

Injured Workers' Consultants Community Legal Clinic

Supplementary Submission to the WSIB Funding Review

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Thank you very much for continuing the dialogue on the funding review issues. We have had the opportunity to discuss your recent presentation with our colleagues in the Ontario Network of Injured Workers' Groups (ONIWG), the Ontario Federation of Labour (OFL) and the Industrial Accident Victims Group of Ontario (IAVGO) and we endorse the positions they present in their final submissions. In addition, we offer the following thoughts:

1. Current Conditions at the WSIB

Your proposals, as a package, assume that the WCB/WSIB management will not use administrative cuts to deny entitlements and dignity to injured workers. Unfortunately, this is already happening via the KPMG Value for Money audit of the WSIB claims adjudication (endorsed by WSIB management) and other policy changes (e.g. expansion of the experience rating window) already undertaken after your review began.

The injured worker community will have little faith in any potentially positive proposals you advance if the WSIB is and is seen as being in an "anti-injured worker" cutback mode. This may not be in your mandate to deal with, but will affect the perception of your report.

When Bill 135 was introduced the Government stated that the UFL would not be eliminated on the backs of injured workers:

Mr. Peter Tabuns: So if, in fact, it's found that there are financial problems with the WSIA, the government will ensure that the changes that are needed are not going to be done on the backs of workers. Is that correct?

*Ms. Leeanna Pendergast: That's correct, Mr. Tabuns. Full funding will not be achieved on the backs of injured workers.
(Hansard, December 6, 2010, Standing Committee On Finance And Economic Affairs)*

This promise has disappeared, as you have heard at your briefing session. The WSIB/WCB should be focussing on the people for which it was created to serve, the injured workers. Steve Mantis mentioned the under-compensation of many permanently disabled injured workers. Laurie Hardwick mentioned the issue of "deeming" injured workers able to do jobs they are not able to do.

Deeming additionally blames the worker for their unemployed state without recognition that the main problem is the unwillingness of employers to hire injured workers. The existence of experience rating aggravates this situation by establishing that workers with permanent impairment are ongoing risk factors.

As a legal clinic, we are receiving increasing numbers of calls from injured workers who had received a determination that they would be entitled to full benefits to age 65 but who are now receiving calls from the WSIB/WCB to say that it was a “mistake” and the worker will now need to go to some upgrading. At the end of the upgrading these workers will be deemed to have employment income which most will not have. Most of the workers receiving these calls are in their 50’s and even 60’s and are experiencing high levels of anxiety about their pending benefit cut.

Instead of focussing on improvement, the current administration is focussing of administrative cutbacks that violate the careful balance you have sought to bring to us. In your final report, we urge you to avoid subtlety and speak clearly about what you have heard and what is required to achieve fairness under the legislation.

2. **Funding occupational disease claims**

We support the principle that occupational disease should be funded the same as other compensable disabilities and a separate fund should not be established. We do not agree that occupational diseases are unpredictable. The timing of when society will acknowledge an illness as an occupational disease is somewhat unpredictable because of the huge financial resources that industrial users of hazardous material will invest in trying to create doubt about the causal connection between their industrial practices and the health and well being of their employees and the general population. We submit that the current debates over the safety of asbestos and the existence of ‘man-made’ climate changes are examples of this phenomenon.

We are concerned that your proposal for allocation of costs of “newly recognized diseases” may open an adjudicative ‘can of worms’ that becomes time consuming, administratively costly and may have unintended consequences for injured workers. Do you mean only diseases newly added to Schedule 3 or 4? Or would it include conditions newly recognized in WSIB policy or guidelines? What if the disease had already been accepted as compensable in practice and the policy or schedule is simply a codification of practice? What about conditions recognized under different names. Psychogenic pain disorder was recognized as fibromyalgia in 1986 and as chronic pain in 1987. And what is the distinction between “diseases” and other types of occupational injury? For example, the list of occupational diseases in Schedule 3 of the *Workplace Safety and Insurance Act* includes conditions such as bursitis, tenosynovitis and inflicted blisters, conditions that might also be considered as repetitive movement injuries.

If there is a financial incentive for an employer to have a disease claim recognized as a ‘newly recognized disease’ when it has been determined to be a ‘known disease’ by the

Board's initial adjudication, employers will object to entitlement and once again injured workers will suffer because of financial incentives found in the assessment setting process.

