

L. A. Liversidge, LL.B.
Barrister & Solicitor, Professional Corporation

**A Response to the WSIB Consultation Paper
Occupational Disease Policy Framework**

Presented:
February 24, 2022

L. A. Liversidge, LL.B.
Barrister & Solicitor, Professional Corporation

5700 Yonge Street, Suite 200, Toronto, ON M2M 4K2
Tel: 416-590-7890; Fax: 416-590-9601; E-mail: lal@laliversidge.com

A Response to the WSIB Consultation Paper Occupational Disease Policy Framework

A. An expression of frustration decades in the making

1. To begin, let me express that I do not at all doubt, for one moment, the earnestness and sincerity or professional dedication behind the Board's most recent effort to address the continuing conundrum of compensating occupational disease in Ontario as expressed in the draft "*Occupational disease policy framework*."
2. Indeed, I am earnestly rooting for the Board to be to be able to loudly declare the equivalent of **Archimedes' cry of "Eureka!"** as bold new legal and scientific methods are discovered.
3. My enthusiasm though, I am afraid I must confess, is damped by a pragmatic and historically proven understanding of the peripheries of the present legal workers' compensation paradigm rendering such a jubilant proclamation, to put it candidly, unlikely. I sincerely hope that I am proved wrong. Unfortunately, the past 42 years,¹ if nothing else, bolsters my forecast.
4. In this response I will assess three core questions:
 - The compensation of occupational disease is an issue that has received an unprecedented amount of attention and focus for 42 years. Why is the WSIB still promising the same nascent solutions as were begun four decades ago, and which have so far eluded success?
 - What does the "*Occupational disease policy framework*" offer that is different from the innumerable past similar propositions?
 - Why has the Board not publicly assessed the efficacy and failings of past similar efforts to better contextually assess how best to address the unremitting conundrum that is compensation for occupational disease?

¹ Since Professor Weiler's first report in November, 1980 – more on Weiler later

Response to Occupational Disease Policy Framework Consultation

5. The frustration inferred in these opening comments is not reflective of any frustration caused by a lack of effort periodically but sincerely surfacing within the WSIB. As mentioned, the Board's policy authors and administrators have always conducted themselves with utmost professionalism, as I know they will this time.
6. However, unleashing the very same tools and efforts every decade or so and expecting a different result simply proves that occupational disease remains the elusive *Holy Grail* of Ontario workers' compensation.
7. *What is the stumbling block?* The primary theme of this response is simply this - the Board is trying to unlock the door with the wrong key. No matter how many attempts, that door will never open. A new key is needed.

B. A brief but essential history

1. The "*Occupational disease policy framework*" of course, is not the first effort to address the occupational disease ("OD") conundrum.
2. There have been several inquiries and reports addressing the very issue, and I will introduce five of those:
 - Paul C. Weiler: *Reshaping Workers' Compensation for Ontario*: November 1980 ("Weiler I");
 - Paul C. Weiler: *Protecting the Worker from Disability: Challenges for the Eighties*: April, 1983 ("Weiler II");
 - Terence G. Ison: *Compensation for Industrial Disease Under the Workers' Compensation Act of Ontario*: September, 1989 ("the 1989 Ison Report");
 - *Minister of Labour: Report of the Occupational Disease Task Force*: March, 1993 ("the 1993 Task Force Report").
 - *Final Report of the Chair of the Occupational Disease Advisory Panel*: February, 2005 ("ODAP Report").

