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REWARDING OFFENDERS

REPORT ON HOW ONTARIO'S WORKPLACE
SAFETY SYSTEM REWARDS EMPLOYERS
DESPITE WORKPLACE DEATHS & INJURIES





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The Ontario Federation of Labour (OFL) represents 54 unions and one million workers. It is Canada's largest provincial labour federation.

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EXECUTIVE SUMMARY

Ontario's Workplace Safety and Insurance Board (WSIB) is rebating millions of dollars each year to companies that have been found guilty of offences that resulted in employees being killed in workplace accidents.

Over the three year period between 2011 and 2013, 135 employers who had been convicted of offences under the Occupational Health and Safety Act (OHSA) were granted rebates on their premiums by the WSIB.

Astonishingly, 78 of the 135 (almost 58%) received nearly \$15 million in rebates in the very same year they had committed their offences. In many of these cases, the rebates received by the companies exceeded the fine they were levied as a result of their conviction.

The figures were derived from a comparison of the WSIB's experience rating data obtained under Ontario's *Freedom of Information and Protection of Privacy Act*, and publicly available Ministry of Labour Court Bulletins for convictions under the *Occupational Health and Safety Act*.

Many troubling examples emerge from this research. For example, the WSIB paid Goldcorp a net rebate of \$2.7 million for 2013, two years after a 57-year old electrician was

killed when he was run over by a scoop tram. Goldcorp pleaded guilty to failing to implement procedures to alert equipment operators about workers in the area and was fined only \$350,000 – a figure seven times smaller than the \$2.7 million rebate it got back from the WSIB a year later.

The WSIB's controversial experience rating system is supposed to promote workplace health and safety outcomes using insurance premium surcharges and rebates. Under these programs, employers get rebates or surcharges on their premiums depending on the cost of workers' compensation benefits paid to their workers and, sometimes, the number of benefit claims. Proponents of experience rating believe that employers incur surcharges because of poor health and safety performance, or are rewarded with rebates for good performance. The result, they claim, should be improved health and safety for Ontario workers.

But experts who have studied experience rating point to the lack of evidence supporting health and safety benefits. Indeed, experience rating undermines the WSIB's health and safety mandate because it provides incentives for employers to suppress claims instead of reporting injuries, ignore occupational-related illnesses, and promote the contracting out of dangerous work. As noted here, the Board's experience rating programs undermine the enforcement of occupational health and safety laws by rebating employers who have committed offences. The message this sends to employers is that reducing their claims costs is more important than complying with occupational health and safety laws.

This is not a new problem. In 2007, a landmark study by the Ontario Federation of Labour raised serious concerns about the WSIB's experience rating programs. The study, *The Perils of Experience Rating: Exposed!*, demonstrated that companies guilty of offences resulting in employees' injury and even death were receiving rebates through the WSIB's experience rating program.

In response, then Premier Dalton McGuinty declared the matter "an embarrassment," and former Chair of the WSIB Board, Steven Mahoney, acknowledged, that this practice of rebating employers convicted of occupational health and safety offences "means we're paying their fines." The Board promised changes, but there is no evidence of progress.

A government-initiated 2012 funding review by Professor Harry Arthurs, declared that the WSIB was facing a moral crisis over experience rating programs, and "has failed to take adequate steps to forestall or punish illegal claims suppression practices." Arthurs

said that if the WSIB did not make changes within 30 months, experience rating should be scrapped.

The WSIB's experience rating system is wasting resources that could be used for more effective health and safety programs.

The WSIB issues premium rebates totaling much more than the amount collects in surcharges, an amount that is described as the "off-balance." The Board estimated the off-balance to be \$80 million for 2013 and projects at over \$100 million for 2014. In the first half of this year, the off-balance was \$59 million. Over the years, the off-balance has been enormous: from 1994-2009 the off-balance cost the workers' compensation system over \$2.5 billion.

It is difficult to overstate the importance of occupational health and safety. Hundreds of Ontario workers die every year because of work-related traumatic accidents or diseases. In 2013, at least 243 workers died because of traumatic workplace accidents (102) and occupational diseases (141). Tens of thousands more are injured, although the statistics on this are likely unreliable.

Recommendation 1:

The WSIB should be subject to regular oversight by a body with expertise and the clout to hold it accountable.

Recommendation 2:

The WSIB should scrap its experience rating system in all its forms and the resulting savings should be reinvested into workplace health and safety, as well as compensation for injured workers and their families.

INTRODUCTION

On April 27, 2013, a worker at the Home Depot in Bradford, Ontario was struck in the head by a pallet of patio doors. The pallet had tipped and fallen off of an overhead rack that was about 11 feet high. The worker was left with head injuries, paralysis and broken bones.

Home Depot had improperly installed the overhead rack. The rack was installed a foot higher than it was designed for and it was missing a supporting beam, making it impossible to store the pallet at that height. Home Depot pleaded guilty to not safely storing the pallet, a breach of regulations under the *Occupational Health and Safety Act*. A justice of the peace fined Home Depot \$90,000.^{1,2}

Later that same year, the Workplace Safety and Insurance Board gave Home Depot a rebate of \$2,530,238.53 on its premiums.³ This

**HOME
DEPOT**
RECEIVES REWARD
28 TIMES GREATER
THAN PENALTY
AFTER WORKER
WAS SERIOUSLY
INJURED

FINE: \$90 K

REBATE: \$2,5 MILLION

- 1 The information about this offence and the fine is from a Court Bulletin dated July 22, 2014 and posted on the Ministry of Labour's website at <http://www.labour.gov.on.ca/english/news/courtbulletins.php>. The descriptions of the other offences described in this paper are all taken from such Court Bulletins.
- 2 *Occupational Health and Safety Act* fines are subject to a 25% surcharge as required under the *Provincial Offences Act*.
- 3 These figures are based on data provided by the

rebate was issued under one of the WSIB's "experience rating" programs. Under these programs, the premiums each employer pays increases or decreases depending on the cost of workers' compensation benefits paid to its workers. Experience rating programs are supposed to incent employers to improve workplace health and safety.

This research report shows that Home Depot is one of many employers who committed occupational health and safety offences while continuing to receive rebates from the WSIB. According to data provided by the WSIB and cross-referenced with Ministry of Labour press releases, the WSIB gave rebates to 78 employers in the same year that they committed serious occupational health and safety offences.⁴ The rebates given to these employers in the same year they committed occupational health and safety offences totals almost 15 million dollars. [See pages 21-30 for the findings of this report.]

This is not a new issue. The WSIB has been aware that it is rebating employers that committed occupational health and safety offences for years. This was first made public in a 2007 OFL report, *The Perils of Experience Rating: Exposed!*, which described several cases where employers had been convicted of serious offences where workers were killed and maimed, but received large rebates from the WSIB.⁵ At the time, Premier Dalton McGuinty

called this "an embarrassment," while the WSIB acknowledged the problem and promised changes.

But the only change that the WSIB made was to create policy allowing it to refuse a rebate to an employer in the same year that one of its workers was killed in a work-related accident. It is not clear whether and how the WSIB applies this policy. And the policy is narrow: employers can still be entitled to refunds in the years after committing offences, or if the offence they committed results in workers being maimed or put at serious risk of injury, instead of being killed.

The WSIB is in the midst of revamping its experience rating program. But instead of addressing the disconnect between its incentive programs and the enforcement of occupational health and safety laws, the WSIB's proposed system would further entrench a system that bases premium rates on claims costs. Employers that have broken health and safety laws would still be entitled to reduced premiums if they are able to minimize the cost of their employees' workers' compensation claims.

78

employers
were
rebated

\$15M

by WSIB in
the same
year a worker
was killed or
maimed

Workplace Safety and Insurance Board to the IAVGO Community Legal Clinic in response to requests under the *Freedom of Information and Protection of Privacy Act*.

