

*Second Injury & Enhancement Fund Relief Can Stretch 3-Year Window
Is Your Company Eligible for a Retroactive NEER Adjustment?*

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NEER Policy

For purposes of calculating lifetime costs of accidents with respect to the NEER rating, the Board has established a "three-year window" during which costs and cost relief can be applied to the Employer's account, with a cut-off date of September 30 of the third calendar year following the accident. Under the NEER Plan, this is felt to be a reasonable period for an accurate estimation of the appropriate cost for each claim.

Beyond this date, the claims are no longer considered under the NEER Plan, and no cost consequence will impact upon an Employer. Therefore, if the claim attracts greater costs than those estimated, after the closure of the "three-year window", these costs are not included in the Employer's Neer account. Likewise, if any relief is granted to the Employer after the Neer closure, the Employer does not obtain the benefit of that relief.

The three-year cut-off period was felt to be desirable for administrative convenience and finality. The cut-off point has the effect of finalizing the Employers' assessments for that year, as affected by a refund or surcharge, thereby giving certainty to Employers.

The theory behind the "three-year window" is explained in a letter dated September 21, 1993 from the Director of the Revenue Policy Branch which notes that it is unnecessary to continue to carry old claims on an Employer's experience rating record for extensive periods for no justifiable purpose, since the Employer's ability to take remedial action to contain claims costs is very limited beyond a certain stage in the life of a claim (WCAT 591/94).

The Board's Experience Rating Adjustment Guidelines dated March 8, 1993 notes that the "three-year window" is intended to give the Employer sufficient time to mitigate the costs of accidents, while ensuring that the window is short enough to provide a continuing incentive to Employers to promote vocational rehabilitation, return to work and safety on the job. Permitting cost relief granted after the closure of the "three-year window" to be considered in determining NEER refunds or surcharges could have a negative impact on the incentives built into the NEER Plan (WCAT 151/96).

Board Practice:

Board practice, as outlined in the March, 1993 Guidelines, was to refuse to re-open the Neer window after the 3-year cut-off date, in order to retroactively readjust the Neer assessment, with strictly limited exceptions, as follows (WCAT 591/94) :

A. For All Voluntary Experience Assessments, in General, to Readjust the Most Recent

Assessment and up to Five Preceding Assessments:

1. For audited payroll or classification revisions;
2. For retroactive closures of claims;
3. For third party recoveries/transfers;
4. For fraud/disallowance of a claim;
5. For claim overpayments and;

6. When directed by an Appeal level.

B. To Readjust the third year of the Neer Assessment:

1. For S.I.E.F. granted on claims before Sept. 30, of the final review year and not fully processed;
2. For computer errors (e.g. cap values on FEL); and
3. For overpayment corrections/fraud adjustments.

C. To Readjust the first and second years of the Neer Assessment:

1. For undue delay/error in processing (e.g. SIEF granted more than 3 months before being processed.)

W.C.A.T. Decision No. 591/94

Workers' Compensation Appeals Tribunal (W.C.A.T.) Decision No. 591/94 dated January 9, 1995 was the first Appeals Tribunal Decision to direct the Board to retroactively adjust a Neer assessment, in order to incorporate Second Injury and Enhancement Fund Relief of the costs of a claim awarded after the Neer closure for the claim. The Decision was made further to the Board Policy allowing for retroactive adjustments when directed by an Appeal level.

Interestingly, W.C.A.T. Decision 591/94 notes that, according to the case law, the Workers' Compensation Appeals Tribunal (the "Tribunal") is the only appeal level which has the authority to direct a retroactive adjustment, other than ones falling within the narrow parameters outlined in the Board Guidelines.

W.C.A.T. Decision No. 591/94 has the effect of expanding the scope for re-opening the "3-year Neer window", after its closure, to allow for retroactive adjustments of a Neer assessment, beyond the extremely limited circumstances previously recognized by the Board which essentially corrected errors in calculations or processing. The Employer who appealed to W.C.A.T. for this ruling was represented by the law firm of Fink and Bornstein, currently Fink and Associates.

W.C.A.T. Decision 591/94 provide that the "3-year Neer window" should be opened when warranted, having regard to the real merits and justice of a particular assessment appeal. The Tribunal reasoned that the cut-off period in the NEER program is desirable for administrative convenience and finality. However, the NEER Policy should recognize exceptional circumstances in accordance with the real merits and justice requirement which the W.C.B. legislation imposes on both the Board and the Appeals Tribunal in rendering decisions.

