

The Changing Workplaces Review
Injured Workers' Consultants Community Legal Clinic Submissions
September 18, 2015

Contents

Overview.....	1
1. Expanded Objectives	1
1.1 Equity and Human Rights	1
1.2 Health and Safety.....	2
1.3 Formal Acknowledgement	2
2. Harmonization and Universalization	2
2.1 Harmonization.....	2
2.2 Universal Coverage.....	3
3. Standards that Create Healthier Jobs and Workplaces	4
3.1 Experience Rating	4
3.2 Sick Leave.....	6
3.3 Unjust Dismissal of Disabled and Injured Workers.....	6
3.4 Stigma.....	7
4. Effective Enforcement	7
Conclusion and Summary of Recommendations	8

Injured Workers' Consultants Community Legal Clinic Submissions

Overview

Injured Workers' Consultants is a community legal clinic that has been serving injured workers free of charge since 1969. We presented to the Special Advisors of The Changing Workplaces Review on September 11, 2015, and provided a copy of our oral presentation at that time. These written submissions are supplementary to our oral presentation. We continue to ask that the experience and perspective of injured workers be taken into account in reforming the employment standards regime.

To that end, we recommend as follows:

- 1. Focus on Health and Human Rights**

Health and safety should be acknowledged as key objectives of the employment relationship. Equity, identified in the "Guide to Consultations" document as a key objective, must include respect for human rights principles. These objectives, as well as the changing nature of work, should be explicitly acknowledged in the revised employment standards legislation.

- 2. Harmonize and Universalize Employment and Workplace Legislation**

The entire scheme should be equalized so that the same fair rules apply to everyone. This requires the harmonization of all workplace and employment-related legislation.

- 3. Ensure Standards Create Healthy Jobs and Workplaces**

Certain standards require strengthening or modification to create healthier jobs and employment relationships. The single change that would have the greatest positive impact for injured workers would be to recommend the abolishment of any "experience rating" metric at the Workplace Safety and Insurance Board ("WSIB"). Sick leave, unjust dismissal, and stigma should also be addressed.

- 4. Strengthen Regulation and Enforcement**

Finally, the regulation and enforcement of employment standards should be strengthened through coordinated, proactive, and expanded investigations with more powerful tools for enforcement. More funding is necessary to support workers in reporting and managing violations and workplace injuries.

1. Expanded Objectives

1.1 Equity and Human Rights

The "Guide to Consultations" document suggests "efficiency, equity, and voice" as key objectives in the employment relationship. We agree with the importance of equity in particular, and would like to highlight the human rights principles that are essential to

Injured Workers' Consultants Community Legal Clinic Submissions

achieving equity in the workplace. **Accessibility** and **accommodation** are necessary to fostering **barrier-free** workplaces. Workplaces should also be **inclusive**, which includes being **harassment and stigma-free**. Finally, the principles of **dignity** and **respect** are integral to establishing equitable and fair standards in the employment relationship.

1.2 Health and Safety

We further recommend that health and safety be recognized as an equally important objective that must be achieved within the employment relationship. The Ontario Ministry of Labour's website declares that "All workers have the right to return home each day safe and sound,"¹ recognizing that the health and safety of workers is not only important, but it is their right. The objective of workplace health and safety includes ensuring the psychological well-being of workers, which is reflected in the prohibition against harassment contained in the *Occupational Health and Safety Act*² as well as the *Human Rights Code*.³ The *Employment Standards Act*⁴ should acknowledge the importance of health and safety, and its provisions should reflect this objective.

1.3 Formal Acknowledgement

These objectives should be formally enshrined in the ESA. That way, in the event of ambiguity, these principles may guide the interpretation of the Act so that it best reflects the purpose and intent of the legislation. For the same reason, the ESA should also acknowledge (for example in the pre-amble) its intention to address the increasing incidence of precarious employment and to accommodate an increasingly diverse workforce, including individuals with disabilities.