- 4 As will be discussed below, the WSIB also gave many convicted employers rebates in the years after the offence as well.
- 5 Ontario Federation of Labour, *The Perils of*

Experience Rating: Exposed!, October 2007, online at <http://ofl.ca/wp-content/uploads/2007.01.01-Report-ExperienceRating.pdf>

BACKGROUND

The Importance of Occupational Health and Safety

It is difficult to overstate the importance of occupational health and safety. In its recently released “Integrated Health and Safety Strategy”, the Ministry of Labour describes society’s obligations and responsibilities for occupational health and safety:

At the most fundamental level, society has a moral obligation to ensure proper conditions in workplaces to allow workers to return home unharmed. We also have a responsibility to help ensure all workers in the province are able to experience the benefits of a healthy and safe work environment, which extend into all aspects of their lives.⁶

Despite this moral obligation, hundreds of Ontario workers die every year because of work-related traumatic accidents or diseases. In 2013, for example, at least 243 workers died because of traumatic workplace accidents (102) and occupational diseases (141).⁷ Tens of

thousands more are injured every year.⁸

This situation is unacceptable. It points to both a continuing lack of political will to address health and safety and a troubling cultural acceptance of workplace accidents and deaths.

243
**workers killed
in work-related
accidents or
diseases in 2013**

6 Ontario Ministry of Labour, *Healthy and Safe Ontario Workplaces: A Strategy for Transforming Occupational Health and Safety*, December 2013 at p. 7. Online at: <http://www.labour.gov.on.ca/english/hs/pdf/strategy.pdf>

7 Ontario Ministry of Labour, *Occupational Health and Safety in Ontario, 2013-2014 Annual Report*, pp.35, 37. These numbers probably underestimate the true number of deaths from occupational diseases for two reasons. First, they only reflect the 70-72% of

employers covered by the workers’ compensation system. Second, these figures represent claims that the WSIB has allowed. The WSIB’s denial decisions may have been incorrect and may be overturned on appeal.

8 The WSIB’s statistics suggest that there were 41, 987 lost-time injuries (injuries that result in the worker missing work.) These figures are likely unreliable because of claim suppression, where employers directly and indirectly misreport or discourage reporting of injuries. Claim suppression is discussed further on pages 12 to 14.

The Ministry of Labour and Enforcement of the *Occupational Health and Safety Act*

The enforcement of the *Occupational Health and Safety Act* (OHSA)⁹ and its regulations is a key part of Ontario's system for preventing workplace illness and injury. The purpose of OHSA is to reduce workplace accidents.¹⁰ OHSA and its regulations create rights for workers and set out the minimum safety standards by which workplace parties must abide. OHSA establishes procedures for dealing with workplace hazards and provides for enforcement of the law where compliance has not been achieved voluntarily.

The Ministry of Labour enforces OHSA by inspecting workplaces, issuing orders, and prosecuting occupational health and safety offences. A person who has been convicted

The fine “must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere license for illegal activity.”

9 *Occupational Health and Safety Act*, RSO 1990, c .O.1. (OHSA)

10 *R. v. Ellis-Don Ltd.* (C.A.), 1990 CanLII 6968 (ON CA), <<http://canlii.ca/t/g1376>> retrieved on 2014-09-12

may be fined up to \$25,000 and imprisoned for up to 12 months; a corporation may be fined up to \$500,000.¹¹

The main purpose of these fines is to deter others from committing occupational health and safety offences. The amount of the fine varies depending on the size of the company involved, the scope of the economic activity in issue, and the extent of actual and potential harm to the public. But these factors are weighed and the fine determined in relation to “the need to enforce regulatory standards by deterrence.”¹² The fine “must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere licence fee for illegal activity.”¹³

The convictions and penalties for OHSA offences are one of the most effective means of promoting health and safety. One recent systematic review of research studies found “strong evidence that the experience of actually being cited or penalized was associated with a reduction in injuries.”¹⁴ No other form of incentive or regulatory mechanism was found to be as well-supported by the evidence.¹⁵

Enforcement of the OHSA is not just about punishment and deterrence – it is “a vital element of a comprehensive approach to setting and supporting societal behaviour and

11 OSHA, ss. 66(1) and (2).

12 *R v. Cotton Felts*, [1982] OJ No 178 (QL).

13 *ibid.*

14 E. Tompa et. al., *Systematic review of the prevention incentives of insurance and regulatory mechanisms for occupational health and safety*, Scand J Work Environ Health 2007; 33(2): 85-95, p. 90.

15 *ibid.*

norms.”¹⁶ Put otherwise, OHSA enforcement is a critical part of developing a health and safety culture in Ontario.

The WSIB’s Role in Ontario’s Prevention System

Since the mid-1960s, the WSIB has had a role in promoting occupational health and safety.¹⁷ From 1998-2011, the WSIB was responsible for the provincial government’s efforts to prevent workplace accidents.¹⁸

In 2011, following the recommendations of the Expert Advisory Panel on Occupational Health and Safety, some of the WSIB’s prevention mandate was transferred to the Chief Prevention Officer. The Chief Prevention Officer now has a number of responsibilities including:

- establishing a provincial occupational health and safety strategy;
- providing the minister with an annual report on the performance of Ontario’s occupational health and safety system;
- promoting the alignment of prevention activities across all workplace health and safety system partners (including the WSIB);
- providing advice on preventing occupational injuries and illnesses; and

- advising on proposed changes for the funding and delivery of prevention services.¹⁹

Despite the shift of these responsibilities to the Chief Prevention Officer, the WSIB still has a key role in promoting workplace health and safety. Indeed, this remains the first of four purposes listed in the *Workplace Safety and Insurance Act*.²⁰ The WSIB is supposed to use its incentive programs to fulfill these responsibilities: the *Act* permits the WSIB to establish experience rating and merit rating programs to “reduce injuries and occupational diseases and to encourage workers’ return to work.”²¹

The WSIB has committed to work with the Ministry of Labour and the Chief Prevention Officer to promote healthy and safe workplaces.²²

The WSIB also funds most of Ontario’s occupational health and safety system including the Office of the Worker Adviser, the Office of the Employer Adviser, the Institute for Work and Health, the Workers’ Health and Safety Centre, four Safe Workplace Associations, Occupational Health Clinic for Ontario Workers and the prevention-related activities of the Ministry of Labour – including the enforcement of occupational health and safety legislation.

16 Expert Advisory Panel on Occupational Health and Safety, *Report and Recommendations to the Minister of Labour*, online at http://www.labour.gov.on.ca/english/hs/pdf/eap_report.pdf, p.13.

17 Expert Advisory Panel Report, pp.14-15.

18 *ibid.*

19 *OHSA*, s. 22.3.

20 *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Sch A, s.1.

21 *ibid.*, Sch A, s. 83(l).

22 WSIB, 2012-2016 Strategic Plan 2014 Update, online at: <http://www.wsibstrategicplan.ca/pillar-1.html>

The Workers' Compensation System and Experience Rating

The Historic Compromise and the Meredith Principles

Ontario's workers' compensation system has its roots in a report issued by Sir William Meredith in 1913.²³ This report sets out what has become widely-known as the "historic compromise": workers gave up their right to sue employers for workplace injuries, and, in return, were supposed to be entitled to promptly-paid benefits for as long as any work-related disability lasts. For their part, employers get protection against lawsuits for workplace injuries and predictable costs.

Sir Meredith recommended a workers' compensation system based on the following principles:

- **No Fault:** The worker should not need to prove that the accident was the employer's fault.
- **Non-Adversarial:** The system should be administered as an inquiry-based system to determine the worker's need for compensation, not an adversarial battle to assign blame.
- **Compensation for as Long as Disability Lasts:** Every injured worker should be able to depend on security of benefits based on his or her lost wages. The injured worker should not be forced to become a financial burden on their family or the community.
- **Employer Pays:** Employers should pay the costs of the system, because they can pass those costs on to others, including their customers and other employees.

²³ Sir Meredith's report is available online at: http://www.injuredworkersonline.org/Documents/Meredith_report.pdf

Meredith's Historic Compromise:

Workers gave up their right to sue employers for workplace injuries for the promise of promptly paid benefits for as long as any work-related disability lasts.

