The Liversidge *e*-Letter

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

April 11, 2013 **An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.** **2 pages**

WSIB "Fatal Claim Policy"

An unfair, ill-conceived policy
The only solution? Get rid of it. (Part 3)

The Fatal Claim Policy can be replaced with a simple adjustment that preserves experience rating integrity

In the March 28 and April 4, 2013 issues of **The Liversidge *e*-Letter**, I repeated and expanded on the case against the Board's **Fatal Claim Policy (Operational Policy 'Employer Accounts, Fatal Claim Premium Adjustment', Document No. 14-02-17, (June 13, 2008) ["Fatality Claim Policy"])** I have been making for five years.

The case for the repeal of the Fatal Claim Policy is convincing . . . . *but* . . . . can ER policy be improved?

While the case for withdrawal of the **Fatal Claim Policy** is convincing, I am not insensitive to some of the pressures the Board was facing five years ago when this policy was first developed. That statement should not be construed as a softening of my position. The **Fatal Claim Policy** does not deserve to remain on the books. As I said in the March 28th issue, while I have an idea to replace it with something better, even if not replaced *this policy has got to go!*

In an experience rating context, fatal injuries *do* require special treatment

With that noted, I propose a workable policy solution which respects the Board's interests and recognizes that in an experience rating ["ER"] context fatal injury claims indeed have distinct qualities. My suggestion meshes the no-fault foundation of the workplace safety and insurance ["WSI"] system with the public policy objectives of ER.

The core policy flaws of the Fatal Claim Policy

The case against the current **Fatal Claim Policy** is well stated in the April 2008 series of **The Liversidge *e*-Letter** and the two most recent issues and will not be fully repeated.

These are the core policy flaws:

- The **Fatal Claim Policy** incorporates employer moral culpability into WSI administration, a breach of the no-fault founding tenet.
- The fatal claim adjustment is applied against the ER rebate earned in preceding years, not the year of the accident.
- The **Fatal Claim Policy** ironically levies the heaviest penalty against safer employers. A poor performing employer already in an ER surcharge position, large or small, is totally immune under the **Fatal Claim Policy**. The policy simply doesn't touch that employer.
- The size of the penalty is arbitrarily variable based on the size of an already earned rebate. Consider the example set out on April 4th:

  Two companies of the same size ($3.5 million in WSIB premium) have a very different ER and OH&S history.

  Company A is an exemplary employer, with an impeccable OH&S record. It is set to receive a $1.5 million ER rebate.

  Company B has a less exemplary record but it is set to receive a $25,000 ER rebate.

  A **Company A** employee tragically dies in a single vehicle MVA. **Company A** is not negligent. The WSIB applies the **Fatal Claim Policy** and issues a penalty of $1.5 million to negate the otherwise earned ER rebate.

  A **Company B** employee tragically dies due to the clear negligence of **Company B** which had improperly removed a required safety device. The WSIB applies the **Fatal Claim Policy** and issues a penalty of $25,000 to negate the otherwise earned ER rebate.

  That WSIB policy drives a $1.5 million penalty for a fatality for which **Company A** bears no culpability and the very negligent and culpable **Company B** is penalized a mere $25,000 exposes the capricious and arbitrary operation of the **Fatal Claim Policy**. **And, don't forget – *the unsafe employer not getting rebates is immune from this policy*.** Any policy which gives rise to such absurd results is itself absurd. *The only solution? **Get rid of it.***
- The **Fatal Claim Policy** is fuelled less by legitimate WSI insurance concerns and more by WSIB PR concerns.
- In a rush for a response to media criticism, the reasons *behind* a tainted WSIB public image were never fully analyzed, hence the birth of the incoherent **Fatal Claim Policy**.
- The **Fatal Claim Policy** is a resource intensive approach that consumes extensive investigative and adjudicative resources at the WSIB needlessly adding to WSIB transaction costs, with no measurable net system gain. Successful defences, which are expensive, add to the needless waste.

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The real source of fatal injury claim/ER incongruity

The problem in a nutshell is this: The WSIB has chosen a disjointed policy solution because the ER approach to fatal injury claims is itself disjointed.

The real source of the problem is the ER administration of fatal injury claims as measured against the ER policy objectives of prevention and worker reinstatement. *Simply put, for fatal injuries, the program arithmetic conflicts with the program objectives.*

The primary ER objectives are to motivate prevention and RTW (along with delivering insurance equity)

That ER seeks prevention and return to work ["RTW"] behaviour modification is undeniable. See for example the analysis set out in the Harry Arthurs' report ***Funding Fairness***, the final report from the **Funding Review**.

