WORKERS' HEALTH AND SAFETY LEGAL CLINIC

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WHSLC

09 January 2018

Via Electronic Mail

Consultation Secretariat
Workplace Safety and Insurance Board
200 Front Street West
Toronto, Ontario
M5V 3J1

RE: Rate Framework Policy Consultation

To Whom It May Concern:

I am writing to provide submissions with respect to the Rate Framework Policy Consultation on behalf of the Workers' Health and Safety Legal Clinic. The submissions focus on two policies: the Temporary Employment Agencies Policy and the Employer Premium Adjustment Policy.

The Workers' Health and Safety Legal Clinic ("the Clinic") is a community legal 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. We have appeared before the Ontario Labour Relations Board on behalf of workers who were fired for raising occupational health and safety concerns. We have also assisted federally regulated workers with unlawful reprisal complaints before the Canada Industrial Relations Board. The Clinic also represents workers who are injured on the job with respect to their workers compensation claims before the Ontario Workplace Safety and Insurance Board and the Ontario Workplace Safety and Insurance Appeals Tribunal, and workers who have reprisal claims under the Ontario *Employment Standards Act*.

Temporary Employment Agencies Policy

The Temporary Employment Agencies policy is inadequate for the purposes of protecting workers. The weaknesses of the policy are found by examining who the policy benefits and whether the policy has any positive effect on worker health and safety.

The WSIB is the Financial Beneficiary of the New Policy
The introduction of the rate framework policies has changed the premium structure for temporary employment agencies. Agencies are now required to separate payroll so that their workers can easily be identified in the same rate group as the client employer. The policy does

not require a reporting of the different third party employers. This change is solely for the benefit of the Workplace Safety and Insurance Board ("the Board").

In the previous classification scheme, temporary employment agency ("TEA") had a decidedly lower premium rate to their client employers. The creation of separate payrolls allows the Board to bill TEAs at the same rates as their clients. While the policy increases the Board's revenues, it fails to take any steps recognising occupational health & safety, accident prevention, and return to work goals with client employers. The policy also does not require identification of client employers. If particular client employers were the source of higher than expected claims, the Board would not have that data on hand for investigation. It is therefore suggested that in addition to separate payroll organisation, every TEA must also report their clients to the Board.

The Board's Focus on Monetary Benefits Fails to Support Worker Health and Safety

A study by the Institute for Work and Health ("the Institute") found that temporary workers are at a higher risk of workplace accidents.[1] The reason was unsurprising: experience rating was the cause of the higher accident rate. The Institute found that TEAs served a specific purpose; risk avoidance for client employers.[2]

Claim costs under the new system will remain a motivator for client employers. TEAs will still divert dangerous or more onerous work on temporary employees. Given that employers naturally want to reduce their claim costs, TEAs will continue to serve their function as a claims costs suppressor for client employers. The policy takes no action to support accident prevention for workers. There is no incentive for client employers to address health and safety issues because the TEAs are the employers for the purposes of the Board.[3] The decision to increase premium rates for TEAs based on their clients does not equate to increased support for prevention.

One example, cited in the aforementioned study, came from a TEA employer, "We were providing industrial labour... to a client. The client was receiving an award [workers' compensation] for best health and safety practices. That day I had two people... rolled out the back door in the ambulance. The client kept his health and safety record up high because he outsourced to staffing companies all the risky jobs, all the heaviest lifting, all the jobs that required any type of dangerous work went to a staffing agency. So, his record looked... perfect... The WSIB thought he was great."[4] The new TEA policy would do nothing to prevent the same scenario from repeating itself. The Board will continue to think employers are "great" while remaining oblivious to the hazardous conditions in the workplace for TEA employees.

Although there is the option of "transfer of costs" between employers, it is unlikely to be done. As the Institute's study found, TEAs would not opt to transfer costs because of the negative effect on their business.[5]

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[1] E. MacEachen et al, "Workers' compensation experience rating rules and the danger to workers' safety in the temporary work agency sector" (2012) 10:1*Policy and Practice in Health and Safety*, 79.
[2] *Ibid*, 82.
[3] *Ibid*, 82.
[4] *Ibid*, 83.
[5] *Ibid*, 84.

It is the Clinic's position that the rate framework fails to address the problems of experience rating. When introduced as Bill 18, *Stronger Workplaces for a Stronger Economy Act, 2014*, the Bill envisioned claim costs for accidents involving TEA employees moving from the TEA to the client employer.

Section 2 of Bill 18 originally read:

2. Section 83 of the Act is amended by adding the following subsections:

Temporary help agency worker

(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.

Same, access to records

(5) If there is an issue in dispute in respect of a determination made by the Board under subsection (4), the other employer described in that subsection shall be deemed to be an employer for the purposes of sections 58 and 59.

Notice by other employer of injury

(6) The other employer described in subsection (4) shall notify the Board within three days after learning of an injury to a worker that necessitates health care or results in the worker not being able to earn full wages.

Same

(7) The notice must be on a form approved by the Board and the other employer shall give the Board such other information as the Board may require from time to time in connection with the injury.

Failure to comply

(8) An employer who fails to comply with subsection (6), (7) or (9) shall pay the prescribed amount to the Board.

Copy to worker

(9) The other employer shall give a copy of the notice to the worker at the time the notice is given to the Board.

