

Experience rating

Backgrounder

What is Experience Rating?

Experience rating (ER) is a financial incentive system used by the WSIB/WCB to promote workplace health and safety. The idea is that while employers belong to rate groups, which are supposed to reflect their relative hazard, individual employers could be encouraged to improve conditions of work through financial enticements. Paul Weiler, who promoted the concept in his major review of the compensation system in the late 70's, indicated that based on "intuitive presumption" it seemed to make sense that if employers got a rebate for having fewer accidents, and if they got a surcharge for having more accidents, then employers would turn their minds and their money to health and safety investments.

An experience rating system was therefore put in place and has been expanded over the years. The system is highly complex and consumes a significant portion of the WCB/WSIB's administrative budget. A corresponding, highly lucrative, industry has grown in response to provide services to employers to maximise their rebates and to protect against surcharges. The stakes are high, for while the rates paid by employers are known elements which are a cost-of-doing-business-- a rebate represents actual profit and a surcharge can be a significant profit-loss. It is indeed a powerful incentive system--but to what end?

Rebates are given (and surcharges imposed) with no questions asked.

In order to understand the behaviours prompted by experience rating and the related consequences, it is important to understand two key elements of the system: Rebates and surcharges are not calculated on evidence of actual health and safety conditions. Rebates and surcharges are calculated on the cost of injured workers' claims¹

Does experience rating help improve health and safety?

There are some employers who are likely motivated by the threat of surcharges to improve conditions of work to prevent accidents. There is however no direct link. Studies based on claims data, are unable to conclude whether the reduction in lost-time injuries seen over the years represents improvements in

¹ For a comprehensive examination of the impacts of experience rating and why it is not beneficial to our compensation system, see Ison, Terence. *Compensation Systems for Injury and Disease: The Policy Choices*. Toronto: Butterworths, 1994. Ch. 10: Revenue and Finance.

the conditions of work, or claims management techniques.² Although few exist, studies that look beyond the claims statistics, uncover significant evidence of claims control behaviour by employers,³ as well as attempts to discourage reporting of accidents. Overall, experience rating diverts employer resources away from health and safety investment and to claims management. Compounding the problem, this produces unreliable statistics on accidents and especially lost-time claims which the Ministry of Labour relies on for its workplace health and safety programmes including inspections and public announcements regarding workplace safety in Ontario. By managing the claims of injured workers, employers not only get rebates, but also can avoid inspections and continue production undisturbed by health and safety concerns.

Does experience rating represent a health and safety risk?

Experience rating hurts injured workers. It does so in a myriad of ways.

Perhaps foremost is in the creation of an highly adversarial system. Employers are pressured through the temptation of rebates, and even more, the threat of surcharges, to engage in adversarial behaviour. Once an employer is in a potential surcharge situation, there is only one way to convert it to a rebate: prevent the injured worker from receiving benefits or at least minimise them. For the injured worker this can lead to negative health consequences which come from uncertainty, trespass on privacy (employer access to their compensation file, video surveillance), undermining doctor-patient relationship, unjust termination of benefits, hostile encounters, and increased vulnerability⁴—all leading to the significant health ramifications of stress overload.

Injured workers and their co-workers get hurt at work because of experience rating. Employers don't want injured workers to become "a lost-time claim." which will reduce the chances of a rebate, or will cause a hefty surcharge. Stories abound of workers being pushed to work with no time to heal. Or insufficient time to heal. What should have been a temporary injury can become permanent. A second injury can occur, while trying to use the uninjured limb for example. Too many people end up with two injuries instead of one. Co-workers can become injured while bearing the burden of the heavier or more repetitive aspects of the work in the employer's "accommodation" plan. Resentment has been experienced by many injured

² See, for example: Tompa, Emile et al. "Systemic review of the prevention incentives of insurance and regulatory mechanisms for occupational health and safety." *Scandinavian Journal of Work, Environment & Health* 33.2 (2007): 85-95.

³ See, for example: Kralj, Boris. "Employer Responses to Workers' Compensation Insurance Experience Rating." *Relations Industrielles* 49.1 (1994): 41-61.

⁴ For a good overview of the negative consequences of the adversarial system see the work by Katherine Lippel, Canada Research Chair in Occupational Health and Safety at the Law Faculty of the University of Ottawa. She has done extensive work on the harm done by video surveillance and on the rupture of the doctor-patient relationship. For example see:

workers by co-workers and production managers who are frustrated by the presence of someone who really is not fit to work. This situation can lead to a deteriorating work-environment marked by the “discourse of abuse.”⁵

Experience rating is a health and safety hazard and needs to be recognised as such officially.

