

**WSIB Funding Review**  
**Submissions of the Ontario Legal Clinics' Workers'**  
**Compensation Network**

**April 27, 2011**

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## **Introduction**

The Ontario Legal Clinics' Workers' Compensation Network is comprised of injured worker advocates who work in the community legal clinics in Ontario. Members of the Network work in all areas of the province, in both general service legal clinics and in legal clinics specializing in workers' compensation. Our clients are injured workers with very little means. Before their injuries, these clients were non-unionized workers, generally earning low wages, generally non-English speaking and very often facing mental health issues. We welcome this opportunity to comment on the issues before the WSIB Funding Review and encourage the Funding Review to consider the effect that each of its recommendations will have on the vulnerable workers who entrust their legal matters to our community legal clinics.

Several of the members of the Network, IAVGO Community Legal Clinic, Injured Workers' Consultants community Legal Clinic and the Hamilton Community Legal Clinic have made written submissions and have appeared before the Funding Review. We commend those submissions and support them. The following are additional comments to supplement those thorough submissions. We will comment on five of the key issues being addressed by the Funding Review.

## **Funding**

It is in the interests of injured workers that the WSIB funding remain at a level that ensures long-term financial sustainability. Our view on the appropriate level of funding is premised on the notion that the unfunded liability does not present an existential crisis to the WSIB. Many of the workers' side submissions (IAVGO, the OWA, ONIWG, the OFL, IWC) have presented the arguments fully.

The view that the unfunded liability presents a crisis derives from the inappropriate use of private insurance company metrics to the evaluation of the health of the Workplace Safety & Insurance Board accident fund. These private insurance company metrics were developed in order to deal with the real risk that an insurance company would not be able to obtain premiums and would go bankrupt. The Workplace Safety & Insurance Board is not an insurance company; it does not depend on premiums that a policy holder can choose to stop. Covered employers in Ontario must pay premiums. Since there will always be employers in Ontario, there will always be Workers' Compensation Assessments. These future assessments will be able to provide for future benefits for injured workers.

The comparison ought to be with the Canada Pension Plan. This is a large public pension scheme that pays for retirement, disability, death and survivors benefits for almost all Canadian workers. Funding of the Canada Pension Plan was examined in the late 90's. Despite worries about the financial health of the plan, it was determined that a satisfactory funding level would be approximately 25%. A conscious choice was made not to publish the unfunded liability. This has been referred to as the "steady state" funding model.

We submit that the Canada Pension Plan is the appropriate comparator for the funding levels at the WSIB. Any funding levels higher than Canada Pension Plan ought to be rigorously justified for reasons due to the size of the accident fund,<sup>1</sup> the risks that the accident fund faces,<sup>2</sup> or differences in the nature of the benefit structure between Workers' Compensation and Canada Pension Plan.

When reviewing the employer community submissions on the appropriate level of funding, it is striking that most assert, without providing reasons that 100% is the only appropriate level of funding beyond assertions that injured workers' benefits are at long term risk without a fully funded accident fund. This assertion is not justified. In assessing the submissions of both the employer and worker community on the appropriate level of funding for the WSIB, we urge that you consider that many reasons have been given for maintaining an unfunded liability; not many reasons have been given for its elimination.

In particular, we would like to respond to the submission of the Ontario Chamber of Commerce in which the following suggestion was made:

Provided WSIA is amended to give the board full operational independence, the board will be able to pursue the possibility of financing the UFL through debt issuance. As a longer-term strategy for bringing down the UFL, the board should consider issuing investment-grade bonds on capital markets, structured the same way as federal and provincial government bonds.

This particular proposal is quite misguided in our view. It suggests replacing the unfunded liability with debt. Many have argued that one of the problems with understanding an unfunded liability is the ease with which it can be confused with a debt. Understanding that the unfunded liability is not a debt makes it easier to understand why an unfunded liability does not present a crisis for the WSIB.

The Ontario Chamber of Commerce would end the confusion by turning the unfunded into a debt. This would not be cost free and would indeed be a waste of money that would serve no public policy purpose. The primary purchasers of long term debt are banks and insurance companies. A review of the membership of the Ontario Chamber of Commerce indicates that their membership includes

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<sup>1</sup> A smaller fund may have to have a larger funding ratio.

