The Liversidge *e*-Letter

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

November 23, 2012 An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B. 3 pages

WSIB Benefits Policy Review:

What are the real challenges?

Focus of the Jim Thomas Benefits Policy Review should adapt to stakeholder submissions

Several powerful points have been made that may shape the direction of the review

In the October 12, 2012 update issue of **The Liversidge *e*-Letter**, I commented that the **Jim Thomas Benefits Policy Review** "*is a fascinating project that is underway right now, that is getting more interesting with each passing day*". Well, the hearings are just about to close next week and I repeat that sentiment. But, as readers of **The Liversidge *e*-Letter** know, I was never convinced of the need for the review in the first place.

I have changed my mind – this review can be a powerful turning point for the Ontario WSIB

I have changed my mind. Or, more to the point, two elements of the mandate – a review of the policy reform process itself and perhaps most importantly, the expectation to "*provide independent leadership . . . through a transparent process that provides meaningful opportunities for information sharing*" potentially set the stage for significant and needed reform.

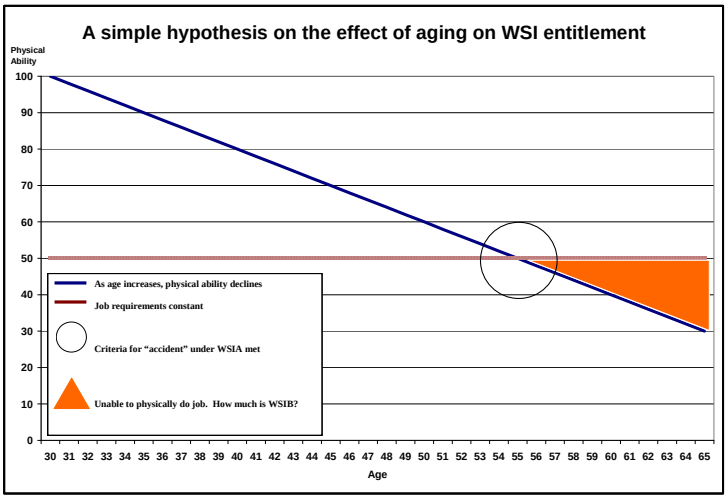
I should add that while I was and remain of the view that Jim Thomas was perfectly suited to lead this review, the core mandate to review the four policies is of lesser importance.

The scope of the consultation – what is missing

The **Benefits Policy Review**, or something like it, could have been given a broader mandate. This isn't a gripe against the conduct of this review - Mr. Thomas' leadership has been impeccable and it has the capacity to gain traction. But, the Harry Arthurs' **Funding Review** was never permitted to address expenditures even though the **Auditor General** suggested that "*fundamental legislative changes may also be needed before any significant progress can be made in reducing claims duration*" (2009 Auditor General Annual Report, p. 331; ed., commenting on the Board's new service delivery model). A full scale objective analysis of WSIB expenditures remains on the "to do" list.

A depiction of the policy challenge being addressed

I understand fully the policy problems being addressed. They were first formally introduced in last year's **Value for Money Audit** (see the December 11, 2011 issue of **The Liversidge *e*-Letter**, ***Claims Value for Money Audit: A recipe for change or conflict?***). I have attempted to illustrate this below:



The fundamental policy question is not new

The question the Board is trying to answer is an age-old one - *when does the Board's responsibility start and end in the face of pre-existing conditions?* These considerations are well and best articulated in an early leading decision of the Appeals Tribunal 26 years ago. **W.C.A.T. *Decision No. 32* (June 3, 1986), 2 W.C.A.T.R. 1**, addresses the issue as follows (forgive the lengthy excerpt):

> This is a case of classic difficulty for the Workers' Compensation system. There is no doubt about the existence of the disability. The worker was unable to work because of back pain during the claim period. The pain is attributable in the opinion of the orthopaedic specialist to what is called, generally, degenerative disc disease. Degenerative disc disease in its various forms is a condition common to a large proportion of the population. Its causes are not well understood. Epidemiology studies do not establish any greater incident among populations of manual labourers than among office workers. Thus, it is not possible to conclude that manual labour itself causes or accelerates the condition. Obviously, a manual labourer who has a back problem has more difficulty than an office worker in accommodating the demands of his job to the condition of his back, but that circumstance does not speak to the cause o[the condition.

The Workers' Compensation system is not designed to provide compensation to all disabled workers. It is an employer-paid system which is intended to compensate only for disabilities caused by employment.

Thus, in this case, if the worker's experience of acute pain following the boulder-shoving incident in 1976 was an effect of the slowly emerging underlying disease - its first symptom, if you will - and not something that caused the disease or aggravated it or significantly accelerated its development, then there is no compensation entitlement. On the other hand, if shoving the boulder produced some trauma in the back which caused or aggravated or accelerated the condition and if this caused the disabling pain in 1984, then compensation should flow for the temporary disability. In short, did the 1984 disability result from the 1976 compensable injury?

. . .

