SUBMISSION

TO THE

STANDING COMMITTEE

ON

FINANCE AND ECONOMIC AFFAIRS

RE: BILL 127

AN ACT TO IMPLEMENT BUDGET MEASURES AND

TO ENACT, AMEND, AND REPEAL VARIOUS STATUTES

[STRONGER, HEALTHIER ONTARIO ACT (BUDGET MEASURES), 2017]

15 May 2017

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Who We Are

The Workers' Health and Safety Legal Clinic ("the Clinic") is a community legal clinic funded by Legal Aid Ontario. Our mandate is province-wide and we have a very specific purpose - to provide legal advice and representation to non-unionized low wage workers who face health and safety problems at work. We have appeared before the Ontario Labour Relations Board on behalf of workers who were fired for raising occupational health and safety concerns. We also represent workers who are injured on the job with respect to their workers compensation claims before the Workplace Safety and Insurance Board ("the Board") and the Workplace Safety and Insurance Appeals Tribunal ("the Tribunal"), and workers who have reprisal claims under the *Employment Standards Act*.

In addition to advocacy, we conduct community education and outreach programs to inform vulnerable workers of their rights and entitlements in the workplace. Where we feel the law is deficient, we engage in law reform initiatives. The Clinic also provides information about health and safety hazards that workers face in their place of employment, and advice about the rights that employees have under the law. Our activities are controlled by a Board of Directors that is composed of volunteers from the community.

The clients that we serve vary in many ways. We serve new Canadians who work in small non-unionized workplaces. We also serve employees who are assigned to larger workplaces through temporary staffing agencies. Additionally, we respond to inquiries from young employees who are not aware of what their rights and entitlements are. To qualify for our services, clients must meet the legal aid eligibility criteria of being non-unionized and relatively low-wage earners. In other words, we represent and seek justice for people who have no resources and no recourse of their own.

Bill 127 – Schedule 33

These submissions will focus on the proposed amendments to the *Workplace Safety and Insurance Act, 1997*[1] ("the WSIA"). If passed as written, some but not all injured workers with claims for mental stress would be accepted, assuming the claim is documented and made in a timely manner. A significant portion of the calls we receive are from people with legitimate complaints of illness related to harassment at work. The amendments as proposed do not match similar provisions found in the *Occupational Health and Safety Act*.[2]

As well, the proposed amendments give unprecedented authority to the Board to change the legal landscape of the workplace safety and insurance system with the uninhibited ability to alter evidentiary requirements. The Board already has sufficient authority to control the system. The proposed amendments would create an authoritarian nightmare in which the established practices can be re-written every time the Board sees fit.

The Management Decision Exclusion should be Amended

The proposed exclusion of management decisions as the cause of compensable mental stress is not in keeping with the spirit of the legislation or related statutes.

Over the many years that the Clinic has served workers, we have seen firsthand that too often management decisions are at time implemented in a manner that causes mental stress. These examples include:

- Alleged discipline that amounts to being repeatedly demeaned, called stupid, incompetent, or worse in front of colleagues
- A new manager or supervisor significantly changing job requirements
- Increasing the production quota that long term employees can't achieve and then subjecting the worker to degrading comments in front of co-workers
- Constantly changing what was a straight forward job by modifying different job requirements accompanied by belittling comments like, "You're slow" or, "You don't know that?"

[1] S. O. 1997, Chapter 16, Schedule A, as amended.
[2] R. S. O. 1990, Chapter O.1. [hereinafter "OHSA"]

Health and safety laws in Ontario are geared towards prevention of injury and harm. When the OHSA was amended to address workplace harassment, the prevention mandate of the Ministry of Labour contemplated the ongoing need for protection of workers and their mental health. We therefore submit that the prevention mandate expressed by the Ministry of Labour must be reflected in the WSIA.

This is the type of employer conduct that clearly violates the OHSA and fits the OHSA definition of workplace harassment which "means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonable to be known to be unwelcome".[3]

Under the OHSA, these workers have the right to make a complaint about harassment at work from management. These behaviours are not exempt under the OHSA. Depending on the employer's policies, or lack thereof, the Ministry of Labour will dispatch an Inspector to assess the complaint. Recent amendments to the OHSA recognised that management behaviour can go too far. The exemption for managerial decisions in OHSA is not as wide as proposed in Bill 127. The analogous section reads, "A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment."[4]

Bill 127 carves out an exception in s. 1 for managerial decisions that is too broad. Employers can cause injury due to harassment at work but as long as the conduct is couched in management language, any resulting injury would not be compensable.

