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August, 2009 Vol. 21, No. 1

Workers' Compensation Newsletter

A reply to Mahoney's speech of June 16, 2009 to the Economic Club of Canada

WSIB Chairman Mahoney is Absolutely Mistaken About the WSIB:

The Board's Finances 2000 - 2009*

Year	Assets (Billion $)	Revenue from Premiums	Benefit Costs	7% Return on Investments	Deficit (Billion $)
2009	13.96	2.54	4.72	0.98	-1.2 **
2008	13.20	2.74	4.16	0.92	-0.5 **
2007	15.97	2.5	5.47	1.12	-1.85
2006	16.46	2.39	4.83	1.15	-1.29
2005	14.55	2.26	4.5	1.02	-1.22
2004	13.64	2.12	4.5	0.95	-1.43
2003	11.87	2.1	3.9	0.83	-0.97
2002	11.62	1.97	3.47	0.81	-0.69
2001	11.58	1.86	3.45	0.81	-0.78
2000	11.40	1.71	3.15	0.80	-0.64

* All figures come from WSIB Annual Reports & are in billion of dollars rounded;
** 2008 and 2009 based on 2009 1st quarter report

Financially, the WSIB is close to Exhaustion.

Have a close look at the chart above. For the past 10 years, by averaging out the WSIB's investment returns at 7%, the WSIB has not had one year where Revenue has exceeded benefits!

In the past 10 years the WSIB have seen a long progression of Presidents, Chairs, Vice Presidents and even a significant change in legislation, but the Board's performance has been dismal. Without a stock market turnaround, the WSIB will be losing $2 billion dollars annually, and it will be insolvent in 6 years. The resulting bailout will cost either employers or the government $26 billion dollars, which is more than 4 times what General Motors has cost Ontario, to bail it out, to date.

But let's first hear what Chairman Mahoney has to say about this situation in a recent speech to the Economic Club *(exact remarks in quotations, otherwise remarks have been paraphrased)*:

Mahoney:
The WSIB has led the world to "protect workers and employers from the consequences of workplace injuries and illnesses."

Our Reply:
It's amazing that Ontario, with the lowest accident rate in Canada, has the highest claim cost per injury. One would think that if accidents are fewer, then the effects of the ones that did occur would be milder. Since the reform of the out of control California workers' compensation system, Ontario is leading the world alright, but not necessarily in the realm of "protection", but in per claim benefit cost.

Mahoney:
70% of employers have an overall positive opinion of the WSIB.

Our Reply:
This means that 73,000 employers in Ontario have a negative view of the WSIB. Could it be that these 73,000 are the ones that regularly deal with the WSIB?

Mahoney:
"Our ability to fund the current legislative obligations of the workplace safety and insurance system remains secure."

Our Reply:
An Ontario WSIB system that secures a 7% percent return from its investments, and has accrued an average annual deficit for the past 10 years of $1 billion, will be bankrupt in 12 years at that rate. With a 2% return on investment, which the banks are currently paying, the WSIB will be bankrupt in 8 years. The Board's unfunded liability has moved from $5.66 billion to $14 billion in the past ten years.

Mahoney:
We don't live in an ideal world so one can't expect the Board's unfunded liability to be paid down by the target date of 2014.

Our Reply:
Employer's premiums were raised 30% - 18 years ago so that the unfunded liability would be paid down by 2014. This was a promise. The increase in assessments gave Ontario one of the highest WSIB rates in North America at the time. Instead, the Board diverted the increased assessments to pay higher benefit awards.

Mahoney:
Provinces with 90% of their workforce covered by Workers' Compensation don't have an unfunded liability, while Ontario with 64% coverage does.

Our Reply:
Is Mahoney suggesting he wants all employment in Ontario covered by the workers' compensation system? If the WSIB system pays out more benefits than it can afford to construction workers, what makes Mahoney think it won't do the same with bank employees who aren't currently covered? As a lawyer employing staff, I am not looking forward to joining the "WSIB unfunded liability swamp". In fact, Bill 119 is about to pull into WSIB all construction independent operators and many executive officers. Initially, the Board's revenues will rise, but in 3 years the Board will be worse off. For the past 10 years, the more payroll the Board covers, the greater deficit it runs. And what employer is going to monitor independent operator benefit fraud, when the independent operator is himself the employer?

Mahoney:
A single lost time injury costs the WSIB $121,000.00. Repetitive strain injuries have cost the Board $18 billion over the past 5 years.

