The Liversidge *e*-Letter

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

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WSIB announced significant interim adjustments to experience rating

Will they stand up to legal scrutiny?

On March 10 WSIB announced experience rating program changes for traumatic fatalities
Companies "responsible" for a workplace fatality will be ineligible for an otherwise earned rebate

In the April 9th issue of **The Liversidge *e*-Letter**, I suggested that "*rational insurance concepts were steamrolled by a well-played media campaign*." On April 14th I looked closer at spin-offs from this story, suggesting that the story is continuing to morph.

In this issue of **The Liversidge *e*-Letter**, I will address whether the Workplace Safety & Insurance Board ["WSIB" or the "Board"] March 10, 2008 announcement is likely enforceable. What I offer here is not a legal opinion, but just some relevant and on-point legal observations. In the months (and perhaps years) ahead, these issues will likely undergo extensive legal scrutiny and cannot be pre-judged. While the "policy" may have been cobbled together rather quickly, the legal response will more slowly evolve.

But first, a reminder: Experience rating is still an outstanding concept (*and it works*)

Once all the media dust settles and this becomes a less frenetic exercise, the Board will get around to earnestly reviewing experience rating ["ER"] policies. ***At the end of the day, until presented with evidence to the contrary, I still must believe that the Board's Chair and the WSIB Board of Directors remain ardent supporters of experience rating.***

Frankly, without ER the Board will find it tougher to deliver on the core purposes of the *Workplace Safety and Insurance Act* ["WSIA"] to "*promote health and safety in workplaces*" and to "*facilitate the return to work*" of workers [WSIA, s. 1]. A strong unambiguous declaration from the Board that ER has delivered remarkable results might help.

A second reminder: *There is a better way*

While this "review" has a less than auspicious start, I hope that what comes out in the end is an ER program that still meets the needs of the Board, workers, and employers but which no longer is such an easy political target. Since ER program integrity seems to be measured of late more in political than insurance terms, this seems to be an essential ingredient. *What is clear is that the status quo is finished*. The recent controversy may be seen one day as the trigger point for a better mechanism. I am always confident in the Board's ability to incrementally improve. *Time will tell*.

There is a better way

As I said on April 9th, I think there is a better way:

> Here is a better way, which preserves the core elements of ER, demands perpetual incremental improvement, all the while addressing the program's shortcomings:
>
> ***In any case* (not just fatalities) where there is either a serious injury *or* a safety prosecution, the Board will initiate a thorough "*best practices*" audit of that firm before issuing *any* rebate. The Board will grant an ER rebate for that year *or any future year*, only if there is demonstrated change and a clear renewed commitment to worker safety by the firm. The Board will also use this process to allow surcharged employers to recoup surcharges.**
>
> This approach takes the hysteria out of the debate, demands improvement, and compliments the Board's highly touted ***Road to Zero*** campaign. I encourage the Board, employers and workers to get behind this new way, this better way, and make Ontario a safer place to work.

What did the Board announce on March 10th?

The only thing that is clear is this – *the Board's announcement is not clear at all*. In fact, as I pointed out on April 9, even senior Board officials are not so sure what it means. At the moment, there is only one public document explaining the Board's new "policy", a one page March 10, 2008 announcement under the heading, "***Important Information about Your Experience Rating Program***" [the "Announcement"] along with an accompanying two page Q&A. It says where "*a fatality has occurred it is inappropriate to reward an employer who is participating in a prevention incentive program*".

There's a lot riding on the legality of the new "policy"

If it turns out the Board's high profile announcement does not pass legal muster, that may have a profound impact on this unfolding policy exercise. If the Board got this wrong then the Announcement, rightly or wrongly, may be

50 Acadia Ave., Suite 101, Markham, ON L3R 0B3 Tel: 905-477-2039 Fax: 905-477-4659 E-mail: lal@laliversidge.com ISSN 1710-5757

interpreted as less than a thoughtful policy response, possibly impacting stakeholder confidence.

All WSIB incentive programs are included

This "policy" applies to every WSIB incentive program (other than the "**Merit Adjusted Premium Program"** ["MAPP"]), and includes CAD-7, NEER, Safe Communities and Safety Groups.

The Announcement eliminates "*the financial incentive in the year the event occurred"*, which really doesn't mean too much until the Q&A is read. In the Q&A the Board advises it is *"eliminating the rebate in the year the event occurred"* not the year that experience "counts" the fatality. *Still confused?* Consider this example:

> Company ABC is a large corporation. It is assessed under NEER. ABC has a good OH&S record and corresponding WSIB experience rating record. Moreover, ABC has a successful early and safe return to work ["ESRTW"] program in place and gets injured workers back into the workplace as soon as is practicable.
>
> For "Accident Years" 2005, 2006 and 2007 **ABC has earned a large combined rebate of $2.75 million** (ABC pays about $4.0 million in premiums to the WSIB every year). Those rebates are calculated at the end of the 3rd quarter 2008.
>
> On June 1, 2008 an ABC employee in the course of his employment was tragically killed in a single motor vehicle accident.

