

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

June 8, 2004

An *Electronic Letter* for the Clients of L.A. Liversidge, LL.B.

4 pages

Major Employer Group Releases Position on Experience Rating Reform

WSIB Interim Chair Recognizes Need for More Ontario Based Research

Employer Group Sets Out a Principled Approach to Experience Rating Reform

The following is the modified text of a recent letter sent to WSIB officials regarding the position of an employers' group with respect to WSIB experience rating ["ER"] reform initiatives:

Dear Mr. Potter:

[Employers] support moving forward with additional reforms only when, and if, the existing experience rating programs are shown to be, and are recognized to be by the broad based employer community, in need of replacement.

[Employers] are strong proponents of the Ontario experience rating programs, and there is a recognized need for continual maintenance of the NEER, CAD-7 and MAPP programs. The WSIB has recently studied, consulted upon and implemented reforms to the NEER program effective January 1, 2004 (the Phase I reforms), the impacts of which, of course, are not as yet known, and likely will not be known for several years.

A recent study from the Institute of Work and Health entitled "A Systemic Review of the Prevention Incentives of Insurance and Regulatory Mechanisms for Occupational Health and Safety, Working Paper #213" establishes that a linkage between experience rating and improved accident prevention has not been established.

The WSIB "Phase II reforms" introduce significant principles which, on their own, warrant individual study, analysis, debate, and policy consideration. Experience rating reform initiatives must respect the concept of evidence based change such that, a clear case for change is advanced prior to the design initiatives proceeding. We have adopted the following resolution:

The WSIB experience rating review project must return to first principles having regard for the following guiding principles:

Principle No. 1: That a credible case be made for each individual reform initiative based on established need and credible evidence, and that such a case be recognized and accepted by the ERWG, or employers generally, before the Board proceeds with any reforms;

Principle No. 2: That the WSIB is expected and encouraged to devote sufficient resources to experience rating maintenance to ensure that experience rating remains relevant and current.

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Notice of Roundtable Discussion On WSIB ODAP Report

June 16, 2004

9:30 AM – 11:30 AM

The Guild Room

Days Hotel & Conference Centre

6257 Airport Road

As announced in recent issues of The Liversidge e-Letter, the WSIB recently released the Chair's Report of the Occupational Disease Advisory Panel ["ODAP"]. This report very likely will lead to significant adjustments in WSIB occupational disease adjudication policy, with far-reaching funding implications.

L.A. Liversidge will be providing an in-depth policy and legal analysis of the ODAP Report, along with an overview of the advocacy avenues open to businesses and employer trade associations, to ensure that responsible and legally consistent arguments are advanced.

The deadline for submissions is September 30, 2004.

In addition, there will be an update provided on the status of the WSI reform agenda proposed by the worker advocacy community.

Invitations will be e-mailed.

On page 2: It is time for a renewed approach to employer WSI lobbying. Long-term responsible influence will be achieved only if the "business vision" is at the vanguard of idea innovation. Business and labour interests must intersect at one vital juncture – at the requirement of the system to be fair.

Principle No. 2 (continued): That such initiatives would include, but not necessarily be limited to, establishing or refining reserve, overhead and expected cost factors, but would not include features with policy or design implications, such as, but not necessarily limited to, claim limits, firm limits, and/or rating factors;

Principle No. 3: That the need to establish a positive relationship between experience rating and accident prevention be recognized by the WSIB and a commitment to establish that recognition be advanced to the Experience Rating Working Group;

Principle No. 4: That potential refinements to the existing experience rating plans be reviewed, investigated, assessed and consulted upon, prior to considering developing a new experience rating program;

Principle No. 5: That a new experience rating program be considered only when and if the existing experience rating programs are shown to be, and recognized to be by the broad based employer community, in need of replacement;

Principle No. 6: That the WSIB investigate the relationship of experience rating and positive return to work initiatives.

See a response of the WSIB Interim Chair below

Interim WSIB Chair confirms need for further study into effect of experience rating programs

In a recent letter, WSIB Interim Chair, Ms. J. Hutcheon, recognized the need to study the effects of experience rating. Ms. Hutcheon wrote:

April 28, 2004

The Workplace Safety and Insurance Board (WSIB) is committed to the review of experience rating and determining our next steps. Your organizations' continued support will help ensure that future developments in experience rating will be thoroughly considered.

As points of clarification, I would like to respond to concerns raised in your letter of April 8, 2004:

The WSIB is committed to continue communication and consultation on experience rating with employers and their representatives.

The WSIB supports the establishment of internal (WSIB) and external (e.g. Institute for Work and Health) based research on experience rating.

While some research has commenced we appreciate that to date there have been different conclusions. For example, the Institute for Work and Health review, entitled "Systematic Review of the Prevention Incentives of Insurance and Regulatory Mechanisms for Occupational Health and Safety, Working Paper #213", found:

- "moderate evidence that the introduction of experience rating is associated with a reduction in the frequency of claims".

