

# The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

April 2, 2004

An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.

6 pages

## *Experience Rating Reform: The Debate* Does Experience Rating Need a Massive Overhaul?

**In January, 2004, after extensive consultation, NEER was revamped**

In the last issue of *The Liversidge e-Letter*, I presented a somewhat academic overview of the theories behind experience rating ["ER"]. While there is little question that ER promotes positive and appropriate return-to-work behaviour, and while ER is intuitively consistent with promoting accident prevention, there is no hard evidence that ER leads to changes in accident prevention behaviour. In this issue, I discuss the wisdom in proceeding with significant ER reform at this time. Readers will recall that it was only in January, 2004 that NEER was revamped and tweaked to be slightly more powerful [See *The Liversidge e-Letter*, September 12, 2003].

**Opponents to massive ER reform: Do not proceed further until clear and convincing evidence establishes the need**

Opponents to massive ER reform argue that the Board should wait until the effects of the 2004 reforms are known, even if that takes a few years. Moreover, it has been suggested that ER reform is not high on the list of employer priorities at this time, and that it would be a more effective allocation of WSIB resources to concentrate on employer education and upgrading of WSIB communication capabilities (such as enhancing website capabilities to allow for more efficient company specific ER reports). In addition, proponents strongly assert that until and unless very specific problems with the current ER programs are identified and recognized as such within the broad employer constituency, the Board should remain focused on maintaining current ER programs to keep it current and viable. In other words, no ER reform should proceed until clear and convincing evidence establishes the need.

**Proponents for immediate ER reform: Scrap NEER and replace it with a more powerful program now**

Proponents for massive ER reform argue that the reform project has been stalled even though many of the core principles were agreed upon by some industry representatives eight years ago. It is argued that ER simply must be made more powerful (i.e., increase both rebates and surcharges) if it is to be an effective motivator. Some suggest that ER should fill the gaps of the deficiencies of the employer classification scheme by allowing for more company specific premiums. In addition, some prefer to move away from a [continued p. 2]

### Registration Notice

*An interactive executive briefing*

**WSI Policy Forum**

**June 16, 2004**

**8:30 AM – 1:00 PM: The Guild Room  
Days Hotel & Conference Centre  
6257 Airport Road [American Drive and  
Airport Road]**

*L.A. Liversidge announces formation of an  
interactive WSI Policy Advisory Committee*

In response to client requests, a workplace safety and insurance policy forum will be held on June 16<sup>th</sup>.

***More than just an information session:***

This will be an interactive executive briefing, and will give clients an up to the minute account of pressing and leading issues.

***Discover, first hand, changes that will impact  
your business***

Clients will be introduced to controversial legislative, legal, policy and procedural matters under active consideration by the WSIB and/or the Government.

***An opportunity to channel your feedback:***

You will have an opportunity to present comment, opinion, and feedback on these leading issues. This feedback will then be channelled, directly or indirectly, to the Board and/or Government.

*See Page 6 for the Registration Form*

*This will be a fairly small group to allow for discussion and  
debate. Space is very limited – Please register early*

## **WSI Policy Forum: *The Issues***

**Experience rating:** A debate raging for some time will set the future direction of experience rating [“ER”]. Some support scrapping NEER and developing a new ER program. Others argue a new program is not necessary – just fix up the current one [see **March 26<sup>th</sup> and April 2<sup>nd</sup> issues of The Liversidge e-Letter**]. Your point of view on this issue is crucial.

**Coverage:** Two years ago, the WSIB released a discussion paper which leaned towards expanding WSIB coverage. I countered that the coverage debate should also include private insurance options [see **The Liversidge e-Letter, June 26, 2002**]. *What is your preference? The status quo? Expanding WSIB coverage? Or, full coverage with private insurance competition for the WSIB?*

**Occupational Disease:** The WSIB established the Occupational Disease Advisory Panel [“ODAP”], a tri-partite (business/labour/WSIB) committee to establish new adjudicative guidelines for disease claims. It was unable to reach a consensus but a WSIB report will likely be released soon. The ETS case (March 8<sup>th</sup> issue) highlights the pitfalls of deciding disease cases without policy. Others argue that policy should not be a prerequisite for entitlement. Hear all sides of this important debate and express your viewpoint. This is the new frontier – today’s policy affects tomorrow’s workplace.