***How will the Board treat this case*?** Unquestionably, in the context of workplace safety and insurance ["WSI"], ABC is *responsible*. ABC will therefore lose its otherwise earned $2.75 million rebate payable in 2008 (earned for years 2005, 2006 & 2007). *Read that again*. ABC will lose the rebate earned during the three years *pre-dating* the tragic fatality, even if ABC was accident free in those years.

Paradoxically, if ABC maintains an otherwise good record for 2008, the year of the tragic fatality, ***ABC will get a large experience rating rebate for that year***.

***WSIB legal problem No. 1*: A policy that is not a policy**

Of course, at the moment, the WSIB Announcement is more press release than it is WSIB policy. According to the Board, a WSIB policy "*must be published in a policy manual and must be minuted*". At the moment, this "policy" does not meet either criteria. It is *not* a WSIB policy. Period.

Why is this significant?

Any decision that the Board makes on this is appealable. And, expect any employer (such as the ABC example) denied an otherwise earned multi-million dollar experience rating rebate to appeal to the Workplace Safety & Insurance Appeals Tribunal ["WSIAT" or "Appeals Tribunal"], the final *and independent* level of appeal.

The Appeals Tribunal *must* apply WSIB policy

The WSIA (s. 126) makes it clear – the Appeals Tribunal must apply WSIB policies when the Tribunal makes decisions. Since the Announcement does not rise to the level of policy, the Appeals Tribunal is not required to apply it, but *is required* to apply the WSIA and *existing* WSIB policy.

In the ABC example, the applicable WSIB policy would be **Operational Policy Manual Document No. 13-02-02, Experience Rating, NEER (January 3, 2006)**. While the arithmetic of the NEER policy is complex, the policy is not:

> The New Experimental Experience Rating Plan (NEER) generates premium refunds and surcharges based on an employer's accident cost experience. When determining claims costs for the refund or surcharge calculation, NEER takes into account overhead costs and the future costs of benefits relating to the claim.

It is highly likely that the Appeals Tribunal would be required to apply this policy. Nowhere in the operative Board policy is anything remotely resembling the process in the Announcement.

***WSIB legal problem No. 2*: The policy must be consistent with and authorized by the WSIA**

Even if the WSIB were to properly "codify" the Announcement as official policy, the Board's problems may not end there. As written, it is my assessment that the Announcement is not consistent with the WSIA.

***WSIB legal problem No. 3*: The WSIA itself**

The Appeals Tribunal of course (as is the Board) is required to apply the WSIA.

> ***s.83(1)*** **The Board may establish experience and merit rating programs to encourage employers to reduce injuries and occupational diseases and to encourage workers' return to work.**
>
> ***s.83(2)*** **The Board may establish the method for determining the frequency of work injuries and accident costs of an employer.**
>
> ***s.83(3)*** **The Board shall increase or decrease the amount of an employer's premiums based upon the frequency of work injuries or the accident costs or both.**

While the establishment of ER programs falls within the Board's discretion **[WSIA, s. 83(1)]**, once established, the Board's discretion is tempered by the language of the WSIA. Notwithstanding that the Board may establish the *method* for determining injury frequency and accident costs **[WSIA, s. 83(2)]**, employer premiums are adjusted based on frequency and/or costs or both **[WSIA, s. 83(3)]**, not it would appear, the elements of the Announcement. While any statute is open to interpretation, it will be difficult to squeeze the Board's Announcement into the dictates of the WSIA.

***WSIB legal problem No. 4*: Employer expectations**

The design of WSIB ER programs represent the archetypical model of WSIB/employer consultation. From the mid-1980s until now, every major ER design adjustment has been preceded by an elaborate and open consultative process. In fact, while the Board has enjoyed peaks and valleys in its commitment to consult with stakeholders generally over the years, it has always consulted broadly on ER design changes. *This time it didn't*.

While the legal **"*doctrine of legitimate expectations*"** is complex and evolving (still), it generally holds to the proposition that a regular practice of consultation gives rise to an expectation that such consultation will be employed before program changes are developed or implemented. That may well mean that until the Board's ER consultation is completed, the Announcement will be of no effect.

There will be other legal arguments considered. While the legal processes which may be trigged by this cannot be pre-judged, what is predictable is that this may well become a legal battle and not just a policy development exercise. ***Frankly, I think this benefits no one.***