The Liversidge *e*-Letter

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

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Do WSIB interim adjustments to experience rating make policy sense?

WSIB trying to do the right thing, but . . . . .

Last week I said WSIB experience rating changes may not stand up to legal scrutiny
Today I examine whether they make policy sense

In the April 9th issue of **The Liversidge *e*-Letter**, I suggested that "*rational insurance concepts were steamrolled by a well-played media campaign.*" On April 14th I looked closer at spin-offs from this story, suggesting that the story is continuing to morph. On April 16th I introduced the notion that the Workplace Safety & Insurance Board's ["WSIB" or "Board"] new experience rating ["ER"] "policy" may not stand up to legal scrutiny. Today I will be examining whether the Board's interim "solution" makes policy sense. *My conclusion?* There is a better way.

WSIB concerned story is fuelled by "theatrics"

On April 16, the ***Daily Commercial News*** reported that WSIB Chair Mahoney says that this story has been fuelled by "*theatrics more than anything else and it was politics"*. I tend to agree. I also agree with Mr. Mahoney's comments to the ***News*** that the Board did not "*generate the media (attention)"*. But it may not be entirely off beam to observe a certain thespian quality in the Board's approach as well.

The Board is trying to do the right thing

While I am of the firm view that this entire affair could have been handled better, I have no question that from the Board's Chair on down, there is one over-arching goal being sought – *to make Ontario workplaces safer*. I have commented on WSIB Chair Mahoney's personal commitment to worker safety at length in the past describing it as his personal "mission".

While I rarely mention by name (other than the Chair's) other WSIB officials in **The Liversidge *e*-Letter**, the recently ensconced **WSIB Chief Prevention Officer**, Mr. Tom Beegan, is as driven and committed a public servant as one could find to change the culture of Ontario workplaces in a positive way. And from my few contacts with Mr. Beegan, it becomes clear that this is what he seeks to do. Ontarians can expect changes from the Mahoney/Beegan "prevention tag team".

All this is mentioned as the **Chief Prevention Officer** undoubtedly will be charged with the task of assessing the efficacy of the Board's current ER programs. This actually brings several benefits.

First, the focus to injury prevention and early and safe return to work ["ESRTW"] will be front and center.

Second, Mr. Beegan's fingerprints are nowhere to be found on the Board's ER file. He just hasn't been there long enough. Even though the NEER plan underwent several reviews and adjustments over the past few years, all of these have pre-dated Mr. Beegan's arrival. In other words, this review is able to commence unencumbered by past design features.

Third, this also brings a high standard of accountability into the picture. Whatever comes out in the end, better or worse, this administration is the undeniable author. No more surprises. No passing the buck.

The Board had no choice but to review experience rating

With the media heat this story generated, it would have been a complete abdication of the Board's responsibilities not to open the program up for a full and honest review. To do otherwise would show disregard for what may be legitimate public criticisms, explainable or not. I would have preferred to see the Board more firmly stand behind its own program and not add to the chorus of critics, but announcing a review was the right thing to do.

No one can argue with a review – but it must be fair

What is a genuine worry is whether the review will be needlessly fast-tracked. A proper and fair review will take time. ***If the process and/or result is unfair, employers as a group will be outraged.*** The Board's institutional memory may have faded, but this has happened in the past. Clumsy and unfair changes to ER in the 1980s sparked a firestorm of employer protest that left the Board reeling. The Board scrambled to make good, but employer confidence waned.

Worse are legitimate worries that the results may at least be partially preordained. Comments from the Minister of Labour, the Premier and even the Board's Chair that changes *will* be forthcoming are disconcerting, and historically

foreign to ER program design. I continue to find this troubling, but hopefully they can be overcome with a fair and open process. We shall see. The Board is unlikely to squander *more* goodwill capital on a flawed process.

The Board was mistaken to kick-off this process with purely reactionary decisions

While a review is now needed, once the Board started making immediate and reactionary decisions, as it did in this case, the foundation of that review was weakened right at the outset. The problem started with the release of the one page March 10, 2008 announcement, "***Important Information about Your Experience Rating Program***" [the "Announcement"] announcing that effective immediately where "*a fatality has occurred it is inappropriate to reward an employer who is participating in a prevention incentive program.*" **This reactionary statement was ill-considered.** As bad, by labelling its own policies in the media as "*nonsense*" the Board was effectively throwing gasoline on its own burning house.

ER is both complex and controversial. It always has been. But lost in this "debate" is the indisputable fact that ER works, a point I will relentlessly continue to make. In fact, as I have noted in past issues of **The Liversidge *e*-Letter** (and as I pointed out to the **Standing Committee on Government Agencies** last year), a 2005 independent study by the **Institute for Work and Health** concluded: "*Our research indicates that (experience rating) functions well, encourages prevention and contributes to positive workplace health and safety practices"*.

