundry.

Thirdly just as there are some AROs known to be either employer friendly or worker friendly, the same applies to WSIAT vice chair. This is not a perfect situation, but it exists to some degree or other in every Court or Tribunal I have appeared before (6 tribunals, and 3 Courts). Nothing is perfect, and certainly not the justice system.

The better question to ask is whether there should be differences in approach between the WSIAT and the ARO, or should the ARO exist altogether? On the one hand what's the use of having a level of decision making that use up the resources of 50 senior Board adjudicators, when their decision making technique is so out of sync with the final level of decision making. The WSIAT reverses some 40% of the cases that arrive for determination. Imagine the criminal justice system if 40% of all verdicts were overturned at appeal from trial. There would need to be 5 times the number of appeal court justices.

On the other hand, the ARO office strains out of the appeal system many obviously flawed adjudicative decisions or flawed appeals, that would otherwise clog up the WSIAT system.

I believe the better solution would be for the Board to grant to at least one law school a workers' compensation law chair. The professor sitting in such a chair could, as one of his/her mandates better explore and make known the strengths and weaknesses of both ARO and WSIAT, along with bringing together both bodies to better consolidate their decision making jurisprudence. After all, the WSIB is paying out 3.5 Billion Dollars in benefits per year, and has a liability for benefits currently amounting to one half the cost of the Beijing Olympics. Wouldn't it be of value to better understand the mechanics of decision making leading to this significant expenditure?

Board Tries to Sneak In New Policies Regarding Employers Return to Work Obligations For Injured Workers

Employers have to October 20, 2008 to comment on new, draconian and frankly idiotic return to work policies. There has been no employer or public notification of this time for comment as of the writing of this article on September 8, 2008.

Workers are now given a half dozen reasons to refuse modified work.

Under current policies the employer can force an injured worker to return to modified duties, and thus have the worker cut off loe benefits if the offer of work is physically suitable and reasonably productive. The Board, in a major supplication to the labour movement wants to end all that. Workers can refuse modified work on the following grounds:

Unsustainable Work

* Significant work or workplace accommodations made
* Rate of pay is significantly higher than what the employer pays for similar jobs
* Productivity required of the worker is significantly lower than would normally be expected
* Job was created especially for worker
* If job no longer available, would be difficult for the worker to find new employment with similar clinical restrictions or accommodations in the general labour market
* WSIB will consider LMR assessment

Take the following example:

The injured worker is a construction worker making $30.00 per hour. The employer decides to employ him as an estimator. Normally estimators are paid $15.00 per hour, but either the employer agrees to pay $30.00 or the Board agrees to pay the difference. Under the proposed policies the worker can reject this job offer because the worker could not find a $30.00 per hour job as an estimator in the local job market. The WSIB has no business in telling employers what jobs and what wages they can pay their work force so long as the job is physically suitable. In fact the Board policy is contrary to the Ontario Human Rights Act which states that an employer would have to provide the disabled worker with an estimator job unless to do so would bankrupt the employer.

Employers Must Re-instate Workers Whom they haven't seen for 10 years.

Currently after the expiry of the NEER Plan (3 years) or CAD VII (4.5 years), an employer's obligations to return an injured worker to work ends. The re-employment legislation in the Act specifically limits the obligation to 2 years from the date of injury.

The Board, by using the section 40 co-operation policy is extending the employer's obligation to return an injured worker to work indefinitely.

Furthermore what defines employer co-operation in returning injured worker to work are whatever the Board's adjudication staff think they are: from being forced to firing a healthy productive worker, to requiring an employer to take back a dishonest worker. The penalty will be one years loe and lmr payments the Board makes, which could be easily $50,000.00. An employer can run afoul of experience rating, re-employment and co-operation requirement simultaneously in one claim and face and penalty of $500,000.00. These are the highest employment law penalties in the Western World.

All of this is because the Board has lost complete control of the average days lost per claim, which is rising exponentially each year, due to very deficient legislation. (See Previous newsletter article Workers Compensation System Broken...)

WORKERS' COMPENSATION PROCEDURE
THE WORKERS' PERSPECTIVE

When interviewing a client for the first time, I don't like to spend too much time on how the injury happened, unless of course the worker's problem is that his/her claim has not been accepted, referred to in WSIB parlance as "denial of initial entitlement". The reason is that the *WSIA* (hereinafter referred to as "the Act") is no fault legislation. By the time a client comes in to see me, the whys and wherefores of the accident aren't necessarily very relevant as to why benefits were discontinued or reduced months and even years after an accident. Whether a worker stupidly stuck his arm into a machine or was pulled in, through no fault of his own, is not much relevant to the quantum of benefits he/she is entitled to now.

In fact, workers who come to my office for the first time, and keep bringing the conversation back to the accident, are most probably only interested in suing their employer or anyone else I can suggest, which is usually a non starter. But my reluctance to hear about the accident is really a big mistake, and the reason why is that a lot can be learned about the worker and his circumstances from the how the accident occurred.

