

INITIAL  
SUBMISSIONS  
TO THE  
WSIB  
FUNDING REVIEW

Toronto Workers' Health and Safety Legal Clinic  
2000 – 180 Dundas Street West  
Box 4  
Toronto, Ontario  
M5G 1Z8

## **Introduction**

With a deadline for submissions of 15 June 2011, this initial submission is presented in advance of the in-person presentation before the WSIB Funding Review. While we welcome the opportunity to provide our thoughts, this type of review has been conducted in the past to legitimise changes to the system, changes that have not always been favourable to workers.

The key to reducing costs is to reduce the number of accidents. By focusing on accident prevention instead of the resulting costs we can produce safer workplaces which in turn lead to lower costs. Instead, the Unfunded Liability is the focus of this review. Despite the perceived financial shortfall, the system is not in crisis. It is our position that the funding level can be at a satisfactory level in a pay-as-you go system.

## **Who We Are**

The Toronto Workers' Health and Safety Legal Clinic is a community legal clinic funded by Legal Aid Ontario. One of nearly 80 clinics throughout the province, we are a "Specialty Clinic". Unlike a neighbourhood clinic that is for the local community, our mandate is province wide and we have a very specific purpose - to provide legal advice and representation to non-unionised low wage workers who face health and safety problems at work. The Clinic provides information about health and safety hazards that workers can face in their employment, advice about their rights under the law and legal representation where required in Occupational Health and Safety, Workers' Compensation, and Human Rights matters. In addition to advocacy, we conduct community education and outreach programs aimed at immigrant workers and engage in law reform initiatives. Our activities are controlled by a Board of Directors elected from the community.

We represent people who have no resources and no recourse on their own. Our view is that the system already places enough burdens on an injured worker. This Review should be mindful of the plight of injured workers before making any recommendations.

**Issue One: Funding and the Unfunded Liability**

Having reviewed the contents of the Funding Review Green Paper, it is necessary to first address the concept of the unfunded liability ("the UFL") itself. The UFL, although spoken in terms similar to that of a deficit or a debt, is markedly different.

Simply put, a deficit is the difference of expenses over revenues. Although the UFL is expressed in terms of expenses and revenues, it is a not the same thing. The UFL is the shortfall of funds if the WSIB were to pay off all of its current **and** future expenses immediately.

Experienced participants in the workers compensation field have seen similar reviews of the UFL. The threat of the UFL has been used to limit workers' benefits. Benefit payments are not the cause of the UFL. The real cause is the failure to maintain adequate accident prevention through enforcement.

If the WSIB collected an amount that would cover future costs, the WSIB would be holding funds that could not be used to support the economy. Accordingly, the UFL also warrants examining the relative merits of future claim costs money held by the WSIB. The threat of the UFL is to hold back the economy by having such a large amount of money being held out of the economy.

We agree with the statement made by the President of WSIB to the Standing Committee on Government Agencies that, "the system is not in crisis." As noted by the President,

the average funding ratio was “barely above 50% on average” over the last 25 years and all obligations have been met. He went on to state that, “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.” If the system, as it stands today could carry on for 25 years without the influx of new funds, the system can hardly be described as in crisis.

The first issue is the question of monies. Is it financially viable for the WSIB to hold money in trust? It should also be accepted that “full” funding would have to be higher than 100% to properly protect the system. If “full” funding were to be at a level of 100% it would need to be higher to avoid the embarrassing situation of double dipping. For example, were there an economic downturn or a poor return on investments, the WSIB would be required to potentially raise assessments to make up the shortfall. Employers would pay twice for the same level of coverage to return to 100%. To avoid this situation, “full” funding would have to be over 100%.

It is our submission that this would be a waste of resources by having such funds held in trust by the WSIB. An alternative approach is that proposed by Professor Weiler in his review of the unfunded liability in 1980. His approach was one that recognised the importance of a pay-as-you-go system with sufficient cushioning to protect against unforeseen circumstances. This approach had the support of employers at the time of the Meredith Report. As the President noted, the system has sufficient funds to last for many years. The system should be funded to be sufficiently cushioned.

