The Liverside *e*-Letter

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

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For 2010 WSIB reaps startling windfall from Statistics Canada

"Methodology changes" likely gain millions for WSIB

- **WSIB earnings ceiling based on Ontario Average Industrial Wage ["AIW"]**
- **AIW based on latest data from Stats Can**
- **Stats Can changed how it estimates AIW**
- ***The impact? Actual AIW up only 1.6% but WSIB hikes ceiling 4%***

Earnings ceiling up 4% even though inflation a net negative and earnings up only 1.6% *How can this be?*

For 2010 the WSIB set the earnings ceiling at $77,600, **up 4.0%** from the $74,600 2009 level, even though the *actual* escalation in average Ontario earnings (the key factor in calculating the ceiling) increased only 1.6%.

This is a head scratcher

Right out the gate, when I saw a whopping 4% upswing in the ceiling, I started scratching my head. *How could this be?* It just did not make any intuitive sense, particularly in "post-melt-down" Ontario. Wages are *not* spiking. Some aren't moving at all. Moreover, economic buzz seems more worried about deflation, not increasing wages. At a time when the **Consumer Price Index** ["CPI"] ***dropped*** 0.9% from June 2008 to June 2009 (as per Statistics Canada), *how could it be that the WSIB earnings ceiling jumped 4%?*

WSIB does not volunteer the whole story

WSIB public information releases, although technically correct, don't explain the full reasons behind this: "*changes to the maximum Insurable Earnings Ceiling are directly linked to changes in average earnings in Ontario as measured by Statistics Canada*" (WSIB website). Well, while this is quite true, it doesn't come close to "full disclosure" to explain why the ceiling is spiking 4% at a time when wages are barely moving.

So, what gives? After unsuccessfully trying to get the full story from the Board, I decided to investigate and find the real reason. *I did*. **My conclusion:** The Board is on the receiving end of a premium windfall.

***The overall effect of a 4% jump in the ceiling?* Many employers get hit with significant premium hikes well in excess of the actual increase in average wages**

Since the Board uses the ceiling both to calculate payments to workers *and* premiums from employers, as a result of the 4% jump in the ceiling, many high wage employers will face significant increases in premiums 2009 to 2010 ***well beyond normal inflationary and wage adjustment levels***. This may well appear to some as a "back door" rate hike.

The chart below illustrates the impact on an actual industry (the industry itself is not particularly material; for high wage employers the same basic arithmetic will transcend industry lines; the calculations below are from masonry construction). In this example, the 2009 & 2010 wages for the worker stayed the same at $78,000 – in other words, no actual increase.

Year	Rate	Ceiling	Premiums
2009	$11.15	$74,600	$8,317.90
2010	$11.15	$77,600	$8,652.40

Increased premium of $334.50 per worker (+4%).

While the premium per each high wage worker in this sector jumps 4.0%, the CPI actually decreased 0.9% (June 2009 to June 2009), and the *actual* Ontario AIW increased only 1.6%.

How did this happen? Did the Board goof?

So, how in the world did this happen? Did the Board just engineer a colossal goof? ***Well, yes and no***. The explanation gets a little technical. I will provide the essential information.

First, the WSIB earnings ceiling is set by statute (*Workplace Safety & Insurance Act* ["WSIA"]) at 175% of the "average industrial wage for Ontario" ("AIW") **[WSIA, s. 54(1)]**.

Second, the AIW is based on the "*most recent published material that is available July 1 of the preceding year" as published by Statistics Canada* [WSIA, s. 54(2)]. In most cases, this is the April issue of Statistics Canada's ***"Employment, Earnings and Hours" Report***.

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Third, usually, the AIW closely matches normal fluctuations in earnings. Year to year variations are usually explainable by, and consistent with, inflation and known sector wage adjustments.

Fourth, for the 2009 – 2010 adjustment, these factors do not explain the variance. In fact, the *actual* AIW from April 2008 to April 2009 (the relevant period to set the 2010 WSIB earnings ceiling) increased only 1.6% (from $836.08 per week to $849.99 per week). Yet the WSIB accounted for a 4% increase. **[Note 1: Source - Statistics Canada, "*Employment, Earnings and Hours*, April 2009, Catalogue No. 72-002-X, Table 4-7, p. 100 and Table 8-7, p. 189]**

Fifth, there **was not** a 4% increase in the *actual* AIW 2008 – 2009 (as shown immediately above, the actual increase in the AIW for the relevant period was 1.6%).

