

# The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

October 27, 2006

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

8 pages

## WSIB Releases Revised Draft Policies on Early and Safe Return to Work *Closer – but – still no cigar!*

### **New draft policies are a marked improvement – *but, are they needed?***

On October 20, 2006 the Workplace Safety & Insurance Board [“WSIB” or “Board”] released *revised* early and safe return to work [“ESRTW”] policies [see the **October 12, 2006 issue of The Liversidge e-Letter**, “WSIB Set to Release *Revised* Draft Policies on Early and Safe Return to Work, *Expect Significant Changes*”].

These came out a little later than expected due I am told, to some web-site glitches. The Board says the policies have been “streamlined” and reflect much of the input received from seventy (70) written submissions and stakeholder discussions earlier this year. Stakeholders have plenty of time - to February 15, 2007 - to respond. The full set of revised policies are available on the Board’s web site at <http://www.wsib.on.ca/wsib/wsibsite.nsf/public/ESRTWconsult>. The policies will be piloted in four test units – three sector-based and one geographically based (health care sector; service sector; manufacturing sector and Hamilton). **The WSIB heeded earlier advice and pulled back first batch of draft policies**

As I argued in the January 19 and 23, 2006 issues of *The Liversidge e-Letter*, “WSIB Releases Draft Policies on Early and Safe Return to Work: *The Board Should Re-Group; Re-Think and Re-Draft*”, the ESRTW policies released on October 27, 2005 were a troubled lot. I called for the Board to re-think the entire approach. The Board did just that. And, the urgency to implement changes has been removed. Overall, without question, these policies are vastly superior to the first batch of last year. In fact, the Board has responded rather well to several core criticisms. So far so good - the *Palm d’Or* to the Board.

### **The policies are an improvement - but – what was broken? Is *any* policy change really needed?**

But, before we get too carried away with accolades, we have to address the question – *is any policy change really needed?* With the release of the first batch of policies I questioned then, and I question now, the need for *any* policy refinements at all. [continued on page 2]

### **L. A. Liversidge Executive Seminar Series**

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**Early and safe return to work is now the cultural standard in all Ontario workplaces. Yet, the WSIB still persists on fixing something that is not broken.**

**While the Board pulled back last year’s ill-conceived policies, a new slate of policies have been released for public consultation while simultaneously being implemented in four pilot projects.**

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[from page 1] When the Board released the impugned and now reworked October 2005 drafts, I could not see that any serious policy problem was identified.

Those policies seemed to be a “*a solution looking for a problem*”. They still do. While I am all for continuous improvement and policy refinement *when needed*, the new policies still do not identify any serious deficiencies with the *status quo*.

In an October 20, 2006 accompanying introductory letter to the new and improved policies, we are advised that a “. . . number of improvements and changes have been made to the policies based on the constructive input received from stakeholders” and the policies “. . . have been streamlined and simplified to ensure that their intent and direction is clear and unambiguous”. And, I concede that the Board has done exactly that – the policies are a little clearer – and as I will demonstrate some of the glaring mistakes have been fixed. Except one – ***why is the Board proceeding to revamp its ESRTW policies at all?***

Even though the revised ESRTW policies are quite an improvement over what we saw released last Fall, it remains my frank opinion that they still are not necessary. I am still of the firm view that ESRTW remains quite the success story. ESRTW “*is now part of the day-to-day culture of Ontario workplaces*”. Let me return to what I said earlier this year [refer to the **January 19, 2006 issue of The Liversidge e-Letter**, at pages 1 & 2]:

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. 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.

Further (at page 3):

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.

#### **The Board is still not defining the problem**

Yet, the Board is still not defining the problem. Rather than address the overall intent and need for a policy change at all, the process has taken an interesting turn – the focus is now exclusively on “fine tuning” the previous policies. Forgotten is the original policy need (or lack thereof) in the first place. The question, “*what is wrong with the current ESRTW policies?*” is simply now irrelevant. It shouldn’t be.

#### **The intent may simply be to manufacture an opportunity to implement employer fines**

This is still, in my view, a solution looking for a problem, and seems nothing more than an elaborate effort to implement employer fines under the smoke screen of a larger policy review. Frankly, the system has been operating quite fine ***for the last nine (9) years*** (since Bill 99 on January 1, 1998), thank you very much, without the need for employer fines (even though they have been permissible under the *Workplace Safety and Insurance Act* [“WSIA”]).

