

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

May 9, 2002

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

4 pages

Our Client Newsletter Returns

The new e-Letter: An electronic dialogue with our clients

Our Client Newsletter Returns

After a lengthy hiatus, in response to client demand, the previously named **The Liversidge FaxLine**, returns under the new name **The Liversidge e-Letter**. As before, the e-Letter will provide our clients with essential executive level information on emerging issues within the Canadian workplace safety and insurance (WSI) field.

The **Liversidge e-Letter** will be as interactive as our clients wish. I will personally respond to questions raised and topics suggested by our clients in upcoming issues (or directly to the client as circumstances warrant). The e-Letter will provide an opportunity to maintain an efficient dialogue amongst a diverse group of business leaders with respect to an always important social insurance program.

Compared to Past Eras, Today's Workplace Safety and Insurance Seas Are Smooth

In a contemporary context, by all measures, the Ontario WSI scheme has been extremely quiet over the last four years. Dramatic change had taken place over the previous decade. No less than three major legislative reforms had been introduced in that period.

A New Appeals System Changed the Power Dynamic

First, the administrative structures were transformed. The antiquated internal appeal system was replaced. No longer was it acceptable for the Board to be the initial and final arbiter. The perception of a lack of independence proved fatal to this arrangement. In 1985 the Workers' Compensation Appeals Tribunal ("WCAT") replaced the old Appeal Board. Overnight a new standard of administrative justice took root. Decisions were published and an impressive and influential body of jurisprudence emerged in lightening speed. Every significant issue was a candidate for a fresh perspective. Core issues such as what constituted a compensable accident and compensation for chronic pain and chronic stress re-defined the limits of workers' compensation. For the first time, individual cases assumed powerful jurisprudential significance. In upcoming issues I will be addressing the current WSIB/WSIAT relationship and examine whether some elements of the past have crept back. Is the Board's control again absolute? Does the current model promote or discourage policy reform?

Register TODAY for our WSI

Executive Briefing:

Workplace Safety and Insurance: The Last 5 Years: An executive overview of the effect of changes on today's workplace safety and insurance scheme. What are the sign-posts for the future?

*June 26, 2002: See Page 4 for Registration Form
Space is very limited - Register early*

A New Board of Directors With Links to the Community

At the same time the governance of the scheme was radically altered. A new representative Board of Directors with close links to partisan constituencies and a renewed emphasis on strategic policy replaced the more staid old Corporate Board. However, almost over-night, a tension arose between the Board and the Tribunal. The compelling question of the day was who had the final say – the Board, which remained responsible for the viability of the scheme and which maintained official control over policy, or the Tribunal, which was the final decision maker on individual cases often with far-reaching policy consequences. This question was never fully resolved. Within a few years, this resulted in a widening divergence of institutional perspectives. With some issues, the same set of facts received a very different policy treatment depending on whether the case was before the Board or the Tribunal.

Meat-Chart Pensions Done Away With

In 1990 the benefit delivery system was restructured, moving from a meat-chart scheme to a more sensitive wage-loss approach, allowing for a greater emphasis on the individual circumstances of workers. This bold step alone ended long-standing systemic inequities. The 1990 reforms focused attention on the effect of the worker's injury on the worker's earning capacity – not simply the degree of physical impairment. A more equitable means of compensating disabled workers resulted.

A New Focus on Rehabilitation

At this time, the focus of workers' compensation began to transform. Historically, the principal concern dealt with worker benefit issues. Rehabilitation, while important, was an

ancillary matter. This was about to change. In 1990 workers were provided with new reinstatement rights and employers with new obligations to accommodate disabled workers and return them to work. Non-compliance was met with sizeable penalties.

Employer Premiums Experience Rated

Consistent with this theme, employers became more directly accountable for their workers' compensation costs. Renewed experience rating schemes, introduced in the mid-1980s, were system wide by the early 1990s. An employer's premiums were now directly tied to accident and claim experience. The new regulatory requirement to reemploy was complimented by a financial incentive scheme.

