



INJURED WORKERS
COMMUNITY LEGAL CLINIC

**REPRESENTING INJURED WORKERS
FREE OF CHARGE SINCE 1969**
A community directed not for profit legal aid clinic

Submission to the Workplace Safety & Insurance Board Operational Review

August 15, 2019

Introduction

The enclosed submission and supporting documents contain feedback from the Injured Workers Community Legal Clinic (IWC) to the Operational Review of the WSIB. The Review is focused on three primary areas of the Board's operations: financial oversight, administration, and efficiency. While these are high-level areas of focus, they also have significant frontline implications for injured workers who are seeking support from the WSIB. As such, these three issues cannot be discussed without consideration of the on-the-ground reality for injured workers, for whom the WSIB exists to support. Our submission aims to provide some of this direct experience context.

Financial Oversight

In recent years, there has been concern in the injured worker community that the WSIB's own financial considerations have come at the expense of fair compensation for injured workers. The idea that there must be a restriction on benefits in order to shore up the Board's finances is based on a – perhaps unspoken and unintentional – assumption that robust compensation is bad for the Board's finances. The reality, though, is that the WSIB's funds exist in order to support and compensate injured workers. If there are financial worries, then they should not be alleviated by restricting compensation.

Universal coverage

One way of ensuring greater financial revenue for the WSIB, while also benefitting injured workers, is by expanding workers' compensation coverage to all workers in Ontario. Currently, Ontario has one of the lowest rates of workers' compensation coverage in Canada, with almost 25% of workers not covered by the WSIB. That means almost 1.7 million people have no guaranteed protection or support if they are injured on the job.

On an individual level, the low coverage rate puts those who are not covered at serious physical, mental, and financial risk. On a broader level, it means the public pays huge costs for work injuries, as workers without any support net fall onto social assistance programs and their medical costs are carried by OHIP. Fully covering all workers in Ontario would save hundreds of millions of dollars in public money, according to an April 2019 study, enclosed here.

Ontario's labour market has changed significantly over the past number of years, with the rise of the gig economy and new forms of work that did not exist when the coverage Schedules in the *Workplace Safety & Insurance Act* were written. Often, newly emerging forms of work are precarious and do not provide workers with basic protections. This is highlighted in the attached letter to WSIB President and CEO Tom Teahen, written by the Women of Inspiration Injured Worker Group. It is troublesome that the Schedules have not been updated in decades to keep up with emerging trends, and to ensure that all workers are afforded the right to workers' compensation should they need it.

Moving to universal coverage would add some \$220 million in revenue to the WSIB. Better funding and less financial worry in the system should lead to better compensation for injured workers. It would also reduce financial strain on the public, and provide benefits for employers. The WSIB itself commissioned a study in 2002 that recommended full coverage for all workers unless they were specifically excluded from the Act. All parties stand to gain from universal coverage, and there is broad consensus that it should happen. It is long past time to make it a reality.

Rate setting and experience rating

The employer rate setting and experience rating processes are two key elements of the Board's financial picture. Rate setting should be done in a manner that is divorced from political and government interference, as employer rates should be determined based on what the Board needs in order to provide fair compensation to injured workers. However, as Professor Harry Arthurs states in his *Funding Fairness* report, "It is widely acknowledged that, despite the WSIB's clear statutory authority to set premium rates, governments can and do intervene in the rate-setting process. In a few cases, they have publicly directed the WSIB to freeze or lower rates." (p.54)

In practice, then, the rate-setting process has become politicized and often does not protect the integrity of the compensation system as a whole. Arthurs goes on to say, "Clearly, then, it is important to restore the integrity of the rate-setting process. This must involve a change in behaviour both by the WSIB's Board of Directors (BoD) and the government. For its part, the BoD must signal its commitment to setting premium rates in response to its overall funding strategy and in accordance with the best available professional advice. The government must agree not to intervene clandestinely in the rate-setting process." (p.55)

In sum, the rate setting process should be transparent, simple, and removed from political interference.

