

ADDENDUM: A RESPONSE TO SOME KEY ASPECTS OF THE VARIOUS BUSINESS GROUPS RECOMMENDATIONS

General Commentary

It is clear from many recommendations from various business groups that they want to seriously undermine the spirit and intent of workers compensation and to drastically weaken the whole system. This concerted effort is of grave concern to the SFL and its members and affiliates. The review process provides very limited opportunity for responses to submissions and we would like to take this opportunity to offer our comments and extend an invitation for the Committee to meet with us for further exchange and discourse.

The Chamber of Commerce Submission

Recommendation 2.3.1

Renaming the Act as they propose reflects a philosophical and legal shift in the overall purpose and intent of our system. The title of an Act is recognized by the courts as an aid to interpreting its provisions. As stated in s. 10 of the Interpretation Act, acts shall be interpreted to be “remedial and shall be given fair, large and liberal construction and interpretation to ensure the attainment of its objects”.

There are two aspects to their proposal: to remove any reference to ‘workers’ compensation’ and to replace with the key word ‘insurance’. The first removes the suggestion that the object of this Act is to compensate workers, the second to suggest that a business model following general insurance industry concepts is the new purpose.

The Act has this name for the obvious purpose and that is confirmed by s.21.1 which outlines the duties of the WCB (a further reflection in law of its purpose). That section makes no reference to insurance concepts and confines itself to the singular purpose of the Act – to compensate workers for injuries at work. The sections of the Act concerning the Fund and the powers of the Board also reflect this purpose...to levy employers whatever it takes to cover the cost of the workplace injuries workers suffer. That is – not to make money from general insurance business practices. The WCB is established solely for workers to ensure that they and their families are compensated for the workplace injuries they suffer.

We also note that this is consistent with the Sask. Party sponsored attempt to change the name of the Trade Union Act with similar consequences for workers and their rights.

Recommendation 3.1.4

This suggestion of exploring privatization further reinforces the above intent – to convert to a private insurance system. One might view this with somewhat of a favourable look if the motive was clear that it would make life better for injured workers. We, of course, do not support this notion of privatization of such a service for the obvious reasons. What is important is to note that their submission in total reveals their true motive – to dramatically reduce the compensation levels and to dramatically remove coverage for some of the most serious injuries workers can suffer.

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As stated above, this is to reduce benefit levels. Why should a system which is supposed to compensate workers for the losses suffered as a result of workplace injury make workers take an economic loss because they are injured?

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As with others we do not mention, this again reflects their intent – to create an economic penalty for workers who have proven claims. This does seem somewhat contrary to the spirit and intent of the Act, does it not?

Recommendation 3.3.6

This is the most serious example of their intent – to remove coverage for the sometimes life ending and in many cases, devastating lifelong destruction of a workers life and their families as a result of ‘stress’. The medical evidence about the relationship between ‘soma’ and ‘psyche’ is long established. An injury to the physical (soma) can and usually causes injury to psyche – stress. A stress injury (to psyche) can cause physical injury (soma). And a stress injury can cause further stress injury. Depression is a typical example of this and leads to many, many life ending and life threatening consequences.

There are also potential legal consequences for the WCB if it decides to discriminate on the basis of disability. The Saskatchewan Human Rights Code defines disability to include “s.2(i.1) mental disability means a disorder of thought, perception, feelings or behaviour that impairs a persons (i) judgment, (ii) capacity to recognize reality (iii) ability to associate with others (iv) ability to meet the ordinary demands of life”. Then there is s.15 of the Charter which has no limits on the definition of disability. There are a growing litany of cases against insurance companies whose plans discriminate on the

basis of disability by treating mental and physical disabilities differently for coverage and eligibility. That is also the case for differentiation between various forms of mental disability.

We also note the economic consequences for employers as well with the recent decision in *Keays v. Honda Canada Inc.*, [2005] O.J.No. 1145 (Ont. S.C.J). The employer refused to acknowledge chronic fatigue syndrome as a 'legitimate' disability'. The court upheld the Human Rights Commission award of 24 months of lost wages as damages AND awarded \$500,000.00 in punitive damages!

