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Workers' Compensation Newsletter

Abridged Edition

The Aetna Fraud Study at the Workplace Safety and Insurance Board: Where is the Byte?

Four years ago the accounting firm of Peat Marwick, in the first independent study of fraud occurring at the Workers' Compensation Board, discovered that 36% of the randomly chosen claims they surveyed were "irregular" (unproven fraud). Peat Marwick suggested that many of the claims that were irregular were the work of "organized crime", and gave the Board a suggestion for further steps to be taken to weed out criminal activity, which were never followed up on. Last Spring, two years into Tory rule, the Board has spent another $96,000 of employers' money to perform a review of 600 claims chosen at random, in order to explain to the Board how to find irregular claims.

The 1997 Aetna Study, which the Board refused to release to the public for 6 months, is another in a series of embarrassments relating to WCB fraud research. Employers should first consider what Aetna found wrong about the Board's procedures; and second, whether what Aetna found out is still going on nearly a year later. Employers should ask whether Aetna's recommendations are of any value and in turn what proposals that Aetna hasn't recommended would combat fraud.

What Aetna Found:

1. **20% of the 600 claims Aetna studied had enough suspicious indicators to be considered irregular.** (A list of indicators is included at the end of this article to help employers with disputing claims). Not one of these claims was however investigated further by Aetna in order to determine whether their suspicions were correct. What value is a theorem without a proof?

2. **The Compensation Board does not obtain from its files the claimants' prior work accident history.** Adjudicators at the Board do routinely ask the computers for prior claims, but the results are inconsistent due to old software database failures, which Aetna did not address. **16.8% of the claims Aetna surveyed had 3 or more prior claims.** This is an illustration that the rehabilitation system as currently practiced is a failure: injured workers are not being reintegrated into the workforce but only sent through a revolving door of workers' compensation.

3. **Poor judgement is routinely exercised by Board adjudicators.** Aetna disagreed with over 50% of WCB adjudicator decisions involving the "benefit of the doubt". Unfortunately, Aetna fails to comment for the reasons of this debacle: Board management terminated or promoted its most experienced adjudicators over the past 3 years.

4. **Decisions are made on the basis of illegible medical reports.**

5. **Offers by employers of return to work opportunities are ignored by adjudicators.**

6. **There are no reviews of medical fitness while workers are engaged in vocational rehabilitation activities.**

7. **Workers were not sent regularly or expeditiously for independent medical reviews.** If Aetna had looked a little bit more closely at the claims they would also have

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Functional Abilities Evaluation: Your Need to Know

by Tammy DeSousa and Richard Fink

As noted in the preceding article of this newsletter, "early return to work" is the primary strategy employed by the WSIB to economize on the costs of workers' ompensation. The plain fact is that you can't find modified work for your employee if you don't know what's wrong with him, and what he/she can or can not do.

The new *Workplace Safety and Insurance Act* addresses this issue in several places. In Section 35, the Board can order the with a completed Functional Abilities Evaluation form,

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noticed spotty medical treatment.

8. **8% of the claims accepted by the WCB had no medical documentation in the file.**

9. **Board computers routinely lost documents.**

Aetna Recommendations:

1. **Injured workers should have photo i.d. taken upon acceptance of their claims.** Does Aetna know that the Board accepts over 100,000 claims per year? Why not use electronic thumb prints, and while the Board is at it, why not electronic thumb print the 70% of the Province's workforce subject to WCB coverage? Does Aetna have some "brave new world" play book they're reading from?

2. **The Board should stop paying claims which exceed the usual healing time (3 months for strains).** This suggestion would require legislative authority, outside of Aetna's term of reference, and is on hold by the Government while the Board convenes its third in series of expert panels for no apparent reason.

3. **There should be a list of disreputable doctors.** The Board has such a list, but it didn't show Aetna.

4. **The onus should be on the worker to prove his claim.** Again, Aetna not able to root out some hard fraud, is wasting employer's money with suggestions of law reform that had been thoroughly canvassed 2 years ago.

5. **The Board should do a physical job demand analysis of workplaces, particularly where repetitive strain injuries are involved.** What does this have to do with fraud. In any event the Board today is doing less of these studies, not more, leaving it to employers.

6. **The Board should seriously review 56% of the 600 claims Aetna studied.** Peat Marwick pointed out that 36% of its claims needed more study. Is fraud increasing? Right now 40% of every employer dollar going to the Board is paying for old claims. Employers could save a billion dollars per year in premiums if every irregular claim being paid today was rooted out! The Board doesn't have the guts to do this, so instead they are saving "pennies" by cutting off Tylenol 3 prescriptions and clothing allowances to today's claimants.

7. **The Board needs to obtain more medical information on claims.**

What Aetna Didn't Consider:

1. The underutilization of the dozen private investigators retained by the Board.

2. The many instances where fraud is being conducted in concert with WSIB staff.

3. The inability of Board staff to recognize fraud if it hit them in the face.

4. That Employers' complaints of fraud including videotape evidence is not given priority attention.

The Compensation Board's Response To Aetna:

Linda Lamoureux, a lawyer, and the Board's Director of Fraud Investigation gave a report to the WCB Board of Directors concerning their response to the Aetna Study at the Board of Director's meeting of November 4, 1997. Our firm received this report on February 13, 1998 under a Freedom of Information Request. It contained the following information:

- The Board expects to complete an investigation of 600 claims by the end of January 1998. It is not certain if these are the 600 claims that Aetna looked at, of which they found 56% suspicious, or some other grouping.
- The Board is currently investigating 55 companies for fraud.
- The Board is preparing a print and radio campaign to fight fraud. Ads and radio spots had already been prepared in draft. It will be interesting to see if the Board actually will go through with this campaign given the inevitable criticism that they are black marking all injured workers.
- At the Board meeting, one Director asked whether the Board has statistics on how much fraud exists in the Compensation system since that question will be asked once the public fraud campaign starts. Lamoureux said there is no need to know this because any fraud is too much. This of course belies the actual knowledge the Board does have and their failure to tackle the internal and historical fraud already shown to them by Peat Marwick's study.
- At the meeting another director stated that the fraud campaign could be conceived as being anti-injured worker. Lamoureux's reply was that the campaign should therefore deal with employer fraud as well.
- In order to stifle this criticism, the Board decided to do pre-ad public opinion polling to test how the ad would be received, and Chairman Wright would get back to the Board on the issue.

Conclusion:

The Aetna study was prepared by a gaggle of nurses, physiotherapists, occupational therapists, adjudicators, etc. The Workplace Safety and Insurance Board is already swimming in these people. The Board needs forensic accountants, internal computer auditors, and police detectives to get back for employers the 8 billion unfunded liability dollars stolen from them over the past 20 years! Simply stopping payments to injured workers currently residing in jails and penitentiaries would save millions.

