

**Injured Workers' Consultants Community Legal Clinic**

**COMMENTARY ON THE  
WSIB "FRAMEWORK FOR POLICY DEVELOPMENT AND RENEWAL"**

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## COMMENTARY ON THE WSIB “FRAMEWORK FOR POLICY DEVELOPMENT AND RENEWAL”

### Introduction

Injured Workers’ Consultants’ (IWC) is a non-profit community legal clinic funded by Legal Aid Ontario. We have been representing injured workers with their worker’s compensation claims, free of charge, for over forty years. We believe that we have valuable experience and insight concerning Board policy and we welcome the opportunity to comment on the Framework for Policy Development and Renewal.

### The Inclusion of Meredith and the Concept of Remedial Legislation

We wish to commend the Workplace Safety & Insurance Board (WSIB) on the inclusion of the guiding principles of the worker’s compensation system in Ontario. It is the opinion of our clinic that the original ideas espoused by Meredith should continue to shape the compensation system a century after his investigation.

However, the WSIB should include another major concept from the original purpose of worker’s compensation legislation: that it is remedial legislation. In his final report, Meredith wrote that

*“In these days of social and industrial unrest it is, in my judgment, of the gravest importance to the community that every proved injustice to any sections 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 on the workingman is admitted by all. From that injustice he has long suffered, and it would, be 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 groundless fears that disaster to the industries of the province would follow from the enactment of it.”*

This proposal is still applicable to policy development today and is incorporated in the Legislation Act, 2006, section 64. (1) which reads “An Act shall be interpreted as remedial and shall be given such fair, large and liberal interpretations as best ensures the attainment of its objects.”

We suggest that the WSIB policy framework make reference to the sections of the Meredith Report and the Legislation Act that explain the concept of remedial legislation.

## **Financial Responsibility: a Recurring Theme**

Financial/fiscal responsibility and potential financial impact are concepts that appear throughout the WSIB consultation paper. However, the paper does not explain what is meant by these terms. In common parlance, these expressions are often used to mean frugality, or making ends meet, or working with fixed resources, or even making financial cutbacks. We are concerned that this repeated concept will be a significant factor in the creation of policy and that it is necessary to clearly explain what is meant.

The concept of “financial responsibility” does not necessarily equal cutbacks or spending restrictions. Pursuing its statutory goal of providing compensation and other benefits to injured workers in a financially responsible manner, financial responsibility may require the WSIB to raise employer rates in order to ensure that it collects sufficient funds to pay that compensation. Left undefined, we are concerned that repeated references to financial responsibility will be mis-interpreted with the result that injured workers will have to shoulder the majority of the burdens arising from the focus on financial restraints.

Here, the responsibility, as it should be in a worker’s compensation system, is first and foremost to provide security to the injured and disabled worker when they can no longer provide for themselves. Our clients, and injured workers across Ontario, do not demand the impossible or the unreasonable from the WSIB. What injured workers want is fair monetary compensation for lost wages due to injury, required medical treatments that result from injury, quality vocational rehabilitation if they are unable to return to their previous occupation and financial security if the injury prevents the worker from returning to the labour force.

As legal representatives of injured workers, we see first hand on a daily basis just how renewed emphasis by the WSIB on “financial responsibility” translates to practical implications and decision making. The WSIB has taken to the practice of reviewing every claim that is about to be locked-in, including the workers that have been deemed competitively unemployable due to his/her injury and will never return to work. As such they have been thus granted wage loss benefits until the age of 65. We continue to encounter injured workers who are severely disabled with no hope of ever returning to work that have been told that they are being retrained for work just prior to the lock-in date . Many others have called stating that the WSIB has refused to pay for long prescribed medications; treatments the worker needs to carry out their activities of daily living. This is cost cutting, not financial responsibility; it is detrimental to the well being of those the WSIB was created to provide for. Injured workers want what is fair and just, nothing more and nothing less.

As noted on page 8 of the WSIB’s consultation paper “All policy proposals will be grounded in the fundamental objectives of the Act (the purpose clause) to satisfy legal requirements.” One of the fundamental objectives of the Act is to provide compensation to injured workers. We find that this concept is under-emphasized in the policy and that expressions about financial and fiscal responsibility are overused and undefined.

## **Interim Policies**

IWC believes that interim policies need processes that are more clearly defined than in the July 2011 paper. There must be timelines for the process and implementation. If not, we fear that interim policies will become “permanent interim” policies, such as is the case with the current interim policies on deeming that were introduced in July 2007.

Furthermore, there needs to be a clearer process for evaluation of the lived experiences of interim policies before they are finalized. This would include analyzing how injured workers have experienced the interim policies.

