POLICY REPORT

Vol. 14 No. 2 March 2001

WSIB ONTARIO CSPAAT
Workplace Safety & Insurance Board
Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

INSIDE

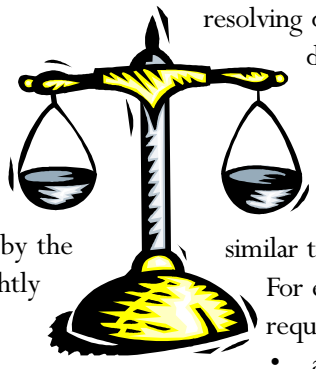
Merits and Justice

a new policy

Section 119(1) of the *Workplace Safety and Insurance Act* (the Act) states that the Workplace Safety and Insurance Board (WSIB) "shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent." Over the years, this important legal provision, which applies to all WSIB decisions, has caused some confusion, both internally and externally. This issue of *Policy Report* outlines why the merits and justice provision was included in the Act and why the WSIB developed a policy for it — operational policy 11-01-03, *Merits and Justice*. Because the concept of "merits and justice" is quite abstract, this issue of *Policy Report* also highlights the main principles of the policy, and illustrates the principles using scenarios with questions and answers.

Why is the merits and justice provision included in the Act?

The merits and justice provision was included in our legislation primarily to reinforce the fact that the WSIB is an administrative tribunal. An administrative tribunal is an agency, created by a statute, which has been given the power to decide matters that would normally be decided by the courts. The merits and justice provision, in slightly different form, has been a part of the WSIB's legislation since 1917.



Administrative tribunals were created as an efficient way for governments at all levels to enforce legislative requirements and to resolve disputes arising from those requirements. Both governments and the courts recognized that with their specialized expertise, administrative tribunals could resolve disputes more quickly and in a more cost-effective manner than could the courts.

If administrative tribunals such as the WSIB or the Employment Insurance Commission had not been created, the courts would have the task of determining entitlement and resolving disputes arising from the various laws; having to do so could create a major backlog in the courts.

How the WSIB as an administrative tribunal is similar to a court

Administrative tribunals, such as the WSIB, are similar to courts in some ways and different in others. For example, both the WSIB and the courts are required to:

- allow parties to be represented by a lawyer or other representative,
- give disputing parties the right to present their cases at a hearing,
- provide adequate notice of all proceedings (e.g., the hearing's time, date, and place; time limits for appealing decisions or complying with legislative requirements),
- make all decisions, and conduct all proceedings, in a way that is fair and open to all the parties,
- ensure that decisions are based on evidence, and
- provide reasons for all decisions.

How the WSIB as an administrative tribunal differs from a court

One of the most important ways that the WSIB, as an administrative tribunal, differs from courts is that its decisions do not have to follow legal precedent. What this means is that in recognition of their own expertise, administrative tribunals have the flexibility to depart from previous decisions where the facts and circumstances of individual cases, or compelling reasons of public policy demand it. However, the WSIB must observe and apply the appropriate legislative provisions and WSIB policies to each case it reviews.

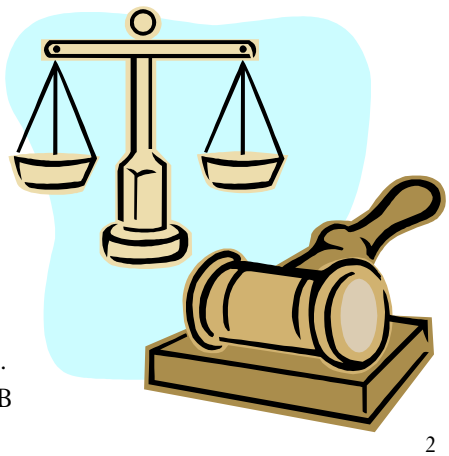
Another important way that the WSIB, as an administrative tribunal, differs from courts is that courts do not have the authority to review WSIB decisions. In this respect s.118 of the Act provides that the WSIB has exclusive jurisdiction to decide all matters and questions arising under the Act, and that a WSIB decision "is not open to question or review in a court."

Lastly, the WSIB as an administrative tribunal has the power to develop policies when the Act is silent or ambiguous, or when it permits a number of possible interpretations. These policies help decision-makers apply the Act fairly and provide guidance to external stakeholders on how the WSIB is likely to rule on a given set of facts.

