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JUSTICE FOR INJURED WORKERS: THE STRUGGLE CONTINUES

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RÉSUMÉ

Dans cet article, on étudie brièvement le rôle qu'ont joué les cliniques juridiques communautaires dans le mouvement des travailleurs accidentés. Il décrit l'érosion des principes de base de l'indemnisation des travailleurs accidentés et le changement dans cette organisation qui met désormais l'accent sur la nécessité de contenir les coûts au lieu d'indemniser les travailleurs, ce qui était sa priorité traditionnelle. Il met en lumière le mythe de la crise de l'endettement du régime d'indemnisation des travailleurs accidentés et explore les effets de ce changement sur les prestations des travailleurs, sur la santé et la sécurité au travail et, ultimement, sur la viabilité d'un régime d'indemnisation des travailleurs accidentés sans égard à la faute et administré par le gouvernement. Dans cet article, on traite également des menaces pour le régime actuel que constituent les propositions d'indemnisation des travailleurs de l'actuel gouvernement.

This article briefly reviews the role that community legal clinics have played in the injured worker movement. It chronicles the erosion of the basic principles of workers' compensation and the shift in emphasis from compensating workers to containing costs. It exposes the myth of a debt crisis in workers' compensation and explores the effect of this shift on workers' benefits, on workplace health and safety, and ultimately on the viability of a no-fault, publicly-administered

* © Copyright 1995, Phil Biggin, Orlando Buonastella, Marion Endicott, John McKinnon, Sebastian Spano and Dan Ublansky. This article is adapted from the presentation by the authors to the Ontario Royal Commission on Workers' Compensation on behalf of the Toronto Injured Workers' Advocacy Group (TIWAG) and the Union of Injured Workers (UIW). Phil Biggin is the executive director of the Union of Injured Workers. Orlando Buonastella is a community legal worker with Injured Workers' Consultants (IWC), a community legal clinic. Marion Endicott is a community legal worker with Injured Workers' Consultants. John McKinnon is a lawyer and executive director with Injured Workers' Consultants. Sebastian Spano is a community legal Worker with the Industrial Accident Victims Group of Ontario (IAVGO), a community legal clinic. Dan Ublanski is a lawyer and executive director with the Toronto Workers' Health and Safety Legal Clinic. The authors gratefully acknowledge the research done by Michael Webster, student-at-law for his 1994 paper: *The Ontario W.C.B.'s Unfunded Liability: Myths and Realities*.

workers' compensation system. The article also outlines the threat to the existing system in the workers' compensation proposals of the current government.

1. INTRODUCTION

(a) *The Lessons of Our Past*

A coalition of Toronto area community legal clinics and the Union of Injured Workers has been active for nearly two decades in the struggle to improve our workers' compensation system. Too many injured workers' and their families have been exiled to poverty and despair.

Even before there was a community legal clinic system, community activists established storefront advocacy centres to help poor communities, such as the injured worker community, fight battles that they could not win alone. Organizations like The Injured Workmen's Consultants (now Injured Workers' Consultants), established in 1969 by Al Baldwin. He gained notoriety for being lowered by rope from the public gallery to the floor of the legislature in a body cast to dramatize the plight of injured workers. Proudly staffed by non-lawyers, they helped injured workers take on the system.

Ten years ago, Nick McCombie chronicled the community organizing and the legal and political struggles of the movement for justice for injured workers in an article for the *Canadian Community Law Journal*.¹ Injured workers had just won a long political battle against an anti-injured worker program of change that began with the Paul Weiler studies, commissioned by the Davis government.²

Injured workers had forced the government to withdraw a proposal to replace permanent disability pensions with a small lump sum for "pain and suffering" and a reviewable monthly payment for "deemed" wage loss. And they went on to obtain a legislative amendment to fully index their pensions to changes in the Consumer Price Index.

(b) *The Role of Community Legal Clinics*

That was a time of victory. A clear example of the unique potential that community legal clinics have to gain access to justice for our communities in

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1. N. McCombie, "Justice for Injured Workers: A Community Responds to Government 'Reform'" (1984) 7 *Canadian Community Law Journal* 136.
 2. Ontario, *Reshaping Workers' Compensation for Ontario*; A report submitted to the Minister of Labour by P. Weiler (November 1980); and, Ontario, *Protecting the Worker from Disability: Challenges for the Eighties*; A report submitted to the Minister of Labour by P. Weiler (April 1983).

ways that rival the methods of the powerful and wealthy special interest groups. The imbalance of power between rich and poor in our justice system reflects their influence on legislative agendas, on administrators, on the media and the general public. That cannot be resolved simply by giving poor people lawyers to do appeals when they are being evicted or their benefits cut-off.

One of the strengths of community legal clinics is that we are in a position to identify the systemic problems affecting our communities. We have the “tools” to help organize a broader response, based on the strength and experiences of many for whom the system is not adequate. Case-by-case representation is necessary, but impossible to achieve in many areas of poverty law such as workers’ compensation where the number of potential clients is enormous. Even victory often brings too little, too late. For people living at the margins of society, marriages break down, children grow up in poverty, and people take their own lives, or the lives of others, while advocates squabble with bureaucrats, adjudicators and judges.

Nick McCombie’s article chronicles some of the effective work that was done by injured workers and community legal clinics in all aspects of our mandate. Education was essential; training other advocates, educating community members and the public at large. Organizing was essential, because so many poor people experienced the same difficulties with a system that is too big to fight alone.

And law reform was essential, if poor people were to be entitled to the same access to our justice system as those special interest groups with wealth and influence. When a zoning by-law interferes with the plans of developers, or a labour law interferes with the plans of employers, they get the law changed. When Paul Weiler began his study of workers’ compensation, he proposed to meet with employers and unions but he did not want to meet with injured worker groups. It was an essential part of the mandate of community legal clinics to ensure that their communities have that opportunity as well.

(c) *The More Things Change ...*

Now we have come full circle. In 1983, injured workers stopped the Tory proposal to kill permanent disability pensions and replace them with “deemed wage loss” benefits. But it was then passed by a Liberal government in 1989. A Liberal-NDP accord legislated full indexation of injured workers’ benefits for inflation in 1985. But an NDP government took away full indexation of benefits in 1994. These developments have been troubling for the injured worker movement. They have raised concerns about the direction of the movement, created internal wrangling and divisions in relations with labour organizations, and contributed to a climate of anger and despair.

During all this time, we heard the business community cry louder and louder about the “W.C.B. debt crisis”. In spite of major cutbacks in compensation for permanent disability, it has become “common knowledge” that the system is being crushed by a debt that is spiralling out of control. The new reality, we are told, is that the debt must be eliminated and the cost of benefits capped now, or very soon we will not have a workers’ compensation system at all. And that, the argument goes, would be bad news for employers and injured workers alike. So let’s sit down and talk rationally about the most effective way to allocate the increasingly scarce resources in the system.

(d) *Welcome to Law Reform in the '90s: Don't Question Authority*

It is a universal scenario. “Economism”, the economic terrorism of the '90s, threatens our very humanity. “Of course”, wizened veterans of all political stripes say, “governments/we can no longer afford to be the element of social change/provide the same social safety net as in the past. For the good of all society, let’s negotiate the cutbacks in a way that will cause the least harm.” Welcome to law reform in the '90s. Apparently, all programs for the “financially or influentially challenged” are a luxury of good economic times and must now be dissected, restructured or just plain trashed.

Unless you are prepared to question the premise. The injured worker movement has challenged the authority of that economic premise. No one should rush to line up at the chopping block. In our history, poor people, tenants, unions, injured workers, and disabled people never got anything without a fight. The more you fight, the more you get. The fact that it took so long to get where we are reflects the dominance of the ideology that “we can’t afford” to care too much about others in our society.

(e) *Another Royal Commission*

The announcement of a Royal Commission into workers’ compensation last year was an opportunity for the injured worker movement to challenge economic terrorism, to develop its position on reform of the system and to raise the profile of their struggle. The Union of Injured Workers and the Toronto Injured Workers Advocacy Group made a joint presentation to the Commission in the popular style that integrates analysis with the practical experience of our community.

A special session of the Commission hearings was demanded. The twenty minute time slots granted for presentations at the regular hearings was totally inadequate to hear about such an enormous issue from those who bear the burden of its shortcomings.

The hearing was held in a theatre at the Canadian National Exhibition, not in a rented boardroom of a stuffy hotel. Unlike the public hearing which sparked the

tradition of Injured Workers' Day, injured workers in attendance numbered in the hundreds, not thousands. But it was probably the largest public hearing that any Royal Commission has seen.

It was not a dry presentation by a bunch of lawyers reading briefs. The Commission faced a hard hitting analysis of the system delivered through the testimony of injured workers, their families, satirical street theatre, audience participation as well as community legal workers and lawyers with a total of more than seventy-five years of experience in injured worker advocacy.

