

## **Experience Rating: Prevention of Injuries or Managing Injured Workers?**

When Gordie Heffern died on the job in 2001, Inco was fined \$ 375,000 by Ontario's Ministry of Labour (MOL) for failing to provide adequate training to workers. Yet shortly afterwards the company received \$ 5 million in rebates from Ontario's Workplace Safety and Insurance Board (WSIB) for low injury statistics (Welsh and Bruser). Inco is not alone; over 88 percent of companies receive rebates from WSIB in the same three year-review period that fatalities occur (Kralj 199). The payout amounts in many cases not only neutralize fines received for the fatality, but also provide profits to the firm which leave little incentive to institute workplaces changes necessary to prevent workplace fatalities in the first place. In 2008, responding to one of many criticisms of experience rating, that the WSIB is paying companies sometimes quadruple the penalties levied from health and safety fines, Ontario Premier Dalton McGuinty admitted that the practice was "an embarrassment." Although the WSIB immediately instituted a moratorium to withhold rebates in the year that fatalities occur, the action does not address other shortcomings in the program, therefore "death remains pretty cheap" (Bruser 12).

Handing down fines for health and safety violations in one hand and providing rebates on the other is typical in Ontario's dual approach to making workplaces safer because the system focuses on both prevention and compensation of injuries, illnesses, and occupational disease. However, although Ontario's rebate program, the "New Experimental Experience Rating" (NEER) intends to reward employers that operate safer workplaces, the program has other unintended effects that need to be addressed. NEER causes employers to engage in strategies to lower claim numbers that have little to do with improving workplace safety and also that worsen the situations of injured workers. Ontario needs a balanced approach to effectively prevent and

compensate injuries. Combining financial incentives with new legislative options and enforcement activity will improve workplace safety as well as provide fair treatment for injured workers. Recognizing and addressing system faults means continuing with changes already begun to ensure that, if employers get rewarded, it is for instituting health and safety improvements that can be observed and measured rather than simply managing injured workers.

Laws and regulations, combined with robust enforcement are critical components of Ontario's injury prevention system and should not be overshadowed by financial incentives where decisions about how to manage workplace safety compete against other firm priorities. Ontario's Ministry of Labour leads prevention by enacting and enforcing health and safety regulations through a system of inspections, investigations, and prosecutions. Laws, accompanied by rigorous enforcement, increase the likelihood that employers will invest attention and resources into prevention of injuries, fatalities, and occupational disease.

According to economist Boris Kralj, the probability of health and safety compliance increases with government agency inspections (191). Indeed a KPMG study of 95 employers finds that only 16 percent of employers took voluntary action in an environmental issue, whereas over 90 percent said they would comply with a regulation (Canada 8). Lack of regulatory compulsion and enforcement have horrific consequences. Only four months before twenty Ontarians died from a listeria outbreak from tainted meat in 2008, the Canada Food Safety Agency eliminated a regulation that forced companies to report positive bacterial results (Cribb, 4). Likewise, the deaths of 7 Ontarians and injuries of 2 500 others were attributed to lack of enforcement and privatization of Ontario's water testing standards in the 2000 Walkerton tragedy, where tainted water went unreported to authorities in a small Ontario community because services had been downloaded from the provincial government (CBC 2). Indeed, some employers comply with

laws more than others; the degree of enforcement required for each employer depends on their internal patterns of compliance and awareness.

Employers who voluntarily comply with laws utilize another aspect of the prevention system, self regulation and internal responsibility principles which exist to encourage workplaces to govern their own compliance. According to the theorem of “internal responsibility,” employers and workers are expected to jointly cooperate in addressing workplace hazards. The “internal responsibility system” (IRS) operates through joint health and safety committee (JHSC) meetings, workplace inspections, and recommendations. However, while internal responsibility and self regulation are effective in some workplaces, they lack impact in others. Wayne Lewchuk argues that many JHSCs are powerless and do not function appropriately. Since workers and management each compose half of a JHSC, their attitudes and commitment to health and safety determine how the committee will function. Employers make final decisions about health and safety and often refuse to adopt committee recommendations. According to Lewchuk, self- regulation through internal responsibility only works where management of the firm is committed and applies resources to health and safety (226). Although cost effectiveness of self- regulation and internal responsibility make these options desirable in Ontario, they must be part of a system balanced by laws, rigorous enforcement, and incentive approaches that effect prevention of injuries.