- **Collective Liability:** Employers should pay into a single accident fund and should not suffer financial consequences from the cost of a specific accident.
- **Independent Public Agency:** The workers' compensation system should be administered by a non-partisan public agency.²⁴

In 1914, these principles were enshrined into law and the "Workmen's Compensation WSIB" was created. A much-changed workers' compensation system continues on today, but the Meredith principles remain at its foundation.²⁵

²⁴ For an excellent discussion of these principles see Robert Storey, "The Meredith Principles – Economic or Humanitarian", Submissions to the WSIB Funding Review Commission, April 18, 2011 online at http://www.injuredworkersonline.org/Documents/WSIBFR_Storey_Submission_Apr_2011.pdf

²⁵ These principles are described differently by the WSIB and often not observed. See, for example, the description of the Meredith principles in the WSIB's Framework for Policy Development and Renewal,

The Purpose of the WSIB

The WSIB administers Ontario's workers' compensation system. It maintains an accident fund to cover the cost of benefits and services to injured workers and to the families of workers killed on the job. It determines how much each employer contributes to the accident fund. The WSIB is also the initial decision maker on all issues about injured worker claims for compensation.

As the administrative agency responsible for administering the workers' compensation system, the WSIB is bound to promote the purposes of the *Workplace Safety and Insurance Act*, 1997. Those purposes are to accomplish the following objectives in a "financially responsible and accountable manner":

1. To promote health and safety in workplaces.
2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.
4. To provide compensation and other benefits to workers and to the survivors of deceased workers.²⁶

The *Act* requires the WSIB to "evaluate the consequences of any proposed changes in

online at <http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdex/~edisp/wsib011411.pdf> at p.3.

26 *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Sch A, s.1.

benefits, services, programs and policies to ensure that the purposes of the *Act* are achieved."²⁷

The Funding of Ontario's Workers' Compensation System

The WSIB is funded by employer premiums. The vast majority of the funding comes from what are known as "Schedule 1" employers. Schedule 1 employers include almost every employer subject to workers' compensation in Ontario.

Within Schedule 1, the WSIB groups employers into classification units based on their type of business. Employers with distinct business activities may have different classifications for each activity.²⁸

The WSIB divides classification units into rate groups based on similar expected claims costs and rates of injury and illness. Each year, the WSIB sets premium rates for each rate group according to the group's injury and illness record and claims costs. Rate groups that have higher risks for injury and illness are charged higher premiums.

Around half of Schedule 1 employers are also experience rated. This means that they are given rebates or surcharges depending on claims costs and sometimes also the frequency of injuries. Rebates and surcharges can amount to millions of dollars for some employers.

27 *ibid*, s. 161(2). If the WSIB conducts such reviews, they are not generally made public.

28 WSIB, Operation Policy Manual Document No. 14-01-01, *The Classification Scheme*, January 2, 2014.

The Origins of Experience Rating in Ontario

The current incarnation of experience rating has its roots in two reports on the workers' compensation system by Professor Paul Weiler in the early 1980s, *Reshaping Workers' Compensation for Ontario and Protecting the Worker from Disability: Challenges for the Eighties*.²⁹ Weiler recommended that the WSIB adopt a system of experience rating because of its potential to incent safety and improved return to work practices.

Weiler acknowledged that there is no "irrefutable scientific proof" of experience rating's effectiveness.³⁰ To fill the gaps in the evidence, he relied on "an intuitively plausible assumption" that claims cost incentives promote investment in health and safety.³¹ Weiler admitted that experience rating may have undesirable effects because some employers would unduly emphasize claims costs instead of accident frequency. This, he acknowledged, could lead to employers hiding claims or fighting legitimate claims. But Weiler contended that the net benefit would favour experience rating. Indeed, he claimed that "this is the key contribution the compensation program can make to prevention."³²

From the outset, there were criticisms of Weiler's "intuitively plausible assumption." Professor Terence G. Ison, for example, offered

There is no "irrefutable scientific proof"

Paul C. Weiler, the architect of today's experience rating, relied on an "intuitively plausible assumption."

a detailed critique of this assumption.³³ Ison rejected the proposition that it was common sense that experience rating promoted occupational health and safety; he noted that "some of the finest minds that have been devoted to this subject and that have spent years of contemplation on the value of experience rating have recommended against it."³⁴ He then gave several reasons why experience rating was problematic, and undermines health and safety, including:

- it provides incentives for employers to suppress claims instead of reporting injuries;
- it does not do anything for occupational diseases, which often have long latency periods, and thus employers are incented to reduce claims costs instead of preventing disease; and
- it creates an incentive for employers to contract out dangerous work to companies who may not be capable or willing to perform the work safely.³⁵

29 Paul C. Weiler, *Reshaping Workers' Compensation for Ontario*, November, 1980, and *Protecting the Worker from Disability: Challenges for the Eighties*, April, 1983.

30 *ibid*, p.115.

31 *ibid*, p.116.

32 *ibid*, p.128.

33 Terence G. Ison, *A Commentary by Terence G. Ison on the Report Entitled "Reshaping Workers' Compensation in Ontario" by Paul C. Weiler, February 1981 at pp.68-75.*

34 *ibid*, p.69.

35 *ibid*, p.69-72.

The WSIB's Experience Rating Programs

A few months after Weiler submitted *Protecting the Worker from Disability*, the WSIB introduced two of its three experience rating programs, known as NEER and CAD-7.³⁶ These programs remain in effect along with a third program known as MAP.

NEER, which stands for “New Experiential Experience Rating Plan,”³⁷ applies to all non-construction employers that pay more than \$25,000 each year in annual premiums. This includes a significant majority of employers subject to experience rating.

Under NEER, employers are entitled to rebates or surcharges depending on a complicated formula based on their claims cost-experience in the four previous years each September 30.

The second program, CAD-7, applies to employers in the construction industry with more than \$25,000 annual premiums.³⁸ Under CAD-7, which stands for “Council Amended Draft-7,” rebates and surcharges are based on both cost-experience for five years and accident frequency for the previous two years.

The third program, MAP or the “Merit Adjusted Premium Program”, applies to employers that pay more than \$1000 dollars but less than \$25,000 in premiums each year.³⁸ Instead of surcharges and rebates, employers in the MAP program have their premiums adjusted up or down depending on the number of claims costing over \$500, the number of claims that have cost more than \$5,000 and the number of claims involving a worker’s death in the three previous years.

The WSIB also created three merit rating programs but they apply to far fewer employers, are voluntary and have far less effect on employer premiums than experience rating.³⁹

36 WSIB, *Chronology and History of WSIB's Incentive Programs*, Prepared January, 2011 at p.2.

37 WSIB Operational Policy Document No. 13-02-02, NEER (*New Experimental Experience Rating Plan*) July 15, 2011. The WSIB's policies are available online at: <http://www.wsib.on.ca/WSIBPortal/faces/WSIBManualLandingPage>.

38 WSIB Operational Policy Document No. 13-02-04, *Merit Adjusted Premium Program*, October 12, 2004.

39 WSIB Operational Policy Manual Document No. 13-01-02, *Workwell Program*, January 25, 2010; WSIB Operational Policy Manual Document No. 13-01-03, *The Safety Groups Program*, January 3, 2007; and WSIB Operational Policy Manual Document No. 13-02-08, *Safe Communities Incentive Program - Revised (2002 and later entrants)*, October 12, 2004.

The Financial Costs of Experience Rating

Experience rating drains millions of dollars out of the workers' compensation system every year. For many years the WSIB's experience rating programs have had an "off-balance". The off-balance is the amount by which all of the rebates the WSIB issued exceed surcharges. This off-balance costs the WSIB tens of millions of dollars every year. It was \$80 million for 2013⁴⁰ and projects at over \$100 million for 2014.⁴¹ In the first half of 2014, the off-balance was \$59 million.⁴²

Over the years, the off-balance has been enormous: from 1994-2009 the off-balance cost the workers' compensation system over \$2.5 billion.⁴³

There are also costs of administering the experience rating programs. The off-balance does not include the costs involved in issuing rebates, collecting surcharges, determining the amounts of rebates and surcharges, appeals at both the WSIB and the Tribunal about the amount of rebates or surcharges, and increased litigation around injured worker benefits.

40 WSIB, *Fourth Quarter 2014 Report to Stakeholders*, April 14, 2014, p.12.

41 Douglas Stanley, *Pricing Fairness: A Deliverable Framework for Fairly Allocating WSIB Insurance Costs*, February 2014 (available on the WSIB's website) at p.20.

42 Workplace Safety and Insurance Board, *Second Quarter 2014 Report to Stakeholders*, September 18, 2014, at p.6.

43 Harry Arthurs, *Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System*, online at: <http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdex/~edisp/wsib011358.pdf> at p. 76.