The most significant aspect of our presentation for the direction of reform was aimed at the "crisis" in workers' compensation. As the Minister of Education recently advised, the most effective way to implement your agenda is to use it to solve a crisis—even if you have to make up the part about the crisis. It should come as no surprise to anyone that, on further analysis, the "W.C.B. debt crisis" appears to be a hoax.

The rallying cry of the coalition of business interests that has stripped the injured worker movement of its gains is a myth, nurtured by fear and ignorance. The "reason" that we must face the "reality" of more cutbacks for injured workers does not stand up to scrutiny. But in the meantime, the real crisis in workers' compensation has remained hidden: the rising toll of deaths, diseases and injuries in the workplace.

2. FUNDING THE SYSTEM: IS THERE A DEBT CRISIS?

(a) *Why Are Injured Workers Going on Welfare?*

That question was posed by the headline of an article in the Toronto Star last fall.³ Over the past 10 years we have witnessed a shift from basic principles of workers compensation to cold blooded cost reduction which is undermining our workers' compensation system. This pre-occupation with costs has driven an erosion of the benefit scheme, bringing changes to the system that are inconsistent with the basic principles of workers' compensation. It threatens to seriously undermine the foundations and the integrity of the system.

What is most troubling about these shifts is that they have consisted of major cuts in permanent disability compensation. In 1989, the law was changed from a system which provided a pension for life, for life-long disabilities, to a cheaper, time-limited wage loss system.

3. B. Livesey, "Why injured workers are going on welfare" *The Toronto Star* (10 October 1994) A11.

(b) *A Shift From Concern With Disability to Cost*

Recent legislative examples include Bill 165, passed in December, 1994.⁴ It introduced the Friedland de-indexation formula, replacing full cost of living indexation with less than the rate of inflation and a cap on increases. The rationale can be understood by considering the enormous sums of money at stake for employers. Estimates of cost savings range from \$18 to \$23 billion over a 20 year period. It was argued that the system could no longer afford full indexation of benefits.

In the W.C.B. administration, we have seen changes in policy such as the recent so called "Financial Improvements Package", released by the W.C.B. for external consultation in January 1995.⁵ It contains a series of policy measures to help eliminate the unfunded liability by the year 2014. Among the measures are:

- Shifting the cost of health care from employers onto the publicly funded Ontario Drug Benefit Program when the worker reaches age 65, by eliminating payment for medication for compensable disabilities after the injured worker turns 65 years of age.
- Reducing clothing allowance benefits for repair or replacement of clothing damaged by braces, wheelchairs and artificial limbs.
- Eliminating the notice requirement when benefits are to be terminated. Once a determination has been made that a worker can return to work, no notice is required.
- Eliminating transportation allowance payments to injured workers attending W.C.B. rehabilitation programs or trying to find a job.

Although employers have been perpetuating the view that they are paying for the system, data show otherwise. Workers actually pay in the form of lower wages. Employers simply pass the costs on to the workers because the personnel budget is limited.⁶ Other data show that costs are also passed on to consumers in the form of higher prices.⁷

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4. Bill 165, An Act to Amend the Workers' Compensation Act and the Occupational Health and Safety Act, 3d Sess., 35th Leg. Ont., 1994.
 5. Ontario Workers' Compensation Board, *Financial Improvements Package* (12 October 1994).
 6. J. R. Chelius and J. F. Burton, "Who Actually Pays for Workers' Compensation?: The Empirical Evidence" (November/December 1994) John Burton's Workers' Compensation Monitor at 20.
 7. *Ibid.*

(c) *The W.C.B. Debt Crisis is a Hoax*

Changes in the legislation and policy have been made that are not consistent with the fundamental principles of workers' compensation. They have been fuelled primarily by the "W.C.B. debt crisis", a shameless campaign that plays on the natural fears of the public in a recession in order to gain support for the demand to reduce injured workers' benefits.

The "W.C.B. debt crisis" is a hoax. There was never any intention of paying off any kind of debt. In fact, there is no debt at all. So why are injured workers going on welfare? Why is our compensation system being gutted without regard to the fundamental principles of compensation?

The workers' compensation system is being gutted so that employers can have even cheaper insurance than they were already getting. Every time the workers' compensation system has been changed to pay less money out to injured workers, employers and the W.C.B. have had the opportunity to build up larger reserves and thereby reduce the unfunded liability without any increase in the employers' costs. But every time the system was changed to pay less to injured workers, they didn't use that money to pay down the unfunded liability. Employers took the money out of the system for themselves by reducing W.C.B. premiums.

Injured workers have experienced major cutbacks in the loss of a pension for life for life-long disabilities and the loss of automatic cost of living increases. Employers, however, have made financial gains. Adjusted for inflation, the average employers' premiums, published by the Ontario W.C.B., for workers' compensation coverage have dropped about 19% over the past 6 years.⁸

(d) *W.C.B. Debt and Other Tall Tales*

Injured workers bear the burden of the W.C.B.'s mythical debt. Business lobbyists have secured lower W.C.B. assessment rates by spreading popular mythology: a series of simple, believable, but wrong explanations of workers' compensation. The myths are not just about the financing issues. We have heard the myth of the overcompensated injured worker and the myth of the fraudulent injured worker. We begin with the financial myths.

It's not just the uninformed or the uneducated who have accepted these myths. They run through all segments in our society: left and right, workers and employers. During the recent provincial election campaign, the Toronto Injured Workers Advocacy Group and Union of Injured Workers sent a questionnaire to each of the three main party leaders. Look at the response of Mike Harris.

8. *Ontario Workers' Compensation Board: Annual Report (1994)* at i.

We asked: "Would you reduce benefit levels or services to injured workers?"

Mr. Harris answered:

"After an extensive study of the W.C.B., representatives on the Premier's Labour-Management Advisory Committee advised the government that the system is technically bankrupt and is in desperate need of fundamental reform. Bond rating services have identified the W.C.B.'s unfunded liability as a cause for concern with respect to the province's credit rating.

My colleagues in the Ontario PC Caucus and I believe that, following the lead of Manitoba and New Brunswick in reflecting income realities, we will reduce benefit levels from 90 to 85% of net salary, and review the idea of life time pension awards."⁹

The Premier's reply reveals that he too has been taken in by two of the most popular myths surrounding the "W.C.B. debt crisis": the myth of the bankruptcy of the workers' compensation system and the myth that the unfunded liability is part of the provincial debt.

(e) *The Myth of the Bankruptcy of the Workers' Compensation System*

The W.C.B. is not in debt. It has never even borrowed money. For eighty years the W.C.B. has always been able to pay injured workers with the money it collects from Ontario employers. The W.C.B. has been able to pay its costs from the premiums collected and still have enough left over to amass a reserve of over \$6.8 billion.

In addition, the W.C.B. just announced that it made a "profit" of \$130 million in 1994—a surplus of revenues after it paid for injured workers' related expenses.¹⁰ That was before injured workers' benefits were stripped of full cost of living increases at the end of 1994. Employers' average W.C.B. premiums went down again in 1995. Imagine how low they will go next year when employers get the full benefit of de-indexed W.C.B. payments to injured workers.

(f) *The Unfunded Liability: The Board's Mythical Debt*

The unfunded liability is a widely misunderstood concept. It refers to the difference between W.C.B. reserve funds (now at over \$6.8 billion) and the projected cost of all future payments to all workers now injured until the last one dies of old age (now at about \$18 billion). The unfunded liability is therefore

9. Letter from M. Harris, Leader of the Progressive Conservative Party of Ontario, to the Toronto Injured Worker Advocacy Group (15 May 1995).

10. *Supra*, note 8, at i.

not a debt. The \$11.2 billion figure is the total of all future costs for claims on file, minus the money in the bank.

The unfunded liability is an artificial concept because the *Workers' Compensation Act*¹¹ (hereinafter, *WCA*) generally requires injured workers to take their compensation in periodic monthly payments. Injured workers have no right to go into the W.C.B. and say "I'll take it all now please, just put the cash in a bag". So its not surprising that the W.C.B. doesn't keep it all on hand to pay out today.

A private insurance company would be in trouble if it had a large unfunded liability. The *Insurance Act* requires a private insurance company to be pre-funded.¹² Yet the W.C.B. is not in trouble. Why? Because s.102(1) of the *WCA* says that the W.C.B. does *not* have to be pre-funded. There are good reasons for the distinction.

The W.C.B and private insurance companies are similar since they will be paying out compensation in the future. However, private insurance companies have to be pre-funded because they are in competition with each other for premiums. The problem with competition is that, next year, people might buy their insurance from a different company, or they might not buy insurance at all. The insurance company still has to pay claims on the policies that it sold this year.

For that reason, they have to get the money that they will need for future payments on this year's policies out of the premiums that they collect from the people who bought this year's policies. If they had no customers next year and no cash reserves, they would be bankrupt and could not pay their claims.

Private insurance companies are required by law to be fully funded so they won't go bankrupt in the event that they don't get enough business one year. That is the problem with competition in a free enterprise system. You cannot have an unfunded liability when you are in competition for premiums because you may lose customers next year.