Our Reply:
The cost of a lost time injury has risen over 50% in the past 5 years. Does that mean workers have been more badly injured over that period of time, or that the Board has decided to pay each one of them more? The average NEL award has risen little, therefore the answer points directly to the Board

itself.

The Province's work force is aging. The older the worker the more susceptible he/she is to a repetitive strain injury. Mahoney thinks he can, through ergonomic shop floor changes, work his way out of a further explosion in repetitive strain injuries. He'd be better off considering, that as manufacturing leaves the Province, there might be fewer repetitive strain claims Of course, that will come with less revenue for the Board to pay the claims already allowed, but not funded.

Mahoney:
"A small number of employers - something in the range of 36,000 firms . . . are placing the greatest financial burden on the system".

Our Reply:
"36,0000" is the number of firms each year who are penalized under the Board's experience rating plan. Most of these firms have less than 50 employees and the turnover as to whom is penalized is over 50% a year. This is because it takes only one accident with benefits lasting more than 6 months in a year, to drive a company into an experience rating penalty. So what Mahoney is saying is, that if a small firm has one 6 month claim every 3 years, it's a poor performer, but a company with 150 workers and a 6 month claim every year, who would therefore receive an experience rating rebate, is a good performer.

More importantly, if it's only "36,000" problem firms, the Board has 50 employees in the Workwell Safety Audit Program; 50 employees who were displaced from adjudication and migrated into health and safety; 300 health and safety inspectors with the Ministry of Labour (paid for by the Board); and a hundred more employed in the safety associations. That's one Board employee for every 80 firms. So what is the Board's problem with enforcing health and safety standards?

Mahoney:
"Make insurance equity a key driver for the WSIB's premium rate setting process".

Our Reply:
While Mahoney talks about "insurance equity", his chief lieutenants (Beegan and Hinrichs), say experience rating is about employer behaviour, and that "insurance equity" is history. In other words, experience rating is now used to compel companies to take injured workers back to work, and the Morneau Sobeco Report's recommendation to decimate Second Injury Fund Relief is just one more blunt instrument to do so. (See enclosed article below).

Mahoney has thrown out the possibility of raising rates even further on employers who have any accidents, in order to generate revenue. Because most firm's accident frequency is sporadic, that plan is nothing but a coloured rate increase.

Mahoney:
The only way to prevent employer's rates from rising is to eliminate injuries.

Our Reply:
Employers have reduced injuries by more than 30% in the past 6 years, and 30% so far this year, but the increased in the cost of each claim has more than wiped out any savings. In 2008, the reduction in the number of accident dropped by a few percentage points, which would have caused the Board to miss its financial targets even without their losses on the stock market. Employers could eliminate the number of accidents by 30% in the next 6 years, but the only thing that will stop a rate increase is a new workers' compensation scheme in Ontario.

Mahoney:
"We've launched a wide ranging Efficiency Review within the WSIB".

Our Reply:
Recently, the Board did a Value for Money audit study of the Appeals Branch. 40% of Appeals Branch decisions were overturned by the Appeals Tribunal. That doesn't seem very efficient. If the Law Courts operated in that way, the Attorney General would come down so hard on the first level Courts they wouldn't know what hit them. But the Value of Money experts thought the Appeals Branch was doing a fine job. I spoke to 4 other lawyers about the Value for Money audit - we collectively do over 300 hearings a year at the Appeals Branch. The Board's Value for Money team spoke to none of us. Where is Mahoney's Efficiency Review? What is its mandate? Why does it not talk to parties that have to put up with the Board's inefficiency - employer and worker counsel? What's it done to date other than shuffle Case Managers into so many different branches it's impossible to find the same person handling your case week to week.

Mahoney:
"We've cancelled bonuses for senior management in 2009"

Our Reply:
For the past 10 years the Board has annually outspent its revenue, after factoring a steady rate of investment returns. Why were bonuses ever paid in the first place?

Mahoney:
"We've found that private insurance companies like Great West Life and Sun Life have had a higher ratio of administrative costs to premiums than the WSIB".

Our Reply:
The number of Court cases challenging the benefit decisions of Great West Life and Sun Life are infinitesimally smaller, compared to the over 15,000 appeals per year launched against WSIB adjudication.

Mahoney:
Health care spending is topping $600 million per year . . . We've also created a Drug Advisory Committee.

