Injured Workers' Consultants Community Legal Clinic Submission to the WSIB Funding Review

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Introduction

Injured Workers' Consultants is a community legal clinic funded by Legal Aid Ontario. We are am independent, non-profit organization with a Board of Directors from the injured worker community. We have been representing injured workers, without charge, for more than forty years. Given our long history, we have a wealth of experience in dealing with financial "crises" and we welcome this opportunity to share our comments with the Funding Review.

In this submission, we comment on all six areas of inquiry. Before we turn to those specific comments, however, we wish to make some introductory comments about the review process and the past history of WCB/WSIB funding concerns.

Process Concerns

> "*Disabled people have no bargaining power*" -- *Terence Ison*[1]

For the reasons that follow, we have several concerns with the proposed process of mediation and the harm this process will cause to those to whom the system was designed to benefit – injured workers. We prefer a judicial inquiry which hears and makes decisions based on the true principles of the workers' compensation system – not political mediation.

"Brokerage Politics" Hurts Injured Workers

Professor Terry Ison coined the term "brokerage politics" as a way to describe the process where the interests of injured workers and of the compensation system as a whole are downgraded in a process of political manoeuvring by power brokers. In this system, instead of a judicial inquiry or a royal commission looking at the principles of the system, political accommodations are made by the powerful at the expense of the weak. In this system, the weak ones, i.e. injured workers, always lose.

It is worth quoting from Professor Ison's description of "brokerage politics", which was made in 1981, and became quite foretelling.

> The Traditional Model
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> Government is perceived as reflecting democratic ideals. Political parties offer to the public policy options or value options, and the public preference having been expressed through the electoral process, the government provides leadership in implementing its polities and values. On this model, one might see the responsibilities of government as including the initiation of issues, and processes of fact-finding, analysis and evaluation before decisions."

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[1] Terence G. Ison (February, 1981). *Re Workers Compensation In Ontario; A commentary by Terence G. Ison On the Report Entitled "Reshaping Workers' Compensation in Ontario" By Paul C. Weiler*, submitted to the Ontario Legislative Assembly Standing Committee on Resource Development, Exhibit No. 122.

Brokerage Politics

This model perceives of political parties and consequently of government a being reactive rather than initiating institutions. The demands and pressures of various institutions and interest groups in society are balanced through the processes of elite accommodation or brokerage politics. Since the aim is to balance or accommodate conflicting demands according to the incidence of economic and political power, the processes of government may not include more than minimal amount of independent fact-finding, analysis or evaluation. The long-term significance of what is being done may fade from sight in the face of the perceived need to achieve an accommodation or consensus among major interest groups. If a consensus cannot be reached immediately, it may be coerced by the use of arm-twisting techniques on the weaker of the contesting groups."

The advantages of the first model are its adherence to democratic principles, accuracy in fact-fining before decisions, the proviso of rational analysis to ensure the connection between problems and solutions, and a responsibility for long –term planning."

The disadvantage of the second model is its abandonment of democratic principles, its equation of power and interest, its failure to attach equal weight to the interest of those unable to wield economic or collective power, its propensity to sacrifice future in favour of present interests, and its failure to separate factual enquiry and analysis from political judgement."

The first model requires an independent inquiry into the facts, the second does not. Hence the second model can tend to promote damnation by insinuation. This process of generalized allegation and insinuation can only be mitigated by analytical and discriminating inquiries."

Attempts can be made to justify the second model by resorting to contemporary jargon, such as pluralism or pragmatism, and this is not entirely illegitimate. Adherence to the first model would require constant rejection of the demand of powerful groups. Hence any Minister or government adhering to this model could soon be replaced."

There is, however, a more substantial justification for the second model in relation to some government functions, particularly those that relate to the operation of a market, including the labour market. Thus in labour relations in particular, there would be an aggravation of friction and conflict if the decisions of government did not reflect to a large extent, the balance of bargaining power between organized management and organised labour."

Workers' compensation is, however, entirely another matter. Disabled people have no bargaining power and this economic and political handicap does not disappear, although it may be ameliorated, when they form into organisations of the disabled. Nor can this problem be solved by perceiving of the trade union movement as a bargaining agent for disabled workers. Trade unions are themselves poetical organisations whose priorities are partly determined in ways that are a microcosm of government itself. Of course unions take a stand in support of disabled workers, but it is still in the context of structural weakness. The bargaining power of a trade union derived very largely from the power to strike, but that mode of asserting power is not available in relation to workers' compensation. On the political scene, the trade union movement has some influence, but it does not have the peer group affiliations, professional and status interactions, and the full range of lobbying technique that are available to the corporate world."

Disabled people will, therefore, never be treated as citizens with equal status and equal rights or in any other way of which we can be proud, if their destiny depend upon the outcome of brokerage politics."

Sir William Meredith did not express himself in exactly these terms, but he may have had similar thought in mind when he concluded that:

> In these days of social and industrial unrest it is, in my judgement, of the gravest importance to the community that every proved injustice to any section or class resulting from bad or unfair laws should be promptly removed by the enactment of remedial legislation and I do not doubt that the country whose Legislature is quick to discern and prompt to remove injustice will enjoy, and that deservedly, the blessing of industrial peace and freedom from social unrest. Half measures which mitigate but do not remove injustice are, in my judgement, to be avoided. That the existing law inflicts injustice to the workingman is admitted by all. From that injustice he has long suffered, and it would, in my judgement, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but of what is the least he can be put off with; or if the Legislature were to be deterred from passing a law designed to do full justice owing to the groundless fears that disaster to the industries of the Province would follow from the enactment of it.[2]

Professor Ison was proven right: Our past experience with "brokerage politics"

In our clinic's long history, we have experienced the negative effects of brokerage politics before. We sincerely hope this experience will not be repeated with the Funding Review. The injured workers' movement may not yield a lot of political weight, but it has been active, is knowledgeable, and knows its history and the history of workers' compensation since its inception. Our clinic holds history classes where injured workers study the main "textbooks" of our system, from the Meredith reports and the transcripts from his hearings, the various Royal commissions (McGillivry, Roach, etc.) the Wyatt report, the Weiler report, and Ison's commentary, the Jackson reports, to the recent Auditor General of Ontario report.

At our clinic, we also remember and study what happened to injured workers every time the "unfunded liability" becomes a political issue and a "solution" or a "consensus" is sought. In short, injured workers lose. Take, for example, Bill 165, which was introduced in 1994. The Bill introduced the Friedland formula ostensibly in order to eliminate the unfunded liability. We opposed it, even if a labour/management advisory committee (which excluded injured workers) had agreed to it (initially). The imposed sacrifice was supposed to get rid of the unfunded liability once for all.

The management side of the joint advisory committee broke ranks and reneged on Bill 165. Many of the same advisors were part of the new Harris Government and its review of compensation. This process produced two reports by Minister without Portfolio Cam Jackson and Bill 99, which produced new major cutbacks in the name of eliminating the unfunded liability. At the same time, revealing the hypocrisy of the concern about the unfunded liability, employer assessments were reduced by 29%, thus preparing the ground for the current "crisis". The "unfunded liability was used as a political hammer against injured workers.

[2] *Ibid.*, at pp.1-4.

The UFL: The Same Old Manufactured Crisis

It's the same old song: manufacture a crisis and then cut benefits and services to injured workers. While this may seem like a harsh statement, it is a product of our direct experience in the last thirty years, during which time our clinic has interacted with our workers' compensation system and the series of governments and Ministers of Labour who have overseen it.

An overview of this, with a particularly close look at the "Jackson Report" and Bill 99 noted above, is detailed in Dave Wilken's comprehensive article: *Manufacturing Crisis in Workers' Compensation*[3] Wilken points out:

> *In Ontario, a small army of business lobbyists, lawyers and consultants has been labouring for years to create the impression that the Workers' Compensation Board (WCB) is out of control. They have alleged that the WCB's rising debt and increasing assessment rates are symptoms of past irresponsibility on the part of politicians eager to reap the immediate political rewards of increased benefits without considering the long-term financial cost. The familiar prescription is to slash entitlements and hack away at benefits.* [p. 124] . . . . *The first line of attack against injured workers has been the unfunded liability.* [p. 129]

Wilken's paper contains details of both the cutbacks which injured workers have endured under Bill 99 and the explanation of the false crisis of the *unfunded liability.* The false nature of the crisis is highlighted by the parallel action at the time of Bill 99 to drastically reduce the rates paid by employers. With one hand, they took from injured workers, purportedly in the name of the unfunded liability, while the other hand gave to employers. This duplicity is detailed elsewhere in our submission.

Before Bill 99, when the Wyatt Company raised the spectre of the unfunded liability in its report of June 1978, it was anticipated by the Board initially that rates should increase, however they were reduced.[4] While the government did not cut back on benefits at the time, the Board embarked on a series of reviews, and it is worth noting that for the first time, a private company was used to comment on the overall compensation system and it put forward concepts that undermined the public, remedial nature of our system.[5]

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[3] Dave Wilken (1998). "*Manufacturing Crisis in Workers' Compensation,"* in *Journal of Law and Social Policy,* Vol. 13, 1998. (pp 124 – 165) Attached to this submission with permission of the author.

[4] As noted in the AIWG submission.

[5] *The Wyatt Report on the Financial Structure of the Workmen's Compensation Board and an Assessment of the Actuarial Deficit.* May 31st, 1978. This report was astonishing in its stigmatic notions suggesting that injured workers would inevitably abuse the system. For example: "It must be recognised that each person covered by any insurance system possesses the power to precipitate the event against which insurance is provided and to intensify his loss from the occurrence of the event. Utilization of this power is a moral hazard characterized by the failure to uphold accepted community standards, the propensity to submit fraudulent claims, to exaggerate legitimate claims, to suppress, distort, or misrepresent claims information, and by the failure to maintain self-respect in times of adversity."

The Wyatt report led to "The Grey Paper" formally known as *Current Concerns in Workmen's Compensation,* issued by the Chair of the Board, Michael Starr on December 20th, 1979 and ultimately led to commissioning Prof. Paul Weiler to do his comprehensive study of the system under the new Chair, Dr. Robert Elgie. The injured worker community successfully argued strenuously against the implementation of the key recommendations of Prof. Weiler which introduced the idea of deeming. To put forward these arguments thousands attended the Standing Committee on Resources Development on June 1st, 1983. That was one time, that injured workers clearly prevented the unfunded liability from being paid by reducing their benefits.

The Wyatt Company sounded the alarm bells again in its report of April 17th, 1984. Once again threats to injured worker benefits permeated the discourse. In February 1984, *Canadian Business* carried an article:

> The coming crisis in workers' compensation: as employers yell about soaring assessments, provincial governments are sweetening the workers' compensation pot. Neither side has noticed that some of our biggest plans are already badly under funded.[6]

Citing the situation in Ontario in particular, the Winnipeg Free Press led its article with: "Shortfalls bring fear of compensation cuts to injured workers"[7]

Submissions were made to the government by the Association of Injured Worker Groups (AIWG) and by the Union of Injured Workers (UIW), the lead organisations representing the views of injured workers and legal clinics at that time.

The AIWG noted that if the Board had maintained the rates since 1978 when the unfunded liability alarm was raised "we wouldn't be in this situation." [8] Sounds familiar to the Auditor General's comment that had premium rates been maintained at 1996 levels the UFL would have been paid off by 2006.[9]

The UIW concluded its submission with the following words:

> In conclusion, the UIW believes that the current unfunded liability is another manifestation of the same administrative incompetence which has plagued our members for years. Injured workers will not be the scapegoats for this incompetence by seeing their benefits reduced. Rather the Government and the new administration at the Board must ensure that employers – and particularly those who have escaped their responsibilities—be held accountable from (sic) the continued solvency of the system.[10] (Emphasis in original)

The government pushed ahead with the major revisions of the compensation system and the introduction of deeming. On January 2nd, 1990, Bill 162 came into force over the significant protests of the injured worker community.

