Chapter 30

STRATEGIC CONSIDERATIONS

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Representing injured workers today is not a simple matter. There are four separate schemes that regularly come into play, and numerous issues within each of the schemes. The preceding chapters describe the salient features of the schemes and provide practical tips to deal with issues that arise in each of them, but it is necessary to know more than this on representing injured workers well. One must develop a sense of how the issues fit together, what is important and what is not, and, all in all, have a "feel" for it. The purpose of this chapter is to aid in this development process. This chapter is not a substitute for practical learning in the casework context, but hopefully an addition to it.

If you are new to the area, do not be put off if much of what is written in this chapter seems to be in a language foreign to you. Follow the references to learn about the substantive areas as you read this for the first time, and then come back to this chapter again over time. If we have done well, the chapter will become more familiar to you from casework experience.

The following is a list of abbreviations used in this chapter:

ARO	appeals resolution officer
ESRTW	early and safe return to work
FEL	future economic loss
LMR	labour market re-entry
LOE	loss of earnings
NEER	new experimental experience rating
NEL	non-economic loss
RTW	return to work
SEB	suitable employment or business
SIEF	second injury and enhancement fund

1. INITIAL STRATEGIC PLANNING

The first step in representing an injured worker is developing a strategic plan. This may occur in the first interview or later, after the claim file(s) have been reviewed and any questions or concerns arising from this review have been addressed with the worker.

1.1 Issue Identification

At the first interview, workers may or may not have an idea about what the issues in their claims are or which ones they would like you to address. Even when they do have an idea about some of the issues, it is unusual for workers to have a complete understanding of their claims. The system is simply too complex. So, questions must be asked about other claims and issues not addressed by the client. Let us illustrate with two examples, one a pre-1990 accident and the other a post-1997 accident.

EXAMPLE: Pre-1990 accident

A 70-year-old woman comes to a first interview. After the initial pleasantries, she tells you that she is getting a pension of $350 per month for a back injury sustained in the 1970s and that she has heard from her friends that it is possible to get a pension increase after a time. She has none of the documents, except an old letter that tells you nothing of significance save for the claim number. Her WSIB pension, her Old Age Security pension, and a small pension from CPP constitute her only income and she can barely survive.

You ask her if she knows the percentage of her pension (see Chapter 13: Permanent Disability Awards). She does not. You ask her for particulars of her pre-accident employment and earnings (see Chapter 23: Compensation Rate). She tells you that she worked as a desk clerk at a hotel but does not remember how much she was paid before the accident, what her hours were, or whether she missed any time in the year prior to her accident. Upon further questioning, she provides some sketchy details of her work history and medical treatment after the accident. She is sure that she sees only her family physician at present and has not seen a specialist in many years. You ask her whether she has ever received a pension supplement (see Chapter 14: Pension Supplements). She has no idea what you are asking about. You decide to try another way and ask if she received more from the WSIB before she turned 65. She knows that she received more at some point but she is not sure how much. She is quite sure that she had only one accident at work and has no injuries other than her back injury

At the end of the interview, you tell her that you will obtain and review her claim file and discuss the matter with her after that. At this point, your issue identification notes might look something like this:

- 1970s pension earnings basis? — check
- Pension quantum?
- Deterioration?
- Section 147(4) supplement and s.147(14) payment?

Later, you receive and review the claim file thoroughly. The report of accident shows that she earned $200 per week at the time of her accident in 1978, and that the accident employer had employed her for three years. The file also has a completed one year's earnings report from the accident employer, which shows earnings of $8,500 and no missed time in the year prior to the accident. The documentation suggests that the worker was assessed for her pension in 1981, at which time she was working in a supervisory capacity in the hotel industry. Her pension of 10% was for lumbar strain only. She had no sciatic symptoms and a fairly good range of motion of her low back. After the hotel closed down in 1990, she found work in a factory for six months before losing that job in a recession-induced layoff. Her last job was at a convenience store where she worked until a recurrence of back pain led her to stop in 1996. At the time, she had a CT scan which showed evidence of a disc protrusion and she saw specialists. The Board recognized the recurrence but did not reassess her pension. There are no medical reports on file within the last five years. The Board eventually paid her a s.147(4) supplement and the consequential s.147(14) payment. In the file, you also find a memo that refers to a prior claim, apparently from 1977, but provides no details of the claim.

After your review of the claim file, your issue identification notes might look like this:

- 1970s pension earnings basis
    - check inconsistency between weekly wages and yearly wage
    - lost time from prior work accident?

- Pension quantum
    - 10% pension from 1981 assessment seems OK

- Deterioration
    - 1996 recurrence and disc protrusion on CT scan
    - no re-assessment done
    - up-to-date medical required

- Section 147(4) supplement and s.147(14) payment made

- Any entitlement issues arising from prior accident?

