OCCUPATIONAL DISEASE REFORM ALLIANCE (ODRA)

Presentation

To

The Standing Committee on Social Policy

On

BILL 149: An Act to Amend Various Statutes With Respect To Employment And Labour And Other Matters

The Hon. D. Piccini

Minister of Labour, Immigration, Training and Skills Development

2nd Reading

INTRODUCTION:

What is ODRA

We are a group of people of various backgrounds from across the province that came together with a common goal, to demand justice for victims of occupational disease. Our group name is the Occupational Disease Reform Alliance (ODRA), and we include members who are: victims of occupational disease (workers, retirees, and family members including far too many widows), advocates (Union and Community alike), and allies (injured worker groups, injured worker representatives, and others who believe in this cause). Members in this group are from Peterborough, Sarnia, Kitchener, Waterloo, Hamilton, Niagara, Toronto, Sudbury, Elliot Lake, Sault Ste. Marie, Thunder Bay, and Dryden. We have witnessed the injustices to the workers and families who filed occupational disease claims related to their work at GE, Ventra, Neelon Castings, Algoma Steel, Uniroyal, in addition to other industries, and mining (including those forced to inhale McIntyre Powder). The common goal of fighting for justice for the victims of occupational diseases unites us, and we are calling on the government and the WSIB to implement necessary changes.

We are here to address what is missing in Bill 149, and draw the committee's attention to the desperate state of affairs concerning deficiencies in the current Workplace Safety and Insurance Act, in particular, the way the WSIB conducts scientific investigation and adjudication of occupational disease claims. In this brief we look at the consequences of under reporting occupational disease and the Board's excessive denial of disease claims. Indeed, there seems to be a culture of denial that permeates every internal structure and activity within the Board.

Within Bill 149, ODRA fully supports the firefighters' achieving a, less restrictive, threshold criteria for assessing work-relatedness for esophageal cancer. We are glad that the government is introducing an amendment to the Act changing the required latency period from 25 to 15 years for fire fighters who develop presumptive, work-related, esophageal cancer. However, we maintain that while this is a step in the right direction, even 15 years is too high a threshold. And we hope that the committee and the government would lower this time period further in the interest of justice and what the evidence dictates. So, ODRA will go on record in supporting the Firefighters position for further changes to the presumptive threshold as well as its coverage with "Presumptive Provision" for occupational disease recognition. In this case we refer to Dr. Paul Demers' note that these latency thresholds should not be used as hard and fast boundaries for causation where other risk factors are operating, such as frequent peak exposures and multiple exposure that may be additive, or even multiplicative. Most epidemiological studies focus on single exposures and do not factor in the impact of multiple exposures. Thus, these may overestimate the time period by not considering these other risk factors.

RECOGNITION OF OCCUPATIONAL DISEASE IN GENERAL

However, such piecemeal provisions do not address major problems with the way the WSIB engages in occupational disease recognition and adjudications. It leaves the majority of victims behind with dire consequences for workers and their families -- as well as major consequences for communities and society as a whole.

HOW SERIOUS IS THE PROBLEM OF OCCUPATIONAL DISEASE RECOGNITION IN CANADA

Canada's failure to recognize occupational disease is a serious problem, particularly in Ontario where only a small percentage of occupationally caused diseases are recognized annually. Importantly, most victims of occupational disease do not file claims and, among workers who do, many are denied because of the heavy, ever shifting, burden of proof imposed on those least able to produce the "conclusive" evidence wrongly required for claim acceptance. Studies carried out by IAVGO reveal the arbitrariness of the adjudicative process at the Board level. The IAVGO report, entitled "NO EVIDENCE," is based on a review of WSIAT decisions showing that a large percentage of rejected claims were not based on any evidence. Based on WSIB reported accepted claims, Buonasstella and Furniss (2016) noted that during a period of austerity under the leadership of David Marshall (2010-2016), rejected injury claims more than doubled in number to address WISB's "unfunded liability, "

Importantly, a study conducted by the Occupational Cancer Research Centre under direction of OCRC's executive director, Dr. Paul Demers (Demers, 2020), identified that Ontario's workers' compensation system lagged seriously behind most industrialized nations in occupational

disease recognition. The study, entitled "Using Scientific Evidence and Principles to Help Determine the Work-Relatedness of Cancer" was commissioned by the Ontario Government in 2019 to examine the scientific practices of the WSIB with regard to occupational disease recognition and adjudication of disease claims. Dr. Demers identified that Ontario has the lowest acceptance rate of cancer compensation claims among industrialized nations. According to the report: "0n average, the WSIB has accepted 170 cancer claims per year (130 of which are for asbestos-related cancers)." It further states that "this is only a small fraction of the 3,000 estimated occupational cancers predicted for Ontario (of which 800 are due to asbestos)." In contrast to European jurisdictions, Ontario has the lowest claim acceptance rate at 2.9 per 100,000 compared to 15 per 100,000 for Germany at the high end, and 4.7 for Belgium at the low end.