Functional Abilities Evaluation:

(Continued from Cover)

an excertp of which is attached at the end of this article. There mini-functional abilities evaluation are adequate when dealing with a simple injury and a motivated worker. However, because the worker's doctor does not have a clear description of the work, or the doctor is only parroting the worker's complaints, these Board mandated evaluations can be worse than useless.

For example, let us say the worker injured his back and the doctor reports on the form that the worker cannot lift over 10 pounds repeatedly. What if during the course of the working day the worker must lift 12 pounds from knee height to table height 4 times per day. Does this mean the worker cannot perform the job? How does the family doctor know the worker can't lift 10 pounds repeatedly. Did he do any objective measurement in his office to come up with this figure? Board mandated functional ability forms are more likely to force the employer into providing 'make work' instead of modified work.

There is also a problem as to the timely receipt of these evaluations. While the worker is compelled to consent to the preparation and release of a functional abilities evaluation, the doctor him/herself is not obligated to actually provide one. Worker's conditions

change and it's often necessary to receive adtional reports on a timely basis.

Section 40 of the new Act requires all employers to "attempt" to provide injure workers with suitable work in accordance with the worker's "functional abilities", an apparent reference to the paramountcy of functional abilities assessments.

When an employer is: (1) faced with any uncertainty as to the injured worker's restrictions and/or limitations; (2) needs assistance in the development of a suitable modified work plan; or (3) needs to objectively determine if the injured worker is capable of returning to productive work; a professional Functional Abilities Evaluation (FAE) is worth its weight in gold. Here's why:

Attached at the back of this article is an abstract from a full and professional functional abilities evaluation performed by the *Health Recovery Clinic*. The Clinic considered the actual job the worker usually performs and options for other work that may be available. You cannot get a F.A.E. worth anything unless the tester has a full appreciation of the job. It is necessary for the employer to provide a job demands analysis of the relevant work or utilize staff from the *Health Recovery Clinic* to perform this function.

In doing a proper evaluation, the *Health Recovery Clinic* looks at the medical information on the worker'S condition to date, and speaks with the family doctor if necessary.

The procedure consists of:
- taking a history of the accident and some background regarding the work activities, experience and the social setting.
- a physiotherapist performs a musculoskeletal examination to identify the nature, extent and symptomatology of an employee'S injury.
- a neurological evaluation is done to identify or rule out neurological problems.

The kinesiologist or occupational therapist does:
- objective testing of an employee's ability to perform the physical demands of a particular job.
- objective testing to determine whether or not an employee is providing a maximal effort during testing.
- objective testing to determine whether or not an employee is providing the assessor with consistent and reliable results.
- specific occupational testing which simulates the employee's work requirements.
- subjective reports by the employee as to their limitations, restrictions and symptoms.

The final report, besides detailing what the worker's limitations are and outlining where there are definitive matches with offered reemployment, makes recommendations (eg.: job modification, treatment, etc.) for future management that may improve or facilitate a successful and timely return to regular productive work

This testing sifts out the real disability from the embellished symptoms that all too often appear, by the following means:

1. A worker with a bad back has his/her grip strength measured. Back injuries rarely effect grip strength, but a worker who is out to distort his/her disability will have a grip strength well below the averages for his/her age weight and sex. Not only that, but the amount of grip strength will vary with each test.

2. Computerized testing, requiring for instance the performance of repetitive lifting techniques from the injured worker, should indicate a curve of productivity that moves up and then flattens out with perhaps a slow decline over the time of testing. Workers attempting to fool the computerized equipment will show strength and mobility patterns that move randomly up and down. The worker is of course trying to show the computer that he/she has great restrictions but a dishonest worker can't mimic them adequately and consistently.

3. Furthermore, this computerized testing combined with other testing requiring the worker to perform simulated work place functions, will demonstrate whether the worker is capable of repetitive work during the course of the day. A worker who is incapable of performing repetitive work throughout the day will find that their endurance to perform the work trails off slowly over the one hour testing time, while workers who can perform at an average level for one hour continuously, can continue for the rest of day. This formulation is based on extensive and reported scientific testing that employers and their representatives can later rely on if disputes arise.

4. When a worker is asked to lift 20 pounds but claims not to be able to lift a pound more, then there should appear physiological and biomechanical signs of exertion at the 20 pound level, such as increased heart rate and sweating, on the part of the worker. When these signs don't appear, the worker has not reached their maximum ability but are providing subjective complaints in an attempt to fool the examiner.

5. Workers who complain of certain movements contained in exercises, but are able to perform simulated work containing the identical body movements; and workers who indicate that practically every function they perform is a cause of pain, (but when they are watched without themselves knowing they are watched, can demonstrate good lifting mechanics), illustrate to the examiner what the worker's true limitations might be.

In several contested Compensation Claims involving our office, Board adjudicators have accepted the results of the functional abilities evaluation in matching essential job demands to determine occupational suitability, over the opinion of the family doctor and in one case over the opinion of the specialist.

The *Health Recovery Clinic* uses ARCON testing equipment which is becoming an industry standard. A full Functional Abilities Evaluation is detailed and exhaustive and thus costs approximately $995.00. Less costly but narrower evaluations can be purchased. Readers seeking further information should call David Corey at 905-855-1807.

Tammy DeSousa *has a background in nuclear medicine, behavioural therapy and marketing. Ms DeSousa is currently employed as Director, Health Recovery Clinic in Mississauga where she directs a multi-disciplinary team of professionals specializing in assessment and treatment of injured employees.*

Excerpts from a useful *Health Recovery Clinic* Functional Abilities Evaluation

CLIENT INFORMATION:
Report Date: **03/04/98**

Client: Mr.X
DOB: **05/07/71**
Age: **26** Sex: **M**
Height: **67** in
Weight: **135** lb
Date of Assessment: **03/04/98**
Occupation: **Warehouse Packer**
Referred by: **n/a**
Employer:
Resting Pulse Rate: **91**
Insurance Co: **n/a**.

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Blood Pressure (sitting): **115/60**
Physician: **n/a**
Tested By: **Health Recovery**

Present Complaints:

1. Constant sharp pain across the low back, right greater than left.
2. Intermittent throbbing pain into the right side of the neck and into the right upper fibres of trapezius.
3. Intermittent throbbing frontal headache with blurriness in the eyes.
4. Intermittent dull pain in the right side of his chest.