Your next steps would be to clarify if your client can recall whether she missed any time from work prior to the 1978 accident and what the details of the 1977 accident are. You would also need to obtain the ongoing medical information and arrange for a current re-assessment, most likely by a specialist.

Even in this relatively straightforward matter, it is easy to see how the issues being considered change as more information becomes available. This happens even more often when the claim is a recent one, and the worker's ongoing medical and vocational rehabilitation is in flux.

Issue identification is not the only part of initial strategic planning. Assessment of the client as a prospective witness is an important part of a representative's work. Down the road, other issues may emerge that may or may not end up in the appeals process (see Chapter 3: System of Review and Appeals) and it is important for the representative to have assessed how the client will fare in an oral hearing, if one is required. In the above example, for instance, a representative might decide that due to the nature of the issues, it is unlikely that the worker's

reliability as a witness would come up, but that if for some reason it did, the representative might assess the worker as a likeable and credible, if forgetful, witness.

Identifying whether there are any time limit issues and addressing them promptly is a key aspect of initial strategic planning (see Chapter 27: Appeal Time Limits). In the above example, if the Board had made an adverse ruling in 1996 concerning a deterioration of the worker's condition, or worse yet, concerning entitlement to the disc protrusion, the representative would need to identify whether the right to appeal the decision was preserved by June 30, 1998. If not, immediate thought would have to be given to the necessity and means of addressing the missed time limit.

1.2 Issue Sorting

Once the issues are identified, they need to be sorted. Sometimes this is a straightforward matter, as when all identified issues in the injured worker's case can be addressed at the same time from the start. That was the case with the example above. Other times, the relationship between various issues in one or more claims is more complex and organizing the handling of the issues requires more thought.

Factors to take into account when organizing the issues include:

- the presence of any time limits;
- the importance of the respective issues;
- the chances of success on the respective issues;
- the stage in the decision-making or appeal process that the respective issues are at; and
- the interconnectedness of the issues.

EXAMPLE: Post-1997 accident

At your first interview, the worker, a 53-year-old man, comes to see you in 2006 and tells you that he wants help appealing a NEL (see Chapter 16: NEL) and immediately plunks down a Case Record from the Appeals Tribunal on your desk. After interviewing the worker and briefly reviewing the Case Record, you glean the following basic facts. The worker has been a carpenter all his life. In a 2002 accident, he lost parts of three fingers on his left hand in a circular saw without a guard. He received a 15% NEL for his left hand injury and this award was confirmed by the ARO. Both the NEL assessment and the recent progress reports from his family doctor mention that he is depressed. When you ask him where his pain is, he indicates that it is in the entire left arm from the shoulder down, and that the left shoulder pain started within the last year. There is no mention of this in the medical reports. He then volunteers that, about two years ago, when he attempted a modified job with the employer sorting hardware, he also had right hand pain but this pain seems to have gone away. No decisions have been made by the Board concerning psychotraumatic disability entitlement (see Chapter 9: Psychological Disabilities), chronic pain (see Chapter 10: Chronic Pain), right hand or left shoulder entitlement. In a letter dated nine months prior to your interview, the Board denied entitlement for anti-depressant medication prescribed by the family doctor and the worker did not appeal this decision. The Board has paid the worker full LOE benefits, save for the two weeks that he worked for the

employer in the modified job in 2004. The worker advises that he has recently been referred to a case manager and that he went through paper and pencil testing last week (see Chapter 18: ESRTW and LMR).

Let us first run down the issue list:

- Tribunal NEL appeal for left hand injury
- Right hand entitlement
- Left shoulder entitlement
- Psychotraumatic disability or chronic pain entitlement
- Anti-depressant medication denial
  - time limit problem
  - interaction with psychotraumatic disability/chronic pain?
- Ongoing LMR services/LOE benefits
- Civil action (see Chapter 25: The Right to Sue Third Parties).

Sorting through the issues is challenging. The easiest issue is the last. You know that you do not have enough information to give an opinion on whether a civil action is possible. It will depend on the age of the machine, where the manufacturer of the machine is located, whether a guard was originally provided with the machine, whether appropriate warnings and instructions were provided, and the time limits applicable both in Ontario and in the place where the machine was manufactured. It is best to refer these questions to an experienced civil litigation practitioner for an opinion on the advisability of commencing a civil action. This will need to be done immediately because there could be time limits about to expire.

With respect to the remaining issues, all of which presume that the worker will not be pursuing a civil action, the significant issue appears to be the amount of the worker's LOE benefits at the final review in 2008 (see Chapter 26: LOE). The worker is 53 years old, and has received full compensation up until now (2006). Final review compensation will cover the period 2008-2018 (until worker turns 65), and the worker's employability is dubious in light of his impairments, age, and pre-accident occupation. The worker's NEL award, in and of itself, is unlikely to be significant financially (see Chapter 16: NEL), but the percentage of the NEL award may influence the decision with respect to the worker's employability.

