

**WORKPLACE SAFETY AND INSURANCE BOARD
RATE FRAMEWORK CONSULTATION**

**Submissions of the IAVGO
Community Legal Clinic**

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I. Introduction

IAVGO fundamentally disagrees with the Board's proposed rate framework. Worker stakeholders, researchers, the Expert Advisory Panel on Occupational Health and Safety, and Professor Arthurs have all told the Board about the serious problems caused by relying on claims experience to calculate individual employer's premium rates. But instead of addressing these issues, the Board proposes embedding claims experience even more deeply into the rate-setting process.

The Board has been told repeatedly that claims-experience based incentives:

1. are ineffective at promoting health and safety, and
2. encourage claim suppression and claims management.

In the redesign of its rate setting process, the Board has an opportunity to address these problems and align its individual-employer level incentives more closely with the statutory objectives of improving health and safety, and helping injured workers return to work.

But instead of taking this opportunity, the Board just assumes away all of the problems associated with experience rating. The Board assumes that claim suppression is the result of "design flaws" in its current programs, rather than problems inherent in basing premiums on claims experience. And the Board assumes that claims experience is an accurate measure of an employer's health and safety performance. And the Board further assumes that a premium rate setting method that relies even more heavily on claims experience will improve health and safety. The Board offers no foundation for these assumptions, nor any explanation for its refusal to implement the recommendations of the Expert Advisory Panel and Professor Arthurs.

IAVGO reluctantly participates in these consultations. We do so only to document our objections and with little hope that the Board will take our concerns seriously. We are frustrated and disappointed: we have spent many years helping injured workers who have been hurt by the employer behaviour that experience rating incents, and the Board refuses to even acknowledge, much less address, these issues. And to make things worse the proposed rate framework show that the Board is passing on the opportunity to both improve our workers' compensation system and make Ontario workplaces safer.

2. IAVGO's work and experience rating

IAVGO's submissions are from the perspective of experienced injured worker representatives. We are a community legal aid clinic that specializes in workers' compensation. We have been helping low-income injured workers with their workers' compensation cases for over 38 years. We have seven caseworkers, including three with over 25 years of experience representing injured workers.

IAVGO represents and advises hundreds of injured workers and their families at any given time. Our advisory services range from a 40-minute meeting to opening what we call "merit review" or "self-help" files to provide injured workers with more hands-on help. For these workers, we ghost-write letters to the Board, gather medical information, evaluate cases for merit, and make sure time limits are met. Over the years, we have advised and represented thousands of injured workers.

Our clients include some of the most marginalized workers in Ontario. In addition to their work-related disabilities, the injured workers we serve often have:

- mental health conditions, including depression, post-traumatic stress disorder, or addictions
- racialized identities
- limited literacy
- little or no English language skills
- low levels of education (usually high-school or below)
- no or limited Canadian immigration or citizenship status
- precarious employment both before and after the accident
- limited or no vocational skills
- no income other than social assistance or Ontario Disability Support Program

Our clients are particularly vulnerable to claim suppression and claims management. The employer-employee power imbalance is particularly pronounced for these injured workers and employers often exploit that imbalance. We regularly see workers who have been threatened or discouraged against reporting their injuries, face spurious employer appeals, are subjected to unfounded allegations of malingering, are fired on false pretences, are rushed back to unsuitable work before they are fit to do so, or are forced to return to work in fake and demeaning jobs.

In addition to our casework, IAVGO is dedicated to law and policy reform. We work together with injured worker groups, other legal clinics, private lawyers, and labour organizations to advocate for fairness for injured workers. This includes work on experience rating: we participate in the Experience Rating Working Group and we were heavily involved in the funding review. More recently, one of our staff lawyers wrote *Rewarding Offenders*, a report exposing how the Board's experience rating system requires it to pay huge rebates to employers that have committed serious occupational health and safety offences.

3. The fundamental flaw: continued reliance on claims experience-based premiums.

Our main concern with the rate framework is the continued reliance on claims experience in determining each employer's premium rate. Indeed, the proposed rate framework makes claims experience even more central to the determination of each employer's premium rates than now.