The Hidden Costs of Experience Rating

The financial costs associated with the WSIB's experience rating program are only part of the total cost of experience rating. There are less-quantifiable but equally significant costs associated with experience rating – and these costs are almost always borne by injured workers, their families, and eventually, the general public through various forms of social assistance.

\$100M

**The amount by which
WSIB rebates are
projected to exceed
surcharges for 2014**

These costs arise because experience rating incents employers to suppress and "manage" claims. Claim suppression is when an employer hinders or discourages reporting of a workplace accident or injury. This suppression may include stated or implied threats, or be more subtle, like when an employer offers to (illegally) continue a worker's wages instead of reporting an accident. Claim suppression may result in injuries not being reported at all, or to reporting that understates the extent of lost time or the severity of the worker's injury.

The result of claim suppression is that workers and employers don't report their injuries, or their claims are filed late, often with incomplete information, and are thus

more likely to be denied or be considered out of time. Injured workers and their families are forced to bear most of the costs of their injuries, except those which are passed on to the public through income supports, such as Ontario Works and the Ontario Disability Support Program, and through OHIP.

Claim suppression is usually either subtle or hidden, so it is difficult to know exactly how often it happens. A WSIB-funded study recently conservatively estimates that employers do not

Claim Suppression:
when an employer hinders or discourages reporting of a workplace accident or injury

Claims Management:
when an employer aggressively fights injured workers' claims so as to limit claims costs

report 8% of work-related injuries or illnesses and misreport whether the worker lost time because of the injury in between 3-10% of cases.⁴⁴ There is reason to believe claim suppression is more widespread: the WSIB's estimates seem very low to those of us who regularly work with injured workers.

Nonetheless, the WSIB has failed to take meaningful action on claim suppression. Indeed, in a recent funding review of the

⁴⁴ Prismic Economics and Analysis, *Workplace Injury Claim Suppression Study: Final Report*, 2013 at p.3.

WSIB, Professor Harry Arthurs described the WSIB's failure to address claim suppression as a "moral crisis."⁴⁵ He recommended that the WSIB commit to making the changes necessary to protect workers against claim suppression and other abuses related to its experience rating programs. For Professor Arthurs, this moral crisis was so significant that he recommended that the WSIB make this commitment within 12 months of his report and discontinue the program if it failed to fulfill the commitment within 30 months.⁴⁶ He wrote:

In my view, the WSIB is confronting something of a moral crisis. It maintains an experience rating system under which some employers have almost certainly been suppressing claims; it has been warned – not only by workers but by consultants and researchers – that abuses are likely occurring. But, despite these warnings, the WSIB has failed to take adequate steps to forestall or punish illegal claims suppression practices. In order to rectify the situation, the WSIB must now commit itself to remedial measures that might otherwise require more compelling justification. Unless the WSIB is prepared to aggressively use its existing powers [...] 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.⁴⁷

Claims management is similarly costly. This is when employers take an adversarial approach towards injured workers' claims so as to limit claims costs and it may include accusing injured workers of malingering or exaggerating their symptoms, appealing meritorious claims,

⁴⁵ *Funding Fairness*, p.81.

⁴⁶ *Funding Fairness*, p.86. The 12 and 30 month deadlines have passed and the WSIB has not followed either recommendation.

⁴⁷ *Ibid*, p.81.

hiring private investigators to surveil injured workers, withholding supportive evidence, pressuring injured workers to return back to modified work before they are ready, assigning the worker to meaningless and demeaning jobs, and terminating injured workers' employment once further claims costs would no longer affect their premiums.



The WSIB has failed to take adequate steps to forestall or punish illegal claims suppression practices.

- Prof. Harry Arthurs

Claims management makes the workers' compensation system become adversarial, undermining the Meredith principles and denying injured workers the support they need at the very time they are most vulnerable. Instead of helping injured workers, the frequent challenges to the validity of their claims stigmatize and marginalize them, often further undermining their health.⁴⁸ There is also evidence that claims management extends to hiring practices: employers may avoid hiring disabled workers because of misguided fears that they are more likely to be injured on the job and increase premium costs.⁴⁹

48 K. Lippel, "Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems", *International Journal of Law and Psychiatry* (1999) 22:5-6

49 M. Harcourt, H. Lam. and S. Harcourt., "The impact of workers' compensation experience-rating on discriminatory hiring practices", *Journal of Economic Issues* (2007) 41 (3): 681-699.

The Effects of Experience Rating on Occupational Health and Safety

Even though the current form of experience rating has been widely-used in Ontario for three decades and in many other jurisdictions in North America, Australia and New Zealand, there is still, at best, only modest evidence that it reduces accidents.⁵⁰ Even the studies that found some support for this proposition acknowledge that experience rating likely creates incentives for claim suppression, so this evidence may not be reliable.⁵¹

Advocates of experience rating sometimes point to the declining numbers of lost-time injuries as evidence that the WSIB's incentive programs are working. Indeed, even the WSIB sometimes adopts this argument.⁵² But this just shows correlation, not causation. There are other more plausible explanations of this decline: greater awareness of health and safety issues, new work practices, changes in industry mix moving from higher-risk manufacturing and resource companies to lower risk service industries, and underreporting because of experience rating.

50 *Funding Fairness*, p.81.

51 *Funding Fairness*, p.82; D. E. Hyatt and T. Thomason, "Evidence in the Efficacy of Experience Rating in British Columbia: A Report to the Royal Commission on Workers' Compensation in BC" May 1998. Online: <http://www.qp.gov.bc.ca/rcwc/research/hyatt-thomason-experience.pdf>.

52 See for example, the WSIB's infographic "That was then, this is now" at <http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdi3/~edisp/wsib027058.pdf>.

In fact, experience rating has become so discredited as a means of promoting health and safety that Ontario's Expert Advisory Panel on Occupational Health and Safety recommended that the WSIB review and revise its financial incentive programs "with a particular focus on reducing their emphasis on claims cost and frequency."⁵³ The Expert Advisory Panel, comprised of academic experts, labour representatives and employers, indicated that it "strongly believes that financial incentives should not simply be tied to claims experience."⁵⁴

An employer's claims costs are a poor indicator of its investment in occupational health and safety. Many other factors drive an employer's claims costs including: its workers' susceptibility to injury or resilience, the extent of the injury, the costs of healthcare, the WSIB's handling of claims, the availability of modified work, the worker's vocational characteristics, and the labour market.

In Ontario, the evidence shows that claims cost incentives don't provide an effective incentive for accident prevention.⁵⁵ This isn't surprising: claims cost incentives are far less significant than other indirect costs of injury (lost production, costs of recruitment and training etc.)⁵⁶ These indirect costs will have usually already provided the incentive for the employer

53 *Expert Advisory Panel Report*, p.40.

54 *ibid.*

55 E. Tompa et. al, "Financial incentives in workers' compensation: an analysis of the experience-rating programme in Ontario", Canada. Policy and Practice in Health and Safety, 2012; 10(1):117-137 at p.135.

56 A. Clayton, "Economic incentives in the prevention and compensation of work injury and illness," Policy and Practice in Health and Safety (2012) 10.1,27 at pp.387-38.

to invest in health and safety to the extent that it makes sense. Often further investment would be more difficult or more expensive than claims management.⁵⁷

Experience rating also makes important indicators of health and safety performance unreliable. Put simply, if employers are hiding or misreporting injuries, then we cannot rely on the figures we have for workplace accidents and lost-time injuries. This makes it more difficult to measure health and safety performance and to know whether policy initiatives have been effective.

Unless the WSIB is prepared to aggressively use its existing powers [...] 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.

- Prof. Harry Arthurs

Perhaps the most troubling is the fact that experience rating sometimes rewards employers who have endangered their workers by violating occupational health and safety laws. As will be discussed below, these rebates are often far larger than the fine the employer

57 T.G. Ison, "The Significance of Experience Rating." Osgoode Hall Law Journal 24.4 (1986):723-742 at pp.727-729. See also D. Smith, "Turning the Tide: Renewing Workers' Compensation in Manitoba" (Canadian Centre for Policy Alternatives, 2002) at p.20.

has to pay for breaking the law. This sends a message to employers: in Ontario, reducing claims costs is more important than complying with minimum standards of occupational health and safety.

It is difficult to disagree with research lawyer Alan Clayton's conclusion:

... 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.⁵⁸

The WSIB is Put on Notice: The Perils of Experience Rating: Exposed!