So, with that in mind, let us go back to the issue list above. The NEL appeal to the Tribunal concerning the left hand injury is unlikely to require much immediate significant action. A successful appeal concerning the NEL quantum for the amputations is unlikely to affect the LOE question. There is a two-year time limit for filing the Confirmation of Appeal form that accompanies the Case Record (see Chapter 3: System of Review and Appeal) but, if necessary, extension requests can be made. It would be appropriate, in this case, to complete the Confirmation of Appeal Form, but to advise the Tribunal that related issues (i.e., questions of entitlement for the left shoulder, psychotraumatic disability, chronic pain) are being pursued at the Board, and that the matter should be placed in inactive status pending resolution of these issues at the Board.

Right hand entitlement should be investigated. One would want to know if there is medical information not in the Case Record, perhaps from the worker's physiotherapist or family doctor, confirming the condition and, if one is fortunate, relating the symptoms to overuse during the modified work program. This issue requires action soon, but not immediately.

Similarly, left shoulder entitlement needs to be investigated. Up-to-date medical information (see Chapter 5: Medical Evidence) concerning the nature and cause of the shoulder injury should be obtained.

The most challenging question in this situation is the interaction of the worker's depression with the ongoing LMR assessment process. Negotiation of the worker's LMR assessment and plan will normally take place within a narrow time frame, usually 30 to 60 days (see Chapter 18: ESRTW and LMR). This is usually less time than it will take for the Board to address questions of entitlement for depression under its psychotraumatic disability or chronic pain policies. One approach would be to contact the case manager to find out the results of the assessment and to "suss out" the case manager's inclinations with respect to possible plans. The case manager might very well take the view that the worker is unemployable based on information provided by the Board about the left hand restrictions, together with the worker's age, and his transferable skills and abilities, and recommend this to the Board. If the Board accepts this recommendation, the issue of entitlement for depression under either the psychotraumatic disability or chronic pain policies might lose its urgency.

Finally, the Board's denial, nine months ago, of entitlement for the depression medication raises a time limit question. It is unlikely that the denial of entitlement for the medication precludes the pursuit of entitlement for the underlying condition under the psychotraumatic disability or chronic pain policies — there is relatively little at issue. Still, because of the Board's policies on time limit extensions (see Chapter 27: Appeal Time Limits), it would be wise, out of an abundance of caution, to indicate an intention to appeal prior to one year from the date of the decision.

Issue sorting can take many different forms. Sometimes, there is one area of injury, perhaps the low back, and many accidents, and the issue is which accident(s) does the worker assert that his or her current back condition is related to. Or colloquially, which one is "the big one". Often different legislative schemes will apply to the various accidents, and the worker may have had vastly different compensation rates (see Chapter 23: Compensation Rate) in the claims. This makes the tactical decision to pursue one claim over another a complex one.

1.3 Time Limits

Once you have identified potential issues and then sorted out how you will approach them, you may be faced with the fact that there appear to be time limit problems associated with one or more of the issues.

It is important to do some careful thinking and perhaps some related tactical work to determine whether or not there really is a time limit problem, or if there are ways around it. Consider these questions:

- Is there any collateral evidence that a timely objection was made to the decision in question?

  EXAMPLES:

  - Your thorough review of the Board file may reveal a letter from the worker (or someone else) that appears to substantively object to the decision without referring to it. The letter is undated but is date-stamped by the Board as having been received after the decision was made.
  - There is a memo on file documenting that the worker was verbally advised of the negative decision and immediately verbally objected to it.

  In situations where such evidence exists (and you are sure that there really is a time limit problem otherwise), point this evidence out to the relevant decision-maker and argue that a timely objection was made.

- Does the decision deal with a substantive issue or a merely collateral issue?

  EXAMPLE:

  - The worker received a decision denying reimbursement for an anti-depressant prescribed for depression (see example above in Section 1.2). The decision-maker denied reimbursement because no psychological entitlement was established in the claim. You have identified psychological entitlement as an issue to pursue. Your careful search of the file reveals that there is no ruling, as such, on psychological entitlement. The appropriate strategy would be to write requesting psychological entitlement but, as suggested above, it may also be appropriate to object to the decision that denied the medication, especially if less than a year has passed since the decision was made.

- Does the decision actually rule on the issue that you want to raise?