<sup>2</sup> For example, industrial disease disasters may have a more significant impact on the finances of the WSIB than they would on the CPP investment fund.

some of the largest banks and insurance companies in Canada. These banks and insurance companies would be prime beneficiaries. We therefore find it reprehensible that the Ontario Chamber of Commerce would make such a submission clearly intended to promote the financial well-being of its members.

### **Premium Rates**

*"[Experience rating] is the most dominant cause of the damaging changes that have been made to WC in Ontario, and the damaging changes that continue to be made."*

-Terence Ison, November 2010<sup>3</sup>

*"Simply stated, it's important to avoid making people more depressed by the process if you want them to return to work as rapidly as possible, and in this sense attacking anti-therapeutic mechanisms in the system becomes a cost-saving approach."*

-Katherine Lippel<sup>4</sup>

*Primum non nocere* ("First, do no harm")

In our experience as representatives of thousands of injured workers across Ontario, experience rating is the main cause of many of the worst aspects of the workers' compensation system. Experience rating has meant that, in the course of seeking compensation and restoration of their health and incomes after being hurt on the job, injured workers are in fact subject to new harms and new injuries. And, our clients - many of whom work in precarious employment, are people of colour, recent immigrants and women, or have other non-work-related injuries - are among the most vulnerable to these new injuries because of the nature of their employment and because they usually do not have unions to defend and support them.

Experience rating has the following pernicious effects, all of which are comprehensively detailed in the submissions of other worker stakeholders to this funding review:

- It re-shapes workers' compensation as an adversarial system in which it is assumed that there is a conflict of interest between the worker and employer as "parties" on opposite sides of the claim.<sup>5</sup> This is contrary to one of the main intentions of the workers' compensation system as

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<sup>3</sup> Terence Ison (Address delivered at the Health & Safety and WCB Conference of the OFL and ONIWG, November 2010), online: <[www.ofl.ca](http://www.ofl.ca)>.

<sup>4</sup> K. Lippel, "Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems", (1999) 22:5-6 International Journal of Law and Psychiatry 521.

<sup>5</sup> See the submissions of the Experience Rating Working Group, especially p. 10 and submissions of the IAVGO Community Legal Clinic, pp. 60-63.

Meredith conceived it, which was to remove employers from the front-lines of the workers' compensation system.<sup>6</sup>

- It creates unnecessary employer appeals of entitlement issues, as well as Second Injury Enhancement Fund (SIEF) relief, that unduly burden the appeals systems and create significant costs.
- It shifts costs from larger companies that are better able to "manage" claims and thus benefit from experience rating to smaller employers.
- It discourages reporting of injuries.
- It skews the ability to assess health and safety and prevention in workplaces because it results in underreporting.
- It coerces workers to return to work before they are fit to do so. Most injured workers return to work before there is a medical opinion that they are able to do so. A reliable medical opinion must be given by a doctor who has considered and examined the actual work that will be done; this rarely if ever happens.<sup>7</sup>
- It causes re-injury because injured workers return to work too soon, or to unsafe work.
- It encourages employers to bring workers back to work temporarily, and then make up non-injury-related excuses to terminate their employment, rather than just acknowledging that they cannot provide safe and sustainable employment.
- It encourages employers to contest and undermine efforts to retrain injured workers. We have noted that, before starting a worker's LMR program, the WSIB will sometimes send a letter to the employer specifically noting that the costs of the retraining program will be applied to the employer's accident cost statement. The WSIB then asks again if the employer can offer suitable work. Faced with an explicit reminder of the direct cost impact of WSIB-sponsored retraining, many employers suddenly "find" suitable work that previously did not exist. In our experience, these "found" jobs are rarely real and sustainable.
- It leaves injured workers in poverty when they are deemed "non-cooperative" in return to work and denied WSIB benefits.

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<sup>6</sup> See Robert Story, "The 'Meredith Principles' - Economic or Humanitarian?: Submission to the WSIB Funding Review Commission", April 18, 2011, p. 28.

<sup>7</sup> Terence Ison (Address delivered at the Health & Safety and WCB Conference of the OFL and ONIWG, November 2010), online: <[www.ofl.ca](http://www.ofl.ca)>.

We discuss in more detail below one of the most troubling aspects of experience rating - the secondary injuries it causes.