The disconnect between experience rating rebates and occupational health and safety law enforcement was publicly exposed in October 2007, when the OFL published *The Perils of Experience Rating: Exposed!* This report detailed examples where the WSIB had paid large rebates to employers who had committed serious occupational health and safety offences. It then goes on to ask:

If the theory of experience rating programs is to encourage investment in health and safety, why are so many employers with a history of serious violations and convictions rewarded with significant rebates?

If employers can obtain significant rebates from a seriously flawed experience rating scheme, what incentive is there for them to invest and promote good health and safety practices?⁵⁹

58 A. Clayton, "Economic incentives in the prevention and compensation of work injury and illness," *Policy and Practice in Health and Safety* (2012) 10.1, 27 at pp.43-4.

59 *Perils of Experience Rating*, p.3.

Why are so many employers with a history of serious violations and convictions rewarded with significant rebates?

- 2007 OFL Report

Following the release of *The Perils of Experience Rating: Exposed!*, *The Toronto Star* published a series of articles on experience rating, including an article called "When companies get rewarded for mistakes."⁶⁰ The article quotes then-Chair of the WSIB, Steven Mahoney, who acknowledged "When you see people getting rebates when they have obviously fallen down through fatalities or (safety) convictions, that doesn't jive." He admitted that this practice of rebating employers convicted of occupational health and safety offences "means we're paying their fines."

Even Premier McGuinty was on the defensive about the WSIB effectively paying the fines of employers convicted of occupational health and safety offences. He acknowledged that this practice was "a bit of an embarrassment." He emphasized that this issue would be addressed: "I think we're all in sync in terms

60 D. Bruser and M. Welsh, "When Companies Get Rewarded for Mistakes," *The Toronto Star*, April 5, 2008 online at: http://www.thestar.com/news/investigations/2008/04/05/when_companies_get_rewarded_for_mistakes.html

of the recent developments and our shared understanding of something that's been taking place, which is simply not acceptable." He assured the public that:

Certainly our government believes we need to make some real changes here ... there is a strong consensus that has developed around this issue and I know there are going to be some changes. Changes in terms of the policy.⁶¹

A bit of an embarrassment

- Premier Dalton McGuinty on WSIB experience rating scandal

The WSIB's Response

In response to the issues raised in *The Perils of Experience Rating: Exposed!*, the WSIB adopted a "Fatal Claim Premium Adjustment" policy that allowed it to increase premiums to offset any rebate for an employer in the same year that one of its employees was killed.⁶²

The policy suggests that this premium adjustment is applied automatically. It says that "[i]n the year of a traumatic fatality claim, a premium increase, equivalent to the NEER or CAD 7 refund an employer is entitled to receive, is applied to the employer of the deceased worker."

61 R. Benzie and M. Welsh, "WSIB rebate embarrassing, premier says," *The Toronto Star*, April 10, 2008.

62 WSIB Operational Policy Manual Document No. 14-02-17, *Fatal Claim Premium Adjustment*, June 13, 2008.

In practice though, it appears that the WSIB exercises discretion as to whether it applies the fatal claim adjustment. Although not detailed in the policy, it appears that these decisions are made by a "Validation Unit," presumably composed of WSIB staff. The standard that the Validation Unit applies to determine whether to apply the adjustment to an employer is not clear. In some communications – including the policy – the WSIB says the premium adjustment would be applied unless there are exceptional circumstances.⁶³ Other WSIB documents suggest that the Validation Unit reviews the circumstances surrounding traumatic fatalities to determine if "sufficient" precautions were taken to prevent incidents or unsafe conditions were present.⁶⁴

We're paying the fines.

- WSIB Chair Steve Mahoney 

Relatively recent rumours suggest that the WSIB will not apply the policy unless the Ministry of Labour prosecutes the employer.⁶⁵

63 See for example the WSIB's mailout: Important Information About Your Experience Rating Program, June 2008, online at: <http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdey/~edisp/wsib012130.pdf>

64 WSIB Website: "Incentive Programs: Overview", accessed September 7, 2014.

65 The Liversidge e-letter, April 4, 2013 at p.3. Online at <http://liversidge.com/Portals/0/eLetters/The%20Liversidge%20e-Letter%2020130404%20WSIB%20Fatal%20Claim%20Policy%20has%20to%20go%20-%20Part%202.pdf>

WSIB documents also suggest that the Validation Unit was “to immediately begin to review workplaces to ensure the link between experience rating rebates and real performance in health and safety.”⁶⁶ Other than auditing employers who had traumatic fatalities, it is not clear what, this Validation Unit has done. Certainly there have been no policy changes (other than the Fatal Claim Premium Adjustment policy) that would allow the WSIB to adjust rebates for employers with poor health and safety performance.

The Morneau Sobeco Audit Recommends Further Action

In the wake of *The Perils of Experience Rating: Exposed!*, the WSIB announced a value-for-money audit of its experience rating system. The audit was conducted by consulting company Morneau Sobeco (now Morneau Shepell). In its report issued in October 2008, Morneau Sobeco raised concerns about what is described as a “disconnect” between the experience rating program and occupational health and safety enforcement which allowed the WSIB to rebate employers who had violated OHS. The report notes:

It is clear that legislation (Workplace Safety and Insurance Act), which is intended to prevent injuries, illnesses and fatalities in workplaces and to financially compensate workers for injury or disease occurring by virtue of their employment, and legislation (Occupational

Health and Safety Act and the Canada Labour Code), which are intended to protect and promote worker health and safety, must work together for real improvements in prevention and return to work to be achieved.⁶⁷

Morneau Sobeco made several recommendations to address this disconnect:

Recommendations

(Short Term)

A conviction would result in an audit by the Validation Unit. Possible outcomes would be:

- The employer would need to address the reasons for the conviction, where possible, and make changes to meet a minimum score on the audit before receiving a refund.
- A portion, or all, of the refund would be used to make improvements in the area where a shortfall exists.
- An employer in a surcharge position would need to meet minimum audit requirements to avoid increased penalties.

Considerations

(Long Term)

- As an alternative for convictions, the WSIB could consider withholding refunds in the year of a conviction and possibly in the next year or two.
- Unpaid refunds could be set aside in a prevention/return-to-work fund, for example an Excellence Fund, to be used to finance investments to improve outcomes where most needed.⁶⁸

The WSIB did not implement these recommendations. As far as can be discerned from the WSIB’s website, the Validation Unit only audits companies to determine whether

66 WSIB, Experience Rating Q&A, (undated) and letter dated February 27, 2009 from Stephen W. Mahoney, online at <http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdey/~edisp/wsib012132.pdf> and <http://www.wsib.on.ca/cs/groups/public/documents/staticfile/c2li/mdey/~edisp/wsib012203.pdf>.

67 Morneau Sobeco, *Recommendations for Experience Rating*, October 28, 2008, p.10.

68 *ibid*, pp.16-17.

to apply the Fatal Claim Premium Adjustment Policy where a worker was killed on the job. There are few implications for employers convicted of serious offences that did not result in death but may have caused serious injuries or put workers at risk. Yet the WSIB still rebates employers in the same year and the years following a conviction for an occupational health and safety offence.

The Arthurs Funding Review Brings Strong Recommendations for Action

Recommendations to address the disconnect between experience rating and occupational health and safety continued to roll in. As mentioned above, in 2010 the Expert Advisory Panel recommended that the WSIB move away from claims experience-based incentives.

May 2012 saw the release of yet another report urging the WSIB to take stronger measures to ensure that its experience rating program was not at odds with occupational health and safety enforcement. This time, the recommendation was from Professor Harry Arthurs, who had been appointed by the provincial government to do a funding review of the WSIB, including its incentive programs. Professor Arthurs recommended that:

Employers found to have violated the WSIA or other occupational health and safety legislation should be automatically ineligible for favourable premium adjustments or rate rebates, for at least one year and for any additional period up to five years ...⁶⁹

69 *Funding Fairness*, p.84.

Professor Arthurs was also critical of the WSIB for its lack of emphasis on occupational health and safety in its NEER program. In material produced by the WSIB, it claimed that NEER was about “insurance equity”, not health and safety.⁷⁰ That, however, was contrary to the purposes of experience rating permitted under the WSIA, which are to encourage injured workers’ return to work and reducing

No public agency should act in violation of its own statute.