#### **There will be no “value added” as a result of the imposition of employer fines – ESRTW will not be improved**

I predict that all the imposition of employer fines will do is serve to expand the divide between employers and the WSIB, increase more needless litigation and appeals, and distract the parties from the job at hand. Fines will strengthen neither the objectives or results of ESRTW.

The reason is simple – employers right now are *very motivated* with respect to ESRTW (and have been for decades) because of financial incentives delivered through experience rating [“ER”].

**The WSIB is not satisfied with “double jeopardy” for employers – it wants “triple jeopardy”**

Employers are already subject to experience rating and reemployment penalties. As I painstakingly point out in the January 23, 2006 issue of **The Liversidge e-Letter** (refer to pages 4-5), the *rational and informed* experienced rated employer when guided by the financial incentives *and penalties* of ER, behaves appropriately. I concede that some employers may not be acting appropriately. But, that is usually simply a strong signal of WSIB failure to explain. Many employers do not fully understand how to apply the ER math to their workplace (nor do by the way, *most* WSIB Adjudicators).

Rather than address this problem, which would go a long way to *constructively* improve ESRTW, the Board’s response is to activate employer cooperation penalties, even though employers are already held to financial account through experience rating and reemployment penalties. I have long asked the Board to put a simple ER calculator on its website, to allow employers to easily and quickly calculate the benefit of ESRTW, case by case. The Board has so far refused to implement this easy solution which would promote ESRTW through *positive* inducements – not penalties.

**These policies are consistent with a paradigm shift towards more regulation and a focus on employer compliance**

My thesis as to what is actually going on here dates back to the WSIB consultations held in early 2005 on a broad range of issues, from premium rates, to funding, to nurse case managers (now – there is a program that warrants a full scale review!), to experience rating. At that time, it started becoming clear that we were in the midst of a paradigm shift – toward a new focus and institutionalized commitment to crack down on “employer compliance”.

In the **May 16, 2005 issue of The Liversidge e-Letter** (at page 4), I noted that the WSIB gave notice it will be taking aggressive action to uncover evidence of undesirable employer behaviours. In fact, the Board called this “*a new era*” [see **Slide 9, of WSIB February 11, 2005 ER Session**], in which the Board was eager to uncover “*evidence of undesirable behaviours*” [see **Slide 34, February 11, 2005 ER Session**].

In the March 21, 2005 ER Session [**Slide 30**], the Board tipped its hand and outlined that it planned a “*Workplace Performance Monitoring and Control*” program to audit employer reporting and return to work obligations. While the Board may be stepping down a bit from **Defcon 1** [maximum force readiness], the overall message in the revamped ESRTW policies is not at all inconsistent with this approach.

**The Board has said – “It is in the Act, so, we should do it”**

In those 2005 consultation sessions, the Board did not present any research that demonstrated a particular ESRTW problem that warranted the development and deployment of a penalty based regime.

In short, a problem was not, and still has not been, identified that warranted such a policy response. It is trite to note that *Public Policy Development 101* demands that the very first step in policy development is *problem identification* [see for example “*Public Policy and Public Participation: Engaging Citizens and Community in the Development of Public Policy*”, by Bruce L. Smith, prepared for Population and Public Health Branch, Health Canada, September 2003].

Instead, the Board simply advised that this power has been vested in the WSIA since 1998, and it should be used. *But why?* The empowering section [WSIA, s. 86(1)] is a discretionary section (“the Board *may* levy a penalty”).

**If a need had been established – fine – but no need has been shown in almost nine years**

I do not at all dispute the wisdom of incorporating this power into the WSIA – and it would make complete sense to deploy this power *if a need has been established*.

But, it hasn’t. Just because a power is set out in the WSIA, does not mean that the Board is compelled to activate it (why hasn’t the Board allowed a committee of employers to adjudicate WSI claims? That power is also set out in the WSIA in s. 177, has been for decades, yet remains inoperable).

**The Board’s rationale remains “soft”**

The only rationale provided for the policy changes are set out in a letter of October 27, 2005 which accompanied the first set of policies [see the **January 19, 2006 issue of The Liversidge e-Letter**], in which the Board said the ESRTW policies were designed 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*”. These are all pretty soft reason. They are so vague as to be of no real value in assessing the true policy intent of the ESRTW changes. The bottom line is this – *no compelling reason for the ESRTW policy changes is yet to be presented*.

