

Experience Rating:

An addiction looking for a rationale?

**Submission to the WSIB/WCB Funding Review
Experience Rating Working Group.**

**Toronto
April 5th, 2011**

"I was ill and my employer was considerate of me. Then it was discovered that my illness was from work and my doctor reported to the WSIB. I checked off work-related on the next insurance form. Everything changed after that. It became a dark world."

Injured worker
Toronto
2011

"If the incentives to hide these things would go away, the proper reporting would happen for the employees."

Former company president.
quoted in The Toronto Star
May 29th, 2008

"Like many things in life, some of it is beneficial while too much of it can be disastrous. The problem with experience rating is that it promotes the monitoring of claims by employers without creating any incentive to stop at the right amount"

Professor Terence Ison
former Chair of the Workers' Compensation Board
of British Columbia

The *Experience Rating Working Group* was formed in the 1990's in an attempt to bring to light the adverse affects of the incentive systems used by the Ontario workers' compensation system and to urge the closure of those particular incentives. At the same time, the group has worked on suggesting other ideas to the Board and Ministry which would more likely achieve the intended results of the incentive systems. The ad hoc group is composed of members of the injured workers groups, labour organisations, legal clinics specialising in workers' compensation, and interested individuals.

Through the years, injured worker groups and labour have had difficulty in being recognised by the Board and Ministry as having an interest in funding matters and incentive systems that are targeted toward employer behaviour. Such matters, however, lie at the heart of the system and profoundly affect outcomes for injured workers.

Our group did manage to get the attention of the WSIB in approximately 2004 at which time we worked together to develop a comprehensive research project which would explore our concerns. Unfortunately, the project never came to fruition. This was followed in 2008 by approximately two years of what we called "Blue Sky" meetings with Board staff to explore the dynamics of experience rating and to develop new ideas for effective promotion of occupational health and safety. Despite the commitment and dedication to these meetings, they petered out, and experience rating continued.

We warmly welcome the Funding Review as an opportunity to have these issues thoroughly scrutinised and considered.

One of your six areas of inquiry is employer incentives. This is the topic which we wish to address. Related to it, are two other topics in your mandate, premium rates, and rate groups which we will touch on. It is the employer incentive commonly known as *experience rating* that is our focus. Experience rating is the main financial incentive employed by the WSIB and can be found in its large incentive programmes known as NEER and CAD-7, as well as an aspect of its smaller programmes.

Based on many years of work in the compensation field by the individuals and organisations involved in the Experience Rating Working Group, it is our experience that experience rating prompts negative claims management behaviour by employers and produces harmful results for injured workers. It is our experience that experience rating fundamentally works against improving occupational health and safety.

In fact, at this point, few continue to claim that it has a positive impact on health and safety. The implied focus of experience rating is now on return to work. It is our experience that experience rating fundamentally works against the employment of injured workers.

While much critical attention goes to the off-balance between rebates and surcharges that has drained the accident fund of about three billion dollars in the past twenty years, this is only a symptom. The problem is the design of the system. The

design is entirely based on the duration (cost) of injured workers' claims and in the case of CAD-7, frequency. This design will inevitably produce the harms to injured workers and their families which we see each working day and which will be touched on in this submission.

There is an argument that experience rating is important to provide equity amongst employers in regard to the rates which they pay to fund the workers' compensation system. It is our analysis that experience rating works against equity for employers. Furthermore, the arguments for equity are misplaced in a workers' compensation system, especially one which is a no-fault system.

There is a disturbing additional argument that lurks beneath the surface of support for experience rating and that is, an actual desire to promote an adversarial system to ensure that employer activity will keep decisions in favour of injured workers in check. This helps to keep the overall costs, and relatedly, rates down. This rationale for experience rating contributes to the degradation of the system and has no place under our no-fault, remedial legislation.

It is our submission that the experience rating programmes are inappropriate and harmful. They should be cancelled as soon as possible. The significant funds, which will be freed up from the cancellation, can be used in part to fund systems and enquiries into systems which truly target health and safety on the one hand, and systems which support the employment of injured workers on the other.

Background to experience rating

The concept of experience rating was used minimally and on a voluntary basis as far back as the 1950s, however in the 1980s it was given a major push by the WCB. This generated sufficient controversy, even at that time, that the Corpus Occupational Health and Safety Group held a special conference on the subject ("Experience Rating: Incentive or Disincentive?" Toronto, September 1986).

It was the major study of Ontario's workers' compensation system by Paul Weiler in the early 1980s which gave the concept new vigour.¹ Professor Weiler supported experience rating on the "intuitively plausible presumption" (*Protecting the Worker* 116) that it would be effective in reducing workplace injuries.

When Sir William Meredith outlined his proposals for Ontario's compensation system² he founded it on what is known as the "historic compromise" in which workers gave up the

¹ Paul C. Weiler, Reshaping Workers' Compensation for Ontario (Toronto: Queen's Printer, 1980) and Protecting the Worker from Disability: Challenges for the Eighties, (Toronto: Queen's Printer, 1983).

² Commission on Laws Relating to the Liability of Employers to Make Compensation to their Employees for Injuries Received in the Course of their Employment which are in Force in other Countries, Final Report on Laws Relating to the Liability of Employers. (Toronto: King's Printer, 1913).

right to sue their employers for injury in exchange for secure compensation benefits for as long as the disability lasted. This compromise essentially provided two great financial securities: one for the employer who would pay regular and knowable assessments which could therefore be treated as a cost of doing business, and one for the worker who would have security of benefits if injured and would not need the expensive services of a lawyer to obtain them.

In the debate over who should pay for the system, Sir William Meredith concluded that it should be the employer alone and this was principally because the employer was in the best position to pay. He said: "*The burden which the workman is required to bear he cannot shift upon the shoulders of any one else, but the employer may, and no doubt will, shift his burden upon the shoulders of the community, or if he has any difficulty in doing that will by reducing the wages of his workmen compel them to bear part of it.*" (Meredith xvii)

While his report contains some insurance type concepts, he also indicated his preference for terms which distinguished the system from an insurance scheme: "*I do not like the term "premium" which is used in the Association's [Employers'] draft bill to designate the rate at which the employer is to be assessed. I prefer the terminology which I have used. What is levied by the Board is not a premium but an assessment.*" (Meredith xii)

The Funding Review website has a link to the Meredith Report and also lists four principles that are at the foundation of our system:

- Security of payment
- No-fault system
- Collective liability
- Administration by an independent agency

We believe it is important to add another, which is perhaps considered implicit in those listed, but should be made clear:

- Non-adversarial

Experience rating puts all five of these principles at risk.

What harms do injured workers experience due to ER?

The following points are made based on the experiences and observations of the individuals and organisations in the Experience Rating Working Group. Our experience is principally, but not exclusively, with injured workers who have sustained permanent injuries.

Many injured workers do not report their injuries

There are various reasons why injured workers may not report their injuries, including that they do not know their rights, that compensation benefits cause a reduction in income

and they prefer to use sick time, and that they do not think their injury is significant. One recurring reason that we see is that they have been pressured by their employer not to report. They are told to go on EI sick time, or private insurance disability. They are sometimes told to do this "to help the employer out," to prevent his compensation costs from going up. They are sometimes threatened. When we see the person, it is usually at the point where they realise they have a permanent injury or illness, have made a claim, and been turned down often due to delay.

In their national study to explore anecdotal evidence that there are injured workers who do not file for workers' compensation, authors Harry Shannon and Graham Lowe found that 40% of their injured worker respondents had not filed a claim.³

Harassed at time of injury

The injured workers we talk to often have been pressured not to report their injury as noted above. Sometimes the pressure comes from co-workers. In workplaces that have rewards for safety, an accident, a lost-time accident especially, of one worker will cause the rest of the workers (in the entire workplace, or in a unit) to lose the reward. Rewards may be, for example, the opportunity to be in a draw for a car, or a turkey at Christmas, or annual shares in the company⁴. In these instances, the co-workers cover for the worker, but the worker must remain at work. No lost-time is key.

Pushed to return to work too soon

Probably the most frequent and significant problem we run into on a daily basis is injured workers who are in a crisis due to pressure from the employer to come to work when they are not medically fit to do so. Compounding this problem is the propensity of the compensation board to downplay the medical status of the worker and embrace the offers of work from the employer.

The structure of experience rating attaches rebates or surcharges directly to lost time of an injured worker. It is in this area that the blossoming of employer consultants on the fertile ground of experience rating has been most effective. Companies are assisted in setting up modified-work systems that attempt to ensure that a worker comes off benefits whether they actually come back to work or not. Company health and safety staff give injured workers papers as they go out the door to the hospital and the admonition to be sure to be back at work the next day.

