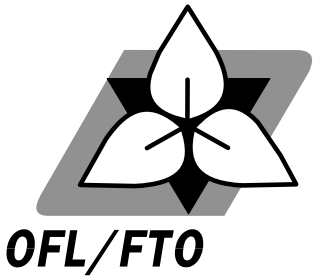

Submission

by the
Ontario Federation of Labour

to the
Workplace Safety & Insurance Board (WSIB)
Funding Review

April 13, 2011

PRELIMINARY SUBMISSION OF THE ONTARIO FEDERATION OF LABOUR TO THE WSIB FUNDING REVIEW

INTRODUCTION

Thank you for the opportunity to share our thoughts with the WSIB Funding Review. The Ontario Federation of Labour (OFL) is the largest provincial federation of labour in Canada. Our affiliates represent over one million unionized workers employed in virtually every economic sector and every community across the province. A workers' compensation system that is fair, financially sustainable and covers all workplaces is vital to the working people of Ontario.

This submission provides our general perspective on the questions put to the Funding Review. We look forward to discussing these matters with you, to the receipt of further information from the WSIB and the presentation of more detailed submissions as necessary.

OVERVIEW

Any examination of workers' compensation financing must start from the recognition that it is those injured or killed in the workplace and their families who are the first payers. They begin paying in blood, pain, tears and mental anguish even before the often devastating financial impact hits.

The purpose of the compensation system should be to make the victims whole as best we can through medical, vocational and social rehabilitation, as well as financial compensation. But our no-fault system provides compensation that is only partial and is premised on the elimination of the right to sue. Workers' compensation is neither full compensation, nor a gratuitous benefit; it is the result of a historic compromise.

Once longstanding injustices in the common law related to workplace injuries were removed by statute in the late 19th century, it immediately became apparent that the resulting system was still insufficiently accessible to injured workers, while successful claims could bankrupt small employers and go unpaid. This unsustainable situation led to Chief Justice Meredith's search for a solution and his assertion of the founding principles of our workers' compensation system. Of particular relevance to funding are the principles of the collective liability of employers and security of payment for injured workers.

We continue to support these as the cornerstones of workers' compensation funding, but both principles have been under attack for years. Security of payment for injured workers was trampled when promised benefits in the form of inflation indexing were rolled back in 1995 and then further in 1998. The implementation of Bill 99 beginning in 1998, together with the expansion and intensification of experience rating, undermined the principle of collective liability. All too often, the result has been shady claims management practices and adversarial attitudes that damage workplace relationships and leave injured workers with neither secure benefits nor secure employment.

We hope that the current review will be a step forward in restoring the fundamental principles of workers' compensation and the balance that they imply. However we regret that one fundamental issue has been left out of your mandate. Full coverage of all workplaces would remove the most troubling area of uncertainty around the WSIB's long-term funding. We have written the Minister of Labour requesting that this irresponsible omission be corrected. Even without this element, however, it is possible to provide injured workers with a stable system that pays fair compensation now, beginning with the restoration of full, automatic, annual indexing of their benefits.

1. FUNDING

What is full funding? What should the WSIB set as its funding target? What is a reasonable time frame for the WSIB to reach its funding target?

During the darkest days of World War II, the heavy loss of allied planes to anti-aircraft fire over Europe led to the establishment of a team of scientists to investigate and provide solutions. The team dutifully examined returning aircraft, assessed the damage each had suffered, mapped the holes in the fuselage, stabilizer, wings, etc., identified those areas most likely to be hit and recommended the placement of armour plating accordingly.

Needless to say, those scientists failed in their mission, having weighed down aircraft with unnecessary protection in precisely those areas where a plane was most likely to be hit by enemy fire, yet still return safely from its mission.

The WSIB's unfunded liability (UFL), carefully measured to be in the billions of dollars, is a convenient political target, made all the more credible by the evident distaste of actuaries trained in the necessities of private insurance and pension plans. But the mere existence of the UFL has never prevented a single benefit dollar from being paid, has never presented an imminent threat to the short-term viability of the system and has arguably never presented a threat to the long-term sustainability of the system.

Full funding on an accrual basis is neither necessary nor desirable, and the WSIB has to our knowledge never achieved it. Initially this was by design. The idea of so-called full funding is that the WSIB should have in its investment fund assets sufficient to make all of the future payments related to injuries that have already occurred – without relying on its future premium income. This could also be characterized as a wind up position, and that is one reason we oppose this notion of full funding. Workers' compensation must remain a public system.

