

The Liversidge e-Letter

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

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

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WSIB Releases Draft Policies on Early and Safe Return to Work *The Board Should Re-Group; Re-Think and Re-Draft*

Part I: Commentary on Process *Consultation open to January 26, 2006*

On October 27, 2005, the Workplace Safety & Insurance Board ["WSIB" or "Board"] released draft policies on early and safe return to work ["ESRTW"] purportedly to "improve the understanding of the roles and responsibilities of the various parties" in the RTW process, to "help address the challenges the WSIB and the workplace safety and insurance ["WSI"] system face", and to "demonstrate respect for injured workers and employers to mitigate the significant costs of existing claims" [October 27, 2005 letter to "Stakeholders" from WSIB Chief Corporate Services Officer]. These policies will, for the very first time, allow for the levying of *additional fines* against employers. It is my assessment that these policies will likely result in unfair application to smaller businesses, and contrary to the declared policy expectations, in contrast with present policies, *will actually extend, not reduce*, time on claim. If these policies are to be fairly applied, significant re-writes are required.

I will be addressing the Board's proposed policies in two special issues of **The Liversidge e-Letter**. In this issue I will be addressing the consultation process the Board has chosen to deploy. In the next issue of **The Liversidge e-Letter**, which will be released very early next week, I will be discussing the merits of the proposals themselves.

The bottom line: The Board would be well advised to change both the process and the content of the proposed policies, or risk setting the Ontario WSI system back several years.

The "problem" has not been defined

While I understand the stated objectives, it remains very unclear to me what actual problem these new policies are intended to fix. No illustrative evidence has been provided of *any problem*. I find this passing strange as I am of the view that the current ESRTW process, first codified in the 1998 statute [Bill 99] has been, for the most part, a resounding success. (Continued p. 2)

WSIB ESRTW Proposed Policies *Four Critical Changes Needed*

Critical Change No. 1: Policies must be changed to more fairly apply to small business

- The Board's proposed policies will lead to unfair fines being levied against smaller businesses.
- Presently, there is no distinction between the potential liabilities for small versus large businesses.
- Yet, large sophisticated employers are very different than smaller employers, a distinction that is recognized within the WSIA itself [employers regularly employing less than 20 employees, for example, are not subject to the reemployment provisions of the WSIA].
- Still, the Board expects the same of large and smaller employers.
- I have set out suitable recommendations to remedy this.

Critical Change No. 2: The WSIB adjudication processes must be revamped for fairer case-by-case determinations

- The issuance of a fine requires a different decision-making framework than benefit administration.
- Fair process, ensured by Board policy in benefit administration cases, will be less than perfect for levying fines.
- I have offered recommendations to ensure that these policies are fairly administered.

Critical Change No. 3: WSIB must focus on awareness

- Once operational, these policies will immediately empower Adjudicators to levy penalties against "non-cooperative" employers.
- I have offered a simple transitional recommendation to ensure an increase in employer awareness *before* the Board starts levying fines.

Critical Change No. 4: Dispute resolution must be "fast-tracked"

- ESRTW disputes presently are "fast-tracked" within the system. Disputes pertaining to ESRTW fines, to be fairly administered, must receive similar consideration.
- I have recommended structural adjustments to the WSIB adjudication procedures to ensure that ESRTW fines receive appropriate and due consideration and disputes are quickly settled.

The “problem” has not been defined (Continued) These changes have resulted in a cultural imprint on the modern workplace.

ESRTW is now part of the day-to-day culture of Ontario workplaces. You cannot ask for more than that. The proposed policies risk undoing many of these gains.

The Board has not outlined at all what is deficient in the present policies, and has introduced these new policies with a preamble so vague as to blur any intended effect. Before proceeding further, the Board is well-advised to clearly define the problem. Only then will stakeholders be able to gauge the validity of this policy reform exercise, and if so, whether or not the proposals hit, or miss, the intended mark.

A broader consultation process is needed

In the past, when embarking on such a significant policy change, the WSIB has usually held public meetings, open to a wide constituency. For example, to explain recent changes to experience rating, the Board held a series of meetings across the province open to the public. Even then, those meetings were more about the Board presenting information, which while very important, is arguably of lesser importance than *both* explaining *and* requesting feedback. Effective consultation must facilitate an open exchange of information and ideas.