What about employment of injured workers? Does experience rating help?

For years, the Board has in fact used the threat of surcharges and the enticements of rebates, not to promote health and safety improvements, but as a lever to get employers to provide quick (immediate if possible) return to work for injured workers as a means of reducing benefit payments. Besides continuing to throw injured workers into the unsafe environment of an experience-rated employer, the strategy is ill-advised because experience rating does not support successful return to work. The incentive promotes short-term, rapid, return to work, but not suitable, nor sustained return to work.

Since experience rating operates using actuarial risk assessment—once injured, a worker becomes an ongoing risk for any employer. The logic of the system creates a risk of a surcharge to the employer, if the worker loses even one day from work due to their injury in each year that the claim is being experience rated. The employer will consider any worker with a permanent compensable injury a liability. The result? Many employers will seek to terminate the employment of that worker –and to do so in a manner that does not link the termination to the injury. This is not difficult to do, especially in non-unionised workplaces which constitute the majority in Ontario at this time. The worker with the injury now has no job and no support from the compensation board and faces a competitive labour market.

E.C. Hunt lost his arm in a sawmill in the early 1900’s and testified to Sir William Meredith⁶ that he and his family were in great poverty because, despite his efforts to find work, an employer “prefers a man with two arms.” Nothing has changed in that regard.

Looking for employment with a new employer does not lessen the risk of unemployment related to ER. Because of the risk of a surcharge under experience rating, an employer takes care not to hire an injured worker. They may consider such a worker to be accident-prone. Or they may know that such a worker could suffer a recurrence that could be costed as a new injury. While

Managing Claims or Caring for Claimants: The effects of the compensation process on the health of injured workers. Montréal: UQAM, 2007.

⁵ Eakin, Joan et al. *Return to Work in Small Workplaces: Sociological Perspective on Workplace Experience with Ontario’s “Early and Safe” Strategy.* Toronto: Institute for Work & Health, Nov. 2002.

⁶ Sir William Meredith was appointed by the Ontario government to enquire into compensation systems and to make recommendations for a system in Ontario. His recommendations laid the basis for the first workers compensation law in Ontario passed in 1915. The principles he established at that time remain fundamental to our system to-day.

unlawful, many job applications ask about a prior workplace injury. Gaps in employment history are also a good clue to employers. There has been little research on this topic, however one study examines the existence of this behaviour and indicates it also heightens the discriminatory hiring practices against the disabled in general.⁷

An Embarrassment

In 2008, the Apr. 5 Toronto Star cover story revealed that the disjoint between experience rating and health and safety was so great that companies who had been heavily fined by the Ministry of Labour due to workplace death, were getting in some cases more than double the money back in rebates from the WSIB/WCB. The Premier was embarrassed. WSIB/WCB Chair Steve Mahoney was caught off guard. Swift action was taken to stop a rebate cheque in the same year as a death.⁸ But nothing was done to prevent the harm to the living injured workers.

Again in 2014, the Toronto Star Nov. 24 cover story headlined: “Dangerous employers get big payouts: Report finds safety board still giving firms rebates despite major violations---years after Star first exposed practice.” The WSIB/WCB simply does not want to stop experience rating. It is a useful tool to get injured workers off benefits. But it has become more and more difficult to justify with exposure of how it works.

Something of a moral crisis

In response to the ongoing call for something to be done about experience rating, the WSIB/WCB appointed pre-eminent labour lawyer scholar Prof. Harry Arthurs to look into the issue along with other funding related issues. In his report “Funding Fairness” (released May 2012), Prof. Arthurs observed that something was amiss in the program and expressed his view that the Board “is confronting something of a moral crisis,” He called on the board to “commit itself to making the changes in its rules, structures and processes necessary to protect workers against claims suppression and other abuses that may occur in the context of experience rating programs” Furthermore he said that if the Board could not achieve this within 12 months of receiving his Report, then it should discontinue the programs (Ch. 6: Employer incentives and Experience Rating). The Board took no steps to make any such changes and in fact extended its existing experience rating program during this period.

⁷ Harcourt, Mark et al. “The Impact of Workers’ Compensation Experience-Rating on Discriminatory Hiring Practices.” *Journal of Economic Issues* 41.3 (2007): 681-699.