To enhance its prevention/compensation mandate, Ontario utilizes a financial incentive program, the New Experimental Experience Rating (NEER) that aims to improve workplace safety and reduce injuries. Health and safety prevention and workplace injuries are inextricably linked; NEER links the two by providing financial rebates to organizations with low injury statistics and dispensing penalties when levels are above average. Adopted in 1984, NEER is a

scheme in which employers pay premiums to WSIB based on similar rate groups and the WSIB provides benefits to workers who become injured at work. In employer injury claim numbers are below the group average in each year of a three year evaluation period, companies receive a financial rebate to offset their premiums at the end of each period (WSIB). If injury claim numbers are higher than the rate group, employers pay a surcharge in addition to their premiums. Interested in maximizing their profits, employers looking for rebates rather than surcharges strive to reduce their injury statistics.

Although NEER does decrease injury statistics, which helps control cost of the system and acts as a motivator to employers, its link to improving workplace safety is less clear. Kralj points out that NEER engages employers to reduce claims and draws them into the entire issue of workplace injury and preventative safety where they might not have concentrated before (42). Even though no empirical evidence supported success of experience rating strategies when NEER was introduced in 1985, Kralj argues that through moral theory alone the program makes sense (43). NEER also brings horizontal equity to employers in the same rate group. Employers in the same rate group are judged according to their own claim experience, whereas without NEER no incentive exists for poor performers within a rate group to improve because all employers within a rate group pay the same premiums. Although the NEER program exists for important reasons and has good intentions, the program creates many unintended effects that need to be addressed.

Ontario's NEER program contradicts the basis of Ontario's compensation regime that began in 1914 when injured workers were promised fair and just compensation for workplace injuries. Almost a hundred years ago, workers entered into what is known as the "historical compromise," whereby they relinquished their right to sue employers in cases of injury in

exchange for a “just” system of compensation. Prior to this trade-off, workers were forced to sue employers in court for injuries, and the legal process was cumbersome and uncertain for both parties. Employers opposed workers’ claims to compensation on many grounds, including worker fault, assumption that risk comes with the job, and many other grounds (Gunderson and Hyatt 59). Workers often had difficulty winning cases, and if they did win, employers were bankrupted by large awards. Chief Justice Sir William Meredith was instrumental in forming today’s model of a compensation system in his founding report in 1913, creating what was designed to be a no-fault system of compensation in which employers bear the cost of injuries to their workers without the uncertainty of court and the losses of their businesses. In return, compensation was recognized as a worker’s right; workers were guaranteed fair and just compensation for workplace injuries, without labouring in long, expensive court proceedings. Unfortunately, the NEER program unwittingly influences employers into reducing claim numbers in ways not intended by NEER itself or by the original intents of the compensation system.

Reducing workplace injuries is an honourable objective, but the program is flawed; NEER is based upon a false assumption that reducing injury rates creates safer workplaces. If the goal is reducing injuries, providing a safe workplace is only one option for employers—a moral, but often expensive, option. Researchers Campolieti, Hyatt, and Thomason recognize the lack of empirical evidence to show that experience rating acts as an incentive to reduce workplace hazards. Rather, they note that other employer actions dominate possible prevention possibilities. For example, employers engage in claims management strategies, such as excessively disputing claims, or managing less serious claims outside the system so that only the most expensive claims progress through the system (131). Kralj concurs, arguing that firms

decide whether to allocate resources to safety practices or pay costs associated with injury based on economic advantage (45). NEER rebates provide a strong financial reason for firms to manipulate costs related to injuries rather than implement safety measures where effects of preventing injury are not as clearly linked or directly rewarded.

