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'IN UNITY THERE IS STRENGTH'

ONTARIO NETWORK of INJURED WORKERS GROUPS

UN Convention on the Rights of People with a Disability (CRPD)
Ontario Network of Injured Workers Group Submission
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Introduction

The Ontario Network of Injured Workers Groups (ONIWG) was founded in 1991. It brings together 22 local groups from across Ontario to focus on systemic issues facing injured and disabled workers.

It is a democratic organization and volunteer led with no staff or significant funding.

The Workers Compensation System is the first program in our public safety net created over 100 years ago. It was a "historic compromise" where workers gave up their right to sue their employer for negligence causing an injury or disease in exchange for a no fault system of compensation for losses incurred.

The Ontario government called a Royal Commission in 1911 led by Sir William Meredith, Chief Justice of the Ontario Court to study the issue. Meredith tabled his report in 1913 and legislation was passed creating the Workman's Compensation in January 1915.

The system was based on the "Meredith Principles" which include:

- No fault.
- Employer pay.
- Injured workers receive benefits for as long as their disabilities last.
- Collective liability.
- Public system with independent board.
- Non-adversarial.

Focus of this report.

We will focus in this report on the experience of Injured & Disabled Workers in their efforts to maintain employment following workplace injuries or diseases.

We are primarily addressing Article 27 of the United Nations Convention on the Rights of Persons with Disabilities and additionally Article 28.

While Workers Compensation is a provincial jurisdiction, most provincial systems operate on the same or similar principles. The Ontario Network of Injured Workers Group (ONIWG) has focused our attention primarily on our own province and much of the information in this report is from Ontario.

Approximately 500,000 workers in Canada are injured or made sick at work each year. About 10 % - or 50,000 – of these workers have serious injuries that become permanent impairments and disabilities.

About 50% of these workers are able to successfully re-enter the workforce and maintain their employment over the long term.

The other 50% or approx.. 25,000 people end up unemployed or under employed, depressed and suffer deteriorating health status.

Most of these workers return to work following injury or disease but become injured a second or third time leading to greater impairments and losing their attachments to the labour market.

Some of the systemic barriers to successful re-employment include the use of Experience Rating (ER) Programs by the provincial workers compensation boards. ER has created an incentive for employers to focus their efforts on cost containment following a workplace injury or disease rather than prevention and rehabilitation.

Another barrier is the practice of “deeming” by Workers Compensation Boards (WCB). This often happens after a lost time injury or disease where the worker is unable to return to the pre-accident employer. The WCB adjudicator will determine a job they think the worker can do and deem them to be making full time wages at that “phantom job” and reduce their WCB benefits accordingly.

A third barrier is the lack of willingness or knowledge amoung many employers to provide appropriate accommodations to workers with a disability. And to make

matters worse is the stigma that many workers with a disability face in their struggle to become re-employed.

In fact, recent research findings has identified that many workers with a disability are reluctant or unwilling to ask for reasonable accommodations at work – fearing reprisals.

A fourth barrier is the lack of harmonization of our employment related laws and policies. Such legislative areas as Employment Standards, Labour Relations, Workers Compensation, Human Rights, Employment Insurance, CPP – Disability and Social Assistance. For example, people with a disability in Ontario who receive social assistance (income support) and become self-employed can see their benefits reduced by their gross income from that self-employment. They may only take home their net income but the gross income is deducted.

CRDP - Work and employment

Article 27 requires that States Parties recognize the right of persons with disabilities to work, on an equal basis of others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. And that States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to inter alia:

1. Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, continuance of employment, career advancement and safe and healthy working conditions;
2. Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
3. Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
4. Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
5. Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
6. Promote opportunities for self-employment, entrepreneurship, the development of cooperative and starting one's own business.
7. Ensure that reasonable accommodation is provided to persons with disabilities

in the workplace.
8. Promote the acquisition by persons with disabilities of work experience in the open labour market.
9. Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forces or compulsory labour.

Article 28 requires that States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this rights without discrimination on the basis of disability.

States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that rights without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of the rights, including measures;

1. To ensure equal access by persons with disabilities to clean water service, and to ensure access to appropriate and affordable service, device and other assistance for disability-related needs.
2. To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes.
3. To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care.
4. To ensure access by persons with disabilities to public housing programmes.
5. To ensure equal access by persons with disabilities to retirement benefits and programmes.

