

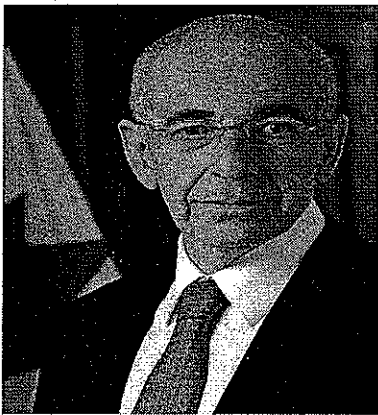


Workers' Compensation Newsletter

WSIB President David Marshall:

'The Workplace Safety and Insurance Board is in a Broad Crisis, caused by employers, and drugs.'

(p.487 and 473 of Hansard)



We've noticed that since 1998, duration levels have been rising sharply, and not so surprisingly, so has the average cost of benefits...the key drivers for this increase...behaviours on the part of employers resulting from the way financial incentives were structured... (and)... addictive narcotics..."

What Are the Possible Causes of the Increased Duration of Benefits Paid to Injured Workers and the Consequentially Bloated WSIB Unfunded Liability:

Is the Problem Mismanagement by the WSIB in its day to day operations?

Introduction

On February 21, 2010 David Marshall, the WSIB's new president, and former federal assistant auditor general and private banker appeared before the Standing Committee on Public Accounts of the Ontario Legislature to explain what is transpiring at the Board. After protesting many times that Ontario Worker's Compensation system is not in "crisis", under direct examination by MPPs, Marshall had to finally admit that the Board's habitual spending on benefits in excess of their revenues leaves the Board over the long term, in a financially untenable position: "a crisis in a broader sense". The reason the Workplace Safety and Insurance Board faces an ever expanding level of benefits paid, even though accidents have declined by 40% over the last 10 years, was explained by Marshall as follows: "More importantly, workers are staying on benefits longer because they are failing to return to work..."

The Ontario Business Coalition commissioned a Report prepared by Edward Nixon, actuary, entitled *Workers' Compensation in Ontario A System in Crisis*. Nixon has been dealing with Workers' Compensation issues for over 20 years. He notes, along with every other commentator recently, that most of the Board's financial woes are on account of the increasing duration of the average claim and the resulting benefits that this forces upon the WSIB, under the current legislation, to shell out. He blames WSIB mismanagement as the primary cause, because the cost per claim pursuant to similar legislation in other provinces, is less.

The Liversidge e-Letter in its November 16, 2009 edition points out that in 1988 the Board employed 23 people per 1000 lost time claims and that increased to 70 people by 2007. By 2009, when

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employers assessments decreased by 10% the WSIB should have fired 10% of their workforce, as every other Ontario corporation has been forced to do. The Board praises itself for eliminating bonuses and not increasing its staff! Notwithstanding, that obviously the WSIB is none too efficient, a study by the Institute of Work and Health found that Workers' Compensation boards in Canada, where State monopolies run compensation systems, are far more efficient and inexpensive than California's private carrier Workers' Compensation insurance companies.

The poor service level experienced by participants in the day to day operations of the WSIB through its adjudicators and management staff has been ragged on in this newsletter for over 20 years. On the other hand, our firm deals with the WSIB in four other provinces, and those Workers' Compensation Boards are just as bureaucratic and sclerotic.

In my opinion the increased duration of claims has been caused by the metamorphosis of Ontario Workers' Compensation into the world's richest and most generous welfare system, while at the same time making it available to the most litigious population this side of California. My readers are invited to speak for a few minutes with worker representatives of the Office of the Worker Advisor and their clients, to determine the voracity and length of their demands for even greater benefits than now available under the Workplace Safety and Insurance Act and its policies.

In one case heard at the Workplace Safety and Insurance Appeals Tribunal (Dec. 996/08) the Ontario Worker Advisor (funded by the WSIB but administered by the Government) spent 30 hours of time challenging the second injury fund relief received by the employer because the employer paid low wages (an appeal worth nothing to the worker). The relief was indeed reduced from 90% to 75%. The employer may do the same with his workforce, as a proportion between Ontario and offshore. The Ontario Government should feel embarrassed for allowing such folly.

Let's take the Workers' Compensation system of Nova Scotia as an example and compare the litigious nature of the Nova Scotia workforce with Ontario's.

