NEW DIRECTIONS FOR WORKERS' COMPENSATION REFORM:

A DISCUSSION PAPER

The Honourable Cam Jackson
Minister Without Portfolio,
Responsible for Workers' Compensation Reform

January 1996

Minister Without Portfolio
Responsible for
WCB Reform

Ministre sans portefeuille
délégué à la Réforme
de la CAT

Ontario

NEWS RELEASE

January 30, 1996

MINISTER JACKSON RELEASES DISCUSSION PAPER ON NEW DIRECTIONS FOR WORKERS' COMPENSATION REFORM

TORONTO -- The Honourable Cam Jackson, Minister Without Portfolio Responsible for Workers' Compensation Reform, released a discussion paper today mapping out possible new directions for Ontario's workers' compensation system. The discussion paper will provide the basis for focused consultations in February and March.

"Workers' compensation in Ontario is out of control," said Mr. Jackson. "The goal of reform is to renew the system so that workers injured on the job are guaranteed secure and fair compensation now and in the future. A renewed system will restore greater responsibility to the workplace parties for accident prevention and recovery from injuries."

Mr. Jackson said that fundamental change is needed to remove barriers to job creation, economic growth and investment in the province. "Employers need more affordable, stable workers' compensation premiums to remain competitive in today's global marketplace. By restoring business confidence, the government will enhance opportunities for workers injured on the job to return safely to suitable work."

A priority of Mr. Jackson's review is to eliminate the Workers' Compensation Board's (WCB's) unfunded liability -- the difference between its assets and what it owes in current and projected benefits. At $11.4 billion, this liability is three times as much as that of all other Canadian provinces combined. Mr. Jackson pointed out that unless decisive action is taken soon, the future of the system is at risk.

"Legislative changes over the past decade have created a costly, complex, uncertain and unmanageable system that is in serious financial trouble. Previous governments have failed in their responsibilities to address these problems."

Mr. Jackson said he is seeking input on how to achieve the government's goal of a renewed workers' compensation system, in such areas as:

- providing better incentives for accident prevention and workplace health and safety
- helping injured workers return to work
- improving the administration of workers' compensation and its appeals process
- ensuring secure and fair compensation for long term disability
- clarifying which injuries are compensable, and under what circumstances, and
- stabilizing the financing of the workers' compensation system.

During the consultations, Mr. Jackson will meet with injured workers, health care providers, and worker and employer organizations.

Copies of Mr. Jackson's discussion paper are available through the Ministry of Labour Communications and Marketing Branch; telephone (416) 326-7400 or toll-free outside Toronto at 1-800-267-9517.

Written submissions can also be sent by March 15 to:

The Honourable Cam Jackson
Minister Without Portfolio
Responsible for Workers' Compensation Reform
10th floor, 777 Bay Street
Toronto, Ontario
M5G 2E5
Attention: Consultation Co-ordinator.

Drawing on the consultations and written submissions, Mr. Jackson will make recommendations to the government about reform of the workers' compensation system in the Spring.

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QUESTIONS AND ANSWERS ABOUT WORKERS' COMPENSATION REFORM

1. Why is workers' compensation reform a priority of this government?

- The workers' compensation system needs fundamental change to restore business confidence in Ontario and bring order to the WCB's finances.
- Employer premiums pose a barrier to job creation, economic growth and investment in Ontario, and are among the highest in North America.
- Reform is necessary to secure fair and affordable compensation for injured workers now and in the future.

2. Why is workers' compensation important to all Ontarians?

- The current cost of the system hurts Ontario's capacity to grow, create jobs, and attract and retain investment.
- Over 3 million Ontario workers (70% of the workforce) and about 200,000 employers are protected by workers' compensation.
- The Workers' Compensation Board provides services to more than 350,000 injured workers each year.
- Over 170,000 injured workers receive lifetime pensions, and about 25,000 receive wage loss benefits.

3. Why is a comprehensive review of the workers' compensation system necessary?

- The WCB's unfunded liability is three times larger than the combined unfunded liabilities of WCBs in all other Canadian provinces. This unfunded liability threatens the long term viability of the system.
- Workers' compensation must be reformed to ensure that workers are insured only against injuries caused by work.
- This complex, bureaucratic and adversarial system must provide better services to both injured workers and employers at a lower cost.
- The system does not put adequate priority on encouraging accident prevention and workplace health and safety.
- For all its problems, workers and employers have come to rely too much on the WCB in preventing and managing workplace injuries.

4. The WCB's "unfunded liability"

What is it?

- The unfunded liability is the difference between the value of the WCB's assets and the cost of its current and future benefit obligations.
- Between 1984 and 1994, the unfunded liability grew from $2.7 to $11.4 billion.

Why is it a problem?

- The size of the current unfunded liability puts at risk the WCB's ability to guarantee fair benefits to injured workers in the future.
- Employer premiums in Ontario are already uncompetitive compared to neighbouring jurisdictions, so they cannot be increased or maintained at current levels to pay off the system's huge unfunded liability. Almost one third of the current employer premium is now dedicated to paying off the unfunded liability.

Can the unfunded liability be eliminated without significant reforms to the system?

- No. Without significant reforms to the workers' compensation system, it is estimated that the unfunded liability will grow to $14.5 billion by 2014, instead of being eliminated under the WCB's current "full funding" strategy.

5. How do Ontario's WCB premiums compare with those of other provinces and neighbouring states?

- Ontario employers pay Canada's second highest premiums for workers' compensation. Newfoundland has the highest premiums in the country.
- The average rate of $3.00 per $100 of assessable payroll is 32% higher than the national average.
- Although it is difficult to compare American and Canadian WCB premiums, Ontario's average premium is estimated to be over 40% higher than the average rate in neighbouring Great Lakes states.

6. In what ways has the current system become more expensive and complicated?

- Since 1984, there have been four major legislative changes to the workers' compensation system.
- The result is a very complicated multi-layered system in which the WCB is required to administer two completely different benefit plans.
- There has been a substantial increase in the WCB's cost of administering lost-time claims and in the amount of litigation in the system.

7. How has the system expanded beyond its original intention?

- The system was originally conceived as a means of providing insurance to workers injured in accidents caused by employment.
- There has been a trend in recent years to provide compensation to workers suffering injuries with a variety of causes including but not confined to employment, even though the system remains exclusively funded by employers.

8. How will reform of the workers' compensation system focus on injured workers' needs?

- One of the key goals of reform is to guarantee secure, fair compensation to injured workers today and in the future.
- This means the system must become equitable and affordable.
- Another goal is to shift the system's focus on compensating injuries to preventing injuries in the first place. Where injuries do occur, the system should support workers in their effort to return to work.
- A reformed workers' compensation system will provide better service to injured workers.

9. Why is the government releasing a discussion paper?

- The discussion paper will provide the basis for consultation on the needed reforms.
- It defines the most serious challenges facing the system in five key areas and describes a variety of alternative approaches to meet those challenges.
- Consultation is a critical element in the process of review leading up to Minister Jackson's recommendations to the government this Spring.

DID YOU KNOW THAT...

- Ontario's unfunded liability is three times larger than the combined unfunded liabilities of WCBs in all of the other provinces?

- in just ten years, the unfunded liability of the Workers' Compensation Board has more than quadrupled from $2.7 billion at the end of 1984 to $11.4 billion at the end of 1994?

- instead of being eliminated by 2014 under the WCB's "full funding" strategy, the unfunded liability will grow to $14.5 billion unless significant reforms are made?

- every time an employer hires a new worker, the employer assumes a share of the unfunded liability equal to about $4000?

- between 1991 and 1995, the WCB transferred $1.65 billion from its Investment Fund to pay for benefits and operations?

- employer premiums are 32% higher than the Canadian average and 40% higher than neighbouring American states?

- between 1985 and 1994, the number of lost-time injury claims were reduced from 186,000 to 125,000, yet:

  - benefit costs more than doubled from $1 billion to $2.3 billion
  - the number of WCB staff increased from 3700 to 4600, and
  - the cost of administering the workers' compensation system expanded from $185 million to $331 million?

- in 1984 the WCB was the only workers' compensation agency, but by 1994 five more agencies had been added with close to 400 staff at a cost of almost $100 million?

- the number of appeals of decisions on claims to the WCB and WCAT almost doubled from 25,000 to 47,000 between 1991 and 1994?

- though spending on vocational rehabilitation more than doubled from $200 to $459 million between 1987 and 1994, the unemployment rate of injured workers remains at approximately 50 per cent?

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Attention: Consultation Co-ordinator

January 1996

Dear Reader:

Reform of the workers' compensation system is a critical issue for all Ontarians. What is at stake is the future viability of a system that has historically served both injured workers and employers well.

As Minister Responsible for Workers' Compensation Reform, I have been asked to conduct a comprehensive review of Ontario's workers' compensation system. The government's goal is to bring about timely reform to ensure that the workers' compensation system can meet its future obligations to injured workers at a level that does not pose a barrier to investment and job creation in Ontario.

You are invited to participate in the reform process by responding to the issues posed in this discussion paper. Please send your comments and proposals regarding the future of Ontario's workers' compensation system to me at the address above. Written submissions should be received no later than March 15, 1996.

These submissions and stakeholder consultations will greatly assist me in developing the government's recommendations for reform.

Thank you for taking the time to read this paper and help the government bring about a workers' compensation system which better serves workers and employers now and in the future. I look forward to receiving your suggestions about reforming workers' compensation in Ontario.

Sincerely yours,

Cam Jackson
Minister

TABLE OF CONTENTS

Executive Summary

Purpose of Discussion Paper

The government has already taken the first critical steps to redirecting the workers' compensation system in Ontario and restoring it to financial health. This discussion paper launches the next phase of reform needed to build a workers' compensation system that better serves the needs of workers and employers of today, and into the future. The paper describes the fundamental problems facing the system and explores some possible solutions. It invites stakeholders and the public to participate in this important review.

Goals of Reform

The Honourable Cam Jackson's review will provide a vision for reform that will result in:

- A system based on the original concept of workers' compensation as a workplace accident insurance plan.
- A system based on:

  Prevention first, return to work if possible, rehabilitation when needed and compensation as required; and

  Self-reliance by workers and employers in cooperatively preventing and managing injuries, and ensuring timely return to suitable work.
- A well-managed system that:

  Uses employer assessments efficiently;

  Ensures all liabilities are appropriately financed; and,

  Administers services for workers and employers in the most efficient and effective manner possible.
- A viable system of workers' compensation that:

  Provides secure and fair no-fault compensation to workers injured because of their job;

Ensures competitive premium rates;

Provides a fair distribution of the assessment burden among generations of employers; and,

Achieves and maintains full funding.

The Case for Intervention

The Workers' Compensation Board's (the WCB's) $11.4 billion unfunded liability (the difference between its assets and its liabilities) threatens the viability of the workers' compensation system. It puts at risk the ability of the system to provide fair and secure compensation to injured workers now and in the future. It has resulted in employer assessment rates that are among the very highest in North America, and that adversely affect Ontario's competitive position and its capacity to create jobs.

There are additional compelling reasons for redirecting the current system. Workers' compensation has become increasingly complex, adversarial and costly. It has grown well beyond the original plan for insuring workers only against injuries caused by work. And as the system has expanded, it has encouraged employers and workers to rely on the WCB rather than themselves in the prevention and management of injuries. Finally, there has been insufficient integration of health and safety and compensation measures to ensure a seamless approach to accident prevention and protection against wage loss.

The discussion paper seeks input on reforms in the following areas:

A. Entitlement to Compensation

KEY PRINCIPLE: Workers' compensation should insure workers only against injuries caused by work.

The Problem: The boundaries of entitlement have been expanded over the years so that compensation is payable for injuries not clearly caused by employment.

B. The Administration of Workers' Compensation

KEY PRINCIPLE: Workers' compensation should be administered to serve workers and employers efficiently and effectively.

The Problem: While legislative and administrative changes over the past decade have sought to make the system more equitable and accountable, they have resulted in administrative complexity, more litigation and a cumbersome and costly process for resolving claims.

C. Long-Term Disability

KEY PRINCIPLE: The system should guarantee a fair and affordable level of compensation to permanently disabled workers today and in the future.

The Problem: Legislative changes over the past decade significantly enriched pension benefits, particularly for the most disadvantaged in the system. Previous governments however, did not introduce the measures necessary to finance these enrichments. Also, there remain troubling inequities within the pension population that are not justifiable on grounds of either fairness or financial responsibility.

There are also concerns that the costs of Future Economic Loss (FEL) awards may be higher than expected because injured workers are not returning to work as predicted and are receiving benefits for adverse labour market conditions rather than their injuries. It has also been suggested that the calculation of FEL awards results in injured workers receiving more than their pre-injury earnings in certain circumstances.

D. Return to Work and Rehabilitation

KEY PRINCIPLES: The system should include incentives that encourage timely return to suitable work.
No worker should receive more on compensation than he/she would from working.

The Problem: The current benefit structure acts as a disincentive for some workers to return to work, and incentives for employers to rehire injured workers are insufficient. Vocational rehabilitation is the current focus of WCB expenditures in returning workers to work. However, the program is very costly and has not proved entirely successful.

E. Financing Workers' Compensation

KEY PRINCIPLE: All employers benefiting from a collective liability scheme should pay their fair share of its costs.

The Problem: There is a significant degree of unjustifiable cost-shifting in the workers' compensation system and not all employers pay their fair share. There has been a persistent shortfall in revenues due to a shrinking revenue base, changes in the economy and an outdated approach to coverage in the Act. In addition, the system does not provide appropriate incentives for investing in accident prevention and health and safety in the workplace.

