Workers' Compensation Board
Commission des accidents du travail

2 Bloor Street East
Toronto, Ontario
M4W 3C3

2, rue Bloor Est
Toronto (Ontario)
M4W 3C3

Telephone: Téléphone :

927-3424

Telephone Device for the Deaf
1-800-387-0050

Appareil téléphonique pour les malentendants
1-800-387-0050

January 18, 1990

When writing the Board please quote the above file number.

Indiquez le n° de dossier dans toute correspondance avec la Commission.

Ms. Judith Andrew
Director
Provincial Affairs Ontario
Canadian Federation of Independent Business
4141 Yonge Street, Suite 401
Willowdale, Ontario
M2P 2A6

Dear ~~Ms. Andrew~~ Judith:

I am pleased to attach a discussion paper entitled "The Application of the Second Injury and Enhancement Fund" for your review. The Board is currently reviewing the policy on the Second Injury and Enhancement Fund (SIEF) and invites written submissions regarding this discussion paper. Submissions should be mailed or faxed to my attention at the address or fax number shown on the title page of this paper. Submissions must be received by May 22, 1990. All submissions will be available for public review in the Board's Reference Library after May 22, 1990.

I look forward to your participation in the consultation process respecting this topic.

Yours sincerely,

Paul

Paul Holyoke
Director
Operational Policy Branch

DISCUSSION PAPER

THE APPLICATION OF THE SECOND INJURY AND ENHANCEMENT FUND

The Workers' Compensation Board invites submissions regarding this discussion paper.

SIEF Consultation Project submissions should be mailed to:

Paul Holyoke, Director, Operational Policy Branch
Workers' Compensation Board
2 Bloor Street East, 22d Floor
Toronto, Ontario M4W 3C3

or they may be faxed to:
416-927-4995

Submissions must be received by May 22, 1990

January 5, 1990

CONTENTS

DISCUSSION PAPER

THE APPLICATION OF THE SECOND INJURY AND ENHANCEMENT FUND

I. ISSUE

Many concerns have recently been expressed about the Workers' Compensation Board's (the "Board's") Second Injury and Enhancement Fund (SIEF). Among these concerns, two themes predominate. First, during recent assessment rate meetings employers have expressed concern respecting the escalating use of SIEF. Cost transfers from individual employer accounts to SIEF increased from $18.3 million in 1975 to $167.6 million in 1986. Each year since then, the amount of cost relief has continued to escalate. In 1987, transfers to SIEF reached $218.2 million. In 1988, SIEF transfers totaled $230.1 million. This amount was already surpassed by October 1989 with a total of $263.4 million. The projected amount of SIEF transfers for 1989 is about $300 million.

A second theme that has emerged is whether the underlying social goal of SIEF, the re-employment of injured workers who might otherwise experience difficulty securing employment, is being achieved. There is concern that the more than $250 million in SIEF transfers is not actually reflective of success in returning injured workers to employment but rather reflects the use of this fund as a cost cutting measure by some employers.

As a first step in addressing these two primary concerns, as well as other issues relevant to SIEF policy, this discussion paper has been developed for consideration by the Board's stakeholders. The Board is very interested in receiving the views of all concerned parties respecting the issues that are highlighted in this paper.

II. BACKGROUND

1. Statutory authority

Section 108(2) of the Workers' Compensation Act (the "Act") has been used as the legislative authority for SIEF. This section states that:

> The Board, where it considers proper, may add to the assessment for any class or classes or for all the classes in Schedule 1 a percentage or sum for the purpose of raising a special fund to be laid aside and used to meet the loss arising from any disaster or other circumstance that, in the opinion of the Board, would unfairly burden the employers in any class.

In determining whether this section does indeed provide statutory authority for SIEF, the focus is on the words "any disaster or other circumstance, that in the opinion of the Board, would unfairly burden the employers in any class".

It is a fundamental principle of statutory interpretation that the words of a statute derive their "colour" from the other words that surround them. Where a specific word like "disaster" is followed by a general term such as "other circumstance", the general term should be interpreted in reference to the specific term.

Thus in terms of the authority conferred by this section for SIEF, the question is whether claim costs related to a worker's previous disability would be considered a circumstance akin to a disaster. Given the unlikelihood that prior disability and disaster would be considered similar in nature, this rule of statutory interpretation casts doubt on the legal authority under s.108(2) for a mechanism such as SIEF.

Additionally, the current SIEF policy provides for cost relief to individual employers in situations in which a worker's disability has been enhanced by a pre-existing condition. Section 108(2) contemplates that all employers in a particular class must be effected before the fund can be utilized.

Although s.108(2) may not be legal authority for the SIEF policy in its current form, it could be argued that elements of the current program, including cost relief for second accidents, are authorized by the parts of the Act which permit experience rating and penalty assessment.

2. SIEF in other Canadian jurisdictions

In reviewing the use of SIEF in other Canadian jurisdictions two key issues emerge. The first issue is the statutory authority to relieve employers of the costs associated with enhanced disabilities. The second issue is the nature and extent of SIEF use. The statutory provisions found in other provincial acts is provided in Appendix A.

In terms of the issue of statutory authority some provincial Boards rely on sections very similar to s.108(2) for authority to develop an SIEF policy. Many other Boards, in addition to the provision for a disaster fund found in s. 108(2), have an explicit statutory provision for an SIEF policy. For example, the legislation in Newfoundland, Quebec, Manitoba, British Columbia and the Yukon specifically provides for a special reserve fund for payment of claim costs related to enhanced disabilities because of similar or other disabilities previously suffered.

There is also a wide range in terms of the nature and extent of SIEF use across Canada. The data available for Newfoundland reveals that SIEF transfers in 1986 were $413,153. In 1987 they increased to $481,542. In 1988 a further increase to $532,491 was recorded. Newfoundland, currently phasing in an Experience Rating program, may review SIEF policy after complete implementation.