  EXAMPLE:

  - The worker has a decision denying further LOE entitlement, based on a failure to co-operate in ESRTW where there would have been no wage loss while the worker carried out modified work. It was not appealed in time. The letter states that "there is no further entitlement in this claim". Part of your initial strategy is to have the Board accept that there is a permanent impairment, which should be rated for a NEL award. Just because a failure to co-operate led to the termination of LOE benefits, it does not follow that there is no permanent impairment. Although decision-makers at Operations level may not grasp the point, one hopes their managers will. Write requesting a NEL assessment, and pointing out the evidence that supports the conclusion that a permanent impairment exists.

- Were the issues that were supposed to be addressed in the decision actually addressed?

  EXAMPLE:

  - The worker raised various concerns in a letter and there is a responding denial decision from the Board that refers to the worker's letter. However, on close reading, you see that one issue that you have identified as important to pursue was actually raised in the worker's letter but was not explicitly addressed in the responding decision. In this case write again, raising your specific issue, and suggesting that it was not dealt with in the previous decision.

- Is the decision in question the only one that deals with the issue that you want to pursue?
  EXAMPLE:
  - In an initial entitlement claim, there may be a series of denial letters from the Board dealing with the same issue. The receipt of some additional piece of information has prompted each fresh decision by the adjudicator. Some of the decisions were objected to; the most recent was not. The fact that the most recent decision was not objected to cannot take away from the fact that *at least one* denial of initial entitlement was objected to within the time limit. This should be sufficient for the Board to allow the issue to proceed on the merits.

- Has a subsequent decision undermined the foundations of an earlier "out of time" decision, thereby rendering it irrelevant?
  EXAMPLE:
  - You want to challenge the LOE award based on an inappropriate SEB. Neither the LOE decision, nor the LMR decision outlining the SEB, was appealed in time. However, you have identified an error in the earnings basis calculation. If you can win on the earnings basis issue, the SEB, the LMR plan, and the related LOE award will all have to be redetermined anyway.

- Is it possible to advance a claim for a collateral form of entitlement in the same claim that may lead to an outcome which is as good as, or perhaps even better than, the one that would follow from the decision where there is a time limit problem?
  EXAMPLES:
  - Consider claiming for a 100% FEL award based on a material change, rather than the continuation of a FEL supplement.
  - Consider claiming for a s.147(4) supplement rather than the extension of a s.147(2) supplement.
  - Consider claiming for chronic pain where there is an out-of-time decision denying ongoing entitlement for an organic condition (or vice-versa).
  - Consider claiming for psychological entitlement where there is an out-of-time decision denying chronic pain entitlement.
  - Consider arguing for entitlement on a disablement basis where there is an out-of-time chance event denial decision.

- Is it possible to advance a claim for something in a different claim that may lead to an outcome which is as good as, or perhaps even better than, the one that can no longer be pursued because of the time limit problem?

  Many injured workers have more than one compensation claim and some of these claims may span more than one administrative scheme. Having a time limit problem with one issue in one claim may make pursuing other options in other claims more attractive. A worker who has been denied a FEL award in a 1993 claim may have a compelling argument for a full LOE award in a more recent claim or, perhaps, even for a s.147(4) supplement in a pre-1990 claim.

- Can a fresh request be made for something previously denied on the basis of a change in circumstances (not the same thing as requesting a reconsideration of the previous decision)?

  EXAMPLES:
  - A fresh request for LMR assistance where the worker has a "new willingness" to co-operate, where the compensable condition has changed, where the accident employer no longer has suitable work available for the worker, etc.
  - A fresh request for a s.147(4) supplement where the compensable condition has deteriorated, the accident employer no longer has suitable work available, etc.
  - A fresh request for a FEL (or LOE) award on the basis of a "material change" of one sort or another, bearing in mind the strictures related to "final" FEL or LOE determinations, in which case the only option is to argue about a deterioration in the compensable condition(s) as reflected by an increase in the NEL award.

In general, in situations where you think there may be a time limit problem regarding the issue that you want to raise, consider writing the letter that you would have written if there were no time limit problem (after having pointed out in writing to your client that there may be a time limit problem). If the decision-maker responds without raising a time limit concern, so be it.

If it looks as if there is a time limit problem that has to be tackled head-on, some thought should go into designing a strategic plan that may strengthen the case for allowing a time limit extension. An example here may help (see also Chapter 27: Time Limits).

