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WHSLC

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Submitted Electronically

Standing Committee on Social Policy
Natalia Kusendova, MPP, Chair
Tanzima Khan, Clerk
99 Wellesley Street West Room 1405, Whitney Block
Toronto, Ontario M7A 1A2

RE: Bill 27 Working for Workers Act, 2021

To the Standing Committee on Social Policy:

We are writing to provide submissions with respect to Bill 27.

Who We Are

The Workers' Health and Safety Legal Clinic ("the Clinic") is a community legal aid clinic funded by Legal Aid Ontario. Our mandate is to provide legal advice and representation to non-unionized low wage workers in Ontario who face health and safety problems at work.

Clinic staff represent workers at the Ontario Labour Relations Board who were fired for raising occupational health and safety concerns, federally regulated workers with unlawful reprisal complaints before the Canada Industrial Relations Board, and workers who have occupational disease claims or have appeals with respect to returning to work at the Workplace Safety and Insurance Board (the "WSIB"). Clinic staff also represent workers before the Human Rights Tribunal of Ontario, at Small Claims Court, and workers who have reprisal claims under the Ontario *Employment Standards Act, 2000*.

The Clinic has intervened on several cases before the Court of Appeal of Ontario and the Supreme Court of Canada.

The aim of our submissions will be to speak to those specific parts of Bill 27 that we have expertise on, and, to wherever possible, not duplicate the helpful submissions of our colleagues in other legal clinics and in the injured workers community.

Changes to the *Occupational Health & Safety Act*

Bill 27 proposes amending the *Occupational Health and Safety Act* ("*OHSA*") to require owners of workplaces to ensure that access to a washroom is provided, on request, to delivery workers present in the workplace. However, Bill 27 also proposes that access to a washroom is not required "if providing access would not be reasonable or practical having regard to all the circumstances, including, but not limited to, the nature of the workplace, the type of work at the workplace, the security of any person at the workplace and the location of the washroom within the workplace".

While providing washroom access represents a necessary occupational health and safety development, broadly allowing owners of workplaces to deny access if "it would not be reasonable or practical" and outlining a non-exhaustive list of exceptions undermines the effectiveness of this amendment. Practically speaking, the proposed amendment grants owners wide, unchecked discretion to deny delivery workers washroom access, perpetuating the occupational health and safety concerns this amendment was meant to ameliorate. Further, the level of discretion granted to owners makes it impossible for delivery workers to be certain they will be granted washroom access.

While we recognize that certain exceptions are necessary, we urge the Government to consider explicitly narrowing the list of exceptions to guarantee the amendment achieves its intended purpose of broadly ensuring delivery workers have access to washrooms while working. The Government should consider a narrow list via regulation to outline legitimate exceptions. We propose the following amendment to s. 29.1(2)

29.1(2) Access to a washroom at a workplace is not required under subsection (1),

(a) if providing access would not be reasonable or practical for reasons relating to the health or safety of any person at the workplace, including the worker who requests to use a washroom that are adopted by a regulation; or

~~(b) if providing access would not be reasonable or practical having regard to all the circumstances, including, but not limited to, the nature of the workplace, the type of work at the workplace, the conditions of work at the workplace, the security of any person at the workplace and the location of the washroom within the workplace; or~~

~~(c)~~(b) if the washroom is in, or can only be accessed through, a private dwelling.

Changes to the *Workplace Safety and Insurance Act*

Bill 27 proposes changes to allow the WSIB to give monies to Schedule 1 employers. These monies would come from funds collected by the WSIB pursuant to the *Workplace Safety and Insurance Act 1997*, SO 1997 c. 16 Sched. A. (the "*WSIA*"). These funds are premiums that the *WSIA* requires employers to pay to the WSIB. The Clinic opposes the redistribution of funds from the WSIB to Schedule 1 employers.

There Is No Surplus

The proposed changes to the *WSIA* are based on the presumption that the WSIB has a surplus amount of monies. It does not. While the WSIB has claimed that they have a surplus, this is illusory. The surplus is illusory for two reasons.

First, the reduction in the WSIB's liability over the last 12 years came from a reduction in services provided by the WSIB. In 2009 the Auditor General's report claimed that the WSIB had an unfunded liability. That claim was the basis for this reduction in services. If the unfunded liability is gone the WSIB has a legal and moral obligation to injured workers to begin restoring the services that they have cut over the last 12 years.

Some may try to dispute that services have been cut. That claim is false. The statistics are clear that the WSIB provides less now to workers than it did before the legislative changes in 1997 to the *WSIA* and less still than it provided to workers in 2010.