Second Injury Fund requests in Saskatchewan have increased noticeably since a "surcharge program" to penalize poor performers was initiated in 1986-87. Transfers to SIEF in 1985 totaled $1.73 million. In 1988, $2.3 million was transferred to SIEF.

In Alberta, SIEF relief is applicable following 8 weeks of temporary total benefits. A recent trend is to allow recurrences as new claims and then transfer a portion of costs to SIEF. Originally, SIEF was applied only in claims with back injuries but in recent years SIEF has been applied more liberally. A review of SIEF and allowance on an aggravation basis policies is being considered.

According to the 1988 British Columbia Annual Report almost $16 million was deducted from the "enhancement reserve". The amount deducted in 1985 was $7.9 million. It was suggested that a possible reason for the increase may be a policy change that requires adjudicators to consider SIEF at a 13 week review rather than at the request of the employer as had been previous practice.

Annual reports from Manitoba showed that transfers to the "enhancement reserve" totaled $4.7 million in 1983 but was only $4.2 million in 1987. The 1983 New Brunswick Annual Report indicated $580,000 was deducted from SIEF and that by 1988 this increased to $1.6 million.

3. History

The following is a brief historical perspective of SIEF. A comprehensive history is contained in Appendix B.

In 1915, s.88(2) [now s.108(2)] was added to the Act to provide authority to establish a special fund named the Disaster Reserve Fund. This section made provision to distribute a loss, resulting from a disaster, that would unfairly burden a class over all the classes.

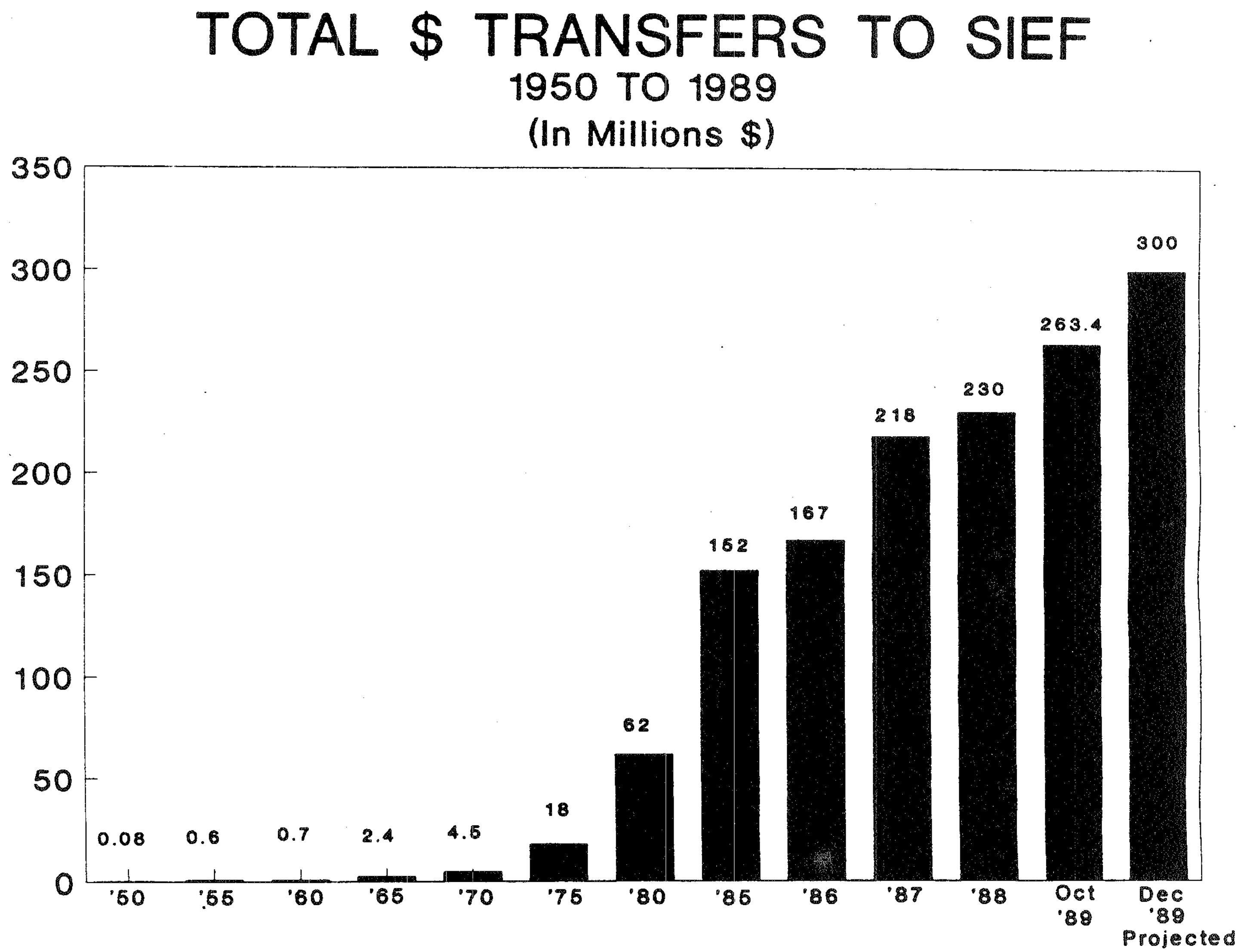
In 1925, costs were first transferred to the Fund for the purpose of second injury relief. The 1926 Annual Report explained this use of the Fund as a reflection of the Board's concern respecting injured workers who may encounter discrimination in the labour market because of previous loss of an eye or a limb.

A Board order dated October 30, 1942 provided for the transfer of the capitalized value of a multiple factor to the Disaster Reserve. A December 27, 1945 Board order established the Second Injury Fund as separate from the Disaster Reserve Fund. It was to be considered only in those cases where an award for permanent partial disability was increased by reason of a previous permanent disability.

