

Experience Rating Working Group

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Consultation Secretariat
Workplace Safety & Insurance Board
200 Front St. W.
Toronto, ON
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Dear Consultation Secretariat:

Re: Rate Framework Policy Consultation

We are writing to provide our submissions to the Rate Framework Policy Consultation. We have participated in every phase of the rate framework consultation, and although the concerns of the worker community with the rate framework continue to be ignored, we feel we must continue to assert our strong, evidence based opposition to the use of claims experience as a proxy for health and safety and the mechanism for rate setting. Our position was most recently outlined in our submissions of October 2015, which we have appended, since they bear repeating.

Our submissions at this juncture will focus on the Temporary Employment Agencies draft policy, with a few comments on the Employer Premium Adjustments and Employer Level Premium Rate Setting Draft Policies.

While we have no comments to make on the Coverage Status draft policy, we do note our disappointment that the WSIB proposed changes to the General Regulation and had them approved by its Board of Directors and the government in December of 2016 in silence and with no opportunity to provide input. In our view, this was a missed opportunity to expand coverage for Ontario workers, and area in which Ontario lags. As you know, Ontario has one of the smallest covered workforces in the country.

Temporary Employment Agencies

The key problem with the Temporary Employment Agencies policy is that it does nothing to further health and safety for temporary workers. It is commonly known that temporary workers are at greater risk of injury, in part because of their unfamiliarity with the workplace and lack of safety training, and in part because they are more likely to be assigned dangerous work as employers seek to protect themselves from the cost consequences of injuries. Because the accident costs of temporary workers are attributed to the claims record of the agency, rather than the client employer, there remains an incentive to use temporary workers to do dangerous work.

The WSIB has been clear throughout the rate framework consultation that in its view, it has the authority to set rates using risk bands under section 83, which reads as follows:

83 (1) The Board may establish experience and merit rating programs to encourage employers to reduce injuries and occupational diseases and to encourage workers' return to work.

The WSIB therefore can use experience rating programs, such as risk banding, only for the purposes of improved health and safety and return to work. While we believe that claims costs are a far better indicator of claims management practices than a reflection of health and safety practices, it is clear that in the case of temporary agencies, there is absolutely no link at all. Since the costs of the injury are attributed to the agency rather than the client employer, there is absolutely no nexus to either legislative objective. The temporary agency has no control over the conditions of work or the worksite, nor does it have any ability to return an injured worker to work at a client employer.

Any number of temporary workers could be injured while working for a client employer, and that employer can retain a clean accident record, and falsely appear to have stellar health and safety practices.

To actually remove the incentive to use temporary workers for more dangerous work, the claims costs must be attributed to the client employer – the employer that actually has control over health and safety practices. The proposed measure of having the temporary agency pay the same base rate as the client employers may increase the cost of using temporary workers, but the fact remains that the use of temporary workers will continue to be a viable way to avoid premium increases, and therefore the incentive to use temporary workers for more dangerous tasks will remain, to the peril of those workers.

It is also notable that temporary agencies generally have small operations and highly portable assets – it is easy to wind them up and reopen under a new business name if their premiums get too high.

The submissions of the Worker's Health and Safety Legal Clinic to this consultation contain a fulsome accounting of the government's attempt to fix this issue with Bill 18 and its subsequent retraction in the final version of that Bill. It is clear, though, from the Minister's statements that it was his intention to fix this issue with the new rate framework. The policy should be revised to fall in line with the legislative intent expressed in Bill 18.

Employer Premium Adjustments

Our concern with the Employer Premium Adjustment policy center on what it excludes: claims suppression and health and safety.

Claims suppression

The policy does contain a sentence on claims suppression, but it appears to only contemplate instances of claims suppression where a claim was not reported at all. As we have indicated in our previous submissions, we are gravely concerned that the new rate framework, with its sole emphasis on claims costs as the driver for premium rates, will further encourage claims suppression and claims management, which are already commonplace. The Board has indicated that it will be relying on its new claims suppression offences to combat this issue. In our experience, one problem is that case managers do not appear to have the ability to recognize when claims suppression may be occurring, even in cases where a worker tells them about it directly. Furthermore, there do not appear to be any policies that address claims suppression aside from the brief reference in the policy at issue.

