The Liversidge *e*-Letter

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

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♫ *'Tis the season to be jolly* ♫
♫ *with workers' comp reform folly* ♫
♪ *Fa* ♪ *la* ♪ *la* ♪ *la* ♪ *la* ♪ *la* ♪ *la* ♪ *la* ♪ *la* ♪

***'Twas the night before Christmas, when all through the house* (QP that is), *not a creature was stirring, not even a mouse* (except the WSI reform elves, hard at it this season)**

A flurry of pre-Christmas (and likely pre-election) workplace safety and insurance ["WSI"] reform bills, both government and government-side private-member bills, were packed into Santa's sleigh this year – just in the nick (St. Nick?) of time. In fact one of them was the very last bill introduced this session just before the Christmas recess. Whether or not Santa unpacks these from his sleigh before the next election is anyone's guess - *but mine is this* - they are setting the table not for a holiday feast, but for a spread to be laid out in an election platform. There were three bills dealing with WSI reform:

Bill 128, An Act to amend the Workplace Safety & Insurance Act, 1997, with respect to permanent partial disability supplements, a private members bill introduced November 6, 2013 and receiving 2nd reading November 21, 2013. This is significant as this is the 2nd time around for this bill – it was introduced before by another Liberal member in September 2012 as Bill 125.

Bill 146, the Stronger Workplaces for a Stronger Economy Act, 2013, a government bill introduced by the Minister of Labour on December 4, 2013, and which amends the *Employment Protection for Foreign Nationals Act (Live-in caregivers and others);* the *Employment Standards Act;* the *Labour Relations Act;* the *Occupational Health and Safety Act;* and, the *Workplace Safety and Insurance Act*. Among other things, this bill changes how the Board's experience rating ["ER"] programs will work when a company contracts with a temporary-help agency.

Bill 155, Workplace Safety and Insurance Amendment Act (Premium Rates for Deemed Workers in Construction), 2013 a private-members bill introduced December 12, 2013 by a government-side MPP (who is the Parliamentary Assistant to the Premier). This bill applies just to the construction sector and significantly alters the premium rates for certain individuals mandatorily dragged into WSI coverage through Bill 119, passed in 2008.

I will deal with each bill in the order introduced.

Bill 128, An Act to amend the Workplace Safety & Insurance Act, 1997, with respect to permanent partial disability supplements

This is quite a technical bill that deals with a lot of WSI history. It has its roots in the Bob Rae NDP's workers' compensation reform bill, Bill 165, introduced in 1994 and effective 1995. It actually applies to what is referred to as the "Pre-1997 Act" and deals with a very narrow element of the Bill 165 reform package that impacts workers injured before 1989. The bill addresses a very specific claw-back to a $200 pension added to certain workers. This is how those amendments were explained by **Jim Thomas**, then Secretary of the Management Board of Cabinet and who had just finished up as **Deputy Minister of Labour**, at a Standing Committee hearing August 22, 1994 (many of the names in this game 20 years ago are still in the game, one way or another, the author included):

> Section 32 of Bill 165 amends section 147 of the act so that the board is required to pay an additional $200 a month to a worker receiving an amount awarded for permanent partial disability if the worker is entitled to a supplement under subsection (4) or if the worker would be entitled to one but isn't by virtue of his turning 65. In order to qualify for a subsection 147(4) supplement, the worker must not be able to benefit from a voc rehab program or fails to have an earnings capacity which approximates his or her pre-injury net average earnings following the voc rehab program. The maximum monthly supplement under this section is now $387 a month, which is the old age security benefit level as of August 1994.

Get it? Don't worry. The point of this piece is not what Bill 128 actually does, which I will get to in a moment, but what I will describe as over-the-top rhetoric and spin to get there, all of which is all the more remarkable as it is presented by a government member MPP, sounding more like an opposition member in full fledged exigent fervour.

