

Via email

September 01, 2021

Ms. Elizabeth Witmer, Chair
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

and Mr. Tom Bell, Acting President & CEO
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Witmer and Mr. Bell:

Re: Prolonged Loss of Earnings benefits due to COVID-19

I hope that you enjoyed your summer. As we continue to adapt to these trying times, life's small pleasures become all the more important.

I am writing to re-introduce an issue I first raised more than a year ago at the commencement of the COVID-19 protocols and policy responses. This issue was formally raised by the CEC on April 23, 2020 (see **Appendix A** at *Proposal 5*). As time has passed and Ontario employers have continued to adjust to COVID-19 impacts, COVID-19 continues to unfairly prolong loss of earnings ("LOE") benefits for which employers are held accountable (for non-COVID-19 claims). This issue remains and needs to be addressed.

Since the April 23, 2020 correspondence, this issue has been discussed several times (during various meetings and correspondence exchanges), most notably in the September 14, 2020 Chair Advisory meeting, in my email message to Diane Weber of October 22, 2020 (**Appendix B**), the CEC's February 1, 2021 letter (**Appendix C**) and in the June 21, 2021 Chair Advisory meeting. The Board has neither agreed nor disagreed with our suggested action, which is:

Where the evidence clearly supports that the LOE benefits have been extended/paid because of COVID-19 related issues these costs should be removed from the employer's record/claim and allocated in the same way that the Board determined all COVID-19 claim costs should be removed from individual employer accounts.

The Board has admitted that there are claims prolonged due to COVID-19. Previously I have provided identity protected examples where this clearly occurred (see **Appendix B**). A client has now provided instructions to provide you with the details of a particular case for your consideration. This case provides an excellent example where an employer warrants relief from COVID-19 caused excess costs.

In this claim there have been approximately seven-and-a-half (7.5) months of full LOE benefits and return to work (“RTW”) services provided to the Worker as he could not or was delayed in obtaining required education and a job placement (a position was identified/offered but subsequently rescinded due to COVID-19). We have outlined details of this specific claim below.

Claim No. [REDACTED] Mr. [REDACTED]:

- Correspondence from the WSIB Return to Work Specialist [“RTWS”] dated January 30, 2020 indicates that Mr. [REDACTED] [the “Worker”] was to undergo upgrading/training from January 14, 2020 to April 24, 2020 and then progress was to be reviewed. The original Work Transition Plan [“WTP”] agreement confirms ESL training was to take place from January 13, 2020 to April 24, 2020.
- On March 31, 2020 the RTWS advised that because of COVID-19 the school where the Worker was doing his ESL training closed, as did the job search location. The RTWS advised that when COVID-19 has been resolved his work transition [“WT”] plan will probably be extended as the Worker will not have had sufficient ESL training to move forward.
- The Worker resumed his ESL training on August 4, 2020 and the RTWS advised his entire WT program was expected to be finished by December 4, 2020. The RTWS would start looking for a work placement for the Worker.
- On September 21, 2020 the RTWS advised that the worker’s ESL training was scheduled to end on December 4, 2020. She will be looking for a job placement for him, however, if none is found he will have 2 weeks of job search training and 10 weeks of job search. The entire plan should be complete by March, 2021.
- On January 18, 2021 the RTWS advised there were issues in terms of securing a job placement due to the lockdown. There was a potential placement with [REDACTED], however, that placement opportunity was paused due to the lockdown and on January 15, 2021 they confirmed with her that they won’t be offering the placement at this time due to COVID-19.
- On February 4, 2021 the RTWS advised that the service provider was suggesting another 28-week combination program of placement and in class training. However, the RTWS was unsure as to when the school would reopen for in class learning and the required language assessment could not be completed until it was open. The RTWS advised that in the absence of COVID-19 the Worker’s RTW plan would have ended at the end of March, 2021.
- On February 22, 2021 the RTWS advised that she accepted another 16 weeks of ESL training + 12 weeks of placement and job search services.
- On July 15, 2021 the RTWS advised that the Worker has moved to [REDACTED], ON. She advised that she has started a job placement search, however, there is less opportunity in the Worker’s new city. She stated she is going to engage employment services as well. Basically, she will use both services and see which pans out first. She is going to open up the search and if unable to find a placement will look for employment instead.

- On August 6, 2021 the RTWS advised she still has two (2) service providers working to find a placement or employment for the Worker with no results yet. The area of search has been expanded noting that the Worker moved to [REDACTED], Ontario, however, the job opportunities are not as good in such a rural area. The Worker's file will be closed on October 15, 2021.