The Decision notes that when designing its policy on Second Injury and Enhancement Fund Relief, the Board recognized there could be situations fraught with delays which are systemic, and not necessarily the result of any failure by the Employer, the Board or the Tribunal to exercise due diligence. For example, it was conceivable that neither the Employer nor the Board would be aware that S.I.E.F. would apply in a claim, until the Worker's recovery became prolonged. This delay would be inherent in the S.I.E.F. policy. Similarly, delays in obtaining medical access, a possible section 23 medical examination, and 3 possible appeals could prolong the time involved in any S.I.E.F. application. Finally, adjudicative delays could result from an increased number of appeals within the compensation system.

The Tribunal concludes, on page 16 of the Decision:

"...Where an employer has acted with due diligence in investigating a potential SIEF claim and in pursuing such claim, we find that such employer should not automatically be deprived of an equitable remedy simply because of the nature of a worker's disability, systemic delay, and an arbitrary cut off date designed to foster administrative convenience."

The Tribunal stipulates that the following four factors should be considered when it rules on whether exceptional circumstances exist to warrant a retroactive NEER adjustment:

1. Whether the employer acted with due diligence in pursuing a SIEF claim after the employer knew, or ought to have known, of a "prolonged" recovery period or "enhanced" disability;
2. The nature of the disability i.e. whether it involved a long usual recovery period; whether it involved a complex condition which made diagnosis and treatment difficult; or whether the pre-existing condition was unknown;
3. Whether systemic delay resulted in a final decision outside the three-year "window"; and
4. The elapsed time between the NEER cut-off date and the final SIEF decision, because a longer elapsed time period could mean a more complex adjustment.

W.C.A.T. Decision 591/94 found that since the Employer acted with due diligence in pursuing S.I.E.F. relief, once the Worker's chronic pain condition was detected, and a favourable S.I.E.F. Decision was ultimately received from W.C.A.T. less than three months after the arbitrary cut-off date for Neer adjustments, the Employer's Neer assessment should be retroactively adjusted to incorporate the S.I.E.F. Relief of costs.

W.C.A.T. Decisions Subsequent to W.C.A.T. Decision No. 591/94

Subsequent W.C.A.T. Decisions have discussed and followed the principles established in W.C.A.T. Decision No. 591/94.

A review of the case law indicates that the most important consideration in influencing the outcome of an appeal for a retroactive Neer adjustment will be whether an Employer has met the "due diligence" standard. In other words, the Tribunal will tend to consider whether the Neer cut-off date expired, despite the due diligence of an Employer in pursuing S.I.E.F. Relief of costs.

W.C.A.T. Decision No. 887/95 dated December 12, 1995 states that there should not be a rigid definition and application of the "due diligence test" established in W.C.A.T. Decision No. 591/94, since this would encourage frivolous and routine S.I.E.F. requests by Employers for the sole purpose of obtaining S.I.E.F. Relief of costs prior to the 3-year Neer cut-off date.

However, in the following cases, the Tribunal has focused on a determination of whether an Employer has pursued S.I.E.F. Relief of costs with due diligence:

1. In W.C.A.T. Decision No. 931/95 dated January 24, 1996, with respect to the second claim under review, the Tribunal found that there was no due diligence, on the part of the Employer, who first requested S.I.E.F. Relief of costs, 3 months following the Neer cut-off date;

2. In W.C.A.T. Decision No. 443/ 95 dated August 24, 1995, the Tribunal found that the Employer did not exercise due diligence by failing to request S.I.E.F. Relief of costs, until less than one month prior to the Neer cut-off date;

3. In W.C.A.T. Decision No. 968/95 dated July 5, 1996, there was no finding of due diligence since the Employer, though aware of a pre-existing condition prior to the allowance of the claim, failed to request S.I.E.F. Relief, until 10 months after initial entitlement was granted;

4. In W.C.A.T. Decision No. 19/96 dated June 7, 1996, the Tribunal found, in the all cases under review, that one request by the Employer for S.I.E.F. Relief of costs prior to the Neer cut-off date with no follow-up by the Employer, other than on the Neer cut-off date, did not constitute due diligence by the Employer;

