PROVINCIAL BUILDING & CONSTRUCTION TRADES COUNCIL OF ONTARIO

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WORKPLACE SAFETY & INSURANCE BOARD RATE FRAMEWORK CONSULTATION

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➢ WHO WE ARE

The Provincial Building & Construction Trades Council of Ontario (Ontario Building Trades) is pleased to respond to the Workplace Safety & Insurance Board (WSIB or the Board) Rate Framework Review. (RFR)

The Ontario Building Trades consists of 13 International craft unions in the construction industry with a total membership of about 150,000, with locals being situated in both urban and remote regions of the province. Workplace incidents and occupational disease affect construction workers at an alarmingly high rate. This means that workers and their unions have to deal with the WSIB more often than in other sectors.

Since its initial charter in 1958 the Ontario Building Trades has continuously lobbied for a fair and equitable public compensation system. Although we represent the interest of unionized construction workers we firmly believe that all injured workers regardless of industrial sector and whether they are unionized or not deserve equal treatment and the right to fair and just compensation.

➢ BACKGROUND

In the past few years the Workplace Safety and Insurance Board has conducted reviews of its classification and premium rate setting systems. The reviews, led by Harry Arthurs and Doug Stanley, discovered that stakeholders believe the employer classification system and premium rate setting systems are outdated, overly complicated, and have design flaws which have led to rate instability and difficulty forecasting WSIB costs.

As a result, the WSIB launched a consultation in March 2015 on the 'Rate Framework Reform' initiative. The WSIB held technical sessions with stakeholders in April to provide a detailed overview of the proposed preliminary Rate Framework Reforms and have requested feedback from stakeholders. The WSIB's proposed Rate Framework Reform initiative would drastically alter:

1. How employers are classified (i.e. rate groups/classification units)
2. How Premium Rates are Set
3. Experience Rating Programs (i.e. NEER, CAD-7 and MAP)

We would like to commend the Board on being transparent in making public all the technical papers and various presentations which explain the proposed rate framework. In reviewing the various materials and presentations we acknowledge that the Boards current employer classification system is overly cumbersome and outdated.

It has allowed employers to rate shop which has created an unfair competitive advantage for some employers and misclassification of others in rate group which do not fairly represent their actual business activities.

However, in reviewing the RFR we have concerns that the Board will still be relying on claims experience to calculate individual employers' premium rates. Essentially, the Board will be embedding the experience rating into new rate setting process.

➢ THE FAILED EXPERIENCE RATING EXPERIMENT

Section 83 of the Workplace Safety and Insurance Act provides the Workplace Safety and Insurance Board with discretionary authority to establish experience rating programs. The Board first introduced an experience rating model in 1984 with the intent to promote good health and safety and provide insurance equity to employers based on claims experience. Unfortunately, experience rating hasn't had any measurable impact on prevention and in many cases has led to claim suppression and fabricated safety performance.

From 1998 to 2007 experience rating rebates to employers exceeded surcharges by a total of $880 million.[1] Since 1984, almost $3 billion have been returned to employers in the form of rebates. It is our position that most employers have been more interested in maximizing their potential experience rating rebate and, in turn, have diverted resources to seek immediate gains through claims management strategies, rather than by investing in long term prevention.

All experience rating has done is create an artificial safety climate and helped drain the WSIB Accident Fund by employers who know how to game the system. If we are to move prevention forward and raise the bar on occupational health and safety outcomes, then relying solely on employer incentive programs clearly falls short of this goal. By affording incentives to workers to encourage them to raise legitimate safety concerns and report injuries, we will begin to see substantive change on the occupational health and safety front.

Both the *Expert Advisory Panel on Occupational Health & Safety* (Dean 2010) and Professor Arthurs' *"Funding Fairness" (2011)* raise serious concerns by relying on claims experience to calculate premium rates.

Professor Arthurs *"Funding Fairness"* advised the Board that continuing to maintain and support an experience rating program amounted to a moral crisis. The relevant sections of Professor Arthur's comments are provided below:

> 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.
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> 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[2]

It is disconcerting that despite Professor Arthur's warnings about claim suppression the Board is proposing a rate framework which will perpetuate artificial safety records and employers gaming the system.

[1] Recommendations for Experience Rating Morneau Sobeco October 28th 2008 page 7.
[2] Professor H. Arthurs, *Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System,* p. 81.

There is no doubt that claims experience has created a system which encourages claim suppression and ineffective and artificial safety records. There is little evidence in Ontario and anywhere in the world that experience rating provides little or no incentive for employers to improve safety. That is to say, the evidence that experience rating leads to better prevention and therefore fewer injuries.

