

Injured Workers' Consultants Community Legal Clinic

Second Submission to the WSIB Funding Review

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Introduction

Injured Workers' Consultants Community Legal Clinic is pleased to provide the Funding Review with our additional comments stemming from the review hearings and employer submissions. We have not yet had the chance to comment on the Board's own submission to the Funding Review, as it was only recently released. We will provide our further submission on the Board's position in the near future.

Our submission addresses additional points arising in five of the six key areas as identified in the Green Paper. At the outset, however, we wish to briefly address a few of the erroneous or inaccurate assumptions that we have noted in a number of employer submissions.

Employer Assumptions about the Purpose of Workers' Compensation

A number of employer submissions, such as the Chambers of Commerce, started with the false premise that the workers' compensation system was conceived simply as a no fault income replacement system and then argue that the system has departed from its origins. We take issue with that 'straw man' type of argument. The workers' compensation system was proposed by Justice Meredith as a surrogate for our justice system in the courts. It was created to provide "just compensation":

"Sufficient progress has, however, been made to warrant the statement that the law of Ontario is entirely inadequate to meet the conditions under which industries are now carried on or to provide just compensation for those employed in them who meet with injuries or suffer from occupational diseases contracted in the course of their employment.

It is satisfactory to be able to say that there is practical unanimity on this point, and that those who speak for the employers concede the justice of the claim made on behalf of the employees that the industries should bear the burden of making compensation."¹

As a part of Ontario's justice system, it was always intended that "just" compensation be considered with reference to justice in the courts and in our society. As such justice is an evolving concept. The inclusion of health care and rehabilitation costs in the statutory schema are not foreign to the nature of the system, they are inherent in it:

"...the very basis of this legislation is that it is social, there is no use disguising the fact. One of the main objects of it is to prevent injured employees and their dependents being made a burden upon the public."²

¹ Meredith Commission, Interim Report, page 5, 27 March 1912

Injured Worker Stigma in Employer Submissions

We do feel the need to comment briefly on the submission of the Ontario Masonry Contractors Association (OMCA), which portrayed a highly stigmatic view of injured workers. That submission alleged there were “many instances” where workers return to work after the 72 month lock-in of benefits for loss of earnings, suggesting that injured workers are cheating the system by staying home and misrepresenting their disability for the 6 year period until their benefits are locked, and then going back to work.

It should go without saying that this accusation is unfounded. In their 2009 Value for Money Audit of the Labour Market Re-Entry (LMR) Program, auditor KPMG found that less than 50% of injured workers were employed at 18 months post-LMR plan closure. Given this low rate of employment at 18 months after successful completion of a retraining program, and given the well established difficulties that persons with disabilities face in securing employment, it is completely implausible to think that there are “many instances” of these injured workers suddenly being able to rejoin the workforce 6 years after they left due to injury.

This type of stigma is greatly damaging to injured workers on an individual and systemic level and should never go unchallenged. It can taint all levels of decision-making, and it can lead to feelings of shame and isolation or more serious mental health problems among injured workers.

The Board has recognized the harm done by this type of unfounded stereotypical comment to injured workers, and has been working to combat these views. The WSIB recently issued an anti-stigma brochure called “The facts about injured worker stigma” which targets many of the stereotypes surrounding injured workers.

That brochure responds with the following statements:

“When someone is injured on the job, they need our help – not snap judgments about who they are just because they got hurt on the job. We have to do everything we can to help them recover their lives, dignity and health.” David Marshall, WSIB President and CEO.

Injured workers don’t want to be off work. They want to recover from their workplace injury or illness and get back to work where they can earn their full wages and interact with friends and colleagues.” (see: http://www.wsib.on.ca/files/Content/DownloadableFileStigmaBrochure/3757A_StigmaBrochure.pdf)

We urge the Funding Review to carefully consider the weight that should be given to the comments made by any individual or organization that relies on stigma and stereotype rather than facts.

² Meredith, Minutes of Evidence, Vol. 2: 264-65

2. Assessment Rates

A number of employer submissions, such as the Employers' Advocacy Council, referred to provinces where the workers' compensation system was fully funded and the average premium rate was also lower than Ontario. They suggested that there was a causal connection between full funding and lower premiums. We believe this represents a misunderstanding of premium rate comparisons and the rate setting process.