Entirely different considerations apply when the compensation system is a monopoly. In a monopoly, there is no competition for premiums. Employers have to buy coverage and they have to get it from the Workers' Compensation Board of Ontario. This eliminates the dangers of people opting not to buy coverage or opting to buy it from another source. It ensures a stable, long term source of revenue. It is therefore possible to use the cheaper "pay-as-you-go" or current account approach to financing the workers' compensation system.

11. R.S.O. 1990, c.W-11.

12. R.S.O. 1990, c.I-8.

If workers' compensation is provided by a monopoly, like the Ontario W.C.B., and if workers' compensation coverage is mandatory, as it is for many industries in Ontario, then the concept of the unfunded liability is irrelevant. That is why the WCA specifically provides that the system need not be fully funded. It is wrong and dishonest to say that the workers' compensation board is bankrupt.

(g) *The Myth of the W.C.B. Liability as a Provincial Debt*

The second myth reflected in Mr. Harris' reply is that the W.C.B. liability is a part of the provincial debt. Mr. Harris notes that the W.C.B. liability is treated like provincial debt by bond rating agencies and this is affecting the province's credit rating.

But it is not a provincial debt. The W.C.B. has not used a cent of taxpayers' money to cover the workers' compensation system. The system has always been entirely funded by the employers of Ontario and has never had to borrow. Eighty years of experience reveals absolutely no reason to fear that the W.C.B. will not continue to be self-sufficient. No government has a track record like that.

In addition, the W.C.B. is prohibited by law from borrowing taxpayers money to pay off the unfunded liability. Section 100 of the WCA allows the W.C.B. to borrow money from the government to meet payments already due. For example, to pay current monthly pension benefits due to injured workers. If it does so, the law requires the W.C.B. to immediately recover that money by a special assessment on employers and give it back to the Treasurer of Ontario. However, the provision is clear that the W.C.B. cannot borrow money from the government to pay off the unfunded liability.

So the government is legally protected and the workers' compensation board has an unbeatable track record. If there is no legal or practical reason to fear that the W.C.B. liability could be added to the provincial debt, why are the off-shore bond rating agencies saying that the W.C.B. makes Ontario look like a bad credit risk?

These "guys" are not impartial civil servants. They work for wealthy international money market speculators who want us to pay them the highest interest rates possible. The bond rating agencies represent speculators who would like to make us look bad so that we have to pay them higher interest on the money we borrow.

The G-7 "world leaders" met this spring in Halifax to find a way to reduce the impact of international money market speculators. Their aim to profit from speculation rather than investment in industry is costing us jobs. Governments are forced to stabilize the value of their currency by attracting money lenders through high interest rates, which chokes our economy.

It is ironic that at the same time, the Premier of Ontario is suggesting that we should cater to these speculators and restructure the financing of our W.C.B. in a manner that will only further choke the economy of Ontario. We should not allow monetary speculators to spook us into undermining the fundamental principles of our workers' compensation system.

(h) *The Myth of the Morality of Full Funding*

In our questionnaire we also asked Mike Harris: "Would you expand workers' compensation coverage to include all workplaces in Ontario?"

He answered:

"We are not prepared to consider any further changes until the unfunded liability is brought under control. Expanding coverage or benefits in the face of looming bankruptcy is irresponsible, and therefore, we would impose a moratorium on any expansion of entitlement."¹³

This answer exemplifies another popular misconception about W.C.B. funding. Mr. Harris offers the myth of a moral justification for a fully funded system. The argument is that future employers and other employers should not be saddled with the cost of today's injuries. It is strong on emotion but weak on practical and economic grounds.

The practical reality is that many of today's employers successfully escape responsibility for today's injuries. In its 1993 Annual Report, the W.C.B. reported that about 10% of assessment revenues were lost to "doubtful accounts". Interestingly, no government reform proposals have addressed such an obvious and significant revenue leakage.

As well, an increasing proportion of injuries and diseases are the result of long term exposure in many workplaces. W.C.B. statistics show significant increases in the proportion of lost time claims that result from such conditions as over-exertion and strains.¹⁴ Many of the harshest and most costly work related diseases such as cancers, lung diseases, and chemical sensitivities are the result of long periods of exposure or long latency periods, or both.

So the lost time claims filed this year are not just the result of the work done this year or even the work done for the employer at the time of the claim. As well, the changing economy in Ontario requires workers to be more flexible, changing jobs and employers more often than ever before.

13. *Supra*, note 9.

14. Ontario Workers' Compensation Board, *Statistical Supplement to the 1993 Annual Report*.

(i) *Full Funding Does Not Score Moral or Economic Victories*

For example, a new store opens up and a few months later a cashier goes off work with carpal tunnel syndrome. He may have spent the last five years bagging parts for an automotive supplier that always had W.C.B. assessment rebates for a good claims record. It may even have moved to Mexico and no longer pay W.C.B. premiums. Perhaps he spent the last five years doing data entry for the banks, which have never had to pay into the workers' compensation system. Are we scoring a moral or economic victory by making sure that the store pays the whole bill for this injury, with no contribution from the other responsible industries?

Employers have always been saddled with the cost consequences of the work practices of the days before. The history of the industrialized world assures us that the workers of today are engaged in injurious work processes that are virtually unknown to us. Even if every employer paid, up front, the full future cost of every claim filed this year by its employees, that would completely ignore the future cost of the injuring processes that have been set in motion this year.

So full funding means paying for injuries that are not even known. It is an impossible task. At the very least, it would require employers to pay W.C.B. premiums for claims that have not been filed yet. That will not be welcomed by the employers who have already taken up the cry for a fully funded system.

(j) *The Myth of Higher Premiums for Future Employers*

The moral argument also appeals for inter-generational economic justice. The argument goes that we have to try to pre-fund the system because financing the workers' compensation system on a "pay-as-you-go" basis will push us to economic and social collapse. The financial burden for future employers of the cost of departed employers that did not pay the full cost of injuries from their work will force up W.C.B. premiums so high that the remaining employers are forced to close down, leaving the W.C.B. unable to pay injured workers.

This is the myth of higher premiums for future employers. While the injured worker movement does not have resources to hire the actuarial experts to help make this point, we can rely on the actuarial opinions on which employer organizations have operated for decades.

The Canadian Manufacturers Association (C.M.A.) brought its actuarial experts to the 1915 Royal Commission by Mr. Justice Meredith that eventually established our workers' compensation system. To quote their actuary:

"The serious objection which can be urged against the system of current cost assessments is that it involves a throwing on future industry of some burdens occurring in the present. This objection is entirely outweighed by

the consideration that the rate will not, when it reaches maximum, be any larger than the capitalized rate, but as experience shows in Germany will be much lower, and the further consideration that the immense sums of money which it would be necessary to lay aside as a reserve fund are left in active circulation in the employer's business. But the theoretical objection itself vanishes when it is remembered that employers and the community generally are now bearing and will continue for a generation to bear the burden of the accidents of the past."¹⁵ [emphasis added]

The C.M.A. argued strongly for a current account or "pay-as-you-go" system because premiums would be lower than they would be on a fully funded system. They also saw the practical impossibility of saddling today's employers with the complete cost of the injuries initiated today, as we described above. The Canadian Manufacturers Association got what it wanted from the Meredith Report in 1915. The legislation contained, and still contains a special provision that the system need not be pre-funded.¹⁶

They warned about the immense sums of money that would have to be laid aside in a reserve fund. In Ontario right now, \$18 billion dollars would be out of circulation if we had pre-funded our system. The W.C.B. is not investing the more than \$6 billion that it has in reserve in Ontario industries. Looking at the 1993 Annual Report, only 11.5% of reserves were invested in equities in Canadian corporations. Less is invested in Ontario businesses and even that will include blue chip firms that don't necessarily pay any W.C.B. premiums. Fully funding the W.C.B. system would choke the economy of Ontario even more today than in 1915.

Is a pay-as-you-go system still cheaper today? Does it still mean lower assessment rates than a fully funded system? Yes. Take a look at the United States. In some states, employers have the option of buying their W.C.B. type insurance coverage from private insurance companies or from a state-run insurance company. Where the state-run insurance companies compete with private insurance companies, the state-run companies are required by law to fully fund their system. Otherwise, they would have an unfair competitive advantage over the private insurance industry.¹⁷

15. Ontario, *Interim Report on Laws Relating to the Liability of Employers* (Toronto: King's Printer, 27 March 1912) (Commissioner: Hon. Sir William Ralph Meredith, C. J., C. P.) at 107-111.

16. *Supra*, note 11, s.102(1).

17. M. Webster, *The Ontario Workers' Compensation Board's Unfunded Liability: Myths and Realities* (Toronto: 1994) at 15. The study was part of the submissions to the Standing Committee on Resources Development of the Ontario Legislature on Bill 165, *Supra*, note 4, by the Toronto Injured Workers' Advocacy Group and the Union of In-

(k) *The Key to a Viable, Low Cost Compensation System*

The private insurance industry would like to move in and take over the Ontario market for workers' compensation coverage. But it cannot compete with our workers' compensation system. We have an unbeatable cost advantage because we have a monopoly system with mandatory coverage and therefore we can fund the system on a pay-as-you-go basis. That is the cheapest way to fund a workers' compensation system and the private insurance industry cannot do it that way. If that feature of our system is destroyed, and it is certainly under attack, then W.C.B. assessments will go up. If W.C.B. assessments go up, the private insurance industry can step in to offer their own similarly expensive services as a viable alternative.