Basing premiums on claims costs creates incentives for employers to reduce claims cost. Some employers may invest in health and safety or build their capacity to accommodate disabled workers. But often it is easier, cheaper, and more direct to suppress or manage claims. Such behaviour hurts injured workers and undermines health and safety.

3.1 Claim suppression is widespread and would undermine the integrity of the rate framework.

Claim suppression is widespread. An April 2013 report, commissioned by the Board, attempted to quantify the extent of claim suppression in Ontario's workers' compensation system. The report's authors, Prismic Economics and Analysis, acknowledged that this would be difficult: claim suppression is "a practice that those who engage in it seek to conceal", and it is doubtful as to whether conventional research could ever validly estimate the amount of claim suppression or identify the motivation for suppressing claims.¹

But the report does identify "plausible estimates" of things that are components of or closely related to claims suppression. This includes estimates that:

¹ Prismic Economics and Analysis, *Workplace Injury Claim Suppression: Final Report*, April 2013, p.2.

- Workers do not claim 20% of likely compensable, work-related injuries or illnesses.
- Employers do not report 8% of work-related injuries or illnesses (although the report acknowledges this may be underestimated)
- Employers misreport injuries or illnesses as no-lost time in between 3% to 10% of cases.
- 5.2% of the abandoned lost-time claims examined indicated that the worker had more than two weeks of lost-time.²

These figures seem low to those of us who work with injured workers. And they do not capture more subtle forms of claim suppression that employers use, like giving employees bonuses for low lost-time injury rates.

But limited as they are, Prsim’s “plausible estimates” show that the scale of claim suppression is so vast that it would undermine the integrity of a rate framework based on claims experience. How can the Board claim that each employer is paying its fair share if employers either do not report or misreport 11-18% of injuries or illnesses? How can the Board claim the claims experience is a legitimate measure of an employer’s health and safety performance if that many employers aren’t reporting claims correctly?

3.2 Claim suppression results from claims experience incentives.

In a meeting with the Experience Rating Working Group to discuss the rate framework, Board representatives suggested that claim suppression is a complex problem, not clearly attributable to claims experience incentives. This suggestion is presumably based on comments made in the Prsim report on the motivation for claim suppression.³

The Prsim report says little about the causes of claim suppression. It acknowledges that the only source of evidence on the motivation for claim suppression it reviewed were the 100 Board enforcement files, so no “strong” conclusions could be drawn.⁴ That said, the report notes that 49 of the 100 employers who were prosecuted hadn’t even registered with the Board. According to the authors of the report, this

² Prsim Economics and Analysis, pp. 3-4.

³ Prsim Economics and Analysis, pp. 3

⁴ Prsim Economics and Analysis, p. 3.

implies that “a general aversion to compliance is a stronger motivation for under-reporting than any other factor”, including experience rating.⁵

It is surprising that Prsim would advance even such a tentative conclusion about employer motivation for underreporting. The sample size was tiny (only 100 enforcement files) and it is highly unlikely that the Board’s enforcement files are a representative sample of employer misreporting.⁶ The high proportion of unregistered employers in the sample enforcement files likely tells us more about the Board’s priorities in enforcement than about employer motivation for claim suppression.

And other than the incentive to reduce premiums, there is no credible explanation for the behaviour of the thousands of registered employers that suppress claims. Experience rating gives employers a direct and often substantial incentive to suppress claims. It is not be surprising that they respond to these incentives.

3.3 The Board assumes that rate volatility causes claim suppression.

The proposed rate framework only includes one measure to address claim suppression: reduced annual volatility for some employer’s premium rates. The Board’s argument seems to be that the current system allows too much volatility and that this is what provokes employers to suppress claims. According to the Board, the rate framework addresses this by capping the extent of premium rate changes in any year.

