

## SE-GA's Decisions at the WSIAT

### Is your company being denied Cost Relief? Are you frustrated with the WSIB Appeals Process?

Among the greatest frustrations in dealing with the WSIB is the difficulty in gaining Second Injury Enhancement Fund (SIEF) Cost Relief. Since the advent of the SIEF team in 2009 the degree of cost relief awarded to employers has dropped dramatically from pre 2009 levels (it is estimated to be, in terms of total dollars, to be a reduction of approximately 75%).

SE-GA has found that appealing up to the Workplace Safety and Insurance Appeals Tribunal (WSIAT) is the only consistent way of ensuring the policy of granting cost relief is properly applied. In 2012 SE-GA had more successful decisions, representing employers exclusively, at the Tribunal than any other advocates. These decisions have resulted in great improvements to the respective companies (NEER or CAD-7) experience rating. This issue, and our next newsletter, will focus on significant decisions at the Tribunal where SE-GA was representing our client's interests.

All decisions made by the Tribunal become public record and can be found at [www.wsiat.on.ca](http://www.wsiat.on.ca). Upon request SE-GA will provide you with any of the decisions cited in this newsletter. If you have questions about cost relief, the Tribunal or any WSIB matter please send your request to [sonia@segaconsulting.com](mailto:sonia@segaconsulting.com).

### Precedent: Smoking and Obesity are Pre-Existing Conditions

**NEER:** A filing clerk developed a right elbow impairment as a result of her duties (stapling and unstapling documents) which was diagnosed as *lateral epicondylitis* (tennis elbow). The worker was absent from work and received **Loss of Earning Benefits for 15 months as a result of this accident**. The Case Manager deemed this to be a *moderate* accident, stating that the repetitive nature of this activity would likely cause a disabling injury. The worker was determined to have a permanent impairment, and received a 5% Non- Economic Loss (NEL) pension.

SE-GA applied for Second Injury and Enhancement Fund (SIEF) cost relief based upon the

medical evidence, including an MRI. This was denied by the Case Manager on **October 21, 2010**. That decision was in turn affirmed by an Appeals Resolution Officer on **July 15, 2011**.

SE-GA appealed this decision to the Tribunal (WSIAT) and submitted our arguments to a written hearing (**November 19, 2012, over two years from the initial denial by the Case Manager**).

Our appeal was granted by the Vice-Chair, who provided an opinion on multiple matters:

**a) The severity of this accident is minor.** The Vice-Chair agreed with our submission that the probability of disability was unlikely as a result of these work activities. A “normal” person (i.e., one without the pre-existing condition) would likely **not** have suffered an injury as a result of this work. (This therefore increased the quantum [percentage] of cost relief available.)

**b) The MRI showed a pre-existing condition.** The MRI revealed that the worker had an *exostosis*, i.e., a bone growth on her elbow which contributed to her pain. She had surgery as a result of her injury, and the bone growth was removed. The Vice Chair agreed that the *exostosis* made it more likely this worker would “develop a disability of greater severity than a normal person”.

**c) Smoking and Obesity are Pre-Existing Conditions.** We submitted the following after soliciting medical opinion:

### ***Tendonitis causes***

*Risk factors for tendonitis include repetitive motion, trauma, thermal injury to the tendon, use of certain antibiotics and smoking.*

*Tendonitis can also incur in people with certain diseases such as rheumatoid arthritis, obesity and diabetes.*

Additional medical research showed:

*Physical load factors, smoking and obesity are strong determinants of **epicondylitis**.*

The Vice-Chair recognized the worker’s pre-existing conditions contributed to both the impact of the injuries and to the prolongation of her recovery. Our client was awarded 50% SIEF Cost Relief.



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## Worker suffers minor fall and requires surgery

A 57 year-old mechanic fell while carrying several parts in the shop where he was employed, and suffered a rotator cuff injury. The WSIB classified this accident as *moderate* (meaning a lost time accident was the expected outcome), and while there was evidence of multiple pre-existing conditions, all applications for cost relief were denied.