- "moderate evidence that the degree of experience rating was associated with a reduction in the frequency and/or severity of injuries"

The above study is a review of research literature from across Canada and the United States. Therefore, the statements made in this study may or may not be entirely reflective of experience rating in Ontario. This supports the need for Ontario-specific research on experience rating.
(emphasis added)

The WSIB will continue its review of experience rating programs and will continue consulting.

WSIB Experience Rating Working Group Meeting to Address Future of Experience Rating Reform Project

The next WSIB Experience Rating Working Group ["ERWG"] meeting is scheduled at the Board's offices for Wednesday June 9, 2004.

The meeting will address the terms of reference for the ERWG, examine the need for experience rating reform, and discuss research needs for experience rating.

A further update will be provided following that meeting. The position of the Interim-Chair of the WSIB (above) is encouraging. Before the WSIB embarks on another reform of experience rating, an enhanced understanding of the impacts of experience rating is required. More importantly, the impetus for change must emanate directly from employers in response to real program concerns.

It is time for a renewed approach to employer lobbying

A little history

Before 1984: Business was sleeping – Labour issues were in the forefront (and rightly so)

Before 1984, there was no organized business lobby on workplace safety and insurance ("WSI") matters. Employer trade associations, for the most part, were not involved except in response to *ad hoc* industry specific issues, with such participation usually reactionary to worker generated public issues, and even then, involvement was low-key. Individual corporate involvement focused principally on regulatory compliance issues (accident reporting, information requests, etc.). For the most part, companies

facilitated the day to day administrative burdens in a complacent, compliant fashion.

Before 1984 the term “unfunded liability” had no external meaning

Rates were stable, the unfunded liability [“UL”] was a term with no external meaning (the Board ran a surplus until 1969 and the UL was not an “issue” until after 1985) and employers had little, if any, variable cost exposure (the only experience rating plan in force [developed in the 1950s] had minimal power and performance based penalty assessments were implemented only in the 1970s). For business, WSI was likely and properly perceived to be a stable and reasonable business insurance cost exposure.

The appearance of financial stability was a mirage

However, this appearance of financial stability was a mirage. Under no circumstances was the scheme stable. Labour discontent, fuelled by a system which, by any benchmark, delivered an inadequate standard of justice, by a hierarchical, autocratic institution, galvanized into a forceful and dominant political juggernaut, powerful enough to seize absolute political control of a pressing social issue.

From a 1973 Government Task Force on WCB administration, which radically expanded the Board’s administration resources, to the first Weiler Report (1980) which would dovetail into two massive legislative reforms in 1985 and 1990, changing in absolute terms the legal and administrative framework, labour issues influenced, and then directly manoeuvred, every facet of reform. This commanding influence was sparked and then fed by a potent and formidable ingredient – being on the side of fairness.

Before 1990, the system was systemically unfair to workers

Before 1990, the WSI legal and administrative framework was, by any measurement, systemically unfair to workers. It may require some effort to recall the depth of worker despair from today’s vista. But it was meat chart pensions, a refusal to address disease, an autocratic and paternalistic Board, a strictly in-house appeal and review mechanism, that created true discontent, discontent allowed to ferment for years, until it erupted in a screaming demand for change, change which was delivered with an as yet unmatched political enthusiasm.

The worker lobby addressed unfairness

So powerful were the demands, and in many respects, so principled the cause, this change was begun to be structurally implemented in the early 1980s through a loosening of various entitlement provisions, well before legislative amendments in 1985 and 1990 (which together implemented the slate of Weiler reforms). More and more money was being spent as a means to address a longstanding systemic imbalance (all of this long before the arrival of the Appeals Tribunal).

In response to growing worker pressure, unabated if not increased after the 1973 Task Force review, Professor Paul Weiler was commissioned to undertake what would turn out

to be the single most influential review since the 1913 Meredith Report [Ontario, Reshaping Workers’ Compensation for Ontario, Paul C. Weiler, November, 1980]. Describing workers’ compensation as “. . . a vast and fractious field” (at 13) “ripe for government action” (at 11), the Weiler recommendations, forged from the flames of 1970s discontent, became the reform blueprint for a massive realignment of the Ontario WSI scheme. Weiler’s ideas, once implemented, served to virtually eliminate systemic worker inequity.

Workers’ compensation reform became a mainstream political issue

During the Weiler dialogue, the White Paper, and the extensive Standing Committee examination which followed, labour prominence escalated (for one committee hearing in 1983, the Committee actually convened on the front lawn at Queens’ Park, the numbers demanding an audience so great). Business participated, in a traditional, constrained way, but, the real message was properly owned by another constituency. The issue moved into the mainstream political arena in a massive way, acquiring a political potency previously unseen.

1984: Overnight an employer lobby is created

The new insatiable financial appetite of the Board eventually and unavoidably came face to face with reality – the piper must be paid. In a strategy which exposed the madness of the times, the Board proposed (demanded) employer assessment rate hikes of almost 40% to take place immediately. And it was that single action – a demand for a huge tax increase that overnight created the impetus for the creation of an employer coalition formed to aggressively respond to this unprecedented tax hike.