PHYSICAL ASSESSMENT

Mr. X presented as a cooperative young gentleman of stated age who used the assistance of a Vietnamese interpreter to assist in the assessment. There were numerous pain behaviours noted throughout the assessment, including rubbing of the head, squinting of the eyes, rubbing of his painful areas, and some groaning during the physical examination.

Posture

Postural observation revealed rounded shoulders and forward head posture with a slight decreased lumbar lordosis.

Palpatory Examination

Moderate tenderness was noted in the area of the right sternocleidomastoid greater than the left sternocleidomastoid. There was significant tenderness in the right upper fibres of trapezius, more so than the left. There was also significant tenderness in the region of the right sacroiliac joint with concomitant acute spasm of the right paraspinals in the low back during this palpation. There was exquisite tenderness in the right gluteal region.

Mobility

There was significant mobility loss in the cervical spine and right shoulder range of motion. During abduction of the shoulder, there were complaints of significant pain in the right pectoral region during this manouevre. There was also moderate mobility loss in the lumbar spine region. Mobility in the elbows, wrists, and hands were optimal. There was light mobility loss noted in internal rotation of the right hip, causing significant pain in the right buttock. Optimal mobility was noted in the left hip, bilateral knees and bilateral ankles.

StrengthTesting

Strength was optimal with grade five out of five measured throughout the upper and lower extremities. There was no giving way during this manouevre, however when testing the right hip there was slight trembling.

Neurological Evaluation

Normal myotomes, normal dermatomes and normal deep tendon reflexes were found throughout all four extremities. Straight leg raise testing was negative to 60 bilaterally with significant complaints of low back pain at 60 on the right. In sitting, there was 90 of straight leg raise testing, however during this manouevre on the right there were complaints of significant pain in the right buttock.

Sacroiliac Joint Testing

There was pain on the compression test on the right sacroiliac joint as well as pain with sacral compression. However, there were also numerous non-organic signs noted during this portion of the examination. During palpation of this area, there was acute spasm on the right side of the paraspinals. There was also significant pain on internal rotation of the right hip in this region. Kinetic tests were difficult to objectify due to Mr. X's inability to fully flex his right knee up towards his chest in standing or to weight bear on his right leg in a one-legged stance position.

SUMMARY OF FUNCTIONAL ASSESSMENT

SUBJECTIVE SUMMARY:

Mr. X was administered the Spinal Function Sort disability questionnaire in order to evaluate his self-perceived level of functioning. On this test, Mr. X generated a score of 17 which places him well below in the 'sedentary' (100-110) level of functioning with respect to physical demands. The specific responses are available for review in appendix 2, as Mr. X indicated all tasks involved some level of restriction.

On a 0-10 pain rating scale (10=worst pain ever experienced) Mr. X indicated a pre-testing pain level of '7' After testing, this pain level had increased to a rating of '8'. Both times the low back was referred to as the painful area.

In addition, Mr. X frequently displayed theatrical heavy breathing (this was not taken to be a sign of increased respiration in response to increased oxygen demands as Mr. X was seated and resting on several of these occasions). He was observed to shuffle his feet repetitively, and sat with his left hand in his right armpit. He stated that he needs his lumbar support belt every day because "it will help me", and he avoided eye contact with both the assessor and the translator.

OBJECTIVE SUMMARY:

Several tests and cross-checks are examined in order to help quantify the level of effort provided during an evaluation. Tests which indicate that Mr. X provided a consistent and possibly maximal effort are:

- an acceptable coefficient of variability was generated on 3 of 4 static (ST) tests

Tests which indicate an inconsistent and possibly sub-maximal effort are:

- the minimum expected heart rate increases (based on populational norms) were not achieved on any of the static (ST) tests
- the acceptable coefficient of variability was exceeded on 8 of 14 hand grip tests
- results for rapid exchange hand grip testing exceeded results for standard hand grip testing
- maximum voluntary effort hand grip testing failed to generate an appropriately shaped Bell curve with either hand

Due to the lack of signs of physiological or biomechanical stress in conjunction with the tests noted above, it is the opinion of the kinesiologist that Mr. X did not provide a maximal effort during functional testing on this day. His demonstrated hand strength levels (pinch, grip) are inconceivable for a 26 year old male, especially considering the fact that forearms/hands were not described as an injury site.

Conclusions of the FAE:

Although Mr. X did not demonstrate the ability to perform the essential duties of his occupation, his behaviour and lack of effort suggest that the results of this evaluation are a significant under-representation of his true abilities. In light of this, the results of the FAE are inconclusive as to determining Mr. X's true maximal abilities.

Mr. X is a 26 year old gentleman who was the

(Continued on next page)

Company Health and Safety Checklist

The following is a short checklist to be used to determine the general state of preparedness for a "Workwell" or "Accreditation" audit. A company answering NO to five or more questions should give serious consideration to upgrading their program in the near future. This is not a complete list but will be a good indicator as to your company status.

YES NO

___ ___ A Company Health and Safety Policy is signed, dated and posted in the workplace. It outlines the management commitment and responsibilities.

___ ___ There are a set of company rules and procedures that cover such items as; material handling, house keeping, personal protective equipment, hand tools, machinery and vehicles, progressive discipline, electrical equipment etc.

___ ___ A Joint Health and Safety Committee has been established and functions in accordance with the O.H.S.Act; incl. Minutes, Postings, Actions etc.

___ ___ An Accident Investigation Procedure exists, which includes; a step by step procedure, company investigation form, injury control process, remedial action and documented follow-up, medical treatment and modified work forms.

___ ___ Have an employee orientation program including a checklist. Also post Job Task Analysis at work stations which describe major tasks, hazards and required PPE.

___ ___ A written Electrical Lockout Procedure which includes shutdown and restart is developed and enforced.

___ ___ The WHMIS Program is up to date including the training of all applicable employees and the MSDSheets are complete, current and available.

___ ___ An Emergency Evacuation Plan exists and is posted; and a drill takes place and is recorded.

___ ___ Senior management plays an active role in inspections and health and safety issues are on the agenda of senior management meetings.

___ ___ Both workers and management are given written performance appraisals where health and safety issues are evaluated.

___ ___ Health and safety issues are considered when purchasing product and equipment; or in design changes at the workplace. These are in writing.

___ ___ Written records are kept of all internal and external training taken by workers, supervisors and management.

___ ___ Company Safety Manual exists and is in the possession of all supervisors. An Employee Safety Manual has been distributed with training to all workers.

This checklist has been compiled by Route Management Services, P.O. Box 189. Palgrave ON LON 1P0, (905) 880-4773, route@inforamp.net

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rear lap seat-belted passenger of a vehicle that was struck on the right side while traveling at approximately 100 kilometres per hour on Highway 400. The mechanism of injury of this impact caused Mr. X to not only be thrown in a forward and backward movement, but there was a rotational component which rotated him towards the left from the right around his lap belt. Mr. X's pain diagram is consistent with this type of mechanism of injury, complaining primarily of right sided body pain.

