Injured Workers' Consultants

Representing injured workers free of charge since 1969

November 25, 2015

Tonia Grannum, Clerk
Standing Committee on Justice Policy
Room 1405, Whitney Block
Queen's Park, Toronto, Ont.
M7A 1A2

Via email: tgrannum@ola.org

Dear Ms. Grannum:

Re: Bill 109, *Employment and Labour Statute Law Amendment Act, 2015*

Injured Workers' Consultants Community Legal Clinic is pleased to make submissions with respect to the proposed amendments to the *Workplace Safety and Insurance Act,* Bill 109 Schedule 3. We have been representing injured workers, free of charge, since 1969 and have particular insights into the vulnerability of our community. Many of the injured workers we assist are women, immigrants, and work in non-union and precarious employment situations. We respectfully ask the Standing Committee to review our submission with due consideration of the vulnerability of the workers we represent and that you, the committee members, represent in your own constituencies.

Our specific comments and recommendations follow.

Section 22.1, *WSIA*, 1997

This section would prohibit the taking of any action against a worker with the intent of discouraging the worker from filing a claim for benefits (the reporting of workplace injuries) or influencing the worker to withdraw or abandon a claim for benefits under Section 22. The Board powers of examination and inspection under Section 135 would be amended to include inspection for contraventions of Section 22. A contravention of Section 22.1 would be an offence.

In essence, this amendment is aimed at discouraging employer claims suppression. We support all efforts to tackle claims suppression, which we have observed to be a pervasive problem, a problem which we expect will worsen once the WSIB introduces its new rate framework.

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~ A Community Legal Aid Clinic ~

While we are pleased to see any initiative that targets claims suppression there are limitations to the amendments that we would like to bring to the committee's attention.

We are pleased that the proposed amendment includes direct and **indirect** claims suppression. However, the scope of the "indirect" pressure and employer may exert on a worker may be broader than that contemplated by the proposed legislation.

The WSIB commissioned a study from Prism Economics and Analysis, called Workplace Injury Claim Suppression: Final Report (April 2013). It noted that

> Approximately half of the enforcement files examined as part of this study contained evidence of employer behaviour that was intended to induce workers not to report a work-related injury or illness to the WSIB. In about a fifth of these files the inducement involved overt threats or sanctions. In the remaining files with evidence of inducement, the inducement did not involve threats or sanctions. In these cases, inducement variously took the form of (1) appeals to loyalty, (2) shared involvement in the underground economy, (3) continuation of wages in lieu of WSIB benefits, and (4) misinformation as to eligibility for WSIB benefits. There were also instances of peer pressure not to report an injury or illness that was sometimes motivated by the potential loss of a group-based incentive to remain accident free (p.3).

This is a useful analysis to identify the indirect inducements used to avoid filing claims for workers' compensation.

The proposed Section 22 (2) provides examples of actions that are prohibited, and this is not an exclusive list; however, questions do arise about the inclusiveness of Section 22.1. (2) 4:

> **Will an employer's appeal to loyalty be considered?*
> **Will the shared involvement in the underground economy be considered?*
> **Will continuation of wages in lieu of compensation (already prohibited under the Act) be considered?*
> **Will misinformation about eligibility of benefits be considered?*
> **Will pressure by co-workers participating in an employer group-based incentive (for example, a turkey at Christmas if no one reports an injury) be considered?*

These questions show the difficulties in addressing claims suppression when it is embedded in the culture of the workplace, and the vulnerability of a worker who attempts to make a claim in such an environment.

The above questions also raise the fundamental issue of *who* will complain? Certainly few workers will, perhaps a tiny minority. Certainly very few vulnerable or precarious workers, who now constitute a huge part of our economy. Who will complain if they risk losing their job? Who will complain if they are not aware of their rights? Who will complain if they must face their employers and the co-workers who have lost their incentives for remaining "accident-free"? Certainly no one who wants to return to his or her job.

The proposed amendment to s.22 is aimed at a laudable goal, but it falls short. To properly address claims suppression, it would be more effective to get rid of its source – experience rating. Instead of adding penalties, take away the incentive. This means revoking s.83, and adding a prohibition against using claims costs as a factor in rate setting. We have attached our brief on the WSIB Rate Framework Consultation to offer a broader understanding of the issue.

We would like to remind the Committee that both Tony Dean and Harry Arthurs recommended reform of WSIB experience rating programs in their respective reports. In particular, Tony Dean recommended that financial incentive programs be reviewed and revised "with a particular focus on reducing their emphasis on claims costs and frequency". The WSIB's proposed rate framework stands in direct opposition to this recommendation.