But the Board provides no evidence that it is the volatility of premiums that results in claim suppression. It is just assumed to be so. One would think that if there was any basis for this claim, there would be some supporting evidence – experience rating is used in many jurisdictions all over the world, presumably with for varying levels of premium volatility. Yet concerns about claim suppression are widespread.⁷

⁵ Prsim Economics and Analysis, p. 65

⁶ In *Funding Fairness*, at p. 80 Professor Arthurs noted that the Board’s prosecutions and convictions were “not a reliable measure of employer wrongdoing.”

⁷ See for example Doug Smith, *Turning the Tide: Renewing Workers’ Compensation in Manitoba* (Canadian Centre for Policy Alternatives, 2002) at p. 20; Service Employees International Union, Submission to the Workers Compensation Act Committee, pp. 6-8 (Online: <http://www.wcbactreview.com/pdf/sub101.pdf>); and Prsim Economics and Analysis, Claim Suppression in the Manitoba Workers’ Compensation System: Research Report, November 2013 (online at

There are common-sense reasons to doubt whether it is the annual volatility in the current incentive programs that causes claim suppression. It seems unlikely that employers that suppress claims calculate how much each potential claim might affect their NEER rebate or surcharge before they decide whether or not to threaten the worker not to report. Some may do this, but the more likely situation is that many employers and their front-line managers know that claims experience generally affects premium costs and respond accordingly.

Even accepting the Board's analysis that volatility is the problem, how does the Board know what level of volatility would cause claim suppression? Not only does the Board offer no explanation for this, it also assumes that that the proposed framework will both reduce incentives for claim suppression and improve incentives for health and safety. But if claims experience incentives are effective at changing employer behaviour, how can the Board just presume that all of those changes will be positive?

Without convincing answers to such questions, the Board's proposed system risks encouraging more claims suppression. While reducing volatility for some employers, the proposed rate framework is designed to more closely align each employer's claims costs with their premium rates. The materials describe it as "more responsive" and note that "[t]he proposed system would place more emphasis on an employer's accountability for claims costs, and charging that employer a premium rate that represents their fair and reasonable share."⁸

Through the proposed rate framework, the Board's message to employers will be stronger than ever: reduce claims costs and you will reduce premiums. There is a substantial risk that this will result in increased claim suppression.

3.4 The moral crisis deepens.

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.

<http://www.wcb.mb.ca/sites/default/files/Manitoba%20WCB%20Claim%20Suppression%20Report%20-%20Final-1.pdf> .

⁸ WSIB, Rate Framework Reform, Paper 3: The Proposed Preliminary Rate Framework, March 2015, at p. 36.

...

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.⁹

It is nearing four years since Professor Arthurs put the Board on notice that its inaction on claims suppression was a moral crisis, a moral crisis so serious that he recommended shutting down the Board's experience rating programs if they were not addressed. But the Board's inaction has continued. And now the Board, instead of addressing claim suppression, proposes a rate framework which risks perpetuating it.

Professor Arthurs made specific recommendations that the Board could and should have already implemented. He recommended that the Board:

- Adopt a "firm" policy to protect the integrity of its experience rating programs. (Recommendation 6-1)
- Train staff to detect claims suppression and require them to report it. (Recommendation 6-2.3)
- Establish a special compliance unit, headed by a senior officer and sufficiently resourced to detect and initiate the process for punishing employer abuses. (Recommendation 6-2.3)
- Require employers to designate a Health, Safety, and Insurance Officer (HSIO) responsible for ensuring compliance with the WSIA. (Recommendation 6-2.1)
- Require that HSIOs ensure that every worker gets a Board-prepared document briefly summarizing their rights under the WSIA. (Recommendation 6-2.1)
- Require that each HSIO make sure that every worker is told of their right to file a claim in the event of a workplace accident or illness. (Recommendation 6-2.1)
- Amend its experience rating policies to provide that employers found to have violated the WSIA or other occupational health and safety legislation be

⁹ Professor H. Arthurs, *Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System*, p. 81.

automatically ineligible for favourable premium adjustments or rate rebates.
(Recommendation 6-2.3)

And more globally, Professor Arthurs recommended that the Board:

... commit itself to making the changes in its rules, structures and processes necessary to protect workers against claims suppression and other abuses that may occur in the context of experience rating programs. If it cannot or does not commit to making such changes within 12 months from the receipt of this report, and fails to initiate all necessary changes within its competence within 30 months, it should discontinue its experience rating programs.¹⁰

Professor Arthurs urged the Board to make dealing with claim suppression a priority:

I view the adoption of these measures to protect the rights of injured workers as a matter of highest priority. While appreciating that it will take time for the WSIB to develop specific strategies, to consult with stakeholders about them, to train and deploy personnel, and to budget for this new initiative, I am also aware that if it does not adopt and implement these much needed reforms in the very near future, it likely never will. ... And if these reforms are not put in place, in my view, the risks associated with ER programs are too significant to allow them to continue.¹¹

The Board has made no commitment to making the changes necessary to protect workers against claim suppression and other abuse. And there is little evidence that it has done anything to seriously address claim suppression. The Board's response to the moral crisis on claims suppression was to commission the study by Prisms. But Professor Arthurs recommended action, not further study.

In the rate framework materials, Board says it has set up a "Specialized Employer Compliance Team" to deal with incidents of claim suppression which "may persist notwithstanding the proposed preliminary Rate Framework."¹² It remains to be seen whether this unit is given the resources, authority, and properly defined objections. Other than this new compliance team, the Board hasn't implemented a single one of the Funding Review recommendations to deal with claim suppression.

Ignoring the Funding Fairness recommendations and increasing reliance on claims experience is no way to deal with a moral crisis.

¹⁰ Funding Fairness, at p. 86.

¹¹ Funding Fairness, at p. 86.

¹² The Proposed Preliminary Rate Framework, at pp. 70-71.

3.5 The rate framework will encourage claims management.

Claims experience incentives also encourage employers to “manage” claims. Under this approach, employers focus on reducing claims costs instead of improving health and safety or return to work. Much of this behaviour is legal, but it hurts injured workers and undermines the purposes of the workers compensation system.

Employers manage claims through the appeals process and gamesmanship in return to work. Many employers routinely appeal their workers’ claims, even when there is no legitimate reason for doing so. This makes workers’ compensation more like litigation, to the detriment of injured workers. An adversarial system hurts injured workers in many ways, including:

- increasing delays in the adjudication of claims
- undermining the Board’s investigative role
- subjecting injured workers to accusations of lying and malingering
- increasing the complexity of worker’s compensation proceedings
- fostering distrust between injured workers, their co-workers and their managers and colleagues
- having their personal health information disclosed and scrutinized by employers and their representatives
- encouraging employers to hide, or at least avoid disclosing, relevant information.

Some employers abuse the return to work process either by offering fake, non-productive jobs that disappear when convenient, by firing injured workers on false pretences, and pressuring workers to return to work before they are ready or before their restrictions are identified.

To put it bluntly, claims cost incentives transform the injured worker’s employer into an adversary at the very time he or she most needs support and understanding.

4. The rate framework materials are wrong about health and safety incentives.

The rate framework materials assume that an employer’s claims experience is a valid measure of its health and safety record. Relying on this assumption, the Board claims that premiums based on claims experience will incent employers to invest in health

and safety. The Board is surely aware that neither of these assumptions are well-founded.

The Board has an opportunity here to make a substantial improvement to Ontario's occupational health and safety system. By focusing on leading indicators of health and safety performance, the Board could make Ontario's workplaces safer. And this approach would also allow for more principled solutions to the issues of long latency occupational disease and temporary employment agencies.

4.1 Claims experience is a poor measure of occupational health and safety performance.

An employer's claims experience is a poor measure of its occupational health and safety performance. Claims experience is a lagging indicator and it is distorted by other factors, including claim suppression and claims management. Using claims cost in particular leads to unacceptable results, as in the many cases where the Board has given large premium rebates to reward employers that committed serious *Occupational Health and Safety Act* offences.

