

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

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

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NDP Motion Defeated in House

But the essence of the Motion - that experience rating is flawed – receives resounding support

**The government voted against the motion but strongly supported the underlying principle:
*Experience rating is flawed***

The NDP Motion

As I set out in the May 12, 2008 issue of **The Liversidge e-Letter**, New Democratic Party leader Howard Hampton introduced a motion in the Ontario legislature to demand that the government order the Workplace Safety & Insurance Board ["WSIB" or the "Board"] to outright kill experience rating ["ER"]. The motion was debated Wednesday afternoon at Queen's Park and I observed the proceedings first hand from the gallery. Recall the motion:

Mr. Hampton – That, in the opinion of this House, the McGuinty government must:

Immediately direct the Workplace Safety & Insurance Board (WSIB) to eliminate the flawed "Experience Rating" program;

Immediately direct the Provincial Auditor to conduct an audit of the flawed "Experience Rating" program;

Recognize the fact that tens of millions of dollars have been drained out of the WSIB's accident fund each year by employers who have learned how to play the game of "Experience Rating";

Recognize the fact that Experience Rating reduces employer claims – not worker injuries;

Recognize the fact that the practice of experience rating actually encourages employers to mis-report or under-report injuries and occupational diseases, force injured workers back to work before they are medically ready, and pay workers sick pay rather than have them receive compensation benefits;

Recognize that this hides the true extent of workplace injuries and illnesses in Ontario;

Recognize that employers actually receive rebates after they have been penalized for workplace injuries and occupational diseases and deaths; and

Recognize that the rebates flowing to employers under the program often exceed the cost of the original fine. Addressed to the Premier of Ontario. **To be debated May 14, 2008.**

Critics make their case with passion and conviction

The air was, as you might expect, somewhat thickened by overstatement and hyperbole. But, I must say, that while I fundamentally disagree with the argument against ER, I must respectfully bow to the passion and conviction in the manner in which those arguments are carried forward.

The case against ER is *not* supported by the facts, but those speaking against it are "true believers"

To be clear, I think the case against ER is wrong. In my opinion, it is not remotely supported by the facts. I am also of the view that there is needless overreach and "spin" attached to the "anti-ER" argument. But, with all that said, notwithstanding my position (which I believe has been objectively presented), and even though I believe that the ER critics overstate their case, they are "true believers" on this issue. I include the **Ontario Federation of Labour** in this. The OFL was out in numbers at Queen's Park on Wednesday carrying the message they have been pushing forward for more than a decade.

The point that I am making is this – the critics' position is more than political posturing (although it is that), it is more than aggrandizement (although it is that), and it is more than pure dogma (although it is that too) – it is *believed*. One must respect that.

To raise the debate to this level requires political dexterity

More pragmatically, in the context of political lobbying, agree or disagree, one must have some awe in the manner a tremendously complicated, exceedingly technical, and (in the grand scheme) relatively obscure WSIB ER program has dominated the workplace safety and insurance ["WSI"] landscape for three (3) months now.

Recall, this went from the pointed criticism of the OFL in its appearance in February 2007 at the **Standing Committee on Government Agencies**, to the release of the OFL report "**The Perils of Experience Rating: Exposed!**" in October, 2007 (which was virtually ignored by the WSIB and everyone else) to the exposé series in the **Toronto Star** beginning in February (the so called "walking wounded" series).

I have never seen anything like this before

I have been a student and participant of the Ontario workers' compensation debate from one juncture or another for 35 years now. I have been witness to some of the most volatile periods of WSI reform, when the public

conversation was heated and fractious and occasionally spilled over into actual violent confrontation. This was a time when issues drilled down deep into the policy mantle. The vibrancy of the system was under attack, first by injured workers legitimately angered by an inequitable, paternalistic system and then by employers frustrated and alarmed by ever increasing premiums paying (and paving) the way towards financial oblivion. In both instances, these forceful demands for a new way resulted in just that – a new way. And, I should note – a better way. ***Each time.***

Yet, even during these events I did not see a single issue attract such media attention, result in the self-declared embarrassment of the Premier, capture question after question in the legislature and peel bare the policy skin off an issue as this one has. And, all the while, the government has been left reeling and reactionary, never able to get in front of the issue.

So, while I disagree with the content of the argument against ER, that there is even a debate at all is rather remarkable. That it has progressed to this level is astonishing. That it has forced the Board into reaction after reaction is undreamt of.

No matter on what side one sits on this issue, one must tip one's hat to those that have driven it.