In summary, the Worker's ESL training was delayed in the initial stages of the return-to-work plan as it was interrupted due to COVID-19. The potential job placement fell through as a result of the December 26, 2020 lockdown period. Because of the Worker's lack of job prospects the service provider proposed 28 more weeks of combined job placement activity and ESL training and, if no job after that, another 12 weeks of job search. The RTWS agreed the interruption in the ability to locate a job placement was due to the COVID-19 lockdown. The original end date for the Worker's return to work plan was the end of March, 2021, however, the file will not be closed now until October 15, 2021. In the absence of the COVID-19 lockdown the Worker would have been engaged in a job placement at [REDACTED] by December, 2020 and his file would have been closed in March, 2021. Consequently, there was an additional 7.5 months added to the plan due to the COVID-19 interruptions.

While there is currently no specific policy mechanism to facilitate this request, it is my opinion that the merits and justice provisions of Workplace Safety and Insurance Act ["WSIA"] (s. 119(1)) would apply and would rise to sufficient authority to remove costs in such cases. If it is the Board's position that the merits and justice provision of the WSIA do not provide sufficient authority, then the Board must address this issue through specific policy. This request is completely consistent with the Board's policy to ensure that individual employers should not be responsible for COVID-19 claim costs.

I look forward to hearing from you and would welcome a conversation. You can reach me directly at lal@laliversidge.com or 416-986-1166.

Regards,



L.A. Liversidge

cc: Diane Weber, Special Advisor to the Chair
Redacted copy to David Frame, CEC

Appendix A

**Construction Employers Coalition
(for WSIB and Health & Safety and Prevention)**



April 23, 2020

Ms. Elizabeth Witmer, Chair
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

& Mr. Tom Teahen, President & CEO
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Witmer and Mr. Teahen:

Reference: Considerations for employer relief due to the COVID-19 national emergency

On April 9, 2020 Ontario Premier Ford announced the creation of the new “Ontario Jobs and Recovery Committee” (OJRC). The CEC has developed a preliminary list of suggestions and initiatives available to the WSIB that we believe are thematically consistent with the OJRC mandate.

We are asking that the Board robustly consider our suggestions and we would welcome the Board’s response prior to the CIAC telephone conference scheduled for May 5, 2020.

All current WSIB programs, protocols and policies are designed within the construct of a normally functioning economy. The post-COVID-19 economy will be anything but normal. As businesses and workers face this fast-moving and unprecedented health and economic crisis, it is necessary that the Board adjust at the same pace. We are confident that it will.

Proposal 1: Cancel 2020 experience rating surcharges: The WSIB plans on issuing final 2020 experience rating surcharges (CAD-7 and NEER). We ask that those surcharges be cancelled.

Proposal 2: Delay implementation of Rate Framework (RF) transition plan: Many employers are slated for Year 2 RF premium increases (one risk band). We ask that the 2020 RF policy (no upward risk band movement; maximum earned downward movement) be extended to at least 2021. No premium rates should increase in 2021. Earned decreases should be applied in the same manner as RF Year 1 (2020). 2022 (RF Year 3) premium rate transition policy protocols should be reviewed and decided in mid-2021.

Proposal 3: Waive 50% of 2020 WSIB premiums for smaller employers: We recommend that the WSIB adapt and adopt the policies of Alberta (deferral of 2020 premiums to 2021; 50% waiver of 2020 premiums for small employers) and Manitoba (return 2019 surplus funds to employers). We request that a specific policy proposal adapting these proposals be urgently developed for discussion with the Chair’s Advisory Committees (CAC) by mid-June, 2020.

Proposal 4: Delay collection of past-due accounts: As a result of past WSIB audit and verification activities, WSIB collection actions should be suspended without interest until at least 2021 as appeal and advocacy action is presently impossible. Moreover, cash flow realities render payment near impossible, especially for those employers contributing under an agreed payment plan.

Proposal 5: An examination of the impacts of COVID-19 in extending loss-of-earnings benefits: We ask the Board to strike an immediate emergency CAC sub-group to examine the impacts and remedies of claims that but for the COVID-19 crisis, would likely have been brought to closure. COVID-19 has reduced, delayed or stopped medical follow-ups, delayed return-to-work programs, and

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rendered expected offers of employment impossible, all of which has and will result in extending loss-of-earnings benefit payments indefinitely.

