The Liversidge *e*-Letter

An *Executive Briefing* on Emerging Workplace Safety and Insurance Issues

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WSIB Reform will heat up after the election

A few helpful comments

No matter who wins the election, the WSIB will be an issue that cannot be ignored. The stage has been set for significant change in 2012

In the last issue of **The Liversidge *e*-Letter** I canvassed the results of a CFIB survey on where the three main parties stand on the WSIB. Not surprisingly, no bold plans were unveiled by any party (the PCs vowed to kill Bill 119 and review the Board along with all other agencies, boards and commissions (ABCs), none of which is a surprise). But, the WSIB rarely gets any attention immediately before or during an election (historically, workplace safety and insurance ["WSI"] reform is usually one of the *last* acts of a government, not the 1st – the 1995 election of a PC government was the one exception to that rule).

Not much has changed since the 2009 Auditor General report

While a number of processes are underway (Funding Review; Value for Money Audit on WSIB claims processes), not much of substance has really changed since **Ontario's Auditor General** (AG) declared two years ago that "*there is a risk that the WSIB may not be able to meet its obligations. The time to start addressing this problem is now*" (see the December 18, 2009 issue of **The Liversidge *e*-Letter**). (The AG report remains relevant and I still encourage readers to read it at http://www.auditor.on.ca/.) As I said at the time:

> Actually, the UFL was recognized as a serious problem requiring immediate action **26 years ago**! In the **Board's 1983 Annual Report** the Board noted the UFL "*has been rising steadily over the last few years*". 1983 is a pivotal year with historical significance. That was the year the "*30 year funding plan*" (zero UFL by 2014) was developed.

In June 2009 the Board said "*. . . our ability to fund the current obligations of the workplace safety and insurance system remains secure*" (June 16, 2009 speech to the Economic Club of Canada). And, just a few *weeks* before the AG's fateful message the government asserted "*. . . the WSIB confirms that its ability to fund the ongoing obligations of the workplace safety and insurance system remains secure*" (see the November 9, 2009 letter from the (then) Minister of Labour at http://www.cfib-fcei.ca/). It was not until the release of the AG report that the Board dropped its "*don't worry, be happy*" stance and turned its mind to the unfunded liability ["UFL"] in earnest.

The AG warned significant change is needed

While the AG acknowledged the Board's efforts and commitment to reduce claims duration (AG Report at pp. 317 and 331), the most powerful and significant comment in the entire report suggests:

> **However, in addition to improved investment returns and further cost reduction measures, *more significant structural changes, including legislative reforms, may be needed to ensure that the Board continues to have the ability to meet future financial obligations*. (at p. 317)**

Two years later that is pretty much where we sit. No decisions have been made. While in 2010, ***Schedule 21 of Bill 135, An Act Respecting Financial and Budget Measures*** amended key financial sections of the *Workplace Safety & Insurance Act* ["WSIA"], specifically those sections dealing with the Board's requirement to maintain the accident fund "so as not to burden" "employers in future years," the Bill defers to (unwritten) regulations to provide the governing details with respect to funding levels and funding plans. Since, no serious structural reforms have been defined let alone implemented.

The new WSIB executive team seems to agree the finances are at a critical stage

Granted, a new management team is in place, and by all accounts, the new group supports the AG's general assessment of the problem. And a few easy process realignments have been implemented, namely Work Reintegration [WR"] and a new case management model (neither of which in my view will seriously change the

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direction of the WSIB). The two most important processes currently in play are the **Funding Review** and the **Value for Money Audit ["VFMA"] on the Board's claims processes**.

***Comment:* The Funding Review is an essential step but its mandate is too narrow**

As readers know, I started calling for what I called a **Funding Summit** three years ago (see the November 21, 2008 issue of **The Liversidge *e*-Letter**, "***WSIB Funding Crisis - Everything Old is New Again***"). I set out a detailed suggestion for the Funding Review in the April 19, 2010 issue of **The Liversidge *e*-Letter**, "***The WSIB 2014 Funding Plan - Why it Failed***." A look at funding issues was necessary but I suggested the review must be very comprehensive and leave no stone unturned.

