The Liversidge *e*-Letter

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

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WSIB interim experience rating adjustments should be reconsidered

Or has the WSIB crossed its Rubicon?

The introduction of employer culpability into WSIB experience rating design is wrong-headed
There is a better way

The experience rating story so far

In several issues of **The Liversidge *e*-Letter**, I have addressed recent high profile changes to the Workplace Safety & Insurance Board ["WSIB" or the "Board"] experience rating ["ER"] programs. I suggested that "*rational insurance concepts were steamrolled by a well-played media campaign*" (April 9); that the government is unwisely getting into the debate (April 14); that the Board's new "policy" may not stand up to legal scrutiny (April 16); and the Board's interim solution opens a ***Pandora's box*** the Board may one day lament (April 23).

I have opined that ***"thrown out the window is all proportionality and with it any prevailing sense of justice."*** I have ascribed good but misguided intentions to the Board, which is undermining WSIB, employer *and* worker interests.

The Board has not done enough to douse the fires of confusion. As I commented on April 23, "*by labelling its own policies as "nonsense" the Board was effectively throwing gasoline on its own burning house*". Under the smoke clouds of that confusion a muddled concept of "*employer culpability*" emerged. Last week I said this:

> ***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.
>
> ***It is time for a clear-headed approach. End the smoke and mirrors. Develop lucid policy. Too much is at stake***.

A lucid and politically viable solution is possible

I noted "*since it seems that ER program integrity is measured of late more in political than insurance terms, essential to any new design are features which deflate the political air from this balloon*". I will offer a coherent solution which respects the political volatility fuelling the debate without sacrificing the foundational insurance principles so essential to a viable ER scheme.

What is wrong with the Board's interim solution

While I recognize that the Board's March 10 announcement was a stop-gap measure, it is flawed at its core by introducing concepts of culpability into ER design. The Board has moved far-a-field from the founding insurance concepts essential to a fair and credible ER program, introducing arbitrary and capricious rules.

Prior to these recent announcements, the Board deliberately and rightly disconnected culpability and insurance. **Addressing culpability of course *is* important.** Culpability rightly is a central ingredient in the Ontario workplace safety *regulatory* regime and is the *raison d'être* of the criminal justice regime. It simply has no place in workplace safety and insurance ["WSI"].

As I said last week, ***"the recent "debate" has been hijacked, knowingly or not, by a melding of related but unique concepts"***. I can understand that the general public will have difficulty discerning the finer points between criminal law, safety law and workplace insurance law. The Board though should have cleared the smoke and better explained related but different objectives and complementary but discrete methods (the media too). That the Board found itself caught up in the vortex of a media whirlwind is no excuse. Anyway, the cyclone has subsided.

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.

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WSIB has put its corporate mind to the very ER design elements now being discredited (by the WSIB)

As I explained on April 14, the Board's Chair did not misspeak or mislead when he told the Toronto Star (on April 9) that he ". . . *was absolutely not aware that at the same time as the ministry was levelling fines against companies, that they were receiving rebates from us".* This though does not mean the Board has not put its corporate mind to the question before now. It clearly has.

The Board addressed the role of fatalities in ER policies

As I argued on April 23, before the March 10 Announcement, WSIB ER programs were governed exclusively by insurance principles. Now, with respect to at least fatal injuries, the idea of employer culpability has unwisely crept into the mix. Influenced by the Board's response, someone untutored in both the history and design of ER may suppose that the Board simply neglected to previously consider this question, and used this recent skirmish as an opportunity to put right a design lapse.

While on occasion the Board (as any other institution) may let something "*slip through the cracks*," this is anything but the case here. The current treatment of fatal injuries in the NEER and CAD-7 programs is a deliberate and thoughtful element of ER design, that has the full backing of the WSIB Administration and the WSIB Board of Directors.

The central focus of the recent media onslaught was not sparked by some shocking design flaws discovered through the talents of a team of investigative reporters. ***This is the way that ER was thoughtfully and deliberately designed.*** One need only peek at the Board's website to be convinced:

> **Program Details**
> The **cost** of your company's claims is compared to the average for your rate group. The size of your company is taken into account. **To protect you from the costs of unusually bad years or individual accidents, there are limits to: *the maximum cost assessed for any one claim*; the *total amount assessed by NEER for all your claims* combined.**

The WSIB "**NEER User Guide**", adds the following:

> **To protect you from the financial effects of an unusually costly claim, NEER's insurance provisions set a limit on how much each individual claim can cost. The same insurance provisions also protect you against unusually high claim costs in any given year by limiting the total cost of all your claims in that year.**

It is clear that the Board put its corporate mind to limiting ER to insurance principles, not questions of culpability.