Our second concern is that there appears to be no contemplation of the vast forms that claims suppression can take, beyond a failure to report. For instance, a worker may be fired ostensibly for unrelated reasons such as absenteeism, when the worker is off due to the injury. This often leads to a stoppage of loss of earnings (if there is any indication modified work may have been provided, but for the termination).

Claims suppression also includes inducing workers back to work too soon (for instance, telling a worker to come in and lie down in the break room), or offering to pay a worker full salary even though they are only working partial hours. These forms of claims suppression can lead to negative consequences for injured workers. The worker who appears to have no wage loss, even though he was only working partial hours, will have a harder time re-establishing loss of earnings benefits if his condition worsens or if the position ends, for instance. Cost suppression is a form of claims suppression, and it needs to be recognized and addressed in the policy.

We sincerely hope that the Board is able to develop an effective and comprehensive strategy to address claims suppression, but it bears repeating that a simpler solution would be to remove the incentive to suppress claims in the first place. That is, set premium rates based on classification and actual health and safety practices rather than claims costs, so that employers are rewarded for promoting safety rather than managing accident costs.

Health and Safety

We understood that the WSIB had undertaken to put some actual health and safety measures into the rate framework, as expressed in Mr. Chris Buckley's letter to Mr. Tom Teahen of August 30, 2017. We are dismayed to see in your interim update of December 21st that the WSIB has no intention of doing this. Instead, the update indicates that

The WSIB is considering revisions to the section of the draft premium rate setting policy that describes the mechanism for greater employer accountability, in order to better articulate the link to health and safety and return to work efforts, while also simplifying the wording of the policy.

This seems to suggest that rather than integrating actual health and safety incentives into the rate framework, the policies will instead be revised to better explain how they are already doing so. As you know, we fundamentally disagree that claims costs are a valid proxy for health and safety, given that they are complicated by claims suppression and claims management practices. The Board's attempt to "better articulate the link" is, frankly, insulting to the worker community and, if this is truly the only action the Board intends to take with respect to adding health and safety, it represents a broken promise.

Employer Level Premium Rate Setting

The section on Traumatic fatalities demonstrates that the true intention of the rate framework is not to improve health and safety but to promote premium rate equity. As you know, premium rate equity is not a permitted purpose under the legislation. If the Board was truly concerned with using the rate framework to promote health and safety, it would attribute a cost equal to the average serious injury claim, which may appear fair from an equity perspective, since the fatality costs significantly less than the serious injury, but it is not fair from a justice perspective, or if the true intention is to promote health and safety. In effect, this policy rewards employers for killing (rather than seriously injuring) workers.

Thank you for staging this consultation and providing this opportunity to reiterate our concerns. We hope you will actually take them into account in revising the rate framework.

Sincerely,
Experience Rating Working Group
per

Laura Lunansky



Submissions to the WSIB Rate Framework Reform Consultation

October 2, 2015

Submitted by the Experience Rating Working Group
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The Experience Rating Working Group was formed in the 1990's and is composed of members of injured workers' groups, labour organizations, legal clinics, and interested individuals. The group's main objective is to expose the adverse affects of the incentive systems used by the Ontario workers' compensation system and to advocate for the discontinuance of experience rating. At the same time, the group has worked on ideas for alternative schemes which would more likely achieve the intended results of the incentive systems – improved health and safety and return to work.

To be blunt, we cannot support any rate scheme that adjusts premium rates for individual employers based on claims costs. This is a further expansion and entrenchment of experience rating and so it will carry with it all of the negative aspects of experience rating. It is bad for workers, and contrary to the fundamental principles of workers' compensation.

No link between claims costs and health and safety

Like any other experience rating initiative, the proposed framework will likely result in lower claims costs. Lower claims costs translate into lower costs to the system, and it is obvious to all concerned that this is the primary focus of WSIB management at present. The question, though, is *how* will the framework result in lower claims costs? The assumption is that experience rated premium rates (risk bands, in this case) will incent employers to improve workplace health and safety. This assumption is unproven.

