

WORKPLACE SAFETY AND INSURANCE BOARD FUNDING REVIEW

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**Second Supplementary Submissions of IAVGO**

November 18, 2011

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## 1. Introduction

Thank you kindly for both your “What I’m Thinking” presentation on November 2-3, 2011 and the opportunity to make additional submissions.

We are encouraged by many of your tentative recommendations. In particular, we believe your recommendations on occupational disease funding, rate setting and rate groups are a step forward.

These submissions will deal with four concerns we have following your presentation:

- **The proposed experience rating experiment:** the proposed experiment is the wrong approach to the experience rating problem. While the precise extent of the damage caused by experience rating is unknown (and perhaps unknowable), it is a significant problem. Taken together with the weak evidence of any positive effects of experience rating, one wonders what value there is in extending a twenty-year experiment.

The experiment is even less desirable when two further problems are considered. First, the experiment will be difficult to conduct. We doubt that the proposed experiment could ever provide thorough or reliable data. The experiment you propose seeks to measure “abuses”, which are difficult to detect and represent only part of the damage caused by experience rating. Moreover, the Board, as a vocal proponent of expanding the role of experience rating, cannot reasonably be expected to assume the role of a disinterested scientist.

Second, the experiment treats injured workers as guinea pigs. It assumes that they will be at risk of some harm and wants to measure that harm. The only protection afforded these injured workers is increased enforcement powers. But such powers depend on the institutional will of the Board or the Ministry of Labour to use them. And, again, such an approach only deals with the most flagrant of abuses, but leaves intact the adversarial system created by incentives to manage claims.

- **Unfunded liability-driven benefit administration:** the Board’s unfunded liability-driven approach to benefit administration has hurt too many injured workers and their families. It must stop. You mentioned that this approach is inappropriate and that it has been ineffective. A strong statement to this effect in your report is necessary.

- **The unpredictability of occupational diseases:** many occupational diseases are predictable, in some circumstances even more so than other types of claims. We are concerned that the report may overstate the unpredictability of occupational diseases.
- **Injured workers on de-indexed benefits deserve fair redress:** we endorse and adopt the submissions of ONIWG and the OFL on this issue. Injured workers who continue to suffer from the unfairness of de-indexing deserve justice. Even given the Board's financial circumstances, there is room for more to be done for these injured workers.

## **2. Employer incentives: the proposed experience rating experiment should be abandoned.**

The experience rating experiment you proposed has been underway since at least 1984, albeit without much rigour. We know that experience rating hurts injured workers, even if we can't quantify the frequency or the extent of the damage it causes. On the other hand, as you recognize, the evidence of positive effects of experience rating is weak. There is no reason to believe that experience rating promotes the purposes identified in s. 83 of the *Workplace Safety and Insurance Act, 1997*, encouraging employers to take steps to reduce injuries and encouraging return to work.

The experiment itself is fraught with difficulties. The abuses you propose measuring are difficult to detect and, further, only capture some of the problems experience rating causes. Then there is the question of the Board's involvement: given both its role in administering the workers' compensation system and its advocacy for expanding experience rating, how could such an experiment generate trustworthy results? Moreover, how can we justify leaving injured workers exposed to known risks of claims management?

### **2.1 The experience rating experiment is unnecessary.**

No more experimentation is necessary to show that experience rating hurts injured workers.

In your presentation, you acknowledged that experience rating generates some "abuses", but suggest that their extent is unknown. We agree that no-one knows the exact extent or frequency of the harms perpetuated by experience rating. But there is ample evidence that experience rating hurts injured workers and these problems aren't uncommon. Injured worker representatives and injured workers told the Review about their experiences. There is academic literature, scientific

studies, and policy papers – not to mention the recent report of the Expert Advisory Panel on Occupational Health and Safety – all identifying similar concerns.<sup>1</sup>

Too many varied sources have identified the damage caused by experience rating to dismiss such concerns as potential outliers. We may not know exactly how often the behaviours incited by experience rating hurt injured workers, but we know that this happens regularly and far too often.

Given the acknowledged problems with experience rating, one would expect a compelling reason to continue to experiment with it. The statutory purpose of experience rating is to “encourage employers to reduce injuries and occupational diseases and to encourage workers’ return to work.”<sup>2</sup> But despite twenty-seven years of NEER and CAD-7, there is only weak evidence that it achieves these objectives. It is difficult to see the value in continuing experimentation with a system that we know hurts injured workers.