There are no inter-generational advantages to full funding. This concerns the financial bottom line. Will "pay-as-you-go" stick the next generation with a higher bill for workers' compensation than if we pre-fund the system now? No, the opposite is true. If we want to finance a viable workers' compensation system on the lowest cost basis, then we must continue on a current account basis.

The key to maintaining the viability of our pay-as-you-go workers' compensation system, and to keeping rates lower than private insurance could ever do, is to ensure that the rate groups, the assessment base of our workers' compensation system, stay strong and healthy. There has been a shift in employment away from the types of industry that are required to have workers' compensation coverage. The proportion of workers in the traditional types of industry which are listed in the schedules of the WCA as required to have coverage is shrinking. The growth has been in the service, technical and light industries which are not listed for mandatory workers' compensation coverage.

(l) *Fighting Fire With Gasoline*

Meredith himself conceded in his final report that there was no logical basis for bringing some industries into the system and leaving some out. He judged that there was simply not the political will at the time to overcome the resistance to workers' compensation coverage by some sectors of the economy. Meredith anticipated they would be brought into the system through future negotiations.¹⁸

When Premier Mike Harris vows that he will not bring more employers into the workers' compensation system until it is on a better financial footing, he is putting out a fire with gasoline. We cannot imagine anything more ludicrous

jured Workers.

18. Ontario, *Final Report on Laws Relating the Liability of Employers* (Toronto, King's Printer, 1913) at 9 (Commissioner: The Hon. Sir William Ralph Meredith, C.J.O.).

than fighting a “debt crisis” by keeping out new contributors and reducing the premiums paid by those participating in the scheme. Full coverage for all workers and all workplaces in Ontario would insure that the W.C.B. continues to be financially sound and continues to be the cheapest insurance possible for employers in Ontario.

3. THE REAL CRISIS IN WORKERS COMPENSATION: UNSAFE AND UNHEALTHY WORKPLACES

(a) *A Public Health Disaster of Crisis Proportions*

Every year thousands of Ontario workers are killed or injured on the job. The exact number of injured workers is difficult to determine with precision. Although W.C.B. statistics are the usual source of reference for this information, many have argued that the actual number of workers experiencing some form of occupational injury or disease is much greater.

A Statistics Canada survey done in 1991 found that $\frac{2}{3}$ of adults working at a job or business felt that they are exposed to health hazards at work. Shockingly, $\frac{1}{2}$ of those adults exposed to health hazards reported that they have suffered adverse health effects as a result. **This means that less than 10% of workers whose health is damaged by their working conditions actually receive benefits from the Workers' Compensation Board.**

There are a number of factors that contribute to the gap between the number of people reporting adverse health effects and the number of lost time claims allowed by the W.C.B. To begin, there are almost 700,00 workers in Ontario who are excluded from coverage under the WCA. These workers are employed in so-called “safe” industries such as banking and insurance. However, with the introduction of new computer technology, many of these workers have suffered repetitive strain injuries affecting their hands, wrists, shoulders and neck. Because there is no W.C.B. coverage for these workers, the injuries suffered by these workers are unrecorded and, in many cases, uncompensated.

Secondly, many workers suffer adverse health effects as a result of exposure to chemical and biological agents in the workplace. There are 25,000 toxic chemicals used in the workplace by businesses in Ontario. Less than 700 of these are subject to any form of regulation. The vast majority of these substances have never been tested to determine if they cause cancer or other occupational diseases.

(b) *Employers Do Not Acknowledge This Crisis*

Very few employers take adequate precautions to protect their workers from exposure to chemicals and biological agents. Because so little is known about the connections between toxic substances and human health, employers in this province are allowed to use their workers as guinea pigs in an experiment to see if they can survive the exposure.

Even if their workers get sick or die, employers vigorously oppose any claims for W.C.B. benefits blaming lifestyle factors such as smoking, diet or alcohol. The onus is placed on the worker by the W.C.B. to prove that the illness is work-related and this can be virtually impossible because of the requirement for scientific proof of causation.

In Paul Weiler's 1983 report, *Protecting the Worker from Disability: Challenges for the Eighties*, using very conservative assumptions, he estimated that the W.C.B. was compensating less than 1 out of 17 occupational cancer deaths every year.¹⁹ Similarly, Weiler observed that there was a significant shortfall in the recognition of respiratory diseases as occupationally-related.

Employers in this province continue to assert that occupational disease is not a major problem because so few claims are allowed by the W.C.B. The fact is that employers have no idea whether the toxic substances they use are killing or injuring the health of their workers. They don't make the effort to find out about the toxic substances in their workplace. They don't provide their workers with information and training on how to handle toxic substances safely. They don't spend the money to do proper air sampling to find out the extent of worker exposure to toxic substances or to buy the personal protective equipment to limit worker exposure.

Finally, despite substantial research which has been done to identify sources of stress in the workplace, employers and the W.C.B. have vehemently resisted the pressure to provide benefits in respect of illnesses linked to occupational stress. As a result, very few stress claims are allowed by the Board. On the other hand, the Statistics Canada survey revealed that 37% of Canadians felt that they were subjected to excessive stress as a result of the demands placed on them by their jobs and poor relationships with supervisors or co-workers.

All of this points to the real crisis in workers' compensation—unsafe and unhealthy workplaces. It is scandalous that employers have been allowed to get away with creating the atmosphere of financial crisis around the issue of workers' compensation without addressing the fundamental question—**why are so many workers being injured and made sick in the workplace.** Surely, if

19. *Supra*, note 2. Using more radical assumptions would put the figure at 1 out of every 75.

we could get to the answer to that question, the compensation “crisis” would be solved.

(c) **Problems With Existing Legislation and Enforcement**

Employers have a responsibility under the *Occupational Health and Safety Act* (hereinafter, *OHS*) “to take every precaution reasonable in the circumstances for the protection of a worker.”²⁰ The Ministry of Labour employs approximately 250 inspectors to cover almost 120,000 workplaces in Ontario and enforce the provisions of the *OHS*. In 1992-93, inspectors made 40,000 visits to workplaces and issued over 50,000 orders in respect of violations.²¹ These violations together with the 350,000 claims allowed by the W.C.B. speak for themselves as to the commitment of employers to the health and safety of their workers. These numbers are staggering when one considers the hysteria created by the amount of money paid out in W.C.B. benefits. **Is it any wonder that compensation costs are skyrocketing when there is so little regard for health and safety legislation.**

We do not accept or believe that it is impossible to reduce accidents and occupational illnesses to a manageable level. It is completely unacceptable to suggest that it is inevitable that more than 350,000 workers will be injured or poisoned every year in this province and that this must be tolerated as the price of keeping business here. Surely a public health disaster that affects the well-being of over 350,000 workers every year demands a better response than that. It requires a bold and dynamic plan of action aimed at eradicating the root cause of this epidemic—unsafe and unhealthy workplaces.

(d) *Experience Rating is Not Effective*

At present, the Board relies on its experience rating program as the vehicle for reducing the incidence and severity of workplace injuries. Under experience rating, the assessment rate for a firm may be higher or lower than the basic rate for the relevant industry group, depending on the firm’s individual accident costs. It is assumed that experience rating creates a financial incentive for employers to make investments aimed at improving unsafe working conditions. Unfortunately, despite the theoretical attractiveness of this underlying premise, there has been very little evidence to substantiate that experience rating has the desired effect. The studies that have been done to test the effectiveness of programs in Canada and the U.S. have shown conflicting results.

20. R.S.O. 1990, c.O-1, s.25(2)(h).

21. It should be noted that due to cutbacks within the Ministry, these figures are down from previous years.

In 1990, the W.C.B. hired Peat Marwick Stevenson and Kellogg to do a case study aimed at assessing the impact of the New Experimental Experience Rating (NEER) and the Council Amended Draft-7 (CAD-7) programs on the behaviour of participating employers with respect to workplace health and safety practices. Peat Marwick looked at 28 NEER and 7 CAD-7 participants selected by the W.C.B. The NEER employers were selected because it was felt that they were particularly likely to have responded positively. The reasons for selection included recent large surcharges, continuing large surcharges and movement from large surcharge to large surplus. It was presumed that, if these employers were not motivated to improve their workplace conditions, then it was unlikely that the programs had any impact on the population as a whole. On the other hand, because these employers were hand-picked, it is virtually impossible to conclude that positive results have much validity for employers as a whole.

The results of the study did show some modest impact on the health and safety practices of NEER employers although factors considered were fairly common practice among larger employers and were basic to any credible health and safety program under the OHSA. The factors were:

1. emphasis on safety training
2. safety promotion activities
3. emphasis on personal protection
4. commitment to health and safety

It is interesting to note that the impact on the CAD-7 employers was substantially less. These employers were small construction firms selected more at random and were more "typical" of the general employer population.