⁸ There were a number of articles in the *Toronto Star* on this issue. See for example: “Firms with worker deaths to lose rebates.” 23 Sep. 2008

Employer representatives claim experience rating is a matter of equity.

Some employers argue that the system should treat employers, who put great efforts into establishing safe workplaces, differently from employers with poor safety practices and therefore more injuries

We can support that—but what needs to be measured is the investment in safety. We know that compensation claims statistics are not a reliable indicator of the safety of the working conditions. Through claims management techniques a company can have a ‘claims free’ workplace and still have highly unsafe conditions and many injuries. It may be eligible for a rebate cheque. Similarly, another can have a safe workplace but experience a serious injury e.g. a worker struck by a drunk driver while making a delivery. It may be slapped with a surcharge. That is not equity.

At present employers that get substantial fines for safety infractions from the Ministry of Labour can also get a substantial rebate from the WSIB/WCB under experience rating. That is not equity.

An equitable way to recognize an employer’s commitment to a safe workplace could be thorough an accreditation process that looks at the conditions of work.

Furthermore, experience rating penalises the employer who is most supportive of the injured worker. Experience rating discourages the kind of behaviours that promotes healing and safe return to work. The employer who requires the worker to report to the workplace the day after the injury, regardless of the injury, may get a rebate because of their clean record of no lost-time injuries, while creating a series of safety problems for the injured worker and co-workers. The employer who allows time off to heal and then sets up a graduated return to work program that builds up a claim cost for loss of earnings benefits. This employer may get a surcharge. That is not equity.

In any event, the workers compensation system was not set up as a private insurance company. It was set up on a collective liability system in which employers share the cost of accidents and illnesses and as such are protected from fluctuating and potentially ruinous costs of a claim. Experience rating works against that fundamental safeguard for employers.

In fact, Prof. Arthurs pointed out that it is illegal under the legislation to use experience rating as a means to deliver insurance equity. (“Funding Fairness”, ch. 6).

The WSIB/WCB is determined to keep experience rating despite it all.

Under the pressure to get rid of experience rating, and taking its cue from the employer advocate community, the Board commission yet another study on funding. This time it appointed the prior head of the New Brunswick workers’

compensation system, Mr. Douglas Stanley, former CEO of WorkSafe NB (2000-2010) who recently completed a report on funding for the Manitoba WCB proposing a similar model that was significantly criticized by labour⁹. It was clear from the terms of reference that Mr. Stanley's duty was to construct a funding system that would adopt the employers' equity argument for experience rating. It was so clear that legal clinics, unions, and injured worker organisations had a special meeting with Mr. Stanley to explain why they would be boycotting his enquiry. There was no surprise when Mr. Stanley's report was delivered (Feb. 2014) that a new form of experience rating had been constructed: one that will no longer use rebates and surcharges, but will imbed the function into the rates. Every employer will see their rate fluctuate based on the cost of claims arising from their workers. The Board will use employers as a tool to reduce benefit cost and the harms to injured workers and their families will continue.

How much money is spent on this dubious system?

In the past twenty years well over 3 Billion dollars have been given back to employers in rebates (source: WSIB Annual Report figures).

In the year 2007-2008, the Board spent \$523,000,000 on the experience rating programme. (In the same year it funded expenditures on Ministry of Labour inspection and enforcement at \$90,000,000.)¹⁰

What could we do better?

The Board could use some of that money to support real improvements in workplace health and safety —ONIWG and the OFL have long promoted the establishment of an Excellence Fund. Using some of the money saved by terminating the experience rating programme, funds could be used to provide loans, subsidies and outright grants to employers who fit certain criteria and who are seriously seeking to improve the health and safety of their employees.

And just think: with over 500 million dollars a year to play with, our compensation system could really improve things for injured workers -- no questions asked.¹¹

IT'S TIME TO GET RID OF EXPERIENCE RATING Let Your Voice Be Heard

⁹ Manitoba Federation of Labour. *MFL Response to Morneau Shepell Discussion Paper on the Rate Setting Model by Douglas C. Stanley*. Winnipeg: MFL, 2014.

¹⁰ Institute for Work & Health. *Report to the Expert Advisory Panel Occupational Health and Safety Prevention and Enforcement System. Summary Measures*. Toronto: IWH, 7 June 2010.

¹¹ Remember, employers under the current experience rating programme get their rebates with no questions asked. The programme is blind to the story behind the statistic.