

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

April 14, 2008

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

2 pages

The Politics of Experience Rating *Premier McGuinty embarrassed by WSIB experience rating*

**Premier says “need to make some real changes here”
WSIB sticks to its story that it was unaware
experience rating program was “defective”**

Last week I said that the WSIB experience rating story is “*unfolding at the speed of light*”. Well, now it’s going even faster. *What’s faster than the speed of light?* Superman? No, I guess he’s only faster than a speeding bullet. Too bad. It seems that only super-human strength can turn this around. In the April 10th issue of the *Toronto Star* the Premier is quoted as saying:

"I think we're all in sync in terms of the recent developments and our shared understanding of something that's been taking place, which is simply not acceptable." "This is a bit of an embarrassment. Certainly our government believes we need to make some real changes here." "There is a strong consensus that has developed around this issue and I know there are going to be some changes. Changes in terms of the policy."

Hold on a minute. Who’s in charge here? The WSIB or the government?

Set aside the experience rating policy fiasco for a second – **just who is calling the shots now on WSIB policy?** The Board or the Government? Last I looked, the WSIB was an independent agency with no links to the government, operational, policy, political or otherwise. In fact, the *only* links to the government are in a very broad sense - the Board gets its powers from statute passed by the Ontario legislature, the *Workplace Safety & Insurance Act* (WSIA), and it is that statute that clearly says it is the Board and the Board alone that sets policy (WSIA, s. 159).

The government has only a very broad scope of control

The most direct ongoing link to the government is through the appointment process. The Board of Directors, including the Chair, is appointed by the Lieutenant Governor in Council.

There are only two other official WSIB/Government linkages. Every five years the WSIB and the Minister of Labour enters into a “*memorandum of understanding*” which sets out the Board’s 5 year plan along with its priorities (and

that certainly is not in play in recent days). There is only one way that the government can *legitimately directly* intervene in the Board’s policy affairs.

Minister of Labour has power to issue “policy directions”

The Minister of Labour may issue “*policy directions*” to the WSIB (WSIA, s. 167) with executive council approval. But, that hasn’t happened here.

This experience rating story is morphing daily. No longer is it only about what it started as a few weeks ago – a critique of certain features of the WSIB experience rating plan. In fact, it is becoming far more important.

The first shift: WSIB Chair Mahoney becomes the story

The first major shift is when the Board’s Chair himself became an independent story line. According to the *Toronto Star* on April 9th, WSIB Chair Steve Mahoney (who I think has been trying to do the right thing but may be getting dreadful advice) said that he didn’t realize “. . . *that we were paying out those kinds of bonuses to companies that are breaking the law, and when I saw that, I said. ‘This is nonsense.’*”. According to the *Toronto Star*, Mr. Mahoney “. . . *was absolutely not aware that at the same time as the ministry was levelling fines against companies, that they were receiving rebates from us*”.

At that moment, this story started to get almost *Watergate* type legs (the repeated refrain from the 1974 **Senate Watergate Committee** “*what did the President know and when did he know it?*” still rings loud 34 years later).

The President of the **Ontario Federation of Labour** (a 20+ year critic of experience rating) jumped on this theme and said he was “stunned” to read that the WSIB Chair says did not know, noting “*this is an issue we have been raising with the Board for over a decade*” and “*surely the Chair and the entire Board of Directors were aware . . .*”

I will leave it to others to worry about “*what the Chair knew and when he knew it*”, but the story has made a quantum leap and is no longer just about experience rating.

The second shift: The Government is directly engaged

Past governments of all stripes have always been particularly skilled and dexterous on the WSIB file, trying to

“stick to the high road” and leave their WSI involvement exclusively to the legislative management of issues.

While I have always said that workplace safety and insurance [“WSI”] is inherently political (it is after all more social contract than insurance contract), this is only in a broad context.

Operational policy issues must be left in the independent hands of the WSIB

For the most part, governments have rightly and wisely left the management of immediate issues completely in the independent hands of the WSIB. Ministers of the Crown have rarely commented on active WSI policy issues (except to offer general or tacit support to whatever the Board is doing) let alone so directly and openly criticize the WSIB on an active and volatile issue. In fact, I can’t recall when *any government* so aggressively and so clearly condemned existing WSIB policy. This may well be a first.