Recommendations # 1A and 1B

The workplace rights of employees should be uniform and should reflect a prevention-oriented approach that strives to reduce hazards and avoid injury to workers. Behaviour that would be captured under the OHSA definition of workplace harassment should be reflected in the relevant provisions under the WSIA.

The amendment proposed recognises that some management behaviour can and does go too far. Not clarifying this in the legislation will leave workers who have suffered workplace harassment embedded in "managerial decisions" short-changed. It is wrong to have those workers rely on employment insurance benefits and receive a lower amount than Loss of Earnings benefits under

[3] OHSA, s. 1(1).
[4] OHSA, s. 1(4).

the WSIA. It is therefore submitted that Bill 127 be amended to reflect the same language as found in the OHSA.

The following amendment is suggested to s. 1 and s. 2:

> 1. Subsections 13 (4) and (5) of the Workplace Safety and Insurance Act, 1997 are repealed and the following substituted:
>
> (4) Subject to subsection (5), a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker's employment.
>
> (5) A worker is not entitled to benefits for mental stress caused by the reasonable decisions or the reasonable actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.
>
> 2. The English version of subsection 14 (7) of the Act is amended by striking out "his or her employer's decisions or actions" and substituting "the reasonable decisions or the reasonable actions of the worker's employer".

An alternative approach would be to refer the OHSA directly. This would allow the WSIA to recognise and utilise a definition of workplace harassment that already exists in legislation. The Bill could alternatively be amended to allow entitlement in situations that the OHSA prohibits:

An alternative amendment to s. 1 and s. 2 would be:

> 1. Subsections 13 (4) and (5) of the Workplace Safety and Insurance Act, 1997 are repealed and the following substituted:
>
> (4) Subject to subsection (5), a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker's employment.
>
> (5) A worker is not entitled to benefits for mental stress caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment~~.~~, unless the decisions or actions could constitute workplace harassment as defined in the *Occupational Health and Safety Act*.
>
> 2. The English version of subsection 14 (7) of the Act is amended by striking out "his or her employer's decisions or actions" and substituting "decisions or actions of the worker's employer unless the decisions or actions could constitute workplace harassment as defined in the *Occupational Health and Safety Act*".

The Amendments should be Retroactive

On 29 April 2014, *WSIAT Decision No. 2157/09* was released. The Panel hearing that decision determined that the limitations to entitlement to mental stress were unconstitutional. It was ground breaking; the Panel read down the limits to mental stress entitlement.

The Panel hearing that appeal had the benefit of submissions from a number of different parties, including the Ministry of the Attorney-General. The Ministry was involved in the appeal to address the Panel's ability to make constitutional determinations. The decision was not reconsidered. The decision was never judicially reviewed. The Board implemented the decision in that claim alone. The Board did follow the rationale in the Tribunal's decision elsewhere. There was no change to the Board's adjudicative process. Two more appeals proceeded to the Tribunal and again, the mental stress limitation was found unconstitutional. There was still no judicial review.

The need for amendments was raised with the Ministry of Labour. A number of stakeholders raised the issue with the Office of the Ontario Ombudsman.

With the greatest of respect, the consequences of inaction should not unduly burden workers. Workers should have the benefit of fair adjudication. It is therefore submitted that the legislative changes should have a retroactive component.

Recommendation # 2

It is therefore submitted that those workers who had their claims adjudicated under legislation that should have been amended years ago have their claim for benefits adjudicated fairly. The Tribunal has been making the correct decision since at least 29 April 2014. Those workers who for whatever reason could not continue their struggle for justice should not be left behind. Therefore, the following amendment is proposed to add to s. 1:

> (6) If the Board has made a decision denying a worker entitlement to benefits for mental stress under subsections 13(4) or 13(5) on or after 29 April 2014 but before the date on which section 1 of Schedule 33 to the *Stronger, Healthier Ontario Act (Budget Measures), 2017* comes into force, the worker whose claim was denied may request that the Board reconsider the claim. The Board shall reconsider the decision under subsection 13(4) as amended by section 1 of Schedule 33 to the *Stronger Healthier Ontario Act (Budget Measures), 2017*.

