

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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Claims Value for Money Audit *A recipe for change or conflict?*

WSIB Releases Value for Money Audit Report on WSIB Adjudication & Claims Administration

While it seemed to be sitting on the shelf for awhile, a few weeks after the election the WSIB finally released the *Summary Report on WSIB Adjudication & Claims Administration* ["ACA"] *Program Value for Money Audit*. Employer risk exposure may increase

The Report sets out several recommendations, which if adopted, could increase the workplace safety and insurance ["WSI"] risk for Ontario's employers, notably higher experience rating ["ER"] exposures, a loss or reduction of Second Injury and Enhancement Fund ["SIEF"] cost mitigation, and more forceful return to work ["RTW"] initiatives by the Board with a greater potential reliance on fines and penalties to be imposed on Ontario's employers.

Certain benefit entitlement policies may come under review

In addition, the Report raises several questions pertaining to benefit entitlement policies (entitlement on an aggravation basis for example) which, if adopted, could well trigger a new era of worker discontent. I will have more comment on these and related WSIB practice in later issues of **The Liversidge e-Letter**. I should note that a groundswell of worker discord is already beginning to percolate. A copy of an executive summary of the Report can be found at the WSIB link:

<http://www.wsib.on.ca/en/community/WSIB/230/ArticleDetail/24338?vnextoid=377fb0ac66c13310VgnVCM100000469c710aRCRD>.

While only the Executive Summary appears on the Board's website, I obtained a copy of the full report, and frankly, the Summary is enough. Overall, while interesting, I would have preferred a far deeper discussion on many of the issues, particularly a stronger effort to assess them in a broader historical and legal context. Over the next few issues of **The Liversidge e-Letter**, I will attempt to do just that with a few of the topics. In this issue, I will briefly introduce readers to the Report, present the Board's initial response to the recommendations, and offer my preliminary thumbnail commentary.

The Scope of the Review

This is right from the Report: to "provide an opinion as to whether current adjudication decision making and claims administration processes are being delivered in an efficient and effective manner". The audit focused on: Initial Entitlement Decisions; Non Economic Loss (NEL) Decisions; Loss of Earnings (LOE); 72-month Lock-in Decisions; Second Injury Enhancement Fund Decisions; and Recurrence Decisions

Report Recommendations, WSIB Management Response and LAL Thumbnail Commentary:

RECOMMENDATION #1: *WSIB should enhance its current case management by developing a comprehensive risk assessment framework to identify all high risk claims and by developing specific processes and procedures to manage these claims more quickly, in order to improve recovery and return to work outcomes and reduce the benefit duration of high risk claims.*

WSIB Management Response: WSIB agrees with the recommendation. The WSIB will implement new internal processes for the management of the three highest risk injuries (low back, shoulders and fractures) by the end of Q4 2011. The WSIB is committed to developing a robust front-end risk assessment process to differentiate other high risk cases based on injury type and other risk factors by the end of Q1 2012.

LAL Comment: This is not at all unlike procedures and claim assignment protocols that were in place in the 1970s at the (then named) **Workers' Compensation Board** to the mid to late 1980s, when replaced with "Integrated Service Units" (claims assigned on a geographic basis around an integrated claims, medical and rehabilitation team). This itself was replaced with cases assigned into industry units. Since, we have seen several variations of the current case management model, and it looks like we are about to see another. For a more complete history of the Board's efforts to enhance its claims handling processes through constant change, take a look at the December 1, 2008 issue of **The Liversidge e-Letter**, "**WSIB reorganizing. . . It's déjà vu (all over again)**", in which I recounted about a dozen or more reorganizations since 1986, about one every two years or so.

RECOMMENDATION #2: *WSIB should establish a new work stream model within the Long Term Case Management (LTCM) Program which differentiates services to high leverage cases from those cases where only maintenance activity is required. For example, claims with adjusted long term LOE benefits would be streamed to a different unit supported by a separate staffing model.*

WSIB Management Response: WSIB agrees with the recommendation. In Q2 2011, a new Permanent Benefits Services Branch will be established to provide ongoing claims administration functions for cases in receipt of Future Economic Loss (FEL) and LOE lock-in awards. To further enhance focus on cases requiring active management to improve recovery and return to work outcomes, the WSIB will implement a separate work stream for pre lock-in cases where Labour Market Re-Entry/Work Transition services have been completed and LOE payments have been adjusted. This will be in place by the end of Q1 2012.

LAL Comment: Same comment. It is my opinion that the true weakness of WSIB claims management capacity has less to do with system architecture and more to do with decision-making competence, which I suggest has been in a state of erosion since 1997. These repackaging type initiatives are unlikely to effect any significant change over the long-term, a comment so far proven time and time again.