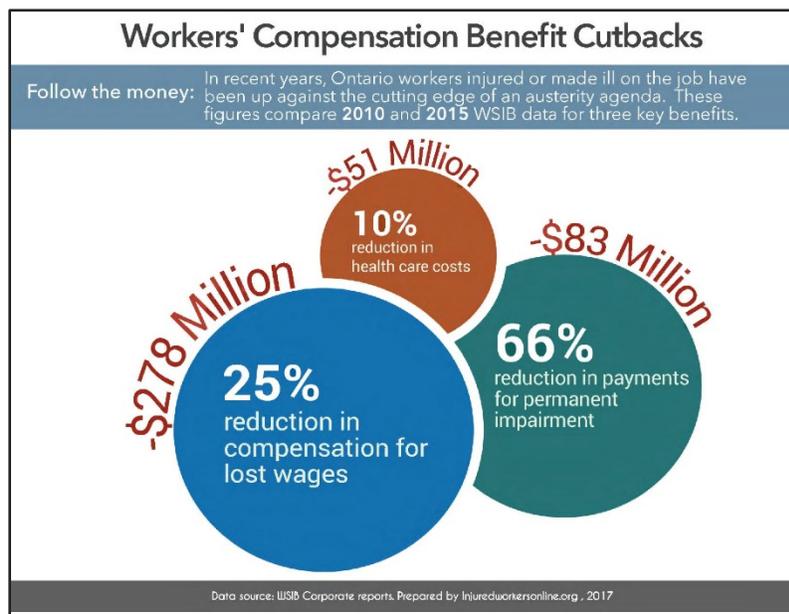
With regards to experience rating, we fully support the submissions that have been provided to you by the Experience Rating Working Group.

Efficiency

To consider the efficiency of WSIB's operations, it is important to review its operational results on their stakeholders. A significant stakeholder group in the WSIB's operations are current and future injured workers, the recipients of the funds the WSIB administers.

Service provision for injured workers

A recent injured worker campaign, *Workers' Compensation is a Right*, has compiled case examples that highlight some key systemic issues that injured workers face due to poor administrative decisions and policies set by the WSIB. Many of these poor decisions have led to injured worker poverty and a mental health crisis.



The chart to the left depicts the significant benefit reductions that have been imposed on injured workers in recent years. A comprehensive study published in 2015 that found that 46% of injured workers with a permanent disability from their work injury were at or near the poverty line, with 9% living in deep poverty.¹ 38% of them were unable to return to employment since they were injured, and yet the

WSIB cut their benefits. The vast majority of these individuals are now sustained meagrely though the tax-payer funded provincial net for those with disabilities and unable to pursue meaningful employment. In effect, this chart depicts one failure of the WSIB system in allocating lower funds for those with work-acquired permanent impairments.

¹ Ballantyne, 2015, p.15

With regards to the nature of service provision, injured worker groups have recognized the mental health impacts due to poor service from the WSIB. A 2012 study found that nearly 50% of injured workers experienced symptoms of depression, while 37% had symptoms of anxiety.² A significant number of these cases of mental health struggles arise from the stress of dealing with the WSIB itself. Many injured workers report that they are unable to even open mail or answer phone calls from the WSIB because of the intense anxiety and panic-like symptoms that are provoked by any interactions with the system.

The previous chart may seem to contradict the WSIB reporting on quick labour reintegration for those injured at work, and thereby, the explanation for the reduction in benefits was that more injured workers were recovering faster and getting back to work. However, this explanation, conflates better health outcomes with aggressive adjudication of claims. This aggressive method and poor adjudication is demonstrated by a recent report on WSIB decisions from the Workplace Safety & Insurance Appeals Tribunal (WSIAT). The report found that in 2016 alone, there were 425 cases where the WSIAT addressed unfair decision-making practices that have consistently been identified previously such as disregarding medical evidence, forcing people back to work before it is safe to do so, wrongly cutting benefits based on "pre-existing conditions," and targeting workers with mental health issues.³ As a resolution, a 2016 study on the role of healthcare providers in the workers' compensation system recommended that compensation boards such as the WSIB should consider how to fairly adjudicate complex cases "in a way that does not further injure and stigmatize workers."⁴

Additionally, the WSIB has relied on the practice of "deeming" or "determining" in order to reduce benefits to permanently disabled injured workers, even when they are unable to find employment following their injury. The enclosed report produced by the Ontario Network of Injured Workers' Groups (ONIWG) uses documents obtained through Freedom of Information requests in order to show the extent of the problem.

In addition to the above issues, the WSIB's practices around adjudication and communication procedures have been disproportionately felt by marginalized groups such as immigrant workers, women workers, and racialized workers. We are aware that

² O'Hagan, p.305

³ IAVGO, *No Evidence*, p.10

⁴ Kosny, *The Role of Health-Care Providers in the Workers' Compensation System and Return-to-Work Process*, p.35

these demographics are often stuck in more precarious and unsafe employment conditions with a greater risk of workplace injuries. Further, they are more vulnerable to intimidation from employers and threats of losing even the precarious work they have. We write for this review to consider the WSIB's specialized services for those in these groups.

