The Liversidge *e*-Letter

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

January 23, 2006 **An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.** **8 pages**

WSIB Releases Draft Policies on Early and Safe Return to Work

The Board Should Re-Group; Re-Think and Re-Draft

Part II: Commentary on Draft Policies
Employer "non-cooperation" penalties

To repeat from the January 19, 2006 issue of **The Liversidge *e*-Letter**, on October 27, 2005, the Workplace Safety & Insurance Board ["WSIB" or "Board"] released draft policies on early and safe return to work ["ESRTW"] purportedly to "*improve the understanding of the roles and responsibilities of the various parties*" in the RTW process, to "*help address the challenges the WSIB and the workplace safety and insurance* ["WSI"] *system face*", and to "*demonstrate respect for injured workers and employers to mitigate the significant costs of existing claims*" **[October 27, 2005 letter to "Stakeholders" from WSIB Chief Corporate Services Officer]**. These policies will, for the very first time, allow for the levying of *additional fines* against employers. It is my assessment that these policies will likely result in unfair application to smaller businesses, and contrary to the declared policy expectations, in contrast with present policies, *will actually extend, not reduce*, time on claim. If these policies are to be fairly applied, significant re-writes are required.

I have addressed the Board's proposed policies in two special issues of **The Liversidge *e*-Letter.** On January 19th, I explained that the Board would be well advised to adjust the consultation process to allow more time for the proposed changes to be understood and sink in. In addition, after an introductory phase of consultation, I suggested that it was incumbent on the Board to open up the process for broader public comment this coming Spring, and allow until the Fall for informed submissions to be presented.

The proposed policies risk setting back the Ontario workplace safety and insurance system several years

In this issue of **The Liversidge *e*-Letter**, I present arguments for changing the policy proposals themselves. I argue the proposed policies risk setting ESRTW back several years, and will actually serve to add to time on claim, not decrease it at all. The policies risk creating needless uncertainty, and almost certainly, will be less than fairly administered for small business (***continued p. 2***).

WSIB ESRTW Proposed Policies
Four Critical Changes Needed

***Critical Change No. 1*: Policies must be changed to more fairly apply to small business**

- The Board's proposed policies will lead to unfair fines being levied against smaller businesses.
- Presently, there is no distinction between the potential liabilities for small versus large businesses.
- Yet, large sophisticated employers are very different than smaller employers, a distinction that is recognized within the WSIA itself [employers regularly employing less than 20 employees, for example, are not subject to the reemployment provisions of the WSIA].
- Still, the Board expects the same of large and smaller employers.
- I have set out suitable recommendations to remedy this.

***Critical Change No. 2*: The WSIB adjudication processes must be revamped for fairer case-by-case determinations**

- The issuance of a fine requires a different decision-making framework than benefit administration.
- Fair process, ensured by Board policy in benefit administration cases, will be less than perfect for levying fines.
- I have offered recommendations to ensure that these policies are fairly administered.

***Critical Change No. 3*: WSIB must focus on awareness**

- Once operational, these policies will immediately empower Adjudicators to levy penalties against "non-cooperative" employers.
- I have offered a simple transitional recommendation to ensure an increase in employer awareness *before* the Board starts levying fines.

***Critical Change No. 4*: Dispute resolution must be "fast-tracked"**

- ESRTW disputes presently are "fast-tracked" within the system. Disputes pertaining to ESRTW fines, to be fairly administered, must receive similar consideration.
- I have recommended structural adjustments to the WSIB adjudication procedures to ensure that ESRTW fines receive appropriate and due consideration and disputes are quickly settled.

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Commentary on "*timely return to work*" versus "*early return to work*"

New policies override "*early RTW*" with "*timely RTW*"

The proposed policies introduce the term "*timely RTW*" and walk away from the term "*early RTW*". In the WSIB slide presentation, "**Return to Work Policy Framework: Key Concepts and Themes, October 27, 2005** (found on the WSIB website) ["Slides"], at slide 9, the Board expresses its intent to de-emphasize the "narrow" interpretation in "early" and to emphasize the timeliness of the return to work effort. My opinion - *this is a massive mistake*, and is not legally supportable.

The lack of a proper legal approach has not deterred the Board in the past

But, then again, the lack of a proper legal interpretation of the *Workplace Safety and Insurance Act* ["WSIA"] has not stopped the Board before.

