Injured Workers’ Consultants

Representing injured workers free of charge since 1969

The Injured Worker Community View of The 'Unfunded Liability' Issue

For the past decade employer organizations, the WCB/WSIB and the Ministry of Labour have raised the unfunded liability as a central theme in all discussions of workers' compensation reform. The argument goes that there is an unfunded liability, that this is a bad thing that threatens the viability of the workers' compensation system, and that the elimination of the unfunded liability must therefore be a priority for the Board. Improving benefits for injured workers, or simply restoring the cost of living adjustments that once applied to injured workers' benefits, cannot be on the table until later, once the unfunded liability is eliminated.

If you accept this line of reasoning, injured workers will never see the restoration of cost of living adjustments, compensation will never be improved, and their suffering will only increase. There is another way to understand where future costs fit into the balance sheet. This other way allows for needed reform.

The Injured Worker Perspective

The injured worker community and the community legal clinics have been organized and active in compensation issues for more than 30 years. We have studied the history and principles of workers compensation. We bring an historical perspective on the unfunded liability that you will not likely hear from the other participants in this discussion.

The unfunded liability represents the difference between the lump sum that would be required to pay the future costs of all claims now on the books, compared to the reserves available. Private insurance companies are not permitted to operate with an unfunded liability because, as private corporations, they could close tomorrow for any number of reasons. Existing claimants should not be abandoned, so the law requires insurance companies to ensure that their claim will be funded. The Workers Compensation Act simply requires the Board to ensure that current costs are funded and there are adequate reserves for contingencies. So the funding ratio, or the unfunded liability, has been monitored, but it was not a burning issue for workers' compensation for nearly 80 years.

The ongoing pre-occupation with the unfunded liability is the culmination of political campaigns that began for all the wrong reasons during the previous two provincial governments. It is a relatively recent phenomenon and has no basis in the history and philosophy of Ontario's workers' compensation system. It became an issue in the early 1990's as part of a political strategy to undermine public confidence in the Ontario government's financial management skills. Allegations that the unfunded liability was a debt that would have to be picked up by the Ontario taxpayers (which is incorrect) led Wall Street bond rating agencies to downgrade Ontario's credit rating. Employer organizations joined in 'painting' the WCB as debt ridden and therefore unable to afford to continue to compensate injured workers as they had been in the past. This argument served their interest in keeping WCB assessments under control. These two forces moved the government to begin the de-indexation of some claims in 1994. In the 1995, pro-privatization and private insurance groups climbed on the 'unfunded liability bandwagon' because they saw a new government that was open to privatization of workers' compensation. They hoped to have the system transferred to private hands, in which case it would have to be fully funded.

In 1996, Cam Jackson, Minister Without Portfolio Responsible for Workers' Compensation Reform, produced a report recommending that employers be allowed to secure private insurance coverage for the first six weeks of an injury. This would have privatized roughly 80% of workers compensation claims (New Directions for Workers Compensation Reform, June 1996, p. 12). Fortunately that was not included in the legislative amendments passed the following year. However, the shift to a private insurance model for workers' compensation was integral to Bill 99, from the change of name to "Workplace Insurance", the privatization of vocational rehabilitation and training services, the self-reliance philosophy for injured workers returning to work after injury, the elimination of temporary disability benefits and other significant changes. The change from the Workers' Compensation Board to the Workplace Safety and Insurance Board delivered up a system that was ready for further privatization. Once this system is fully funded, it can be closed down or further privatized like any private insurance company. And the lower the benefits, the less it costs for full funding.

Meredith's Founding Principles

Our workers' compensation system was established on the basis of recommendations set out by Chief Justice Sir William Meredith in the 1913 Final Report of his commission of inquiry. This report remains important to understanding the system that we have, so we have attached a copy for you to read. Meredith heard the debate between funding the system on a current cost or 'pay as you go' plan where assessments are collected to cover the year's expenses; and the pre-funded model that is used by the private insurance industry. Meredith's earlier reports explain how the concerns that lead to a full funding model for individual private insurance companies do not apply to a **collective liability model** in which all employers in a class of industry contribute to the cost of injuries in that class. A collective liability model very different from a private insurance model. We urge you to read our paper "The Ontario Workers' Compensation Board's Unfunded Liability: Myths and Realities" for a more thorough analysis of these issues. A copy is attached.