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

What Bill 128 does

Bill 128 is very short. Complex history-wise, and technical, but short. Currently, under the Pre-1997 Act, the $200 per month additional pension is clawed back (for pre-1985 and pre-1989 injuries) by ss. 147(16) & (17) of the Pre-1997 Act by: "*Any pension for old age security that the worker is eligible for under section 3 of the Old Age Security Act (Canada)*". Bill 128 would repeal that claw-back. Simple enough. I won't get into the virtues or failings of the bill. I want to look at the selling-job behind this incarnation of the bill (remember, it was introduced in 2012 and went nowhere then).

What was the reaction to the $200 pension when introduced in 1994?

But first, let's look at the commentary of the Ontario Liberals when this part of the Bill 165 reform package was addressed in the **Standing Committee on Resources Development in 1994**, and what better source than the then **Liberal Labour Critic** and **future WSIB Chair**, **Steve Mahoney**. This is what Mr. Mahoney said on August 22, 1994:

August 22, 1994

Mahoney: Now, the parties did agree that if the $200-per-month increase was necessary, it was to be paid in the form of the supplement, not for life. If you pay the additional benefit, **it's unfair to the employers who are being asked to fund what is now a social program and to the other workers with pensions who had been motivated enough to return to the workforce**. Moreover, this benefit improvement is going to cost approximately $96 million a year in cash, and if we remember the negative cash flow that the WCB had last year, this is going to represent an increase to the unfunded liability by $1.5 billion immediately and $5.6 billion by 2014. **I ask the government, where will the additional money come from?**

So, the focus of the Liberals when this element was 1st debated was both fairness and cost. *A reasonable position.* It was thought to be unfair to workers who had returned to work (and thus were ineligible) and unfair to employers if made permanent instead of a temporary pension supplement, particularly in view of the then (and of course, far more so now) precarious financial position of the Board. Quite forcibly, and remarkably, was the comment that this adjustment was tantamount to moving the workers' compensation scheme towards "*what is now a social program*". As you will read in a moment, those worries seem long-ago evaporated.

When the 1st incarnation of Bill 128 was introduced as Bill 125 in September, 2012, the entire legislative debate was set out in a single sentence:

Mr. Mario Sergio: The bill amends section 110 of the Workplace Safety and Insurance Act, 1997, so that any pension a worker is eligible for under the Old Age Security Act, Canada, does not reduce the worker's permanent partial disability benefits for pre-1985 and pre-1989 injuries under the pre-1997 act.

The bill then went . . . *well* . . . nowhere. It was introduced, the single sentence uttered and that was it. By the time Bill 128 was introduced a whole new passion was obviously found for this bill. This is what was said, in part, upon 2nd reading on November 21, 2013:

Mr. Lorenzo Berardinetti: The reason this bill is still so necessary today is the continuing and growing difficulties that partially but permanently disabled workers have when trying to cope with the cost of inflation and their need to maintain a level of purchasing power in today's uncertain economic climate.

A partially permanently disabled person is an individual who experiences a debilitating injury that prevents him or her from participating in the workforce as a result of limited mobility. If passed, this bill ensures that old age security benefits would no longer be used in the calculation of workers' compensation schemes for injuries that occurred prior to 1989.

The problem with the current legislation is that when a worker's old age security benefit is adjusted for inflation by the federal government, the injured worker's WSIB benefits are subsequently reduced. That, of course, makes it obviously harder for an injured worker to maintain a sustainable quality of life.

I cannot stress the importance of the proposed legislation enough. Many, if not most, of these permanently disabled workers are now past the age of 65, and are at even greater risk and need of income assistance.

Based on this rhetoric, if true, Bill 128 seems a noble and essential initiative. One could of course question why it took 10 years to get to it and why if so essential it remains a private-member worry and not a government worry. But, left out of the selling job are some essential facts. Interestingly left out was any mention of a "***Benefit Adequacy Study***" by the **Institute for Work & Health (IWH)**, released earlier this year by the WSIB. This summary is from the WSIB website (http://www.wsib.on.ca):

A key objective of workers' compensation programs is to provide adequate compensation for lost earnings to people who experience work-related injury or illness.

