The Liverside *e*-Letter

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

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WSIB "Fatal Claim Policy"

An unfair, ill-conceived policy
The only solution? Get rid of it. (Part 1)

A clumsy policy struck more for more public releations reasons than any legitimate policy objective

Long-time readers of **The Liversidge *e*-Letter** are aware I have been a very strong and public critic since the inception of the Board's **2008 Fatal Claim Policy**. This policy, struck in the midst of a high profile media attack on the Board's experience rating ["ER"] schemes, automatically removes an earned ER rebate from the employer in the event a worker tragically dies due to a workplace accident. I first wrote a series on this ill-conceived policy five years ago, commencing in April 2008.

While I was then of the view this policy was an improper response to what was no more than a public relations problem facing the Board, as a result of several recent requests under the *Freedom of Information and Protection of Privacy Act*, I have uncovered additional evidence and my position has hardened.

As this issue falls within the mandate of the **Rate Framework Review** ["RFR"] (under the experience rating pillar of the RFR), in this series of **The Liversidge *e*-Letter**, I will set out the case why this policy must be revoked.

Let me start with what is undeniably a strong statement – the Board's "***Fatal Claim Policy***" (**Operational Policy 'Employer Accounts, Fatal Claim Premium Adjustment', Document No. 14-02-17, (June 13, 2008) ["Fatality Claim Policy"])** is an illegitimate policy formed for improper reasons (WSIB public relations exposures) with no valid workplace safety and insurance ["WSI"] interest, which offends the basic tenets of administrative justice and the core principles of the *Workplace Safety & Insurance Act*.

My Basic Theme: The Board unleashed an arbitrary prosecutorial style weapon to advance its own public relations interests. This policy represents an affront to the basic tenets of administrative justice from its very introduction, with these breaches inflamed after a post-implementation high level review. This policy does not represent the Board at its best. ***The only remedy:*** It must be withdrawn. I have an idea to replace it with something better - but – ***even if not replaced this policy has got to go!***

Today's WSIB management would not dream-up let alone implement the FCP

With these strong statements, I think it appropriate that I add this caveat - while the **FCP**, for all of the reasons which will follow in the next few issues of **The Liversidge *e*-Letter** is bad policy, and while only five years old, this flows from a different era of WSI administration. I have no hesitation in concluding that the governing minds of today's WSIB not only would not have implemented the **FCP**, a very different approach to the PR fallout would have been engineered (if there had been any PR fallout at all – the issue would likely have been better managed out of the gate). Today's management benefits from greater public outreach, seeks out input before acting, and has a clearer sense of direction as to the Board's priorities. The establishment of a comprehensive **Strategic Plan**, a renewed approach to stakeholder engagement, and a broader outreach through the engagement of independent third party experts to address leading policy concerns, ensures that the Board stays on track, on message and focused. Not only is the Board less inclined to develop and implement *ad hoc* "solutions" on the fly, it is simply a more disciplined organization today. (I should add that the last administration started the ball rolling on *some* of these approaches, but the **FCP** pre-dated this style.)

With that said, the FCP is still on the books, is still being applied and is still bad policy.

Why the Fatal Claim Policy was established

Media reports in early 2008 outlined that the Board was paying rebates (pejoratively labelled as "bonuses") under its ER programs to employers who were "killing" workers (see the April 9, 2008 issue of **The Liversidge e-Letter**, "***The Politics of Experience Rating, Rational insurance concepts steamrolled by well played media campaign***").

In response to these reports, effective March 10, 2008, the Board announced that "*effective immediately, if a company is responsible for a workplace fatality, they won't be eligible for a rebate from the WSIB that year*". According to WSIB materials, the intent of the **FCP** is to ensure that employers who do not maintain an effective health and safety program and who experience a fatality as a

result of not doing so, do not receive ER rebates (**Workplace Safety and Insurance Board, 'IMPORTANT INFORMATION about Your Experience Rating Program', June 2008)**. When applied, the **FCP** fines a company the amount of the anticipated rebate in the calendar year of a fatality, which negates any rebate. An earned rebate is rescinded unless the employer demonstrates that the **FCP** should not be applied. (Yet, the Board has never outlined what constitutes reasons for waiving the **FCP** – *more than slightly Kafkaesque!*)

The Board created the "**WSIB Validation Unit**" to investigate employers who receive rebates to make sure that they are, in fact, meeting their health and safety obligations, an extraordinary historical and legal development in (what has been) a no-fault insurance scheme.