Because NEER provides rewards to employers who lower claim numbers, employers utilize the most cost effective strategies possible to lower their statistics, all of which have negative effects on injured workers. For example, one way to lower claims without any cost at all to the firm is to discourage claims from being filed with WSIB in the first place, either by eliminating reporting through WSIB or by managing minor injuries outside of the WSIB system. Shannon and Lowe note that underreporting of claims is a serious problem to begin with (468). Underreporting injuries provides an added bonus for employers in that it means that the public health system absorbs the costs of injuries not reported to WSIB as opposed to employers paying through premiums they pay into the WSIB plan. In Meredith's time and beyond, employer accountability for costs of workplace injury has always been and is a central premise of Ontario's compensation system, which is not what occurs when workers receive treatment for workplace injuries outside the WSIB system. Alamgir et al argue that workers fail to report injuries for many reasons: discouraging supervisors and co-workers, legal status, job insecurity, odds of having the claim rejected, procedural implications, unawareness of the system, injury not serious enough, and social stigma (444). Not reporting injuries means that workers suffer physically and mentally without support from their injuries and also suffer financially due to lack of benefits. One common strategy employers use to manage claims is to offer prizes or rewards to departments that report the lowest number of injuries. Such contests are mechanisms of claims management aimed at attracting NEER rebates and help reinforce the idea that reporting

injuries is undesirable behaviour and increases the negative effects on workers.

Some employers attract NEER rebates by managing minor injuries outside the WSIB system, by allowing illegal practices, such as workers utilizing company sick leave for injuries or recovering at home with full pay. Both Kralj and Campolieti et al point to such unfortunate post-injury controls acting as unwitting incentives to reduce claims in the WSIB system to enable employers to achieve NEER rebates (Kralj 56; Campolieti et al 139). Even Harvard Law Professor Paul Weiler's report, commissioned in 1983 to explore the merits of a potential experience rating system in Ontario predicted, "a perverse reaction where (sic) the employer would induce the employee to remain on the payroll as so-called, walking wounded, rather than leave the job, apply for benefits, and thus show up on the employer's assessment bill" (qtd. by Hyatt and Kralj 96). Since NEER formulas are linked to claim duration, employers also increase rebate potential by shortening claim duration, even though doing so also negatively impacts injured workers. Employers shorten claim duration by rushing workers back to work too early, often before they are fully healed, which makes workers susceptible to further injuries. Workers may also lose faith in the system, making them less likely to report injuries or become involved with WSIB in the future.

In cases where workers do file claims, employers aggressively contest claims, also negatively affecting workers. Hyatt and Kralj cite excessive claims management as a "secondary effect" of Ontario's experience rating program (96). Hyatt and Kralj argue that experience rated firms are more likely to appeal workers' claims, even in cases where the claim should be accepted (105). In fact, Hyatt and Kralj argue that excessively appealing claims introduces fault back into the system and returns workers and employers back prior to 1914 when both parties argued in court whether injuries were legitimate and should be compensated (105). Successfully

challenging claims at the outset is profitable for employers because the NEER formula attributes claim costs by calculating the expected total costs of the claim rather than actual costs creating exponential advantage (Hyatt and Kralj 106). Injured workers, on the other hand, rather than being free to focus on their recovery from their workplace injuries, are forced instead to struggle to obtain their compensation benefits.

Besides impacting employers' claims management activities, experience rating worsens the overall situation of injured workers because NEER rebates take money out of the compensation system and out of the hands of injured workers. Not only do NEER rebates come out of the "Accident Fund" (WSIB 7), the same fund that pays compensation benefits to injured workers, but employer premiums have fallen cumulatively by 24.7 percent over the last 13 years (Injured Workers Consultants 4). In 1984, just before cost of living adjustments for injured workers became law, the average employer assessment was \$ 2.17. In 1994, premiums were slashed from \$ 3.00 to \$ 2.13 after the same adjustments were cut (Injured Workers Consultants 56). Injured workers are back cap in hand; begging and being treated like frauds is not the fair and just compensation system that Justice Meredith spoke of in 1914. Experience rating means that employers have so much at stake financially regarding injury claims that it leaves less power in the system for workers and injured workers.