The Board Has Enough Power

What is often referred to as "the historic compromise" established a new, fair, adjudication scheme. Employers funded a compensation system and in return for giving up the right to sue for damages, injured workers received timely benefits while they recovered.

The compromise was one between stakeholders that is now overshadowed by the relationship between stakeholders and the Board itself. There has always been unwavering support for a publically funded non-adversarial system. However, it should be recognised that there are and will continue to be with respect to how the Board manages the entire system. These complaints will only grow in number if the Bill passes unamended.

The proposed amendments to the Act give the Board the unprecedented power to simply re-write evidentiary requirements and/or adjudicative principles. Rather than engaging as a system partner in the compensation system through reconsideration requests or judicial review, Bill 127 gives the Board power to simply re-write established principles on a whim. While the Government of the day may have faith in the Board today, this Bill if passed may have dire consequences in the future in any number of ways. Therefore the Government must maintain the existing framework of accountability and the current system of checks and balances.

It is possible that the Bill would allow the Board to create a more onerous test for entitlement for any type of injury. The Bill would also allow the Board to inappropriately limit entitlement only where scientific certainty is established and thereby ignore the case law as it stands today. The Bill would allow the Board to draft policies on return to work that favour the employer. A real concern is what unfair disadvantages the Board has planned for workers that have asymptomatic pre-existing conditions; the Bill would give the power to effectively eliminate compensation for these individuals.

The proposed amendments do not and will not benefit workers. The fair and just response to these concerns is not to hope the Board uses this power wisely. Trust in the Board is already at a low. This is not the right time to introduce these amendments.

Recommendation # 3

The powers already held and exercised by the Board are sufficient to administer the system.

The proposed amendments go beyond what the Board requires. It would create a system where the Board does not need to engage with stakeholders or the system at all. The proposed amendments would allow the Board to simply re-write the legal principles wherever it sees fit. Therefore the following amendment is proposed deleting section 8 in its entirety:

~~8 (1) Subsection 159 (2) of the Act is amended by adding the following clauses:~~
~~(a.1) to establish policies concerning the interpretation and application of this Act;~~
~~(a.2) to establish policies concerning evidentiary requirements for establishing entitlement to benefits under the insurance plan;~~
~~(a.3) to establish policies concerning the adjudicative principles to be applied for the purpose of determining entitlement to benefits under the insurance plan;~~
~~(2) Section 159 of the Act is amended by adding the following subsection:~~

~~Same~~

~~(2.1) A policy established under clause (2) (a.2) or (a.3) may provide that different evidentiary requirements or adjudicative principles apply to different types of entitlements, where it is appropriate, having regard to the different basis for and the characteristics of each entitlement.~~

~~9~~ 8(1) Subject to subsections (2) to (4), this Schedule comes into force on the day the Stronger, Healthier Ontario Act (Budget Measures), 2017 receives Royal Assent.
(2) Subsections 3 (1), 4 (1) to (3), 5 (1) to (8) and 7 (1) come into force on December 31, 2017.
(3) Subsection 7 (2) comes into force on the earlier of December 31, 2017 and a day to be named by proclamation of the Lieutenant Governor.
(4) Sections 1 and 2 and subsections 3 (3), 4 (4) and 5 (9) come into force on January 1, 2018.

Summary

There are a number of positive changes found in Bill 127.

However, as these submissions have illustrated, there are some changes that we submit are necessary.

Our first recommendation reiterates the need to recognise that not all decisions or actions by employers should be exempt. Those decisions or actions that are specifically highlighted in OHSA as requiring prevention should be better reflected in the proposed amendments.

Our second recommendation submits that the delay in recognition that mental stress should be included in the WSIA should not benefit workers on a go forward basis only. When the Tribunal issued its decision with no objection, the process to amend the legislation should have begun immediately. In that respect, we submit that there should be explicit retroactive application to the date of the Tribunal's first decision.

Our last recommendation is to reverse a very dangerous proposal. The Board already has sufficient power in the workplace safety and insurance system. It does not need any more to effectively manage it. The proposed changes if passed would have long lasting and far reaching consequences to the detriment of workers in Ontario.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.