## **2.2 The experiment is unlikely to succeed.**

### **2.2.1 The measurement problems.**

There are two measurement problems with the proposed experience rating experiment. First, abuses are difficult to detect and the harm they cause is difficult to quantify. Second, focusing on abuses only captures some of the deleterious effects experience rating has on injured workers.

First, measuring employer abuses of the experience rating system would be difficult. Employers do not advertise when they fail to report injuries, force workers back to work in fake jobs, or fire workers for manufactured reasons. Some employers are quite sophisticated in their manipulation of the system. Moreover, when such abuses are detected, it would be impossible to quantify the extent to which they hurt either the worker or the integrity of the workers’ compensation system.

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<sup>1</sup> For a more detailed analysis of these materials see pp. 56-75 of IAVGO’s initial submissions to this Review.

<sup>2</sup> *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A, s. 83(1).

The suggestion that this measurement problem could be addressed through a closer examination of employers' accident or claims experience records for irregularities is dubious. Such an approach depends on a reliable measure of regularity. In many cases, the regular claims experience records will be distorted by sample size and by longstanding claims management practices which have reduced claims costs.

Second, by focusing on abuses, the experiment would ignore much of the hurtful behaviour that experience rating incents. Focusing on abuses limits the inquiry to the most flagrant employer misconduct, such as failing to report injuries and pressuring employees not to report. But this only captures a part of the damage experience rating causes. Much, if not most, of the damage experience rating wreaks results from employers acting legally, but in accordance with incentives to minimize claims costs.<sup>3</sup>

The problem with an incentive scheme based on claims experience is not just employer abuses. Instead, the problem is that incentives based on claims experience makes the workers' compensation system adversarial to the detriment of injured workers. Focusing on employer abuses, for example, won't measure situations where an injured worker with post-traumatic stress disorder faces cross-questioning by an employer representative, hired to reduce claims costs, who accuses her of malingering. The tentative recommendations and the proposed experiment ignore such problems and appear to focus exclusively on abuses.

### **2.2.2 The integrity problem.**

The Board cannot be relied on to play the role of the disinterested scientist on the issue of experience rating. There is a long-developed institutional interest at the Board in favour of retaining and expanding a claims-based incentive scheme. For many years, the Board has devoted resources to administering, expanding and defending experience rating. It will not want to admit that it was wrong to do so.

Even during the course of this Review and despite the recommendations of the Expert Panel, the Board extended the NEER window to four. It publicly stated that this would improve return to work outcomes.<sup>4</sup>

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<sup>3</sup> See IAVGO's Submissions, pp. 60-69.

<sup>4</sup> Workplace Safety and Insurance Board, "Work Reintegration Program: Questions and Answers,"

<<http://www.wsib.on.ca/wsib/wsibsite.nsf/EFToggle?OpenAgent&docname=rtwwrqanda>> (as at December 15, 2010).

In this Funding Review, the Board, acting as a stakeholder, advocated the expansion of the role of experience rating.<sup>5</sup> In these submissions, it made similar claims – even proudly crediting experience rating for the reduction in lost-time injuries.<sup>6</sup>

Most recently, the Board accepted the recommendations of the 2010 Value for Money Audit – conducted and released during the Funding Review – to extend the NEER window another two years.<sup>7</sup> This audit recommends extending the NEER window to drive down claims costs.<sup>8</sup>

All of these actions undermine any credible role for the Board in conducting the proposed experiment or interpreting its results. But, given the Board's role in administering the workers' compensation system, it is difficult to see how such an experiment could be done without allowing opportunities for Board involvement. This will cast doubt on the experiment's reliability.

### **2.3 The experiment leaves injured workers at risk.**

Moreover, the proposed experiment leaves injured workers at risk. The news that their suffering will be used to test the validity of experience rating will be cold comfort to injured workers who have to face their employer as an adversary. This adversarial relationship is the last thing injured workers need. It impedes their recovery or their adjustment to life with a disability. Injured workers shouldn't be put through this just so we can continue a decades-long experiment.