Sixth, this variance is explained by an ***administrative change*** in the ***methodology*** employed by Statistics Canada in estimating the AIW, ***not by an actual change in the AIW***. Effective January 1, 2009 the AIW was calculated in a different manner. [I contacted officials at Statistics Canada for an explanation of the changes. The short answer is this: "*With the release of January 2009 "Survey of Employment, Payrolls and Hours" data on March 31, 2009, an improved estimation method for earnings and hours data was introduced and estimates back to 2001 were revised . . .*" **(*supra* Note 1, p. 5)**. **[Note 2: For a more detailed account for the changes, refer to: Statistics Canada, "*Improvements in 2009 to the Survey of Employment, Payrolls and Hours, March 2009*"; and for a very technical explanation: Statistics Canada, "*Redesign of the Survey of Employment, Payrolls and Hours; Change of Estimators and Sampling Plan*", March 2009]**

Seventh, accordingly, the "gap" between the 2009 ceiling and the 2010 ceiling is driven less by a change in the actual AIW and more by a change ***in the method* to estimate** the AIW. The 2009 ceiling was based on April 2008 data calculated under the previous methodology – which set the Ontario AIW wage at $818.07. **[Note 3: Source - Statistics Canada, "*Employment, Earnings and Hours*, April 2008, Catalogue No. 72-002-X, Table 5, p. 97 and Table 9, p. 211]** The 2010 ceiling is based on April 2009 data calculated under the "new" methodology which set the Ontario AIW at 849.99 per week). **[Source: *supra*, Note 1]**

All this explains that, in fact, there was not a 4% hike in the AIW. Rather, there was an administrative adjustment in a calculation *method*, not an actual adjustment of the AIW.

Has the WSIB acted legally and fairly?

Is the WSIB method legal? Likely yes. The WSIB has simply applied s. 54 of the WSIA. The scope of the Board's lawful discretion is actually somewhat complex, which I will get into momentarily. But, at this juncture, let me just affirm that the Board acted legally, meaning that their actions are not likely open to judicial review. *Can the Board legally get away with increasing the premium ceiling by 4% even though the actual increase in the AIW was only 1.6%?* **Yes**. *Must the Board legally do this?* In my opinion: **No**. *Should the Board do this?* **Absolutely not**.

Is the WSIB method fair to employers? No. Not at all. High wage industries will be hit with a *de facto* premium hike driven by an administrative change at a federal department. At the best of times this is difficult to justify. During difficult economic times it is unconscionable.

Is the WSIB *required* to assess employers on the 2010 ceiling?

This is the $10 million (or more or less) question. At a time when the Board declares its sensitivity to the plight of employers during these unprecedented times (just review any press release or financial notice delivered by the Board over the past year - the message is clear - these are difficult times), it should have been a tad bit more sensitive to a 4% premium hike for high wage paying employers. ***But, can the Board do anything about it?*** In my considered opinion, absolutely.

The WSIB has no discretion in setting the ceiling for worker benefits

First, let's look at what the Board can't do. It can't change the earnings ceiling (as calculated by s. 54 of the WSIA). This is set by statute. The formula and instructions are very clear. And very simple. The ceiling is set at 175% of the AIW. The AIW is established by Statistics Canada. It is set using the most current information available as at July 1 for the next year. **[WSIA, s. 54]**.

But the WSIB does have *complete discretion* to set employer premiums

But wait a minute – the Board has made an interpretive presumption - a wrong one in my opinion – the that ceiling for worker benefits and the ceiling for employer premiums must be the same. Let me examine *that* question for a moment. I concede that the Board is absolutely correct to set the ceiling as they have for worker benefits. The statute is ever so clear. Read it yourself:

Maximum amount of average earnings

54. (1) If *a worker's* average earnings exceed 175 per cent of the average industrial wage for Ontario for the year, *his or her* average earnings shall be deemed to be 175 per cent of the average industrial wage for Ontario for the year.

Average industrial wage

(2) The calculation of the average industrial wage for Ontario for a calendar year is based upon the most recent published material that is available on July 1 of the preceding year with respect to the estimated average weekly earnings industrial aggregate for Ontario as published by Statistics Canada.

It is crystal clear that the ceiling calculation relates to the maximum for worker benefits. ***But, is the Board required to use the same maximum for calculating employer premiums?*** **In my opinion – no, not at all**. The WSIB has complete discretion to determine how premiums are calculated. The WSIA is just as clear. Again, read it for yourself:

Method of determining premiums

81. (5) *The Board shall establish the method* to be used by employers to calculate their premiums. The method *may* be based on the wages earned by an employer's worker.

With respect to the relationship between maximum earnings and employer premiums, the WSIA is clear:

Maximum earnings

88. (3) The premium payable by an employer applies *only* with respect to the maximum amount of average earnings determined under section 54 for each of the employer's workers.

I interpret this as being equally clear – the Board is statutorily barred from collecting premiums *over* the worker benefit ceiling. The WSIA is not demanding that the Board collect premiums *up to* that ceiling. ***In fact, this is left entirely to the Board's discretion***. As noted under **WSIA s. 81(5)**, premiums don't even have to be based on workers' earnings (they "may"). Even that is discretionary. It is quite clear that the Board enjoys a very liberal and broad discretion is determining the method to calculate premiums.