What is needed is a renewed focus on staff development, both formally through training and ongoing legal education, and informally through staff mentoring. I remain perplexed that very few WSIB decision-makers, even at the final level, are at all familiar with emerging decision trends at the Appeals Tribunal or major appeal decisions at all. It is as if the Appeals Tribunal exists on some foreign soil for which the Board lacks a current passport. Hopefully, the new **Skills Development Branch** (see *Recommendation #8*) will begin a long-road of improvement.

Of late, greater energy has been expended on appeal rule development as evidenced by the recently revamped **APPEALS SYSTEM Practice & Procedures**, an exercise that in my considered view was not only not worth the effort, it served to further “legalize” and encumber the Board’s appeals processes. The system does not need a complex court-like book of procedures (the Board’s Appeals Practice & Procedure [“APP”] runs 57 pages), but rather an enhanced ability to quickly make fair decisions and adapt the process to the circumstances. Frankly, I am of the view the Board’s final decision-making level ran better when there were few rules *per se* - just some broad procedures. Perhaps not surprisingly, I have observed that the Board’s reliance on rules has risen commensurately with a decline in decision-making efficacy.

I am very surprised that the WSIB internal Appeals System and decision review protocols were untouched by the audit. Over the past several years I have formed the view that the Board lacks the need and resources for a final in-person hearing level and would do well to consider refurbishing the old **Decision Review Branch** [“DRB”]. With the Appeals Tribunal as the final decision-maker in the

WSI system, there is little need for two almost identical processes. At the end of the day, an appellant, be it worker or employer, will have access to an in-person hearing if required. The challenge is to funnel those cases to that level fairly and efficiently.

A suggestion that warrants serious attention is doing away with the Appeals Branch altogether and replacing it with the DRB, and locating the DRB decision-makers right in the operational units, providing both efficiencies and built in mentoring opportunities. To ensure decision integrity, the review function design would run independent to operations management reporting wise, but be physically housed within the units. I would also suggest a greater tie-in with final level WSIB decision-making and the Board’s policy development processes.

RECOMMENDATION #3: *WSIB should improve the time to registration by enhancing electronic registration channels, and expand the use of auto-adjudication in order to expedite eligibility adjudication and facilitate earlier claims management. WSIB should pursue regulatory and/or policy change to increase the level of the administrative penalty that can be assessed for late reporting and the timeline for reporting.*

WSIB Management Response: WSIB agrees with the recommendation. Under the **WSIB eClaimServices Project**, work is currently in progress to improve the online reporting to increase uptake of the WSIB electronic claim reporting channel. This will result in more efficient claim registration, expanded use of auto-adjudication and improved routing of claims for timely decision making and better return to work outcomes. Implementation to occur by the end of Q3 2011. The WSIB will pursue regulatory and/or policy change to improve compliance with statutory reporting obligations. Any necessary policy changes will be implemented by the end of 2011 and submissions to the government on any required regulatory changes will be made by the end of 2011.

LAL Comment: A case has not been made for more and higher employer fines and/or penalties. However, this initiative is consistent with contemporary WSIB actions focused on increasing employer cost exposures. I will address this approach more thoroughly in an upcoming issue of **The Liversidge e-Letter** dealing with the new Work Reintegration [“WR”] program.

RECOMMENDATION #4: *WSIB should improve the collection of medical information to support more timely decisions on MMR and improve the accuracy and efficiency of permanent impairment ratings. WSIB should also seek efficiency opportunities to allow for the electronic exchange of medical information with approved providers. WSIB should reassess its application of the AMA Guide 3rd Edition, in order to establish easily understood, less generic and more occupational-injury based guidelines to assess permanent impairments using accepted objective standards.*

WSIB Management Response: WSIB agrees with the recommendation and will take the following action: Revise

standardized health care provider reports to include better information regarding MMR and PIs, with implementation to occur in Q4 2011. Seek efficiency opportunities to allow for the electronic exchange of medical information by expanding its eServices program. The first priority is the exchange of information with contracted providers will be implemented by the end of Q4 2011. Using the AMA Guide as a foundation, WSIB will develop new guidelines for assessing permanent impairments that will represent a more appropriate application of this general disability guide to work-related injuries. The new guidelines will be in place by the end of Q1 2012.

