The Liversidge *e*-Letter

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

April 4, 2013 **An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.** **3 pages**

WSIB "Fatal Claim Policy"

An unfair, ill-conceived policy
The only solution? Get rid of it. (Part 2)

The Fatal Claim Policy has no legitimate workers' compensation purpose

As said in the March 28, 2013 issue of **The Liversidge *e*-Letter**:

> 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*.

I made a case against the Fatal Claim Policy five years ago

In the last issue, I repeated the case I made five years ago - that this was a hurried, ill-conceived, knee-jerk response to what was in essence a public relations challenge. I noted that as a result of a series of requests under the *Freedom of Information and Protection of Privacy Act* ["FOI"] that as strong as my position was then it has actually hardened and "***the problem is worse than I first realized***".

The Board's own documents reflect the real institutional interest

In this issue of **The Liversidge *e*-Letter**, I will show that the primary concern was the public relations interest of the WSIB and government. I now have documentation that the intent of the policy was to simply avoid embarrassment. This was, in effect, about media relations. There was no other legitimate WSI policy objective sought.

The additional case I now make

I will show (or have shown):

That post-implementation, senior Board officials issued an extraordinary diktat – a decree that in **Fatal Claim Policy** cases, reasons were not to be provided in decision letters, a clear infringement of one of the most basic tenets of administrative justice;

That the **Fatal Claim Policy** is inconsistent with the policy objectives of the WSIB experience rating ["ER"] programs and the overall intent of the no-fault WSIA scheme;

That *even if* the **Fatal Claim Policy** pursues a legitimate WSI policy objective (*it doesn't*), the policy creates bizarre results, allowing rebates to be retained by negligent employers in serious cases while rescinding rebates for non-negligent employers in fatal cases;

That the application of the penalty (the rescinding of an earned rebate) is a variable penalty and is not connected to any finding of negligence or degree of fault (even if this is legally permissible in a no fault system), but rather is related to the size and degree of otherwise positive performance for a company, leading to absurd results.

A previous administration devised this policy but the "fix" is up to the current administration

As I said in the last issue, it is my strong view that the governing minds of today's WSIB not only would not have implemented such a policy - "*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. It is simply a more disciplined organization today."*

But, while this narrative relates to a past administration, the **Fatal Claim Policy** is still on the books. As I said last week, "*. . . 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.*"

I have every confidence that once the case is heard, Doug Stanley's **Rate Framework Review** will recognize this as bad policy and recommend its demise, a suggestion the current regime I predict will endorse and implement. (In the next issue of **The Liversidge *e*-Letter**, I set out a suggestion for its replacement.)

The Real Objective: *WSIB (and government) public image*

The foundation of the **Fatal Claim Policy** while touted as being linked to improving health and safety, in reality is solely tied to WSIB (and government) public image.

This is not about pursuing a legitimate WSI objective sanctioned by the *Workplace Safety & Insurance Act* but instead to avoid (perceived) damage to the Board's and government's reputation.

5700 Yonge St., Suite 200, Toronto, ON M2M 4K2 Tel: 416-590-7890; Fax: 416-590-9601 E-mail: lal@laliversidge.com ISSN 1710-5757

(Ironically, the policy itself and subsequent senior actions have, in my opinion, been so egregious as to potentially sully the Board's reputation as a gatekeeper of administrative justice! That however has not been, nor is likely to be, the subject of any media attention.)

This is rendered clear from documents I obtained through an FOI search. The **Executive Committee Document, Experience Rating Review, August 12, 2008** removes any uncertainty. At page 5, the document purports that the "*WSIB is exposed to a reputation risk*":

PROBLEM

The problem must clearly state the nature of the problem. This section must clearly outline the possible causes of the problem

The Experience Rating Program does not specifically include the health and safety, and claims reporting compliance, provisions of the WSIA and the OHSA. WSIB is exposed to a reputation risk when ER rebates are given to employers who:

- Experience traumatic fatalities at their workplaces
- Do not meet their claims reporting obligations under WSIA;
- Were convicted under the OHSA; or
- Allow other workers on their worksites, such as temporary agency employees, and who are then injured or killed at these worksites

At page 9 it is made clear that "*This project (the Fatal Claim Policy) is initiated to address a reputation risk. . .*" :

4. APPROACH

FINANCIAL METRICS

The financial metrics piece is designed to provide in detail a financial evaluation of the project, not only in terms of cost but also including Return on Investment (ROI) and Net Present Value (NPV) analysis. To assist with the calculation of this information, projects should contact the Director, Financial Planning & Analysis.