5. In W.C.A.T. Decision No. 967/95 dated July 5, 1996, the Tribunal found there was due diligence, on the part of the Employer. The Employer was persistent in pursuing its request for S.I.E.F. Relief of costs, made in the same month the claim was allowed, by requesting file access, making written submissions, and reminding the Board, twice, after having received 3 negative Decisions from the Claims Adjudicator, to refer its appeal to the Decision Review Branch;

6. In W.C.A.T. Decision No. 887/95 dated December 12, 1995, the Employer was found to have acted with due diligence in requesting S.I.E.F. cost relief about 3 months after the Worker's one-year recurrence of disability, and in requesting file access, right after the Board had rendered a negative decision.

The Tribunal, in this case, found that the Board's S.I.E.F. Operational Policy No. 08-01-05 provides that, irrespective of a request from the Employer, the Adjudicator should promptly consider entitlement to S.I.E.F. Relief, particularly where the evidence suggesting a pre-existing condition is clear and unambiguous. In the case under review, the Doctor's First Report, and another early medical Report noted pre-existing symptoms and problems. Therefore, the Board's failure to consider S.I.E.F. Relief, until the issue was raised by the Employer, was held to be a factor contributing to the untimely S.I.E.F. award. The Tribunal found that the Employer, would not have had any knowledge of a pre-existing condition prolonging the Worker's disability, until it had received medical file access following the Worker's recurrence of disability;

7. In W.C.A.T. Decision No. 218/96 dated April 4, 1997, the Employer did not request S.I.E.F. Relief of costs, until after the Neer cut-off date for the claim. However, the Tribunal did not find that the Employer failed to act with due diligence, since the Employer had been denied file access, and only the Board was aware of the X-Ray Report indicating degeneration in the neck, prior to the Neer closure;

8. In W.C.A.T. Decision No. 571/97 dated June 17, 1997, the Worker was only off work for two months, and his claim was not re-opened, until he underwent surgery, in the third year of the claim. Therefore, although the Employer did not request file access, until after the Neer cut-off date for the claim, the Tribunal held that there would have been no reason for the Employer to have raised the issue of S.I.E.F. Relief earlier, and that there was, therefore, due diligence, on the part of the Employer.

The Tribunal found that the Board had evidence on which to address the S.I.E.F. issue, prior to the Neer cut-off date, but that fact, alone, would not have

warranted a retroactive cost adjustment, without due diligence, on the part of the Employer;

9. In W.C.A.T. Decision No. 151/96 dated March 14, 1996, the Employer was found to have acted with due diligence, although it only requested S.I.E.F. Relief of costs, once, in the first year of the claim, and once in the third year of the claim.

Once again, the only knowledge of a pre-existing degenerative condition was with the Board who received a CT Scan Report, after denying the Employer's initial request for S.I.E.F. Relief of costs. The Tribunal found that the Board should have notified the Employer of this CT Scan Report, or revived the Employer's entitlement to S.I.E.F. cost relief. However, no ruling was made, until the Employer renewed its appeal for S.I.E.F. Relief of costs, 21 months later.

Therefore, the test regarding what constitutes "due diligence" can be relaxed where the Board is plainly aware of the pre-existing condition.

W.C.A.T. Decision No. 151/96 notes that another important consideration in determining whether an Employer has discharged its obligation of due diligence is whether the Employer was actively involved with the Worker's re-employment and rehabilitation, in order to reduce the impact of the injury upon the Worker, as early in the life of the claim as possible.

In the claim under review, the Employer had accommodated the Worker, prior to his work injury. In addition, following the work injury, the Employer made consistent efforts to accommodate the Worker's disability through modified work;

10. In W.C.A.T. Decision No. 426/95 dated July 12, 1996, the Employer contacted the Board respecting returning the Worker to modified work. However, the Employer did not contact the Worker personally. The Employer did not appeal an award of 50% S.I.E.F. Relief of costs, until more than one year after receiving file access. In all of the circumstances, the Employer was not found to have acted with due diligence in further reducing the costs of the claim;

11. In W.C.A.T. Decision No. 1055/94 dated January 9, 1996, the Employer's due diligence was questionable in that periods of one year and 6 months, respectively, elapsed before the Employer's first request for S.I.E.F. Relief of costs, and second request for S.I.E.F. Relief of costs and file access. In addition, a pension and pension supplement was granted to the Worker subsequent to the Neer cut-off date for the claim. The Tribunal found that, in all of the circumstances, the Employer had not raised the S.I.E.F. issue with the consistency required to justify a retroactive cost adjustment;