Claims costs are driven by factors largely unrelated to the employers health and safety performance. As discussed above, claims costs do not differentiate between improved health and safety practices, claim suppression and claims management. Any of these strategies may reduce claims costs, but managing and suppressing claims doesn't do anything to improve health and safety. And other factors also affect claims cost, including:

- the unpredictability of accidents: some work-related accidents are impossible, or at least very difficult, for employers to predict or prevent. Sometimes even safety-committed employers have accidents. And the reverse is also true – employers with poor health and safety practices may be lucky and avoid accidents despite putting their employees at risk.
- the extent of a worker's injury: the extent of a workplace injury is beyond the employer's control. Instead, this will depend on the susceptibility of the worker to a particular type of injury. One worker may recover quickly from a back strain, incurring minimal claims costs, while another worker with the same injury may develop debilitating chronic pain, never return to work again, and spend the rest of his or her career on benefits.
- health-care costs: employers have little control over the health-care costs generated in each case. Some injuries will require expensive health care

treatment and others won't. These costs may not even correlate with the severity of the injury.

- the Board's actions: claims cost will often be closely connected to the Board's handling of a case. Sometimes claims cost will increase because of factors such as delay and low-quality adjudication. Increased claims cost because of the Board's mishandling of a case doesn't say anything about the employer's performance.
- the injured worker's wage rates: everything else being equal, the claims cost for an injury to a high-wage employee will be higher than the claims cost for a low-wage employee. The wages of an injured worker have little to do with an employer's safety practices.
- the employer's ability to accommodate injured workers: claims cost will often be related to an employer's ability to accommodate injured workers. Not all employers are equally well situated to do so. Much will depend on both the characteristics of the worker (the nature of the disability, vocational skills) and the employer (the size and diversity of operations, positions available, collective agreement obligations).
- the worker's vocational characteristics and the job market: if unable to return to work with the accident employer, some injured workers will be entitled to benefits based on their ability (in the Board's opinion) to find work in a new suitable occupation. Employers obviously have limited control of the job market or the worker's pre-injury vocational characteristics.

Given all of the variables at play, claims costs cannot be considered an accurate measure of an employer's health and safety performance.

Using claims experience to measure health and safety leads to absurd results, like the Board's payment of huge rebates to employers that committed serious *Occupational Health and Safety Act* offences.¹³ With such results, how can the Board say that claims experience is a valid measure of health and safety performance?

¹³ Joel Schwartz, *Rewarding Offenders: Report on How Ontario's Workplace Safety and Insurance System Rewards Employers Despite Workplace Deaths and Injuries*, 2015, online at: http://ofl.ca/wp-content/uploads/2014.11.24-Report-WSIB.Exp_Rating.pdf. Although the Board found fault with several of the examples used in that report, it has never denied its experience rating programs require it to reward employers that have maimed workers and failed to comply with Ontario's minimum safety standards.

The proposed rate framework does nothing to address the disconnect between claims experience and actual health and safety performance. Instead it just ignores these problems and perpetuates the unfounded notion that claims experience appropriately measures health and safety.

4.2 Experience rating is ineffective at improving occupational health and safety.

The evidence of experience rating's effectiveness as a health and safety incentive is limited and unpersuasive. In the funding review, Professor Arthurs empirical studies on experience rating: there is modest – not overwhelming – support for the proposition that experience rating may indeed reduce accidents.”¹⁴ But many of these same studies that reached this conclusion also confirmed that “experience rating probably creates incentives for abuse such as claims suppression.”¹⁵

A more recent study of Ontario's experience rating programs conducted by several of the scientists at the Institute for Work & Health, showed that higher rates of experience rating didn't significantly affect the overall accident rate. Instead a higher degree of experience is associated with fewer lost-time injuries and more no lost-time injuries.¹⁶ The study found that experience rating was ineffective at preventing accidents that result in permanent impairments.¹⁷ And again, the authors noted that experience rating incents cost management.¹⁸

Experience rating's limited effectiveness in improving health and safety shouldn't be surprising. As noted above, claims cost are a poor proxy for health and safety performance. And claims cost incentives are likely to be less significant than other indirect costs of injury (lost productivity, costs of recruitment and training etc.)¹⁹ These indirect costs already provide an incentive for the employer to invest in health

¹⁴ Funding Fairness, at p. 81.