3. **Indexation of partially disabled workers**

We appreciate your analysis of the importance of fairness and agree that it is unjust to deny full cost of living adjustments to partially disabled workers. Cost of living adjustments are not an increase but simply an adjustment to preserve the value of the award that has been made by the WSIB. Employers in our discussion groups still treated cost of living adjustments as a benefit "increase." We urge you to stress this point to them more clearly.

By denying full retroactivity you are sending, with respect, a message you may not intend. You have suggested that it is not fair for the government to grant benefits without proper funding for it. However, as you know, that is not why we are in the current debate. The Board has acknowledged that the unfunded liability would already have been eliminated if the employer assessment rates had not been slashed in the 1990s. The current debate was caused by the opposite process. WCB Chair Glen Wright's Board of Directors reduced employer assessment rates dramatically, to the applause of the business sector, and left it up to government to deal with the political problem of the UFL. This is why the Funding Review was called for. This also explains much of the worker side positions on all issues before the Review.

Whether a mistake was made by the government or the WSIB, the implication of endorsing the lack of full retroactivity will be that injured workers will be punished and employers will be rewarded for this so called 'mistake'.

We share with you the view that fairness requires full indexing. However, with that premise injured workers cannot condone a solution that is not fully retroactive, restoring the base amount and paying the arrears to those denied full cost of living adjustment. The employers of Ontario who pay for the workers' compensation system were not mere bystanders during the de-indexation of injured workers benefits. The employer community not only successfully campaigned for the elimination of full indexation but also successfully campaigned for the massive reductions in the assessment rates they have paid since full indexing was eliminated for partially disabled workers over the past 17 years. Employers continue to enjoy significantly reduced assessment rates today only because the majority of injured workers with permanent disabilities continue to receive compensation that is significantly reduced from the value of the original award. Without fully restoring the base amount, these injured workers will continue to be denied the real value of their compensation while the WCB/WSIB improves its funding ratio and even when this funding ratio reaches the comfort zone you have described – at which point employer assessments will be stable at well below the rates they paid before de-indexation.

As set out in the submissions of ONIWG and the OFL, a perfect adjustment for past injustice in each claim may be complicated but a good and fair adjustment is simple and affordable without a significant impact on the future rates set out in your model.

4. Rate Setting, Rate Group and Employer Incentives

Rate Setting

We agree that the rate setting process, so far seen as an “employer issue,” should be seen as an issue for the entire system. A special area of need is proper involvement of injured workers’ groups, particularly the ONIWG. As you heard, Steve Mantis and Karl Crevar did not have any funding to attend the session. You were very wise to facilitate the involvement of ONIWG in the Funding Review, but will the management of WSIB be as understanding for the rate setting process? We have not seen this yet, despite decades of submissions from the injured worker community expressing concerns about the assessment rates and the implications for injured workers’ benefits. We ask you to be more specific in your recommendations.

However, we are unable to agree with the proposal for enhancing the role of the Chief Actuary. It has been the experience of injured workers since 1984 that the hazards of experience rating and the ‘unfunded liability crisis’ with the consequential downward pressure on benefits has resulted from a lack of control or direction of the actuaries in the WCB with the result that they have behaved the way that they do in the private insurance industry. Actuaries have not demonstrated to us an appreciation of the basic principles of workers’ compensation, the differences from the private insurance model and they appear to treat all benefits as costs that may require downward adjustment to meet financial targets. Actuaries have not demonstrated to us an appreciation of the impact on injured workers of their models for funding the system. Despite our concerns about the adverse impact of experience rating, actuaries have not demonstrated an appreciation that how they allocate the system costs between employers has a serious impact on injured workers and the ability of the system to provide compensation.

We begin with the fundamental principle that workers’ compensation should not be funded on the same basis as the private insurance industry. This was the funding principle established by Meredith. He proposed that the system should be required to collect sufficient funds to pay the cost of claims to be paid out in the year and to maintain a reserve fund that is adequate for contingencies. In a system funded on Meredith’s principles, the role of actuaries would be limited to calculating the cost of claims to be paid in the coming year.

We note that you are considering recommending that employers receive a plain-language explanation of their WSIB/WCB bill in the interest of making the rate setting more transparent. It may be better for the employers to receive a bill that simply indicates their rate only. It has been our experience to date that efforts to break it down into component parts only inflames resentment among employers and this is the very thing you are trying to reduce.