Here are some of those statistics:

1. From 2010 to 2018, Loss of Earnings benefits paid to injured workers in the province dropped by over $2 billion.
2. Employers were given a 47.1% reduction in their premium rates between 2018 and 2021;
3. Payments for permanent injuries to injured workers fell by 65% in the 5 years between 2010 and 2015;

The surplus came from cuts. Those cuts should be reversed now that they have achieved their goal of eliminating the unfunded liability.

Second, the concept of an unfunded liability in the context of the WSIB is conceptually flawed. The 2009 Auditor General's report rejected arguments that the WSIB did not have an unfunded liability because it was not a private insurance company and its future liabilities would never come due at one time unless a government dissolved the Board entirely.

The Auditor General applied a metric suitable in a for-profit context. The WSIB has no profit motive. Therefore, this unfunded liability, the cuts, and the resulting "surplus" are based on a fiction. As such, any extra funds that the WSIB has today should be used to improve services to workers after 12 years of austerity.

WSIB Is a Health and Safety System

Employer premiums are paid into the health and safety system by employers. However, once paid, the premiums no longer belong to the employer. Premiums belong to the health and safety system as a whole.

At the Clinic we have encountered an attitude among WSIB employees that employers have ownership of files because they pay premiums. This is a perversion of the WSIB's purpose and goals. This attitude underpins this Bill. Employers do not own the WSIB. It is meant to be a public good and should be administered accordingly.

The belief that "surplus" money belongs to employers creates the appearance of a separateness between employers and the entire system. Viewing the "surplus" as solely within the purview of the employer community is a narrow perspective antithetical to the Historic Compromise. Instead of fostering a paternalistic relationship where employers give money to workers, the appropriate course of action would have been a consultation to invite suggestions addressing how to use this "surplus" to improve health and safety in the Province of Ontario.

The WSIB's mandate is greater than simply collecting money and paying injured workers who meet an increasingly narrow set of legal definitions. The WSIB is meant to promote health and safety. This necessitates a carrot and stick approach. The proposed handout to employers is all carrot and no stick.

In addition to improving benefits paid to workers back to acceptable levels, the WSIB should use these monies to fund *proactive* health and safety inspections. The need for more inspections became abundantly clear during the COVID-19 pandemic. The pandemic revealed that the inspectorate had been sorely underfunded for years. During the time the economy has grown. There are more workplaces and workers that need the protection of inspectors, but, until recently, the number of inspectors had either stayed the same or decreased.

Temporary fixes to that system during the worst of the pandemic are insufficient. Employers must know that they need to ensure health and safety proactively because they could be subject to a proactive inspection. Workers should be able to rely on Ontario's workplace health and safety system to look out for their safety, not just react to unsafe conditions after a worker calls the Ministry, or is killed.

Connection between Surplus and Underfunding the Compensation System

In his report, *Funding Fairness*, Professor Harry Arthurs made a number of recommendations in response to the perceived crisis of the unfunded liability.

Notwithstanding the need to improve the funding ratio, Professor Arthurs recommended addressing a historic wrong perpetrated against partially disabled workers. Without going into the history of the compensation system, these workers' benefits have been adversely affected by inflation and the unfunded liability was used as the excuse to not address that issue. Professor Arthurs recommended full indexation and retroactive payment of benefits to address historic wrongs. With the recent dramatic increase in inflation this wrong is only more emergent for partially injured workers.

We note that Professor Arthurs wrote, "Unfortunately, I am not able to recommend lump-sum retroactive payments to compensate for the effects of inflation on benefits from 1995 onward" because "[…]this imposes an insupportable burden on the WSIB's finances[…]" The erosion of benefits paid to partially injured workers by inflation is a wrong that the WSIB should use the "surplus" to remedy."[1]

Work Transition Services, the WSIB program to retrain workers, was one of the many sacrifices made on the Board's road to surplus. When the unfunded liability took centre stage, the WSIB

[1] https://www.wsib.ca/sites/default/files/2019-03/fundingfairnessreport.pdf p 103

amended the return to work policies to shorten the potential length of any program. Workers were given fewer and lower paid options to re-enter the workforce.

The WSIB Drug Verification process is an antiquated system relying on a formulary that has not kept up with the advice of family physicians. The WSIB should cover all pharmaceutical prescriptions for injured workers.

In keeping with the theme of trusting medical professionals, the WSIB must end the exclusive treatment for those within the Serious Injuries Program. Whether or not the worker has a 60% Non-Economic Loss ("NEL") award should not be the deciding factor in determining treatment coverage. If the worker's treating healthcare practitioner recommends a treatment, the recommendation should be considered whether or not the worker's NEL award is high enough. This would also include coverage of non-traditional recommendations from doctors like gym membership or pool therapy, for example.