¹⁵ Funding Fairness, at p. 81.

¹⁶ 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.

¹⁷ Tompa et. al, at p. 133.

¹⁸ Tompa et al, at p. 135.

¹⁹ 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.

and safety. Often further investment would be more difficult or more expensive than claim suppression and claims management.²⁰

Experience rating also undermines our prevention system by rendering important indicators of health and safety performance unreliable. Put simply, if employers are hiding or misreporting injuries, 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.

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.²¹

4.3 The Board's approach contradicts the recommendations of the Expert Advisory Panel on Occupational Health and Safety.

The Board's move to increase the role of claims experience in premium rate setting is directly contrary to the Ontario's Expert Advisory Panel on Occupational Health and Safety recommendation that the WSIB review and revise its financial incentive programs "with a particular focus on reducing their emphasis on claims cost and frequency."²²

The Expert Advisory Panel, comprised of academic experts, labour representatives and employers, wrote that it "strongly believes that financial incentives should not simply be tied to claims experience."²³

Instead, the Expert Advisory Panel recommended that the Board's incentives focus on evidence of occupational health and safety improvements in the workplace and reward employers for such improvement.²⁴

²⁰ 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

²¹ 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.

²² Expert Advisory Panel on Occupational Health & Safety, Report and Recommendations to the Minister of Labour, December 2010, at p. 41.

²³ Expert Advisory Panel, at p. 40.

²⁴ Expert Advisory Panel, at p. 40.

The Board offers no explanation as to its refusal to follow the Expert Advisory Panel's recommendations.

4.4 The better approach: focus on leading indicators.

It is unfortunate that the Board doesn't take the Expert Advisory Panel's recommendation more seriously: focusing on evidence of actual occupational health and safety improvements makes good sense. To put it simply, if you want to incent good health and safety practices reward good health and safety practices, don't use a vague proxy that also encourages illegal and undesirable employer behaviours.

Premium rate adjustments at the individual employer level should be based on evidence of actual health and safety practices, not claims cost. Claims cost is a lagging indicator, and, as discussed above it is unreliable and indirect. Instead, the Board would be better off focusing on leading indicators, indicators that measure health and safety before illnesses and injuries happen. The Institute for Work and Health has been involved in several projects working on developing such indicators and they have been used with considerable success.²⁵

With further investment and cooperation with organizations like Institute for Work and Health and the Prevention Office, the Board could develop more comprehensive leading indicators of health and safety.

Focusing on leading indicators would help address the problems the framework materials mention about long latency occupational disease costs.²⁶ It is much easier to reward (or penalize) employers for taking (or failing to take) preventative steps to minimize exposures to harmful substances than to adjust premiums of employers years after their unsafe practices, especially when the multiple employers are involved or the responsible employer has gone out of business.

Focusing on the actual practices instead of claims cost also deals with the problem of our developing knowledge of occupational disease risks. The Board could adjust its incentives as more is learned about the causes of occupational disease. Employers would not be penalized for exposing workers to risks that they could not have been expected to know about.

²⁵ See the Institute for Work and Health's pages on the Ontario Leading Indicators Project ([www.http://www.iwh.on.ca/olip](http://www.iwh.on.ca/olip)) and the Organizational Performance Metric (www.iwh.on.ca/opm).

²⁶ Proposed Preliminary Rate Framework, p. 31.

The potential benefit of a leading indicators approach to Ontario's occupational health and safety system is enormous. For better or for worse, the Board's incentives are by far the most financially significant and broad-reaching in the occupational health and safety system. These incentives should be used effectively, and the best way of doing that is to align them as closely as possible to the behaviours they are designed to affect.

5.0 Prioritizing the right things: “risk to the system” should be defined in relation to the objectives of the *Workplace Safety and Insurance Act*.

