INJURED WORKERS
COMMUNITY LEGAL CLINIC

November 17, 2021

Standing Committee on Social Policy
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

RE: Submission of Injured Workers Community Legal Clinic Regarding Bill 27

Injured Workers Community Legal Clinic has been providing free representation and services to injured workers regarding workers' compensation matters for over 50 years. We are making submissions with respect to the government's proposed Bill 27, dubbed the "Working for Workers Act", because in our view, this legislation is not working for injured workers at all. We are extremely disappointed that the government would combine a huge cash giveaway to employers (Schedule 6) with some small, though important, worker protections (contained within other Schedules of the Act).

This Bill is doing injured workers a great disservice, and we urge the Committee to reject the portions of the Bill regarding the workers' compensation system (namely, Schedule 6), or to, at the very least, amend the Bill to include consideration of injured workers. Specific suggested amendments to the Bill are contained within this submission.

As part of this submission, we are enclosing our submissions to the Ministry of Labour dated August 10, 2021 regarding the surplus distribution model being codified in this Bill. Our August submissions provide further detail and context to our position, which is being outlined and supplemented here.

The Unfunded Liability was Eliminated on the Backs of Injured Workers

As you know, Schedule 6 of Bill 27 proposes that when the Workplace Safety and Insurance Board (WSIB) reaches 115% funding, the WSIB "may" distribute this surplus among Schedule 1 employers, and at 125% funding, this distribution would be mandatory.

We are very concerned that the WSIB has reached levels of funding which would make the topic of surplus distribution even remotely relevant. When the government first directed the WSIB to work toward "full funding", it directed the WSIB to do so by 2027. The fact that the WSIB reached what it considers to be full funding by 2018 should be a matter of deep concern rather than pride. The way that the WSIB was able to amass such a huge amount of money in the bank (approximately $40 billion) was on the backs of injured workers. Before the government or the WSIB even consider claiming to be in a surplus position and propose paying out funds to employers, injured workers need to be provided with full and fair compensation, in compliance

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with their legal rights and as promised by the historic compromise and founding principles of the workers compensation system.

Restitution for Injured Workers

Essentially, we do not believe that the WSIB would be in or near a significant surplus position if it properly addressed outstanding obligations and made appropriate corrections to adequately fund a full and fair workers' compensation system. Our enclosed August 10, 2021 letter to the Ministry of Labour provides more detailed reasons for our recommendations, but in summary, before any legitimate "surplus position" is possible, there needs to be adjustments to the following obligations to injured workers:

- Loss of Earnings: no more deeming, restore LOE rate to at least 90%, full inflation indexing (including retroactivity);
- Loss of Retirement Income: restore to 10% contribution;
- Mental Stress Injuries: criteria needs to be adjusted so that approval rate is more on par with physical injuries, and paid out accordingly;
- Occupational Disease: needs to be properly funded, and Demers Report fully implemented (see submissions of the ODRA);
- Listen to worker's treating physicians and end the over-application of "Better At Work" principles that are used to reduce and eliminate compensation benefits;
- NEL awards: more generously rated and base amount legislatively increased;
- Claims Suppression Audits: need to be adequately funded to be able to do many more, and increased training provided to front line staff to identify cases;
- Special pandemic help for injured workers as demanded by the Ontario Network of Injured Workers' Groups (ONIWG)
- Arm's length funding for ONIWG to support more equal participation of injured workers in the evolution and management of the workers' compensation system
- Other priorities, to be determined through adequate consultation with all stakeholders.

In other words, ***inadequacies of the workers' compensation system need to be addressed before any "surplus distribution" to employers is considered***. It is incumbent on the WSIB to identify any gaps in services and liabilities before considering itself in a surplus position, so that those needs can be met before taking money out of the system through employer discounts. Therefore, we recommend that ***a consultation is always necessary before the WSIB considers any surplus distribution. This step should be incorporated into the "formula" for determining whether the Board can properly consider itself in a surplus position (the proposed additions to section 100).*** As already stated, this is necessary in order to avoid the creation of new unfunded liabilities when the Tribunal, Court, or political will reverses decisions or expand entitlements to recognize historic injustices.

In order to be able to address outstanding obligations and inadequacies of the system with available funds, ***any surplus distribution provisions must prioritize the distribution of funds to programs and services for the benefit of injured workers – not only employers (the proposed section 97.1)***. Schedule 6 of Bill 27 is otherwise inexcusably one sided and pandering to employer interests and not "working for workers" at all.