The line of independence has been blurred but not erased

This isn’t a total erasure of the “line of independence” between Board and government, but it may cloud future issues. Seems that an aggressive media campaign can fan political coals and bring about results in a month that otherwise were unattainable in decades. *But what should the Board have done?* Certainly initiate a policy review. But don’t prejudge. Hold off on all decisions. No shooting from the hip. Not action packed, boring maybe, but responsible.

Once this genie gets out of the bottle, I don’t know how it gets lured back in. *Why should anyone with a legitimate beef not just take it to the press first, or to the government, or to the streets and forget the normal policy development protocols?*

The WSIB is an independent agency for good reason

There are clear legal, legislative and public policy reasons as to why the WSIB is an independent agency. In fact, all of the reasons tend to boil down to the same concern – ***the Board must be completely immune from political interference*** to avoid issues with political potency (like this hot potato) being driven by the government. Once that line is crossed, more than experience rating policy is at stake.

So who down at the WSIB is responsible for this “embarrassment”?

I take the Board’s Chair very much at his word that he was unaware of what I will call certain nuances in the design and operation of the Board’s experience rating programs. While I absolutely think that Mr. Mahoney is as wrong as can be in his announced “solution” (and as wrong in his definition of the problem), I have no doubt whatsoever that he was unaware that some employers could be charged by the Ministry of Labour and still be eligible for experience rating rebates. **Frankly, that he did not know is evidence of the insurance disconnect between the two issues.**

But, I can understand the genesis behind his critic’s beliefs. Disbelief is likely fuelled in part by the long and distinguished history the current Chair enjoys on the WSI file. As most readers know of course, while a labour critic in

the provincial parliament, Mr. Mahoney authored a very detailed position paper in the mid-1990s called “***Back to the Future***”. This comprehensive study and series of recommendations touched on every leading and pressing WSI issue of the day (many of which are still with us today).

As importantly, Mr. Mahoney is officially “on the record” time after time in no less than parliamentary transcripts and elsewhere as an ardent supporter of experience rating, a position held consistently now (at least until the last few weeks) for 15 or more years.

So, how in the world did he not know? *The reasons, I am afraid, both explain why he was speaking the 100% truth and why the Board’s “solution” is not credible.* The reason goes beyond the notion of “*plausible deniability*”. That the WSIB Chair didn’t know makes perfect sense.

The nuances of experience rating are fruit cultivated in the garden of technocrats. Many very senior WSIB officials at very high levels toil in that soil. *But the WSIB Chair does not.* Experience rating, as many sophisticated policy vehicles, applies relatively simple theories (see the April 9, 2008 issue of **The Liversidge e-Letter**) to solve complex public policy problems. But past the overarching theory, the mechanics and operational nuances ever so essential to consistent and fair application, are intimately known by only a few.

So, I unhesitatingly take the Board’s Chair at his word. In fact, I would be surprised otherwise. **But, that leads us to the \$64,000 question – why didn’t he know?** Because the question has never before come up. *Why not?* Because it was never a relevant consideration. *Why not?* Because experience rating is an insurance concept not an enforcement concept. *So what?* In case everyone has forgotten, the name of the place is the Workplace Safety & Insurance Board.

But, someone senior at the WSIB knew

Now, the WSIB is sitting squarely on the horns of a dilemma. Here’s the tangled web the Board has spun for itself. If it is the case that the Board’s Chair is right, and certain experience rating elements are “*ridiculous*” and “*embarrassing*”, someone senior at the WSIB, to put it bluntly, messed up. *Big time.* When WSIB officials write or perpetuate policies that embarrass the Premier and outrage the Chair, *well.... let me put it this way* – I don’t think that is a career accelerator. And, WSIB experience rating has undergone senior level reviews within the last few years by those that do toil in the experience rating garden.

Now, if it turns out that no WSIB officials are culpable of wrong-headed policy development (*which to be clear, is my view*), then the Board’s Chair and the Premier were overly dramatic. So, who *is* wrong? *The Premier?* Don’t be silly. *The Chair?* Not a chance. *No one?* If no one, then the Board’s credibility slips another notch because the very group that messed this up in the first place will be (are) the same ones designing the *new* experience rating policy. ***All in all, a tangled web indeed.*** **Next Issue:** Will the Board’s announced changes stand up to legal scrutiny?