**Still, the new policies are an improvement over last year’s: *A policy by policy review***

Even though I question the need for these policies, especially the employer penalty provisions, it is clear that the Board is as committed as ever to implement them. The penalty provisions aside, the revised policies as presented are a vast improvement over last year’s batch.

I encourage readers to review the actual policies and compare them to last year’s bunch. I will review what I consider to be the most significant adjustments and offer my

comments where change is still required. Structurally, I will address each policy one by one (there are six (6) of them – down from last year’s eight (8)).

### **Overall commentary**

I will address the specifics of the changes, but first my overall commentary (besides that there is no need for these policies) - they are a *vast improvement*. Not only has the Board addressed some of the core complaints (although they have ignored several), the overall tone is markedly different. The previous policies were very authoritarian and rigid. The message last year was clear – *do what we say or else!*

This time around, the language is far more measured. There is a clear effort to paint a more balanced approach. This was clearly the Board’s intent this time, and it came out in the drafting. Last year, the focus was principally on employer compliance – and with a vengeance the Board made it clear that *the times they have a’changed*. This time there seems to be a deliberate effort to re-adjust the focus back to cooperation and less on coercion. Cooperation is unquestionably the backbone of ESRTW. So, overall, the revised policies, while still problematic (and unnecessary), are a vast improvement over last year’s. **So, plus one for the Board.** This is not to say they should be implemented as drafted – they shouldn’t. They’re just better than last year’s.

### **Draft Policy 19-02-02; Return to Work: Key Concepts, Definitions and Responsibilities**

#### **ESRTW is a process**

The Board comes out of the gate with a strong policy declaration that ESRTW is a process. While ESRTW as a process was touched on in last year’s policies, it was buried deep in the enforcement policy [October 13, 2005, ESRTW Policy 19-02-07, Enforcing Workplace Parties’ Co-operation Obligations, page 3, under the subheading, “Making a Finding of Non-cooperation”].

This time around, the Board kicks off with an unequivocal declaration that the “*WSIB views return to work as a process*” [19-02-02, page 1]. This is significant. The point is clear – ESRTW is fluid – the target is usually always moving and the theme advanced is one of flexibility and adaptation. Such flexibility is required for the workplace parties and for the WSIB. If I am correct that this re-ordering of ESRTW as a process signals a change in WSIB mind-set, then we can expect a more fluid and less authoritarian approach by WSIB decision-makers. So, while this ingredient of the “recipe” is fine, the “*proof will be in the pudding*” (actually the proverb is “*the proof of the pudding is in the eating*”, but, however said, the point is clear – the jury is out until we see how the Board actually administers these policies). **Plus two to the Board.**

#### **The “early” in ESRTW is again “early” – not timely**

Last year’s policies represented a major misstep with the omission of the word “early” from the policies and the substitution of the word “*timely*”. In the January 23, 2006

issue of **The Liversidge e-Letter** (at page 2), I argued that the Board was wrong, legally and pragmatically, to write out “early” from ESRTW policies. That was akin to re-drafting the WSIA itself (which as I argued, was not at all above the past efforts of the Board – for example, see the January 20, 2005 issue of **The Liversidge e-Letter**, “**WSIB Changes Appeal Time Limit Rules**”).

To its credit, the Board listened and has walked away from that mistake, never to look back. The new policies bring back the term “early”. Last year’s policies declared “[r]ather than focusing on the timing of the return to work activities, the focus should be on the appropriateness of the return to work” [October 7, 2005, 19-02-02, page 1]. This was a mind-boggling assertion which ran counter to the stated objective of facilitating more effective ESRTW. Last year the emphasis was clear – employers are returning workers to employment *too early!* Well, this year, they’re not.

With a minor wordsmith adjustment, the revised policies convey a very different meaning. The new 19-02-02 notes the more appropriate, “*the workplace parties should be focusing on both the timing and the appropriateness of their return to work activities*” (emphasis added). Much better. So, enough said on that point. **Plus three for the Board.**

#### **Suitable work – a more workable approach**

The Board really blew it last year with a revamped definition of “suitable” [see January 23, 2006 issue of **The Liversidge e-Letter**, pages 3-6], which included measuring new concepts of productivity, remuneration, and sustainability, in a way that would only serve to *increase* time on claim (!), and render it most difficult for employers to promote imaginative ESRTW solutions. This is what I said last year:

The Board notes that the definition of suitable work is to include post-accident work that is “productive” which is to be defined as “*adds value to company’s products/services*” [Slides, p. 11]. With the greatest of respect, this calls for a determination which will be beyond the scope of expertise of the Board.