In these circumstances, the Hearing Panel is of the view that the WCB and the Appeals Tribunal have to rely heavily on what is really the only actual evidence available as to the causal relationship and that is the presence or absence of symptoms before the incident in question and the existence and continuity of symptoms following the incident. *To take a clear case: if a worker has an entirely symptom-free back before a strain at work and suffers continuous agonizing back pain from the point of the strain incident onwards, it seems a reasonable conclusion that it is more probable than not that the strain was at least a significant cause of the pain even assuming an underlying degenerative disc condition.*

On the other hand, if the symptoms disappear a short-time after the strain incident and do not reappear for a long period of time then in the face of an underlying degenerative disc problem it would seem equally reasonable to conclude that it is more probable than not that the previous strain incident was either a symptom of the underlying condition - an incident of temporary aggravation - or not related to it at all, and, therefore, not a significant factor in the subsequent disability.

For a time, cases received more advanced analysis

For at least a period of time commencing in the mid-1980s, starting at the Appeals Tribunal but filtering through the advocacy community and the Board, the system approached these cases with a higher level of analysis and legal sophistication than previously applied.

Yet, a series of case examples drafted by the Board and presented to the **Benefits Policy Consultation** (go to the Consultation Secretariat page of the WSIB website for the case scenarios) seem to reflect pre-1986 thinking.

It is not unreasonable to suggest that this is a function of training, experience and a lack of integration of the decision-making expertise of the Appeals Tribunal with the Board's day-to-day case decision-making. This is not a problem of policy.

What are the real challenges?

I posit that the true weakness of WSIB decision-making capacity has less to do with policy architecture and more to do with decision-making ability. This is not to be interpreted as a slight against individual decision-makers. This is an institutional concern.

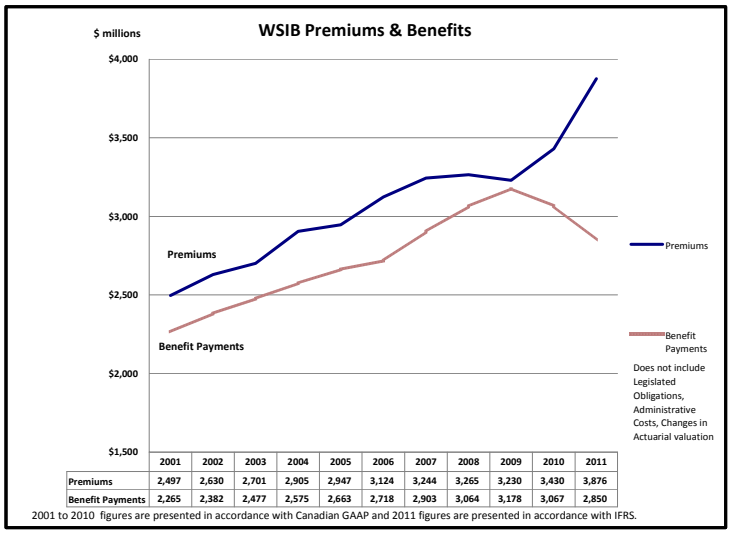
A renewed focus on staff development is called for

What is needed is a renewed focus on formal staff development through training and ongoing legal education. WSIB decision-makers should be taught WSI law in no different and no less elaborate a fashion than a focused law school education, utilizing the same teaching mechanisms of casebooks and the Socratic method, with continuing legal education an indispensable component.

WSIB decision-makers generally do not rely on similar cases decided at the Appeals Tribunal

It is perplexing but a fact that very few WSIB decision-makers, even at the final level, are at all familiar with emerging decision trends at the Appeals Tribunal or major appeal decisions at all. It is as if the Appeals Tribunal exists on some foreign soil for which the Board lacks a current passport.

An observation: Benefit cost trends are changing



	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Premiums	2,497	2,630	2,701	2,905	2,947	3,124	3,244	3,265	3,230	3,430	3,876
Benefit Payments	2,265	2,382	2,477	2,575	2,663	2,718	2,903	3,064	3,178	3,067	2,850

2001 to 2010 figures are presented in accordance with Canadian GAAP and 2011 figures are presented in accordance with IFRS.

A change in the benefit cost curve (see chart above) starting in 2010 begs the question: *What has changed?*

How employers may view it: In the face of increases in premium rates 2010 – 2013, a UFL in the $14 billion range, and a new WSIB executive group, employers will likely applaud a downward swing, attributing the change to "better management" and more effective return to work outcomes, which hopefully is the true narrative behind that curve.

How workers may view it: Workers on the other hand, may contend this is consistent with an improper tightening of eligibility rules, if not an outright peremptory change in *de facto* policy. Such comments in fact were advanced to the Chair of the review in the first day of hearings. I present this excerpt from one of the submissions:

(In addressing the "Aggravation" policy): "Modernization" of this policy is code for re-writing the policy to narrow its positive impact on entitlement, thereby reducing benefits costs; this is not about "clarity".