It is the physiotherapist's opinion that Mr. X exhibits myofascial pain both in the right side of his neck, chest, and upper shoulder region as well as in his right low back and buttock region. As well, there is an impairment of the right sacroiliac joint . However, there were also numerous non-organic signs evident throughout the examination. Despite the impairments noted above, Mr. X is not substantially disabled from performing his duties as a Warehouse Packer.

WSIB CSPAAT

Compare the HRC repor with an excerpt from a W Functional Abilities Forr

Capabilities

Walking: short distance only ☐ ; as tolerated ☐ ; other (eg. uneven ground) ☐ __

Standing: less than 15 min ☐ ; less than 30 min. ☐ : as tolerated ☐ ; other ☐ __

Sitting: less than 30 min ☐ ; less than 1 hour ☐ ; as tolerated ☐ ; other ☐ _____

Lifting floor to waist: less than 10 Kg. ☐ ; less than 25 Kg. ☐ ; as tolerated ☐ ; otl

Lifting waist to shoulder: less than 10 Kg. ☐ ; less than 25 Kg. ☐ ; as tolerated ☐

Stair climbing: none ☐ ; 2-3 steps only ☐ ; short flight ☐ ; own pace ☐ ; as tolerate

Ladder climbing: none ☐ ; 2-3 steps only ☐ ; 4-6 steps only ☐ ; own pace ☐ ; as

Limited ability to use hand to: hold objects ☐ ; grip ☐ ; type ☐ ; write ☐

New Penalties under Bill 99: Workplace Safety & Insurance Act:

When Employers Are Liable for $150,000 Re-employment Fines

Must every employer in Ontario return every injured employee to work the moment he/she is able? Have the new *Workplace Safety and Insurance Act* and the regulations changed the reinstatement landscape? The Minister of Labour has written to tell us things are just as they were. Well then, what does the reader make of the following **new** penalty, employers will face for not co-operating with the Board in attempting to provide suitable available employment:

"In all cases, the amount of the penalty will equal 100% of the cost to the Board of providing loss of earnings benefits plus an LMR program to the worker. The penalty is in addition to any premium or reimbursement obligation the employer may have". (Policy Framework, October 14, 1997; "Return to Work"; p.8)

An example of the scope of this penalty can be illustrated by considering the benefits that will be paid to a worker with shoulder tendinitis who can no longer work as a shipper/ receiver. The Board must, in order to place him in a job that will pay the equivalent of his $15.00/ hour pre-accident wage, send him for academic upgrading for two years, plus three years at DeVry Tech to be trained in electronic repair, and a wage loss pension for two years while he gains the experience to reach his old income level. Total cost to the Board is $150,000.00. That's the employer's penalty for non co-operation: $150,000.00!

For eight years, employers with more than 20 workers have had to "offer" suitable modified work in the face of a one year wage penalty under the Workers' Compensation Act. Starting in July of 1998, the Board has introduced a penalty of five times that amount if the employer does not "attempt to offer". What's the difference between "failing to offer" that's worth $25,000.00 and "failing to attempt to offer" worth $150,000.00? What more is being expected of employers?

Consider the following job description as a remedial measure to comply with the reinstatement obligations and avoid various penalties:

VISUAL INSPECTION
MODIFIED JOB

SUMMARY

To visually inspect and remove all waste in lunchrooms , coffee stations, smoking areas and washrooms. Check each area for appropriate supplies and report for any safety hazards.

DESCRIPTION

Visually inspect the following areas in a continuous circuit:

1 lunchroom
1 smoking area
2 women's washrooms
2 men's washrooms
1 lunchroom
1 smoking area
2 women's washrooms
2 men's washrooms

1 lunchroom
1 smoking area
1 women's washroom
2 men's washroom

1 smoking area
1 coffee station
1 men's washroom

1 lunchroom
1 smoking area
2 women's washrooms (Detail & upstairs)
4 men's washrooms (Detail & upstairs)
2 coffee stations (Detail & upstairs)

I lunchrooom
3 smoking areas
1 women's washroom
3 men's washroom

Lunchrooms & Coffee Stations

- Inspect tables and counters for any waste material (ie. Coffee cups, napkins, papers) and place in the garbage
- Check tables and counters for any spills and wipe clean.
- Notify cleaning staff of any large spills on the floor.
- Wipe microwaves clean inside and out side.

Smoking Areas

- Inspect area for any debris and place in garbage
- Extinguish any live cigarette butts.
- Search area for any safety and /or fire hazards and report any problems to the Health and Safety Officer

Washrooms

- Inspect floors, counters and sinks for any garbage and dispose of in the appropriate containers.
- Wipe up spills on counters and around the sinks.
- Check soap, toilet paper and paper tow els to ensure containers are full.
- For the men's washroom, have a man enter the washroom first to ensure no one is in there, post the sign provided and insert the door stopper to keep the door ajar.

PHYSICAL / MENTAL DEMANDS

- Must complete the circuit at least twice daily starting in Plant 4, 3, 1, 2 in the morning and reverse it in the afternoon. Walking or standing 8 hours a day.
- No lifting over 5lbs. No lifting above the shoulders.
- No repetitive movement of the shoulder against resistance.

How many of our readers have four plants containing four cafeterias which require daily inspections? Is the Workplace Safety and Insurance Board applying a standard of compliance upon smaller employers which can only be met by larger employers? To provide our readers with an understanding of these new return to work obligations and how they can be met, I will discuss with you 2 recent claims which are office is currently dealing with:

Mr. R.:

In 1996, the worker incurred a shoulder injury caused by a sudden strain in the usual course of work resulting in three months of lost time, and thereafter returned to his regular job. The worker had a recurrence of the same injury in 1997 which the company managed to convince the Board was a new injury. The creation of the new injury was beneficial to the company because Second Injury Fund relief could be claimed, and the cost of the claim would not show up until the 1998 NEER plan statement.

Mr. R. is the Union President and antagonistic with management, resulting in behaviour which has harmed productivity. After another three month absence, the worker returned to a special modified job, sitting at a table sorting, which job the employer reserves for injured employees. After a further three months, the worker was told he was laid off because his allotted term at modified work had ended. At the same time, the worker was seen at the Board's Regional Evaluation Centre and found to need a cortisone shot and four weeks of further rehabilitation. The Board's finding was that at the end of this four week period, the worker would be fit to resume his regular activities, gradually in 2-4-6-8 week step up "work hardening program".