Important facts supporting ER so far have not surfaced. The Board can add a lot to the discussion with an unqualified declaration that ER works. Hidden so far for instance, is that for 2006, one in four Ontario employers under this program were surcharged $169 million, with the largest firms seeing average surcharges of $319,000, outpacing the average rebate by a margin of 2.4 to 1 (the average rebate for large firms was $135,370).

These type of facts, which tend to show that the ER program *is* balanced, were not mentioned in the recent media "*exposé*", nor were they introduced by the Board. *They should have been*. Stakeholders should be able to expect that the Board will vigorously come to the defence of its own programs. *It is about time the Board does just that.*

There is a better way

Since it seems that ER program integrity is measured of late more in political than insurance terms, essential to any new design are features which deflate the political air from this balloon. I was convinced several years ago that *positive* adjustments can be made to ER. Recently, I said this:

> Here is a better way, which preserves the core elements of ER, demands perpetual incremental improvement, all the while addressing the program's shortcomings:
>
> ***In <u>any</u> case* (not just fatalities) where there is either a serious injury *or* a safety prosecution, the Board <u>will</u> initiate a thorough "*best practices*" audit of that firm before issuing *any* rebate. The Board will grant an ER rebate for that year *or any future year,* <u>only</u> if there is demonstrated change and a clear renewed commitment to worker safety by the firm. The Board will also use this process to allow surcharged employers to recoup surcharges.**
>
> This approach takes the hysteria out of the debate, <u>demands</u> improvement, and compliments the Board's highly touted ***Road to Zero*** campaign. I encourage the Board, employers and workers to get behind this new way, this better way, and make Ontario a safer place to work.

How my proposal is distinguished from the Board's recent message: *ER is about change – not punishment*

One central element has been lost in this debate. *ER is about change*. It is not about rewarding or punishing. It is not about balancing the books. **It is an insurance concept that at its core is designed to inspire employers to do better no matter how well *or how poorly* they are doing.** I will be returning to this suggestion in future issues.

Instead of enhancing incentives to change, the Board has yanked those incentives in the workplaces that arguably need them the most. The Board's first and, I suggest poorly considered reaction, adjusts the ER policy focus by introducing the concept of employer culpability.

A commentary on the concept of "*responsible employer*"

The Board announced "*effective immediately (March 10), if a company is responsible for a workplace fatality, they won't be eligible for a rebate from the WSIB that year*". This swift response, I imagine, was intended to lay claim to decisive action. Instead, I consider it rash and ill-conceived.

It is clear that "responsible" now means something more than in an insurance context

While it is clear that the Board is not too certain at this point what "responsible" means, whatever it means, the definition includes new concepts. Previously under NEER, employers were held to account only for costs arising from a workplace incident (in construction's CAD-7 there was a frequency factor as well).

Up until now, the idea of employer or worker culpability has not been at all relevant

Deliberately and wisely left out of ER design has been any notion of culpability – the employer's or the worker's. To me that made perfect design sense.

The Board may lament opening up this *Pandora's box*

In one stroke that is all changed. The Board's new policy stance incorporates concepts of employer culpability, as in blameworthiness, into the ER scheme. This is brand new territory that may well open a **Pandora's box** the Board may one day lament.

To ensure the discussion which follows is fully understood, let me be clear - employer culpability is now a relevant consideration *only* with respect to employer ER accountability and rightly remains irrelevant with respect to worker entitlement questions.

The idea of employer culpability in ER design uncovers a snake-pit of complexity

The idea of employer culpability in an ER context uncovers a snake pit of complexity and conflicting concepts.

Pardon the pun, but it is no accident such concepts have been deliberately absent from WSIB ER design. This marks a massive and dramatic paradigm shift in ER design.

Prior to the Board's recent announcements, ER design paralleled entitlement design. Culpability was a totally irrelevant consideration. While it remains irrelevant for entitlement questions, it now forms a central feature in the Board's new approach to defining "responsible".

The Board's explanations, as limited as they are, seem to boil down to this: ***It is wrong for the Board to "reward" employers through ER rebates when they are "responsible" for workers' deaths***. Public relations-wise this may defuse some of the recent media controversies, but it sparks more compelling questions. *In just what direction is WSIB ER policy heading?*

Why is the idea of employer culpability limited to fatal injuries?

Once the Board crosses the "culpability" line, the door is opened for other legitimate questions. The first is why this new design feature is limited to fatal injuries. Consider these examples.