For these reasons, we endorse a system that has 50% funding.

*Time to Reach Target*

Should the Review endorse a lower threshold for the concept of “full” funding, the question of time to reach the target is not as pressing as one set at 100%. However, if the review should press for a higher goal, the question of timing is an important factor to review.

The decision to retire the UFL by 2014 gave the WSIB thirty years to reach “full” funding. However, a later change in government saw a reduction in premiums to appease employers. Studies today show that had the reduction not taken place the system would have a greatly reduced UFL. It is probably true that this type of review would be unnecessary.

Invariably the shockwave from changes to the system are largely borne by the injured worker. The appropriate time to adjust the system should be measured in decades. If the system is strong enough to soldier on for twenty-five years without support, it is not necessary to expedite the retirement of the UFL. Should this review conclude that “full” funding is close to 100%, the workers compensation system should be given thirty years to reach that goal.

## **Issue Two: Premium Rates**

According to the Green Paper, premiums paid have been unable to meet expenditures since 2001. The Government and the WSIB have been unwilling to raise premiums despite the goal set for 2014.

Palpable fear of the UFL was expressed in the Jackson Report. Notwithstanding the UFL concerns over competitiveness and the high rate of premiums, the very same expressed by employers today, a 5% reduction in premiums and further reductions were endorsed. The optimism that the UFL could still be retired by 2014 even with the premium reductions was unfounded. The political pressure of the UFL is not as great as the political pressure to see immediate effect in reducing premiums.

In light of the Historic Compromise, which is the foundation of the workers' compensation system, employers must accept the financial responsibility for workplace injuries and diseases. By not raising premiums to meet those demands the WSIB has essentially freed employers from their responsibility. This generates a UFL and invariably this Review will like hear suggestions that blame workers and seek lower benefit payments.

Premiums should be raised and there is little merit in discussing the fairness of this approach. The UFL would not be at the forefront of every WSIB decision had the premium not strayed from the level at 1996. This problem has a direct correlation to that decision.

### **Issue Three: Rate Groups**

As noted in the Green Paper, there are an inordinate amount of rate groups within each of the nine classes. Changes to the WSIB classification policy have largely limited retroactive classification of employers to two years. With changes in Bill 176 to require premiums across the construction sector further jockeying can be expected.

At the same time there is great overlap giving the appearance of an over-abundant amount of rate groups. For example, a licensed restaurant, an unlicensed restaurant, a take-out stand, a catering company, a bar/nightclub, and a supplier of labour to each of those establishments all pay the same premium rate. However, they all have their own classification unit.

In addition, there are thirty-three separate classification units for wholesalers of various products. A variety of different rates are paid across these wholesale operations. Should we favour a concept of collective liability then premium rates should be similar across all industries. Collective responsibility also requires universal coverage in the province.

### **Issue Four: Employer Incentive Programs**

The *Occupational Health and Safety Act* requires employers, "to take every precaution reasonable in the circumstances for the protection of a worker." The WSIB has effectively let the employer off the hook for the results of workplace accidents by failing

to raise premiums as the circumstances require. No incentive should be paid for achieving the bare minimum required by law.

Merit rating creates an incentive to reduce accident costs. It creates an incentive to focus on claims management rather than pre-emptive prevention. According to the Ministry of Labour website, complaints to the Ministry rose from 4,806 in 1997/1998 to 8,111 in 2008/2009. In the same time span, Stop Work Orders rose from 3,383 to 9,892. There were 313 convictions that amounted to fines of \$3.7 million in 1997. In 2008/2009<sup>1</sup> there were 1,303 convictions which lead to fines of approximately \$14.1 million. There should be a focus on enforcement and prevention.

With an experience rating system the focus is on the costs of claims after the fact. For example, one can see with the WSIB changes to return to work policies, to reduce WSIB costs the new policies pressure employers and workers return to work create employment opportunities there before proposing a work transition plan. Where is the focus on prevention of the initial accident? The magnitude of the prevention problem is so great the Government has seen it necessary to remove prevention duties from the WSIB and create a new Chief Prevention Officer and a supporting Prevention Council.