For one of the best more recent examples of the WSIB outright ignoring the express words of the WSIA, please refer to the **January 20, 2005 issue of The Liversidge *e*-Letter, "*WSIB Changes Appeal Time Limit Rules*"**. There are others.

The "rule of law" must govern WSIB policy development

That the WSIB must meticulously ensure that any proposed policy, practice or procedure scrupulously adhere to the statutory language and intent of the WSIA is, one would think, quite a superfluous statement. Once the "rule of law" no longer guides WSIB policy development, then all bets are off.

It was not too many years ago that the Board routinely ignored the prevailing statute

I find it remarkable just how short lived is the collective memory. It was not too many years ago when the Board's adherence to its own way, to policies and practices that bore a very loose kinship with the governing statute, gave rise to a passionate frenzy. So fervent was this movement that it drove not only the reform initiatives of the mid and late 1980s, but remained the hallmark of workers' compensation administration and decision-making from the mid-1980s to throughout the 1990s. In fact, right up to until recently.

Ignoring the law gave rise to a powerful reform agenda

The advent of the Workers' Compensation Appeals Tribunal ["WCAT"] (now of course, named the Workplace Safety & Insurance Appeals Tribunal ["WSIAT" or the "Appeals Tribunal"]), was the first step. The rigorous adherence to legal standards and the rule of law by the WCAT gave rise to what was no less a reconstruction of legal interpretation of years of WCB practice, rules and policies. A new way had arrived. *The rule of law had arrived to workers' compensation adjudication and administration*.

After a short period of some institutional resistance, this new approach very quickly was absorbed into everything the Board did. A refreshing new way emerged. The new starting point for WCB policy design came from a revolutionary point – the statute itself. Imagine, Board policy based on the law! As outright silly this statement is now, less than twenty years ago, this indeed was remarkable.

That WSIB policies must adhere to the law is so trite as to be almost irrelevant

Extolling the virtues of legally correct policies really should be such a trite and clichéd commentary as to be waved away as irrelevant. And so it would, if not for a return of the Board's lack of concern for the rule of law, a renewed phenomenon. The ESRTW policies are not the only example. The Board's overriding of the statute in its appeal time limit "guidelines" is another [**see the January 20, 2005 issue of The Liversidge *e*-Letter**]. There are more.

The return of a governing mindset that permits policies and practices contrary to the law is troubling. We have been down this road before. We know where it leads. Increment by increment, in the absence of external resistance, the Board begins to assume a legislative role. Once that is entrenched, often the words of the statute become viewed as an obstacle to policy reform. Where the law no longer is in step with the governing minds of the Board, rather than try to reform the law, the Board instead ignores the law. And, often the Board gets away with it.

Stay tuned for future issues of **The Liversidge *e*-Letter** which will continue the discussion on the erosion of the rule of law in contemporary WSI administration. Now, back to the most recent example – the shell-game switch of "early" with "timely".

The use of the term "*timely*" is legally and pragmatically inappropriate

The retrenchment from the use of the word "early" is both pragmatically and legally inappropriate. Firstly, the WSIA uses the term "early", not "timely". Secondly, changing the terminology will send the wrong message, which I predict will result in the lessening of worker/employer efforts to return a worker to the employment, the opposite of what is said to be intended.

A change in terminology from "early" to "timely" must be presumed to be substantive

It must be presumed that the word change is substantive and is simply not an exercise in semantics. One of the basic tenets of statutory interpretation, which can be applied to policy changes such as this, of course, is that when a change in the wording of a statute occurs, that change is interpreted as a deliberate effort on the part of the drafters to change the meaning of the previous text. It is my opinion that it would be inappropriate and contrary to the language of the WSIA for the Board administrators to implement such a change in meaning.

The WSIB does not have the power to legislate – Policy does not trump the law

Firstly, the WSIB does not have the power to legislate. The term "early" is explicitly set out in the governing provisions of the WSIA. Employers are directed to cooperate in the "*ESRTW of the worker*" [**WSIA, s. 40(1)**], workers are directed to cooperate in his or her ESRTW [**WSIA, s. 40(2)**], payments are provided where workers are cooperating in his or her ESRTW [**WSIA, s. 43(3)**], to name but a few explicit references to the word "early". "Timely", on the other hand appears no where with respect to ESRTW (and only appears in the WSIA once with respect to the governance of the Board's enforcement policies [**WSIA, s. 148(1)**]).