**Early & Safe Return to Work “ESRTW”:** “Suitable employment” was heightened when the current Act was proclaimed in 1998, yet it remains a controversial and uncertain issue. What constitutes suitable employment? What is the effect of worker or employer non-cooperation? The ESRTW of an injured worker may take on numerable twists and turns and can result in extensive litigation. Discuss your experiences and listen to others. *What can the Board do to improve this controversial area of case management and enhance your ability to implement and manage effective ESRTW programs?*

**Constitutional Issues and the WSIB:** Are you ready for WSIB cases becoming Charter challenges? In October, in *Nova Scotia (WCB) v. Martin*, [2003] S.C.J. No. 54, the Supreme Court of Canada changed the law with respect to an administrative tribunal’s ability to address constitutional questions. The SCC held that administrative tribunals which have jurisdiction to decide questions of law (which includes both the WSIB and the Appeals Tribunal) are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. *How will this impact you? What discretion does the WSIB have to refuse to address Charter issues?*

**The Administration of the WSIB:** On February 12<sup>th</sup>, the Minister of Labour announced a third party audit on the “efficiency and effectiveness” of WSIB administrative services to report by the end of May. This, along with the resignation of WSIB Chair Glen Wright, ensures that the winds of change will be blowing long and hard. Discover the findings and impacts of the auditor. *What are your priorities?*

**Compensation for stress:** The *Martin* case makes it almost certain that the stress provisions of the Act will not survive a constitutional challenge. We again will see a policy void on a crucial issue – the worse possible scenario. *Should the WSIB take the lead and develop a new stress policy now?*

[from page 1] “retrospective model” towards a “prospective model”, so that companies pay for their record, up front.

### **LAL supports the “show me first” approach**

I am in the “show me” camp – ER reform should not move forward until a strong case is made and supported by employers generally. Until that case for reform is made, WSIB resources should be channelled towards better education, outreach, and program maintenance.

### **The downside to proceeding with Phase II ER reform** **Expenditures will be allocated to design and not communications or current program improvement**

If a decision is taken to continue developing a new ER model, resources would be allocated to the new design team, and fewer resources would be available to maintain the present NEER program. Why would the Board maintain a program if it had plans to shelve it within two years? It is no secret that the present ER programs would benefit significantly from enhanced educational tools, including the upgrading of the WSIB website and electronic communications. Employers must still rely on the submission of paper reports every three months, the same communication protocol that was in place in the mid-1980s when NEER was first introduced.

### **The ER target audience is the “informed and rational” employer making self-interested decisions**

As the ER target audience is the “informed and rational” employer making self-interested decisions, up-to-date information and sound program understanding is critical. The most mathematically perfect ER program will be unable to deliver on its core objectives if employers do not understand it, or if information intended to drive decision making is not current. At present, NEER is well understood, at least conceptually, within the employer community. Most employers understand how the program works and will rationally adjust their behaviour to promote their financial better interests. A new ER program will return all employers to “ground zero” understanding, at least transitionally, thereby temporarily losing the motivational benefits of ER.

### **The link between ER and accident prevention is not established**

As was clearly set out in the March 26<sup>th</sup> issue of **The Liversidge e-Letter**, notwithstanding academic support for the theory, at best, the jury is clearly “out” on whether or not there is a motivational link between ER and accident prevention. The program has been built to date on an intuitive acceptance of a relationship between financial incentives and improved health and safety. The WSIB’s “purpose statement” for ER links the program to prevention:

#### **WSIB ER Purpose Statement:**

To provide a fair and equitable ER plan that will encourage employers to:

- Put in place measures that will reduce and eventually eliminate all workplace injuries;
- Facilitate early and safe return to work; and
- Encourage the adoption of appropriate disability management practices.

### **Institute for Work & Health Study: No established link between ER and prevention**

Yet, the following conclusions were set out in a paper recently released by the Institute for Work and Health [the "Institute"] entitled: **A Systemic Review of the Prevention Incentives of Insurance and Regulatory Mechanisms for Occupational Health and Safety, Working Paper #213 [the "ER Working Paper"]**. The ER Working Paper, based on a review of all leading ER literature, concluded *there is no evidence to support a link between experience rating and accident prevention behaviour* and that further study was required. The report noted:

- There is only moderate evidence that the degree of experience rating reduces the frequency and/or severity of injuries (p. 3).
- Research needs to be conducted before definitive conclusions can be drawn about the effectiveness of workers' compensation experience rating programs on reducing the frequency and severity of work-related injuries and illnesses (p. 3).
- Experience rating is a key policy lever of workers' compensation insurance providers, yet the few studies that investigate this feature of either exploited natural experiments, which have little to say about varying degrees of experience rating, or use crude proxies for the degree of experience rating (p. 27).
- When so little evidence rests on precise measurements on the degree of experience rating, no robust conclusions can be drawn about its effectiveness (p. 27).
- Specific aspects of experience rating design merit investigation including the question of prospective versus retrospective programs (p. 27).
- Few studies have considered both workers' compensation and occupational health and safety regulation features simultaneously (p. 30).
- There is a need for a standardized set of reporting conventions to be adopted by researchers and publishers in this field of inquiry (p. 31).
- Confidence in the effectiveness of experience rating appears premature (p. 3).