Double Rewards for Suppressing Claims

In addition to our concern regarding the premature and one-sided nature of this surplus distribution legislation, we are also very concerned with the power (yet lack of direction) given to the WSIB regarding how any potential surplus should be distributed amongst employers. The proposed legislation provides that money be distributed among Schedule 1 employers "having regard to such criteria as may be prescribed and such other factors as the Board considers appropriate." We heard from the Minister of Labour at the start of these hearings that the government's alleged intention is to "reward safe employers". However, the current system uses "claims experience" (i.e. claims cost) as a proxy for "safety", which is inherently problematic and contrary to research and real world data. Employers pay premiums based on their cost experience, but if they coerce their workers not to claim or reduce compensation costs, bad actors win.

The current rate setting system does not address (and in fact unintentionally encourages) the problem of claims suppression and under-reporting. This includes both legal and illegal means taken by employers to reduce claims costs by under-reporting and misrepresenting the circumstances surrounding a workplace injury. Its existence has been documented in many studies, although it is, by its very nature, extremely difficult to measure definitively. A 2013 Report commissioned by the WSIB indicated that "20% is a plausible estimate of the proportion of likely compensable, work-related injuries or illnesses for which workers do *not* submit claims."[1] Other studies (including very recent ones) have suggested that workplace injuries are under-reported in the range of 40-60+%.[2]

The current Bill gives the WSIB the power to judge who is an employer with a "good" record in the context of surplus redistribution. But the WSIB has no handle on claims suppression, so a "good" employer could be a "bad" or illegal employer. If the system makes employers pay

[1] Prism Economics and Analysis. (2013). *Workplace injury claim suppression: Final report*. Toronto: Prism. (Prepared for Ontario's Workplace Safety and Insurance Board) at p. 3.

[2] See, for example, Mustard, C. (2021). What can hospital emergency records tell us about the incidence of work-related traumatic injuries in Ontario? Toronto: Institute for Work & Health (presentation June 8, 2021). Available at: https://www.iwh.on.ca/sites/iwh/files/iwh/presentations/iwh_speaker_series_2021-06-07_mustard.pdf. Another recent study about under-reporting: Nadalin, V. & Smith, P. (2020). Examining the impact of occupational health and safety vulnerability on injury claim reporting in three Canadian provinces. American Journal of Industrial Medicine, 63(5), 435-441. Available at: https://onlinelibrary.wiley.com/doi/full/10.1002/ajim.23094

premiums according to the number of claims and cost to the WSIB, there is a proven incentive for employers to avoid those costs. An Act designed to protect workers should ensure this does not happen, and offer protection from these types of actions.

WSIB audits can detect claims suppression. For example, they can compare first aid reports to WSIB claims and ask questions, and fines can result. The problem is that there are too few audits, which is a huge problem for the credibility of the system, identified in the recent Speer-Dykeman Operational Review. Specifically, recommendation 16 of the 2020 WSIB Operational Review includes the following statement: "it is important that, as the new framework is implemented, the WSIB maintain sufficient staffing and resources to protect a statistically relevant number of annual audits. It is beyond the capacity of the review to judge the number of annual audits. But it should be a much higher than planned for the foreseeable future in order to ensure that number of audits is statistically relevant and, in turn, can provide a credible basis to make judgements about the system's performance. This will be key in ensuring that the new rate framework does not contribute to higher rates of claims suppression."

In other words, the WSIB system cannot be credible if it does not monitor activity that suppresses the number of WSIB claims. ***The lack of sufficient WSIB audits for claims suppression is problematic for many reasons, and should be addressed in this Bill because it will otherwise produce unintended perversions in payments to employers***. If the WSIB relies on its current approach to identifying "good" and "bad" employers, the surplus redistribution to employers (which we oppose) could end up rewarding employers who in fact engage in claims suppression or have unsafe workplaces. These employers would in fact be rewarded twice – first through the rate setting model, and then again in the surplus distribution model. Without sufficient and significant audits to identify under-reporting and claims suppression, the WSIB would never know who is who in terms of claim suppression, and the distinction between good and bad apples is nullified.

If the government truly intends for this surplus to be used to improve the health and safety of workplaces, then surplus funds should be used to support health and safety programs through the WSIB (e.g. WorkWell Audits, loans and grants for safety improvements, increased compliance measures/inspections, etc) and existing partners (e.g. OHCOW, Health & Safety Associations, Workers Health and Safety Centre, etc.).

