

FAIR PRACTICES COMMISSION 2010

ANNUAL REPORT

FPC

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*an independent office working to ensure fair practices
at the Workplace Safety and Insurance Board of Ontario*

Également disponible en français

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FAIR PRACTICES COMMISSION

MISSION STATEMENT

The mission of the Fair Practices Commission is to facilitate fair, equitable and timely resolutions in individual complaints brought by workers, employers and service providers and to identify and recommend system-wide improvements to Workplace Safety and Insurance Board (WSIB) services. In carrying out its mission, the Commission will contribute to the WSIB's goals of achieving greater openness, better relationships and improved services.

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The Acronyms

CPP	Canada Pension Plan
FPC	Fair Practices Commission
LMR	Labour market re-entry
LOE	Loss of earnings
NEL	Non-economic loss
ODSD	Occupational Disease Services Division
OPID	Operations Planning and Implementation Division
OWA	Office of the Worker Adviser
RTW	Return to work
SSM	Sault Ste. Marie
WSIAT	Workplace Safety and Insurance Appeals Tribunal
WSIB	Workplace Safety and Insurance Board

FROM THE COMMISSIONER

This has been a significant year for the Commission. In a major effort to reduce its unfunded liability, the WSIB embarked in 2010 on a review of all its decision-making processes. The Commission, in turn, received complaints from workers and employers about the fairness of some of the new processes. In responding to those complaints, the Commission's ability to influence positive institutional change was, to the WSIB's credit, demonstrated once again. It is this ongoing ability to influence systemic change on which the Commission's legitimacy and effectiveness ultimately rests.

While the WSIB was focused on reviewing its processes, the Commission's work highlighted the importance of the WSIB not losing sight of the impact of the changes on individual workers and employers.

The Commission engaged with the WSIB in discussions about several important systemic issues. The most significant involved the "lock-in" process for workers who have been on benefits for 72 months. After the Commission alerted the WSIB to a number of fairness concerns, the WSIB introduced "pause guidelines" in August and new Practice Guidelines in December. (See Proactive and Systemic Solutions on page 3.)

This was also a busy year for the Commission in handling individual complaints. There were five per cent more complaints than in 2009 and the Commission conducted 23 per cent more in-depth inquiries into those complaints. The good news is that the WSIB was successful in targeting some of the delay concerns the Commission has noted. Thus, complaints about delays declined from 39 per cent in 2009 to 36 per cent of all incoming complaints in 2010. In particular, the WSIB reduced its backlog of cases waiting for non-economic loss (NEL) assessments by 67 per cent in 2010, a significant achievement.

As we move into 2011, the Commission continues our commitment to working for fair treatment and fair processes for the thousands of injured workers and employers who come into contact with the WSIB.

In this, I am helped tremendously by the support, the professionalism and the hard work that Commission staff continue to demonstrate.



Laura Bradbury

FAIR PRACTICES COMMISSION OMBUDSMAN FOR THE WSIB

We are advocates for fairness.

We look at fairness in terms of process, decision-making practices and consistency.

We look at complaints when the WSIB has not resolved the concern.

We are independent of WSIB management. The commissioner reports directly to the Board of Directors, the governing body of the WSIB.

We operate according to a charter that sets out our mandate and authority.

We conduct inquiries and investigations as necessary.

We make recommendations that may include asking the WSIB to change their processes, practices and guidelines.

We report publicly.

I don't know what I would do without you. Everything now is much better than before. You have been a real big help to me and reduced the psychological pressure I've been under. It's such a relief to me.

—injured worker

PROACTIVE AND SYSTEMIC SOLUTIONS

Identifying and helping fix problems at an early stage is one of the most effective ways for the Commission to influence positive change. This proactive model targets areas of concern before they become persistent or recurring problems.