This time, the Board will not be holding any general public meetings. This is a mistake. Upon request, the Board *may* meet with interested representatives or groups.

Senior WSIB officials are available for discussions

If any reader would benefit from a briefing from the Board, I recommend that you get in touch with **Ms. Slavica Todorovic, WSIB Executive Director, Policy and Research**, or **Helene Guilmet-DeSimone, Manager, Benefits and Revenue Policy Branch** (416-344-4344; 1-800-387-0050, ext. 4344), or by e-mail at helene.guilmet-desimone@wsib.on.ca. But act fast – these policies, if approved as written, will significantly alter the ESRTW landscape. And, not for the better.

I should note that I recently had the opportunity to meet with Ms. Todorovic and Ms. Guilmet-DeSimone, and I found the discussion extremely helpful. In the section immediately following, I present an argument that the Board should significantly alter the consultation method and process adopted. Without committing to a different process, Ms. Todorovic was quite sensitive to the points raised, and I would be surprised if the Board did not alter, in a positive manner, the consultation plan. We shall see.

Any commitment to consult should be encouraged – the goal though should be the best model

Of course, *any* demonstrated WSIB commitment to consult with stakeholders is to be encouraged. The individual consultation process selected will, and ought to be, specific to the issue under consideration. Some issues will be sufficiently considered simply with a notice on an issue accompanied with an invitation to make submissions (what I will call the “abridged track”). Others may require

the release of a draft document, followed by a full public consultation meeting, or a series of meetings, and as circumstances warrant, followed with “feedback” sessions (what I will call the “comprehensive track”). In other words, it is the nature of the issue that should define the process. It would be wasteful for the Board and stakeholders to have a “one size fits all” consultation process regardless of issue.

ESRTW policies should attract a broader process

In this instance, the Board has made a serious error in judgment in designing the consultation process. The Board has released draft policies and for the most part will simply receive written submissions from interested parties. And, that will be it. Board officials will review those submissions, may or may not adjust the draft policies, and then will seek out internal policy approval. Upon request, the Board may brief certain representatives. This process, while perhaps sufficient for another issue, is not nearly enough for an earnest consultation on ESRTW.

ESRTW policies will impact every Ontario workplace

ESRTW policies affect every Ontario workplace. The Board is well advised to, *at a minimum*, hold public forums on the proposed ESRTW policies.

Timeline for commentary too short

The time line for submissions is far too short (submissions must be received by January 26, 2006). An issue of this type will require this amount of time simply for the stakeholder community to *begin* to understand the issue, longer to formulate meaningful and thoughtful submissions, longer still to engage in a peer dialogue to assess position similarities and divergences, and longer still to advance meaningful positions to the Board.

These policies, for the reasons which I will set out in the next issue of **The Liversidge e-Letter**, would benefit from a massive re-write if not outright withdrawal.

ESRTW policies take time to be well understood, including within the WSIB

When the *Workplace Safety and Insurance Act* [“WSIA”] was proclaimed effective January 1, 1998, ground-breaking changes to ESRTW were introduced. Even though these changes were thematically connected to a long-spanning evolution pertaining to worker rehabilitation, re-instatement and return to work that actually commenced in the 1970s (and dramatically advanced in 1990 with the installation of injured worker reemployment rights), the 1998 reforms were ground-breaking.

The direct role of the parties - workers and employers - were highlighted while the role of the Board was deemphasized. Workers and employers both were provided with statutorily prescribed duties and obligations pertaining to cooperation, and were expected to jointly marshal their efforts to facilitate a return to work, and involve the Board only in the face of disagreements or obstacles. Even then the WSIA defined the role of the Board principally as a facilitator in the first phases of its involvement, and as a

decision-maker only if the parties were unable to work things out.

These changes took significant time to be fully understood, both within and outside the WSIB. It would be no understatement to suggest that it took a period of several years for the Board itself to acquire a mature institutional understanding as to what the new statutory guidelines meant, and for the appropriate policies and practices to evolve.

These changes though were powerful and were (are) a remarkable success. They changed the culture of Ontario workplaces. More on that later.

January deadline should be for preliminary input only

The WSIB should utilize the January deadline to acquire some preliminary input, following which the Board should re-group, and then engage in organized public briefings throughout the Spring and early Summer of 2006.