The language of the Board's policies must reflect the language of the WSIA

The language of the Board's policies must reflect the language of the WSIA. To do otherwise inappropriately confers upon the Board the capacity to legislate. It is trite commentary to note legislating is beyond the purview of the Board's discretionary powers under the WSIA. I recommend that proposed **WSIB Operational Policy 'Return to Work: Key Concepts and Definitions', Document No. 19-02-02** be revised to maintain the current meaning of the word "early".

If there is no substantive change intended with the use of the word "timely", then there ought not to be any change at all for the reasons earlier cited. If there is a substantive change expected through the use of the word "timely", it is counter to the express wording of the WSIA and will lead to needless litigious exercises seeking the proper legal interpretation of the word "timely". The Board must re-think this.

Commentary on "productive work"

Proposed policies requires work be "productive" – the WSIB will decide what is productive and what is not

The Board notes that the definition of suitable work is to include post-accident work that is "productive" which is to be defined as "*adds value to company's products/services*" [Slides, p. 11]. With the greatest of respect, this calls for a determination which will be beyond the scope of expertise of the Board.

A more appropriate question is – *Does the employment provide an objective benefit to the employer*?

I caution the WSIB against including this term within the definition of suitability. Suitability must always be contextually determined. There can be no absolute definition. Rather than focus on whether or not a job is "productive", which requires both an analysis and determination far beyond the scope of the WSIB, a more appropriate question is whether or not the employment provides an *objective benefit to the employer*.

Indeed, while it is reasonable to infer that a job must meet minimum standards of satisfaction and dignity [**see for example WCAT *Decision No. 514/95*, (October 22, 1995), at para. 199**], suitability must be contextually determined. Even what may appear to be the most minimal of activity would be suitable employment if it returns the worker to the workplace without exceeding his limitations [see for example **W.S.I.A.T. *Decision No. 1162/98* (September 10, 1998)**], *while delivering an objective benefit to the employer* [**see W.S.I.A.T. *Decision No. 1947/01* (October 31, 2001)**].

It is my respectful view that the requirement to establish an objective benefit to the employer is more meaningful in the context of the ESRTW policies than "productive employment".

Commentary on "remunerated work"

"Remunerated work" is work at the rate the employer would normally pay that reflects the value of the work

Policy Document No. 19-02-02 defines "remunerated work" as work that the employer would normally pay for at the rate or pay that reflects the value of the work, and which restores as much as possible, the worker's pre-injury earnings, and which will be comparatively remunerated in the general labour market. It is my opinion that this policy in particular is problematic and ought to be withdrawn. The application of this policy will assuredly lead to increasing time on claim, in aggregate. Moreover, the policy reason for this change, as has been communicated to me by senior WSIB officials, flows from a misunderstanding of the root causes of the "problem" that is being remedied. I will show that the "problem" being addressed does not at all really exist, and that *the real problem* is one of systemic WSIB miscommunication.

This will impede the ESRTW of workers

This definition of "remunerated work" inappropriately impedes the discretion of an employer to set the rate or pay for the job, and will actually impede the ESRTW of workers. This policy conflicts with other WSIB policy statements.

The proposed policy resides in conflict to long-standing WSIB policy interpretations

In a general policy letter of June 26, 1998, the (then) Director of the WSIB Policy Branch, in making commentary to the WSIB document, "**Clarification of the WSIB's Position on Employer's Advances**" dated November 27, 1996, confirmed that it is Board policy that, in instances where a worker returns to work at reduced hours and/or reduced productivity and the employer maintains full wages and chooses not to be reimbursed by the WSIB, regardless of whether the worker returns to work at reduced hours and/or loss of productivity, this would not be categorized as a lost time injury. Of course, it is inferred in that WSIB policy statement that such work must be considered to be "suitable".

The new definition of "remunerated work" will do nothing but add to interpretative litigation and is contrary to currently enforced WSIB policy statements. It would be preferable if the Board did not needlessly fetter the discretion of an employer to remunerate workers at a rate of pay of the employer's choosing.

The proposed policy will block the Board's own objectives

The Board's proposed definition actually will impede the policy and statutory objectives of ESRTW. In effect, the Board appears to be trying to ensure that suitable work is proffered with a "competitive wage" by limiting the employer's discretionary ability to set the remuneration level. Such requirement may well fly in the face of certain provisions of various collective agreements and work against the policy objectives of ESRTW.