Barriers

Deeming

For injured workers, however, even with both the Ontario Human Rights Code and AODA in place, new barriers are being introduced by the WSIB that further hurt injured workers. In his 1913 report setting out the founding principles of our workers compensation, Sir William Meredith said: “The true aim of a compensation

law is to provide for the injured workman and his dependents and to prevent their becoming a charge upon their relatives or friends, and upon the community at large." (p. 4, Final Report).

According to the WSIB, under the most recent "Work Re-integration" scheme, nearly 92% of injured workers with lost time claims return to their full pre-accident earnings within a year of their injury.

The problem is the WSIB doesn't actually track the return to work experience of injured workers. It doesn't have to, because of the practice of "deeming." When an injured worker approaches the "usual healing time" for their injury, they will be informed by letter that they are expected to be able to return to their old job by a certain date and benefits for loss of earnings will cease. On the WSIB‟s books, that is another injured worker back to pre-accident earnings, case closed.

There is no doubt that 92% of injured workers with lost time claims are deemed able to return to their full pre-accident earnings within a year of their injury. Whether the injured worker ever gets back to work is irrelevant.

What is the barrier?

The WSIB practice of deeming is a barrier to employment for injured workers. It lets the WSIB off the hook from its obligation to assist injured workers to return to gainful employment.

Deeming comes from the WSIB‟s interpretation of the Workplace Safety and Insurance Act. From 1998 to 2007, benefits for loss of earnings were based on the difference between the injured worker‟s earnings before the injury and what he or she "earns or is able to earn in suitable employment" after the injury (former WSIA s.43(2)). The WSIB would simply decide the worker is able to do their old job or another job at equivalent wages.

Even when the injured worker is accepted by the WSIB as unable to return to their old job and only able to return to a lesser paying job, what actually happens to the injured worker is considered irrelevant. He or she will be deemed to be working full time in a lesser paying job and will receive a small benefit for loss of earnings when they actually have a total loss of earnings. Deeming is a barrier to employment even for those accepted by the WSIB as requiring assistance in returning to employment.

However the practice of deeming continues unchanged and the WSIB has no interest in tracking whether employment is actually available to the injured worker or what sort of employment or wages they are able to obtain, if any.

Are WSIB benefits adequate?

When an injured worker is "deemed" to be back at their old job, benefits for loss of

earnings are drastically cut or cease altogether. Many never get back to employment. They are forced to rely on the provincial health care system and support programs such as Ontario Works, ODSP or the Canada Pension disability benefit. Deeming is not only a barrier to employment but also the mechanism by which substantial costs are downloaded from the employer funded workers‟ compensation system to publicly funded programs. This is part of the trend identified by John Stapleton in his studies of the welfarization of disability.

For example, figures from the Ontario Ministry of Community and Social Services for 2012- 2013 show more than 4000 OW and ODSP cases were also receiving WSIB benefits. These are people who the WSIB has acknowledged will have a loss of earnings from their injury but has cut their benefits and “deemed‟ them to be employed when they are not employed, and are still receiving a small monthly benefit.

If each injured worker was receiving an average of $1000 a month from social assistance, that amounts to $4 million every month downloaded from the workers‟ compensation system to the public. Deeming is not only a barrier to employment for those with work injuries, it is also creates a barrier for access to scarce public assistance resources by other people with disabilities with no alternative support systems.

A study of benefits adequacy by the Institute for Work and Health found that about 30% of injured workers with permanent impairments rated less than 50% impaired had incomes of less than 75% of their pre-injury earnings.

Employment Legislation - Focus on Health and Human Rights

Health and safety should be acknowledged as a key objective of the employment relationships. Equity must be a key objective, must include respect for human rights principles. These objectives, as well as the changing nature of work, should be explicitly acknowledged in employment standards legislation.

Accessibility and **accommodation** are necessary to fostering **barrier-free** workplaces. Workplaces should also be **inclusive**, which includes being **harassment and stigma-free**. Finally, the principles of **dignity** and **respect** are integral to establishing equitable and fair standards in the employment relationship

These objectives should be formally enshrined in the Employment Standards Act (ESA). That way, in the event of ambiguity, these principles may guide the interpretation of the Act so that it best reflects the purpose and intent of the legislation.

1. **Harmonize and Universalize Employment and Workplace Legislation**
   The entire ESA should be equalized so that the same fair rules apply to everyone. This requires the harmonization of all workplace and employment-

related legislation.

