

Injured Workers' Consultants

Representing injured workers free of charge since 1969

June 1, 2010

Mr. Norm Sterling, Chair
Standing Committee on Public Accounts
c/o Katch Koch, Clerk
99 Wellesley Street West, Room 1405
Whitney Block, Queen's Park
Toronto, Ontario
M7A 1A2

Dear Mr. Sterling,

Re: the 2009 Auditor General's Report on the Unfunded Liability of the WSIB

Injured Workers' Consultants is a community legal clinic operating out of Toronto. We are funded through Legal Aid Ontario and have advocated for injured workers since 1969.

We understand that the Standing Committee on Public Accounts will be preparing a draft report tomorrow regarding the Auditor General's Report. We have enclosed a submission from our legal clinic on the Unfunded Liability of the Workplace Safety and Insurance Board. Given the shortness of time, we have not had the opportunity to provide a thorough response to the Auditor General's report.

As advocates of injured workers, one of the identified "stakeholders", we would have appreciated the opportunity to present our submissions to the Standing Committee in person through public consultation. We urge the committee to hold public hearings on this report. We hope that the Committee members will consider our enclosed submission carefully.

Thank you for your attention.

Sincerely,

Injured Workers' Consultants Community Legal Clinic

Per:

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Encl.

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~ A Community Legal Aid Clinic ~



Submission to the Standing Committee on Public Accounts Concerning the 2009 Report
of the Office of the Auditor General of Ontario, Section 3.14 Unfunded Liability of the
Workplace Safety and Insurance Board

Injured Workers' Consultants is a community legal aid clinic in Toronto. We have advocated for injured workers in Ontario for more than forty years. We make this submission to the Standing Committee to express our grave concerns about the Auditor General's Report on the unfunded liability of the WSIB, and the consequences it could have for injured workers.

With respect, it is our position that the Auditor General's report contains assumptions and misinformation that artificially inflate concerns about the unfunded liability. The unfunded liability does not present a danger to the WSIB's finances; fear and panic about the unfunded liability, however, present a significant threat to injured workers' livelihoods and the integrity of compensation system.

The Unfunded Liability is Not a Threat to the WSIB

The unfunded liability has never been a threat to the workers' compensation system. The Workers' Compensation Board (WSIB) has operated for close to a hundred years in Ontario, and it has always had an 'unfunded liability'. For all of that time, through the great depression and several recessions, the Board has never had difficulty meeting its financial obligations.

Partially Funded for Good Reason

The legislature has made a reasoned and intentional decision to have the Board operate on a partially funded basis. When the Board was originally created, the legislature followed the recommendations of the Royal Commission regarding funding. The Commission recommended that the Board carry funds sufficient to meet the cost of claims as they become due, plus a reserve fund in the amount the Board deems necessary.¹ The reserve fund was not required to meet the value of benefits due in future years. Sections 96 and 97 of the current legislation, the *Workplace Safety and Insurance Act*, continue this system of partial funding.

The last major independent review of workers' compensation in Ontario commented on the fiscal soundness of Ontario's partially funded model.² The main advantage of a partially funded system is that it leaves a greater amount of capital in the hands of Ontario businesses for investment.³ The review's author, a Harvard University law professor wrote:

...the Ontario business leaders to whom I spoke shied away from full funding by the Workers' Compensation Board. They believe that the prospects for economic growth in this province are enhanced by entrepreneurial rather than governmental control of this huge pool of capital.⁴

¹ Meredith, Sir William R., *Final report on laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily*, 1913. Available at: https://www-wcb-ab-ca.ezproxy.library.yorku.ca/pdfs/meredith_report.pdf

² Weiler, Paul C. *Reshaping Workers' Compensation in Ontario*. A report submitted to Robert G. Elgie, MD, Minister of Labour, November, 1980.

³ *Ibid*, and *Supra* note 1.

⁴ *Supra* note 2 at p.75.

Ontario's model of partial funding was clearly purposeful and well reasoned. We see no reason why this model, which has served for almost a hundred years and gained the approval of independent reviews, should now be rejected.