On the contrary, the worker's specialist advised that the worker could not use his arm against force while lowering it (the pronated position) on an indefinite basis, and did not need cortisone. The employer has one machine which does meet this restriction, but it is operated by an employee who has an occasional sore back, and many more years seniority than worker R.

Consider the following questions:

1) Was it better to treat the second occurrence as a new accident or a recurrence? What about SIEF?
2) What is the difference between a new accident and recurrence?
3) How does the employer know what light work to offer, and when should it be offered?
4) How long does the employer have to provide the light work on the sorting table, and does the employer have to provide it all?
5) How far does the employer have to go to accommodate the worker with a job that meets the restrictions of no application of force while the arm is in pronation?
6) When the Board and the worker's medical specialist are in disagreement with the restrictions offered, "who rules"?
7) Can the employer have the worker evaluated by its own medical staff?

1) & 2) New Accident Or Recurrence?

The maximum obligation under the old Compensation Act was that an employer had to maintain an injured worker's employment for up to two years. The minimum, subject to dismissal for just cause, was one year from when the worker or Board notified the employer he was able to perform his essential duties. Essential duties are the worker's regular job at the regular productivity demands. The new Act doesn't change these time limits on the duration of obligation, according to the Minister of Labour's letter to me of February 9, 1998 quoted from below:

"As you know, the return to work provisions of Bill 99 were amended in August, 1997 to clarify that employers are not required to create suitable jobs for their injured workers, and are required only to provide jobs that are available at the workplace.

In addition, I would point out that provisions of the Act concerning the re-employment obligation, the 'duty to accommodate', and 'undue hardship' are fundamentally unchanged (aside from the codification of the WCAT test for employer compliance with the re-employment obligation), as from comparable provisions in the Workers' Compensation Act."

Therefore, should it not be concluded that the time limit on the obligation is unchanged? Thus, it may be desirable to have the work injury seen as a 'recurrence' rather than a 'new accident', because the window of responsibility will have run some period of time towards its end by the time of the second event. However one should also consider that in the case of Mr. R. the plant was unionized and the employer's duty to accommodate under the collective agreement exceeds two years, pursuant to the *Ontario Human Rights Code.* Secondly, the employer is entitled to
Second Injury Fund relief in the case of a second accident, even if the first happened in the same workplace, which is not the case for a recurrence.

The difference between a 'new accident' and a 'recurrence' is dependent on whether the event is insignificant (i.e.: there was no external trauma) and whether the employee continued to have a disability or continued medical treatment since the first incident.

3) What to Offer and When?

WSIB Operational Policy Guideline 11.0 (page 1) exhorts that the "workplace parties must work cooperatively and be self-reliant in developing and implementing early and safe return to work programs". Before a worker can be paid benefits he/she must put his/her signature on the Employer's Report of Accident (Form 7) which specifically authorizes the Board and the employer to obtain a functional abilities evaluation from the worker's family doctor. Surprisingly, there is no stated penalty if the family doctor refuses to send it. More importantly, the Functional Abilities form which family doctor are obliged to sign gives me cause for concern when the claim has an air of contentiousness about it. Consider one of the questions in the Board's FAE form.:

Check off the following restrictions:

"Standing: less than 15 min __; less than 30 min __; as tolerated __; other ___

Sitting: less than 15 min___; less than 30 min__: as tolerated___; other__"

Thrust into the hands of the family doctor are a universe of restrictions that can last until the expiry of the usual healing time which so far is three months. There is no obligation on the doctor to revise the form weekly or even monthly. The form invites restrictions that are difficult to meet: a job that can be performed while standing or sitting may not be too large a hurdle, but just how productive is a worker going to be who is up and down like a jack in the box?

Employers must invite the worker to return immediately and by telephone no less. (It's also a legal requirement to have a modified work policy in place, which workers are aware of). If the doctor has not sent in the functional abilities form, it's still up to the employer to obtain one. If the employer can't - then call the Board. If the Board can't get one, I haven't got the answer because the issue has not arisen nor do the regulations contemplate it. One solution obviously would be to ask the worker to go before an employer sponsored medical evaluation which the Board adjudicator could insist the worker attend, on

pain of a cessation of benefits. We suggest that where the claim is beginning to appear odd or contentious, the employer attempt to have the worker attend before an employer sponsored medical examination at a clinic specializing in these services. Otherwise the employer is in the dark, possibly not only concerning the worker's restrictions but also as to what is medically going on and what can be expected in the future.

4) For How Long And Whether to Offer Light Work

Worker R.'s employer offered the worker a specially created sorting table job as soon as they were appraised of the worker's restriction of no repetitive or forceful arm movements. The sorting table job need not be provided indefinitely because it is not "available", in the sense it exists only as a temporary rehabilitation measure. It is neither the worker's old job made over nor another job that is open or available, and merely fitted with modifications. I am supported in this view by Reinstatement Branch Decision 3/94:

"Both the worker and employer witnesses agreed that it was the employer's normal practice to offer temporary modified employment with the intention of the worker returning to the pre-accident employment. This process generally involved assigning a number of work tasks to the injured employee for a prescribed period of time. All the participants agreed that these were not actual positions. The worker representative argued that it was within the employer's control to continue to offer such work assignments and that it had a responsibility to do so short of undue hardship. The employer is not obligated under this section to create a new position or offer a position which does not exist."

Reinstatement Branch Decision 92/93 expresses a similar sentiment.

Of course outside of the philanthropic employers among our readership, the question will arise as to what savings there are to be had from offering light work. For employers under MAP, that is with less than $25,000 of assessment payable to the WSIB annually , if the worker is not returned to work within 4 days the employer has incurred a $2000 penalty but no further liability will be incurred on account of any additional payments made by the Board to the injured worker. For those under NEER the penalties rise with every further payment.

Consider for a moment again the $150,000 penalty for not **"attempting"** to provide "available suitable employment". Compare that with a $25,000 penalty under S.41 for terminating a injured worker within one year of re-employment. Could an employer therefore avoid the $150,000 penalty merely by providing the suitable employment, which is a compliance with the word "attempt", and then terminate the injured worker a week or month or a year later, which is only non-compliance with the $25,000 liability to "accommodate"? Could the Board order the employer who terminated the worker prematurely to ask the employer to "attempt" again, or join the employer in an endless round of "attempts" and terminations. Could this go on even past the usual 2 year time limits? I would appreciate the readerships views on this point, when last I checked with the Board, the officials at the policy branch hadn't thought about this yet!

5) What is "available" or has to be made "available".