To assess the adequacy of benefits provided to injured workers in Ontario who were awarded a permanent impairment benefit, the **IWH conducted a 2011 Benefit Adequacy study** and recently released a supplemental report to the study.

The study looked at how well injured workers who suffered permanent impairments were able to replace their pre-injury earnings through a combination of WSIB benefits, employment earnings and Canada Pension Plan (CPP) disability benefits.

The supplemental report examined workers who were injured or became ill between 1992 and 1994, tracking their earnings over the 10 year period from the date of their injury or illness. ***The results show that, on average, earnings replacement rates exceeded the study adequacy target of 90 per cent level for all impairment levels. In fact, the average earnings replacement rate for all impairment levels was 105 per cent of the non-injured worker control group.***

Pretty relevant stuff and a counter-narrative to the bill's spin. The **Progressive-Conservative Party labour critic, Monte McNaughton, MPP** responded in the House November 21st:

Mr. Monte McNaughton: I'm pleased to rise to speak on this bill this afternoon. I'd also like to thank the Minister of Labour for taking the time to speak with me recently about the important labour portfolio as a whole and the challenges that we're facing on some of the issues here in the province of Ontario today.

. . .

Of course, this is not the first time that the House has seen this bill. We've seen it before: back in 2012. The MPP for York West, I believe, introduced the same piece of legislation. **It was not called for debate back in 2012, likely because the government of the day realized it simply was not practical or fiscally prudent**.

With nearly one million people out of work in Ontario today, right across this province, the PC caucus has been urging a change in direction and a new approach. Here with Bill 128, we are getting a complete and total change for the WSIB, but in the wrong direction.

My main problem with the bill is that there could be a whole series of ramifications and outcomes that were not intended. As I understand, there is great potential that the new benefits being added with this bill will be subject to costly litigation as other recipients seek to have the benefits applied more broadly. **Not only is this bill a 180-degree change in direction for Ontario's WSIB program; it would require the WSIB to revisit their entire funding strategy. Bill 128 creates benefits without any funding mechanism, and there's a huge potential that these changes could be applied retroactively, which would dramatically increase the costs for the WSIB**.

. . .

Additionally, I believe more transparency is needed in these discussions and in the development of new labour-related legislation. It is important that the Ministry of Labour look at this throughout the entire portfolio in the process of creating any new legislation.

. . .

As I said, I'm going to be opposing this legislation here today. I encourage all members to join me in opposing this bill. It's taking the WSIB down a path that I know they're not prepared to go down. **We need to get the unfunded liability back in order and back to a sustainable number**. I think that this legislation is going to add to the unfunded liability at a time when, as I said, Ontario's debt is skyrocketing. It's almost at $300 billion. I think that this legislation is flawed and I just don't think Ontario can afford it at this time.

So, it seems that the Liberal position in 1994, when these provisions were first introduced, is the PC position of 2013 (actually, the 1994 PC position was put forward by then PC Labour Critic, and now WSIB Chair Elizabeth Witmer, and is pretty consistent with what the PCs are saying today – it's the Liberal position that has changed).

Is Bill 128 likely to go anywhere?

Probably not. At least not as a stand-alone piece. But remember, in the 2007 budget the government advanced very far-reaching WSIA amendments that added almost $1 billion to the unfunded liability ["UFL"] at a time when the Board was bleeding several hundred million dollars a year. *My prediction?* I may be wrong but don't be surprised if WSIB reform is again included in next Spring's budget. Perhaps all of this is just softening the ground for that. And, what has happened to the commitment for fiscal responsibility triggered by the November 2009 report of Ontario's Auditor General and front and center for a few years? Well, it seems its waning. *Time till tell*.