The Board finally announced a Funding Review in September, 2010 and while a necessary step, it does not go near far enough in its mandate. The Funding Review is examining six policy issues related to the financial state of the system: Funding, Premium Rates, Rate Groups, Employer Incentives, Occupational Disease Claims and Benefits Indexation for Partially Disabled Workers. (Go to http://www.wsibfundingreview.ca/resources.php for details on the Funding Review mandate). Of the six items, Rate Groups ["RG"], Incentives (experience rating ["ER"]), and benefit indexation are not issues facing critical mass, and could well "stand down" while more vital issues receive attention. Visibly absent from the mandate is any focus on the expenditure side of the ledger.

Both revenues *and* expenditures need attention

The AG made it clear two years ago that *both* outflows and inflows need to be addressed. While I have every confidence that the Funding Review under the very capable direction of Dr. Harry Arthurs will deliver a thoughtful and important analysis that likely will be a new milestone in the history of the WSI system, it simply can't answer all of the critical questions. I remain convinced that it would have been preferable for the Funding Review to be part of a more complete process consistent with the full perspectives advanced by the Auditor General, to address (at least) expenditures, including an assessment of the 72 month benefit lock-in provisions of the WSIA.

***Comment:* Why the 72 month lock-in has got to go**

The problem of increasing time on claim is longstanding. For years, the Board itself has been lamenting about increasing claim durations. Yet, the current statutory framework is accepted as if written in stone and thus out of reach. I am of the view that the current benefit package is fair and just and as readers know, I have always opposed calls to reduce worker benefits. But one area crying out for reform is the benefit "lock-in" provisions in the WSIA (WSIA, s. 44. (2) *". . . the Board shall not review the payments more than 72 months after the date of the worker's injury*"). While benefit lock-in has been a feature of the wage loss scheme in place since 1990, the Board has never evaluated the efficacy of the lock-in provisions.

Locking in benefits leads to overcompensation

"Locking in" benefits by the end of the 6th year post-injury was introduced as a mechanism to curtail unnecessary administrative activity on established cases. The (unproven) theory is that within 72 months the injured worker would have achieved maximum earning potential and thus, no claims work would be needed after 6 years. I have never bought into this theory. It simply makes no sense.

Arguably (and ironically) the "lock-in" feature *diminishes* the capacity of the Board in the most serious of cases. For the seriously injured, after a period of protracted medical rehabilitation which may consume much of the initial several years in the lifespan of the claim, the focus would turn towards vocational rehabilitation, another lengthy process. Often, by the time of the lock-in a worker may not have achieved maximum earning capacity. Worker motivation may understandably abate in the few years leading up to the "lock-in." *Why trade certainty for uncertainty?*

Workers who improve their post-injury earnings profile after the "lock-in" will be over-compensated, albeit quite legally and while consistent with the statutory provisions, this is clearly not the intended result. ***Consider:***

- A 30 year old worker, earning $65,000 per year, seriously injured, required two years of extensive medical treatment, followed by a three year retraining program in a new vocation, which enhanced the worker's employability. The worker's WSIB benefits are $41,400 per annum.
- As the worker is not employed at the time of the "lock-in" (the worker is now 36 years old), the $41,400 benefit is "locked-in."
- The worker returns to employment in the worker's new vocation a year later (7 years post-injury), and earns the same wage as earned pre-injury, $65,000 per year.
- As a result, the worker receives a "locked-in" WSIB benefit of $41,400 *plus* his new earnings of $65,000 for the next 28 years.

It should be noted that the reverse corollary is not possible. Should a worker's post-lock in earnings profile deteriorate as a result of the injury, the WSIA allows for post-lock-in review (WSIA, s. 44 (2.1)).

The WSIB has never publicly assessed the efficacy of the 72 month lock-in – this discussion must happen *now*

The 72 month lock-in offers nothing to the system. It is a long failed experiment that can but lead to one result – lax administration and structural over-compensation. I am not at all suggesting that workers being overcompensated have done anything wrong – quite the contrary. They are behaving quite lawfully. This is a problem with the law. The solution is simple – just get rid of the lock-in and ensure every long-term case receives the attention it deserves. *Who can quarrel with that?*

In the next issue, a comment on the Board's submission to the **Funding Review**. *Has the Board painted itself into a corner?*