The surplus, which should go to injured workers as restitution, is otherwise going back to employers without regard or knowledge of claims suppression. Employers are being rewarded once through the current rate setting process which rewards low claims costs, and with this proposed legislation be rewarded again through surplus distribution. If this government truly cared about health and safety, it should amend this Bill to require a statistically significant number of audits and allow surpluses to also be distributed for other purposes such as increased audits, improved health and safety programs, as well as to injured workers who deserve justice.

<u>Select Suggested Legislative Amendments</u>

The following is not a complete list of legislative changes that would be needed in order to implement our recommendations, but they are an important start, and ones we believe must be addressed immediately.

Include Injured Workers in Surplus Distribution
We do not believe that a surplus distribution law is necessary at all. However, should the government insist on enacting such a provision, we insist that injured workers be added as potential beneficiaries of available WSIB funds.

The proposed section 97.1 should prioritize injured workers through investments in benefits and programs which assist them, and not only permit the distribution of funds to Schedule 1 employers. A further subsection should also be added requiring consultation with stakeholders to identify any obligations or needs of the workers' compensation system that should be met before any distribution is approved.

An assessment of the outstanding obligations or inadequacies of the workers compensation system should also be a consideration contemplated in the proposed section 100 (f.3) and/or (f.5), which address the Board's ability to prescribe the criteria and method of calculating the sufficiency ratio (in other words, whether the WSIB can determine itself to be in a surplus position would require an analysis of system inadequacies).

Inspections / Claims Suppression
In order to help address recommendation 16 of the Speer-Dykeman Review and to help combat the impact of under-reporting and claims suppression on calculating surpluses and surplus distribution, ***we propose the addition of the following two sections into the Act:***

Section 161(4) The Board shall evaluate the prevalence of claims suppression by conducting sufficient workplace audits every year to ensure the purposes of this Act are achieved.
161(5) The Board shall report its audit results to the Ministry of Labour.

Eliminate deeming
In order to ensure injured workers are appropriately compensated for their lost earnings and money is not divested from the system and given to employers before injured workers are given their fair due, we implore you to eliminate the practice of deeming / determining. This can be done by passing Bill 119, Respecting Injured Workers Act, which would add the following provision to the Act:

> ***Section 43 (4.1) The Board shall not determine the following to be earnings that the worker is able to earn in suitable and available employment or business:***
> ***1. Earnings from an employment that the worker is not employed in, unless the worker, without good cause, failed to accept the employment after it was offered to the worker.***

2. Earnings from a business that the worker does not carry on.

Other Pressing Legislative Changes

Related to the issue of claims suppression and being able to adequately assess employers for the purposes of both rate setting and surplus distribution, ***an order in council should be signed immediately to bring into effect section 83.4 of the WSIA***, which would bring in joint and several liability with temporary help agencies / recruiters and accident employers.

Another important outstanding issue is ***the expansion WSIB coverage to other industries. A consultation already took place with respect to expanding coverage to include Developmental Support Workers***, however no Bill has actually been proposed yet to implement those recommendations. Pushing forward that issue and expanding workers compensation coverage (and the other recommendations within this submission) would have been a better use of this Committee's time than legislating money back to employers, and more accurately described as "working for workers".

Conclusion

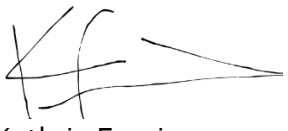
Injured workers' benefits have been reduced by billions of dollars in the name of addressing the unfunded liability, and now that the unfunded liability has been abolished, the government is consulting on how to give the profits to employers. There is an important piece of the puzzle missing, and that is reparations and ensuring proper benefits for injured workers.

We, as a society, should not be engaging in an exercise of balancing corporate profit against full compensation for injured workers. In order to avoid helping businesses at the expense of injured workers, the proposed legislation needs to be amended to include the need to consult stakeholders on outstanding inadequacies of the system before allocating available funds, and potential allocations need to be allowed and prioritized for programs and services that benefit injured workers.

We sincerely hope our recommendations will be taken into account and amendments to this Bill will be made. Injured workers deserve to be included, and we would be pleased to discuss our submissions and proposed amendments further if helpful.

Sincerely,

INJURED WORKERS COMMUNITY LEGAL CLINIC
Per:



Kathrin Furniss

INJURED WORKERS
COMMUNITY LEGAL CLINIC

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

10 August 2021

Ministry of Labour, Training and Skills Development
Health, Safety and Insurance Policy Branch

Delivered by e-form.