As the Saskatchewan Ombudsman, Kevin Fenwick, wrote in his 2009 Annual Report:

“Rather than just trying to solve a particular problem, we identify the underlying issues that cause the problem. We look beneath the tip of the iceberg to identify what is under the surface. In this way, the work we do can have a broader impact and benefit more people than just the individual who may have contacted us with the complaint.” (page 7)

Using this proactive model, the Commission can often find solutions to broader problems without resorting to a formal investigation.

The commissioner meets regularly with senior WSIB staff to address broad system-wide fairness issues.

Loss-of-earnings reviews at the 72 month “lock-in”

The Workplace Safety and Insurance Act requires the WSIB to make a final decision about a worker’s benefits when the worker is still receiving benefits 72 months from the date of injury. The decision results in a “locked-in” rate that the worker continues to receive until age 65. In May, Commission staff met with the vice-president of Service Delivery in response to complaints the Commission received about the decision-making process in conducting the reviews just prior to making final lock-in decisions.

The complaints came from workers who had been on full benefits for many years because the WSIB found them to be competitively unemployable due to their work injuries. The WSIB had earlier advised many of them, often in writing, that their benefits would be locked in at 100 per cent and that benefits would continue at that rate to age 65. The workers contacted the Commission after the WSIB told them, just before the 72 month lock-in, that their benefits were under review and in some cases would be reduced. The workers thought this was unfair.

The Commission's inquiries disclosed a number of fair process concerns including the need for:

- reasonable notice to workers of the change in benefits
- written guidelines for the reviews
- attention to workers' reasonable expectations, given prior WSIB decisions about their claims
- attention to all medical information on file.

The commissioner raised her concerns with the chief operating officer and the president. As a result, in August, the WSIB established pause guidelines for three groups of cases:

- workers who were previously advised in writing that they were to receive the full loss of earnings (LOE) benefit until age 65, with no reference to a review at the 72-month point
- workers at the 60-month review point or after who had not been engaged with the WSIB for the past three months
- workers who were age 60 or older who had not been engaged with the WSIB for the past three months and were receiving full LOE.

The commissioner reported the issue to the Board of Directors at its September meeting. In her subsequent report to the board, the commissioner showed that complaints about the issue started to decline after the WSIB introduced the guidelines.

Formal Practice Guidelines based on the pause guidelines came into effect on December 1. The new guidelines incorporated submissions from the Commission and the Office of the Worker Adviser. They set out guiding principles for reviews including processes and special circumstances that should be considered in the decision-making. Since the guidelines were established, the Commission has received fewer complaints about this issue.

Reducing NEL backlog

The Commission's 2009 Annual Report reviewed the steps the WSIB was taking to reduce a backlog in non-economic loss (NEL) assessments that resulted from file reviews when the service delivery model changed.

Commission staff met in December with the director of the NEL program for an update on the WSIB's progress in addressing the backlog. The original inventory of NEL cases, as of January 2010, was 3,912. By December the inventory was reduced to 1,092 cases, a reduction of 67 per cent in one year.

The reduction resulted from:

- triaging all incoming cases
- conducting paper reviews wherever possible (35 to 40 per cent of cases are now reviewed based on information in the file and the review is completed within three weeks)
- hiring and training new staff
- giving additional reasons for second assessments.

The commissioner congratulated the director on the excellent work he and his staff have done. She told him that complaints to the Commission on this issue decreased significantly.

Work Reintegration Complaints Office

The 2009 KPMG value-for-money audit of the Labour Market Re-Entry program (now called work reintegration) recommended an independent complaint process for workers who have concerns about the contractors who provide retraining and other return-to-work services.

The commissioner met throughout 2010 with the vice-president and directors of the WSIB's new Work Reintegration division to discuss the development of an internal complaint model to resolve complaints about service providers. The new complaint model will include dedicated staff. A complaint officer and manager will set up the Complaints Office in January 2011.

The Fair Practices Commission will provide independent oversight by conducting an annual audit of the Complaints Office and will include the review results in future annual reports.