See in the attached materials:

- Compass Group. "Early and Safe Return to Work Plan" and the motto "Remember, there is no such thing as lost time injuries at Compass." [Tab 1] Minus the unusually obvious motto, these sorts of letters and plans are common. These are not plans for

³ Harry Shannon and Graham Lowe, "How Many Injured Workers Do Not File Claims for Workers' Compensation Benefits?" *American Journal of Industrial Medicine* 42 (2002):467-473

⁴ For example, please see in the appendix copies of shares given by the accident employer in recognition of no lost-time claims. The injured worker who received these ones before injury received a letter after putting in a claim which rescinded her entitlement to the shares. [Tab 2]

therapeutic return to work for a recovering injured worker. They are plans to avoid or minimise lost-time claims.

- Christie Brown & Co. Modified work available on first day of injury/illness. [Tab 3] This is a form letter given to workers who have sustained an injury or illness.
- Toronto Star. May 29th, 2008: "Hiding injuries rewards companies". [Tab 4] This article reviews the results of a Star investigation that found evidence from data between 2000 and 2007 that *"at least 11,000 worker injuries were downplayed or improperly handled . . . including 3,000 fractures, dislocations, bad burns and other injuries, even amputations, that companies reported as resulting in not even on day off work."* (p.3)
- One example from the Star article:
"One of the large employers that reported several serious injuries resulting in no loss time is Staffing Edge, a Brampton-based temp agency. Since 2000, WSIB data shows Staffing Edge employees suffered 10 fractures, three intracranial injuries, three crushing injuries, two concussions and one fingertip amputation, and not one day of work was missed. Chief financial officer Victor Winney said a loss-time claim can be expensive and that the WSIB pushes companies like his to give the wounded work as soon as possible." (p.7)
- Chrysler's on-site clinic. Article in Back to Work, February 1999.⁵
" [employer] . . likes the idea that easy access to on-site rehabilitation services--paid for directly by the company and bypassing the Workplace Safety and Insurance Board (WSIB)'s claims costs ledger--is expected to result in 'substantial savings' in both experience rating and lost-time costs . . .
" [employer]. . .is sure the savings 'are going to be there and they're going to be substantial'. First, the plant will save money on experience rating costs (or NEER, as it is called in Ontario). Chrysler is paying PATH up-front for all assessments and treatments of its employees; it is not submitting bills related to compensation claims to the WSIB. 'If you don't put any rehabilitation costs on a claim, these costs don't show up on your NEER statement. The injury is reported to the WSIB as a no loss-time claim, says [employer]. And there's no administration charges if you don't generate any funds to the claim, he adds, pointing out that these charges can be up to 35 per cent of the treatment cost."

This is a unionised plant where the union has agreed to the set-up essentially to enable workers to keep their wages during recovery. This aspect is clearly to the workers' benefit and should be supported, however the result is improper information going to the WSIB (and Ministry of Labour which uses lost-time injuries as its measurement of safety in the Province). If any of these injured workers do not recover sufficiently to be able to continue to work for Chrysler, they will likely have a difficult time establishing their entitlement to compensation. Their injury was a no-

⁵ "Independent rehab firm runs Chrysler's on-site clinic," [Back to Work](#) 3 (Feb. 1999): 4-6

lost-time claim and thus considered minor in nature. The lack of independent medical treatment also raises concerns.

Forced to take physiotherapy after work

Most workplaces do not have on-site physiotherapy. If a recovering worker takes time off during work to attend physio appointments, her/his claim is registered as "active" within the experience rating system. This has a negative effect on the employer's experience rating status. Recovering injured workers, who are already working in pain, are therefore asked to extend their day to attend physiotherapy after work hours. By the time they get home, possibly with the need to care for children, they are exhausted. Injured workers find this to be a perverse system which compounds their difficulties and hinders healing.

Co-workers

From a health and safety perspective, when injured workers are forced to return to work too soon, co-workers run the risk of related injury. Companies sometimes create modified work through bundling of the lighter aspects of various jobs, leaving the other workers with a greater concentration of heavy work. Often injured workers are told to ask their co-workers for assistance with aspects of the job that they cannot do.

Also, co-workers often resent the presence of an injured worker in the work environment. There is a general feeling that if the person cannot do the job, they should not be there. It is demoralising to have someone taking constant breaks, or just sitting in a chair. We have heard from numerous injured workers how they have been made to feel very bad with unkind comments and unsympathetic treatment. This creates mental strain.

Production managers (at odds with Human Resources)

Another source of strain for the injured worker who is engaged in modified duties comes from dynamics with the onsite supervisor who is in charge of production versus the agreed-on modified work. Arrangements for modified work usually come from the Human Resources branch of the company in the interest of avoiding or reducing lost time. The fit of the injured worker in the production process is of secondary importance. For the onsite supervisor, it is quite a different matter. If the modified work does not function well in the production process, the injured worker will be pushed to take on more and more of the regular work. This leads to both emotional and physical strain.

Insufficient time to heal. Temporary injury can become permanent injury.

A common story we hear from injured workers is that they believe that they would not have developed a permanent injury if they had been given sufficient time to heal. The combination of experience rating and WSIB support for early return to work, has resulted in the virtual elimination of the concept of 'time to heal,' with life altering consequences.

Secondary injury

Another, very common, situation that we see, is injured workers who sustain a second injury when they return to work too soon. Most commonly this is seen in upper limb injuries in physical jobs. A worker with an injured right arm, for example, is expected to do a job with the left. A strain develops from overuse of the left arm. For the injured workers we see, these secondary injuries have usually also developed into permanent ones.

Board data shows with the rise of experience rating there has been a corresponding rise in recurrences.⁶ Whether these are the original injury worsening, or a related secondary injury we cannot tell, but in either case we are seeing the consequence of workers being brought back to work too soon. The human story behind these statistics and injuries is often that of someone working in considerable pain and discomfort, often taking high doses of pain pills to cope, and finding themselves miserable and depressed at home with their family.

Pushed out of work

Once a worker is an injured worker he or she represents a "risk" under the experience rating programme. If the worker loses any time due to compensable condition, the employer may find the rebate at risk or that a surcharge is possible. As long as the experience rating window is open, the best option for the employer is to find a way to dismiss the worker unrelated to the claim, or have the worker leave on their own volition. The disabled worker is then left without employment and without the support of workers' compensation.

Subject to employer intervention in claim

For those of us who represent injured workers in their claims, we are able to see frequent instances where the employer calls the WSIB to complain about payments to the injured worker and to cast doubt upon the claim. This activity occurs without the injured worker even knowing about it. The WSIB's response varies, but all too often the employer's suggestion, for example, that the worker is "manipulating" his claim, is picked up and repeated on through the memos without apparent thought, and colours decision making. We can trace this in a file and raise it in an appeal process, but by then harm has already been done.

Appeals by employers (or employers opposing workers' appeals)

Those of us who have been working in the compensation field for many years noticed a major change in employer presence in workers' appeals through the 1990s as experience rating deepened in the system and employer consulting firms expanded. In the 1970s and 1980s, it was somewhat rare to have an employer initiate an appeal or oppose a worker's appeal. The exception was Schedule II employers who are essentially 100% experience rated. They were always present to fight an appeal. Two other exceptions, although rare, were the occasional case of an employer who honestly felt that the claim was unwarranted and would attend to say so (or sometimes who did not really understand the

⁶ Institute for Work and Health and WSIB, Study of Locked-in Award Recipients, Final Report, (Toronto: WSIB, Jan. 2008)

compensation system); and the occasional case where the employer came to support the injured worker in the appeal.

It is now more rare not to have an employer represented at an appeal. Appeals have moved from being often the first occasion for an injured worker to meet face to face with someone at the Board to sort out their claim, to a stressful, adversarial battleground in which the injured worker is subject to hearing his employer's representative undermine his credibility and his moral fiber. This is not appropriate in our no-fault system established to replace the adversarial process with remedial legislation and an inquiry process for claims adjudication. With some exceptions, the employer participation at the hearings are about nothing more than reducing their experience rating liability. Usually when the experience rating window is closed, there is no further interest. See the example of XXXX Prevention Claims Management Inc. [Tab 5]

One study on the propensity for employers to appeal due to experience rating has been done.⁷ This study, from 1995 noted:

"Whereas the costs of investing in safety are high relative to the benefits, employers may pursue potentially less costly mechanisms for reducing claim costs, including contesting claims." (Hyatt and Kralj 99)

It sought to test this hypothesis. The data studied does not measure employer presence to contest workers' appeals, but looks at where, in 1986, an employer initiated his own appeal of a lost-time injury to the Decision Review Branch. This data is from very early days of the experience rating system before the growth of employer consultants and before the deepening of experience rating, however the study found:

"The estimation results indicate that relative to non-experience-rated employers, experience-rated employers are significantly more likely to appeal workers' compensation board decisions to the DRB level." (Hyatt and Kralj 104)

It is our experience that the main employer appeals activity is involvement in appeals initiated by the worker. Rather than initiating their own appeals, employer-initiated activity at the Board will seek to minimise a claim through other means, usually unobserved by the injured worker, such as use of the Second Injury and Enhancement Fund (recently reformulated to reduce its use); rate reassignment; and calls to the claims manager to complain about payment of benefits and to cast doubt on its validity.