Fatal injuries have been addressed in ER policy

Some WSIB ER policies expressly mention fatal injuries, clear evidence that the Board has turned its mind to this direct question. Yet, until March 10, both the NEER and CAD-7 programs, the programs at the hub of the recent controversies, were influenced only by costs (and in the case of CAD-7, injury frequency). In fact, in the case of NEER, the Board developed a separate and distinct "***Reserve Factor***" for fatal injuries. ***This was not a design misstep***.

Last October the OFL told the same stories as the media

I was recently reminded (by an observer and scholar of Ontario politics) that the **Ontario Federation of Labour** ["OFL"] brought the *exact* stories profiled by the ***Toronto Star*** to the Board's attention last October with the release of its report, **"The Perils of Experience Rating: Exposed!"**.

Readers will recall that I commented on this report in the October 30, 2007 issue of **The Liversidge *e*-Letter [Experience rating under attack: *OFL renews demand to kill experience rating; Says "boondoggle" must end*"]**. The OFL report did not tell similar stories – *the OFL told the exact same stories as did the Toronto Star and told them 5 months earlier. If* elements of ER policy were "nonsense" why did the changes not commence then?

Now getting on to the real question – *how can ER be changed for the better*?

To be clear, while I do not support the Board's March 10 Announcement, and while I remain unwaveringly opposed to the introduction of concepts of culpability into the design mix, ***I support structural adjustments to ER***. There is a way to make ER better and more politically acceptable without denigrating Ontario employers, and in so doing, restoring needed stability.

***A reminder* - ER is trying to change corporate behaviour**

ER, in its purpose, design and execution, is actually quite brilliant and contrary to the image recently cultivated shows the Board at its best and brightest. At its core ER is focused on one thing and one thing only – *continual improvement*. Through the provision of incentives ER seeks to change corporate behaviour. *Change* is the operative feature.

Rewards and penalties are not the objective

While it would be difficult to discern this from either the media attention or the Board's March 10 response, ER is not about rewarding or penalizing employers. **Rewards and penalties are not the end sought – they are only the tools available**. ***The end sought is to inspire employers to do better***. All employers. That includes those doing well. But, it also includes those that are doing worse than expected.

There is a way to design ER to promote continual improvement and make it more politically palatable

There is a way to redesign ER making it more politically palatable without increasing the insurance *moral hazard*. The administrative machinery already exists. The Board simply has to "flick a switch" (although some legislative changes are needed). Readers recall my suggestion:

> Here is a better way, which preserves the core elements of ER, demands perpetual incremental improvement, all the while addressing the program's shortcomings:
>
> ***In any case* (not just fatalities) where there is either a serious injury *or* a safety prosecution, the Board will initiate a thorough "*best practices*" audit of that firm before issuing *any* rebate. The Board will grant an ER rebate for that year *or any future year*, only if there is demonstrated change and a clear renewed commitment to worker safety by the firm. The Board will also use this process to allow surcharged employers to recoup surcharges.**
>
> This approach takes the hysteria out of the debate, demands improvement, and compliments the Board's highly touted ***Road to Zero*** campaign. I encourage the Board, employers and workers to get behind this new way, this better way, and make Ontario a safer place to work.

ER "strictly by the numbers"

ER is based "strictly on the numbers" (costs, frequency or both). While sensible insurance wise, that design attribute has been the genesis of this most recent controversy.

The "Liversidge Solution"

For want of a better descriptor I will call my proposal the ***Liversidge Solution***. To borrow a phrase "*If what I have to say is responsible, then I alone am responsible for the saying of it*" (Edward R. Murrow, 1958). If the premise is shown false these ideas need attract no allegiance other than my own.