Invitation to Reform

In each of the areas noted above, the paper raises specific questions about possible new future directions for the system. The paper also explores a range of possible solutions that could be considered to bring about the government's new vision for reform. It draws on examples followed in other jurisdictions that have addressed problems like those being faced in Ontario today.

Minister Jackson will be making his recommendations for reform to government in the Spring of 1996. His proposals will be based on the objectives outlined in this paper, and the responses of stakeholders and the public to the issues raised and possible solutions explored. The measures recommended this Spring will be those that work best for Ontario.

On behalf of the Mike Harris government, we welcome your participation in this important process of reform.

1. Introduction

This government believes that reform of the workers' compensation system is a critical matter for all Ontarians. What is at stake is the future viability of a system that historically has served both injured workers and employers well. The system has been pushed well beyond its original mandate as a workplace accident insurance program and is now in serious financial difficulty. This situation has profound implications for current and future workers and employers and adverse consequences for provincial growth, investment and job creation.

The reality is:

- The Workers' Compensation Board's (the "WCB's") reported 1994 unfunded liability--the difference between its assets and its total liabilities --is $11.4 billion.

- Workers' entitlement to benefits has been expanded and interpreted in a way that makes access to compensation unpredictable, the distribution of benefits among workers unequal and allows compensation for injuries not mainly related to work.

- Over the last decade, workers' compensation benefits have been steadily enriched to enhance both the income replacement and rehabilitation services provided to injured workers, without the necessary cost reductions or rate increases needed to pay for these improvements.

- Ontario employers pay assessment rates that are 32 per cent higher than the national average.

- The system now fosters an undesirable degree of reliance on the WCB without recognizing that employers, workers and health care providers are collectively in the best position to make practical and effective decisions about accident prevention, return to work and rehabilitation.

- The system does not give sufficient priority to injury prevention and health and safety, nor have these concerns been effectively integrated into the workers' compensation system.

Recent Changes

Very shortly after coming to office, the government began carrying out its commitments to reform the workers' compensation system. It disbanded the Royal Commission on Workers' Compensation established by the previous government. The Royal Commission was a high profile, high cost approach to enlisting views on the problems of the current system. The government has adopted a more focused approach to studying and then acting upon the problems with workers' compensation. This review process is benefiting from the many comprehensive and useful submissions made to the Commission by employers, injured workers and other stakeholders across the province.

On December 14, 1995, the Legislature passed into law measures to begin the process of formal change at the WCB. The *Workers' Compensation and Occupational Health and Safety Amendment Act, 1995*, tackles the problems of governance at the WCB and the Workplace Health and Safety Agency (WHSA), and provides measures to reduce fraud and enhance financial accountability in managing the system.

On December 20, 1995, the panel appointed to review the operations of the WHSA reported its findings to the Minister of Labour. The panel made nine recommendations to improve Ontario's health and safety system. Key recommendations include the need for a stronger emphasis on accident prevention and health and safety promotion within the WCB and the transfer of the WHSA's functions to the WCB.

These measures represent the first phase of the government's plan to reform the workers' compensation and health and safety system in Ontario.

Purpose of the Discussion Paper

This discussion paper sets out the government's vision for the next phase of workers' compensation reform. It is intended to provide stakeholders and the public with the basis for a meaningful say in this important area of public policy reform. The paper is not a traditional "green paper" that invites comments on specific options. Rather, it describes the context within which the government plans to turn around the workers' compensation system. It offers a discussion of the problems facing the current system and raises questions about a variety of possible future new directions.

Beginning with a snapshot overview of the workers' compensation system in section 2, the paper moves quickly in section 3 into an analysis of why timely and major reform of the system is urgently necessary. It explores: the burgeoning cost of the system, both how the trends emerged and their implications; the

persistent expansion of entitlement to benefits and its impact; the tendency of governments and the WCB to enrich benefits without adequate financial support; and the propensity of the system to foster dependence rather than self-reliance in the workplace parties.

Section 4 provides a detailed discussion of the problems experienced with the system, and possible approaches to reform in each of the five subject areas in the mandate of the review: entitlement; administration and adjudication; long-term disability; vocational rehabilitation and return to work; and issues of financing the system. These sections are not meant to provide exhaustive analyses of the areas discussed. Rather, the discussion is meant to provide the reader with general insight into the significant structural and financial pressures facing the system. The reader is then invited to consider a range of different approaches that could be taken to solve the problems identified.

The goal of this review is to provide the basis for recommendations to the government in the spring of 1996 that will result in:

- A system based on the original concept of workers' compensation as a workplace accident insurance plan.

- A system based on:

  Prevention first, return to work if possible, rehabilitation when needed and compensation as required; and

  Self-reliance by workers and employers in cooperatively preventing and managing injuries, and ensuring timely return to suitable work.

- A well-managed system that:

  Uses employer assessments efficiently;

  Ensures all liabilities are appropriately financed; and,

  Administers services for workers and employers in the most efficient and effective manner possible.

- A viable system of workers' compensation that:

  Provides secure and fair no-fault compensation to workers injured because of their job;

  Ensures competitive premium rates;

  Provides a fair distribution of the assessment burden among generations of employers; and,

  Achieves and maintains full funding.

Consultation Process

The Hon. Cam Jackson, Minister without Portfolio Responsible for Workers' Compensation Reform, will be meeting with stakeholders over a three-week period starting in February 1996. In contrast to the Royal Commission hearings held earlier this year, this consultation will be a less expensive, more focused process leading to practical and timely reform of the system. The minister will be interested in hearing from individuals and organizations on the far-reaching issues raised in this paper. Those unable to participate directly in consultations are encouraged to provide their perspectives in writing to the minister.

2. Overview of Ontario's Workers' Compensation System

Workers' compensation is a program designed to compensate workers that suffer from personal injury by accident arising out of and in the course of employment or from occupational disease due to the nature of the employment. Fundamental to Ontario's workers' compensation system is the so-called "historic trade-off" wherein workers gave up the right to sue for their work-related injuries, irrespective of fault, in exchange for guaranteed protection against income loss. Employers, for their part, received protection from law suits in exchange for totally financing the program.

The workers' compensation system was established in 1915, on the basis of recommendations by Sir William Meredith. Under the scheme proposed by Sir William, a compulsory and (generally) collective liability system, administered by an independent public agency, the WCB, was created to adjudicate and compensate the claims of injured workers and survivors. The benefits and the administration are financed by assessment rates levied on employers and paid into the accident fund.

In its first year, the WCB administered some 17,000 claims with a staff of 56. The workers' compensation system has undergone profound change over the 80 years since these modest beginnings. Today, the WCB administers over 370,000 claims annually and delivers a broad range of services with a staff of over 4,600 and a budget of $331 million. The system has grown in other ways as well. It pays for a number of workers' compensation agencies: the Workers' Compensation Appeals Tribunal, the Office of the Worker Adviser, the Office of the Employer Adviser, the Occupational Disease Panel and a variety of occupational health and safety programs. Funding for these legislated obligations amounted to $104 million in 1994. The number of staff employed by the agencies at year end 1994 was 395.

What Workers' Compensation Delivers:

The WCB delivers a range of benefits and services to employers, injured workers and their survivors:

- temporary total and partial disability benefits
- lifetime permanent disability pensions for injuries before 1990
- long term benefits for loss of earnings and non-economic loss that results from injuries after 1990
- payment of health care expenses and treatment
- medical and vocational rehabilitation services
- survivor benefits (lump sum and periodic benefits) in the case of a fatality

Workers' compensation legislation has changed significantly over the 80 years as well. The most significant of these changes have occurred over the last decade and are summarized below.

A DECADE OF LEGISLATIVE CHANGE

Bill 101 (1984) Changed benefits from 75% of gross earnings to 90% of net average earnings

Restructured the workers' compensation system:

- Replaced long-standing corporate board composed of Commissioners with multipartite board of directors
- Added five external bodies--an appeals tribunal, a medical review panel, an industrial disease standards panel and external offices to provide representation services to workers and employers

Expanded entitlement to "older" permanent partial disability pension recipients by providing supplements equivalent to old age security benefits

Introduced a dual award scheme for survivors, who were given a lump sum payment and a continuing benefit payment

Bill 81 (1985) Provided automatic annual indexation of all benefits based on the Consumer Price Index, with retrospective application

Bill 162 (1989) Introduced a dual award system for workers injured on or after January 2, 1990:

- A lump sum award recognizing loss of enjoyment of everyday life or non-economic loss (NEL); and
- An award recognizing loss of earning capacity or future economic loss (FEL), based on 90% of the difference between pre-injury and post-injury net average earnings

Improved worker supplements under the former clinically-based pension system

Introduced obligations on employers to re-employ and accommodate injured workers and to continue contributions to employment benefits

Recognized the loss of retirement income resulting from the injury

Strengthened vocational rehabilitation services to workers and spouses

Bill 165 (1994) Provided pension recipients entitled to the supplement equivalent to old age security benefit with an additional benefit of up to $200 per month

Modified full CPI indexing by "Friedland" formula [3/4 x CPI]-1, with a cap at 4% and a minimum of 0%, with certain exceptions

Introduced additional measures to strengthen vocational rehabilitation and return to work

Introduced bipartite board of directors (giving legal recognition to bipartite model in place since 1991)

3. The Case for Intervention

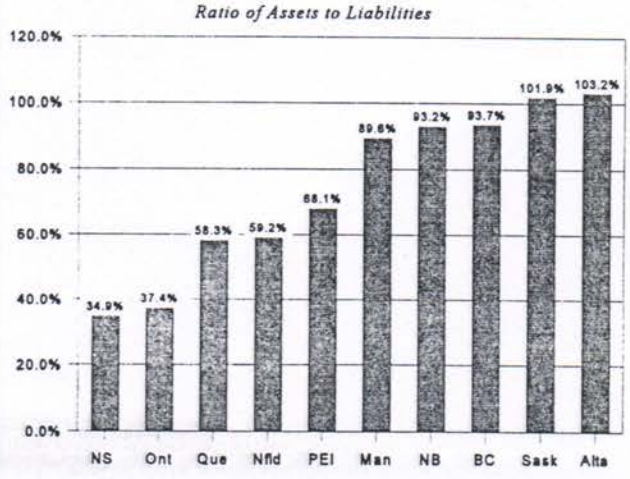
A. The Unfunded Liability

The Problem of the Unfunded Liability and its Implications

The principal case for legislative intervention in Ontario's workers' compensation system is its overall cost, which has ballooned to a size unmatched elsewhere in Canada. The high cost of the system is reflected in the WCB's unfunded liability, the difference between the value of its assets and the present value of its liabilities. In 1994, the unfunded liability was reported at $11.4 billion, based on assets of $6.8 billion and total liabilities of $18.2 billion. This means that the Ontario workers' compensation system is financed at a level of only 37.4 per cent (the funding ratio), the second lowest funding ratio of all WCBs in Canada.

Funding Ratios of WCBs Across Canada (1994)

Ratio of Assets to Liabilities



Source: Association of Workers' Compensation Boards of Canada (AWCBC)

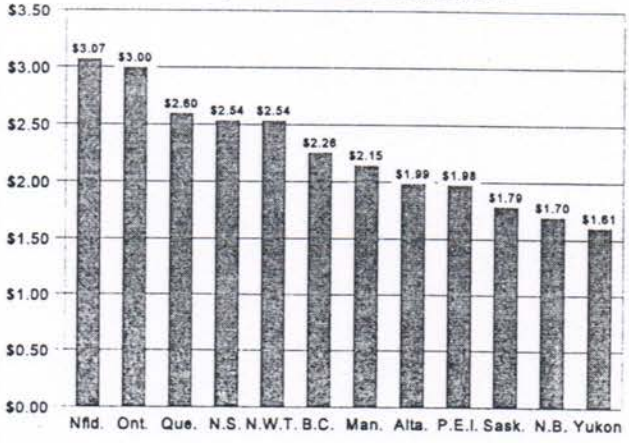
The unfunded liability represents the shortfall in funds that would occur in the event the WCB were called upon to use its present assets to pay off all of its current and future commitments immediately. The existence of a large unfunded liability is a serious concern for three reasons.

First, a large unfunded liability means that employers in Ontario must pay assessment premiums that are substantially higher than the jurisdictions with which Ontario competes. A high unfunded liability and correspondingly high assessment rates affect the province's ability to retain and attract investment. They also affect the province's capacity to grow and create jobs, and the ability of employers to continue to fund a workers' compensation system into the future. Ontario employers currently pay an average premium of $3.00 for every $100 of payroll, which is the second highest in Canada and 32 per cent higher than the national average.

Although it is difficult to compare U.S. and Canadian assessment rates, Ontario's average rate is estimated to be over 40 per cent higher than the average rate in neighbouring Great Lakes states.

Employer Average Assessment Rates

Amount Paid per $100 Assessable Payroll, 1995



Source: AWCBC

The main reason for Ontario's high assessment rate is that it includes a charge allocated to eliminating the unfunded liability. About 30 per cent of the $3.00 average rate or $.88 is dedicated to eliminating the unfunded liability by the year 2014. By contrast, unfunded liabilities are a small component of the rates charged by U.S. insurers and state workers' compensation administrators, and the rates are correspondingly lower.

There are concerns, however, that the costs associated with the past decade's legislated benefit changes, unless checked, will continue to place upward pressure on the unfunded liability. Without intervention in the system, the unfunded liability is likely to increase to over $14 billion by the year 2014, rather than be eliminated. Put differently, significant changes are needed to achieve the twin goals of eliminating the unfunded liability and ensuring competitive premium rates.