- Prof. Harry Arthurs

injuries and occupational disease.⁷¹ Professor Arthurs challenged the WSIB to either acknowledge that experience rating cannot be about insurance equity and must promote its mandated objectives, and if the WSIB failed to do so “NEER should be discontinued forthwith.”⁷²

Professor Arthurs also recommended that the WSIB continue to operate its experience rating programs “if, and only if” (a) it declared that the purpose of those programs is solely

70 *ibid*, p.82.

71 *ibid*, p.62 and 82.

72 *ibid*, p.82.

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.⁷³

The reason for this recommendation was "obvious": "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 that statute."⁷⁴

The WSIB has not followed these recommendations.

73 *ibid*, p.81.

74 *ibid*, p.82.

FINDINGS

Given the WSIB's limited response to the problems highlighted in *The Perils of Experience Rating: Exposed!*, it should not be surprising that it continues to pay rebates to employers who have committed occupational health and safety offences.

Our research shows that the WSIB still pays rebates to many employers:

- in the same year they committed an offence resulting in a worker's death;
- in the years immediately after they committed an offence that resulted in a worker's death or serious injury;
- in the same year that they committed an offence that seriously injured workers;
- in the same year that they committed offence related to unsafe working conditions; and
- in the same year they were convicted of an occupational health and safety offence.

The WSIB Still Rebates Employers in the Years Workers are Killed

The data the WSIB provided suggests that it still gives rebates to employers in the same year that workers are killed on the job. Here are some examples:

Sherritt Int. Corp.

\$932K rebate

\$285K fine

- ***Sherritt International Corporation:*** Sherritt got a net rebate⁷⁵ of \$932,209.22 for 2008, the same year that it committed an offence that resulted in the death of 22-year-old worker. The worker, who had only been hired six weeks earlier, was stationed directly in front of a tunnel used to move muck. The tunnel overflowed with muck and the worker was smothered. Sherritt was later convicted of several offences and fined \$285,000.

⁷⁵ A net rebate is the sum of the rebates and surcharges that the employer got from the WSIB in that year for each of its accounts.

For 2008, the WSIB issued a surcharge of \$40,540.84 for Sherritt's Mineral Products Divisions, but this was dwarfed by huge rebates to other aspects of Sherritt's operations. The result is that the net rebate was more than three times the amount of the fine that Sherritt paid for its occupational health and safety offences.

- **Sifto Canada Corp:** The WSIB gave Sifto Canada Corp. a net rebate of \$675,101.27 in 2009 – the same year it committed an offence that resulted in a worker's death. The worker, a 57-year-old grandfather, was pulled into an unguarded grate towards a conveyor belt and was buried in salt. Sifto later pleaded guilty to an offence and was fined \$140,000 – less than ¼ of the net rebate it received from the WSIB that year.

Metro Ontario Inc.

\$828K rebate
\$350K fine

- **Metro Ontario Inc.:** In 2009, a 17-year-old high school student was killed at a Metro Ontario Inc. retail location after falling through a drop ceiling. Metro pleaded guilty to failing to ensure that a guardrail was in place to prevent workers from accessing the drop ceiling and was fined \$350,000.

That same year Metro got a net rebate of \$827,524.57 from the WSIB.

Enbridge Gas Dist.

\$302K rebate
\$150K fine

- **Enbridge Gas Distribution Ltd.:** The WSIB paid Enbridge a rebate of \$302,478.49 in 2011. That fall, one of Enbridge's employees was killed in an accident when the sit-down lawnmower he was using rolled over while he was on it. The mower's seatbelt could not be fastened and its roll-over protective structure was secured so that it could not protect him.

Enbridge pleaded guilty for failing to ensure the seatbelt was properly maintained and was fined \$150,000, less than half of the rebate it got from the WSIB.

Sifto Canada Corp.

\$675K rebate
\$140K fine

The WSIB is Still Rebating Employers in the Years Following a Worker's Death

The fatal claim premium adjustment applies only to the year of the fatality. This means that employers can still get rebates in the years following the year that the worker was killed – indeed, an employer can even get a rebate in the same year that it pleads guilty or is convicted of an offence related to the death. As the past Chair noted, this means the WSIB is effectively paying these employer's fines.

Here are some cases where employers got huge rebates in the years after committing OHSA offences that resulted in worker deaths:

Goldcorp Canada

\$2.7M rebate
\$350K fine

- *Goldcorp Canada Ltd.*: The WSIB paid Goldcorp a net rebate of \$2,656,912.80 for 2013, two years after a 57-year old electrician was killed at one of its mines. The electrician was run over by a scoop tram and Goldcorp pleaded guilty to failing to implement procedures to alert equipment operators about workers in the area.

In 2012, Goldcorp pleaded guilty and was fined \$350,000 – a figure dwarfed by the two-and-a-half plus million dollars it got back from the WSIB a year later.

Lafarge Canada Inc.

\$1.3M rebate
over 3yrs
\$350K fine

- *Lafarge Canada Inc.*: The WSIB paid Lafarge a net rebate totalling \$1,308,767.82 in the three years following the 2008 death of a 34-year-old worker who was crushed when a 400-kilogram rig that was being used improperly fell on him.

Lafarge pleaded guilty to an occupational health and safety offence and was fined \$350,000.

Triple M Metals

\$927K rebate
over 2yrs
\$225K fines

- *Triple M Metals*: In 2009, a worker at Triple M Metals was killed after being trapped in a metal shredder. Triple M Metals was fined \$150,000 for failing to properly equip the shredder to protect workers.

In 2010, another worker suffered second and third degree burns after using a welding torch to cut a railcar coupling. The coupling contained a cylinder of

hydraulic fluids that escaped and ignited. Triple M pleaded guilty to failing to take the reasonable precaution of having a safe procedure to ensure that objects being cut contained no hazardous materials. It was fined \$75,000.

But rebates from the WSIB for 2011 and 2012 totalling \$926,909.76 surely softened the blow to Triple M Metals.

The WSIB Gives Rebates to Employers that Committed Offences that Resulted in Serious Injuries:

The Fatal Claim Premium Adjustment policy doesn't address cases where employers have been responsible for accidents that resulted in workers suffering serious injuries. Apparently the WSIB has decided that is okay to pay employers whose irresponsible and illegal behaviour led to a worker being maimed, rather than killed.

Iron Mountain Canada

\$287K rebate
\$90K fine

For example:

- *Iron Mountain Canada:* In 2012, a worker at Iron Mountain Canada lost an arm when clearing out a jam from a conveyor. Iron Mountain pleaded guilty to failing to ensure that the conveyor

was properly equipped with safety equipment. It was fined \$90,000.

Iko Industries Ltd.

\$184K rebate
\$60K fine

The WSIB gave Iron Mountain a net rebate of \$286,381.07 that same year.

- *Iko Industries Ltd.:* A worker at IKO Industries suffered third-degree burns to his hand, which had been pulled into a machine and exposed to hot tar. IKO Industries pleaded guilty to not having the proper safety equipment on the machine and was fined \$60,000.

In 2011, the same year as the injury,

Arcelormittal Dofasco Inc.

\$3M rebate
\$100K fine

the WSIB gave Iko Industries a rebate of \$184,151.69.

- *Arcelormittal Dofasco Inc.:* In 2009, a worker at Arcelormittal Dofasco was seriously injured while helping to change a crane hook block. The worker's lanyard was caught by the crane's motor drive

shaft, and the worker was pulled into the motor. The crane's motor drive shaft was not protected by a guard.

Arcelormittal Dofasco plead guilty to failing to ensure that a machine that has moving parts that may endanger a worker is equipped with a guard or other device which prevents access to moving parts. The fine was \$100,000.

Cimco Refrigeration

\$167K rebate

\$90K fine

But that same year, Arcelormittal Dofaso Inc. received a rebate of \$3,014,900.34.

- **Cimco Refrigeration:** The company received a net rebate of \$167,057.84 in 2009, the same year it was fined \$90,000 for a violation of OHSA when a worker who was standing on a ladder made contact with an energized control panel. The worker fell from the ladder and suffered severe head injuries and electrical burns. The power supply control panel was not disconnected from the power supply, locked out, or tagged.