When WSIB employer rates are announced annually, the Board explains that the premiums are made up of the cost of new claims, the WSIB administration costs, an amount for legislated obligations, and a charge to retire the unfunded liability. For example, at page 15 in the technical briefing material by the WSIB regarding Funding, the WSIB has a 'pie chart' showing that about 94 cents of the average premium of \$2.35 is to pay the principle and interest of the unfunded liability.

Some employers interpret that to mean that, when the unfunded liability is paid off, their average rates will go down about 94 cents. However, this is not an actual payment. This is simply a notional amount based on the WSIB strategy to pay off the unfunded liability. Quite often, nothing goes from employer payments to reduce the unfunded liability. On page 14 the briefing document indicates that the WSIB has had operating deficits since 2002, meaning that premium and investment revenues have not been sufficient to cover current benefit costs. During these times there were actually no funds directed to pay the unfunded liability. Under those circumstances, there would be no change in employer premiums even if the unfunded liability disappeared.

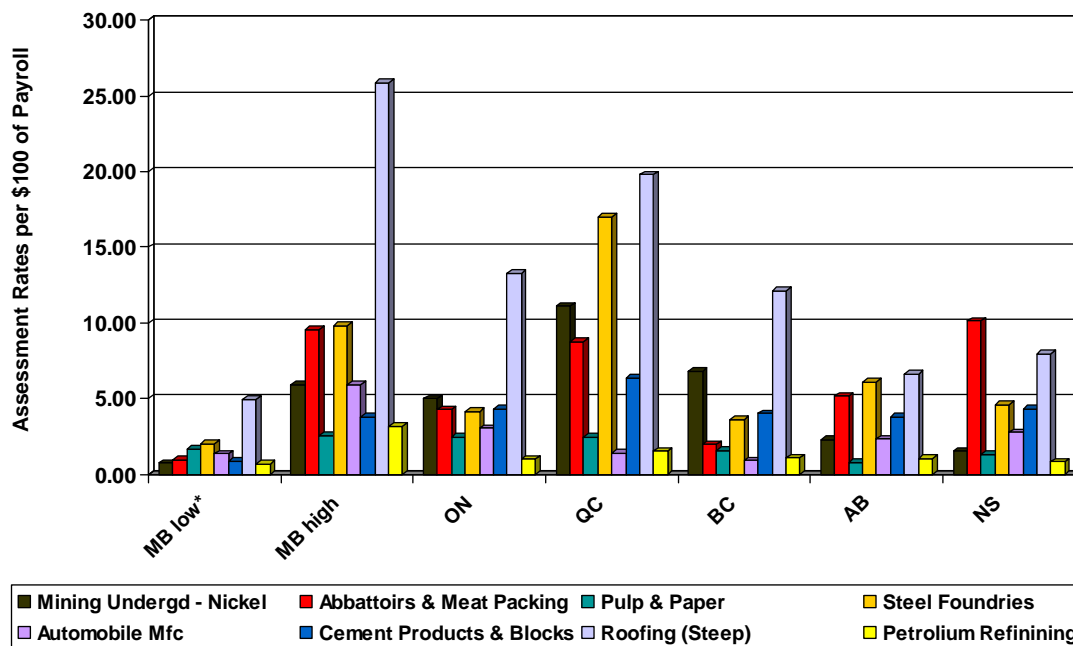
We also need to clarify that you cannot compare workers' compensation assessment rates by comparing one province's average rate to another provincial average rate. The average rate is closely connected to the extent of the workforce that the workers' compensation system covers and the type of industry that is based in the province.

For example, in British Columbia the workers' compensation system covers about 93% of the workforce compared to Ontario's coverage of about 72%. If Ontario's workers compensation system followed British Columbia's lead and brought in all of the banks, law offices, insurance companies, call centres, high tech industries, etc., these are low risk types of work and therefore they have a low assessment rate, likely well below \$1.50 per \$100 of payroll). Ontario's workers' compensation system would have a much lower average employer assessment rate if it expanded the workforce that is covered.