There is no evidence that the threat of increased premiums incents employers to improve health and safety. In his systemic review of research on prevention incentives, Tompa noted that “with so little evidence, and such imprecise measures, it is difficult to draw robust conclusions about the effectiveness of experience rating”.¹ Alan Clayton put it succinctly:

What is contested is the facile assumption that experience-rated premiums result in action to achieve safer workplaces, that is, a reduction in accidents, injuries and illnesses rather than simply a reduction in claims. Starkly stated, the issue is that if the goal of accident prevention is to be a serious objective of workers' compensation schemes, then experience rated premiums are a very blunt and problematic instrument to achieving this end and may result in other, undesirable effects.²

¹ Emile Tompa, Scott Trevithick, and Chris McLeod (2007). “Systematic review of the prevention incentives of insurance and regulatory mechanisms for occupational health and safety” *Scandinavian Journal of Work and Environmental Health*, 33(2), p.7.

² A. Clayton (2012). “Economic incentives in the prevention and compensation of work injury and illness” in *Policy and practice in health and safety*, 10.1, p.p.40-41.

An earlier study from British Columbia drew similar conclusions. Hyatt and Thompson found that “[n]one of the studies are able to determine whether experience rating results in actual reductions in the frequency and costs of injuries, or whether some claims are either not reported or shifted to other forms of disability insurance.”³

Like the current experience rating programs, the proposed rate framework has no direct link to health and safety. This disconnect between health and safety and experience rating in Ontario has been well documented. The value for money audit of experience rating programs in 2008 noted that employers could receive premium adjustments (rebates) for periods in which they were found to be in violation of the *Occupational Health and Safety Act (OHSA)*.⁴ We note that there is no provision to remedy this inconsistency in the new framework. It will still be possible for employers to receive rewards in the form of lower premium rates (moving to a lower risk band) while violating the OHSA, as long as they can keep claims costs low. The auditors made several recommendations to address the issue, all of which have been ignored to date.

The Framework ignores the Expert Panel and Arthurs recommendations

The Expert Panel on Occupational Health and Safety also recommended taking a step back from the use of claims experience in incenting health and safety.

The panel strongly believes that health and safety incentives should not simply be tied to claims experience. An ideal incentive program should reduce emphasis on measures such as LTI by taking into account OHS practice improvements in the workplace, and reward employers for those improvements.⁵

The Panel recommended that the WSIB “review and revise existing financial incentive programs, with a particular focus on reducing their emphasis on claims costs and frequency”.⁶ The new framework stands in opposition to this recommendation. Although the framework does away with the distinction between lost time and no lost time, it continues and in fact expands the use of claims experience-based incentives. Under the proposed framework, claims experience becomes the main driver of

³ Douglas Hyatt and Terry Thompson (May 1998). *Evidence on the Efficacy of Experience Rating in British Columbia: A report to the Royal Commission on Workers' Compensation in BC*, p.51.

⁴ Momeau Sobeco, *Recommendations for Experience Rating*, October 28, 2008.

⁵ *Expert Advisory Panel on Occupational Health and Safety Report and Recommendations to the Minister of Labour*, December 2010, p.40 http://www.labour.gov.on.ca/english/hs/pdf/eap_report.pdf

⁶ *Ibid.*, at p.41

premium rates for all Schedule I employers. The framework contains no provision to recognize or reward health and safety improvements.

The Ontario government has indicated its intention to implement the Expert Panel recommendations without delay. The proposed rate framework stands in direct opposition to this intention.

Professor Harry Arthurs also urged the WSIB to address the disconnect between occupational health and safety and its experience rating programs. One of his recommendations was that employers found to be in violation of the WSIA or the OHSIA should be ineligible for favourable premium adjustments for up to five years.⁷ As noted, the new framework contains no provision that accounts for this recommendation.

The proposed framework expands experience rating and will exacerbate its negative effects

There is no dispute that the proposed framework is likely to result in lower claims costs. As we indicated at the outset of this submission, the important question is how this will be accomplished. There is substantial evidence that claims costs can and will be reduced through claims management and claims suppression. In fact, the rate framework, with its experience rated premium rates (risk bands) will continue to carry the many detrimental unintended consequences of the experience rating programs we have now. The late esteemed Professor Terence Ison identified the following practices that have been used to reduce claims costs: failing to report injuries; discouraging workers from reporting claims (including threats of dismissal); creating peer group pressure on workers not to make claims through worker safety programs; delaying completing paperwork and omitting relevant information to delay claims processing; and having as many claims as possible classified as medical care only (that is, as no lost time claims).⁸

In our practices, we have observed these tactics time and time again. We have also seen many cases where workers have been terminated, allegedly for non-compensable reasons, or induced to quit through harassment and other tactics. We have also seen instances where workers are given degrading make-work tasks such as sorting different sized ball bearings or different colours of paper with the apparent goal of encouraging the worker to quit in frustration.