Weiler I - 1980

3. Forty-one years ago, in Weiler I, Prof. Weiler correctly predicted that "*occupational disease bids fair to be the major battleground of the next decade,*" but notes that workers' compensation was designed to deal with traumatic injuries. He states the obvious that workers disabled by accident and disease have the same financial needs, and asks "*What social aim is served by trying to decide (causation)*?" Weiler, in addressing the structural impossibility to establish employment causation, concludes his first report with the observation that the time may have come to dispense with the issue of work-relatedness – "*therein lies the fundamental dilemma.*"

Weiler II - 1983

4. In 1983 in “Weiler II,” Prof. Weiler thoroughly canvassed the question of compensation of disease. Weiler asked whether the system should rely on case-by-case adjudication or general standards, statutory schedules or policy guidelines, and analyzed the problem of evaluating claims which do not meet a guideline. His over-arching conclusion though is a damning indictment of the (still) existing legal regime: *“We should be under no illusion, though, that OD will ever be anything but a conundrum as long as we try and fit it within a program which requires a judgment about the cause of the disease”* (Weiler II, pp.32-36).
5. No matter how “generous” the system, so long as the system focuses only on workplace injuries, Weiler opined that *“workers’ compensation law will always fall short in the identification of industrial disease”* (Weiler II, p. 53). After giving the question of compensation of OD likely its most thoughtful consideration up to that point in time, Weiler returned to his original conclusion: *“We can tinker . . . but we should be under no illusion that we can solve this dilemma in the absence of major scientific breakthroughs . . .”* (Weiler II, p. 55). Weiler’s strong recommendation was for a new social contract for OD compensation: *“The only way to guarantee . . . all OD cases get compensation is by compensating all diseases”* (Weiler II, p.73).

The 1989 Ison Report

6. On the recommendation of Prof. Weiler (in Weiler I), an “**Industrial Disease Standards Panel**” (“IDSP”) was created in 1985 (later named the “**Occupational Disease Standards Panel**” and later still, disbanded, and later again effectively reinstated). In 1989, the IDSP requested that Prof. Terence Ison discuss similar issues (1989 Ison Report, p. 3). Prof. Ison concluded his analysis in a paragraph aptly entitled “**The Eternal Dilemma**” (at p. 38):

“A major difficulty in the context in which the Panel (the IDSP) must work is that workers’ compensation rests, and always has rested, on a false assumption. In relation to disease, the system assumes the feasibility of determining the etiology of disease, not just in general, but case by case.”

“No system of compensation will ever work with efficiency, justice and consistency if the eligibility for benefits depends on establishing the etiology of each disablement.”

7. Like Weiler, Ison concluded that the system itself must be changed (at p. 38).

The 1993 Task Force Report

8. The 1993 Ministry of Labour Task Force again covered the very same ground as Weiler and Ison before it. The Task Force’s mandate was to examine the principles underlying the adjudication of occupational disease claims.

Response to Occupational Disease Policy Framework Consultation

9. The Task Force concluded, “. . . if the system is still unmanageable after the recommended changes are made, either the whole system has to be changed and new sources of funding found or the Act has to be amended.” “The means of funding the system must be considered” (p. 116) and noted that, “The system cannot be changed by changing the interpretation of the Act without changing the Act” (p. 118).

2005 ODAP Report

10. The ODAP Report was an extensive exercise and report, all of the parts of which [can be found here](#) on the WSIB website.

Guide to Documents and Summary of Changes to Draft Report (PDF)
Document A - Background Memorandum on Occupational Disease Issues (PDF)
Document B - History of the Occupational Disease Advisory Panel (PDF)
Document C - Chair’s Response to 2004 Public Consultation (PDF)
Document D - Final Report of the Chair (PDF)
Document E - Final Report of the Chair: Executive Summary (PDF)
A Protocol for Occupational Disease Policy Development and Claims Adjudication (Draft)

11. At the time, I presented a comprehensive overview of the ODAP Report. See the **June 29, 2004 issue of The Liversidge e-Letter, “Occupational Disease Advisory Panel Report, An Executive Overview,” (Attachment 1)** and the September 28, 2004 issue of **The Liversidge e-Letter, “Occupational Disease Advisory Panel Report, A Recommended Course of Action: Occupational Disease Requires Legislative Reform” (Attachment 2)**. I repeat those comments and incorporate them into this submission.
12. I appeared before Mr. Brock Smith, the Chair of the ODAP, on September 28, 2004. The entire transcript of the presentation and the Q&A is at **Attachment 3**. I encourage a full read of the transcript, which I adopt and incorporate into this submission. Relevant excerpts follow.

