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WSIB Consultation

Temporary Employment Agencies

Proposed Rate Setting Modifications

This is a giant step backwards.
There is a fairer road forward.

Presented to:
WSIB Policy and Consultative Services

November 4, 2022

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A. Opening Commentary

1. The Board completed a preliminary consultation mid-year (Phase I), and has now commenced Phase II on "**Temporary Employment Agencies proposed rate setting modifications**." I thank you for the opportunity to participate in the Phase II consultation project.

2. In the consultation paper under consideration, the Board advises:

> **TEA industry perspective**
>
> ***The key concern raised by the TEA industry related to the potential for significant rate increases applied to their clerical labour*** (including certain knowledge-based job roles, like IT professionals).
>
> Under the pre-2020 classification system, that labour was generally classified under the Supply of Clerical Labour Operations classification unit, which was assigned a $0.13 rate in 2019.
>
> The rate setting approach for TEAs that the WSIB originally planned to introduce in 2020 was designed to generally align TEAs' rates with the rates of their clients' classes. ***However, the implication of that approach for TEAs that supply clerical labour to higher risk classes is they could be subject to significant rate increases*** (emphasis added).

3. The Board presents this commentary as the exclusive reason for the proposed change.

4. Respectfully, this is a remarkable and puzzling U-turn.

5. Absent is any acknowledgement that increases in WSIB premiums for TEA supplied clerical labour has been a *planned and intended outcome* of WSIB rate framework (RF) policy since the inception of the RF project from at least 2015.

6. Also absent from the consultation paper is an outline of the principled policy objectives driving the current approach, let alone the elaborate history of the legislative, regulatory and policy reform journey traveled over many years to implement those objectives.

7. Other than increased premiums for TEAs supplying clerical labour, which as noted was not only the expected <u>but desired</u> policy goal, the Board has offered no principled hypothesis for the proposed approach.

8. While at first blush the casual observer may conclude that assessing clerical labour with a premium reflecting the insurance risk of clerical labour only makes sense, the intricacies of the WSIB premium setting process requires a more complex analysis.

9. I posit that the overriding policy objective is not, and ought not to be, exclusively the insurance interests of TEAs, but rather, the insurance interests of *all* employers.

10. The proposed approach will defeat a longstanding equitable policy objective and in a relative sense, result in the over-charging of non-TEA clerical labour. In so doing, this will undermine a long-sought social policy objective of promoting safe and secure full-time employment in Ontario.

11. In this paper I will provide the policy context and founding principles against which the proposed approach must be assessed.

12. While I did not respond to the Phase I consultation, I have engaged on this issue in the early days of the broader rate framework consultations 2013 – 2016, and was engaged in the legislative and regulatory reforms from 2013's ***Bill 146***, 2014's ***Bill 18***, and **O. Reg. 470/16** which amended **O. Reg. 175/98** into its current form (with respect to the classification of and premiums for TEAs).

13. I will conclude this paper with an assertion that the proposed changes offend the foundational organizational principles behind RF. I will argue that if they proceed, the employer classification and premium scheme is needlessly and improperly thrown out-of-plumb, all the while defeating important policy goals.

14. However, I will present a curative remedy, consistent with the originating organizing thesis, based on sound principle that will achieve the result set out in the proposed approach, and maintain system integrity.

B. Historical Context – *Why the Board developed the current approach - there was a principled reason*

1. There were two primary inter-related policy reasons for the Board's current policy choice.

2. One was to avoid a "*duck and cover*" approach by farming out risky employment to TEAs. This problem was addressed at some length in a series of articles appearing in the Toronto Star commencing in 2017.[1] However, this was not a new policy worry in 2017. In 2012, **Funding Fairness**[2] broadly introduced this issue (at p. 114), with a more elaborate narrative set out in 2014's **Pricing Fairness**[3] (at pp. 20 – 21 and 24). By the early 2010s, it was generally accepted that the Board's premium treatment of TEAs promoted undesirable business organizing and recruiting decisions.

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[1] See for example the Toronto Star article published under the banner, "**Undercover in Temp Nation**," Toronto Star, September 8, 2017, https://projects.thestar.com/temp-employment-agencies/, last accessed October 30, 2022. The Star has published a series of several dozen related articles since.

[2] Harry Arthurs, Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System (Ontario: Queens Printer for Ontario, 2012)

[3] Douglas Stanley, Pricing Fairness: A Deliverable Framework for Fairly Allocating WSIB Insurance Costs, February 2014.