For far too long the unfunded liability has been an excuse to limit scope of WSIB coverage. We submit that before giving money, which is meant to compensate workers and improve health and safety, to employers the Government should correct historic wrongs now that the system has sufficient funding.

Unfulfilled Promises Abound

Following the recommendation in the Speer-Dykeman Report, we note the government has sought submissions for extending coverage to Personal Support Workers and Developmental Support Workers. This recommendation has not been fulfilled. There were also recommendations to increase funding for prevention-related programming, ensure stable funding for health and safety associations, and maintain sufficient funding for auditing purposes to combat claims suppression. These recommendations remain unfulfilled.

The aforementioned Report also recommended that the WSIB undertake audits to combat claims suppressions. No action has been taken on this front.

We also note that the WSIB and the Government are in possession of the report recently completed by Dr. Paul Demers. His report addresses the currently inadequate approach to addressing the prevention, investigation, and compensation of occupationally related diseases. While the report has been accepted, it remains unfilled. Protection against occupational diseases should be implemented.

These unfinished tasks should be implemented before contemplating gifting to employers money that should be spent on improving health and safety in the Province of Ontario.

Please reconsider this handout to employers who have enjoyed years of cost cutting from the WSIB and a 47.1% premium reduction, and consider how this "surplus" could help the thousands of injured workers who have endured more than a decade of austerity. The unfilled gaps at the WSIB and the health and safety program deserve addressing before handouts to corporate interests. Further, it is disappointing that injured workers who must oppose Schedule 6 are as a consequence opposing improved rights for other workers. Workers in Ontario should not have to compete against each other for justice.

It is our recommendation that Schedule 6 be removed completely from the Bill.

If the Government is committed to giving employers money that should have been invested in the province's health and safety programs amendments are required to improve prevention and the plight of workers before lining employers' pockets.

Consult before Gifting Employers

Injured workers have a right to be heard before the money that should have been invested in health and safety is gifted to employers. Public consultation should be necessary. We propose the following amendments:

97.1 (1) If the amount of the insurance fund meets a sufficiency ratio that is equal to or greater than 115 per cent and less than 125 per cent, <u>following a public consultation</u> the Board may distribute any amount in excess of the amount prescribed under clause 100 (c) that it considers appropriate among Schedule 1 employers having regard to such criteria as may be prescribed and such other factors as the Board considers appropriate.
(2) Except in such circumstances as may be prescribed, if the amount of the insurance fund meets a sufficiency ratio that is equal to 125 per cent <u>after a public consultation,</u>

Notwithstanding the assurances heard at this Committee, there are employers guilty of *OHSA* offences that are in good standing with the WSIB. Those employers will receive a surplus as the bill is currently drafted. The WSIB should be required to take into account the actions of employers under other legislation like health and safety violations. Therefore, we propose the following amendment:

97.1 (3) The Board may determine that Schedule 1 employers are to be distributed different amounts under this section having regard to such criteria as may be prescribed and such other factors as the Board considers appropriate, including an employer's compliance with this Act <u>or any other acts or regulations</u>.

Follow Other Recommendations

We also support the proposal by Injured Workers Consultants Community Legal Clinic that the WSIB should address claims suppression – as recommended by the Speer-Dykeman Report. The WSIB must audit employers to end suppression of claims. We agree with the proposed amendment:

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.

Address the Temporary Employment Agency Loophole

Under this Bill, as currently drafted, Fiera Foods stands to receive $44,000 from the WSIB for being a "good" employer. As a Toronto Star investigation revealed, Fiera Foods has avoided liability for killing workers by employing temporary help agencies who bring workers into their facilities. Giving this company tens of thousands of dollars intended to help injured workers is perfectly legal under this Bill, and this Bill does nothing to stop that kind of injustice.

This abhorrent situation is the result of using a temporary employment agency to do the most dangerous work. As such, the regulation in s. 83(4) must be used, alternatively, the Act should be amended to restore stronger language. Specifically, that claim costs are the responsibility of placement employers when the accident happens at their facilities. We recommend the following amendment to replace s. 83(4) with the following:

83(4) For the purposes of this section and despite section 72, if a temporary help agency lends or hires out the services of a worker to another employer who participates in a program established under subsection (1), and the worker sustains an injury while performing work for the other employer, the Board shall,

(a) deem the total wages that are paid in the current year to the worker by the temporary help agency for work performed for the other employer to be paid by the other employer;

(b) attribute the injury and the accident costs arising from the injury to the other employer; and

(c) increase or decrease the amount of the other employer's premiums based upon the frequency of work injuries or the accident costs or both.

Notwithstanding these proposed amendments, it remains our primary position that Schedule 6 should be deleted in its entirety.

Thank you for the opportunity to make submissions.

Yours truly,

Chetan Muram

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