As background, I now present an overview of excerpts from the 2008 series of **The Liversidge *e*-Letter**. In the April 9, 2008 issue, "***The Politics of Experience Rating; Rational insurance concepts steamrolled by well played media campaign***", I note that "*everyone is reacting – no one is taking the time to think this through*":

> . . . a composed scholarly assessment of what is one of the most complex, controversial and yet very effective *insurance* components of the Ontario workplace safety *and* insurance system seems all but impossible. ***At this very moment, a policy and public relations forest fire is raging out of control***. Lost, perhaps irreparably and evermore, is the established reality that experience rating works, and contrary to the themes getting public airing, ***it does not reward unsafe employers***.

I noted that the "*newspaper stories are gripping and compelling and at first blush seem to expose a wide policy crack*":

> The human elements of the stories are tragic and gripping. They compellingly relate shocking real human tragedy to what at first blush appears to be a policy crack – allowing companies to receive massive ER rebates, sometimes in the millions of dollars, even though those same employers are responsible for work-related deaths.

I posited:

> . . . at first blush it appears that the Board's ER program is outrageously flawed and needs to be shut down. *But, is this the full story?* Can it be that the WSIB administration is so inept as to design such a ridiculous program and let it stand for two and a half decades?

Right out of the gate, the Board ratcheted up the rhetoric, aggressively responding to phantom employer criticism:

> Responding to the "pushback" from business groups (except there hasn't been any yet – this process just started), (the WSIB Chair) said, "*The answer I gave them was, 'Are you telling me that we should continue to pay bonuses to companies that are responsible for killing workers?' That is ridiculous*".

I suggested that PR wise, in the short-term, the Board gained some ground:

> **The Board has acted with dispatch changing what would seem to be an indefensible practice**
>
> *Sticking to the public relations arena, the Board gets an A$^+$.* No one can argue with the potency of the public message. A "policy crack" *appears* to have been identified in the media, the Board immediately responded, and at the same time, the WSIB deservedly seems to warrant kudos for being tough as nails to unsafe employers who disregard their employee's health and safety.
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> And, any critic will be sidelined as somehow being soft on unsafe workplaces, a position of course, no right minded person would hold. *Surely, no one can support unsafe employers getting massive rebate returns from the very WSIB that is getting tough on unsafe workplaces*?

I argued that while this may be a sound PR exercise it was not a sound policy exercise:

> **So who can argue with the Board's approach? *Well, I can and do***
>
> Contrary to being a fast-track, thoughtful and considered solution to a pressing policy problem, while I fully understand the message that is being sent, and have very high regard for Mr. Mahoney's unqualified commitment to the health & safety of Ontario's workers (which is unmatched), I am afraid that I must categorize the Board's response as a well-intended, but misplaced knee-jerk reaction. **This just has not been thought through**.

In the April 14, 2008 issue, "***The Politics of Experience Rating; Premier McGuinty embarrassed by WSIB experience rating***", I commented on the extraordinary and seeming direct intervention flowing from the highest levels of the government:

> In the April 10th issue of the ***Toronto Star*** the Premier is quoted as saying:
>
> > "*I think we're all in sync in terms of the recent developments and our shared understanding of something that's been taking place, which is simply not acceptable.*" "*This is a bit of an embarrassment. Certainly our government believes we need to make some real changes here.*" "*There is a strong consensus that has developed around this issue and I know there are going to be some changes. Changes in terms of the policy.*"

I responded with this:

> ***Hold on a minute*. Who's in charge here? The WSIB or the government?**
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> Set aside the experience rating policy fiasco for a second – ***just who is calling the shots now on WSIB policy***? The Board or the Government? Last I looked, the WSIB was *an independent agency* with no links to the government, operational, policy, political or otherwise. In fact, the *only* links to the government are in a very broad sense - the Board gets its powers from statute passed by the Ontario *legislature,* the *Workplace Safety & Insurance Act*, and it is that statute that clearly says it is the Board and the Board alone that sets policy (WSIA, s. 159).

I suggested that operational policy issues must be, and usually were, left in the independent hands of the WSIB, heightening the extraordinary positioning of the government at its highest level. As will be shown in the next issue of **The Liversidge *e*-Letter**, the involvement of the government may well have been influential in the later policy choices made at senior WSIB levels.

> For the most part, governments have rightly and wisely left the management of immediate issues completely in the independent hands of the WSIB. Ministers of the Crown have

rarely commented on active WSI policy issues (except to offer general or tacit support to whatever the Board is doing) let alone so directly and openly criticize the WSIB on an active and volatile issue. In fact, I can't recall when *any government* so aggressively and so clearly condemned existing WSIB policy. This may well be a first.
Once this genie gets out of the bottle, I don't know how it gets lured back in. *Why should anyone with a legitimate beef not just take it to the press first, or to the government, or to the streets and forget the normal policy development protocols?*

In the April 16, 2008 issue, "***WSIB announced significant interim adjustments to experience rating; Will they stand up to legal scrutiny?***", I suggested the Board's "*haste makes waste*" approach to policy development resulted in a less than clear directive:

What did the Board announce on March 10th?