Administration Overhauled, then overhauled again (and yet again!)

Throughout this period, the Board, as an administrative agency, underwent a massive organizational overhaul. The Board which was in place in 1985 was completely reshaped by 1990 and again by 1995 (and yet again by the year 2000). A new policy department set out to manage a burgeoning policy agenda, setting in motion a new era of public consultation, before quite foreign to the Ontario workers' compensation scheme. An invigorated policy debate expressing sophisticated and often contrasting viewpoints explored controversial issues, all the while testing the administrative limits of the Board and its core constituents. Everything continued to be up for grabs. By this time, the representative Board of Directors had evolved into a bi-partite labour-management board. On major issues, an entrenched stalemate surfaced. The Board became deadlocked. Progress came to a halt.

Financial Sustainability was the New Focus

By the early 1990s, employer assessment rates had begun to skyrocket. The Board's unfunded liability, almost non-existent in the early 1980s, mushroomed to almost twelve billion dollars in just over a decade. The very sustainability of the system became the issue of the day. These pressures dovetailed into further legislative reform in 1997. The scope of this change was massive yet still consistent with core themes maturing over the past fifteen years.

A New "Workplace Safety and Insurance Act"

Not insignificantly, the name of the scheme was changed from "workers' compensation" to "workplace safety and insurance". The Board was now the "Workplace Safety and Insurance Board" ("WSIB"), the Tribunal the "Workplace Safety and Insurance Appeals Tribunal" (WSIAT") and the legislation itself, the *Workplace Safety and Insurance Act*. The changes introduced in 1997 represented a complete rewrite of the statute – the first since its inception in 1915. The bi-partite Board was replaced with a less partisan one, links to the stakeholder constituencies at the individual Board member level were replaced with more central controls over an external dialogue. The powers of the Tribunal were curtailed. The question of who had the final say was definitively answered in the new Act – it was the Board. The Tribunal is

now required to apply Board policy. Time limits were introduced for appealing Board decisions – within the Board and to the Tribunal. Compensation for chronic stress was removed from coverage. Both workers and employers were obliged to cooperate with one another and the Board or face penalties. Reporting obligations for both parties were enhanced. Penalties for employer non-compliance became severe. The focus was now clearly one of prevention – preventing the injury itself and containing the effects of the injury. The overall responsibility for worker reemployment devolved from the Board to the parties directly – the Board would intervene only when the parties were unable or unwilling to return a disabled worker to employment. Unlike previous reform periods, this last stage of reform coincided with a province wide economic upswing. Employer premium rates peaked and started to significantly decline. The unfunded liability is at its lowest level in over a decade.

Old Issues Reappear – New Ones Emerge

And yet, long-standing issues continue to reappear. Compensation for stress for example, is yet again the subject of a Board policy consultation paper. Jurisdictional issues between the Board and the Tribunal continue to appear. Experience rating is again on the policy agenda. As both the Board and the Tribunal struggle under heavy caseloads, expectations on all parties and representatives are increasing to present more thoughtful and realistic positions. While it is clear that most of the structural adjustments that this system has undergone over the last twenty years have advanced an impressive and sustainable legacy, some old challenges are re-appearing as some new ones arrive. [Much of the preceding is from the Preface of the book I co-authored: Gilbert, Liversidge, *Workers' Compensation in Ontario: A Guide to the Workplace Safety and Insurance Act*, 3rd ed. (Aurora: Canada Law Book, 2001)].

It is against this backdrop of change that **The Liversidge e-Letter** returns. Future issues will address every important and pressing issue. This **e-Letter** will inform. It will educate. It will attempt to serve as a catalyst to spark and maintain a high level continuing debate. The input of our clients matter. Most issues will provide a direct opportunity for feedback and participation. Feel free to ask questions. Share your views. Through this process, our clients will set the agenda.