The Canadian Manufacturers Association was one of the strongest advocates for a current cost system and presented the actuarial evidence to Meredith which showed that that in a pay as you go system, employer assessments will always be less than, or equal to assessments in a fully funded plan. Given the choice between paying the entire cost of an item up front or over time, a business will always choose time to pay. If you told a business that its workers compensation claims this year require paying $100,000 now, or $3000 a year for the next 40 years, they will choose to keep the $100,000 invested in their business and that investment will return more than the $3000 a year that they need to pay. This investment was one of the conclusions of law Professor Paul Weiler who was hired by the Ontario government to study and prepare a series of reports on workers compensation reforms. In "Reshaping Workers' Compensation for Ontario", (1980, p. 83), he noted that current cost funding in effect allows the WCB to invest in smaller business in Ontario, something it could not do directly because its investments must be blue chip stock. Current cost financing leaves vast sums of money in circulation in the hands of Ontario's employers where it does more good for the employers and our economy that it would if tied up in WSIB investments.

Meredith's Final Report recommended current cost funding and the main issue it considers is the decision as to whether or not some reserves were necessary to cover unanticipated changes in costs. Meredith wrote "I have, therefore, concluded that the Act should not lay down any hard and fast rule as to the amount that shall be raised to provide a reserve fund and that it is better to leave that to be determined by the Board which is to have the collection and administration of the accident fund as experience and further investigations may dictate." (Final Report, p. 7) The workers compensation system was never intended to be fully funded. During its entire history it has operated on current cost basis with reserves as determined by the Board. The Board continues to collect premiums well in excess of the cost of this year's claims and has accumulated reserve funds in excess of $10 Billion.

So the funding question facing our workers compensation system is not "How can we pay off the unfunded liability?" The real questions are: "What is the proper funding ratio at this time? What reserves are appropriate to cover potential changes in accident rates or claims duration? What are the rates that need to be charged to accomplish this?"

Injured Workers Are Suffering

One fact that is clear and beyond dispute is that injured workers are suffering. The majority of those with serious permanent disabilities are unemployed and dependent on their workers compensation benefits, often topped up by social assistance or Canada Pension Plan Disability benefits. Over the past ten years of only partial indexation of workers compensation benefits, the Consumer Price Index has risen about 20.8% while adjustments to WSIB benefits total 2.5% over the same period. Injured workers have lost 18.3% of their incomes that were below poverty level to begin with. This creates physical and psychological stress, financial crisis, family breakdown and misery. The full implications of only partial cost of living protection initially obscured, but the government can no longer ignore the impact of inflation on injured workers.

Over the same ten years, employers have enjoyed a premium holiday. They have received a 27% reduction in the average premium for their workers compensation coverage. An analysis of the WSIB figures shows that full cost of living adjustments could have been continued with a less extreme reduction in employer assessment rates.

Not Keeping Benefits In Line With Inflation Is Stealing From Injured Workers

From an injured worker's viewpoint, failing to ensure that the benefits of injured workers keep pace with the rate of inflation is stealing from those injured workers. This win/lose relationship was one of the conclusions reached by law Professor Paul Weiler in his report "Reshaping Workers' Compensation for Ontario." He wrote:

> "In addressing this issue as a matter of principle, there should be no question about the entitlement of workers' compensation claimants and pensioners to inflation adjustments as a matter of *right*." (page 69)
> …
> "Once we decide as a community what the appropriate level of compensation for injured workers is to be – in light of all the considerations and complexities I have already set out in this chapter – and 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 the expense of the disabled worker. In the case of workers' compensation benefits, the immediate beneficiary of such inaction would be business." (page 70)

Weiler recommended that injured workers' benefits be fully indexed to the annual change in the Consumer Price Index. This was implemented in legislation that received all party support when Labour Minister Bill Wrye introduced it in 1985.