#### **A more appropriate question is – Does the employment provide an objective benefit to the employer?**

I caution the WSIB against including this term within the definition of suitability. Suitability must always be contextually determined. There can be no absolute definition. Rather than focus on whether or not a job is “productive”, which requires both an analysis and determination far beyond the scope of the WSIB, a more appropriate question is whether or not the employment provides an *objective benefit to the employer*.

Indeed, while it is reasonable to infer that a job must meet minimum standards of satisfaction and dignity [see for example **WCAT Decision No. 514/95, (October 22, 1995), at para. 199**], suitability must be contextually determined. Even what may appear to be the most minimal of activity would be suitable employment if it returns the worker to the workplace without exceeding his limitations [see for example **W.S.I.A.T. Decision No. 1162/98 (September 10, 1998)**], while delivering an *objective benefit to the employer* [see **W.S.I.A.T. Decision No. 1947/01 (October 31, 2001)**].

It is my respectful view that the requirement to establish an objective benefit to the employer is more meaningful in the context of the ESRTW policies than “productive employment”.

**The WSIB accepts “productive employment”**

To its credit, the Board accepted this suggestion and dropped its convoluted and needlessly complex approach to assessing “productivity”. The new ESRTW policies defines suitable work as work “*that is safe, productive, consistent with the worker’s functional abilities, and that when possible, restores the worker’s pre-injury earnings*” [19-02-02, page 5].

Productive work is now defined as “. . . work whose tasks provide an objective benefit to the employer’s business” [ibid, page 5]. As additional guidance, a non-exhaustive list is provided listing what work may provide an “objective benefit”. Work which i) forms part of the regular business operation (obvious); ii) permits the worker to acquire new job skills (which means that a training element is present – the *actual* benefit may be deferred); iii) generate revenue (an obvious attempt to avoid useless “make-work assignments”); and/or, iv) increase business efficiency or lead to business improvements (which allows for work that may not be directly producing revenue but which aids the business enterprise). So far, so good - **plus four for the Board.**

**A clearer template of mutual responsibilities**

The new policy (at 19-02-02, page 4) more clearly declares that ESRTW is the primary responsibility of the employer and the worker, but is the *shared* responsibility of other parties, including representatives and unions. **Plus five for the Board.**

In addition, the Board has re-drafted the language describing its role to make it less as a dispenser of penalties and “edict maker” setting out rules and demands [see October 7, 2005, 19-02-03 at page 3 as an example] and more of a vehicle to *assist* the process. The new policies emphasize and highlight the Board’s role as facilitator (“. . . *the WSIB actively supports the activities of the workplace parties in their efforts* . . .” [19-02-02, page 4]). The key responsibilities of the Board in the ESRTW process are listed as including education, case management, dispute resolution, ensuring co-operation/reemployment and providing labour market re-entry services. The “*ensuring co-operation*” language is in stark contrast to last year’s prescribed element of “*ensuring compliance*”, which can only be interpreted as a direct signal that the Board is trying to re-define and soften its role. **Plus six for the Board.**

**Treating health professionals have role in re-assessing use of prescriptions**

A minor but significant adjustment in the prescribed responsibilities of health care professionals and workers and employers is noteworthy. Last year’s draft [19-02-03, at page 2] expected workers and employers to provide the treating health care professional with “*any information which will assist*” in the re-assessment of prescription medications that may be impeding a worker’s ESRTW. Hardly likely. The new policy [19-02-02, at page 5] places this responsibility clearly on the doctor and removes that

prescribed demand from employers and workers. **No points to the Board for this one** – it is too obvious.