Board orders of March 25, and May 8, 1970, initiated major changes to SIEF. These primarily included 50% cost relief on costs for temporary disability and medical aid, as well as for claims involving neurosis and psychoneurosis. Additionally, cost relief was given in hearing loss cases with the amount of the transfer dependent on whether a pre-employment audiometric test had been conducted.

A policy change approved November 3, 1978 provided a more detailed means of determining employer cost relief by assessing the severity of the accident in relation to the severity of the pre-existing condition (Appendix C). In a Board order dated April 8, 1980, no lost time claims became eligible for SIEF relief.

This evolution of SIEF policy is reflected in the escalation of the number and dollar amount of cost transfers over time. As the boundaries for SIEF were widened, there was a corresponding increase in utilization. This dramatic escalation in use is evident from the following description of cost transfers:



This graph illustrates that the use of SIEF has not only escalated gradually over many decades but, that during recent years, use has significantly escalated on an annual basis. Possible explanations of its increasing use in recent years are: the inception of NEER and CAD-7 as part of the Experience Rating program in 1984, the emergence of employer advocates during the 1980's, and the 1987 change in the net discount rate for the Board's published liabilities, applied to January 1986. This actuarial change led to a significant increase in the capitalized values of pensions and in addition to increasing numbers of pensions has thus increased the amount of SIEF transfers.

4. Purpose of SIEF

The purpose of SIEF is:

- To encourage employers to employ disabled workers who might otherwise have difficulty securing employment by reducing the employers' financial risk.

SIEF has been used to shield individual employers from all or a portion of the accident costs of a claim where a pre-existing condition or disability is either aggravated by a compensable injury or causes, prolongs, or enhances a compensable injury. This limitation on employer costs is designed to remove the financial disincentive to hire workers who may be perceived to be at higher risk of having accidents or aggravating pre-existing conditions.

5. Thin Skull Doctrine

A general principle of workers' compensation law that has been adopted in Ontario is that the system and, by implication, employers take their workers as they find them. This is commonly referred to as the "thin skull doctrine". Through this concept of legal liability, when an employer has financial accountability for a claim, all costs related to that claim are assigned to that employer.

However, there is a general view in the employer community that employers should not be required to pay the costs associated with a worker's accumulated medical history. As a result, SIEF has been used to provide protection from these costs and is thus construed as a fairness measure. The reallocation of costs in this way raises questions respecting the compatibility among the "thin skull doctrine", SIEF and experience rating. A more comprehensive discussion regarding the relationship of the latter two is found on page 14.

6. U.S. legislative restrictions on Second Injury Funds

About one third of the states that have an SIEF provision limit the application of SIEF to combined results that are permanent and total. SIEF cannot be applied to the claim even if the combination of the two injuries results in 90% disability.

Many jurisdictions also specify the timing of SIEF relief through statutory provisions that prohibit the application of SIEF to a claim until it has surpassed 104 weeks. Cost relief is thereby restricted to claims of extended duration.

Another aspect of the U.S. experience centers around the question, should it be necessary for the employer to be aware of the pre-existing condition in order to qualify for cost relief? One view is that employers must have knowledge of the employee's impairment and a good faith belief in its permanency. This is based on the reasoning that if the disability were unknown, it would not create a barrier to employment and the Fund would not serve to encourage employment.

Another approach rejects the requirement of employer knowledge. For example, the California courts have ruled that the previous disability need never have manifested itself, even to the worker.

7. Definitional framework

Current Board policy differentiates between pre-accident disability and pre-existing condition. Pre-accident disability is defined as a condition which has produced periods of disability in the past requiring treatment and disrupting employment. Pre-existing condition is defined as an underlying or asymptomatic condition which only becomes manifest post-accident.

Within the context of SIEF, a second injury is defined as an injury which, combined with a pre-accident disability or a pre-existing condition, creates costs in excess of the normal costs for that injury. SIEF relief for claims prolonged or enhanced by a pre-existing condition is considered when it is recognized that the pre-existing condition is contributing to the claim costs.

Allowance on an aggravation basis refers to the acceptance of a condition, caused by a compensable incident, that is superimposed on a prior disability whether or not compensable. SIEF relief for claims allowed on this basis is considered at the time of initial adjudication.

8. Current practice

a. References

SIEF policy is outlined in "Board Policies and Divisional Administrative Guidelines, Claim Services Division" at pages 235 - 245 pursuant to section 108(2). Directive 1 (April 13, 1982 Bd. M.

4959 #10) and (April 8, 1980 Bd. M. 4845 #13) and Directive 2 detail how SIEF is to be applied.

This policy is elaborated in "Claims Adjudication Branch Procedures Manual" by: Document # 33 28 01 "Basic Concepts"; Document # 33 28 03 "Permanent Disability"; and Document # 33 28 05 "Industrial Diseases". It is also explained in "Vocational Rehabilitation Division Manual" Document # 02-01-04 "Interpretation of Application of SIEF".

b. Timing of SIEF application

In current practice, once a decision is made that SIEF relief is in order, cost transfers are often applied to the claim from the date of the accident. While this approach is administratively simple, it does create some commonsense problems.

If a worker with a pre-existing condition has a second accident, it is reasonable to assume that from the date of accident to a certain time in the future, the disability is exclusively related to the second accident. However, once it is determined that the claim has become prolonged and cost relief is in order, the timing of the application of SIEF to a claim is imprecise.