The release of the Institute's report renders WSIB ER programs vulnerable to criticism. Several groups, notably organized labour, have been consistently opposed to ER as a matter of principle. Labour argues, and not without some merit [see **The Liversidge e-Letter, March 26, 2004 issue**], that the costs of occupational injury and disease cannot and should not be measured solely in financial terms. It is argued that financial levers are an inadequate tool through which to secure a higher standard of prevention behaviour. The preferred model, it has been argued, is a regulatory enforcement regime, or at the least, a hybrid of ER and regulated compliance measures.

If aggressive reform is built solely on an unstable foundation of an intuitive relationship between ER and prevention, a large and needless risk is likely created. It is highly probable that the WSIB, or the Institute directly, will be studying the accident prevention outcomes of ER in the future. In the event that such a study credibly establishes that there is no significant link between ER and accident prevention, the

foundation of the reforms and the integrity of ER overall may be shaken.

This would certainly buttress any campaign against ER as a program. The Phase II ER reform initiatives will raise the profile of ER and make the program vulnerable to such a policy attack, which if successful, could very well undermine the well recognized and positive return to work motivational features of ER. It makes more sense to focus on those features of ER which are proven (return to work), and begin to realign the weighting of the priority of ER from prevention towards RTW.

### **The larger employer community has not identified ER as a core issue**

Neither the Phase I or Phase II reform initiatives have been in response to a groundswell of business concern. With the exception of the introduction of MAPP (Merit Adjusted Premium Program) introduced January 1, 1998 to address the concerns of small business, ER reform has been the exclusive interest of a small select group of employers or associations.

In the late-1990s the Board commenced planning for a massive overhaul of ER (which is now the Phase II reforms). This initiative suffered several false starts involving the turnover of senior WSIB actuarial resources and the development and abandonment of several distinct reform plans. It is instructive to review the recent history on the development of the "new ER" model:

**March 2000:** the WSIB administration engaged in an initial and limited consultation geared towards ER reform;

**November, 2000:** Board staff obtained approval from the WSIB Board of Directors ["BOD"] to develop a prototype;

**December 2000 to September 2001:** a "new ER model" was developed;

**September 2001:** the WSIB hired a new Actuary. The "new ER model" was scrapped;

**October 2001:** the Board started development of a "new new ER model";

**February 2002:** the "new WSIB Actuary" resigned;

**February 2002:** the Board retained the services of an old WSIB Actuary ("new old Actuary") to continue with the ER reform project;

**March 2002:** the WSIB BOD approved limited consultation on the "new new ER model", with an expectation that the Board would move into wider consultation by mid-2002;

This is as far as that plan progressed, even though initially, the Board expected to obtain WSIB BOD approval by March 2003 for the "new new ER model", with implementation scheduled for January 1, 2004. The first interim reports were expected to be released mid-2004, and the first rebates/surcharges were to be issued September, 2005.

The Board experienced difficulty developing a working model that would be able to provide essential impact reports. As the Board was running out of time, WSIB officials changed gears and focused instead on realigning NEER and established a two phase reform plan [Phase I: adjustment to NEER; Phase

II: Scrap NEER and implement a new ER]. The Phase I reforms were successfully launched January 1, 2004.

**NEER employers have not identified serious systemic or program deficiencies**

However, it remains to be the case that the 12 -15,000<sup>+</sup> employers presently enrolled in NEER, have not collectively identified serious design deficiencies in the current program. Most employer trade associations acknowledge that ER reform is not a pressing issue within their respective memberships. Having said that, most of those same associations remain committed to continual improvement of the ER program.

However, continual improvement and the development and implementation of a new program are very different concepts.

**The impacts of the “new ER” are unknown – it may or may not be beneficial**

In addition, the impacts of a new ER are totally unknown, and will not be known for some time, likely not until the program is near the final stages of design, or conceivably not until post-implementation. Therefore, the implications of a policy decision to proceed to Phase II ER reform now will not be known for at least 1 to 2 years from this point. As ER reform expenditures increase, the institutional capacity for the WSIB administration to “pull the plug” on Phase II reforms becomes less likely for fear of having the expenditures consumed to that point being viewed as a “wasted expenditure”. It is, in my view, a reasonable proposition to expect that the case for reform be made *before* expenditures are made.