In his final report, Professor Arthurs wrote that the WSIB is facing a "moral crisis" with respect to experience rating. By this he meant that there is clearly claims suppression, which the WSIB has been warned about, not only from worker advocates but from researchers as well, and it has failed to take any adequate steps to rectify the situation.

We have also attached an article from OHS Canada called "Under the Carpet", which describes the claims suppression faced in Manitoba. Notably, Manitoba has a rate framework very similar to the one proposed by the WSIB.

As written, the proposed amendment could address some claims suppression, but not without a mechanism for enforcement. Unless there are proactive investigations and concerted efforts to enforce claims suppression activities, the penalties will be little more than empty threats.

Recommendation:

Consider additional revisions to the WSIA to revoke s.83 and to amend s.81. Section 81 could be amended to prohibit the use of claims costs in premium rate setting at the level of the individual employer.

We further urge the Committee to consider adding additional sections to include a mechanism for enforcement. This could include a requirement

that the WSIB inspect a certain number of employers each year for evidence of claims suppression activities.

At the very least, it would be useful to include reprisal provisions in the Bill. Draft suggested amendments are as follows:

22.1 (4) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize a worker or threaten to do so because the worker gives information or is about to give information to the Workplace Safety and Insurance Board.

Onus of proof

(5) In any proceeding under this Act, the burden of proof that an employer did not contravene s. 22.1(4) lies upon the employer.

Section 48.1 WSIA, 1997

This amendment is directed at determining a deceased worker's average earnings. It provides that the WSIB may, in such circumstances as it considers appropriate, take into account the average earnings at the time of the workers' injury of a person engaged in the same trade, occupation, profession or calling as the worker was engaged in when the injury or disease arose.

We endorse this amendment. It would go a long way towards rectifying the disadvantages suffered by the families of survivors who died at a time when they had minimal or no earnings, yet the disease or death resulted from work that was paid at a higher rate.

We do suggest minor changes to the wording of the proposed s.48.1(2) to remove the discretionary nature of the provision. The current wording makes it sound like these benefits are an act of charity whereas they should be a right of the workers who died to work in and build our Province.

Recommendation:

We suggest the following language for s.48.1(2):

(2)Despite section 53 and the minimum amounts set out in subsections 48 (3), (14) and (15), for the purpose of determining amounts payable under section 48, the Board shall determine the amount of a deceased worker's average earnings to be the greater of,

(a) the average earnings at the time of the worker's injury of a person engaged in the same trade, occupation, profession or calling as the worker was engaged in and out of which the worker's injury arose; or

(b) his or her average earnings at the date of accident.

Section 176.1 WSIA, 1997

This section would require the board of directors to appoint a Fair Practices Commissioner to act as an ombudsman of the Board. We agree that the WSIB requires a proper ombudsman. In fact, the WSIB ranks in the top five most complained about agencies to the Ontario Ombudsman. This suggests that there are many complaints and that these complaints are not being adequately addressed.

To function as a proper ombudsman, the Fair Practices Commissioner must have autonomy from the WSIB. A commissioner who is appointed by the Board itself will not have, and will not be seen to have, the necessary independence to fully pursue complaints. A commissioner who may be replaced at the leisure of the WSIB will continue to lack the authority to fully address concerns and the commissioner's recommendations will continue to fall on deaf ears. It is essential that the commissioner can act at arms length from WSIB and without political interference.

Recommendation:

The Fair Practices Commissioner should be an Order in Council appointment. We recommend that the appointment process be akin to similar positions such as the Ontario Ombudsman and the Information and Privacy Commissioner.

We suggest the following changes to the proposed s.176(1)

Fair Practices Commissioner

176 (1) There shall be appointed, as an officer of the Legislature, a Fair Practices Commissioner to exercise the powers and perform the duties prescribed by this Act.

Appointment

(2) The Commissioner shall be appointed by the Lieutenant Governor in Council on the address of the Assembly.

Term and removal from office

(3) The Commissioner shall hold office for a term of five years and may be reappointed for a further term or terms, but is removable at any time for cause by the Lieutenant Governor in Council on the address of the Assembly.

We thank the Committee for its attention to these submissions and for its work on this important Bill.

Sincerely,

Orlando Buonastella and Laura Lunansky
Injured Workers' Consultants Community Legal Clinic

Att.