Second, a large unfunded liability puts increased pressure on the WCB's assets to earn more income needed to pay benefit obligations as they come due. During the period 1991-95, the WCB was compelled to transfer substantial sums annually from its investment portfolio (assets) to general operations in order to pay each year's benefit payments. To date, these operational cash shortfalls amount to $1.65 billion (of which $250 million was transferred back into investments at the end of 1995). The effect of transferring significant sums every year from investments to pay for ongoing benefit costs is that interest is lost on these sums and they cannot be re-invested to ensure asset growth.

Third, as the discussion below shows, a large portion of the unfunded liability is due to government decisions to improve the level of benefits of workers injured in the past. This means that current and future generations of employers will be required to bear the burden of benefits granted to a previous generation of injured

workers. Today, an employer already assumes a share of the unfunded liability equal to about $4,000 for each new worker hired. In short, everyone pays the price of the unfunded liability.

The Growth in the Unfunded Liability

The rapid increase in the unfunded liability in the early 1980s, and the anticipated statutory indexation of all benefits to the rate of inflation, prompted the WCB to adopt a formal long-term "full funding" strategy to retire it. The full funding strategy required the selection of a period over which the unfunded liability could be amortized (that is, the setting of a date in the future when assets and liabilities were expected to match) and a method for funding it. The period chosen was 30 years, and the method was to add a surcharge of about $.50 to the average assessment rate required to finance the present and future cost of a year's new claims (plus the cost of administration). It was expected that the resulting "target" assessment rate, all things being equal, would be sufficient to eliminate the unfunded liability by 2014.

Matters did not unfold as anticipated. The unfunded liability was approximately $2 billion at the end of 1983, largely a reflection of the effects of previous annual ad hoc indexing decisions. It grew very rapidly over the next 10 years, mainly as a result of benefit enrichments, increased longevity of pension recipients and administrative decision-making. As the accompanying table summarizes, the main factors accounting for the growth of the unfunded liability are:

Growth in the Unfunded Liability: 1984 to 1994[1]

	$ Billions
Balance as at 12/31/83	2.0
Indexation of benefits	3.0
Limit on assessment rates	3.0
Propensity to award benefits	2.0
Bill 162 transitional supplements	2.1
Bill 165 "Friedland Indexation"&200	(0.3)
Other	(0.4)
Balance as at 12/31/94	11.4

[1] *Source: WCB*

- legislated full inflation protection in 1986 ($3 billion);
- annual limits placed on the assessment rates required to eliminate the unfunded liability under the funding strategy ($3 billion);
- propensity to award benefits, reflecting a number of factors causing higher costs of claims, such as increased longevity of pension recipients and administrative decisions that tended to expand the system ($2 billion);

- supplements granted to existing recipients of permanent partial disability pensions under Bill 162 ($2.1 billion) and Bill 165 ($1.5 billion, although offset by changes to inflation indexing amounting to $1.8 billion).

The recent recession has also contributed to the growth in the unfunded liability since the decline in economic activity has led to lower revenues and more employer bankruptcies, in addition to a lower number of accidents. This is reflected in a trend to higher annual bad debt charges and in the size of the experience rating "off-balance". These factors, which are described in greater detail in the financing section of the paper, have combined to add over $400 million annually in the last few years to the unfunded liability.

There is no doubt that the burden of the unfunded liability, with the pressure it places on assessment rates, provides a compelling reason to intervene in the workers' compensation system. But there are additional reasons to intervene and these are discussed in the sections that follow.

B. Enriching Benefits without Adequate Financial Provision

A number of the important benefit changes introduced over the past decade were intended to make the system more equitable for injured workers. Legislative changes made in 1989 and 1994 were targeted at correcting inequities in the former pension system, which still governs the benefits of more than 170,000 injured workers. Under this scheme, a significant number of those receiving permanent partial disability pensions were inadequately compensated.

However, the costs of these improvements were not balanced by measures to guarantee adequate reserves to meet current and future financial obligations. Understandably, expansion and enrichment in the name of improved equity have proved popular. However, governments in the past have chosen not to address the critical but difficult problem of how to finance these benefit changes.

As a result, the WCB has been compelled to resort to a form of deficit financing by shifting legislated benefit costs into the unfunded liability. These funding pressures are increased by a number of problems inherent in the current financing structure of the system. These issues are reviewed in more detail later in this paper.

C. The Expansion of the System

Over the past decade the system has expanded significantly beyond the boundaries of an accident insurance plan designed to compensate workers only for work-related injuries. The system now provides compensation to workers for injuries that have multiple causes and only a questionable connection to the employment. Examples include strains and sprains, chronic pain and chronic stress. The cause of such injuries is not always clear and the connection to work is often uncertain.

The system has also expanded in various ways as it shifted to a more individualized approach to adjudicating compensation claims over the past decade. This shift is illustrated by the change in 1989 from a pension scheme based on clinical impairment ratings to a dual award scheme that compensates for the loss of enjoyment of everyday life and the loss of earnings of the individual worker. The addition of an appeals tribunal and other external agencies in 1985, designed to improve administrative processes and access to the system, had the effect of expanding the basis of entitlement under the legislation.

Another growing pressure on the system is the dramatic rise in the volume and frequency of appeals, even as the number of claims has declined over the past number of years. This trend has resulted in growing backlogs within the WCB and WCAT, lengthy proceedings, increased delay and complexity, and a waste of resources that would have been better used to manage claims efficiently in the first place. These pressures on the system are detailed later in the paper.

D. The Failure of the System to Encourage Employer and Worker Responsibility

One of the consequences of this expansion is a system that tends to encourage dependence rather than timely return to suitable work. The current framework encourages workers to get and stay on benefits, and provides limited incentives to leave the system. High benefit levels and current post-injury measures do not sufficiently reinforce the workplace connection. This problem is reflected in the large number of permanently disabled workers who are unable to return to suitable work. It is also reflected in the fact that the lifetime average duration of short term claims in Ontario is currently 70 days, which is significantly longer than in comparable systems (in British Columbia and Nova Scotia, for example, the average duration is in the 45-50 day range).

At the same time, too many employers rely on the system to assume responsibility for injuries and their effects, particularly in the case of more serious disabilities. There are also insufficient incentives for reducing workplace injuries, and many

employers do not take adequate responsibility in re-employing injured workers or actively participating in worker rehabilitation.

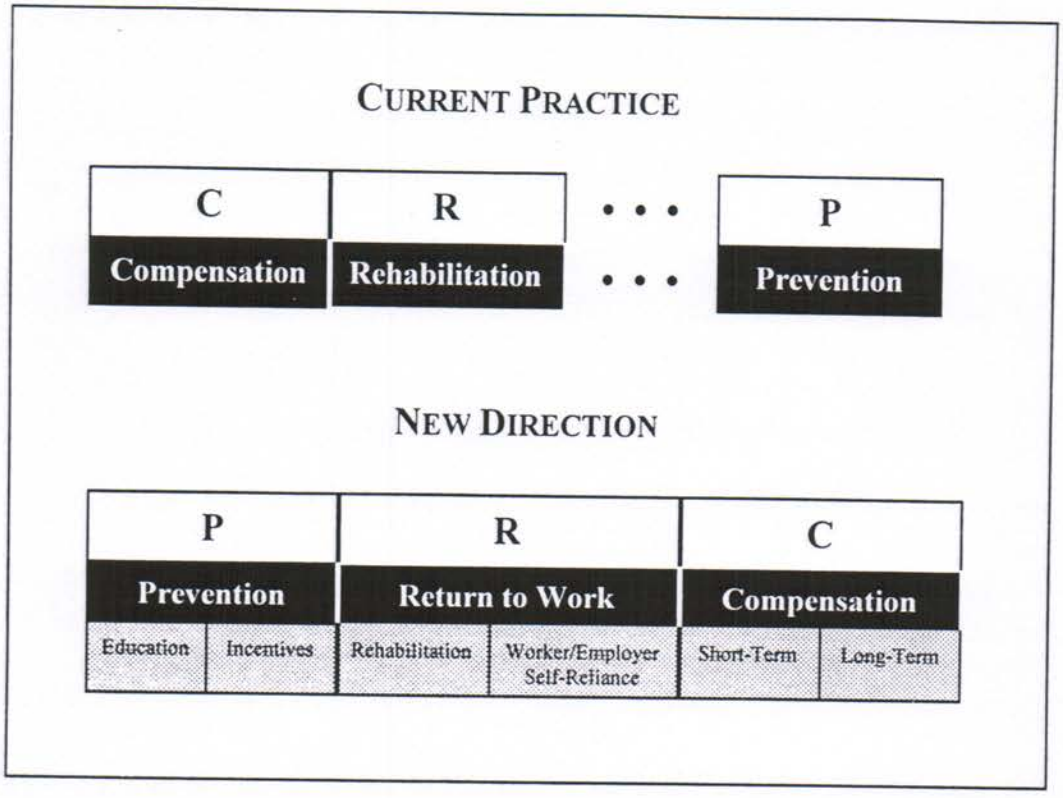
Employers and workers, with the support of health care providers, are most often in the best position to make decisions regarding accident prevention, rehabilitation and return to work. However, the evolution of the system has seen the WCB assume ever greater measures of responsibility for the entire process, from injury management through to rehabilitation and re-employment. The system needs to be refocused so that the parties who are best equipped to make these decisions are empowered to do so while the WCB acts as a facilitator, standard-setter and performance manager.

E. The Need for an Enhanced Focus on Accident Prevention and Health and Safety

The approach which has come to dominate workers' compensation and occupational health and safety programs, and its related systems and institutions, has been a "compensation - rehabilitation - prevention" orientation. Labour, business and policy-makers readily agree that the primary focus should be the reverse of this paradigm. Organizational efforts should be directed primarily at "prevention" but also at the effective integration of accident prevention and health and safety activities.

When a serious, lost-time injury occurs, it can be said that the system has failed the worker. Immediate efforts in the area of physical rehabilitation are required, first in the form of health care followed by additional physical rehabilitation if required. The system has again failed the worker if return-to-work initiatives and the results of the injury prevent the worker from returning to the pre-injury work. Accordingly, incentives to increase the likelihood of return to work supported by effective rehabilitation efforts, when needed, must become a primary focus of attention within the system. Only when the injured worker suffers a permanent disability or is unable to return to the pre-injury work does the issue of long-term compensation normally arise.

The figure below depicts graphically the "current practice" and the "new direction" for the system. Not only is the current system dominated by a compensation focus, but prevention is not effectively integrated, nor does it have the appropriate priority in the system.



In recent years, employers and workers in Ontario have been subjected to a relatively piecemeal, unintegrated approach to injury prevention and compensation. Many arms of government, including the Workplace Health and Safety Agency, the WCB and the Ministry of Labour have had mandates and administered programs with overlapping objectives. This fractured approach reflected an incomplete understanding of the interdependence of prevention and compensation goals and programs. This approach also led to significant duplication and misuse of scarce resources.

The recent report of the Workplace Health and Safety Review Panel addressed the need for a stronger, more blended emphasis on accident prevention and health and safety promotion at the WCB. The Panel recommended a number of structural mechanisms to ensure that adequate priority would be placed on health and safety in a renewed WCB. These included:

- Representation of health and safety interests on the new governing body of the WCB;
- Full integration of health and safety programs so that they would be a major and integral part of WCB operations, under the leadership of a senior health and safety officer, reporting to the CEO; and

- Changing the name of the WCB to convey its responsibilities not just for compensation but for accident prevention and health and safety promotion.

An integrated vision of health and safety and workers' compensation is essential for a system designed to encourage the self-reliance of workers and responsibility of employers in preventing and managing injuries. This government's vision of an integrated approach to accident prevention, health and safety and compensation is critical to the successful reform of the workers' compensation system.

4. Steps Toward a Renewed Workers' Compensation System

A. Entitlement to Compensation

A fundamental principle underlying this discussion paper is that workers' compensation should insure workers only against injuries caused by work. It follows that injuries caused by non-work-related activities or circumstances like natural degeneration associated with ageing processes or "natural diseases of life" should not be covered under an accident insurance plan funded solely by employers.

Defining the Problem: Injury by Accident

Unfortunately, the line between what is caused by work and what is caused by non-work factors is often difficult to draw. The test for entitlement to compensation under the Act has not made it easier to draw this line. Under the Act, a worker is entitled to compensation benefits if the worker suffers "an injury by accident arising out of and in the course of employment." This entitlement test has been interpreted inconsistently by workers' compensation authorities and the courts, and has generated a great deal of litigation and commentary across the common law world over the past century.

In circumstances where there are a number of work and non-work causes for an injury, the entitlement test does not provide much guidance in deciding whether or not the work is a sufficient cause of the injury to award compensation. There is usually little difficulty in deciding that injuries with obvious external symptoms (cuts, fractures, burns, contusions) caused by an external event (a fall, being hit by an object or caught in a machine) while on the job meet this entitlement test. It is far more difficult to determine whether injuries with no obvious external symptoms or causes, such as sprains and strains, meet the test, since there are typically non-work causes in addition to work causes for the injuries.

The issue is of critical importance because in Ontario, as in many other jurisdictions, sprains and strains (or soft-tissue injuries) comprise approximately one-half of all lost-time injury claims.

Consequences of Uncertainty: Litigation and Unpredictability in Costs.

Uncertainty over whether or not an injury is caused by work produces a significant number of appeals within the WCB and to WCAT. Given the uncertainty inherent in the meaning of the entitlement test, where there is a potential range of causes of injury in addition to the work, different and reasonable views are to be expected.