The increased presence at worker appeals has significantly undermined the intended non-adversarial nature of the system.

Privacy and confidentiality

We are very concerned about the breach of privacy and confidentiality which is provoked by experience rating. An employer or his consultant who wishes to reduce experience rating risk, will routinely request the files of injured workers experiencing lost time in order to take action. The file contains all the medical reports submitted to the Board.

⁷ Douglas Hyatt and Boris Kralj, "The Impact of Workers' Compensation Experience Rating on Employer Appeals Activity," Industrial Relations 34 (Jan. 1995):95-106

This includes psychiatric reports and can also include entire clinical notes by a family physician. This is demeaning and hurtful to the worker. We can only imagine how any one of us would feel if such reports were made available to our employer.

Furthermore, some employers resort to video surveillance in order to pursue their challenges to lost-time claims. This practice and its harmful effects have been documented in a comprehensive paper by Professor Katherine Lippel.⁸ She says (footnotes not included here):

"Experience rating has been shown to encourage employers to adopt 'aggressive' claims management practices. Hyatt and Law suggest that the current adversarial climate drives ' . . . straight at the heart of the original 'bargain' that was struck between labour and capital over the formation of the WC system -- a bargain that was intended to save both sides from the cost, torment, and unpredictability of litigation.' As predicted by Ison, there is little doubt that pressure on compensation systems to reduce costs and promote a more competitive environment for business, and in this context, the increased resort to experience rating, have promoted aggressive management strategies in the field of workers' compensation. Private surveillance, the subject of this paper, is a product of this context." (Lippel 98)

To discover that one has been clandestinely filmed, sometimes along with one's children, creates significant vulnerability and fear. It also impedes recovery, as Lippel observes:

"A severely injured worker suffering from painful physical ailments, significant disfigurement and post-traumatic stress disorder was encourage by her care givers to try to leave the security of her home, despite her disabling fear. She finally went out and was subsequently confronted by videotape evidence that she was capable of going out. Workers are encouraged by healthcare professionals and even by WCB policy to try to regain a maximum of mobility by attempting movements they fear they are unable to do. If they can't peacefully attempt activities without being 'caught in the act', they are much less likely to ever reach the therapeutic plateau attainable were they to have been allowed to test their limits without fear of reprisal." (Lippel 106)

Doctor-patient relationship

In our society, we consider our relationship to our doctor to be a special one. It is a relationship which is confidential and which concerns a fundamental in our lives: our health. Experience rating can put the relationship at risk through pressure from the employer to have the worker return to work. In some instances, employers will call a doctor's office to insist that they have suitable modified work for the patient. More often

⁸ Katherine Lippel, "The Private Policing of Injured Workers in Canada: Legitimate Management Practices or Human Rights Violations?" Policy and Practice in Health and Safety 1, no.2 (2003):97- 118

this call will come from the WSIB on behalf of the employer.⁹ Many doctors correctly refuse to discuss anything without the patient present as well, however it puts a strain on the relationship. Some injured workers tell us of their experiences with doctors who refuse to see them once they realise there is a compensation claim involved. While this is partially due to difficulties more directly related to the WSIB itself and the reporting requirements, the pressures exerted by experience rating magnify the problem.

Another problem for doctors is created when patients with an obvious workplace injury situation ask that it not be reported.¹⁰ This was highlighted on one occasion when the Ontario Medical Association presented to the Standing Committee on Resources Development in 1994 during the discussions of Bill 165. On behalf the OMA, Dr. John Gray had the following to say:

“As a senior member of the joint OMA-workers’ compensation liaison committee, I became aware of what appears to be a disturbing and increasing trend, namely, a patient who presents to his or her physician with what clearly appears to be a work-related injury yet requests the physician not to report to the board, apparently at the behest of the employer. Faced with a choice either to report against the patient’s instructions or to ignore the apparent workplace circumstances, the physician has a terrible dilemma.” (R-1321)

Noting this problem, the OMA undertook a survey of its members and reported on this to the committee:

“Members were asked the question whether or not in the previous six months a patient had requested that they not report to the Workers’ Compensation Board an apparent work-related injury. Of those who responded, 51% had indeed encountered such a request in the past six months and 47% had not. Of those who responded, the frequency of the requests was as follows: In the past six months, one to three requests, 36%; four to six requests, 12%; more than six requests, 6%.” (R-1321)

In light of the contradiction which this places the doctor in, the OMA requests in the submission: “. . . a provision which would ensure that physicians who voluntarily report to the board that a patient may have been injured at work be protected from incurring any legal liability . . .” (R-1322)

⁹ Please note that it is appropriate for a doctor to discuss the suitability of work with their patient. The best way for this to occur, is for the employer to provide a detailed explanation of the job to the worker to take to the doctor. Such a report would include hours of work and ergonomic considerations. It is entirely appropriate for the doctor to discuss details with the employer if the doctor finds that necessary and if the worker/patient is present for the discussion.

¹⁰Ontario Medical Association, “Submission [regarding Bill 165, an Act to amend the Workers’ Compensation Act and the Occupational Health and Safety Act” Ontario. Legislative Assembly. Standing Committee on Resources Development Hansard 8 Sep. 1994

The OMA's submission gives another indication of the extent of non-reporting due to employer pressure. It also gives us a window into how experience rating reaches into the doctor's office and complicates and strains the relationship between the doctor and the patient.

Deemed inappropriately

The Ontario workers' compensation system pays for the wage-loss impact of a permanent injury or illness through a process called *deeming*. This process generally looks at the actual earnings of an employed injured worker or, if they are unemployed, their assumed wages. Experience rating drives employers to provide work of any sort to injured workers to avoid a surcharge through lost-time claims.

Some companies are big enough enterprises and have few enough injured workers that they can genuinely provide for suitable, permanent employment for disabled workers. Others find it difficult to do so due to the nature of the industry or the size of the workforce. Many are simply not willing to keep on a less productive worker. Under experience rating, all of them need to show that they have suitable work for the duration of the experience rating "window".

It is our experience that a significant portion of the calls to unions, legal clinics and others assisting injured workers are from distraught injured workers who have been unable to cope with the modified work (due to the injury itself and/or other stressful inappropriateness--a day worker put on the night shift, a construction worker given paper work) but are not receiving benefits. In these cases the WSIB claims managers accept the assurance from the company that "suitable work" continues to be available. The worker is therefore *deemed* to have the earnings. Many of these cases go to appeal, however even if the worker succeeds to make their case, much harm has been done in the ensuing months and usually years. These claims unfortunately often end up with a psychological disability added to the original injury. The psychological aspect is usually recognised later in the claim and does not affect the experience rating status of the employer. The harm that is never paid for is that which affects the home--too often the virtual loss of the house due to poverty and too often the alienation of the family.

Hard to get a new job

The injured worker who for whatever reason does not maintain employment with the accident employer, also has an uphill battle securing new employment. Prospective employers are adverse to hiring an injured worker for three reasons:

- There is a general disinclination to hiring disabled people. Research consistently indicates an unemployment rate of between 40% to 70% amongst the disabled community as a whole.
- An injured worker may be seen as an accident prone worker.
- An injured worker represents a specific risk due to experience rating. This key aspect is addressed in this paper under the heading: Does experience rating provide incentives for employment of injured workers?

A myriad of harms

The nature of experience rating causes harms to injured workers in a myriad of ways. Here we have reviewed fifteen significant aspects of the harm. These harms could be

outlined in different ways and most certainly in more detail. It is our sincere hope that as you listen to the stories of injured workers during the course of the hearings you will understand that there is a good chance that an experience-rating-effect is a part of their misfortune. You may have to scratch the surface to find it and with this outline, we hope that we will have assisted you in knowing what to look for.

As you become more familiar with these harms we hope that it will become clear to you how they contravene the fundamental benefit for workers in the historic compromise: security of benefits. At the same time, the injured worker is still bound by her side of the historic compromise, she cannot sue the employer.