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[6] Margaret Wente, in *Canadian Business* February 1984. p. 46
[7] Winnipeg Free Press, July 18th, 1984 p. 28 (attached).
[8] AIWG letter to the premier, July 1st, 1984. Archives IWC.
[9] As reported in the Green Paper at p.13.
[10] *Financing*, Union of Injured Workers, undated submission to the Standing Committee on Resources Development. approx. 1984. IWC Archives.

In 1994, the WCB found itself in a situation very similar to the one it faces today -- wherein an inadequate cash flow required the Board to dip into its investment fund by $400 million in each of the past three years. It responded with a proposal, *Financial Improvement Package.* (FIP) dated January 19th, 1995. The package noted the cash flow problem including reference to its negative impact on the unfunded liability. It was anticipated that these proposals would significantly reduce the unfunded liability.[11]The proposals contained massive administratively generated cutbacks to injured workers: including for example:

- change net earning calculations—save $26 million/year
- change earnings basis for seasonal and casual workers—save $23 million/year
- reduce payment of local travel expenses—save $13 million/year
- reduce interest on NEL benefits – save $5.9 million/year
- reduce workers eligible for certain supplements—save $7 million/year

Injured Workers Consultants Community Legal Clinic joined with other legal clinics and the Ontario Network of Injured Worker Groups to oppose this move to make injured workers pay for the finances of the Board. The Toronto Star published an op-ed piece from our clinic.[12]

ONIWG wrote to the Premier in protest in a letter of March 6th, 1994[13] and included an analysis of the FIP noting:

> Right now we have a new administration at the Board (Copeland being the leader) that has absolutely no respect to the history of the WCB and the injured workers. This new administration is there to just "balance the books", with no respect to its role of serving the injured workers. It has no respect to the spirit of the legislation and how it has been developed through the years. It has no respect to past practices of the Board. It is there to just balance the books. And how would they achieve that, without the reduction of workplace accidents? Without finding new ways to fund the system? Without making the employers pay whatever is necessary to compensate injury workers? To them it is very simple: pay less to injured workers.[14]

To add insult to injury, these cuts to injured workers meant that workers were being asked to pay for massive handouts to employers under the experience rating program. Net transfers for 1990 to 1994 from the WCB's investment fund to cover the shortfall which provoked the FIP amounted to $1.4 billion. In the meantime, rebates to employers during the same period totalled $1.75 billion.[15]

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[11] Please see the attached document: Graph #2 Unfunded Liability Projections, Reform and Financial Improvement Scenarios. This is from the Financial *Improvements Package, January 19th, 1995* which was put out for consultation and contains great detail on the financial situation and proposed remedies.
[12]John McKinnon "Injured workers bear burden of board's mythical debt." Toronto Star, September 7th, 1994 (attached).
[13] Available upon request from library of IWC
[14] FIP: A package to cut down workers' benefits and balance the books, ONIWG. March 1994 (available upon request from the IWC library).
[15] WCB Annual reports; Wilken, *supra* note 3 at p. 155. See also p. 152.

It is well to note here, that these rebates are provided to employers with no questions asked, in a system which is highly criticised as missing its objectives on the one hand and hurting injured workers on the other. Injured workers pay in multiple ways.

Each time financial bell was rung, the imposed sacrifice on injured workers was supposed to get rid of the UFL once and for all.

It was nevertheless a stunning blow, to see the News Release headline accompanying the release of the Auditor General's Report of December 2009[16], which this Funding Review seeks to address:

WSIB'S UNFUNDED LIABILITY COULD THREATEN FUTURE BENEFITS: AUDITOR GENERAL

Perhaps we should be used to this by now, but since it is so contrary to the purposes of the compensation system, we always hope for the best. The Funding Review is of course an opportunity to get to the bottom of the funding issues and, we sincerely hope, to solve them for the next 100 years.

"Tired of being a kicked like a political football"

Once you understand this history, you can appreciate injured workers' sense of betrayal. Karl Crevar summed it up very well when he presented to the Funding Review on behalf of the Ontario Network of Injured Workers' Groups on April 5, 2011. To paraphrase, he said "we are tired of being kicked around like a political football". The same concept has been raised at injured workers' meetings across Ontario. There is a real fear that the past is about to be repeated with the weakest ones, the injured workers, losing once again.

The current debate about the unfunded liability has the same characteristics of the old "political football". The cuts injured workers were forced to make are not sufficiently acknowledged. The rate cuts employers received in the past are not sufficiently acknowledged. Current benefit rates are exaggerated. Current employer rates are exaggerated (by not accounting for the coverage rate). Meanwhile, benefit cuts are happening as we speak.

Benefit cuts are already happening

Even without legislative benefit reductions, the financial "crisis" mentality has already harmed injured workers. As a legal clinic with a more than forty year history of representing injured workers, we are already seeing the effects of the financial "crisis" in our everyday work. Concern over Board finances has permeated to all levels of decision makers, and cost cutting has become a major focus. The clearest example of these cutbacks comes from the top, the Minister of Labour. The Minister promised that WSIB benefits would not be cut, and then turned around and approved a meager 0.5% cost of

[16] Office of the Auditor General, News Release, December 7th, 2009

living adjustment this year.[17] The cost of living went up 2.9% over the past year according to the CPI, so an adjustment of 0.5% is a cut to injured workers' benefits.

Cutbacks are also evident in recent Board policy. In December 2010, the Board introduced new interim "work reintegration" policies as part of its reform of labour market re-entry. Many aspects of the policies have positive intentions, but unfortunately, this is tempered by the overriding focus on cost containment. Cost concerns are evident in, for example, the three year total plan limit for all workers who need retraining, a one year time limit on English as a second language training, and a $10, 000 limit on any private college, even though the policy explicitly recognizes that this limit will be insufficient for some programs. It should be noted that the previous LMR policies had no time limits or caps; injured workers received what they needed to be retrained. A review of the new policies shows that the Board is tightening its belt on even the little things, like travel expenses.

One of our biggest concerns is the new focus on increased deeming. Deeming occurs when the Board cuts an injured worker's benefits to the amount the Board deems (or determines) he or she should be able to earn in suitable employment, regardless of whether or not the worker has actually obtained that job. The Board has managed to expand deeming with its new policy on relocation. Previously, a worker would be deemed if a job was theoretically available in her local labour market. Under the new policy, a worker will be expected to relocate anywhere in the province if there is no job available locally. This means that as long as a job is theoretically suitable somewhere in Ontario, a worker will be deemed to be employed. This represents a significant potential cutback on benefits. For workers who do relocate, there is no comprehensive coverage of expenses beyond perhaps, the cost of a moving truck. Family ties, housing costs, and transportation needs are irrelevant.

The preoccupation with the poor Board's funding has also extended to appeals. In our office, we have seen a distinct drop in the number of successful decisions at all levels from claims up to the Tribunal. Overall, our clinic's statistics show that 56% of decisions were positive in 2008 and 2009, compared to only 35% in 2010. This represents a drop of 21%. Possibly, this is just a coincidence, or there is some other explanation for this drop, but we don't think so. We think it is a symptom of the chilling effect of cost concerns on WSIB decision-making, the same chilling effect we witnessed when cost concerns last arose in the 1990s.

Professor Ison was right. The system has lost its sense of purpose: instead of being remedial legislation to deal with injured workers in a just way, it has become a system concerned with employer finances. It has been led by "brokerage politics" – a system where the weakest always lose. And injured workers have lost.

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[17] The Minister of Labour pledged not to cut benefits in the speech he made at Injured Workers' Day, June 1, 2010. This was confirmed by Leeanna Pendergast, MPP: "Full funding will not be achieved on the backs of injured workers." Committee Transcripts: Standing Committee on Finance and Economic Affairs, December 06, 2010, Bill 135, *Helping Ontario Families and Managing Responsibly Act, 2010.*

A "Wise Judge" Hampered by a Restricted Process

Professor Arthurs is an excellent choice for hearing and deciding what the issues are. The information and process that has been given to him, however, produce a number of biases:

1) The Funding Review materials lack a philosophical connection to the Meredith principles.

Instead it seems to promote a view of our compensation system where political mediation itself is a principle, not simply a method. The real purpose of the system is bypassed, as if the Auditor General of Ontario had become the "new Meredith". The Funding Review Green Paper opens with a quote from the Auditor General of Ontario. We will not reproduce this quote, but will note how different it is from the above-quoted final paragraph by Justice Meredith. Meredith set out a "justice" approach. The Auditor General set out a compromise of interests approach based on accounting principles. Accounting principles should follow the justice approach, not precede, or replace, the justice approach in our remedial system for the injured.

The lack of principles is also reflected on page 3 of the Green Paper where the system is called "insurance *for employers and their workers*". The system is for workers and employers equally, it is not for employers followed by the workers they possess. The Green Paper addresses the concept of "public expectations of financial stability" (p. 7), but fails to note the public expectation that injured workers be treated justly. In short, the Green Paper reflects a "lack of principles approach" typical of a financial review. But just as an accountant cannot drive the purpose of an organization, the Funding Review should not look at funding issues as a separate entity from what the principles Justice Meredith set out for the compensation system.

The Green Paper noted that the "Auditor General concluded that UFL constituted a clear contravention of spirit and intent of legislation". With respect, we disagree. It is clear from the tone of his report that the Auditor General has a misguided understanding of the spirit and intent of the legislation. Workers' Compensation was conceived as a system that would always carry an unfunded liability. It is true that present employers were not to be *unduly* burdened with the costs incurred by past employers, but the intention was always that the system would carry some unfunded liability – it was to operate as a pay as you go system, with a cushion for hard times. Eliminating the unfunded liability at this time would certainly be an unfair burden on present employers who would now be forced to pay present, past, and future costs.

It must be noted, too, that the spirit and intent of the legislation was to provide a secure no fault system of benefits to injured workers. In exchange for these benefits, injured workers would give up their future earnings increases, part of their current earnings, and their right to sue. The intent of the legislation is to benefit those injured at work.

2) The Review has favoured employers and employer participation.

Employers have had more access and preparation to the hearings than injured workers. Every Ontario employer received a letter advising of the funding review on September 30, 2110, while injured workers had to lobby to be included. In response, the Board sent some injured workers a letter early this year, while others were sent a measly note on the back of an envelope. This sent the message that injured workers were an “afterthought” and with views that do not really count as much as employers in this review.

It is also notable that there is no injured worker representative on the Funding Review panel.

3) The statistical information the Board provided to the Review and to this debate is biased and misleading.

We will deal with this issue in our brief as it appears in specific sections, like in the employer assessment portion. However, the fact that misleading statistics are being presented skews the debate and affects the “openness to information” that Professor Arthurs is seeking in this review.

4) Universal Coverage has been left out of the Review.

The scope of the inquiry cannot deal with universal coverage. How can there be an impartial discussion on the unfunded liability if one of the principal levers for dealing with it is off limits? How can you compare the rates paid by employers in British Columbia, for example, without considering the employers who are covered by the system? This suggests that political mediation has already happened behind closed doors. Which political lobby did the drafters want to satisfy by putting this issue off the table? Injured workers are asking these questions.
The aforementioned biases and restrictions severely hamper the Funding Review’s ability to truly understand the issues and to make proper recommendations. While we appreciate the Review may have little input into its scope, especially at this stage in the process, we do urge the Review to conduct its own research and draw its own conclusions on the background information provided.

“Paying for the Freight” is Illusory and Does Not Mean Employers Own the System

The discourse on funding issues is hampered by the notion that employers pay for the system. This notion induces many an employer to feel “possessive” about the workers compensation system and the benefits that are provided to injured workers. This notion, however, is illusory. Employers should be reminded that they are saved from lawsuits under the historic compromise. However, they should also be reminded that they do not really pay. They “shift” their costs as a way of doing business, and many notable observers have noted this.