An employer *must* be able to set the wage specific to a worker

By impeding the capacity of an employer to set the wage for work offered specific to a worker, the Board will ensure that what otherwise would be suitable employment, artificially will be deemed unsuitable by virtue of a unilateral declaration of the Board on the value of the work. Yet, only the employer can reasonably set the value of the work employing a vast array of factors, not the least of which is the desire to maintain a long term working relationship with the worker.

It is clear that the Board has not fully examined the potential ramifications of this policy. I encourage the Board to reconsider the definition of "remunerated work".

Why is the WSIB proposing such a policy?

The question that begs asking, of course, is why is the Board proposing such a policy change? What exactly is the problem that the Board is trying to correct? In my recent meeting with WSIB policy officials, I gained some insight into the Board's purpose. The Board seeks to avoid and/or remedy two potential scenarios.

The first is where an employer returns an injured worker to a "make work" type job, that has no or little true economic value to the employer, and is offered simply to avoid WSI costs and experience rating exposures. In other words, there is not a *bona fide* or "good faith" offer of "suitable employment", and the job is offered simply to avoid the accumulation of WSI costs which will adversely affect the employer's experience rating record and result in higher premiums.

The second is where, while the employer may be acting in good faith, because the job itself has no real economic value, it is unlikely to be sustainable employment.

In both instances, the Board worries that after a period of time, the worker may lose the "suitable employment" (since it is not economically viable in the first place) and will have to seek alternative employment and become enrolled in a Labour Market Re-entry Program ["LMR"]. As I understand the Board's theory, there is a worry that as the time span from the "unsustainable RTW" to the point where an LMR is approved lengthens, the likelihood of a permanent and sustainable RTW diminishes. Thusly, the claims costs are higher than they would have been had an LMR been initiated earlier. In addition, as there are restrictions in the WSIA with respect to a review of loss of earnings benefits claimed 72 months from the date of injury **[WSIA, s. 44(2)]**, the Board is concerned that a worker's eligibility to benefits may be artificially and improperly restricted if the worker returns to employment that is not economically sustainable.

I will de-bunk both of the Board's concerns.

Rational business persons act rationally

So, the first concern of the WSIB is that a rational business person will return a worker to unsustainable and economically unproductive employment in order to avoid WSIB experience rating ["ER"] surcharges. Implicit in the Board's theory is that the Board's own experience rating programs could encourage such behaviour. This, to be blunt, is simple nonsense. As I will show, for small, medium and large businesses alike, the rational, informed business person, the individual the Board seems to fear will exploit ESRTW and ER alike, even if inclined to present such an offer of employment, would *not* do so for business reasons. In other words, the rational pursuer of self-interest would not make such an offer for self-interested business reasons.

Consider three examples – the Board's worries are fiction

Presume the following facts. A high wage earning skilled worker ($69,400 per year or $34.70 per hr.) sustains a fairly serious work injury, and is disabled from his pre-injury employment, but is fit for suitable employment. The employer presents the worker with a "make work" type job that is within his physical ability but has an actual economic value of $7.75 per hour (minimum wage). The employer chooses to pay the worker his pre-injury wage of $34.70, a *de facto* $27 per hour premium, ostensibly to acquire a financial benefit over potential ER surcharges. Let me look at a small, medium and large employer to see if this financial benefit actually presents itself. Presume that for all of these examples, had the employer not returned the worker to employment, the ER claims costs would be at maximum, $270,800.

The small business example: 23 employees and a WSIB premium of $63,519.85. That employer has "expected costs" of $6,745.81, a rating factor ["RF"] of 40% (the minimum), a maximum rebate potential of $2,698.32 and a maximum surcharge potential of $5,396.65. For this "dodge" to work, to avoid ER costs the employer would be required to pay the worker's full salary for three years to avoid the case being "active" while the ER "window" remains open. So, even before the calculations are made, it is readily apparent that this astute, ever so clever business person has scammed who? - only himself. For the three year period, he would fork out over $166,200 in *extra* wages to avoid a $5,396.65 surcharge. Would *any* employer do that?

Certainly, the self-interested maximizing employer, the very beast the Board is worried about, *would not do it*. ***A stupid business decision of paying unsustainable, uneconomic wages cannot be transformed into a sound business decision even when subjected to the remarkable arithmetic of the Board's ER program***. So, case number one debunked. Soundly.