The Minister of Labour has stated that employers are not obligated to create a job, but only to provide a suitable available job, just like the law has always been. Consider for a moment WCB Reinstatement Branch Decision 25/95 (page 5):

" In the Reinstatement Officer's opinion, the further accommodation (that is, of having someone else set-up the machinery first thing at the beginning of the shift) does not fall outside the Act and Board policy. The test established by the Act and Board policy is that of 'undue hardship'....The Reinstatement Officer also notes the evidence of the Director of Operations, who testified that, prior to his coming on the job in September, 1993, the employer allowed people to do the creamer job without knowing how to do the initial set-up. The Reinstatement Officer concludes that, where it has been in the employer's own interest to do so, it has made these modifications. There was no reason why the same modifications could not be made in the interests of returning an injured work to work and in the interests of the meeting the obligations (under the Act)".

In other words, if the employer is able to take the current job and modify it to meet the restrictions of the worker, then the employer must so modify it, including stripping away from the job essential requirements. Do not modifications made to the worker's pre-accident job at some point become the creation of a new job? However, Reinstatement Branch Decision 50/94 (page 5) seems to state the opposite:

" 'Suitable' employment is work which the worker can perform without risk to her own health or the safety of others. It 'becomes available' when the employer has productive work which requires a worker on a full or part time basis and which if the injured worker did not do it, would be done by someone else on overtime or through additional hiring. The notion of work becoming available in s.54(5)... does not require the employer to make work available or to create activity suitable for the injured worker. Were that the case the language of s.54(5) would be very different than its current form". (See also 37/96).

This view is also echoed in WCAT Decision 464/96 (42W.C.A.T.R. 124, at 128) : "the employer must in fact have work that needs to be done".

Do employers have to displace one worker from his job in order to hand it over to the disabled worker? Decision 464/96 notes that even when work is potentially "available" with the accident employer, there may be barriers to making such work available to the particular worker such as seniority under a collective agreement which is explicitly recognized in section 41(15). Contractual obligations and other statutory barriers such as the Employment Standards Act could stand in the way. Nevertheless I believe an employer will have a hard time convincing the Board that the employer "attempted" to find available work, when the employer could have moved worker S to position B from position C, a light job, and worker R into position C in S's stead?

Must the worker be fully productive when returned to either his/her old job or a modified job? Board Policy Guideline 9.3 states that in the case of "essential duties", referring to the worker's pre-accident job, the worker must be "able to meet normal productivity demands".

But when considering available suitable duties, referring to an available modified job, Board Policy Guideline 9.6 - the requirement of accommodation, the employer must shoulder a burden something short of "undue hard-

ship". "Undue hardship" under past Board policy has been defined as something just short of creating insolvency upon the employer.

In a labour arbitration decision a couple of years ago involving the Calgary District Hospital the arbitrator wrote that employers may have to endure a higher degree of absenteeism from their injured workers. The arbitrator suggested, when determining whether an employer termination of an injured worker is justified, the arbitrator must consider the rate of absenteeism, the availability of substitute workers, and whether regular attendance is critically important to job function. This view point is echoed in WCAT Decision 649/96.

However, in WCAT Decision 647/95I the employer did not have to offer modified work while the worker was off half the day at physiotherapy, and when the modified duty required him to be a flag man at a construction site.

In WCAT Decision 464/96, the employer did not have to offer modified work on a weekend shift devoted to "just in time production" where the pace of work would be frantic and the assignment would be irregular, but still indicated that the requirement of offering modified work need not be confined to permanent positions.

In Reinstatement Decision 26/96 the Appeal Officer stated "that the worker was slower in performing his job due to injury was not cause for dismissal", while Reinstatement Branch Decision 39/95 reminds employers not to maintain the worker in a job merely to avoid experience rating penalties, but rather the work must be "productive".

My conclusion is that where work exists, the employer will be expected to modify the job to the extent that the worker can perform it as long as the character of the job remains the same. A painter will not be excused from painting the top part of a wall, but the employer will be obliged to provide portable scaffolding. In the case of Mr. R., as long as the worker he is displacing could work elsewhere, I believe the Board will consider the light machine job to be available. But this opinion is only an extrapolation from the musings I have heard from the Board's Chairman.

While the Minister claims the Act hasn't changed, the requirement that employers must in 1998 be prepared to "attempt" to modify available work or the pre-accident work to the point of financial hardship, are two additional responsibilities which have expanded the meaning of the word "available". Whereas "available" use to mean: all the jobs here require lifting so nothing is available and the Board often bought that without much ado, the word "available" now means "is the employer certain that the lifting aspect cannot be avoided and the job is unsuitable".

In a case I handled several years ago, the question came up as to whether an employer must reinforce his plant's roof so as to accommodate and then purchase an overhead crane, in order to meet the worker's restrictions of no heavy lifting, but the case was settled before hearing. Even in 1995, when considering a $200,000 expenditure to secure the roof under threat of the "undue hardship" burden, included not in the statute but in the Board Policy Manual, employers were forced to create some alternative remedies.

Before leaving this question consider a New Brunswick labour arbitration case: T.C.C Bottling (32 L.A.C. (4th) 1993. The employer was compelled to accommodate an epileptic in his regular job with the following modifications:

". . . he not be required to handle caustics, acids, drive a forklift or climb. The worker was to be provided with safety rails, wire mesh and padding be installed in the work area to minimize the chance that the worker might injure himself during a seizure. The worker was to be allowed to work the night shift where chance of seizure was less; and on each shift the disabled employee works, at least one employee experienced in administering first aid must be present."

The old Workers' Compensation Act has been amended within section 41 (the former reinstatement section 54) to state that the employer must not only accommodate the "work" but also the "workplace". Again this is another keyword which connotes employers have been given new and greater responsibility. Is the Minister's letter to me a question of semantics to calm employers down for now, while a gun is held to their head individually later?

For smaller employers, under 20 employees, or concerning workers with less than one year's seniority the question arises whether after "attempting to accommodate" any further obligation arises which the employer did not previously have to defer to. Policy Guideline 11.1 apparently indicates that employers outside of the traditional duties to accommodate are free and clear of any obligations and that the responsibility flows back to the Board:

(11.1 p.2): "If modifications would allow the worker to return to appropriate employment and the employer does not have a duty to accommodate, the employer may be considered unable to provide appropriate employment. In most cases the Board is not involved in early return to work"

6) Medical Restrictions

Ultimately it is the Workplace Safety and Insurance Board that has the final say in what disability it is prepared to accept for the purposes of defining the appropriate work restrictions and other benefits which flow from such a finding. "Nurse adjudicators" have been given the role of making these determinations. However, employers must ask how much money they are prepared to wager that the "nurse adjudicator's" decision is correct and will not be overturned at a later point of time by the Board's appeal process, leaving the employer facing a substantial financial liability. Consider these factors when weighing your bets on the nurse adjudicator:

a) their lack of a medical degree.
b) no clinical exam has been performed by the nurse.
c) occupational health nurse training that does not include significant curriculum in either ergonomic nor disability expertise.
d) the nurses would be in possible breach of nursing ethics, as these nurses are providing a medical opinion.
e) the nurses are applying guidelines which are subject to amendments and further interpretation.