Fred Bancroft, the union representative most active in the original Justice Meredith inquiry, observed that workers were paying for the system by not receiving full wage replacements. It is well known that injured workers do not receive full compensation, even at the initial stage of incapacitation from injury, while at the hospital or recovering at home. The rate of compensation is currently 85% of net wages in Ontario, which is below most other provinces and falls further downward as the system "deems" injured workers capable of earning wages they may not actually earn. In a sense, even initially, workers contribute 15% of their wages to pay for their compensation. As Mr. Bancroft said in 1913, receiving less than full compensation forces injured workers to co-pay for the workers' compensation system.[18]

Justice Meredith noted that employers can shift the cost of compensation. In his final report, he said:

> The burden of which the workman is required to bear he cannot shift upon the shoulders of any one else, but the employer may and no doubt will shift his burden upon the shoulders of the community, or if he has any difficulty in doing that will by reducing the wages of his workmen and compel them to bear part of it"[19]

Professor Paul Weiler also noted that employers can and will shift the cost of their assessments:

> True, it is the employers who are the immediate targets of WCB assessments. They must find the money to pay this bill. However the employers pass the bulk of thee expenditures on to others…Ultimately the incidence of workers' compensation assessments is must be distributed across three groups: the shareholders, the customers, and the employees of the enterprise…In any event, my judgement that the ultimate incidence of worker' compensation costs is borne largely by the active labour force doe not shake my conviction that injured workers are entitled to fully adequate compensation for lost earnings.[20]

Injured workers have lost a lot of ground since Professor Weiler spoke these words. The discourse of the "new WSIB" (post 2009 Auditor General Report) seems to be that employers pay and injured workers receive. There is, of course, the "small matter" of the historic compromise that protected employers from lawsuits. A successful lawsuit could bring unpredictable costs and bankrupt an employer, especially a small employer, Meredith noted. The protection from lawsuits has become an enormously important factor of stability and predictability of rates for employers.

An equally important "small matter" is that employers do not really pay the full cost of the compensation system. It is the labour force and consumers that pay for it in

[18] Taken from the transcripts of the Meredith hearings obtained by Professor Robert Storey, McMaster University.

[19] William Ralph Meredith (1913). <u>*Final Report on Laws Relating to the Liability of Employers.*</u> *Commission 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.* Toronto. King's Printer.

[20] Paul C. Weiler (November, 1980). *Reshaping Workers' Compensation for Ontario*, A report submitted to Robert G. Elgie, MD, Minister of Labour, Queen's Printer for Ontario, 1980 at p.p. 17-18.

substantial ways, as well as the injured workers themselves, who pay with their bodies and minds.

To conclude our introductory comments, we recommend that the Funding Review:

1) State that the funding review must reflect the true (Meredith) nature of the compensation system. A review of financing a system cannot be done without stating what the system should be about.

2) State how much injured workers have already suffered from "imposed sacrifices" in the name of the unfunded liability. An apology should be made to injured workers in this regard, before asking them to contribute to the same debate once again.

3) State that by lowering employer rates the Harris Government contradicted its stated concern about the unfunded liability.

We would welcome a review where a judge or a law professor of the calibre of Professor Arthurs would hold hearings on a broad range of questions and make decisions based on the true purpose of our workers' compensation system. Given our history, we object to resolving issues via political mediation – we have enough evidence to predict the results by now.

<u>The Funding Review Six Key Issues</u>

1. Funding

It is our position that the compensation system should continue to rely on a model of steady state funding. This model has served the Board well for almost a hundred years, and in that time, the Board has always managed to cover its current expenses, even during the Great Depression.

The last major independent review of workers' compensation in Ontario commented on the fiscal soundness of the current funding model. In his 1980 report to the Minister of Labour, Harvard law professor Paul Weiler analyzed the Ontario Board at time when it was about 50% funded. In his view, 50% funding posed no threat to the financial viability of the Board. He further commented that, while some people worry that future economic concerns might make it impossible to meet future obligations to injured workers, this concern was not a reason to increase funding levels:

> We cannot assume that the investment portfolio of even a fully-funded system of workers' compensation would escape unscathed from such economic disasters.[21]

[21] *Ibid.,* at p.75.

As long as the Board is taking in enough money each year to meet the costs of claims for that year, we see no reason why 50% funding should not continue to be the standard.

In the past few years, assessment rates have not kept pace with current costs and the Board has had to sell assets to meet expenses. This is a separate issue. We agree that this should not happen in a relatively stable economic climate. Assessment rates need to cover ongoing costs. That does not mean, however, that the Board cannot continue to carry an unfunded liability. As long as the Board has enough cash on hand to cover current costs, with a cushion available in case of tough economic times (like a depression, for instance) or unexpected costs (like a disease cluster), then that is sufficient.

Not a Private Insurance Company

The Compensation Board is not a private insurance company and does not need to be funded as such. Private insurance companies are required to be fully funded to protect beneficiaries in case they cease to operate, through insolvency or wind up. This is not the case for the Board. Employers are statutorily obligated to pay assessments to the Board, and as a public agency, it carries no risk of going out of business. The arguments for full funding simply do not apply.

The Board is more akin to the Canada Pension Plan than it is to a private insurer. After the 2007 review of the CPP, it was decided that CPP should move from a pay as you go to a system of partial funding. The report contrasted the CPP with private pension plans, which need to be fully funded to protect promised benefits in case of employer insolvency.[22] The report noted that as a public plan this risk simply did not apply to the CPP.

The report went on to note that a partially funded system was the best option. Moving from pay as you go to full funding, the report found, would be unfair to some generations who would be forced to pay higher contributions to cover both their own benefits and the past unfunded liability of current retirees.[23] The report concluded that a more fair solution was to increase the funding ratio to 25% (it was about 15% funded in 2007). This was to be done over a long period of time with a target date of 2030.

The CPP, a comparable public body, is considered financially stable with 25% funding – less than half of what the WSIB has in the bank now. This further supports that the WSIB is not in a "funding crisis". By the Board's own admission, even if it did not collect another dollar from Ontario employers, it has enough money available to pay its costs for the next 25 years:

> Even today, the system is not in crisis. From the figures I've seen, the WSIB is financially able to meet its obligations as far into the future as one can reasonably see, and that means for at least a quarter-century or more.[24]

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[22] *Optimal Funding of the Canada Pension Plan* (April 2007). Actuarial Study No. 6, Office of the Chief Actuary, p.11 http://www.osfi-sif.gc.ca/app/DocRepository/1/eng/oca/studies/Optimal_Funding_CPP_e.pdf
[23] *Ibid*., at p.21.
[24] David Marshall deputation to the Standing Committee on Public Accounts, *Hansard*, February 24, 2010.

Critics may point out that the CPP differs from the Board in that its future benefit levels are more certain and easier to predict, especially considering the possibility of occupational disease clusters. It is true that CPP future costs are more certain, and that is why we suggest that the WSIB's funding ratio be 50%, double the amount deemed adequate for the CPP.

The costs of full funding

Moving to a fully funded system could have a number of negative affects for employers and the Ontario economy. As Wegenast and Weiler pointed out, a fully funded system takes money out of circulation; instead of leaving it in the hands of employers to reinvest in their businesses, it goes into the Board's investment coffers.[25] As noted earlier, moving from a system of partial to full funding could present a large burden to current employers whose assessments will have to past, current, and future expenses.

Imagine how much larger the investment losses would have been during the market downturn if the Board had been fully funded. The statistic cited on page 9 of the Green Paper shows that other provinces, which on average had a higher level of funding than Ontario, also experienced a greater drop in funding following the 2008 market downturn. According to the Green Paper, the average funding ratio was 114% for other provincial compensation boards in 2007, and fell to an average of 95% following the downturn – a drop of 19%. Ontario had 66.4% funding in 2007 and dropped to 54% - a smaller loss of only 12.4%. The more there is invested, the more there is to lose.

Mandatory full funding has another potentially large cost. Requiring the Board to be fully funded will also leave employers at risk of sudden assessment increases in cases of shortfall or unexpected losses. If the Board had been required to be fully funded during the last period of stock market downturn when the Board experienced significant investment losses, it would have been necessary to increase assessments immediately in order to maintain the mandatory level of funding.

Partial funding allows more flexibility in difficult times. A steady stream of current assessments funds the costs each year, with a reserve fund to cover costs in times of difficulty or unexpected costs. This also means that rates hold steady (that is, are not reduced) when the coffers are full, as has happened in the recent past.

A better alternative: ensure stability by increasing coverage

Proponents of full funding claim it is necessary to ensure the stability of the system and the Board's ability to continue to meet its costs. Paradoxically, they argue for full funding but not full coverage even though expanding coverage to all Ontario workers

[25] Wegenast authored the Canadian Manufacturers' Association's brief to the Meredith inquiry. Meredith incorporated many of the Brief's recommendations in his final report. "Brief of F.W. Wegenast, Representing the Canadian Manufacturers' Association" in William Ralph Meredith (1912). *Interim Report on Laws Relating to the Liability of Employers*, Toronto: L.K. Cameron; Weiler, *supra* note 20.

would go a long ways towards ensuring ongoing stability. Covering all industries will protect against assessment losses by providing a broader revenue base.

At present, only about two thirds of Ontario's workforce has mandatory coverage – the lowest rate in all of Canada. This is largely because the schedules that dictate the industries to be covered have not really changed in the last hundred years. Jobs in construction and manufacturing are covered, while newer sectors such as call centres and information technology are excluded.

If the manufacturing sector continues to shrink, the percentage of the workforce covered will also continue to decline. Job losses in a large covered sector could have a significant affect on the Board's revenue stream if the present system of covering only select industries continues.

A Stable Financial Target: Measure in years, not dollars

In the 'historic compromise engineered by Sir Meredith, injured workers would be guaranteed secure benefits and employers would get stable, predictable costs. That was possible under the current account funding model chosen by Meredith. But now, some people are proposing that we change the financial basis of the workers compensation system and turn it into a fully funded model like a private insurance company.

The data collected by the Funding Review confirm that the unfunded liability is a very volatile number, something that careens up and down on an annual basis as a result of economic factors beyond the control of the WSIB. It appears to us that it is very unwise to hitch our workers compensation system to such a volatile number if we also want a system that will generate stable, predictable costs. The unfunded liability bounces around like a ping pong ball and employers rates will have to follow it if we tie the required financial reserves to the unfunded liability.

The steady state funding model adopted by the Canada Pension Plan looks at its financial reserve in terms of the number of years of future benefits that it has in reserve. This strikes us as a more sensible yardstick for measuring the financial stability of the system. The CPP reserves are in the range of 5 years of benefits. As cited above, WSIB President David Marshall has stated that the current financial reserve of 50% of future liabilities is sufficient to carry the existing claims for the next 25 years. Given that the system is sufficiently funded, that would be a useful a more useful way to look at the adequacy of the financial reserves.

Conclusions

The Board is not in a "financial crisis". We agree that the Board cannot continue to pay out more than it collects which can be easily accomplished by restoring assessment rates to previous levels. This does not require full funding. We recommend that the Board continue to rely on a system of steady state funding. We further recommend that

coverage be expanded to all Ontario workplaces by moving to a system of inclusion rather than exclusion to better protect all workers and further ensure system stability.

2. Premium Rates

> *THOUSANDS OF BUSINESSES REAP BENEFNITS OF LOWER WSIB PAYROLL TAXES*
>
> *TORONTO--- About 160,000 Ontario employers will reap the benefits of lower WSIB payroll taxes beginning Jan.1, says Labour Minister Chris Stockwell. "The average rate for employers is going down seven per cent this year'" Stockwell said. "This is a continuation of the incredible turn around that started at the WSIB in 1995. Overall, the average premium rate has dropped 29 per cent since 1995."*
> *-- Ministry of Labour Communiqué, January 3, 2001*[26]

Assessments, not premiums

We submit that the terminology of "premiums" should be abandoned in favour of "assessments" in accordance with Justice Meredith and Professor Weiler.[27] To quote Meredith:

> I do not like the term "premium" which is used in the [Canadian Manufacturers'] 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.[28]

In the same report, Justice Meredith notes that "the true aim of a compensation law is to provide for the injured workman and his dependants and to prevent their becoming a charge upon their relatives or friends, or upon the community at large." We suggest that Justice Meredith's insistence in using the concept of employer **assessments** was linked with this statement about the true purpose of the workers' compensation system.