Chief Justice Meredith, having examined different systems around the world decided that neither a pure pay as you go system nor a fully funded system was appropriate. The system was originally set up by Meredith to be pay as you go with a reserve to be determined by the Board. This general approach was approved by Professor Weiler during his review of the system in the early 1980's, and the WSIB's current level of funding exceeds what existed at that time.

Professor Weiler pointed out that full funding would have the effect of drawing capital from the Ontario economy, especially disadvantaging small employers who could have no hope of making the Board's investment roster. The "unfunded" portion of the Board's accrued liabilities should be considered a loan to Ontario's employers. In materials prepared for this review, WSIB management has characterized this as a loan at 7% interest. This is simply a reference to the discount rate used to value the Board's future liabilities. No interest payments need to be made, and the UFL does not need to be paid off.

The WSIB is not a private insurer or pension fund, but a public body with what amounts to a taxing power. Based on current projections, there is no reason to doubt that even with the restoration of full indexing the Board will continue to meet benefit payments as they come due. That is the standard set by Chief Justice Meredith and the only meaningful definition of full funding from the worker's point of view. Future benefits are fully funded by the investment fund and the WSIB's future stream of income.

It is questionable whether full funding on an accrual basis would enhance the security of injured workers in any way. Individual injured workers have no vested legal rights to the assets in the Board's investment fund. In future tough economic times, those assets could simply be used to finance premium holidays for employers.

This has happened in the past, when the greatest danger to the payment of individual workers' benefits has been the use of the UFL as a political cudgel. Benefit reductions enacted in 1995 and 1998 used the UFL as an excuse, but the notional savings created were not used to eliminate the UFL, which could have happened well-in advance of the original 2014 deadline. Instead, employer premiums were dropped dramatically. Adjustments to the Board's assumptions regarding inflation indexing and investment returns which workers had advocated as reasonable and as showing that benefit cuts were not necessary, were made only after the cuts had been made, functioning as supports for continued low premium rates.

When the UFL is brought out to attack injured worker entitlements, the issue of intergenerational equity is always raised. Chief Justice Meredith addressed this issue by indicating that the Board's reserves should be sufficient that future employers will not be unfairly burdened with costs from accidents in previous years. Given that the WSIB has always been partially funded, any generation called upon to pay off the existing UFL would be unfairly burdened.

Instead, a system of sustainable steady state funding should be established, one which looks in a balanced way at the Board's accrued liabilities and assets, its current costs and income, and its future expected claims and premium base. Whatever the final contours of the funding strategy, we are confident that the system can remain sustainable without drastically increasing the size of the WSIB's investment fund relative to its liabilities. Full funding on an accrual basis is not necessary. Nor is it desirable to spend money on armour plating at the expense of the benefits that need to be delivered.

2. PREMIUM RATES

Is the current WSIB premium rate setting methodology appropriate? What changes would improve it to ensure that premium revenue covers costs? Should premium rates increase until the WSIB's funding target is reached?

An old political adage variously attributed to Benjamin Disraeli and David Lloyd George warns that "you can't leap over a chasm in two jumps". The WSIB's traditional rate setting methodology has amounted to attempting to do so in thirty slow, deliberate steps, filling in the chasm as you go.

That methodology , as formulated in the early 1980's, was to cost out the new claims costs for the current year (on an accrual basis) and then to add an amount for overhead and an amount for paying off the UFL by a target date 30 years in the future, 2014. The result was premium volatility and increases beyond what was anticipated, due to the sensitivity of the UFL to recession.

A recession decreases the value of the WSIB's investments even as the base of assessable earnings shrinks. This cyclical decrease in funding is accompanied by higher unemployment, which affects the ability of injured workers to find and retain suitable employment. Strict adherence to the traditional rate setting methodology, with its focus on the UFL, causes rates to rise during bad economic times.

In the recession of the early 1990's, the result was a political revolt by employers against increased premiums, leading to benefit cuts for injured workers followed closely by politically imposed premium cuts for employers. The Board's premium setting methodology is now broken, with the amount of income set aside to pay off the UFL determined by nothing more rigourous than "whatever is left over" under the political rate cap after new claims costs and overhead are taken into account.

It has been suggested that what's needed is for the politicians to stick to legislating benefit levels, while allowing the WSIB, independently of Cabinet and the political process, to set the premium rates necessary to pay them. But it was precisely this "disciplined" approach that self-destructed in the 1990's, and it would be naïve to think that a do-over of this failed strategy would somehow produce a stable and sustainable system for delivering worker benefits.

