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August 31, 2011

Dalton McGuinty
Premier of Ontario

Tim Hudak
Leader of the Official Opposition

Andrea Horwath
Leader of the New Democratic Party

Dear Sirs/Madam,

Re: workers' compensation platforms

Since my letter to you of October 25, 2010 (copy enclosed), I have received a response from Mr. McGuinty through the Minister of Labour and no response or acknowledgement from Mr. Hudak or Ms. Howarth.

In the meantime, the Workplace Safety and Insurance Board continues a stealthy program of cutbacks to address its financial issues. Here is an example. For the last 30 years (at least), it has been the Board's consistent and routine practice (and policy) to accept that workers who have a pre-accident condition without symptoms before an accident and consistent symptoms in the same area after the accident have suffered an aggravation of that condition and are entitled to benefits until the symptoms disappear. So, for example, a 55 year old construction worker who has had no back problems prior to a slip and fall accident at work and is discovered to have degenerative disc disease, has been entitled to benefits for aggravation of the condition until the symptoms disappear and on a permanent basis if they do not.

The Board issued a set of work reintegration policies in December, 2010. One of these policies contained an innocuous-seeming change to the "Post-Accident Change" policy, which provided that deterioration of a pre-existing condition would be a post-accident change meriting review of benefits, but with an example that referred to a work accident involving one body part and a pre-existing condition involving another. The Board now apparently takes the view, without publicly announcing a major change in long-standing policy and practice, that this change allows it to disentitle workers who have pre-existing asymptomatic degenerative disc disease and who develop consistent symptoms after an accident.

What this means is that a 55 year old construction worker with no back problems before an accident at work and consistent low back problems after which he or she cannot return to construction work (according to the Board's own medical opinions) is completely disentitled to benefits and must rely on other (often completely inadequate) sources of income. Again, as I noted in my previous letter, some of the cost of this cutback is borne by the taxpayer.

It is shocking that the Board goes through a long and public consultation about increases to employer assessments of even 2%, whereas worker benefits are cut quickly, deeply and behind closed doors.

My clients ask me if anything can be done about this, and I am forced to tell them that none of the political parties has made any proposals that will assist them. I would like to be able to say that all of them have. Please let me know if your party has some proposal to help injured workers.

Yours truly,

Michael S. Green

cc: Gary Newhouse
Ellen Lipes
Office of the Worker Advisor
Ontario Federation of Labour
Injured Workers' Consultants
Industrial Accident Victims Group of Ontario

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November 2, 2010

Dalton McGuinty
Premier of Ontario

Tim Hudak
Leader of the Official Opposition

Andrea Horwath
Leader of the New Democratic Party

Mike Schreiner
Leader of the Green Party

Dear Sirs/Madam,

Re: Workers' Compensation platforms

I have been representing injured workers for over 25 years. I have reviewed each of your websites and found no workers' compensation platforms on any of them. Perhaps your parties are not aware of the sorry state of our workers' compensation system. I am writing to you to outline the current situation in the hope that the public might have the benefit of clear choices prior to the next election in a year.

There are two aspects of workers' compensation, funding and benefit levels. These aspects can diverge from time to time, but over the long run, benefit levels track funding.

FUNDING

The Workplace Safety and Insurance Board has two sources of income, assessment income and investment income.

Assessment income has fallen drastically over the last 15 years. When Bill Davis left office in 1985, the assessment rate was \$3.15 per \$100 of payroll. When Bob Rae left office in 1995, the assessment rate was the same- \$3.15 per \$100 of payroll. The government of Mike Harris moved quickly to cut assessment rates to \$2.25 per \$100 of payroll in the late 1990s. The rates have remained there since. The WSIB proposes to increase rates by 2% in 2011 and 2012; this amounts to a total of 9 cents per \$100 of payroll after the 2 years.

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For many years in the early 2000s, the Board did not reduce benefit levels to the degree that the decline in assessment income would dictate, as it was earning double digit investment income on its substantial fund. That changed in 2007 and 2008 when the WSIB lost significant money on its investments (as most other institutional investors did). This continues, of course, to be an issue.

BENEFIT LEVELS

The government of Mike Harris reduced WSIB benefits in at least two significant ways:

1. the compensation rate was reduced from 90% of net to 85% of net,
2. the level of indexation was reduced to $\frac{1}{2}$ Consumer Price Index – 1 for most injured workers.

The second point needs to be explained perhaps. If inflation (CPI) is 2%, most injured workers receive an increase at the beginning of the year of $\frac{1}{2}$ (2%) -1% or 0. If inflation (CPI) is 4%, most injured workers receive $\frac{1}{2}$ (4%) – 1% or 1%. In other words, injured workers lose 2 to 3% per year to inflation, on top of the 15% of their income that is not replaced.

The current government proposed and implemented ad hoc inflation increases before the last election for 3 years, but these have now ended and there is no plan to reintroduce them.