12. In the following two cases, due diligence was missing but the Employer was granted relief from the 3-year rule:

(a) In W.C.A.T. Decision No. 931/95 dated January 24, 1996, in the first claim under appeal, the initial Adjudicator awarded 50% S.I.E.F. Relief of costs, in error, instead of 75% S.I.E.F. Relief of costs which was later granted by the Claims Manager. A retroactive Neer adjustment was granted to incorporate the award of 75% S.I.E.F. Relief, having regard to the identified error, even though the Employer did not request increased S.I.E.F. Relief, until after the Neer cut-off date. The Tribunal found that the Board's own criteria for re-opening the Neer window for identified errors had been met;

(b) In W.C.A.T. Decision No. 328/97 dated April 29, 1997, respecting the claim designated as "#400", the Employer first requested S.I.E.F. Relief, in the last month of the 3-year Neer window. However, the Claims Adjudicator had failed to address the S.I.E.F. issue, twice, through oversight, in the first year of the claim, and in the second year of the claim, following the finding of the Pension Assessor of a moderate pre-existing condition. The Tribunal found that the Adjudicator's obvious errors resulted in an S.I.E.F. Decision outside the Neer window and constituted exceptional circumstances sufficient to warrant a retroactive adjustment of the Neer Assessment;

In summary, the Tribunal will find due diligence, on the part of an Employer, warranting retroactive cost reduction for an untimely award of S.I.E.F. Relief, where an Employer's initial appeal for cost relief was timely, having regard to the circumstances of the case, and where the Employer made consistent efforts to ensure that its appeal was processed through the W.C.B. Appeal system within the 3-year Neer window. However, other factors may influence the due diligence requirement. The scales could tip in favour of finding of due diligence where the Employer was active in reducing the costs of the claim, for example, by encouraging the Worker to return to modified work. Where substantial costs, (i.e., a N.E.L. or F.E.L. award) were not included in the final Neer assessment for a claim, an Employer may have to pass a stricter test of due diligence, in order to merit a retroactive Neer adjustment. Conversely, an Employer could be held to a much more lenient standard of due diligence, where the Board failed to exercise its discretion to consider the Employer's entitlement to S.I.E.F. Relief, in situations where only the Board, and not the Employer, could have been aware of potential S.I.E.F. Relief. Finally, the due diligence requirement has been downplayed by the Tribunal, where blatant errors in Board decision-making have been found to warrant a retroactive adjustment of a Neer assessment.

It should be noted that, in W.C.A.T. Decision No. 920/96, a finding of due diligence, on the part of an Employer, was found to warrant a retroactive adjustment to a Neer assessment, to incorporate the W.C.A.T. ruling, on November 7, 1996, that a Worker's disability, in 1993, should not have been allowed as a new claim but as a recurrence of his disability, in 1986, under a prior claim.

The other two important considerations in the granting of retroactive Neer adjustments are the nature of the disability and systemic delay resulting in a final decision outside the 3-year Neer window.

The following W.C.A.T. cases, in which the appeal was allowed, comment on how the nature of the disability can impact on an appeal for a retroactive cost adjustment:

1. In W.C.A.T. Decision No. 591/94 dated January 9, 1995, the Worker's claim was for tendinitis of the right arm. However, the Worker developed chronic pain, which was not accepted by the Board, until the second year of the claim. The Tribunal found that in cases involving serious injuries or those involving chronic pain, as in the case under appeal, recognition of potential S.I.E.F. claim could take a significant part of the three-year Neer window. Therefore, a retroactive cost adjustment would be required;
2. In W.C.A.T. Decision No. 986/96 dated November 21, 1996, the Worker injured his low back. However, the Worker also suffered from an upper respiratory infection which prevented him from returning to work. Prior to adjudicating the Employer's entitlement to S.I.E.F. Relief, the Board had to conduct

investigations and rule on whether the respiratory condition was compensable. The Tribunal found that the complicated nature of the Worker's disability contributed to unavoidable delays in that it required investigation which the Board was not able to undertake quickly enough to meet the NEER deadline for rendering a final determination on S.I.E.F. Relief of costs;

