

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

February 16, 2007

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

2 pages

Early and Safe Return to Work Policy Revision *LAL Submission to WSIB*

LAL submission to WSIB consistent with e-Letter dialogue: *Address the real problem!*

In several issues of **The Liversidge e-Letter** over the past year, I have presented comment on the Board's planned early and safe return to work ["ESRTW"] policy changes. In this issue, I am presenting readers with the text of the submissions that I formally presented to the Board this week.

February 15, 2007

WSIB Early and Safe Return to Work Policy Reviews

Background

As (the Board) is on the distribution list for my communication, **The Liversidge e-Letter**, you are aware as to my overall position with respect to the Workplace Safety & Insurance Board ["WSIB" or "Board"] early and safe return to work ["ESRTW"] proposed policy revisions. For completeness, I am forwarding the following issues of **The Liversidge e-Letter**:

February 6, 2007, ESRTW Policy Revision Final Comment

October 27, 2006, WSIB Releases Revised Draft Policies on ESRTW

October 12, 2006, WSIB Set to Release Revised ESRTW Draft Policies

January 23, 2006, Part II – WSIB Release Draft Policies on ESRTW, *The Board Should Re-Group; Re-Think and Re-Draft*

January 19, 2006, Part I - WSIB Release Draft Policies on ESRTW, *The Board Should Re-Group; Re-Think and Re-Draft*

No policy revision is required

Notwithstanding the significant adjustments that have been made since the first batch of policies (refer to the October 27, 2006 issue of **The Liversidge e-Letter**), *I still maintain that no changes to the current ESRTW policies are necessary*. In fact, other than the imposition of the employer penalties (to which I will present comment momentarily), the "re-worked" ESRTW policies are remarkably similar to current ESRTW policies.

I have opined that ESRTW is one of the most successful policy evolutions in the history of Ontario workplace safety and insurance ["WSI"]. ESRTW is not only an unqualified success (a point now admitted by the Board), but represents what should be construed as the archetypical example of policy reform which has evolved over a period of almost three decades. The codification of ESRTW in the *Workplace Safety and Insurance Act* ["WSIA"] in 1997 was simply a recognition of practical and policy approaches which had evolved over the previous two decades, most notably since the development of system-wide experience rating programs in the early 1990s.

L. A. Liversidge Executive Seminar Series

**A Hands On Experience Rating
Executive Briefing
is scheduled for:
May 16, 2007**

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Invitations will be e-mailed

Summary of overall problems with proposed policies *Revised ESRTW policies similar to current policies:*

The current batch of draft policies are materially similar to presently operational policies. As ESRTW has been declared a success by the WSIB, nothing is gained by advancing policy adjustments which essentially affirm the *status quo*.

The Board's objective of reducing long-term time on claim will not be met:

Until recently, the WSIB had not disclosed its purpose behind the proposed policy changes. Late last year however, (the Board) indicated that it is attempting to reduce the claim duration of long-term injuries. As I point out in the February 6, 2007 issue of **The Liversidge e-Letter**, while this is an appropriate policy objective, and while the "problem" identified is one that does indeed warrant

senior consideration at the WSIB, with respect, *the ESRTW policy revisions will do nothing to achieve this objective.*

As I have argued, ESRTW is a remarkable success, has been extremely effective and *has* resulted in the reduction of time on claim. The factors behind the increase in long-term claims has nothing to do with ESRTW policies. I urge (the Board) to review my analogy to the “*lost keys in the parking lot*” set out at p. 2 of the February 6, 2007 issue of **The Liversidge e-Letter**.

The Board however, is quite correct to identify the increase in long-term claim as an urgent policy issue. However, tinkering with ESRTW policies is not the answer – the Board must find the root cause of this phenomenon. As I set out in **The Liversidge e-Letters**, this is more than likely a very complex problem which requires a complex and deep-rooted solution. The first step, however, is to realign the resources dedicated to this needless ESRTW policy exercise towards finding out why time on claim is increasing.

The issue of employer penalties:

ESRTW has been a remarkable success without the imposition of employer penalties. These penalties will solve nothing.