We do acknowledge that experience rating creates incentives of some kind as it creates perverse incentives to distort claims reporting and retrospectively rewards employers for managing claims at the expense of genuine efforts to prevent accidents.

The RFR makes a few unsupported assumptions:

1. Claim suppression is the result of "design flaw" rather problems inherent with in basing premiums on claims experience;
2. Claims experience is an accurate measure of an employer's health and safety performance;
3. Premium rate setting method that relies even more heavily on claims experience will improve health and safety.

As mentioned these assumptions are unsubstantiated and in our opinion will continue to reinforce false safety practices which will manage claims rather than prevent injuries.

Experience Rating & Cognitive Dissonance Theory

The Board and the employer community have convinced themselves that experience rating, regardless of all the evidence to the contrary, is the best way to set premiums and all that is required is a few modifications.

In the 1950s, psychologist Leon Festinger formulated one of modern psychology's most important new schools of thought; the theory of cognitive dissonance, which he detailed in his 1956 book *When Prophecy Fails*.

The way cognitive dissonance works is that when people are confronted with information that contradicts either their beliefs or actions, they feel discomfort. To feel better, they either have to modify their beliefs and actions, or find some way to discount the disconfirming action. And the more effort someone invests in a particular action or idea, the greater the lengths he or she will go through, to craft justifications to ease discomfort.

Elliot Aronson, one of Festinger's former students and regarded as one of the foremost experts on cognitive dissonance theory, together with co-author Carol Tavris, looked closely at the phenomenon in their 2007 book, *Mistakes Were Made (but not by me).* Among the examples cited are prosecutors who insist that people cleared by DNA evidence are still guilty; scientists who insist results that agree with funders interests could not have been swayed, and people who like an idea from their political party, but dislike the same idea if told it came from the opposition party.

Cognitive dissonance theory also applies to climate change deniers, those who support supply-side economics, and those who believe that tax cuts to the wealthy create jobs and lead to a more sustainable economy. Despite evidence to the contrary, these groups of people still follow disproven and discredited

beliefs. Cognitive dissonance is bipartisan and the worker stakeholder community is equally guilty of sticking to discredited beliefs.

Committing to a specific ideology or belief can make it much harder to see facts clearly. It is especially hard for people or groups who have committed a lifetime and in many cases, have crafted policies around specific theories to admit that they have failed.

The Board and the employer community have committed the last 25 years to defending experience rating and it has become impossible to completely admit that it has been a failed policy. So, instead of abandoning the concept altogether, the Board and employer community continue to drink the proverbial experience rating "cool aid." The Board and the employers are so committed to the belief that experience rating improves safety that it has become impossible for either side to examine the data objectively.

It is submitted that the current proposed frame work which will rely on claim experience will do little to curtail bad behavior and will actually perpetuate claim suppression. There isn't anything in the rate frame work proposals which lead us to conclude that employers will change behaviors.

We acknowledge that in the rate framework materials, the Board has asserted that 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."[3] However 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.

We are submitting that the WSIB, prior to finalizing the rate framework process, implement all Professor Arthurs' recommendations to deal with claim suppression. For clarity, Professor Arthur's specific recommendations on claim suppression are provided below:

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

[3] The Proposed Preliminary Rate Framework, at pp. 70-71.

Professor Arthurs also 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.[4]

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.[5]

Other than non-descript comments of the Board establishing a specialized unit there really isn't anything in the rate frame group recommendations which address any of Professor Arthurs suggestions.

The rate frame group proposal also fails to comprehend the degree and scope of claim suppression by not considering the barriers that workers have in reporting incidents or simply exercising their occupational health and safety rights.

Overt Claim Suppression

The first class of workers represents those who do not have adequate systems to report incidents or health and safety violations. This class of workers are bullied or harassed into not filling a compensation claim or are misled about worker's compensation until the time limit to file has passed. This is more common with smaller employers and low wage sectors. These workers continue to work despite pain because they have no alternative and they fear being terminated.

Covert "Invisible Hand" Claim Suppression

The second class of worker is those that have all the workplace systems/mechanisms and ability to file a claim and or exercise their rights under health and safety but barriers exists in the form of powerful disincentives to use the system. We liken this to an *"Invisible Hand"* which prevents workers from reporting or exercising their health and safety rights.

For example in the construction industry most workers are reluctant to report an injury and or exercise their duties due to fear of reprisals and being blacklisted. In construction the right to "report, "participate" and "refuse" is commonly referred to as the right to unemployment or early' retirement. Consequently, construction workers are reluctant to report accidents or refuse unsafe work due to fear of employer reprisals.

[4] Funding Fairness, at p. 86.
[5] Funding Fairness, at p. 86.