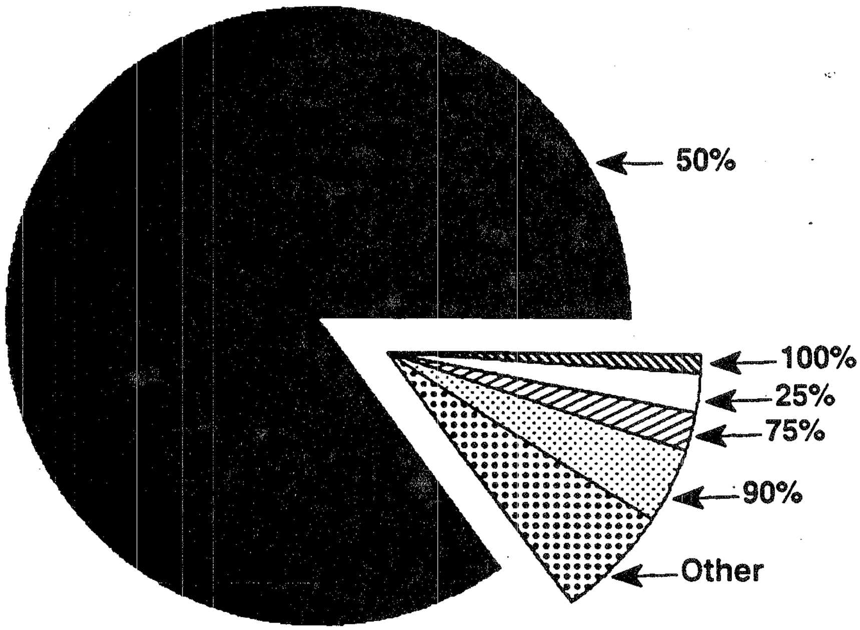
Some employers may argue that many accidents are minor and therefore lost time after four weeks must be due to an underlying condition, or they declare that the accident, in and of itself, would have resulted in a no lost time claim but for the underlying or pre-existing condition. This however is no more precise in determining correct SIEF application.

c. Employer relief

SIEF relief may be granted for pre-existing conditions or disabilities whether physical or psychological, compensable or non-compensable. In the majority of cases, 50% cost relief is given. In cases where the accident is caused by epileptic seizures or the malfunctioning of artificial appliances or where the accident occurs during a Board-sponsored job placement, training on the job, or assessment program, 100% relief is provided for all claim costs.

A survey of 1,114 SIEF transfers revealed that about 85% of SIEF transfers are for 50% cost relief. Only 1% are total claim cost or 100% transfers. The following pie graph illustrates the percentage of SIEF relief in this sample.

% SIEF Transfers



The extent of relief can be adjusted at the time of permanent disability assessment. This adjustment is made by evaluating the extent of a pre-existing condition and the severity of the accident and applying these evaluations to a matrix developed for SIEF application (see Appendix C). Adjustment in the percentage of SIEF relief is often applied retroactively to all claim costs.

An increase in employer cost relief at the time of permanent disability rating certainly can occur but a reduction in the percentage of cost relief is also possible. The rationale for such a downward adjustment in SIEF relief, sometimes two years after an accident, can be difficult to explain to an employer who has assumed that the original SIEF calculation will likely remain consistent throughout the duration of the claim.

Where the pre-existing condition is measurable, the enhancement of the disability is calculated by taking the value of the combined rating of the disabilities and subtracting the sum of the prior condition and the new condition. The remaining amount is called the enhancement factor and it is transferred to SIEF.

Anomalies in SIEF application can arise once entitlement has been established. It is possible for instance, that a non-compensable psychiatric disability could increase temporary benefit costs by prolonging recovery, yet not have any effect on permanent benefits. Thus SIEF would only be considered in relation to the temporary benefits. Conversely, SIEF may not be relevant for temporary benefit costs but can arise when an enhancement factor is identified at permanent disability assessment.

d. **Worker benefits**

Although SIEF is primarily associated with employer costs, SIEF policy can also have an impact on worker entitlement and benefits. At initial entitlement, it might be suggested that SIEF affords an opportunity to err, if necessary, on the side of the worker without provoking an employer objection. At the time of permanent disability assessment, evaluation of the extent of pre-accident disability will sometimes affect the amount of a permanent disability award.

Other impacts of SIEF on worker benefits can include adding a multiple or enhancement factor to a permanent disability award. Both are identified through calculation, and then are totally removed from the employers costs, unless they result from the compensable accident. Since a multiple factor (bilateral disabilities only) is distinctly different from an enhancement factor, it is possible to have both in one claim.

However, a different rule of application is followed in the case of total blindness, where the pre-existing disability is blindness in one eye. Rather than add the enhancement factor to the new condition only, the pre-existing disability is also added.

Another situation highlighting an inconsistency in SIEF application arises when worker awards are reduced. If a worker does not receive the full clinical impairment award because of a moderate or major pre-accident disability, should the employer receive any cost relief on the amount that is awarded? While in current practice additional cost relief is provided to the employer for the actual permanent disability award, presumably the reduction of the worker award in view of the pre-accident disability has already accounted for this factor.

Consistent application sometimes requires investigation of a worker's personal and financial history. Such investigations are not always undertaken. For example, if the Board learns of a prior and measured disability that is similar to the one being rated, this can be deducted from any current clinical impairment.

SIEF policy also allows inconsistency in its treatment of Schedule 2 workers and employers. Although Schedule 2 employers are not eligible for SIEF cost relief, Schedule 2 workers may have pension awards reduced because of a pre-accident disability.

9. Pre-existing psychological conditions

The policy for "The Adjudication of Claims for Psychotraumatic Disability" is contained in Bd. M. 4951 #11, February 9, 1982. In part, it provides for the allowance of cases of a prior psychiatric condition on an aggravation basis having regard for the emotional effect of the occupational occurrence and its sequelae. The policy also identifies the application of SIEF for psychiatric awards.

Further elaboration on SIEF application in these cases is provided in "Claims Adjudication Branch Procedures Manual" Document # 33 28 03 page 4, as follows:

> With psychological conditions the possibility of prior psychic trauma from life could be considered as evidence of vulnerability and justify recommending relief to the employer, even in the absence of pre-existing psychological impairment.