The lack of reporting, the misreporting of what should be lost-time claims, the regular challenges by the employer of the claim--these all deny the fundamental right of the worker to *security of payment*. An accident/illness must be reported and must be appropriately compensated. Furthermore, once the condition has been identified as compensable, it is not right for the worker to feel insecure about his ability to hold on to his compensation for the time he needs it.

Experience Rating works in the background.

How are we to know that *experience rating* causes these negative things to happen? No employer tells an injured worker, "I want you to come to work in a taxi tomorrow regardless of how you feel because *experience rating* makes me do it." Some will tell an injured worker that their compensation costs will go up and they can't afford it—that's about as close as it gets.

There is little hue and cry from injured workers specifically about experience rating because they don't know about it. But those who do know about how experience rating works and who observe and care about the effects on injured workers are thoroughly opposed.

Early on, Professor Terence Ison, probably Canada's leading expert on workers' compensation systems, wrote about experience rating. His work, including *The Significance of Experience Rating*¹¹, should be included in the materials posted for this Funding Review. Ison's comprehensive coverage of the subject concludes:

"Adjustments to workers' compensation assessments have great potential as an incentive to care if the adjustments are made as a direct response to the existence of hazardous conditions. Indeed, such adjustments are essential to the fulfillment of government responsibilities in occupational health and safety. This requires a program of inspection and penalty assessments, and perhaps also penalty levies. Experience rating, however, is very damaging." (Ison 742)

¹¹ Terence G. Ison, "The Significance of Experience Rating," Osgoode Hall Law Journal 24 (1986):724-742.

Another excellent coverage of the nature and dynamics of experience rating is contained in the article by Doug Smith, *Turning the Tide: Renewing Workers Compensation in Manitoba*.¹² Smith highlights how experience rating is returning the system to the adversarial model. He points out that the compensation system was established to specifically eliminate the adversarial model--in the interests of both workers and employers.

While there has been some quantitative research of the experience rating system to assess whether it has an effect on promoting employer attention to health and safety, there has been none to directly explore the actual effect on injured workers. The effect on injured workers is a difficult area to get at from a research perspective and until very recently, it has not been on the research agenda.

Some research has given us clues however, for example:

1990 study for the WCB. In 1990, Peat Marwick Stevenson & Kellogg, Management Consultants, conducted 28 NEER case studies on behalf of the Board¹³. This study uncovered the types of problems that we observe and experience. Overall it found that experience rating had an incremental impact on health and safety activities already undertaken by employers in about 10% to 40% of the cases, depending on the activity. In contrast 82% of the firms placed an emphasis on controlling claims costs. The activities here are described in Chapter IV of the study (KPMG 24-29). The study found increased activity in five basic areas of claims management:

- Contesting claims
- Seeking relief under SIEF
- Following up on the status of the worker, and perhaps encouraging them to return to work
- Providing various forms of on-site medical treatment, and perhaps avoiding a WCB claim for health care costs as a consequence
- Conducting various forms of internal monitoring of accidents, claims costs and claims activity, with a view to focusing management's attention on claim costs

They also found widespread techniques to get claims adjudicator attention to a claim and they found a substantial NEER impact on the increased practice of offering modified work. The study notes that this can be both positive (rehabilitative) and negative ("*to avoid or to shorten the duration of a temporary total disability claim*"). The study indicates that it could not get accurate counts on these two categories of modified work however the impression was that "*among the case study employers, there was a much higher incidence of short term modified work in comparison to longer term modified work with a rehabilitation focus.*" (KPMG 27)

¹² Doug Smith, Turning the Tide: Renewing Workers Compensation in Manitoba (Ottawa: Centre for Policy Alternatives, 2002)

¹³ KPMG Peat Marwick Stevenson&Kellog, Workers' Compensation Board NEER Case Studies Final Report, prepared for the Workers Compensation Board, Research and Evaluation Branch. (Toronto: KPMG, 1990)

Despite this evidence, the WCB decided to go ahead with making experience rating plans a comprehensive part of its system.¹⁴

At the Board there was discussion, at the time, of the unintended negative behaviours generated by the plan and ideas were discussed to curb this, including an "*Employer Code of Conduct*" and to have the purpose of NEER "*further clarified during the seminars and workshops*" (WCB 5) It noted that there was a "*need for more effective procedures to ensure that all compensable injuries are promptly and fully reported. This includes steps aimed at eliminating failures to report, as well as verifying that provision of in-house medical treatment is not being used as a means of evading reporting obligations.*" (WCB 5-6)

It further noted that "*among employers, support for ER appears strong*" but "*On the labour side, there remain some concerns, largely related to particular aspects of ER which may encourage inappropriate behaviour.*" (WCB 8) It goes on: "***If those aspects can be corrected***, the Board should, in light of its commitment to reduce the frequency, severity and disabling consequences of injuries, extend the benefits of ER in these regards to all Schedule I employers." (our emphasis)

Thus in 1990, before experience rating was expanded and made mandatory, the negative claims management behaviours were already identified as being of sufficient concern that something had to be done. Nothing has been done. Behind the each claims management technique lie injured workers and their families who have been harmed further as a result of their use.

1994 Boris Kralj undertook an examination of experience rating in Ontario and its impact on employer behaviour.¹⁵ He found in his case-study-firms that about 20% to 40% increased their accident prevention activities. He found that 96% focused on claim cost control. (Table 4, Kralj 54) He summed this up saying: "*It appears that a good deal of claims management activity is motivated by the experience rating incentive to minimize the number of claims reported to the WCB, and for any reported claim, to minimize its duration or cost.*" (Kralj 55)

1994 Ontario Medical Association. As previously indicated this survey of doctors found that 51% had one or more incidents in the prior six months of a patient asking that their work-related injury not be reported to the WCB.

2002 Joan Eakin, Director of the Centre for Critical Qualitative Health Research, University of Toronto, studied return to work in small workplaces.¹⁶ She was not

¹⁴ Ontario. Workers' Compensation Board. Strategic Policy Branch, Comprehensive Experience Rating, (Toronto: WCB, Aug. 24, 1990) [Tab 6]

¹⁵ Boris Kralj, "Employer Responses to Worker's Compensation Insurance Experience Rating," Relations Industrielles 49, no.1 (1994):41-57

¹⁶ Joan Eakin et al., Return to Work in Small Workplaces: Sociological Perspective on Workplace Experience with Ontario's "Early and Safe" Strategy, Report on Research Funded by the Research Advisory Council of the Ontario Workplace Safety and Insurance Board (Toronto: WSIB, Nov. 2002)

studying experience rating, but she does note that it is one of the influences in the process. Some of the quotes from employers and workers in her study show experience rating at work in the background--we can see below instances of an employer who does not want to report or support a claim; meaningless work provided in order to ensure there is no, or reduced, lost time; and efforts to have the injured worker leave without having him/her get back on benefits.

- One employer is frustrated with the situation of having an injured worker: *"I'm saying heh, if we wanted to fix this (problems created by the injury), what you do is, when you are forty-five we throw you out. **We don't do that . . . We accept the fact your productivity comes down. You have to play the game, you have to help us a little bit too.** You can't at the end think you're going for a free ride. It just doesn't work that way. We have to defend ourselves, we say 'No, your problem is not related to this work.'"* (bold emphasis in the original; underlined emphasis is ours) (Eakin 27)
- Eakin (28) says: *"The activities around early return can be a 'hot spot' for moral strain. This is particularly the case when employers, trying to avoid increased premiums, approach injured workers about returning before the worker is able to cope with the idea, and do not receive the willingness and commitment (and gratitude) they expect from the worker."*
- She notes further: *"Injured workers speak movingly of their experiences in jobs that require different skills than the ones they had in their pre-injury work (e.g. Tony does not have experience as a dispatcher and the thought of taking it on terrifies him), or no skills at all (one worker's modified job is to check that workers wear their sanitary 'booties' on the shop floor). Jobs of substantially lower social status than pre-injury ones, and ones where there is 'nothing to do', can be particularly difficult and degrading for workers. As Tony describes [note: he is later moved to a different job when the dispatcher job did not work.]*

They stuck me out at the gate to watch people coming in . . . I am on 'light' duties standing up all day in the heat in the middle of summer in a little room 2 x 2 waiting for someone to come by so I can push the button (to open the gate), which they just as easily could do themselves.

Transcribed words cannot communicate the humiliation conveyed in tone of voice and physical demeanor." (Eakin 38-39)

- And: *" . . .one employer avoids 'lost time' by placing workers in charity work until they have recovered. While this does not meet the system's goals of social rehabilitation within one's own work environment, it does hold down employer's premium costs, while possibly even promoting good public relations for the firm. Most employers acknowledge that their commitment to the business can conflict with individual worker well-being, but see themselves as obliged, ultimately, to give priority to the former, and justified in doing so (although this varies with*

individual management styles and, of course, the economic security of the enterprise)." (Eakin 29)

- Eakin also discovered what we believe happens extensively--that is, the employer constructs a situation that pushes the worker out of the workplace, without recourse back to the WSIB.