That remains the case even if Cabinet passes a regulation pursuant to Bill 135 with benchmarks and timeframes as a means to show that "we really mean it" this time. Such a regulation would do nothing to address the volatility inherent in any rate setting methodology that sets a hard target for UFL elimination, nor would it insulate the system from political pressure. The WSIB is also subject to direct pressure to hold the line on rates while exercising its tremendous administrative control over the flow of benefits to hold down costs. As long as rates are set on an annual basis and more or less immediately reflect the vagaries of the business cycle and adjustments to benefits, rate-setting will be politicized, both inside and outside WSIB.

We suggest that the best way to depoliticize rate-setting is to construct a methodology inspired by the steady state funding model of the Canada Pension Plan (CPP). Faced with a demographic situation that would have saddled younger workers with steady rate increases to fund the retirement of aging baby boomers, CPP instead accelerated the increase in premiums to a rate that could in theory be sustained

for decades. Baby boomers now fund an increased portion of their own retirement, while the long-term stability of rates guarantees intergenerational equity. The result is a sustainable system with a funding ratio that is not expected to exceed 25%.

Viewed in context, rather than only through the misleading prism of the "average premium rate", Ontario's rates are within the Canadian mainstream. Full coverage of all workplaces would markedly lower the average rate, through the inclusion of large payrolls in relatively low rate sectors such as banking and government. Rates can be increased to a steady state rate covering a return to fair benefit indexation, including the payment of arrears, as well as providing for expected increases in occupational disease claims and for more meaningful incentives to improve health and safety practices and reintegrate injured workers into the workplace.

A steady state rate setting methodology should also put to rest once and for all the question of whether, once full coverage is achieved, currently excluded employers should bear part of the cost of the Board's existing UFL. Of course they should, just like every other new entrant to the system in past decades. They would not be required to fill in a chasm, just to walk over a bridge.

3. RATE GROUPS

Is WSIB's rate group structure appropriate, given the principle of collective, no fault liability? What opportunities exist to simplify the rate group structure?

The current classification system is too complex, leading to unnecessary confusion, inconsistency and manipulation. We support the dramatic flattening of the number of rate groups. In an ideal world, the principle of collective liability would be reflected in one single flat rate. In the real world, it is still possible to reduce the number of rate groups to the nine classes, or even to white collar, blue collar, restaurant, driving and construction categories, similar to the current rate groups for supply of labour.

Collective liability within a smaller number of rate groups, each sufficiently large to cover the field of current manipulative practices and legitimate close business interactions and partnerships, would provide a platform for transforming employer incentives along the lines suggested below. These incentives should not encourage employers to target injured workers for anything other than job offers. Rather, they should encourage them to improve their own workplace practices and to push for the enforcement of higher standards in other workplaces and even entire industries. Is demolition work inherently more dangerous than electrical contracting, or are industry practices in need of forced radical change? Questions like this must be pushed to the forefront.

4. EMPLOYER INCENTIVES

Is the present design and operation of these programs appropriate? What alternatives exist to promote increased safety in the workplace, fairness in insurance costs to the employer, and incentives to employ injured workers?

Our comments are directed primarily to the design and operation of those programs that involve the most employers and the lion's share of WSIB premiums, namely MAP, CAD-7 and especially NEER.

These experience rating programs all rely on claims cost and/or claims frequency to determine positive and negative incentives. They should be eliminated and replaced with more effective incentive programs.

The OFL's highest policy making body, its biennial convention of delegates from affiliated unions, has repeatedly called for the elimination of experience rating, citing both the lack of any reliable empirical evidence that it effectively promotes investment in prevention and return to work, as well as the evidence of our members' own eyes that it does effectively promote bad practices, especially claims suppression and sharp claims management.

The inability to validate claims regarding health and safety or return to work improvements makes the persistent off-balances in the WSIB's experience rating programs, which have negatively affected the Board's finances, all the more indefensible.

Claims Suppression

Our members report that the current design of these programs has created a pervasive culture of non-compliance in reporting, running from senior management down to frontline workers. Workers are afraid to report work-related disabilities to their employers out of fear for their jobs and often ask their physicians not to report to WSIB for the same reason. Front line supervisors who receive reports warn injured workers off making a WSIB claim and fail to relay reports to those responsible for filing paperwork.

Experience rating directly incents this claims suppression. What gets counted, gets incented. Large sums of money are at stake, employers are the primary reporters of injury to the WSIB, the risk of being caught is small for minor injuries, the risk of punishment when caught is almost non-existent and when penalties are assessed, they can be miniscule.