It is also to be noted that there is a direct relationship between O.H.& S. and the workers compensation system. We ask you to consider whether this recommendation would cause serious conflict in law and in operational issues when you read section 2 (p) of the O.H.& S. Act which defines that an occupational health and safety issue includes emotional and psychological injury.

This recommendation has no moral, medical, legal or socially responsible foundation yet the fact that it is made and given such weight by the Chamber should cause this Committee to view with serious doubt ALL recommendations made in their submission. The motive reflected here speaks volumes.

Recommendation 3.3.7

Consistent with its motive, this seriously undermines one of the pinnacles of our workers' compensation system. Penalizing workers who may already be disabled by attempting to deny them coverage essentially may violate the Human Rights Code and the Charter. The fact that a workplace injury may not be covered because the worker was previously injured works against the concept – they are more vulnerable and yet are to get less respect, dignity and coverage?

Recommendation 3.3.9

There are many employers who negotiate with unions for top ups and additional coverage and some who do so voluntarily. It is astounding that this representation of the business group would seek to void freely negotiated collective agreements and punish workers who work for good employers. There may also be some doubt whether legislation in one statute declaring null and void collective agreements protected by the Trade Union Act is permissible. The legal concept of free collective bargaining has protection in international law and has gained strength in recent decisions of our Supreme Court of Canada. The consequences would certainly not lead to industrial peace, a concept that we thought was always of benefit to employers and society as a whole.

Recommendation 3.4.3

Saskatchewan's O.H.& S. Act has been a model for North America for decades. The difference between the legislative roles of the two statutes is important. The WCB exists to compensate workers for injuries. The O.H.& S. Act exists to protect workers from dangerous work and to eliminate dangerous employment practices and work situations. The fact that we have one of the highest workplace fatality ratings and injury ratings in Canada has nothing to do with the WCB. Employers have that responsibility under the O.H.& S. Act. Of course co-operation between the two arms of government is important. The fact that the record of employers is so bad here in this Province suggests that more effort is needed on that front. The alleged "duplication of services" still leaves workers in this Province behind others in workplace safety!

Recommendation 3.6.1

This recommendation has to be read in the context of another statute – The Labour Standards Act. The duty to accommodate exists in s. 44.3. It, as stated in the Labour Standards Act, also is subject to the Saskatchewan Human Rights Code. The jurisprudence in Canada is exhaustive with respect to the obligation on the employer to accommodate. This recommendation impacts on other statutes which, in our respectful submission, are somewhat beyond the scope of this Committee's mandate. Before proceeding in such an area as this, these organizations should have the right to their own view based upon their experience.

Recommendation 3.6.2

As discussed above, this is another example of limiting worker coverage for injuries. An injury is an injury!

This also touches upon a general theme. Establishing histories for workplace injury is very important for the system to operate effectively. Reducing the reporting of actual injuries works as well to encourage under reporting or even more so, to put pressure on workers who are injured to report to work prematurely to avoid any reporting.

There are many other recommendations in the Chamber submission that are of concern.

They are consistent with the above philosophical undermining of or workers compensation system. We urge the Committee to accept our invitation for further discourse.

The CFIB Submission

The vast majority of the recommendations in this submission simply mirror those of the Chamber of Commerce. The overall tone is to eliminate the essential concept of a workers compensation system and replace it with an insurance business model – they reject the Meredith Principles.

Recommendation 1

In law, a purpose clause identifies the fundamental premise for interpretation of the statute as a whole. Consistent with the Chamber recommendation to change the name, this proposal goes dramatically further. We appreciate that it is more transparent in its intent. It is disturbing that we should decide whether and how to compensate workers for their workplace injuries on the basis of a ‘competitiveness’ concept.

Recommendation 2

Making the WCB part-time is an obvious concern. If the purpose of recommendations is motivated by a desire to fix a problem, this is one misses the reality that we all experience – the backlog and delay in filing, processing and adjudicating claims.