LAL Comment: Ironically, before the adoption of the AMA Guide, the Board employed its own rating guide, which was replaced by the AMA Guide with one of the reasons to ensure greater consistency and objectivity. A clear history behind the adoption of the AMA Guide would have been instructive including an articulation of some of the observations going back to *Decision No. 915 (1987), 7 W.C.A.T.R. 1* (known as the “Pensions Leading Case”). Of assistance as well would have been a clearer analysis of the Ontario benefit system and how it differs or conforms with other Canadian jurisdictions. The Report fails to comment on the impact of out-sourcing disability rating assessments, which perhaps is a much more influential factor in inconsistent awards.

RECOMMENDATION #5: *WSIB should examine the value of the six year lock-in window in supporting effective return to work and recovery outcomes for injured workers and promoting efficient resolution of claims, and develop an options paper assessing the benefits and costs associated with eliminating this provision to be provided to the government.*

WSIB Management Response: WSIB agrees with the recommendation and will assess the issue.

LAL Comment: This is a long-standing LAL request. The Board’s analysis though must be made public immediately upon completion. There is a risk this will be a “behind closed doors” process (advice to government) which will be unacceptable. I have written on the “lock-in” recently in the October 4, 2011 issue of **The Liversidge e-Letter**, which I repeat here:

Locking in benefits leads to overcompensation

“Locking in” benefits by the end of the 6th year post-injury was introduced as a mechanism to curtail unnecessary administrative activity on established cases. The (unproven) theory is that within 72 months the injured worker would have achieved maximum earning potential and thus, no claims work would be needed after 6 years. I have never bought into this theory. It simply makes no sense.

Arguably (and ironically) the “lock-in” feature *diminishes* the capacity of the Board in the most serious of cases. For the seriously injured, after a period of protracted medical rehabilitation which may consume much of the initial several years in the lifespan of the claim, the focus would turn towards vocational rehabilitation, another lengthy process. Often, by the time of the lock-in a worker may not have achieved maximum earning capacity. Worker motivation may

understandably abate in the few years leading up to the “lock-in.” *Why trade certainty for uncertainty?*

Workers who improve their post-injury earnings profile after the “lock-in” will be over-compensated, albeit quite legally and while consistent with the statutory provisions, this is clearly not the intended result. **Consider:**

- A 30 year old worker, earning \$65,000 per year, seriously injured, required two years of extensive medical treatment, followed by a three year retraining program in a new vocation, which enhanced the worker’s employability. The worker’s WSIB benefits are \$41,400 per annum.
- As the worker is not employed at the time of the “lock-in” (the worker is now 36 years old), the \$41,400 benefit is “locked-in.”
- The worker returns to employment in the worker’s new vocation a year later (7 years post-injury), and earns the same wage as earned pre-injury, \$65,000 per year.
- As a result, the worker receives a “locked-in” WSIB benefit of \$41,400 *plus* his new earnings of \$65,000 for the next 28 years.

It should be noted that the reverse corollary is not possible. Should a worker’s post-lock in earnings profile deteriorate as a result of the injury, the WSIA allows for post-lock-in review (WSIA, s. 44 (2.1)).

The WSIB has never publicly assessed the efficacy of the 72 month lock-in – this discussion must happen now

The 72 month lock-in offers nothing to the system. It is a long failed experiment that can but lead to one result – lax administration and structural over-compensation. I am not at all suggesting that workers being overcompensated have done anything wrong – quite the contrary. They are behaving quite lawfully. This is a problem with the law. The solution is simple – just get rid of the lock-in and ensure every long-term case receives the attention it deserves. *Who can quarrel with that?*

RECOMMENDATION #6: *WSIB should design a policy renewal framework that ensures the timely identification of policies that are inconsistent with the first principles of recovery and return to work. In addition, the policy framework should focus on encouraging adjudication decision making finality and more timely resolution of active cases. Such a framework would also reasonably balance stakeholders’ need to be consulted with the WSIB’s obligation to respond to changing circumstances and emerging needs in a timely manner and in order to effectively manage the system. In addition, through this framework, WSIB should review its current adjudication policy suite and prioritize policy changes required to support the achievement of return to work principles. The review should also consider the impact of an aging workforce on the effectiveness of its current policy suite. An objective of the new framework should be to simplify policy language wherever possible.*

WSIB Management Response: WSIB agrees with the recommendation. The WSIB has developed a draft framework for policy development and renewal that will be released for public consultation in July 2011. The document outlines what is policy, the role of policy at the WSIB and the process for developing/renewing policies, including the internal and external consultations that may be necessary before a policy is finalized. An annual policy agenda with a five year rolling plan will accompany

the policy framework and will set out the policy priorities for 2011/2012. Implementation of the new policy framework will occur by the end of Q3 2011.