⁷ Harry Arthurs (2012) *Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System* (Toronto: Queen's Printer for Ontario).

⁸ Terence G. Ison (1994). *Compensation Systems for Injury and Disease: The Policy Choices*, Butterworths, Toronto, p. 202

Another unintended consequence is the effect of experience rated premiums on hiring practices. A study from New Zealand found a direct relationship between experience rating and discriminatory hiring practices. It concluded that employers proactively manage compensation claims by discriminating against employees with disabilities in the hiring process to try to prevent future claims.⁹ More specifically, they note that

as the premium rate increases, experience-rating provides strong incentives to limit the level of employees' claims by discriminating on the basis of disability.¹⁰

The study shows that employers avoid hiring not just injured workers, but persons with disabilities in general, who are seen as a risk.

In his comprehensive report on funding, Professor Arthurs recognized that claims suppression was almost certainly occurring under the current experience rating system. He called the situation "a moral crisis" and made strong recommendations that the WSIB consider discontinuing the programs:

Unless the WSIB is prepared to aggressively use its existing powers – and hopefully new ones as well – to prevent and punish claims suppression, and unless it is able to vouch for the integrity and efficacy of its experience rating programs, it should not continue to operate them.¹¹

The moral crisis is on course to continue under the risk-adjusted premium bands of the proposed rate framework. As long as premium rates remain tied to claims costs, there will be a strong incentive for employers to reduce costs. The new framework makes this link readily apparent and clear: lower claims costs will equate to lower premium rates. Even well meaning employers are faced with the pressure to keep costs down and remain competitive. We have no doubt that all of the claims management and claims suppression behaviours that currently go on will continue, or even expand under the new framework. The drive to reduce costs will result in discouraging claims reporting, challenging entitlements, and managing workers out of employment through dubious return to work programs.

The WSIB rate framework materials suggest that claims suppression will be abated under the new framework because there will be less volatility in premium rate changes. The thought is that graduated per claim limits and controlled movements between bands from year to year will make rates more predictable. Predictability is good for

⁹ Mark Harcourt, Helen Lam, and Sondra Harcourt (September 2007). "Impact of workers' compensation experience-rating on discriminatory hiring practices" *Journal of Economic Issues*, Vol. XLI no. 3, p. 681 – 699, at p.695

¹⁰ *Ibid.*, at p. 694

¹¹ *Supra* Note 7, p.81.

employers and indeed one of the purposes of the compensation system, but we strongly disagree that this version of predictability will impact claims suppression and claims management practices. What is predictable is that if you report a claim, your rates will increase. As long as claims costs are used to set premium rates, there will be an incentive to reduce claims costs and for many employers, claims costs will be reduced by whatever means necessary.

The automobile insurance rate framework is a clear example of the future of workers' compensation under the proposed rate framework. Everyone knows their insurance rate will increase if they report an accident. Every driver in Ontario has, or knows someone who has, settled an accident by an exchange of money between drivers in return for a promise not to report the accident. This is more problematic in a worker's compensation context because of the power imbalance between the employer, who pays the premium and stands to lose by reporting, and the worker, who stands to suffer a loss if the claim goes unreported.

It is not lost on us that the proposed window for claims costs to be included in the calculation of risk is 6 years, which coincides exactly with the 72 month window in which benefits can be reviewed. This means that employers will have an incentive to contest claims and provide return to work only for so long as the worker's benefits can be reviewed and reduced. An employer could provide highly accommodated work for 72 months at which time, the worker can be terminated with no claim cost repercussions for the employer and no benefit costs to the WSIB. The worker, though, having lost his highly accommodated job will have no benefits and no prospects for finding new employment.