A 50-year-old injured worker comes to see you with a very complicated case. He has a pre-1990 low back injury with a 15% pension in place. You learn that, following that accident, the worker was "rehabilitated" and did return to the workforce where he earned wages comparable to his pre-accident wages. Therefore a s.147(4) supplement was never considered. In 1993 he hurt his neck in a work accident and has not worked since. The NEL rating for the neck injury is 27%. Initially, some further attempts at rehabilitation were made following the 1993 injury and it appears that the worker had been hoping to return to some form of work. While he was engaged in further rehabilitation, a FEL award was granted and topped up with a FEL supplement because of the worker's involvement in vocational rehabilitation activities. The worker had not found employment when the VR plan ended and the FEL supplement stopped. But, at the time of the final FEL review in 2000, the Board took the position that the worker could earn his pre-accident wages and so granted a zero FEL award. Independent evidence seems to indicate that the back has deteriorated. There is also a compensable shoulder problem in the 1993 claim that the Board says has cleared up. The worker has developed psychological/chronic pain problems following the 1993 injury. It seems pretty clear that the worker is unemployable because of his organic and non-organic problems spread over the two claims. He made a double-barrelled claim for the non-organic entitlement which was denied by an ARO. A second ARO decision acknowledged that there should be entitlement for chronic pain management even though, technically, there was no chronic pain entitlement. The worker thought that since the second ARO decision had allowed entitlement for chronic pain management, this meant that chronic pain entitlement was also accepted. For this and other reasons, the first ARO decision was not appealed to the WSIAT within six months. The worker made a request to the WSIAT for a time limit extension but it was denied in spite of the rather good point about the second ARO decision.

The worker presents with two issues, as he sees them: he wants the FEL supplement extended, and he wants to "appeal" the WSIAT's denial of the time limit extension so that he can have the

ARO's "non-organic" decision dealt with on the merits at the WSIAT. What is the representative's reaction?

The FEL supplement issue is not really going anywhere: even if there were a basis for an extension, it would be for only a few weeks or months. The better argument is that the worker is unemployable. The issue of non-organic entitlement is very important, but the WSIAT decision cannot be appealed. *However, it could be reconsidered*. The question is when — bearing in mind that, happily, there are no time limits for reconsideration requests. In a perfect world, with endless resources, a reconsideration request could be made right away and it might succeed. If it did not another reconsideration request could be made later. However, is it appropriate to put limited resources into a reconsideration request right away? In this case, perhaps not.

It is clear from the material on file that good arguments can be made for a pension increase for the low back, a NEL award for the shoulder in the 1993 claim, a s.147(4) supplement in the low back claim, psychological or chronic pain entitlement, and for finding the worker unemployable (a 100% FEL award follows from this) because of both organic and non-organic factors. Although technically possible to get both, it is likely that if a s.147(4) supplement is granted, a 100% FEL award will not be granted, and vice-versa. Subject to your being able to re-open the FEL window because of a deterioration in the neck or the finding of a permanent impairment in the shoulder after November 26, 2002, the case for a 100% FEL award has to be made based on things as they were in 2000.

Obviously more than a time limit problem lurks in this fact situation, but it is important to set up the case to deal with what can be done; that is, not an "appeal" to some mythical court, but a reconsideration request at the WSIAT. Who knows — along the way a result (more money) may be achieved that is satisfying enough that the WSIAT reconsideration request need not be made. What to do?

It makes sense to request a pension increase in the low back claim and try out a request for a pension supplement, the latter request standing a better chance of being granted if a pension increase is awarded. In fact (this example being close to a real life case), the pension was raised to 30% but the supplement request was denied nevertheless. It is now on hold at the ARO level, and the ARO in question has made it clear that he really does not want to grant the supplement because, although he thinks the worker is unemployable, he thinks it is related to the 1993 injury. He is not the kind of ARO who will meet the client, feel sorry for him, and grant the s.147(4) supplement anyway (see the discussion in Section 4 below about knowing the parties you are dealing with). So if that ARO is still responsible for the file if and when the time comes, it may probably make sense to proceed with a decision without a hearing.

Making the non-organic claim in the low back file would have been one way to get around the ARO's decision. Unfortunately, there is no basis for doing that.

Meanwhile, a NEL award for the shoulder in the 1993 claim should be pursued simultaneously. It is and, following an ARO decision, a 7% NEL award is granted and factored into the NEL award already in place, resulting in a combined NEL of 32% (i.e., the new NEL of 7% is not added to the existing NEL of 27%, but factored into it; see Chapter 16: NEL, Section 3.3.4 for more on the rating of multiple impairments). The Board is requested to look at the final FEL award again, now knowing that, in 2000, there was a shoulder impairment that was not considered, and that the back impairment in the pre-1990 claim was worse than it was understood to be at that time. There is no change.

The file goes back to the ARO who awarded the NEL for the shoulder. The argument is that even without factoring in the worker's currently non-compensable non-organic problems, it should have been clear by 2000 that he was unemployable. This ARO actually does feel sorry for the worker but is troubled by the non-compensability of the non-organic problems (and also thinks that the first ARO decision was wrong on the merits). If the ARO accepts the unemployability argument even without officially factoring in the non-organic problems and a 100% FEL is awarded, the main objective has been attained.