In recent years, Ontario has taken steps to improve the current situation through the WSIB moratorium on rebates in fatality years and by focusing some MOL enforcement on hazards rather than always being claims-based. But these changes represent only a fraction of the changes needed to impact workplace safety. In its 2008/2009 strategy, while the MOL proactively visits some workplaces on a hazard basis without regard to claim numbers, much enforcement is still claims driven. This change is a step in the right direction considering that

claims based enforcement sometimes targets the reporting employers, while other employers who hide claims go free of inspection.

The system needs to expand a non-claims based approach to other aspects of the prevention/compensation regime, such as measuring workplace safety by observing actual safety improvements rather than relying upon injury statistics to make that indirect link. For example, if Ontario exchanged the NEER program that provides rebates based on injury statistics for a system that accredited employers for investing in actual health and safety prevention measures, employers would be getting directly rewarded for implementing safety improvements in the workplace rather than for implied initiatives wrought with available short cuts. Indeed, stakeholders in Ontario, such as the MOL, WSIB, employer groups, and labour groups, are currently discussing possibilities of such an accreditation system in Ontario. Such a system would measure employer inputs into a workplace, such as training, implementing engineering controls, safety practices, substitution of hazardous substances, and many other measurable criteria.

Prevention of injuries, fatalities, and occupational disease in the workplace is also related to compliance with laws and regulations. In a 2009 report on experience rating commissioned by the WSIB in 2008, consultant Morneco Sobeco suggests that employers be mandated to disclose workplace practices and declare compliance with both the Occupational Health and Safety Act (OHSA) and Workplace Safety and Insurance Act or face increased surcharges (16). Although Sobeco's recommendation is accurate, for his theory to succeed, Ontario's regulations ought to be updated to reflect hazards in today's workplaces. The change in work from an industrial to service economy means that workers face new hazards, which are not controlled by Ontario's archaic health and safety laws. For example, asbestos regulations of the past need to be

accompanied by new laws compelling employers to prevent workplace violence or reduce ergonomic hazards. Indeed, while over 40 per cent of all WSIB allowed claims are for ergonomic injuries such as repetitive strain injuries or other soft tissue injuries, Ontario lacks specific regulations that describe measures employers should take to prevent these injuries other than a general duty clause that is ineffective in attracting compelling MOL inspector orders.

It is not enough to simply rely on outside parties like the MOL to initiate employer action; Ontario needs to reinforce its self regulation/internal responsibility regime by legislating more training to worker health and safety representatives and addressing unequal power balances between workers and employers in regards to health and safety in the workplace by having a more stringent obligation for employers to address committee recommendations. Currently, the OHSA specifies that only one employer member and one worker member of a committee must receive employer paid certification training (Sec. 9.34). Not only do other members of the committee remain untrained, but existing laws provide no obligation to provide any training at all in workplaces too small to qualify for a committee, those workplaces that operate with only one health and safety representative. Also, the process for a committee to make and the employer to respond to health and safety recommendations needs to be examined and strengthened to ensure that recommendations are meaningfully considered and followed up on. Truly maximizing the potential of the self regulation/internal responsibility regime is more likely if workplace parties are trained in health and safety and have reasonable authority in the workplace.

Authority inside the workplace works in tandem with external factors to effectively reduce injuries in Ontario. Focusing more on workplace prevention in Ontario rather than trying to manage frequency of injury from the compensation side means ensuring adequacy of the

legislative component, promoting strength in the self-regulation regime, as well as utilizing enhancement schemes that actually reinforce health and safety objectives. Such activities reduce workplace injuries as well as make workplaces safer for return of injured employees. Indeed, expending attention and resources to manage outcomes rather than addressing causes has grave implications for successfully managing crises both inside and outside the workplace. Only by balancing focus on inputs as well as outputs can progress truly be made. Not only would injured workers benefit from safer workplaces where they face lower chances of re-injuries, employers would benefit by reducing initial and repeated reports of injury to WSIB, leading to cost savings. In fact, employers could obtain financial rewards from a system that rewards their investments directly into health and safety. Only a balanced system with a strong focus on prevention has a reasonable prospect of actually preventing injuries that truly improve outcomes, and is a better use of society's resources than simply managing injured workers.

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*All opinions contained in this paper are hers and do not necessarily reflect those of OPSEU.*

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