I had a hearing in March 1998 which dealt with the following fact situation:

The worker suffered a back strain while lifting a heavy object. He returned to light work for three months and was then judged by the Board to be recovered for regular work. The worker refused to perform the regular job duties and was terminated. Six months later, the Reinstatement Hearings Officer reversed the finding that he was fully fit and restored the

worker for six additional months of benefits costing the employer $8,000 in NEER penalties. Now the worker is at the Appeals Tribunal requesting an additional 6 months of benefits and that the employer be penalized for wrongful termination.

I suggest that where there is a conflict between the Board's medical opinion and the worker's physician that cannot be resolved, explicit or implicit, the employer is well advised to seek its own medical opinion. Operational Policy 16.2 outlines the conditions under which the Board will allow an employer health exam: clarifying discrepancies or gaps in medical information needed for workplace safety and insurance purposes.

The re-employment obligation lasts 2 years from date of injury or 1 year from when the worker is able to return to his essential duties (ie. preaccident job). If the worker is never able to return to his "essential duties", in effect the employer's obligation is doubled from one to two years. A way to avoid this situation is apparent in the Board's Policy Framework:

"If the Board makes a determination on its own initiative regarding the worker's fitness to return to work, or where the workplace parties disagree about the worker's fitness, the Board will notify the employer of the re-employment obligation. Once notified, the re-employment obligation lasts for up to one year. (Policy Framework; Obligation to Re-Employ; p.3)

In other words compelling the Board to make a determination on what modified work is appropriate shortens the liability period to a maximum of one year.

If the reader believes Mr. R's case opens up a can of worms, consider the case of Mr. U.

Mr. U.:

The worker, a roofer, injured his elbow when climbing a ladder. His job at the time at the time of injury was to hold the ladder for other members of the crew while they worked on the roof. Mr. U. got bored waiting for the crew to come down and decided to climb the ladder himself, whereupon the wind blew him off the ladder and he injured the nerve in his elbow. The employer gave the worker a job in the office. The worker was found reading documents marked "confidential". The worker was given a job driving a truck. He complained his elbow was too sore to drive. The Board adjudicator ruled the worker could drive. In effect the worker was being paid $28.00 per hour to act as a courier.

Three months later, following another series of disputes over the worker's restrictions the employer put Mr. U. to work on a roofing crew doing modified work. The other members of the crew were resentful of the worker's seemingly arbitrary restrictions, while the worker himself felt that the employer was cheating him by not giving him enough overtime: i.e. Allowing him to work extra hours to do nothing; and b) combining with the Board to force him to continue working for the employer when there was little future for him in the roofing business with a bad elbow.

I might also mention that the worker's affected arm, which was causing him great pain, had more muscle bulk on it than my leg. The employer offered to pay for the worker's attendance at a draftsman training course so as to allow him to either seek employment elsewhere or come back to the employer with new skills. The Compensation Board decided to do this themselves, and thus the worker and employer parted company amicably, well sort of.

This true fact situation raises the following questions:

1) What discipline can be meted out to a worker for causing the work accident?
2) Should the employer pay the worker his normal wage rate while doing modified or part time activities?
3) Can the employer meet his re-employment responsibilities by finding the worker employment elsewhere; does offering modified work make any sense?
4) If the worker signs a termination agreement, is the employer free of any other obligation. Does the duty to cooperate under s.40 over ride section 41's qualifications for accommodation? What is the Board's new role in the new shibboleth of cooperation within workers' compensation?
5) Does the employer have to retrain the injured worker in order to comply with the obligation to provide available alternate work?

1) Discipline:

Prior to the new act (Bill 99 : *Workplace Safety and Insurance Act*) the Board's rule was that unless the employer could prove that they discharged an injured worker for reasons of employee misconduct, the employer would be fined up to one years salary. Bill 99 and Operational Policy 9.7 significantly alters this rule in 1998. If the employer proves that the dismissal was for reasons other than the worker's injury then the employer is immune from penalty.

Even though an employer now need only prove the work accident played no part in the employer's decision to terminate, reinstatement provisions still can work injustices against the employer. For example, there are a series of reported decisions where employers disciplined and terminated workers over misconduct concerning the accident itself. In these decisions, the employers were thereby judged to have had an anti injured worker animus, thus negating the employer's reasons for dismissal. The conclusions of these decisions are outrageous, but nevertheless, unless the worker's conduct endangered not only himself but others, or was one in a series of offences that predate the accident, I recommend that discipline be gently applied at first.

As reconfirmed in Reinstatement Branch Decision 18/97, the employer is entitled to terminate the injured worker's employment when the worker is not faithful to the employer. "Unfaithfulness" can take the form of dishonesty, gross disobedience, failure to put forward an effort equal with ones ability, etc. Previous newsletters have documented numerous examples therein.

2) What wage?

Operational Policy Guideline 11.0 (page 1) states: "The desired outcome of the early and safe return to work policy is an early return to appropriate employment that is within the worker's functional abilities and, **if possible**, restores the worker's pre injury earnings". I don't believe "if possible" means an employer is required to pay full time wages for part time work or to pay a driver $28.00 per hour when the job is worth #10.00 per hour. Sometimes, not very often, it is cheaper to overpay the worker than to take the NEER penalty, or there may be collective agreement concerns. But the Compensation system isn't Disneyland, and the reinstatement provisions should not be transformed into the Magical Kingdom .

3) Location of Work:

There is nothing in the Act that says the employer has to provide suitable or essential duty work with the same employer as where the worker injured himself. Policy Guideline 9.2 states the employer must "offer the worker the first opportunity to accept suitable employment that may become available with the employer". However, if there is nothing available, Policy 9.1 states that "essential duties" are the "pre-injury job, and any other jobs that the worker is normally assigned to or is eligible or qualified to be assigned". If the worker is qualified to work for the guy down the street, why not let him receive a work offer to engage him there. Or to take it further, why not have an employment agency locate alternative work.

