

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

October 30, 2007

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

5 pages

Experience rating under attack *OFL renews demand to kill experience rating* *Says “boondoggle” must end*

OFL says employers under-report accidents and force workers back to work too early
One problem: A 2005 WSIB sponsored study says just the opposite

In report released earlier this month, the OFL slams experience rating

In a report released by the Ontario Federation of Labour [“OFL”], *The Perils of Experience Rating: Exposed* (released October 5, 2007), the OFL revives its campaign to discredit experience rating [“ER”], suggesting among other things that:

- There is “*absolutely no evidence*” to support that ER is a major incentive to improve workplace health and safety;
- Instead, ER promotes many negative employer practices;
- ER has a very negative effect on injured workers;
- ER burdens smaller employers for the gain of the bigger employers

Readers should make up their own minds

I would encourage readers to look at the OFL report first-hand and decide whether this is an objective assessment of ER. *Form your own conclusions.* I am not going to respond with a clause by clause critique. Suffice to say that I disagree with the conclusions reached and the method of the study. The report is published on the OFL website at www.ofl.ca.

A more complete assessment of the benefits of experience rating exists

Readers should also read a 2005 comprehensive Workplace Safety & Insurance Board [“WSIB” or the “Board”] sponsored study, “*Assessing the Effect of Experience Rating in Ontario: Case Studies in Three Economic Centers*”, (June 2005, Institute for Work and Health, IBM Business Consulting Services). This appears on the Board’s website at:

[http://www.wsib.on.ca/wsib/wsibsite.nsf/LookupFiles/DownloadableFileAssessingEffects/\\$File/NEER_Case%20Studies.pdf](http://www.wsib.on.ca/wsib/wsibsite.nsf/LookupFiles/DownloadableFileAssessingEffects/$File/NEER_Case%20Studies.pdf)

L. A. Liversidge Executive Seminar Series
November 21, 2007

In the morning:

WSIB Policy & Reform Conference

Get the *BOTTOM LINE* on the top issues:

Impact of the Budget Reforms

The future of experience rating

Future reforms: the next four years

How can the WSIB treat employers more fairly?

What changes do YOU want?

In the afternoon:

A Hands-On Experience Rating Executive Briefing

The Snakes and Ladders of NEER

Sign up today

Morning program: Sign-up form page 4

Afternoon program: Sign-up form page 5

OFL says “no analytical data” supporting experience rating exists – this is just not so

In the OFL report, the following sharp criticism was posed:

Wayne Samuelson, President of the Ontario Federation of Labour, raised the alarm about this lavish boondoggle for large employers at the expense of injured workers at the Standing Committee on Government Agencies on February 27, 2007. He tendered the challenge to anyone in the government to provide analytical data that supported the theory that experience rating programs in any way contributed to workplace investment and improvement of health and safety practices. The response has been a deafening silence.

LAL attended and appeared at the February, 2007 Standing Committee

Well, actually, the silence is not really all that deafening. In fact, I was present at the Standing Committee on Government Agencies on February 28, 2007 when those allegations were first raised. **I responded. Immediately.** I advised the Standing Committee that ER has been proven, and contrary to the assertion of the OFL, a WSIB sponsored report presents the very proof that is said not to exist.

In the March 12, 2007 issue of **The Liversidge e-Letter**, this is what I said in direct response to these criticisms:

Experience rating gets maligned

One of the presenters went after experience rating [“ER”] – with a vengeance, accusing ER of being nothing less than a scam. Here is what was said:

Let me deal first of all with this experience rating scam. What you have here, just so everybody understands, is a system that basically encourages bad practices. **You have a system that encourages employers to lie and cheat so they can get money back on their WCB claims, in many cases literally millions of dollars.** You’re going to hear people talk about, *“This has decreased and so many injuries over here have decreased.”* Let me tell you, **in the real world what’s going on is that employers are not reporting incidents because they know that if they don’t, they can get money back from the workers’ compensation system.** ***If the system was really and truly interested in preventing injuries and ensuring that people have a safe workplace, they would not be paying liars and cheaters.*** What they would have is a system that provides money for investment in prevention and return to work. That’s what you would see. Unfortunately, that’s not the case right now.