In addition to the legislative changes, there have been two internal policy decisions at the WSIB which have significantly exacerbated the situation for injured workers:

1. the use of deemed “experienced” wages where the worker is not employed within the vocational goal chosen by the Board, as of the time of the final review of the worker’s compensation, and
2. the Board’s recent view that “there are no unemployable workers” save for those in the Serious Injuries Program.

The combination of the 85% of net, greatly reduced inflation protection and deemed “experienced” wages can be devastating for a younger employed injured worker. An example might illustrate how they work together. A maintenance mechanic with 5 years experience is making \$20 per hour when she injures her hand significantly at age 28. More experienced maintenance mechanics earn \$25-\$30 per hour, but this is of no significance to the WSIB system. In the labour market re-entry process, the Board determines that the most suitable goal is as a customer service clerk with an entry level wage of \$13 per hour. The worker looks for such work, but is unable to find it and ends up working as a security guard paying \$12 per hour. Initially, the Board pays her on the basis of the difference between 85% of difference between her pre-accident net earnings

and the net earnings associated with a gross of wage of \$12 per hour. She has a very noticeable loss but she is able to survive. At the final review of her compensation when she is 34 years old, if she is still working as a security guard, the WSIB will likely determine that she is “underemployed” and pay her based on the experienced level wages of a customer service clerk according to labour market statistics, which may be \$17 per hour. So, her compensation would be 85 per cent of the difference between the net average earnings associated with \$20 per hour (with the minimal inflation adjustments described above) and those associated with \$17 per hour. Worse yet, in the succeeding 30 years between the final review and her retirement, her minimal compensation will be further eroded significantly by the lack of inflation protection.

To summarize, for young permanently injured workers, the current system amounts to “death by a thousand cuts”. Who bears the cost of this system? Obviously, the worker and the worker’s family bears most of the cost. Less obviously, the public (i.e. the taxpayer) bears some of the cost. How? With the gross reduction in compensation, young injured workers are more likely to be on social assistance when a subsequent job is lost, and more likely to end up homeless, because of the inadequate recognition of the income losses due to injury sustained through work.

The Board has recently advised its front-line decision makers (numerous of whom have spoken to me) that “there are no unemployable injured workers other than those in the Serious Injuries Program”. It has not said so explicitly in printed material, but one can easily see this from the Board’s training material (a copy of which was obtained through the freedom of information process). What is notable are the charts at pages 5-6 of the material which indicate that there are workers who are “not ready to work”, but there is no item in the chart for workers who are realistically unemployable.

From 1985 until now, the Board has usually recognized that workers who:

- are over 55 years old
- have a permanent impairment which prevents them from performing the pre-accident occupation or working with the accident employer in some other capacity
- do not possess particularly notable transferable skills and abilities

are unemployable, and paid full compensation (or older worker supplements in the case of workers injured between 1985 and 1990.

The Serious Injuries Program is only available to the most seriously injured, those with non-economic loss awards of 60% or higher. For all other permanently injured workers of 55 and older, the WSIB is now routinely determining that the worker is capable of working, usually at minimum wage on a full-time basis.

It is a sad irony that this decision-making comes at a time when job opportunities for those 55 and older are fewer than in decades because of the poor economy. Unbelievably, the Board is pursuing this line of thought even with workers as old as 63.

Who bears the cost of this decision? As above, workers and their families bear the cost in the first instance, and the public second. The Board's recent decision is exacerbated by changes to the Canada Pension Plan disability program made in 1998, which increased the contributory requirements to 4 of the previous 6 years. Many older injured workers who formerly would have been in receipt of CPP disability benefits no longer are. The combined effect again is an increased number of older injured workers who must rely on social assistance.

Publicly, the Board continues to take the view that it is a reasonable objective to have "a fully-funded workplace safety and insurance system that provides a benefit package comparable to the best of other Canadian jurisdictions along with premiums that are at level lower than the average of other jurisdictions." (see the 2nd quarter 2010 summary attached). This view is laughably naïve. Employers pay, workers pay or the system runs an unsustainable deficit.

SUMMARY

I would characterize the last 15 years as an age of employer irresponsibility for the long-term effects of injuries sustained in their workplaces. Workers first have paid, and to some degree, the taxpayer has also. The current WSIB plan to increase assessments by 2% in each of the next 2 years is a laughably weak effort to address this.

I hope that some of you have a plan to end this age of employer irresponsibility. In any event, I would be grateful if you could place some indication of your plans on your websites, so I may direct my clients' attention to them.

Yours truly,

Michael S. Green
Barrister & Solicitor

cc: Gary Newhouse (with enclosures to all)
Ellen Lipes
Office of the Worker Advisor
Ontario Federation of Labour
Injured Workers' Consultants
Industrial Accident Victims Group of Ontario

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