The proposal to add someone from the insurance industry speaks for itself.

Recommendations 4 to 9

The key aspects of these are identical to the Chamber recommendations – reduce benefits and coverage for injured workers.

Recommendation 10

The business motive – privatization. We are curious. Are they also proposing that private insurance firms have to provide the same coverage, benefit levels, enforcement mechanisms and rehab/counseling services, etc. as required under the Workers Comp. Act or is this to permit contracting out (thus reducing eligibility, coverage, etc).

Recommendations 11 – 15

See our comments above in response to the Chamber submission.

In short, the CFIB submission is simply a ‘me-too’ to the Chamber submission – although it is more open about its motives.

The Submission of the Workers Compensation Board

General Commentary

We are very concerned about the perception of bias and any potential conflict of interest which arises out of the unprecedented appearance of Senior Officers of the Workers' Compensation Board before this Committee of Review.

We find the submission of a brief, in this manner, and on behalf of the Workers' Compensation Board to be highly irregular and question its appropriateness.

Suggestion 1 – Prevention Mandate

We restate our comments above under Chamber of Commerce recommendation 3.4.4. While we agree with the fact that 'our province has virtually the worst injury rate in the country' and that 'strong measures are needed to change and revitalize injury prevention', we believe this suggestion is misguided.

DESPITE the duplication in some areas, matters have gotten worse. This suggestion will reduce the total resources being used to reduce workplace injuries. How can that have the effect of making matters better?

Under the O.H.& S. Act, the responsibility for workplace health and safety is on the employer. It is the employer who must allocate sufficient time, money and resources to ensure safe workplaces. The cause of the rise in injuries rests with their failure.

The other matter concerns the dramatic under funding of the O.H. & S. branch of the Department of Labour. While we support increased support for workplace committees, this is not the underlying cause of the problem. There are many other ways to address this very serious matter:

- More funding for education programs inside the high schools and post secondary institutions to address the concerns of young workers who work casual hours and are not likely to be able to take advantage of workplace education programs. This should be the responsibility of the Government Departments responsible for education. WBC and O.H.& S. should be part of that team.
- Increasing the penalties and enforcement mechanisms under the O.H.& S. Act to deal with employers who are obviously failing their employees. To attribute, partly if not all, the problem to lack of education and effective training and support to the workplace committees moves away from the legislative obligation on the employer.

We very much join with the WCB in supporting their intent. They obviously see the effect of the failures in each workplace. Perhaps some of the Funding powers of the WCB could be extended to authorize the WCB to increase levies on the employers and transfer more funds to O.H.& S. for the specific purpose that the WCB sees as a weakness in the system.

Suggestion 2 – False Statements Offence

While the overall intent may have some aspects of merit, this may cost more to enforce than the cost of the problem. While the offence is put into the statute, the burden of proof is not necessarily reduced. When you accuse someone in this country of an offence that is ‘criminal like’, the burden of proof moves towards the criminal standard. As with all criminal offences, there is also the two aspects of the offence: the ‘*actus reus*’ (proving the fact of the offence) and the ‘*mens rea*’ (proving the guilty state of mind). This suggestion uses the word ‘knowingly’, a very tough and high standard of proof. The additional offence of ‘withholding information that is relevant’ has even more problems. Until there is a determination that an injury (does that mean a compensable injury?) has occurred, how can you withhold relevant information? What if the Board does not make an award for that injury?

Our resources are better used for the legislative purpose.

Conclusion

The tone of the above submissions overall and as reflected in some of the recommendations we have commented upon should be cause for concern. The workers compensation system is designed for the benefit of workers. It has never been intended to turn workplace injuries and their consequences into a commodity that has a value which is determined by the lowest bidder.

Legislative intervention is needed for reasons which we all know. As stated unanimously by the Supreme Court of Canada in a recent Saskatchewan case:

“ The imbalance between the employer’s economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship”
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This is a social responsibility and we do not support any move towards letting the market decide.

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