In the case she relates, the employer claimed it was because the worker was not good in the first place: *"Employers can, and do, use their control over the allocation of modified work to serve unrelated business ends. For example, in a couple of workplaces where we were able to combine worker and employer accounts, the employer assigned an unattractive job to an injured worker who had 'not been working out well' before the injury. One of these employers explicitly expressed the hope that such a move might encourage the injured worker to leave on his own accord. This would avoid spoiling the employer's compliance record, minimize costs to the firm, and would prevent the need to lay off the worker off [sic] in the future when it might be contested on the grounds that it was injury-related. Employers complied with the ESRTW regulations, but in a way that maximized benefits to the business."* (Eakin 29)

2007 Katherine Lippel, Canada Research Chair in Occupational Health and Safety Law, University of Ottawa, has done extensive work on the experience of injured workers. In her Research Report: *Managing Claims or Caring for Claimants*,¹⁷ Lippel comments on experience rating in the Quebec compensation system, the CSST:

- *"In recent years, the CSST has relied on experience rating, a system that personalizes the assessments of each employer according to its compensation record, purportedly to encourage employers to take steps to prevent accidents and disability. However, many workers told us that this incentive system has instead led employers to challenge workers' claims or to pressure workers to abstain from filing claims. An employee of a subcontractor in an outlying region told us that his employer forbids CSST claims and tells workers that a clause of his subcontracting agreement prohibits CSST claims. . . .*

Workers and their representatives inform us that since the advent of the "mutuelles de prevention" [from footnote: "the term used to designate the 'insurance product' offered to small and medium sized employers in Quebec who want to benefit from experience rating in order to reduce their compensation costs. They were introduced in 1997. Firms specialized in disability management (and to some extent OHS prevention) offer their services to groups of small employer who then share their 'experience.' An accident in one business will affect that assessment rate of all members."], small businesses are sometimes obliged to contest a worker's claim, even when they believe it to be legitimate, under the threat of exclusion from their 'mutuelle.' In other cases, even if the employer has promised the worker he will not

¹⁷ Katherine Lippel et al, Managing Claims or Caring for Claimants: the effects of the compensation process on the health of injured workers (Montreal: Université du Quebec à Montreal, 2007)

contest the claim, that has not prevented the 'mutuelle' from appealing in the name of the employer, and all decisions taken with regards to the file.

Lawyers we met with, as well as many of the workers, described that when an employer contests a claim this often results in a poisoned work relationship, as the worker feels betrayed by an employer for whom he has worked for many years in a context that he believed to be one of mutual respect and collaboration.” (Lippel 11-12)

While no research has been done to explicitly look at the impact of experience rating on injured workers, we can see, both in case studies of experience-rated employers and in qualitative research involving injured workers, that there is evidence of negative claims management activities which have the effect of creating significant additional financial, emotional and social harm.

A close look at how experience rating work makes it very clear.

Let's go through the NEER¹⁸ workbook.

Take it step by step. Read the Board materials attached. Look at the basics (this will be the main part of the oral submission).

- Note the "Workshop" on NEER put on by the WSIB. [Tab. 13] Note the complexity. Note the case studies, page 68 on. What activity is being prompted? Is there any obvious health and safety improvement activity?
- Note the "NEER User Guide" [Tab 7] which along with other materials to promote employer attention to experience rating, can be found on the WSIB's website.
- This guide briefly explains the purpose of experience rating and focuses on how to use the NEER quarterly statement that is issued to each employer.
- Key pages:
 - page 6 containing the Claim Types charts
 - pages 14 and 15 with case examples
 - at the end of the guide we have attached one of the NEER reserve factors charts. There is a different one for each rate group and they can be found on the Board's website as well.
 - page 17 September Firm Summary Statement: Refund/Surcharge Calculation

A close examination of how that system works allows us to see that essentially employers are forced into adversarial behaviour. The Toronto Star article of May 29th, 2008

¹⁸ New Experiment in Experience Rating (NEER)--this is the main experience rating system used by the Board. It measures claims duration (cost). The other key system is CAD-7 which is used for the construction industry and measures both claims duration and frequency. This paper assumes the knowledge of the Funding Review of the different programmes and there essential differences.

included discussion of a company which had a significant history of hiding/misreporting claims and quoted the former company president to say: *"If the incentives to hide these things would go away, the proper reporting would happen for the employees."*

We can imagine that some employers will look at these NEER cost statements and say, "Well, we can take measures to reduce accidents by improving the conditions of work--slow things down, check equipment more regularly and such, and by taking the time to provide excellent training and supervision with an eye to safety"--and then go about doing that. In such a situation experience rating will have a health and safety effect. But this is very indirect. We are aware of some cases where unions have provided direction to the system by using it as leverage on the employer to take action. Overall however there is little evidence of a significant health and safety effect.

Helping to direct employers' attention to the claims control (cost control) advantage of the experience rating programmes are innumerable employer consultants who make a living from experience rating. These companies effectively show a company how they can move from a surcharge situation to a rebate by 'managing' the injured workers with active WSIB claims. They can move from a surcharge to a rebate without a single moment's reflection on the health and safety environment of their company.

Take the example of EMCOMP Professional Corporation who advertises on the internet. [Tab 8] This company offers services to help an employer turn "NEER Surcharges into Rebates." It claims:

"Through comprehensive and diligent claims management [the company] can help turn your NEER experience from a Cost Centre to a Profit Centre."

It goes on to helpfully outline its claims management services in regard to the return to work process:

"We at [the company] are very experienced at what is required for a successful Return to Work program. We will help an employer build a process that will either result in a return to work or the closure of WSIB benefits in cases where the worker does not return to work."

The dynamic of experience rating creates only an indirect incentive for improving health and safety, but it creates a direct incentive to control claim costs without regard to the impact on the injured worker whose claim is being 'managed.'

Discourse of Abuse¹⁹

When Professor Joan Eakin interviewed both employers and injured workers in her study of return to work in small workplaces she discovered a complicated and negative situation. Within this she found that injured workers became subject to *"the discourse of abuse."* As we have seen, experience rating drives, more than anything else, the

¹⁹ Eakin et al, Return to Work in Small Workplaces

employer imperative to bring the worker back to the workplace right away or as soon as possible. In this situation the Board's policies on "early and safe return to work (ESRTW)" become confounded with effects of experience rating. Eakin, in studying ESRTW, was also effectively studying effects of one of the main outcomes of experience rating: the rapid return to work. She paints the picture in her summary as follows:

"For employers, ESRTW is a business problem, with significant administrative and managerial challenges, that can draw them, often involuntarily, into the disciplinary and medical management of RRTW. Compliance with ESRTW and compensation regulations can impose an administrative burden, conflict with workplace norms, undermine their managerial authority, and damage relationships with injured worker and with other employees. For workers, ESRTW can be a struggle to protect their personal credibility and integrity, and to reconstruct their physical and working lives within the ambiguous and contested terms of 'co-operation'. Workers suffer under what we call the 'discourse of abuse' – persistent, pervasive imputations of fraudulence and 'overuse' of rights. Surveillance and its effects can extend into the injured workers' homes and family life. During the vulnerable and fragile stage of bodily injury and recovery, workers confront a range of social difficulties in determining when they should return to work, in managing issues of loyalty and commitment to the firm and employers, and in engaging in modified work that can be meaningless or socially threatening. For both employers and injured workers, damaged moral relationships and trust can trigger snowballing of social strains, induce attitudinal 'hardening' and resistance, and impede the achievement of mutually acceptable solutions to the problems of injury and return to work." (Eakin 43)

Professor Ison also noted the anti-therapeutic impact of experience rating. He says in part:²⁰

"As mentioned above, experience rating encourages employers to establish routines for the scrutiny of every compensation claim. The incentive created, however, is not for an impartial scrutiny or open-ended enquiry, but for a partisan scrutiny. Experience rating creates an incentive to develop only negative information to disallow or to minimize a claim. These routines with this motivation are almost bound to generate within the company attitudes of suspicion towards claimants, and such attitudes are likely to be sensed by claimants. They cause anxiety and resentment, and their impact on the vulnerable psychological state of an injured worker can increase the gravity of a disability. Related to this, the system must obviously include the detection and investigation of fraud; but if therapeutic damage is not to be inflicted upon legitimate claimants, the prevention of fraud must not be sought through a program that results in all claimants being treated with suspicion. The monitory for fraud should be done by people who have an incentive, or at least a duty, to distinguish fraudulent from legitimate claims, not by people upon whom there is imposed an

²⁰ Ison, "The Significance of Experience Rating"

economic incentive to defeat or minimize any claim, however legitimate.” (Ison 730)

We are struck, through our years of work, how many injured workers say that the worst thing about their injury experience is how they were /are treated afterwards. This is where they have experienced the greatest harm by their own account.