Rate group and Assigning Costs

We reassert our position in favour of the “modified flat rate” formula modelled after rates for OHIP, Employer Health Tax, Employment Insurance and the Canada Pension Plan. The flat rate is used in the majority of jurisdictions around the world for workers’ compensation systems or universal disability systems which incorporate workers’ compensation. Schedule II employers should be brought into the flat rate system.

We appreciate that an immediate transition from 154 rate groups to one rate group would be difficult. However, a transition to 3 or 4 rate groups could be made without significant disruption and with significant reduction in administrative time and cost dedicated to administering the current rate setting process.

We disagree with the proposal to shift health care costs to the OHIP system for the reasons enumerated by Nick DeCarlo at the meeting of November 3, 2011. Preserving the elements of the historical compromise is important in moving forward to the second century of life for the WCB/WSIB.

At present, the underreporting in our workers’ compensation system creates an extra burden on OHIP. Furthermore, while deductions are made for contributions to EI, CPP, OHIP and union dues, etc., in calculating the injured worker’s net pay for the purpose of calculating compensation payments, those contributions are not then made to EI, CPP, OHIP, and unions. This is a significant loss to these programs and a significant loss to the worker. Despite the wording of the *WSIA* which provides that “earnings” includes any remuneration capable of being estimated in terms of money, it is the policy of the WSIB to provide no compensation for the loss of EI, CPP, medical/dental/life/disability insurance etc. in calculating the compensation for loss of earnings.

When Paul Weiler studied the system, it was his view that payments for a number of these should continue since they actually represent an important part of the workers pay package.

Ideally, the direction for reform in this area would be for workers' compensation to maintain, uninterrupted, the protection of the injured worker under CPP and UIC, notwithstanding a period of absence from work due to the disability...In my view, the Act should be revised to empower the Board to work out further arrangements with Ottawa to fully implement this principle of continued protection of the injured worker. On that footing, appropriate adjustments can and should be made (Weiler, Reshaping Workers' Compensation, p. 43,44)

In the case of OHIP, being discussed here, it makes no sense to have OHIP cover those costs when contributions are not being made. Additionally as confirmed in our recent meeting with you, we are opposed to the WSIB/WCB paying for preferential treatment for injured workers. We are not at all opposed for them paying for services not covered under OHIP such as acupuncture, massage, and even now, physiotherapy - that is an important benefit. However we are opposed, as Canadians, to payments made to give injured

workers priority access to treatment and services which are provided by OHIP. This contributes to both a two-tier health care system and to increasing privatization of our public healthcare system.

Employer Incentives:

We appreciate that you heard and understood the injured workers who made presentations about their experiences after their injury. We believe our proposal to get rid of experience rating is the only way to eliminate the pressure to hide claims and force premature return to work.

The Workers' Compensation Board began experience rating as an experiment in 1984. The WCB commissioned an appropriate study of the experiment in 1990 and the abuses were noted. It was recommended that the program not be expanded unless these problems were corrected. Nothing was done. The WCB could not stop the expansion of experience rating, despite its operating cost of approximately \$500 million a year, because it so lucrative for some employers and their consultants that the employer pressure to continue and expand the program was relentless and unstoppable. For example, despite the mandate of your commission, the WSIB/WCB administration recently attempted to increase the experience rating window to six years. Only the worker side objection to the Minister of Labour prevented this, but they have made it very clear to us that 6 years is still on their implementation list. The July 2011 expansion of the experience rating window from 3 to 4 years was done by the WSIB management after setting up your review to advise it on that very question.

We appreciate that you have attempted to address such concerns by reference to a sunset clause and the need to prevent abuses. We have practical concerns with the "controlled experiment" idea. People who are bullied do not volunteer to speak up. People in vulnerable positions (non-union, newly hired, in precarious financial situations, etc.) will endure employer abuses. Those in unionized environments also feel vulnerable. How will the controlled experiment be a real experiment and not a cover-up? What will be different this time to enable the WSIB to stop experience rating if the results of the experiment continue to disclose harmful impacts on injured workers and negligible change in workplace safety practices? The information on the record of this Funding Review is sufficient to warrant a complete moratorium on Experience Rating as we know it – any adjustment to employer assessment based on claims cost or claims frequency data - until a true experiment is designed and assessed.

By the way, it is very important that programs to encourage workplace health and safety conditions and practices are quite separate from those to encourage return to work and hiring of injured workers. Motivation for improved health and safety, and motivation for quality hiring of injured workers needs to be achieved in separate programs specifically geared to those purposes, sometimes in different agencies. Having the two objectives mixed in the same programme gives too much room for employer 'gaming' as we have seen in experience rating.