When applying policy, WSIB decision-makers first consider whether the case falls within the application date of the policy and then whether the facts of the case fall within the scope of the policy. If the facts of the case pertain to one or more policies, the decision-maker must apply each of those policies when making a decision. Of course, policy can never depart from the provisions of the Act — should the two conflict, the Act prevails. If a decision-maker finds that the facts of the case are not covered by existing policy, the case must be decided on its particular facts, in accordance with the general provisions of the Act.

Why a policy on merits and justice?

A review of past WSIB decisions shows that some confusion exists as to the meaning of the merits and justice provision, and when and how it should be applied. For example, some WSIB decision-makers believe that the merits and justice provision allows them to ignore applicable WSIB policy if the end result of their decision is "just." The merits and justice policy was developed in order to remove this confusion and to help decision-makers apply this important provision.



Principles of the merits and justice policy

In the context of the WSIB, basing a decision on the merits and justice of the case means that **decision-makers must take into account all of the relevant facts and circumstances of the case**. Once they have done so, decision-makers must adhere to the following three principles:

1. First and foremost, they must apply all of the relevant provisions of the Act, without exception.
2. Second, they must apply all relevant WSIB policies providing the case does not have any exceptional circumstances.
3. Finally, if there are exceptional circumstances, decision-makers may depart from relevant WSIB policy, **only** if the application of such policy would lead to an unfair or absurd result that the WSIB could never have intended. In these cases, decision-makers must clearly identify the exceptional circumstances and explain in the decision why the relevant policy is not applicable.

By applying relevant legislative and policy provisions to similar situations, decision-makers ensure that:

- similar cases are adjudicated in a similar manner,
- each participant in the system is treated fairly, and
- the decision-making process is consistent and reliable.

When determining entitlement to a disease claim, a decision-maker considers the worker's medical condition and exposure at work, the up-to-date medical and scientific information, any pertinent non-occupational factors, and all of the relevant policies.

Policy application examples

Because the concept of "merits and justice" is quite abstract, the next section illustrates each of the three principles of the merits and justice policy using a scenario, a question, and an answer. Given that the WSIB has three policy branches: Benefits Policy, Revenue Policy, and Medical and Occupational Disease Policy, and given that each branch deals with different situations, we have illustrated each principle with examples from each branch.

Principle 1:
Decision-makers must apply all relevant provisions of the Act, without exception

Example from the Benefits Policy Branch

Scenario: A worker has been receiving loss of earnings (LOE) benefits for more than 72 months. The amount of the LOE payment is equal to 12% of the payment the worker would receive for full loss of earnings. The worker tells the decision-maker that he needs a new car and would like a commutation of his LOE benefit so that he can buy the car.

Q: Can the decision-maker grant the worker's request for a commutation?

A: No. In this situation, the decision-maker cannot grant the worker's request for a commutation. Although the decision-maker may feel sympathetic to the worker's request for a commutation, s. 62(2)(a) of the Act states that a commutation of LOE benefits will only be allowed when the amount of the worker's LOE payment is 10% or less of his/her full LOE payment.

Example from the Revenue Policy Branch

Scenario: ABC Manufacturing Inc. (ABC) was sold to G. Smith Limited (Smith) on February 1, 2001. The WSIB is holding Smith liable for $8,000 in overdue premiums that ABC did not pay to the WSIB before the sale of the business. Smith believes that G. Smith Ltd. should not be responsible for ABC's overdue WSIB premiums, as the two businesses were separate and unrelated prior to the purchase. Consequently, Smith has asked the WSIB to relieve them from paying ABC's unpaid premiums.

Q: Should the WSIB relieve Smith from paying ABC's unpaid premiums?

A: No. Section 146 of the Act states that the purchasing employer is liable for the previous employer's unpaid premiums accumulated prior to the sale and purchase of the business. Thus, to comply with s.146 of the Act, the decision-maker has no choice but to pursue Smith for unpaid WSIB premiums.

Example from the Medical and Occupational Disease Policy Branch

Scenario: A worker in the automotive industry whose task for the last three years has been to manufacture and assemble asbestos brake linings develops primary pleural mesothelioma. The employer provides expert scientific evidence that such a short latency interval (from first exposure to development of the disease) is not compatible with a work-related cause of the cancer.