3. This concern sparked legislative and regulatory reform commencing in 2013 with the introduction of ***Bill 146, Stronger Workplaces for a Stronger Economy Act*** on December 4, 2013. An omnibus bill, in the context of TEAs and WSIB premium reporting, ***Bill 146*** proposed to shift the cost accountability of an accident from the record of the TEA to the record of the client employer:

> 2. Section 83 of the Act is amended by adding the following subsections:
>
> **Temporary help agency worker**
>
> (4) For the purposes of this section and despite section 72, if a temporary help agency lends or hires out the services of a worker to another employer who participates in a program established under subsection (1), and the worker sustains an injury while performing work for the other employer, the Board shall,
>
> (a) deem the total wages that are paid in the current year to the worker by the temporary help agency for work performed for the other employer to be paid by the other employer;
>
> (b) attribute the injury and the accident costs arising from the injury to the other employer; and
>
> (c) increase or decrease the amount of the other employer's premiums based upon the frequency of work injuries or the accident costs or both.

4. While I supported the general aim of ***Bill 146***, I strongly opposed the ***Bill 146*** methodology, explaining that the bill would actually benefit TEAs with no or little impact for the client employer (see **The Liversidge *e*-Letter, December 20, 2013**, pp. 3-5). ***Bill 146*** would inadvertently usurp the very goals it was chasing. It was a mess.

5. ***Bill 146*** moved slowly for second reading on February 19, 2014 with the 2nd reading debate continuing on April 16, 2014. The House rose on May 2, 2014 for the June 12, 2014 election campaign and ***Bill 146*** died on the order paper.

6. The bill's ideas though were quickly resurrected after the 2014 election in ***Bill 18*, An Act to amend various statutes with respect to employment and labour**," on July 16, 2014 passing this time and securing Royal Assent on November 20, 2014. *Bill 18* amended the WSIA s. 83 and to this time, is the current rendering of that section.

> **Experience and merit rating programs**
>
> **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.
>
> **Same**
>
> (2) The Board may establish the method for determining the frequency of work injuries and accident costs of an employer.
>
> **Same**
>
> (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. 1997, c. 16, Sched. A, s. 83.
>
> **Regulations re temporary help workers**
>
> (4) The Lieutenant Governor in Council may make regulations,
>
> (a) defining a temporary help agency for the purposes of this section;
>
> (b) requiring that, despite section 72, if a temporary help agency lends or hires out the services of a worker to another employer who participates in a program established under subsection (1) and the worker sustains an injury while performing work for the other employer, the Board,

> (i) deem the total wages that are paid in the current year to the worker by the temporary help agency for work performed for the other employer to be paid by the other employer,
>
> (ii) attribute the injury and the accident costs arising from the injury to the other employer,
>
> (iii) increase or decrease the amount of the other employer's premiums based upon the frequency of work injuries or the accident costs or both, and

7. There was, however, one marked difference between ***Bill 18*** and ***Bill 146***. ***Bill 18*** (the current WSIA s. 83(4)) required regulations to make it operable. No s. 83(4) regulations have ever been proclaimed turning this reform into a rather toothless tiger.

8. Interestingly, on March 8, 2018, just before the June 2018 election, the (then) Minister of Labour advised the Toronto Star that with respect to the latent s. 83(4), the "*government will proclaim legislation written three years ago but never enacted*."[4] The regulation didn't materialize. The election occurred. A new government was in power.

9. Since its enactment the now anachronistic WSIA s. 83(4) has been flapping in the proverbial wind, and is likely to so continue until one day removed in a future WSIA housekeeping amendment.

10. Statutory reform though was not the only game in town.

11. The extensive WSIB **RF** project commenced after the release of the 2012 **Funding Fairness** report. Following significant design development, the RF project was maturing by 2015 and ready for a full public debate. The premium treatment of TEAs was an integral part of that debate.

12. Before introducing the Board's 2015 RF proposals, it is necessary to discuss the concept of "ancillary operations." The premium treatment of "ancillary operations" is a core element to the question of fair premium rates for TEAs and other employers.

13. Up to December 31, 2019 "ancillary operations" rules were set out in **O. Reg. 175/98**, s. 6 (the relevant portions are excerpted below; follow the link for **O. Reg. 175/98** as it was up to December 31, 2019):

> **6.** (1) For the purposes of calculating an employer's premiums, an operation of the employer that is ancillary to a business activity of the employer shall be deemed to be part of that business activity. O. Reg. 175/98, s. 6 (1).
>
> (3) An operation is ancillary to a business activity if it supports or is incidental to the business activity and it falls within any one of the following paragraphs:
>
> 11. **Administration related to the employer's operations.**

[4] March 8, 2018 Toronto Star, "*New law to make employers accountable for temp worker injuries*," https://www.thestar.com/news/gta/2018/03/08/new-law-to-make-employers-accountable-for-temp-worker-injuries.html, last accessed October 31, 2022.