We note that Manitoba has a premium assessment rate framework that is very similar to the one proposed for Ontario, and that claims suppression is regarded to be a widespread concern.¹² A recent review in Manitoba found no connection between the rate framework and the implementation of health and safety programs, and that instead, costs were controlled by measures taken after an accident has occurred, including claims suppression in some cases:

Experience rating systems are more effective in controlling the cost of claims after the injury has occurred through effective disability management programs, and in some cases rewards illegal suppression of claims.¹³

¹² Prism Economics and Analysis (November 2013) *Claims Suppression in the Manitoba Workers Compensation System: Research Report*, Prepared for Manitoba Workers Compensation Board.

¹³ Paul Petrie *Fair Compensation Review A Report to The Minister of Family Services and Labour*, January 30, 2013, p.16.

The Manitoba review also noted that experience rating can contribute to “unsafe workplaces because employers focus limited resources on managing reported claims rather than on prevention”.¹⁴

A recent report on claims suppression prepared for the Manitoba Workers Compensation Board suggests that suppression is fairly commonplace. The report notes that claim suppression largely remains hidden because employers try to hide claims from the start. The report found that six per cent of workplace injuries, about 1,000 workers annually, go unreported due to overt claim suppression tactics by employers. This includes threatening or bullying workers to deter them from filing claims as well as intimidating workers into withdrawing claims after they have been filed.¹⁵

We note that the Ontario Provincial Legislature is also worried about ongoing intimidation and has recently introduced amendments to the WSIA in Bill 109. The proposed amendments will impose and increase fines for some aspects of claims suppression. Unfortunately, as in Manitoba, there is no reason to have confidence that such measures will deter claims suppression—scared workers do not report.

The proposed Rate Framework is inconsistent with the WSIA

Professor Arthurs wrote in his report that “no public agency should act in violation of its own statute and any well-run agency should confirm that its programs are achieving the goals laid out in the statute”.¹⁶ Professor Arthurs was prompted to make this seemingly “obvious” comment by the WSIB’s disregard for the statutory purposes of its experience rating programs – health and safety and return to work. Professor Arthurs recommended that the WSIB discontinue its experience rating programs “forthwith” if it could not confirm that the programs were fulfilling their mandated purposes. He recommended that the WSIB only continue to operate its experience rating programs if

- (a) It declared that the purpose of those programs is solely to encourage employers to reduce injuries and occupational diseases and to encourage workers’ return to work and
- (b) it establishes a credible monitoring process to ensure that it was achieving those purposes.¹⁷

The new rate framework does nothing to further these recommendations or respect the statutory mandate. The current experience rating programs will cease under the framework, since experience rating will be incorporated directly into the rate setting process. The WSIB has been clear that the risk band system is experience rating and

¹⁴ *Ibid.*

¹⁵ *Supra* Note 12.

¹⁶ *Supra* Note 7, P.82.

¹⁷ *Supra* Note 7, p. 81.

falls under the authority of s.83, experience rating, and yet, there is no mention of return to work and only a vague reference to the framework acting as an “early warning system” for employers to address health and safety issues. The materials claim the framework can include health and safety initiatives but there is no description of what these might be or how they would be incorporated. It is obvious that health and safety is nothing more than an afterthought in the proposed framework.

Although the rate framework papers do not speak of insurance equity, this is clearly the main consideration of the proposed scheme. The rate framework papers focus on “risk” as measured by claims costs; there is no provision to measure health and safety risk. However, as Professor Arthurs has stated, “the “risk” metric is not the same as the “claims costs” metric usually associated with insurance equity.”¹⁸ Risk must encompass more than just the risk of financial consequences under the WSIA.

The WSIB has been advised by one of Canada’s preeminent legal scholars, Professor Harry Arthurs that it does not have a statutory mandate to use experience rating for insurance equity purposes. And yet, this is exactly what the new framework proposes to do.

Injured workers are more than a financial risk

As noted, the proposed framework is based on a conception of risk that has been narrowly defined as the risk of costing money to the system. This is inconsistent with the broader purposes of the legislation, which are to promote health and safety, to facilitate return to work, and to provide compensation and other benefits to workers. What about the risk to health and safety? The risk of job loss due to illegal claims management practices?