I couldn’t let those comments go untouched and **Mr. Gerry Martiniuk, Progressive Conservative MPP for Cambridge**, asked me to *“discuss it (experience rating) philosophically, because, as I understand it, there has been a considerable decline in accident claims over the last 10 years. Is there any correlation between that decline and the various incentives that were in place and that may be changing?”* This is how I responded:

That’s an excellent question. I think that from an anecdotal standpoint, I could say yes, but what value is that? An opinion on my part, even based upon years of direct observation and experience, is really of little help and of little value. ***But actually, there is a study on this that was recently released by the Institute of Work and Health. It was provided to the Workplace Safety and Insurance Board a year or two ago. It resulted in several conclusions, one of which was that experience rating does drive both positive accident prevention activities on the part of Ontario business and positive early and safe return to work initiatives on the part of Ontario business. That question, I think, has been settled.***

In fact, so outrageous were the smears against ER, that I wrote to the Committee the very next day and provided the members of the Committee with excerpts of that report. This is what I wrote: Several times during yesterday’s proceedings, questions were posed with respect to the effectiveness of the Workplace Safety & Insurance Board’s experience rating [“ER”] programs. Some presenters suggested that there was an absence of evidence of the effectiveness of ER. More significantly, others suggested that ER encourages untoward conduct on the part of employers. **Neither allegation is supported.** There has in fact been a study on the effects of the Ontario WSIB’s ER program entitled, *“Assessing the Effect of Experience Rating in Ontario: Case Studies in Three Economic Centers”*, (June 2005, Institute for Work and Health, IBM Business Consulting Services). The Executive Summary (a copy of which is attached) notes:

Our research indicates that NEER functions well, encourages prevention and contributes to positive workplace health and safety practices. Nearly three-quarters of all managers across all three sectors state that NEER is influencing them to develop safer workplaces. The large majority of employees state that they are being encouraged to report accidents and incidents and are being offered suitable modified and early return to work if injured.

In my comments to the Committee, I noted that in the area of injury prevention, experience rating is but one tool in a larger arsenal of tools. I suggested that *“You can’t do it absent a regulatory framework; you can’t do it absent a prosecutorial model; you can’t do it absent certain expectations and guidelines”*.

With respect to the worry *“about experience rating that when you start to hold employers to account for their actual performance, are they going to fudge the numbers”*, I went on the **record** to repeat the analysis I first set out more than a year ago on the January 23, 2006 issue of **The Liversidge e-Letter**.

I argued that first of all, there are strong safeguards through fines up to \$100,000 to prevent that type of behaviour. But, also, I argued that *“the informed rational employer”* (the very audience of ER), simply would not behave in that fashion. ***Contrary to unsubstantiated rhetoric that employers are hiding claims, I said this:***

Who would do that? Who’s the individual who would engage in that type of behaviour? The experience rating model is designed to focus in on the rational, informed business person who’s going to respond in a self-interested manner to look after their self-interest. That’s supposed to translate into positive employer behaviour. The study I made reference to earlier says it does just that. That means you’re going to avoid an injury and you know there’s going to be a reduction in premiums as a result. We all understand experience rating. If you are driving an automobile and you’re accident-free, your premiums go down; if you have an accident, your premiums go up. It’s the same principle. The arithmetic is a little bit more complicated, but the principle is identical.

If the self-interested business person says, *“I’m going to skirt the system. I’m going to pay the worker under the table not to come into work and I’m not going to report that claim to the Workplace Safety Insurance Board, and somehow I’m making money,”* **he’s not.** ***He’s not only breaking the law and open for the prosecution that I’ve outlined earlier, but there’s no financial gain in it at all. If you go through the numbers, there’s absolutely proof that you aren’t better off skirting your insurance program by directly self-insuring. It’s absurd. It doesn’t happen. I’ve shown these numbers in the past”***.

I noted though that *“I don’t dismiss the fact that a few outlier companies may be performing in this way”*, but, I attributed this to employers that have *“an inadequate understanding of this program”*. In other words, while they may be acting in a “rational” (albeit untoward manner), they are not informed. I pointed the finger back at the WSIB for not explaining ER well enough [more

on this in upcoming issues of **The Liversidge e-Letter**, when I will again address the need for a simple, easy to understand NEER Calculator to be placed on the Board's website]. (NOTE: Since this was first published, the Board has placed a NEER calculator on its website.)

On March 1st, Mr. Mahoney came out with one of the most definitive and strongest statements of support for ER I have heard from the Board in recent years. In direct response to criticism that ER is nothing more than a "scam", this is what he said:

I'm a strong supporter of incentives for the business community to provide better-quality health and safety and **I categorically reject the comments that the people who are employers in this province are liars and cheaters.** I don't believe that.

Hooray (again). For far too long now, the Board has been too quiet when faced with unsubstantiated and outrageous attacks against ER. The study I referred to earlier ("***Assessing the Effect of Experience Rating in Ontario: Case Studies in Three Economic Centers***", (June 2005, Institute for Work and Health), **which really settles the question,** and absolutely supports Mr. Mahoney's comments, has not been widely circulated by the Board. *It should be.* If it's on the Board's website, I certainly could not find it. Nor could I locate it on the Institute's website as late as this morning (an earlier literature review is on the website). **It is time to accept that ER works, and put that question away. Energies should be focused on how to make it work better.** And, to that end, I have a number of suggestions which I will lay out at a future date.