WHAT ARE THE SOCIAL AND ECONOMIC CONSEQUENCES OF INADEQUATE OCCUPATIONAL DISEASE RECOGNITION AND ADJUDICATION

Negative Impact on Our Economy and Public Health-Care System:

The failure to accurately and effectively recognize the true extent of occupational disease has major social and economic costs for our entire society. For example: diseases that are not identified as work related and fall through the cracks; files that are erroneously rejected by the Board's system of claim adjudication; and, lax or poor disease investigation all have a tremendous impact on our health care system. When occupationally caused diseases go unrecognized by the board, this place additional economic burden on our already underfunded and stressed health care system. Consequently, these health costs (meant to be funded through workers' compensation) are shifted to the taxpayers and small businesses that fund the public health care system. It would not be wrong to say, some employers get away with murder!

Under-reporting Distorts Prevention of Injury and Disease:

In addition to its negative impact on our health care system, Ontario's low rate of acceptance due to poor and inconsistent scientific investigation and analysis, subverts disease prevention initiatives, and distorts the regulatory process. Detailed studies, the world over, substantiate the importance of regulation and enforcement in the prevention of occupational disease and traumatic injury. Analysis of Australian data indicates that most injuries and chronic diseases are the result of non-compliance with regulations governing hazardous exposures and physical safety risks – in addition to the absence, or weakness, of regulations (Emmett, 1997).

Importantly, approval of work-claims provides the basis for determining the nature and extent of hazards in the workplace. Injury and illness claims approved are a reflection of how unsafe or unhealthy a workplace may be. The fact that a majority of projected cases of occupational disease in Ontario are never filed by workers, and among those that are, few are allowed by the board, means that employers are not held accountable, nor are hazards effectively addressed through remediation, enhanced exposure controls, and improved safety practices.

Impact on victims and families:

We would be remiss in not addressing the disastrous direct impact on victims of occupational disease and their families when claims go unrecognized. For many, it is a deep plunge into poverty and all the social and political conditions that victims and families must confront when prolonged illness and suffering take over (Ballantyne, 2016), (DePillis, 2015). In many instances, workers and their families will suffer severe psychological depression, substance abuse, and physical and mental abuse within the family accompanied by other physical illnesses. Much of this flows from social isolation during long periods of unemployment. Families with young children will also suffer tremendous psychosocial stresses associated with learning disabilities and serious behavioral manifestations in children. Unemployment and poverty are major determinants of (ill) health. These are major stressors that supress the immune system and make us more susceptible to illness and disease.

We can't stress enough how important this hearing on Bill 149 is for the safety and health of workers in Ontario and their families. We strongly emphasize the importance of this opportunity to address the issue of occupational disease in Ontario in a serious way that corresponds to the magnitude and urgency of the problem. These resulting problems associated with occupational disease will continue to affect workers and their families and our communities with devastating consequences. We point to the enormity of these consequences in not addressing the underlying cause of the problem that resides in the serious conflict of interest inherent in our current system of worker compensation based on an insurance scheme whose primary duty is to its employer clients. This is revealed at so many levels. For example, consider that the Government of Ontario recently returned several billion dollars in "surplus" funds to their corporate clients, at the same time that: injured and diseased workers had more pressing needs and whose rejected disease claims left them in poverty, or; the austerity measures placed on workers to address the Board's unfunded liability reflected in a doubling of claim denials, or; the illegal system of "deeming" that both hinders workers' recovery while thrusting them further into poverty. In addition to exposing an inherent conflict of interest, this same neglect of workers is a betrayal of the basic fundamental governing principles of worker compensation established in 1913 (referred to variously as "Meredith principles" or "the historic compromise") that are worth repeating:

1. Work does not have to be the predominant or primary cause
2. Absolute certainty is not required
3. Causation is based on balance of probabilities not scientific certainty
4. The worker is afforded the benefit of the doubt

A Compensation system based on the following tenets:

1. No fault
2. Non-adversarial
3. Security of benefits
4. Employer pays
5. Collective liability

If these principles were adhered to, employers would be forced to place higher value on ensuring a safe workplace, and governments' allocation of grants, loans, and subsidies to companies could be directed towards ensuring this goal, thus fairly addressing employee, as well as employer, needs --thus in the long term ensuring healthier communities with less stress on the health care system.