**WSIB drops “best practices” requirements**

Last year’s policies required employers to implement the Board’s idea of a sound ESRTW corporate procedure under the heading “**Proven return to work good practices**” [October 7, 2005, 19-02-03, page 8]. This section has been dropped from the revised policies. The focus is on what the parties are actually doing. **Plus seven for the Board.**

**The Board attempts to soften its role on penalties**

Under the heading “**Ensuring Cooperation**” [19-02-02, page 10] (rather than “*ensuring compliance*” which was the description last year), the Board tries to emphasize that benefit reductions and employer penalties are a last resort, and are to be considered only after the Board has tried to educate, has tried to mediate, has tried case management options and has issued warnings, all of which have failed to bring the workplace parties “*into compliance*” (the Board can’t escape the realities of its authority completely). We’ll see. **No points to the Board yet.** I’ll wait to see what happens when “*the rubber hits the road*”.

**Sustained return to work – a more useful template**

Last year, the Board presented an unworkable template within which the idea of sustainable employment was to be considered [see October 7, 2005, 19-02-02, page 6]. In the January 23, 2006 issue of **The Liversidge e-Letter**, I debunked the Board’s premise and policy concerns (at pages 3-6) and argued that the problem the Board was chasing was outright fiction. A far more useful and workable template is designed and presented in 19-02-02 (at page 11), which more reasonably reflects the actual type of cases that are likely to come forward. **Plus eight for the Board.**

**Draft Policy 19-02-03; The WSIB’s Role in Return to Work****Subtle language adjustments convey a very different message**

Last year, the Board described its role as *informing* workplace parties *what is expected* of them [October 11, 2005, 19-02-05, page 1]. This time around the Board has softened its language (and hopefully has re-defined its role) and now describes its role with an assertion that the “*WSIB recognizes that the workplace parties’ ability to meet their return to work obligations is largely based on the parties being fully informed of, and understanding, those obligations*” [19-03-03, page 1]. A marked difference. A failure in application is now, by default, first shouldered by the Board – it is the Board’s job not just to inform but to ensure *understanding*. **Plus nine for the Board.**

**A special but inadequate mention for small business**

I was very critical of last year’s policies with respect to their treatment towards small business. Last year, there was no distinction at all between small and larger businesses. In the January 23, 2006 issue of **The Liversidge e-Letter**, I noted:

### Penalties are proportionately more severe for smaller business and out of step with other WSIB plans

There is no recognition in the proposed policies that there should be any differing approach between a small, medium or large employer. This is surprising since the WSIA itself speaks of such distinctions. For example, the re-employment provisions do not apply to employers regularly employing less than twenty (20) workers [WSIA, s. 41(2)]. Additionally, the WSIB ER plans are geared to the size of the employer, with the scope of accountability commensurately increasing with the premium (or payroll) of the employer. At the low end of the spectrum, employers are 40% accountable and at the high end – 100%. In fact, the NEER plan is not even applicable for smaller employers with less than \$25,000 in annual premiums (those employers fall under the MAP plan). No such considerations are evident in the proposed policies.

It is therefore my recommendation that the Board re-draft the penalty element of these policies to not only make them fairer, but to ensure that they are thematically in sync with other Board policies.

The only “remedy” that the Board has proposed in the new policies is in the form of some internal direction:

The WSIB recognizes that small businesses may not have the same knowledge, capability and/or experience as larger businesses in the return to work process. As a result, small businesses may require increased assistance and intervention from the WSIB to achieve positive return to work outcomes. As case manager, the WSIB is therefore sensitive to the needs of small businesses during the return to work process [19-02-03, page 2].

This is woefully inadequate. A substantive change is called for. My arguments a year ago still stand. **Minus one for the WSIB** (score now *plus nine; minus one*). Small business needs an entirely different framework than set out in these policies.

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### **Draft Policy 19-02-05; Resolving Disputes Regarding the Suitability of Offered Work**

There is not too much substantive difference between last year’s draft [October 11, 2005, 19-02-06] and this year’s [19-02-05]. The Board’s role is defined a little softer, consistent with my earlier observations. The proposed policy sets out a common sense approach that is consistent with current practice.

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### **Draft Policy 19-02-06; Ensuring Workplace Parties’ Co-operation Obligations**

#### **“Ensuring” versus “Enforcing”**

Last year, the Board named this policy **“Enforcing Workplace Parties’ Co-operation Obligations”**. Presuming that there is some substantive content in the terminology change, **plus ten for the Board**. But, this is still the “enforcement” element of the ESRTW policies, so time will tell.