Q: In this case, can the decision-maker accept the employer's scientific evidence to deny the worker's claim?

A: No. In spite of the scientific evidence, the decision-maker must allow the claim, because the worker is covered under Schedule 4 of Regulation 175/98 to the Act: The worker worked in a process listed in Column 2 and has the disease specified in Column 1. Therefore, the Act provides an irrefutable presumption of work-relatedness under s.15(4). This worker's disease is deemed to have occurred due to the nature of the worker's employment in spite of evidence to the contrary.

Principle 2:

If there are no exceptional circumstances, decision-makers must apply all relevant WSIB policies

Example from the Benefits Policy Branch

Scenario: A decision-maker has to determine whether an employer is obligated to re-employ a worker. The issue depends on the number of workers regularly employed by the employer. Section 41(2) of the Act exempts employers who regularly employ fewer than 20 workers. The decision-maker obtains information which indicates that the employer regularly employs 15 full-time workers and 10 part-time workers. The employer urges the decision-maker to include only his full-time workers in the calculation stating that otherwise he would not be able to run his business efficiently.

Q: Can the decision-maker include only the employer's full-time workers in the calculation and absolve the employer from the obligation of re-employing the injured worker?

A: After reviewing WSIB policy 19-04-02, *Re-employment Obligation*, the decision-maker concludes that the facts of the case are addressed by the policy. The policy states that both full-time and part-time workers must be included when calculating how many workers an employer regularly employs. Recognizing that there are no exceptional circumstances, and that the application of the policy would not lead to any absurd or unintended results, the decision-maker applies the policy to the facts at hand and decides that the employer has an obligation to re-employ the worker.

Example from the Revenue Policy Branch

Scenario: An employer asks for a reclassification of its nursing home operation from Classification Unit 851-01: Nursing Home Operations to 853-01: General Hospitals on the basis that it has an excellent New Experimental Experience Rating plan (NEER) record and an injury record closely matching that of 853-01.

Q: Does the decision-maker have the authority to reclassify this nursing home operation?

A: No. The WSIB classification policy places the type of operation carried out by this employer under RG 851-01. Therefore, the decision-maker must use 851-01 as the appropriate classification for this employer's nursing home operation, regardless of its outstanding injury record. Individual employer operations are classified according to the WSIB's classification scheme. The employer's business activity is the sole criterion for classification. The WSIB does not take individual employer's risk, claim experience, or accident cost history into account when classifying the employer's operations. However, since this employer has a good accident cost experience record, it will likely be eligible to receive refunds under the NEER plan.

Example from the Medical and Occupational Disease Policy Branch

Scenario: A worker has a hearing loss of 20 decibels (dB) in both ears and claims for occupational noise-induced hearing loss (NIHL).

Q: Can the decision-maker approve benefits for this worker?

A: No. Since there are no exceptional circumstances, the decision-maker cannot disregard WSIB policy 04-03-06, *Occupational Noise-Induced Hearing Loss*, which requires a minimum hearing loss of 25 dB in both ears before there is entitlement to benefits.

Principle 3:

Only when there are exceptional circumstances can decision-makers depart from WSIB policy

Example from the Benefits Policy Branch

Scenario: On March 14, 2000 the WSIB sent a letter to a worker stating that he is entitled to a Non-economic Loss (NEL) benefit in the amount of $24,500.00. The letter also stated that the benefit will be paid monthly unless, within 35 calendar days, the worker elects to receive it as a lump sum.

On March 16, 2000, before he received the WSIB's letter, the worker finds out that his mother, who lives in Cambodia, has been stricken with a disease from which she is not likely to recover. On March 17, 2000 the worker left for Cambodia and, due to circumstances connected with his mother's illness, was unable to return to Canada until April 25, 2000.

When the worker returned, he found the letter from the WSIB. As the worker did want to elect a lump sum payment, he contacted his NEL clinical specialist.

Q: Given that the 35-day time limit has expired, could the NEL clinical specialist depart from WSIB policy and award the worker the lump sum payment?