The framework in fact contains no provisions to protect workers against the broader risks that are inherent in any system that relies on a claims cost metric: “if motivation for behavioural change is heightened, so too is the risk of abuse; and if the risk of abuse is heightened, so too must be the effectiveness of regulation to deter it, to punish it and to repair its negative consequences.”¹⁹ As noted, the framework contains no such provisions to deter, punish or repair abuses, and even if it did, the efficacy would be questionable.

The mental health risk

It is important to note, too, that many of the behaviours that are incited by experience rating have significant negative consequences for workers. Research shows that routine claims management practices such as questioning work relatedness or the level of

¹⁸ *Supra* Note 7, p.61-62.

¹⁹ *Supra* Note 7, p.63.

disability adversely affect the mental health of injured workers in the Ontario workers compensation system. A recent cross-sectional telephone survey of Ontario injured workers examined mental health status. The data suggest that becoming a WSIB claimant leads to mental health problems and/or significantly exacerbates existing mental health problems.²⁰ Another study showed that questioning the legitimacy of the injured worker can lead to mental health consequences such as stress, anxiety, and anger in the injured worker.²¹ Instead of providing a nurturing and supportive environment where recovery occurs, claims management interactions may create ill health and exacerbate emotional stressors, in many cases promoting the development of psychological disease secondary to physical injury. These mental health consequences will continue to occur if the proposed rate framework is implemented.

The 'exceptions that prove the rule': long latency occupational diseases, fatalities, and temporary agency workers

Fatalities

Long latency diseases, fatal claims, and temporary agency workers –all three of these special circumstances exemplify the disconnect between the claims costs metric and actual health and safety. The most flagrant example is that of fatal injuries. As is well known, it is far cheaper to kill than to maim; that is, the claims costs associated with a workplace fatality can be extremely small. Fatalities represent a very small risk to the compensation system, although they can and usually do reveal a very high risk to health and safety. If risk is defined as purely a financial risk, as the framework proposes to do, then it would make sense to adopt the Ontario Chamber of Commerce's recommendation to just 'roll' the cost of fatalities into the plan as is. Of course, this has highly unpalatable consequences: it seems obscene that an employer who kills a worker should pay a lower premium than other employers in its group.

One alternative is to attribute a cost to fatalities, as is done in Manitoba, and as is done with the current fatal claims premium adjustment policy. Under that policy, the WSIB increases the cost of an employer's premium to an amount equal to any rebate they would have been eligible to receive in the year of a fatality. The limits of this are obvious – firstly, it applies only to the year of the fatality, whereas the costs of other accidents can span many years. Second, there is evidence to suggest that the fatal claim policy has been applied on a discretionary basis.²² The Workplace Safety and Insurance

²⁰ F. O'Hagan, P. Ballantyne, and P. Viennau (2012) "Mental Health Status of Ontario Injured Workers With Permanent Impairments," 2 *Canadian Journal of Public Health* 103(4), pp.303-8.

²¹ Kilgour, Kosny, McKenzie, Collie (March 2015) "Interactions Between Injured Workers and Insurers in Workers' Compensation Systems: A Systematic Review of Qualitative Research Literature" *Journal of Occupational Rehabilitation*, 25(1), pp 160-181.

²² Joel Schwartz (2014) "Rewarding Offenders: Report on how Ontario's workplace safety system rewards employers despite workplace deaths and injuries." Ontario Federation of Labour.

Appeals Tribunal (WSIAT) has recently held that the policy does not permit such discretion in the application of the premium adjustment.²³ The use of this discretion, illegal as it may be, means that there have been no cost consequences to employers for at least some worker fatalities.

The recent WSIAT decision noted above illustrates the moral bankruptcy of claims cost-based premiums. In that case, the employer was convicted under the OHS Act for failing to ensure overhead guarding was in place. The OHS Act fines totaled \$375,000. The employer appealed the WSIB's application of the fatal claim policy which had the effect of rescinding its experience rating rebate of about \$1 million. The WSIAT has not yet issued a final decision on the matter and it is possible that the decision will stand, but in any case, something is fundamentally wrong with a system that would provide a \$1 million refund to an employer who fails to take the minimal safety precaution of guarding its machinery. Yet this exact situation could occur under the proposed framework, which has no direct incentive to improve health and safety. An employer who chooses to pay a claims management firm to address claims that have already happened could very well pay less than an employer who invests that money in machine guarding and other safety initiatives instead.