Pending policy change WSIB decision-makers are issuing decisions that state conclusions without reasons thereby "end-running" the policy. The Board's TIPS Newsletter on "Aggravation Basis" (attached) has been withdrawn

> presumably because it is out of step with the direction that the Board wishes to take regarding this policy. In fact it is a helpful adjudicative guideline consistent with the Act and Board policy. Administrative guidelines must be published so that compliance with the Act and Board policy can be transparent. . . . . ***the clear operational mandate of the WSIB since 2010 has been to limit benefits entitlement.*** Having the current "narrow" criteria correspondingly "widens" benefits entitlement. (From the October 24, 2012 paper submitted by Michael S. Green and Gary W. Newhouse, Lawyers, at p. 1)

Why it is important to know the reasons behind the change in the benefit cost curve

As the funders, employers must have confidence that the change in the benefit costs curve is not an aberrant transitory occurrence. Such downward trends are an important and powerful indicator of future premium requirements, and employers must be able to rely on current and recent past performance as an indicator of future premium demands.

Workers, on the other hand, must have confidence that their case will be addressed fairly in a manner consistent with the legal principles advanced in the *Workplace Safety & Insurance Act*.

Any dramatic fluctuation, either way, must be explained

Any dramatic change in benefit costs, upwards or downwards, in the absence of any significant adjustment in the law or WSIB operational policy, will trigger tensions in one or both camps.

***Funding Fairness* warned of "tightening the screws"**

This is particularly important at a time of significant financial stress. In ***Funding Fairness***, Dr. Arthurs commented on a potential phenomenon of "*tightening the screws*" and cautioned that the WSIB must not subvert "*the intention of the legislature or denying injured workers their legal rights*". (***Funding Fairness***, at p. 53).

The WSIB has acknowledged a more stringent application of eligibility rules

The **2010 WSIB Annual Report** notes that the Board exercised a "*more stringent application of eligibility rules"* and that, along with fewer lost-time injuries, reduced "*the number of paid claims*" **(WSIB 2010 Annual Report, at p. 13)**. I encourage the Board to more carefully and precisely set out what is meant by that phrase as it may be easily interpreted as being the same as the very warning advanced by Dr. Arthurs about "*tightening the screws*".

The policy objective of the modern WSI scheme was, and is, benefit fairness for Ontario workers

The modern WSI system was formed to deliver a public policy goal of benefit fairness for injured workers. The (almost mythical) "historic compromise" is often touted as being close to a quasi-contractual agreement between employers and workers. Of course there was no "deal" in a contractual sense – but there was a political deal so to speak, with the forging influences of a government paramount to its creation.

The state of affairs before the "deal" benefited employers as a class more than workers as a class. The "deal" did not drive equal gain - workers as a class did better. WSI was and remains an opportunity to ensure the post-injury dignity and standard of living of injured workers (among other things). In short, worker equity was always paramount. That is not to say costs don't matter. Of course they do. And, an important part of the Board's mandate is to carefully scrutinize cases to ensure threshold requirements are met.

At times of financial stress, it is important to recall the founding principles

In "normal" times, this is self-evident. But, at times of financial stress, this is an important theme to recall. The prevailing theme of ***Funding Fairness*** is aptly reflected in the genius of the double meaning of its very title, a well crafted and gentile double entendre.

Faultless structural worker equity is an essential prerequisite to address frail finances

The real capacity to systemically address WSI financial issues is sanctioned only at times of faultless structural worker equity. If that trust is disrupted, the capacity to focus on financial issues evaporates.

This has happened before

It is not as if this has not happened before. It has. An indifference to worker equity sparked the worker reform movement of the 1970s and early 1980s. Even though costs were increasing during the 1980s and early 1990s, and the unfunded liability was recognized as a serious problem since 1983, it was not until the mid-1990s that the Board (and government) had the legitimate authority to address financial issues. The prime reason was not the state of the Board's finances – they were under pressure from the early 1980s – it was the absence of legitimate worker equity issues.

The conclusion I reach is this – a focus on the UFL is unquestionably important (system sustainability is actually and ultimately as much if not more a worker interest issue). But, a singular focus on the unfunded liability, without a watchful eye on worker equity, will most certainly drive a short-term correction of WSIB finances. But, it will not last. Once worker equity issues re-emerge, and that is inevitable, they will displace and overtake any concerns over WSIB funding.

So, the bottom line is really quite pure. Financial sustainability of the system is both a worker and employer interest. And, worker equity is both an employer and worker interest. In other words, everyone's in the same boat.

What should be done

Getting back to worker advocate comments raised in the **Benefits Policy Consultation**, the Consultation Chair is urged to comment on this element, and suggest that the Board recognize the potential for a parallax view of the Board's policy and administrative intentions. The Board should be asked to respond directly to these allegations.

The recently published **Measuring Results** reports for Q1 & Q2 2012 may assist, but a direct and clear response should be presented by the Board. ***This is now an issue of stakeholder confidence.***