2. Harmonization and Universalization

2.1 Harmonization

Other important employment laws such as the *Workplace Safety and Insurance Act*⁵ (WSIA) are also losing their potential to protect workers in the changing economy and workplace, and should form part of the scope of this review. We appreciate that your terms of reference focus on the ESA and *Labour Relations Act* (LRA),⁶ but they do include broader issues affecting the workplace and access to the protection of labour and employment laws. The Minister may also consider an amendment to the scope of your work based on feedback received and at the request of the Special Advisors.

¹ <http://www.labour.gov.on.ca/english/hs/> (accessed on Sept. 17, 2015).

² R.S.O. 1990, c. O.1, part iii.0.1 ("OHSA").

³ R.S.O. 1990, c. H.19 ("HR Code"), s.5

⁴ S.O. 2000, c. 41 ("ESA")

⁵ 1997, S.O. 1997, c. 16, Sched. A ("WSIA")

⁶ 1995, S.O. 1995, c. 1, Sched. A ("LRC")

Injured Workers' Consultants Community Legal Clinic Submissions

At the very least, the Special Advisors have the ability make recommendations about how the ESA and LRA should harmonize with other related legislation.

For example, in order to better reflect the HR Code and WSIA, the ESA should contain a universal re-employment or return to work obligation. In short, if a worker takes a leave of absence for health or disability-related reasons (including a workplace injury), the employer should have an obligation to re-employ that worker, and seek modified duties and accommodations if necessary.

There is a narrow reemployment obligation in the WSIA, but it only applies to certain employees for a limited amount of time.⁷ On the other hand, the *Human Rights Code* requires that employers accommodate an employee's disabilities up to the point of undue hardship⁸ and extends the obligation to accommodate for as long as the disabled or injured worker remains an employee, but does not amount to an obligation to re-employ. The ESA should expand and clarify the obligation of employers to re-employ and accommodate disabled and injured workers. This would harmonize these three pieces of employment-related legislation, and do so in a way that enhances and promotes the proposed objectives of the employment relationship.

We want to encourage you to consider the WSIA and HR Code as other important employment laws that form an integral part of the basic rights that we are trying to protect with our employment standards legislation. We hope that this review leads to better harmonization of all employment-related legislation and mends gaps in the provisions. In other words, the *Employment Standards Act, Labour Relations Act, Workplace Safety and Insurance Act, Human Rights Code, Occupational Health and Safety Act, Employment Insurance Act*, and other relevant legislation, should all work together to create respectful, healthy, and productive workplaces.

2.2 Universal Coverage

In order to effectively harmonize the law so that the same fair rules apply to everyone, the legislation should be universally applicable to all workers and employers in Ontario. In particular, there should be no exemptions from the ESA, LRA, or the WSIA, or any of the minimum standards contained within those Act.

In terms of the WSIA, coverage of the workforce in Ontario is very poor. A background on Universal Worker's Compensation Coverage was provided to the Special Advisors on September 11, 2015. About 74% of the Ontario workforce is covered by the WSIA. This compares to 93% of the workforce in Quebec or 92% in British Columbia.⁹ The reason for this is that industries that are required to have workers' compensation coverage for their employees are listed in Schedules to the Act and those schedules have not been updated for decades. Many modern forms of work such as call centres and technology industries were

⁷ WSIA, s. 41.

⁸ HR Code, s. 17.

⁹ Association of Workers' Compensation Boards of Canada, http://awcbc.org/wp-content/uploads/2013/12/Industries_Occupations_Covered.pdf

Injured Workers' Consultants Community Legal Clinic Submissions

unheard of at the time of the last review. A 2003 WSIB report on coverage by Brock Smith recommends that virtually all employers and workers in Ontario should be required to have workers' compensation coverage and yet no action has been taken on that report. Now, in the context of your review, is a good time for the government to implement the 2003 Final Report on WSIB Coverage.¹⁰

Ensuring universal protection of the ESA, LRA, and WSIA to all workers is integral to addressing precarious work and protecting the rights of vulnerable workers in particular.

3. Standards that Create Healthier Jobs and Workplaces

As previously mentioned, our hope is that this review takes a holistic approach to assessing workplace issues, and ultimately recommends better harmonization of all employment-related legislation. This harmonization should not happen by reducing standards to the lowest common denominator, but rather the entire scheme should be equalized in a way that reinforces the fullest extent of each worker's rights.