### ***Experience rating causes secondary traumatic injuries***

From our perspective as representatives, one of the most shameful effects of experience rating is how predictably the conflict and mistrust it creates ultimately re-injures our clients. The adversarial return-to-work, claims and appeals processes gradually wear down even the most "stoic" workers and cause them to develop secondary psychological injuries. Often, we can see it happening during the course of our retainers. It happens initially when workers are told they must return to work with the accident employer to do "safe" work. They return to work as ordered, but find themselves in a completely different workplace than the one they left. Their supervisors question their every request for accommodation. They feel disbelieved, and like a burden. Most often their pain is dismissed and denied by employers who see injured workers as a financial liability.

Often, our clients cannot handle the poisoned workplace any longer, and leave. Then, they face the new damaging impact of poverty. If they appeal and ask for benefits, the employer objects and argues that they are deliberately unwilling to work or even that the injury never happened or at least not the way the worker says. They go to hearings, where the Appeals Officer or Vice-Chair asks them to express their story and their pain, and the employer challenges their story and their pain. At all levels of the workers' compensation system, workers are challenged and judged on their honesty and their credibility.

Researchers have shown that 56% of workers with "litigious" workers' compensation claims - and 29% of all injured workers - believe they are being punished because of their work injury.<sup>8</sup> Injured workers feel (and in our experience are) disbelieved, treated as if they are at fault, and made to feel as if they are weak. In an increasing number of cases, workers are even placed under surveillance by employers who hire private detectives to try to disprove workers' claims of disablement.<sup>9</sup>

Every day, we see that the adversarial and litigious climate surrounding workers' compensation causes psychological injuries. Indeed, it is a routine matter of good legal practice in the workers' compensation field to inquire into the mental health of every one of our clients, because secondary psychological injuries are 1) so common and 2) often a partial or complete explanation for a failed return to work, failed retraining program or failed re-entry into the job market.

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<sup>8</sup> Katherine Lippel, "Legal and social issues raised by the private policing of injured workers" (2003) (online) Available: <http://www.wcbcanada.com/archives/Editorial/private-policing-lippel.pdf>

<sup>9</sup> Ibid.

Research also demonstrates that the stigmatization of injured workers causes re-injury.<sup>10</sup> As described by psychologist G. Lea, secondary wounding occurs when "the institutions or caregivers, to whom the worker turns for assistance, respond with disbelief, denial, discounting, blame, stigmatization, and denial or delay of assistance."<sup>11</sup> As noted by researchers examining the workers' compensation system in Quebec:

Institutional practices create incentives for employers to "better manage" workplace health and safety issues, and, in particular, the legislative modifications carried out in the 90s to rules governing the financing of the system, have had the effect of promoting contestation, not only of the initial claim, but of each subsequent ruling throughout the compensation process.

[...]

Refusing claims that are seemingly well founded, or encouraging employers to dispute claims, medical reports of attending physicians, individualized professional training programs and other aspects of the file, contributes to a more stressful process that is harmful to the health of the injured worker involved. ... *In the long term, in the case of many of the people we met with, the process contributed to the development of new handicaps ....*<sup>12</sup> [italics added]

## Rate groups

A review of many of the employer submissions indicates a concern for the instability of assessment rates and the effects of changing assessment rates on their abilities to do business. Typical of this reasoning are the submission of the Ontario General Contractors association which both sets out the problem and provides reasons for employers concerns. They state:

Contractors enter contracts often years before they will be completed. The pricing includes best estimates of WSIB premiums amongst other costs. The contractor is usually responsible for these costs even when they're surprised by substantial increase with short notice. The WSIB usually does not publish assessment rates until September, and some years it is New Year before they are released.

A funding policy should include principles that focus on advanced communications, process and whenever possible, no surprises. ...

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<sup>10</sup> G. Lea, "Secondary Traumatization of Work-Related Rehabilitation Clients", 9(1996) 22 *The Canadian Practitioner* 5; K. Lippel, "Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems", (1999) 22:5-6 *International Journal of Law and Psychiatry* 521.

<sup>11</sup> *Ibid.*

<sup>12</sup> Katherine Lippel et al, *Managing Claims or Caring for Claimants: Effects of the Compensation Process on the Health of Injured Workers*, (Université de Québec à Montréal, 1997) at 55-56.

Early communication and consultation about premium rates are vital to empower employers to prepare for changes associated with the new funding strategy.