**Broad employer “buy-in” should be obtained before the decision to proceed with Phase II is made or there may not be a sense of business partnership**

In the event that a new program is unveiled to the general business community for consultation, and the results are not beneficial or anticipated to have a net benefit, change is unlikely to obtain broad based employer support. This increases the risk for formal opposition to ER reforms which will place the overall ER program in jeopardy and will diminish WSIB credibility.

**In the mid-1980s ER represented a dynamic Board/business policy development partnership**

ER began in the mid-1980s with a focus on employer based interests and represented a dynamic partnership between business and the WSIB. At its initial formation, choice was a core and key element to ER, and participants voluntarily opted in (until 1992 when the program was mandatory for all Schedule 1 employers, except construction). The voluntary entrance component to ER translated into broad based employer support for the ER principles. A sense of partnership and overall ownership prevailed. Employers viewed this as “their program”.

Absent that quality, ER program reform initiatives, which adjust individual employer WSIB taxation levels, create a risk that program redesign will proceed without employer support, and may lead to active protest against the new design. In the mid-1980s, when ER was in its infancy, this is precisely what

occurred. The (then named) WCB, after launching ER with much employer involvement, revamped the program without first securing business support for the changes. A grass-roots “firestorm of protest” immediately ignited which almost finished ER off before it started. It was not until the Board recanted and revoked the changes, and implemented acceptable transition features that business support again grew.

**Experience rating can and should be the archetypical example of public policy development**

When done right, ER reform initiatives allows the WSIB to perform at its best, and can be (and has been), the archetypical example of public policy development and consultation.

When done incorrectly, ER reform is viewed suspiciously, and seen as the imposition of unwanted and unneeded taxation risks.

**ER change must proceed cautiously**

The very fact that minor adjustments to the current NEER program took more than a year of discussion within the Experience Rating Working Group, and were followed by an extensive consultation process, is a signal of the sensitivity associated with ER design and implementation. A massive overhaul without the prior support of Ontario business creates a high risk of lack of acceptance.

**Prospective Rating may be a slippery slope**

The cornerstone and foundation of the Phase II reforms is “prospective rating”, which sets current premiums for each employer based on past performance. The NEER plan, by contrast, is a retrospective plan. Under NEER, a single accident year is “open” for three reviews. The actual accident costs incurred (plus future reserves) are measured against expected costs. Each year is in effect a self-contained account. One bad year will not “infect” other years.

Prospective rating means that yesterday’s performance will determine tomorrow’s premium rates. Yet, the principle of prospective rating, on its own, has not been endorsed by the broad employer community. Prospective rating may raise legitimate concerns dealing with the classification regime and WSIB accountability. I will explore both concerns.

**Prospective rating diminishes a reliance on employer classification**

With prospective rating, individual employer classification is less critical as each company will be effectively setting its own rate (within established ranges). Therefore, classification disputes and the significant administrative activity to maintain the classification grid will no longer be required. In effect, the need to maintain the employer classification grid will, over time, simply “fade away”.

This will occur despite the high profile and significant policy exercise of the late 1980s and early 1990s [WSIB Revenue Strategy] which affirmed the importance of the classification regime. In fact, that policy development process, involving years of study and consultation, established a greater reliance on classification precision. Readers will recall that strong academic support still remains for employer

classification [see the **March 26<sup>th</sup> issue of The Liversidge e-Letter**].

Even if it is the case that the classification regime is outdated, is no longer effective, has outlived its usefulness, or requires modification and modernization (I do not subscribe to that view – in reality, the WSIB has been very active over the last decade in maintaining the classification grid – new rate groups have been added and others deleted as circumstances warrant), the debate on classification should be addressed as a policy issue *on its own merit*. Policy development must be viewed holistically, with a strong awareness of the influence or impact of one policy towards connected policies.

Responsible policy development cannot occur in a vacuum.

Therefore, while it may be the case that prospective rating is a concept with some merit, this is an issue that must be addressed, in principle, within a broader debate of the employer classification regime.

#### **Prospective rating may diminish WSIB accountability**

One of the few remaining pressure points available to Ontario business to hold the WSIB accountable rests with the requirement of the WSIB Board of Directors to annually approve the premium rates for the upcoming year on an industry-by-industry basis.

With the advent of prospective rating, individual company premium rates will be set more by company performance and less by WSIB policy directly. The WSIB will be less accountable with prospective rating.