Bill 146, the Stronger Workplaces for a Stronger Economy Act, 2013

This is a big, full blown omnibus bill that as noted earlier adjusts many statutes. I will focus on the changes to the WSIA. This is what the bill does:

WORKPLACE SAFETY AND INSURANCE ACT, 1997

1. Subsection 2 (1) of the Workplace Safety and Insurance Act, 1997 is amended by adding the following definition:

"temporary help agency" means an employer referred to in section 72 who primarily engages in the business of lending or hiring out the services of its workers to other employers on a temporary basis for a fee;

2. Section 83 of the Act is amended by adding the following subsections:

Temporary help agency worker

(4) For the purposes of this section and despite section 72, if a temporary help agency lends or hires out the services of a worker to another employer who participates in a program established under subsection (1), and the worker sustains an injury while performing work for the other employer, the Board shall,

(a) deem the total wages that are paid in the current year to the worker by the temporary help agency for work performed for the other employer to be paid by the other employer;

(b) attribute the injury and the accident costs arising from the injury to the other employer; and

(c) increase or decrease the amount of the other employer's premiums based upon the frequency of work

In effect this shifts the financial cost of claims from the ER record of the actual employer, the temporary help agency, to the client employer. I should add that while the bill does not expressly remove accountability from the temporary help agency, in other words both employers *could* be held accountable, fairness and double-counting issues aside, I am assured by senior members of the Ministry of Labour that the intent is not to "double-count". There will be a *transfer* of financial accountability. At present, if a worker employed by a temporary help agency is injured, the ER record of the temporary help agency only is impacted.

What is the purpose of this bill?

As seems common of late, there is no clear outline and certainly no serious fact based study of the WSI "mischief" the bill is attempting to address. Therefore one can only speculate. It seems to me that the only reason for the bill is this – by some undisclosed analysis or a "gut-feel", the government is of the view that somehow employers responsible for injuries are being "let off the hook" and Bill 146 corrects this.

Here's the problem. Even *if* this is true (and I will leave it to the temporary employment industry to comment on the overall business efficacy of its business model), Bill 146 thwarts its own goals. ***As I will show, Bill 146 will actually usurp the very goals it seems to be chasing***. While I would

presume that the WSIB is normally engaged by the government to assist in drafting serious WSIA reform packages, this bill exposes such a lack of understanding on the actual functioning of the Board's ER programs, that I would be shocked if there were any WSIB fingerprints on this bill at all. I am speculating here, and I have not asked (it would be a confidential and non-accessible communication between the Board and government even if I did ask – advice to government is exempt from disclosure under the *Freedom of Information and Protection of Privacy Act*), but the current head of the Board's policy department is one of the most thoughtful, capable, vigilant and diligent incumbents that office has ever employed, and I have every confidence that this is not her department's work. (If I'm told otherwise, I will clarify this in a future issue.)

OHSA already holds the contracting employer to account

Of course, the *Occupational Health and Safety Act*, ["OHSA"] already holds the contracting employer to account, pretty much as if it were the actual employer. The definition of employer under the OHSA is quite clear:

> "employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

The Ministry of Labour, on its website, describes the relationships and responsibilities in this fashion:

> **Who has employer duties under the OHSA for temporary help workers?**
>
> Where a worker is employed by a temporary help agency to perform temporary work assignments for agency clients (i.e., the client employer) in the client's workplace, the agency employer and the client employer are jointly responsible (as employers) for taking every precaution reasonable in the circumstances to protect the health and safety of the worker. The client employer normally has the day-to-day control over the work and working conditions of the workplace to which the workers are assigned. However, an agency employer is not relieved of its legal duties under the OHSA for the worker's health and safety during an assignment. Employer duties in the OHSA apply to both the client employer and the temporary agency employer.

Here's why Bill 146 will not work

Let's take a look at how this bill will actually work, with an actual, reasonable example. Here is the fact setting. A temporary driver supply company (let's call it **Supply Corp**) employing 300 drivers typically engages with a variety of smaller trucking companies requiring temporary drivers from time to time. Remember, when considering this series of examples, presume that the government's inferred objective makes sense. I will show that the objective, warranted or not, won't be - *can't be* - realized. **Not only is the objective immediately thwarted, the *exact opposite of the intended* result is achieved**. Here are some of the basic facts for the scenarios. The 2014 trucking rate is $6.72 per $100 of payroll. The earnings ceiling for 2014 is $84,100. For a driver earning at or above the ceiling, the WSIB premium is $5,651.52. The ER (NEER) claim limit for 2014 is $420,500 (5 times the ceiling).