Aside from the unsupported claims about claims and health and safety, the Board justifies its continued reliance on claims experience through the concept of “insurance equity.” The Board uses that term less than in *Pricing Fairness*, but the concept that fairness means each employer paying premiums that reflect its claims experience is pervasive throughout the rate framework materials.

The problem is that an employer's claims cost is not a true measure of its “risk to the system.” This notion is based on a misguided and weakly argued understanding of the Board as a state-run insurance company, set up only to insure employers against the financial risk of workplace injuries. But the Board not just an insurance company: it is an independent government agency charge with administering a statutory scheme with the public policy objectives. Those policy objectives are set out in section 1 of the *Workplace Safety and Insurance Act*:

Purpose

1. The purpose of this Act is to accomplish the following 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.

Note that while the objectives must be achieved in a “financially responsible” way, that is only the means, not the ends. And the ends – promoting occupational health and safety, helping injured workers return to work and recover, helping injured workers re-enter the labour market, and compensating them for their losses – are far different than those of any insurance company.

Professor Arthurs said much the same thing in *Funding Fairness*, rejecting the notion that the addition of “Insurance” into the Board’s name changed it into an insurance company:

... while the legislature has every right to call the WSIB an “insurance system,” if it is to behave like an insurance company, the legislature must do more than change its title. It must reconfigure the statute so that the WSIB is structured, endowed with powers and regulated in ways appropriate to this new identity. This the legislature has not done: indeed, it has done the contrary. The WSIB is required to provide “compensation” rather than an “undertaking ... to indemnify” — the defining characteristic of “insurance” under Ontario legislation; it is mandated to promote workplace health and safety, and to facilitate the return to work and labour market re-entry of injured workers — activities not normally undertaken by insurance companies; and the WSIB is not subject to oversight by either provincial or federal insurance regulators.

...

Consequently, to insist that the WSIB as presently constituted is just a state-owned insurance company is to ignore the history, language and structure of its governing statute, the functions undertaken by the WSIB pursuant to that statute, and the individual, corporate and public expectations that have shaped and reshaped Ontario’s workers’ compensation system for almost a century.²⁷

The “system” that the Board should be considering when it talks about “risk to the system”, is the workers’ compensation system set out in the *Act*, with the objectives as set out in section 1. An employer’s risk to the system, therefore, is the risks it creates through behaviours that undermine prevention, compensation, and returning to work.

The relevant provisions of the *Act* support this analysis. Sections 82 and 83, the provisions that allow the Board to adjust premiums at the individual employer-level, focus entirely on these objectives and do not even implicitly suggest that insurance

²⁷ *Funding Fairness*, at p. 14.

equity is a relevant consideration. Section 82 allows the Board to increase or decrease the premiums paid by particular employers:

1. If, in the opinion of the Board, the employer has not taken sufficient precautions to prevent accidents to workers or the working conditions are not safe for workers.
2. If the employer's accident record has been consistently good and the employer's ways, works, machinery and appliances conform to modern standards so as to reduce the hazard of accidents to a minimum.
3. If the employer has complied with the regulations made under this Act or the Occupational Health and Safety Act respecting first aid.
4. If the frequency of work injuries among the employer's workers and the accident cost of those injuries is consistently higher than that of the average in the industry in which the employer is engaged.

And section 83 allows the Board to establish experience and merit rating programs only "to encourage employers to reduce injuries and occupational diseases and to encourage workers' return to work." These are the objectives the Board should focus on instead of its myopic obsession with having each employer's premium rates reflect its claims cost.

This is not to say that fairness to employers is irrelevant. 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 is both common sense and consistent with the governing statutory provisions.

In any event, the Board's claim that a rate framework based on claims experience would deliver some form of insurance equity is dubious. As discussed above, many 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 that suppress claims and take an adversarial approach to injured workers at the expense of those who do not.