Long latency occupational diseases

Long latency occupational disease cases also illustrate the deficiency of using claims cost-based premium adjustments. The WSIB has proposed to exclude long latency diseases from the cost record of individual employers because it is often impossible to know which employer is responsible. This is not always the case - where a worker has worked for one employer with known exposures over his entire work-life, the responsible employer is fairly clear. In any case, the exclusion of these disease cases makes possible a situation where a handful of employers with inferior safety practices are responsible for the majority of the claims, and the cost of those claims, but all employers in the group would pay equally.

If premium adjustments were made based on health and safety practices, though, the result could be different. Employers who invested in better health and safety equipment, those who adopted higher safety standards, or similar initiatives, would pay less, irrespective of actual claims costs. Safer employers would be compensated directly for their efforts.

Temporary Agencies

The final exception is perhaps the starkest example of the limits of claims cost-based premium adjustments: temporary agencies. When a temporary agency employee is injured while working at a client employer, under the proposed framework, the costs of

²³ *Decision No. 2346/12 12*

that claim affect the temporary agency's premium rate. The temporary agency has no control over the conditions of work at the client employer. There is no way for any shift in risk bands to "act as an early warning sign" for the temporary agency to remediate health and safety conditions because it has no control over the conditions that require remediation. It is unlikely that the temporary agency will "pass on its costs" to the client employer. Under the current system, and with s.84 of the WSIA, temp agencies could pass on costs but they don't because it is bad for business. What they do, and what they would continue to do under the proposed framework is manage claims. Temporary agencies can and will aggressively object to entitlement decisions, and they can and likely will find a way to terminate the worker, or give him make-work projects.

The proposed claims premium structure actually makes work more dangerous for many temporary workers. This type of cost structure creates an incentive for employers to contract their more dangerous jobs out to temporary workers since there will be no effect on their premium rates if the temp worker is injured. Research has found that temporary workers have a high risk of injury.²⁴

In 2008, the Toronto Star reported on a "loophole" that allowed companies with histories of serious work accidents to maintain good experience rating records by employing temporary workers.²⁵ The employers used poorly trained temp workers to do dangerous jobs, or took inadequate safety precautions, but because the temp workers were not their employees, the accidents did not show up on their claims records and the employers continued to receive rebates. If we substitute "lower risk band" or "lower premium" for "rebate", the same scenarios recounted in the Toronto Star article could, and likely will, continue under the proposed framework.

All of these cases – temporary agencies, long latency diseases, and fatalities – show the perils of claims cost-adjusted premiums and the fundamental disconnect between claims costs and health and safety. These perils cannot be repaired by creating exceptions for temp agencies, or fatal claims, or long latency diseases; instead, the solution is to abandon the use of claims costs as the metric for rate setting.

An alternative approach

We agree with the Board's proposal to use NAICS categories for classification, and we agree that the system would benefit from fewer groups or classes of employers, which is in accordance with the collective liability principle. As we have made clear, what we disagree with is the use of claims costs as the metric for risk-adjusted premium rates.

²⁴ See for instance, E. MacEachen et al. (2012) "Workers' compensation experience-rating rules and the danger to workers' safety in the temporary work agency sector" *Policy and Practice in Health and Safety* 10.1, p.77.

²⁵ David Bruser "Hiding injuries rewards companies" The Toronto Star, May 29, 2008.

Measure genuine indicators of health and safety

We suggest instead that “risk” be measured by actual health and safety leading indicators rather than claims costs. Leading indicators shift the focus to prevention rather than dealing with the costs of a claim after the accident has happened. The recently developed Institute for Work and Health leading indicator tool, for example, could be used to determine risk.²⁶

Proactive inspections with penalties have also been found to reduce the frequency and severity of work injuries, and could also be used as a risk indicator.²⁷ Workwell used to be a strong and genuine health and safety tool, and we strongly support the reinstatement of penalties in Workwell to restore its effectiveness. Consider the auto insurance example. Your rates will stay the same if you drive over the speed limit, but they will go up if you are caught speeding by the police and found guilty of an offence. This is the inspection with a penalty.