Should these structural problems not be addressed, the resulting problems associated with occupational disease in Ontario will continue to affect workers and their families, as well as communities, with devastating consequences. This is unacceptable in a civilized society!

We are calling on the government to broaden the scope of this legislation to include consideration of amending the Act further by including consideration of additional amendments outlined below that address the problem of under recognition of occupational disease, including our proposals for addressing these critical shortcomings.

WHAT ARE SOME REMEDIES FOR A FLAWED WORKER COMPENSATION SYSTEM

ODRA PROPOSALS: ODRA members have observed first hand many issues with occupational disease adjudication and have developed 4 PROPOSALS that would help resolve many issues. Overall, we are calling for recognition of occupational disease that is more reflective of the disease burden noted in reviews such as the Ontario Cancer Research Centre's Burden of Occupational Cancer Project.

Our proposals include the following four basic principles:

1. Grant entitlement when the incidence of disease exceeds that found in the general population and community;

2. Use the appropriate legal requirement, one based on the balance of probabilities that is imbedded in the WSIA, and not scientific certainty;

3. Expand the list of diseases that are presumed to be work-related in schedules 3 as well as those involving exposure to chemicals deemed carcinogenic by the IARC'S categories 1 and 2;

4. Recognize diseases resulting from exposures to multiple carcinogens/irritants.

Proposal #1: We are calling on the WSIB to grant entitlement for occupational diseases when the workplace rate of the disease exceeds the level in the community. This is a sound, epidemiologically based, process that the Supreme Court of Canada has endorsed as an appropriate scientific measure to ascertain work-relatedness. Implementing proposal #1 not only allows for compensation to be provided, but also identifies a workplace risk that can be applied to prevent future cases. Observed increased incidences of disease are a reliable indicator that something is wrong, and while the exact cause might not be known it prompts the need for investigation to determine the cause. For example, over the last 20-30 years workers have reported clusters of diseases in various workplaces that should have been treated as indication that this may be due to common workplace exposures, thus requiring a detailed investigation by the employer, government, and the WSIB. Rarely is this undertaken by any, much less all three agencies which all are under mandate to do. Given that there are sufficient data bases available for community comparison of disease rates -- we see no obstacles preventing the implementation of Proposal #1. We can provide numerous examples where the WSIB has denied claims for workers when the incidence rate exceeded that of the surrounding community and/or general population. Should the WSIB wish to confirm this, they need only look at: past breast cancer claims from Bell or Ventra Plastics; glioblastoma-multiform claims for coke oven workers at Algoma; and lung cancer claims at Ventra Plastics, to support our point.

Proposal # 2: The "balance of probabilities" as test for claims requires that the WSIB not wait for future scientific proof but decide today using the principal of "probable cause." Thus the proper legal test must be based on the balance of probabilities and not "beyond a reasonable doubt," i.e. conclusive proof. Recently, Canada's Supreme Court confirmed that "scientific proof" is not required for workers' compensation. Instead, the WSIB must use the evidence at hand. The WSIB must not leave workers and families in poverty until the body count has sufficiently accumulated over decades, to prove cause. The law requires that WSIB decisions be made on the balance of probabilities with the worker given "benefit of the doubt." Limited evidence or weak evidence (often the case in uncommon diseases) is not NO EVIDENCE! The very existence of a cluster of diseases at a workplace must be treated as sufficient evidence of work-related disease/s, particularly where incidence exceeds that in the community, even when there is no identifiable cause at the time. According to Dr. Demers' report, scientific and/or medical evidence doesn't exist for every case; the absence of which should never be viewed as the absence of a causal connection.

Proposal #3: The WSIB must implement presumptions of work-relatedness for cancers listed in categories 1 and 2 by the International Agency for Research on Cancer (IARC). This requires a non-rebuttable presumption for chemicals/situations with the most significant occupational contribution and

a rebuttable presumption for the others. Applying the IARC cancer categories to create presumptive lists for disease recognition would open up a more efficient pathway to science-based disease recognition. Two recent reports have recommended that the WSIB expand the list of diseases and/or conditions in Schedules 3 & 4. Both the ODAP Final Report and the WSIB draft protocol document provided a framework for adding to the Schedules, an indication that expanding these lists was their recommendation as well. While Schedule 3 has increased from just 6 to 30 diseases/conditions, there haven't been any additions to Schedule 4 since the early 1990s. Expanding the list of compensable diseases, presumed work-related, isn't a novel concept and should constitute a regular part of the WSIBs ongoing work to ensure justice for victims of occupational disease.