The other way the *"Invisible Hand"* prevents workers from reporting and leads to claim suppression is fear that by reporting an accident the employer will not be able to bid future work. In certain parts of the province an employer's WSIB claim cost record is relied upon to bid future jobs or be able to work in a particular industrial sector. In these situations the workers "peer group" will put pressure on the injured worker not to report so as not to affect the employer's ability to secure future work. There isn't anything in the framework process which will prevent or curtail the *"Invisible Hand*."

Claims Management

If employers are unable to overtly suppress claims by nefarious tactics such as "threats and termination" or by using the more covert *"Invisible Hand*" approach they simply undertake vigorous claims management to mitigate the costs. Essentially, instead of implementing real tangible health and safety protocols, employers simply turn all reportable/compensable incidents into no lost time claims so they do not negatively impact the sanctity of the employer's record and experience rating profile.

The current proposal to rely on accident experience will lead to employers to simply ramp up "fake" and "non-productive" return to work offers. The Board's current adjudicative approach in industries like construction actually encourages bad behavior by condoning and enabling "fake" job offers. When a worker raises issues with the employer's job offer, the case manager simply threatens the worker with "non-cooperation." Workers and their union simply go along to get along.

Certain employers and workplaces often use offers of modified work as a covert tool to dissuade others not to report future incidents. By providing injured workers with "archaic and mundane tasks" other workers will get the message that if they report something, they will suffer a similar fate. Employers in construction also provide offers of modified work outside the injured worker's home location, which greatly disrupts medical treatment and family life.

Considering the requirement for construction workers to often travel to secure work assignments, the employer is often able to provide offers of modified work in locations far outside the injured worker's primary area of work. Even if a job is available closer to the injured worker's primary residence, the employer will still insist on the more intrusive path. This is done to intimidate the injured worker and his or her co-workers to discourage speaking out. Once again, the message is if that "if you report a claim, this is what will happen to you."

More Restrictive Entitlement Criteria

The Board in recent years has become more aggressive in deeming workers fit and completely recovered despite medical evidence to the contrary. The Board simply asserts that any ongoing impairment is the result of a worker's pre-existing condition. The employer conveniently offers the worker to return to regular duties, but as the worker is still not recovered, he or she refuses. The employer then will either lay the worker off or terminate employment.

The Board's proposed approach to rely on individual claims experience, to calculate individual employers' premium rates, will just increase claims management and cost mitigation and will have no impact on real, proactive prevention. Essentially, why would employers extend resources on prevention when they can achieve a positive claims record by doing the bare minimum by managing incidents through claims suppression and by ensuring that every reportable claim is deemed 'no lost time'?

Changes to Board entitlement adjudication will also assist employers in creating false safety records by effectively denying claims. As mentioned, since 2010 the Board has implemented more restrictive eligibility rules which will decrease the number of soft tissue and gradual onset claims on the basis of pre-existing conditions. If these conditions are simply not being compensated, what incentive is there for an employer to implement prevention?

The Board's continued reliance on claims experience will not only perpetuate claim suppression, but will also increase claims management rather than real prevention. If the Board is going to rely on claims experience to calculate employer premiums, the Board should consider implementing the following:

Develop Methodologically-Sound 'Leading Indicators'

A leading indicator in occupational health and safety needs to signal future events or positive efforts towards preventing injury and illness (e.g. inspections completed, use of safe work practices, etc.). We recommend that the Board in addition to reviewing an employer's claims experience, consider the following "leading indicators"

1. Number of health and safety training hours by job / risk classification.
2. Number of inspections / audits performed in a given time frame.
3. Number of work orders or incident investigations performed on time.
4. Number of "near miss" incidents reported and addressed.
5. Number of OHS inspection / audit findings.
6. Percentage completion or implementation of planned site OHS programs.
7. Percentage of personal protective equipment (PPE) compliance.
8. Number of times the Joint committee meets.
9. Employers who volunteer to either do a WorkWell audit or who have undergone an equivalent Safety Audit would move to lower risk band with a downward premium adjustment. This would include evidence of involvement with an HSA or private safety consultant and the implementation of health and safety interventions not to be confused with claims management strategies. (RTW etc.)

In addition, when it comes to developing measures, we feel it is important to track information such as:

1. Whether an organization or Industry uses temp agency workers.
2. Whether an organization uses contract workers, Independent Operators, etc.
3. The number of workers on modified work (temporary) and (permanent).
4. How many workers in the organization have reported an incident or safety concern in the last 6 years and are still employed with the employer.

5. Number of no lost time claims. The higher the numbers of no lost time claims mitigated by offers of RTW is a red flag and the Board should undertake further review. If the review indicates that a workplace is continuously having the same type of injuries and simply mitigating the claim costs and not implementing any health and safety that workplace would automatically move to a higher risk ban and upward premium adjustment.