Stakeholders should be allowed the opportunity to make informed commentary during that period of time with an expectation that final submissions will be received no later than September 30, 2006, with the matter being remitted to the WSIB Board of Directors ["BOD"] later that Fall.

There is no urgency – there is no current “policy vacuum”

It is not as if there is a policy void with respect to the governance of the WSIA ESRTW provisions. Quite the contrary. ESRTW is a well entrenched statutory regime, and the Board's current policies are generally well understood within the employer and worker communities. Business practices are well established and generally very consistent and complementary to the legislative objectives. There also exists now a mature body of Workplace Safety & Insurance Appeals Tribunal ["WSIAT" or the "Appeals Tribunal"] jurisprudence which assists greatly in supplementing the application of the policy, and ensuring consistency and fairness. For the most part, the present ESRTW protocols are working – and working very well.

ESRTW is a tremendous success story

I will go further. ESRTW has likely been one of the true modern WSI reform success stories. ESRTW principles were well grounded by the time legislation changes were introduced in 1998. In the 1970s the (then named) Workers' Compensation Board ["WCB"], began to build up its vocational rehabilitation efforts, buttressed in large measure by statutory reform (rather mild compared to today's standards), which began to link employability obstacles to ongoing partial impairment.

By the end of the 1980s, the Board had revamped (several times) its approaches to rehabilitation and reinstatement. By the early 1990s, with the complementary introduction of reemployment rights, the system benefited from an evolution which included at least two task force reports on rehabilitation, and the introduction and development of an elaborate rehabilitation strategy, the core principles of which survive to this day. By the time the 1998

changes rolled around, the pump had been primed for a significant cultural shift. The legal shift was less dramatic.

By 1998, it was well understood that there were entrenched rights to full benefits for unemployed injured workers, so long as the unemployment was a result of an on-the-job injury or illness, and the worker cooperated in his or her return to work. While there were significant technical adjustments in 1998 (the abandonment of the "Future Economic Loss" ["FEL"] approach and the introduction of the current "loss of earnings benefits" ["LOE"]), the legal context of benefit eligibility did not change. Moreover, the complementary policy of holding employers more directly accountable to costs through an experience rated premium (introduced in the mid-1980s and expanded in the early 1990s to include all industries), aggressively made the link to increased business costs and increased time on claim.

ESRTW is now part of Ontario workplace culture

By the time the WSIA codified cooperation standards, the stage had long been set. Still, it took several years for the Board, workers and unions and employers, to fully accept and understand their newly defined roles. But they did. In fact, ESRTW is much less a legal concern in most Ontario workplaces now than it is a cultural reality. It is now the norm. It is now expected. It is now a matter of course. And that, in my view, represents the quintessential goal of statutory reform – to positively change a set of rights and behaviours in a manner which advances an important social objective, and in time, to have those legal principles absorbed into every day conduct. ESRTW is an archetypical example of successful legislative and policy reform.

A new set of policies though will require everyone to pretty much return to "ground zero". This will prove to be particularly problematic if the new policies are shown to be deficient in certain areas, as I believe they are.

The Board would be well-advised to “front-load” the knowledge curve

It makes much more sense to "front load" the knowledge curve and engage in a more elaborate and appropriate consultation process that serves the dual purpose of educating both the Board and the public, while at the same time, presenting an opportunity to fine tune the proposed policies. I do though understand the institutional mindset behind the Board's present approach.

WSIB officials do not commence a consultation process with a “work in progress” approach

The Board no doubt has given very serious consideration to these policies, and has invested long hours into the development of what the Board no doubt considers to be appropriate and measured policy proposals. In other words, as far as the Board officials are concerned, the Board has given this matter due consideration and comes "out of the gate" with what it considers to be its best work and its best answer. The Board clearly does not envision making serious or significant adjustments to this policy, nor does the Board consider this policy to be a "work in progress".