The worker who was dragged into the machine may be out for revenge and justice, or feel like a helpless victim, or a combination of these things. This will later effect his/her performance at work; his/her motivation to work (at least with the accident employer); the level of pain, anxiety, depression, and changed family dynamics he/she experiences. The worker who stupidly enters the machine may feel guilt and embarrassment, which can be further re-enforced by how he is treated by coworkers and management upon return, and can lead to the same psychological and physically dysfunctional symptoms.

Before I go on, let me comment on both initial entitlement and lawsuits. Workers who are injured due to the actions of their coworkers and management or anyone else's coworkers and management can't sue, unless they get hit by Granny driving her car to get some groceries (known as a stranger to the Act). They could sue a postal worker because he's Schedule 2 and any other Schedule 2 employers which are mainly government associated organizations. You can't sue the WSIB for their idiotic actions, but you can if they act maliciously. The line between idiocy and maliciousness needs to be saved for another day.

The Board uses the four immediates to determine whether an accident occurred: war, famine, pestilence..., not those four, but: immediate onset, immediate reporting, immediate lay-off, and immediate medical attention. The requirement of each is not written in stone (see WSIAT Decision 1682/98), but the farther one sways away from the four immediates, the less chance there is for entitlement. Employers must file a Form 7, within 3 days, and workers a Form 6 (within 6 months). (see attached as 1 & 2). Incidentally, the WSIAT website, and to a lesser extent the WSIB site, is a treasure trove of legal information.

If there is a dispute as to initial entitlement or which body parts were injured, speak to the witnesses and get signed statements from them in writing immediately. With the passage of each minute, the memory leaves the realm of documentary and enters that of fiction.
Let me briefly address Occupational Disease. There are some diseases like asbestosis (the leading occupational killer of Ontario workers) which are scheduled, which means that if the worker has it and some at least circumstantial exposure, the Board will presume it is work related and pay the worker. In 31 years I have handled less than 5 cases dealing with scheduled diseases. Other diseases like leukemias are subject first to the test as to whether the disease and the exposure are reasonably related to each other in the abstract, and secondly whether the worker had sufficient exposure to the noxious item to contract the disease. The easiest occupational disease to prove is hearing loss, and the hardest are various cancers and Alzheimer.

Before you get started on one of these claims, you should read a few leading articles regarding the disease and occupational exposure which you can find on the internet. Whether science is going to allow you to make a case forces one to subject the article's finding to the Bradford Hills 8 criteria: strength of association; consistency; specificity; temporality; biological gradient; plausibility; coherence and analogy. To take

a simple application of Bradford Hill: cigarette smoking is known scientifically to cause cancer, because studies show the more you smoke, the longer you smoke, the more chances there are of getting cancer, and if you feed smoke to mice you can watch their bodies under the microscope slowly but surely develop cancer cells.

If the worker's medical specialists report don't address the Bradford Hill criteria, or don't provide some reasoning and description between the amount of exposure and the disease, including a reference to how many months need to pass between exposure and symptoms, then either you must ask them to prepare new reports and/or refer the worker to a specialized occupational disease clinic, all of which are government funded, like Occupational Health Clinics for Ontario Workers Inc. (OHCOW). The Supreme Court of Canada has said that not all of Bradford Hill's criteria need be met, but that something approaching all of the criteria is sufficient.

The current legal test at the WSIB is that the exposure and the resultant disease must be proved on a balance of probabilities, in other words it is more likely than not the disease was contracted from work. The Appeals Tribunal and the Board's draft policies suggest a test of "more likely than not... made a significant contribution" which is somewhat more expansive.

As soon as you're retained by the worker have him sign a WSIB authorization form (3), appeal everything in sight, and order the file from the Board (4). Time limits for appeal are usually 6 months but can be as little as 30 days for a labour market re-entry plan. This is among the shortest appeal periods in the Western World. So the worker with a grade 4 education who is being sent to a LMR for academic upgrading is supposed to understand he has 30 days from being told he's going to school to appeal. This is a perverted law. Time can be extended and a copy of an extension letter is enclosed (5).

Adjudicators who receive your request for an appeal out of time, have a Dr. Evil/ Austin Powers routine which they go through every single time I write to them without fail. "Talk to the hand because the brain don't hear". Insist to the adjudicator that the time limit issue go to the Appeals Branch, call the adjudicator's manager, assistant director, director, vice-president of claims, president, chairman, as necessary. The Appeals Branch will give you 21 days to make your case. Generally time is extended if there was some intent demonstrated to appeal, but you will observe many more grounds in the attached precedent letter (7). The Board is supposed to be more lenient within 6 months after the miss.

If you miss a time limit report it to the law society. To avoid the Law Society, appeal every letter that comes into your office if only for "time limit purposes". The Board writes: "We have just awarded your client $1.3 million dollars." Write back: "Thank you very much but we appeal your decision for "time limit" purposes". Who knows, maybe 8 months from now you'll discover he/she was entitled to $1.5 million.