A: After confirming the worker's trip to Cambodia through travel evidence, the NEL clinical specialist reviewed WSIB policy 18-05-04, *Calculating NEL Benefits* and determined that the facts of the case came within the policy. The policy states that workers whose NEL benefit is greater than the threshold for that year have 35 calendar days from the date of the decision letter to elect to receive the benefit as a lump sum.

Despite the fact that the workers election to claim a lump sum was not received within 35 calendar days, the NEL clinical specialist concluded that due to the exceptional circumstances, the worker's election to claim his NEL benefit as a lump sum should be honoured.

Example from the Revenue Policy Branch

Scenario: A customer service representative (CSR) initiated a review of an employer's classification on August 1, 2001 and informed the employer in writing. Consequently, August 1, 2001 is the notification date. According to WSIB policy 14-02-06, *Employer Premium Adjustments*, retroactive adjustments are made from the notification date back to the beginning of the calendar year which includes the notification date. During an initial review of the firm's file, it was determined that the employer appeared to be misclassified under an incorrect (lower) construction rate. However, before a final decision could be made, additional information was required about the employer's business activity. The CSR sent out a letter on August 10, 2001 requesting additional information.

The CSR reviewed the employer's file on October 3, 2001 and found that the requested information had not been received. As a result, the CSR sent out a follow-up notice to the employer. The follow-up notice was returned by Canada Post. The CSR was finally able to track the employer down in late November and was informed that the employer had moved to a temporary location for about four months, because they had experienced a major fire in late August. The employer informed the CSR that the WSIB's request was likely destroyed in the fire. The CSR sent the employer a copy of the original request. The employer was unable to deal with the request until 2002, as they had to move back to the original location.

Q: Can the CSR depart from policy 14-02-06, *Employer Premium Adjustments*, and make the classification change to the correct (higher) construction rate, effective as of January 1, 2002?

A: Yes. Given that there are exceptional circumstances in this situation, which the CSR was able to verify with the fire department, and since the employer had engaged in contract pricing for 2001 at the lower rate, the CSR decided that it would be unfair to the employer to make the retroactive change effective January 1, 2001. Instead, the CSR decided to make the classification change to the correct (higher) construction rate, effective January 1, 2002.

(cont'd on page 6)

Principle 3:

Only when there are exceptional circumstances can decision-makers depart from WSIB policy (Cont'd from page 5)

Example from the Medical and Occupational Disease Policy Branch

Scenario: A worker with poor kidney function, who must undergo regular intraperitoneal dialysis, continues to work in an occupation with exposure to aluminium dust. While this is harmless to workers with functioning kidneys, who effectively excrete the aluminium, the worker develops neurological symptoms as a result of work exposure. WSIB medical consultants agree that his condition is caused by work exposures in conjunction with his unique predisposition.

WSIB policy 04-03-13, *Occupational Aluminium Exposure, Dementia, Alzheimer's Disease and Other Neurological Effects*, indicates that conditions with neurologic effects are not occupational diseases when they are alleged to result from occupational aluminium exposure.

Q: Can the decision-maker depart from WSIB policy 04-03-13, *Occupational Aluminium Exposure, Dementia, Alzheimer's Disease and Other Neurological Effects* and approve the worker's claim for benefits?

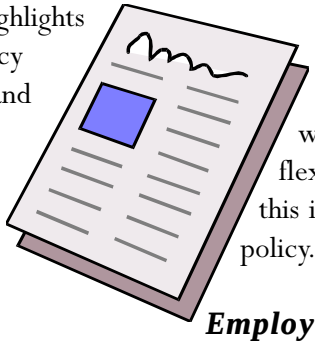
A: Yes. In this case, the decision-maker may depart from the policy, as there are exceptional circumstances, namely that the worker's pre-existing medical condition made him vulnerable to aluminium dust.

Coming in future 2001 issues of *Policy Report*

Watch for these timely topics in our 2001 issues of *Policy Report*:

Training participants

This issue of *Policy Report* will bring you the highlights of policy 12-04-05, *Training Participants.* This policy covers the funding aspects of training programs and describes how a person, company, or training agency can apply for and cancel coverage, and calculate the insurable earnings of a trainee.



Employer by application

Policy 12-01-02, *Employer by Application*, has been revised to give employers, who are not required by law to have WSIB coverage, but who voluntarily apply for coverage, more flexibility in their application options. Look for this issue which will address the changes to this policy.