6.0 The Board should do more to discourage temporary employment agencies.

The proposal to charge temporary agencies as if they are in the same class as the employers they are supplying is a half-measure. It is based on the premise that “TEAs are expected to pass along their premium costs to client employers as part of their fee.”²⁸ This, the Board claims, would mean that “there would be minimal financial incentive for client employers to use TEA workers to avoid premium costs.”²⁹

The Board provides no evidence for the claim that temporary agencies will pass along their premium costs to the employers who use their services. And there are reasons to doubt this claim: maybe the agency would absorb any additional costs themselves to keep customers; maybe it would pay workers less; or maybe it will use the lower premium rates it gets for supplying workers to some businesses to subsidize increased rates for others. This is a complex issue that cannot just be assumed away.

A better approach would include direct disincentives for employers to regularly use temporary agencies. Although the Board is focused on the insurance equity issues, regular use of temporary agency employees is also an occupational health and safety hazard. As research from the Institute for Work and Health has found that temp agency employees are:

- less likely to complain about unsafe job conditions
- unfamiliar with the equipment, processes, staff and specific conditions of the workplace
- more often injured than other employees
- more vulnerable to claim suppression³⁰

Employers should be discouraged from using temp agencies. Direct financial incentives to this effect would surely be more effective than the theoretical gymnastics the Board proposes.

²⁸ The Proposed Preliminary Rate Framework, at p. 21.

²⁹ The Proposed Preliminary Rate Framework, at p. 21.

³⁰ MacEachen, E. et. al., Workers’ compensation experience-rating rules and the danger to workers’ safety in the temporary agency sector, Policy and Practice in Health and Safety, Issue 1, pp. 77-95.

7.0 Create return to work incentives that travel with the worker.

The Board should provide incentives for employers to hire injured workers. These incentives should travel with the injured worker and apply to all covered employers, not just the accident employer.

Under the proposed rate framework, the injury employer has an incentive to offer modified work that lasts until the experience rating window closes or the worker are terminated “non-compensable” reasons. But using claims experience-based premiums along with cooperation obligations forces injured workers and their injury employers into an awkward and ill-fitting forced marriage. The result is often demeaning and unsustainable return to work jobs, and hostility between employers and injured workers.

Sometimes the best thing for an injured worker is to find a new job with an employer that can more easily accommodate their disability. That may also be the best thing for some employers who, because of their size or the nature of their work, may not be able to effectively accommodate injured workers.

But injured workers face substantial barriers in finding new employment. Injured workers are often disabled from working in the only field where they have the necessary training, qualifications and experience. They face discrimination in the job market because of their disabilities.³¹

Incentives for employers to hire injured workers would help alleviate some of these barriers. And this would be consistent with the Board’s statutory mandate to help injured workers return to the labour market.

Surely this is a better approach than SIEF, which instead of providing incentives to hire injured workers, awkwardly purported to remove risks. SIEF is another example of the Board using indirect incentives and getting poor results. It is unsurprising that the program was not successful and just became a means for large employers to shift costs to smaller ones. SIEF should be scrapped and replaced by an incentive program that actually helps injured workers find new jobs.

³¹ Martin Turcotte, Persons with disabilities and employment, Statistics Canada, December 3, 2014, online at <http://www.statcan.gc.ca/pub/75-006-x/2014001/article/14115-eng.pdf>.

8.0 Conclusion

We conclude by reminding the Board of Professor Arthurs' comment about experience rating. He said that "any well-run agency should confirm that its programs are achieving the goals laid out in that statute." Through this rate framework the Board furthers a pattern of direct defiance of that recommendation. The Board has done nothing to ensure that that its individual employer-level premium rate setting powers are serving the purposes required by the statute: improving health and safety and return to work.

Despite warnings from Professor Arthurs and others that claims experience-based incentive programs are inciting claim suppression and having very little effect on improving health and safety, the Board offers more of the same in its proposed rate framework. Instead of responding to problems, the Board pretends they don't exist.

This is not just about the Board's integrity and commitment to its constituent statute. Injured workers are suffering because of claims suppression and claims management. Workers are getting killed and maimed at work, while the most significant financial incentives in our prevention system are based on superficial notions of insurance equity.

We call on the Board to abandon the proposed rate framework and refocus its efforts on ensuring that its individual employer-level incentives support prevention and return to work.