The WSIB Still Rebates Employers Who Have Been Convicted for Unsafe Work Practices

The WSIB has paid rebates to employers that have been convicted for failing to protect workers against exposure to well-known carcinogens like asbestos. As a result of the WSIB's experience rating system that focuses on claims costs instead of workplace health and safety, such employers can get rebates even in the same year they commit such offences or are fined by the courts.

For example:

Pembroke Regional Hospital Inc.

\$42K rebate

\$167K fine

- **Pembroke Regional Hospital Inc.:** Pembroke Regional Hospital was fined for two incidents in 2011 and 2012 of failing to protect its maintenance workers against asbestos exposure. The Hospital had instructed the maintenance workers to perform work with power tools on asbestos-containing materials with no protective equipment. The supervisor who assigned the work didn't have the knowledge, training or experience to identify the hazards in the workplace or take the proper protective measures.

The Hospital pleaded guilty and was fined \$60,000. But most of this fine was pre-paid by WSIB rebates of \$2,244.18 in 2011 and \$40,040.79 in 2012 – the same years the Hospital put its maintenance workers at risk.

David J. Cupido Construction Ltd.

\$67K rebate
over 3yrs
\$52K fine

- **David J. Cupido Construction Limited:** David J. Cupido Construction Limited pleaded guilty of failing to take the reasonable precaution of checking for asbestos in a building it had been hired to renovate. As a result, in May 2007, workers discovered the asbestos after they started working on the renovations. David J. Cupido Construction plead guilty for not taking every precaution reasonable in the circumstances for the protection of workers and was fined \$52,000.

But this fine was offset by rebates from the WSIB each year from 2006 through 2008 totalling almost \$67,000. In 2007, the same year that David J. Cupido's workers were exposed to the asbestos, the WSIB paid it \$22,377.82.

Under MAP, the WSIB Gives Premium to Employers That Broke Occupational Health and Safety Laws:

The fatal claim premium adjustment policy does not apply to employers covered under MAP.

Westario Power Inc.

10% premium
reduction
\$110K fine

- **Westario Power Inc.:** On September 21, 2010, a worker was killed when replacing a damaged insulator at a power plant substation. Workers had tried to de-energize the equipment at the substation, but weren't successful. The worker came into contact with energized equipment and was electrocuted. Westario Power was found to have failed to provide workers the information they needed to de-energize the equipment. It pleaded guilty to failing to provide the information they needed to perform their work in a safe manner. It was fined \$110,000.

The WSIB gave Westario Power a 10% reduction on its premiums for 2010.

King Roofing & Aluminum Contractors

6&7% premium reductions
\$100K fines

- King Roofing & Aluminum Contractors Inc.:** On August 11, 2008, a worker was carrying a bucket of hot tar on a roof that King Roofing was replacing. The worker accidentally stepped off the roof and fell to the ground. The bucket of tar overturned and spilled on the worker. The worker had broken bones and third-degree burns.

The Ministry of Labour investigated and found that there was no form of fall protection at the project. The worker had no training in fall protection and was not wearing appropriate clothing for work with hot tar. King Roofing was fined \$90,000 and the owner/supervisor was fined \$10,000.

The WSIB gave King Roofing a 6% premium reduction in 2008 and another 7% reduction in 2009.

We are not talking about a few isolated cases. We examined the data for employers convicted from 2011-2013. 135 employers that participated in NEER or CAD-7 were convicted of offences. 78 (almost 58%) of those employers received rebates in the year that they committed offences. 69 (almost 51%) of those employers received rebates in the year they were convicted. The following tables show this broken down by year of conviction:

TABLE 1
OF NEER AND CAD-7 EMPLOYERS THAT RECEIVED REBATES IN YEAR OF OFFENCE⁷⁶

YEAR OF CONVICTION	# OF CONVICTED EMPLOYERS IN NEER OR CAD-7	# OF CONVICTED EMPLOYERS GIVEN REBATES IN YEAR OF OFFENCE	% OF CONVICTED EMPLOYERS IN NEER OR CAD-7 GIVEN REBATES IN YEAR OF OFFENCE
2011	54	34	62.96%
2012	47	24	51.06%
2013	38	22	57.89%
Total	135*	78**	57.78%

* Four employers were convicted in multiple years.

** Two employers twice got rebates in the same year as they committed OSHA offences.

⁷⁶ The data in this and the following tables are based on Ministry of Labour Court Bulletins. The Ministry does not release these Bulletins for less serious offences.

TABLE 2
OF NEER AND CAD-7 EMPLOYERS THAT RECEIVED REBATES IN YEAR OF CONVICTION

YEAR OF CONVICTION	# OF CONVICTED EMPLOYERS IN NEER OR CAD-7	# OF CONVICTED EMPLOYERS GIVEN REBATES IN YEAR OF OFFENCE	% OF CONVICTED EMPLOYERS COVERED UNDER NEER OR CAD-7 GIVEN REBATES
2011	54	26	48.15%
2012	47	25	53.19%
2013	38	20	52.63%
Total	135*	69**	51.11%

* Four employers were convicted in multiple years.

** Two employers twice got rebates in the same year as they were convicted.

The amounts of these rebates are also significant. The WSIB gave employers convicted of offences in 2011-2013 \$14,862,742.88 in rebates in the same year as their offences and \$11,033,578.27 in the year that they were convicted. This is reflected in the following two tables:

TABLE 3
TOTAL REBATES GIVEN TO CONVICTED EMPLOYERS IN THE YEAR OF OFFENCE

YEAR OF OFFENCE	# OF CONVICTED EMPLOYERS GIVEN CAD-7 REBATES IN YEAR OF OFFENCE	TOTAL AMOUNT OF REBATES TO THOSE EMPLOYERS IN YEAR OF OFFENCE
2011	34	\$5,572,652.55
2012	24	\$5,330,248.33
2013	22	\$3,959,842.00
Total	77*	\$14,862,742.88

* Two employers twice got rebates in the same year as they committed OSHA offences.

TABLE 4
TOTAL REBATES WSIB GAVE TO CONVICTED EMPLOYERS
IN THE YEAR OF CONVICTION

YEAR OF CONVICTION	# OF CONVICTED EMPLOYERS GIVEN NEER OR CAD-7 REBATES IN YEAR OF CONVICTION	TOTAL REBATES TO THOSE EMPLOYERS IN YEAR OF CONVICTION
2011	26	\$4,742,241.75
2012	25	\$3,546,633.52
2013	20	\$2,744,703.00
Total	69*	\$11,033,578.27

* Two employers twice got rebates in the same year as they were convicted.

The WSIB’s Experience Rating Programs are Inconsistent with its Health and Safety Mandate

This practice of giving rebates to employers that have been convicted of occupational health and safety offences shows how the WSIB’s incentive programs are inconsistent with its mandate.

The WSIB is paying rebates to some employers that are so large that they dwarf fines for occupational health and safety offences. Surely this practice undermines the effectiveness of the Ministry of Labour’s enforcement activities. It also sends a message to the public and to employers that reducing claims costs is more important than obeying occupational health and safety laws.

The WSIB is paying rebates to some employers that are so large that they dwarf fines for health and safety offences.

The disconnect between the WSIB’s experience rating programs and occupational health and safety enforcement also highlights the fundamental failure of claims experience as

a measure of health and safety performance. Claims experience is such a poor measure that it often results in rebates to employers that have violated our minimum standards of occupational health and safety.

This is troubling given the enormous costs of administering experience rating. Why is the WSIB pouring so much money into a system that is producing such troubling results?

Defenders of claims-cost based incentives may say that these cases of the WSIB rebating employers that committed occupational health and safety offences are just isolated “blips” in a system that otherwise works well in promoting health and safety. They might propose a broadening of the Fatal Claims Adjustment Policy or attributing a high claims cost to employers with fatal claims. But this narrow approach fails to acknowledge the underlying problem that these cases show: experience rating undermines health and safety.

The More Things Change, the More They Stay the Same: The WSIB’s Plans to Change Experience Rating

The WSIB has plans to overhaul its premium rate-setting process, but its plans do nothing to address the negative effects of the current experience rating system on occupational health and safety. In fact, the plan further entrenches individual firm claims costs into rate setting. Claims experience will still play a central role in the proposed rate-setting process, but the stated objective has shifted from health and safety to “insurance equity.”