Submission re: Workplace Safety and Insurance Board (WSIB) Insurance Fund Surplus Distribution Model Consultation. Proposal # 21-MLTSD 017.

The enclosed submission contains feedback from the Injured Workers Community Legal Clinic (IWC) to the Ministry of Labour, Training and Skills Development.

Background

When we speak to injured workers and the labour community about the current consultation the MOL has launched regarding the surplus distribution model, "kicked when down," is the main sentiment we hear. This is because the consultation is expressly aimed at determining how to reward employers – yet again – for the elimination of the WSIB's unfunded liability and the resulting surplus funding.

We share their sense of shock and disappointment. How can this government even think of redistributing funds to employers when it is injured workers and their benefits that were sacrificed to eliminate the unfunded liability in the first place? Surely it is time to return to injured workers what was taken away from them in the name of eliminating the unfunded liability.

We reject the premise of the consultation, and we find it hard to disagree with injured workers when they tell us that the questions – which only relate to how to divide the spoils amongst employers – are insulting. From its very inception, this consultation itself is unfortunately flawed. This is because it grows from Speer-Dykeman report[1], which has a glaring defect in its analysis. Simply put, the report refused to look at the history of the unfunded liability and who paid for it. In fact, that report explicitly stated that it:

[1] Also called *WSIB in Transition*, 2020
https://www.ontario.ca/document/workplace-safety-and-insurance-board-operational-review-report

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> *…is not a backward looking document. Others have effectively covered the historical evolution of the WSIB. There is no reason to revisit the past here.*

With this one simple sentence, the report released itself from the responsibility of looking at what created the unfunded liability in the first place (artificially low premiums) and who paid for its elimination (injured workers). By refusing to understand the past, WSIB's Speer-Dykeman inspired modernization process – and subsequently this consultation process – fails to understand the present.

Briefly, we will summarize why history is not only *an* important part of understanding what the government and WSIB should do at this historic juncture, but that it is *the most important element* of creating a path forward.

1990s

The Mike Harris government was brutal in their benefit reduction to injured workers. However, it was at least honest in pursuit of its intended cuts. For example, the second Jackson report of 1996 announced explicitly that cuts that would be imposed in bill 99, including significant reductions to cost of living adjustments, reduction of Loss of Earnings benefits from 90% to 85% of net, the halving of the loss of retirement income benefit, and cuts to chronic pain entitlement.[2]

The Jackson report calculated that these cuts would amount to $15.2 billion in loss of benefits to workers. However, it at least admitted that these were "very difficult measures" for injured workers. These "very difficult measures" were simply overlooked by the Speer-Dykeman report's stated disinterest in history. However, injured workers have never forgotten the "difficulty" that these measures caused them.

2000s

Injured workers have also not forgotten about David Marshall, the banker appointed by then Premier Dalton McGuinty to further dramatically reduce benefits. Mr. Marshall was given the express job of reducing the unfunded liability by any means necessary. The means he chose was the further reduction of injured worker benefits. For example, he greatly extended the practice of "deeming"[3], reduced compensation based on

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[2] *New Directions in Workers' Compensation Reform*, 1996 https://ia800202.us.archive.org/7/items/newdirectionsfor00jack/newdirectionsfor00jack.pdf

[3] "Deeming" pretends that injured workers have a job that they do not have, and reduces their benefits by the wages they are imagined to be earning in this phantom employment.

asymptomatic "pre-existing conditions" that had never caused the worker problems before, and by proactively ignoring the opinion of injured worker's treating doctors.[4] Mr. Marshall was equally candid in admitting that he would introduce "tough, tough" measures, that he would challenge his team to "reduce the rate of long term (compensation) recipients by half," and that there would be "some kind of pain somewhere in the system."[5] While it is simple for the Speer-Dykeman report to turn a blind eye to that "pain somewhere in the system," it is not as easy for injured workers, for many of whom this "pain" was having to choose between paying for their housing, or feeding their children.

At the time of these cuts, however, injured workers were unambiguously told that once the UFL was eliminated, some of these cut benefits would begin to return. For example, standing next to Mr. Marshall in front of the Standing Committee on Public Accounts on February 24, 2010 was then WSIB Chair Steve Mahoney, who stated:

> *The real benefit to eliminating the unfunded liability is that it would free up the one third of that premium, which could then be used to either reduce premiums, or increase benefits, or both.*[6]

Speer-Dykeman feel it is not worth "looking backward" at this promise, but injured workers don't have the same luxury. Instead, they have been patiently waiting in progressively growing poverty for this promise to be honoured.