In order to better reflect the HR Code and WSIA, the ESA should contain a universal re-employment or return to work obligation. In short, if a worker takes a leave of absence for health or disability-related reasons (including a workplace injury), the employer should have an obligation to re-employ that worker, and provide modified duties and accommodations if necessary.

There is a narrow reemployment obligation in the WSIA, but it only applies to certain employees for a limited amount of time. On the other hand, the *Human Rights Code* requires that employers accommodate an employee's disabilities up to the point of undue hardship and extends the obligation to accommodate for as long as the disabled or injured worker remains an employee, but does not amount to an obligation to re-employ.

The ESA should expand and clarify the obligation of employers to re-employ and accommodate disabled and injured workers. This would harmonize these three pieces of employment- related legislation, and do so in a way that enhances and promotes the proposed objectives of the employment relationship.

2. **Ensure Standards Create Healthy Jobs and Workplaces**
   Certain standards require strengthening or modification to create healthier jobs and employment relationships. The single change that would have the greatest positive impact for injured workers would be to recommend the abolishment of any "experience rating" metric at the Workplace Safety and Insurance Board ("WSIB"). Sick leave, unjust dismissal, and stigma should also be addressed.

3. **Strengthen Regulation and Enforcement**
   Finally, the regulation and enforcement of employment standards should be strengthened through coordinated, proactive, and expanded investigations with more powerful tools for enforcement. More funding is necessary to support workers in reporting and managing violations and workplace injuries.

This is important because research has shown that bad jobs make people sick. In fact, workers in precarious jobs have a 40% increased risk of coronary heart disease, are two times more likely to get diabetes, and 2.5 times more likely to have fatal occupational injuries. According the World Health Organization, "job insecurity harms health, even more than unemployment."

In addition to these medical reasons for ensuring that workplaces are stable and supportive, the Supreme Court of Canada has said, "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's

employment is an essential component of his or her sense of identity, self-worth and emotional well-being." Given the importance of work to so many people's sense of identity and well-being, it is important to set high standards that promote the creation of safe, stable, and supportive jobs.

Experience Rating

The specific recommendation that we believe will have the biggest impact in creating a healthier employment relationship for injured workers (and likely many people in the disabled community as well) is the abolishment of any "experience rating" metric at the

WSIB. Essentially, experience rating means increasing or decreasing each individual employer's premium rates according to the costs of its compensation claims. Although this sounds innocuous, experience rating has significant negative consequences for workers. Experience rating creates an incentive for employers to suppress claims and push injured workers to return to work prematurely.

Research indicates that returning to work before full recovery may actually lead to more extensive, long-terms problems.14 Studies have also revealed that claims suppression is a real problem within the system.15 Employers often suppress claims by terminating or constructively dismissing injured or disabled workers, who are seen as a cost risk. Given the experience rating system, it is generally fiscally prudent for an employer to terminate an injured worker, since the money saved by the employer through the experience rating program would outweigh the termination pay that would be owed to the injured worker under the ESA.

Every time an employer hides a claim or fires an injured worker, the employer saves money! If an employer can make it appear as though a worker voluntarily quit or was fired for reasons unrelated to the injury, the worker will not be entitled to benefits for lost wages and there will therefore be no cost consequences for the employer.

A recent report by Professor Harry Arthurs, former Dean of Osgoode Hall Law School called the WSIB's experience rating programs a "moral crisis" for Ontario's worker's compensation system.16 He made several recommendations on experience rating, none of which have been implemented to date.

Employers also avoid hiring injured workers and persons with disabilities because they are perceived to be a cost risk under experience rating. The perception is that they may lose more time from work or their injuries may be more severe.

Experience rating fuels the incidence of precarious work, as it leads to increased use of temporary workers. Studies have shown that employers tend to hire temporary workers to perform more dangerous work, since any injuries to those workers will not show up on that employer's claims records, but rather that of the

temporary agency. Because workers new to a worksite are statistically more likely to get injured, experience rating in fact contributes to the incidence of unsafe workplaces.

For all of these reasons, recommending the abolishment of any experience rating based metric at the WCB would make a significant contribution to the creation of healthier jobs and workplaces.