Why is having each employer pay premiums based on the costs of their employees’ claims more important than preventing occupational injuries and deaths?

Under this system, the WSIB would continue to reduce premiums for some employers that break occupational health and safety laws.

The Proposed Rate-Setting Process

After the Funding Review, the WSIB hired a consultant to develop a new rate-setting process. The consultant, Doug Stanley, was appointed as a “Special Advisor” for a consultation on the WSIB’s rate framework. Stanley held a consultation and issued a report that recommends an overhaul of the WSIB’s rate setting system.⁷⁷ These changes would eliminate retrospective premium adjustments like rebates and surcharges. But claims experience would still feature prospectively: each employer’s claims costs would be factored into its premium rates in the following years.

Stanley’s primary concern is to develop a system that promotes “insurance equity” between employers. On this view, a fair premium reflects the employer’s claims cost which, according to Stanley, is the best measure of its risk to the system.

But Stanley makes two questionable assumptions. First, he assumes that the risk to the workers’ compensation system is best measured by claims costs instead of measures that focus on improving occupational health and safety. But why is having each employer pay premiums based on the costs of their employees’ claims more important than preventing occupational injuries and deaths? Why is insurance equity a more pressing objective than workers’ health and safety?

⁷⁷ Douglas Stanley, *Pricing Fairness a Deliverable Framework for Fairly Allocating WSIB Insurance Costs*, February 2014.

Stanley's assumption about the importance of claims costs is based on an unspoken premise that the WSIB is essentially a private insurance company. On this view, "risk to the system" is best assessed financially by claims experience.

But the WSIB isn't a private insurance company – it is a public institution with a statutory responsibility to promote occupational health and safety, help injured workers get back to work, and compensate them for their losses. There are also specific statutory provisions that require that the WSIB's incentive programs focus on those purposes.⁷⁸ It is these objectives that should be used to measure "risk to the system" – this is more important than simply encouraging employers to reduce claims costs.

This is not to say that fairness to employers is irrelevant, of course it is. But fairness doesn't require basing premiums on claims experience. There are other fair ways to set premiums, and aligning them with the objectives of the workers' compensation system makes the most sense.

Stanley's second assumption is that a system based on claims experience would deliver some form of insurance equity. As noted above, there are widespread concerns that many

⁷⁸ Indeed, it is uncertain whether the WSIB has the power to create an incentive system that ignores these objectives. As noted above, Professor Arthurs concluded that the Act prohibited the WSIB from having experience rating programs set up for any other purpose. See *Funding Fairness*, pp.62 and 82.

There is nothing equitable about a system that rewards employers who suppress claims.

employers game the experience rating system by managing or suppressing claims. These employers may have artificially low claims costs and be rewarded with lower premiums, while those employers that focus instead on health and safety and return to work have higher premiums than they should. There is nothing equitable about a system that rewards employers who suppress claims and take an adversarial approach to injured workers at the expense of those who do not.

The Proposed Rate Framework Moves Away from Occupational Health and Safety

Under Stanley's rate framework, workplace health and safety is shunted to the side. It has no role in determining employer premiums. Health and safety is not even mentioned among the fundamental goals Stanley sets for the "new integrated system."⁷⁹

Stanley instead draws what he calls "a clear distinction" between experience rating "designed to ensure fair and equitable premiums" (by which he means fair and equitable to employers) and incentives to drive behaviour.⁸⁰ He favours the insurance equity model, with modifications to avoid "any incentive leading to unintended and undesirable outcomes."⁸¹

⁷⁹ *Pricing Fairness*, p.39.

⁸⁰ *Pricing Fairness*, p.41.

⁸¹ *Pricing Fairness*, p.41.

Stanley acknowledges that, despite the transfer of some prevention responsibilities to the Chief Prevention Officer, the “advancement of occupational health and safety must remain an important objective of the WSIB.”⁸² Despite that acknowledgement, however, occupational health and safety is barely mentioned in Stanley’s proposed framework except in several instances where he falls back on the assumption that an employer’s claims cost is a legitimate measure of its health and safety performance.⁸³

Nothing to Address the Disconnect

There is nothing in the proposed rate framework to address the disconnect that allows companies convicted of occupational health and safety offences to save money by reducing claims costs. Stanley’s framework still allows an employer to get reduced premiums in the same year it commits an occupational health and safety offence in the years that any resulting accident would normally affect the employer’s premium rates.

Stanley doesn’t address the issues raised in this report except to suggest that the Fatal Claims Premium Adjustment Policy be replaced by a system where a high cost experience is assigned to a fatal claim. This is to avoid situations where employers benefit from artificially low claims cost that sometimes results from a worker’s death.⁸⁴ This is driven by a concern about insurance equity, not health and safety. It doesn’t contemplate any other consequences for employers who violate occupational health and safety legislation.

82 *Pricing Fairness*, p.42.

83 *Pricing Fairness*, pp.36 and 39.

84 *Pricing Fairness*, p.51.

CONCLUSION

The WSIB's refusal to address the problems with incentive systems ongoing reveals two large-scale problems: (1) the WSIB's lack of accountability, and (2) the need for reform of the WSIB's incentive programs.

Make the WSIB More Accountable

The WSIB has been able to continue a practice that undermines the enforcement of occupational health and safety laws, is at odds with the purposes of its governing legislation, the statutory objectives of experience rating, and its role as a system partner in Ontario's occupational health and safety system. It has broken promises to address this problem and ignored recommendations from its own auditors and the provincially appointed funding review. It has plans to change its incentive system, and there is no indication that occupational health and safety concerns are even on the WSIB's radar. Indeed, it seems that the WSIB wants to essentially abandon the idea of using its incentive programs to promote workplace safety.

But there has been no consequence to the WSIB for its failure to act. Given the WSIB's apparent impunity on this issue, how can the public and stakeholders remain confident of our government's commitment to occupational health and safety?

There is a lot at stake here. Occupational health and safety is a matter of life and death.

The WSIB is entrusted with a prominent role in Ontario's prevention system and it operates an extraordinarily expensive incentive program, which costs tens of millions to run and turns over billions of dollars each year. Given this

significant responsibility, it is critical that the WSIB operate its programs in a manner that is consistent with its statutory mandate.

Recommendation 1:

The WSIB should be subject to regular oversight by a body with expertise and the clout to hold it accountable.

The WSIB's failure to address problems with its incentive programs suggests that it needs more regular and more effective oversight, especially when it comes to its role in promoting health and safety. The occasional appearance before standing committees of politicians in the Legislative Assembly is not enough. Nor is the occasional "Value for Money Audit" by accounting firms focused on cost reduction instead of statutory obligations.⁸⁵ The WSIB should be subject to regular oversight by a body with the expertise and the clout to hold it accountable.

Recommendation 2:

The WSIB's should scrap its experience rating in all its forms and the resulting savings should be reinvested into workplace health and safety, as well as compensation for injured workers and their families.

⁸⁵ Under s. 168(1) of the *Act*, the WSIB is required to have the "cost, efficiency and effectiveness of at least one of its programs" audited by a licensed public accountant. Usually, these audits are done by consulting companies like Deloitte and KPMG with little expertise in workers' compensation or occupational health and safety. For a detailed critique of some of these audits see A. King, *Making Sense of Law Reform: A Case Study of Workers' Compensation Law Reform in Ontario in 1980 to 2012*, (thesis) 2014 at pp. 97-109.

Scrap the WSIB's Incentive Programs

Something must be done to address the disconnect between the WSIB's incentive programs and its health and safety mandate. Indeed, the WSIB should scrap its experience rating system in all its forms and the resulting savings should be reinvested into workplace health and safety, as well as compensation for injured workers and their families. Experience rating undermines health and safety, and encourages employers to suppress and manage claims. Workers are suffering and a large amount of money is wasted on incentive programs that undermine occupational health and safety enforcement.

Something must be done and this is not the time for a public relations response and minor changes, as the WSIB did in its response to the original *Perils of Experience Rating: Exposed!* Nor is it time to give up the opportunity to use the WSIB's incentive programs to improve occupational health and safety. Instead, the time is right to take a more expansive approach and re-imagine these programs with a focus on health and safety and return to work.

Ontario's policy makers have an opportunity to show a commitment to making work safe for workers and to demonstrate the leadership necessary to translate that commitment into a reality. Let's hope they grasp that opportunity.

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