Our Reply:
The increasing use of narcotic medication, like Oxycontin, is highly expensive; has skyrocketed among injured workers in the past 6 years; and is one of the major contributors to injured worker's failing to return to work, according to an article in Spine Magazine. The Board has known about both the increasing expense of oxycontin and its debilitating effects for the past 3 years, but has done almost nothing. Recently, the Board announced a pilot project in Ottawa to stem the use of narcotics, but the terms of the Ottawa protocol still do not adequately address limiting narcotic use, but only monitoring it.

Mahoney:
In 2001, Ontario workers' compensation costs were lower than neighbouring US states.

Our Reply:
Medical care in the US outstrips benefit costs because the medical providers are private. If Ontario did not enjoy the savings of the Canadian Health Insurance system, Ontario costs would be higher. Ontario's U.S. neighbours are not allowed to run unfunded liabilities, in order to hide the annual cost of claims from employers. If Ontario was a pay as you go system, the compensation costs of both jurisdictions would be equivalent.

Mahoney:
Private workers' compensation insurance would cost more, and not be politically accountable. "I still think we are the best deal in town for the employers of Ontario".

Our Reply:
The problem with the WSIB is that they are the "only deal" in town, and the head of sales is the Trade Union movement. While the trade unions can get the Board to change experience rating, which is primarily an employer program, employers are helpless in getting the Board to start paying injured workers less.

Mahoney:
"Our system was founded on the principles that injured workers must be cared for and employers should share the liability for compensation costs. Our number one priority is to improve the lot of the injured worker while remaining fiscally responsible."

Our Reply:
The system was founded on the basis that injured workers receive "no fault" damage awards for injury. The current system which spends billions per year on Labour Market Re-entry programs and offers full wage replacement for life due to a back strain, is obviously not based on the founding principle. The WSIB was a tort replacement system until the 1980s when it became a disability plan, but today it's a social service. It's wonderful that Ontario has such a generous social service system, but ten years of a growing unfunded liability, which now tops $14 billion, is hardly fiscally responsible.

Mahoney:
"I acknowledge that there are a number of problems with the current LMR program and I am committed to addressing those issues."

Our Reply:
The number one problem with the Labour Market Re-entry Program is that the Board has still not implemented the recommendations from the last review, 5 years ago. One such ignored recommendation was to keep detailed statistics of the LMR Plan results, and to hold the service providers' feet to the fire for inadequate results.

Mahoney:
"We need a system that will sustain an Ontario with improved economic competitiveness . . . That's my commitment to you."

Our Reply:
Are there any manufacturing companies clamoring to move to Ontario to help us pay down the Board's $14 billion dollar unfunded WSIB liability over the next 10 years?

Conclusion:

The Ontario Government recently only extended Mahoney's term of commitment for two years, a period of one year less than the norm. His commitment may be a short one. But in fairness, Mahoney's problem goes deeper than the unfunded liability, increased benefit costs, shrinking revenue base, faltering stock markets, and the Government's pandering to the Trade Union Movement.

The world is undergoing an economic restructuring. The current recession is just one more seismic aftershock. The growth of India and China in wealth and power is not entirely a "win-win" situation. Ontario has lost or will lose most of its electronic industry; toy industry, clothing industry, automobile industry, forest industry etc., and yet spending on health, education and welfare services like the WSIB continue to escalate like nothing has changed. Not only is the WSIB deep in the red, so is the Ontario Government. While the Premier may believe it is wise to be doling out money for electric cars and General Motors, the world's bankers may have other ideas.

Second Injury and Enhancement Fund Relief: Overboard or Over the Top?

An individual claim can cost an employer subject to the NEER or CAD VII experience rating systems, from $10,000.00 to $300,000.00 for each claim. Second Injury Enhancement Fund relief (SIEF) can lower that cost all the way down to zero. SIEF is awarded to an employer when a pre-existing condition enhances the amount of benefits a worker receives. The greater the pre-existing condition and the less traumatic the injury, the higher the SIEF award.

The Morneau Sobeco Report, commissioned by the WSIB to look at experience rating, suggests that SIEF, be capped at 50% (discussed in detail below). Tom Beegan, the WSIB's head honcho in charge of Health and Safety, questions SIEF because it gives employers an incentive to not return injured workers to work, takes up the time of Case Managers, and ameliorates the penalty for an injury.