The other significant factor in provincial average rates is the mix of types of industry. A province like Ontario with a significant amount of the workforce involved in more dangerous activities such as logging, mining and heavy manufacturing will have a higher average rate because of the proportion of the workforce employed in industries with higher WSIB rates.

Selected 2010 Industry Assessment Rates

Ontario in Relation to Neighbouring Provinces and Three Others



*Manitoba assessment rates range from a low to high within an Industry – Low 40% below and high 200% above ave.

In order to compare workers' compensation costs between provinces, it is necessary to compare the rates industry by industry, comparing industries with comparable presence in both provinces. When done on this basis, Ontario's employer rates are not high, they are quite 'middle of the road' compared to other provinces.

4. Employer Incentive Programs

As we indicated in our initial written submission, it is our position that the Board's current experience rating programs should be eliminated. These programs are costly, and ultimately, they work against health and safety. We do not wish to repeat ourselves, but we do feel the need to clarify one point that came out during the funding review: hiding and minimizing claims is not simply an issue of enforcement; it is a widespread systemic problem arising from the fact that these programs measure claims history.

During the funding review, Prof. Arthurs and panel members heard many stories directly from the mouths of injured workers who had experienced the detrimental effects of experience rating. They spoke of how their employers tried to hide their injuries from the Board, and forced them back to work before they were ready only to suffer re-injury. As a legal clinic that has been assisting injured workers for more than forty years, we know from experience that these are not isolated incidents.

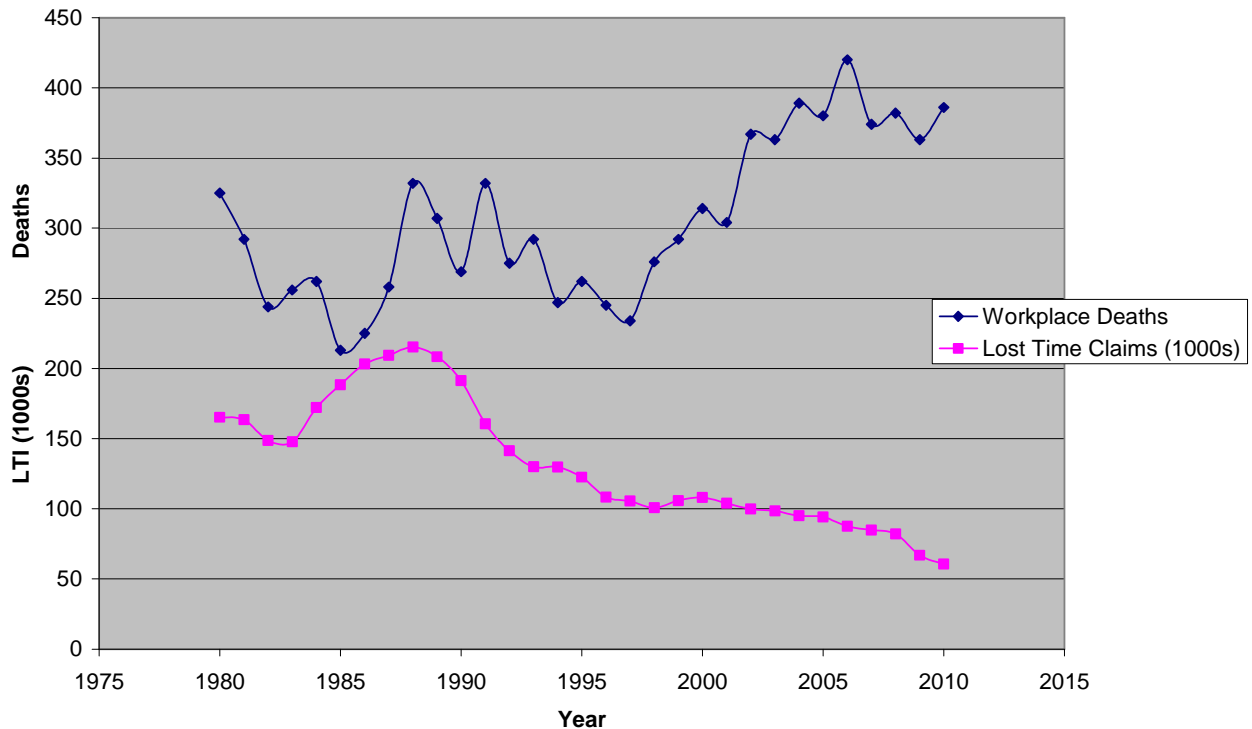
Experience rating programs measure claims history – not safety. These programs *do not* encourage employers to reduce injuries, but they *do* reward those employers who manage to hide and limit claims. The hefty financial consequences of experience rating for employers, and the competitive nature of business operations leads even well meaning employers to pressure workers to reduce claims, or ensure that claims are ‘no-lost-time.’ It is unclear how better enforcement could effectively manage such a widespread issue that stems from the very nature of the incentive programs themselves.