The medium business example: 93 employees and a WSIB premium of $256,860.33. That employer has "expected costs" of $70,020.13, a RF of 58%, a maximum rebate potential of $40,611.60, and a maximum surcharge potential of $81,223.20. The maxed out claims costs would drive a maximum surcharge for the employer. Again, for this "flim-flam" to work, for the three year period, the employer would fork out over $166,200 in *extra* wages to avoid a $81,223.20 surcharge. A better deal than the earlier example. This time, the self-interested maximizing employer is getting a $0.50 return for every $1.00 invested in extra wages. ***He will go broke half as fast as the first example, but broke he will be***. So, case number two debunked.

Lastly, the big business example: 1,787 employees and a WSIB premium of $4.8 million, and a 100% RF. A "maxed out" claim of $270,800 will have a cash impact in the same amount. This time, the numbers at least partially support the Board's thesis – the $166,200 in *extra* wages is less than the potential cash impact of the claims. In fact, there is a $61,000 benefit. Now, this is a large employer. If unionized, the "make work" approach would be prohibited by the collective agreement. So, no worries there. Of course, for the Board's worries to hold true, one would have to believe that a large sophisticated employer would be willing to fork out $166,200 in inflated wages to a worker to do a job that does not have to be done in the first place! Instead of doing something "radical", like finding sustainable, suitable employment that actually provides an economic benefit to the business. Of course, a employer this large will have more than this one accident, and would have to engage in such a "practice", say 20 times. That means that for the Board's concerns to hold water, this particular employer would have to fork out $3.3 million in unearned wages! ***Unlikely. And, if any large employer did engage in such a practice, well, they would not be a large employer for very long***. Third case debunked.

And, these examples have not even factored other relevant considerations such as severance and notice costs, low morale, low productivity and the cumulative affect of engaging in unsupportable business practices.

The bottom line: The very economic theories that the Board worries will motivate untoward behaviour actually will encourage the opposite – the provision of sustainable and economically vibrant suitable employment. The WSIB cannot base its policy development on a silly assumption that Ontario business will make unsustainable business decisions.

The WSIB's concerns are at odds with its own policies – the Board encourages the business case approach to rehabilitation

The founding premise of the Board's experience rating programs is that financial incentives will result in positive managerial behaviour directed towards prevention and reinstatement. In other words, a business case approach [see the March 26, 2004 issue of **The Liversidge *e*-Letter, "*Experience Rating Reform: The Concepts*"** for a detailed explanation of the underpinning economic theory behind experience rating]. The entire foundation of experience rating is that business persons will act rationally and in their better business interests. The Board's concerns about improper behaviour pertaining to ESRTW practices not only make no sense as just shown, but run counter to the entire theory behind the Board's own ER policy.

If employers are acting irrationally – it is because they do not understand – they do not understand because the Board has failed to educate

I have no doubt that some employers likely do act in the manner feared by the Board. However, these employers simply do not understand the inner-workings of the Board's ER programs. I fully understand why. It is almost impossible for most employers to actually benefit from the business case method ER promotes because the arithmetic is so darn confusing. Most employers do not understand the WSIB ER reports, let alone feel at ease to engaging in various "what if" scenarios to test and price ESRTW alternatives. I know most WSIB officials can't do it.

This lack of understanding is entirely the Board's fault. Instead of using its communication powers to better explain ER, and make it easy for employers to facilitate the essential "what if" calculations (which by the way, I challenge any WSIB employee to efficiently calculate), the Board has been consuming its ER resources to change the math, not make the program more effective.

The Board's website provides the following: "*If your claims costs are lower than would be expected for a company of your type and size, you receive a rebate. If your claims costs are higher than would be expected for a company of your type and size, you are assessed a surcharge*". Most employer's understand these general rules.

What is not understood is the actual effect of individual cases, let alone how the case-specific business analysis should be addressed. This has been a long-standing weakness in the Board's ER programs, especially NEER, which *requires* this knowledge and application to be effective. The Board has published several NEER guidelines, which add very little in the way of assistance to any employer. From the title of one document entitled, "***A Financial Business Case for Health and Safety in Ontario Workplaces***" one would think that it would hit this nail on its head. It doesn't. This 22 page document though addresses only the total NEER costs incurred by a firm and attempts to

translate those into lost profit opportunity (in a manner warily close, I might add, to an approach I have published in information seminars in the past). It does not provide any guidance as to how to develop a business case for ESRTW on individual cases.