We agree with this sentiment. It is trite but necessary to say that it is the employer's of Ontario that provide jobs for workers, and provide much of the economic activity that we rely on. Running a business is inherently risky and one of the risks involves costs. While we cannot eliminate the risk of costs, the WSIB, as an agency of the Ontario Government, ought to work to minimize the amount of unforeseen changes in the costs that employer's face.

One of the drivers of these unstable rates is the politicization of the rate setting process. For too long the setting of rates has been based not on the short and long-term revenue needs of the Workplace Safety & Insurance Board. Instead rate setting has been politically driven; since 1995 rates have been set artificially low in order to satisfy the employer lobby. As many in the worker community have pointed out, this underassessment of employers for all those years directly caused the unfunded liability. In 2008 this lead to the Auditor General report which contributed to the crisis mentality around the unfunded liability which directly contributed to the political decision to raise rates during a recession. But for the politicisation of the rate setting process, this would not have happened.

We must remove the politics out of the rate setting process.

One of the ways of doing this is to revamp the rate structure of the WSIB and gradually move towards one rate group. Moving to a flat rate rating system would reduce the politics in the rate setting. Instead of a small of industry representatives engaged in lobbying to reduce their particular industry's contributions to the accident fund, there would be one rate. While there would be politics around the setting of this one rate, it would be more transparent and open to both the employer and injured worker community. The WSIB and government would hear from both sides of the funding issue and would be more likely to make a decision based on the revenue needs of the Board.

There would be other benefits as well. Currently there are dozens of different rate groups. At present, there is a large industry of employer representatives who spend a great deal of resources trying to get employers moved into different (cheaper) rate groups. A great deal of money is wasted in maintaining the 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.

More importantly we believe that collective liability is a bedrock principle of Workers' Compensation. The further we move away from a single rate group, the further we move away from the principle of collective liability and the closer



we move to individual liability for employers. We believe in collective liability amongst employers and therefore we believe in a single rate for all employers.

We realize that this would be a big change in the manner in which Workers' Compensation is funded. Some employers would enjoy steep reductions in their Workers' Compensation Assessments; many would face steep increases in their costs. This should be implemented gradually over the course of many years.

### **Employer incentives**

Some worker and employer side advocates have cited examples where the Board and unions have been able to call employers on their illegitimate "gaming" of the system and improve their reporting of workplace injuries or even improve health and safety practices.<sup>13</sup> Certainly, in some cases - with a sophisticated and knowledgeable union, a sophisticated employer and WSIB support - the negative incentives of experience rating can be reduced or, in a few cases, experience rating might even encourage better employer practices. But, the more common result of experience rating is overwhelmingly negative. And, any positive results can be equally or better achieved through incentive programs targeted directly at employer practices rather than claims numbers and duration. Practice-based experience rating programs can incent positive behaviours without the pernicious negative impact of the current experience rating system.

This funding review has a unique opportunity to start a conversation about what incentive program(s) *can* work to reduce injuries and improve return to work. No one system is likely going to be entirely appropriate for Ontario as an immediate replacement to the current system, but a number of jurisdictions present helpful options. Indeed, throughout the world, safety incentives not tied to claims or loss experience are more common than experience rating.<sup>14</sup> Some notable examples include:

- New Zealand, which does not use individual experience rating of employers, but instead has a threefold incentive programme directed at encouraging specific safety initiatives or penalizing poor safety records;
- Germany, which uses a bonus/malus system for some industry sectors to award credits or debits for specific practices within an industry; and
- Denmark, which offers grants to firms targeted to reduce specific workplace injuries.<sup>15</sup>

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<sup>13</sup> See e.g. Submissions of the Ontario Nurses' Association, pp. 20-21;

<sup>14</sup> Robert W. Klein and Gregory Krohm, "Alternative funding mechanisms for workers' compensation: An international comparison" (2006) 59:4 International Social Security Review at 22.

<sup>15</sup> Ibid at 22-24.

We also would refer the funding review to the "incentive backpack" idea being studied by the Experience Rating Group.<sup>16</sup> This "backpack" could provide a monetary incentive for employers to hire injured workers.

The funding review should recommend the abolishment of experience rating as it is currently structured. As well, a comprehensive process should be started to research, discuss and design an alternative system.