It is difficult to imagine a truly effective reporting enforcement mechanism at this point in time, given the insidious reach of this culture even into the consciousness of individual workers. Meanwhile, minor injuries that should serve as red flags and prevention opportunities are swept under the rug in an attempt to simulate a safe workplace. Eliminating the financial incentive to suppress claims is a necessary starting point for establishing the culture of reporting that is a necessary underpinning for effective prevention.

Claims Management

When claims are reported, experience rating programs point the employer not towards prevention, but towards claims management. The injury itself cannot be reversed, but its financial consequences can be eliminated or significantly reduced. Entitlement can be delayed, denied or overturned through objection, sharp reporting practices, outright lying and appeals. Full wages can be paid to make lost time claims appear to be no lost time claims, issues such as the payment of wage loss benefits rather than health care only or recognition of a permanent impairment can be appealed, injured workers can

be forced back on the job prematurely, they can be demeaned or harassed into quitting, rendering their wage loss non-compensable, and so on.

Experience rating encourages adversarial conditions in the workplace, turning injured workers into liabilities on the employer's accident cost statement. In those cases where good workplace relationships already exist and/or the employer is also motivated by other economic incentives related to interruption of its business, experience rating may act as a supplementary reward for good behavior. In other cases, astute union representatives or WSIB employees may be able to use those programs to convince an employer to take back an injured worker they otherwise might not. But in no case does experience rating confer a benefit that could not be obtained more reliably by direct incentives for the desired behavior.

Better Incentives

The problems with experience rating are not incidental, but inherent to the programs' design. This has been confirmed by our 2007 investigation of the massive rebates received by many employers convicted of health and safety violations causing serious injury or death, research that was replicated by The Toronto Star the following year. This in turn led to further confirmation, when the WSIB contracted the Morneau Sobeco consulting firm to review its experience rating programs. Most recently, the Expert Advisory Panel on Occupational Health and Safety has recommended that incentive programs should focus on health and safety practice improvements in the workplace rather than lost time injuries. Self-reported accident frequency and claims costs that can be manipulated are good benchmarks if the goal is to create a competition among employers to keep the WSIB costs originating in their workplace down – by any means necessary. But they are not valid or reliable measures of return to work or health and safety performance.

Consider the absurdity of the following situation. A worker suffers a serious workplace injury, requiring either significant accommodation in her current occupation or retraining. Her accident employer fires her, explicitly indicating that this is because of her disability. Through luck, she is quickly offered a job with another employer who is willing to train her on the job for a new, better paying position in a related but less physically demanding field. Under experience rating, the reward for returning this injured worker to meaningful, productive employment accrues to the accident employer. There are no incentives for any other employer to hire an injured worker.

We believe that within the context of a steady state funding system, better return to work incentives would directly target return to work, rewarding those employers who put cheques into the hands of injured workers. The WSIB should be in the business of making jobs available for injured workers, who are encumbered not only by the fact of their disabilities, but by the attendant stigma and discrimination. The work of determining a design that properly accounts for differences in severity of injury or between temporarily and permanently disabled workers still lies ahead. But there are models for similar programs, from B.C. to Germany that can be analyzed and adapted.

Prevention incentives should also focus directly on the practices that lead to healthy and safe workplaces. Under experience rating, claims suppression provides the same reward as preventing an

injury, even while undermining workplace safety. Aware of this, the Ministry of Labour has recently begun targeting inspections to workplaces with no reported injuries over the last three years. Initial reports to stakeholders indicate that more orders are issued in these cases than in workplaces targeted due to worse than average accident records. Incentive programs cannot replace enforcement, but experience rating does not even act as a supplement. It is indifferent to these orders indicating unsafe conditions.

No employer should receive a financial reward while in violation of their statutory health and safety responsibilities. In fact, every employer should be required to validate their compliance with fundamental health and safety obligations with respect to their physical plant, work and safety procedures before graduating from a high risk premium to the steady state premium. Claims of compliance should be subject to strong auditing standards, including physical inspection and interviews with workers, by independent evaluators, preferably Ministry of Labour inspectors. Falling out of compliance should result in a penalty assessment.

Within the bounds of a steady state funding model and what is allowable under the Occupational Health & Safety Act and its regulations, there remains room to adjust premiums up or down based on merit. Nearly every U.S. jurisdiction allows for “schedule rating”, adjustments to class rates based on the risks to which employers expose their workers. Private insurers and public regulators have developed standards for assessing the quality of premises, supervision, worker training, management cooperation with the insurer and safety organizations, onsite medical services, surveillance programs and other benchmarks that could be analyzed and adapted for use by the WSIB.