In normal times, the Board's method makes perfect sense

In normal times, the Board's method makes perfect sense. As I said earlier, for the most part, usually the AIW closely matches normal fluctuations in earnings. Year to year variations are usually explainable by, and consistent with, inflation and known sector wage adjustments. Therefore, it normally makes perfect sense for the Board to match the ceiling for worker benefits (over which it has no discretion – the amount is effectively set by statute) and the ceiling for employer premiums. In fact, in normal times it would be silly for the Board to use different calculations.

But we are not in normal times

But, for the 2010 premium rate setting exercise, we are far from normal times. Statements in the recently released **WSIB 2008 Annual Report** are consistent with the messages we have heard from the Board over the past year – times are tough. The Board has acknowledged time and time again that we are "*in the midst of a global financial crisis of unprecedented proportions*" **[WSIA 2008 Annual Report, Chair's Message, p. 5]**.

2010 premium rates were set with a unique method

In fact, the Board exercised its broad discretion this year by moving away from the normal protocol in setting the 2010 premium rates. As I set out in the August 21, 2009 issue of **The Liversidge *e*-Letter**, **"WSIB issues "Fair Warning":** ***If WSIB's economic situation does not improve it will consider future rate hikes*"**, the WSIB adjusted its method, altering key aspects of the normal rate setting protocol:

> For 2010 premium rates, the WSIB intends to use the same method for setting premium rates as has been used in previous years – *but with one important change.* ***Premium rates will be frozen for rate groups with good health-and-safety performance, while rate increases will be calculated for poor-performing rate groups "in the usual way".***

This aberration of the usual rate setting protocol was driven by today's economic challenges. That there is a link between the performance of the economy and the capacity of the Board to impose higher premiums onto Ontario's employers is implicit in the Board's July 27, 2009 open letter to Ontario employers, where the Board declares:

> **"We are doing all we can in these difficult economic times to avoid placing undue financial burdens on employers".**

Last year, Premier McGuinty was a little more explicit. As I introduced in the October 16, 2008 issue of **The Liversidge *e*-Letter**, ***"Stay the Course or Change Direction? Tough Times. Tough Choices"*** the "*worst thing you can do in times of an economic slowdown*" would be to raise taxes **[Toronto Star, October 9, 2008, "*Rough time ahead, but no tax hikes*: McGuinty"]**.

So, what should and CAN the Board do?

With respect to the ceiling for worker benefits, the earnings ceiling for the calculation of worker benefits, should be exactly as the Board has set out, $77,600. Statistics Canada has set the amount. The WSIA directs that the Board use that figure. And, Statistics Canada appears quite confident that the "new" methodology to estimate the Ontario AIW is superior to the previous method.

With respect to the ceiling for employer premiums, the WSIB Board of Directors ["BOD"] has not yet issued any policy decree. So far, all of the announcements are preliminary and have not been approved by the WSIB BOD. While that review is imminent, there is time for the Board to exercise the appropriate, fair and legal discretion.

Since it is the case that the actual AIW increased by only 1.6%, it makes perfect sense, and is quite respectful of the plight of Ontario employers, that the earnings ceiling for the purposes of employer premiums not increase any more than 1.6% from 2009 and 2010. Anything more than that amounts to a windfall for the WSIB. In the best of times it is inappropriate for the Board to reap a premium windfall flowing from an obscure methodology change in a statistical department of the federal government. In these precarious economic times, it is unconscionable.

My advice to the Ontario WSIB Board of Directors:

Suggestion No. 1: Set the 2010 ceiling for the purposes of worker benefits at $77,600. **Suggestion No. 2:** Set the 2010 ceiling for the purposes of employer premiums at $75,793.60 (a 1.6% increase over the 2009 ceiling of $74,600).

In the event the Board protests and argues that premium ceilings *must* keep pace dollar for dollar with benefit ceilings, I say poppycock. They don't. Neither in law, in policy, or in practice. While in the fullness of time, premiums should match benefit liabilities, at this moment, the future liabilities of the Ontario WSIB are influenced a heck of a lot more by the vagaries of the equity markets than they are with transitory variances in earnings ceilings.

WSIB must step up and "*avoid placing undue financial burdens on employers*" (July 27, 2009 WSIB letter to employers)

My proposal is fair to workers *and* employers, legal, and well within the Board's discretion. It is a sensitive, rational method that respects the reality of today's times. **It is now up to the Board**. *I am certain the Board has no desire to reap a premium windfall on the backs of Ontario's struggling employers. The WSIB BOD can do the right thing and call off the 4% ceiling hike for employer premiums.*

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