WSIB “sense of policy ownership” is part of the problem

In advancing this thesis, I am not suggesting that there is an underlying institutional arrogance (“our way or the highway”) fuelling the Board’s method. To the contrary. I have no doubt that the Board has addressed this issue most comprehensively and from the perspective of developing *the best* policy which the Board believes respects the public policy objects of the WSIA, and resolves whatever administrative challenge they are addressing, even if, at the moment, that challenge has not been publicly defined. (*This presumption of mine still stands intact, albeit is slightly weakened by WSIB behaviours observed over the last year. Until evidence clearly shows otherwise though, I will always first presume that the Board is acting in the broader public interest. At the moment, I do not think I am wrong.*)

I have no doubt that the Board stands behind these policy proposals with commitment, confidence and assurance that they have hit the mark. A strong sense of institutional and individual “ownership” naturally emerges after such a process. And, this is a large part of the problem.

While understandable, this approach is wide of the mark - the Board should view these and similar policies as preliminary drafts or works in progress and be very open to drafting changes. In fact, while producing its best effort, the Board should enter every consultation exercise with the *expectation* that the Board will learn and more often than not, change. In fact, the Board’s “internal final draft” should be the “consultation first draft”, and sold as such.

WSIB officials view the purposes of consultation differently than do stakeholders

The WSIB has been engaged in formal public consultations of one form or another now for over two decades [for a more detailed discussion on the history of WSIB consultation, please refer to the **January 20, 2005 issue of The Liversidge e-Letter, “WSIB Changes Appeal Time Limit Rules”**]. While some of the techniques may vary slightly from one administrative regime to the next (and goodness knows there have been many over the last 20 years - at least seven identifiable regimes over the span of five different governments), typically, Board officials have acted and reacted very similarly (and predictably) over the years. Informed observation shows that WSIB officials have consistently viewed the consultation process through a very different prism than that of the stakeholder communities (both workers and employers).

WSIB uses consultation to cultivate support and “educate” stakeholders

The Board has tended to view the consultation process as an opportunity to cultivate constituency approval for proposed policies, and as a forum through which to conduct much needed (in the eyes of the Board) stakeholder education.

Stakeholders want to refine proposed policies

Stakeholders, on the other hand, have viewed the consultation process as an opportunity to shape the policy, to

provide input and commentary, and to inspire a re-drafting of the particular proposals, and to occasionally, outright oppose proposed policies and demand their removal.

The WSIB must change its mindset – it must listen more

These two spheres of expectation are mutually exclusive. Respectfully, it is the Board that must adjust its approaches to consultation. Stakeholder expectations are valid and appropriate. Too often the Board is more inclined to speak and less inclined to listen – more inclined to advise and less to seek advice. Consultation, if it is to be meaningful, must be more about the Board listening (listening more).

A recent example of the Board’s approach is found in last year’s funding strategy consultations

The most recent significant example can be found in last year’s premium rate and funding strategy consultation process [see **The Liversidge e-Letters, June 23, 2005 Issue, “2006 Premium Rates: There is a Responsible Alternative to Premium Rate Hikes; and, July 22, 2005 Issue, “2006 Premium Rates: Business leaders’ demands WSIB develop a different strategy unheeded”**]. While employer groups *unanimously* disagreed with the Board’s proposed funding approach and *unanimously* proffered what was considered to be a reasonable alternative (an alternative which, by the way, was entirely consistent *with the Board’s own approach* and funding policy adopted less than two years earlier), the employer community proposals were summarily rejected.

No doubt, the Board retained confidence in its policy proposals and was sure that it “got the message out” and explained its position. Even though that message was *unanimously rejected by employers*, and an alternative presented, the Board did not revisit its proposals. The Board remained of the view that its proposals and approach were the “responsible” road to follow, and by extension it would seem, other alternatives were not as responsible [refer to the **WSIB July 21, 2005 Press Release, the Board’s September 20, 2005 Press Release and the widely distributed September 20, 2005 Letter from the Board’s CEO** (all of which can be found at the Board’s website)]. In these, the Board lauds its “*open and transparent process*” which gave employers and employer associations “*an opportunity to understand the considerations and pressures affecting the WSIB’s funding decisions*”.

The bottom line: The process the Board has adopted in the ESRTW policy consultation does not do the issue justice and heightens the likelihood of policy design error. These risks would be more effectively managed with a different process with a longer window for review. But first and foremost, before proceeding further, the Board must carefully and specifically explain what it is trying to achieve and must define the problem. So far, it has not done so.

In the next issue of The Liversidge e-Letter, I will be examining the policy proposals in depth. Concrete recommendations will be advanced. Stay tuned.