The WCB has held the general view that, in order to be compensable, an injury must be caused by an accident which is a sudden, external event distinct from the injury; that is, the accident is the cause and the injury is the result. This interpretation filters out claims with uncertain causes. WCAT took a less restrictive view of the entitlement test in a back injury case that became the focus of a lengthy dispute within the system. In this case, WCAT decided that the evidence need only show that the injury was accidental and that the work was a significant cause of the injury to establish entitlement. A review of this decision and of the law upon which it was based by the WCB board of directors did not resolve the issue for future cases.

Action point.

WCAT has expanded the borders of compensability in other areas as well, the best known of which involved issues of chronic pain and chronic stress. As a result of a complex policy hearing in 1987, WCAT granted a claim for chronic pain. The WCB board of directors undertook another complex hearing process to review this and other chronic pain decisions. In the end, the board of directors resolved the issue by accepting WCAT's view and made final the interim policy it had developed for compensating chronic pain disability.

The impact on system costs is reflected in the fact that back injury and chronic pain cases, on average, account for 30 per cent of permanent impairment awards and 40 per cent of future earnings loss awards.

The dispute between the WCB and WCAT over the compensability of chronic stress has not been resolved. A series of WCAT decisions beginning in 1988 created a legal foundation for compensating workers with chronic stress under the Act. These cases are based on a recognition that such claims are not really distinguishable from other types of claims where there is no obvious external cause and potentially a number of causal factors in addition to the work. The basis for deciding to compensate a particular claim is whether a reasonable person in the situation of the worker would find the alleged workplace stressors to be potentially disabling.

The WCB does not recognize chronic stress claims, but stress that is the result of a sudden traumatic event is considered compensable. Although the WCB board of directors undertook a review of the WCAT cases and the WCB issued a consultation paper on the issue, the board of directors made no decision on the compensability of chronic stress, thereby asserting the status quo. The virtual stalemate on this issue has resulted in litigation since each chronic stress claim must be individually litigated at WCAT.

The obsolete government mandate reputation appeals point of

Approaches to a Solution

1. ***What kinds of changes to the entitlement provisions of the Act are likely to result in greater certainty and predictability for purposes of determining compensability?***

It would be possible to reword the entitlement test and provide that a worker is entitled to benefits where the worker suffers an injury caused by the employment. A number of common law jurisdictions have similar language. However, there is no assurance that such wording changes would in practice simplify the determination of whether or not an injury is work-related, particularly where there are competing non-work causes.

Another approach might be to recognize the issue of multiple causes and address it specifically. For example, the legislation could be changed to direct the adjudicator to recognize that an injury can have multiple causes and apportion the compensation payable on the basis of a determination of the relative significance of competing causes. Alternatively, as some stakeholders have proposed, it would be possible to amend the entitlement test to provide that the work activity that is reported to be the cause of an injury must be the predominant cause before entitlement to compensation is allowed. A further alternative is to exclude explicitly, in the statute or in a regulation, the injuries or disabilities that are not compensable because their connection to work is unlikely to be conclusively established.

There are Canadian precedents for these measures in recent amendments to four workers' compensation statutes. In Manitoba, New Brunswick, Prince Edward Island and Nova Scotia, legislation excludes chronic stress injuries from the scope of workers' compensation coverage. The recent amendments to the Nova Scotia legislation go one step further: the government can, by regulation, exclude any type or class of injury or occupational disease from the Act. Such an approach could introduce greater certainty into the system and greater predictability in costs.

The Dilemma of Occupational Disease

While it can readily be agreed that soft tissue and chronic stress injuries present challenging problems for workers' compensation administrators, it has long been recognized that occupational disease presents a dilemma for the system. The fundamental challenge in occupational disease claims is to link a disease to a worker's occupation. While a medical practitioner can diagnose a disease, it can be very difficult to determine whether the disease was caused by the employment. The instances in which the evidence has conclusively proved a work connection are relatively rare. This is particularly true in the case of diseases known to have

multiple, lifestyle causes. In the final analysis, as has long been recognized, the resolution of most occupational disease claims involves practical decisions made on the basis of limited and inconclusive evidence.

The Act provides that a worker is entitled to compensation where the worker suffers from an occupational disease and the disease is "due to the nature of the employment". The WCB administers occupational disease claims in one of three ways. A worker with a disease who is employed in a work process listed in two schedules to the Act is entitled to compensation. A worker meeting the criteria set out in one of the WCB's more than 40 disease guidelines will also receive compensation. Most occupational diseases, however, are adjudicated on a case by case basis.

A fundamental problem is the continuing uncertainty about how occupational diseases should be treated for workers' compensation purposes. There are three aspects to this uncertainty.

1. Litigation. To adjudicate a large proportion of occupational disease claims case by case involves the exercise of a great deal of discretion, and has led to criticism that decisions are made on the basis of insufficient scientific evidence or on arbitrary and unduly restrictive grounds.

2. Multiple, lifestyle causes. Where there is an insufficiently persuasive scientific basis to establish a general causal link between work and a disease, serious questions must be raised about whether it is the role of a workplace accident insurance system to cover on a case by case basis the costs of diseases that, in the general population, are associated with lifestyle or other non-work factors.

3. Financing occupational disease claims. The concern is not with the cost of occupational disease. There is universal agreement that, where a sufficient scientific basis exists to establish that the work caused the disease, the worker should receive compensation. The concern relates to who pays for these disease claims. Currently, the costs of a disease resulting from an occupational exposure decades ago are borne by the present generation of employers, which may not include the initial exposure employer.

2. *What approaches are available to ensure that scientifically established occupational disease claims are compensated and funded appropriately?*

A number of Canadian jurisdictions have adopted one of two approaches to resolving the dilemma associated with occupational disease.

The legislation in Manitoba and Prince Edward Island excludes from the definition of occupational disease "an ordinary disease of life". The legislation provides that, where an occupational disease is due in part to the employment and in part to a cause other than the employment, the disease is compensable only if the WCB is of the opinion that the employment cause is the "dominant" cause. This is presumably to be contrasted to the test adopted by WCAT and in a number of American jurisdictions, that it is sufficient if it is shown that the employment is a "significant" cause of the disease. The question here, as in the case of injury by accident, is whether this change will in fact achieve the certainty sought. As noted above, the Nova Scotia Act permits the government to exclude an occupational disease by regulation.

A further alternative might be to permit compensation only for those diseases listed in a schedule to the Act. Such a schedule could describe the disease and the corresponding work process or activity associated with the disease. Thresholds or guidelines could be established that must be met in order to award compensation. Since the schedule would be contained in a regulation, the ultimate decision to include a disease in the schedule would be shifted from the WCB to the government.

It seems clear that before the decision is made to compensate a particular disease, it is necessary to determine how the benefits payable for a disease are going to be financed. One approach to funding disease claims may be to pre-fund such claims through an assessment levy paid into an occupational disease fund. Disease claims would then be charged against this fund as they arise in the future.

3. *Is there a continuing role for an external adviser on occupational disease issues and, if so, what should its role be?*

The Occupational Disease Panel was established in 1985 (initially as the Industrial Disease Standards Panel) as an external advisory body to the WCB to investigate possible occupational diseases, determine the probability of a connection between a disease and an industrial process or occupation, and create or revise disease evaluation or eligibility criteria. The Panel makes

recommendations to the WCB, which may accept or reject its findings. By design, the Panel is as much a policy body as it is a scientific one.

It has been argued that the WCB, as the system manager, is in the best position to make policy decisions that take into account how occupational disease claims should be financed. If an external body is needed at all, according to this view, it should be an organization that provides purely scientific advice. The contending view, reflected in the current legislative scheme, is that an arm's length body providing advice based on scientific and policy considerations is needed to guarantee the integrity of occupational disease decisions.

B. The Administration of Workers' Compensation

The focus of this section is on the administration of workers' compensation, its problems and the range of potential solutions that will lead to a system that serves workers and employers better at a lower cost. The discussion is guided by the principle that workers' compensation should be administered to serve workers and employers efficiently and effectively.

Workers' compensation service delivery attracts a great deal of criticism from WCB users. The administration of workers' compensation is commonly perceived by workers, employers, and their advocates, to be costly, slow, adversarial, complex, arbitrary and, ultimately, frustrating. This ongoing dissatisfaction is in large measure due to the nature of the WCB as a mass adjudication system that has grown dramatically in size and complexity over the past three decades.

The growth in the size and complexity of the administrative apparatus is a reflection of a number of factors including: growth in claims volume; the increased complexity of the legislation; the efforts of legislators and administrators to improve the equity in the system; and the rise of workers' compensation advocacy.

Growth of the System

In Ontario and elsewhere there is a relationship between expansions and contractions in the economy and the volume of claims registered annually with the WCB. The total number of claims registered rose gradually through the 1970s, exceeding 460,000 in 1979, dipping through the recession of the early 1980s and peaking at almost 490,000 in 1988. The recent recession, which has had a variety of serious effects on the WCB's financial position, saw claims volume drop dramatically. Lost-time injuries, which represent the bulk of system

costs, have fallen to levels not experienced since the early 1970s. The table below summarizes key data over the past decade.

WCB Operational Trends: 1985 - 1994

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Claims Registered	426,880	442,080	469,681	489,819	467,212	473,407	409,946	377,019	368,485	370,444
Lost Time Injuries	186,684	195,937	205,259	208,499	200,967	184,444	155,475	136,940	125,122	125,644
Benefits Paid ($Millions)	1,099	1,246	1,464	1,624	1,782	2,059	2,342	2,444	2,435	2,331
Admin. Costs										
- WCB Expenses	185	214	267	259	281	323	343	347	343	331
- Agency Expenses	7	16	22	26	26	53	87	97	100	104
Total ($Millions)	192	230	289	285	307	376	430	444	443	435
Number of Staff										
-WCB	3,735	4,218	4,211	4,387	4,611	5,138	5,139	4,909	4,751	4,603
-Agencies	101	104	220	220	222	247	304	341	343	395
Total	3,836	4,322	4,431	4,607	4,833	5,385	5,443	5,250	5,094	4,998
Cost per LTI (000s)	-	-	-	1.04	1.18	1.61	2.33	2.55	2.77	2.65

Source: WCB 1994 Annual Report and Statistical Supplement; Ontario Ministry of Labour.

From 1985 to 1990, as the WCB increased substantially in size to deal with the growing volume and complexity of the caseload, the costs of administration rose by some $138 million. While administrative costs have started to come down over the past two years, it is also true that claims volume has dropped to levels not experienced in over 20 years. The size and cost of administration are simply not as responsive to pressures to contract as they are to pressures to expand. To this must be added the rapidly escalating costs of the WCB's legislated obligations, principally the costs of the various agencies within the system. The Workplace Health and Safety Agency, which accounted for $66 million of the $104 million cost in 1994, is in the process of being dismantled and integrated into the WCB.

A significant trend is the rising cost of administration in relation to the cost of new claims in any one year. The WCB's administrative costs were approximately 12 per cent of new claims costs in 1985, while the figure in 1994 was over 20 per cent. (Data derived from table at page 45.) The same trend over a shorter time frame is reflected in the previous table, which reveals a dramatic increase in the costs of administration per lost time injury over the last seven years.

not there!

Increased Complexity of Law and Administration

As the workers' compensation system grew through the 1970s and 1980s, so too did demands for greater access to the system. The response to these demands was a series of legislative changes between 1984 and 1994 that dramatically increased the WCB's benefit obligations and improved equity. These changes also seriously complicated the legislation and the system of benefits administration.

As a consequence of the decade of legislative change, the WCB is now required to administer two benefit schemes under one statute: one scheme basing lifetime pension benefits on the degree of the injured worker's clinical impairment; the other (since 1990) basing benefits on the worker's loss of earning capacity and loss of enjoyment of life.

The former pension scheme is subject to a variety of complexities: workers injured before 1985 have their benefits calculated on the basis of 75 per cent of gross pre-injury earnings, while the benefits of those injured later are based on 90 per cent of pre-injury net average earnings; the more vulnerable portion of this group of pension recipients is also entitled to receive a variety of supplements; and inflation protection is applied differently to different sets of pension recipients. The dual award system is administratively more complex than the former pension scheme and is further complicated by a variety of legislative requirements to provide vocational rehabilitation programs and supplements as well as re-employment to injured workers.

The obligation to administer two complicated benefit schemes explains to some extent the continuing high administrative cost per lost-time injury noted in the table above.

Increased Procedural Complexity and the Rise of Advocacy

The dual award scheme, while more equitable than the former pension scheme, involves the exercise of a far greater degree of discretion, and requires that many more decisions be made in respect of each lost-time injury claim. These factors, together with the absence of any limits on appeals, have increased uncertainty and litigation within the system. As a consequence, challenges are routinely brought against a variety of decisions that, on a reasonable view, should not attract litigation.

The increased tendency to litigate workers' compensation issues emerged in the late 1970s, as a greater number of workers challenged compensation decisions to the WCB's appeals officers and the Appeal Board (a panel of the WCB Commissioners), and thereafter to the recently created Ontario Ombudsman and to MPPs. In 1985, in response to this rising demand for impartial review and

hearing, the government established WCAT, the Industrial Disease Standards Panel and two offices to provide representation services to employers and workers.

The effect of these new agencies was to provide a much needed outlet for the pressures that had built up within the system through the 1970s. The establishment of an external appeals tribunal and external client advisory services provided a check on the WCB's administrative processes, counteracted some of the arbitrary characteristics inherent in a system of this size, and added a certain discipline to the system. Scrutiny by these bodies encouraged the WCB to practice a greater degree of openness and care in the development and implementation of operating policies. The overall effect was to move the system to a more individualized approach to adjudicating compensation claims, a move completed with the implementation of the wage loss system in 1990.