SIEF relief has been growing at about the same rate as the average cost of a WSIB claim over the past 6 years, which is to say by 50%. In 2002, 7.1% of all claims attracted SIEF and that had risen to 11.2% by 2007. The average amount of SIEF per claim was 57% in 1990 and was 61% by 2004. (WSIB: Study of Locked-In Award Recipients to the OBC: Oct. 28, 2008).

The reasons for the increase in SIEF relief could be on account of a) more aggressive claims management by employers; b) more generosity on the part of WSIB claims managers; c) fewer traumatic accidents, and a corresponding increase of claims being prolonged by pre-existing conditions; d) some or all of the above.

This article will look at how Second Injury Fund relief has developed into the fine art of experience rating escape, and why it has become the most important element of the Board's current experience rating schemes.

Is it the **Objective Severity of the Pre-existing Condition that must be considered, or the Role of the Pre-Existing Condition, when determining the "Medical Significance of the Pre-Existing Condition"?**

The greater the medical significance, the more SIEF. The Board Policy reads: "The medical significance of a condition is assessed in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person". For decades, the Board's Medical Consultants (MCs) have in fact determined the amount of SIEF. Board Adjudicators never gave out SIEF before checking with the MCs, and the doctors were trained to consider whether the pre-existing condition was objectively **minor, moderate or major**. For instance, the worker may have strained his/her back tying a shoelace and never worked again, but if x-rays of the back showed **minor** degenerative changes, only 50% SIEF relief was awarded.

A good example of this line of jurisprudence is illustrated in WSIAT Decision 1877/07.

To appeal SIEF decisions, generally one would have to corral enough sympathy from the Appeals Resolution Officer (ARO), so that the ARO would agree that for some extraneous reason, such as the additional pre-existing condition of the worker's obesity (see below), or a CT scan showing bulging discs (which are really diagnostically insignificant), the Board doctor at fist instance made a slight error.

More recently there have been a string of ARO and Appeal Tribunal (WSIAT) Decisions that have considered the "role" of the pre-existing disability and not just its objective seriousness.

In the previously mentioned WSIAT Decision 1877/07, the Panel stated that since the injury was only supposed to produce a week or two of disability, but in fact produced a permanent disability, the pre-existing condition must have been **"major"**.

WSIAT Decision 2729 approved an ARO decision that gave the employer **90%** SIEF on account of the worker's irritable bowel syndrome and bipolar disorder which played a **"major role"** in making the worker liable to develop a disability of greater severity than a normal person. In this case the worker contacted a bacterial infection while working as a nurse.

WSIAT Decision 1582/07 followed the advice of Dr. Malcolm, orthopaedic surgeon, that while the condition in the worker's knee was only degenerative, the ongoing problems were essentially the result of the worker's pre-existing condition, rather than the work injury which was a MCL strain. This pre-existing condition was considered by the WSIAT to be of **"major significance"**, and thus resulted in 90% SIEF.

Approaching 100% Second Injury and Enhancement Fund Relief:

In 30 years of representing employer clients, I have seen **100%** SIEF granted on only 6 occasions. Most recently, I observed it in a case where a worker had developed repetitive strain syndrome while working with a previous employer, but the claim was charged to my employer client because it was the last employer to employ the worker in a job at risk for repetitive strain syndrome (F. & B. Precedent Book 1619). The granting of this genre of relief is not stated or implied in Board Policy, but was awarded more as a grant of **"equity"**, such concept will be discussed later in this article.

A second recent case involved a worker who lost consciousness on account of an alcohol induced seizure and thereafter fell from a roof. While the Board's official SIEF policy is to deny SIEF when alcohol plays a role in the accident, the Board's policy was waived by the ARO in the circumstances that the worker's employment duties played no role in causing the worker to lose consciousness, and that the SIEF policy does allow for **100%** relief when an accident is caused by a seizure.

The policy concerning **100%** SIEF brings two questions to the fore. The first is, if the pre-existing condition caused the accident in the first place, why did the WSIB pay the claim? The second is, what does it take to convince the Board that the pre-existing condition was the cause of the accident?