This specific provision for psychological conditions has been seen as altering the usual determination of SIEF application and introducing a less precise standard for qualification. In practice, a majority of claims for psychiatric disabilities receive SIEF simply because of this statement. However, it is difficult to assess the extent of the pre-existing condition in the absence of any prior identifiable psychiatric condition or impairment.

10. <u>WCAT approach</u>

In Decision 431/89, WCAT expresses the following view of SIEF:

> ...the policy is driven primarily by equity and employment considerations....Presumably, if an employer realizes that it will not be fixed with the costs of any recurrence reasonably attributable to the disability, then an employer will be more inclined to hire the disabled worker.

WCAT's use of the term "recurrence" in this context appears to be in error. When defined as a recurrence, claim costs are charged to the original accident employer, not to a new employer. This apparent misunderstanding relevant to recurrences is further illustrated in Decision 910/89. The worker's claim for a recurrence of disability was accepted by the Panel. In directing the Board to pay the worker lost time benefits, the Panel also directed that SIEF application be considered. It is unclear whether this is suggested because the Panel did not consider that recurrences are charged to the accident employer.

With respect to psychiatric conditions and SIEF, in Decision 431/89 the Panel stated:

> The Board has recognized the difficulties created by psychological conditions and appears to provide a lower threshold for entitlement to SIEF relief in cases involving non-organic conditions....Where the prolonged recovery is attributable to non-organic factors...the assumption of at least a minor pre-existing psychological condition is, prima facie, a reasonable one....

This comment suggests that it is this Panel's view that all claims prolonged by psychological factors inherently involve a pre-existing psychological condition and are thus eligible for SIEF.

III. DISCUSSION

1. The 1990's context

a. SIEF as an incentive to employ disabled workers

If the primary objective of SIEF is to provide an incentive to employers to hire disabled workers, the threshold question is whether its application has, in fact, achieved this goal. There is little direct evidence available to suggest whether this is the case. Indirect evidence (for example the views of Board staff who administer SIEF) suggests that it may achieve this goal in certain limited instances.

There are three scenarios where the employment of disabled workers arises.

i. Employment of individuals with non-compensable pre-existing conditions

Since there are no statistics available regarding the impact of SIEF on employee selection in the general community, this is principally a matter of speculation. Individuals with visible disabilities which have a significant impact on employability may, in theory, benefit from the availability of the SIEF. However, it is more likely that the nature of the work, its relation to the disability and the individuals' qualifications are more critical to the hiring decision than the knowledge that, in some cases, a subsequent injury can be charged to SIEF. In addition, it is unknown how many human resource personnel are even aware of the Fund's existence.

To gain additional insight with regards to the employment of disabled individuals, information was obtained from a report entitled "Statistical Profile of Disabled Persons in Ontario", based on a Statistics Canada survey completed in 1983-84. Data from this report indicated that of the estimated 304,000 disabled Ontarians who were employed at the time of the survey, about 35,000 reported that they were provided with special equipment and/or special arrangements at work due to their condition. The survey also indicated that about 10,000 disabled Ontarians needed special arrangements or equipment that was not provided by their employers.

Aside from establishing whether SIEF enhances employment opportunities for disabled individuals, an important question is whether individuals with pre-existing non-compensable conditions should be a target of Board programs. While the Board supports employment for all disabled individuals, the Act is not designed to address the disabled in general. Indeed, a legal analysis of the Act suggests strongly that the Board has no authority to provide incentives for the hiring of disabled individuals who are not injured workers. Other statutes, such as the Human Rights Code, discussed later, do provide a measure of protection for these individuals.

ii. Employment of injured workers with the **accident employer**

Recent policy changes will encourage employers to re-employ their injured workers. For example, the change to the s.54 policy requires that all vocational rehabilitation costs be identified on the employer's Accident Cost Statement. It is anticipated that employers will now more fully appreciate the costs of work-related injuries and, in an effort to reduce the cost of vocational rehabilitation, will re-hire their own injured workers. Employers are also becoming aware that reducing accident costs may improve experience rating benefits and decrease susceptibility to a penalty under s.91(4) or (7) of the Act.

The implementation of the Vocational Rehabilitation Strategy will also encourage employers to provide suitable employment for their disabled workers through its capacity to assist employers in developing modified work programs. The optimum result of a vocational rehabilitation program is to return an injured worker to the accident employer. The emphasis of the Vocational Rehabilitation Strategy, now implemented province wide, is to return the worker to the pre-injury job if possible.

Section 54b of the Act as amended by Bill 162 also addresses the re-employment of injured workers in the workplace. This section obliges employers to provide their workers with re-employment whether at the pre-injury job or at comparable employment. If a worker is unable to perform the essential duties of the pre-accident job, the employer will be obliged to offer that worker the first opportunity to accept suitable alternative employment. This obligation extends for 12 months from the date that the injured worker was able to return to work. Employers who fail to meet this obligation to re-employ could be assessed a penalty. This reinstatement provision is a fairly strong incentive for employers to re-integrate injured workers into their workplaces.

iii. Employment of injured workers with a **new employer**

According to the current guidelines, the full or 100% cost of a claim is charged to SIEF where a worker suffers an accident during an on-the-job training program sponsored under the Board's vocational rehabilitation program.

The experience of vocational rehabilitation caseworkers suggests that, in many cases, employers are cautious about hiring individuals with known compensable disabilities. Arising from that premise, the availability of SIEF would likely meet its stated purpose by encouraging employment of injured workers. Furthermore, the provision of cost relief might provide an incentive to "take a chance" and hire workers with known medical problems.

A survey of 114 employers who had recently hired injured workers following an employment campaign was conducted in November, 1989. These employers were asked to rank, in order of importance, nine factors that may have influenced the decision to hire injured workers. The most significant factor identified in the survey was that "Financial assistance, for injured workers wages, is provided by the WCB's vocational rehabilitation programs". The factor stated as "The Second Injury and Enhancement Fund (SIEF) provides financial relief" was not perceived as a highly significant one. Only three employers placed this as first or second in importance to their employee selection decision.