At the same time, these external bodies added complexity to the structure of the system and have generated more rather than less litigation. Further, the 1985 legislative amendments establishing WCAT provided for a mechanism to balance its adjudicative role with the WCB's dominion over policy as the manager of the system. However, for a variety of reasons, this mechanism has not been effective and, as described earlier, the consequence has been that the WCB and WCAT apply different standards to a range of important workers' compensation issues.

As a result of these factors, advocacy has become embedded as a feature of the system. From relatively modest beginnings in 1985, the Office of the Worker Adviser and the Office of the Employer Adviser have grown into arm's length government agencies operating with advisory councils drawn from client groups. With WCB-funded budgets of approximately $10 million and $4 million, respectively, they now offer a wide range of services to workers and employers, including representation, advice, outreach and education, policy research and advocacy. At the same time, a lucrative advocacy industry serving both workers and employers has grown up that takes advantage of the inherent uncertainties in the system, the frequent exercise of discretion and the openness of the appeal process. Advocates necessarily have an interest in the adversarial nature of the system, and their role and method of payment have become a source of increasing concern to the workers' compensation system.

The impact of these developments is seen in the dramatic increase in the number of appeals of initial determinations taken within the WCB and to WCAT. Between 1991 and 1994, the total number of internal appeals from initial decisions almost doubled (from 23,015 to 44,506 appeals). In addition, over the same period, the total number of appeals taken annually to WCAT rose by 40 per cent (from 1,560 to 2,197 appeals). The rising volume of appeals has resulted in

significant backlogs of cases and unacceptable delays for both workers and employers.

Approaches to a Solution: WCB Administration

The WCB has become increasingly sensitive to concerns expressed about the effectiveness of its service delivery system. There have been a variety of service delivery improvements over the past few years, resulting in faster claim turn-around times. It has also taken steps toward streamlining its adjudication processes.

In addition, the WCB is considering a promising approach to managing claims in an integrated way rather than by the individual components of a case (for example, adjudication, medical, vocational rehabilitation). At the same time, it has embarked on the process of reducing internal appeal levels from two to one. Objections to initial entitlement decisions are referred to an appeals officer who, in consultation with the parties, will determine whether a claim can be disposed of by means of a paper hearing or an oral hearing based on the record. This streamlining initiative is supplemented by mediation for objections to re-employment and vocational rehabilitation decisions.

It is too early to assess the success of these new approaches to service delivery. However, it is fair to observe that both the objectives and the methods employed seem likely to improve the administration of the Act. A number of additional steps would seem to be available that would lead to further service improvements at lower cost.

4. *To what extent should rights of appeal available under the Act be modified?*

Modifying the availability of appeal on certain WCB determinations would reduce litigation on issues where appeals have little or no positive result and free WCB resources for better uses elsewhere in the system. A good example of the type of WCB decision where an appeal is of questionable value is the determination of the amount of non-economic loss. Even though this amount is determined by reference to an external disability rating schedule, some 15 per cent of all NEL assessments are appealed. Further, almost one-quarter of all appeals to WCAT in a given year arise out of disputes over access to the worker's claim file. These matters are routinely appealed to WCAT, and WCAT routinely denies them. Disputes over access are inconsistent with the principle that the party contesting a claim is entitled to know the nature of the issue.

Other complementary approaches are also available. For example, consideration could be given to introducing time limits for appeals. Time limits are found in a number of Canadian workers' compensation statutes and are a common feature of most regulatory schemes and justice administration systems. In addition, WCAT could be given the power to determine which appeals it would hear.

5. *Should greater use be made of alternative dispute resolution?*

Alternative dispute resolution (ADR) refers to a variety of methods for resolving disputes consensually without resorting to oral hearings. The Act mandates the use of mediation in re-employment and vocational rehabilitation appeal situations, and gives the WCB power to use mediation elsewhere. Early indications are that the mediation program is meeting with considerable success as over 70 per cent of the disputed cases are settled and do not require a hearing.

There would seem to be scope for more extensive use of mediation and related alternative dispute resolution techniques in the workers' compensation setting. The advantages of ADR generally include the potential to reduce delay and costs and to improve the ongoing worker-employer relationship. In considering the benefits of ADR in this setting, however, consideration should also be given to reviewing the current section of the Act that precludes workers from waiving their statutory rights through a mediated settlement. It may be reasonable to increase the flexibility of the parties in reaching agreement on certain matters, while ensuring agreements are not reached under duress.

6. *What alternative approaches to claims management could significantly improve service to workers and employers and potentially reduce costs?*

While the WCB's proposed approach to streamlining its case management processes is promising, the question which remains is whether internal procedural improvements go far enough to deliver better service at a lower cost. Once a claim is registered with the WCB, it assumes virtually exclusive responsibility for managing it, from initial processing through to vocational rehabilitation and even re-employment.

Some measures aimed at shifting greater responsibility to workers and employers that have been adopted in other jurisdictions are worthy of consideration. Three Australian states (South Australia, Victoria, New South Wales) have taken a major step toward lowering the cost pressures on their workers' compensation systems by "outsourcing" all claims management to private insurers selected as claims agents. The agents pay all claims, subject to a deductible (two weeks in

South Australia and Victoria, $500 in New South Wales). The WCB authority retains all regulatory functions such as responsibility for agent selection and performance management, fee levels and levy collection.

A less dramatic alternative has been adopted in the New Zealand compensation insurance legislation. It requires the employer to pay compensation for loss of earnings for the first week of incapacity at the prescribed level of benefits (80 per cent of earnings lost). The obligation to pay beyond that point reverts to the compensation authority. In Quebec, an employer pays an injured worker's full salary for the first fourteen days after the injury. The WCB reimburses the employer within a further fourteen days. The WCB adjudicates the claim, and recovers the compensation paid to the worker if the claim is subsequently denied.

An alternative approach to effective claims management

Consideration could be given to an alternative approach in Ontario that maximises the responsibility of the employer and the worker in avoiding workplace injury and in managing injuries when they do occur. Such an approach could follow the direct payment model used in New Zealand.

Under a direct payment model, in the event of a lost-time injury caused by the employment, the worker would file an application for coverage with the employer. The employer would continue to pay the worker at a level of compensation defined under the Act for a period of four or six weeks. Where the claim exceeds the direct payment period, it would move to the WCB for further handling. If the WCB subsequently denies the claim, it would refund to the employer the payments made and recover from the worker the benefits paid. Disputes over compensability would be referred to mediation and, if necessary, adjudication by the WCB. Mechanisms would have to be in place to ensure that employers comply with their obligation to pay for injuries caused by the employment.

A direct payment approach would have a significant impact on the size and cost of WCB operations because about potentially 70 per cent of the current lost-time injury claims would not be adjudicated at the WCB. From the worker's perspective, this approach provides immediate payment for a work-related injury. From the employer's perspective, this approach provides greater control over the claims management process, and raises the incentives to invest in accident prevention and health and safety in the first place. Finally, this approach should improve an injured worker's prospects for re-employment, since it preserves the employment connection after the injury, and thereby reduces the number of workers on long-term compensation.

7. *Is the continued existence of an external appeals tribunal justifiable?*

In light of the previous discussion, it may well be asked whether it is necessary or appropriate to retain WCAT in its current form. From one point of view, the answer is clearly no. In addition to WCAT's $11.4 million direct cost, it has raised system costs and created uncertainty and unpredictability by allowing appeals where the work connection is suspect. Examples of chronic pain and chronic stress cases discussed earlier support this view. This suggests that consideration should be given to eliminating WCAT and restoring the final level of appeal within the WCB.

Another perspective recognizes the benefits of an external tribunal as a check on WCB decision-making, but would restrict the authority of WCAT to matters of fact. The rationale behind this restriction is that, as manager of the system, the WCB must be solely responsible for decisions on both the law and policy. The question arises, however, of whether the system requires a trier of fact to be at arm's length from the WCB.

A final approach could be to retain a transformed WCAT, with a mandate limited by restrictions on appeal rights and a requirement to follow WCB policy. WCAT could also be significantly streamlined. For example, the legislation could state a preference for single adjudicators over three person panels, require leave to appeal hearings and require mediation. In addition, to reduce overhead costs, WCAT could be consolidated with another government agency.

8. *Is the continued existence of the Office of the Worker Adviser and the Office of the Employer Adviser in their current form justifiable?*

These agencies play an important role in pursuing the causes and interests of their individual clients and enjoy strong support from their stakeholder communities. For all their success, one aspect of their activities that could be questioned is their vigorous pursuit of policy advocacy, commonly in opposition to the body that funds them. This is not something that was contemplated by the legislation, and is arguably inconsistent with the objectives of the workers' compensation system, particularly since such advocacy tends to reinforce the opposing views of the parties.

In the interests of reducing unnecessary litigation in the system and reducing costs, consideration could be given to eliminating both offices, leaving to the WCB the task of providing representation services to workers and small employers, as deemed necessary. Another approach would be to reduce the scope

of their operations to the essentials -- representation on behalf of workers and small employers, at arm's length from the WCB. A more innovative alternative that could reduce overhead costs and potentially counteract the present tendency to increased adversarial relationships might be to combine the offices into a single representation agency acting for both small employers and workers.

9. What other measures could be taken to improve the delivery and reduce the cost of WCB services?

A range of alternatives to further streamline and reduce the cost of WCB services requires investigation. For example, consideration could be given to reducing the WCB's involvement in the direct delivery of vocational rehabilitation services or to outsourcing aspects of WCB administrative and support services. In addition, the further integration of health services provided under the Act and by Ontario's public health system could be explored. These matters would require further study by WCB senior management in conjunction with the government.

C. Long-Term Disability

The principle underlying the discussion in this section is that the system must guarantee a fair and affordable level of compensation to permanently disabled workers today and in the future.

The Act requires the WCB to administer two schemes for compensating workers suffering long-term disability. The date of the worker's injury determines which scheme applies. Workers injured before January 2, 1990 receive permanent disability benefits in the form of a lifetime pension based on an assessment of the permanent impairment that results from the injury. Workers injured on or after this date receive benefits for the loss of enjoyment of everyday life or non-economic loss (NEL) and the loss of earnings or future economic loss (FEL).

The Pension Scheme and its Problems

Long-term disability benefits for workers injured before January, 1990 account for about 65 per cent of the WCB's total benefits liability. That is, of the WCB's total benefits liability of $17.5 billion, over $11 billion is for pensions and

cost problems

supplementary benefits payable to over 170,000 permanently disabled workers injured prior to the introduction of the dual award system.

The financing of this component of the overall liability is a critical challenge for the workers' compensation system. To understand the problem more fully and the approaches available to meet it, a brief review of Ontario's approach to compensating long-term disability is necessary.

WCB Benefits Liabilities
(As of December 31, 1994)[1]

	($ Millions)	(%)
Worker Pension	8,041	46
OAS Supplement	1,196	7
Survivor Pension	1,213	7
Temporary Compensation	523	3
Health Care	1,160	7
Rehabilitation	712	4
Non Economic Loss	142	1
Future Economic Loss	1,988	11
FEL Supplement	422	2
Retirement Income	241	1
Bill 165 Additional Amount	1,529	9
Provision for Review of OAS Supplement	350	2
TOTAL	$17, 517	100%

[1] *Source: WCB*

Prior to the introduction of the dual award scheme in 1990, compensation for permanent disability was based on the "clinical impairment" rating approach. Under this approach, an injured worker was given an impairment rating based on the degree of physical or functional loss caused by the injury, according to a schedule designed for this purpose. This percentage impairment rating was then applied to the worker's pre-injury earnings to produce a disability benefit in the form of a lifetime pension. This "scheduled" approach to determining permanent disability resulted in workers with the same impairment rating receiving identical pensions, regardless of the injury's actual impact on the worker's capacity to earn income.

Since this approach to determining permanent disability was not sensitive to the actual wage loss suffered by injured workers, serious inequities resulted. A significant number, perhaps as many as one-quarter, of pension recipients were seriously disadvantaged and received benefits that were less than the actual wage loss they experienced. The remainder of the pension recipients received benefits that matched or exceeded the wage loss they experienced as a result of their injuries.

The legislation did attempt to remedy the situation of the most seriously disadvantaged workers by permitting the WCB to provide supplements to the pension: a temporary full supplement where the worker was likely to benefit from vocational rehabilitation; and a supplement equal to the old age security benefits for older workers who had not returned to work and would not benefit from vocational rehabilitation.

Example of Inequities in the Old Pension System:

A construction worker and an office administrator both earning $40,000 a year suffer the loss of a leg as a result of an accident.

The construction worker will likely suffer a substantial drop in future wages (and employment prospects), while the office administrator will likely experience little or no long-term earnings loss.

Yet, both would receive the same life-time pension based on the 50% figure contained in the Permanent Disability Rating Schedule.

Bill 162 (1989) responded to the problem of the most seriously disadvantaged pension recipients by modifying the eligibility criteria so that more workers who would benefit from vocational rehabilitation programs could receive a temporary full supplement. Those who would not benefit could receive a supplement equivalent to old age security benefits regardless of age and employment status. Younger and employed workers would now be eligible for this benefit.

Bill 165 (1994) took a further step in addressing the needs of this group of workers by providing those workers entitled to the old age security supplement (or who would have been eligible on July 26, 1989 but for their age) with an additional benefit of up to $200 per month. The WCB has taken significant measures to identify the pension recipients eligible to receive these supplementary benefits.