Frankly, the Board should have responded very differently last fall when the OFL report was received. That really was the first stumble. Agree or disagree, support or not, when a major stakeholder publicly submits a major report, thought credible or not, it warrants a public response. Had the Board responded last fall with facts, reason and logical analysis, and refuted the thesis advanced in a thorough and respectful manner, it may not have quelled OFL disagreement, but it certainly would have channelled the discussion into that - a policy discussion - not a public relations exercise.

As I recently publicly observed, the allegations against ER can be summed up in a sentence or two. But, the counter-argument takes several pages to explain. As a result, the counterpoint has been lost like a tree in the forest.

ER described as a perverse incentive

NDP leader Hampton decried ER as a “*perverse incentive*” responsible for employers “*pushing injured workers back to work as soon as possible, even when the injured worker's doctor is of the opinion that the injured worker is not fit to return to work. Employer efforts to get injured workers back to work often see injured workers coming back to the workplace the next day to some sort of modified work, often long before they're ready to return to the workplace*”.

ER is designed to encourage early – but not “too early” return to work. Isn't that a net positive for everyone?

Of course, lost in all of the heavy spin is that ER is in fact an incentive that is designed to encourage an early and safe return to work [“ESRTW”]. It seems that what was once a

noble endeavour, reducing lost-time associated with an on-the-job injury is now fiendish in design and execution.

Implicit in the attacks is that ER provokes *illegitimate* return to work actions on the part of Ontario employers. While I soundly debunked that outrageous myth in the May 12, 2008 issue of **The Liversidge e-Letter**, that was the ever-present theme of the legislative debate Wednesday.

In fact, one NDP member, with admirable heart-felt and clearly sincere passion, related one purportedly “*smoking gun*” real-life anecdote. An injured worker allegedly “*was pressured by her company to keep on working to reduce claims costs*” and was “*forced to work too soon*” without “*the actual modifications that would be necessary for a suitably productive job*”. As a result, the worker apparently “*suffered a number of other compensable injuries*”.

Here's the problem with that “smoking gun”. ***It misfired.*** In actuality, while I do not deny the facts, ER is designed to *prevent* that very scenario. *Recall what the critics' thesis is* – that ER promotes business self-interest and as a result, employers force workers back to work too early. Yet, as the injury recurred in the “*smoking gun*” example, the employer would actually have been hit with extraordinarily high ER costs. **So the very actions being attributed to ER are in fact the very actions that ER design is trying to avoid. The critics can't have it both ways.** If business is motivated by ER to look after its self-interest it cannot then be accused of acting in a manner that is clearly *against* its self-interest. But, so far the ER debate has managed to be immunized against rational analysis.

The government needs a history lesson

I must say that I was disappointed that this far into the ER debate that the government members were still unaware that ER was effectively introduced under the Peterson Liberals in 1986. For reasons that I guess are somehow written into the rules of some “*political gotcha*” game, a silly focus of this debate has been this – *just who started this ER thing in the first place?* The Liberals say it was the NDP. The NDP say it was the Liberals. In fact, only the Tory labour critic, Mr. Bob Bailey of Sarnia/Lambton, acknowledged that all three political parties had their respective fingers in the ER pie. This is what I said on May 12:

Modern ER was introduced as a design experiment in 1983/84 under a Progressive Conservative government. Under the Peterson Liberals it underwent its first major expansion in 1986. Under the Bob Rae NDP it was applied to the entire system in 1992. It continued to be reformed and revised under the Mike Harris government in the late 1990s. So, all three political parties have had their hands in the “ER pie”. ***No party (including the NDP) killed it when given the chance.*** And, in that I think lies the real story – ER is a credible program.

Liberals say ER started by the NDP – but – not so

Yet, on the origins of ER, even the Minister of Labour said the NDP “*implemented much of it somewhere around 1992*” and then noted the “*Tories continued this system*”, not even mentioning that the Liberals were responsible for starting it in the first place.

Jeers, howls and shouts that it was “*the Peterson Liberals!*” greeted another government member who quite incorrectly declared “*I think any interested viewer, anyone who was in the house today, might want to know where the experience rating system came from. Surprisingly enough, it was brought in during the NDP government.*”

Set aside for a moment that at this stage in the debate even the Minister has not been fully briefed as to the origins of ER. *The real point is this – why does it at all matter? What difference does it make? Especially since all parties are responsible.* And, as I said earlier, that this can be accepted as pretty good evidence of supporting the efficacy of the program. But instead, the “debate” (at least between the NDP and the Liberals) is which party has more fingerprints on the WSIB ER file. Not too productive, in my view.