In injury claims, ER policy reasonably chases these policy objectives in a manner consistent with the insurance underpinnings of ER. (I have always subscribed to the theory that a properly designed ER plan (such as NEER) achieves the policy objectives of RTW and prevention all the while delivering insurance equity. The concepts are not mutually exclusive.)

The ER impact is variable with the employer's premium (Rating Factor), tempered with various caps and limits (such as Claim Limits and Firm Limits), but based on actual costs incurred *and* future costs expected. Ever so simply, the more the cost, the greater the ER impact.

For injury cases, ER costs vary considerably due to post-injury actions

Typically, serious injuries cost more than less serious injuries. *But, that is not always the case.* A minor but protracted physical injury can easily attract large ER costs if the employer refuses or is unable to reemploy the worker. Similarly, a serious physical injury case may end up costing little if the employer aggressively models a RTW program consistent with the worker's needs and abilities. ***This is the genius of the ER design – both prevention and RTW motivation is built into the basic arithmetic of the program – for injury cases***. *(But not so for fatal injury cases.)*

The risk of future costs is the prime motivator

The most influential and powerful motivator of an injury claim is the future reserves along with the compounding overhead costs. In fact, the risk of potential future costs is far more influential than actual payouts.

For injury cases, analogous cases are treated similarly

For example, for both "high wage" and "low wage" cases, for workers who do not RTW (by September 30 of the fourth year - the final cut-off), *ER arithmetic drives the same result* – in each case the maximum claim cost is applied against the employer. This means that in the context of employer accountability, for a worker that does not RTW, ER holds the employer of the low wage earner and the high wage earner to the same maximum accountability.

Consider these two cases: *Basic facts:* DOA June 1, 2011; No RTW; Non-economic loss award (NEL) $10,000; ongoing payment of LOE benefits; as at September 30, 2015 (final issue) claim type 13, claim age 51 months; reserve factor (for RG 851) 1.6192; overhead factor (for RG 851) 45%. ***For the low wage earner:*** NEER costs as at September 30, 2015 for worker who earns $35,000 - weekly benefit rate of $656.00 per week = $522,741 total NEER costs. ***For the high wage earner:*** NEER costs as at September 30, 2015 for worker who receives weekly benefit rate of $1,571 per week = $1,231,647 total NEER costs. *Therefore, both claims would max out at $398,000 for Accident Year 2011 (the claim limit for 2011).*

The lesson here? For injury cases, the ER plan packs the same wallop for analogous cases *even if* the individual characteristics of the cases are different. *Why?* Because the most powerful formula element relates to potential future costs not actual costs.

This does not hold true for fatal injury cases. For fatal injury cases, the Board applies the same insurance principles *without taking into consideration the policy objectives of ER or the unique features of fatal claims*. **This is the crux of the problem**. Unlike injury cases, for fatal injury cases the actual benefit payouts (potentially survivor payments, funeral costs, bereavement counselling and help in joining the workforce) are determinative of the ER impact, and those payouts vary based on the personal characteristics of the deceased.

Under ER, fatal claim costs attract no reserves (each fatality is categorized as a "Claim Type 15"). This is appropriate since all of the costs are calculable and there obviously is no capacity for *ex post facto* mitigation (as there is in injury cases). Where there are no dependents, the costs are minimal. A fatal claim may cost a few thousand dollars or several hundred thousand dollars.

For fatal injury claims, all of the ER design focus must be on the prevention component. Yet, fatal injury claims attract the same insurance cost allocation paradigm in a manner identical to non-fatal cases.

A simple, rational, internally consistent solution

I posit that the development of the **Fatal Claim Policy** was a direct result of imperfect ER design as it applies to fatal injuries. The **Fatal Claim Policy** though was an incoherent band-aid. I propose a simple solution that respects the policy objects of ER, and which requires no administration cost at all. (Incidentally, without trying to address the Board's PR concerns, it does that as well.)

The LAL proposal

Withdraw the **Fatal Claim Policy**. ***Replace it with this*** - all fatal claims will attract an ER cost equal to the maximum claim cost limit (for 2013 this would be $416,000). Of course, all of the other exposures (potential prosecution under the *Criminal Code*, or *Occupational Health and Safety Act*, etc.) continue to apply as they would, and do, in the normal course. This removes the incongruities of the **Fatal Claim Policy**, respects the contextual distinctiveness of fatal injuries, and preserves the integrity of the Board's ER programs.

It's simple, fair, is consistent with plan objectives and requires zero WSIB resources.