This project is initiated to address a reputation risk associated with issuing rebates to employers with fatality occurrences.
2008
VU startup and administration = $260,525
2009
VU administration = $1,786,652

Projected return on investment may come from: the effects of positive change in LTI rate and traumatic fatalities (using trend analysis) attributable to this initiative and additional Workwell

And at page 10, in speaking to why the status quo is not viable, "*It is a certainty to damage WSIB's reputational image and cause embarrassment to the government*":

6. ALTERNATIVE #1 – STATUS QUO

Each project needs to identify at least one alternative to the work outlined in the Business Case. In most cases, the Do Nothing option is listed as one of the alternatives. This section provides insight into the 1st alternative.

Not a viable alternative. It is a certainty to damage WSIB's reputational image and cause embarrassment to the government.

Last Revised: Aug 12, 2008 WSIB Confidential Page 10 of 14

I emphasize that the "embarrassment" is not about "*bringing the administration of justice into disrepute*" (a legitimate concern). Concerns over the Board's reputation trumped the establishment of a cohesive policy that fairly advanced a genuine policy interest. That the Board would implement an arbitrary and variable penalty that ironically impacted safer employers (who had earned an ER rebate) more severely than unsafe employers (who had not) is irrational, but presents convincing evidence that the Board's interest was not policy cohesion but WSIB public image.

WSIB deliberately withheld reasons for Fatal Claim Policy decisions

Through another FOI request, I secured copies of a series of decisions rendered under the **Fatal Claim Policy**. A representative decision is copied below.

A Typical Fatal Claim Policy Decision Letter

wsib cspaat ONTARIO

December 13, 2010

[redacted]

Workplace Safety & Insurance Board
Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

Head Office:
200 Front Street West
Toronto, Ontario
Canada M5V 3J1

Siège social :
200, rue Front Ouest
Toronto (Ontario)
Canada M5V 3J1

(416) 344-1016 (416) 344-3493
TTY/ATS : 1-800-387-0050
1-800-663-6639
www.wsib.on.ca

Dear Mr. [redacted]

Re: Decision - Fatal Claim Premium Increase
Account: [redacted], Firm: [redacted], Claim: [redacted], Mr. [redacted], Date of Incident: [redacted]2010

This letter is further to our notification of April 19, 2010 indicating that a potential premium increase may be applied to your organization as a result of the above noted traumatic fatality claim.

As discussed with [redacted], on December 13, 2010, I have completed a review of the circumstances surrounding this claim and determined that your organization will receive a premium increase under WSIB Operational Policy 14-02-17, Fatal Claim Premium Adjustment. The particulars of this case suggest that there are no exceptional circumstances that would justify not applying the policy.

A review of the circumstances surrounding the fatality revealed that [redacted] did not ensure at the time of the incident that sufficient precautions were in place, thus leaving Mr. [redacted] exposed to an overhead hazard.

Your organization is subject to a premium increase of [redacted], which is equal to the CAD-7 ($[redacted]2) and NEER ([redacted]) refund you would have received in 2010. This premium increase is in addition to any other adjustments your firm may be subject to.

This decision is appealable, but you should know the *Workplace Safety and Insurance Act* imposes time limits on appeals. Under Section 120 (1) (b), anyone objecting to a WSIB decision must do so within six months of the date of the decision.

Please visit the Workplace Safety & Insurance Board (WSIB) website at www.wsib.on.ca for more information about the appeals process.

If you have any questions, please feel free to reach me at (416) 344-5107.

Sincerely,

I obtained several dozen decisions and it was readily apparent that each decision was virtually identical. No reasons were provided. In *any* decision. The identical "decision paragraph" read as follows:

> **"A review of the circumstances surrounding the fatality revealed that (Company) did not ensure at the time of the incident that sufficient precautions were in place . . ."** (The "circumstances" are never outlined.)

To "explain" why there was no exemption to the **Fatal Claim Policy**, the decisions typically advised:

> **"The particulars of this case suggest that there are no exceptional circumstances that would justify not applying this policy"** (No "particulars" are ever presented.)