14. As a result, for every Schedule 1 employer, the premium rate for clerical labour was set at exactly the same premium rate the company paid overall for all of its workers.

15. Consider these examples for 2015:[5]

a. Company A is in the home building business and is assessed under WSIB Rate Group (RG) 764 Homebuilding, attracting a premium rate of $9.10/$100 of payroll. Company A employs 20 clerical staff (accounting/clerical etc.) at an average salary of $75,000 each, for an aggregate administration salary of $1,500,000. As a result of **O. Reg. 175/98**, s. 6, Company A must submit $136,500 in WSIB premiums for the administrative staff.

b. TEA Company Z provides temporary administrative /clerical labour. If TEA Company Z were to supply Company A with $1,500,000 in administrative/clerical labour, TEA Company Z would be assessed very differently. TEA Company Z would be assessed under RG 956, attracting a premium rate of $0.21/$100 of payroll. TEA Company Z would contribute $3,150 or $133,350 less for the same labour, doing the same work, with that labour still working on the premises of Company A.

16. The Board addressed the potential implications of this result front-on in its public consultation document, "**Rate Framework Reform, Paper 3: The Proposed Preliminary Rate Framework," March, 2015** **(Paper #3)**. In **Paper #3**, at pages 21 – 22, the Board writes (highlight added):

> **Summary of Current Approach**
>
> TEAs are often classified differently from their client employers because their classification is based on their business activity, not the business activity of their client employers. As a result, the premium rates TEAs pay for their workers are lower, in some cases, than the premium rates client employers pay for their workers. This could create an incentive for client employers with relatively higher premium rates to use TEA workers, rather than hire their own workers, to reduce their premium costs (premium cost avoidance).
>
> Additionally, the costs of a TEA worker's injuries are attributed to TEAs for experience rating purposes. It is conceivable that the client employers may use TEA workers to perform dangerous and/or unsafe work to avoid the experience rating consequences of injuries (claims cost avoidance).
>
> These issues call into question the fairness of how TEAs are classified and experience rated by the WSIB. The WSIB would consider how to address these issues under the proposed preliminary Rate Framework.
>
> ***Proposed Preliminary Rate Framework***
>
> **Premium Cost Avoidance**

[5] 2015 is chosen as it is the year the WSIB published public consultation documents on Rate Framework, particularly **Paper 3: The Proposed Preliminary Rate Framework**, which will be discussed later.

> The proposed preliminary Rate Framework recommends that TEAs and their client employers would need to be classified in the same class in order to mitigate the premium cost avoidance issue. If this occurs, their premium rates would be similar in many cases.
>
> TEAs are expected to pass along their premium costs to client employers as part of their fee. If TEAs and client employers have similar premium rates, there would be minimal financial incentive for client employers to use TEA workers to avoid premium costs.
>
> To allow TEAs and client employers to be classified in the same class:
>
> - the WSIB would seek to amend Schedule 1 of O. Reg. 175/98 to indicate that supply of labour to a class (regardless of what activities are performed) is considered a business activity of that class; and
> - TEAs would be allowed to have a separate premium rate linked to each class they supply.

17. In ironic unintended support of the Board's policy worry, at least one TEA through its website has actively promoted the very behaviours the Board has attempted to curtail, suggesting that hiring through a TEA reduces the client employer's WSIB costs, going so far as to suggest TEA employees should not be hired permanently or risk increasing WSIB premiums.[6]

18. During the WSIB 2015 consultation, many employer associations expressed support for the Board's then proposed approach. It is noteworthy that these associations would represent at the very least potential buyers of TEA services. The WSIB has posted the submissions on its website. These included but would not be limited to:

    Ontario Trucking Association ("*OTA supports the proposal . . .*", submission page 4)

    Cement Finishing Labour Relations Association ("*All temporary labour should be assessed based on the risk of the client employer, ensuring principled premium assessment*," submission page 19)

    Group of power supply companies (Hydro 1, OPG *et al*) ("*The Group does support the proposed direction of incorporating increased rates by the TEAs. . .*", submission page 4)

    Greater Toronto Hotel Association ("*The Associations support this recommendation,"* submission page 16)

    Ontario Restaurant Hotel & Motel Association ("*The Associations support this recommendation,"* submission page 16)

    Construction Employers' Council and the Mechanical Contractors Association of Ontario.