If the appeal is denied, it has to be appealed to the WSIAT. Hopefully the ARO's decision will mention the intertwining of the compensable and non-compensable factors. Meanwhile the other ARO's anticipated s.147(4) denial in the low back claim should also have been obtained and that decision should be appealed to the WSIAT.

Once both Notices of Appeal are at the Tribunal, a request should be made for reconsideration of the WSIAT extension denial. Over and above a reiteration of the good argument about the worker's reasonable expectations in light of the second ARO decision (the one that granted entitlement for chronic pain management), a strong argument can also be made that the issue of non-organic entitlement is so central to, and intertwined with, the issues raised in the two new appeals, that the time limit should be extended for appealing the first ARO decision and dealing with the merits on all of the issues in one WSIAT proceeding concerned with the "whole person". *Voilá*. If necessary, a very strong argument can be made for allowing a time limit extension upon reconsideration at the WSIAT. However, if other approaches have led to substantial success, there may be no need to get into the time limit extension reconsideration at the WSIAT.

1.4 What the Worker Needs to Do

The worker has three basic tasks:

1) To advise the Board of material changes in circumstances (see Chapter 18: ESRTW and LMR).

2) To ensure that he or she is receiving active medical rehabilitation and is involved in reasonable self-directed LMR activities during periods when the Board is not offering LMR services and considers the worker to be partially disabled or not disabled (see Chapter 18: ESRTW and LMR)

3) To ensure that he or she advises you, the representative, if written decisions are made so that time limits can be met in situations where, for one reason or another, you do not receive the decision.

It is important for representatives to advise workers of these tasks at the outset, and to follow up with workers about material changes and self-directed activities as these questions become relevant.

2. VARYING THE STRATEGIC PLAN

A strategic plan should be revisited from time to time. Indeed, it is quite possible that fresh strategic decisions will be called for when a hearing takes place at the Board or the Tribunal. Representatives should not be so locked into "the plan" that there is no room for adjustment. The trick is being able to see far enough down the road to anticipate the longer-term implications of what you are or are not doing or claiming on behalf of your client.

The last time limit extension situation outlined in Section 1.3 above illustrates a case where the strategic plan has to be adapted to ongoing developments. Another example follows.

A construction foreman (working foreman) comes to you in 2001. He has hurt his right knee at work in a slip and fall accident, but x-rays show that there are fairly severe pre-existing degenerative changes in both knees. He has been off work since the accident, his specialist is considering surgery, and the Board has not yet ruled on initial entitlement. He is a worrier and he is worried. He wants you to take on his case. He is not really sure what he wants you to do — he just wants to make sure that his interests are protected as things progress.

You could worry that:

- The Board will not be satisfied that there is sufficient proof of an initial injury.
- The Board will feel that although there was an incident, it was trivial, and that the real problem keeping the worker off work is the pre-existing condition in the knee.
- The Board will feel that the need for surgery is related to the non-compensable degenerative state of the knee rather than the accident, and so will accept entitlement for only a brief period of time loss but not the surgery and recovery period.
- The Board will feel that if any permanent impairment is present, it does not result from the accident.

You can point out these worries to your client. In cases like this, the initial plan may be to stay in the background and do nothing and see what the Board does. Simple plan.

Three months later the Board has accepted initial entitlement, is not concerned at all about the pre-existing degenerative changes, and is prepared to authorize knee surgery on the right knee if the worker wishes. The worker does want to have the surgery. Benefits are being paid and the calculations look correct. The initial plan was to do nothing and it worked quite well. Unless the employer objects to something, the first set of worries can now be ignored. But the worker is still worried:

- What if the surgery does not help and he cannot get back to his old job?
- What if he is fired?
- What if his employer wants him back at a light job a week after the surgery but he does not feel up to it?

These are not concerns you would want to raise with the Board, so the plan is to inform the worker about how cases like this usually go, with some of the variations and permutations that that entails, and still stay in the background.

Eight months later, surgery has taken place and the worker is at home recovering. His employer is providing modified duties consisting of reviewing invoices that have been dropped off at the worker's house and sorting them into numerical order. Huge piles of invoices are being dropped off but there are no pressures on the worker to have them sorted within a tight deadline. He has been doing the "job" but he knows it is made up work. He finds this frustrating and demeaning and he wants you to confront the Board and the employer about it. He is thinking about quitting. At last, here is something for you to do! What exactly should you do though, and what is "the plan"?

The best thing to do is to counsel the worker on how to co-operate. Quitting will get his LOE benefits cut really fast. Complaining may achieve the same result, especially if the adjudicator feels that the worker has a pretty easy arrangement at this point — just staying home, being paid to do next to nothing. Maybe the adjudicator will start thinking about that pre-existing condition. Why not put up with the work until the knee is as good as it is going to get? Maybe at that point more meaningful modified work will be available. That sounds like a good plan.