#### **Will the Phase II reforms simply be more re-distributive or will Phase II reforms result in a reduction in WSI costs system wide?**

It is generally recognized that those that cost more should pay more, a concept palatable under the general rubric of employer equity. However, a program which simply is more powerful in its rewards and penalties, without reducing the overall system costs, serves little purpose other than to adjust the basic insurance concepts behind the Ontario WSI scheme.

Historically, ER has been promoted as a program which supports prevention and return to work. While it is arguably more equitable, the cost allocation provisions of the program is the tool through which the program achieves its core objects. If it is the case that the primary policy objective of ER is to be focused more on employer equity and less on accident prevention and return to work, that issue must be addressed on its own as a policy principle, before any major reforms to ER are contemplated.

#### **The upside to proceeding with Phase II ER reform**

##### **Reasons for proceeding with ER reform**

The NEER plan has not been well maintained over the last decade or more and notwithstanding the Phase I reforms effective January 1, 2004, the program likely does require additional attention, principally, towards design maintenance.

Therefore, a strong argument presents itself for some ongoing attention to maintain the existing programs. In addition, areas which the WSIB has not as yet effectively addressed would include enhanced educational and electronic capabilities.

## **Proposed “Principles of ER Reform”**

The principles set out below allow for continued improvement to the WSIB ER programs, without scrapping NEER and without too hastily proceeding to a new program before a clear need is established:

**Principle No. 1:** A credible case must be made for each proposed reform initiative based on established need and credible evidence, and that case, when made, must be accepted by employers before the Board proceeds with any reforms;

**Principle No. 2:** The WSIB is expected and encouraged to devote sufficient resources to experience rating maintenance to ensure that experience rating remains relevant and current. Such initiatives would include, but not necessarily be limited to, establishing or refining reserve, overhead and expected cost factors, but would not include features with policy or design implications, such as, but not necessarily limited to, claim limits, firm limits, and/or rating factors;

**Principle No. 3:** The WSIB should study the relationship between experience rating and accident prevention to ensure that a positive link exists before proceeding with significant experience rating changes. Concurrently, the WSIB should investigate the relationship between experience rating and positive return to work initiatives;

**Principle No. 4:** Potential refinements to the existing experience rating plans should be reviewed, investigated, assessed and consulted upon, prior to considering developing a new experience rating program;

**Principle No. 5:** A new experience rating program should only be considered when, and if, the existing experience rating programs are shown to be, and recognized to be by the broad based employer community, in need of replacement.

# *Workplace Safety & Insurance*

## *Executive Policy Briefing*

**L.A. Liversidge presents an interactive executive overview of contemporary WSI policy issues. The winds of change are blowing. WSI is again on the policy front burner. *Are you ready?***

**June 16, 2004: 8:30 am – 1:00 pm**

**Days Hotel and Conference Centre: The Guild Room  
6257 Airport Road [American Drive and Airport Road]**

A new government is in place. The executive levels of the WSIB are being shaken up. Longstanding policy issues (stress, occupational disease, experience rating, coverage, administrative costs) are returning in full force, and new ones (Charter challenges, WSIB structure) are emerging. WSIB administrative budgets are under scrutiny. Worker demands are on the rise. Employers expect lower premiums. The long-term funding strategy is under scrutiny. Charter challenges may become routine. What happens over the next two years will set the pattern for the next 20. *It is time to become engaged. Are you ready?*

**The *Policy Briefing* will provide you with a senior perspective on today's WSI scheme:**

*Carmer Sweica*, Chairman of the Employers' Council of Ontario and past-director of the WSIB Board of Directors, will be introducing the policy forum. The format of the *Policy Briefing* will allow for an exchange of views and a dialogue. Once registered, all participants will receive a survey to provide an opportunity to highlight the areas of most concern to you. The program will be tailored to our client's specific needs.

Each policy issue will comprise a 20 minute segment. A policy paper and policy question will be prepared for each issue. *L.A. Liversidge* will provide a 10 minute briefing, accompanied by a 5 minute Q&A session and a 5 minute discussion period. A policy question will then be posed to the delegation which will provide feedback.

**This will be an executive style briefing.**

**The pace - fast. The focus - intense. The information - essential.**

**Register NOW. Space is very limited. E-mail, Fax or mail your registration.**

**Please register me for the June 16, 2004 *Policy Briefing* on WSI Issues**

<b>Company:</b> _____	
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<b>Registration Fee</b> [note discount for same firm registrations] First Company Participant at \$125 = \$125 Subsequent Participants: ____ at \$55 each _____ Total Registration fees: _____ Plus 7% GST: _____ Total Amount: _____	<b>Name of First Participant:</b> 1. _____ <b>Names of Subsequent Participants:</b> 2. _____ 3. _____ 4. _____