This is important because research has shown that bad jobs make people sick. In fact, workers in precarious jobs have a 40% increased risk of coronary heart disease, are two times more likely to get diabetes, and 2.5 times more likely to have fatal occupational injuries.¹¹ According to the World Health Organization, "job insecurity harms health, even more than unemployment."¹²

In addition to these medical reasons for ensuring that workplaces are stable and supportive, the Supreme Court of Canada has said, "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."¹³ Given the importance of work to so many people's sense of identity and well-being, it is important to set high standards that promote the creation of safe, stable, and supportive jobs.

3.1 Experience Rating

The specific recommendation that we believe will have the biggest impact in creating a healthier employment relationship for injured workers (and likely many people in the disabled community as well) is the abolishment of any "experience rating" metric at the

¹⁰ Brock Smith, *Final Report: Coverage* under the WSI Act, Report to Board of Directors (October 8, 2002), BOD Minute #15, December 10, 2003, p. 6569.

¹¹ Access Alliance, "Bad jobs are making us sick" (poster), Good Jobs Campaign, available online at:

¹² "Enterprise for Health: A joint project between AOK for Lower Saxony and WHO" WHO Regional Office for Europe, available online at: <<http://accessalliance.ca/get-involved/advocacy/pathways-to-economic-security/good-jobs-campaign/>>
<http://www.who.int/occupational_health/regions/en/oeheenterprise.pdf>.

¹³ *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, 1997 CanLII 332 at para 93, quoting with approval Dickson C.J. in *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 1987 CanLII 88 at p 368.

Injured Workers' Consultants Community Legal Clinic Submissions

WSIB. Essentially, experience rating means increasing or decreasing each individual employer's premium rates according to the costs of its compensation claims. Although this sounds innocuous, experience rating has significant negative consequences for workers. Experience rating creates an incentive for employers to suppress claims and push injured workers to return to work prematurely. A background paper on Experience Rating was provided to the Special Advisors on September 11, 2015.

Research indicates that returning to work before full recovery may actually lead to more extensive, long-term problems.¹⁴ Studies have also revealed that claims suppression is a real problem within the system.¹⁵ Employers often suppress claims by terminating or constructively dismissing injured or disabled workers, who are seen as a cost risk. Given the experience rating system, it is generally fiscally prudent for an employer to terminate an injured worker, since the money saved by the employer through the experience rating program would outweigh the termination pay that would be owed to the injured worker under the ESA.

Every time an employer hides a claim or fires an injured worker, the employer saves money! If an employer can make it appear as though a worker voluntarily quit or was fired for reasons unrelated to the injury, the worker will not be entitled to benefits for lost wages and there will therefore be no cost consequences for the employer.

A recent report by Professor Harry Arthurs, former Dean of Osgoode Hall Law School called the WSIB's experience rating programs a "moral crisis" for Ontario's worker's compensation system.¹⁶ He made several recommendations on experience rating, none of which have been implemented to date.

Employers also avoid hiring injured workers and persons with disabilities because they are perceived to be a cost risk under experience rating. The perception is that they may lose more time from work or their injuries may be more severe.

The WSIB is currently proposing a new rate framework which it claims abolishes experience rating, however, in reality it continues to adjust employer premiums based on claims costs.¹⁷ No matter how the program or metric is structured, any system that ties employer costs to claims costs leads to claims suppression, including under-reporting and termination of vulnerable workers, and pushing people back to work before they are healed.

¹⁴ MacEachen, E. et al., "A deliberation on 'hurt versus harm' logic in early-return-to-work policy", *Policy and Practice in Health and Safety* v. 5(2) 2007 at pp. 57-58.

¹⁵ See e.g. Stock, S. et al., "Underreporting Work Absences for Nontraumatic Work-Related Musculoskeletal Disorders to Workers' Compensation: Results of a 2007-2008 Survey of the Quebec Working Population," *American Journal of Public Health*, vol. 104, no. 3 (March 2014); Putter, Kelly, "Under the Carpet," *Occupational Health and Safety Canada Magazine* (July 1, 2014), available online at: <
<http://www.ohscanada.com/features/under-the-carpet/>>

¹⁶ Arthurs, Harry, *Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System*, Queen's Printer for Ontario: 2012.