19. The approach set out in **Paper #3** became the approved policy position of the WSIB and is the "current approach." The Board proceeded to amend **O. Reg. 175/98** (several times as will be seen), develop and enact policies over the course of several years, and proceeded with the system design introduced in 2015's **Paper #3**.

20. It can only be concluded that the Board was convinced of the rectitude of its policy position and put in motion extensive administrative effort and resources to implement that position.

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[6] See "**A hiring strategy that actually reduces your WSIB premiums and NEER surcharge risk**," https://www.pivotalsolutions.com/hiring-strategy-that-actually-reduces-your-wsib-premiums-and-neer-surcharge-risk/, last accessed October 31, 2022.

21. **O. Reg. 470/16** (filed December 16, 2016), deleted s. 6 of **O. Reg. 175/98** effective January 1, 2019 (later adjusted to be deleted January 1, 2020 as per **O. Reg. 349/17**, filed August 31, 2017), to coincide with the commencement of the new RF classification and employer premium pricing model.

22. While removed from **O. Reg. 175/98**, the ancillary rules survived essentially intact but in the form of WSIB operational policy, specifically, "**Operational Policy, The Classification Structure, Document Number 14-01-01**, **Section: Ancillary operations.**"

> **Ancillary operations**
>
> The WSIB will not separately classify the employer's operations that are ancillary, i.e., incidental to the employer's business activity.
>
> Activities that are incidental to an employer's business activity and are therefore not a business activity in their own right include:
>
> - administration related to an employer's operations including management, payroll, human resources, information technology, training and clerical services

23. This immense amount of administrative effort to officially pave the way forward for the current approach, establishes the depth and breadth of the Board's fidelity to this approach.

C. Why is the Board proposing a change?

1. The only reason offered in the consultation document is TEAs' concerns over increased premiums. From the Board's document:

> The WSIB continues to support the objective of generally aligning TEAs' rates with the rates of their clients' classes. However, significant rate increases for TEAs that supply clerical labour (including certain knowledge-based job roles) would be misaligned with the low-risk nature of those activities. As a result, it is reasonable to introduce an exception for clerical labour.

2. As already introduced, unexplained is that today's proposed policy "remedy" was yesterday's policy "dilemma."

3. The Board has not explained why TEAs should experience a lower rate than the client employer rate for the exact same labour. No principled policy focused argument has been offered. The reverse has been well-argued by the Board itself for years.

4. A review of the June 2022 Phase I consultation submissions shows that essentially TEAs lamented the higher premiums and unions, injured workers and community legal clinics cried foul that the Board was even reviewing this policy. The United Steelworkers District 6 (starting at page 41) said it best and quite succinctly (at United Steelworkers submission page 2, bundle page 43):

> The consultation document also stipulates that the rate setting approach introduced in 2020 was designed to rectify that very issue. No reason has been provided for not having this rate framework

implemented other than TEAs don't like it, which quite frankly isn't sufficient to ignore the regulations as there is no reason that justify such an action.

5. I tend to agree.

D. A conundrum returns to WSIB premium pricing

1. The current approach remedied the "cheap apples versus expensive apples" problem reflected in the example set out at para. B-15. All of the apples were made "expensive apples."

2. The proposed approach reignites the original policy dilemma. The conundrum returns. The proposed approach is incongruous to the triggering quandary described by the Board in 2015.

3. If it is the case as the Board asserts that higher premium rates "*would be misaligned with the low-risk nature of those activities*," then that is as true for client employers as it is for TEA employers. The insurance risk associated with clerical labour is the same for client employers as it is for TEA employers. The risk does not change with the name of the employer.

4. The root issue is clearly driven by the rules linked with ancillary operations, first through s. 6 of **O. Reg. 175/98** and then with Board policy **Document Number 14-01-01, Classification Structure**.

5. The Board initially sought to price all apples the same, and achieved that by increasing the price of the TEA apples. However, if the TEA apples are too expensive as the Board now attests, the only principled policy remedy is to lower the price of all apples to the same low price, i.e., the actual inherent insurance risk for the provision of clerical labour.

6. Rather than create an exception only for TEA clerical labour, the ancillary operations rules should be modified by striking "*administration related to an employer's operations including management, payroll, human resources, information technology, training and clerical services*," from the ancillary labour list. Those functions, in a manner identical to the proposed approach for TEAs, would then be assigned the new classification code for clerical labour.

7. In this manner, the immediate objective is realized. TEA clerical labour premiums are set in a manner commensurate with the inherent insurance risk.

8. Significantly, and in the context of the policy debate since 2012, this approach also resolves the originating policy concern – the potential motivational implications of differing rates for essentially the same labour (low TEA clerical premium rates versus higher client employer clerical premium rates).