It is again time for the Board to come out and strongly support ER

Notwithstanding the strong support for ER from the WSIB Chair earlier this year, in light of the OFL report, the time is ripe for the Board to again come out and endorse ER, and set these accusations aside. *The debate on ER has been settled. **It works. It has been proven.***

It would seem that the assault against ER is primarily ideologically based. If it is, any validity in the over-arching theory underpinning the program will never be acknowledged. The very concept to some is unsupportable. **Nothing is going to convince otherwise.**

This inflexible stance in my view impedes a constructive public policy conversation on the merits *and* shortfalls of ER. Advancing extreme positions that are simply not borne out by the evidence leads nowhere and is, in my respectful view, simply wrong-headed. And, it does not help advancing occupational health and safety or better return to work outcomes. The objective analysis has been done.

One allegation warrants comment: ER does not give rebates to larger employers at the expense of smaller ones

In the OFL report it is alleged (at page 1) that ER "*burdens smaller employers for the gain of bigger ones*". **This is simply not the case.** In fact, if anything, it is larger employers that subsidize smaller ones. Here are the facts.

Premium Year 2005 NEER 1st Issue as an example

I will use the 2005 1st NEER issue to show this. All of the data which follows is the Board's (from the Board's *NEER System Rate Summary Report, November 4, 2006*). This presents the Fall, 2006 NEER issue (with data as at September 30, 2006).

The smallest firms in NEER consumed more than expected

For 2005, 14,045 smaller firms (those with a 40% "rating factor") contributed \$449.9 million in WSIB premiums (\$32,000 each, on average). After paying contributions for the unfunded liability ["UFL"] and the Second Injury and Enhancement Fund ["SIEF"], the "net assessment" (the premiums left to cover actual NEER costs), was \$217.999 million.

This same group of employers consumed \$264.759 million in NEER costs, overshooting targets by about \$46.76 million. But, as a result of the insurance features for smaller employers inherent in the NEER plan, that same group of employers received a "net surcharge" of only \$2.5 million, less than 5% of the actual shortfall.

The largest firms in NEER consumed less than expected

At the same time, the largest 950 employers (with a 90%-100% rating factor) contributed \$649.207 million (\$683,000 each, on average). After paying contributions for the UFL and the SIEF, the "net assessment" was \$313.332 million.

The largest employers consumed \$273.576 in NEER costs, \$39.75 million less than expected. Yet, the total net rebate returned to the largest employers was only \$19.6 million (leaving \$20 million "on the table").

In fact, sticking to the 1st 2005 NEER Issue, the class of all larger employers (those contributing \$200,000 or more in premiums & with a resulting rating factor of 50% or more), used less than contributed whereas the smaller firms, as a class, used more than contributed.

According to the OFL report, smaller employers are being burdened by larger employers. *The facts show otherwise.* If anything, it is larger firms that are cross-subsidizing the smaller ones (although such terms are misleading – this is simply the insurance features at work). This is not an aberrant result – this is part and parcel of the overall insurance design of the program.

ER does not undermine collective liability – it supports it: The facts prove it

Contrary to the suggestion that ER is undermining the collective liability aspects of ER, collective liability is alive and well, thank-you very much. Those firms that require higher amounts of insurance protection (the smaller ones) get it. Those that should be more accountable (the large ones) are more accountable – without any ability to be a "free-rider". Rebates are not at all at the expense of smaller companies.

As it stands, larger employers are being held more accountable, all the while providing the funds for the collective liability or insurance elements of the system to function well. **But, that is not just my opinion. That is the simple fact of the matter.**

Upcoming issues of The Liversidge e-Letter: Next Monday, the WSIB restores the Voluntary Registration Program. In upcoming issues: Anatomy of a WSIB Audit, followed by, A WSIB Classification Horror Story.

With a *fresh governing mandate* expect workplace safety & insurance issues to continue to receive attention over the next four years

As part of our *Executive Seminar* policy series L.A. Liversidge is holding a special

WSIB Policy & Reform Conference

November 21, 2007 9:30 A.M. – 12:00 P.M.
Centre for Health & Safety Innovation
5110 Creekbank Road, Mississauga

As a valued client and colleague, ***YOU ARE INVITED***
Change is inevitable – You can watch it happen, or you can make it happen!

Get the **BOTTOM LINE** on the top issues:

- | | |
|--|--|
| The impact of the Budget Reforms: | <i>Are there alternatives to premium rate hikes?</i> |
| Experience Rating: | <i>Does experience rating have a future?</i> |
| The future reform agenda: | <i>What can you expect over the next four years?</i> |
| Business end of the Board’s business: | <i>How can employers be more fairly treated?</i> |
| Your issues: | <i>What changes do YOU want?</i> |

E-mail, Fax or mail your registration: Register NOW. There are *very limited spaces*
50 Acadia Avenue, Suite 101, Markham, Ontario L3R 0B3 Tel 905-477-2039 Fax 905-477-4659 email lal@laliversidge.com

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

As a valued client and colleague, you may bring up to three (3) people from your organization:

Names of Participants:

1. _____
2. _____
3. _____