You asked us

This "question and answer" (Q&A) issue will answer frequently-asked questions we have received from our readers.

Employer classification

We also hope to bring you a special issue that updates *Policy Report Vol. 6 No. 2, Employer Classification - An Overview*.

2001 Benefit Rate Changes

Background

The Workplace Safety and Insurance Board (WSIB) provides workers with various benefits and may pay for a variety of expenses associated with their claims. The rates for some of the benefits and expenses paid by the WSIB are not specifically set out in the *Workplace Safety and Insurance Act* (the Act). The WSIB sets and adjusts these rates from time to time.

> "As a result of the review, some of the rates were increased based on information obtained through the external cost findings."

Why rates are changing

WSIB staff and external stakeholders expressed concerns that some of these rates were out of date. For instance, the mileage rate, paid to injured workers who must travel to appointments and to other activities associated with their claims, had not been updated for some time and was no longer realistic. There were other rates that had been increased in the recent past but still did not appear to adequately reimburse workers for costs they incurred. In order to clarify what rates were still appropriate and which needed to be changed, the WSIB conducted a full review.

About the review process

The review intended to determine current costs that might arise in the market place for various items. To identify these costs, the WSIB reviewed what other agencies were paying for expenses and what companies are charging for providing different goods and services. This provided some external cost sampling information. Although the review was not exhaustive, it showed that some rates reasonably covered specific costs and did not require a change at this time, while others were indeed out of date.

Rate increases

As a result of the review, some of the rates were increased based on information obtained through the external cost findings. A few of the rates had regularly been updated through application of the Consumer Price Index (CPI) changes, and it was determined that a current adjustment based on the 2000 CPI was adequate. Still other rates were not changed at this time because there was no clear indication that they were inappropriate.

The transportation rate was increased from $0.22/km to $0.34/km. This was set as a flat rate to reflect market costs, instead of the cascading rate that reduces payments based on greater distances traveled. Fees were increased from $333.37/day to $600/day for professional witnesses, and from $77.60/day to $110.96/day for lay witnesses to reflect what the courts are currently paying. The room and board allowance was increased from $280/mth to up to $600/mth to reflect current market costs (noting regional variations), and expense information obtained through WSIB experience. Meal allowance was increased from $29.25/day to $45/day for similar reasons. Also, the maximum burial allowance was increased from $8,650 to $10,122 based on actual burial costs submitted during the year 2000. Rates indexed by CPI included allowances for independent living allowance, personal care and guide and support dogs.

> "Still other rates were not changed at this time because there was no clear indication that they were inappropriate."

Application date

The rates that have been increased apply to all expenses incurred on or after January 1, 2001. For example, the new travel rate applies to travel expenses incurred as of January 1, 2001. Expenses incurred up to December 31, 2000 will still be paid at the "old" rates even though submitted to the WSIB in 2001.

Table of rates

All of the rates set by the WSIB have been removed from the applicable policies and are now included in a new policy document 18-01-05, *Table of Rates*.

For your reference, this issue of Policy Report includes an insert with *Facts and Figures 2001* on one side and the *2001 Table of Rates* on the other.

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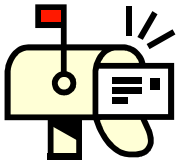
1 

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POLICY REPORT

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Policy Report is published by the Benefits Policy Branch of the Workplace Safety and Insurance Board. If there is any conflict between information in this publication and the *Workplace Safety and Insurance Act* or approved policy documents, the Act or the policy governs.

In this publication, the "old Act" refers to the *Workers' Compensation Act*. The "new Act" refers to the *Workplace Safety and Insurance Act*.

Benefits Policy also publishes the *Operational Policy* manual and the *Employer Classification* manual.

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Cette publication est disponible en français.

ISSN 1486-1844

Facts and figures 2001

Each year, benefits are indexed by the appropriate indexing factor. For 2001:
- the general indexing factor (modified Friedland) is 0.4%, and
- the alternate indexing factor (Consumer Price Index or CPI) is 2.8%.

In the first two columns, you will find the section of the *Act* and the legislated dollar amount under that section. In the third, you will find the indexed amount for 2001. For more information about indexing, please refer to 18-01-02, Benefit Dollar Amounts, in the *Operational Policy* manual.