Precept No. 1*: The arithmetic and essential design elements stay the same** (for NEER and CAD-7). The current quandary is not fuelled by the arithmetic *per se* – it is driven by a "*strictly by the numbers*" approach and the need for ER to be in reality and perception compatible with the Board's ***Road to Zero campaign (which while supportable, sometimes ramps up the rhetoric to evangelical heights, some of which we saw spilling over into the ER debate). Presently the chasm between ER rebates *and* serious or fatal injuries *and/or* safety prosecutions appears wide. While it may make "insurance sense" it does not make "common sense". Once this *Gordian Knot* is cut the chasm can be bridged.

***Precept No. 2*: ER rebates will be held in abeyance, not cancelled, pending a safety audit.** This cuts the *Gordian Knot*. In any case where an employer is set to receive an ER rebate but experiences a fatal *or* serious injury *and* is charged under the *Occupational Health & Safety Act* ["OH&SA"] (but not necessarily convicted), payment of the rebate is suspended pending the outcome of a safety audit. No longer are rebates driven "*strictly by the numbers.*" No longer will a company automatically receive a rebate if a fatal or serious injury occurs. Nor is any notion of culpability at all relevant and is completely written out of the equation. Moreover, an audit is fully consistent with insurance practice and in harmony with risk management concepts. To retain its rebate the employer will have to aptly demonstrate that it has in place the appropriate "best practices" and is committed to improve. *Improvement, not punishment, after all is the goal*.

***Precept No. 3*: Existing audit protocols will be used.** The WSIB already has in its prevention arsenal a sophisticated audit protocol – Workwell. There is no need to design another tool. Workwell will no longer operate as a "stand alone" mechanism running independently of ER, but rather will now be part of a harmonizing system. I have never been a solid "fan" of Workwell, but set in motion in this fashion, it will be beneficial.

***Precept No. 4*: Analogous concepts and time intervals will be consistently applied**. The March 10 Announcement removes rebates in the year that the incident occurred regardless of the years addressed by the rebate. This is unfair and confusing. The time intervals enshrined in current designs will be maintained. For NEER, a 2008 serious injury will suspend the earned rebate for 2008, not previous years.

Precept No. 5*: A prevailing principle of proportionality will govern all program outcomes.** The March 10 Announcement throws all ideas of proportionality out the window. *This is unjust*. Under the ***Liversidge Solution, the rebate will be cut back proportional to the findings of the Workwell Audit. A WSIB matrix will translate the audit "score" into the degree of claw back.

Precept No. 6*: An incentive for improvement must be a critical design element.** The Board's March 10 announcement is punitive and increases the insurance *moral hazard*, diminishing incentives for workplaces that need them the most. This works against the interests of the Board, employers and workers. The ***Liversidge Solution presents an opportunity for improvement consistent with the current NEER and CAD-7 programs. Once the results of the Audit are determined, and all or a portion of the rebate is clawed back, that sets the benchmark allowing for improvement during the "ER window", thus countering the *moral hazard* influences. Should a subsequent audit demonstrate substantial improvement, the employer will "earn back" some or all of the clawed back rebate. An analogous process would be available to surcharged employers.

What do employers have to do now?

Employers have so far been remarkably silent. It would be wrong to interpret this silence as complacency or indifference. It is difficult though to recruit participants to a debate that is accusatory, unstructured and unfocused. Business solves problems calmly and with purpose. As the whirlwind dissipates and as new ideas emerge I expect that employers will become engaged and actively contribute to this essential policy conversation.

I recommend employers do three things. *First*, fully agree or not, acknowledge that the critics may have a point. *Second*, outright reject the Board's introduction of culpability. *Third*, be open to alternatives and a new way, be it the ***Liversidge Solution*** or something different and better.

***I recommend the Board do three things*: *First*,** censure its March 10 Announcement. *Second*, distance itself from any concept of employer culpability and tone down the rhetoric. Inflammatory language only incites. *Third*, quickly set out the terms of reference for the ER review. There is no need to outsource this. The Board is able and equipped to develop WSIB policy in-house.

***Labour is advised to do the following as well*: *First*,** recant the demand for the resignation of senior WSIB officials which only serves to personalize a policy debate. *Second*, admit that the ultimate goals sought by ER and by labour are the same – a reduction in injuries and claim duration. *Third*, look for ways to *objectively improve* ER and take the dogma out of the debate.

The stakes are high. If employers wake-up and conclude the founding principle of "no fault" has been irreparably eroded and they find themselves in a *de facto* fault based system, I predict it will be business soon leading an assault against the social contract. ***There are always alternatives***.

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