In 2008 the Nova Scotia Workers' Compensation Board received 8,050 lost time injuries. In the same

year, the Ontario Workplace Safety and Insurance Board received 78,256 lost time injuries. The Nova Scotia Workers' Compensation Appeals Tribunal received 976 appeals in 2008 (Nova Scotia's interim appeal process is mainly a gate keeper system prescribed in writing), while in 2008 the Ontario Workplace Safety and Insurance Appeals Tribunal received 4,000 appeals, and the Appeals Resolution Office received over 9,000 appeals, most done by hearing. Why are there 14 times more appeals in Ontario compared to Nova Scotia, when the number of lost time injuries is only 10 times greater?

Is the Nova Scotia legislation less complex? Workers' Compensation benefits in Nova Scotia are similar to Ontario by providing indefinite wage loss for those significantly injured; they even recognize chronic pain thanks to their Court of Appeal. Are Nova Scotia Board employees smarter or better trained than Ontario? Doubtful, given that the qualifications for the job and training programs are similar. Are Chief Executive Officers of the Nova Scotia Board better? Probably not since both Boards have a mix of political appointments and career civil servants.

So what's the difference? In 2007 there were 892 decisions rendered by the Nova Scotia Appeals Tribunal. From the 892 decisions, 30% of appellant workers were self-represented, compared to Ontario where only 12% were self represented and 82% had either paralegals or lawyers.

The population and legal profession in Nova Scotia has not yet caught up to Ontario's "*a WSIB claim is an uncashed lottery ticket*" social environment, though judging by the number of appeals in Nova Scotia concerning chronic pain awards, they are moving in that direction.

Is Experience Rating the Problem?

At the Legislature WSIB President David Marshall stated: "...the incentive scheme that is inherent in the lost-time-injury number and the experience rating of employers relative to that number is in need of serious overhaul." (P. 473) Marshall went on to state that employers are failing to make work available to injured works after the year window of the NEER Plan expires in order to get refunds. (P.481)

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WSIB Vice President John Slinger who also appeared before the Standing Committee on Public Accounts in February this year noted that The Institute of Work and Health of Ontario found that the increase in the use of second injury fund was “diminishing the overall incentive to the employer to take the injured worker back and to sustain that return to work over the long term”.

There is no doubt that when the experience rating incentive to retain injured employees is removed, many employers will terminate grossly unproductive injured workers. But firstly is this a negative thing, or should Ontario encourage labour feather bedding? And secondly, other provinces have limited windows for experience rating, but not Ontario’s claim duration problem.

Is the Economy and the Recession the Problem?

WSIB President Marshall blames the 2007-2008 recession as the cause of the Board’s financial difficulties. (P.473) One supposes that Bernie Madoff’s difficulties can also be ascribed to the recession as well. (We are not suggesting that the WSIB has engaged in any illegal activity or can be compared to Bernie Madoff). In fact, for the past 10 years, adjusting a constant 7% rate of return on investments, the WSIB’s revenue fell short of expenses by at least a quarter of a billion up to one and a quarter billion dollars per year. (See the F and B Newsletter for 2009).

The WSIB lost 1.392 Billion dollars in the first 9 months of 2009. This was a \$120 million greater loss than in 2008, even though in 2009 the Board had a \$240 million return on its investments compared with a \$490 million loss the previous year, and the Ontario economy improved in 2009 compared with 2008. The Board’s accountant subscribes this dismal picture to increases in benefits and decrease in assessment revenue, although assessment revenue is only down by \$125 million, and adjusted for investment return up \$610 million.

The Board revenue is now reducing its equity investment holdings to 15% from 60% just at the time equities on the stock market are rising! Over the past 20 years, the cyclical revival of the Ontario and world economies has only masked the problems at the WSIB, not solved them, temporarily or otherwise. Nevertheless, the more opportunities injured workers

have to obtain high value jobs after injury, the more likely they are to return to work. Ontario and Alberta worker compensation statistics prove this.

Is the problem too many narcotics consumed by workers?

Recent studies have shown that workers who take synthetic codeine drugs are two times less likely to return to work. (“*Prescription Opioid Dependence is Associated With Poorer Outcomes in Disabling Spinal Disorders: Spine Magazine; Vol. 33 no.20 p.2219*”) However the studies do not adjust for the fact that injured workers on codeine drugs are probably less likely to return to work in any event due to a heightened pain response. There is no doubt that the Board needs to stop excessive codeine use, but in my opinion the President’s and Deputy Minister’s emphasis on drugs can be interpreted as stereotype labeling of injured workers as a bunch of drug addicted indolent individuals who are coddled by irresponsible doctors. The problems with chronic pain conditions and worker disabilities run a lot deeper than just over prescription of narcotic medications.

