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

November 17, 2021

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

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: Revised Experience Rating Adjustment Policies

The issue

We are writing regarding **WSIB Operational Policies 13-02-02** and **13-02-06** which outline the Board's approach to retroactive experience rating adjustments. It is our assessment that these policies unfairly fetter the administrative discretion of WSIB decision-makers and in so doing, undermine the clear and unambiguous statutory directive that "*the Board shall make its decision based upon the merits and justice of a case*" (WSIA, s. 119(1)).

As a result of these policies, the WSIB will not facilitate retroactive experience rating adjustments for the 2019 and 2020 CAD-7 and NEER issues after December 31, 2021 unless the WSIB is aware of the need for, or the employer requests, such adjustments prior to December 31, 2021. The arbitrary hard deadline of December 31, 2021 is the element that renders the policies unfair and arguably, counter to the tenets of administrative justice.

We will explain why a refusal to consider an application for an adjustment after December 31, 2021 would be unfair. We propose a simple policy adjustment that promotes employer fairness while not undermining the need for finality of the CAD-7 and NEER plans.

While the December 31, 2021 deadline was included in WSIB policies in early 2020, the extent to which these changes would be an issue for our member employers was then uncertain. Since, we have concluded that the December 31, 2021 deadline will adversely impact many of our member employers.

Why this policy is unfair

For the purposes of this communication, the primary case we are concerned with is this: A request for SIEF is advanced *before* the deadline; SIEF is granted *after* the deadline; a request to adjust the experience rating record is denied by the Board. This is a very routine and common type of case. In these cases, it is the Board's own actions and administrative processes and oftentimes outright delays that will drive cases outside the hard deadline. In any case where an employer acted with diligence and in a timely manner, the establishment of an arbitrary deadline must not negate the policy intent of the Board's SIEF policy.

Arbitrary deadlines are not new – a hard stop on WSIB discretion is

WSIB experience rating policy has always included completion dates and deadlines. This is appropriate. Administrative finality in such programs is a proper goal. Our quarrel is not with the

establishment of deadlines. Our objection is with a policy that removes decision-maker discretion on individual cases to the point that the "merits and justice" requirements of the statute are transgressed.

Fortunately, we have a long history of analogous cases being addressed by the Board and the Appeals Tribunal, with much fairer results than will be directed by the new policies. The Appeals Tribunal has usually held that where a request for SIEF has been made in a timely manner, and any SIEF decisions made by the WSIB have been appealed within the legislated time limits, the effect of the decision will be reflected in the employer's experience rating record. This point is succinctly made in **W.S.I.A.T.** ***Decision No. 2113/15R2*** **(February 14, 2019)**, at par. 50:

> Another way of stating this might be to state that where a request for SIEF cost relief has been made within the time limits provided for in the applicable policies of the WSIB and any SIEF decisions made by the WSIB have been appealed within the time limits provided for by the WSIA, the employer must be considered to have met all of the legislative requirements necessary to obtain an effective remedy if their appeal is successful. As long as the employer complies with procedural rules concerning the timely pursuit of appeals at the WSIB or at the Tribunal, neither the WSIB nor the WSIAT can create a further due diligence requirement that detracts from an employer's statutory appeal right as determined by the legislature.

Setting a deadline for experience rating adjustments serves to essentially deprive the employer of the appeal rights to which it is guaranteed under the legislation (***Decision No. 2113/15R2***, *supra*, at para. 38). Cost relief without a retroactive adjustment is a pyrrhic victory (see **W.S.I.A.T.** ***Decision No. 637/20*** **(September 14, 2020)**, at para. 32).

We propose two simple adjustments to policies **13-02-02** and **13-02-06** that will ensure the Board fairly discharges its decision-making authority:

1. Where the employer has diligently initiated a SIEF request before December 31, 2021 but a decision by the WSIB or WSIAT is made after December 31, 2021, a retroactive adjustment will be facilitated.

2. Where a SIEF request is triggered by information new to the employer discovered after December 31, 2021 and diligently advanced in a timely manner, a retroactive adjustment will be made.

We would welcome an opportunity to discuss this issue at the November 22, 2021 CIAC meeting.

David Frame, CEC Chair