To start, the next several issues of **The Liversidge e-Letter** will address the following:

Coverage: An in-depth review of the Board's recent consultation paper, "*Coverage Under the Ontario Workplace Safety and Insurance Act*". Is the review broad enough? Is this the time to think about private insurance options?;

Stress: A look at last year's WSIB consultation paper on entitlement for stress. While the Act was changed to remove entitlement for stress, does the new policy go too far? Will it stand up to a judicial challenge?

The Tribunal: An examination into decisions of the Workplace Safety and Insurance Appeals Tribunal. What has been the true effect of requiring the Tribunal to apply Board

policy? Is policy evolution now stagnated as a result? What has been the effect of the large appeal volume on the quality of decision making? Has the use of part-time Vice-Chairs impacted the institutional consistency of the Tribunal?

Experience Rating: The Board is presently in the early stages of considering massive adjustments to experience rating and is just starting consulting with business. What are the essential elements of the changes? Is NEER DOA? What are the design problems with NEER? Is yesterday's genius today's ineptness?

Early and Safe Return to Work (ESRTW) and WSIB Work Disruptions Policy: One of the hallmark innovations in the new Act is a focus on the self-reliance of the parties in returning workers to employment. The emphasis on ESRTW is structurally supported in the Act with new statutorily prescribed responsibilities for workers and employers alike. The link to benefits now is less the presence of impairment and more the "loss of earnings as a result of the injury". The Board has recently released a consultation paper concerning the payment of benefits when a worker, who has returned to employment, has been laid off as a result of a work stoppage. Is the Board policy proposal expanding the scope of benefits beyond that expected by the Act?

The Business Lobby: In recent years, with a new Board empowered with a new Act, in the wake of a new economic vitality and a tired and worn policy advocacy constituency, change became quieter, in both execution and impact. The "period of protest" had expired. Times changed. What must business do now to remain an active and relevant player?

WSIB Requests to Reconsider Tribunal Decisions: Over the last few years, the WSIB is more routinely requesting the

Tribunal to reconsider its decisions. These are usually cases dealing with employer classification and related issues. Is the Board's practice fair process? Does it undermine the independence of the Tribunal? Yet, how does the system ensure overt errors are not implemented?

Changes to the Board's Classification Scheme: In 1993, after several years of consultation, the Board implemented the *Revenue Strategy*, which overhauled the employer classification system. The number of rate groups was expanded from 109 in 1992 to 229 groups in 1993. Since then, the Board has been consolidating rate groups and they presently sit at 156. Have the organizing principles behind the Revenue Strategy (similarity of business activity, commonality of risk, statistical creditability and clarity of distinction among rate groups) been abandoned?

Same premium rates - distinct rate groups: In addition, the Board has adopted an interesting practice of setting rates for distinct rate groups by consolidating their historical experience. Premiums are being set at the same level, without the bother of going through the formal process of consolidating the rate groups themselves. Are rate groups being disadvantaged by this practice? Is this a proper use of the Board's administrative discretion? Has the Board overstepped its lawful authority? Is the Board able to arbitrarily set rates on the data it chooses?

Your issues and questions: The trademark focus of **The Liversidge e-Letter** will be its response to emerging issues of interest raised by our clients. All of our clients are encouraged to submit questions, points of view, perspectives on issues and commentary on emerging Board or Tribunal practices. **The Liversidge e-Letter** will provide a forum for broad feedback.

WSIB Releases Consultation Paper on Coverage: The Scope of the System is Likely to Change

On January 21, 2002 the WSIB released a consultation paper, "*Coverage Under the Ontario Workplace Safety and Insurance Act*". The Coverage Paper presents a general overview of the pressing coverage issues facing the WSI system, and while no concrete proposals are advanced, it leans towards adoption of a full coverage scheme similar to other Canadian jurisdictions. Canadian workers' compensation schemes are divided between two over-arching organizing philosophies: one dictates that all industries are included unless *explicitly excluded* by statute, regulation or policy, the other approach is to exclude all industries unless the industry is *explicitly included* by statute or regulation. Ontario falls under the "explicitly included" approach. In the next issue of **The Liversidge e-Letter**, I will be exploring the Board's paper in depth. Does the scope of the Consultation Paper go far enough? Is it in the best interests of workers and employers to expand the WSIB insurance monopoly, or is it time to seriously consider private insurance options? In the meanwhile, if any of our clients has an opinion on the question of coverage, please send me an e-mail, letter or fax.