To conclude, our recommendation, stems from a 2017 report from the IAVGO legal clinic that found that in order to cut costs, "the Board is disregarding the safety, health and dignity of workers who are injured on the job. It is abdicating its statutory duty to compensate workers and help them recover and return to work."⁵ This is a problem that takes us back to the poor allocation of funds for complex and permanently impaired injured workers and the nature of service provided to this group. We recommend for the WSIB to take a special focus on their service provision and adjudication to those with complex injuries, including mental-health injuries, those in precarious labour market conditions and other vulnerable persons in Ontario.

Privatization

The administrative costs of the workers' compensation system in the United States, where benefits are provided mainly through private insurers, are much higher than in Canada, where workers' compensation is provided mainly through a single public agency in each province (Workers' Compensation in California and Canada, Institute for Work and Health, Issue Briefing, February 2010). Research shows that that public systems provide workers' compensation insurance more efficiently than private firms (Public and Private Workers Compensation Systems, Journal of Occupational and Environmental Medicine, Vol. 39, No. 2, Feb./97)

Both workers and employers realize benefits from the public administration of the workers compensation systems compared with the competitive private insurance market for workers' compensation in the United States. For example, in California claims administrative costs are more than double the cost to provide \$1 of benefits (54 cents) compared to the median California State workers' compensation system, which is 24 cents to provide \$1 of benefits (2019 State of the System, The Workers' Compensation Insurance Rating Bureau of California Report on California's Workers' Compensation System, chart 42). This is due to additional expenses of privatized insurance coverage such as advertising/marketing costs, profits, taxes, litigation, medical services and insurance industry pay scales.

⁵ IAVGO, *No Evidence*, p.2

The California state system compares to Ontario's public system where the administrative cost of providing \$1 in benefits is about 25 cents (2018 WSIB Annual Report, p. 22). The Alberta workers' compensation board studied private insurance. It chose to retain a public system for several reasons: insurers in a competitive system tend to favour the interests of employers, states with private insurers pay lower benefits, private insurance benefits would be taxable, administration costs more in the private sector due to profits, taxes, marketing costs (A comparative look at workers' compensation models, Alberta Workers' Compensation Board, 1998).

Administration

From our perspective, one of the most pressing issues concerning the governance of the WSIB is that there is currently insufficient representation of injured workers on the Board of Directors. At its core and according to its founding principles, the WSIB exists in order to support injured workers. Injured workers gave up their right to sue employers in exchange for fair compensation. In order to fulfil that mandate, it is important to ensure that injured worker voices are present at the Board of Directors. They must be part of conversations around policy, practice, and governance so that they are involved in the process of making decisions that directly impact their lives.

We therefore support the longstanding demand of the Ontario Network of Injured Workers' Groups (ONIWG) to ensure that the Board of Directors includes strong representation from injured workers and specifically from ONIWG, given that it is the only democratically run, province-wide injured worker organization.

Conclusions

When examining the focus areas of financial oversight, administration, and governance, we ask that the Reviewers also consider the implications that these high level issues have on the frontline experience of injured workers. There are certainly changes to the WSIB's operations that injured workers have been calling for many years, and some of these are reflected here. It is important that any changes to the operations preserve the integrity of the workers' compensation system, as well as its foundational mandate to support workers who have been injured or made ill on the job.

Appendices:

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4. _____. 2002 Oct. *Final Report: Coverage Under the WSI Act / Brock Smith Chair.* Toronto: WSIB
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6. Ontario Network of Injured Workers Groups. 2017 Sep. *Workers' Comp Is A Right .* St Catharines: ONIWG
7. Ballantyne, Peri J. et al. 2016. [«Poverty Status of Worker Compensation Claimants WITH Permanent Impairments.»](#) *Critical Public Health* 26(2): 173-190, DOI: 10.1080/09581596.2015.1010485
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9. IAVGO Community Legal Clinic. [No Evidence: The Decisions of the Workplace Safety and Insurance Board.](#) Toronto: IAVGO
10. Kosny, Agnieszka et al. 2016 Dec. [The Role of Health-care Providers in the Workers' Compensation System and Return-to-Work Process: Final Report.](#) Toronto: Institute for Work & Health
11. Ontario Network of Injured Workers Groups. 2019 May. [Phantom Jobs & Empty Pockets: What Really Happens to Workers with Work-Acquired Disabilities?](#) St Catherines: ONIWG
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