Bold change is needed

My basic message is one of change. Change is needed. Bold change, in my respectful view, is needed. Having said that, I begin with a cautionary comment that the Workplace Safety and Insurance Board should not tinker with occupational disease adjudication policy. The goal you are seeking will elude you. **Fairness to workers and to employers can only be achieved if the law itself is changed.** Let me begin with a very clear statement.

Compensating occupational disease is not a debate about creating cost. The costs exist.

Compensating occupational disease is a debate about who absorbs those costs, the employers directly or collectively, workers directly or collectively or society at large.

.

Weiler

Weiler’s report is remarkable in both its thoroughness and its simplicity. Complex issues which had plagued the system literally for decades and which appear to be without resolution were distilled into workable policy concepts capable of swift implementation. He addressed every leading issue facing the system at that time, including the then, and now, perpetual dilemma of compensation for occupational disease.

Response to Occupational Disease Policy Framework Consultation

Weiler readily recognized however why an occupational disease policy solution eluded the system. He observed that the Ontario workers' compensation system was essentially established for compensation arising from traumatic injury, for which the requirement to establish an employment causal connection was consistent with the funding arrangements. A 100% funded system funded by employers for injury arising out of the employment made sense, was internally consistent, and workable.

In the case of occupational disease however, where the cause of the disease was, in most instances, at best uncertain, the system no longer maintained the same internal consistency. **The need to establish an employment causal link, essential in a 100% employer funded regime, was recognized by Weiler to be an impossible task.**

In light of the potential non-occupational links to disease, or more precisely in the absence of evidence showing a clear occupational connection, Weiler recognized in his very first report that the policy problem centred on the need to establish causality – the very issues the ODAP continues to address. In his second report, three years later and now more than twenty years ago, Weiler addressed the very issues the ODAP was recently asked to investigate. In fact, the core policy questions have not changed at all over the last twenty-five years.

Fair adjudication of OD claims is impossible as long as causality is the issue

The reason for this remains abundantly clear, and clearer as time goes forward. **The fair adjudication of occupational disease cases will remain an impossible task so long as causality is an issue. *That simple reality remains ever present today.***

Ten years after his second report, which I will call "Weiler II," the irresolvable dilemma of occupational disease continued. The Minister of Labour struck a tripartite task force with essentially the identical mandate as that of the ODAP. The same theme in that Task Force report as we saw in Weiler's reports persisted. **Fairness cannot be achieved without changing the law.**

The issue is ultimately one of funding, not the absence of an adjudication test for entitlement. **The 1993 Task Force Report** concluded that the system cannot be changed by changing the interpretation of the Act without, changing the Act. These words, more than ten years later, still ring loud and true.

If all that was needed to crack the occupational disease nut was a better legal test, surely such a test would have emerged with Weiler I, with Weiler II, with the 1989 Ison Report or the 1993 Task Force Report or during the legislative debates, committee hearings and submissions throughout the 1980s and the 1990s. It didn't.

C. Does the draft "*Occupational disease policy framework*" offer anything new?

1. It does not. That is not simply my opinion, that is the express declaration of the WSIB authors of the document themselves.
2. The Construction Employers Coalition (for WSIB and Health & Safety and Prevention) ("CEC") responded to the Board's paper on February 9, 2022 (see **Attachment 4**). I adopt the position of the CEC which I repeat here:

Response to Occupational Disease Policy Framework Consultation

Construction Employers Coalition
(for WSIB and Health & Safety and Prevention)

February 9, 2022

Ms. Angela Powell, Vice President Policy and Consultation Services
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Powell:



Re: Occupational Disease Policy Framework Consultation

Thank you for convening the meeting which took place on January 19, 2022 to discuss the WSIB [Draft Occupational Disease Policy Framework](#) (“**Draft Framework**”). Please consider this letter as our written submissions.