Experience rated employers identified additional factors that influenced their employment decisions. In noting employers' responsibility to hire injured workers and the fact that recurrences are charged to the original accident employer, experience rated employers suggested these factors were as significant as the financial assistance provided by the Board. Larger employers (250+ employees) demonstrated similar views to those of experience rated employers.

A review of workers placed in jobs with new employers as a result of employment campaigns dating from March to October 1989 revealed that of 218 workers, only 4 workers (1.8%) had new accidents and only 8 workers (3.7%) suffered recurrences of the work-related disability. Of the new accidents recorded, only one involved lost time. This reveals that the number of new accidents for injured workers placed in industry under the Board's vocational rehabilitation initiatives is very small.

b. Vocational rehabilitation programs

Keeping pace with developments in vocational rehabilitation and ergonomics, the Board has vocational programs designed to assist a worker's reintegration into the workforce after an injury and to provide financial benefits to employers to help with the costs of reintegration. Through work trials, training on the job, job modification and workplace modification, the Board encourages the development or maintenance of an employment relationship between a worker and an employer.

The work trial is usually a short assessment program during which the Board pays full compensation benefits to the worker. This program is a trial placement of a worker with an employer to ascertain worker-job compatibility at no cost to the employer.

Often preceded by a work trial, the training on the job program is intended to teach an injured worker new vocational skills and to provide "hands on" instruction and supervision in the performance of skilled work methods. The Board may share up to 50 percent of the cost of such a program with the employer.

To ensure that an injured worker is able to complete job duties, modifications both to the job and to the workplace may be required. A professional work site analyst provides consultative services and recommendations regarding job and/or workplace modifications to an employer free of charge. Job modifications are designed so that the requirements of the job and a worker's physical restrictions are compatible. Workplace modifications involve the physical alteration of a workplace, the provision of specialized equipment and/or modification of existing equipment.

c. Ontario Human Rights Code

When SIEF was established, there was no statute in place to safeguard the employment rights of the disabled. It was not until the adoption of the Ontario Human Rights Code in 1981 that employment protection was provided for disabled individuals. The Code, by recognizing handicap, whether physical or mental, as a prohibited ground of discrimination in employment, created new protection for disabled workers. In addition to the general provision, the 1984 amendment to the Human Rights Code included specific protection for injured workers in s.9(1)(b)(v).

d. Experience Rating and SIEF

The WCB administers three experience rating plans: NEER, CAD-7, and the Voluntary Plan. These three plans now include about 61,300 (or 30%) of Ontario's 200,000 employers. It is expected that the number of experience rated employers will increase yearly as additional rate groups are included in NEER.

Each plan, through its own formula, rewards employers who reduce their accident costs through rebates, and penalizes employers with excessive accident costs through surcharges. The clear intent of the programs is to focus assessment costs on employers with the worst accident experience -- not to spread this risk amongst other employers. Therefore, experience rating and SIEF may not always be compatible.

For example, some employers may try to reduce their costs by seeking SIEF relief for any perceived pre-existing condition, rather than concentrating on improving workplace safety to reduce the number and severity of accidents. This practice undermines the "risk focusing" intent of experience rating programs.

Similar concerns were expressed in a 1985 brief to the Standing

Committee on Resources Development prepared by the Association of Injured Workers' Groups. In this brief, it is stated that:

> The implication of a cost transfer is that all employers, safe and unsafe, pay additional assessments resulting from the transfer....The Board is taking a very short-sighted view by allowing SIEF transfers to skyrocket. Instead of passing on costs to all employers, the Board should be dealing directly with the high accident and disease rates of the unsafe employers.

e. **Revenue Strategy**

As a result of the Revenue Strategy deliberations, there may be other changes to the 1990's context of workers' compensation in Ontario. The Revenue Strategy is considering a concept known as the "per claim limit". This concept sets a dollar limit on the costs of a claim for which the employer and the relevant classification group (employers operating similar businesses with comparable risk) would be responsible. The costs exceeding the per claim limit would be shared and funded by the classification group belonging to the larger industry sector (employers operating within the same general industry). This is being considered as a way to improve classification group stability by spreading the costs above the per claim limit to a broader group of employers who are part of that industry sector. In contrast to SIEF, this consideration is a fundamentally different approach to the reallocation of employer costs.

2. Financing of SIEF

Section 108(2) explains the financing of this special fund as follows:

> ...may add to the assessment for any class or classes in Schedule 1 a percentage or sum for the purpose of raising a special fund to be laid aside....

This wording seems to contemplate a special fund to be laid aside and used for a specific purpose, the loss arising from any disaster or other circumstance that would unfairly burden the employers in any class. Originally there was a fund set aside from which money was withdrawn. However, in current practice there is no longer a separate fund set aside for the purpose of withdrawing funds to cover SIEF transfers. In order to cover the amount in this account, an actuarial calculation is made and this amount is added to the assessment for each rate group thus spreading the cost of SIEF across all Schedule 1 classes and employers.

Increasing disenchantment with SIEF from the employer perspective was noted by John Bulloch, President, Canadian Federation of Independent Business (CFIB). In a keynote address in December 1987 to the

Employers' Council on Workers' Compensation, Mr. Bulloch, referring to a study commissioned by the CFIB that recommended: "development of specific limits on the degree of utilization of the Second Injury Enhancement Fund." He further stated:

> For the individual employer relief is vital and welcome, but overall, the costs of this "slush fund" are reallocated to every employer in WCB.

By not maintaining a separate and discrete fund as proposed in the statute, there is far greater opportunity for misuse of SIEF. In practice, the number and value of transfers controls the amount of SIEF annually, rather than the amount available in a reserve fund controlling the use of SIEF.