I was flabbergasted (gobsmacked, stunned, shocked, staggered, bowled-over, knocked-for-sixes?? – any one of these will do). As a result, I wrote to the Board's Chair and President February, 2012 pointing out that the basic tenets of administrative law require the issuance of reasons.

Dear Messrs. Mahoney and Marshall:

Re: Fatal Claim Premium Adjustment Policy Decisions

I recently advanced a Freedom of Information request for all Workplace Safety & Insurance Board ["WSIB" or the "Board"] decisions made under the **Fatal Claim Premium Adjustment Policy [the "Policy']**. I have received the decisions. I have noted that there are no reasons of any substance provided for either confirming the application of the Policy or for making an exemption from the Policy in *any* of the Validation Officer decisions. All of the decisions are remarkably similar if not effectively identical. It is clear that this is a purposeful WSIB practice (for fatal claim policy decisions) and does not reflect individual decision incongruity.

It is my opinion that this practice falls well outside the express requirements of the ***Workplace Safety and Insurance Act*, S.O. 1997,**

c. 16, Sch. A., as amended ["WSIA"], the guidelines set out by the Board's own operational policy for making and communicating decisions, and the relevant tenets of administrative law.

WSIA s. 131(4) directs that the Board shall promptly notify the parties of record of its decision in writing and the reasons for the decision. "Shall" has peremptory meaning.

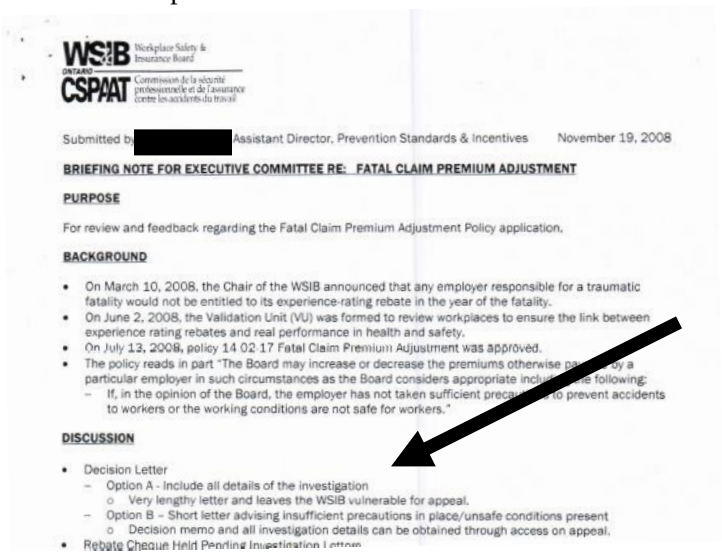
Procedural fairness "is a cornerstone of modern Canadian administrative law"[1] and the duty to give reasons is an integral element of procedural fairness. In view of recent judicial developments, the duty of administrative tribunals to give reasons, and the content of that duty, has been well canvassed and will not be repeated in this communication, suffice to note that reasons must be "sufficient". While not an exhaustive list, sufficient reasons are expected to: set out the findings of fact; set out the evidence; address the major points in issue; reflect the consideration of factors relevant to the decision; set out the law or policy, and set out the reasoning process.[2] I respectfully submit that Validation Officer decisions adhere to none of these principles.

I am bringing this to your attention so that you are able to immediately direct Validation Officers to provide "sufficient reasons" as commonly understood in an administrative law context. As it is clear this is a purposeful practice in place from the very promulgation of the Policy, and is a serious affront to the principles of procedural fairness, I also respectfully suggest that you investigate the genesis of this practice and implement steps to ensure an analogous situation never again emerges within the Board.

Yours truly,

L.A. Liversidge

The Board agreed and the practice ceased. While welcomed, I was curious - *what drove this practice in the first place?* It was not conceivable that this represented some inadvertent omission. I found the answer in yet another FOI request. I discovered a **November 19, 2008 "*Briefing Note for Executive Committee Re: Fatal Claim Premium Adjustment***" that discussed the content of decision letters. Two options for decision letters were set out:



WSIB Workplace Safety & Insurance Board
ONTARIO CSPAAT Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

Submitted by [redacted] Assistant Director, Prevention Standards & Incentives November 19, 2008

BRIEFING NOTE FOR EXECUTIVE COMMITTEE RE: FATAL CLAIM PREMIUM ADJUSTMENT

PURPOSE

For review and feedback regarding the Fatal Claim Premium Adjustment Policy application.