At the January 19, 2022 meeting, the Board confirmed that the **Draft Framework** does not include new information and has been prepared to promote issue momentum to update occupational disease policies, bring focus to the issue, provide transparency and assess and implement scientific research.

As it is clear that no new approaches are being set out in the **Draft Framework**, it is our position that the most significant and still viable document setting out a new direction for the administration of occupational disease in Ontario is the [Final Report of the Chair of the Occupational Disease Advisory Panel](#), February 2005 (“**ODAP Report**”). The **ODAP Report** sets out a series of comprehensive [recommendations](#) which remain relevant to this day.

While there was some renewed and sincere WSIB focus in the immediate wake of the **ODAP Report** (we can share those with the Board if desired), within a very short time, the Board’s renewed engagement in occupational disease waned. The interest in ODAP and occupational disease simply was not sustained and was displaced by other emerging issues. An internal assessment and analysis by the Board of its corporate response to ODAP, we sincerely suggest, may be instructive for this and other issues, and we would encourage the Board to conduct such a review.

While we view the Board’s renewed interest as important and necessary, in effect this as a continuation of what the **ODAP Report** commenced almost twenty (20) years ago. The new **Draft Framework** should simply be viewed as **ODAP 2.0**. We are guided more by the **ODAP Report** and the process which preceded that report.

We draw your attention to the [ODAP Report Executive Summary](#), and in particular to the following recommendations which were added as a result of the public review completed in 2004 and which are discussed in the document entitled “*Chair’s Response to ODAP 2004 Public Consultation*”:

- 1. Monitoring of occupational disease costs should be a priority of the WSIB. If these costs continue to escalate as they have during the past two years, the Board should consider alternative strategies to cope with them.**
- 2. The Board should look at directing the WSIB to prepare a paper on the issue of alternative funding formulas for the Board’s consideration. The paper could also be circulated for public comment.**

Time has shown that the Board did not prudently follow through with those core and important recommendations. We encourage the Board to pick-up where it dropped the ball, follow through with these recommendations of the **ODAP Report**, and commence that important element of public consultation as suggested by the ODAP Chair. Please reach out at any time, as we welcome discussion on this topic.

David Frame, CEC Chair

Response to Occupational Disease Policy Framework Consultation

3. I concur that:

. . . the **Draft Framework** does not include new information and has been prepared to promote issue momentum to update occupational disease policies, bring focus to the issue, provide transparency and assess and implement scientific research.

4. It is the **2005 ODAP Chair's Report** that remains the leading and most current in-depth analysis and discussion on OD compensation. If anything, the "**Occupational disease policy framework**," as succinctly opined by the CEC "*should simply be viewed as ODAP 2.0.*" I agree.

D. The 2005 ODAP Report: What did the WSIB do?

1. What did the WSIB do in the immediate wake of the ODAP Report, and why did those efforts come to an end?

2. Initially, the Board took the **ODAP Report** seriously. Immediately after the release of the **ODAP Report**, the Board undertook massive policy reform and structured a series of stakeholder discussions, with the first being May 19, 2005. For the entire presentation, see **Attachment 5**. Even a cursory review of the presentation shows the depth and scope of the Board's engagement, summarized by the main themes below:

- A summary review of ODAP (Slides 6 – 14);
- Development of Draft Protocol for Policy Development and Adjudication (Slides 15 – 25) (Note: This focus is almost identical to the "**Occupational disease policy framework**" paper).
- Draft Protocol Legal Principles & Scientific Evidence in Adjudication of Occupational Disease (Slides 26 – 43).
- Funding Occupational Disease in the Future (Slides 44 – 52);
- Ontario Occupational Health Services Network (Slides 54 – 68).