Assessment rates need to be increased

In 6 years, the Harris Government reduced employers' assessments by 29%. If this cut had not happened, there would be no unfunded liability and we would not be having this Funding Review today. However, injured workers would still be raising the issue that the unfunded liability was eliminated at their expense, and demand reparation. Injured workers feel that the cuts injured workers were forced to make went directly into the pockets of employers.

The problem of rate reductions has an easy solution: restore rates to 1995 levels. Employers' rates should be increased by 29% and phased in over 6 years, the same

[26] Attached
[27] *Supra* note 20.
[28] *Supra* note 19.

amount and the same period that it took the Harris government to do the reverse and precipitate the current crisis.

The Green paper acknowledges the fact that assessments have gone down and would have eliminated the UFL if they stayed the same. This statement contains a ready solution: restore the old rates, period. These rates were reduced by 29% in 6 years by the Harris Government after it reduced the compensation rate for injured workers, thus causing today's "crisis" and the Funding Review.

The UFL portion of assessments: A phantom carrot

The UFL portion of assessments is only a theoretical notion and is not a "carrot" available to workers and employers when and if the UFL is retired. While it is true that this amount is supposed to go towards paying off the unfunded liability, this has not been happening in practice, since in recent years, the Board has been collecting less than it needs to meet annual expenses. This means that the whole assessment, including the UFL designated portion, has been used to pay for ongoing operating expenses. It has become de-facto an integral part of the assessment rate and it is only nominally used for the UFL. When former Premier Mike Harris lowered the rates, the UFL portion became part of the basic rate, despite its theoretical purpose.

Employers have been promised rate cuts once the unfunded liability is paid off – the phantom carrot to get them onside. Since employers are not paying enough to reduce the UFL now, there is actually nothing left to cut once the UFL is paid off. Telling employers they will see a 43% cut once the UFL disappears is simply not honest. It has and will continue to generate anger among employers when they learn the facts. Steady state funding will allow a more modest increase in assessment rates, which will be better for workers and employers alike.

Misstatements of "fact" in the Green Paper

As noted previously in this submission, the argument that employer assessments are "too high" and that injured workers' benefits are "too generous" was used in the Jackson reports of 1996 and cost injured workers dearly.[29] The initial compensation rate was reduced from 90% to 85% of net pre-injury wages. The inflation indexation formula was further reduced and is one of the worst in Canada. Loss of retirement income benefits were cut in half, from 10% to 5%.

We observe with profound disappointment that the Green Paper is reproducing the same erroneous discourse that preceded the Harris policy of reducing benefits and assessment rates while "talking the talk" about the unfunded liability crisis.

[29] The Honourable Cam Jackson, Minister Without Portfolio, Responsible for Workers' Compensation Reform (January 1996), *New Directions For Workers' Compensation Reform: A Discussion Paper,* pp.7-11

Once again, employer rates are being painted as too high and worker benefits as too rich. The misinformation that has been provided to this inquiry is so upsetting to us, given our history with the Jackson reports and the subsequent legislation. We believe that there is sufficient misleading information to raise serious questions as to the ability of this review to make impartial decisions. We do not question Professor Arthurs' impartiality, but we do take issue with the politicized information he has been receiving and basing his inquiry upon.

Selective comparison of provincial assessment rates

The Green Paper reproduces misleading information about Ontario assessment rates, stating that "**...**despite the considerable reduction in Ontario's average premium rate, it is still one of the highest in the country".[30] This is a misleading statement to say the least. Average assessment rates are influenced by a number of factors that make straight comparisons difficult if not dishonest. One such factor is the percentage of covered workplaces in a province. As noted, Ontario has the lowest rate of coverage and excludes many less dangerous workplaces such as banks, insurance companies, and offices. If Ontario was to cover the equivalent number of employers and employees in other provinces, its average rate would be reduced considerably, given the nature of the non-covered industries. We have appended charts to this submission that show these differences in coverage and assessment rates.

This selective comparison of provincial averages began with the Auditor General's report, we which criticized in our submission to the Standing Committee on Public Accounts (attached). It is most disturbing to see it replicated in the Green Paper without any critical analysis. This use of misleading figures skews the debate and raises real questions about the objectivity of the inquiry.

We ask that the Funding Review consider asking the Board to disclose more complete information on rate comparisons. Compare assessment rates by industry – "apples with apples".

Exaggerated Benefits

While employer assessments are exaggerated, injured workers benefits are also exaggerated, further skewing the facts and diverting the debate from fair solutions. The Green Paper states: "Perhaps Ontario's high premium rate can be explained by the need to meet the cost of higher benefit levels and more expensive programs mandated by Ontario law or provided by WSIB policies".[31] The paper fails to provide any comparison to support this statement, but we note that at 85% of net wages, Ontario benefits are lower than most other jurisdictions. Ontario's cost of living adjustment formula is also at the low end, thanks to the Harris Government. The charts appended to this submission show how Ontario compares in benefit rates and cost of living adjustments.

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[30] Green Paper at p.13.
[31] P.13.

"Rising" benefit costs

Another misleading statement concerns benefit costs: "Or perhaps rapidly rising average benefit costs per new lost time injury (68% increases between 2003 and 2008) are to blame".[32] This statistic does not provide the full picture. With a constant pressure to keep injured workers from filing lost time claims, statistics based on lost time claims are misleading. Keeping injured workers at work (even if they spend their days lying on cots) artificially lowers the number of lost time claims.

While the Board insists on using lost time statistics, it must be noted that due to the effect of experience rating, less serious injuries tend to remain hidden. At one time it was understood that on average a claim lasted twelve weeks. Because workers are frequently forced into situations of no-lost time (by not having time to heal, or by using sick days, STD, or EI sickness benefits) those shorter claims no longer figure into the average, thus leaving only the longer claims, which tend to be the more serious claims that cannot be hidden. Naturally, taking the shorter claims out of the calculation will result in an increase in the average claim length.

The Board claims that "income replacement for injured workers is meeting targets" and attributes this to the Institute for Work and Health, although the study was not properly cited. This is included in the "disclosure" the Board made available to the Funding Review and is available on the Funding Review website. With respect, this is stunning partisan propaganda. The Board selectively reported the study findings to suit its own purposes. The Board failed to report a key finding of the study, that there was a huge variation in earnings replacement rates. [33] The post-injury earnings of injured workers were polarized – most had either strong or weak earnings recovery: "In Ontario, about one-third of those with less than 50 per cent impairment had an earnings replacement rate of less than 75 per cent." That means a third of injured workers were earning at least one-quarter less than they were pre-injury. For a substantial number of injured workers (about 33%), the Board certainly was <u>not</u> meeting its "income replacement targets". We comment further on this research in the benefits indexation section of this submission.

Request that the figures be amended

This inquiry is very important to the future of injured workers, and the basis of discussion must be based on correct figures. That is why Professor Arthurs began his inquiry by requiring full financial disclosure by the Board to a group of financial experts. This principle applies to the Green Paper too, and it must reflect a true picture of what is happening. We feel that the misinformation about the "high average employer rates" and the "high" benefit rates, and the "high wage replacement rates" is inaccurate and potentially distorts the debate. Injured workers went through a similar process in the late

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[32] P.13.

[33] R. Saunders (April 2011). "Examining the adequacy of workers' compensation benefits" Issue Briefing from the Institute of Work and Health. http://www.iwh.on.ca/briefings/adequacy-of-workers-compensation-benefits Based on research led by Dr. Emile Tompa et al which is unpublished and not peer reviewed.

1990s and paid for it with benefit cuts. We urge Professor Arthurs to amend the above mentioned inaccuracies.

3. Rate Groups

> *"Have you ever heard of OHIP consultants?" -- Steve Mantis' comment to Funding Review, April 5, 2011*

We agree with the Green Paper that the number of rate groups in Ontario is excessive and wasteful. It is our position that the Funding Review should recommend a gradual phasing in of a single rate group. The OHIP scheme is one example of a single rate system, which has an adjustment for small businesses. While compensation systems vary around the world and it is not easy to compare them, many of them, almost half, use a single rate system.[34] We encourage the Funding Review to consider this recommendation as it would better serve the collective liability and no-fault principles on which the system was founded.

It would also serve to make the system less adversarial. From a funding point of view, this could have a significant cost savings for the Board. At present, there is a huge industry of employer representatives who spend a great deal of resources trying to get employers moved into different (cheaper) rate groups. We estimate that the Board wastes a great deal of money in maintaining its employer classification scheme and in hearing all of the employer rate group appeals. Moving to a single rate group would free up this money, allowing it to be better spent elsewhere.

For workers, a less adversarial system would do much to protect them from additional harm after they have been injured. This is of critical importance tin our compensation system.

Likely a flat rate system (with no experience rating) would do more to de-politicize our compensation system than any other single move. Combining it will full coverage of all workers would both cushion the impact and would further remove distinctions between employers that have caused discontent in the past.

4. Employer incentive programs

1. Is the present design and operation of the WSIB's employer incentive programs appropriate? If not, how should they be changed?

It is our unequivocal position that all three of the Board's incentive programs, NEER, CAD-7, and MAP are not appropriate and need to be eliminated. Experience rating programs were supposed to promote health and safety. As an organization with a forty

[34] C. Arthur Williams, *An international comparison of workers' compensation*. Kluwer Academic Publishers, Boston, 1991.

year history of advocating for injured workers, it has been our experience that these programs have a detrimental effect on health and safety and provide a strong incentive for employers to behave rather poorly.

The other commonly cited reason for experience rating programs, that they tailor premiums to firms based on accident rates, is also flawed. This notion is based on insurance principles that have no place in a workers' compensation system. Collective liability is one of the foundational principles of workers' compensation. Furthermore, one must ask, does experience rating actually reward employers with good claims records, or does it simply reward those who are more adept at claims management? We will expand on this more later.

From a funding perspective, experience rating adds extraneous costs in a number of ways. Each year the Board pays out significantly more in rebates than it collects in surcharges. The experience rating net refund was $114 million in 2006 and $124 million in 2005.[35] However, we do not wish to dwell on the off-balance; correcting that will not correct the adverse effects of experience rating on injured workers.

Of more concern, from a funding perspective, is the overall cost of the experience rating system. For the 2007-2008 fiscal year, for example, the cost of experience rating was $523 million.[36] As noted, experience rating also costs the Board money in other, less visible ways, while in the process, causing great harm to injured workers. We will elaborate on this in the points below.

No evidence that Experience Rating improves health and safety

Experience rating has, at most, a tenuous indirect effect on health and safety. Consider what the programs measure: not safety initiatives, but lost time claims. As Professor Terry Ison notes, "there is no empirical evidence that experience rating creates an incentive to care. Indeed, such empirical evidence as there is suggests that it does not."[37]

As long as a firm can minimize or avoid lost time claims, it can get a rebate. Employers need not show any evidence of good health and safety practices or programs to get a rebate. This was recognized in the last review of experience rating in 2008, the Morneau Sobeco Report, which found that

> There is currently no link between and employer receiving a refund (or surcharge) and its meeting its legislative obligations under either the Occupational Health & Safety Act or the Workplace Safety & Insurance Act.[38]

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[35] Workplace Safety and Insurance Board of Ontario Annual Report 2006, p.23.
[36] *IWH Report to the Expert Advisory Panel Occupational Health and Safety Prevention and Enforcement System. Summary Measures.* June 7th, 2010
[37] Terence G. Ison (1994). *Compensation Systems for Injury and Disease: The Policy Choices*, Butterworths, Toronto, p. 204
[38] *Recommendations for Experience Rating: For discussion with stakeholders.* Morneau Sobeco, October 28th, 2008.

Morneau Sobeco is in the business of designing and implementing experience rating programs for provincial compensation boards. Given their vested interest in maintaining experience rating programs, it is not surprising that their report stopped short of recommending that experience rating be abolished. Nonetheless, they identified serious flaws in the Ontario program and its ability to enhance workplace health and safety. They found that experience rating promoted cost minimizing behaviours and claims management practices rather than incenting good health and safety practices.