BACKGROUND

- On March 10, 2008, the Chair of the WSIB announced that any employer responsible for a traumatic fatality would not be entitled to its experience-rating rebate in the year of the fatality.
- On June 2, 2008, the Validation Unit (VU) was formed to review workplaces to ensure the link between experience rating rebates and real performance in health and safety.
- On July 13, 2008, policy 14 02 17 Fatal Claim Premium Adjustment was approved.
- The policy reads in part "The Board may increase or decrease the premiums otherwise payable by a particular employer in such circumstances as the Board considers appropriate including the following:
  - If, in the opinion of the Board, the employer has not taken sufficient precautions to prevent accidents to workers or the working conditions are not safe for workers."

DISCUSSION

- Decision Letter
  - Option A - Include all details of the investigation
    - Very lengthy letter and leaves the WSIB vulnerable for appeal.
  - Option B – Short letter advising insufficient precautions in place/unsafe conditions present
    - Decision memo and all investigation details can be obtained through access on appeal.
- Rebate Cheque Held Pending Investigation Letter

This is a remarkable document. *Here's the crux:* Two options are introduced. **Option A** would require an outline of the full factual details (what one would expect) whereas **Option B** suggests "*a short letter*" (no reasons). The document argues that **Option A** "*leaves the WSIB vulnerable for appeal*". ***There is only one way to interpret this*** - WSIB officials were of the view that suppressing reasons would stifle appeals, and stifling appeals was a legitimate goal of the WSIB! ***This leads to another conclusion*** – officials were convinced that proper reasons would not sway the reader (the usual intention), but would actually do the opposite and spur on an appeal! *This policy was built on quite the house of cards.* They went with **Option B**.

That the WSIB even considered improperly withholding reasons as a matter of policy let alone approved this approach is, . . . *well*, . . . *remarkable*. This is a significant, far-reaching act which undercuts any residual policy integrity (if there was any) of the **Fatal Claim Policy**. This reasonably leads to a general loss of confidence in the decision-making integrity of the Board with respect to the administration of the **Fatal Claim Policy**. (One could be forgiven if this loss of confidence extended beyond this particular policy). The combined effect of the PR motivations behind the **Fatal Claim Policy** and the length the Board went not to disclose reasons, should be sufficient to void the policy.

***Here's another reason:* A variable penalty for similar "infractions" creates absurd results**

Under the **Fatal Claim Policy** the amount of the penalty varies in accordance with an already earned ER rebate. This leads to absurd results. *Consider the following:* Two companies of the same size ($3.5 million in WSIB premium) have a very different ER and OH&S history.

Company A is an exemplary employer, with an impeccable OH&S record. It is set to receive a $1.5 million ER rebate.

Company B has a less exemplary record but it is set to receive a $25,000 ER rebate.

A **Company A** employee tragically dies in a single vehicle MVA. **Company A** is not negligent. The WSIB applies the **Fatal Claim Policy** and issues a penalty of $1.5 million to negate the otherwise earned ER rebate.

A **Company B** employee tragically dies due to the clear negligence of **Company B** which had improperly removed a required safety device. The WSIB applies the **Fatal Claim Policy** and issues a penalty of $25,000 to negate the otherwise earned ER rebate.

That WSIB policy drives a $1.5 million penalty for a fatality for which **Company A** bears no culpability and the very negligent and culpable **Company B** is penalized a mere $25,000 exposes the capricious and arbitrary operation of the **Fatal Claim Policy**. **And, don't forget – *the unsafe employer not getting rebates is immune from this policy*.** Any policy which gives rise to such absurd results is itself absurd. *The only solution?* ***Get rid of it.*** I have been informed that as a result of criticism, the Board will not apply the policy unless the Ministry of Labour proceeds to prosecute an employer. That may sweeten the taste a bit but it is still a bitter swallow. ***In the next issue I offer a better solution.***

[1] *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190; [2008] S.C.J. No. 9, at 79.

[2] See for example: *Statutory Decision-Makers and the Obligation to Give Reasons For Decisions, A Discussion Paper*, Administrative Justice Office, Ministry of Attorney General, Province of British Columbia, 2008.