The study also found that employers did not undertake any formal quantified financial analysis of the benefits and costs of accident prevention or claims management in the context of the incentives provided by the NEER formula. In other words, the employers studied did not do any cost/benefit analysis to determine the advisability of specific investments in health and safety. It was also concluded that a significant surcharge is much more effective in promoting a corporate response than the NEER formula itself.

On balance, it is difficult to use the Peat Marwick study as an endorsement of experience rating for a variety of reasons.

1. The focus of the study was large unionized employers even though the majority of accidents occur in small unorganized firms.

2. The modifications to employer behaviour were quite modest and, for the most part, involved activities already required under the *OHSA*.
3. The study found that the key factor in initiating modifications was the creation of positions with specific responsibilities for health and safety and claims management. Obviously, this is only possible in large companies.
4. The impact on CAD-7 employer behaviour was minimal. These are the typical small businesses with non-union workforces where most claims are incurred.
5. The absence of any detailed cost/benefit analysis undertaken in respect of investments in health and safety suggest that employers are not interested in making long term financial commitments to improving working conditions. At best, large employers may be motivated by experience rating to implement short-term, low cost, basic programs that should have been in place long ago.

(e) *Incentives to Fight Injured Workers, Not Make the Workplace Safer*

Because experience rating is based on the cost of accident claims, an employer does not necessarily have to take measures to make the workplace safer in order to benefit from the program. In fact, the main criticism of experience rating is that it creates a greater incentive for employers to engage in “inappropriate” claims management activities such as dubious reporting practices, conversion of potential lost-time claims to no lost-timers by retaining workers on payroll, excessive resort to the Second Injury and Enhancement Fund (S.I.E.F.) and claims appeals²² and inappropriate on-site medical treatment. It is much easier and cheaper to reduce the cost of claims by adopting these tactics than it is to invest in improved technology, health and safety training and other preventative measures.

The Peat Marwick study, discussed above, provided some support for the critics of experience rating. Although there was modest impact on employer behaviour in terms of health and safety, 82% of employers placed an emphasis on controlling claims costs by means other than safety initiatives. Claims management techniques include:

22. B. Kralj & D. Hyatt, “Employer Appeals of Workers’ Compensation Board Decisions: The Impact of Experience Rating”, in A. Ponak, ed., *Teaching and Research in Industrial Relations*. (Proceedings of the 27th Conference of the Canadian Industrial Relations Association, 1991).

- talking to adjudicators and raising issues, without formally contesting the claim;
- failing to complete the Form 7 properly, so it requires special attention;
- providing documentation that raises suspicions about claims;
- seeking to identify “chronic abusers” of the W.C.B. and making it more difficult for them to receive payment of benefits;
- non-reporting of health care only claims;
- reporting short duration temporary disability as health care only claims.

One indication that experience rating has resulted in increased emphasis on claims management rather than safer workplaces has been the trend to longer duration of claims even though the number of claims has been declining. Again this suggests that health care claims are not being reported and that short-term claims are either not reported or reported as health care only. In fact, this was confirmed by a survey of some 1103 experience-rated employers, 20% of whom, actually admitted that they allow their injured workers to use the short-term disability plan rather than report injuries to the W.C.B.²³ An additional 13.6% of employers admitted that they encourage workers with mild or less severe injuries to take time off with pay rather than report their injuries to the W.C.B.²⁴

There have been some reviews of experience rating and it appears that most observers agree that the favourable impact of experience rating on the frequency and/or severity of accidents has not been conclusively shown.²⁵ The report of the Manitoba Workers’ Compensation Review Committee states:

“we heard numerous instances of how attempts were made to suppress injury reporting, direct work injuries to private insurance coverage, pressure workers to stay on the job when medical attention was clearly required, coerce workers back to work too soon ... [E]fforts tended toward reducing claims cost rather than reducing injuries ...”²⁶

23. Ontario Workers’ Compensation Board, *Workplace Accident Reporting Practices Study, Main Report* (August 1992) at 36.

24. *Ibid.* at 38.

25. F. Vaillancourt, *Canadian Tax Paper No. 98: The Financing of Workers’ Compensation Boards in Canada, 1960-1990* (Toronto: Canadian Tax Foundation, 1994) at 82.

26. Manitoba, Legislative Assembly, Workers’ Compensation Act Legislative Review Committee, “Report of the Workers’ Compensation Review Committee” (1987) at 147.

(f) *Experience Rating Costs More Than it Brings In*

All of these criticisms about the lack of positive results of experience rating together with the negative influence it has on claims management are of more than academic interest. Although the experience rating program is supposed to be revenue neutral, it has not worked out that way in practice. There has been a serious imbalance between rebates and surcharges which has contributed significantly to the unfunded liability in the system. **In 1993, \$295 million was drained out of the system to pay refunds to employers as a reward for obeying the health and safety laws and challenging claims. For 1994, the net loss from experience rating was \$359 million.**

If experience rating is not the answer to reducing the incidence of occupational injury and disease, then what is? As stated above, we do not accept that injuries and disease in the workplace cannot be reduced to manageable levels. The belief that high levels of accident frequency are inevitable is not tenable or acceptable. There are employers who take safety seriously and the results speak for themselves. It can be done if the will is there to make it happen.

(g) *Employer Commitment to Safety is Necessary*

The recent study commissioned by Liberty International Canada, *Unfolding Change: Workers' Compensation in Canada*, cites several spectacular examples of dramatic improvements in safety performance by corporations that have committed to safety and imbedded this commitment into the working culture of the organization.²⁷ These examples provide support for the work being done by the Institute for Work and Health around the issue of occupational lower back pain which is described in the Liberty International Study. Relying on evidence that total occupational injury rates are related to workplace organizational practices, researchers at the Institute have suggested that it is likely that the same relationship exists with respect to back injuries since they constitute the largest single injury category.

These developments point the finger of responsibility directly at employers. **Employers control the work environment and they are in a position to make the organizational and technological changes that need to be made in order to reduce the number and severity of work injuries and illnesses. What is required is senior management commitment to safety and a plan of action to make the commitment a reality in the workplace.** As the Liberty International study points out, if the level of lost-time claims costs in Canada could be reduced to a level just ten times higher than that of the leading performer among

27. Liberty International Canada, *Unfolding Change: Workers' Compensation in Canada* (Toronto, 1995) 5 Volumes.

chemical manufacturers, the reduction in costs would eliminate the unfunded liability and eventually lead to a reduction of employer assessment rates.

The compensation system must be designed to encourage employers to accept responsibility for improving their health and safety performance. This could be done in a number of ways, and they are discussed below.

4. REFORMING HEALTH AND SAFETY

(a) *Integration of Workers' Compensation and Health and Safety*

Because of the connections between health and safety in the workplace and the number of occupational injuries and illnesses that result from unsafe working conditions, there is an obvious need to combine jurisdiction over these issues in the W.C.B. There are too many agencies, boards and government departments operating in the field. The duplication of effort, whether it be in research, education or enforcement leads to inefficiencies and much higher administrative costs. It also contributes to the lack of focus on prevention which currently exists within the W.C.B.

Combining responsibility for health and safety enforcement with workers' compensation provides a unique opportunity to take dead aim at poor performers. Once systems are in place to identify workplaces that are unsafe, a W.C.B. with overall authority to deal with all aspects of the situation will have the tools necessary to make changes that are needed. In addition, the knowledge that the means exist to root out these performers will provide a real deterrent effect that does not exist at present. The Ministry of Labour simply does not have the resources to inspect all workplaces and employers know it. On the other hand, the W.C.B. is much more visible to employers and constitutes a real threat to those employers that ignore health and safety.

(b) *Workplace Audits*

Because of the criticism of experience rating, there was pressure on the W.C.B. to look beyond frequency or claims costs as a basis for surcharges and rebates. As a result, the Workwell program was introduced in 1987. The criteria used for the Workwell audit focuses on health and safety programs and determines whether they have written standards and procedures, formal training, commitment of senior management, written accident investigation procedures and workplace inspections.

Although the Workwell program itself probably concentrates too much on a paper exercise, the idea of basing rates on actual audits or inspections of working conditions has merit and should be pursued. A real health and safety audit that

inspects working conditions, monitors exposures, scrutinizes the design of workplaces, and the choice of equipment and materials for health and safety purposes is far more likely to promote prevention.

(c) *Employer Education*

One of the problems with experience rating is that it focuses attention on a relatively minor component of the cost of occupational injury and disease incurred by employers. Studies done have estimated the cost of injury and disease at anywhere from 4-20 times the compensation cost. The hidden costs include damage to material and equipment caused by the accident, lost production and time lost by other employees responding to the accident. These hidden costs provide a far greater potential incentive than compensation costs for employers to minimize the incidence of accidents.