Almost all injured workers found work with their accident employers following an injury even before the Compensation Act imposed reinstatement obligations in 1990. The Ontario Government felt in 1990, and is persuaded more strongly today, that it's more efficient for the system in having employers compelled to take the injured worker back: the claim is out of sight and out of mind. The unfortunate statistic for the Board is that 50% of all workers who are re-employed after a disability of over 6 months duration, are unemployed again within 5 years.

In order to lay some theoretical underpinnings for the return to work campaign we see the Board engaged in, the WSIB has gotten the Institute of Work and Health trying to prove that an early return to work cures injured workers of what ails them. In the Institute's Winter 98 Newsletter they quote from a Quebec study that showed that workers who go back early to work get less compensation. And that's fair enough and pretty obvious. Furthermore, the study found treatment (medical, physiotherapy, etc.) did not stop compensation payments. What the Institute failed to mention was that there is no indication that the same workers who went back to work ever recovered from their disability. The Institute of Work and Health also failed to mention that some treatment didn't stop compensation benefits but did lessen the workers' disabilities. These latter two findings are contained in the original article but curiously not mentioned by the Institute in their newsletter.

The point is that most times return to work is beneficial, but sometimes it's no more than the Board passing on its responsibilities to the Employer. Injured workers at times need either some serious and immediate psychosocial attention, or a change of scenery, or both.

Chairman Wright and the Minister troop around the Province proclaiming that certain large employers have either no or almost no accidents. This is utter hogwash. Some employers have the capacity to absorb disabilities occurring at work and remove them from view as lost time claims, particularly when four sets of washrooms on a large employers premises need to be inspected for water pooling. When it comes to smaller employers, the Board is taking their yearly assessments to pay off the unfunded liability from the last 10 years, leaving the employer holding the bag for today's injuries with an inventory of underperforming workers doing modified work. Infasco is the Board's prime example of why modified work works so well, but let's see how committed they are to modified work after laying off 10% of their workforce.

4) Termination Agreements, and the Board's role:

Operational Policy Guideline 9.1 states :

"An employer must offer to re-employ a worker in a job that complies with the re-employment obligations, even if the worker and employer agree to a voluntary severance."

However Reinstatement Branch Decision 18/97 states (p.12) that "the re-employment obligation end at the point of resignation" as long as the worker's intent, subjectively measured, is evidence of a bone fide will to leave.

In WCAT Decision 517/97 the worker was estopped from claiming a wage loss during the term he accepted a grievance arbitration settlement from his employer.

This is another example of the co-operation section "40" butting heads with the accommodation section "41". If the employer re-employs the injured worker for one day has the employer not attempted to accommodate? If the parties decide to part company it would seem the relationship is over, and the accommodation has been consummated under Section "41" because it is the employee who has decided to fracture the relationship. Sure is cheaper than a $150,000.00 penalty. A termination agreement was accepted with an augmentation of a penalty against the employer in Reinstatement Branch Decision 8/96. A termination settlement was accepted in Decision 60/93. But Decision 68/93 stated the worker has to be given the choice to continue working or a severance package, for the package to act as a defense to the penalty. Decision 60/93 stated that the worker's acceptance of a severance package is not a waiver of any of the worker's rights under the Compensation Act.

I have already canvassed the situation wherein the worker has not been employed for one year or the employer has less than 20 employees and that Operational Policy 11.1 seems to alleviate the employer of responsibility. This is a clear signal that perhaps section 40 is nothing more than a procedural section with no real substantive teeth. Then, what are the $150,000 penalties for, not getting on the telephone early enough? I believe this Operational Policy 11.1 will not reappear in the next revision in same form.

The Board sees its role in re-employment limited to mediation and adjudication: Mediators are like hockey game linesman, and the adjudicators are like referees. Firstly a lot of holding grabbing and hooking will go on in Compensation Matters with no penalties being called. Workers will be attempting to modify their jobs to suit real and perceived disabilities and employers will be putting on pressure to get production out. The linesman mediators will be there to break up fights after a few punches are thrown and the parties are a bit out of breath. The adjudicators will hand out the penalties. Hearings officers will be like the Commissioner's Office to resolve protests and hand out fines.

Mediators can call for functional ability assessments and ergonomic studies to clarify what exactly the worker can do and what jobs the employer could possibly provide, but employers have to pay themselves for these services according to Guideline 11.4. There is supposed to be a list of certified specialists, offering these services, but none exists yet.

The Board has stated it will provide grants to assist employers in providing modified work, but Guidelines are not available. In fact for the past seven weeks, since the invocation of the new law, the Board has behaved as they always have. If you've got an injured worker who is reluctant to return, the Board bugs the worker's doctor for a report, has the Board doctor interpret it, pressures the employer to find some job that fits the restrictions, and compels the worker to return. It's not pretty, but then again the Board's current claim costs are down by 40% in the past 2 years and the number of reinstatement disputes are down by half.

5) Retraining:

Accommodating an injured worker with a suitable available job includes training the worker on how to perform the job. This issue was canvassed in Reinstatement Decision 57/94 (page 4):

"The conclusion leads to the question of whether the change in technology, and the worker's subsequent inability to meet the new technological demands, might be 'cause' to terminate the latter's employment . . . but the worker's inability to meet those new demands would not constitute "cause" unless the worker had been afforded an opportunity to satisfy those new demands."

In the Calgary District Hospital case, referred to above, the Grievance Arbitrator ruled that accommodation included training, but 2 years of training would be a hardship on the Hospital and was not required. However I suggest that the Board may in some circumstances be more than willing to pay for the training itself, if the accident employer held out re-employment afterwards.

Conclusion:

No adjudicator in Canada has required an employer to create a job for a disabled employee seeking accommodation that provides no economic benefit whatsoever to the employer, and I don't believe such will ever be required. Employers are going to face additional pressure, however, to locate modified employment

as the Board attempts to download its costs. In a nutshell, the employers' dilemma with Mr. R. and U. are only minimally related to their injuries. The real difficulty for their employers is that Mr. R. is a loose cannon, rabble rouser, and Mr. U has his head on crooked with a chip on his shoulder. But for these characteristics, either worker could be easily be accommodated with minor modifications to their normal duties. In the past these two round hole in a square peg injured workers would have been quickly passed on the Board for rehabilitation. Nowadays, the employer must go through this charade of integration, and in point of fact both Mr. R and U. will pass onto the rehabilitation system anyway.

The Board's position is: 'we don't want these guys- they're just the type that end up costing us $450 million per year in rehabilitation benefits'. But what are employers paying $2.6 billion per year for? Go up to the Board's library on the 20th floor, anyone can. One, you're paying for the view, and two - if you look out you can see the Skydome: employers are paying today for the injuries that occurred there nine years ago.

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Tel: (416) 537-0108
Fax: (416) 537-1604
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