Older workers

The commissioner raised the issue of workers who are injured at work at age 63 or older. Section 43 (1)(c) of the Act potentially limits LOE benefits to two years for these workers. The Commission received complaints from several older workers who were not notified of the limitation and thought it affected their benefits. Now that the mandatory retirement age has been removed, more workers are continuing to work beyond age 65 and the issue is becoming more common.

The vice-president of Service Delivery asked the executive director of long-term case management to look into steps that the WSIB can take to address the issue.

The executive director reported to the commissioner that he has done the following:

- drafted an internal guide that sets out the legislation, policy and new guidelines for staff and is intended to ensure older workers receive immediate notice about the two-year limit on benefits
- added the older worker issue as a permanent section in the training program for all new decision-makers
- started developing relevant website material.

Employer audit issues

The Commission contacted the director of audit services about several employer complaints regarding the audit inquiry process. The employers were concerned that the rulings of other agencies, such as the Canada Revenue Agency or the Workplace Safety and Insurance Appeals Tribunal, are not given sufficient weight in the WSIB process.

The director reviewed the Commission's observations with her management team and advised the Commission of changes to improve timeliness and communication in the decision-making process, including an expectation that all calls or letters sent to managers will be responded to by managers. As well, managers will ensure that all relevant information is reviewed during the decision-making process, with clear reasons provided for the conclusions.

Addressing delays in responding to CPP requests

The Commission received several complaints about WSIB delays in responding to information requests when injured workers applied for Canada Pension Plan (CPP) disability pensions. The concern was that workers' CPP applications were denied when the information was not provided by a set date.

The commissioner and a specialist met in September with senior WSIB staff to review the issue. A new three-step process was set up with Services Canada and CPP to ensure information requests to the WSIB are dealt with quickly and consistently. In future, all requests to the WSIB will go through the Director of Health Services to ensure consistent and timely responses.

Addressing psychological consultation delays

The commissioner and a specialist met in July with the vice-president and director of Health Services to review steps taken to address delays in psychological consultations. The WSIB has completed the contract process and has retained external service providers, including clinics and other

groups. The new contracts will help address the backlog and provide capacity for greater numbers of consultations. Service standards have been built into the contracts, including a provision that reports be provided within 15 business days. The Commission's experience is that the standard is being met.

Update on occupational disease processes

The commissioner and a Commission specialist continued to meet every three months with the vice-president and director of the Occupational Disease Services Division (ODSD). The division has continued to meet its goals for timely decision-making. We can see this in the declining number of complaints to the Commission. We received 31 complaints about ODSD delays in the first quarter of the year and only seven in the fourth quarter. This represents a 77 per cent decrease.

Operational issues

The commissioner and Commission staff meet every two months with the vice-president and program manager of the Operations Planning and Implementation Division (OPID). Here are some of the issues we addressed this year.

Direct deposit of WSIB cheques

The Commission received an increasing number of calls about the hardship people face when WSIB cheques are late. In October, the WSIB announced that workers who have been receiving benefits for six months or longer can choose to have their cheques deposited directly into their bank accounts. The change comes into effect in January 2011.

No-contact cases

The Commission raised concerns that highlighted the need for a built-in review process for "no contact" cases. In these cases people have made harassing or abusive calls to WSIB staff and are restricted to contacting the WSIB in writing.

The WSIB developed a new approach to these cases based, in part, on suggestions from the Commission.

Notice of prescription renewal

In response to the Commission's concerns, OPID advised the Commission that they sent letters to 4,000 claimants giving two months' notice of their prescription expiry. The WSIB has developed a new standard letter to provide this notice in future cases.

Returned telephone calls

The WSIB set a target of reducing complaints to the Commission about delays in returning telephone calls by 50 per cent in 2011.

To assist in reaching the target, the WSIB has begun a review of how it handles incoming calls. Commission staff met in December with the review group.

I really appreciate you calling me.
Nobody has ever listened or talked to me
the way you have.

—*injured worker*

When you're 63 years old and your
benefits are cut and the bills keep
coming in, you just don't know what to
do. This is such wonderful news. Thank
you so very much. God bless you.