As directed by WSIB policy (**Policy Document 4599-002, Supply of Drivers and Helpers**), the premium rate for a temporary driver is the same as that of a normally employed driver, $6.72. So, there is no WSIB "leg-up" through contracting a driver through a driver agency versus directly employing a driver, at least WSIB premium wise. With that said, there is in fact a separate premium rate for some sectors set out in WSIB policy, "**Supply of Non-clerical Labour**". That is assessed under **Rate Group 929**, with a premium of $5.05, *more than two times* the average premium rate. And, there is a long list of exemptions:

> **Exemptions to Supply of Non-Clerical Labour, RG 929, $5.05/$100:** Logging Operations; Marine Cargo Handling; Supply of Drivers and Helpers; Large Bridge Construction; Millwright and Rigging Work; Custom Welding Services; Wrecking and Structural Demolition; Structural Steel Erection; Form Work (high-rise); Steel Reinforcing; Homebuilding Operations; Supply of Labour, Construction; Child Daycare and Nursery School Services; Offices of Social Workers; Supply of Labour, Restaurant/Catering.

Clerical labour supply is dealt with differently (**Supply of Clerical Labour, Rate Group 956**, $0.21/$100 of payroll).

This means that the cost of labour passed through to the client would usually include the same WSIB portion as the client itself would incur (or more). (If there are instances where that is not the case, that can be easily and swiftly addressed through WSIB policy – clearly though, the Board has already put its corporate mind to this issue.)

So, since there is no OHSA advantage and no apparent WSIB premium advantage (and easily fixed if there is), the objects of this bill seem to hinge on there being a WSIB ER advantage. ***One problem: as reflected in my example, there isn't.***

Let's get back to the supply of drivers example. As noted, Supply Corp employs 300 drivers, and hires them out on an "as need" basis to smaller trucking firms. The typical Supply Corp client is a smaller trucking firm employing five (5) company drivers and ten (10) temporary drivers from Supply Corp.

Now, for this example, let's presume the government's inferred premise for Bill 146 is true – that Supply Corp's clients operate less safely with Supply Corp employees than they would with their own. So, for this example, presume that currently Supply Corp is performing at its worse, and is subject to a maximum ER surcharge, which would drive an additional premium of $1.8 million, effectively more than doubling Supply Corp's $1.7 million base premium to $3.5 million. *Ouch!* Being a large employer, Supply Corp is at the maximum 100% accountability (Rating Factor), has a maximum rebate potential of $595,000, a maximum surcharge potential of $1.8 million, and is assigned "expected costs" of $595,000 (if costs are below this amount, Supply Corp is rebated; if above, surcharged; to a

maximum surcharge of $1.8 million). This, one would think, would be quite the incentive for Supply Corp to work towards preventing injuries (and perhaps even refusing contracts with clients with less than satisfactory safety records). But it seems the government is of a different view.

The profile of the archetypical Supply Corp client is this: 5 company employees, a WSIB premium of $28,000, a maximum rebate potential of $896, "expected costs" of $2,240, and a maximum surcharge of just $2,688. 30 small trucking companies with this profile contract on average, 10 drivers each from Supply Corp.

Remember, Bill 146 infers that the contracting carrier is engaging temporary labour, at least in part, to avoid a WSI risk. The only risk is increased ER exposures. *Let's see how this works out.*

The typical client company operates safely with its 5 company drivers. They have no injuries. But, for some reason (or so goes the government's premise), it operates less safely with the contracted drivers from Supply Corp. In the course of the year, 30 of Supply Corp's drivers sustain lost-time injuries (10 times the industry average according to the WSIB's 2012 "**By the Numbers**" report), incurring total ER costs of $2.4 million (which would be enough to drive the maximum surcharge for Supply Corp). Each of the contracting carriers experiences one lost-time-injury (LTI) with an average ER cost of $80,000 each.