3. In W.C.A.T. Decision No. 967/95 dated July 5, 1996, the nature of the disability complicated and delayed the final resolution of the issue of S.I.E.F. Relief of costs since the Board needed to first determine whether to allow the Worker's disability as a recurrence of a disability under a prior claim or whether it constituted a new injury under a new claim;

4. In W.C.A.T. Decision No. 231/96 dated April 10, 1996, the Tribunal found that the adjudication of the claim was complicated by a disabling condition which included more than one element. The initial entitlement was for tendinitis of the left wrist. Subsequent entitlement was granted for the left elbow and shoulder. The Worker's condition was complicated by a left axillary lymphadenopathy, and chronic myofascial pain syndrome was also suggested. The Tribunal noted that a serious injury, difficult diagnosis or extended recovery period and treatment could result in a final S.I.E.F. decision outside the three-year Neer window;

5. In W.C.A.T. Decision No. 151/96 dated March 14, 1996, mentioned above, the Tribunal found that the nature of the disability influenced the untimeliness of the final determination on S.I.E.F. Relief, since neither the Board nor the Employer could confirm the existence of a pre-existing condition, until degeneration was diagnosed following receipt of a CT Scan, in the second year of the claim;

6. In W.C.A.T. Decision No. 954/95 dated July 5, 1996, the Board had to rule on whether a Worker's recurrence following an accident at home, in the second year of the claim was compensable. The Board's ruling to allow the recurrence was not made, until the third year of the claim, and the Employer had no reason to request S.I.E.F. Relief of costs, until then. Therefore, the Tribunal found that the nature of the disability was a factor beyond the normal expectations of the Board and the Employer which contributed to the lateness of the Decision granting S.I.E.F. Relief of costs.

The following W.C.A.T. cases discuss systemic delay resulting in a final Decision outside the 3-year Neer window which would warrant a retroactive cost adjustment:

1. In W.C.A.T. Decision No. 231/96 dated April 10, 1996, noted above, the Tribunal found that the primary source of the systemic delay leading to an untimely Decision, was the Adjudicator's initial misapplication of its S.I.E.F. Policy in failing to consider whether a pre-existing condition contributed to the compensable disability. In addition, the Tribunal found that there were other normal delays inherent in the appeal system which contributed to the deferred S.I.E.F. Relief of costs.

This Decision follows the reasoning in W.C.A.T. Decision No. 591/94 that there are potential delays inherent in the S.I.E.F./NEER system which would not necessarily be the fault of the Board, Worker, Employer, or a representative, that would result in a final S.I.E.F. determination outside the 3-year Neer window. The Tribunal, in this Decision, recognizes that a systemic delay

warranting a retroactive cost adjustment can encompass both normal delays which are inherent in the system and delays resulting from some Board wrongdoing;

2. In W.C.A.T. Decision No. 151/96 dated March 14, 1996, the Tribunal accepts the definition of systemic delay as that which was beyond the Employer's control and which would make compliance with a three-year NEER window exceedingly difficult;

3. Likewise, W.C.A.T. Decision No. 660/97 dated June 30, 1997 notes, on page 8, that in W.C.A.T. Decision No. 591/94, the case involved a number of systemic delays over which the Employer had no control;

4. In W.C.A.T. Decision No. 346/96 dated October 29, 1996, the Tribunal found that there was unreasonable systemic delay by the Board in refusing to consider increased S.I.E.F. Relief, despite having all the relevant information respecting the role of the non-compensable conditions, which deprived the Employer of additional S.I.E.F. Relief prior to the Neer cut-off date;

5. W.C.A.T. Decision No. 954/95 dated July 5, 1996, noted above, found that systemic delays by the Board, including the Adjudicator's failure to refer the Employer's request for S.I.E.F. Relief to the Board Doctor for 6 months, and failure to render a Decision respecting S.I.E.F. Relief prior to the last month of the Neer window, were responsible for the final S.I.E.F. Decision outside the Neer window.