Read the file as soon as possible, cover to cover. Some of the issues immediately discernable: are there prior accidents- get copies of those files, same standard letter. Have time limits been missed- make specific appeals now; have Non-Economic Loss Awards been paid; are the worker's pre-accident earnings correctly calculated? The Board miscalculates the earnings in 20% of the workers who attend our office, and not always to the worker's prejudice. Summarize the important documents. I like to type out the summary. If the file is over 100 pages do a time line of events (see attached 5 & 7). How is one ever to remember what is going on in a claim when you next pick up the file to work on if you don't have some facts (including medical findings) in sequential order to place the claim back into its litigation context.

It is rare that the worker's doctors have addressed all of the controversies in their reports on file. I have enclosed a copy of a typical letter to the worker's psychiatrist (7). Make certain you send the doctor a copy of the medical file. Questions usually asked include: What is the diagnosis; did the accident play a significant role in the disability ; what are the work restrictions; what does the future hold (prognosis); what treatment should be conducted.

If the worker has a psychological element to the disability go to a psychiatrist if he/she is barely functioning; to a psychologist for anxiety and depression; to the Health Recovery Clinic if the restrictions from both a psychological and physical combined perspective are in doubt.

If the worker is not working have him/her do a job search or return to school. The Board will not pay the worker while you await a hearing, if the worker is not doing something to help himself. The motivated worker is also the more sympathetic appellant. A job search reporting list is attached (8).

If a worker can't return to his previous employer because a physically suitable job is not available the Board starts a Labour Market Re-entry Plan to obtain a job called SEB: Suitable Employment or Business, by assigning the worker to the care of an outside agency which usually refers the worker first to a further outside vocational psychologist. What the worker needs from a LMR plan and what the Board wants from a LMR plan are often two different things. From the Board's prospective, now operating at an annual deficit of nearly 1 billion dollars per year: it wants that the training and education offered to the worker qualifies him/her for a job which best mitigates the worker's wage loss while at the same time costs the Board as little as possible, based on a cost benefit analysis. The worker wants an assurance that if he/she puts forward a good effort he/she will have little problem finding a job at the wage projected for the worker to earn within 6 years of the accident, upon which job a projected wage effecting of all future benefits will be paid.

These two expectations can coalesce, but nearly all the workers who walk into my office have a mismatch. The latest statistics demonstrate that less than 30% of workers achieve their SEB. Workers are doing menial but perhaps well paid jobs prior to a work injury for a reason. They are unable to learn English, they lack intellectual capacity; they weren't proficient in school; they have mental instability. Sending them to school again when they didn't do well 30 years ago; expecting them to cover grades 10-12 in 1 year ,when it takes reasonably proficient adolescents 3 years; providing no work placement or job coaching for the marginally employable (based on disability, age, experience), is a window into the reasons for failure of the Board's LMR program. To litigate these kinds of issues the worker's representative needs to obtain a report from WRI, a sample (9), and a WSIAT Decision that adopts the report, are attached (10).

Paralegals and injured workers love to litigate Non Economic Loss awards for pain and suffering. Realistically NEL's account for less than 15% of Board expenditures. An increase in a NEL can reopen the adjudication of the LMR and the final lock in of a worker's earning loss, but NEL's should not become a litigation fetish.

At one time 30% of NEL's were wrong, but since computerization about 5% are wrong. If you want to do something about a NEL, get the AMA Guide (3rd edition) located in Board and WSIAT library; find the joint and compare the degree of loss of movement with result the Board obtained, by asking the Board for their NEL "calculation sheet" for your client. NEL's get complicated when: dealing with fingers (but recalculation is rarely worth the trouble); systemic problems such as spleen removal; denervation of the arm; and operated upon joints like the shoulder without much movement restriction. The Board usually low balls the award, regarding the last 3 disabilities. NELs may be worth the time in these circumstance, but rarely is it the central problem of the claim, which invariably is future wage loss, a factor which accounts for nearly half of WSIB expenditures.

The Appeals Resolution Branch is the first formal level of appeal and is internal to the Board, while WSIAT, the last level, is external. The difference between the two bodies should be the quality of decision making, like a criminal case: going from a Judge to the Court of Appeal, but the law should be the same. But the difference between the WSIAT and ARO is a lot more than that, which I'll be addressing at the end of the seminar (see the article in my newsletter: "*Are the WSIAT and ARO Riding the Same Bus?*"). Appeals to the Courts are possible when the Tribunal decision is unreasonable, but your argument better be good, the Tribunal has only been overturned by the Court one time.

Typically from Paralegals, but often from lawyers, the presentation of the case at appeal is: "the worker's doctors all say my client is really suffering, so pay him more benefits". This works 10% of the time at the ARO and 30% of the time at the WSIAT. That's because either your doctors are quite right and the adjudicator wrong, or the views of the Chair are as simplistic as the argument. If you do 5 hearings a week on contingency you'll make a good living with this routine. If you'd like a better track record then there needs to be presented a logical and well documented continuum between the accident and the resulting situation.

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