3. Section 122(8)

SIEF policy includes specific provision for cost relief for a percentage of hearing loss and vibration induced white finger disease claims. This provision is based on the premise that exposure to hazardous noise in prior employment will have caused some pre-existing hearing loss and that exposure to vibratory tools in prior employment will have contributed to the development of vibration induced white finger disease. The cost transfer is based on a ratio, by years, to the worker's total exposure employment.

The issue has been raised whether SIEF should be used at all in the cost allocation of occupational diseases. It has been suggested that the better alternative to providing SIEF for occupational disease claims is to use s.122(8) which specifically addresses the cost allocation of occupational diseases:

> Where the compensation is payable out of the accident fund, the Board shall make such investigation as it considers necessary to ascertain the class or classes against which the compensation should be charged and shall charge or apportion the compensation accordingly.

IV. CONSULTATION

This discussion paper has highlighted issues and complexities related to the application of SIEF. The WCB Board of Directors expects that this discussion will be of interest to all Board stakeholders. Accordingly, the Board of Directors has requested that all interested parties submit their concerns respecting this policy issue. A four month period has been established for consultation.

CANADIAN JURISDICTIONS

STATUTORY AUTHORITY FOR SIEF

NEWFOUNDLAND

Section 104(1) of the Newfoundland Workers' Compensation Act:

The Commission may, in addition to the amount actually required in each class for the year, assess, levy and collect from the employers in any class surcharges to be set aside as reserves

(b) by way of providing a reserve fund to be used to meet such part of the cost of claims of workers suffering enhanced disabilities, because of similar or other disabilities previously suffered, as in the opinion of the Commission is the result of the previous disabilities;

NOTE: (8) The second injury reserve is used to relieve the employer's experience, of the costs of an injury, that is the direct result of a previous injury or a pre-existing condition. (Operations Manual)

NOVA SCOTIA

Section 89(2) of the Nova Scotia Workers' Compensation Act:

The Board may, in respect of the employers in any industry or class or classes, assess, levy and collect in each or any year such amount as the Board may deem just and proper to be set aside as a reserve or reserves:

(e) by way of providing and maintaining a second injury fund from time to time as the Board may deem advisable in the course of the administration of the Act.

NEW BRUNSWICK

Section 57(2) of the New Brunswick Workers' Compensation Act:

A system of merit rating may, if deemed proper, be adopted by the Board.

NOTE: The New Brunswick Board's actuary indicated that an SIEF system is accounted for in experience rating calculations, pursuant to s. 57(2). There is however provision for a 'disaster fund' under Section 65.

PRINCE EDWARD ISLAND

Although there is no provision in the statute for SIEF nor is there an SIEF policy, there is a disaster fund arising from section 57(2) of the Prince Edward Island Worker's Compensation Act.

QUEBEC

Section 99(3) of the Quebec Workers' Compensation Act :

Where an employer employs a worker handicapped as a result of a previous accident, a congenital infirmity or a pathological condition, the Commission may charge all or part of the cost of expenditures and benefits respecting such accident to a special fund.

Section 99(4) states:

The Commission may add to the assessment for any or several units or all classes of units a percentage or additional sum in order to establish the special fund contemplated in subsection 3.

MANITOBA

Section 81(1) of the Manitoba Workers' Compensation Act:

For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy upon and collect from, the employers in each class by an assessment or by assessments made from time to time rated upon the payroll, or in such other manner as the board may deem proper, sufficient funds, according to an estimate to be made by the board,

(e) to provide a fund to be used to meet that part of the cost of claims of workmen suffering enhanced disabilities, because of similar or other disabilities previously suffered, as, in the opinion of the Board, is due to the previous disabilities;

SASKATCHEWAN

Section 144 of the Saskatchewan Workers' Compensation Act:

The board may, where it considers it proper, add to the assessment for any class or for all the classes a percentage or sum for the purpose of raising a special fund to be set aside to meet the loss arising from any disaster or other circumstances the liability for which would, in the opinion of the board, unfairly burden the employers in any class.

ALBERTA

Section 16(1) of the Alberta Regulations under the Alberta Workers' Compensation Act:

The purposes for which the Board may assess and levy on employers under section 91 of the Act are the following :

(c) to provide and maintain any reserves the Board deems advisable in the course of its administration of the Act.

BRITISH COLUMBIA

Section 39(1) of the British Columbia Workers' Compensation Act:

For the purpose of creating and maintaining an adequate accident fund, the board shall every year assess and levy on and collect from independent operators and employers in each class, by assessment rated on payroll, or by assessment rated on a unit of production, or in a manner the board considers proper, sufficient funds, according to an estimate to be made by the board, but the established practice of assessment and levy shall be varied only with the approval of the Lieutenant Governor in Council, to

(e) provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition, or disability.

NORTH WEST TERRITORIES

Although there is no specific legislative authority to establish a SIEF, the North West Territories W.C.B. Claims Manual does provide a SIEF policy which is quite similar to the Ontario SIEF policy.

YUKON

Section 68 of the Yukon Workers' Compensation Act :

The board shall from time-to-time assess and levy upon the employers in each of the classes and subclasses such percentage of the payroll or such other rate, or such specific sum as, allowing for any surplus or deficit in the class, the board may require

(g) to provide and maintain a reserve for the payment of such part of the cost of claims of workers suffering enhanced disabilities because of similar or other disabilities previously suffered as is due to such previous disabilities.

HISTORY OF SIEF IN ONTARIO

In 1915, s.88(2) [now s.108(2)] was added to the Act to provide authority to establish a special fund named the Disaster Reserve Fund. Notes to the amendment state that this section made provision to distribute a loss, resulting from a disaster, that would unfairly burden a class over all the classes.

Its purpose was further elaborated in the 1916 Board Report which stated that the disaster reserve was a small fund provided by s.88(2) of the Act intended to assist in payment of any unusual or unexpected loss arising from a disaster or other circumstance which might unfairly burden the employers in any class. The amount set aside for the fund was one percent of assessments. The Disaster Reserve Fund was first used in 1917 following a disaster in the milling industry on December 11, 1916 that resulted in twenty-two fatalities.