¹⁷ An overview of the proposed rate framework can be found on the WSIB's website: www.wsib.on.ca

Injured Workers' Consultants Community Legal Clinic Submissions

The Special Advisors may also be interested to know that experience rating fuels the incidence of precarious work, as it leads to increased use of temporary workers. Studies have shown that employers tend to hire temporary workers to perform more dangerous work, since any injuries to those workers will not show up on that employer's claims records, but rather that of the temporary agency.¹⁸ Because workers new to a worksite are statistically more likely to get injured,¹⁹ experience rating in fact contributes to the incidence of unsafe workplaces.

For all of these reasons, recommending the abolishment of any experience rating based metric at the WSIB would make a significant contribution to the creation of healthier jobs and workplaces.

3.2 Sick Leave

In addition to recommending the abolishment of experience rating, enhancing sick leave would be a significant step in creating healthier jobs and workplaces. If workers are not given time to recover from illness or take care of their mental and physical well-being, they are at greater risk of more serious long-term health consequences.²⁰

To that end, we recommend that, in addition to establishing universal entitlement to sick leave, at least some sick days should be paid. Employees should also have the option of taking a long-term sick leave that is job-protected, as previously discussed in the context of a proposed re-employment obligation.

Injured workers who lose time as a result of a workplace injury are entitled to loss of earnings benefits under the WSIA.²¹ They are not required to use up any sick days. Nevertheless, throughout our decades of experience serving injured workers, we have encountered many injured workers who were forced to use up not only their sick days, but vacation entitlement and EI sickness benefits as well to account for the time lost as a result of their injury. This happens for several reasons. Sometimes employers ask workers to use sick days to avoid reporting a claim (for experience rating reasons), and sometimes workers use sick days when they are denied WSIB benefits. The ESA should specify that worker's cannot be compelled to use sick days instead of claiming for benefits under the WSIB, and that sick days shall be replenished once a claim has been accepted under the WSIA, or upon a successful appeal for benefits.

3.3 Unjust Dismissal of Disabled and Injured Workers

The ESA does not currently contain any protection against unjust dismissal. As is evident from the above description of experience rating and its consequences, injured workers are

¹⁸ MacEachen et al. "Workers' compensation experience-rating rules and the danger to workers' safety in the temporary work agency sector," *Policy Practice and Health and Safety*, vol. 10, no. 1 (April 2012)

¹⁹ "Study finds persistence of higher risk for new workers," *At Work*, Issue 69, Summer 2012: Institute for Work & Health, Toronto.

²⁰ See above, MacEachen, "Hurt versus Harm".

²¹ WSIA, s.16 and s.43

Injured Workers' Consultants Community Legal Clinic Submissions

often terminated from their employment, or treated so badly that they are forced to quit. The WSIA provides limited protection to injured workers who are terminated within 6 months of re-employment, by establishing a legal presumption that the employer has not discharged its re-employment obligation.²²

The ESA should adopt and expand this principle, and place a reverse onus on the employer to prove that the termination of a disabled or injured worker was not as a result of the injury or disability. This would provide greater job security for vulnerable workers, and help guard against unfair practices.

3.4 Stigma

In addition to improving specific employment standards to create healthier workplaces, the ESA and Ministry of Labour should acknowledge the stigma that exists around the hiring and retention of injured and disabled workers. The Ministry of Labour should conduct research and develop programs or incentives to proactively reduce stigma, and increase the hiring and retention of vulnerable workers. In the past, the WSIB has acknowledged the stigma surrounding injured workers and launched an anti-stigma initiative.²³

4. Effective Enforcement

Regardless of how fair and well-written the new ESA may be, its provisions will not have a substantial impact on the lives of the most vulnerable workers without effective enforcement. We endorse the thorough and thoughtful recommendations of the Worker's Action Centre,²⁴ including on the matter of enforcement, and would highlight the importance of strengthening enforcement through coordinated, proactive, and expanded investigations with more powerful tools for enforcement.