Insurance Principles Erroneously Applied

The Report's preference for full funding appears to be predicated on its misapplication of insurance concepts to workers' compensation. The Report acknowledges that there is no legislative requirement for full funding but, for reasons it fails to explain, it presumes that full funding is preferable. It appears that this preference is based on an assumption that the Board operates as an insurance business.⁵ Insurance companies are not permitted to carry an unfunded liability – they need to maintain funding equal to the value of future projected claims costs to safeguard beneficiaries against insurer insolvency and wind up. The Board, however, operates a public system of compensation; it is not a private insurer. As a public entity with legislated compulsory contributions, the Board has no risk of insolvency or wind up.

Other public income support programs, like the Canada Pension Plan (CPP), also operate on partially funded basis. The CPP switched from a pay as you go system to partial funding in 1997. The CPP aspires to reach a funding ratio of about 25%, which is less than half of the Board's current funding ratio.⁶

Misleading Information in the Auditor General's Report

We are particularly concerned that the Report relies on incomplete or misleading information regarding both benefits and premiums. The report's characterization of benefit costs as too high is premised on a few questionable points: supposed benefit increases in 2007 and an Institute for Work and Health Study on longer claims duration, which is said to be a principal contributing factor to rising benefit costs. Our submission elaborates further on each of these below.

There Were No Benefit Increases

The legislative benefit increases that the Report refers to were in fact not increases, but cost of living adjustments. These adjustments were put in place to lessen the erosion of benefits by inflation. The Weiler Report explained why a cost of living adjustment is not an increase, and its importance:

...I deliberately speak of an *adjustment* to, rather than an *increase* in, pension benefits to take account of intervening inflation. We must keep clearly in mind that no real improvements to benefits are at issue here. We do no more than avoid an erosion in real income levels we earlier awarded to workers' compensation pensioners. This is how the problem looks from the point of view of fairness to the injured worker. But we have been told again and again that Ontario business and the Ontario economy simply cannot afford the cost. This fear is unjustified. The explanation is implicit in the very notion of inflation, which consist of changes in money values, not real values ... once we award an individual disabled worker a certain share of the real economic pie, our refusal to keep the monetary amount of his pension in line with the changing rate of inflation must mean that someone else in the economy will receive a net increase in his share of real goods and services. In effect, someone will reap a windfall profit from inflation at

⁵ Auditor General's Report at p.324.

⁶ Optimal Funding of the Canada Pension Plan, April 2007.

the expense of the disabled worker. In the case of workers' compensation benefits the immediate beneficiary of such inaction would be business.⁷ (original emphasis).

It is our position that there were no benefit increases. The supposed increases referenced in the Report were actually cost of living adjustments designed to offset inflation. In 1997, benefit levels were reduced from 90% to 85% of net average earnings and remain at that lower level.

The Institute for Work and Health Study Was Authored by the WSIB

Even more problematic is the Report's reference to the Institute of Work and Health's study on claims duration, which is actually an internal Board document written by the Board with some assistance from the Institute. Our Legal Clinic became interested in obtaining a copy of this study after first reading the Auditor General's Report. The study's focus on increased claims duration and benefits was at odds with our own experience – we have noted a trend towards fewer injured workers being awarded long term full benefits.

The Report refers to this study as the "IWH study" or "the Institute's study" throughout the section on benefits. This is misleading since the study was actually authored by a team from the WSIB with "technical assistance" from IWH.⁸ It is actually an internal WSIB document written for WSIB purposes – it has not been published in a peer-reviewed journal, and its conclusions are not objective. In light of this information, we urge the Standing Committee to place very little weight on the Study and on the Report's comments stemming from it.

Claims Duration Is Not An Increasing Financial Burden on the WSIB

Longer claims duration cannot explain increased benefit costs because a smaller number of workers are receiving these long term benefits. The Report notes that "concerns about rising benefits costs prompted the WSIB to engage the Institute for Work and Health to examine its claims duration data". The "IWH" Study purports that the percentage of workers receiving long term benefits from the WSIB is increasing.

Even if this is true, it does not translate into rising benefit costs. The Study data reveal that the actual number of workers receiving long term benefits has dropped significantly – by about a quarter. For 1990 injuries, more than 6000 injured workers were in receipt of long term wage loss benefits. For 2001 injuries, only 1176 injured workers were in receipt of these benefits.⁹

Increased costs cannot be explained by a higher percentage of workers on long term benefits because the actual number of workers in receipt of long term benefits has dropped significantly. Benefit levels remain unchanged. In addition, many of the

⁷ *Supra* note 2 at p. 70

⁸ *atwork*, Issue 60 Spring edition at p.7. *atwork* is a quarterly publication of the Institute for Work and Health.