The Liversidge e-Letter will be delivered via the media of your choice

The primary means of transmission of **The Liversidge e-Letter** will be via e-mail. If you have received **The Liversidge e-Letter** via fax or direct mail, and you would prefer to continue receiving **The Liversidge e-Letter** by e-mail, simply send me an e-mail at lal@laliversidge.com. On the subject line write, "Include me in **The Liversidge e-Letter** e-mail distribution". If there are others within your organization who would benefit from receiving the **e-Letter**, send me their names and e-mail addresses. They will then be included in our regular distribution.

The Liversidge e-Letter will be published regularly as issues emerge. If there are subjects that you would like to see covered, or questions answered, please send me an e-mail.

If you would like to be removed from the distribution list of **The Liversidge e-Letter**, please simply send an e-mail or fax and your name will be removed.

WSI Executive Briefing

Workplace Safety and Insurance - The Last 5 Years:

An executive overview of the effect of changes on today's workplace safety and insurance scheme. *What are the sign-posts for the future?*

June 26, 2002: 9:00 am – 12:30 pm

**Days Hotel and Conference Centre: The Guild Room
6257 Airport Road [American Drive and Airport Road]**

Six years have passed since the Hon. Cam Jackson, Minister Responsible for Workers' Compensation Reform, released "*New Directions For Workers' Compensation Reform*". It is four years since the new WSI Act. Employers and workers were given new obligations. A new governing Board changed how the Board did its business. "*Integrated Service Units*" were replaced with "*Industry Sectors*". The Appeals Tribunal was required to apply Board policy. Premium rates declined. The unfunded liability dropped. It is time to take a step back. Is the system better off now than a decade ago? What does the future hold?

The Executive Briefing will provide you with a senior perspective on today's WSI scheme:

Segment 1: *The road to Damascus: How we got here*

A snapshot overview of the legal, policy, political and financial pressures that brought us to the 1998 WSI reforms

Segment 2: *Stop, Look, and Listen: An overview of today's hot issues*

What are the core developments since 1998? Has the new Act delivered on its promise? Is the system more effective? An update on the Appeals Tribunal since 1998 – what has been the effect of adhering to Board policy? Was anything broken to begin with? What are today's leading cases? Is the system more manageable? Is it fairer? An outline of the hot issues of today: experience rating, coverage, employer premiums, classification, stress, compliance, work disruptions. Are they set to get hotter? How must management respond?

Segment 3: *Tomorrow's Journey Begins Today*

How will today's issues shape future directions? How should business respond? Is management losing its voice?

**This will be an executive style briefing. The pace will be fast. The focus intense.
The information essential.**

Register NOW. Space is very limited. E-mail, Fax or mail your registration.

Please register me for the June 26, 2002 Executive Briefing on WSI Issues

Name: _____ Company: _____
Address: _____ City: _____ Postal Code: _____
Tel # _____ E-mail: _____ Fax: _____

Registration Fee [note discount for same firm registrations]

First Company Participant at \$150 = \$150
Subsequent Participants: ____ at \$55 each = _____
Total Registration fees: _____
Plus 7% GST: _____
Total Amount: _____
 Invoice Me Cheque Enclosed
Cheque payable to: L.A. Liversidge, LL.B.
GST registration #86587 5215 RT001

The format of the *Executive Briefing* will allow for an exchange of views and a dialogue. Q&A will be throughout. Once registered, all participants will receive a questionnaire to canvas your general opinions on the current state of the Ontario WSI scheme, and to provide you with an opportunity to highlight the areas of most concern to you. By completing this questionnaire, the program will be tailored to your specific needs. If you have specific questions or areas you want to see covered, you will have an opportunity to submit these to me before the *Briefing* to ensure that they are included in the program.