#### **Minor adjustments for “legitimate reasons for non-cooperation”**

There has been some minor refinements, with the addition of the *“terms of the collective agreement”* to the list of legitimate worker reasons for non-cooperation, to mirror the employer’s list.

### **Making a finding of non-cooperation**

The language is a little “friendlier” but the substance of the policy remains about the same.

### **The key to the ESRTW policies though is the new provisions for employer penalties**

I continue to argue that the only viable explanation for the development of this entire slate of ESRTW policies is to empower the Board to levy employer penalties. It would much more difficult for the Board to implement employer penalty provisions without this smokescreen. Using the camouflage of a broader policy review, the penalty provisions appear to be presented as simply one of many adjustments. The imposition of employer penalties though is unquestionably the *raison d’être* behind this entire exercise. There is no other rational explanation. That is the only internally consistent thesis that explains the inability to articulate the policy problem the Board is trying to solve. **It’s simple - there isn’t one.**

For all practical purposes, aside from some wordsmith adjustments, the revised batch of policies are very close to what currently exists in the way of policy. Other than the penalty question, most of the objectionable content present in the earlier policies has been corrected and written out. The only meaty changes left are the employer penalty provisions. The principal policy interest of the WSIB in presenting these policy changes is to create the template for compliance penalties on employers. For all of the reasons I set out earlier, this is a bad idea based on an unproven need. My comments in the January 23, 2006 issue of **The Liversidge e-Letter** remain valid and bear repeating:

#### **Penalties will be significant**

The penalties imposed by Adjudicators will be very significant (they can equal the ongoing cost of a claim for up to twelve (12) months), and are in addition to any experience rating [“ER”] exposures arising from a decision not to return a worker to employment). The issuance of a penalty requires a scrupulous adherence to principles of fair process and the basic tenets of procedural fairness. When faced with a cumulative penalty exposure rendered by the individual judgment of a Claims Adjudicator, individual employers, particularly small employers, to avoid the threat of an expensive penalty, will be coerced to act in a manner they may otherwise may not be obligated to do.

#### **A simple yet effective internal procedure will ensure fairness – Adjudicator’s must seek “second signature” approval**

Levying a penalty involves a different decision-making matrix than benefits administration. To ensure that the actual decision is fair in the first instance, I recommend that the WSIB require a managerial “second signature” prior to the imposition of a penalty. There must be a case-by-case scrutiny of WSIB Adjudicator actions when empowered with the capacity to levy significant and ongoing penalties to employers. The requirement for a Manager’s “second signature” is a small but important procedural enhancement.

By the way, a “second signature” should also be a routine requirement when any Claims Adjudicator recommends to reduce or suspend a worker’s benefits. In fact, I recommend that this change be put into effect immediately, even before these policies are considered further. It is an appropriate and administrative check on adjudicative discretion.

#### **“Fast-track” dispute resolution essential**

In addition, I strongly suggest that the WSIB establish a “fast track” dispute resolution process similar with the mediation process set out by statute [WSIA, ss. 40(7), 122]. I encourage the Board to ensure that

there is a capacity within the WSIB Appeals Branch to resolve disagreements and disputes with respect to the levying of penalties within thirty (30) days of the issuance of a penalty. Not only will this ensure that penalties are not unfairly levied, but more senior adjudicators will be actively engaged at the appropriate time as circumstances warrant.

**Penalties are proportionately more severe for smaller business and out of step with other WSIB plans**

There is no recognition in the proposed policies that there should be any differing approach between a small, medium or large employer. This is surprising since the WSIA itself speaks of such distinctions. For example, the re-employment provisions do not apply to employers regularly employing less than twenty (20) workers [WSIA, s. 41(2)]. Additionally, the WSIB ER plans are geared to the size of the employer, with the scope of accountability commensurately increasing with the premium (or payroll) of the employer. At the low end of the spectrum, employers are 40% accountable and at the high end – 100%. In fact, the NEER plan is not even applicable for smaller employers with less than \$25,000 in annual premiums (those employers fall under the MAP plan). No such considerations are evident in the proposed policies.

It is therefore my recommendation that the Board re-draft the penalty element of these policies to not only make them fairer, but to ensure that they are thematically in sync with other Board policies.