## **A Matter of Process**

We are concerned with the steps in the creation of policy as outlined in the July 2011 paper. The formal consultation should not take place after the drafting of policy; consultation should be at the heart of the procedure throughout the process. This would allow “stakeholders” to present views and ideas prior to the release of the drafts. However, how the WSIB describes this process gives a very limited definition as to who is consulted at the initial stages of policy creation. As injured workers, and potentially all workers in the province, could be impacted by the policies, we think the Board should clearly provide for workers to have a greater say in the identification of issues and the creation of solutions through policy development.

We are also concerned with section 3.2.6 of the July 2011 document. The WSIB states that policies will be taken for approval to the President and Executive Committee, and then to the Board of Directors *if appropriate*. The approval of Board of Directors, a Board whose purpose is to represent the various stakeholders of the compensation system, should be required for all policy. They should not be avoided, leaving the President and the Executive Committee ruling the WSIB without input from the Board of Directors, and by extension, the stakeholders of the system. This strips away the community aspect of the WSIB, an institution that has many stakeholders working for the fair and just compensation of injured workers.

Finally, in regards to the process, issues must be identified and dealt with the best way in which is suitable to the individual situation. The concerns of injured workers are varied and are not easily placed into a process of resolution. While it is of importance to identify the best way for policies to be created, it is a concern of ours that a mechanical, time driven, regimented process for the creation and analysis of policies could be insensitive to the importance of a policy to injured workers and the need to be responsive and tailor the policy review process where special circumstances exist.

## **Other Concerns**

Policies control how claims will be adjudicated and interpreted. The date of accident or the decision will stipulate which policy is applicable in the particulate case. As policies change and become replaced, the ones listed on the WSIB website are not the policies required to decide a file under appeal. To make the adjudication and appeal process easier and more accessible we ask that the WSIB create an Electronic Policy Archive. This archive would be hosted on the WSIB website and would contain all the Board policies, not just the current OPM. If the WSIB is going to be transparent and accessible, all policies must be readily available.

Second, we suggest the Board should introduce an additional consideration to address whether or not the proposed policies may have any unintended adverse consequences before the implementation. Furthermore, if a policy is found to have unintended adverse consequences after implementation, the policy should be reconsidered and remedied as soon as possible.

Third, section 2.3.5 discusses Administrative Guidelines. We understand that there are existing guidelines that are not published. We are of the opinion that all these guidelines should be made available as Adjudication Support Documents on the WSIB website. This will allow for transparency and clarity in the decision making process.

Finally, the policies created by the WSIB should consider the social benefit or increased good which would stem from the policy (or removal of policy if it was to have a negative consequence).

## **Summary of Recommendations**

1. Include reference to the historical and legislative requirement that the WSIA is remedial legislation stemming from Justice Meredith's report.
2. Financial responsibility must be defined and framed and contextualized in its proper legislative manner.
3. Interim policies must be more clearly defined and limited so as not become "permanent interim policies."
4. Interim policies must be evaluated and analyzed through the lived experiences of injured workers.
5. Injured workers and their advocates must be included in all stages of policy creation and evaluation.
6. The WSIB's Board of Directors must approve all policy changes.
7. The process of issue identification and policy creation must not become mechanized. Injured workers face many unique circumstances that cannot be easily fit into a structured formula.
8. The WSIB should create an electronic Policy Archive that includes all policies that may be used in decision making.

9. Unintended adverse consequences must be addressed before and after the implementation of the policy.
10. All administrative guidelines used in WSIB decision making should be published and available online as Adjudication Support Documents.
11. The WSIB must consider the social benefit that will result from the policy being implemented.

## **Conclusion**

WSIB policy flows from the legislation governing the institution, the WSIA. The principle of a workers' compensation system is one founded on remedial legislation. WSIB is obligated to ensure that injured workers are compensated and provided for as per Section 1 of the WSIA.

On December 7, 1964, the WCB approved "A Statement of Basic Policy of the Workmen's Compensation Board in its Administration of the Workmen's Compensation Act." It stated:

*"Every employee of the Board is a public servant. Public service requires a spirit of dedication.*

*As dedicated public servants it is our duty to:*

*1. Be sure in all cases that every injured worker who is entitled to the benefits of the Act shall receive as expeditiously as possible the full remuneration provided by the Act and the best available medical and rehabilitation services. "*

We hope that the WSIB still approves of this notion and we believe that it should be restated and serve as the underlying factor in the development of all WSIB policy.

Thank you for the opportunity to express our views on this matter.

Respectfully Submitted,

INJURED WORKERS CONSULTANTS