When the employer lobby first emerged, its strength flowed from its very creation, the establishment of the first coalition of employer associations to focus on workers’ compensation. Initially, the issue agenda was small - a single issue in fact - assessment rates, which required only some *ad hoc* funding for actuarial services. The first and urgent issue was successfully tamed, with the establishment of the first Board/Government/Business long-term funding strategy, the core of which survives today. After that issue, capitalizing on the benefits of organization, the employer lobby began to turn its attention to other WSI issues, but it still remained an unfunded, loose, and “volunteer” coalition, with no institutional identity beyond that of its collective membership.

The employer lobby matures and peaks 1987 – 1997

After 1987, as a result of the effect of the first phase of the Weiler reforms (WCAT, representative Board of Directors), still within a reform-minded environment, the issue agenda exploded. A virtual renaissance was underway – with everything up for grabs. However, its *raison d’être* was still, at its core, political, stimulated by core business concerns – rising rates or increasing financial exposures. WSI lobbying remained an archetypical model of self-

interest pursuit, for all sides. This both explains and pardons a variable level of participation. At no time was the employer lobby a disinterested observer, offering comment for reasons of selfless altruism. Position development was persuasive advocacy at its height – certainly scrupulous, but always promoting direct self-interest.

The financial stability of the system was now the leading workers' compensation political issue

With the election of an NDP Government in 1990, and with either of the opposition parties clearly being a government in waiting, the employer lobby reached its zenith of political activism, successfully redefining the touchstone of WSI reform. It was the business lobby that aided in the development of remarkably similar political platforms from the Liberals and Progressive Conservatives, all the while combating an aggressive front against NDP initiatives. Employer issues began to acquire dominance. The financial sustainability of the system was now the rallying issue, not worker inequity.

Worker equity issues will always trump employer cost issues (and rightly so)

However, this rise in prominence of taxation concerns must be pragmatically gauged. While not without merit, these issues were allowed to float to the top of the issue agenda only through the absence of compelling and competing worker equity issues. Worker equity issues will always trump employer cost issues in any social policy field. But, by the early 1990s, legislative reform had virtually eliminated structural worker inequity.

Employer lobby begins to splinter

Throughout this time, however, the employer lobby began to splinter. As a consultative process became institutionalized, other groups emerged with a seemingly equivalent participatory capacity. WSI lobbying became commercially relevant and attractive. Still, the business lobby, while still generally reactive, spearheaded a formidable barrage against tax hikes and was able to successfully link WSIB financial disarray to bad management, bad law, bad policy and bad structure. After a change in government, WSI reform was implemented, which coincided with an unprecedented period of economic development.

Beginning in 1997, change “was quiet”

Shortly, a new Board was in place, empowered with a new Act, in the presence of a new economic vitality and a tired and worn policy advocacy constituency. Change became quieter, in both execution and impact. The Board, for the most part, stopped consulting, and no one seemed to mind (it has only recently again picked up the consultation mantle). The period of protest had expired, likely through a combination of record employment levels, ever declining premium rates, a curtailed unfunded liability, and a waning will in all quarters.

The WSIB focused on internal organization and non-controversial policy issues

The Board, for its part, focused on internal issues and reorganized itself, again. The appetite for major policy initiatives faded and by the end of the decade, WSI had to all intents and purposes, dropped off the radar screen. The Board focused on issues hard pressed to attract controversy or cultivate dissent (safety, fraud, etc.).

The employer lobby became a latent force

The employer lobby, being advanced through several disassociated and disconnected groups, by the end of the decade responded in a manner not at all inconsistent with its organizing spirit of self-interest – it became a latent force, and understandably so. The aggressive model of interaction so successfully unleashed in the past, was no longer needed.

The present need

Today's need has evolved and is different from yesterday's. Employers, as a class, are not, nor perceived to be, an aggrieved group. The atrophy of the business lobby is a reasonable organic response to a new reality, and is simple evidence that things have changed.

What is not required today, is an organized, aggressive political action force, able to first inform and then mobilize a broad business and political constituency.

Today, thoughtful leading edge and balanced legal/policy analysis is required

Today's need is more aligned to providing thoughtful leading edge legal and policy analysis, presented in a more balanced style and a form which captures all positions. In short, while implicitly ironic, the most effective manner to promote today's self-interest is through disinterested position development.

The presentation of quality ideas, able to bear up to intelligent scrutiny, not constituency strength, is the means to today's influence and securing a legitimate partnership between the Board and business. There is no need for business to mobilize as a lobbying group *per se*, but instead as a source for idea development. The new *raison d'être* would necessitate that the “business vision” be at the vanguard of idea innovation, presenting commentary from an equal perspective as that of the Board and Government itself.

The approaches to be taken for idea development are limitless. At the very least, business leaders could limit themselves to being the focal point for informed discussion, to allow for a debate of competing viewpoints. At the other end of the spectrum, business could mobilize a dynamic, funded “think-tank”, publishing position papers for the consumption of a broad and diverse constituency. While ideal, such an approach is unlikely.

In short, while a need still exists for an employer lobby, it is time for it to be redefined from an advocacy based lobby force to a source for dynamic intellectual thought.