We also recommend that the Board take steps to improve the current approach by of mitigating claim costs by employers offering "fake" and "non-productive" work offers.

1. The WSIB implement Professor Arthurs' recommendation to require the employers designate a Health, Safety, and Insurance Officer (HSIO) responsible for ensuring compliance with the *WSIA*. (Recommendation 6-2.1) The HSIO would also include compliance with all Return to Work Offers.

   If the Board does not move to having the employer designate an HSIO, anyone employed or designated on the employer's behalf who offers the modified work will be responsible to ensure that it is productive and not being offered to simply avert claim costs.

2. The WSIB create an e-service "Offer Modified Work Form" that employers need to complete when extending all offers of modified work. This form can simply be e-mailed to the Board similar to the Form 7. There will be clear direction that ***"It is an offence to deliberately make false statements to the WSIB. I declare that all the information provided on pages (length to be determined) is true.*** As the return to work plan changes, the employer's designated person will be responsible to complete updated versions.

   The current system does not require employers to provide written offers. Most employers simply make a promise of modified duties and/or send a generic letter which states that they have a RTW program and can accommodate all the worker's restrictions. It's only when the relationship breaks down that the case managers get involved.

We acknowledge that the employer community will likely counter our suggestions/recommendations, citing the imposition of an administrative burden. Any entity or worker that raises issues with the level of scrutiny the WSIB should require for a premium adjustment are blowing a "Dog Whistle." What they are really saying is "we don't like the idea of any scrutiny beyond claim costs, and a review of individual employers' Health & Safety practices are not warranted."

Temporary employment agencies

The Board proposes an adjustment to the premium rate setting protocol for some temporary employment agencies. Specifically, the Board recommends:

> The proposed preliminary Rate Framework recommends that TEAs and their client employers would need to be classified in the same class in order to mitigate the premium cost avoidance issue. If this occurs, their premium rates would be similar in many cases.
>
> TEAs are expected to pass along their premium costs to client employers as part of their fee. If TEAs and client employers have similar premium rates, there would be minimal financial incentive for client employers to use TEA workers to avoid premium costs.
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> To allow TEAs and client employers to be classified in the same class:
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> 1) The WSIB would seek to amend Schedule 1 of O. Reg. 175/98 to indicate that supply of labour to a class (regardless of what activities are

performed) is considered a business activity of that class; and

2) TEAs would be allowed to have a separate premium rate linked to each class they supply.

We agree with this proposal and recommend the following to further discourage the use of temp agencies:

1) When the WSIB is assessing an employer's claim cost record there needs to be consideration to whether they regularly employ temp agency workers. This would be considered a Red Flag and a sign that the employer is simply contracting out the health and safety risks.

2) The Board will need to determine the injury rate of temp agency workers contracted to the employer. If there are high rates of injuries to temp agency workers that is a Red Flag of improper health and safety practices and the employer would move to a higher risk band and upward premium.

3) Amend the Form 7 or create a new Form so that the host employer needs to notify the WSIB when a temp agency worker is injured while in their employment. This would not absolve the temp agency from its reporting obligations; it will just allow the WSIB to track the number of temp agency workers injured at host employers and would become part of an employer's claims/incidents profile. This would also dissuade the temp agency from not reporting the claim.

➢ CONCLUSION

The Ontario Building Trades Council acknowledges that the Board's current employer classification system is overly cumbersome and outdated. It also has created the ability for employers to rate shop which has created unfair competitive advantages for some employers and misclassification of others in rate groups which do not fairly represent their actual business activities.

Despite our acceptance that there needs to be change in the classification system and rate group framework we have real concerns that the proposed new model will be relying on claims experience to calculate individual employers' premium rates. Essentially, the Board will be embedding the experience rating into new rate setting processes.

Experience rating has done little to improve workplace safety in the last 25 years. The Board's proposed approach will continue to reward bad practices and to move employers to manage claims rather than prevent injuries and deaths in the workplace.

We are asking that the Board consider more than claims experience and prior to implementing the new rate group costing regime, to undertake the following:

1) Implement Professor Arthurs' recommendations on claim suppression **(Refer to Page 5 of our Brief)**
2) Develop Methodologically-Sound "Leading Indicators" over and above simple claim costs **(Refer to Page 7-8 of our Brief)**
3) Take steps to improve the current approach of mitigating claim costs by employers offering "fake" and "non-productive" work offers. **(Refer to Page 8 of our Brief)**
4) Discourage the use of temp agencies by making the host employer more accountable. **(Refer to Page 9 of our brief)**