Employers need to be educated to view the issue of prevention from a total cost perspective and to be made aware of the impact that good occupational health and safety practices have on the overall profitability of the enterprise independently of their impact on compensation costs. The Liberty International study notes that the University of Toronto is currently carrying out a research project which will attempt to demonstrate that there is a link between world class safety and good business performance.

(d) *Enforcement of Health and Safety Legislation*

Health and safety consciousness is virtually non-existent in the unorganized sector. Unfortunately, the Ministry of Labour's level of enforcement activity in the unorganized sector is also virtually non-existent. That situation has to change if there is to be any meaningful improvement in working conditions in Ontario. The lack of health and safety commitment among small employers is clearly reflected in the injury frequency rates compiled by the W.C.B.

As noted above, better enforcement of health and safety standards would be greatly facilitated by a merger of jurisdictions between the W.C.B. and the Ministry of Labour. However, this does not obviate the need to develop a specific plan of action to focus on unorganized workplaces. Everyone knows there is a problem there but, as yet, there has never been the political will to attack the problem head on.

(e) *Reduce Injuries, Not Workers' Compensation*

It is time to stop paying lip service to the notion that prevention is the only real solution to controlling the cost of workers' compensation. **If employers are unhappy about the high cost of W.C.B. claims, then they must address the need to design workplaces that don't injure people or make them sick. If**

they are unwilling to do that then they must pay the full price of the pain and suffering created as a result. There cannot be a trade-off of workers' health for business profits.

Any effort to deal with the financial problems facing the W.C.B. must recognize that full compensation of injured workers is a principle of the system that is not negotiable. As Paul Weiler said in *Reshaping Workers' Compensation for Ontario*:

"It is illegitimate in principle to argue that the Workers' Compensation Board must tighten up on claims and cut back on benefits because its total budget is growing too large, too fast, for the economy to afford. This should be as unthinkable as would be a suggestion to the Chief Justice that the number and level of tort awards be restrained by his judges because insurance premiums are getting too high. In both cases, the same answer is appropriate: the only proper means of containing the bill for accident losses is to reduce the number of accidents themselves."²⁸

Simply put the only truly legitimate way to reduce the cost of the workers' compensation system is to reduce the number of occupational injuries and diseases. Better health and safety practices mean fewer workplace injuries and diseases, less down time, less lost production, less loss of man-hours, less repair costs etc. Reduce injuries, not compensation.

5. REFORMING THE W.C.B. ADMINISTRATION

(a) *What is the Purpose of Our Workers' Compensation System?*

The purpose for which the system was to serve employers still holds true. Employers are still protected from lawsuits by their employees in the courts. They can still calculate compensation as a cost of doing business, although this is being undermined by activities of employers themselves by their demand for experience rating and by challenging individual claims.

The fundamental purpose of the system, to provide injured workers with "speedy justice, humanely rendered",²⁹ has been utterly lost. Injured workers are experiencing unconscionable delays in the adjudication of their benefits. For example, the W.C.B. cut a man off his benefits two years ago because they thought he was expecting a baby. Even though the error was pointed out more than six months ago, they haven't paid him yet. Workers, especially those with

28. *Supra*, note 2, at 15-16.

29. Official motto of the W.C.B.

non-visible injuries, are treated with suspicion. Many people find that the W.C.B. does not believe them.

(b) *Harassment of Injured Workers*

Injured workers suffer arbitrary benefit cuts without consultation or warning. They go to the bank and find that the direct deposit from the Board has not been made. Two or three weeks later they may receive a cursory letter of explanation from the W.C.B. Many people, at some time, have been cut off their benefits without warning, even though they still had a disability and no job.

On top of problems with the W.C.B., injured workers are experiencing what can easily be termed outright harassment by their employers in their claims. Increasingly, employers are challenging every aspect of a claim and resorting to the use of high paid consultants and private investigators to steer their challenges. While the W.C.B. will defend injured workers from the most blatant of these intrusions, the system is generally encouraging this kind of behaviour through both administrative measures and financial rewards.

(c) *W.C.B. Means Never Having to Say You're Sorry*

We have represented injured workers for many years and have seen a dramatic shift in the way they are treated by the W.C.B. There have always been complaints about the administration of claims. However in the past, bumbling as the W.C.B. was, there was a certain integrity. When a mistake was acknowledged, it moved swiftly to rectify it. Now a mistake is simply re-worded to put up a new roadblock in the claim. Or else a new reason to deny benefits is quickly found.

In the past injured workers were recognized as people who had to put food on the table and pay rent. Attempts were made to smooth over transitions in benefits. No such attempts are made now, except where experienced representatives manage to discuss matters with experienced W.C.B. staff.

We have all seen this trend to move rapidly, ever further, from the fundamental purpose of the system: to seek to compensate injured workers justly and speedily for their injuries.

(d) *Some Simple Administrative Solutions*

In the first place, the W.C.B. must be understood by its staff as the body which is charged with implementing the Act in the best interests of injured workers. Leadership, policy development, and decision making must be carried out by a staff dedicated to this purpose. There are W.C.B. documents from the past that put this concept forward. For example:

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

As dedicated public servants it is our duty to:

1. Be sure in all cases that every injured worker who is entitled to the benefits of the Act shall receive as expeditiously as possible the full remuneration provided by the Act and the best available medical and rehabilitation services ...”³⁰

The ability to handle claims well would be greatly enhanced if claims adjudicators were given low caseloads which they could maintain for the life of the claim. The claims adjudicator must be seen as one of the most important staff functions at the W.C.B. The claims adjudicator must have the knowledge, discretion and mandate to seek to assist the injured worker.

At present, adjudicators are poorly trained, severely overburdened, and given neither time nor mandate to conduct a reasonable inquiry into a claim or properly consider its merits if the conclusion is not obvious at first sight. They are forced to be over reliant on W.C.B. doctor opinions and/or to deny a claim for ludicrous reasons which can take a worker months or even years to rectify through the appeal system.

(e) *Make the Correct Decision in the First Place*

At present a tremendous number of the cases which are clogging up the appeal system represent nothing more than poor initial decision making, ranging from decisions based on incomplete information to a lack of familiarity with the Act or policy. This represents an additional cost to the system which can easily be eliminated if the adjudication is done properly in the first place.

There are three major roadblocks to a system committed to “speedy justice, humanely rendered.” The increasingly adversarial nature of claims, the intrusion of financial concerns into claims adjudication, and the narrowing focus on a “stakeholder” concept of policy development.

(f) *Fundamental Principles Are Undermined by An Increasingly Adversarial System*

When William Meredith crafted the Workers’ Compensation system in 1915, he specifically established an inquiry system, which was to remove confrontation,

30. Ontario Workers’ Compensation Board, *A Statement of Basic Policy of the Workmen’s Compensation Board in its Administration of the Workman’s Compensation Act*, Board of Directors Minutes (7 December 1964).

as a cornerstone of the plan. This was to both allow for speedy payments to injured workers and to reduce costs for employers. Meredith proposed a simple, non-adversarial system in which the Workers' Compensation Board had the mandate to enquire into and decide all matters needed to determine the compensation payable. The system involved the board and the injured worker.

In fact Meredith opposed introducing an appeal system. In that stage of the development of the principles of administrative law, an appeal system involved an appeal to the courts. This is what Mr. Justice Meredith had to say about an appeal system:

“A compensation law should in my opinion, render it impossible for a wealthy employer to harass an employee by compelling him to litigate his claim ... once he has established it to the satisfaction of a board such as that which is to be constituted ...”.³¹

(g) *Employer Involvement in Claims Must Be Limited*

In our experience, we have now achieved the opposite. We have a system with such strong financial incentives to harass an injured worker that an employer does not even have to be wealthy to tie a claim up in years of litigation. There is a growth industry of private consultants who exist, like parasites, on the workers' compensation system. They fight claims on behalf of employers at no cost up front, instead taking a share of the proceeds from experience rating rebates and second injury and enhance fund relief.

We used to see only the occasional employer turn up at a worker's appeal, usually a federal government (Schedule II) employer who pays directly for the claim. Now we find an employer at most workers' appeals and we find them initiating their own appeals. The legalistic Workers' Compensation Appeals Tribunal developed appeal structures which invited employer participation and employers have responded with their own interest, heightened by the experience rating system which came in at about the same time.

In our experience, none of the employer appeals or submissions at workers' appeals have anything to do with actual disagreement over the justice of the individual claim. They have to do entirely with trying to get rebates from the W.C.B.

Employer involvement hampers the W.C.B.'s ability to do its job properly. It creates anxiety, insecurity and anger amongst injured workers who should be allowed to concentrate on medical, vocational, emotional and social recovery. Employers should not be allowed to do this. The rational choice for an inquiry

31. *Supra*, note 18, at 12.

system was made a long time ago. We are convinced that we must return to that function for the system to operate efficiently as was intended.

There are only two points at which an employer should be involved in a claim. At the point of initial adjudication, providing the necessary information which can dispute or support the workers claim. And at the point of return to work, if the employer is offering employment. Otherwise there should be no involvement. Specifically:

1. Employers should not have access to the worker's claim file.
2. Employers should not have the right to request that the worker undergo a medical examination under their direction.
3. Employers should not receive notice about appeals and developments in a worker's case, especially with "cost statements" attached; and
4. Employers should not have the right to be part of the appeal process.