Example 1: A worker is tragically killed in the workplace. The employer is "responsible" but not negligent. Recall the "ABC Company" in the April 16 issue of **The Liversidge *e*-Letter**:

> Company ABC is a large corporation. It is assessed under NEER. ABC has a good OH&S record and corresponding WSIB experience rating record. Moreover, ABC has a successful early and safe return to work ["ESRTW"] program in place and gets injured workers back into the workplace as soon as is practicable.
>
> For "Accident Years" 2005, 2006 and 2007 **ABC has earned a large combined rebate of $2.75 million** (ABC pays about $4.0 million in premiums to the WSIB every year). Those rebates are calculated at the end of the 3rd quarter 2008.
>
> On June 1, 2008 an ABC employee in the course of his employment was tragically killed in a single motor vehicle accident.

As a result of this workplace fatality, the employer has its otherwise earned $2.75 million ER rebate withdrawn.

Example 2: Now, slightly change the facts.

> On June 1, 2008 an ABC employee in the course of his employment was tragically crushed and is rendered quadriplegic, facing the rest of his life in a wheelchair. Investigation shows that the employer was negligent in the cause of the injury and was charged and convicted under the *Occupational Health & Safety Act*.

Even though the injuries are catastrophic and the employer is negligent in the cause of the accident, the employer in this example is still eligible for an otherwise earned $2.75 million ER rebate.

In the first example, ABC loses a multi-million dollar rebate even though it was responsible for, but not negligent, in the cause of the tragic fatal accident. *In the second example*, which quite easily could have resulted in death but did not, the result is no less tragic. Yet the WSIB treatment is very different. *This makes no policy sense*.

Perhaps the Board will address this simply by importing the concepts quickly cobbled together for the fatal injury to other serious injuries. In fact, I would be less than surprised if the Board did just that.

On April 7, in the ***Toronto Star***, WSIB Chair Mahoney is quoted as saying, "*Are you telling me that we should continue to pay bonuses to companies that are responsible for killing workers? That is ridiculous*."

Is it any less ridiculous for serious injuries?

If it is "ridiculous" to give ER rebates to employers "responsible" for fatal injuries, is it any less ridiculous to give those same rebates to employers "responsible" for putting workers into wheelchairs?

And once that question is settled, what about employers "responsible" for workplace amputations?

And then those "responsible" for crushing injuries?

And, once that avenue is traversed, why should any employer "responsible" for any serious injury receive rebates? Why not for *any injury* for that matter?

But why stop there? Why not the same treatment for all unsafe practices?

But, why stop there? What about near misses? Should not any unsafe practice that has not yet resulted in serious injury be enough to cancel out any otherwise earned rebate? If an employer *has not yet* been "responsible" for any serious injury or workplace death, but is "written up" by the Ministry of Labour, why should that employer still be eligible for an ER rebate? *All good questions consistent with the Board's new template.* A Pandora's box indeed.

And what of worker negligence?

But, once culpability flows into the equation, the Board must face the next glaring question, such as: *Why should WSIB ER programs hold an employer to account when the employer is not culpable in the cause of an injury, but the worker is culpable?* Once this question gets thrown into the mix, the slope starts to get very slippery.

Example 3: Now, consider this example:

> On June 1, 2008 an ABC employee in the course of his employment was tragically killed in a single motor vehicle accident. Alcohol was a significant contributing factor to the cause of the MVA. In fact, an open bottle of liquor was found in the worker's vehicle, and the deceased's blood alcohol level was 235 mgs. per ml. of blood, three times the legal limit.

These are the exact facts from an actual case that was allowed by the Appeals Tribunal **[WCAT *Decision No. 349/95* (October 13, 1995)]**, which ruled that even though alcohol was a significant contributing factor to the accident it did not negate the contribution of other workplace factors.

When ER is linked to employer but not worker culpability the system is skewed towards unfairness

So, this type of case triggers several questions. *One: is the fatality compensable?* Yes. *Two, is the employer "responsible"?* In an insurance context, absolutely. In fact, depending on its size, that employer would be liable under ER for a potential cash impact of up to $366,500. *Three: Will the employer lose its otherwise earned rebate (if ABC) of $2.75 million?* Yes, unless the case falls into one of the Board's as yet undisclosed "exceptions".

Alcohol related deaths and injuries are routinely accepted as being compensable

By the way, just in case a reader thinks this is an aberrant result, it is not. I can supply a long list of cases that have granted entitlement even though a worker was intoxicated *and* the intoxication was a significant contributing factor to the accident. **The governing principle is this:** *Intoxication does not in itself bar entitlement unless the degree of intoxication is so severe that it could be said the worker's injury did not arise out of the employment,* a very high standard. This principle has been applied in the following Appeals Tribunal decisions (there are many more):

Decision No. 803/94I2 in which the worker was fired for drinking on the job. While drunk, he was injured. The worker was entitled to benefits and the employer was actually found in breach of the worker's workplace safety and insurance ["WSI"] reemployment rights.