9. This is the only manner in which the Board is able to fairly resolve the immediate concern while remaining true to the original challenge.

E. The consultation document reintroduces an ongoing problem – the scarcity of research backed policy proposals

1. In his 2012 report, **Funding Fairness**, Dr. Arthurs presents some insightful and helpful closing commentary in **Chapter 10**, "**Reflections on the Review**" (at pp. 115-116). I excerpt some of his comments:

> In the future, it (WSIB) will have to deal with issues that have not yet appeared on its agenda, with criticisms from stakeholders and others that it has not yet had to respond to, and with challenges to existing concepts, processes and structures that will often require fundamental changes in the way it thinks about things. In this final chapter of my report, I briefly reflect on what the WSIB might learn from the experience of the Funding Review that might better prepare it to deal with issues of comparable importance in the future.
>
> . . . . .
>
> . . . I have come to suspect that the inability of the WSIB to answer my questions means that it has not been asking similar questions of itself. And if it has not been asking such questions, it has not been giving adequate attention to important issues that all institutions ought to be concerned about: are our policies producing the intended results? Are those policies based on sound assumptions? are those assumptions likely to change? Can the same results be achieved more humanely or efficiently by different means? If, indeed, it has not been regularly asking and answering such questions, the WSIB would not be unique. Many public agencies — especially those with heavy caseloads — find themselves in a similar position. In part this is because, if resources are chronically inadequate (as they are), spending money on research seems self-indulgent. In part it is because such organizations have a natural tendency to fixate on the mechanics of service delivery rather than on renewing their systemic architecture. ***But in part it is because consequential decisions at the WSIB often appear to be taken (or not taken) in response to external criticism and internal crises, real or imagined, rather than in response to well-informed, long-term analysis*** (emphasis added).
>
> . . . . .
>
> ***The WSIB must be, and must be seen to be, proactive rather than reactive***.

2. I will not repeat an outline of my critiques. They are embedded throughout this report. However, the arguments against the Board's current approach to TEA premium setting have persisted since at least 2015. The arguments for the current approach have been on-the-record long before that.

3. RF implementation, for a host of reasons, was delayed. Unquestionably, the Board had before it a luxurious amount of time to develop, assess and table in-depth analysis to prove its basic theses. Yet, it didn't. In response to a new wave of old criticisms, the Board retreated a long-established protocol. *Why?* The policy was simply about to deliver what was intended.

4. One of three things has possibly happened.

   a. *One*, the Board concluded that this major plank of RF design was simply wrong, and thus was wrong from the get-go. Since the Board had more than ample opportunity to review, revisit, adjust or retrench from this policy, this is an unlikely explanation. Moreover, at several junctures, over many years, and as most recently as 2021, the Board initiated numerous regulatory and/or policy changes to promote this policy. This is not a likely explanation.

b. *Two*, a new compelling argument or new compelling evidence was presented to call the original policy into question. No such evidence has been disclosed. No new arguments have been presented. It was not only known and expected that clerical TEA premiums would rise, *this was the intended outcome of the policy!* That this was about to come to fruition was not a surprise. It was desired. This is not a likely explanation.

c. *Three,* with increased premiums on a more immediate horizon, old arguments of rate hikes were repackaged and wrapped in a greater urgency, energizing a renewed lobbying effort. The consultation document reports that the TEA industry's core concern is with increasing rates, the expected and desired result since 2015. This is a plausible explanation but runs counter to my direct and personal experience with the Board's principled response to lobbying efforts.

5. Perhaps there is a fourth explanation. Current events may reflect nothing more than a sober second thought. If this is so, and it may well be, the igniting catalyst should be fully disclosed by the Board. It hasn't been.

F. The current consultation paper should be withdrawn and a new discussion commenced

1. A wider discussion encompassing the alternative suggestion I have set out in this paper should ensue. Only the proposal presented in this paper, setting the premium for all Ontario clerical labour at the same rate, bridges the originating principles with the currently desired outcomes.

2. It is therefore my immediate suggestion that the Board withdraw the current consultation document and re-examine the issue taking into account the points I have raised. Should the Board decide to proceed with policy reform, a revised policy consultation document should be drafted and released to a broad employer audience. This document should include suggested revisions to Board policy and **O. Reg. 175/98**.

3. I would be pleased to present specific advice on the consultation method, however the general approach deployed during the rate framework consultation exercise should be adopted. The process should include the development and release of the aforementioned consultation document to a broad employer audience, a public consultation meeting (in-person or hybrid) followed by a report on the consultations and a final WSIB proposal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

L.A. Liversidge
November 4, 2022