WSIAT Decision 526/08 answers these questions, and provides a surprise ending which I had not observed over the past 32 years. The worker who had previously had 2 failed knee surgeries stepped on a half inch air hose causing his knee to give out once again. The employer argued the failed knee caused the injury not the air hose. The Tribunal Vice Chair, Smith, who is a senior and well respected Vice Chair, made the following points:

a) Unless the events at work were themselves a significant cause of the accident, over and above the pre-existing condition, (like falling off a roof, whereby being on the roof plays a significant role in the result of the event), initial entitlement would not be granted,

b) The pre-existing condition must trigger or precipitate the event itself. So if the worker lost consciousness from epilepsy and tripped over a half inch air hose there could be **100%** SIEF. If the worker trips over an air hose and then his knee gives out, there is no **100%** SIEF.

c) The WSIB can award **95%** relief, which was applied in this decision. The usual markers of **25, 50, 75**, and **90 per cent** in the Board Policy are guide posts, but in a case of an unusually severe pre-existing condition, **95%** can be applied.

Minor, Moderate or Major Pre-existing Condition, What's the Difference?

The Board's Policy regarding whether the pre-existing condition is **"minor, moderate or major"** directs one to look at the extent it makes the worker liable to develop a disability of greater severity, but

does not give differentiated guideposts between minor and major. WSIAT Decisions 1136/04 and 2380/08 state that it is a good idea to use the definitions of the **severity** of accidents to determine the **severity** of the pre-existing conditions. This makes little sense. For instance, is it expected that **minor** degenerative disc disease (ddd) will cause a non-disabling or **minor** disabling in the future, which is the definition taken from a "**minor injury**"? There's no science to give an answer to this question. Some people have **major** degenerative changes in their back and are pain free throughout their lives, and others have **minor** changes and are crippled.

However, the logic contained in WSIAT Decisions 1136/04 and 2380/08 was not followed in WSIAT Decision 677/08 reflecting that WSIAT Vice-Chairs are not bound by precedent when rendering decisions. In WSIAT Decision 159/09 two "moderate" pre-existing conditions combined, equaled a "major" pre-existing condition.

Out of the Ordinary SIEF:

Obesity:

This is considered a pre-existing condition and can draw SIEF (WSIAT Decision 677/08).

Smoking:

This is **not** considered a pre-existing condition (WSIAT Decision 464/09). Tobacco addiction is certainly a medical condition, and it is a cause of death and illness. This decision should be challenged, up to and including the *Supreme Court of Ontario*. WSIAT Decision 1730/07 called smoking a "behaviour" not a condition, even though it clearly delayed the injury's healing time. Last time I checked, heroin addiction is a behaviour, but the Diagnostic and Statistical Manual (DSM) treats it as a "condition".

WSIAT Decision 1699/02 rejected smoking as a pre-existing condition on the grounds it affected the length of time for healing and was thus an "after injury" condition. This reasoning is obviously faulty. Asymptomatic degenerative disc disease becoming symptomatic, is an "after injury" condition as well, but it attracts SIEF.

Depression and Psychological Traits Prolonging a Back Disability:

WSIAT Decision 1021/08 denotes the first time I have observed SIEF given for a pre-existing psychological condition when the disability itself is not psychological, but organic. Both the WSIAT and the Board usually prefer to separate psychological conditions from organic conditions. However, this compartmentalism is: (i) contrary to Board Policy insofar as NEL awards are holistic, encompassing both organic and psychological conditions, and (ii) contrary to common sense. It would be surprising if a depressed person did not suffer a heightened back disability. WSIAT Decision 1021/08 does not address this divide between the organic and the psychological. More importantly, neither does the Board, either in its policy or in its rush to emasculate SIEF. If a worker is a long time pre-accident depressive and has a minor back strain that results in the worker becoming a career invalid, why is the employer charged a $100,000.00 experience rating penalty? Or better still, why is the WSIB paying the worker $400,000.00 in Loss of Earnings benefits resulting in the $100,000.00 penalty to the employer?

Hernias:

The Compensation Board generally does not award SIEF relief for hernias, nor does the WSIAT. This is notwithstanding that fact that 10% of men have a congenital condition putting them at risk for an inguinal hernia. However, WSIAT Decision 1124/08 states that if the Operative Report points out that there was a congenital defect, 50% SIEF will be given.

Repetitive Strain Injuries:

An employer who has 20 workers doing the same job and one develops tendonitis, is likely to say that the severity of the accident is "**minor**" given that the none of the other 19 workers were injured or expected to be injured. In contrast, the WSIB Appeals Branch and the WSIAT in Decision 529/07 state otherwise, postulating that if developing a repetitive strain injury from the type of work done is a "reasonable possibility", then the accident is deemed "**moderate**", resulting in less SIEF relief for the employer. To obtain greater SIEF relief, employers will have to obtain an ergonomic assessment stating that developing a disability from the work is very unlikely. Such was the finding in WSIAT Decision 877/01.

