

Human Rights of Injured Workers and Covert Surveillance by WSIB

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Identifying the Issue

- Advocates relying on injured workers to tell us about their experience with covert surveillance
- Extensive research and freedom of information requests
- Presentation at Bancroft Institute Workshop - April 2014

Identifying the Issue

- WSIB was deciding who it would put under surveillance by using a list of “red flags”
- These red flags are listed “as potential indicators of wrong-doing/fraud in a claim...which staff should be mindful of as potential identifiers of fraud or non-compliance when dealing with workers...”
- These red flags disproportionately affect and distinguish individuals on the basis of Human Rights Code protected grounds and include:

Identifying the Issue – Red Flags

- Frequent change of address or phone number
- Erratic employment history (changes job frequently)
- Motivational factors (hard to reach, uncooperative)
- Secondary Gain evident (anti-social behavior, over-reaction)
- **Language barriers** (rarely able to speak to worker directly)
- Frequent change of doctors/specialists
- **Unreasonable distance traveled by worker to see GP.**

Identifying the Issue – Red Flags

- **Diagnosis of Chronic pain.** functional overlay.
overreaction anti-social behaviors
- **Psychological problems**
- **Pre-existing medical problems (same area)**
- **Pre-existing medical problems (different areas)**
- Worker's recovery is inconsistent with usual healing time
- Permanent impairment inconsistent with benefits paid or **usual healing time**
- Indication of **drug dependency** over prescribing worker upset when medication denied)

Identifying the Issue – Red Flags

- Secondary Entitlement inconsistent with accident history (**Chronic pain, disability, fibromyalgia**)
- Claiming **numerous areas of injury** (generalized pain)
- **First medical treatment from Chiropractor**
- Missed appointments
- Inconsistent attendance of school/inability to provide marks
- Inconsistencies in prevalent non-work related issues (e.g. **death of spouse or family member/marriage break-up**)
- **Previous participation in LMR** under prior claims

Forming the Human Rights Group

- Following presentation on the research workshop at the Bancroft Institute met and used the *Human Rights Code* to brainstorm around possible legal action on the Red Flags List
- ARCH agreed to organize a working group to develop a legal analysis and strategy
- Group including representative from ONIWG, community legal clinic advocates, the OWA met several times over the fall and winter 2014

Human Rights Analysis

- Analysis – several grounds protected by the *Human Rights Code* were right there in the “Red Flags” list e.g.: disability, age, family status, ethnic origin, and receipt of public assistance
- Code protects against discrimination based on these grounds
- WSIB practices disproportionately affected people with disabilities who are reliant on WSIB benefits for their livelihood.

Human Rights Strategy

- Considered the pros and cons of an application by an injured worker to the Human Rights Tribunal of Ontario
- Considered the powers and mandate of the Ontario Human Rights Commission:
 - Bring its own application to the Tribunal if the matter is in the public interest
 - Duty to protect the public interest, to identify and promote the elimination of discriminatory practices
- Group decision to approach the Commission

Ontario Human Rights Commission

- Approached lawyers at the Commission
- Commission Lawyers invited to meet with our Human Rights Group
- Advised us to prepare a Statement of Facts that they would bring to the Chief Commissioner

Statement of Facts for the OHRC

- Outline of the WSIB practice and the “red flags”
- Discriminatory Effect of the Policy
- Effect on mental well-being of covert surveillance practices
- Effect of WSIB’s surveillance policy on stigma and stereotypes
- Request that the OHRC commence an application to the HRTO addressing the discrimination against injured workers caused by covert surveillance practices of the WSIB.

Result – A Step Forward

- Barbara Hall, then Chief Commissioner of the Ontario Human Rights Commission, meets with several members of WSIB senior management to discuss the process applied by the WSIB in using surveillance
- Michael Johnson, the Executive Director of Regulatory Services at the WSIB, writes a letter to IAVGO following the meeting with the Chief Commissioner

Result – A Step Forward

Michael Johnston
Executive Director, Regulatory Services

March 12, 2015

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To Whom it May Concern:

Recently we have been contacted by the Ontario Human Rights Commission regarding concerns your group raised on the internal guidelines for WSIB surveillance.

On February 25, 2015, several members of WSIB Senior Management met with the Chief Commissioner and her staff to discuss the process applied by the Workplace Safety and Insurance Board in determining the appropriate use of surveillance in our compliance program.

Like any insurance system, the WSIB investigates potential compliance issues brought to our attention. These represent a small handful of claims of the more than 200,000 the WSIB receives annually.

At our meeting we shared that the starting point for considering surveillance as an investigative tool is restricted to two threshold issues:

- 1) identification of a potential false statement or misrepresentation, or
- 2) a failure to report a material change in circumstances in connection with entitlement to WSIB benefits.

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Result – A Step Forward

- WSIB admits only a small handful of claims out of 200,000 yearly claims represent potential compliance issues
- WSIB says surveillance is used as a last resort
- WSIB agrees to remove from its systems all references to a discriminatory “Red Flag” list that it was using to decide whether to commence covert surveillance on an injured worker

Result – A Step Forward

- WSIB agrees to prepare a guidance document for staff to “better reflect” a process for surveillance referrals that adheres to the Ontario *Human Rights Code*.
- WSIB agrees to share this document with the OHRC.

Lessons Learned

- Require input and involvement of injured workers
- Good Research
- Committed group of people that includes injured workers and their advocates
- Legal analysis and good strategy
- Clear communication
- Convinced Partners

Looking ahead

- Need to monitor the WSIB practices on surveillance to ensure compliance with their commitment to the OHRC
- Keep connected to the OHRC and ensure they receive promised documents
- Provide injured workers with a safe and confidential service to ensure their rights are enforced and any discrimination is addressed

Thank you

Questions?