### **Occupational Disease Claims**

As representatives of injured workers, we are most concerned that at the suggestion contained in the Funding Review's Green Paper that uncertainties surround occupational diseases and that perhaps the practice of funding compensation for these claims in the same manner as workplace-related injuries should be changed.

We agree with the submissions of the Office of the Worker Adviser which advocate for the use of the steady state model for occupational disease as well as the submission the occupational disease should be a collective liability.

In 1986, the then Workers' Compensation Appeals Tribunal dealt in its Decision 915 with the employer concerns regarding the fairness of compensating for diseases that are also caused by non-work-related aspects of life. In that decision Ron Ellis, Chair of the Tribunal, set out the following principled response to the employer side concerns:

Ontario courts have not yet had occasion to consider that issue in a compensation context, but the Panel is satisfied to conclude at this point that at least the Legislature cannot have intended to provide workers with less coverage for disabling consequences of an industrial injury than the common law provides for disabling consequences of negligent injuries. Furthermore, that the plain-meaning of the words leads to that conclusion should come as no surprise. There is nothing in the historical record to suggest that in giving up the right to sue and the right to damages for pain and suffering in exchange for the no-fault protection, it was intended that workers would accept, as well, a reduced breadth of protection in respect of consequential damages.

We urge the Funding Review to recommend the continued treatment of occupational diseases in the same way as all other workplace-related injuries. To do otherwise raises concerns of discrimination and of the violation of the Charter rights of injured workers who acquire occupational disease arising from their employment.

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<sup>16</sup> See the submissions of the Experience Rating Working Group, p. 32.

Distinguishing injured workers with occupational disease from those without is a disability-based distinction and in our submission discriminatory. As in the Supreme Court of Canada decision in *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, this differential treatment is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from other than a workplace-related injury.

But there is more. Sometimes, as in the case at bar, the lack of correspondence between the differential treatment to which the claimants are subject and their actual needs, capacities and circumstances is at the heart of the s. 15(1) claim to such an extent as to make a relative disadvantage analysis largely inappropriate. This is particularly true when distinctions are drawn between various types of mental or physical disabilities, because, as I noted above, the rationale underlying the prohibition of disability-based discrimination is the imperative to recognize the needs, capacities and circumstances of persons suffering from widely different disabilities in a vast range of social contexts. It can be no answer to a charge of discrimination on that basis to allege that the particular disability at issue is not subject to particular historical disadvantage or stereotypes beyond those visited upon other disabled persons. Indeed, the contrary position could potentially relieve the state from its obligation to accommodate or otherwise recognize many disabilities that, despite their severity, are not subject to widespread stereotypes or particular historical disadvantage. Such a result would run contrary to the very meaning of equality in that context and cannot be condoned.<sup>17</sup>

... in my view, the gravamen of the appellants' s. 15 claim is the lack of correspondence between the differential treatment imposed by the Act and the true needs and circumstances of chronic pain sufferers: see generally Law, *supra*, at paras. 64-65.<sup>18</sup>

### **Indexation of Partial Benefits**

In the 70's injured workers were faced with large increases in the cost of living; their compensation was only partially adjusted for these increases. The reality of injured workers in the 70's were that they faced real decreases in the purchasing power of their compensation and injured workers who relied on their compensation benefits were becoming steadily poorer. In 1985, the government introduced legislation that mandated annual increases of all workers'

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<sup>17</sup> *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para 89.

<sup>18</sup> *Supra* at para 91.

compensation benefits by the rate of inflation.<sup>19</sup> All three parties supported this change in legislation.

Unfortunately this protection lasted a mere 10 years. In 1995, Bill 165 was introduced. One of the significant changes of this Bill was that it eliminated full inflation protection for the majority of injured workers; with certain exceptions, most would only receive benefit increases that were 1% less 1/4 of the rate of inflation. This disturbing trend continued with Bill 99. The class of workers that received full inflation protection was reduced and the amount of inflation protection was reduced as well. After January 1, 1998 most injured workers would only receive benefit increases that were 1% less than 1/2 of the rate of inflation.

Even with the low inflation that we have been experiencing since January 1, 1995, the de-indexing benefits have had a significant impact on injured workers' benefits. The cost of living in Ontario has increased by 36.6% whereas most injured workers benefits have increased by 11.4%. This means that an injured worker receiving \$1000.00 in benefits in 1995 would require \$1366.42 in 2011 to have the same purchasing power as in 1995; due to the de-indexing of benefits this worker only receives \$1114.01. This amounts to a real decrease in benefits of 18.47%.