All standards should be subject to strong auditing by independent evaluators, including a standard for accuracy in injury reporting. Such a system is in everyone’s interest. It is more fair to individual employers to assess their premiums based on the risks that are within their direct influence and control, than to the occurrence of incidents which may not be. It is more fair to workers to replace the race to the bottom of the claims management racket with a race to the top of health and safety standards and disability prevention.

5. OCCUPATIONAL DISEASE CLAIMS

How should the insurance fund treat occupational disease claims? Should they be a collective liability or charged back to specific employers? Should the WSIB establish a special fund for occupational disease claims?

Our primary concern is that occupational diseases should as nearly as possible be treated like all other claims. When work is a significant contributing factor in the genesis or onset of a disease, entitlement should be recognized and compensation paid.

The creation of a special fund for occupational disease claims would not advance this goal. Under the current model of full funding, the creation of a special fund would represent an immediate addition to the UFL. The temptation to look to this (unfunded) fund as the primary source for paying occupational

disease claims would inevitably lead to pressure to restrict entitlements through administrative action or legislative change.

On the other hand, if a new funding model along the lines suggested above is adopted, a special fund is not necessary, even on a prudential basis. Rather, expectations regarding future claims, and even provision for currently unknown sources of disease, can and should be considered in determining an appropriate steady state rate. As part of this process, the WSIB's Program for Exposure Incident Reporting (PEIR) should be expanded.

As with other claims, those for occupational disease should be a collective liability. Assigning their cost more narrowly or subjecting them to experience rating would do little, if anything, to promote prevention. Rather, the primary effect would likely be to create powerful and motivated adversaries to the recognition of entitlement. As the sorry history of asbestos –related disease in Ontario demonstrates, this leads to the promotion rather than prevention of disease.

As with other claims, any use of employer incentives to prevent occupational disease must focus on workplace practices. Incentives related to the implementation of protective measures and surveillance programs or the elimination of known or suspected hazardous substances, could be used to move workplaces beyond the current regulatory framework into more proactive prevention based on the application of the precautionary principle.

The horrific, ongoing human toll of asbestos-related disease cannot be overstated. The lost prevention opportunity, rooted in the stubborn refusal to accept the available independent medical and scientific evidence regarding causation, is heartbreaking. On the purely financial level, this callous disregard for the evidence delayed much needed compensation while increasing the number of claims. It also closed off the opportunity to effectively pursue third party actions for the recovery of expenses. Although the WSIB now pursues these with some vigour, this is happening in an environment when the main culprits have already passed into bankruptcy, and claims can only be made to trusts that pay pennies on the dollar.

The WSIB should invest in strategic action to identify causes of disease in the workplace, to provide enhanced support to workers and survivors and to pursue actions against third parties wherever possible.

6. BENEFITS INDEXATION

What level of inflation protection is fair for partially disabled workers?

The answer to this question is clear. Fairness demands that benefits for partially disabled workers must be fully indexed for inflation. The failure to do so over the last 15 years has led to an unjustified and unfair erosion of benefits.

It is black letter law in the area of torts that the calculation of damages, whether for economic or non-economic loss, must take account of inflation. It is an obscenity that the meager compensation paid to injured workers for pain and suffering has decreased in real value with each passing year.

In the more financially substantial areas of compensation, de-indexation has led to a real reduction in the compensation rate paid for loss of earnings or loss of earning capacity. This is completely unacceptable.

Full indexing in accordance with the Consumer Price Index would be acceptable, given that it is a measure of inflation with which most workers are familiar. But even this would not have fully compensated injured workers for the real increase in their lost wages during this period, given that wages have risen faster than the CPI.

Fairness going forward demands not only the restoration of automatic, full CPI indexing prospectively, but catch-up indexing from 1995 to date. Whether workers declared partially disabled actually have a job or are merely deemed to have post-injury earnings, those earnings reflect current labour market prices. Bill 187, passed in 2007, is a modest start on this catch-up indexing, although the Legislature's intention to eliminate the injustice of deeming has been obstructed by WSIB policies. Any calculation of wage loss going forward that does not fully update pre-injury earnings with at least full CPI from the date of injury, locks in the loss of real value caused by de-indexing from the date of injury and exacerbates the unfairness of deeming.

Full fairness, of course, would also entail retroactive arrears payments and interest to make up for the losses experienced by workers over the years. This is exactly what should happen. As Professor Weiler noted over thirty years ago, failing to provide inflation protection for injured workers can only result in a windfall for someone else. The reduction in the real value of permanent disability benefits over the last 15 years has been used to finance a windfall for employers in the form of artificially low premium rates. It is time for them to pay that money back.

All of which is respectfully submitted,

ONTARIO FEDERATION OF LABOUR