—*injured worker*

INDIVIDUAL ISSUES

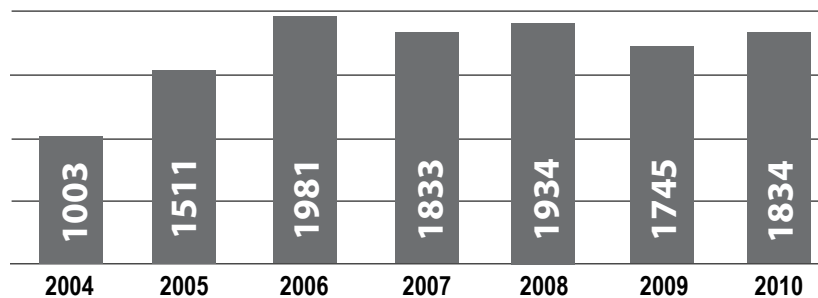
The Commission acts as an independent voice for fairness in individual cases brought by workers or employers. If the Commission identifies a fairness issue, it acts quickly to resolve the problem. We are assisted in this by the increasing responsiveness of WSIB front-line staff and managers.

Keeping Track

The Commission instituted a new case management system in June 2009. We can now track individual issues within complaints.

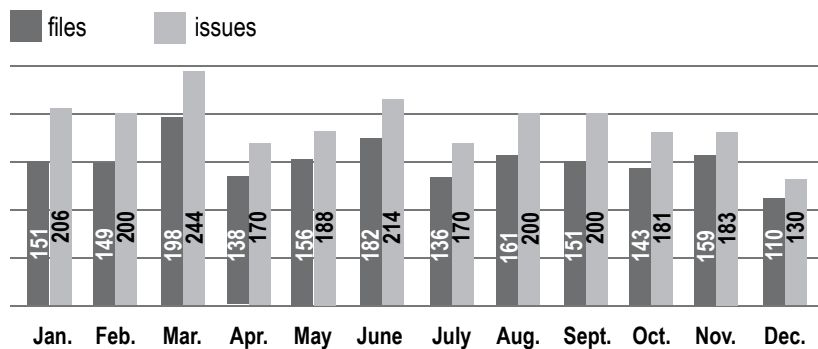
The Commission opened 1,834 files in 2010, compared with 1,745 files in 2009, an increase of five per cent.

Seven year summary of files opened



Issues per file

The Commission opened 2,286 issues in 2010, an average of 1.2 issues per file.



Sixty-five per cent of the issues received in 2010 were within the Commission's mandate, the same as in 2009.

As before, most complaints, 94 per cent, were brought by injured workers.

Inquiries

One of the distinguishing features of 2010 was the increased number of Commission inquiries. The Commission conducts an inquiry where a potential fairness concern is identified and the complainant was unsuccessful in resolving the concern directly with the WSIB.

The Commission conducted 386 inquiries in 2010, a 23 per cent increase over 2009.

