

USW DISTRICT 6 SUBMISSION RE: BILL 127, STRONGER, HEALTHIER ONTARIO (BUDGET MEASURES) 2017

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The United Steelworkers (USW) is the largest private sector union in both Canada and North America, representing approximately 860,000 active and retired workers. USW District 6 is the largest of the United Steelworkers' 13 districts, with over 74,000 members and approximately 50,000 retirees located in Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island. Our union is diverse and represents workers in every sector of the Canadian economy such as industry, education, mining, chemical, glass, rubber, railroad transport, forestry, telecommunications, security companies, nursing homes, call centres, banking and more.

USW Local 2251 represents over 2,000 workers; in 2008 we held an occupational disease intake clinic and since that time have filed approximately 1,000 occupational disease claims. We have a long history of representing our members before the WSIB and WSIAT. In short, we are aware of the issues faced by workers who incur injury and disease as a result of their work.

First we would like to thank the government for recognizing that the restriction regarding chronic stress should be eliminated from the WSIA. Workers and their representatives have fought long and hard to gain the recognition for this issue reflected in WSIAT Decision Nos. 2157/09, 1945/10, and 665/10. These decisions could have been challenged by the government, so we congratulate the government on recognizing that the legislative changes were the best course of action. The restriction regarding section 13(5) was not addressed in the WSIAT Decisions, and remains an issue that will likely be challenged another time. Nonetheless progress has been made with regard to recognizing that chronic mental stress can be work-related.

The rewording of section 14(7) of the WSIA does not change its meaning or intent, and the updated dollar amounts used to calculate benefits under sections 46 & 48 seem to be a matter of simply updating the Act. These proposed changes do not represent any significant changes in the WSIA. We do not take issue with any of these proposed changes, and believe that it is appropriate to provide these types of updates when revising the WSIA.

It would seem that the amendments to section 43 of the WSIA are intended to provide a better benefit to low wage earners through the introduction of a minimum amount for partial loss of earnings. The language used to amend the minimum amount for full loss of earnings appears to contradict the intent of a minimum. In order for there to truly be a minimum amount the proposed amendment should read,

“Minimum amount, full loss of earnings

(2.1) The minimum amount of the payments for full loss of earnings is the greatest of \$22, 904.44 or the worker's net average earnings before the injury.”

Currently the WSIA directs the payment to be the lesser of the prescribed minimum or the worker's net average earnings before the injury, and the proposed amendment uses similar language opting to use 'and' instead of 'or'. The lesser of the prescribed minimum amount for full loss of earnings or the worker's net average earnings before the injury could result in a worker receiving less than the prescribed minimum. For example if a worker's net average earnings before the injury is \$20,000 then that would be less than the prescribed minimum of \$22,904.44. This would defeat the purpose of having a prescribed minimum amount for full loss of earnings. We do not point this out to be petty or nitpick, only to demonstrate that we have thoroughly reviewed the proposed amendments.

Second, we would point out that despite the progress made with these proposed amendments that there are issues of grave concern regarding some of the proposed amendments. The fact that there is no retroactivity regarding chronic stress entitlement perpetuates the discriminatory effects of the previous versions of the Act. Workers with chronic stress claims prior to January 1, 2018 will have to go through the long and arduous process of a Charter challenge that will likely only be successfully resolved at the final level of appeal. There is no principled or logical reason to restrict entitlement based on the date of injury, and this is nothing more than an attempt to mitigate costs for these types of claims. We agree with the OFL's proposed amendments regarding chronic stress and ask that they be implemented.

Bill 127 has not yet been passed, and the WSIB is already holding a policy consultation regarding chronic mental stress claims. They have introduced the term "substantial work-related stressor" thereby further restricting entitlement for claims under the proposed revision to section 13(4) of the WSIA. The revision only requires that the chronic mental stress be "arising out of and in the course of the worker's employment", which is consistent with requirements for physical injuries and occupational diseases, prescribed by sections 13(1) & 15(1) respectively. WSIB's requirement for one or more "substantial work-related stressor(s)", essentially limits entitlement for chronic stress to claims that involve workplace bullying or workplace harassment. Such a narrow scope is not consistent with the wording of the proposed amendment, and defies the rule of liberal interpretation prescribed by section 64 of the Legislation Act, 2006.

We also agree with, and support the OFL's position that the proposed amendments to section 159 of the WSIA be removed from Bill 127. WSIB is supposed to be an administrative body responsible for investigating claims and determining entitlement for benefits provided by the WSIA operating at arm's length from the government. Their website states that, "The Workplace Safety and Insurance Board is an independent trust agency that administers compensation and no-fault insurance for Ontario workplaces." There is nothing to suggest that WSIB should operate as a legislative interpretation agency; therefore the proposed section 159(2)(a.1) should be eliminated.