LAL Comment: The quest for “decision finality” is arguably code for limiting opportunities of appeal for workers and employers. This may well re-trigger the reform pressures of the 1970s and 1980s which were in response to a lengthy period of inadequate access to justice. These in turn gave rise to the most aggressive period of reform in the history of the system, resulting with a new and entrenched focus on fairness, of which the archetypical independent Appeals Tribunal was an emblematic result. This may prove to be a very short-sighted recommendation refuelling a hostile lobby for future change.

RECOMMENDATION #7: *WSIB should immediately address the following policies negatively impacting on return to work and recovery outcomes. The WSIB should review and revise the following policies: SIEF (subject to Arthur's review mandate); Aggravation Basis Entitlement; Work Disruptions; Recurrences; CPP LOE Benefit Offset; Assessing Permanent Impairments; Claims Reporting; Reimbursement for Health Care Travel Expenses; Relevant Experience Rating windows.*

WSIB Management Response: WSIB agrees with the recommendation. These policies will be included in the policy priorities for 2011/2012.

LAL Comment: The SIEF policy review will disrupt employer equity and the envisioned new aggravation policy will very probably create serious worker inequities. There is a strong risk that the new entitlement policies may run counter to long established “thin skull” legal principles and may not endure legal scrutiny. I will be writing about both of these potential policy proposals in an upcoming issue of **The Liversidge e-Letter**.

RECOMMENDATION #8: *WSIB should identify and address knowledge gaps and develop additional technical support capabilities. This would include emphasizing technical training related to policy and administrative decision making, expanding technical advice capabilities and identifying and addressing the most significant limitations of current claim information systems over the next six to nine months. WSIB should conduct a strategic review of its current information management strategy.*

WSIB Management Response: It is well recognized that WSIB must make eligibility decisions in a complex medical, policy, social and legal environment. To this end, we are renewing and simplifying our policy suite as recommended in other sections of this audit report, to provide our adjudicators with as much guidance and clarity as possible. In addition, as this audit report acknowledges, 'key' decision points in the ACA process have been considerably strengthened through the creation of specialized roles and training to handle the more complex adjudication stages of a claim. As well we have instituted increased oversight by experienced managers. These specialized areas include initial entitlement, SIEF, permanent impairments, recurrences and LOE lock-in decisions. Starting in Q1 2011, the WSIB established a new

Skills Development Branch within the Operations Cluster to ensure the continuous improvement of staff skills and knowledge, including the development of effective desktop tools for decision makers.

LAL Comment: “Increased oversight by experienced managers” is an approach with which I cannot disagree, if implemented in a manner that does not compromise decision-making integrity, fully respects procedural fairness, and is principally interested in decision-maker development, as opposed to controlling the decisions themselves. In the absence of strong structural checks and balances, there is a risk that prevailing Board culture rather than facts and law may gain influence. It has happened before. It can happen again. More on this is future issues.

RECOMMENDATION #9: *WSIB should assess its timelines with respect to all critical adjudication activities to ensure appropriate review deadlines have been established to support timelier decision making with respect to recovery and return to work.*

WSIB Management Response: WSIB agrees with the recommendation. In Q1 2011, the WSIB established and began installing operational benchmarks (process measures) that describe all critical adjudication activities with corresponding management measures and targets for all phases of a claim. Full implementation is expected to be completed by the end of 2011.

LAL Comment: Deadlines, targets and benchmarks have been a part of WSIB claims protocols since the 1960s and on their own are unlikely to deliver significant results.

RECOMMENDATION #10: *WSIB should strengthen its management oversight by developing a formal review and approval framework for key decisions, including all referrals for PI Assessments.*

WSIB Management Response: WSIB agrees with the recommendation. In addition to existing manager reviews and touch points, the WSIB will establish an oversight and approval framework to ensure an appropriate level of quality, consistency and risk management in relation to key decisions. This would include all referrals for permanent impairment assessments. The framework will be implemented by the end of Q4 2011.

LAL Comment: Interestingly, this is precisely the model in place for eons before the late 1990s. Since, the Board has designed and implemented untold number of administrative models with the legacy of one simply being the rationale for the next. If the proposed model bears fruit, it will take several years to ripen as institutional competence is renewed. Consistent with my comment to **Recommendation #8**, if this is designed to enhance decision-maker development – good. If it is simply ratcheting up the actual decision to a few higher levels within the Board – not so good.

WSIB Board of Director approval a must

Whatever policy response flows from the Report, the consultation process must be full and robust. But, most importantly, at the end of the day, the final policy approval must rest the WSIB Board of Directors. These are not administrative decisions. These have far reaching policy implications for the future direction of the WSIB.