Perhaps most conspicuously, the Speer-Dykeman report does not refer at all to a significant consultation that was completed in advance of its 2010 release, Harry Arthurs "Funding Fairness" report.[7]

After much investigation of the issue, Arthurs, as his chosen title suggests, believed there needed to be a balance between reducing the UFL and maintaining a dedication to the mandate of the WSIB (helping injured workers). A few important quotes from his report are as follows:

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[4] For more information on WSIB's approach to treating doctors, see *Prescription Overruled*, 2015 https://ofl.ca/wp-content/uploads/2015.11.05-Report-WSIB.pdf

[5] Hansard, Standing Committee on Public Accounts, February 24, 2010.

[6] https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2010/2010-02/committee-transcript-1-EN-24-FEB-2010_P027.pdf, p 479.

[7] https://collections.ola.org/mon/26005/315866.pdf

No strategy to achieve the WSIB's financial stability and sustainability is appropriate if it impairs the WSIB's ability to perform its multifaceted statutory mandate. (Page 14)

I mean to signal that the WSIB should always keep in mind that financial strategies are not and end in themselves but rather a means to an end…the Board may be tempted to adopt measures that would undermine stakeholders' confidence or impair its reputation for fairness. (Page 32)

…the WSIB cannot and should not make premium rates affordable by subverting the intention of the legislature or denying injured workers their legal rights. (Page 53)

…efforts to eliminate the unfunded liability need not – and should not- pre-empt other initiatives to design and implement fair and sensible policies for the WSIB. (Page 103)

Recent Years

Finally, in the two years prior to the report alone, employers were already rewarded a 47.1% reduction in premium rates since 2018, which has already saved them billions of dollars.

A reasonable observer might conclude that since employers have already been rewarded with massive premium rate cuts, there should only be one kind of consultation now: how to return some of the benefits to the injured workers who were forced to make the sacrifices that eliminated the unfunded liability.

Workers' Rights & Legal Obligations

In 1914, workers gave up their right to sue employers in exchange for full and fair compensation for workplace injuries, for as long as their injuries last. The deal – which was a compromise – was as follows: full and fair compensation for injured workers in exchange for reasonable, dependable costs for businesses, without the reputational, legal, and financial risks of being sued. The promise was simple – full justice, no half measures.

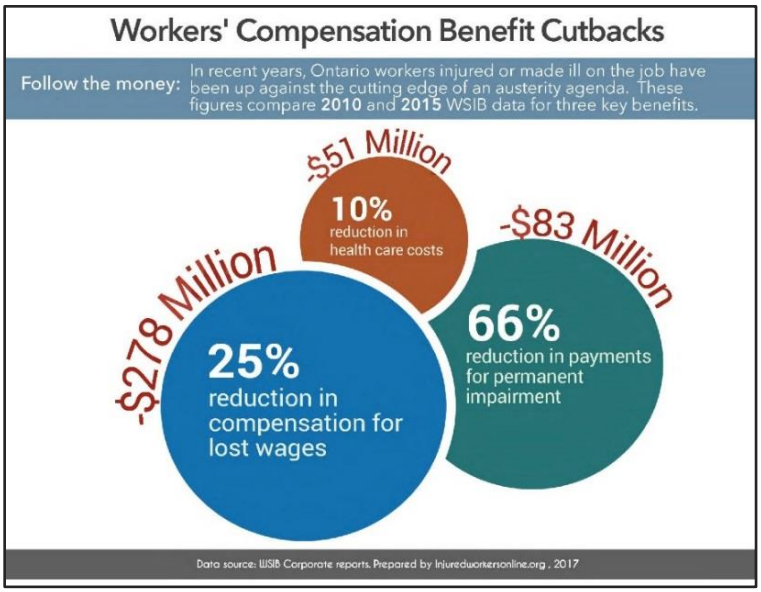
Currently, there are several legislative obligations to injured workers which are not being met. For example, injured workers have already made submissions before the United

Nations raising their concerns over the failure of the government and Workplace Safety and Insurance Board (WSIB) to respect their human rights as people with disabilities.[8]

Given the circumstances, the MOL and WSIB must prioritize respecting injured workers and the sacrifices they made before even beginning a discussion on returning "surpluses" to employers.