Bill 165 also modified the provisions in the Act that automatically adjusted benefits each year to reflect the full changes in the Consumer Price Index. The revised indexing factor, which applies to all but the most vulnerable benefit recipients, provides inflation protection at [3/4 × CPI] − 1, with a cap at 4 per cent (the "Friedland formula"). One of the consequences of this change is that it partially corrects for the inequity associated with the remainder of the

Snapshot of pre-Bill 162 Pension Population[1]

- Over 170,000 pension recipients
- Average pension rating is 16.5%
- About 50,000 pensioners receive an additional benefit of up to $200 per month (including over 30,000 who also receive a supplement equivalent to OAS)
- Some 3,000 pensioners are in vocational rehabilitation and receiving a full supplement
- About 1,770 pensioners or 1% are 100% disabled

[1] *Source: WCB*

pension recipients who receive benefits which match or exceed the wage loss they suffer as a result of their injury.

The impact of these changes on the WCB's liabilities was substantial: the change in 1989 added $2.1 billion, while the changes in 1994 added $1.5 billion. The downward adjustment of inflation protection offset these dramatic benefit enhancements by approximately $1.8 billion.

Approaches to a Solution

10. What additional measures should be taken to ensure that all pension recipients are compensated at a level that is equitable and consistent with the long-term viability of the workers' compensation system?

It is critically important to ensure that workers injured in the future can continue to enjoy a fair level of compensation for the injuries they may suffer because of work. To achieve this objective, it may be necessary to consider additional measures to modify the lifetime pension system. As each of the approaches outlined below is reviewed, it should be borne in mind that these difficult steps must be considered only because of the gravity of the WCB's financial situation, the obligation to protect the interests of future generations of workers and the need to maintain a viable system.

One approach is suggested by the example of Bill 165. Consideration could be given to further adjusting the inflation protection of those pension recipients who do not receive the additional $200 benefit or are not 100 per cent disabled or survivors. This approach would preserve inflation protection for the most vulnerable persons in the system. In addition to adjusting inflation protection, consideration could be given to reducing the pension received at retirement age, so that the compensation for lost wages received by an injured worker reflects the experience of an uninjured worker (whose earnings cease on retirement).

An alternative approach is to reconsider the appropriateness of providing for inflation protection through an automatic mechanism in the Act. The government or the WCB could be given the authority to adjust for inflation each year, taking into consideration economic conditions and the ability to pay for the adjustment.

Another possibility is to reduce the level of benefits for all current claims. Under this approach, benefits payable in the future for new and past injuries could be based on 85 per cent of net pre-injury earnings. Alternatively, it would be possible to adopt the 85 per cent benefit structure to determine benefits payable for new injuries, and freeze the indexation of past pensions for a period of approximately three years, at which point the compensation received by pension

recipients would be equivalent to the compensation received by workers injured after the change came into effect. Nova Scotia adopted such an approach in 1995.

It would also be possible to review the pension supplements provided over the past few years to determine whether they have more than corrected for the inequities they were designed to address.

To reduce the burden of its growing liabilities, the Quebec WCB has on two occasions offered workers the option of having their life pensions commuted and paid out as a lump sum at a rate acceptable to both the worker and the WCB. Consideration could be given to permitting retirement-age recipients and workers with a disability rating below 15 per cent, for example, the right to have their pensions commuted.

The Dual Award System and its Problems

As noted earlier, the dual award scheme replaced the clinical impairment scheme in January, 1990. This scheme was designed to match more closely the losses experienced by injured workers by compensating for both non-economic loss (NEL) and future economic loss (FEL). The elements of the scheme are as follows:

- NEL is based on the percentage of permanent impairment that continues to exist after maximum medical rehabilitation of the worker has been achieved and assessed using the American Medical Association's *Guides to the Evaluation of Permanent Impairment;* the NEL award is generally paid out as a lump sum.

- FEL is based on 90 per cent of the difference between the worker's net average earnings before the injury and net average earnings that the worker is likely to be able to earn after the injury in suitable and available employment.

- Workers participating in a WCB-authorized medical or vocational rehabilitation program are entitled to a supplement to bring their FEL benefit up to 90% of the pre-injury net average earnings.

- The level of benefits is to be set one year after the injury and reviewed twice by the WCB: the first review taking place two years after the initial decision, and the second review three years later, establishing a loss of earnings award that is payable until the worker reaches the age of 65. A worker can apply for a review of the wage loss benefit if the permanent impairment deteriorates significantly and in a way that was not anticipated at the time the NEL decision was made.

- At age 65, the loss of earnings benefit is replaced by a retirement income loss benefit. The WCB is required to contribute an extra 10 per cent of the worker's loss of earnings compensation to a separate fund. This amount, plus any accrued investment income, is to be used to provide the worker with a retirement benefit.

Although the dual award system has been in operation for only five years, a number of concerns have emerged that require attention. The first relates to the WCB's assumptions about the number of FEL recipients expected to return to work at the first and second FEL reviews. The WCB uses these assumptions to set the lifetime costs of FEL claims for assessment rate purposes.

Dual Award Fact Sheet

Non-Economic Loss (NEL)

- About 9% of LTIs receive a NEL benefit
- The average NEL rating is 13%
- Over 30% of NELs are for backs and chronic pain cases

Future Economic Loss (FEL)

- About 5% of LTIs receive a FEL benefit
- The average wage loss is between 35 - 40%
- Over 40% of FELs are for backs and chronic pain cases

Detailed FEL Data

- About 20% of FEL decisions are based on actual post-injury earnings
- The average FEL award based on actual earnings is around 30%
- The average FEL award based on "deemed" earnings is around 40%
- About 4% of FEL recipients eventually receive no NEL award

Concerns have been expressed that workers have not been returning to work as expected, and likely will not return to work as predicted. As a result, workers are receiving FEL benefits (including supplements) for longer periods of time. It has been suggested that, since it is often difficult to distinguish between the impact of the injury and the impact of general economic conditions on earning capacity, FEL benefits are being paid longer because of adverse labour market conditions rather than as a result of compensable injuries.

If the actual number of workers returning to work is not as expected, the consequence is that the WCB will not have set aside sufficient reserves to finance current and future FEL obligations. As a result, the WCB's FEL liabilities, which are now reported at 15 per cent of total liabilities, may be understated, resulting in an increase in the unfunded liability in the future.

The second concern relates to the method used in any wage loss system to determine the loss of earning capacity where a worker has not returned to work. In these situations, the WCB must determine post-injury wages based on what the worker is likely to be able to earn in suitable and available employment. Although in these cases the WCB is required to take into account the individual

worker's personal, medical and vocational characteristics in estimating the worker's post-injury earning capacity, a concern has been expressed that too many workers are having jobs imputed to them that may not exist in the labour market.

A third concern relates to the high number of workers suffering sprains and strains who are qualifying for FEL awards. As noted earlier in this paper, it is often difficult to know whether or not a strain or sprain injury and any continuing disability are caused by the work or mainly by some non-work related factor. As a result, it is possible that the workers' compensation system is paying FEL benefits for non-work related conditions.

Finally, there is a concern over inequities resulting from the current FEL system. In a number of circumstances, FEL recipients are in a better financial position than they would have been had they not been injured. For example, it is suggested that a number of FEL recipients return to work with little or no wage loss (and in some cases, no permanent impairment) after the benefit has been calculated and awarded, and hence receive a FEL benefit in addition to their earnings. Further, since the FEL benefit is not integrated with other benefit systems, some workers receive more than their pre-injury net average earnings after the benefit has been awarded. Lastly, the way in which average earnings are calculated does not take into account the fact that some FEL recipients were employed on a seasonal or other temporary basis before their injury and therefore receive more than they earned prior to injury.

Approaches to a Solution

11. What measures should be taken to improve the design and operation of the dual award scheme that will ensure the long-term viability of the system?

The issue underlying the concerns identified above is fundamental to this review: the workers' compensation system has expanded beyond its original mandate and is being used for purposes it was not designed to serve. It is compensating for injuries and disabilities not directly caused by the employment and in circumstances where the inability to return to work is attributable to adverse labour market conditions rather than the compensable injury itself. An effective long-term solution must ensure that compensation is provided only to those workers who are disabled as a result of their compensable injuries and cannot return to work because of those injuries.

One solution could be to set a threshold of permanent impairment as the basis on which FEL benefits are payable. This could help ensure that inability to return to work is due to the compensable injury and not the prevailing economic conditions. For example, the Australian state of Victoria recently adopted a benefit "step-down" approach to compensating long-term disabilities that limits the duration of benefits for impairments of less than 30% as part of a range of measures to respond to the crisis facing its workers' compensation system.

"Step-Down" Approach in Victoria

A worker receives 95% of the pre-injury net average weekly earnings during the first 26 weeks of disability. The amount and duration of benefits payable for injuries exceeding 26 weeks in duration depend on the extent of the worker's impairment. If the impairment is greater than 30% (a serious injury), the worker receives benefits at 90% of the difference between pre-injury and post-injury earnings. But if the impairment is assessed at less than 30%, the worker receives benefits at the rate of 60% for a defined period of up to 104 weeks.

This "limited duration" approach is also a feature common to U.S. workers' compensation systems. While the U.S. systems are quite diverse, it is generally the case that workers suffering from obvious external and significant injuries receive benefits for fixed periods of duration based on presumed wage loss. Workers with "unscheduled" injuries (soft tissue and psychological injuries) similarly receive benefits for fixed durations, but on the basis of actual wage loss, loss of earning capacity or the degree of functional impairment suffered.

A variety of adjustments could be made to address the inequities characterizing the current FEL system. For example, it would be possible to require that there must be a recognized permanent impairment before a worker is eligible for a FEL award and to mandate more frequent reviews of the wage experience of workers with FEL awards. In addition, steps could be taken to integrate workers' compensation and other benefit systems, as suggested in the next section of this paper. Lastly, the Act could be changed to require the WCB to take into account the nature of the pre-injury work for purposes of calculating the average earnings of seasonal and other workers.

With respect to the issue of estimating the wages of workers who have not returned to work for purposes of calculating the FEL award, it has been suggested that these unemployed workers should receive full benefits unless they have refused to accept a specific job that was suitable for their abilities. An alternative approach, which avoids making workers' compensation responsible for solving labour market problems, is to put in place incentives that improve the chances of return to work so that post-injury earnings have to be estimated in a limited and narrowly defined set of circumstances. These are examined in the next section.

Finally, in some jurisdictions faced with serious financial problems, steps have been taken to address the NEL component of the dual award system. New Zealand, for instance, eliminated non-economic loss awards. Alternatively, the non-economic loss award could be blended with the future economic loss award so that workers receive a fixed NEL lump sum amount as a percentage of the average industrial wage and a full FEL top-up to reflect the estimated loss of earnings capacity.

D. Return to Work and Rehabilitation

One of the goals of reform must be to effect changes that secure timely return to suitable work. Effective return to work and vocational rehabilitation strategies are critical complements to the wage loss system and can help reduce the long-term financial, social, and personal costs of a permanent disability.

The Problem: Does Vocational Rehabilitation return Workers to Work?

The Act gives the WCB complete discretion in the provision and management of vocational rehabilitation (VR). It directs the WCB to "take such measures and make such expenditures as it may deem necessary or expedient" to aid injured workers in getting back to work or lessening the effects of any disability. The WCB has devoted a great deal of attention and money to VR over the past seven years. In 1994, it spent over $450 million on VR benefits and services--$369 million on VR benefits and supplements, $63 million on external expenditures and $20 million on VR administration (an internal staff of 459). This is more than double the $200 million spent in 1987. The increased expenditure reflects the more aggressive VR strategy implemented by the WCB in 1989 and the requirements of Bill 162 for timely VR assessment (within 45 days of injury) and

The WCB's Vocational Rehabilitation Strategy:

1. ***Assessments:***

   - Identification of worker and employer need for VR by 45 days and every 6 weeks thereafter
   - Worker VR assessment at 6 months if no return to work
   - Assessment includes functional abilities evaluation, vocational skills, education, literacy

2. ***Written VR Plan:***

   - Design of program by VR Caseworker, in cooperation with injured worker, physician and employer
   - Plan coordinated by VR Caseworker, functional evaluation and formal training may be provided externally

3. ***Services Provided by WCB:***

   - Return to Work Programs (training on the job - 50% of wages paid by WCB)
   - Vocational Rehabilitation programs - Recipients of VR programs receive benefit supplements to ensure their income equals 90% of net income

intervention (if possible within six months of injury). The result has been a nearly 60 per cent increase in VR case load over the last five years.

Yet, the unemployment rate of injured workers remains a persistent problem. WCB data indicate that roughly half the workers referred to VR services remain unemployed. A recent Ontario survey of workers with permanent partial disabilities indicated that 60 per cent of those who did return to work suffered subsequent injuries and periods of unemployment. As a result, a significant percentage of the WCB's VR caseload is made up of repeat clients.

There are also indications that VR programs may actually delay return to work. The broad availability of VR services and VR supplements encourage many workers to use and stay in VR. This is consistent with WCB data that indicate that the average duration of temporary compensation claims in the year of injury increased from 28 to 33 days between 1985 and 1994.