Section 83 of the *Workplace Safety and Insurance Act, 1997* permits the Board to establish experience rating programs “to encourage employers to reduce injuries and occupational diseases and to encourage workers’ return to work” (our emphasis). We note that the Act uses the word “and” rather than “or” between the two objectives of reducing injuries and encouraging return to work. This suggests that experience rating programs must fulfill both criteria; they must reduce injuries/diseases and they must also encourage return to work.

We do not believe that the current incentive programs achieve either of these criteria, let alone both. As noted before, all we can say with certainty about the efficacy of experience rating programs are that they reduce workers’ compensation claims and especially ‘no-lost-time’ claims. That is not the same as reducing injuries.

We support the proposition made by the Ontario Legal Clinics Workers Compensation Network regarding the patent unreliability of workers’ compensation claims statistics as an indicator of health and safety. The reason is because Experience Rating introduces powerful financial incentives for employers to manage claims in order to reduce the number of lost time claims. This is reflected in the claims statistics.

Workplace Deaths & Lost Time Claims 1980 - 2010



Data source: WSIB, OFL Information flyer: Why we need a day of mourning, April 2011

The chart above shows that up until the late 1980's the trend in workplace deaths was similar to the trend in lost time claims. From the late 1980's until 1997, the relationship begins to break apart. Starting in 1998 the trend in workplace deaths becomes the opposite of the trend in lost time claims: work-related deaths are on the rise but lost time WSIB claims are falling. How can that be? We submit that it is not coincidental that in 1998, the Board had in place its full array of experience rating programs.

The figures on workplace deaths may be reliable because, to put it crudely, it is very difficult to hide the bodies. It is much easier to hide or minimize less serious injuries. Shannon and Lowe found that the biggest predictor of non-reporting was injury severity.³ Board statistics also show that while the rate of lost time claims has decreased, the rate of serious injury has increased.⁴ However, the experience rating programs have introduced

³ Harry Shannon and Graham Lowe (2002). "How Many Injured Workers Do Not File Claims for Workers' Compensation Benefits?" *American Journal of Industrial Medicine* 42:467 -473

⁴ Institute for Work and Health and WSIB (January 2008). *Study of Locked-in Award Recipients, Final Report*

financial incentives so powerful that they have produced a marked decrease in the willingness of employers to report a lost time injury to the WSIB.

The Ontario Board's Research and Evaluation Branch hired an external research company to perform a survey of accident reporting practices of employers registered with the Board in 1991. The results were published by the WCB in the Workplace Accident Reporting Practices Study: Main Report, August 1992. The findings include 8.8% use short-term disability (STD) plans instead of reporting to the WCB, 20.1% give time off with full wages for a "minor" injury not reported to the WCB, and 27.2% provide modified work at full wages for not reporting accidents to the WCB. It is clear that the financial incentives for not reporting lost time injuries are powerful enough to persuade a significant number of employers to break the law.

Experience rating in the form of the New Experimental Experience Rating (NEER) program was introduced in 1984 in the forestry industry and was expanded to other industries. It replaced a voluntary plan which was eventually terminated in 1992. The CAD 7 experience rating program began in 1984 for the construction industry. During the period from 1987 to 1992, the WCB introduced a series of 4 revisions of the NEER plan. In 1997, the voluntary Safe Communities Incentive Program (SCIP) was introduced to target small to medium sized businesses. In 1998, the WSIB introduced a simplified financial incentive program for small business called the Merit Adjustment Premium (MAP) program. This completed the full array of experience rating programs.