Stigma

Experience rating contributes to stigma.

Many of us have directly experienced the caution expressed by claims adjudicators, in the provision of benefits, expressed by the phrase: “It’s the employer’s money.”

Joan Eakin in her study of front-line workers (FL) found this in practice.²¹ She noted:

“The solvency imperative. Financial accountability – particularly the balancing of revenue and expenditure – is a foundational, overriding responsibility of the WSIB. Although primarily a function of senior management, a concern with solvency (particularly cost control) can be found at all levels of the organization. It is present in the general discourse (way things are commonly conceived, named), most significantly in the finding that employers are seen as ‘revenue’ while injured workers are seen as ‘cost’. It can also be seen as implicit in various operating procedures. For example, cost considerations figure prominently in decisions to admit injured workers to re-training programs, and employer non-compliance is referred for special investigation only when financially ‘worth it’.” (Eakin 14)

Claims managers are acutely aware of how experience rating works. They know that that surcharges can have significant, even devastating, consequences for a company. They know that rebates are much sought after and that companies often invest considerable time and effort (most often through claims control) to obtain them. Experience rating individualises the money as “the employer’s money” and thereby exaggerates the “cost control” effect on workers’ claims.

Furthermore, to the degree that an injured worker represents a risk to co-workers (if workplace incentives are in place for no lost-time claims) and to employers due to surcharges, stigma is increased. This carries over to a prospective new employer for workers with permanent impairments.

²¹ Joan Eakin et al, The Logic of Practice: An Ethnographic Study of Front-line Service Work with Small Businesses in Ontario's Workplace Safety and Insurance Board, (Toronto: Institute for Work and Health, Apr. 2009) Working Paper #346

Workers who are brought back before they have had sufficient time to heal and do not fit into the norm of the workplace pattern will be vulnerable to stigmatic behaviour by co-workers and production managers.

As a result of recent work with injured workers and researchers, the WSIB has embarked on a significant and remarkable campaign to eradicate stigma of injured workers--starting within its own house. (See material attached, Tab 9) Experience Rating works directly against this campaign.

Does ER provide incentives for improved H&S?

Research does not show a satisfactory link between experience rating incentives and improved attention to workplace health and safety by employers. Most research has used claims data—frequency and duration of claims--as a measure of success in health and safety. However these studies also caution that the measure is not a useful one since it is not possible to know if those numbers are actually as a result of health and safety improvements or if they represent increases in claims management.

In their study on experience rating in British Columbia²², Douglas Hyatt and Terry Thomason attempted to measure what actions employers consciously took in response to experience rating and whether their behaviour was different than those who were unaware of experience rating. In this case the term “claims management” unusually included some health and safety features (Hyatt and Thomason 65), and the term “cost control” referred more to what we usually consider to be “claims management.” With this clarification in mind we see the summary statement indicates that employers are not significantly incented to improve health and safety:

“While there is some ambiguity with respect to the theoretical predictions of the impact of experience rating on the frequency and cost of workers’ compensation, and indeed some ambiguity in the results of previous empirical analyses, the more methodologically sound studies generally support the proposition that firms respond to the incentives of experience rating by attempting to reduce claims costs. Furthermore, we can expect that firms will respond to these incentives by initiating any cost-effective action that reduces overall costs, without regard to the intentions of policymakers. Thus, in designing experience-rating plans, policy makers must recognize that firms are likely to respond in a multitude of ways to reduce claims costs.” (Hyatt and Thomason 67)

²² Douglas Hyatt and Terry Thompson, Evidence on the Efficacy of Experience Rating in British Columbia: A report to the Royal Commission on Workers’ Compensation in BC. (Victoria: The Commission, May 1998)

The Morneau Sobeco report²³ following its enquiry into the functioning of experience rating in Ontario, noted:

“There is currently no link within the Experience Rating programs between an employer receiving a refund (or surcharge) and its meeting its legislative obligations under either the Occupational Health & Safety Act or the Workplace Safety & Insurance Act. Changes are needed to ensure that the WSIB’s Experience Rating programs are not working at cross-purposes with legislation and regulation governing injury reporting and workplace safety. Employers may be entitled to rebates for ‘performance’ as defined by Experience Rating programs while at the same time being non-compliant with their regulatory obligations.” (Morneau 9)

The fact is, an employer can get a substantial rebate under the experience rating system, without a shred of evidence about how safe the workplace actually is (the conditions of work and training) or their efforts to improve the situation.

This, by the way, stands in stark contrast to the injured worker who must supply clear and convincing evidence regarding their compensable condition in order to receive benefits.

Experience rating not only does not sufficiently incent attention to health and safety at the workplace—it works against it.

Although there have been recent efforts to correct the situation, the Ministry has relied, and continues to principally rely, on lost-time claim data as an indicator of how the Province is doing in workplace health and safety. The reliance on lost-time data results in perverse situations where fundamentally safe companies can have a single accident and, as a result of giving the worker time to heal, will have a visit from an inspector. (This occurred to two of the organisations that participate in the ERWG). In reverse, the Ministry of Labour may well fail to send an inspector to an unsafe workplace which successfully maintains a lower than expected lost-time rate through immediate modified work programmes.

Clearly this works against health and safety improvement and in the meantime the Ministry fools itself and the public about the actual state of safety improvement based on claim data (see the Ministry of Labour News release. [Tab 10]). Its ‘quick facts’ indicate that over a four year period the workplace injury rate was reduced by 20%. That sounds impressive. The next fact indicates that this statistic is based on “the annual rate of lost time injuries”. Based on the Hyatt and Thompson study and our own experience, we are more likely talking (at least in part) about an annual rate of injured workers squeezed off their benefits one way or another.

²³ Morneau Sobeco, Recommendations for Experience Rating: for Discussion with Stakeholders. (Toronto: Oct. 2008). This company was commissioned by the WSIB to look into experience rating following the revelations about it in the Toronto Star in May and June of the same year. Unfortunately this is a private company which itself helps to set up experience rating programmes and its attachment to the concept is evident in the report.

Experience rating works against health and safety in at least two other significant ways:

- Further injury. The injured worker is put at risk of further injury. Once an employer is in a potential surcharge situation, there is ONLY ONE WAY to convert it to a rebate—and that is to prevent or at least minimise the injured worker’s receipt of benefits. This unleashes many potential further threats to health of the injured worker: secondary and/or worse injury due to the push back to work too soon; emotional stress overload from the points outlined in this paper, including trespass on privacy (employer access to the compensation file; video surveillance); unjust termination of benefits; discourse of abuse; and increased sense of vulnerability.
- Use of temporary workers. Experience rating is one of the business costs which employers seek to avoid through the use of temporary agency employees. Temporary workers do not get the same kind of health and safety training as permanent workers and there is little accountability to them by the client employer. Injury rates are high. The Toronto Star reported on this phenomena as its front-page news on February 16th, 2008. [Tab 11]
- This Toronto Star article quotes WSIB Chair, Steve Mahoney, as saying the situation is “*fundamentally wrong . . . to allow a company that is using temp agencies to simply skip the responsibility for safety is not in the interest of the workers and that is our main focus.*” (Toronto Star A1)
- Thus in the case of the use of temporary agencies, more workers are getting injured on the one hand, and companies are not being identified as hazardous on the other. Unfortunately, despite the Chair’s concern, the practice continues unabated.
- To make matters worse, the temporary agencies are adept at ensuring that they themselves do not get hit with the surcharge by ensuring injured workers do not go on benefits, or minimally so.²⁴

²⁴ For example, the following is an excerpt from a legal clinic caseworker memo regarding the perverse effects of experience rating: “*When early and safe return to work comes along, no problem. The Staffing Edge has a million suitable jobs all catalogued by injury/accommodation. Standard back restrictions? You can supervise students writing exams in one end of the city, giving out pencils and washroom passes, or you can go to a warehouse on the other side of town and sort tiny ball bearings into buckets based on their size. They have enough trivial jobs to break the will of any injured worker. No one could put up with such modified work.*”

Mr. X was uncomfortable with the job supervising exams because he did not go very far in school himself and would not be able to cope with any questions. He was threatened with having his benefits cut off for not co-operating with his employer in returning to suitable work. He decided to try the sorting job. He was told to report to a factory he never heard of before. When he got there they took him to a desk with a large bucket of

The final point we would like to make in regard to health and safety is to note that there can be companies who are doing well with health and safety, but who still treat injured workers very badly due to experience rating. Even if experience rating was shown to positively affect health and safety, it must be substituted by another incentive which does not at the same time harm injured workers.