The only protection contemplated for injured workers during this experiment is improved enforcement powers for the Board and the Ministry of Labour. We do not oppose this recommendation, but it will not provide adequate protection for injured workers during or after the experiment. Setting aside the question of whether the deterrent effect of enforcement would change employer behaviour, we don't believe that enforcement will solve the problems of experience rating for two reasons:

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<sup>5</sup> Nexus Actuarial Consultants Ltd., *A Pricing System Conceptual Design for Moving Forward*, May 31, 2011.

<sup>6</sup> *A Pricing System Conceptual Design for Moving Forward*, at p. 45.

<sup>7</sup> KPMG, *WSIB Adjudication and Claims (ACA) Program Value for Money Audit Report*, pp. 42-43.

<sup>8</sup> KPMG, *VFMA*, p. 42

- First, this approach relies on the political and institutional will of both the Board and the Ministry of Labour to use their power to crack down on employers. We question whether such will exists or is sustainable. In our stakeholder meetings, you acknowledged that the Board has failed quite conclusively to use the tools at its disposal to eliminate abuse.
- Second, as discussed above, employer “abuses” are only part of the problem with experience rating: preventing and punishing such abuses does nothing to make the workers’ compensation system less adversarial. Improved enforcement wouldn’t protect the injured worker who is cross-questioned by her employer’s representative on her medical history in front of her employer, possibly her representative and at least one stranger. Nor will improved enforcement protect the injured worker whose employer wants to manufacture a performance-related reason to fire him to avoid further claims cost.

#### **2.4 A different experiment.**

We propose a different experiment. As several injured worker and labour organizations have argued, there are alternatives to incentive schemes based on claims cost. The Board should instead focus on implementing and testing systems that focus on actual health, safety and return to work practices. This is more consistent with the purposes of the *WSIA*, the objectives identified in s. 83 of the *WSIA*, and the recommendations of the Expert Advisory Panel on Occupational Health and Safety.<sup>9</sup> And adopting a new approach makes more sense than continuing to tinker with a scheme that hurts injured workers.

### **3. Funding: the Board needs a clear message that the UFL shouldn’t be used to reduce benefits.**

We were encouraged by your comments about the inappropriateness of the Board or the government using the UFL as reason to “tighten” benefit administration or, even worse, to ratchet down benefits. In your presentation you commented about the inappropriateness and ineffectiveness of the Board’s use of the UFL as a “guillotine” for injured worker benefits. This theme, however, was more muted in your powerpoint presentations.

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<sup>9</sup> Expert Advisory Panel on Occupational Health and Safety, *Report and Recommendations to the Ministry of Labour* (Toronto: Ministry of Labour, December 2010) at 40-41 (Chair: Tony Dean).

This is not the place for subtlety or diplomacy: the Board needs a clear and blunt message – its administration of injured worker benefits must be driven the purposes of the *Workplace Safety and Insurance Act*, not the UFL. Anything more subtle risks licensing the Board’s use of the UFL as a club to beat down injured worker benefits. This approach hasn’t worked before and there is no reason to believe it would be any more effective – or less damaging – in the future.

### **3.1 The Board’s continued use of the UFL as a reason to cut benefits.**

Strong comments about the inappropriateness and ineffectiveness of UFL-driven benefit administration are necessary. In our initial submissions, we described in detail the Board’s formal and informal measures to reduce benefits in response to the most recent “crisis” around the UFL.<sup>10</sup> Unfortunately, the Board has continued to implement these measures during the course of your funding review.

Indeed, there are signs that the Board’s attack on injured worker benefits will intensify. The Board has accepted and endorsed the recommendations of the recent Value for Money Audit conducted by KPMG. The Audit was supposed to focus on claims administration, not substantive issues of benefit entitlement.<sup>11</sup> Yet the Audit delved deeply into questions of entitlement and benefit levels, much to the detriment of injured workers. For example, the Audit calls for the Board to revise its policies to:

- abrogate from the long-established legal principles (the thin-skull principle and the material contribution causation standard) by reducing or eliminating entitlement for work-related injuries that aggravate pre-existing conditions;
- limit entitlement for recurrences of previous compensable injuries;
- reduce entitlement for injured workers who lose modified positions because of lay-off or other workplace disruptions; and
- reduce the amount of compensation for injured workers’ Non-Economic Loss awards.<sup>12</sup>

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<sup>10</sup> IAVGO’s submissions, at pp. 12-14.

<sup>11</sup> KPMG, *VFMA*, at p.4.

<sup>12</sup> KPMG, *VFMA*, at pp. 23, 28, and 37.