In order for this to occur, the system must be set up such that an employer has no financial interest in an individual claim. This means abolishing the experience rating system and returning to collective liability.

(h) *The Cash Register Approach to Adjudication*

Employers may have legitimate concerns about their competitive edge in our free-trade world. The W.C.B. may have legitimate concerns about its eroding financial base as Ontario loses its industrial base and coverage is not extended to the emerging economic sectors. But these concerns have no place in the adjudication of claims.

The W.C.B. has allowed a cost hysteria to permeate at all levels—right down to the individual claim. Cost control is replacing common sense, policy and the Act itself in the adjudication of individual claims. Claims adjudicators, rehabilitation caseworkers, hearings officers—all claims decision makers, have gotten the message to "keep costs in mind," as they render their decisions. We see the results every day as injured workers come to us with truncated claims.

Perhaps the most notorious example of this was the massive termination of supplements under s.147(4) of the WCA which took place last winter. These supplements are to be recalculated based on the worker's actual income situation on two occasions. Last winter thousands of injured workers came up for their second and final recalculation. The W.C.B. used the occasion to actually cut-off about 30% of supplements generally, claiming that the workers should not have received them in the first place.

The reason was obvious. Receipt of these supplements is the eligibility criteria for the additional \$200 per month provided in Bill 165 which was passed in December, 1994. Terminating a \$380 a month supplement saved the Board \$580 a month under the new legislation. Eventually the W.C.B. and Ministry of Labour acknowledged that the cut-offs were contrary to the Act and the supplements are slowly being reinstated. This “mistake” would never have been made if cost cutting had not become a key adjudicative principle.

It would be in the best interests of an effective system which seeks to do justice for injured workers to clearly separate the adjudicative functions of the Board from the revenue concerns.

(i) *The “Stakeholder” Concept Entrenches Conflict in the W.C.B.*

The complete acceptance of the adversarial aspect of the system, and the complete lack of identification of the injured worker as the person for whom the system is meant to serve, is reflected in the bi-partite structure of the W.C.B.’s Board of Directors, that resulted from Bill 165, which splits the seats between representatives of labour and employers. It does not give any seats to injured workers in their own right, nominated from their own organizations.

The stakeholder concept is a dubious one to run the Board. The two sides are too fundamentally in opposition to each other to allow the Board to function. It has been paralysed. Ask anyone who works at the W.C.B. for details of how this affects their work. In order to overcome the paralysis there will be an attempt by some to forget the fundamental principles of the system and to resort to bargaining. It will be difficult to resist trading off issues for each side in order to get something, anything done.

The stakeholder concept tends to exclude the input of those who are not formally at the table. For example, we requested a meeting with top executives of the W.C.B. to discuss some concerns. We were informed that these executives were already planning a meeting with representatives of organized labour and business on the same subject. Therefore it was not necessary to meet with us. We would be informed of the outcome of the meeting. Injured workers and their advocates have never had less meaningful contact with W.C.B. officials than in these years of “stakeholder” consultation.

The W.C.B. should be run by people with a commitment to the system of workers’ compensation and a fundamental understanding of what that system is meant to accomplish. It should be run by people who understand the needs of injured workers and can translate this into administrative action. A recommendation in this regard was made to re-institute the former practice of involving Board members in the appeal system. Participation in appeals provided admin-

istrators the opportunity for tremendous insight into the workings of the W.C.B., the nature of policies, and the practical problems faced by injured workers.

6. REFORM OF THE BENEFIT STRUCTURE

(a) *Does the System Measure-Up to Basic Principles?*

The recent Royal Commission into Workers' Compensation was the fifth. Following the Meredith Commission and report in 1915, we had the Middleton Commission in 1932, the Roach Commission in 1952 and the McGilvary Commission in 1967. Almost every Royal Commission Report begins with the observation that the public has a large misconception of the principles on which workers' compensation is based.

We approach the problem of what is wrong with workers' compensation by comparing what we see in our day to day experience with the fundamental principles of workers' compensation. These are the principles which guided the scheme proposed by Mr. Justice Meredith in 1915 and which we believe are still valid today.

We begin with the principle of the "historic compromise", a term given to describe the original social contract between workers and employers that gave rise to the workers' compensation system. Working people gave up their right to sue their employer in the courts for compensation for work place injuries in exchange for a no-fault, employer paid, state administered system of compensation for work related injuries and diseases.

The term "historic compromise" is often used rhetorically, like "justice", and "fairness". However, it is a fundamental principle that is not without content and application in assessing the workers' compensation system of today. From the historic compromise, it can be seen that workers' compensation is a substitute for a legal right. It follows, therefore, that workers' compensation must be viewed as a right of workers in Ontario. It is not a discretionary system of charity, paid only as long as convenient or affordable to an employer. Workers' compensation is not spare change for injured workers.

(b) *It May Be Better Than a Kick In The Pants, But ...*

In the courts, where the right to sue originates, the ability of the defendant to pay is irrelevant to the issue of the liability of the defendant and it is irrelevant to the amount of damages awarded. As well, in the courts there has been a tremendous liberalization in the principles of liability and the level of damages awarded as compensation over the past 80 years.

Workers' compensation, and any changes to the workers' compensation system must be measured against the historic compromise. Workers' compensation

must be assessed in comparison to the present day value of the right to sue. The question must be asked: Can the system still be considered a fair exchange for giving up the workers' common law right to sue the employer for damages?

Many fail to appreciate this important principle. For example, consider the recent announcement by the Minister of Labour that she will introduce a Bill to reduce workers' compensation benefit levels and to limit entitlement to exclude compensation for some stress and other work related disabilities.³²

(c) *Workers' Compensation Is A Right, Not A Luxury*

That kind of cutback proposal reveals a fundamental misunderstanding of the workers' compensation system. Workers' compensation is a right, not a luxury of good economic times. The system provides a substantial benefit to employers who receive protection against multi-million dollar law suits by workers killed and injured on the job. The day that benefits are not payable under the WCA for a work related disability is the day that injured workers are free to take their employers to court. The protection in s.10(9) against civil actions will not apply. Employers will face huge lawsuits and will soon have to buy disability insurance while they are still paying for W.C.B. coverage.

The system must measure up to the principles in the "historic compromise". No government should tinker with the workers' compensation system when it lacks a good understanding of the basic principles on which it is based.

(d) *Fundamental Principles for Permanent Disability Compensation*

On the topic of 'full compensation', Mr. Justice Meredith had this to say:

"a just compensation law ... ought to provide that the compensation should continue to be paid as long as the disability caused by the accident lasts, and the amount of compensation should have relation to the earning power of the workman."³³

"Job security or full compensation" has been a fundamental principle in the platform of the Union of Injured Workers for the past 20 years. Full compensation, in our view, is full compensation in the Meredith sense. A pension for life, for life-long disabilities.

On the subject of temporary compensation, Mr. Justice Meredith had this to say:

32. Letter from Elizabeth Witmer, Minister of Labour to the employer and worker communities inviting submissions into proposals for reforming workers' compensation (28 August 1995).

33. *Supra*, note 18, at 13.

“to limit the period during which compensation is to be paid regardless of the duration of the disability, as is done by the laws of some countries, is, in my opinion, not only inconsistent with the principle upon which a true compensation law is based, but unjust to the injured workman for ... he will be left ... without any earning power at a time when his need of receiving compensation will presumably be greater than at the time he was injured ...”.³⁴

(e) *A Move From Permanent to Temporary Compensation*

There has been a movement away from compensation for permanent disability and toward temporary compensation and under-compensation of permanent disabilities. This is not consistent with a basic principle that ought to underlie our system.

Injured workers should be the main focus of the workers' compensation system. The permanently disabled are the “key sector” of injured workers. The reasons are obvious: The system must take care of the most serious and permanent injuries and diseases.

We represent an important group of permanently disabled injured workers—the injured workers from the Metro Toronto region and surrounding communities. We are the ones who fought in the early '70s for pension supplements to increase low pensions. We fought for full cost of living increases in the '70s and '80s. We are the ones who had 5,000 angry voices at the public hearing in 1983 to stop the attempt to take away pensions. The ones who had to storm the Ontario legislature in order to get the simplest thing—public hearings on Bill 162. The ones who fought and stopped the Copeland administration's attempt to take away the pension supplements that belong to the older injured workers.

(f) *Permanently Injured Workers Are the Most Alienated*

The permanently disabled represent the most angry and alienated part of the compensation system. They were good before the injury. They had a future. But after the injury, they went from a somebody to a nobody—a claim number—a burden to employers and a burden to government. How quickly others forgot their contribution to society.

If a country considered its wounded soldiers a burden and forgot them, we would call it uncaring and uncivilized. Injured workers did not go to war, but are the “peaceful soldiers”—those who built the subways, factories, offices and apartment buildings and were injured *permanently* working in them. To treat this group as a burden, as if they were disposable, is also a sign of an uncivilized society.