Regards,



David Frame, CEC Chair

Distribution: Members of the Ontario Jobs and Recovery Committee

Appendix B

From: L.A. Liversidge <lal@laliversidge.com>
Sent: October 22, 2020 8:28 AM
To: Diane Weber
Subject: RE: Follow ups arising from September 14, 2020 CIAC Meeting

Good morning, Diane:

Introduction

This is in response to your request for further information regarding my October 14, 2020 email to you concerning the COVID & LOE issue. I appreciate the continuation of this important discussion. A copy of this email will be sent to core CEC members.

It is useful to commence with the notion that the WSIB has of course already recognized the negative and unfair (in the context of employer cost accountability) impact of COVID-19 on Ontario businesses by:

1. Providing a financial relief package to employers, including deferred payments and a repayment schedule for deferred amounts.
2. Allocating costs associated with COVID-19 claims on a schedule-wide basis rather than at an employer or class level.
3. Keeping 2021 premium rates the same as 2020 premium rates, regardless of the individual performance of employers.
4. Agreeing to discuss with the Minister of Labour the issue of the inflation of the WSIB Maximum Insurable Earnings Ceiling for 2021 due to COVID lower wage job losses.

It is clear, therefore, that the WSIB, when made aware of the negative impacts of COVID-19, sought to assist employers by implementing various policy changes which directly address the COVID-19 environmental factors which are determined to be out of employers' control and which create an unfair financial burden on such employers.

My request and suggestion

The COVID & LOE issue which I raised is thematically consistent with the above issues. In contrast to the Board's presentation at the September 14, 2020 CIAC where it was noted that no significant system impacts have been observed, I noted to you that we have cases demonstrating a competing narrative - COVID-19 *has* extended the length of the claim as a result of medical services, education services, etc., being shut down between March and August, 2020.

This is my policy suggestion: That such claims be addressed on a case-by-case basis and where the facts show the case was prolonged due to COVID related reasons, the WSIB will provide cost relief.

COVID-19 & LOE

Respectfully, the WSIB's proposition that COVID-19 did not affect claim duration cannot be logically or intuitively followed. Clearly, partially disabled workers experienced delays as return-to-work plans were delayed or made impossible due to government mandated business shutdowns; work transition programs were interrupted due to training/education facilities being shut down; doctors were not seeing patients or virtual patient meetings were delayed thus impeding the flow of critical case management documentation to monitor

workers' medical and return to work status. During that COVID-19 period (March to August), through no fault of workers or employers, many cases were left in limbo.

See the details of **Case #1** and **Case #2** below which are extracted from actual cases which illustrate these points. These are cases which even WSIB staff acknowledged were prolonged due to nothing other than COVID-19 and associated business/facility shutdowns. You have asked for the claim numbers for these cases. I will not be providing the claim numbers but be assured that you have my undertaking as counsel that the facts below are properly gleaned from the record, and the individual cases remain active with the Board and under active discussion. For the purposes of the policy discussion I am introducing, consider the facts presented simply as background fact cases. I am not seeking a specific remedy for these cases at this time - I am seeking a policy framework through which to address this *type* of case.

Case Examples

Case #1

- A January 2020 Work Transition Plan Agreement called for the worker to undergo upgrading/training January 14, 2020 to April 24, 2020.
- RTWS would maintain regular contact to assess the worker's progress and ability to acquire the English skills to determine the next step. RTWS would connect the worker with a job search provider for job search resources and support.
- On March 31, 2020 the RTWS advised that **because of COVID-19 the school where the worker was doing his ESL training closed, as did the job search location.**
- Consequently, the worker was provided with online apps so that he can watch movies, etc. in English.
- The RTWS advised that **when COVID-19 has been resolved his WT will probably be extended as he will not have had sufficient ESL to move forward.**
- The worker resumed his ESL on August 4, 2020 and his entire WT program is expected to be finished by December 4, 2020.
- The RTWS advised us on August 18, 2020 that the work transition program has resumed and all is going well. The worker has been attending class since August 4, 2020 in person 5 days per week, 2 hours per day and then he completes the rest of the day online. This will continue for 18 weeks after which time he will have completed Level 2 ESL.
- Once the 18 weeks of ESL has been completed the worker will begin job search for placement as a delivery driver.
- The RTWS advised that it would normally take 3-4 months to complete 1 level of ESL. The worker was to complete 2 levels in order to meet the requirements for the suitable occupation goal of delivery driver. Consequently, if the worker commenced his work transition program in January, 2020, the expectation would be that he would have completed his ESL by approximately September 14, 2020 at which point he would then conduct a job search.
- Due to COVID-19 the worker's ESL training was interrupted and the completion of the entire WT was moved to December 4, 2020.
- Consequently, **the worker's WT program was delayed by approximately 10 weeks the difference between September 24, 2020 and December 4, 2020.**