The dissenting opinion in this case noted that since there was no unreasonable delay by the Board, beyond the normal adjudicative delays, and since a pension was granted after the Neer cut-off date, no retroactive cost reduction should have been granted to the Employer. However, the majority opinion correctly follows the principle of systemic delay outlined in W.C.A.T. Decision No. 591/94;

6. W.C.A.T. Decision No. 716/96 dated December 31, 1996 found there was no systemic delay which precluded a Decision on S.I.E.F. Relief of costs being made within the Neer window. The Tribunal reasoned that unless Board procedure went outside the normal processes or was flawed, a re-opening of the window would not be appropriate. Although the case under appeal involved lengthy delays, they did not result from flaws in the system, or unusual factors, or extraordinary circumstances weakening or faulting the system.

The reasoning in this Decision deviates from the principle and definition of "systemic delay" established in W.C.A.T. Decision No. 591/94, and followed in later Decisions;

7. In W.C.A.T. Decision No. 224/96 dated April 10, 1997, respecting Claim MA, the Tribunal found there was systemic delay by the Board in arranging a pension examination which led to the delay in delivering a Decision respecting S.I.E.F. Relief of costs. Respecting Claim ME, the Tribunal found there was systemic delay inherent in the appeal system, of 4 months in granting file access, and of 9 months, in arranging a hearing date leading to a final S.I.E.F. after the Neer cut-off date;

8. W.C.A.T. Decision No. 649/96 dated April 30, 1997 grants 50% S.I.E.F. Relief of the costs of the claim, and a retroactive Neer adjustment to incorporate the award, on the basis that delays in the administrative and adjudicative system were the major factor in the rendering of the Decision after the Neer closure for the claim.

A review of the case law indicates that retroactive adjustments to a Neer Assessment have been granted, when the elapsed time between the Neer cut-off date and the final S.I.E.F. Decision has exceeded 3 months, as in W.C.A.T. Decision No. 591/94. In various cases, the elapsed time has amounted to 5 months after the Neer cut-off date (W.C.A.T. Decision No. 571/97), 7 months after the Neer cut-off date (W.C.A.T. Decision No. 649/96), one year after the Neer cut-off date (W.C.A.T. Decision no. 218/96) and 17 months after the Neer cut-off date (W.C.A.T. Decision No. 224/96, claim of ME), depending, inter alia, on what level of appeal made the final determination on S.I.E.F. Relief of costs.

The Board has adopted a Revised Policy and Guidelines on Adjustments to Neer Refunds and Surcharges effective January 1, 1997 which can be summarized as follows:

1. The Board will adjust the final Neer refund or surcharge:

(a) In the case of a Board error, for a period of one year after the final review;

(b) For errors in processing (i.e., typographical, computer generated, or failure to process or act upon decisions) if the adjustment is requested by an Employer and the Employer is aware of the error, on or before September 30th of the fourth year after the accident year;

(c) For retroactive adjustments affecting classification and assessable earnings;

(d) As required by court judgement or when a W.C.B. or W.C.A.T. Decision reverses a Decision to allow entitlement to a claim; or

(e) For revisions to cost or assessment data.

2. Where an Employer has not disclosed necessary information to the Board, a retroactive debit adjustment may be made for up to 5 prior assessment years;

3. The Board will adjust the final Neer refund or surcharge as far back as required for fraud or where the Board had not received the year end reconciliation at the time that a provisional assessment was levied.

Every Decision made pursuant to this policy must be made according to the real merits and justice of the case.

This change in policy and guidelines should not prevent the continued application of the W.C.A.T. case law, as outlined above.

Note the provision, from the Guidelines, above, that the Board will adjust a final Neer refund or surcharge, in the case of a Board error, for one year after the final review.

In addition, as noted in W.C.A.T. Decision No. 218/96 dated April 4, 1997, on pages 5-6, " there are no provisions in the Neer plan or policies which preclude retroactive adjustments,....simply guidelines which the Experience Rating Section is currently following." Furthermore, the Tribunal notes, on page 7 of the Decision: "The Board, while it continues to apply a much stricter standard,

has also not challenged, nor addressed, this approach. We therefore adopt the Decision No. 591/94 criteria."

Finally, the updated Policy and Guidelines state: "In most cases, revisions to cost or assessment data not available on or before September 30 for the final review do not result in an adjustment to the final NEER refund or surcharge. The following guidelines explain exceptions to this rule." This statement does not assert that the guidelines intend to encompass all possible exceptions to the rule.

Unfortunately, we will have to continue to appeal to the Workers' Compensation Appeals Tribunal, when justice demands a retroactive adjustment to a Neer Assessment to incorporate cost relief granted outside the 3-year Neer window.