One of the negative health and safety effects of experience rating is that it can lead employers to essentially contract out of more dangerous work. This can be accomplished by using independent operators or smaller companies to do the more dangerous aspects of work.[39] This can also be accomplished by using temporary workers. In 2008, the Toronto Star reported on a "loophole" that allowed companies with histories of even serious workplace accidents to maintain good experience rating records by employing temporary workers. The companies often used poorly trained temp workers to do dangerous jobs, or took inadequate safety precautions, but because the temp worker was not an employee of the plant, the accident did not show up on their record and the company would continue to receive a rebate. Rather than promoting safety, experience rating actually works against safety by encouraging the use of poorly trained temp workers who are generally poorly trained in safety practices.

In our clinic, we have started to see even more complicated employment relationships arising, where firms have arisen to buy the risk of compensation claims. A worker who we will call Jimmy unknowingly found himself in such a situation. He was employed as a truck driver, and up until he was injured, he thought he had been hired by a trucking company and was an employee of that company. When he inquired about the different name on his paycheque, he was told that was just the way they did their payroll.

After Jimmy was injured, he learned that he was actually employed by what was essentially an employment agency. The agency employed workers and contracted them out to other firms, like the trucking company, essentially assuming the risk of workplace injuries. Because the agency was so broad, it always had a modified job somewhere that an injured worker could do. After Jimmy's injury, he was given a modified job in a factory where his job was to sort small parts all day into different buckets.

Jimmy's story shows how experience rating can actually work against health and safety. The structure of the employment relationship meant that Jimmy's injury had no effect on the trucking company's claims record. Instead, that cost was borne by an agency in the business of managing compensation claims. They were proficient in reducing claims costs with any number of undignified modified work positions available to minimize lost time. Predictably, Jimmy quit his new sorting job and his benefits were cut off. He is unemployed but his claims is not lost time.

A recent report on health and safety in Ontario lead by Tony Dean also recognized the perils of relying on lost time as the sole measure of health and safety.

[39] *Supra* note 36 at p.205

> The panel strongly believes that health and safety incentives should not simply be tied to claims experience. An ideal incentive program should reduce emphasis on measures such as LTI by taking into account OHS practice improvements in the workplace, and reward employers for those improvements.[40]

The Panel made several recommendations for improvements to health and safety. One of the Panel's recommendations was that the Board "review and revise existing financial incentive programs, with a particular focus on reducing their emphasis on claims costs and frequency.[41] Although the Panel stopped short of saying that experience rating should be done away with, its main recommendation was that health and safety be removed from the Board all together.

There has been little research linking experience rating to improved health and safety. Research has attempted to determine the affect of experience rating on health and safety, but has been unable to determine anything except that it reduces claims and lost time claims. As most of this research points out, this conclusion does not tell us if this is a health and safety effect or a claims management cost control effect. Hyatt and Thomason were quick to point out the dearth of high quality research on experience rating, and noted that "[n]one of the studies are able to determine whether experience rating results in actual reductions in the frequency and costs of injuries, or whether some claims are either not reported or shifted to other forms of disability insurance."[42] In his systemic review of research on prevention incentives, Tompa noted that "with so little evidence, and such imprecise measures, it is difficult to draw robust conclusions about the effectiveness of experience rating".[43] Experience rating may well have some positive effect on health and safety in some companies, but the negative side effects of the program override any potential benefits.

Experience Rating encourages employers to hide and manage claims

As Professor Ison noted, experience rating creates an incentive to reduce recorded claims cost. He identified the following practices that have been used to reduce claims costs: failing to report injuries; discouraging workers from reporting claims (including the threat of dismissal); creating peer group pressure on workers not to make claims by making worker "safety programs; delaying completing paperwork and omitting relevant information to delay claims processing; and having as many claims as possible classified as medical care only (that is, as no lost time claims).[44]

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[40] *Expert Advisory Panel on Occupational Health and Safety Report and Recommendations to the Minister of Labour*, December 2010, p.40 http://www.labour.gov.on.ca/english/hs/pdf/eap_report.pdf

[41] *Ibid*., at p.41

[42] Douglas Hyatt and Terry Thompson (May 1998). *Evidence on the Efficacy of Experience Rating in British Columbia: A report to the Royal Commission on Workers' Compensation in BC,* p.51.

[43] Emile Tompa, Scott Trevithick, and Chris McLeod (2007). "Systematic review of the prevention incentives of insurance and regulatory mechanisms for occupational health and safety" *Scandinavian Journal of Work and Environmental Health* 2007; 33(2), p.7.

[44] *Supra* note 36 at p.202.

Other sources reveal staggeringly high rates of claims underreporting. One Canadian study found that 40% of injured workers did not file compensation claims for their injuries.[45] An Ontario Medical Association survey of its members found that more than half (51%) had been asked not to report work related injuries to the Board in the preceding six months, “apparently at the behest of the employer”.[46]

A Toronto Star investigation in 2008 uncovered thousands of traumatic injuries which resulted in no days of lost time.[47] The list of injuries included fractures, intracranial injuries, concussions, fingertip amputations and burns. The investigation found that companies pressured workers not to report injuries, paid them to do make-work degrading jobs, or outright lied to make injuries look less serious.

In our own experience as a legal clinic assisting injured workers, we have also encountered a great number of workers that were discouraged from making claims. Even well established workers who know about workers’ compensation are often too afraid of losing their jobs to make a claim. Often times, the company will simply force them to use up their sick or vacation days, and put them on short term disability benefits. Or sometimes, they will simply be told that they must continue to report for work. It is only later in the process, once they still have not recovered and often after they have been dismissed from employment that they visit our clinic for help with a claim.

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.[48] Board statistics also show that while the rate of lost time claims has decreased, the rate of serious injury has increased.[49] Often times, an injury will be reported as a no lost time, and then later converts to a lost time when the worker fails to fully heal.

For claims that are reported, employers use a variety of means to attempt to control claims costs. A Board commissioned study of the New Experimental Experience Rating (NEER) program in1990 found that 82% of employers emphasized controlling their claims costs.[50] The study uncovered a higher incidence of offering short term modified work rather than longer term modified work with a rehabilitation focus. This finding fits with the 2009 KPMG audit of the Labour Market Re-entry (LMR) program, which concluded that experience rating contributed to a disproportionate number of workers

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[45] 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.
[46] Ontario Medical Association (1994). *Ontario Medical Association submission ... regarding Bill 165, an Act to amend the Workers' Compensation Act and the Occupational Health and Safety Act*. Ontario. Legislative Assembly. Standing Committee on Resources Development 8 Sep. 1994. 9 p. (Exhibit no. 3/06/175).
[47] David Bruser. “Hiding injuries rewards companies” The Toronto Star, May 29, 2008.
[48] 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
[49] Institute for Work and Health and WSIB (January 2008). *Study of Locked-in Award Recipients, Final Report*
[50] Peat Marwick Stevenson & Kellog, Management Consultants (July, 1990). *Workers' Compensation Board, NEER case studies, FINAL REPORT*, prepared for the Workers Compensation Board, Research and Evaluation Branch.

being referred to LMR – employers would keep workers until their experience rating window closed when they could then be referred to LMR without financial consequences.[51]

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 significant enough to persuade a significant number of employers to break the law. Unfortunately, the study was not repeated, or at least no further studies were published by the WCB. Our experience is that the problem will continue as long as the Board uses claims based statistics to award financial incentives.

At our legal clinic, we see a lot of workers who are forced to return to work in demeaning, make-work positions. Employers offer these jobs either to try to compel a worker to leave the company, or simply to ride out the experience rating period until the worker can be released to LMR without impunity. Some of the "jobs" we have seen include sitting in a cold room all day, feeding papers a few at a time into an office shredder, monitoring a machine that does not need monitoring, and placing stickers on product bags while lying on a cot in the nursing station. We have also seen a construction worker told to answer phones in the office with the women, a construction worker told to add up account numbers from his bed at home, and a truck driver told to monitor students during exams. The most common jobs are some variation of unnecessary monitoring, and reading safety manuals.

One of our staff attended an employer seminar on workers' compensation in the 1990s. The attendees were told how to avoid surcharges and to gain rebates by offering work to injured workers right away. One employer commented that he found it too difficult to accommodate an injured worker. The response was "there is always something that someone can do, just use your imagination. The main thing is, don't allow for lost time." The employer said "Oh, I get it. We are talking about jobs like sitting on the roof and watching for a hurricane." Everyone laughed and concurred that that was the basic idea.

Sometimes, employers work to find ways of terminating employment. This can include forcing a worker back to modified work which in fact turns out to be her regular job, or making the conditions of work so intolerable that a worker quits. This can include belittling the worker in front of coworkers, not allowing a worker to talk to coworkers or take washroom breaks, or changing a worker's schedule at the last minute.

[51] KPMG (December 3, 2009). *WSIB Labour Market Re-Entry (LMR) Program Value for Money Audit Report.*

In some cases, an employer will start disciplining an injured worker to build a case for termination. For instance, a worker may be penalized for taking an extra five minute break, even though this has been a long standing practice that all of his coworkers participate in. After a few written warnings, the worker is eventually terminated, allegedly for "employment reasons" which means he is not entitled to any further compensation benefits and will no longer affect the employer's claims record. Why would an employer go to these lengths?

The reason is that once a worker becomes an injured worker, they become a risk under the experience rating system. The system operates on the concept of a claim being either *active* or *inactive*. It is an on and off switch which is difficult for an employer to control. If a worker loses even one day in any year the claim is experience rated, the claim becomes *active*. The actuarial repercussion can be to go from a surplus situation to a surcharge. To avoid this risk, it is in the best interests of the employer if the injured worker is no longer employed by the company and for reasons unlinked to the claim.

Claims management is also visible in appeals. Many employers will initiate their own appeals, or participate in a worker's appeal until the experience rating window closes. A 1995 study found that experience rated employers in Ontario were significantly more likely to appeal decisions and that experience rating did not lead to a decrease in injury frequency.[52] The study noted that contesting claims was generally a less expensive alternative, rather than investing in safety.

Increased employer participation in appeals undermines one of the founding tenets of workers' compensation: a non-adversarial system where workers give up the right to sue in exchange for secure benefits. Unfortunately, the Board has identified employer participation in appeals as a method of controlling its own claims costs. In its report to the Funding Review, the Board wrote that employer participation in appeals reduced claims duration, thereby reducing total costs.[53] With respect, this statement is inappropriate in a workers' compensation system. It is an inquiry system where both the Board and the Tribunal have wide ranging investigative powers. This is completely different than our justice system with the passive decision maker who relies on the parties to adduce evidence and arguments. With such broad powers provided to the Board and Tribunal, there is no need to rely on employers in appeals.

Employer participation in appeals can be very detrimental to injured workers. Employer participation in appeals often leads to delays in the already slow appeals process. Employers frequently use resources and techniques that cast doubt on injured workers, painting all injured workers as exaggerators and malingerers, which as we shall explain further later, can cause great harm to injured workers' mental health. To add insult to injury, due to the pervasive idea that "employers pay", their points are often given more weight than is warranted.

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[52] Douglas Hyatt and Boris Kralj (January 1995). "The Impact of Workers' Compensation Experience Rating on Employer Appeals Activity" *Industrial Relations*, Vol. 34, No. 1, p.95 – 106.
[53] Workplace Safety and Insurance Board (January 2011). "Employer Incentives" *WSIB Funding Review Technical Consultation,* p.26.

Evidence that experience rating harms injured workers (and increases costs)

We have already discussed some of the ways that experience rating harms injured workers by heightening claims management behaviours. We have discussed how injured workers are harmed when their claims go unreported, when they are forced back to work while they are still healing from serious injuries, when they are fired or made to quit their jobs, and by employers contesting their claims. Unfortunately, there's more.