Is the Labour Market Re-entry Program responsible for duration and high claim costs?

Deputy Minister of Labour Cynthia Morton, who has had some prior employment background in workers’ compensation administration, opined before the Legislature’s Standing Committee that its not the benefit levels in the Workers’ Compensation Act’s benefit scheme that are causing the problem of lengthy claim duration, but rather the lack of effective return to work assistance, and drugs administered by the WSIB.

KPMG was commissioned to study the Ontario Workplace Safety and Insurance Board’s Labour Market Re-Entry Plan aimed to help unemployed injured workers. The Report was completed in December 2009 and not released for nearly four months. Its revelations illustrate reasons for the financial catastrophe the WSIB has become.

It notes:

a) WSIB benefits are extremely generous compared to every other social welfare program in Canada;

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b) There is no integration between other programs in Ontario and Canada, and the Board's retraining program.

c) Employers are unaccountable for work re-integration

d) Workers have little say in the system

e) ***The WSIB benefit scheme encourages long term benefit dependency.*** Only 50% of LMR entrants were employed within 18 months of the program and many of those went back with their accident employer. Full benefits are being extended now to 40% more workers, and the average wage loss is up close to 20% in the past 10 years.

f) The Board's oversight of the program is unprofessional.

g) The Board does not utilize best practices in returning injured workers to work, notwithstanding the cost of the program have doubled in 10 years.

h) The Board doesn't properly measure outcomes.

All of problems plaguing the Board for the past 10 years have been nicely summarized by KPMG.

What are the Possible Strategies and Scenarios for WSIB Reform:

A More Aggressive Approach to Employers' Obligations in Returning Injured Workers to Work

The most significant recommendation coming out of the KPMG Value for Money Audit and Report is that all employers be compelled to take back all injured workers all the time, and that employers be given wage subsidies to do so.

THE WSIB HAS AGREED TO IMPLEMENT THIS RECOMMENDATION BY JUNE 2010!

WSIB President Williams stated to the legislatures subcommittee that The Board will focus more on return to work and employers will be compelled to return injured workers (P.487).

In August 2007 the Board proposed Policies which compelled employers to do just this. WSIB's Draft

Policies 19-02-02 and 19-02-06 indicated that if all employers did not accommodate back to employment all injured workers, to the point of financial hardship, employers would be fined the full value of the Labour Market Re-Entry Plan, a fine that could exceed \$100,000.00. This policy was shelved at the time because employers threatened to go to Court on the basis the Board had not the legislative authority to impose it under s.40 of the Workplace Safety and Insurance Act, the "Co-operation Section", and because the Policy is the worst form of government job featherbedding imaginable.

This time however it is clear that the Ontario Government is onside, that the Government may change the legislation, and that the Board of Directors is prepared to do whatever the Government tells it to do.

The problem with mandatory work return is that it leaves employers with 3 very expensive choices:

a) Hire outside professionals to take over the re-integration of the injured worker, as the Board has rarely shown any ability to make the recalcitrant injured worker work ready;

b) Pay the worker to voluntarily resign: expect settlements of \$20,000.00 and up; and

c) Have members of the workforce on payroll who are producing little or nothing.

The KPMG reports states that countries like Germany and Australia have similar legislation and it is a legislative theme that is gaining universal acceptance. Yes, and in Germany and Australia companies routinely pay injured workers large settlement to "get lost". No American States have this legislation on their agendas or otherwise, nor do any other Canadian Provinces have anywhere near such severe policies. Our firm represents dozens of employers. None of them would refuse to rehire and maintain employment for an injured worker at any time if he/she was even 70% productive. The problem is that many unemployed injured workers are suffering from a multitude of maladies that make their potential contribution to the work force negligible. The Board's solution is to make employers pay the

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cost for this decrepitude , albeit outside of the Workers' Compensation premium and assessment rates. It's an assessment increase through the back door.

Will an Increase in Board Premiums and Assessment Rates help solve the problem?

WSIB President David Marshall before the legislative committee pointed out, with nostalgia, that had the WSIB under the guidance of the Harris Conservative Government not lowered WSIB rates 15 years ago, the WSIB would be in a surplus position today.

The Board's actuaries want to raise employers' assessments, as the current unfunded liability and its yearly increases are unsustainable. Additionally the Board's debt is a significant inter generational cost transfer that will burden employers and deflate employment opportunities indefinitely. The Ontario Liberal Government however, does not want premium and assessment rates to increase. They are currently paying for an international media campaign trumpeting what low taxes Ontario levies.