The Performance of Return to Work and Vocational Rehabilitation Services at the WCB[1]

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Injured workers Referred to VR	11,269	11,365	13,496	13,811	16,051	28,083	37,251	28,704	26,574	20,199
Injured Workers Employed post-VR	4,874	5,151	5,229	5,521	6,663	7,966	11,132	12,941	12,171	10,281
Employed/ Referred	43.3%	45.4%	38.8%	40.0%	41.6%	28.4%	29.9%	45.1%	45.8%	50.9%
Duration of Short Term Disability Claims: Current Yr.	28.5	29.2	30.8	31.7	35.2	38.7	40.7	39.2	36.6	33.7

[1] *WCB 1994 Annual Report: Statistical Supplement*

In light of the re-employment experience described in the above table, it is reasonable to question whether employers and injured workers are getting value from the WCB's current level of VR expenditures, both in terms of efficiency and the number of injured workers returned to work.

These concerns suggest that it may be necessary to shift the focus from expensive, lengthy VR programs to less expensive, more effective measures that will improve the chances of a return to suitable work for a greater number of workers. One approach is to explore the kinds of return to work and re-employment incentives that could be built into the compensation system. The following discussion examines the incentive effects of the benefits and financing structures.

The Incentive Effects of the Benefits Structure

The structure of workers' compensation benefits can pose obstacles to timely return to work. Economic studies in Canada and the United States suggest that as the level of workers' compensation benefits increases, so does the tendency of workers to claim and stay on benefits. In a wide variety of circumstances, it can be more attractive for an injured worker to stay on benefits if he or she knows that the WCB will replace virtually all of his or her income. This disincentive effect is high where, as in Ontario, the income replacement rate is equal to 90 per cent of net pre-injury income and benefits are not taxable. As a result, it is possible for a worker to receive more on workers' compensation than from working and receiving regular wages. This not only discourages timely return to work, but is unfair to the workers who continue to work.

The "stacking" of benefits also tends to discourage timely return to work. Benefits stacking can occur where an injured worker receives, in addition to workers' compensation benefits, Canada Pension Plan or private disability benefits that top up his or her income to the full pre-injury wage. Although the WCB is required to take CPP payments into account when calculating temporary and permanent benefits, it currently deducts only the portion of CPP that is related to the work injury. The stacking problem reflects the fact that workers' compensation predated the emergence of the social security safety net, and the absence of any serious attempt in the past to integrate public benefit schemes. Compensation benefits may also exceed a worker's wage loss in certain FEL cases. Since the wage loss benefit is offset by any other income, the scheme encourages workers not to apply for CPP benefits until after their FEL benefit has been awarded.

Approaches to a Solution--Worker incentives

12. What changes in the structure of benefits are required to better balance the interests of fair compensation with the need to provide greater incentives to return to work?

Workers' compensation reform in this area should be guided by two principles: there should be positive incentives in the system to reinforce a timely return to suitable work; and a worker receiving compensation benefits should not receive more than he or she would from working.

Manitoba, Newfoundland, New Brunswick, and Nova Scotia have all recently reformed the benefit structures in their workers' compensation legislation. The benefit levels have moved from 90% of net to as low as 75% of net, to increase the incentive to return to work in the first few weeks following the injury. These

are the most crucial weeks from the point of view of the worker's prospects for re-employment. It was on this basis that the government consulted on its commitment to reform benefit structures in the fall of 1995. The legislation in New Brunswick, Newfoundland and Nova Scotia also staggers benefit levels so that higher benefits are paid to long-term injured workers. For example, the New Brunswick Act provides for a payment of 80 per cent of net pre-injury income for the first 39 weeks after an injury and 85 per cent of net thereafter.

Benefit Level Reforms in Canada[1]

Jurisdiction	Benefit Levels	Implementation
Manitoba	90% of net for 24 months 80% of net thereafter	Jan. 1, 1992
New Brunswick	80% of net for 39 wks 85% of net thereafter	Jan. 1, 1993
Newfoundland	75% of net for 39 wks 80% of net thereafter	Jan. 1, 1993
Nova Scotia	75% of net for 26 wks 85% of net thereafter	June 1, 1995

[1] *Source: Various WCB Acts*

There are other disincentives built into the benefits structure. A timely return to work could be reinforced by allowing workers to keep additional income as they gradually return to work. Currently, if a worker returns to work at less than full wage and receives temporary partial benefits to top up his or her income to 90 per cent of pre-injury earnings, the worker faces a dollar for dollar offset for any income earned in addition to this amount. This is a disincentive to a full, successful return to work. To encourage workers (and particularly FEL recipients) to stay on the job, this offset could be reduced on a graduated scale as income rises. Permitting workers to retain a percentage of their earned income obviously would require an adjustment to the maximum benefit level; otherwise workers would receive compensation in excess of pre-injury earnings. In addition, consideration could be given to integrating rather than stacking benefits. Following this approach, CPP benefits would be fully deducted from the workers' compensation benefit, and the WCB would be regarded as the last insurer with the responsibility for making up the remaining income loss.

"Top-ups" of workers' compensation benefits by private disability plans are similar in effect to stacking of social security benefits and could be integrated on the same theory. In Manitoba, for example, WCB benefits are currently offset by the amount of any employer top-ups or private and group disability benefits. Failure to report these top-ups results in fines or discontinuance of WCB benefits. Since preventing top-ups in Ontario would generate savings for the employer, consideration could be given to requiring the reallocation of these monies to return to work or rehabilitation programs for the employer's injured workers.

Employer Incentives to Re-employ

The array of return to work incentives currently provided under the Act is summarized in the accompanying box. The Bill 162 amendments provided a "carrot and stick" approach to encourage the re-employment of injured workers. First, the wage loss system enables employers to reduce their compensation costs by re-employing workers with permanent disabilities. Second, the Act imposes a re-employment obligation and related requirements on employers with more than 20 employees as well as an obligation to accommodate the work or the workplace to meet the needs of the returning worker. There are also a number of financial incentives to encourage re-employment. Primary among these are the WCB's Second Injury and Enhancement Fund and Experience Rating programs.

Return to Work Incentives in Ontario's Workers' Compensation System

- ***Re-employment Obligations***
  - Employers with more than 20 employees must rehire workers, with at least one year of continuous service, for up to two years after the injury, or one year after being notified the worker is capable of resuming work.
  - Penalties for non-compliance: up to 100% of worker's net average earnings; workers suffering a loss as a result of non-compliance may receive up to one year of benefits.
  - Employers must continue contributions to employee benefits, to maintain the employment relationship.
- ***Employer Duty to Accommodate Work or Workplace***
  - Employer required to accommodate work or workplace for injured worker, provided no undue hardship is imposed.
- ***Second Injury and Enhancement Fund***
  - Encourages firms to re-employ injured workers by pooling costs of a worker's second or aggravated injury across the entire Accident Fund.
- ***NEER and CAD-7 Experience Rating Programs***
  - Increases relationship between a firm's accident record and compensation costs, and the assessments it must pay.
  - The WCB may vary a firm's experience rating surcharge or rebate based on health and safety practices and workplace re-employment and modified work programs.
- ***Worker Penalty for Non-Cooperation in VR***
  - Benefits can be reduced or terminated for refusal to cooperate in VR or accept "suitable" re-employment offer.
- ***Employer penalty for Non-Cooperation in VR***
  - Assessment penalty can be assessed for refusal to cooperate in VR services or programs .

The continued high unemployment rate of injured workers suggests that there is room for improvement in the structure of incentives for employers. This is particularly true in the case of small employers. Many firms in this vital employment sector are not bound by the statutory re-employment obligations or covered by experience rating programs, which are generally tailored to larger employers.

re-employment doesn't work.

13. What kind of incentives for employers are likely to be effective in encouraging re-employment?

A survey of re-employment incentives adopted in other jurisdictions indicates that there is a wide menu of choices available. To complement experience rating for larger employers, assessment rate rebates or bonuses could be paid to small employers that re-employ their own, or other employers' injured workers, as is done, for example, in California. Or the current provision in the Act requiring employers to accommodate the work and the workplace could be amended to permit the WCB to assist with the costs of workplace accommodations when they impose financial hardship, particularly on small employers. In Oregon, worksite modification assistance, wage subsidies and premium relief are offered for up to three years after the hiring of an injured worker.

Wage subsidies are a common re-employment incentive in European and Australian workers' compensation systems. They are offered to firms that re-employ workers other than their own. South Australia, for example, offers monthly grants and bonuses to employers for hiring, training, and retaining disabled workers -- the level of subsidy depending on the extent of injury and length of claim. The Netherlands will subsidize up to 20 per cent of a disabled worker's wages for a maximum of four years.

Ontario is one of the few jurisdictions that imposes a positive re-employment obligation on employers. Given the unemployment rate among injured workers, one approach might be to strengthen the re-employment obligation on employers or perhaps shift the obligation from the individual employer to the class or sector into which an accident employer is classified. If, for example, a small business were unable to re-employ the worker, another firm in that sector or class could pick up the obligation and receive the benefit of an assessment rebate. The availability of a broader range of re-employment incentives may lessen the need to rely exclusively on the re-employment obligation and the measures the WCB has put in place to ensure compliance.

14. What additional measures are needed to improve the management of disabilities and the prospects of return to work?

Implementing an array of incentive measures like those explored here is likely to reduce the need to rely on costly VR programs. This shift in focus from VR to return to work incentives could be assisted by amending the Act so that the delivery of VR services is consistent with the goals of efficiency, effectiveness and timely return to work. By way of example, the New Zealand legislation specifies the objectives of VR and confines a claimant's VR program to one year, unless it is likely a second year of rehabilitation will result in employment, or the worker has been unable to continue in full-time work. Similarly, some American states, such as Washington and California, have streamlined their VR programs by introducing ceilings on the duration and total costs of individual VR plans.

Workplace-based rehabilitation presents a complementary approach. There is considerable evidence that a strong continued relationship between the employer and the worker following an injury strengthens the willingness of the workplace parties to accommodate the workplace and return the worker to work. A timely return to work is most successful when: there are open lines of communication between employer and worker; the employer is committed to finding ways to accommodate and rehire the worker; and the worker is willing to participate in re-employment efforts.

The incentives outlined in this section are all designed to support this objective and to increase the responsibility of the workplace parties, who are, after all, in the best position to look after their own interests. The employer direct payment approach outlined earlier in this paper is discussed with the same objective in mind. In short, early return to work that is focused on return to the pre-injury employer (where prospects for continued re-employment are best) is an effective approach to workplace-based disability management.

Innovative approaches to workplace-based rehabilitation have been adopted in the Australian states of Victoria and New South Wales. In the workplace-based rehabilitation model, employers are required to re-employ their injured workers, establish workplace rehabilitation coordinators, and develop written rehabilitation policies. VR plans must be developed in consultation with the worker, but employers can provide these services themselves, jointly with other employers or through external agencies. These plans can involve early referral to medical rehabilitation, graduated return to work and modified work.

The way in which VR is delivered in Ontario and the WCB's role could also be reconsidered. A number of Australian compensation authorities have assumed the role of a regulator of VR providers, establishing standards and monitoring performance. The Ontario WCB has begun this move to a role as VR facilitator and regulator rather than provider. Consideration could be given to statutorily recognizing this emerging responsibility.

E. Financing Workers' Compensation

The main principle in this section of the paper is that all employers benefiting from a collective liability scheme should pay their fair share of its costs. For a variety of reasons, there is a significant degree of cost-shifting and cost avoidance in the system. In addition, the system should provide better incentives for investing in accident prevention and health and safety in the workplace.

Overview

The workers' compensation system is financed entirely by the province's employers. For financing purposes, the Act divides employers into two groups: employers engaged in Schedule 1 industries (the vast majority), who are collectively liable for their accident costs and pay assessment premiums into the accident fund, and employers included in Schedule 2 industries who are individually liable for the payment of all benefit costs.

The WCB's classification system for Schedule 1 employers classifies employers into nine broad industry classes, which are in turn divided into 219 rate groups. The classification is based largely on similarity of business activity and relative risk of injury. The WCB sets a "target" assessment rate for each rate group which reflects: the group's expected benefit costs of new claims in the next year; its share of the WCB's administration expenses, accident prevention costs and other statutory obligations for the next year; and its share of the charge for eliminating the unfunded liability in accordance with the WCB's full funding strategy.

In general, all employers in a rate group pay the same rate of assessment initially, but exceptions arise where the group is participating in one of the WCB's two "experience rating" programs or where employers are not at their "target" assessment rate. Each assessment rate is a dollar amount per $100 of the employer's assessable payroll. Assessable payroll is determined by aggregating all the salaries and wages, including any remuneration that can be estimated in terms of money, for each worker of an employer up to an annual earnings limit, $55,400 for 1995.

For 1995, the average assessment rate paid by employers was $3.00 per $100 of assessable payroll. Actual assessment rates range from a low of $ .23 to a high of $16.07. The levels of the various rates reflect the overall workplace injury costs of the rate group in question. The average actual and target assessment rates for employers since the funding strategy came into operation in 1985 are summarized in the table below. It is noteworthy that the component of the rate needed to meet the obligations associated with the cost of new claims has fallen dramatically over the past five years but the component of the rate dedicated to retiring the unfunded liability has risen even more dramatically over the same period, for reasons examined in section 3 of this paper.