Inflation Adjustment Is Not A Cost To The System

Contrary to those who argue that the system cannot afford cost of living adjustments, in "Reshaping Workers' Compensation for Ontario", Prof. Weiler explained that inflation is not a "real" cost to the workers' compensation system. He wrote:

> "… 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 consists of changes in money values, not real values." (page 70)

It is not a real cost for workers' compensation benefits to keep up with inflation because employer assessments or premiums are not set at a cost per employee but are a percentage of the employer's payroll. The size of employer payrolls increases over time as wages and benefits go up with inflation. Therefore the total number of dollars collected in assessments by the Board increases over time without increasing the assessment rate, thus enabling benefits to keep pace with inflation without even changing employer assessment rates.

Workers Compensation Is A Legal Right, Not A Charity

Injured workers are asked to consider the other side, the employers' financial pressures and the need to remain competitive with other jurisdictions. But do employers consider their obligations towards injured workers? A discussion of workers' compensation rates based on what employers can afford to pay demonstrates a "charity" concept of workers' compensation that has no basis in our society. Workers' compensation is not a charity or form of social assistance where society gives what it can afford. The workers' compensation system is based on the historic compromise engineered by Meredith in which injured workers gave up the right to sue their employer in return for certain compensation benefits, promised to be paid on a no-fault basis. A worker injured 10 years ago was determined to be entitled to compensation benefits that covered a certain proportion of their living expenses and now they can only cover less than 80% of that. Yet the employer continues to be 100% protected from being sued. There is something horribly unfair about that bargain. Although the injured worker community has generally not favoured a return to the old days of suing one's employer, it is only a matter of time before the courts refuse to uphold employers' protection against being sued because it is such an unfair tradeoff for today's meager workers' compensation benefits.

Workers' compensation benefits must seriously pay for the actual loss experienced by workers, that compensation must keep up with the cost of living. The argument that the system cannot afford this is not credible. Recent public outcries by some employer organizations about the proposed 3% increase in WSIB premiums, despite the 27% reduction for a decade, reflects the lack of credibility that exists for all the arguments against restoring fairness to workers compensation benefits. There has never been a real interest in eliminating the unfunded liability, only in reducing employer assessments. Injured workers were told that that their cost of living adjustments had to be cut ten years ago because of the unfunded liability but instead employers were given a premium holiday. Even when the unfunded liability began to increase in recent years there was no movement to restore the old premium rates. The unfunded liability and 'debt crisis' talk is only trotted out when injured workers are seeking fairer compensation benefits because employers do not want to pay for that.

The workers' compensation system must at minimum, ensure that the compensation that it awards an injured worker is not diminished by increases in the cost of living. Workers' compensation benefits must keep pace with the cost of living. There was all party support for that in 1985 and there will be again. Why should injured workers suffer? There is absolutely nothing that can be said to justify further delay in restoring cost of living protection. Beyond that, the system must pay for the actual loss of earnings, or reasonably close to this. The current use of deeming is intolerable.

Begin With a Commitment to Workers' Compensation, Then Ask Whether The System Is Adequately Funded

Once you decide that the workers' compensation system should compensate the real losses of injured workers and that compensation should not be eroded by inflation, then the government should sit down with all the various interested parties to discuss the proper funding ratio and the rates that need to be charged to achieve that. One could accept the previous government's dogma that the system must be fully funded, and raise the rates to the level needed to do that.

But history shows that was never the nature of our system. Those who claimed to be changing the system to a funded one have no credibility because they gave the money back to employers instead. Injured workers are hoping a new government will step back and take a new look at the question of whether the workers compensation system is adequately funded to achieve its intended purpose. We would welcome a discussion about what is the proper funding ratio, and what are the rates required to achieve that.

19 August, 2005

815 Danforth Avenue, Suite 411, Toronto, Ontario M4J 1L2
Telephone: (416) 461-2411; Fax: (416) 461-7138
~ A Community Legal Aid Clinic ~