In fact, as an MPP and labour critic in the Ontario legislature, the Chair of the Ontario WSIB, the Honourable Steve Mahoney, during 1994 legislative committee reviews of the *Workers’ Compensation and Occupational Health & Safety Amendment Act*, 1994 (Bill 165), was extremely critical of the need for “*WSIB police*” to investigate, regulate and impose penalties on employers for matters pertaining to the re-employment of injured workers. I recommend that you review Mr. Mahoney’s commentary in the **August 23, 25, 29, September 6 and 7, 1994 issues of Hansard**.

No policy need has been articulated for employer penalties. In fact, ESRTW has been a remarkable success since its legislative introduction in 1998, more than nine (9) years ago, without any employer penalties. The success of ESRTW absent employer penalties is evidence enough that there is no need for such an approach.

Proposal for small business:

Notwithstanding that the current revisions offer some oblique commentary towards small business, as I have argued throughout the attached issues of **The Liversidge e-Letter**, small business should be removed from the ambit of the ESRTW policy provisions altogether. Small businesses are not subject to the re-employment provisions of the WSIA, are not subject to the full brunt of experience rating, and should not be subject to ESRTW penalties.

Additional Commentary

Productive employment:

I agree with the Board’s definition and requirement for employment to be “productive”. As I have argued throughout the attached issues of **The Liversidge e-Letter**, “*productive employment presenting an objective benefit to the employer is an appropriate measure to determine job suitability*”.

Moreover, it is an appropriate condition precedent that is within the Board’s lawful discretionary authority in determining job suitability. Employment that meets the test of “*an objective benefit to the employer*” is both consistent with the WSIA and the general rulings of the Workplace Safety & Insurance Appeals Tribunal [“WSIAT” or “Appeals Tribunal”], and represents a vast improvement of the definition as set out in the first ESRTW draft policies.

Sustained return to work:

The WSIB is correct in my respectful view to focus on a requirement for a sustainable return to work (in the case of long-term disability). The policy object being sought appears to be clear – the Board is seeking to reduce the likelihood of workers being returned to employment in the short and medium term only, only to eventually be rendered unemployed when the work is no longer sustainable.

In other words, if a Labour Market Re-entry [“LMR”] program is more than likely to be required eventually, it is the interests of the worker, the employer and the system to facilitate the LMR the earliest necessary moment.

In fact, a failure to do so may result in higher long-term loss of earnings [“LOE”] payments. If the employment being offered is not sustainable in the long-term, and it is likely the case that the need for accommodation is not transitory and is a permanent requirement (a requirement of the policy), a concern as to the sustainability that the employment is a reasonable material consideration, and speaks to the suitability of the employment.

Commentary on human rights:

In light of recent rulings by the Supreme Court of Canada, the commentary pertaining to the application of Ontario and federal human rights legislation is both appropriate and within the lawful jurisdiction of the Ontario WSIB.

The proposed policies conform with the WSIA:

Whether one agrees with the proposed policies or not, arguments that they exceed the Board’s lawful jurisdiction and are out of the bounds of the Board’s administrative discretion are, in my respectful view, unfounded.

The policies essentially speak to the determination and effect of job suitability and as such, are well within the lawful jurisdiction of the Board.

What does the Board expect to achieve?

The Board’s proposed approach would gain credibility if the Board were to simply link these policy revisions to measurable achievements. If the objective is reducing time on claim, ***what is current performance and what is the expected performance after implementation?*** If the Board is unable to quantify its expected impact, it should not proceed.

Concluding comments:

I trust that you will find these comments helpful. I encourage you to carefully review and consider the discussions I have set out in the attached issues of **The Liversidge e-Letter**. While I understand the Board’s desire to attempt to solve the problem of increasing claim duration through a re-hash of current ESRTW approaches, the problem is far more complex than reflected in the Board’s approach.

This is not a simple problem. The true solution as well will not be simple. ***But, it will be forever elusive unless and until the Board seeks out the real problems.*** As I argue in the February 6, 2007 issue of **The Liversidge e-Letter**:

My informed sense is that the problem is multi-faceted, deep-rooted, complex and not very easily resolved. The solution may very well require a change in the law, most assuredly a change in the Board’s approaches and practices, and quite likely a complete re-vamping and re-tooling of major WSIB programs (such as LMR). The Board recently admits that it does not know the answer, and concedes that a major study would be required to get to the root causes. If a major study is required, my advice is ever so simple - ***Do the study!*** Stop this ***Quixotic quest of “tilting at windmills”*** – the giants the Board seeks to slay are as yet undiscovered. ***Seek them out.***