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## **From Experience Rating to Rating Experience**

*A submission to the Rate Framework Consultation from the Ontario Network of Injured Workers' Groups (ONIWG)*

The Ontario Network of Injured Workers' Groups (ONIWG) is the largest democratically run network of injured worker groups in Ontario. Despite having few resources and no paid staff, we are committed to advancing the cause of those who have been injured or made ill on the job. Our advocacy is rooted in a solid understanding of the foundations of our compensation system and is informed by both daily knowledge of the experience of injured workers and through regular analysis and discussion.

ONIWG was founded in 1991 and since then has actively advocated on behalf of injured workers to defend and improve our workers' compensation system. ONIWG has intervened in three Supreme Court of Canada cases that affected the rights of injured workers including *Martin & Laseur v Nova Scotia*. ONIWG routinely meets with senior officials at the Ministry of Labour, including the Minister, and also with senior management at the Workplace Safety & Insurance Board (WSIB) to advocate for systemic change to benefit all injured workers.

Our member groups have spent many years trying to convince the WSIB and the province that experience rating is damaging to injured workers. We were heartened when we were told a new system was being created to replace this outdated and discredited program.

Imagine our disappointment when we learned that the Board would be moving from a one type of experience rating to another – in a way that entrenches employer incentives for claim suppression even further.

In this submission, we will explain the effects of any kind of experience rating system from the perspective of injured workers. We are, after all, the only people with lived experience in this matter. We are also the group that the system is supposed to be designed to benefit. As you will see below, the current and proposed rate setting systems only hurt workers.

While our personal experiences with the WSIB and our employers provides us with ample evidence that the proposed rate framework is dangerous, we have, where appropriate, referred to published studies and reports.

## The Problem with Experience Rating

There is, of course, some appeal to what Paul Weiler's 1983 report to the WCB called the "intuitively plausible assumption" that rating employer experience based on claims cost would improve their safety behaviour. But even from the beginning, Weiler himself noted that "we have no irrefutable scientific proof of its efficacy," and that we "should not have inflated expectations about the promise of this instrument."<sup>1</sup>

In his 2012 review of WSIB's experience rating system, Harry Arthurs notes that "Several analyses of experience rating undertaken for the WSIB have suggested that the present system of financial incentives is likely to tempt employers to suppress claims."<sup>2</sup> He also tells us that there is *at most* modest evidence to support the fact that experience rating reduces accident occurrences, while noting that all any existing evidence of such a reduction is found within studies that also observe the systems' tendency towards employer abuse. Mr. Arthurs, as you know, concluded that the "WSIB is confronting something of a moral crisis."<sup>3</sup>

The WCB/WSIB's *own reports* from the 1980s onwards have cast doubt on the ability of experience rating systems to create safe workplaces. The experience of our workers is consistent with these conclusions.

It is not just injured workers who suffer when claims are suppressed and managed. A 2007 editorial in the Canadian Medical Association Journal suggested that between 40% and 54% of work-related injuries go unreported, which shifts the healthcare and social assistance costs of these accidents from employers – who are supposed to be funding the system – to the general population of taxpayers (including, of course, the very injured workers who have been discouraged from making a claim or forced back to work).<sup>4</sup> Seen through this lens, the kind of claim suppression encouraged by experience rating systems seems to treat everyone unfairly *except* the misbehaving employer.

## From "Experience Rating" to "Rating Experience"

The new system applies the same principles as the old: Injured workers are treated as "risk factors" to WSIB sustainability. The board tries to minimize this risk by offering financial incentives to employers. However, these incentives are not based on their actual safety record, but on their total claims costs. Total claims costs, as anyone who has been injured and had to fight their employer for benefits could tell you, are not and never have been an accurate representation of actual workplace safety.

The proposed rate framework remains a system of *general deterrence*, relying on indirect claims-cost data and incentivizing perceived success, rather than an one of *specific deterrence*, that would rely on actually inspecting and enforcing health and safety law, and punishing violation. A

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<sup>1</sup> Paul C. Weiler. "Protecting The Worker From Disability: Challenges for the Eighties," 1983. 115-116.

<sup>2</sup> Harry Arthurs, "Funding Fairness – A Report on Ontario's Workplace Safety and Insurance System," 2012. 81

<sup>3</sup> Arthurs, 81

<sup>4</sup> Aaron Thompson, "The consequences of underreporting workers' compensation claims," Canadian Medical Association Journal, January 30 2007 176 (3). 343-4.

2007 review of health and safety literature in a peer reviewed journal revealed that “general deterrence is less effective in reducing injuries, whereas specific deterrence with regard to citations and penalties does have an impact.”<sup>5</sup> Why not spend the substantial amount of money it takes to run an experience rating program on actually enforcing the law, which evidence suggests is simply *more effective* than an indirect financial incentive program? If the objective is to create safer workplaces, what could possibly motivate the Board to choose the system that has been proven less effective?

A study in 1995 offered evidence that experience rating contributes to claim suppression by concluding that experience rated employers are “significantly more likely to appeal workers’ compensation board decisions” than their non experience rated counterparts.<sup>6</sup> Unfortunately, the new proposed rate framework subjects every WSIB-covered workplace to a rated premium. So rather than reduce the harmfulness of the current rate setting program, the proposed plan will actually expose *more* workers to its negative effects.

Further, the new system also makes the rebates and surcharges that are currently issued to employers based on their claims costs largely invisible. This will make it difficult for observers and advocates to keep an eye on the system, increasing the potential for abuse without public oversight.<sup>7</sup> As far as we can tell, it also eliminates the current ‘death surcharge.’ This means that as long as claims costs are kept low, employers whose negligence causes the death of their workers could receive rate reductions. A death, after all, may potentially be “cheaper” than crippling long term conditions such as back injury, amputation, chronic pain, severe depression, or industrial disease.