Tendency to Catastrophize:

There are decisions from Appeals Resolution

Officers that have given SIEF for pre-existing personality disorders, but never for personality traits. To the contrary, WSIAT Decision 2391/08 decided that the pre-existing personality trait to catastrophize or exaggerate symptoms, was a major pre-existing **vulnerability**, and awarded **75%** SIEF relief in the face of a **moderate** injury. This Decision is remarkable because it allows SIEF for a pre-existing vulnerability in the absence of a pre-existing condition. WSIAT Decision 2391/08 adopts the reasoning in Decisions 431/89 and 1811/01, wherein prior WSIAT Panels lowered the threshold for SIEF in cases involving non-organic conditions in order to remove any inequity that would result from evidentiary problems, such as proving the worker has a distinct pre-existing psychological condition or a Diagnostic and Statistical Manual Personality Disorder.

"Equity" is the big factor, because again as in Decision 1021/08, noted above, the employer is pleading for experience rating clemency when a small disability becomes a lengthy claim.

In F.& B. Precedent. Book 1309, an ARO granted **90%** relief for "Personality Makeup".

SIEF by Innuendo:

In WSIAT Decision 1046/03, the employer argued that turning one's head while driving a forklift would not cause a healthy disc to herniate, and therefore the worker had pre-existing cervical disease. The Appeals Tribunal rejected this argument because there was no other evidence such as x-rays to illustrate degenerative disc disease. Medically speaking the employer was correct, but legally speaking it's a whole different story. Human spinal discs start to degenerate in the 3rd decade of life. The discs are meant to withstand tremendous compression forces, and turning one's head by definition is not something that is going to rupture a healthy disc.

In fact, most disc herniations occur first thing after getting out of bed in the morning perhaps because of overnight dehydration. But tell me, why does an injured worker receive $500,000.00 in WSIB benefits because his disc herniated at 10:00 AM aboard a forklift and $0.00 at 7:00 AM if the herniation occurred while eating cereal? The converse question is why doesn't every employer with an employee suffering from shoulder tendinitis, meniscus degeneration in the knee, back problems, carpal tunnel syndrome, etc. not receive SIEF relief automatically? These are all degenerative conditions. They may have been exacerbated at work, but how often do you see a twenty year old with any of these conditions, and when do you see a 50 year old without at least one of them?

In the F.& B. Precedent Book, item 1199, a Board doctor determined SIEF should apply where the worker had a **"vulnerability"** to soft tissue strains.

In the F.& B. Precedent Book, item 770, the employer received SIEF for "menopause", and in item 897 for "age" and "hypothyroidism" in females with Carpal Tunnel Syndrome. In F.&B. Precedent Book, item 703, the employer received SIEF due to rotator cuff degeneration consistent with age.

Post-Accident Events:

In WSIAT Decision 1751/02, the worker's husband died after the accident, further exacerbating her compensable psychiatric disability. SIEF was refused on the basis it was a Post-Accident Event. What if the worker's husband was sick prior to the accident but didn't die until after? What if the worker's pre-existing psychiatric problems themselves were made worse later by the death, so that while the pre-existing condition was minor before the accident, the pre-existing condition became major with the death, sort of a "more liable"/ "role" test adopted above.

The WSIB has given SIEF in the case of a back claim and pregnancy (F.& B. Precedent Book, item 66). What if the worker becomes pregnant after the accident, is there then no SIEF?

The worker's husband dies or the worker becomes pregnant, and the employer has to pay even more penalties, does this make sense? If you consider that in 1970, the Workers' Compensation system in Ontario was an accident insurance scheme; that by 1990 it became a worker disability scheme; and that by 2005 it morphed again into the world's most generous welfare scheme; the above scenario makes perfect sense.

Morneau Sobeco Report:

Experience Rating came under attack by the trade unions and the *Toronto Star* in 2008. The *Star* was obsessed that employers who experienced a fatality could still get a NEER Rebate. The trade unions don't want to see employers showing up for hearings and disputing benefits. When is the last time an employer showed up at Employment Insurance

Referee Hearing, where there is no experience rating: NEVER. So the Board hired a group of actuaries and management consultants, Morneau Sobeco to do a study. This company's significant workers' compensation experience (among some other small projects) was working in the North West Territories which has a workers' compensation organization smaller than the Ontario WSIB's Sudbury office.