The only thing that is clear is this – *the Board's announcement is not clear at all*. In fact, as I pointed out on April 9, even senior Board officials are not so sure what it means. At the moment, there is only one public document explaining the Board's new "policy", a one page March 10, 2008 announcement under the heading, "***Important Information about Your Experience Rating Program***" [the "Announcement"] along with an accompanying two page Q&A. It says where "*a fatality has occurred it is inappropriate to reward an employer who is participating in a prevention incentive program*".

In the April 23, 2008 issue, "***Do WSIB interim adjustments to experience rating make policy sense?***" I suggested the Board was its own worse enemy by publicly discrediting its own policies:

The Board was mistaken to kick-off this process with purely reactionary decisions

While a review is now needed, once the Board started making immediate and reactionary decisions, as it did in this case, the foundation of that review was weakened right at the outset. The problem started with the release of the one page March 10, 2008 announcement, "***Important Information about Your Experience Rating Program***" [the "Announcement"] announcing that effective immediately where "*a fatality has occurred it is inappropriate to reward an employer who is participating in a prevention incentive program.*" **This reactionary statement was ill-considered.** As bad, by labelling its own policies in the media as "*nonsense*" the Board was effectively throwing gasoline on its own burning house.

I continued explaining that the **FCP** was abandoning long-enshrined insurance principles and instead improperly introduced the concept of employer culpability:

A commentary on the concept of "*responsible employer*"

The Board announced "*effective immediately (March 10), if a company is responsible for a workplace fatality, they won't be eligible for a rebate from the WSIB that year*". This swift response, I imagine, was intended to lay claim to decisive action. Instead, I consider it rash and ill-conceived.

It is clear that "responsible" now means something more than in an insurance context

While it is clear that the Board is not too certain at this point what "responsible" means, whatever it means, the definition includes new concepts. Previously under NEER, employers were held to account only for costs arising from a workplace incident (in construction's CAD-7 there was a frequency factor as well).

Up until now, the idea of employer or worker culpability has not been at all relevant

Deliberately and wisely left out of ER design has been any notion of culpability – the employer's or the worker's. To me that made perfect design sense.

The Board may lament opening up this *Pandora's box*

In one stroke that is all changed. The Board's new policy stance incorporates concepts of employer culpability, as in blameworthiness, into the ER scheme. This is brand new territory that may well open a **Pandora's box** the Board may one day lament.

I argued that employer culpability is now a relevant consideration breaking an almost 100 year statutory and policy legacy:

The idea of employer culpability in ER design uncovers a snake-pit of complexity

The idea of employer culpability in an ER context uncovers a snake pit of complexity and conflicting concepts. Pardon the pun, but it is no accident such concepts have been deliberately absent from WSIB ER design. This marks a massive and dramatic paradigm shift in ER design.

Prior to the Board's recent announcements, ER design paralleled entitlement design. Culpability was a totally irrelevant consideration. While it remains irrelevant for entitlement questions, it now forms a central feature in the Board's new approach to defining "responsible".

The Board's explanations, as limited as they are, seem to boil down to this: ***It is wrong for the Board to "reward" employers through ER rebates when they are "responsible" for workers' deaths***. Public relations-wise this may defuse some of the recent media controversies, but it sparks more compelling questions. *In just what direction is WSIB ER policy heading?*

In a series of examples, I showed that the introduction of employer culpability is a slippery slope:

Why is the idea of employer culpability limited to fatal injuries?

Once the Board crosses the "culpability" line, the door is opened for other legitimate questions. The first is why this new design feature is limited to fatal injuries. Consider these examples.

Example 1: A worker is tragically killed in the workplace. The employer is "responsible" but not negligent. Recall the "ABC Company" in the April 16 issue of **The Liversidge *e*-Letter**:

Company ABC is a large corporation. It is assessed under NEER. ABC has a good OH&S record and corresponding WSIB experience rating record. Moreover, ABC has a successful early and safe return to work ["ESRTW"] program in place and gets injured workers back into the workplace as soon as is practicable.
For "Accident Years" 2005, 2006 and 2007 **ABC has earned a large combined rebate of $2.75 million** (ABC pays about $4.0 million in premiums to the WSIB every year). Those rebates are calculated at the end of the 3rd quarter 2008.

On June 1, 2008 an ABC employee in the course of his employment was tragically killed in a single motor vehicle accident.

As a result of this workplace fatality, the employer has its otherwise earned $2.75 million ER rebate withdrawn.

Example 2: Now, slightly change the facts. On June 1, 2008 an ABC employee in the course of his employment was tragically crushed and is rendered quadriplegic, facing the rest of his life in a wheelchair. Investigation shows that the employer was negligent in the cause of the injury and was charged and convicted under the *Occupational Health & Safety Act*.