Average Actual and Target Assessment Rates: 1985 - 1996[1]

	1985[2]	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996[3]
Average Actual Rate	2.31	2.65	2.88	3.02	3.12	3.18	3.20	3.16	2.95	3.01	3.00	3.00
Average Target Rate	3.20	3.37	3.15	3.30	3.28	3.28	3.28	3.21	3.34	3.20	3.00	3.01
• *New Claims Cost*	2.36	2.52	2.29	2.40	2.39	2.37	2.37	2.08	2.00	1.83	1.68	1.68
• *Administration*	.33	.31	.34	.37	.36	.37	.37	.47	.49	.48	.44	.44
• *Unfunded Liability*	.51	.54	.52	.53	.53	.54	.54	.66	.85	.89	.88	.89

[1] Source: WCB

[2] Target Assessment Rate under an Indexed Act

[3] Actual assessment Rates frozen at their 1995 level

Coverage and the Shrinking Revenue Base

In Ontario, workers' compensation coverage is extended by means of inclusion; that is, only workers employed in industries listed in Schedules 1 and 2 are covered by the Act. This contrasts to the approach taken in the majority (seven) of other Canadian jurisdictions, where all employers are included unless explicitly excluded by regulation. As the accompanying table indicates, Ontario's workforce has the lowest proportion of coverage of any jurisdiction in Canada. Employers in industries not included in Schedule 1 or 2 (for example, financial institutions, trade unions and law firms) can apply for coverage under the Act, while a small number of industries are expressly excluded from the Act.

One of the serious consequences of this approach to coverage is that new and emerging industries are often excluded from the protection of the Act. In addition, as the economy restructures, and firms and their workers move from traditional to service oriented industries, the Schedule 1 revenue base shrinks. These factors not only place increasing financial pressures on the remaining firms, but an increasing number of workers and their new employers lose the protection of the Act.

Coverage Across Canada:[1]

	% of Employed Workforce Covered
Alberta	77.4
British Columbia	97.6
Manitoba	80.8
New Brunswick	82.7
Newfoundland	91.9
NWT	90.9
Nova Scotia	n/a
Ontario	70.0[2]
PEI	n/a
Quebec	86.1
Saskatchewan	89.8
Yukon	100

[1] *Source: AWCBC*
[2] *Source: WCB 1994 Annual Report*

There are a number of other coverage problems under the Act. A particularly difficult problem arises in respect of independent operators, who are excluded from the Act but who can elect to be deemed workers by applying for personal coverage and paying assessments. When these persons do not apply for coverage, it is difficult to determine whether they are in fact workers or self-employed. In addition, it is not uncommon that firms, for tax and other reasons, choose to structure their operations so that persons who would otherwise be considered employees are treated as independent operators.

Among the undesirable consequences flowing from this uncertainty is that a substantial number of workers do not have the protection of the Act. Another problem is the leakage of revenue that occurs when the WCB finds that a person is in fact a worker rather than an independent operator and no assessments will have been paid. Finally, some employers are exposed to lawsuits by independent operators seeking to recover for their injuries.

Approaches to a Solution

15. What measures are required to address the serious consequences of the current approach to coverage under the Act?

As noted above, the Ontario Act is almost unique in Canada in its approach to bringing employers into the workers' compensation system. In light of the serious drawbacks associated with this approach, consideration might be given to following the coverage model in the other provinces: presume coverage for all firms carrying on a business in Ontario and set out in a schedule only those industries that should be expressly excluded from the Act. Under this scheme, firms would be excluded only on the basis of well-defined and justifiable criteria.

In addition, firms or industries meeting certain conditions could continue to be covered under Schedule 2 for purposes of self-insurance.

With respect to the coverage of independent operators, the WCB has been working with industry representatives to reduce the impact of the problem. Among other approaches available, one might be to deem the individuals in this class to be workers of the principal and require the principal to pay assessments on their wages; or treat them all as independent operators but require the employer to hold back a portion of their wages to be paid to the WCB for assessment purposes.

The Cross-Subsidisation Problem

When some employers do not pay their fair share of the cost of accidents in their workplaces, other employers are required to pay more to cover the shortfall under a system of collective liability. "Cross-subsidisation" refers to the incidence of cost-shifting among employers as a result of problems in the system; that is, some employers pay more because others are not paying their true costs. The following briefly examines two key causes of cross-subsidisation, the employer classification scheme and the Second Injury and Enhancement Fund.

a. The Employer Classification System

When the WCB adopted the current classification system in 1993, it expected firms to reach their target assessment rates in three years. This has not happened, mainly because of the annual limits placed on rate increases over this period. As a result, a significant number of employers have not reached their target assessment rates. Currently, approximately one-third of the firms are paying rates above the target rates for their rate groups, one-third are paying rates below their target rates and one third are paying appropriate rates.

In 1994, to expedite moving all employers to their assigned target rates, the WCB established a lower transitional rate for each rate group. The goal was to bring firms up to the transitional rate before requiring them to move to their target rate. However, some 17,000 firms continue to pay assessment rates below even this lower, transitional rate. This situation not only adds to the complexity of the transition process, but it also means that the rates of these firms are being subsidized by others in the rate group.

b. Second Injury and Enhancement Fund

The Second Injury and Enhancement Fund ("SIEF") policy was originally designed to promote the re-employment of permanently disabled injured workers by relieving employers of the costs arising from second injuries that were worsened by conditions caused by previous injuries. These costs are simply removed from the accident experience of the employer and spread across all Schedule 1 employers. Over time, SIEF eligibility criteria have become vague and broad, permitting relief in a much broader set of circumstances than the policy originally contemplated. In particular, relief is granted in many cases where the cause of injury may not be clear-cut or in the event of a great variety of pre-existing conditions. Employers making extensive use of this policy in these cases are effectively subsidized by those employers that do not do so.

SIEF transfers have grown over the years and now represent about 18 per cent of the new claims component of the average assessment rate, or some $225 million annually. Seeking SIEF relief is attractive for employers because costs transferred from the employer's accident cost experience translate into increased experience rating rebates or reduced surcharges. As a result, SIEF has become a significant source of litigation, generating over 1,500 appeals in 1994.

The administration of SIEF has been sharply criticized from a number of perspectives. It has been suggested that the policy encourages the "management of claims", not the prevention of accidents, and that it has proved an ineffective tool for re-employing injured workers. It has also been pointed out that the policy, if used too extensively, works at cross-purposes to experience rating since it dampens the incentive effects of surcharges on employers with poor accident records.

Revenue Leakages: The Bad Debt Problem

Since one of the two aims of the new classification system is to reflect the relative risk of injury of an industry, firms pay different rates of assessment. One of the consequences of this approach is that it encourages some firms not to register with the WCB in order to avoid paying rates that they consider too high, or to find ways of avoiding their liabilities, for example, by setting up different firms for different projects. Either way, this means less revenue for the system, higher rates for employers and an increase in the unfunded liability. The system also loses revenue when firms with unpaid assessments cease operations, either because they relocate to another jurisdiction or because of bankruptcy. One measure of the degree of revenue leakage in the system is the annual bad debt charge, which according to the WCB's most recent annual report was $173 million for 1994.

16. What measures should be adopted to ensure that all employers pay a fair rate that reflects their experience and risk of injury?

With respect to the incidence of cost-shifting resulting from the number of employers who remain below their target assessment rates, the obvious solution would to be to accelerate the transition so that all employers reach their target rates within an acceptable period of time, recognizing that some firms may require some special consideration. Adoption of some of the measures examined in this paper to control the WCB's liabilities would expedite the process.

The SIEF issue is rather more problematic because many employers have come to rely on this form of relief, as the size of the annual transfers indicates, and view it as compatible with the objectives of experience rating. However, if the primary objective of SIEF is to encourage the re-employment of injured workers, and there is little evidence to show that it does in fact achieve this objective with any success, alternative re-employment programs could be considered. Some of these alternatives were reviewed earlier in this paper.

Another, perhaps complementary, approach would be to preserve the essence of SIEF and designate by schedule those conditions over which the employer has no control and the percentage of cost relief that would be granted for experience rating purposes. This approach would serve to reduce the extensive litigation on the program and provide much greater certainty.

With regard to recovering revenue owing, Bill 15 has taken the first steps needed to help plug some of the sources of revenue leakages. Among other measures that are available, the WCB could be given greater priority in the distribution of assets when a firm is wound up, or its lien could be strengthened to apply to all property owned or used by the employer in connection with the business, including that owned by directors or principals of the corporation. Another approach may be to enable the WCB to pass the liabilities and injury experience of a former firm on to the successor firm or associated company.

In the case of a firm likely to cease operations in Ontario, consideration could be given to capitalizing its injury costs and levying a special assessment, or requiring the firm to post an irrevocable letter of credit with the WCB. Alternatively, where a firm with a poor accident record intends to relocate to another jurisdiction, the firm could be required to pay a lump sum contribution towards its rate group's unfunded liability.

Experience Rating and its Problems

The WCB has refined the risk-based system of assessing rate groups by experience rating individual firms. It does so by calculating the firm's actual cost experience and varying its expected assessment premium by levying a surcharge where the experience is poor, or paying a refund where the experience is better than the average in the rate group. (The costs associated with long latency occupational diseases are, however, excluded.) The WCB currently operates two experience rating plans, both of which were introduced in 1984: NEER, which stands for New Experimental Experience Rating, covers some 90,000 firms, and CAD-7, which stands for Council Amended Draft #7, applies to some 25,000 firms in the construction industry.

The justification for experience rating is the contribution it can make to the reduction of workplace accidents and their severity. Without experience rating, a firm does not have a strong incentive to invest in accident prevention and rehabilitation because the benefits of this investment would accrue to all the members of the group, even to those firms that make no investment in workplace safety. With experience rating, however, individual firms can reap substantial financial rewards from this investment or suffer serious penalties for not making the investment.

For small firms, however, the financial incentives available under experience rating may not be significant enough to justify substantial investment in safety. This is because the size of any potential refund or surcharge is small. Currently, some 70,000 firms are excluded altogether from experience rating. From the perspective of the need to enhance health and safety in all workplaces, the absence of an incentive mechanism suitable for this large group of employers is a serious deficiency.

From the same perspective, measures should be taken to maximize the incentive effects of the experience rating scheme. It has been argued that the timing of experience rating determinations does not maximize the incentive to invest in safety because the scheme rewards (or penalizes) employers for their accident performance after the fact.

A serious problem within the framework of the WCB's experience rating scheme is the existence of the "off-balance" between refunds and surcharges. The off-balance is generated in part as a result of methodological imperfections (for example, the method used in setting the assessment rates), and in part as a result of improved accident performance (because of the incentive effects of experience rating). Since the introduction of experience rating in 1984, the off-

balance has consistently taken the form of a net refund. Although not a serious problem in the early years, the off-balance has grown significantly since 1990 to reach a high of over $260 million in 1994.

Experience Rating (Refunds) Off-balance: 1985 - 1994 ($ Million)[1]

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
CAD-7 Off-balance	4.6	0.4	3.5	9.1	27.1	35.3	43.3	41.6	29.6	14.3
NEER Off-balance	0.1	0.4	12.9	22.9	0.5	35.7	2.4	42	156	248.8
Total	4.7	0.8	16.4	32	27.6	71.0	45.7	83.6	185.6	263.1

[1] *Source: WCB*

The off-balance is a serious concern because it impacts directly on the WCB's assessment revenues and, ultimately, the size of the unfunded liability (since the off-balance is not financed in next year's rates but rather flows directly into the unfunded liability). It has added to the revenue shortfalls already experienced by holding average assessment rates below their target levels.

Approaches to a Solution

17. What measures should be considered to maximize the incentive effects of experience rating without unduly reducing the system's revenue base?

Three approaches to maximizing the incentive effects of experience rating could be considered:

- A merit program could be specifically designed to apply to the large number of small firms currently excluded from experience rating. Under such an approach, firms with a good accident record could, for example, receive an assessment rate rebate which could continue to be paid until there was a change in their accident performance.

- Prospective experience rating could also be made available to currently experience-rated firms. This approach would allow a firm to receive an adjustment to its initial assessment payment with reference to an advance estimate of the firm's likely refund or surcharge based on experience over the previous years. The obvious advantage of this approach is that the advance estimate should provide the firm with the incentive to do better.

- Long latency occupational disease costs could be integrated into experience rating. The objective would be to provide employers with incentives to re-employ workers with occupational diseases, even though the exposure giving rise to the disease may have occurred years before.

With respect to the off-balance, the WCB has taken and continues to take steps to address the problem. Modifications made to CAD-7 in 1993 and to NEER for the 1994 accident year are expected to reduce the existing off-balance in net refunds. Proposals have been made in the past to impose limits on the size of the off-balance so that it does not exceed one per cent of revenue ($25 million). Limiting the off-balance in this way could potentially add $150-180 million annually to the assets of the accident fund, with a corresponding positive impact on the unfunded liability.

Employers have argued that the portion of the off-balance caused by methodological problems should be eliminated but that the portion arising from changes in the collective accident performance of the rate group should be retained. This approach would have the effect of requiring the WCB to charge and collect a substantial off-balance in net surcharges when the collective accident experience of the rate group worsens.

5. Invitation to Reform

Ontario's workers' compensation system has been subjected to a great deal of legislative upheaval over the past decade. A government should intervene only where there are compelling reasons for doing so. As this paper has shown, there are very compelling reasons for this government to take the steps necessary to renew workers' compensation for Ontario.

The primary reason is the unfunded liability. The size of the unfunded liability risks the viability of the workers' compensation system and has forced employer assessment premiums to levels that are incompatible with competitiveness, economic growth and job creation. Other reasons have been documented in the paper as well: the expansion of the system beyond the original plan; the high cost and the complexity of workers' compensation administration; the absence of a focus on accident prevention; the inadequacy of incentives to encourage return to work and the re-employment of injured workers; and the tendency of workers and employers to rely on the WCB system rather than on themselves in the avoidance and management of injuries.

The new directions for reform will be determined by the objectives outlined in the discussion paper and by the responses of stakeholders and the public to the major issues raised and their possible solutions. The government welcomes your participation in this important process of reform.