With no changes in the legislation, this real decrease in injured workers benefits will only get worse. If we were to increase an injured workers' benefits by only the current general indexing factor that injured worker would lose 32.94% of the purchasing power of his or her benefits over the next 25 years.

The impact of the limited indexing of injured worker benefits can be large and disturbing. Injured workers who do not return to work but who are deemed to be able to work, will have to face the rest of their working lives with increasing poverty and in some cases decreasing WSIB benefits. It is neither right nor fair that injured workers become reliant on family and on the taxpayers of Ontario because of their injury. While the partial de-indexing of benefits does not cause all of these problems, it contributes to the problem and should be eliminated. All benefits should be fully indexed and all calculations in the Act should be fully indexed to the Consumer Price index for Ontario.

It has been suggested by the employer community that injured workers should not get full indexation while there is an unfunded liability. We are fundamentally opposed to the notion that injured workers should continue to bear the costs of the alleged financial crisis that the WSIB is facing.

There are two reasons for this.

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<sup>19</sup> The particular inflation rate that was used for these increases was the annual Consumer Price Index for Canada.

First, the fact that full cost of living increases are not being paid to injured workers, does not mean that the costs go away. These are costs that are faced by injured workers. The only issue is whether the costs of the increase in the cost of living should be borne by injured workers, or their employers. We would submit that the only just answer to that question is that the employers of Ontario should face these costs.

Second, the costs of providing full indexation are overstated. While it is true that the current cost of providing full indexation to injured workers will be \$2 Billion, the fact of inflation provides the means of financing this sum.

Inflation does not only affect the injured workers. It also affects employers, and other, able-bodied workers. With inflation come increases in the ability of an employer to charge for their goods and services. It also means that there are increases in the general wages levels of workers. We saw the latter with the average industrial wage increasing by 45% whereas the cost of living only went up by 40.2%; during this period injured workers benefits went up by merely 11.2%. During this period of time, the ability of employers to pay for increased premiums increased by much more than benefits actually went up; this was, in effect a transfer from injured workers with loss of earnings benefits to employers and other able-bodied workers in the economy.

Inflation also has an impact on the growth of the accident fund. Inherent in the 7% expected growth of the accident fund, is the expectation that the expected investment growth will always be greater than the prevailing rate of inflation. As the rate of inflation increases, expected investment growth will increase for everyone. This is an economic necessity to ensure that people actually invest. If benefits do not increase by the rate of inflation, the accident fund (and by implication Ontario employers) will be the beneficiaries of this windfall.

This is not a new analysis. This analysis was set out by Paul Weiler in his 1980 report to the Minister of Labour. He states (at pps 70 -72):

Once we decide as a community what the appropriate level of compensation for injured workers is to be - in light of all the considerations and complexities I have already set out in this chapter - and 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 new net increase in a share of real goods and services. In fact, someone will reap a windfall profit from inflation at the expense of the disabled worker. In the case of workers compensation benefits, immediate beneficiary of such inaction would be business.

Happily one can consider these economic truths from a less negative perspective. 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. It does so through the impact of price inflation on the Worker's Compensation Board revenue, either from assessment of current employer payrolls or from the rate of return on its investment portfolio.

Justice demands that injured workers' benefits increase with the cost of living. Ontario employers can afford these increases; injured workers cannot.

## **Troubling Numbers: Experience Rating and Day of Mourning Statistics**

### April 28<sup>th</sup> – Day of Mourning

Countries around the world mark April 28<sup>th</sup> every year as the Day of Mourning for workers killed and injured on the job. The attached fact sheet from the Ontario Federation of Labour (OFL) gives a short history of the commemoration. The OFL also provides the current data each year from the WSIB regarding workers' compensation claims and work related deaths.

Since this submission is to be presented on April 28<sup>th</sup>, the Network proposes to take a look at the statistics provided by the WSIB to see whether there is any discernable effect that might be attributed to employer incentives such as experience rating.

### How Are We Doing Over the Past 10 Years?

What are the trends over the past 10 years in the Day of Mourning statistics that the OFL has compiled from the WSIB? To get a sense of the shift over the last decade, we have used an average of the first 3 years as a starting point and an average of the last 3 years as the end point.