34. *Ibid.* at 13.

(g) *How to Properly Compensate Permanent Disabilities*

The number one issue that has dominated the compensation debate for the last 20 years has been the issue of pension reform. To put it another way, how to properly compensate permanent disabilities. Today there is an artificial division between injured workers with a permanent disability. Those who were injured before 1990, who have the right to a pension for as long as their disability lasts. And those injured after 1989, who can be “deemed” to have a job even if they don’t and who, in no case, will be compensated for their lost earning capacity after they reach 65 years of age.

Consider the reasons that injured workers and their advocates opposed the new “wage-loss” system, and preferred to keep the old pension system and improve on it. Permanent disability affects a worker all day, forever. We wanted to preserve the simple and fundamental principle that there should be a pension for life for life-long disability. It is not only related to the loss in wages, but affects the person in family life, social life, even during sleeping hours. We were offended by the suggestion that compensation should cease at 65 years of age. As if an amputated arm would magically grow back on the 65th birthday.

There is a myth of the overcompensated pensioner. We rejected the notion that a person who returned to work at no wage-loss with a permanent disability should not receive a pension. Suppose your right arm is amputated but you can still do your job. In the name of common sense and simple justice, should you not have some compensation for life since you will be without an arm for the rest of your life?

As for economic loss, how long does it take you to do the same tasks as before? Will you get a promotion as easily as before? What about the loss of the ability to work overtime, or to change to a higher paying line of work? What about the money you will spend hiring people to do the work around the house you could do before?

(h) *The Problem With Wage-Loss Systems*

Deeming is a disaster. We knew that to move from a pension for life system to a wage loss system would involve the infamous practice of “deeming.” We knew that we were not going to get a real wage loss system, as promised by then Labour Minister Greg Sorbara, but a phony wage loss system based on phantom jobs, not real wage losses.

During the pension reform debate of the last 20 years we also knew that “deeming” was a problem that could not be fixed. The experience of all the wage-loss jurisdictions in Canada and the United States is unequivocal. If you move away from pensions to a wage-loss system you will get “deeming”, which is the opposite of what people think of as wage loss compensation.

They are inseparable. The experience of Ontario is illuminating. We got “deeming” in 1990 with the Liberals. The NDP took over in September of 1990 with an express promise by the Premier to “move swiftly to eliminate deeming”. A joint labour-management committee was set up to deal with it. But deeming is still alive and doing very well. We must return to a system that awards pensions for life for life-long disability.

(i) *The Importance of Security*

A pension system offers permanently disabled injured workers more security. Even if the pension is low and inadequate (and it need not be so), the worker knows that it lasts for as long as the disability lasts. It’s secure. It will come every month. And it can increase if the condition gets worse, as is often the case with weight bearing joints.

With the ‘deemed’ wage loss system injured workers know that they are never going to be secure. You will be reviewed by the Board. Chances are, if you got a future economic loss award, it will be reduced, not increased. The W.C.B. says the job they deemed you capable of doing two years ago would provide you with even higher wages now. So they will reduce your compensation accordingly, even if you are not working. Or it will use an increasing area of the province to find an imaginary job for you. First it’s the local job market, after 2 years it’s the regional job market, after 5 years it’s the whole province. There are job opportunities somewhere in Ontario and if you don’t have a good job, that’s your problem.

There is nothing that injured workers want more than freedom from W.C.B. harassment. A pension allows that freedom. If your benefits depend on your “cooperation” with the Board, it’s like being in jail. The Compensation Board is the jailor, the injured worker the Prisoner. That’s how injured workers who have to “cooperate” with the Board see it. We know people who panic every time the phone rings in the house. It could be the W.C.B. caseworker, or the adjudicator. They panic every time the post office delivers a letter. “Is the Board cutting me off?” they fear.

Whatever you do or say may be interpreted the wrong way—and the W.C.B. will cut your benefits. If you say you feel bad, they can say you claim total disability. So you are not cooperating: “Stop the payments!”. If you say you feel good, they may say you don’t need any help: “Stop the payments!”. If they offer a job, you feel you just have to take it, even if you know it will make you worse. If you don’t take it—“Stop the payments!”. If your doctor advises one thing and the W.C.B. says something different, you’re caught in the middle again. And if you choose your own doctor, it’s “Stop the payments!”.

No matter what you do, they may find an excuse to stop those payments tomorrow. It's a system of constant fear and insecurity. The "wage loss" system has been described by Professor Terry Ison as a "sentence of perpetual probation".³⁵ He defends the pension system as a vastly superior system.

(j) *The Effect on Vocational Rehabilitation*

The pension system maximizes vocational rehabilitation. The "deemed" wage loss system interferes with rehabilitation. If you have a pension, any job you find will provide earnings that you can add to your pension. With a so called wage loss system, good rehabilitation means less compensation. If you get retrained for a good job, its bad for you because your compensation will be based on the earnings of this job, whether you are able to get it or not.

The worker is put between a rock and a hard place once again. Do you go for good rehabilitation or decent compensation? The two should never be in conflict. It is not an accident that vocational rehabilitation has deteriorated since 1990. As Professor Ison predicted, vocational rehabilitation has become a system of policing injured workers, a system of "directed labour" with a "paramilitary flavour".³⁶ Strong words from a mild-mannered law professor and former chair of the Workers' Compensation Board of British Columbia.

(k) *An Improved Pension for Life*

While rejecting the wage loss system, there were nevertheless some weaknesses with the pension system. It was too "orthopaedic", in that it recognized the most evident injuries like amputations, but failed to recognize soft tissue injuries, chronic pain and other less obvious yet debilitating conditions. It did not recognize back disabilities sufficiently. The British Columbia W.C.B. increased the percentages for back disabilities in the 1970's to address this inadequacy.

In response to the Weiler studies, the Association of Injured Workers' Groups proposed a "third option". A pension system that would award a pension for non occupational loss and a pension for occupational loss.³⁷ We continue to endorse that proposal. Alternatively, it is also possible to "fix" the old pension system with adequate pension supplements.

35. Ontario, *Re: Workers' Compensation in Ontario. A Commentary on the Report Entitled: "Reshaping Workers' Compensation for Ontario"* by Paul C. Weiler; A report submitted to the Minister of Labour by T. Ison (February 1981) at 16.

36. *Ibid.* at 20.

37. The Association of Injured Workers' Groups, *Our Proposals for Properly Reshaping Workers' Compensation for Ontario* (Toronto, June 1983).

8. ALTERNATIVE COMPENSATION SYSTEMS

We did not address the Royal Commission's mandate regarding alternative compensation systems including the issue of universal disability and accident insurance. The Toronto Injured Workers' Advocacy Group and Union of Injured Workers have had many discussions on these topics. We recently had a one day forum to discuss the pros and cons of universal disability and accident insurance.

One of the few things that was clear to all of us by the end of our forum is that universal disability and accident insurance is a very long term project. It is very important to us and to injured workers that we move quickly to fix the system that we have now. We would support the establishment of a one-person Royal Commission solely for the purpose of studying universal disability and accident insurance. We believe that this is a concept that needs an architect, rather than a committee, to design. A Royal Commission on this issue should have the mandate to design a model system.

We cannot express an opinion on the concept of universal disability and accident insurance when there is no concrete proposal on the table. The concept has proven to mean too many different things to different people. In any abstract discussion about pros and cons, it is more likely than not that people discussing it have different systems in mind. We had hoped the Royal Commission would concentrate on improving the workers' compensation system that we have now.

9. THE STRUGGLE CONTINUES

Ontario's new government moved swiftly to disband the Royal Commission before it could report on what it heard in six months of public hearings. It will not be so easy to kill injured workers' program for reform that developed during that time. Unfortunately for injured workers, there is certainly a plan to do so. The program of the new government for W.C.B. reform includes:³⁸

1. Reduce benefit levels to 85% from 90%.
2. Review the idea of a life-time pension award.
3. Introduce an unpaid three day waiting period for claims.
4. Reduce the Future Economic Loss Awards by 15-40%.
5. Redefine "accident" to require more proof of work relatedness.
6. Put a freeze on new entitlements such as "stress" and limit stress claims to those that result from a traumatic event.

38. Ontario Progressive Conservative Party, *Workers' Compensation: Common Sense. For a Change* (Toronto, 1995).

7. Privatization—examine contracting out for both the administration and provision of services such as rehabilitation.
8. Take immediate action to address fraud and abuse of the system.
9. Entrench financial accountability in the *WCA*'s purpose clause.
10. Improve the experience rating system to reward employers with lower premiums.
11. Cut employers' premiums by 5%, saving Ontario employers an estimated \$98.5 million.

Injured workers have never faced such a comprehensive attack from any government in the 80 year history of our workers' compensation system. If implemented, these changes will destroy the system for injured workers and employers as well. Although the government's proposals are based on myths, misunderstandings and ignorance, the struggle for justice for injured workers is going to require all the "tools" at the disposal of our legal clinics and our communities.