In the eyes of injured workers, there is nothing in this proposed system that will temper the negative effects of experience rating. And if there is, our community requires answers: How will the new system protect injured workers more than the old?

### **A System for Injured Workers**

The provincial government recently passed Bill 109, which drastically increases fines to employers who are caught suppressing claims. While we applaud the increase in fines that the Labour Ministry introduced to employers who break the law, we also see this as a sign that even the provincial legislature fails to see how the new proposal will help discourage claim suppression. In addition, even increased penalties still put the responsibility and consequence of reporting onto the worker. Many of our workers report being treated as a “traitor” for coming to the Board with an injury or a report of claim suppression. Others tell us they have had trouble getting references for a new job after making a claim or complaint.

As you know, Manitoba recently instituted a rate framework similar to the one that is now being proposed in Ontario. They also increased fines for deviant employers. While a Manitoba WCB-

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<sup>5</sup> Topma et. al. “Systematic review of the prevention incentives of insurance and regulatory mechanism for occupational health and safety,” Scandanavian Journal of Work and Environmental Health, 2007 33(2). 92.

<sup>6</sup> Douglas E. Hyatt and Boris Kralj, “The Impact of Workers’ Compensation Experience Rating on Employer Appeals Activity,” Industrial Relations, January 1995 34 (1). 104.

<sup>7</sup> e.g. Arthurs states that a “prospective approach to experience rating may mute its undesirable side effects.” 88-89.

commissioned study published last year found significant problems in reporting and claim suppression, to the best of our knowledge, not a single fine has been levied on an employer.<sup>8</sup> Why create difficult to enforce fines for claims suppression instead of simply enforcing existing health and safety legislation?

Workers simply want a compensation system that honours the principles it was constructed on.

### **Shifting Principles**

In 1915, when Ontario's innovative compensation system was launched, workers' were promised a system that was non-adversarial. This system would not pit the accident employer against the person affected by the injury. The current WSIB still touts this as a virtue of the system.<sup>9</sup> How the Board could consider the previous and proposed experience rating systems as non-adversarial is beyond our understanding. A program that offers financial incentives to employers who reduce the total cost of their claims is, simply put, a program that encourages employers to suppress claims.

Under both the current experience rating system and the proposed rate framework, a company with numerous health and safety violations, but a thorough "claims management" strategy, (such as a pattern of discouraging injury reporting, challenging workers' claims, rushed return to work, 'fake' modified duties, use of sick time, intimidation, etc.) could see their premiums lowered year after year. On the flip side, a company with a clean health and safety record and strong investments in employee well-being that follows the law when it comes to reporting work injury could see their premiums go up. What employer would not be tempted to suppress claims in an environment like this? How is this system non-adversarial?

Another important part of a non-adversarial system is collective liability. When costs are shared equally across a system, there is less incentive for each individual employer to suppress claims. For example, within the thriving (and troubling) industry of "claims management" firms, advertisements tell businesses that they can achieve a "competitive advantage" in their field by engaging a firm that will help reduce claims costs. What happens when hiring a "claims management" firm to reduce costs is cheaper than investing in safety?<sup>10</sup> Many of our injured are or have been employed by workplaces that have retained claims management firms. In large part, we have found that these firms are reducing claims costs not by helping to create safe workplaces, but by aggressively challenging and suppressing claims, encouraging use of sick time, pushing workers to return to work before they are ready, and other irresponsible and illegal tactics. All of these things can – and do – lead to further physical and psychological injury. One repairable short-term injury then becomes two or more long term health concerns, all because of the apparent "competitive advantage" offered to employers who keep claims costs down.

The proposed system takes the retrenchment of collective liability even one step further by creating different "pools" of money across different industry classes. This introduces incentives

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<sup>8</sup> Kelly Putter. "Under The Carpet," OHS Magazine, 1 July 2014.

<sup>9</sup> e.g. WSIB Flyer: The Facts About Injured Worker Stigma.

<sup>10</sup> Hyatt and Kralj, 99.

for different industries to compete against each other, potentially creating a further “race to the bottom” of the claims costs pile.

## **Conclusion**

Injured workers are constantly faced with a form of institutional and social stigma based on the assumption that giving us more money will only encourage laziness. Or that a better financial life for injured workers would act as a disincentive for productive participation in the labour market. Why, then, is it assumed that giving employers more money will make *them* behave better. Employers should not be financially rewarded for following the law. They should not receive a bonus for simply fulfilling their responsibility to keep us safe, *especially* when that bonus is tied to a measuring stick known to give an inaccurate representation of *actual* workplace safety.

As workers, we gave up our right to sue our employer in exchange for a guarantee that – in the case of injury – we would be looked after by a system that helped us regardless of the cause of our injury, in an environment that discouraged worker/employer hostility, out of a fund that collectively shared the burden of costs more or less evenly across the system. The system proposed here does none of those things.

Our end of the bargain (forfeiting our right to sue) is upheld and enforced. It is time for the Board to build a compensation system that upholds theirs. Replacing any type of experience rating with a system that truly measures and controls the health and safety of workers in this province is an essential step.

We are already injured. Please do not entrench a system which injures us further.

Thank you for your consideration on this matter. We trust that you will take our input seriously and work towards a just system of compensation that is built to benefit workers.

Sincerely,

*The Ontario Network of Injured Workers' Groups*

Cc:

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