So, how would such a record be treated under the current rules? Each small carrier would officially remain "injury-free" and be eligible for a maximum rebate of $896, for an aggregate rebate for the clients of Supply Corp of $27,000. Supply Corp, on the other hand, gets hit with a maximum surcharge of $1.8 million. Net, the WSIB sees an overall surcharge of just below $1.8 million for this record.

What will happen under Bill 146? Bill 146 shifts the injury accountability from Supply Corp to each of the client carriers. Under Bill 146, each of the client employers would be at a maximum surcharge of $2,700, for a total surcharge of $81,000 (for all 30 clients). A far cry from the $1.8 million surcharge that currently would be payable by Supply Corp. ***And, what of Supply Corp post-Bill 146?*** Well, instead of a $1.8 million surcharge, since the injury accountability is transferred to the client employers, Supply Corp is effectively and officially "injury-free" as far as the WSIB ER program is concerned. *Supply Corp will now receive a $595,000 rebate*. **So, Bill 146 flips what is now a net $1.8 million surcharge into a net $500,000 rebate, *all in the name of increased accountability?***

Does this make any sense at all? Nope. Of course not. Nor can this be "saved" through amendment, re-drafting, adjustment, more discussion, committee hearings, or anything else. It is, quite simply . . . well . . . just a mess. It doesn't work. It can't work. *The only answer?* Hopefully the other elements of Bill 146 are better thought out, but if it is to survive, I strongly suggest taking a legislative knife to the WSIB portion and cut it out of Bill 146.

Bill 155, Workplace Safety and Insurance Amendment Act (Premium Rates for Deemed Workers in Construction)

This last bill, Bill 155, was the very last bit of legislative business before the Christmas break. In my view, it would be more aptly named the "*That Was Then – This Is Now"* bill. This private-members bill adjusts the impacts of Bill 119, a controversial bill introduced October 28, 2008 and speedily passed November 26, 2008 (oh, to go back to the days of majority government). Bill 119, for construction only, made coverage mandatory for "*independent operators in construction and some other individuals in the construction industry who are currently not covered*" (November 26, 2008 government media-release). For a better idea as to what this was all about, this is what the then Minister said when the bill was introduced on October 28, 2008:

> (Bill 119) . . . would extend mandatory workers' compensation coverage to independent operators, sole proprietors, partners in a partnership and executive officers of corporations in the construction industry. These individuals are not currently required to purchase Workplace Safety and Insurance Board coverage. However, because of the transient nature of construction and the difficulty determining on-site who is eligible for an exemption, *there has been abuse of current exemptions by certain individuals and companies wishing to gain a competitive advantage*. **These unsavoury practices undermine legitimate contractors . . .**
> ***By doing this, we are helping legitimate construction employers be competitive in the marketplace when bidding on construction jobs***. (emphasis added)

So, what does Bill 155 do? It reduces the premiums for those individuals accused of undermining competitiveness by two-thirds!

> **Premium rates — construction**
> 81.1 (1) This section applies to the Board for the purposes of establishing rates under subsection 81 (3) that relate to employers carrying on business in construction.
> **Rates re deemed workers**
> (2) The Board shall ensure that the rate used to calculate the premium to be paid by an employer in respect of a person to whom the insurance plan applies pursuant to section 12.2 meets the following requirements:
> 1. During the five-year period that begins on the day this section comes into force, **the rate must be one-third of the rate used to calculate the premium to be paid by the employer in respect of a worker to whom the insurance plan applies** pursuant to section 11.

Remember, Bill 119 has been law for five (5) years. *Are there any studies that prove those captured under Bill 119 are safer or their claims cost less?* Not that I am aware of. Oh, and what in the goodness happened to the government's worry about those "*wishing to gain a competitive advantage*"? Well, it seems that a competitive advantage would be codified in law. But, *that was then . . . this is now. My view?* Bill 155 guts the moral core of Bill 119.

Will any of these become law? I doubt it. But, then again, it wouldn't be the 1st time some presents placed under the tree resulted in some Christmas morning disappointment.