



June 25, 2012

The Honourable Dalton McGuinty
Premier of Ontario
Legislative Building
Queen's Park
Toronto ON M7A 1A1

Re: Compensation for Occupational Disease Victims and Survivors

Dear Premier McGuinty:

I am writing to bring your attention to a serious attack on Workplace Safety & Insurance Board (WSIB) compensation benefits for victims and survivors of occupational disease. This is an issue of grave concern to the Ontario Federation of Labour (OFL), the injured worker community, and indeed many Ontarians. By way of this letter we are requesting your immediate action to bring forward legislative change to the *Workplace Safety and Insurance Act (WSIA)* which would address this problem. Many widows, widowers, victims and family members depend on your positive action and compassion to this issue.

Background

Effective December 7, 2009, the WSIB changed its operational practice of paying loss of earnings (LOE) benefits when a worker is no longer in the workforce and has no loss of earnings. This change in practice followed a series of successful employer challenges (argued by the law firm Hicks Morley) at the Workplace Safety & Insurance Appeals Tribunal (WSIAT).

The WSIB had previously paid LOE benefits for new occupational disease claims that were diagnosed well after the worker had retired from the workforce. LOE benefits were also paid when a worker underwent surgery after retirement, despite the fact that the worker had no loss of earnings because he or she had voluntarily retired from the workforce.

The WSIAT concluded that the WSIB was incorrectly interpreting section 43 of the *Workplace Safety and Insurance Act, 1997* and that the WSIB did not have the statutory authority to award LOE benefits where the worker had no loss of earnings.

Subsequent to these decisions, the WSIB took the position that it was not bound by these legal precedents. On behalf of employers, Hicks Morley wrote directly to the WSIB's Chief Operating Officer in June of 2009, and then filed a formal complaint with the Fair Practices Commission in August of 2009. Following this, the WSIB approved a change to its practice for determining entitlement to LOE benefits in cases where there are no earnings on the date of adjudication. Now, in order to be entitled to LOE benefits, a worker must actually have a loss of earnings.

The WSIB issued an Occupational Disease and Survivor Benefits Program Practice Guideline on January 19, 2010. The Guideline states that the WSIB was incorrectly interpreting section 43 of the *WSIA* and that the interpretation adopted by the Tribunal was more consistent with the purpose of section 43 of the *WSIA*.

Unfortunately the successful challenge ended a WSIB practice that has been in effect since January 1, 1998 for victims and survivors of occupational disease.

The Problem

In the pre-1998 *Workers' Compensation Act* benefit entitlement was prescribed under section 37 that allowed payment of "disability benefits". Disability was defined as "an impairment of earnings capacity". Therefore benefits were justified where a compensable injury/disease impaired a worker's earnings capacity, whether they were actively working or not. In 1998 with the introduction of the *Workplace Safety & Insurance Act (WSIA)*, the benefit entitlement provision was significantly re-worded and the definition of disability was removed from the Act.

Section 43 of the *WSIA* prescribes benefits where a worker suffers a loss of earnings due to compensable injury/disease:

Payments for loss of earnings

43. (1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins...

A plain reading of the wording of section 43 would support the WSIAT analysis of denying benefits where the worker had retired and therefore had not suffered a loss of earnings.

The Moral Issue

How fair or just is it that occupational exposure that results in a disease that shortens a worker's life and quality of life post retirement is not compensated for? The challenge in all occupational disease claims is the significant latency period between exposure and the development of disease. But this issue does not blur the facts that in occupational disease claims if the evidence proves on a balance of probabilities that the workplace exposure significantly contributed to the disease, the worker should be compensated.

The "Purpose Clause" of the *WSIA* supports the compensation of occupational disease victims:

Purpose

The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:

- 1. To promote health and safety in workplaces.*

2. *To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.*
3. *To facilitate the re-entry into the labour market of workers and spouses of deceased workers.*
4. *To provide compensation and other benefits to workers and to the survivors of deceased workers.*

It must be remembered that the “historic compromise” of 1914 resulted in workers giving up their right to sue their employers for workplace injury or disease. If not for the statutory bar in the *WSIA*, a worker would surely succeed in a personal injury lawsuit where punitive damages could be awarded for pain and suffering and loss of quality of life. The historic compromise was never intended to take away rights that a worker would have under common law.

A Solution

Reasonably, no government would likely entertain a significant re-wording of the *WSIA* to reintroduce a definition of disability. However, since 1990 there is a comparative provision in the legislation (section 41 Re-employment Obligation) that allows payment of section 43 benefits even where the worker is not suffering a loss of earnings due to a compensable injury:

Failure to comply

S. 41(13) If the Board decides that the employer has not fulfilled the employer’s obligations to the worker, the Board may,

....

*(b) make payments to the worker for a maximum of one year **as if** the worker were entitled to payments under section 43 (loss of earnings).*

It could be argued that considering this provision as a precedent, that the government could amend section 43, that could introduce a provision that allowed a worker, who contracts an occupational disease post-retirement, be eligible to collect benefits **as if** the worker were entitled to payments under section 43.

Another Related Problem

Incredibly, based on their successes on the above issue, Hicks Morley is now challenging survivor payments under section 48(3) of the *WSIA*:

Periodic payment to spouse, no children

43(3) If the deceased worker is survived by a spouse who was cohabiting with the worker at the time of the worker’s death, but no children, the spouse is entitled to be

paid, by periodic payments, 40 per cent of the deceased worker's net average earnings...

They use the same argument, that if the worker was retired at the time of their death, the worker would have had no earnings and therefore the surviving spouse should not be entitled to periodic payments.

So far, they have not been successful with this issue at the WSIAT, but clearly they will attempt to persuade the WSIB (or Fair Practices Commission) to accept their interpretation.

You have the opportunity to fix this now for victims of occupational disease and before this immoral injustice is inflicted on survivors. These victims and families have suffered enough with the loss of their loved one(s) and who depend on their WSIB benefits to survive.

The widows of the victims of occupational disease are particularly outraged and ready to take action to stop this impending threat.

I am offering our experts in WSIB issues at the Ontario Federation of Labour to work with you on this issue to ensure we get it right.

Thank you for your attention to this serious issue and I look forward to your prompt response.

Yours truly,



PATRICK (SID) RYAN
President
Ontario Federation of Labour

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cc: Nancy Hutchison, OFL Secretary-Treasurer
Irwin Nanda, OFL Vice-President
Linda Jeffrey, Minister of Labour
Andrea Horwath, Leader NDP
Elizabeth Witmer, WSIB Chair
David Marshall, WSIB President
OFL Executive Board & Council
OFL WCB and H&S Committees
Ontario Network of Injured Worker Groups (ONIWG)