Does experience rating provide incentives for employment of injured workers?

Although experience rating was intended to promote health and safety, the Board has in fact used the threat of surcharges and the enticement of rebates as a lever to prompt employers to provide quick return to work of injured workers. This is an ill-advised practice since not only does it throw the injured worker into the potentially unsafe environment of an experience-rated employer, it also does not support successful return to work.

With the intensification of experience rating, the WSIB has seen an increase in recurrences. Data from a WSIB presentation to this group indicated for example that the average number of recurrences per claim increased from 1.2 in 1997 to 1.6 in 2000. For claims which became permanent, the recurrence rate doubled from 21% in 1997 to 41% in 2000. Experience rating promotes fast return to work which often creates more disability.

Besides the creation of worsened or new injuries, experience rating specifically turns an injured worker into a financial risk. The logic of the system creates a risk of a surcharge to the employer if the worker loses and reports even one day from work due to the injury in each year that the claim is experience rated. A recurrence will reactive a claim. Claims nearing the end of the experience rating windows, carry dramatically higher reserve costs if they are active in that year, as opposed to remaining dormant.

small ball bearings of varying sizes all smaller than a pea. He was given 3 smaller empty buckets and told to separate them into large medium and small sizes. At the end of the day he took his 3 smaller buckets to his supervisor and went home. Every day he would return the next day to the same scenario – a large bucket of mixed sizes and the 3 empty buckets. It was particularly tricky for him because he has large thick fingers and he could not pick up the smaller pieces. He never saw his supervisor dump the bearings back into the larger bucket at the end of the day when he went home, but he is certain that was done.”

And the WSIB is complicit – the IW (injured worker) complained about the mindless menial jobs and the harassment he got there for going to the washroom or talking. The RTW Specialist came and did an ergonomic review and got him a different desk and permission to take breaks and talk. An ergonomically perfect concocted mind breaking job.

For example, using the 2010 NEER reserve factor table for rate groups 207-542, a claim that is 41 months old but in which less than four weeks of benefits have been paid, carries a reserve factor of seven and one-half times the cost of the claim to date if it is active in that year. On the other hand, if the claim remains inactive the reserve factor is less than one-tenth that amount. (Claim type 3 vs. claim type 4.)

It is not really possible to prevent any recurrences from happening, but when they do, there is the option of suppressing the reporting and continuing to pay full wages. The risk can also be avoided by terminating the worker's employment for "non-injury related reasons" as early in the claim as possible. If the Board can be convinced that the worker has been able to earn his or her full pre-injury wages at a job that is generally available in the workforce, this will not create an activation of the claim. In fact, it will inoculate the claim against reactivation, as the Board is often only too happy to go along with even tenuous claims that a worker's actual wage loss is due to "employment factors" rather than the injury, and that any future wage loss is unrelated to the claim.

The termination of the worker for reasons "unrelated to the claim" is not difficult to achieve, especially in non-unionised workplaces which constitute the majority in Ontario at this time. The injured worker then has no job, no support from the compensation board, and faces a competitive labour market.

Experience rating also works against employment with a new employer. Although it is against the law to enquire whether a prospective worker has a compensation claim, employers are always keen to know and they may avoid hiring such a person. A key reason for this is that a recurrence may be costed as a new injury and become experience rated for the new employer. Likewise the worker will be identified as someone who has put in a claim for compensation. If a new accident happens this worker is likely to put in another claim. There is evidence that this discrimination against injured workers due to experience rating heightens the discriminatory hiring practices against the disabled community in general. The impact of experience rating on new hires was explored by the New Zealand study by Mark Harcourt and others. They found:²⁵

"Results from this research suggest three conclusions. First, they show a direct relationship between experience-rating and hiring discrimination. This indicates that employers are proactive, rather than simply reactive, in the management of compensation claims: They try to prevent future claims by discriminating rather than merely limiting the impact of such claims, subsequent to an injury occurring. Second, they show that employer attempts to limit such claims are not restricted to just morally questionable activities, but potentially extend to the unlawful as well. Third, they identify a hitherto unrecognised group of potential victims of experience-rating, the disabled, whereas past research has focused only on the negative consequences of claims management for the newly injured." (Harcourt et al 695)

²⁵ Mark Harcourt, Helen Lam and Sondra Harcourt, "Impact of Workers' Compensation Experience-rating on Discriminatory Hiring Practices," *Journal of Economic Issues*, XLI (2007): 681-699

While experience rating may appear to promote the employment of injured workers, it does not. Experience rating promotes only short-term work for cost-control purposes: to lower the reserve factor and avoid a surcharge. This short-term work actually creates more injury. Furthermore, since an injured worker becomes a day-to-day surcharge risk, the employer is incited to find a way to conclude the employment relationship without any obvious relationship to the claim. The unemployed injured worker then faces a double hurdle in securing new employment: the injury/illness itself in employment lines with plenty of healthy people, and the specific discrimination against injured workers caused by experience-rating.

What about experience rating as an important insurance principle to provide equity amongst employers?

Employers often argue that experience rating is a matter of cost distribution in an equitable manner. They argue that it is not fair for an employer, who has put much effort and expense into safety, to pay the same as one who has not and who generates the majority of accidents.

We can support that, however, what needs to be measured is that effort and expense put into safety, not the cost of accidents. Through claims management techniques a company can have the appearance of a claim-free workplace while still having an unsafe workplace and while actually having workers who get injured.

What goes on under experience rating is *gaming*, not *equity*. Costs are transferred between companies based on the relative success of one company versus another in cost-control of claims.

As noted above, the Morneau Sobeco report highlights the fact that employers can receive substantial fines from the Ministry of Labour for safety infractions and also get a substantial rebate from the WSIB under the experience rating programme. There is no equity in that.

In addition, experience rating penalizes the employer who gives the worker time to heal and therapeutic return to work. The claims of these injured workers will incur costs and drive up the employer's risk of a surcharge (and loss of a rebate). At the other end of the spectrum, the employer who harasses a worker in immediate return to work, tolerates an abusive process, and who has no long term commitment to the worker, is in a good position to get a substantial rebate. There may be actuarial equity here, but no equity that relates to the purpose of the compensation system.

In a collective liability system, the risk is to be shared. A cost-distribution variation can be achieved based on actual conditions of work if employers are willing to have inspections and evaluations of their premises.

Why does experience rating continue when it does so much harm?
Why does experience rating continue when it serves no obvious purpose?

We can only conclude that the system is addicted to it.

At this point, it is fairly well established and accepted by most that experience rating does not help with health and safety. And yet it continues.

The WSIB has received considerable evidence and testimonials from injured workers that rushed return to work, especially under the employer's imperative of avoiding a surcharge, is harmful. And yet the WSIB is relying on experience rating in its new work re-integration initiative—it even proposes to deepen it by expanding the window beyond three years.

WSIB staff know that experience rating causes cost-control activities that serve to shift employer rates away from those who do this well, and on to others who do not – regardless of the actual health and safety of the workplace or the actual commitment to employing injured workers. The Board knows that experience rating does not achieve equity. And yet it continues.

Where does the addiction come from?

We can start with the observation that it is the WSIB actuaries who are in control of the use of experience rating. (When this group first met with Board staff to discuss the problems of experience rating, we found ourselves set up with the Chief Actuary and other actuarial staff, despite our insistence to meet with those responsible for the health and safety programme). In general, actuaries are trained in private insurance models and experience rating makes sense to them.

The effect is that actuaries are making public policy.

It is sad to say, but we cannot help but conclude that the Board likes experience rating because it helps to reduce benefits to injured workers. If an employer offers a job-- whether or not the worker takes it—they can be deemed to have it and thus benefits can be reduced or cancelled. It is not appropriate for the Board to like this--but under the pressure of cost-control and to not raise employer rates -- it's a very handy thing. It is especially handy since it works in the background--people don't really see it. Just like any addict tries to hide their vice.

We are disturbed to find that the Board likes experience rating because it engenders employer challenges and helps to keep claim cost down that way. In the materials provided to the Funding Review (WSIB Technical consultation paper Employer Incentives, January 2011) there is sense of this on page 26. It is noted that the retrospective nature of the Board's experience rating programmes “encourage cost management rather than prevention and return to work” and that after the three year window is closed “employers overwhelmingly do not contest claim appeals”. This has “a

direct negative impact on claim durations and WSIB's cost of claims." Unless we are reading this incorrectly, it seems like a reliance on an adversarial system. This is entirely inappropriate for our compensation system. This desire for experience rating by the Board concerns itself with the board's finances, but doesn't concern itself for the injured workers who are the victims.