Another unintended consequence is the effect of experience rated premiums on hiring practices. A study from New Zealand found a direct relationship between experience rating and discriminatory hiring practices. It concluded that employers proactively manage compensation claims by discriminating against employees with disabilities in the hiring process to try to prevent future claims. More specifically, they note thatas the premium rate increases, experience-rating provides strong incentives to limit the level of employees' claims by discriminating on the basis of disability.

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

Sick Leave

In addition to recommending the abolishment of experience rating, enhancing sick leave would be a significant step in creating healthier jobs and workplaces. If workers are not given time to recover from illness or take care of their mental and physical well-being, they are at greater risk of more serious long-term health consequences.

To that end, we recommend that, in addition to establishing universal entitlement to sick leave, at least some sick days should be paid. Employees should also have the option of taking a long-term sick leave that is job-protected, as previously discussed in the context of a proposed re-employment obligation.

Unjust Dismissal of Disabled and Injured Workers

The ESA does not currently contain any protection against unjust dismissal. As is evident from the above description of experience rating and its consequences, injured workers are often terminated from their employment, or treated so badly that they are forced to quit. The WSIA provides limited protection to injured workers who are terminated within 6 months of re-employment, by establishing a legal presumption that the employer has not discharged its re-employment obligation.

The ESA should adopt and expand this principle, and place a reverse onus on the employer to prove that the termination of a disabled or injured worker was not as a result of the injury or disability. This would provide greater job security for vulnerable workers, and help guard against unfair practices.

Stigma

In addition to improving specific employment standards to create healthier workplaces, the ESA and Ministry of Labour should acknowledge the stigma that exists around the hiring and retention of injured and disabled workers. The Ministry of Labour should conduct research and develop programs or incentives to proactively reduce stigma, and increase the hiring and retention of vulnerable workers. In the past, the WSIB has acknowledged the stigma surrounding injured workers and launched an anti-stigma initiative.

Effective Enforcement

Regardless of how fair and well-written our Employment Standards Acts may be, its provisions will not have a substantial impact on the lives of the most vulnerable workers without effective enforcement. We endorse the thorough and thoughtful recommendations of the Worker's Action Centre,including on the matter of enforcement, and would highlight the importance of strengthening enforcement through coordinated, proactive, and expanded investigations with more powerful tools for enforcement.

In terms of coordination, one body should be responsible for investigation and enforcement under the different pieces of employment-related legislation. The current disconnect can be problematic and ineffective, since an investigation done under one Act will not uncover or address any problems under another. A perfect example of this disconnect can be seen between Ministry of Labour health and safety offences and WSIB experience rating programs. Some employers have received substantial rebates in their WSIB premiums for allegedly being "safe" workplaces, in the same years they have been fined for health and safety violations by the Ministry of Labour for worker deaths and severe injuries. In many cases, the rebates are substantially greater than the fines.

Investigations should be proactive rather than complaint-driven. Increased resources for randomized and targeted inspections are a worthwhile investment since health and safety inspections with penalties have been proven effective in reducing work-related injuries.

Enforcement and sufficient penalties are key. More powerful tools are needed to actually enforce the various Acts, such as increased ability to order changes and increasing the costs of violations.

Conclusion and Summary of Recommendations

In conclusion, we recommend a holistic approach to assessing workplace issues, and ultimately recommend better harmonization of all employment–related legislation. This harmonization should aim to create jobs and workplaces that promote health and human rights, especially for precarious and vulnerable workers

such as those injured or disabled.

We need new legislation that acknowledges:

- The objectives of health, safety, and human rights; and

- The intention to address the increasing incidence of precarious employment and to accommodate an increasingly diverse workforce, including individuals with disabilities.

- The increased harmonization of all employment-related legislation.

- Universal coverage under the ESA, LRA, and WSIA.

- Higher standards to promote healthier jobs and workplaces, including:

- Abolishment of any metric that ties employer WSIB premiums to claims cost;
- Paid sick days for all workers, with the possibility of longer term leave;
- An obligation to re-employ workers after a disability or health-related leave.

- Greater job security for vulnerable workers to help guard against unfair practices, in particular:

- Establishing a reverse onus on the employer to prove that the termination of a disabled or injured worker was not as a result of the injury or disability.

- Promote research and develop programs or incentives to proactively reduce stigma, and increase the hiring and retention of vulnerable workers.

- Proactive, coordinated, and expanded investigations, with the power to effectively enforce employment and workplace standards.