Some of the debate “highlights”:

NDP: From the point of view of the program, it does not matter whether legitimate, modified, meaningful work is being provided or if the employer is simply hiding the claim. The result is the same: an under-reporting of lost-time accidents and more cash rebates for the employer.

NDP: The truth is that if it is cheaper to hide the injuries than to prevent them, many employers with an eye to the bottom line will do just that.

They won't focus on preventing workplace accidents or injuries; they'll focus on hiding them. That is one of the perverse results of this system.

There are numerous examples of employers who operate internal incentive programs and engage in intimidation, all to keep injured workers from reporting their claim.

It is also clear that experience rating has led to an increase in claims abandoned by workers.

That's the perverse way in which experience rating works, and that is why New Democrats argue that this experience rating system must be ended now, and why we call on all members of the Legislature to support this resolution.

Liberal: Had the motion said something like, “We should review it,” or had the motion said something like, “We should consider some way to replace it with a better program,” I would have been happy to support it, Madam Speaker, because as you know, and as everybody in this Legislature knows, our position as a government from the beginning has been that this experience rating program has flaws, that this experience rating program needs to be improved.

Liberal: To suggest that we take an incentive program to encourage businesses to reduce workplace injuries and scrap it altogether, without suggesting that we should be improving upon that program, finding ways to make it work better, is, I think, frankly reckless; it's putting politics ahead of people. That's why we have a problem with this.

PC: The experience rating program is not the biggest problem that the WSIB is facing right now. What we should be spending our time talking about is financial controls that are currently in place at the WSIB, and pressing the current chairman on the importance of wiping out the board's massive unfunded liability by 2014, like they say they are going to do.

Experience rating promotes higher individual employer accountability without sacrificing basic workers' compensation

insurance principles. This encourages companies to invest both in injury prevention and in early and safe return to work.

Reviewing this program is not a bad idea, but many business stakeholders believe that the changes being considered may ill-advisedly introduce concepts of blame into the system, upsetting the founding of the no-fault principles of workers' compensation that are integral to an effective, efficient and fair scheme.

What our party would like to see is the Provincial Auditor do a complete audit of the WSIB. Our party is concerned by the fact that WSIB spending seems to be completely out of control.

NDP: In summary, the WSIB's experience rating program distorts and undermines the province's workplace health and safety system by distorting employer behaviour.

Liberal: As the minister himself has said, both he and the Premier have acknowledged that the program is flawed and have stated that some real, serious changes are needed.

PC: The justification or logic behind the rebate program is that it acts as an incentive to get workers back to work sooner. I understand what the NDP is talking about: It can be used in a wrongful way to encourage a worker to get back on the job, maybe in light-duty work or maybe just showing up and punching the clock, when they're not ready to be back to work. I can't say that doesn't happen, because in the real world, some things happen that shouldn't happen. But that's not the design of the program.

NDP: Experience rating is a system that in effect rewards employers for treating their employees badly: those employees who may be killed on the job, those employees who may be injured on the job, those employees who are forced back to work all too early, those employees who never receive the benefits of the entire WSIB system.

Liberal: If you take a look at the history and you hear about some of the reasons that perhaps we shouldn't have an experience rating system anymore, I think any interested viewer, anybody who was in the House today, might want to know where the experience rating system came from. Surprisingly enough, it was brought in during the NDP government.

PC: I also want to include in the record one of the recommendations the Standing Committee on Government Agencies in its report had, and I quote, “The WSIB should re-establish the experience rating group and review the effectiveness of the experience rating program to ensure that it reflects the overall safety practices of businesses.”

NDP: This government knows what's going on. It knows this system leads to cover-up, leads to people abandoning their rights, leads to breaking of their lives as well as their bodies. This government could make a big difference. It has the power in its hands. It doesn't have to wait for a report. It could change the system now. It could bring in-and this is not directly related to the motion, but related to worker safety and health-card certifications so more people in this province could be unionized to protect themselves. This government could act. This government must act if it wants to show any moral fibre whatsoever.

Liberal: I know that the intent of the motion that was brought forward today certainly was to do that. I am very pleased to say that not only the Premier but also the minister do acknowledge that the program is flawed. They do acknowledge that work needs to be done. It was announced on March 10. There has been a moratorium placed if there is a fatality within the workplace, and the WSIB is committed to bringing forward a report that will deal with this. I see that as a significant step forward. There has been so

much work done on the WSIB. I don't want anyone to think for one minute that I don't believe there is more work to do. I recognize that.