First of all, all of us who work with injured workers know that they face huge hurdles in finding employment in the open labour market. The evidence suggests that experience rating is one of the reasons why this is the case. A study from New Zealand found a direct relationship between experience rating and discriminatory hiring practices. They concluded that employers proactively manage compensation claims by discriminating against employees with disabilities in the hiring process to try to prevent future claims.[54] More specifically, they noted that

> as the premium rate increases, experience-rating provides strong incentives to limit the level of employees' claims by discriminating on the basis of disability.[55]

Injured workers are viewed as a risk by employers. Even if they are capable of the job, employers avoid hiring them for fear of recurrence or re-injury which could potentially affect their own claims records.

Experience rating does further harm to injured workers, and leads to increased claims costs, by increasing injury recurrences. As noted previously, employers attempt to minimize claims costs by getting injured workers back to work as soon as possible, preferably with no lost time at all. In practice, this leads to many workers returning before they have adequately healed, sometimes while heavily medicated, which often leads to recurrence or secondary injury.

Until 2003, the WCB/WSIB Monthly Monitor reported the number of lost time claims that were reopening a prior claim. The Monitor explained that "reopening of a claim is largely due to a recurrence of a disability after returning to work." Since the numbers before 1995 included no-lost-time claims, we looked at the years from 1995 until 2001, the last numbers published in the Monthly Monitor. The WCB allowed an average of 8,792 lost time claims reopened every year. By comparison, over the same period the number of lost time claims that the Board allowed for new injuries averaged 103,447 per year. A significant proportion of lost time claims result from re-injury after return to work.

[54] Mark Harcourt, Helen Lam, and Sondra Harcourt (September 2007). "Impact of workers' compensation experience-rating on discriminatory hiring practices" *Journal of Economic Issues*, Vol. XLI no. 3, p. 681 – 699, at p.695

[55] *Ibid*., at p. 694

One of the most common cases we see in our office is workers with upper extremity injuries. They often return to work while unable to use the injured arm and end up doing their whole job with the other arm. This frequently leads to injury in the opposite arm from overuse. Or take for example, the worker who returns to work and continues to use his injured shoulder. The injury can worsen, often requiring surgical repair and leading to permanent impairment.

Pushing workers back to work as soon as possible also has other deleterious effects. Employers are motivated by experience rating to get injured workers back to work as soon as possible. Early return to work has been implicated in what Professor Joan Eakin refers to as “the discourse of abuse”:

> Workers suffer under what we call the ‘discourse of abuse’ – persistent, pervasive imputations of fraudulence and ‘overuse’ of rights. Surveillance and its effects can extend into the injured workers’ homes and family life. During the vulnerable and fragile stage of bodily injury and recovery, workers confront a range of social difficulties in determining when they should return to work, in managing issues of loyalty and commitment to the firm and employers, and in engaging in modified work that can be meaningless or socially threatening. For both employers and injured workers, damaged moral relationships and trust can trigger snowballing of social strains, induce attitudinal ‘hardening’ and resistance, and impede the achievement of mutually acceptable solutions to the problems of injury and return to work.”[56]

In our clinic, the rate of injury-related depression and related mental illness is staggering. We see, everyday, the mental health effects that workers suffer following workplace injury and exposure to the “discourse of abuse”.

The need to scrutinize who is benefiting from Experience Rating

Considering the mountain of evidence against experience rating that has been building for decades now, one might think it would have been dismantled years ago. Sadly, there are a number of vested interests that keep experience rating afloat. We must examine which groups benefit from experience rating, and more importantly, let’s ask ourselves, are these the groups that the program is designed to benefit? Are these the groups that should be benefiting?

Simply put, the answer is no. Experience rating benefits several groups. The first is unscrupulous employers who manage to hide and minimize claims costs. Certainly these are not the employers that the system should be rewarding.

The second, most powerful group is the employer consultants who make their living off of exploiting experience rating. There is a highly developed industry with a powerful lobby which profits from the programs existence. These consultants earn their living with essentially two tactics: by trying to get employers into rate groups with lower

[56] Joan Eakin, Judy Clarke, and Ellen MacEachen (November, 2002). *Return to Work in Small Workplaces: Sociological Perspective on Workplace Experience with Ontario's "Early and Safe" Strategy,* Report on Research Funded by the Research Advisory Council of the Ontario Workplace Safety and Insurance Board.

assessment rates, and by managing claims costs through contesting claims, and second injury and enhancement fund (SIEF) requests. These consultant/paralegal companies help to drive the worse features of experience rating, the features that cause the most harm.

We have seen that experience rating motivates claims management behaviour. If it ceased to exist, employers would have no reason to participate vociferously in worker appeals or engage in claims management, and there would be no artificial demand for SIEF relief. If it ceased to exist, employers would be motivated to participate (if they participated at all) based on their genuine understanding of the situation, which might be to contest the compensability of a claim, or might be to support it.

The interests of the consultants do not really align with the interests of employers, especially honest employers who report their accidents and refrain from engaging in heavy handed claims management. Surcharges can have a significant financial impact on employers, especially smaller employers, and makes financial planning difficult. All employers would benefit from a system of steady, known rates which could be incorporated into the cost of doing business.

Experience rating introduces the same financial insecurity that the litigation process caused prior to 1915. It is inconsistent with the fundamental objective of workers' compensation, which is to provide stable, predictable costs that employers can factor into their cost of doing business.

When arguments in favour of experience rating arise during this review, it is important to scrutinize who is making those arguments, how they benefit from experience rating, and whether this benefit is appropriate in our public workers' compensation system.

Alternatives to Experience Rating

2. What other incentives might be used to promote increased safety in the workplace and the re-employment of injured workers while ensuring equitable treatment of employers and maintaining the WSIB's premium revenues?

Incentives need to be based on evidence of actual health and safety practices, not claims records. More study is needed before a proper incentive program can be developed.

5. Occupational Disease Claims

The questions asked by this Review can and should be answered by reference to the fundamental principles of our workers compensation system.

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. [57]

In sum, the Royal Commission concluded that occupational diseases should be treated the same as accidents. This means they should be funded by the regular assessment paid by employers, not by any special fund, and the costs should be covered on the same collective liability principles as accidents.

The Ontario legislation adopted Meredith's recommendation and occupational diseases have been compensated the same as accidents since 1915. They have been funded from the revenue collected from the normal assessments levied on employers. This is a collective liability fund. This approach has served Ontario well without the need for any additional or special fund. Just as our 'current account with a reserve' approach to funding has served us well despite the challenges such as the great depression of the 1930's, our treatment of occupational diseases the same as accidents has served Ontario well through occupational disease disasters as well. In the 1970's Ontario's WCB dealt with two occupational disease catastrophes – first, the Elliot Lake uranium miners and then the Johns Manville asbestos victims. Large workplaces were literally evacuated onto the Workers' Compensation Board. Special Rehabilitation Programs were developed, special benefits packages were designed, and the workers compensation system did its job. The system is not broken.

For employers, the problem before 1915 was the unpredictability of the cost of workplace injuries. The common law defenses created by the courts to insulate employers from liability were finding less favour than they did in the previous century and one successful lawsuit had the potential to bankrupt a business. For employers, the purpose of the system was to provide stable, predictable costs that could be built into the cost of doing business. The method that keeps costs the lowest is collective liability, dividing the costs of all accidents and disease among all employers. Some employers object to this principle, not wanting to share the burden of the cost of injuries with their counterparts in business in the belief that they are more careful than others. This argument against collective liability takes us back to the pre-workers compensation days.

The idea of charging back occupational disease costs to specific employers runs counter to the principle of collective liability. It is also impractical, since many of the responsible employers may not be in business when the costs are incurred due to long latency periods, many of the workers who become sick may have worked for several different employers, and some of those employers may have taken better or worse precautions against exposure. Once you begin to compromise on the principle of collective liability you open the door to endless disputes between employers who believe someone else should pay more. These arguments basically all lead back to self insurance, which we rejected in 1915 when we adopted workers' compensation.

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[57] *Supra* note 19, at p. xv.

There is no logical reason to establish a special fund for occupational disease. We have not done this for other gradual onset conditions such as repetitive strain injuries which make up a large portion of compensable injuries and, like diseases, often don't become disabling for many years. If the anticipated future costs of occupational diseases can be estimated for the purpose of setting up a special fund, there is no reason why they cannot be properly factored into the rate setting process like all other injuries.

6. Benefit Indexation: A Matter of Principle, A Matter of Right

> *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." (emphasis added)*
>
> *--Prof. Weiler*[58]

Terms of Reference

The WSIB Funding Review Terms of Reference were attached to a letter dated September 30th, 2010, signed by I. David Marshall and Steven Mahoney. The term for this topic is:

> "What form of indexation would be fair for partially disabled workers?" [59]

We believe that the requirement for the workers' compensation system to be fair is an important fundamental principle of the system that flows from Sir William Meredith's stipulation that there should be "full justice, not half measures." Ontario's workers' compensation system is a part of the Ontario justice system and stands in place of our courts to address the compensation of workers who become ill or injured as a result of their employment. Our workers' compensation system holds the same responsibility to be fair and just as our judicial system.

The key question set out in the Green Paper for the Funding Review is:

> "Should the present indexation formula – that provides limited inflation protection for partially disabled workers – be replaced? And if so, by what?"

We are concerned that the Green Paper departs from the terms of reference and does not ask what is fair for injured workers. There is no mention at all of fairness in the Green Paper's discussion of benefit indexation. This is one of a number of places where the mandate of the review appears to have already become unnecessarily or inappropriately narrow to the exclusion of the interests of injured workers. It is not possible to answer the Green Paper's question of whether the present indexation formula should be changed without knowing what the purpose of the system is. Yet many commentators on our

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[58] *Supra Note* 20 at p.69

[59] p.4.http://www.wsib.on.ca/files/Content/DownloadableFileTermsofReference/TermsOfReference.pdf

workers' compensation system are not familiar with the Meredith principles, they are not familiar with the operation of the system, and they are misinformed about the purpose of the system.

If one begins with the premise, as many observers do, that the purpose of the system is to take whatever funds that employers feel they can afford and divide those funds up amongst injured workers; and if one believes, as many observers do, that employers already pay too much, then it follows that benefit indexing should be further reduced. That may be logical, but it is wrong.

We urge the Review to address the original term of reference which confirms that the purpose of the system is to be fair to disabled workers. Fairness to injured workers is the only consideration in deciding what indexation formula to adopt for partially disabled workers.

History of Benefit Indexation

The first cost of living adjustment since the 'dawn of workers' compensation' in 1915 was passed in 1974.[60] The late 1960's and early 1970's was a period of rapid monetary inflation and the Consumer Price Index had gone up dramatically.

Under these circumstances, full justice would require a fully retroactive adjustment. It would be necessary to go back and calculate what injured workers would have received each year if compensation had been adjusted to keep pace with inflation and then reimburse injured workers for the difference between what they actually received and what they should have received if their benefits had been adjusted to maintain their original value. This was not done.

However, the legislation did make a retrospective adjustment. This was an adjustment that restored the lost value of the compensation so that the pension regained and maintained its value from then on. A very unfair solution would have been to begin to index for inflation from that time onwards, making adjustments to an existing compensation benefit that has already been worn down by inflation.

The first inflation adjustment was a retrospective or 'catch-up' adjustment. It was not an individualized calculation, but the legislation stated that the monthly pension was to be adjusted upward by 2% for each year it had been paid, up to and including 1971. For example: for a pension that started in 1969 you would add 2%, then 2% to that total, then 2% to that total. The monthly pension was adjusted upward by another 4% for 1972 and 1973. Then that total was adjusted by another 4% for 1974. There was a subsequent Bill in 1975 adding another 10% for 1975.

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[60] Statutes Ontario 1974 c.70, sections 3 & 8.

1985: All Parties Support Full Cost of Living for Protection for Injured Workers

Ad hoc adjustments were made until 1985 when the problem was resolved. In 1985, all the three parties approved Bill 81, the Act that introduced full indexation of WCB benefits to the Consumer Price Index.