YEAR	DEATHS	TOTAL CLAIMS	TOTAL LOST TIME CLAIMS
2000	314	382,518	108,142
2001	304	374,826	103,858
2002	367	365,469	99,855
<b>Avg. =</b>	<b>328</b>	<b>356,271</b>	<b>103,951</b>
2008	374	317,031	82,071
2009	382	253,761	66,909
2010	386	242,371	60,609

<b>Avg. =</b>	<b>380</b>	<b>271,054</b>	<b>69,863</b>
<b>% change</b>	<b>+ 16%</b>	<b>- 24%</b>	<b>- 33%</b>

We see that the total claims to the WSIB have gone down 24%. Lost time claims have gone down 33%. This is interpreted by some to show a significant improvement in workplace safety. But workplace deaths have increased by 16%.

How can this be explained?

#### Employer Incentives: Experience Rating

By experience rating, we are referring to the NEER (mid to large non-construction companies) and CAD 7 (mid to large construction companies) programs that use both rebates and surcharges. These two programs together apply to the largest proportion of employer premiums, about \$2.56 billion a year for 2010 according to the WSIB briefing document on employer incentives prepared for this review.

It is an interesting side note that even in a year such as 2010 where there was no “off-balance,” i.e. the total penalty charge was greater than the total rebates paid, the majority of employers in both incentive programs received rebates. The WSIB 2010 figures are that 11,200 out of 16,500 employers in the NEER program received rebates and that 4,500 out of 6,400 firms in the CAD 7 program also received rebates.

In both NEER and CAD 7 financial incentives are based on claims duration, which refers to lost time claims. In these two programs, the WSIB indicates that a combined total \$224 million in rebates were awarded and \$282 million in surcharges or penalties were assigned. Therefore, in total, \$506 million in incentives were brought to bear on lost time claims.

In CAD 7, financial incentives are also based on claims frequency, which refers to reported WSIB claims. In this program the WSIB indicates that \$63 million in rebates were awarded and \$40 million in surcharges or penalties were assigned in 2010. Therefore, in total, \$103 million in incentives were brought to bear on lost time claims.

A point that was emphasized in the presentation by the Experience Rating Work Group is that work related deaths have no cost consequences for an employer in the NEER and CAD 7 programs. There can be no surcharge, no financial penalty triggered by a workplace fatality. Although the WSIB recently changed its policy to provide that there will be no rebate paid in the year of a death, we understand that there has been no cost attached to that death in the calculation of rebates or surcharges, regardless of whether or not survivor’s benefits are

payable. However, if an injured worker receives lost time benefits for even a day in a year, the claim is labelled “active” and it may trigger a substantial surcharge depending on the employers cost position.

This is how it works. In experience rating, an employer’s projected future costs are calculated by multiplying the cost of a claim to date by the reserve factor set by the WSIB. Those projected costs are compared with the rate group and higher costs will get a surcharge and lower costs will get a rebate. Since NEER only compares lost time claims and not claims frequency, payment of health care benefits is assigned a reserve factor of “0” so that the projected future costs will always be “0” if lost time benefits are not paid. But as the Experience Rating work group noted, the reserve factor assigned by the WSIB to fatalities is also “0.” It is impossible for a workplace fatality to trigger an experience rating penalty.

If employers are responsive to financial incentives, it would be expected that the largest incentive effect will be on lost time claims because that is where the greatest amount of financial incentives are in play. That would be followed by a lesser impact on reported claims. And there would be little or no effect on workplace fatalities because they do not affect projected costs in NEER or CAD 7.

It appears from the WSIB claims statistics that employers have responded to the financial incentives as predicted with the degree of change being made in proportion to the total financial incentives in play.

Do these numbers show an improvement in workplace safety?

- is it harder to prevent a death than an injury, so workplace safety measures taken over the last decade only affect less serious injury mechanisms but do not affect potential fatalities?
- is there something about the kind of workplace safety measures implemented over the last decade that has the perverse and obviously unintended consequence of reducing workplace injuries but increasing workplace deaths?
- or is it possible that that there has been no improvement in workplace safety, only changes in employer reporting practices – perhaps it is becoming easier to hide workplace injuries but still impossible to hide the deaths?