PC: First, I want to recognize the people in the galleries today. Certainly in the time I've been here, I know of three reviews-and the member from York-North just spoke. She was referring to the report from the Standing Committee on Government Agencies that held public hearings for the review of the Workplace Safety and Insurance Board. . . . Before that committee, certainly the Federation of Labour-Wayne Samuelson-was there, and he's here today. Other members of the community-Mr. Liversidge, who's practised law in that area. He reported back in 1995-96 with the Cam Jackson review. So it's not a new issue, but it's a very complex area.

But what I want to make sure is-the record here is this review that's being done on experience rating. There was a legitimate reason when it started under David Peterson. This is the important fact here: That's when it started. It was carried on under Bob Rae.

NDP: How can we continue to support a system that treats the death of a worker as a better outcome than a lost-time injury? To me and to all of the workers who lost their life on the job, it doesn't make sense. It needs to be changed. We need to support this proposition.

Liberal: Under the Workplace Safety and Insurance Act, the WSIB has the discretion to establish experience and merit rating programs. The purpose of these programs is to encourage employers to reduce injuries and occupational diseases and to encourage workers to return to work. The incentive works by rewarding good performers with rebates while imposing surcharges on poor performers.

The vote: 9 for; 50 against. While the motion was lost – the idea that the WSIB ER programs are flawed, with a few notable exceptions, carried with resounding support. And, in that, I suggest, lays the meaningful message.

What is the next step? Will a WSIB review be enough?

While I have and still fully support an ER review, and as I wrote recently not only did the Board have no choice but to announce the review, it would have been irresponsible to do otherwise, I have formed the view no matter what the WSIB review comes out with in the end, it will not reduce the political heat on this issue one degree. In fact, it may very well escalate the matter.

At this point, a WSIB review, no matter the result, may well exacerbate the situation

Unless the Board's report results in an announcement that ER is DOA, the critics will not be satisfied. **Yet, if the WSIB ER review does call for the end of ER, the outrage will be transferred to employers who will cry "political interference"**. Employers have been pretty silent in this debate. As I said, it is difficult to recruit participants to a debate that is so unfocused and accusatory in nature.

Employers tend to respond to WSI issues only if necessary and then, only after being poked by a sharp stick. However, once poked, just as much heat gets generated. The WSI reform focus in the early to mid-1990s is testament to that. **The Board is firmly stuck between the proverbial rock and a hard place.** No matter what it does, it will not quell the fury and it may in fact spark a new brushfire of protest.

A "new and improved" ER program will inspire new shouts of "shell-game"

As certain as I am that the sun will rise tomorrow, if the WSIB ER review results in a "new and improved" ER design, the critics will cry "cover-up" or "shell-game", or whatever other descriptor one may wish to unfurl. And more political damage will be done (if that is possible).

While a WSIB review, *on its own*, may have been enough last fall after the release of the OFL report, it not only will not be enough now, it may make a bad situation worse. **At this stage in this debate, what must be achieved is simply this: a restoration of stakeholder confidence – worker and employer.**

The involvement of the Auditor General is now necessary

The vehicle for that process has been raised by the most vocal critics of the WSIB ER program – the NDP – the **Ontario Auditor General** ["AG"] (often referred to as the "Provincial Auditor"). The integrity and independence of the AG is unquestioned. It is my considered view that anything less than the involvement of the AG will only serve to otherwise ratchet up the next phase of the debate.

Nothing will be solved. In fact, this may play into the hand of the critics who will be lying in wait to pounce on whatever the WSIB announces in the end. **The only way now to get ahead of the wave is to involve the AG.**

Both opposition parties support bringing in the AG and support is gaining ground in the employer community. It was discussed at the May 14th **Liversidge Experience Rating Client Forum** and received unanimous backing from all those that attended.

The Board should continue with its review by all means. This review will assess the technical elements of ER and likely recommend design revisions. But, for those recommendations to be acceptable to stakeholders, confidence must be restored. Only a thorough, unbiased and independent assessment by the AG will have the capacity to do that. It is time to start leading the issue instead of the other way around.

And, as one of the participants to the debate in the House said on Wednesday, the **"experience rating program is not the biggest problem that the WSIB is facing right now"**. Bringing in the AG to audit ER is recommended, but the scope of the review should not end there. While ER is very important, it is not the **"be all and end all"** of the Ontario WSI system. In fact, while about \$2.0 billion in premiums fall under the NEER plan, only about 18% of that is redistributed (\$169 million in surcharges and \$195 million in rebates for 2006).

In light of the financial and system pressures the Board is currently facing, an increasing unfunded liability ["UFL"], increased health care costs and longer claim durations, the real emerging issue impacting stakeholder confidence is the long-term financial viability of the system and the capacity of the WSIB to wipe out the UFL by 2014. **It is time to bring in the independent AG. Nothing else will be enough.**