Leaders at the Board know that experience rating hurts injured workers. They know that lost-time claims data is not a measure of either health and safety nor successful return to work. We know this because we have talked to them over and over again and they ultimately have acknowledged this, but even they are apparently powerless do to do anything about it--the pressure to reduce claim costs is fierce--and experience rating is the fix.

It is not clear that employers themselves are addicted to experience rating. Many employers do not know about it or how it works. However, there is a huge business world which has grown up around it and which has become the voice for employers in discussions about experience rating. Experience Rating is big business. It is lucrative business.

ER works against the fundamental notion of a system which exists as *remedial* legislation which is intended to seek to provide the benefits a person is entitled to, not to escape that responsibility.

It is our sincerest hope that this Funding Review will recognise that experience rating is powerfully addictive. It has no proven positive benefit, but the forces behind it, the pushers, will keep seeking rationales for why it is needed. These must be understood for what they are.

What does this system cost?

In the past twenty years, about **three billion dollars** have been given back to employers in rebates. (from WCB/WSIB Annual Report figures)

The cost of running the system is astronomical. For example, in the year 2007 – 2008, the Board spent **\$523 million** on the experience rating programmes. (In that same year, in comparison it funded expenditures on Ministry of Labour inspection and enforcement at \$90 million dollars.)²⁶

Better ideas

The Experience Rating Working Group has spent time discussing better ideas, attending talks by experts, and reading materials on other systems for both achieving healthy and

²⁶ Institute for Work and Health. IWH Report to the Expert Advisory Panel Occupational Health and Safety Prevention and Enforcement System. Summary Measures.(Toronto: IWH, June 2010) [Tab 12]

safe workplaces and for achieving a positive response to the meaningful employment of injured workers.

There is much to learn and it would be premature to suggest what is best. There is however no doubt that positive, effective systems can be discovered and/or developed. If we use some of the funds liberated from what is currently spent on experience rating, an impressive amount of research, design, and discussion can happen.

Whatever systems are devised, it is likely important that health and safety on the one hand, and employment of injured workers on the other, are kept separate. As we can see from the history of experience rating, mixing them can confound the intended policy outcome.

To the degree that our compensation system rate structure should be used to promote health and safety, it is our sense that the following should be considered:

- A flat rate system. This is fully in line with the collective liability principle. While this idea may seem startling to some hearing it for the first time, if we think of how our healthcare system is funded, it can be seen how it could work. It has the great advantage of being simple, straightforward, and uncontroversial. Interestingly, it is used in compensation systems in many jurisdictions around the world.²⁷
- Adjust the flat rate with four grades based on actual workplace health and safety measures, such as training, inspection results, and evidence of investment in health and safety. A company would enter the system at the high rate. Adjustments down would be made based on the direct health and safety measures. The significance of these adjustments should be sufficient to motivate the employer to take positive action. Measures of health and safety must be defined to specifically exclude claims data.

There are likely many good ideas out there. A new emphasis on health and safety will be created under the aegis of the Ministry of Labour further to the recommendations of the Tony Dean Enquiry of 2010. It will be their task to discover and develop new effective systems, but certainly funds saved by closing down experience rating can go to building new designs.

In regard to the employment of injured workers, the WSIB has at its disposal the use of the Ontario Human Rights Code. Mostly we need a societal culture shift, which acknowledges injured workers as worthy participants in the workplace. The WSIB can play a significant role in promoting that shift and will be in a better position to do this once its mandate more clearly focuses on serving injured workers.

In terms of positive incentives, our group has been working on the idea of an 'incentive backpack' carried by the worker. This is a system which allows the injured worker to go

²⁷ Arthurs Williams, An International Comparison of Workers Compensation (Boston: Kluwer, 1991)

an employer without hiding the fact that they are an injured worker and providing a monetary incentive to the employer if they are hired.

The extensive funds freed up from the old experience rating system can also be put to good use in developing these and other concepts to support the employment of injured workers.

Abolishing ER

It is our position that experience rating must be eliminated.

The Morneau Sobeco Report said, despite the problems, it should not be eliminated. The reasons given however do not fit for a system which is flawed.

The report says *"eliminating refunds would meant that those companies that have invested in health and safety would no longer receive the anticipated return on their investment."* (Morneau 23) But as we have seen, there is no particular attachment between rebates and attention to health and safety. The report says: *"For companies who comply with legislation, but have a weak health and safety culture, the WSIB would be left without a financial incentive to persuade such companies to make improvements."* [p.23] Again, there is little evidence that the threat of surcharges persuades companies to make improvements in health and safety.

The report concludes on this matter, saying: *"As a result Morneau Sobeco does not recommend the complete elimination of experience rating unless it can be replaced by a more effective program."* (Morneau 23)

As evidenced by this report and its recommendations, the attachment to experience rating is strong and it is our belief, that until it is eliminated, there will be little done to find a better system.

Some will say experience rating cannot be abolished because everyone else has it. With that sort of thinking of course, change could never happen. Ontario has often been a leader in workers compensation--beginning with the Meredith Enquiry and resulting legislation in 1915. If Ontario can take a leading role in concluding the experiment with experience rating, it will be applauded by many around the country and will hopefully lead the way to truly effective programmes across Canada.

In brief, we say²⁸:

- Stop the system now.

²⁸ We say additionally, that all companies should be in what is now known as Schedule I--that is, part of the collective liability pool. Currently Schedule II employers pay directly for all claim costs--while not in the experience rating programme, they are effectively 100% experience rated. Historically we have found Schedule II employers to be the most adversarial

- Collect any surcharges due at this time. Do not issue any more.
- Provide rebates due at this time. Do not issue any more.
- Re-deploy staff freed up from the experience rating programmes to departments which will serve the needs of injured workers.
 - For example, to provide for more claims managers. This would allow more time for the face to face meetings which are intended by the Board, but rarely occur;
 - Another example is to set up a department to research and develop concepts to enhance the employment of injured workers in society as a whole.

Uncovering the impact of ER during the Funding Review Hearings

We don't know how many injured workers will actually be presenting to this review panel. However we suggest that you try to find out something about Experience Rating from them. Below are some questions that would help. Although you could ask directly about experience rating, most injured workers are not in a position to actually know about it. Framed slightly differently, the same questions can go to union presenters who are also familiar with the dynamics of the workplace.

1. Some employers have rewards for employees if there are no lost-time accidents in workplace--sometimes a draw for a car, or a turkey at Christmas, or shares in the company for example. Did your company have a programme like that?
2. If so, did it have any effect on you in regard to reporting your injury?
3. Or, taking time off work to recover?
4. Did you feel any pressure from your employer to return to work the next day (or sooner than you felt ready for)? If so, describe that a bit.
5. Did the company give an explanation for why you should come back so quickly?
6. If you returned to modified work with the employer, what was the attitude of co-workers and managers? Helpful?
7. If you returned to modified work with the employer, how did you feel? Was it helpful to your recovery? Was it a positive experience?
8. Overall was your employer supportive of your claim for compensation? If so, how? If not, how not?
9. Are you aware of other injured workers at your workplace? Do you have a sense of their experience with the employer?

10. Are you still working for the accident employer? If so, is the work suitable?

You could also ask a few questions about H&S: Does your workplace have a joint health and safety committee? What role does it play? Did you receive good training for your job?

Funding Review Questions:

1. Is the present design and operation of the WSIB's employer incentive programmes appropriate? If not, how should they be changed?

The design and operation of the experience rating-based programmes are flawed and lead to harmful outcomes for injured workers.

The experience rating programmes should be eliminated.

2. What other incentives might be used to promote increased safety in the workplace and re-employment of injured workers while ensuring equitable treatment of employers and maintaining the WSIB's premium revenues?

The large amount of financial resources which would be freed up by the elimination of experience rating (\$500 million/year) could be used in part to study and design world-class systems.

In the meantime a prospective adjustment of employer rates can be used according to a four-grade system. Employers start at the highest rate and, based on evidence of actual health and safety practices and conditions, may be eligible for reductions.

These four grades should be based on what is otherwise a flat rate for all employers.

If the compensation system is to be used as a serious tool to promote health and safety, all workplaces and workers must be covered. Full coverage will also improve Board revenue and/or allow for an overall reduction in employer rates.

Respectfully submitted on behalf of the Experience Rating Working Group.

Marion Endicott

March 27th, 2011

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