Proposal #4: The WSIB must recognize diseases resulting from exposures to multiple carcinogens/irritants (i.e., cancers, COPD, etc.) as recommended by Dr. Demers Report, rather than focusing on single or separate exposures. The realities of industrial workplaces are that workers are exposed to a multiplicity of toxic chemicals and carcinogens which interact with each other synergistically, each enhancing the toxicity of the other. A recent study of Australian workers estimated that 81% are exposed to one of more toxic chemicals; and 29% are exposed to more than five (Steinemann, 2018). It is now recognized that multiple exposures must be considered an additional, and significant, risk factor. The Demers' report states that multiple exposures be treated as "multiplicative" where the relationship between chemical reactions are clear -- and "additive" where the relationship is less clear.

We believe that these four proposals would expedite the growing backlog of claims waiting for resolution through the adjudicative process at the Board level. This would then help relieve the backlog of long-term appeals at the Tribunal level. Streamlining the processes of both disease recognition and adjudication would eliminate the years, even decades, it now takes the WSIB to resolve individual claims. Importantly, it would create a system of "just compensation", where injured workers' needs are addressed as a first priority -- a truly "WORKERS' COMPENSATION SYSTEM" as originally conceived!

As it stands now, the WSIB appeals branch has a tendency to readily shift unresolved cases up to the WSIAT rather than conduct the research and investigation required, instead relying on established biases of focusing on a worker's habits or family history rather than actual work exposures. This was demonstrated in the IAVGO review (NO EVIDENCE) of tribunal findings during appeals which concluded that cases fail to get resolved at the Board's Appeal division as they should.

Pancreatic Cancer Case Study: A case in point can be seen in the recent findings and decision of Vice Chair L. Petrykowski. After reviewing the evidence used to deny compensation in a case of pancreatic cancer at the ARO level, the Vice chair noted that the ARO conducted a very superficial investigation resulting in an exposure assessment based solely on air sampling conducted by a Board industrial hygienist -- despite evidence of a plethora of exposure conditions well documented in a retrospective exposure profile of the plant conducted by researchers and a worker advisory committee identifying that exposures in plating were high, and the chemicals used were carcinogenic to the pancreas. The adjudicator concluded that this report (DeMatteo and DeMatteo, 2017) was far superior and more credible than what the Board's consulting physician presented. He found that the Consulting Physician

relied on erroneous data and neglected to look into other sources that contraindicated the extent of non-occupational factors. According to the Chair: "(names Board Dr's) reliance on erroneous aspects somewhat detracts from the worth of his opinion about causation in this case". He further states: "In my view, the preponderance of evidence from multiple sources, including (names worker's Dr), outweigh the contrary causation opinion provided by (the Board Dr). (L.Petrykowski, 2024). This example, is, in many instances, the class average for the Board's Appeal Division: Exaggerate the non-occupational risk factors, underestimate exposures to toxins.

OTHER ISSUES ADVANCED BY ODRA

These proposals are specific to occupational disease, and address issues regarding initial entitlement. But they are not the only issues we have with the compensation system. Once victims of occupational disease are granted entitlement, they become part of a system that itself needs to change in the way it treats both injured, and ill, workers. In this regard, we support the Ontario Network of Injured Workers Groups (ONIWG) in their call for changes in the workers' compensation system regarding issues such as: deeming, return to work concerns, reliance on external medical consultants over treating physicians, adjudication delays, in particular.

Another important issue concerns the paucity of technical and legal assistance for occupational disease claimants. In truth, the compensation system leaves workers to drown in the legal, scientific, and bureaucratic morass typical of the WSIB. This is particularly acute for non-unionized employees and retirees who have little or no representation when filing and pursuing their claims. While the Office of the Worker Advisor is an important agency assisting unrepresented workers during the long, often drawn out, process, it is unfortunately too little. The OWA is seriously underfunded and lacking in the research and technical skills required to effectively deal with the complexities of industrial hygiene, epidemiology, and science of occupational disease. The agency needs more funding to hire additional staff with skills, not only in the legal parameters of workers' compensation, but also possessing knowledge and research skill in occupational health and medicine.

CONCLUSION:

Making the Case for Change: Each of the four proposals is solidly based on our collective experience and knowledge that includes a combined total of hundreds (if not thousands) of occupational disease claims registered with the WSIB. We recognize that there are likely as many, if not more, occupational diseases never reported to the WSIB. Some of these "failure to report" cases can be linked to worker-unfamiliarity with the reporting requirements of the WSIB, while others are associated with workers deciding not to engage in the onerous task of first filing, then fighting a series of denied claims. Far too many workers have died from occupational diseases without compensation including many who died before claims were (successfully or unsuccessfully) resolved. All workers deserve to know that they and their families have the security and backing of a compensation system that is fair, just, and timely. That is the driving force behind ODRAs Proposals for Reforming Ontario's workers' compensation system.

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