How Did the WSIB Save Money? By Not Providing Benefits to Workers

WSIB's own Annual Financial Reports reveal that between 2010 and 2015 alone, the benefits paid out to injured workers' were cut in half, from $4,809 million to 2,332 million. This was achieved by deliberate cuts to the reduction in healthcare coverage, lost wage benefits (LOE), and payments for permanent impairment. We will delve into these, and other, methods of cost saving below.



<u>Deeming</u>

One of the most devastating practices that the WSIB has used to achieve these cuts is "deeming" (also called "determining"). Deeming pretends that injured workers have phantom jobs – which they do not in fact have – and reduces their benefits by these imaginary wages, thereby only paying the injured worker the difference between what the WSIB simply guesses they should be making as against their pre-injury wage.[9] The total is often zero, especially for the most vulnerable lower wage workers. It unreasonable and unjust to assume that anyone, let alone someone with an injury and

[8] https://injuredworkersonline.org/wp-content/uploads/2019/09/20190904_ONIWG-media-release-CRPD.pdf

[9] For example, if an injured worker was earning $19 per hour prior to injury and the WSIB then deems them able to earn $14 per hour, the injured worker is only receiving 85% of the after-tax take home pay of $5 per hour.

cascading set of complex medical needs, can live off of a deemed wage. There is no doubt about it, the practice of deeming forces injured workers into poverty.[10]

Mental Stress Injuries

In 2016, injured workers won a huge victory when the legislation relating to the WSIBs coverage of work-related chronic mental stress injuries changed, requiring the compensation board to cover this type of injuries the same way it is required to cover others. Despite the change the law, policy and practice remains inadequate and discriminatory. WSIB's own audits have shown us that since the inclusion of work-related chronic mental stress injuries in 2016, the WSIB has only single digit fractions of chronic mental stress cases, compared to 78% of physical injuries.[11]

Occupational Disease

In the last several years alone, massive occupational disease clusters have emerged in Northern Ontario, Peterborough, Kitchener, and beyond. In each case, hundreds or thousands of claims were ignored and/or rejected outright by the WSIB. In each case, little or nothing was done about the clusters until sick workers, along with the families of deceased workers, made significant waves in the media.

The savings to the WSIB were substantial. The costs to the healthcare system, social services, and the families affected are incalculable. Part of the reason the WSIB is in surplus is because of the benefits that were denied to these workers and their families. It simply cannot remain the case that mass work related illness must make the front page before the WSIB steps in to help, and even still, victims of occupational disease are left demanding long-delayed compensation.

NEL benefits

In 2010, the WSIB paid out $126 million in permanent impairment settlement benefits to injured workers. By 2015, that number was $43 million – a 65% reduction in five years, with no matching reduction in injury rates.

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[10] For more information on injured worker poverty, see *Poverty status of worker compensation claimants with permanent impairments*, 2014 https://www.tandfonline.com/doi/abs/10.1080/09581596.2015.1010485?journalCode=ccph20&

[11] https://www.thestar.com/news/gta/2018/12/04/workers-compensation-board-denies-over-90-per-cent-of-chronic-mental-stress-claims-audit-shows.html

The WSIB claims to have simply improved the permanent injury outcomes of workers in Ontario. While that hasn't been what we have observed as representatives, it could theoretically be true that they have improved some outcomes. However, it is simply not believable that they have eliminated permanent injury in two out of every three cases in a period five years with better case management alone, especially given that this same period saw a 10% reduction in spending on healthcare as well.

No reasonable person, corporation, or government could believe that this level of reduction in benefits was provided without a drastic reduction in the quality of service provided.

Claim Suppression

Anecdotally, we see many workers at our clinic who have experienced some form of claim suppression, from outright intimidation to more subtle processes like not being informed about WSIB, being told it will be easier to take sick leave instead, misrepresentation of the severity of the injury of the length of lost time, and so on. Workers often tell us that they informed the WSIB of the pressures they faced not to claim, and that no subsequent investigation was launched, and in fact they were not even told this was a problem.

The Speer-Dykeman Review confirms our belief that the WSIB does in fact face a claim suppression problem, and that it has not conducted sufficient audits to meaningfully reduce them.[12] Legislation was introduced in recent years to strengthen deterrents against claim suppression, but without effective auditing, proper resources for investigators, and training for frontline workers on how to identify and escalate potential instances claim suppression, the legislation is meaningless.