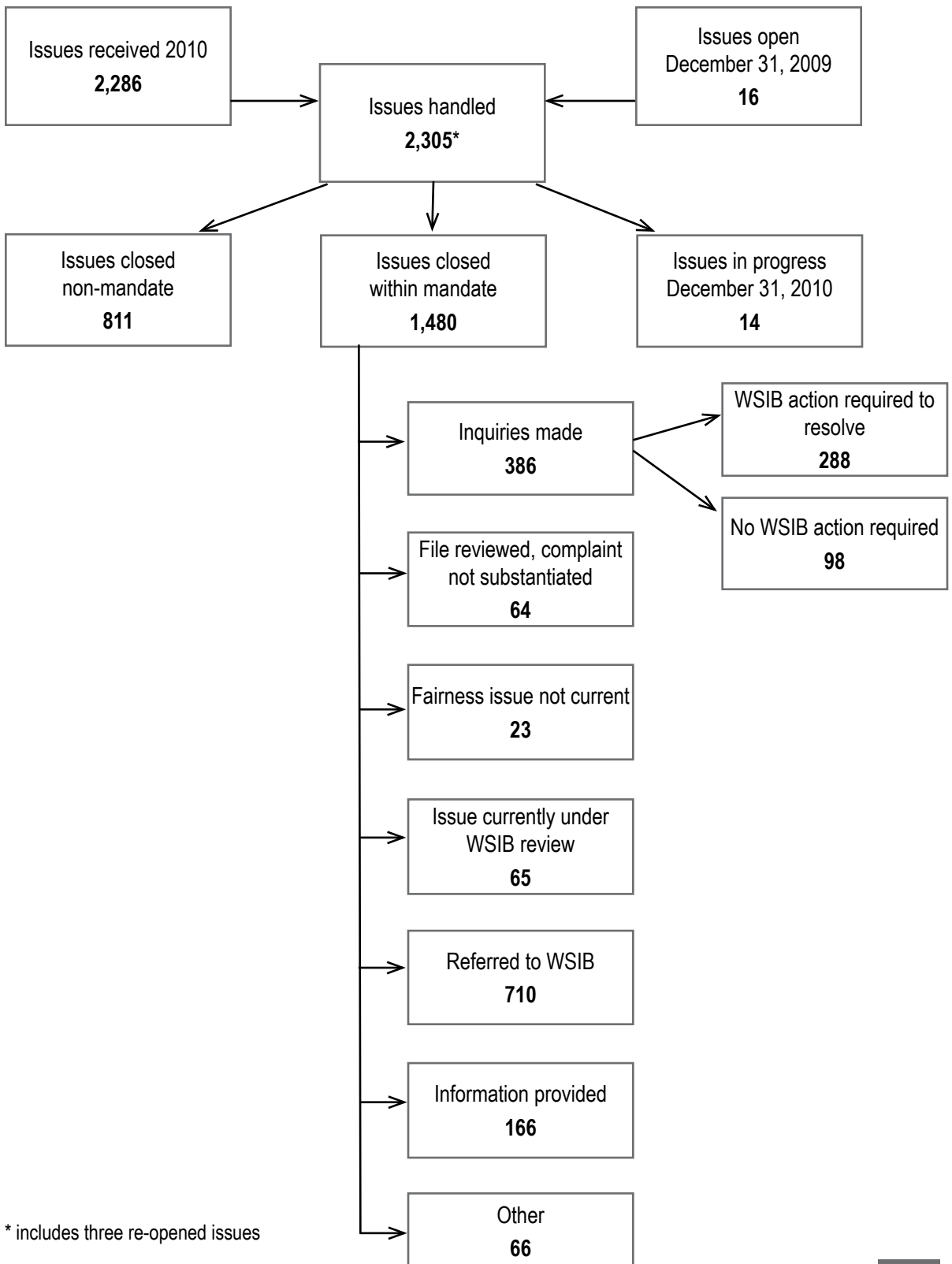
Two main factors contributed to the increase. In the first quarter of the year the Commission received an upsurge in complaints about labour market re-entry (LMR) matters. The complaints followed the publication of the LMR value-for-money audit and of the chair's 2009 Consultation Report. As anticipated by the WSIB, complaints about LMR declined once program changes began to be implemented.

The other contributing factor was the increased number of complaints about the final LOE review process (see Proactive and Systemic Solutions on page 3). These complaints declined once the WSIB instituted new process guidelines.

Top 10 complaints by subject in 2010

1. benefits
2. health care
3. labour market re-entry
4. appeal process
5. return-to-work
6. non-economic loss
7. loss of earnings 72-month review
8. employer assessment issues
9. permanent disability
10. expenses