The rationale for the Bill was presented by then Labour Minister Bill Wrye (Lib.) on December 17, 1985:

> Hon. Mr. Wrye: On the occasion of the last increase in workers compensation benefits in July 1985, I indicated that it was the intention of this government to undertake an examination of the implications of permanently indexing workers' compensation benefits and, as part of that examination, to consult with the various interested constituencies.
>
> Later today I will be introducing for first reading a bill that is the result of those endeavours. It reflects the commitment of this government to injured workers. The bill enshrines permanent indexation and implements and immediate increase in benefits levels as a transitional measure.
>
> ...
>
> The pain, the loss, the disruption and the disorientation caused to a worker and his or her family by a disabling injury is suffering enough. We should never add to this suffering the indignity of having to come cap in hand to the steps of the Legislature angrily demanding merely the protection of compensation benefits from the annual rate of inflation. From this day, injured workers will never again be in that humiliating position.

The Weiler Report

In his speech, the labour Minister quoted Professor Paul Weiler's analysis of the rationale for indexing of workers' compensation benefits. Prof. Weiler wrote:

> …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.
>
> …
>
> … 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.
>
> …
>
> … 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.[61]

[61] *Supra* note 20 at p.70

The 1985 all party consensus established that fairness to injured workers required full indexation of workers compensation benefits, whether they were partially or totally disabled. It is worthy of note that there is no question in the Funding Review as to what form of indexation is fair for totally disabled workers. Their compensation is fully indexed with the cost of living as reflected by the Consumer Price Index. That is not an issue for the review. The legislative changes that reduced inflation protection for partially disabled workers in 1995 and further in 1998 were justified purely on economic arguments; that the system could not afford to protect these disabled workers because of the pressures of the unfunded liability. The debates in *Hansard* and the media confirm that there was no change in the social consensus as to what is "fair" for disabled workers.

The only change was the growing belief that cuts to benefits of disabled workers were necessary because the financial viability of the workers' compensation system was threatened. To answer the question put in the original terms of reference is really an open and shut matter. Full indexation or workers' compensation is fair for all disabled workers, both fully and partially disabled. Full indexation has always been, and always will be the only form of indexation that is fair.

Indexation of Benefits is Not a Cost

The statement at page 21 of the Green Paper that "Changes in the indexation rate have a significant impact on … the premiums paid by employers…" requires closer analysis. One might think intuitively that continually adjusting benefits upward to keep pace with inflation would also require increased assessments by employers. However, the research done for the Ontario government in the early 1980's by Harvard Law Professor Paul Weiler noted that cost of living adjustments are not a cost to employers or the workers' compensation system:

> Since inflation affects the general price level in the economy, it increases not only the price of final consumer goods, but also the price of factors of production. In particular, inflation presses upwards the wages of active employees and the employer's total payroll. Workers' compensation assessments are expressed as a percentage of this payroll figure…
>
> Just as inflation produces the need for adjustment of workers' compensation benefits to monetary inflation in order to provide distributive justice to the injured worker (again, recall, *not* to increase the real value of the benefit), so also inflation generates the financial wherewithal for the compensation system to pay for that adjustment.[62]

The adjustment of injured workers' benefits to keep pace with inflation requires no additional assessments to be paid by employers. The effect of monetary inflation on employers' payrolls and on the Board's investment revenue funds the adjustment of disabled workers benefits.

But as Prof. Weiler noted in the quote above, when injured workers' benefits are not fully indexed to inflation, then business will reap a windfall profit:

[62] *Supra* note 20 at p.p.70-72.

> The application of the same assessment percentage to an inflating payroll will produce a surplus. Unless the Legislature raises these benefit levels, the Workers' Compensation Board has to reduce the assessment percentage in the next year in order to balance its books.[63]

Failure to fully Index Benefits Creates a Windfall Profit for Employers

Adjusting benefits upwards to keep pace with inflation is not an additional cost to employers, but failing to adjust injured worker benefits to keep up with inflation creates a windfall profit for employers. While Prof. Weiler did not mean literally that the WCB "has to" reduce the employer assessment rates when benefits are not fully indexed, it is chilling to see how precisely that happened when full indexation was removed by the legislature.

Look at the period from the first benefit de-indexation in 1995 (Bill 165) until the catch-up adjustment in 2007 (Bill 187):

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[63] *Supra* note 20 at p.p.70-71

Average assessment
per $100 of payroll:

2007	$2.26
2006:	$2.26
2005:	$2.19
2004:	$2.19
2003:	$2.19
2002:	$2.13
2001:	$2.13
2000:	$2.29
1999:	$2.42
1998:	$2.59
1997:	$2.85
1996:	$3.00

25 % reduction of employer premiums for workers' compensation coverage over 11 years

In order to appreciate the extent of the windfall made by employers of this period, the net rebates (off-balances) from experience rating must also be factored in.

Year	Net Refunds to Employer (in $ Millions)
1996	297
1997	350
1998	125
1999	90
2000	109
2001	4
2002	51
2003	169
2004	115
2005	124
2006	114
2007	118
Total	$1.666 Billion

This contrasts starkly with the experience of injured workers over the same period:

	Inflation/CPI (prior year)	WSIB Adjustment Jan. 1st
1996	2.4	0.8
1997	1.7	0.3
1998	1.5	0.0
1999	1.0	0.0
2000	2.3	0.2
2001	2.8	0.4
2002	1.9	0.0
2003	3.2	0.6
2004	1.6	0.0
2005	2.3	0.2
2006	2.6	0.3
2007	2.1	0.1
Total	25.4	2.9
	Lost to Inflation: 25.4 – 2.9 = 22.5 % * *The actual figure is higher due to the cumulative effect.	

WSIB statistics show that Prof. Weiler was correct. Employers immediately received a windfall from the cuts to inflation adjustment by way of a 25% reduction in their assessment rates plus $1.7 Billion in net rebates under the experience rating system.

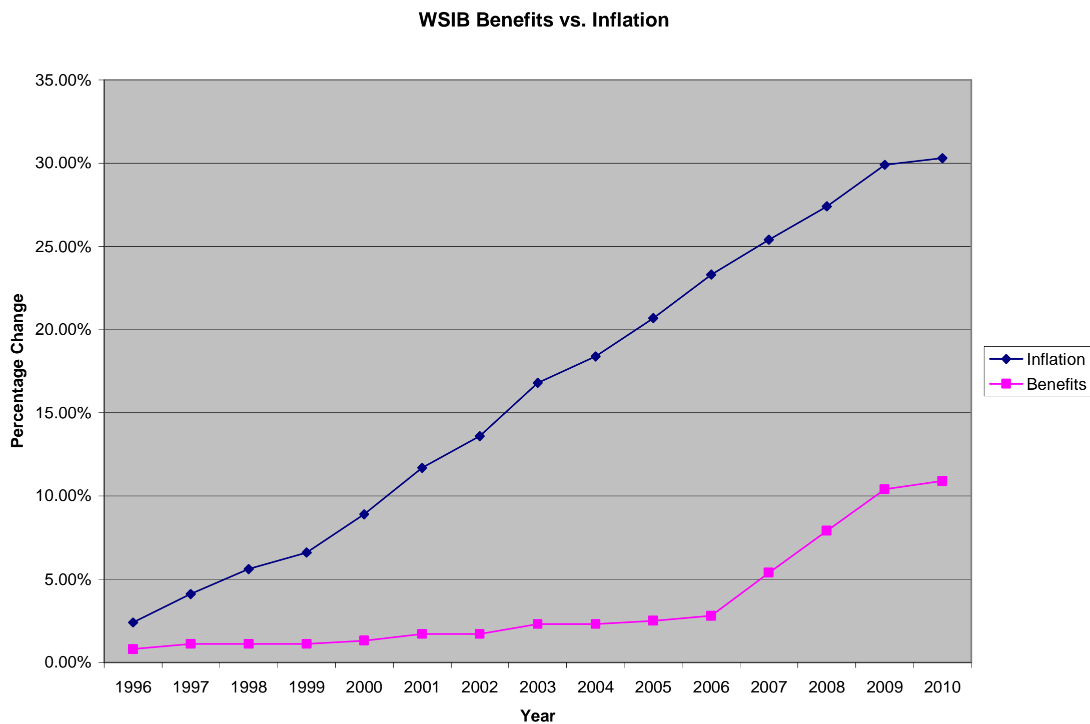
In addition to illustrating that employers benefit when we choose not to fully index workers compensation benefits, these facts substantially undermine the credibility of those who advocated in the past, and who continue to advocate in this review, that reduced benefit indexation is necessary to preserve the financial stability of the workers compensation system. Despite 15 years of reduction of injured workers benefits in the name of eliminating the unfunded liability, the workers' compensation system remains partially funded and remains financially stable, but employers have gained significant economic advantages and injured workers have experienced a significant reduction in their workers compensation.

The Rationale for Partial Indexation

Partial indexation for some injured workers benefits was never proposed or defended on the basis of being fair. It has always been presented as a small price for injured workers to pay in order to preserve the financial viability of the workers' compensation system. The funding review should closely examine the argument that partial indexation 'only hurts a little bit' and 'these people are not totally dependent on their workers compensation benefits.'

As the argument goes, benefits are still being "increased" every year according to the official rate of inflation, they are just a fraction less than the CPI (the word "increased" is inaccurate, as Weiler repeatedly pointed out, but is used universally by proponents of partial indexation). Working people don't necessarily get wage increases to keep up with inflation, why should injured workers be better off than when they were working? And these people are not totally disabled. They are still able to work and not totally dependent on their workers compensation benefits. Is this true?

A Small Price to Pay?



Despite recent increases, injured workers are still trying to survive on nearly 20% less than they received in 1996.

The Current Government Record on Cost of Living

Proponents of partial indexation point to the recent legislation and regulations by the current government as a way to handle the problem of injured workers falling too far behind inflation. In 2007, Bill 187 provided three adjustments of 2.5% over an 18 month period. That is higher than the rate of inflation. Should injured workers be happy about that?

Injured workers received three 2.5% increases, but these have not been enough to keep pace with inflation, let alone catch up from the hit they have taken since 1995. As indicated in the following chart, since the current government came to power, workers' compensation benefits have shrunken by 6.8% due to a lack of protection against the rising cost of living. Without full indexation, monetary inflation constantly and

relentlessly eats away at the value of injured workers benefits. Partial indexation is a half measure, the least assistance that some people believe injured workers can be told to accept. Sir William Meredith urged the government that the workers' compensation system must provide full justice: "Half measures which mitigate but do not remove injustice are, in my judgment, to be avoided."

	inflation/cpi (prior year)	WSIB Adjustment Jan 1ST
2004	1.6	0.0
2005	2.3	0.2
2006	2.6	0.3
2007	2.1	0.1
+July	0	2.5
2008	2.0	2.5
2009	2.5	2.5
2010	0.4	0.5
2011	2.4	0.5
Total	15.9	9.1
	Lost to Inflation: 15.9 – 9.1 = 6.8 % * Despite three 'catch-up' adjustments greater than the inflation rate, injured workers have lost 6.8% of their benefits to inflation since the current government was elected in October 2003. *The actual figure is higher due to the cumulative effect.	

The Green Paper observes that Ontario is the only province where the legislation authorizes the government to increase indexation to a level above the statutory formula that would otherwise apply. As indicated in the graph above, by 2010 partially disabled workers benefits remained about 20% below the purchasing power they had in 1995 and the cost-of-living rose another 2.9%. Despite that, the government announced a 0.5% adjustment of injured worker benefits. Experience to date does not suggest that this power will be used to address the reduction of benefits that continues under partial indexation.

Are Partially Disabled Workers Not Totally Dependant on Workers Compensation?

The other part of the argument for partial indexation is that injured workers who are totally disabled and therefore totally dependent on workers' compensation benefits are fully protected from inflation. Partial indexation only applies to workers considered

partially disabled. They are presumed to be able to work and not totally reliant on their workers compensation for support. How accurate is this presumption?