SE-GA argued at the Tribunal that the worker’s accident should be regarded as *minor* (meaning that a worker should be expected to return to normal duties within a short absence from work due to their injuries) as the worker did not suffer a traumatic injury, and no emergency personnel were required in order the injured worker could receive treatment.

With respect to the issue of a pre-existing condition, the Independent Medical Evaluation provided by SE-GA to the Tribunal demonstrated that the worker had multiple conditions contributing to the weakening of the tendons in the shoulder that would make it more vulnerable to trauma. The conclusion from the evaluation was that the fall should have otherwise resulted in a simple contusion or a strain; therefore the pre-existing conditions should be considered *moderate*.

The Vice-Chair determined that the accident should be considered minor and that the pre-existing conditions were moderate, and **awarded our client 75% cost relief**. It was further concluded that the delays in getting this issue to the Tribunal were caused by the WSIB and that the company should receive “real cost relief” (i.e., an actual dollar savings) which resulted in a **retroactive NEER adjustment**.

This chart, which came from WSIB Policy, and is quoted in the Tribunal decision, shows the matrix by which the *quantum* (percentage) of cost relief is determined:

SIEF – Application to Employer Costs <b>Medical Significance of Pre-existing Condition</b>	<b>Severity of Accident</b>	<b>Percentage of Cost Transfer</b>
Minor	Minor	50%
	Moderate	25%
	Major	0%
Moderate	Minor	75%
	Moderate	50%
	Major	25%
Major	Minor	90% – 100%
	Moderate	75%
	Major	50%

## Horseplay at work: Frequency prevented

A 24 year-old apprentice carpenter injured his knee in what was deemed “horseplay.” The WSIB denied this claim as it was determined the worker had removed himself from the course of employment as a result of the horseplay incident.

The worker, represented by his union, appealed this decision to the Tribunal. SE-GA presented several pieces of evidence at the hearing, including a decision from a previous claim regarding horseplay. The Tribunal agreed with our arguments, and the worker’s appeal was denied.

This prevented a **CAD-7 Frequency** (lost time claim) from being charged against the employer, thereby avoiding a significant financial liability.

## SIEF gained, reduced, returned and more

Many employers have been notified by the Appeals Branch that if the employer chooses to appeal seeking an increase in the quantum of cost relief they have received, they also risk having the quantum reduced. There were two separate claims for the same employer involved in this appeal.

In the first claim, the employer was successful in achieving 50% Cost Relief. It appealed that decision, seeking a greater degree of Cost Relief. The Appeal Resolution Officer (ARO) reconsidered the initial cost relief granted, and reduced the award to 25%.

In the second claim the employer achieved 75% Cost Relief, and upon appeal, this award was reduced to 50%. At the Tribunal, SE-GA appealed both of the ARO decisions.

**For claim 1** – SE-GA was successful in returning 50% Cost Relief to the employer.

The initial decision that this was a claim of minor severity with a minor pre-existing condition was restored.

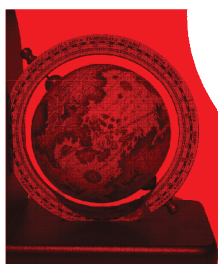
**For claim 2** – SE-GA increased the total quantum of Cost Relief to 90%.

SE-GA was successful in our argument that the accident was not of *minor* severity with a *minor* pre-existing condition but instead was of *minor* severity with a *major* pre-existing condition.

### EDITOR’S NOTE:

Clearly the opportunity for obtaining SIEF cost relief for employers still exists, and should be pursued accordingly. Nevertheless, there is an onus on the employer not only to establish that there is a pre-existing condition, but also, that it is impacting upon the claim. Our success in helping employers achieve maximum SIEF speaks for itself. Our team would be more than happy to assist your organization in maximizing your WSIB cost relief utilization as well as any other WSIB matters impinging upon your firm’s financial well-being.

As always, everyone’s situation is different. The above is not intended to be legal advice for any particular situation and it is always prudent to seek professional legal advice before taking any decisions on one’s own case.



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