Complaint resolution outcomes



* includes three re-opened issues

Issues received by sector

WSIB Sector	Issues received	Issues closed *Specialists' inquiries			
		Mandate	*	Non-mandate	Total
Construction/Transportation (Toronto)	213	145	(35)	67	212
Hamilton/St.. Catharines/Primary Metals	201	146	(34)	55	201
Toronto/Services/Health Care	197	132	(33)	67	199
Specialized Claims/Pre-1990	178	124	(54)	51	175
Industrial (Toronto)	165	122	(39)	44	166
Kitchener/Guelph/Agriculture	160	108	(28)	52	160
Ottawa/Kingston	152	120	(30)	33	153
Government Services (Toronto)	110	76	(21)	35	111
Appeals	85	65	(11)	22	87
Occupational Disease Survivors Benefits	85	67	(17)	19	86
Windsor	73	49	(13)	24	73
Specialized Claims/Eligibility Unit	71	38	(8)	33	71
Sudbury/North Bay/Timmins/Mining	71	44	(11)	27	71
London	61	37	(7)	21	58
Thunder Bay/SSM/Forestry/Pulp/Paper	55	38	(6)	18	56
Revenue/Employer Services Centre	41	25	(3)	16	41
Specialized Claims/Serious Injury Program	34	28	(10)	7	35
Specialized Claims/NEL	26	14	(6)	12	26
Toronto	13	12	(1)	1	13
Finance/Employer Audit	12	12	(5)	2	14
Specialized Claims/Pre-1990 (Serious Injury)	10	6	(2)	4	10
Corporate Executive/Legal Services	5	2	(-)	3	5
Specialized Claims/Business Services	5	5	(1)	-	5
Finance/Treasury	4	2	(-)	2	4
Health Services/Clinical Services	4	4	(4)	-	4
Finance/Collections	3	1	(-)	2	3
Regulatory Services/Compliance	3	2	(2)	1	3
Specialized Claims/Central Claims Processing	2	2	(1)	-	2
Corp Executive/Office of the President	1	1	(ç)	-	1
Health Services/Health Services Management	1	1	(1)	-	1
Operations Planning & Implementation	1	1	(1)	-	1
Not applicable to WSIB	57	-	(-)	57	57
Not determined	158	51	(2)	107	158
WSIAT	29	-	(-)	29	29
Total	2,286	1,480	(386)	811	2,291

SOME INDIVIDUAL RESOLUTIONS

Final LOE review

An inquiry from the Commission about the decision-making process may trigger a review of the decision itself

A 47-year-old worker suffered a lower-back injury in 2004 that aggravated a compensable pre-existing condition. She underwent three surgeries, including a spinal fusion. She also developed a psychotraumatic disability that was related to her work injury. She was granted full LOE benefits as well as psychological treatment. In 2007, the WSIB determined that the worker was “totally impaired with regards to a return to work.”

In June 2010 the worker’s case manager conducted a review pending the 72-month lock-in date and determined that the worker would not receive ongoing benefits—her benefits would be locked in at zero. The decision was based on the accident employer’s statement that it could now provide modified work. The case manager concluded that, as a result, there was no wage loss. The Commission inquired into the short notice the worker received about the decision and a lack of information from the employer.

Meanwhile, the worker appealed the decision. The Appeals Branch sent the case back to Operations for a final decision on the worker’s compensable psychotraumatic disability. The case manager requested a review from the WSIB’s external psychology consultant, who reported that the worker had a major depressive disorder and her prognosis for returning to work was poor. The worker’s treating specialists and family doctor reported that it was unlikely she would be able to work in any capacity because of her extreme functional limitations related to her back injuries and spinal fusion surgery.

Based on this information and new information from the employer, the manager reconsidered the 72-month lock-in decision and found that the worker was competitively unemployable, given the combination of her organic and psychotraumatic disabilities.

The worker’s appeal was discontinued, and the manager said she will receive ongoing benefits.

Assessment of work on the night shift

In this case, the Commission's inquiry led to a review of how a return-to-work specialist could accommodate a worker's schedule

A night shift worker complained to the Commission that the return-to-work (RTW) specialist assigned to his case was not available during his shift and, therefore, could not assess whether his modified job was suitable. The WSIB told the worker a specialist could not attend during the night shift because of restrictions in the specialist's contract.