The ***NEER User Guide***, another 22 page document, tries to explain how NEER works. This document, while not without some use, is effectively of no value to develop a business case to assess varying ESRTW approaches. I challenge the Board to find *anyone* on the basis of reading this guide who acquired sufficient understanding to actually develop a case-specific business analysis. This document was last updated in November 1998 by the way. It is not useless – but – is close to useless.

The Board needs to provide an ER calculator on its website

Yet, all the Board needs to do is provide a user-friendly simple to operate basic ER calculator on its website, so that individual business mangers can easily do the calculations and develop the individual ESRTW business case. I have been suggesting this to the Board for years and years. "*A good idea*" says the Board – but – "*we do not have the resources*". Nonsense. This very simple and effective enhancement would overnight turn ER into what it always should have been – a business tool and not only a report card. Will the Board ever do this? Unlikely. Why? To implement such a calculator would re-affirm the Board's institutional commitment to the business case approach - an approach, I am afraid, that is just no longer in vogue at the Board. What is more politically correct, rather than address a root cause, is to develop policies that resolve fictional problems.

***The bottom line*:** The WSIB would be well advised to go back to the drawing board and define more clearly what problems really need fixing.

Commentary on workplace parties' key return to work activities

WSIB focuses mainly on employer requirements

Proposed **WSIB Operational Policy 'Key Return to Work Activities' Document No. 19-02-03** presents an emphasis on employers' key return to work activities. A focus on employer responsibilities is of course essential. However, the policy is rather passive towards injured worker responsibilities, and this is not, in my respectful view, intended by the WSIA [**WSIA, s. 40**]. I encourage the Board to be guided by the prevailing jurisprudence of the Appeals Tribunal, which has over the years canvassed the question of both parties' roles in the ESRTW process.

A worker must cooperate in ESRTW

Of course, a worker continues to be entitled to benefits only if the worker is cooperating in his/her healthcare measures and ESRTW [**WSIA, s. 43 (3)(a)**]. A worker shall cooperate fully in his or her ESRTW [**WSIA, s. 40 (2)**] and must assist the employer as may be required when requested to identify suitable employment [**WSIA, s. 40 (2)(b)**]. The proposed policies do not highlight the obligations on the part of the worker to assist an employer identifying suitable employment. This omission must be rectified.

The Board proposal is at odds with years of interpretation at the WSIAT

The Board policies do not take into account the general approach, practices and policies of an employer to return workers to ESRTW whereas, the Appeals Tribunal jurisprudence clearly does. For example, the Appeals Tribunal has held that a worker who does not take advantage of modifications and flexibility *generally provided by an employer* could be held to be uncooperative [**W.C.A.T. *Decision No. 658/93* (May 24, 1994), at paras. 24, 36]**.

The WSIA expects ESRTW effort from employer *and* workers

Similarly, Appeals Tribunal jurisprudence highlights the expectations placed upon the shoulders of the worker by the WSIA. A worker is expected to make every reasonable effort to return to modified employment once able [**W.C.A.T. *Decision No. 45/953* (November 14, 1995), at para. 19]** and is held accountable for his or her actions with respect his or her efforts, or lack thereof, concerning return to work [**W.C.A.T. Decision 115/196 (January 16, 1997)**]. The proposed policies place no emphasis at all on the requirement for a worker to show genuine cooperation. Yet, under the WSIA it is clearly expected that a worker must try. If a worker does not try, the success or viability of the ESRTW process cannot be judged [**W.C.A.T. *Decision 35/98* (March 3, 1998), at paras. 39, 44, 45**].

***The bottom line*:** The Board must incorporate clearer language setting out the expectations and obligations placed upon workers by the WSIA.

Commentary on the adjudication process - a recipe for unfairness

The proposed policies expect too much from WSIB Claims Adjudicators

Proposed WSIB Policy 'Enforcing Workplace Parties Co-operation Obligations', Document No. 19-02-07 places significant responsibilities on WSIB Claims Adjudicators. It is my informed opinion, based on a long-span of direct observations, that these responsibilities generally exceed the capacity of most WSIB Claims Adjudicators. More significantly, the normal WSIB adjudication process is ill equipped to allow for the routine levying of penalties for employer non-cooperation. I suggest that the WSIB review its adjudication processes and implement a "fast track" dispute resolution mechanism for disputes of this type.