Two months later the worker is ready to go back to work but now has permanent restrictions related to his knee, a NEL award of 10% (which you have checked and believe is accurate), and a new set of worries:

- His pre-accident work clearly exceeds his permanent knee restrictions — what if he is "forced" to do his old job?

- What if he is given a job that looks suitable but is not, or is changed to something unsuitable within a few days or weeks?

- What if he is laid off because of cutbacks?

- What if he is laid off because, after a period of accommodation, the employer decides that it cannot permanently accommodate the worker?

These are good things to worry about. The best casework strategy may still be to stay in the background as long as work is offered that appears to be suitable and is, in fact, suitable. The worker does need to be advised of potential outcomes should any of the listed worries come to fruition.

One year later the worker is laid off because the employer has decided that it cannot permanently accommodate him. The Board acknowledges this reality as a failure of the ESRTW process and so it arranges an LMR assessment. The LMR assessor reaches the conclusion that the worker needs such significant retraining that, given his age, he is unemployable. However, the adjudicator does not agree with this assessment and directs the LMR service provider to come up with another option. An LMR plan is devised which involves one year of English upgrading, followed by four weeks of creative job search training, and the SEB of parking lot attendant. A substantial wage loss is associated with this SEB and so, LOE benefits of about $2,000 per month will be payable until the final LOE review, whether or not the worker co-operates in LMR. (Note that it is likely that the worker will lose out when the final LOE decision is

rendered because, by then, the deemed wage is likely to have increased significantly over the deemed wage used when the LMR plan was devised.) However, if the worker does co-operate, full LOE benefits of $3,000 will be payable until the LMR plan is completed. The worker insists that he cannot cope with school and absolutely refuses to participate. What should be the plan now?

Given the worker's age, his need for substantial upgrading, and the fact that the LMR service provider is on record as having found the worker unemployable, there is a strong argument for objecting to the LMR decision, refusing to participate in the proposed LMR plan, and requesting the continuation of full LOE benefits. However, in the short run, the worker will lose $1,000 per month, and will probably lose even more when the final LOE decision is rendered (unless the objection has been allowed by then). Try to persuade him to at least attempt school so that full LOE benefits will continue. At the same time, file a "bookmark" objection to the LMR decision. If the worker does his best but fails to achieve much (which is quite likely), the Board may come to realize that LMR *really is pointless*, that the worker *really is unemployable,* and that the worker should be dropped from the LMR program *but paid full benefits until age 65*. And, along the way, full benefits will have been maintained. It would therefore appear that the best strategy is to continue to co-operate. However, if the worker simply will not attempt school, the only strategy is to object and take it from there (although, if two months later the worker is feeling the financial pinch and is willing to try the upgrading, it may be possible to get the plan started up).

To summarize, after years of being in the background simply advising the worker about potential pitfalls as the situation unfolded, the time has now come to step into the foreground and fight for recognition that the worker is unemployable and should be receiving full LOE benefits until age 65.

3. DEGREE OF INVOLVEMENT

It is clear that a representative who has been retained will communicate with the Board concerning Board decisions. What is not clear is how involved the representative will be, particularly in ESRTW and LMR issues, should these issues arise during the representation. Will the representative attend at ergonomic evaluations at the employer's premises? Will the representative attend at all LMR meetings with the case manager?

Many representatives choose an intermediate approach to these questions, depending on the communication abilities and wishes of the worker and the approach taken by the employer. For instance, a worker with weak communications skills, who must attend at an ergonomic evaluation where the employer is aggressive but will permit the representative to attend, can benefit more from representation at the evaluation than a worker with strong communications skills whose employer is taking a *laissez-faire* approach to the claim.

4. ADJUDICATIVE / BARGAINING STRATEGIES

Results in cases are a function not only of legal merit and evidence, but also of all of the people involved. Knowing the other parties, the decision-makers (be they claims adjudicators, AROs, or Tribunal members), and the employer, is an important element of representation, especially since mediation is now often a part of the RTW and appeal processes.

Talking to the injured worker and to other representatives may provide insights regarding the other parties. Another way to learn about decision-makers at the Tribunal is to read Tribunal decisions to develop a feel for how certain decision-makers approach different factual and legal questions.

Employers have interests that are usually defined by their workers' compensation assessments (see Chapter 6: Employer Issues). Understanding when employers' costs are no longer affected by decisions plays a role in a representative's decision-making (see, for instance, Chapter 17: FEL, Section 7.1). This is not to say that all employers act purely in accordance with their financial interests. There are employers who, in order to do the right thing, will support a meritorious claim despite adverse financial effects, and other employers who, out of pure spite or to create a climate of fear and anxiety among their workers, will oppose a claim despite having no financial interest in the matter.