It is a popular misconception that injured workers who are assessed to be partially disabled are able to work. The wage loss system in place since 1990 relies heavily on the process of deeming virtually every partially disabled injured worker to be able to return to full time employment earning at least the minimum wage. Unfortunately for injured workers, the vocational rehabilitation services of the Board have never been able to come close to those high expectations. Research has shown that there are extremely high rates of unemployment among partially disabled injured workers after their workplace injury, leaving them totally dependent on their workers compensation benefits.

Looking at workers under the pre-1990 pension system, the Board research department published the 1981 WCB Survey of Pensioners.[64] This survey of injured workers in Ontario receiving permanent partial disability benefits found 40% unemployed and another 5% underemployed. More recently, the WSIB commissioned a qualitative study of partially disabled workers in the pre 1990 Claims Unit.[65] Forty injured workers were interviewed, all pre 1990. On average, they were 17 years post injury. Most workers had chronic employment instability following injury. Prof. Ballantyne found 60% unemployment at the time of interview.

Even greater levels of unemployment were evident in the early 1990's with the implementation of the Bill 162 wage loss system, despite the new legislated re-employment obligation. For the first few years, the Ontario Workers' Compensation Board research department published data regarding the employment status and income of injured workers eligible for wage loss benefits under the new system. The 1994 "Study of 12-Month Qualifying FEL Recipients: Employment, Occupation and Income Transitions" is the last such data published by the research department. The W.C.B. reported that 77.7% of these injured workers were unemployed at the review conducted two years after their initial determination of wage loss. This is approximately three years post injury. Although some initially returned to employment, about 32% of the injured workers who had been employed at the one year mark had become unemployed by the three year post-injury review.

The WCB ceased to publish data on what happens to injured workers after vocational rehabilitation (later renamed the labour market re-entry (LMR) process) until 2009. Responding to concerns about the effectiveness and efficiency of the labour market re-entry process with its heavy reliance on external privatize service providers, the WSIB engaged the KPMG audit firm to conduct an audit of its LMR process. The WSIB Labour Market Re-entry (LMR) Program Value For Money Audit Report states:

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[64]Workers' Compensation Board (1982). *Report on the 1981 survey of current earnings in permanent disability claims [submission to the Standing Committee ...re Bill 101 (1984)]* Exhibit No. 34.

[65] Peri Ballantyne, Institute for Work and Health (2001). *Pre-1990 Claims Unit study final report to the Workplace Safety and Insurance Board,* Toronto: IWH. http://www.iwh.on.ca/system/files/documents/pre-1990_claims_report_wsib.pdf

> Over the 2007-08 period, approximately 40% of program participants who completed an LMR Plan were employed at one month post-Plan closure and almost 50% were employed at 18 months post-Plan closure.[66]

Even today, we find that more than 50% of partially disabled workers who were deemed by the WSIB to be able to return to full time are not, in fact, returning to any employment.

Research shows that the majority of injured workers considered to be partially disabled are not able to return to employment after their injury. Not only are they totally dependant on their partial disability benefits, they are in greater financial need than workers rated totally disabled because they are forced to survive on smaller, partial disability benefits.

Many partially disabled workers end up surviving on social assistance because their workers compensation benefits are below the welfare rate. For example, a single unemployed injured worker is eligible for Ontario works in addition to their WSIB benefits, up to a combined total income of $550 a month from all sources. The Ontario Ministry of Community and Social Services can provide the Review with current statistics regarding injured workers on social assistance. The last data we received was for June 2009. In that month there were 653 Ontario Works cases and 3,230 Ontario Disability Support Cases who were also receiving workers compensation benefits. A case refers to an individual or family.

Unfortunately, this is a gross understatement of the number of injured workers who depend on social assistance. Many of the injured workers who arrive at our community legal clinic receive no benefits at all from the WSIB. They have been deemed able to return to employment with no loss of earnings, but in fact there is no suitable work available for them. For example, young workers and recent immigrants working at minimum wage jobs who suffer a compensable permanent partial disability will eventually be considered to have reached maximum medical recovery and deemed capable of returning to the labour market. Since all jobs must pay at least the minimum wage, there will be no further compensation for loss of earnings. However, they are unable to return to their pre-accident work due to disability and they cannot obtain other employment because of language barriers, lack of experience, limited transferrable skills, limited education, medical restrictions and the stigma that many potential employers attach a person with a disability. They come to our office surviving on Ontario Works or ODSP benefits and nothing else. These people are not counted in the numbers quoted above. If they are appealing the termination of WSIB benefits, they are usually required to sign an assignment of WSIB benefits in order to obtain social assistance. Data on the number of assignments of WSIB benefits should be available to the Funding Review from the Ministry of Community and Social Services.

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[66] *Supra* note 51 at p. 23.

Institute for Work and Health Study

On the last page of the Indexation document prepared for the Funding Review is a cryptic 1 page document entitled "Institute for Work and Health Study." It suggest that the Institute has done a study that found that income replacement for injured workers is meeting targets and is at the 99 to 105% level. This was a big surprise to us in light of our daily experience with injured workers in poverty for the past forty years, which we have mentioned above.

Upon investigation, it appears that this 1 page document is referring to the Institute's Working Paper #350 "Comparative benefits adequacy and equity of three Canadian workers' compensation programs for long term disability" May 2010, by Tompa, Scott-Marshall, Fang and Mustard. We have now reviewed that study and have concluded that whoever wrote the 1 page document for the Funding Review either did not read this study or failed to understand it.

This study does show that workers' compensation systems do a relatively good job of compensating permanent disabilities when the Board has rated that disability at a very high level. However, the research also shows that the Ontario WSIB does not do a very good job at compensating injured workers that it has rated as having a disability of less than 50%. This is quite a large group. According to the Statistical Supplements to the WSIB Annual Reports, over the past 20 years more than 90% of permanently disabled workers have been assessed by the WCB/WSIB at less than 50% disability.

According to the IWH research findings, about 30% of these injured workers (rated below 50% disability) have a combined total income (WSIB benefits and other income) of less than 3/4ths of pre-injury earnings (Chart 4, page 35). One in three permanently disabled workers is significantly under-compensated.

This is explained by the IWH in their April 2011 Issue Briefing paper about this study:

> In the Ontario programs, about one-third of those with less than 50 per cent impairment had an earnings replacement rate of less than 75 per cent.[67]

In a system in which compensation to replace lost income is determined on a case by case basis, we believe it should be of concern to the WSIB that it is under-compensating by at least 25% in one out every three injured workers. This under-compensation explains why so many injured workers live in poverty and rely on social assistance, family members or charity.

We think that the writer of the Funding Review 1 page document may have been looking at some calculations of averages. There are some calculations that add up the benefits and earnings of all injured workers and compare that with the total for a control group of non injured workers. The average for each group is similar. But averages are irrelevant

[67] *Supra* note 33.

in assessing the adequacy or effectiveness of a compensation system that requires case by case adjudication.

According to Statistics Canada, the average income after tax for Canadians is above $30,000 for individuals and above $70,000 for families. Unfortunately, that does not mean that poverty does not exist in Canada.

Conclusions

Workers compensation benefits are indexed for inflation because fairness and justice require it as a matter of principle and a matter of right. When considered from the viewpoint of what is fair, there is a rare consensus on this. This was evidenced by the studies commissioned in the late 1970's and early 1980's, and by the very rare all party consensus of 1985 in the Ontario Legislature when legislation was passed to implement full indexation.

It is significant to note in passing that the funding ratio was not considered a cause for concern on the matter of indexation. When Professor Weiler endorsed full indexation the WCB funding ratio was about 50%. At the time of the all party consensus in 1985, the WCB funding ratio was about 32%.

When the legislation for partial indexation was introduced in 1995 and expanded in 1998, there was no change in the consensus on what is fair. The cuts were justified solely in the name of economic necessity. And they were not applied to those considered totally disabled and therefore totally dependant on their workers compensation benefits for survival. That would be unfair. The cuts were only applied to those rated partially disabled, because they would be 'small cuts' and 'these people were not totally disabled' and could rely on other employment income in addition to their workers' compensation.

But the impact of the cuts was not small. In the space of a mere 15 years, injured workers saw the purchasing power of their workers' compensation benefits decrease by 20% despite the partial indexation. And the impact was not limited to injured workers who are able to supplement their compensation with employment income. Research shows that the majority of injured workers considered partially disabled by the WSIB do not return to employment after their injury. Not only are they totally dependent on their workers' compensation benefits, they are receiving lower benefits than the workers that have been accepted as totally disabled.

Although injured workers were put through this sacrifice in the name of helping the financial security of the workers compensation system, absolutely none of the income they sacrificed went to the workers' compensation system. All of what injured workers lost, and more, was generously given straight to employers in the form of rate reductions and rebates. This is one of many examples of how the tremendous power imbalance between injured workers and employers has driven our workers' compensation system away from its fundamental principles time after time. Injured workers lose every time this happens.

Professor Weiler was correct 30 years ago when he said there should be no question about the entitlement of workers' compensation claimants and pensioners to inflation adjustments as a matter of principle and a matter of right. There should be no distinction based on level of disability. Justice requires that full indexation should be applied to all workers compensation benefits

The case for partial indexation has turned out to be a fraud upon injured workers. The unfairness that injured workers have experienced, some of the most vulnerable members of our community suffering 15 years of poverty and shrinking compensation while the WSIB handed billions of dollars to employers in lower assessments and excessive rebates, must not be ignored or swept under the carpet.

When an injured worker appeals a denial of compensation and the Appeals Tribunal allows the appeal, the WSIB will retroactively calculate what the injured worker should have received, subtract what the injured worker actually received, and pay the difference to the injured worker, with interest.

The same principle of justice and fairness must be applied with regard to indexation. Partial indexation has been an experiment that went horribly wrong. Justice requires that the benefits of injured workers that were de-indexed should be retroactively recalculated in accordance with the actual rate of inflation and every injured worker should be paid what they have lost, with interest.

At a minimum, fairness requires that the lost purchasing power of all permanently disabled injured workers must be restored and fully indexed from now by means of a retrospective adjustment to benefit levels, as was done with the 1974 inflation amendments. Injured workers have lost roughly 20% of the value of their compensation over 15 years. The solution is to adjust workers compensation benefits by 1.3% (20/15) for each year in which benefits were paid from 1996 to 2011. And full indexation should apply to all workers compensation benefits of injured workers with permanent disabilities from now on.

Summary of Recommendations to the Funding Review

With regards to the six areas of inquiry, we offer the following recommendations:

1. **Funding:** the system should continue to operate on a steady state funding model with a reserve fund. The current funding reserve of about 50% of projected future liabilities is adequate. It would be preferable to measure the adequacy of the reserve fund by reference to the number of years of future benefits held in reserve. The current funding reserve of about 25 years worth of benefits is adequate. Financial stability can be further ensured by expanding coverage.

2. **Assessment Rates:** Employer assessment rates need to be restored to 1995 levels. This requires rates to increase by 29% over 6 years. We further advise that the Board should stop falsely designating a portion of the rates as payment towards the UFL. Premium reductions can be obtained by expanding coverage.

3. **Rate Groups:** We recommend a single, flat rate system like EHT, CPP and EI to be phased in gradually. The system should have one rate with an adjustment for small businesses.

4. **Employer Incentive Programs:** Experience Rating programs incent inappropriate claims management practices which harm injured workers. They need to be eliminated. Incentive programs should be based on actual evidence of health and safety practices, not claims history.

5. **Occupational Disease claims:** These claims should continue to be treated the same as all other injuries and paid out of the common collective liability fund.

6. **Benefits Indexation:** The only *fair* level of inflation protection is *full* inflation protection. We recommend restoring full indexation of benefits for partially disabled workers and full repayment of what injured workers lost with interest.

We further urge the Funding Review, in making its final recommendations, to keep in mind the fundamental principles of Ontario's workers' compensation system and to ensure that the recommendations of this Review are consistent with these principles. We also urge the Review to consider very seriously the history of the re-emerging UFL "crisis", the impact that this had on injured workers over the past twenty-five years, and the impact that the recommendations from this Review will have on injured workers in the near future.

All of which is respectfully submitted this 11th day of April, 2011.

Injured Workers' Consultants
Community Legal Clinic