To best facilitate return to work, we have long suggested that the WSIB support accommodations and tools tailored to the worker, what we have termed the “backpack”. With this approach, the worker would carry with him/her tools or funds to support his/her integration to work. For instance, the WSIB could fund a sit-stand desk that the worker could take with him or her if s/he changed jobs. We have also attached our vision for an “excellence fund” as an appendix to this document.

We don’t pretend to have all of the answers on what an alternative scheme should look like. Instead, we suggest investing some of the cost savings from the dismantling of the current experience rating programs in a research study aimed at finding a solid health and safety based alternative. Part of these savings could also be used to fund a cost analysis of the administrative cost savings of using a collective liability system rather than a risk banded system. It is possible that the savings would be significant enough to warrant abandoning the risk band approach.

Classification changes can lead to full coverage

Finally, we must comment on the potential that the rate framework has for expanding coverage in Ontario. The proposed use of the NAICS system and the necessary regulatory amendments that this shift will entail open the door to making coverage universal for all workers in Ontario. As we know, the Ontario workforce has one of the lowest rates of coverage in all of Canada, and expanding coverage could have a positive affect on premium rates.²⁸

²⁶ Institute for Work and Health (2015) “IWH leading indicator tool wins over advocates across Canada”

²⁷ Institute for Work and Health (2015) “Inspections with penalties linked to lower injuries: IWH review”

²⁸ *Supra* Note 7.

Full coverage would also increase fairness and equity for employers, in line with current WSIB values. It would be fairer to have all employers pay into the WSIB system which in part funds prevention for all Ontario workplaces.

The NAICS system contains the necessary structure to easily extend coverage to all employers and warrants further consideration.

Recommendations and Conclusions

Our recommendations are:

1. Dismantle the current experience rating programs without delay.
2. Abandon the “risk adjusted premium rate” aspect of the rate framework, or use actual health and safety indicators, rather than claims costs as the metric of risk.
3. Further study into alternative approaches, including health and safety indicators.
4. Reinstate penalties in Workwell audits.

Ontario’s workers’ compensation system was intended to be a no-fault system where the total cost of the system was shared by all employers. Adjusting premium rates based on claims experience re-introduces fault into the system, and fosters an adversarial process that the no-fault system was designed to eliminate. It also undermines the collective liability of employers by tying individual employer costs with individual employer claims records.

The proposed rate framework conceptualizes the injured worker as a “risk to the system”. Implementing such a framework will result in the absurdity of making the WSIB an institution which instead of protecting the worker, as intended, turns that worker into a risk from which the institution now seeks protection.

As stated at the outset, we will not support any rate setting model that uses claims costs as the metric for establishing premium rates.

We propose the Excellence Fund to allow the Board and employers to go forward with prevention and accommodation promoting timely and safe return to work (RTW). Funding for the Excellence Program would be transferred from all annual expenditures from the current experience rating program.

The Excellence Fund is set up as a merit system or incentive program which would:

1. Offer grants/loans to employers who want to make real health and safety improvements beyond their obligation under the *Occupational Health and Safety Act*. For example, the addition of patient lifts in health care facilities or the replacement of toxins with safe substances in the workplace. In order to qualify for a grant the employer must undergo an extensive audit by the Board through an accreditation process. The Joint Health and Safety Committee would be involved in the accreditation process. For purposes of the audit employers would be required to record all lost time injuries and no lost time injuries and incident reports. Employers passing accreditation will be publicly recognized. ie. ISO Banner. If an employer fails audit the Board and the Ontario government would not purchase any goods or services from them. Grants would be amortized over a reasonable period.
2. Give grants to employers to modify the workplace to accommodate an injured worker. This could be the accident employer or a new employer willing to hire an injured worker.
3. An employer may be given a prospective rate discount if accreditation is passed and no grant had been awarded during the deemed amortization period of the grant. Rate discounts will be adjusted through regular or spot audits. Audits could be triggered through a Ministry of Labour (MOL) enforcement action and would allow the Board to apply an administrative penalty which would go to the Excellence Fund.
4. Entitlement to grants for employers who modify the workplace to accommodate an injured worker move with the injured worker on RTW i.e. with the accident employer and/or a subsequent employer. Compensation for loss of earnings should resume in the event of job loss by the accommodated injured worker, which could be adjusted on the merits of the individual case.