We know that the WSIB does not hesitate to flag, escalate, and thoroughly investigate any behaviour they deem as 'suspicious' on the worker side of things, up to and including hiring expensive and invasive private investigators to tail workers. Again, it is anecdotal, but we simply don't see or hear of that level of effort, resources, and responsiveness when it comes to investigating suspicious employer behaviour.

Further, without the adequate auditing and investigation outlined above, WSIB's experience rating system for setting employer premiums effectively amounts to a

[12] For example, section 1.7 states that "It is difficult to quantify it but there certainly seems to be evidence that it is present in the system…" and points how the WSIB's targets for audits are very low.

financial incentive for employers to suppress claims. For this reason and others, the Arthurs Report, our office, and many workers and advocates opposed and continue to oppose experience rating.

A suppressed claim, at bottom, is one that the WSIB does not have to pay for, resulting in potentially massive levels of savings for the Board. Returning premium "surplus" to employers before adequately equipping Board staff with strong investigative mandates and resources is another reason injured workers are feeling "kicked while they are down" by this consultation process.

Other Savings

The above systems only begin to scratch the surface of the challenges that injured workers have faced in the name of eliminating the UFL. For example, we have not provided significant detail on other savings, such as:

- Cuts to healthcare services.[13]
- Claims abandoned by workers due to the delays caused by bad decisions, a backlogged appeals system, and gross understaffing.[14]
- The active fostering of a culture of denial among WSIB staff.[15]
- The Board's confirmed practices of creating opportunities to ignore injured workers' treating doctors.[16]
- Defunding injured workers' groups who engage in efforts to improve the compensation system.
- …and a host of other methods.

As you can see, there is little question that a significant portion of the elimination of the savings achieved in the service of savings has come from sacrifices that injured workers were forced to make. Sacrifices that they were explicitly told would pay off in the future, when the UFL was gone.

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[13] For more information on cuts to healthcare benefits, see *Bad Medicine*, 2017 http://iavgo.org/wp-content/uploads/2013/11/Bad-Medicine-Report-Final.pdf

[14] For more information on bad decisions, see *No Evidence*, 2017 http://iavgo.org/wp-content/uploads/2013/11/No-Evidence-Final-Report.pdf

[15] One small example: a case manager requires the approval of senior management for allowing claims above a certain dollar amount, but may deny claims of any amount without the need to consult more experienced staff. Another: FOI's of training material have shown us that trainees are asked to 'consider the consequences' of allowing an illegitimate claim, while never been asked to think of the devastating consequences of denying a valid one.

[16] For more information on WSIB's approach to treating doctors, see *Prescription Overruled*, 2015 https://ofl.ca/wp-content/uploads/2015.11.05-Report-WSIB.pdf

And yet, now that full funding is reached, the first thing that happens is the creation of consultation process that asks *only* how the spoils should be split up amongst employers.

Instead, we make the following suggestions about where new found "surplus" money could be used.

Moving the Compass Needle Back to "Fair" – Restitution for Injured Workers

In the wake of increased funding at the WSIB, the government should make the following legislative changes to prioritize injured workers, aimed at returning the system at least to the level it was before UFL related cuts began in the 1990s.

LOE Rate

The current Loss of Earnings rate is 85% of the net average earnings – a reduction from the early 90% rate. The Jackson Report (cited above) recommended this change would save $3.1 billion; however, the report did not reveal that the $3.1 billion would be on the backs of injured workers. Other jurisdictions that pay injured workers the 90% rate include: Manitoba, Alberta, Saskatchewan, British Columbia, and the Northwest Territories. The legislature should restore the 5% reduction.

Cost of Living Adjustments

Since 2018 injured workers are no longer penalized for the effect of inflation. However, since 1995, they have had real reductions of benefits imposed by the "Friedland Formula" and ad-hoc cuts to cost of living adjustments. There should be full retroactivity to injured workers for these losses.

Loss of Retirement Income Benefit

Bill 99 reduced the Loss of Retirement Income (LORI) benefit percentage to 5% from 10%. The adjustment on this retirement income adjustment was estimated to "save" the WSIB billions. Unfortunately, injured workers simply inherited the cost. Permanent disability injury robs injured workers of their ability to contribute to CPP, yet WSIB benefits end at age 65. As a result, if their health allows them a long life, they will likely have to live it in poverty.