Even though the injuries are catastrophic and the employer is negligent in the cause of the accident, the employer in this example is still eligible for an otherwise earned $2.75 million ER rebate.

In the first example, ABC loses a multi-million dollar rebate even though it was responsible for, but not negligent, in the cause of the tragic fatal accident. *In the second example*, which quite easily could have resulted in death but did not, the result is no less tragic. Yet the WSIB treatment is very different. *This makes no policy sense*.

I suggested that introducing employer culpability without balancing out with worker culpability left the scheme out of balance:

And what of worker negligence?

But, once culpability flows into the equation, the Board must face the next glaring question, such as: *Why should WSIB ER programs hold an employer to account when the employer is not culpable in the cause of an injury, but the worker is culpable?* Once this question gets thrown into the mix, the slope starts to get very slippery.

Example 3: Now, consider this example: On June 1, 2008 an ABC employee in the course of his employment was tragically killed in a single motor vehicle accident. Alcohol was a significant contributing factor to the cause of the MVA. In fact, an open bottle of liquor was found in the worker's vehicle, and the deceased's blood alcohol level was 235 mgs. per ml. of blood, three times the legal limit.

These are the exact facts from an actual case that was allowed by the Appeals Tribunal **[WCAT *Decision No. 349/95* (October 13, 1995)]**, which ruled that even though alcohol was a significant contributing factor to the accident it did not negate the contribution of other workplace factors.

When ER is linked to employer but not worker culpability the system is skewed towards unfairness

So, this type of case triggers several questions. *One: is the fatality compensable?* Yes. *Two, is the employer "responsible"?* In an insurance context, absolutely. In fact, depending on its size, that employer would be liable under ER for a potential cash impact of up to $366,500. *Three: Will the employer lose its otherwise earned rebate (if ABC) of $2.75 million?* Yes, unless the case falls into one of the Board's as yet undisclosed "exceptions".

By the way, just in case a reader thinks this is an aberrant result, it is not. I supplied a long list of cases that have granted entitlement even though a worker was intoxicated *and* the intoxication was a significant contributing factor to the accident. See for example Appeals Tribunal decisions:

Decision No. 803/94I2 in which a worker fired for drinking on the job, while drunk, was injured. The worker was entitled to benefits and the employer was actually found in breach of the worker's reemployment rights.

Decision No. 169/87 an intoxicated worker who injured himself when he assaulted a co-worker was entitled to benefits. The Appeals Tribunal held that the consumption of alcohol did not result in an abandonment of the worker's employment.

Decision No. 635/89 involved injuries arising out of a motor vehicle accident for which the worker was charged and convicted of impaired driving. Entitlement was granted.

Decision No. 187/95 where entitlement was granted where a worker was killed while driving drunk on the basis that despite the worker's intoxication he still carried out his employment duties.

Decision No. 763/91 where the Appeals Tribunal held that voluntary intoxication does not necessarily take a worker out of the course of employment.

Decision No. 235/98 where injuries sustained when an intoxicated truck driver with a blood alcohol level two times the legal limit rolled his truck when failing to negotiate a turn were deemed compensable.

I summarized the problem of introducing the concept of culpability (employer *or* worker) into the WSI regime:

Here in a nutshell is the crux of the problem. Criminal law, occupational safety law and workplace insurance law at one juncture share a common theme – safety promotion. But each regime chases similar objectives very differently and are governed by distinctive legal principles. ***These systems cannot be conjoined***. **Yet, the recent "debate" has been hijacked, knowingly or not, by a melding of related but unique concepts.** In short, the discussion has become confused forcing the Board to "bob and weave" like a punch drunk boxer. Under the smoke screen of that confusion certain political agendas have flourished.

In the April 29, 2008 issue, "***WSIB interim experience rating adjustments should be reconsidered; Or has the WSIB crossed its Rubicon?***" I suggested that the Board should renounce the FCP and instead, commence a full public review. Well, it took five years, new management and a new sense of direction for the Board, but we are finally there – the **Rate Framework Review** is starting a process that should have commenced in March 2008.

Culpability concepts may become the Board's Rubicon

If left uncorrected, culpability concepts may become the Board's Rubicon. The WSIB will find itself unable to yield to a more sensible paradigm that bridges the current policy chasm. I strongly encourage the Board to censure its March 10 announcement as being premature and unworkable. The Board should announce that it will instead instigate a thoughtful and less hurried full public review of ER before *any* decisions are taken and before the Board publicly speaks to *any* policy preferences. Immediately disclosing the terms of reference of that review will assist in calming the waters.

One step remains: Revoke the **Fatal Claim Policy**. ***In the next issue:*** What I have uncovered though freedom of information requests – ***the problem is worse than I first realized.***