⁹ *Study of Locked-in Award Recipients Phase 1: Descriptive Analysis of Data, Final Report, January 2008*. This is the "IWH" Study reference in the Auditor General's Report. These numbers are found in the table "Phase 1: Profile of Locked-In Award Recipients – Bill 162 and Bill 99 Cohorts – Schedule 1 Allowed Lost Time Claims (Excludes Fatal, Disease and Serious Injury Claims) Award Indicators", Data Templates, Award Indicators.

workers in receipt of long term benefits receive only partial payments (in many cases, as little as a few dollars a month).

Employer Premiums: Not the Whole Story

We object to the Report's assertion that premium rates should not be increased. We particularly object to one of the Report's main explanations as to why this is the case: the claim that they are already amongst the highest in Canada. This claim is based on an incomplete representation of employer assessments that does not examine any factors affecting rates.

The apparently higher rate of employer assessments in Ontario can be explained by two related factors: industry type and coverage. As the Report notes, Ontario has one of the lowest coverage rates in all of Canada. The sectors that are covered tend to be those that have the highest risk of workplace accidents (that is, the most dangerous). One would expect that a province that covers only its riskiest work would have higher average assessment rates than other provinces that cover all (or almost all) sectors. To put it another way, a province that covers mining and manufacturing will have higher average rates than a province that also covers workers in banks, insurance, and office work. The only way to accurately compare rates across provinces is to compare by industry sector.

There is also another factor that has not been accounted for in premium rates: the effect of experience rating programs. Experience rating programs are supposed to 'fine-tune' employer assessments by providing rebates to those employers with good accident records and surcharges to those with poor records. Ontario routinely pays out substantially more in rebates than it recovers in surcharges. For each of the years from 2005-2007, for instance, the WSIB paid out over a hundred million dollars per year more than it collected (124 million, 118 million, and 114 million respectively).¹⁰

It would be impossible to have an accurate picture of what employer assessment rates actually are, then, without factoring in experience rating amounts. We suspect that once assessment rates were adjusted for experience rating payments, they would be significantly lower.

The Report notes that premium levels have not been sufficient to cover expenses. It goes on to note that had employer assessment rates not been reduced in the 1990s, the unfunded liability would now be less than a third of its current amount. Figures from a 2009 chart prepared by WSIB Chair's Consultation shows that the cuts to worker benefits implemented in Bill 99 would have been sufficient to eliminate the unfunded liability by 2006, if employer assessment rates had been reduced.¹¹

The Negative Consequences of A Push For Full Funding

We have already noted the negative impact that full funding could have on Ontario employers. It would have even more deleterious effects for injured workers. The last time the unfunded liability was characterized as problematic was in the 1990s. This resulted in the Bill 99 cutbacks to benefit levels (although as noted, it also resulted in assessment rate decreases for employers).

¹⁰ *Workplace Safety and Insurance Board of Ontario Annual Report 2007* at p.22; *Workplace Safety and Insurance Board Annual Report 2005* at p.21.

¹¹ *Unfunded Liability, Chair's Consultation, Spring 2009*, at p.6.

Injured workers should not be asked to pay, again, for the unfunded liability. Benefits to injured workers are already inadequate, forcing many injured workers to live in poverty.¹² Practices such as “deeming” whereby disabled workers’ WSIB benefits are cut when they are deemed to have returned to work (that they do not have) have already forced many injured workers to turn to the Ontario Disability Support Program. Further benefit cuts might force more injured workers to turn to social assistance, which is paid from the public purse.

To conclude, we would like to remind the Standing Committee of the fundamental purpose of workers’ compensation legislation: to provide fair compensation for workers injured on the job. Employers fund the system, and in exchange they are provided legislative immunity from law suits. It would be imprudent to strive for a fully funded system at the expense of injured workers, the very people whom the system is designed to compensate.

¹² Ontario Network of Injured Workers’ Groups. *Impacts of Workplace Injury: Is This What Justice Meredith Envisioned? A study of the Economic and Social Impacts of Workplace Injury and Illness*, June 1, 2009. Available at: <http://www.injuredworkersonline.org/Documents/InjuredWorkerSurveyReportJune2009.pdf>