It would be informative in understanding the reliability of WCB/WSIB claims statistics to know the total value of incentives paid out under the experience rating programs over this period but the WSIB does not publish that data. The WSIB Annual Report does publish the off-balance, the amount by which rebates paid out exceed penalties collected. During the period from 1993 to 2009 the reported off-balances total \$2.8 billion, which is just a part of a very powerful financial incentive that, in our submission, has rendered WSIB claims statistics an unreliable measure of workplace health and safety.

Measuring claims in a system that financially rewards employers for not making them is a poor proxy for measuring injuries. And while we do know that experience rating, as one employer submission noted, "forces employers to drag injured workers back to work on the day after injury" this is not the same as encouraging return to work. As already elaborated, pushing workers back too soon to avoid or minimize lost time claims actually works against return to work in the long term as many of these workers suffer the effects of secondary injury, reinjury, or aggravation, any of which may turn into a permanent injury.

To conclude, experience rating programs are costly and fail to meet their objectives. They need to be eliminated. Many employers too would prefer to have stable known rates rather than face the uncertainty of experience rating affected assessments. Better enforcement cannot mend the systemic flaws in these programs.

5. Occupational Diseases

A number of employer submissions, such as the Ontario Mining Association, the Ontario Business Coalition, and the Canadian Federation of Independent Business have made statements about the compensation of work related occupational disease that are incorrect and call for a response. The OMA brief states "...the intent of the workers' compensation system was never to include the adjudication and funding of disease claims."

The intent of the workers' compensation system in this regard is explicit. In his final report, Sir William Meredith stated:

By my draft bill, following in this respect the British act, industrial diseases are put on the same footing as to the right of compensation as accidents...It would, in my opinion, be a blot upon the act if a workman who suffers from an industrial disease contracted in the course of his employment is not to be entitled to compensation. The risk of contracting disease is inherent in the occupation he follows and he is practically powerless to guard against it.

The Royal Commission expressly provided that occupational diseases should be treated the same as accidents. This means they should be funded by the regular assessment paid by employers and the costs should be covered on the same collective liability principles as accidents.

The argument against compensating for occupational disease is based on the concern that medical science cannot provide conclusive proof of the extent of the relationship between the workplace and the disease. Occupational disease claims may be only a tiny proportion of the WSIB's caseload but that statement could be made about most back injuries, repetitive strain injuries and the sprains and strains that make up more than 50% of claims handled by the WSIB.

This is not criminal legislation requiring proof beyond a reasonable doubt. This is civil legislation based on the civil standard of proof: the balance of probabilities. The jurisprudence of the Workers' Compensation Appeals Tribunal/Workplace Safety and Insurance Appeals Tribunal has developed one test for all claims: did the workplace probably, or probably not make a significant contribution to the injury or disease.

Some employers have opined that the public social safety net should provide some benefits to injured workers who are diagnosed with ODs. It is the belief that the Board should only pay benefits based on the percentage that the worker's labour contributed to the development of the OD. This goes against the founding principles of workers' compensation and furthermore, would require substantial legislative amendment beyond the scope of Funding Review.

The worker is entitled to 85% of the net income if it can be shown that the condition developed as a result of employment. This is the wage loss method applied to all accidents; the act does not differentiate between a sudden and traumatic event or the development of a condition over time. It is the legislated responsibility of the employer to

pay for the cost of work related injury and disease, and that cannot be changed by this review as many others have requested. The transfer of these costs onto the publicly funded health care and social assistance programs, either wholly or in part through the concept of “apportionment” that some employers proposed, would be counter to the very purpose of the workers’ compensation system.

Worker’s compensation was designed to be a no fault, inquisitorial and non-adversarial system. This allows for adjudication based on the facts and merits of the case, and eliminates the debate over fault or blame for injuries. Differential treatment of OD claims in any way will exacerbate the adversarial conflicts in the system, reintroduce the concept of “fault” or “blame” and add significant costs and delays.

6. Benefits Indexation

Employer submissions on this subject have been generally brief and to the point. The position has been that full cost of living protection is not advisable at this time and should not be entertained, at least until the unfunded liability (UFL) is eliminated.