Decision No. 169/87 where an intoxicated worker injured himself when he assaulted a co-worker. The worker was entitled to benefits even though unquestionably intoxicated at the time. The Appeals Tribunal held that the consumption of alcohol did not result in an abandonment of the worker's employment and the fight was "employment related".

Decision No. 635/89 involved injuries arising out of a motor vehicle accident for which the worker was charged and convicted of impaired driving. Entitlement was granted even though the worker had slurred speech and an unsteady gait.

Decision No. 187/95 where entitlement was granted where a worker was killed while driving drunk on the basis that despite the worker's intoxication he still carried out his employment duties.

Decision No. 1075/98 in which a truck driver's claim was allowed even though considerable alcohol was consumed as drinking was not found to be the *sole* cause of the accident.

Decision No. 763/91 where the Appeals Tribunal held that voluntary intoxication does not necessarily take a worker out of the course of employment.

Decision No. 235/98 where injuries sustained when an intoxicated truck driver with a blood alcohol level two times the legal limit rolled his truck when failing to negotiate a turn were deemed compensable.

The questions that now need to be answered

***Question No. 1*:** Since the Board finds it justifiable to remove an otherwise earned rebate in any fatal injury for which the Board considers the employer "responsible", how can the Board justify not applying the same standard for other serious injuries or safety infractions? ***Question No. 2*:** And once that bridge is crossed, how can the Board justify holding employers to account for injuries caused by a worker's negligent and unsafe conduct (as aptly reflected in the alcohol cases cited above)?

If ER is to remain fair to employers, these questions must be addressed

When ER rebates and surcharges were based strictly on the numbers (injury frequency, injury costs or both), none of these questions were relevant. But once concepts of culpability creep into the mix, not only are they pertinent, if ER is to remain fair to employers, they must be addressed.

Maybe the bar should be set higher – employers charged and convicted *of an offence* should lose their rebates

In speaking to *very* senior WSIB officials, it has been suggested to me that what the Board means by "responsible" is this: ***In all cases where an employer has been charged and convicted of a safety offence that employer would be considered "responsible"***.

There are three (at least) problems with this approach. *First,* the "policy" doesn't say anything close to that. *Second*, there may be no relationship between the charge and the workplace fatality – the charge may be addressing a related but distinct infraction. *Third*, it will take years before the court speaks.

Yet, public relations-wise this seems acceptable. **It *sounds* fair**. ***But is it?*** **Far from it.**

There will be many cases where an employer may be charged *and convicted* under the *Occupational Health & Safety Act* ["OH&SA"] and it would still be unfair to claw back an otherwise earned ER rebate. Offences under the OH&SA are varied and diverse, structured to achieve related but distinctive compliance behaviours. The OH&SA is an important regulatory scheme that comes across this dilemma every day: *balancing the need for encouraging high safety standards through deterrence and the aversion to punishing the morally innocent.*

In one case, a worker tragically died due to post-injury complications (an embolism) arising from a traumatic workplace injury. Medically and under the WSIA a "cause and effect" existed. The employer was charged and convicted under the OH&SA for two offences (failing to immediately notify the MOL of a critical injury **[s. 51(1)]** and failure to provide proper instruction **[s. 25(2)a)]**), and was fined $72,000. *The court though held that the death was not a reasonably foreseeable consequence of the violations and thus the employer was not sentenced in relation to the worker's death* **[*R.* v. *North American Food Produce Buyers Ltd.*, 70 W.C.B. (2d) 259, April 13, 2006]**.

Yet, under the Board's recently announced "responsibility" standard, this employer would lose an otherwise accrued ER rebate, perhaps in the millions of dollars. **Thrown out the window is all proportionality and with it any prevailing sense of justice.**

Here in a nutshell is the crux of the problem. Criminal law, occupational safety law and workplace insurance law at one juncture share a common theme – safety promotion. But each regime chases similar objectives very differently and are governed by distinctive legal principles. ***These systems cannot be conjoined***. **Yet, the recent "debate" has been hijacked, knowingly or not, by a melding of related but unique concepts.** In short, the discussion has become confused forcing the Board to "bob and weave" like a punch drunk boxer. Under the smoke screen of that confusion certain political agendas have flourished.

It is time for a clear-headed approach. End the smoke and mirrors. Develop lucid policy. Too much is at stake.