In terms of coordination, one body should be responsible for investigation and enforcement under the different pieces of employment-related legislation. The current disconnect can be problematic and ineffective, since an investigation done under one Act will not uncover or address any problems under another. A perfect example of this disconnect can be seen between Ministry of Labour health and safety offences and WSIB experience rating programs. Some employers have received substantial rebates in their WSIB premiums for allegedly being "safe" workplaces, in the same years they have been fined for health and safety violations by the Ministry of Labour for worker deaths and severe injuries.²⁵ In many cases, the rebates are substantially greater than the fines.

²² WSIA, s. 41(10).

²³ See <http://www.iwh.on.ca/impact/wsib-launches-anti-stigma-initiative> (Institute for Work & Health: April 2010).

²⁴ Gellatly, Mary, *Still Working on the Edge: Building Decent Jobs from the Ground Up*, Workers' Action Centre (Toronto: 2015).

²⁵ Schwartz, Joel, *Rewarding Offenders: Report on How Ontario's Workplace Safety System Rewards Employers Despite Workplace Deaths & Injuries*, Ontario Federation of Labour (November 24, 2014).

Injured Workers' Consultants Community Legal Clinic Submissions

Investigations should be proactive rather than complaint-driven. Increased resources for randomized and targeted inspections are a worthwhile investment since health and safety inspections with penalties have been proven effective in reducing work-related injuries.²⁶

Enforcement and sufficient penalties are key. More powerful tools are needed to actually enforce the various Acts, such as increased ability to order changes and increasing the costs of violations. We were pleased to see the WSIA amendments proposed in Bill 109, which is at second reading. The Bill, if passed, would make it an offence for an employer to suppress a WSIB claim, it would increase fines, and would better protect employees throughout the claims process. These amendments will not do anything for workers though, unless there is adequate enforcement.

Finally, supporting unions to increase the number of unionized workplaces will also improve the enforcement of minimum standards. We endorse the submissions of the Ontario Federal of Labour on the subject of increasing access to unionization in workplaces. In terms of the union representatives who often assist injured workers, funding should be in place to support the training of union representatives in workers' compensation and employment standards matters.

As long as so many workers remain in non-unionized jobs, though, more resources are necessary for third party organizations to support workers. For example, the Office of the Worker Advisor, legal clinics, and possibly a "duty counsel" position are necessary to represent and support workers in the event of violations or injury.

Conclusion and Summary of Recommendations

In conclusion, we hope that this review takes a holistic approach to assessing workplace issues, and ultimately recommends better harmonization of all employment-related legislation. This harmonization should aim to create jobs and workplaces that promote health and human rights, especially for precarious and vulnerable workers such as those injured or disabled. In particular, Injured Worker's Consultants recommends:

- That the new legislation acknowledge:
 - the objectives of health, safety, and human rights; and
 - the intention to address the increasing incidence of precarious employment and to accommodate an increasingly diverse workforce, including individuals with disabilities.
- The increased harmonization of all employment-related legislation.
- Universal coverage under the ESA, LRA, and WSIA.
- Higher standards to promote healthier jobs and workplaces, including:

²⁶ "Inspections with penalties linked to lower injuries: IWH Review", *At Work*, Issue 81, Summer 2015: Institute for Work & Health, Toronto, online at: <www.iwh.on.ca/at-work/81>.

Injured Workers' Consultants Community Legal Clinic Submissions

- Abolishment of any metric that ties employer WSIB premiums to claims cost;
- Paid sick days for all workers, with the possibility of longer term leave;
- An obligation to re-employ workers after a disability or health-related leave.
- Greater job security for vulnerable workers to help guard against unfair practices, in particular:
 - Establishing a reverse onus on the employer to prove that the termination of a disabled or injured worker was not as a result of the injury or disability.
- Promote research and develop programs or incentives to proactively reduce stigma, and increase the hiring and retention of vulnerable workers.
- Proactive, coordinated, and expanded investigations, with the power to effectively enforce employment and workplace standards.