The Deputy Minister categorically denied that the Minister of Labour sets WSIB premium rates. However she did say this: "*... the government of the day, I believe, has an obligation to ensure that the WSIB board of directors, in making a decision, is aware of the economic environment within which they're operating and the expectations that are imposed on any agency to be prudent.*"

In the movie "Avatar" the crippled military hero from Earth is teleported into the body of an alien on another planet, where he is supposed to do the dirty work for Earth. The WSIB is the Labour Ministry's avatar, and one can bet rate increases of any magnitude are not on the table. Mandatory return to work obligations on the other hand appear to punish the employer who is supposedly guilty for having experienced an accident, when close to 50% of the Board's accidents are sprains which are not external and usually not preventable accidents at all.

Do Advisory Committees Hold the Solution?

WSIB Chairman Mahoney recently spent 9 months putting together a report on what is wrong with the WSIB and what can be done to fix it. The report is a disappointing "*analysis of paralysis*". Take Labour

Market Re-entry Plans. Mahoney acknowledges the KPMG finding that the current set up is completely inadequate. His solution is a commitment to become "*a leading practice organization.*" This has been the Board's solution for past 20 years (they've made 6 separate official announcements for change in the past 20 years, each one more hollow than the last) which have taken the problem not one step forward to solution.. Now Mahoney wants to establish Advisory Committees staffed only by real employers, like owners and managers, to make recommendations.

Employer advisory committees, populated by actual employers or company managers, are outright dangerous for employers' interests. It is these real life employer/manager advisors who pointed the finger at SIEF as causing a great deal of the Board's problems with return to work, and made the suggestion of a centralized SIEF decision centre. This has resulted in SIEF decision delays of up to 6 months, and decisions that make no sense. Individual owners and managers do not see beyond their individual interest. Too often they put forward suggestions leading to Board policy decisions whose outcome causes the employer community as a whole considerable harm.

In reality nothing employers have to say is going to be adopted without the approval of organized Labour, and furthermore, as indicated below the Labour Minister of the Ontario Government is about to take the situation in hand and compel changes in the Fall. As WSIB President Marshall states: "*No amount of studying will change the fact that in the end, some tough decisions will need to be made.*"

Will the Government Force Change In the WSIB System?

Deputy Minister Morton states that the Governments Ministry of Finance is currently examining whether the Board's \$12 billion unfunded liability should be added to the overall Provincial Debt. (P.477) Ontario's debt is currently being studied by world bankers to determine at what interest costs loans will be made to the Province to fund its approximately \$25 billion deficit it ran up in 2009-2010. In the early 1990's, Edward Nixon, Actuary, reports in his 2009 study, that the indebtedness of the WSIB reflected the cost of Ontario's borrowing, and will again now.

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Both Chair Mahoney and Deputy Minister Morton say that change is coming this Fall (P.477&478).

Conclusion:

Actuary Nixon estimates that half of the Board's current unfunded liability relates to the recent increases in benefit duration. Chairman Mahoney, President Marshall and Deputy Minister Morton came before the Sub Committee of the legislature, all prepared to agree there's no "crisis". Because if there is a "crisis" the Government has got to fix it, or at least look like its fixing it, and soon. Furthermore legislative amendments are bound to stir up labour and employer lobby groups. However, after thinking about it long enough, WSIB President Marshall had to admit that there damn well is a "crisis" and its going to need to be fixed.

The Workers' Compensation crisis is about money, and someone is going to have to pay, and it's not going to be the Ontario Government which itself is racking up record deficits. My readers should remember that Ontario employers have lowered accident frequencies by over 40% in the last 10 years. That reduction didn't come free of charge, employers paid to make it happen. Employers should step up to the plate and dig deeper to help Ontario injured workers to find employment but up to a reasonable point.

KPMG broadly hints that the WSIB legislation needs to be changed. One of the changes they suggest is that workers be given a lump sum instead of indefinite benefits, and be told to "get themselves back to work" Legitimate employer lobby organizations such as the Ontario Business Coalition and Council of Construction Association should propose changes, and lobby with President Marshall and Deputy Minister Cynthia Morton on what needs to change to bring the WSIB crisis under control.

If the Province doesn't do something to deflate the amount of benefits permanently unemployed and underemployed injured workers are eligible to receive, the WSIB will never be on a financially sound footing, no matter what employers do. It's time for the Ontario Government to shake off the stranglehold the labour movement has on this Province's Workers' Compensation system, and not blame nor charge the whole mess onto employers.

**The Fink & Bornstein Workers' Compensation is published quarterly by
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