Equally disturbing to the specific calls for benefit reduction is the Audit's general approach. It measures the Board's success in administering benefits by the percentage of claims denied or cut off benefits.<sup>13</sup> Nonetheless, the Board endorsed the KPMG report and has already incorporated its recommendations into its 2011-2012 policy agenda and several draft policies.

### **3.2 UFL-driven benefit administration has been ineffective.**

In our stakeholder meeting, you also mentioned that the cost-cutting approach hasn't been effective in addressing the Board's financial problems. Again, we ask that you mention this in your report.

This is not the first time that benefits have been under attack because of the UFL. Dave Wilken's paper, "Manufacturing Crisis in Workers' Compensation" shows how this has happened several times in previous decades.<sup>14</sup> On each occasion, the benefit-restricting approach led to suffering among injured workers, but failed to address the Board's financial concerns.

In short, the UFL-driven approach to workers' compensation has been to the detriment of all stakeholders because of its false promise as a means of addressing the Board's fiscal problems. None have suffered more than the many injured workers and their families who were driven to poverty under this flawed approach.

We therefore urge you to mention in your report that an UFL-driven approach to benefit administration is inappropriate, inconsistent with the *Act's* objectives and an ineffective way of dealing with the Board's funding concerns. This is not the place for subtlety: this approach is entrenched at the Board and has been furthered during your review. Without a strong statement in your report, it will be difficult to shake the Board from this destructive approach.

## **4. Occupational disease: the unpredictability of occupational disease should not be overstated.**

The tentative recommendations on funding occupational disease claims seem reasonable. However, we are concerned that the Review's final report may place undue emphasis on the unpredictability of occupational disease claims. Such a focus can be misleading. While some occupational diseases are unpredictable, many are much more predictable than other types of injuries. For example, the

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<sup>13</sup> KPMG, *VFMA*, at p. 28.

<sup>14</sup> David K. Wilken, "Manufacturing Crisis in Workers' Compensation" (1998) 13 *J.L. & Soc. Pol'y* 124.

most expensive occupational disease claims, for asbestos-related diseases, were predictable for generations. Before 1918, Canadian insurance companies were denying coverage to asbestos workers based on the health risks of their work.<sup>15</sup>

If the Review is going to comment on the predictability of occupational disease as a significant issue for the Board's funding, it should also discuss the measures the Board can take to better understand and plan for occupational diseases. As we previously recommended, the Occupational Disease Standards Panel should be revived to assist the Board to address uncertainties about occupational disease.

## **5. Indexation: injured workers on de-indexed benefits deserve better.**

We endorse and refer you to the submissions of the Ontario Network of Injured Workers' Groups (ONIWG) on this issue.

Very briefly, the tentative solution proposed to the injustice of de-indexation is full indexation going forward, but without increasing workers' de-indexed benefit levels to catch up with the current cost of living. Rather, the proposed adjustment would give injured workers less than half (40-44%) of what they need to have their benefits restored. And, workers will receive absolutely no arrears.

There is no principled basis for the failure to pay retroactive benefits or to fully adjust workers' base payments. The only reason cited is cost. In our view, fair compensation for loss of earnings is a statutory right, and should not be undermined by the idea that worker and employer interests need to be balanced. It costs what it costs.

However, even within the tentative plan the Review is considering, more equity can be achieved. Since the current financial situation of the Board is cited as the main barrier to a principled restoration of injured workers' benefits, the Review should recommend that injured workers who have suffered from de-indexation receive ongoing restitution as the Board's financial position improves. And, de-indexed workers should receive a fixed floor adjustment of at least 2.5% per year until full retrospective base increases and restitution are achieved.

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<sup>15</sup> F. L. Hoffman (1918) "[Mortality from Respiratory Diseases in Dusty Trades](#)", Bulletin of the U.S. Bureau of Labor Statistics, Vol. 231, pp. 176-180.

The tentative proposal to distribute the limited base adjustments by providing a flat rate to each worker is worrisome and should be reconsidered. It would result in arbitrary and unfair allocation of benefits. We recommend an allocation based on individual benefits or, if not feasible, based on each worker's current level of benefits as the benchmark.

## **6. Conclusion**

Thank you for kindly for your involvement and all of your hard work on this Review. Your report will no doubt have an important impact on workers' compensation for years to come.