The worker said the work required during the night shift was different from other shifts and, as a result, a fair assessment could not be done without direct observation of the job.

The Commission contacted the manager, who arranged for a RTW specialist to go to the workplace during the worker's shift. The worker later confirmed that the return-to-work meeting did occur during his shift, that the work during the night shift was noted as being different, and that a job suitability decision would be based on the new assessment. The Commission and the worker were satisfied with this outcome.

Notice of termination of benefits

The WSIB responded to the Commission's inquiry about the length of notice a worker received about a change in his benefits

A worker had been receiving full benefits since 2005 and also had a 22 per cent NEL (permanent impairment award) for his back injury. His treating physician referred him to the Commission when the WSIB terminated his benefits.

In April 2010 the worker's case manager called and told him that he was now considered to be at his pre-accident level of impairment and thus his benefits were terminated. The worker received the decision letter May 3. His last benefit cheque covered him until May 12.

Following the Commission's inquiry about the short notice, the manager decided to extend the worker's benefits for another five days, paying him up to May 17.

Psychiatric issues

Sometimes the Commission can help bring new medical information to the case manager's attention, before a final decision is made

A 49-year-old worker was receiving a 30 per cent NEL (permanent impairment award) for bilateral elbow and shoulder injuries, as well as a neck injury. She had been receiving full LOE benefits for five years, after a number of unsuccessful attempts to return to work.

In May 2010 the worker was advised that, effective immediately, she was being referred to a labour market re-entry plan for four weeks of job search training. She was told that once she completed the training her benefits would be terminated. The decision did not refer to a recent medical specialist's report containing new information including restrictions and possible new areas of entitlement (chronic pain and anxiety disorder). As a result of the Commission's inquiry, the WSIB continued the worker's benefits pending a psychiatric report.

The psychiatrist reported that the worker was suffering from a major depressive episode as a result of her chronic pain. She was also considered to be at risk of suicide.

On reviewing the report, the case manager allowed psychiatric treatment and medication for the period of the worker's LMR plan. The LMR plan was changed and the worker was offered a certificate program in Customer Service Clerk, Retail, followed by an eight-week job search training program and a four-week paid work trial. The worker signed the LMR plan in October.

Thank you for everything you have done for me and for your help and dedication.

—injured worker

EDUCATION

Education and training is an important part of the Commission's work.

In 2010 the Commission provided six fairness sessions for WSIB staff, including two sessions for employer audit and account specialists.

OUTREACH

The Commission continued its outreach program in 2010, meeting with a variety of groups:

- Employer Advocacy Council, business summit
- Eastern Ontario Legal Aid Clinics
- Injured Workers Outreach Services conference
- Law Society of Upper Canada continuing education program
- Industrial Accident Victims' Group of Ontario
- Ontario Federation of Labour workers' compensation representatives

Your commitment and dedication has greatly contributed to a very successful day. As you can see from the participants' feedback summary it was a resounding success.

— Employer Advocacy Council to the commissioner

BUDGET

	2011 Budget	2010 Actual	2010 Budget
Salaries—permanent	657,902	599,166	649,368
Salaries—temporary	132,369	75,846	130,559
Total salaries	790,271	675,012	779,927
Benefits	88,728	80,834	89,046
Total salaries and benefits	878,999	755,846	868,973
Equipment and maintenance	25,000	13,730	38,000
Voice and data communication	33,600	21,725	36,000
Publication and mailing	31,200	5,523	30,000
Occupancy cost	3,600	—	3,600
Travel	69,000	11,785	75,400
Supplies and services	48,600	16,882	48,000
Staff training	27,000	4,919	27,000
Specialized services	—	295	—
Other operating expenses	30,600	725	30,600
Depreciation and amortization	—	39,406	—
Total non-salary expenses	268,600	114,990	288,600
Total operating expenses	1,147,599	*870,836	1,157,573

* The Commission voluntarily decreased its spending in certain areas in response to new government guidelines. The Commission also reduced its spending on temporary staff. In addition, there was one staff vacancy for part of 2010.