NEL Base Amount

As stated above, there was a 65% reduction in NEL payments between 2010 and 2015, a level and pace that simply could not reflect an actual reduction in permanent injury. One way to begin to solve this problem is by setting a fairer NEL award "base rate". Instead, 2021 actually saw a reduction in this rate. The NEL benefit base amount set by Regulation is simply not adequate for injured workers, and these numbers are nowhere comparable to awards granted in personal injury cases or by private insurance. Injured workers are universally shocked and offended when they learn that the WSIB rates their lifelong impairments to a small percentage of the maximum amount, and pays them a few thousand dollars. These ratings are calculated using an outdated methodology that often looks only a reduction in the workers range of motion and assigns a tiny percentage value, rather than attempting to understand the actual pain and suffering that a worker experiences as a result of a permanent impairment.

Arms-length funding for Ontario Network of Injured Workers' Groups (ONIWG)

Arms-length funding for ONIWG would be a tiny but important sign that the Ministry of Labour values the contribution of injured workers. ONIWG received such funding via the *Office of the Worker Advisor* in the past but this was discontinued. The 2012 Harry Arthurs report noted that injured workers, unlike employers, did not have the resources to properly participate in his consultation on how to best fund the WSIB – a conclusion that could be extrapolated to every request for public input from the MOL and the Board:

> *If, indeed, the adversarial attitudes are becoming entrenched in the processing of individual claims and in the formulation of funding and other policies, it is in the interest of the WSIB itself that both adversaries (injured workers and employers) be adequately represented. Anything less will not only undermine the WSIB's reputation for fairness, it will deprive WSIB decision makers of good arguments (page 113-4)*

Restitution to workers should not wait for 125% funding level

Restitution to workers should not wait for the WSIB funding to reach 125%. It should happen immediately regardless of funding level. We will not restate them here, but many arguments have been put forward that there is no reason for a public system like the WSIB to require a permanent state of full funding. Despite this, injured workers have faced 26 years of progressive sacrifice in the name of ending the UFL. Countless

workers have in fact already died without any recognition and restitution. The government has *already* acted swiftly to reduce employer rates, to the tune of billions of dollars in the last few years alone. Swift action for injured workers is called for now.

Don't Create A New Unfunded Liability

The province has clearly decided that unfunded liabilities are not a situation they can live with. Given that, it is important to remember UFL's themselves are created by underfunding a system in the first place. History has provided many examples of governments intentionally underfunding social security systems (through premium rate cuts, tax cuts, etc.) as an excuse to cut programming and benefits available to those who are struggling. Simply racing to find a way to dole out "surpluses" to employers the moment they arise may leave injured workers facing another round of benefit cuts in service of tomorrow's UFL.

Additional Measures

In addition to those listed above, we suggest that the Province takes the following measures with any surplus funds:

- Mental Stress Injuries: need to be approved more fairly and paid out accordingly.
- Occupational Disease: needs to be properly funded, with the adoption of the Demers Report.
- Claims Suppression Audits and Investigations: need to be adequately funded, and more training provided to front line staff to identify cases.
- Special pandemic help for injured workers as demanded by the Ontario Network of Injured Workers' Groups.

Conclusion

This consultation is hampered by the Speer-Dykeman's report's unwillingness to examine how the unfunded liability was eliminated and who paid for it. As a result, it therefore asks the wrong questions and sets out to award the wrong party for the so-called "victory" over the unfunded liability. Said another way: the Ministry of Labour received lop-sided and incomplete advice, and should show dignity and respect for injured workers who surrendered so much for over two decades, by returning the benefits that were cut over time. Above, we have listed some measures that could be undertaken to begin to redress the cuts that have been made to the compensation system, and begin to restore the trust of injured workers.

Finally: Try to imagine yourselves in the position of injured workers, who collectively have watched literal billions of dollars get shaved off of their benefit cheques for decades alongside a promise that "things will get better when we are funded," only to see that the reward for their sacrifices is a consultation about how to divide their lost benefits up amongst employers. The same employers who injured them. Many of whom may have suppressed and managed their claims and those of their community. Who are protected from lawsuits whether they are neglectful or not. Who fight publicly for a system that does less for injured workers.

We don't make these submissions only because we are on the side of workers. We make them because we are on the side of fairness. We believe we have made the case that rushing to return money to employers is not a fair approach to the elimination of the unfunded liability.

Thank you for your time and consideration of these important issues.

IWC

Injured Workers' Community Legal Clinic

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