One of the most detailed and reasoned submissions came from the Construction Industry WSIB Task Force (CIWSIBTF), dated April 11, 2011. We will respond to this particular submission in the paragraphs that follow.

The most glaring omission is that this and other employer submissions on indexation do not confront the “theoretician” of full indexation adjustments that is Professor Paul Weiler. How can this issue be addressed on a pragmatic level only? How can it be addressed without considering the theoretical foundation of its proponent in 1980? Was Weiler wrong? Has the situation changed today to invalidate his views? If so how? What would be the threshold for disregarding Weiler’s recommendation? None of this is addressed, which would be expected in order to adequately address the question for a serious policy review. It would be tragic to draw conclusions on this issue without confronting the theory behind full cost of living adjustments.

The submission seems to suggest many injured workers return to work at no wage loss and yet still receive workers’ compensation. They provide the example of workers receiving pensions under the pre-1990 system but no credible statistic citation is provided (“some estimate 80%” is the only quote provided, without citation). The old pension system was based on “rough justice” and did not accurately reflect wage-losses. In fact, it was designed to compensate injured workers for the permanent impairment they suffered due to injury, which is not the same as wage replacement.

The submission also takes issue with the current “lock in” of Loss of Earnings benefits after 72 months. This feature was also suggested by Professor Weiler to assure some finality of decisions to injured workers, in answer to Professor Ison’s concern about the “sentence of perpetual probation” due to constant reviews of benefits. As noted above,

simply because it is “theoretically” possible for an injured worker to return to a higher wage after the lock in, this is not possible in practice. If someone has not worked for 6 years and has a permanent disability, there is little hope for returning to the labour force.

What is not addressed is how many injured workers are under-compensated due to “deeming.” Many of the injured workers who presented at the hearings have significant, under compensated wage losses because they are “deemed to be working” at jobs they do not have. Why is this other side of the coin not explored by the CIWSIBTF or other employer groups?

The CIWSIBTF should read the submission of Antonio Mauro, who was injured in construction in 1972 and belongs to the old pension system. Given the chronology, most of the old Act pensioners still alive today would be of Old Age Pension age. On page 2 of his submission he says that his CPP old age pension today is \$116.87 a month, instead of \$840 he should receive if he had been working and making contributions for all these years. Has the CIWSIBTF looked at this aspect of “under-compensation”? Or are they painting a picture of “fat cat” injured workers only to cover up their willingness to reduce benefits de-facto through inflation?

If the CIWSIBTF had consulted the 1980 Weiler report, it might have appreciated that the proposal for full indexation was not based on whether the injured worker had a wage loss or not. It was based on a more general principle: once we decide what the compensation rate is, it is unfair and unjust to take it back through inflation and it ultimately benefits business by default. We provided the full quote on page 34 of the IWC brief.

The submission admits that it is difficult to advance their argument for different inflation protection for different groups of injured workers (p. 37). However they call the Mike Harris “modified Friedland formula” a “rough mechanism” that calibrates the tension between equity and the unfunded liability.” We beg to differ. The modified Friedland formula is rough against injured workers, but no “compromise” at all. Workers paid, and employer premiums were lowered at the expense of the unfunded liability. Again, we should remember that Prof. Weiler proposed full cost of living adjustments at a time when the WCB’s funding level was less than it is today! No wonder he is “forgotten” today.

The proposal for a “means test” to allow cost of living adjustments only to some injured workers is mean. It reduces the function of the Board to that of a social assistance or charitable organisation. Without wanting to be pedantic, we would recommend that in addition to reading the 1980 Weiler Report, the CIWSIBTF also read the Meredith Final Report, with particular attention to the statement that the true purpose of our compensation system is to prevent the workman from becoming a burden on his family, his neighbours or the community at large.

Conclusion

We thank you for the opportunity to make these additional submissions. We also appreciate the recent announcement extending the time for further submissions. The recent submission by the WSIB calls for analysis and a response, but that would not have been possible in the Funding Review's original time frame.

We look forward to a continuing dialogue on these issues.

All of which is respectfully submitted this 15th day of June, 2011.

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