An example might help illustrate. A 40-year-old worker in the non-union manufacturing sector injured her low back in 2005. It is one year post-accident when she comes to see you. At the time she sees you, her family doctor has advised her that she is not ready to return to work, but the claims adjudicator has called her to advise that the Board is of the opinion that she is capable of modified work, and that the employer has such work for her. It is this call that has prompted her to seek representation.

You will, of course, ask her about her medical treatment and tests, specialists she has seen, and any opinions that have been given about her current capacity, as well as about any modified work that might be available. It is also a good idea to find out about how the employer responds to claims generally, and whether the worker was well thought of by the employer (although this is not a reliable predictor of how the employer will treat an injured worker).

In this example, the employer's financial interests will expire with the NEER window three years after the accident (see Chapter 6: Employer Issues). On the other hand, one of the two likely key decisions in the claim (whether the worker has a permanent impairment and the quantum of LOE benefits at the final review) will be made six years after the accident (see Chapter 26: LOE). In many instances, these differing time frames can lead to agreements and understandings, particularly where part of the costs of the claim are not attributed to the employer (see Chapter 6: Employer Issues for more on SIEF).

So, if the worker in our example attempts the modified work but is unable to continue, and the Board denies the recurrence, this issue may proceed to appeal. By the time the appeal is heard, the NEER window may have expired. Therefore, the employer may not oppose the appeal, or may, indeed, support it.

Most decision-makers will accept agreements made by workers and employers with respect to claims issues, provided the agreements reasonably conform to the Act. A few decision-makers will scrutinize agreements very carefully "to protect the accident fund". Knowing the particular decision-maker involved plays a role in the representative's choice of approach.

For workers with multiple claims, the bargaining aspect becomes more complex. In the example above, if the worker had a prior claim with the same employer from 2002 for the same injury (low back) and had ongoing problems after her return to work from that injury, the employer has a powerful financial interest in having the 2005 claim recognized as a recurrence rather than as a new accident. Depending on the worker's earnings basis (see Chapter 23: Compensation Rate)

and the timing of her LOE review (see Chapter 26: LOE), this interest may accord with the worker's interests, and agreements may be possible. So, if in 2006, the Board accepts that the 2005 injury is a recurrence, and the employer agrees that it does not have modified work, the worker can proceed to the LMR process unimpeded and with some time left prior to the 2008 final review of LOE under the 2002 claim. If the worker's pre-injury earnings in 2002 were comparable to her pre-injury earnings in 2005, this may serve her well.

Where a union represents the worker, negotiations about return to work differ considerably. On one hand, the union may have more information than the worker about possible modified work options and the physical demands involved but, on the other hand, may also have to balance the interests of the injured worker with the interests of other, and sometimes more senior, workers who may have to take on additional responsibilities if the worker returns to work. In many instances, the worker is probably better off being represented by his or her union, at least until any RTW issues are resolved.

The negotiation of an LMR plan is also three-sided: the worker, the Board (claims adjudicator and LMR/RTW advisor) and the case manager (see Chapter 18: ESRTW and LMR). While the case manager can only make recommendations, the Board usually takes these recommendations seriously. Case managers are given some limited training by the Board about the benefits implications of their recommendations, but this training does not accurately depict the long-term impact of LMR recommendations. One important role for representatives in the process is to ensure that case managers are aware that the worker bears all of the risk of long-term failure of an LMR plan, and that the risk is often huge (see Chapter 26: LOE).

The most formal bargaining occurs in the Tribunal's early resolution process (see Chapter 3: System of Review and Appeals). This process is optional for both parties. In what circumstances should it be considered? If the employer is supportive and participating, clearly it should be considered. If an agreement is reached, the Tribunal vice-chair will likely endorse it, and if it is not, nothing has been lost as the matter will proceed to hearing.

When an employer's appeal has relatively little merit, the early resolution process can help in ensuring disposition with little risk.

The trickier cases are ones where several outcomes are possible and the early resolution process is likely to lead to a middling result. The likelihood of each of the possible outcomes of a hearing must be assessed and then reviewed with the worker before the worker decides to participate in the early resolution process.

5. CONCLUSION

Through a variety of examples, this chapter has attempted to illustrate how issues arise, interact with other issues, and shift in relative significance as a representative probes the facts and evidence in an injured worker's case. As each issue arises or resolves, it changes the overall landscape within which the representative shapes a strategy of how to best serve the worker's interests. With experience comes not only growing familiarity with the details of the various legislative schemes governing workers' compensation, but also skill in fitting issues together, keeping sight of the "big picture", and adapting one's plan of action to the shifting terrain of a case.