Morneau Sobeco dislikes SIEF. They state it encourages employers to spend more time fighting for SIEF than on health and safety projects. Morneau Sobeco also point out that some employers get rebates of $1 million, and construction companies get more SIEF than manufacturing. But Morneau Sobeco presents not a drop of statistical evidence that correlates more SIEF relief to less health and safety, or that employers in rebate, or construction employers are more or less diligent in regards to health and safety. In fact, there are several studies that link experience rating programs with increased attention to health and safety. SIEF is the equitable relation within experience rating, by compensating for the Board's proclivity to pay for pre-existing conditions masquerading as work related disabilities.

The real bug-a-boo for Morneau Sobeco is the knowledge that the assessment rate income the Board receives from employers is **insufficient** to cover annual WSIB benefit awards. What better methods of raising income can there be than taxing employers who have the highest claim costs regardless of cause, and cancelling all rebates.

Conclusion:

As was discussed in the lead article in this newsletter, the Workplace and Safety and Insurance Board is a large insurance edifice resting on rotten timbers. While it may make sense to pay a worker for 3 months following a back strain incurred picking up a 10 pound pipe, any money paid after 3 months has little to do with the injury and much to do with age, underlying degenerative conditions; family life; job satisfaction; culture; education; upbringing; etc. So even if the employer has mechanized lifts for heavy weights; monthly seminars on proper lifting techniques, and all other manner of safety devices and culture, why do they still have to pay an experience rating penalty for the chronic back pain invalid? They don't, because SIEF may save them, but EMPLOYERS BEWARE, if the foundations are rotten, the building is going to crumble, and the first wall to give way may well be experience rating.

No corresponding decrease of benefits.

WSIB ANNOUNCES CASH GRAB RATE INCREASE FROM EMPLOYERS

Last week the WSIB raised the rates for 36,000 employers in 49 rate groups. The Board has disclosed no information of the increased revenue from this rate increase. Our estimate is $14.2 million based on the average increase spread over 36,000 employers.

According to the Workplace and Safety Insurance Board, Industry Rate Groups receiving increases are being targeted for poor safety and high claim frequency. But the Board has given no formula as to how rates were chosen, or how the varying percentages of increase were arrived at. Preliminary information is that the increase is based solely on accident costs, related to the length of the claim. Many of the sectors being targeted such as logging, demolition, and auto are suffering layoffs and cannot accommodate injured workers on specially designed "make work projects", thus increasing the cost of the claims.

There was no warning of the rate increase in Chairman Mahoney's speech given to the Economic Club of Canada just 8 weeks ago, where he pledged to hold rates steady. The WSIB may be finally aware of the statistics contained in the first article of this newsletter, pointing to gigantic financial problems. But why are employers the only constituency having to bear the costs of Ontario's workers' compensation legislation, so generous, that no other jurisdiction in the world could afford it? In fact, the Minister recently announced an intent to raise workers' benefits even higher, through a fourth cost of living increase in 2010. The maximum insurable earnings have increased to $77,600 from $74,600!

The Board states employers can recover the rate increase by having safe records through experience rating. However, for many employers no matter how much better they do in terms of accident costs in 2010, they will not recapture the increase because either the NEER plan provides too small a rebate to small firms, or many large firms are already at or near the maximum rebate in previous years.

The WSIB has announced no consultation process for a discussion of the increased rates. The final rates will be passed by the Board of Directors in September, that's six weeks between the announcement and a done deal. In 2007, employers were consulted for 4 months prior to the final settlement, and in 2006 employers were given 3 months of discussion. In July 2005, employers were promised full discussions would be held on rates: "the chief actuary, chief financial officer and executive committee review the funding scenarios... and a communication plan before they are submitted to the Board of Directors for approval...after the preliminary set of premium rates is approved by the Board of Directors, WSIB management uses these rates to discuss and solicit feedback from employers and employer stakeholders". This promise has now been broken. In November 1998, the Minister of Labour signed a memorandum of undertaking that the financial health of the WSIB would be discussed jointly with employers before rate increases would be decided. **Obviously, the Board has, in August 2009, hit the panic button.**

The *Fink & Bornstein* Workers' Compensation is published quarterly by
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