In 1925, costs were first transferred to the Fund for the purpose of second injury relief. The 1926 Annual Report explained this use of the Fund as a reflection of the Board's concern respecting injured workers who may encounter discrimination in the labour market because of previous loss of an eye or a limb. Referring to this subject as one of "grave difficulty", the Report states:

> The Board...have been trying out during the year the policy of charging against the class and the individual employer in such case only the percentage of disability which would be awarded for the injury actually done in such employment to an unmaimed man, and charging against this Disaster Fund the remaining cost of such **total disability case**.

The annual reports for these early years of the Board's history specify the amount transferred from the Disaster Fund for this purpose. The 1931 Report indicated that money was transferred from the Disaster Reserve Fund to the Pension Fund to remove the objection of employers to re-employment of injured workmen by putting them in the same position they would have been had the workmen been uninjured and charging against the Disaster Reserve Fund the additional costs of carrying such hazard.

Part of the impetus to use the Disaster Reserve Fund to safeguard the employability of disabled workers may have been related to the relative unavailability of vocational rehabilitation services. Employers had to pay for all associated costs when they employed disabled workers. To assist employers who hired injured workers the Board provided financial relief in the event of further related injury. Through this relief, the Board sought to mitigate the lack of incentive to employ individuals, such as war victims, who had permanent disabilities and were thought to be more apt to sustain further injury.

A Board order dated October 30, 1942 provided for the transfer of the capitalized value of a multiple factor to the Disaster Reserve. This did not apply if the amount was less than $500. A December 27, 1945 Board order established the Second Injury Fund as separate from the Disaster Reserve Fund. It was to be considered only in those cases where an award for permanent disability was increased by reason of a previous permanent disability. In 1946 the name of the fund was changed to the Second Injury Reserve, and pre-existing impairment of vision was added as a cause to transfer costs to the fund.

Second injury relief became increasingly accessible over time due to the expansion of the circumstances in which it could be applied, the range of percentage amounts that was transferable, and the nature of the conditions that were considered to be pre-existing. A Board order dated June 3, 1953 expanded the fund to include "where {a worker} is suffering from a visible defect and loss of function of a limb or limbs from any cause...".

In October 1955 the Board appointed a committee to consider and make a recommendation as to the possible increase in scope of the Second Injury Fund. A Board order dated December 7, 1955 expanded the Second Injury Fund to include:

- amputations of limbs or parts thereof....,
- other structural defects of limbs or parts thereof from any cause,
- impaired hearing of one ear where the other ear was previously impaired,
- diseases or conditions which impair the circulation of an injured part sufficient to increase the permanent disability (eg. diabetes) and,
- latent conditions brought to light by superimposed injury, resulting in disability out of proportion to the injury itself.

In 1965, a recommendation was made to the Board to change the name of the fund to the Enhancement Reserve, denoting a reserve to cover increased costs not directly related to the employer. Although this did not occur, a Board order dated June 28, 1967 expanded the fund further to include full cost relief of permanent disability awards where the pre-existing condition would not itself be disabling (eg. diabetes) and; reduction of a permanent disability award over 15% depending on the extent of SIEF relief where the prior condition was not measurable and of a disabling character. The name was changed to the Second Injury and Enhancement Fund.

A Royal Commission in 1967, under the Honourable Mr. Justice G.A. McGillivray, considered labour and employer submissions respecting pre-existing conditions and the Second Injury Fund. This resulted in a recommendation that, where compensation may involve activation or aggravation of a pre-existing condition, a portion of the compensation awarded be paid from the Second Injury Fund. This proposal also reflected concerns raised by such groups as the Epileptic Association of Canada.

Arising from the Royal Commission recommendations, Board orders of March 25, and May 8, 1970, initiated major changes to SIEF.
These included:

- 50% cost relief on costs for temporary disability and medical aid, as well as for claims involving neurosis and psychoneurosis,
- 100% cost relief where: i) the prior condition was the cause of the accident (eg. epilepsy); ii) the wearing of an artificial appliance was the cause of the accident; iii) a disabled worker having been placed by the Board's Vocational Rehabilitation Department suffered a recurrence of the original disability or extension of disability through minor accident; iv) a worker suffered an accident during an on-the-job training program or other type of formal training procedure sponsored by the Vocational Rehabilitation Department;
- cost relief in hearing loss cases for the portion of hearing impairment not related to the employment if a pre-employment audiometric exam was available or; if no audiometric exam was available the employer would be charged in ratio by years to the workers total exposure employment with the balance transferred to SIEF.

A policy change approved November 3, 1978 provided a more detailed means of determining employer cost relief by assessing the severity of the accident in relation to the severity of the pre-existing condition (Appendix C). This change, which could be viewed as a fairer approach to evaluating the impact of prior conditions on costs, also permitted reduction in a worker's permanent disability award based on the extent of pre-accident disability. In a Board order dated April 8, 1980, no lost time claims became eligible for SIEF relief.

T A B L E

APPLICATION TO EMPLOYER COSTS

SEVERITY OF PRE-EXISTING CONDITION	SEVERITY OF ACCIDENT	% RELIEF
Minor	Minor	50%
Minor	Moderate	25%
Minor	Major	0
Moderate	Minor	75%
Moderate	Moderate	50%
Moderate	Major	25%
Major	Minor	90 - 100%
Major	Moderate	75%
Major	Major	50%

T A B L E

APPLICATION TO EMPLOYEE AWARD WHERE A PRIOR CONDITION IS NOT MEASURABLE

SEVERITY OF PRE-ACCIDENT DISABILITY	AWARD OF TOTAL ASSESSMENT
Minor	100%
Moderate	75%
Major	50%