**Fines that are not legally permissible under the re-employment provisions should not be *de facto* applied under the non-cooperation provisions**

Smaller employers regularly employing less than 20 employees are exempt from the WSIA reemployment provisions, including the fines for non-compliance (up to 1 year's net earnings of the worker [WSIA, s. 41(13)]). It must be presumed that there are sound public policy reasons for this exclusion (no economy of scale; business efficacy; lack of awareness; etc.). Yet, a very small employer, say with as few as two employees, could be subject to the very same fines for non-cooperation as a large employer.

It is ill-advised for fines and penalties that are not legally permissible under the re-employment provisions to be *de facto* levied under the "co-operation" provisions of the WSIA. While the Board policies will not be subjecting employers to "double jeopardy" (the proposed policies confirm that an employer will not be fined under *both* provisions), small firms are not exempt from the non-cooperation fines. They should be.

**The bottom line:** I recommend that the WSIB re-visit these policies and take into account the need to adjust the penalties proportionate to the size of the enterprise. Not only are smaller employers generally less aware and less sophisticated with respect to their ESRTW requisite duties and obligations, but smaller employers have a lesser capacity to facilitate an ESRTW than a larger employer.

The WSIB would be well advised to apply the re-employment exemption of less than twenty (20) employees to the penalty provisions of the ESRTW. Additionally, the penalties themselves should be structured in a manner not at all dissimilar to ER surcharges, which vary in accordance with the size of the firm. In fact, the ER rating factor would be an appropriate guide post upon which to set the penalty. Penalties would vary with the size of the firm and would range from 40% to 100% dependent upon the size of the firm.

**Employer's exposed to "triple jeopardy"**

So called "uncooperative employers" will now be potentially subject to three (3) distinct penalty provisions from a single case – cooperation penalties (equal to 100% of the costs of wage loss benefits *plus* labour market re-entry costs, for up to one year) levied under s. 86 of the WSIA; reemployment penalties (up to the amount of the worker's net average earnings for the year preceding the injury) levied under s. 41(13)(a) of the WSIA; and, experience rating

impacts (varying dependent on the size of the firm, but up to - for 2007 - \$287,200 for a single claim).

If an employer breaches the reemployment and the cooperation provisions with a *single act*, the Board will only levy one (the Board's choice) of the reemployment or cooperation penalty (*plus* experience rating). However, the policy makes it very clear that *different* acts or omissions for the same case *may well result in three distinct penalties* – a reemployment penalty *and* a cooperation penalty *and* an experience rating penalty. The draft policy directs:

If an employer breaches both a co-operation obligation and a re-employment obligation, and the respective breaches are for different acts or omissions, the WSIB may levy both the associated penalties. (It should be emphasized that the WSIB will generally look to the pattern of actions and behaviours to determine whether the workplace party is co-operating in the return to work process.)

As an example, an employer who fails to maintain communication with the injured worker following the work-related injury/disease may be subject to a non-cooperation penalty. If the worker becomes fit to perform the essential duties of the pre-injury job and the employer fails to offer the pre-injury job or an alternative job that is comparable in nature to the pre-injury job, the WSIB can also levy a reemployment penalty. [Draft Policy 19-02-06, page 6].

Frankly, I do not see the distinction of failing to communicate and failing to offer a job – they both deal with communication. It is clear from this example, that the Board is paving the road to allow for multiple and expensive penalties. This means that a case which now can cost an employer close to \$300,000 in experience rating costs, *plus* \$50,000 or so in reemployment penalties, may also cost that employer *an additional* \$100,000 or more in non-cooperation penalties – an overall liability close to \$500,000 for one WSIB case! Rather excessive, I suggest.

But, more on point, what is the purpose of the penalties – obviously to persuade an employer to behave differently. In the example above, if the experience rating penalty of close to \$300,000 is not enough to persuade the employer, then the added penalties are unlikely to tip the scales. For the Board's entire treatment of employer penalties: ***Minus 7 points for the Board.***

**Draft Policy 19-02-07; Human Rights Legislation and Accommodation in the ESRTW/LMR Process**

**New policies close in content to earlier drafts**

The new draft policies are fairly close in content to last year's policies. One addition is a clearer discussion on the role and obligations of unions (at page 2), which includes the expectation, pursuant to human rights legislation, that employers and unions may have to "... *adapt or modify the operation of a collective agreement if necessary to satisfy a legitimate accommodation request*". This will prove to be interesting to see that element of the policy develop. It is not clear whether or not the Board will be taking a passive or an active role.