Case #2

- We received a message from the RTWS on February 28, 2020 advising that as the worker was recovering from revision surgery he is taking a break from his non-dominant hand training and one handed typing until he is cleared by his surgeon. His training was initially scheduled to end on May 15, 2020.
- On March 13, 2020 the RTWS advised that the worker is in recovery from surgery and will see his specialist April 22. He will also see a psychotherapist.

- On May 12, 2020 the RTWS advised that she while the worker continues to meet with his psychotherapist over the phone once per week and receive physiotherapy twice per week, **the non-dominant hand training stopped as the school closed due to COVID-19.** The RTWS was not sure when that will resume as it can only resume once school is back up and running.
- On July 21, 2020 the RTWS advised school will resume on August 4, 2020 so the worker will resume his in class training at that time. The RTWS will **revise her WT plan once he resumes in class to account for the time he missed.** She will need to find out from the school how long the extension will be and the costs and then she will revise the plan and send us a copy. The RTWS advised she has a Specialty Clinic report from early July and she will forward the summary. It states the worker should continue with occupational therapy but he is unable to return to work at this time due his psychological condition. He is receiving psychological treatment and physical treatment in person still, although his **group treatments were put on hold due to COVID-19.**
- The initial WT plan indicates that the worker was to undergo computer skills training from February 10, 2020 to May 15, 2020. The revised WT plan indicates computer skills training from February 10, 2020 to October 23, 2020. Therefore, **this WT plan was delayed by approximately 15 weeks from March 13-August 4, 2020.**

Summary

While the WSIB has addressed numerous issues raised by COVID-19 it has not addressed them all and one which has not yet been addressed is the issue of additional costs incurred in claims whose work transition/return to work programs have been delayed due to COVID-19.

Given the WSIB's recent commitment to ensuring just employer accountability during the COVID-19 pandemic we submit that it is appropriate and necessary for the WSIB to also address this issue and provide cost relief to employers for claims which have incurred additional costs due to delays related to COVID-19.

Regards, LAL

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Appendix C

**Construction Employers Coalition
(for WSIB and Health & Safety and Prevention)**



February 01, 2021

Ms. Elizabeth Witmer, Chair
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Witmer:

Reference: Policy request for prolonged loss of earnings benefits due to COVID-19

We initially raised this broad issue in our correspondence of April 23, 2020 (see **Appendix A** at *Proposal 5*). Ontario has continued to adjust to COVID-19 over the past year. It is our observation that COVID-19 continues to significantly and negatively impact loss-of-earnings (LOE) claims durations. This issue has been discussed within the CIAC, most notably on September 14, 2020, followed by Mr. Liversidge's email message to Diane Weber of October 22, 2020 (see at **Appendix B**). The CEC supports the suggestion put forth by Mr. Liversidge.

Summary of the Issue:

Notwithstanding the Board's September 14, 2020 presentation that no significant system impacts have been observed, it is indisputable that workers experienced delays as return-to-work plans were/are delayed or made impossible due to government mandated business shutdowns; work transition programs were/are interrupted due to training/education facilities being shut down; doctors were/are not seeing patients or virtual patient meetings were/are delayed thus impeding the flow of critical case management documentation to monitor workers' medical and return to work status. Through no fault of workers, employers or the WSIB, many cases were (and are currently) left in limbo. See **Appendix B** for some case examples. It is unfair to hold individual employers accountable for increased claims costs due to these type of circumstances.

Policy Suggestion:

The WSIB has already recognized the unfair impact of COVID-19 on Ontario businesses through a number of policy measures: COVID-19 claims costs have been collectivized system-wide; a financial relief package was designed and offered to employers; and 2021 premium rates were frozen at 2020 levels. We suggest that LOE costs increased by COVID circumstances requires similar treatment.

Given the WSIB's recent commitment to ensuring just employer accountability during the COVID-19 pandemic we submit that it is appropriate and necessary for the WSIB to also address this issue and provide cost relief to employers for claims which have incurred additional costs due to delays related to COVID-19.

We look forward to discussing this issue at the upcoming CIAC meeting on March 1, 2021.

A handwritten signature in black ink, appearing to read "David Frame".

David Frame, CEC Chair

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