5. Funding:

Please correct the note on page 5 that says premium rates are “relatively high and rising.” We appreciate the limits of a power point presentation, but note that you agreed that comparing average assessment rates is not fair. First of all, a comparison on an industry by industry basis, as provided in our earlier submission, shows that Ontario’s rates are in the ‘middle of the road.’ Also, it is not fair given the large difference in the level of coverage of the workforce in Ontario as compared to other provinces. Please ensure that this is fairly reported in the final report.

As noted in our earlier submission, as suggested by Justice Meredith, we submit that the word “assessment” should be used instead of “premium,” which is too evocative of the private insurance model:

“I do not like the term "premium" which is used in the Association's draft bill to designate the rate at which the employer is to be assessed. I prefer the terminology which I have used. What is levied by the Board is not a premium but an assessment.” (Final Report, p. xiii)

We welcome your commitment to provide figures to show how the UFL would be affected if full coverage of Ontario employers and workers was in effect. As noted, you have the research capability to do so. In addition, we hope that you will comment on the importance of this ‘lever’ to address the UFL as originally set out in the Auditor General’s report. It is notably absent from the mandate given to you by the WSIB.

We note that we have not seen any analysis of the impact of the statutory maximum assessable earning level on the revenue of the WSIB. Recently, Manitoba removed the statutory maximum on earnings covered by the WCB. Although there is a limit on the maximum assessable earnings for calculation of employer assessments, for 2012 that maximum is \$104,000. In Ontario, the maximum earnings is about \$80,000. What would eliminating the ceiling on earnings covered do to the WSIB’s revenue stream?

We are concerned that the CPP “steady state” funding model was unfairly dismissed. The CPP is not just a retirement benefit plan, it is a disability benefit and a death and survivor benefit program. You mentioned that if the “steady state” model of funding used for the CPP was adapted for the workers compensation system, it would call for a 100% level of funding. This does not accord with our analysis and we would like to see the analysis that your review has done about adapting the steady state model to workers compensation.

We agree that the concept of a “corridor system” is a useful model for developing a funding policy that is not tied to a concept as volatile as the unfunded liability. There should be certain degree of flexibility where assessment rates and benefits are not under threat by the unpredictability of economic fluctuations.

Where we disagree is the appropriate level for a “comfort zone.” We note that no rationale has been presented to support the choice of 90% to 110% funding level for a comfort zone, as opposed to 50%, 60%, 70% or 80%.

Similarly, the definition of “tipping point” needs more scrutiny. We have not seen the scenarios presented by the Board and therefore cannot comment. However, in almost 100 years, the WCB/WSIB has never “tipped.” It has survived the Great Depression, two world wars, numerous recessions and it never went bankrupt. The historical data on funding levels since 1974 presented in this review indicates that the WCB/WSIB has never been more than 80% funded. Yet during this same time it has survived several serious recessions and still functioned well at 50% to 80% funding without encountering a tipping point. In fact, major reforms were made when the funding ratio was lower than today and the Board not only survived, but actually improved its funding position (e.g. COL adjustments in 1985).

The concepts of the corridor model and the tipping point are useful if they are seen as credible, based on solid evidence of what is necessary to achieve funding “sufficiency.” They will not be well received if they are perceived simply as new names for the steps on the road to 100% funding, a private insurance principle that has not yet been justified as appropriate for a public, social agency like the workers compensation board.

We also believe that the historical record of the damage done by the Harris Government which slashed benefits and reduced assessments has not been sufficiently identified in the power point and should be identified in the final report. Many of the members of your audience on Nov. 2 and 3 were part of that process and know only too well who benefitted and who did not as part of that history.

We anticipate that discussion of reforms sought by injured workers will be put off by the WSIB and government until the funding is in the comfort zone. In the proposed model, the workers’ compensation system will not enter into the 90 – 110% funding comfort zone for about 20 years. That is too long for injured workers to wait. As well, with a history of not being able to achieve a funding level above 80% despite the best efforts of the WCB/WSIB and government, it does not seem likely that our workers’ compensation system will ever reach the comfort zone that your report has recommended for WSIB funding.

Conclusion

We thank you for the opportunity to make these additional submissions.

All of which is respectfully submitted this 18th day of November, 2011.

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