While the WSIB has no capacity to administer either federal or provincial human rights legislation, it is open to the Board to actively advise and expect the employer and the

union to manage routine exceptions to the collective agreement provisions. The union though is not a party to any potential penalty provisions under the WSIA. The Board has no legal capacity to coerce the union to do anything. Only the employer and the worker are the direct parties caught within the span of direct WSIB authority. I predict that not much will actually come of these provisions.

#### **WSIB role to accommodate**

The Board makes it clearer that it also has obligations under human rights legislation, which will include the need to accommodate with respect to LMR services and programs. This duty includes accommodating *post-compensable injury* non-compensable medical complications. In one example, the Board posits a set of circumstances where a worker involved in an LMR succumbs to a post-compensable injury ailment, not related to the original injury. To allow the worker to continue in LMR, the Board will treat the non-compensable ailment (which in the example case required the WSIB to provide hearing aids). This approach raises interesting Second Injury and Enhancement Fund ["SIEF"] considerations. It would be unfair to hold the employer to account for these costs, but the SIEF policies speak to "pre-existing" injuries. A concurrent SIEF policy review is called for.

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#### **Draft Policy 19-03-02; LMR Assessments**

These draft policies are quite similar to the previous batch and are not inconsistent with current practice.

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#### **The probable "life arc" of the ESRTW policies**

I expect that these policies will undergo a predictable "life arc" post-implementation, as WSIB policies of this type tend to do.

##### **Phase 1: Confusion**

At first, there will be much confusion as to how these policies ought to be applied (in fairness, the WSIB is trying to mitigate this through its testing).

##### **Phase 2: The mature policy**

The next phase will occur after some institutional experience is gained and the policies become a little more mature, usually a year or more after initial implementation. During this phase, policies are no longer considered "new" and are no longer in the institutional spotlight. The Board decision-makers will simply be applying the policies case-by-case. Not atypically, during this phase, individual decision-makers will tend to lose sight of the original policy intent of the revisions, and characteristically take what I can describe as a "black letter" approach to policy application.

##### **Phase 3: problems are noticed**

In the case of the ESRTW policies, this will likely result in more fines than intended being issued. Yet it will take several years before the hardship stories start to emerge and

inch their way through the appeals system (and to the Appeals Tribunal).

A case decided a year from now will not get through the WSIB and WSIAT processes for up to two to three years from then. That means that three to four years will go by before the cases arising from these policy changes even *begin* to accumulate. This is precisely the timeline that was experienced when ESRTW was first codified in the statute in 1998.

#### **Phase 4: A demand for change**

Even though the problems would have been fermenting for years, it will not be until the discord is widespread before any future policy change results. But, it will.

#### **We have seen it before**

We have seen similar developments before in the arena of employer fines. In the late 1990s, the WSIB (then named) Special Investigations Branch ["SIB"] buttressed by changes to the WSIA and a new WSIB institutional compliance mindset, took to employer prosecutions like a duck to water. It took several years but eventually thematically similar stories began to emerge, and awareness of a problem began to percolate. Eventually, it was realized that a bit of a Frankenstein's monster had been created (out of good intentions), requiring the direct intervention of the (then) WSIB Chair and CEO to order a curtailment of this overzealous approach. New screening guidelines were put in place and many cases were (and are) streamed to more appropriate methods (principally education).

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#### **What should the Board do now?**

As I argued earlier this year, there is no policy urgency at all with respect to the deployment of the ESRTW policies. There is no policy void and ESRTW is now a mature policy concept. There still is no urgency.

The decision of the Board to test these policies in pilots is a sound and very responsible administrative move. To concurrently seek out stakeholder input is desirable as well.

However, until and unless a compelling *objective and fact based* argument can be presented for the need of employer penalties (other than the power is there), the Board should abandon that element of the policies.

Unfortunately, in the WSIB policy development arena, when trains of this type get on the track, for all practical purposes, they have already "*left the station*".

It will be a sign of exceptional leadership for the Board realign the themes presented in these policies and put the employer penalty provisions back on the shelf where it belongs.

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**In the next issue of The Liversidge e-Letter, a full report on the November 2, 2006 Town Hall Meeting with WSIB Chair, the Hon. Steven W. Mahoney**