43(2)	The minimum annual amount for full loss of earnings (LOE) is the lesser of · $15,312.51, or · the worker's net average earnings (NAE) before the injury	$15,404.50
45(6)	Retirement pension: Benefit paid as a lump sum if it is less than $1,145.63/year	$1,152.51
46	Non-economic Loss (NEL) benefit: Base amount = $51,535.37 Age factor: Plus/minus $1,145.63 for each year worker is under/over age 45 Maximum amount multiplied by percentage of impairment = $74,439.52 Minimum amount multiplied by percentage of impairment = $28,631.22 The benefit is paid as a lump sum if it is $11,452.07 or less	$51,844.99 $1,152.51 $74,886.75 $28,803.23 $11,520.87
48(2)	Lump sum to surviving spouse: Base amount = $55,555.55 Age factor: Plus/minus $1,388.88 for each year spouse is under/over age 40 Maximum lump sum = $83,333.30 Minimum lump sum = $27,777.76	$59,894.02 $1,497.32 $89,841.02 $29,946.99
48(4)	The minimum compensation amount payable for spouse and children = $15,312.51/year	$17,004.41
48(8)	If more than one person is entitled to receive periodic and lump sum payments as a spouse · the total periodic payment does not exceed 85% of worker's NAE at the time of the injury, and · the total lump sum payment is limited to $83,333.30	$89,841.02
48(13)	Aggregate lump sum payment for children when there is no surviving spouse = $55,555.55	$59,894.02
48(22)	Minimum burial or cremation expenses = $2,083.32	$2,246.00
54	Maximum earnings ceiling: 175% of the average industrial wage for Ontario for the year in which the accident takes place	$60,600.00
Pre-1998 Act		
39(1)	The minimum temporary total disability benefit to a worker is · $10,500/year when the NAE are equal to or more than $10,500, or · the actual NAE if earnings are less than $10,500/year	$15,404.50
50(3)	Maximum clothing allowance: · upper limb prosthesis = $184 · lower limb prosthesis/back brace/leg brace = $368	$255.55 $511.12
147(14)	Additional monthly payment of up to $200 for workers in receipt of permanent partial disability benefits *(Benefit may be less as it is based on year of initial entitlement)	$209.54

2001 Table of Rates

Every year, the WSIB reviews and sets the following rates. This is done after conducting an external survey of costs for each rate. The only exception is the minimum burial rate. This rate is indexed annually according to the alternate-indexing factor, the Consumer Price Index (CPI).

The rates apply as of January 1, 2001.

For more information on the rates please refer to the policy documents referenced in the table.

Benefit	New Rate	Old Rate	OP Document
Independent Living Allowance	$2974.05/yr	$2893.04/yr	17-06-02
Personal Care Allowance			17-06-05
*General Attendant Rate	$6.85/hr	$6.85/hr	
Personal Attendant Rate	$10.01/hr	$9.74/hr	
Skilled Attendant Rate	$16.04/hr	$15.60/hr	
Bookkeeping Fee	$720.00 annually	$720.00 annually	
*set at minimum wage			
Clothing Allowance	min. damage $255.55 max. maj. damage $511.12 max.	min. damage $255.55 max. maj. damage $511.12 max.	17-05-02
Escorts	$51.00 /day	$51.00/day	17-01-08
Burial Expenses	$2,246.00 minimum $10,122.00 maximum	$2,184.84 minimum $8,650.00 maximum	18-01-05 20-03-02
Guide and Support Dog Allowance	$805.63 annually	$783.69 annually	17-06-04
Meal Allowance			17-01-09
Breakfast	$10.00	$5.75	
Lunch	$13.00	$9.50	
Dinner	$22.00	$14.00	
Hotels (as accommodation)	Rates negotiated with various hotels	Rates negotiated with various hotels	17-01-09
Room and Board (as accommodation)	Up to $600.00 per month	$280.00/month	17-01-09
Transportation	$0.34/km	$0.22/km	17-01-09
Witness Fees (hearings)			09-02-04 in the Pre-Bill 99 OPM
Attendance	$50.00	$50.00	
Professional	Full day $600.00 Half day $300.00	Full day $333.37 Half day $166.66	
Non-professional	Full day up to $110.96 Half day up to $55.48	Full day $77.60 Half day $38.80	