The Clinic and other worker-side stakeholders endorsed the proposed changes.

Unfortunately, during the Committee review the amendments were removed from Bill 18. Instead it was possible to make the changes via regulation. According to the debate during Third Reading, the government anticipated the rate framework changes would address this issue. The Minister of Labour explained during third reading[6]:

> Additionally, we originally proposed changes to the Workplace Safety and Insurance Act experience rating system. However, Speaker, a lot of time has passed since this bill was first introduced; it was almost a year ago. It didn't pass in the last Parliament due to delays. The situation has changed since then. The WSIB is currently itself now undertaking a rate framework review, which also includes a review of the same experience rating system. We expect the WSIB will make decisions regarding these changes just around the same time next year.
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> As a result, it did not make sense to legislate, and then implement, changes to a system that may or may not exist in its current form in the very near future. Therefore, I'm glad the Standing Committee on General Government changed schedule 5 of this bill to a regulatory authority, so when the time comes to act in the future, we can indeed act.

The Minister's anticipation that the old system would not exist was not borne out by the facts. Experience rating has not been eliminated; risk banding is not the end of negative practices

[6] Ontario, Legislative Assembly, *Hansard*, 41st Leg, 1st Sess, 05 November 2014.

encouraged by experience rating. TEAs continue to operate to buffer claims that should be the responsibility of client employers.

Workers will sign up with a temporary agency for payroll purposes but in all other respects are employees of the client employer. The client employer has care and control of the workplace not the TEA. The client employer has no responsibility for return to work. There was an opportunity with the new policy to fulfill the intentions of the Minister. This policy misses the opportunity to address and rectify the very real dangers that TEAs pose to workers.

It is therefore necessary to amend the proposed policy to better reflect the Board's commitment to prevention and better outcomes for workers. A workplace littered with accidents only to have the problems covered by the TEA remains the likely outcome as a result of the lack of substantive measures in the proposed policy.

The policy should be amended so that all claim costs in the event of an accident are the responsibility of the client employer, as was originally envisioned by the Minister of Labour. This can be achieved by requiring the TEA to provide placement information with the Board. An alternative approach is to have the automatic transfer of costs to the client employer when a TEA worker is injured at a client employer's workplace.

The Failure to Encourage Suitable Return to Work

Whereas the Board takes the view that return to work is essential, no nuance or consideration is referenced in the policy to return to work with the client employer. The use of a TEA for payroll purposes means that the employee has no workplace connection to the TEA. Whether or not they are a TEA employee, an injured worker was reporting to work at the client employer.

If the Board believes that return to work is essential in the process, it should be guided by returning the TEA to their actual workplace and not an office they have unlikely visited since their initial hiring.

Employers benefit from the return to work obligations for TEAs. Given the lack of responsibility to return the injured worker to the client employer, return to work normally involves a placement at the TEA office. With a segregated payroll, the returning injured worker would be covered at the reduced TEA office rate and not the higher rate of the client employer. This is a win-win situation for both employers: the client employer can have a fresh worker to injure and not bear any costs while the TEA pays a lower rate for the returned injured worker. The policy is silent on the consequences for the worker. The likelihood of permanent employment is lost.

Return to work responsibilities must also be transferred to the client employer. That relationship should be, and can be, fostered by holding the client employer responsible. Breaking that relationship has the added danger of the worker losing out on a possible opportunity for permanent employment.

There must be an end to the disconnect between prevention and responsibility. It is the client employer's workplace where the accident occurred. It is the investigation by the client employer that will address the health and safety issues. It will be the responsibility of the client employer to eliminate hazards. Our position is that client employer should bear all responsibilities and that

includes ones imposed by the Board. This will hopefully end the use of TEA to avoid compensation claims and encourage return to work with a viable employer. This would particularly help vulnerable workers maintain steady employment where return to work is a realistic option.

Employer Premium Adjustment Policy

The difficulty with the Employer Premium Adjustment Policy in some way reflects the frustration of worker-side stakeholders following the 01 December 2015 Stakeholder session. Notwithstanding the many organisations and individuals who made submissions, presentations and/or met with Board staff, the worker-side position was lumped into 1 slide out of approximately 36. The one slide referred to "additional stakeholder feedback" as if the views of the worker side are not considered on equal footing with employers. The policy is drafted with a focus on employers without any substantive contemplation of matters that would concern the various worker-side stakeholders.

The policy requires more clarity in recognition of other claim issues that are not addressed in the policy. For example, in making reference to situations where premium adjustments will be made, the policy directly references the Second Injury Enhancement Fund ("SIEF") policy. Even though the Board has not produced an SIEF policy in the new framework, it was deemed necessary to mention. At the same time, there is no mention of the adjustments that potentially can happen as a result of the Fatal Claims Premium Adjustment Policy ("FCPAP"). If the Employer Premium Adjustment Policy is meant to spell out when adjustments are to be made and in what circumstances, all circumstances should be identified. This would include those circumstances that are of interest to workers like the FCPAP.

In summary, the expression of a commitment to worker health and safety must be demonstrated. Reviewing the proposed policies where the Board can demonstrate a desire towards improving prevention, more must be done.

Thank you for your attention to this matter.

Yours truly,

John Bartolomeo
Lawyer/Assistant Director