Sections 119(3) & 123 of the WSIA provide workers and employers to appeal decisions of the WSIB to the WSIB Appeal's Branch and WSIAT respectively. WSIAT is bound by

WSIB policy as prescribed by section 126 of the WSIA, and the new policy writing powers proposed by Bill 127 would therefore also be binding on WSIAT. These new policy powers would essentially provide the WSIB with total autonomy regarding decisions made under the WSIA and render the right to appeal an exercise in futility. Workers and employers would no longer be able to argue that WSIB misinterpreted the WSIA, or that they held a claim to a higher standard than that required by the WSIA because the WSIB would have the final say according to the proposed amendments to section 159 of the WSIA.

Establishing different evidentiary requirements for entitlement and/or different adjudicative principles based on the type of claim does not provide the equality prescribed by section 15 of the Charter. The current practice of determining entitlement on a balance of probabilities whether or not the workplace was a significant contributing factor to condition provides injured workers with the equality guaranteed by the Charter. We recognize that the application of certain presumptions afforded by the WSIA does establish different adjudicative principles to a point. That point ends when the presumptions of either section 13(2) or 15(3) of the WSIA are rebutted, and the claim then defaults to its individual merits and justice which would require evidence on a balance of probabilities support that the workplace was a significant contributing factor. There are only four diseases in Schedule 4 that are afforded the presumption prescribed by section 15(4) of the WSIA that isn't rebuttable, but workers must not only have the disease, they must also have employment described in the process column. Workers who do not fulfill both criteria have their claims adjudicated on the balance of probabilities to determine whether or not work was a significant contributing factor. Significant contribution has long been the standard employed to determine entitlement under the WSIA, and has provided equal benefit and protection prescribed by the Charter. Therefore the proposed changes to section 159 should be eliminated from Bill 127.

Employers have the exclusive rights regarding gathering evidence for a great number of claims, and especially for occupational disease claims. Most, if not all, workplaces do not allow workers to take pictures in the workplace, and nor do they grant workers the authority to distribute or make copies of documents that are the employer's property. Measuring noise levels, dust levels, coke oven emission exposures, and other factors in the workplace that include exposures to carcinogens and toxins is conducted by the employer. Imposing evidentiary requirements not currently prescribed by the WSIA would put workers at an unfair disadvantage as they would not be able to collect evidence to establish their entitlement to benefits provided by the WSIA. This further supports our position that the proposed amendments to section 159 of the WSIA should be eliminated from Bill 127.

According the Ontario Ombudsman's Annual Report for 2015-2016, the WSIB ranked fourth highest for number of complaints filed with their office. This should suggest to the government that there is a requirement for more oversight of the WSIB, and that their authority needs to be curtailed rather than expanded. The proposed amendments will likely only increase the number of complaints.

In addition to the example previously provided regarding the WSIB not applying the rule of liberal interpretation to the proposed amendment to section 13(4) of the WSIA, there are other examples of the WSIB not providing a fair interpretation or application of the WSIA. WSIB has been systematically denying claims for neurological conditions for workers exposed to aluminum dust based on Policy 16-01-10 that directs decision-makers to deny these claims. The direction provided in that policy is not authorized by section 119(1) of the WSIA which requires every claim to be decided based on its individual merits and justice. Automatically denying a claim does not consider the individual merit, and Policy 16-01-10 is *ultra vires* the WSIA. This issue and several others were raised with the President & CEO of the WSIB in writing, and he has refused to take any action to correct this policy or any of the other issues identified.

Exceeding the authority provided by the WSIA is not a thing of the past for the WSIB; they recently implement a policy regarding pre-existing conditions and reduce an injured worker's non-economic loss award in a manner not prescribed by the WSIA in many cases. Section 47(2) of the WSIA requires the WSIB to use the prescribed rating schedule or the prescribed criteria, and section 18 of Ontario Regulation 175/98 explains that the prescribed rating schedule is the American Medical Associations *Guides to the Evaluation of Permanent Impairment* (third edition revised) as it read on January 14, 1991. That section of the regulation also states that the prescribed criteria are those of the prescribed rating schedule for the body parts, systems or functions which are most analogous to the conditions of the worker. WSIB's policy provides a percentage based table for the reduction of the NEL benefit for pre-existing conditions not covered by the prescribed rating schedule, but since every disability is covered (either directly or by the most analogous section) then there is no authority to develop such a policy. This is just another example of the WSIB abusing and exceeding their authority that has not been changed by the current President & CEO despite the fact that he has been made aware of these issues and more in May of 2016.

We would gladly provide you with a copy of the issues raised with WSIB's President & CEO, as well as a copy of his reply should you wish. Thank you for the opportunity to provide a submission regarding the proposed amendments to the WSIA.

We look forward to a response on the issues we have raised in this brief submission.

Respectfully submitted; on behalf of all the USW District 6 members in Ontario.