Special issues require special process

There is a precedent for a unique adjudication process for unique issues. When re-employment obligations were first introduced into the workplace safety and insurance regime in 1990, the WSIB established a Re-employment Branch to consider those cases. The Board accepted that the introduction of a potentially complex area of legal interpretation required a unique adjudicative process to ensure fairness and consistency.

***The bottom line*:** These new policies will require a similar treatment, as WSIB Adjudicators will be empowered to issue non-cooperation penalties [**WSIA, s. 86**].

Commentary on the penalty provisions

Penalties will be significant

The penalties imposed by Adjudicators will be very significant (they can equal the ongoing cost of a claim for up to twelve (12) months), and are in addition to any experience rating ["ER"] exposures arising from a decision not to return a worker to employment). The issuance of a penalty requires a scrupulous adherence to principles of fair process and the basic tenets of procedural fairness. When faced with a cumulative penalty exposure rendered by the individual judgment of a Claims Adjudicator, individual employers, particularly small employers, to avoid the threat of an expensive penalty, will be coerced to act in a manner they may otherwise may not be obligated to do.

A simple yet effective internal procedure will ensure fairness – Adjudicator's must seek "second signature" approval

Levying a penalty involves a different decision-making matrix than benefits administration. To ensure that the actual decision is fair in the first instance, I recommend that the WSIB require a managerial "second signature" prior to the imposition of a penalty. There must be a case-by-case scrutiny of WSIB Adjudicator actions when empowered with the capacity to levy significant and ongoing penalties to employers. The requirement for a Manager's "second signature" is a small but important procedural enhancement.

By the way, a "second signature" should also be a routine requirement when any Claims Adjudicator recommends to reduce or suspend a worker's benefits. In fact, I recommend that this change be put into effect immediately, even before these policies are considered further. It is an appropriate and administrative check on adjudicative discretion.

"Fast-track" dispute resolution essential

In addition, I strongly suggest that the WSIB establish a "fast track" dispute resolution process similar with the mediation process set out by statute **[WSIA, ss. 40(7), 122]**. I encourage the Board to ensure that there is a capacity within the WSIB Appeals Branch to resolve disagreements and disputes with respect to the levying of penalties within thirty (30) days of the issuance of a penalty. Not only will this ensure that penalties are not unfairly levied, but more senior adjudicators will be actively engaged at the appropriate time as circumstances warrant.

Penalties are proportionately more severe for smaller business and out of step with other WSIB plans

There is no recognition in the proposed policies that there should be any differing approach between a small, medium or large employer. This is surprising since the WSIA itself speaks of such distinctions. For example, the re-employment provisions do not apply to employers regularly employing less than twenty (20) workers [**WSIA, s. 41(2)**]. Additionally, the WSIB ER plans are geared to the size of the employer, with the scope of accountability commensurately increasing with the premium (or payroll) of the employer. At the low end of the spectrum, employers are 40% accountable and at the high end – 100%. In fact, the NEER plan is not even applicable for smaller employers with less than $25,000 in annual premiums (those employers fall under the MAP plan). No such considerations are evident in the proposed policies.

It is therefore my recommendation that the Board re-draft the penalty element of these policies to not only make them fairer, but to ensure that they are thematically in sync with other Board policies.

Fines that are not legally permissible under the re-employment provisions should not be *de facto* applied under the non-cooperation provisions

Smaller employers regularly employing less than 20 employees are exempt from the WSIA reemployment provisions, including the fines for non-compliance (up to 1 year's net earnings of the worker **[WSIA, s. 41(13)]**). It must be presumed that there are sound public policy reasons for this exclusion (no economy of scale; business efficacy; lack of awareness; etc.). Yet, a very small employer, say with as few as two employees, could be subject to the very same fines for non-cooperation as a large employer.

It is ill-advised for fines and penalties that are not legally permissible under the re-employment provisions to be *de facto* levied under the "co-operation" provisions of the WSIA. While the Board policies will not be subjecting employers to "double jeopardy" (the proposed policies confirm that an employer will not be fined under *both* provisions), small firms are not exempt from the non-cooperation fines. They should be.

The bottom line: I recommend that the WSIB re-visit these policies and take into account the need to adjust the penalties proportionate to the size of the enterprise. Not only are smaller employers generally less aware and less sophisticated with respect to their ESRTW requisite duties and obligations, but smaller employers have a lesser capacity to facilitate an ESRTW than a larger employer.