If in spite of requirements of the *Human Rights Code* and the *Occupational Health and Safety Act*, there are still calls to reward employers for meeting their statutory requirements. These type of rewards take money away from the WSIB and contribute to the UFL. Experience rating equates the costs of the system on the payment of benefits.

---

<sup>1</sup> There was a shift in the reporting year for 2005 from the calendar year to the fiscal year.

Compensation is the result of an accident. The focus of the system should be accident prevention.

Employer incentives should focus on prevention. The WSIB should aim beyond achieving simple compliance. Employer incentives should be given for the promotion of substantive change within the workplace. It is therefore submitted that any employer incentives should be focused on prevention aspects. This does not mean to suggest rewarding employers that obey the law. A new program, akin to the Workwell Audit program, should be considered.

#### **Issue Five: Occupational Disease**

Occupational disease is another danger workers face. It may appear while they are at work or the problem can manifest itself years afterwards. It is unsurprising that claim costs for occupational diseases are on the rise. What today may be defined as an "idiopathic condition" or "possibly" carcinogenic can tomorrow be confirmed as dangerous.

Occupational disease should be the responsibility of the entire province. Be it the financing of the workplace, the production of the raw goods, or the manufacture of the finished project, every sector has some role to play in the profit and the problems of occupational disease. For that reason, it is submitted that universal coverage be introduced in the province.

While the industry itself may have profited from the worker's disease, the corollary benefits to other industries warrant a universal system that reflect the total responsibility of the economy. This would be in accordance with the collective nature of the workers compensation system and would not unfairly burden one sector where the rewards are spread further.

By introducing universal coverage for occupational disease, the WSIB will create collective responsibility without imposing industrial liability. Occupational disease cases do not require scientific certainty to warrant benefits. Occupational diseases already have a high standard of requiring probability. Potentially entitlement may be warranted for claims today when science is twenty years behind in providing an answer. It is therefore understandable to avoid an industry focus in terms of the costs of claims.

The danger to workers continues to be the focus on the UFL. In a UFL centred perspective, the WSIB could raise the requirements to proof with scientific certainty. Decisions must be made on the best information available with the benefit of doubt to the worker. Occupational disease funding should be approached mindful that a discovery in a number of years can provide further evidence. That is why this review must support a lower threshold for proof. This avoids sudden stressors on the system when new evidence appears.

The question of anticipatory funding is best answered by the WSIB. The WSIB is the gatekeeper for claims. Sudden spikes or the rise in new diseases would first be

recognised by the WSIB. The potential costs and conversely the potential protection through health and safety management can come through critical examination of trends. This would help determine the extent of the problem (is it industry specific) and the costs expected (average age of claim).

An independent branch of the WSIB, free from the politics of cost estimates, should be established to review trends or potential hazards in occupational disease claims. This would give the WSIB to prepare for new diseases and propose prevention options. It would also give the WSIB to prepare an actuarial component that would leave the system financially healthy to respond to occupational diseases.

#### **Issue Six: Indexing of Partial Funding**

On this topic it would be appropriate to quote Professor Weiler in *Reshaping Workers' Compensation for Ontario*:

It is illegitimate in principle to argue that the Workers' Compensation Board must tighten up on claims and cut back on benefits because its total budget is growing too large, too fast, for the economy to afford. This should be unthinkable as would be a suggestion to the Chief Justice that the number and level of tort awards be restrained by his judges because insurance premiums are getting too high.

Again, through the politics of costs rather than the responsibility of payment, indexation has been used to limit increases to partially disabled workers.

The failure to properly compensate workers for the past fifteen years has resulted in an 18.47% loss in the difference between full indexation and the various methods used to

limit benefit payments. Again, the focus of past governments has been the costs to the system.

Having made the Historic Compromise, employer should be expected to bear the responsibility for the life of the claim whatever the extent. Indexing should be de-politicised. The question of indexing should not be left to the Government of the day deciding which interest group has more sway. A principled approach does not design benefits depending on the prevailing winds. It is therefore submitted that costs are not a valid reason to further disentitle workers from their benefits. Full indexation should be written into the core of the workers compensation system.