3. In June 2008, an almost identical presentation was arranged. See the slide deck at **Attachment 6** entitled "**Occupational Disease Information Session**" and **Attachment 7**, "**Occupational Disease Cost Review and Projection Model.**"

4. What is striking about the 2008 presentations is that three years after ODAP, three years after the plan as set out in May 2005, the Board essentially repeated the same plan. The Board seemed stalled in neutral.

5. The WSIB released a "**Report on Occupational Disease Cost Study**," **Actuarial Services Division (August 2007)** (see **Attachment 8**). The report notes:

Response to Occupational Disease Policy Framework Consultation

- In 1990, OD claims represented 1.13% of total claims, with this ratio increasing to 2.55% by 2005 (**pp 2 and 11**), but accounted for 8% of total claims costs (**p.4**).
 - The report concluded, “*The results of this study will be used as input to project future OD cost trends . . .*” implying the report was to become an annual or regular feature. My research has been unable to locate additional similar reports published since.
6. After that, pretty much radio silence, until the KPMG review of 2019, the Demers study of 2020 and the current policy framework document of 2021.
7. The CEC addressed this question in this manner:
- While there was some renewed and sincere WSIB focus in the immediate wake of the **ODAP Report** (we can share those with the Board if desired), **within a very short time, the Board’s renewed engagement in occupational disease waned. The interest in ODAP and occupational disease simply was not sustained and was displaced by other emerging issues. An internal assessment and analysis by the Board of its corporate response to ODAP, we sincerely suggest, may be instructive for this and other issues, and we would encourage the Board to conduct such a review.***
8. I agree with the CEC’s thoughtful assessment that the Board of 2022 should seek out why the Board of 2006-2008 stalled on the very issues being raised today with essentially identical plans, identical processes and identical expectations.
9. I do not promote the view that administrative neglect caused this issue atrophy. I posit that the Board did not stall because its commitment waned. Better results were not delivered because better results were impossible.
10. The Board’s key, which is the only key it currently has, simply cannot unlock the door. A new key, a new legal paradigm, is needed.
11. I return to the two most significant instructions from the “**Chair’s Response to ODAP 2004 Public Consultation.**”
- Monitoring of occupational disease costs should be a priority of the WSIB. If these costs continue to escalate as they have during the past two years, the Board should consider alternative strategies to cope with them.
 - The Board should look at directing the WSIB to prepare a paper on the issue of alternative funding formulas for the Board’s consideration. The paper could also be circulated for public comment.
12. Neither of these were facilitated. They should be now. If not, a decade from now, the quandary will survive, and a new search will commence. It is time for bold thinking and bold action.

Link to the Attachments referenced:

- Attachment #1** [June 29, 2004 issue of The Liversidge e-Letter, “Occupational Disease Advisory Panel Report, An Executive Overview”](#)
- Attachment #2** [September 28, 2004 issue of The Liversidge e-Letter, “Occupational Disease Advisory Panel Report, A Recommended Course of Action: Occupational Disease Requires Legislative Reform”](#)
- Attachment #3** [September 28, 2004 transcript of LAL presentation and the Q&A to Mr. Brock Smith, the Chair of the ODAP](#)
- Attachment #4** [The Construction Employers Coalition \(for WSIB and Health & Safety and Prevention\) February 9, 2022 response to the Board’s paper](#)
- Attachment #5** [May 19, 2005 WSIB presentation, following the release of the ODAP Report](#)
- Attachment #6** [June 2008 WSIB presentation slide deck entitled “Occupational Disease Information Session”](#)
- Attachment #7** [June 2008 WSIB presentation slide deck entitled “Occupational Disease Cost Review and Projection Model”](#)
- Attachment #8** [August 2007 report of the Board’s Actuarial Services Division entitled “Report on Occupational Disease Cost Study”](#)