The WSIB would be well advised to apply the re-employment exemption of less than twenty (20) employees to the penalty provisions of the ESRTW. Additionally, the penalties themselves should be structured in a manner not at

all dissimilar to ER surcharges, which vary in accordance with the size of the firm. In fact, the ER rating factor would be an appropriate guide post upon which to set the penalty. Penalties would vary with the size of the firm and would range from 40% to 100% dependent upon the size of the firm.

Commentary on policy implementation

The need for a transitional period

It appears that it is the Board's expectations that once the policies are approved, they will be in full force and effect and employers will begin to be subjected to penalty exposures. I recommend a different approach. It will be far more prudent and consistent with the desire to ensure a broader base of understanding of the requisite rights, duties and obligations of the parties, for the Board to gradually implement the penalties themselves. Since the WSIA has provided the statutory authority to the Board to impose such penalties since 1998, and since the WSIB only now is developing these policies, there certainly can be no argument of urgency presented. It is recommended that a one-year transitional period be implemented.

During this transitional period, I suggest that the Board adjudicate cases in the normal course and make routine findings with respect to employer non-cooperation. However, rather than actually levying a penalty, the Board will present a notice, informing the employer that their actions are deemed to be "un-cooperative" and once the transitional period has been lifted, would normally have resulted in a penalty. This will then allow the employer to become more aware of that employer's duties and obligations under the WSIA, and acquire an understanding and appreciation of the Board's approach. It will also allow for WSIB missteps to be identified and corrected.

Recommendation: I recommend that the WSIB put in place a twelve (12) month transitional period before the penalty provisions of the proposed policy are placed into effect.

Evidence of awareness

The proposed policies comment on the need for the workplace parties to be aware of the Board's provisions for the proposed policies to be effective. I concur that awareness is essential. However, there is no clear mechanism in place for the WSIB to be certain that an employer has the requisite knowledge and understanding of its obligations and duties under the WSIA. One small adjustment, set out below, will ensure the reliability of this finding of fact.

My proposals: For smaller employers in particular, it is important that the WSIB go to great lengths to ensure that there is a clear and broad understanding of the employers' obligations under the WSIA, prior to the imposition of any penalties. This will be difficult to accomplish in a general way, save and except the normal type of routine communication that the WSIB issues to employers (i.e., bulletins, letters in specific cases, etc.).

I suggest a small procedural enhancement that will add integrity to the Board's adjudicative process. I propose an incremental approach to the imposition of the penalties (after the transitional period discussed above). ***For the first offence***, I recommend that a notice be provided but no penalty itself levied. ***For the second offence***, I recommend that the penalty for non-cooperation be set at 50% of what it otherwise would have been. ***For subsequent offences***, the penalty should be set at 100% of what it otherwise would have been.

With this small procedural enhancement, the WSIB fact finding determinations will have a higher level of credibility and integrity.

When this idea was suggested to Board officials, the first response was why not apply a similar "warning" approach to a worker? (*the "good for the goose" doctrine?*). As I understand the question, it is posited that if employers do not receive a fine for their first offence, then a worker ought not to receive a reduction for his or her first act of non-cooperation.

Actually though, workers do routinely get a second or third chance before benefits are reduced *for reasons of non-cooperation*. They do now and they will under the new policies. And, that is fair and appropriate. WSIB policy as currently applied requires an explicit notice of non-cooperation *before* benefits are suspended *for reasons of non-cooperation* **[WSIB Policy Document No. 22-010-3, *Compliance: Workers' Co-operation Obligations*, (June 28, 2004]**. Moreover, current policy expects that the WSIB Adjudicator will discuss the situation with the worker before making and implementing an adverse decision. This issue of notice of non-cooperation and whether or not the Board's policies conformed with the WSIA was discussed in the long-running case (there were three interim decisions and the case took four (4) years to be decided) decided by the Appeals Tribunal ***Decision No. 2474/ 00*** **(2004), 69 W.S.I.A.T.R. 57**, which affirmed the legal correctness of the Board's policy (at paras. 94 – 99). This question is therefore, now well settled.

Closing Commentary

The proposed policies require a significant amount of work. A major re-write is needed. I encourage the Board to view this first phase of consultation as simply that – a first phase. After re-drafting the policies, the Board should arrange public meetings and discussions. There is no need at all for these policies to be fast-tracked.

My bottom line advice to the Board: Re-group, re-think and re-draft.