IAVGO SUBMISSION ON WSIB CONSULTATION ON ENTITLEMENT FOLLOWING WORK DISRUPTIONS

General Comments

The Industrial Accident Victims Group of Ontario is a community legal clinic funded by Legal Aid Ontario. We have been representing injured workers and their survivors for over twenty-five years.

IAVGO views the proposed new policy “entitlement following work disruptions” generally as a positive step in recognizing the barriers faced by injured workers in the labour market. However, there are several problems with the draft policy which will exclude vulnerable injured workers from benefits and services to which they are rightfully entitled.

One of our concerns about the draft policy is that it does not follow the laudatory intentions articulated in the WSIB's framework document on entitlement following work disruptions. That document recognizes that many workers with work-related impairments are disadvantaged in the labour market when compared to their able-bodied co-workers. There is a clear direction in the document, that the WSIB decision-makers must look at the real world obstacles that injured workers face in the general labour market. Yet, as we will highlight in our submission, this objective is disregarded in several parts of the draft policy.

Another general criticism of the draft policy is that it is unnecessarily complicated. Our comments below would help in taking a simpler, more practical approach to adjudicating workers entitlement to benefits and services during work disruptions.

A final general concern with the draft policy is that it is under-inclusive. There are a number of valid reasons why an injured worker may leave or be terminated from his or her employment. For instance, if the worker quits her job because of sexual harassment, or if a worker is fired because she refuses to engage in "illegal" conduct in her job, these injured workers should be entitled to the benefits under a work disruption policy.

Temporary Work Disruptions (pages 4-10 of policy)

An overall issue with this part of the draft policy is the overemphasis on the distinction between partial versus full workforce disruption. While we agree that only in partial layoff situations are the re-employment or ESRTW obligations likely to be issues, there is a convoluted and unnecessary focus on judging the "evidence" of a breach. It is our position, that other than reminding adjudicators to look at the employer's legal obligations, there is no reason to treat vulnerable injured workers differently based on the extent of the temporary work disruption. Injured workers subject to a partial workforce layoff are equally entitled to loss of earnings benefits, taking into account any

benefits which may flow as a result of a employer's breach of their obligations under the Act.

With one exception, we agree with the list of factors for adjudicators to consider additional benefits, which of course will be most important for workers not in receipt of full benefits. The fifth factor as listed on p. 6 of the policy is too restrictive. The factor should ensure that a "real world" analysis is carried out. The question the decision-maker needs to ask is " Is there a comparable job at comparable earnings available in the labour market, and if so would this particular worker be hired by another employer for this job?" This takes into account the personal characteristics of the injured worker in assessing their vulnerabilities in the labour market.

Rather than the complicated set of rules and exceptions for adjudicating a worker's entitlement to benefits at pages 5 to 6 of the draft policy, a simpler and fairer method would be to treat a temporary work disruption as a material change in circumstance. This would require the Board to amend OPM Document 18-03-03 to include temporary work disruptions as a legitimate reason to increase benefits.

Permanent Work Disruptions (pages 10-17 of the policy)

A major concern with this part of the draft policy, is the misapplication of the Act with respect to determining a vulnerable injured worker's SEB. The Act is clear that a SEB is arrived at after a LMR assessment is conducted. Yet the policy directs adjudicators to deem the job the worker was doing at the time of the work disruption as the SEB. This is contrary to the Act, and will clearly result in injustices.

An LMR assessment is a critical tool in assessing the impact of a worker's injury and other personal characteristics in the real world. Although an accident employer is willing to give an injured worker with poor English language skills a security guard position, it is improbable that this worker would be hired as a security job in the general labour market. Yet, this draft policy would deem this vulnerable injured worker at the SEB for the unsuitable job of security job.

The deeming of work disruptions of more that three months as "permanent" is generally a good idea. However, there should be exceptions for unionized workers who have valuable recall rights beyond the three month period. This exception should allow workers to continue to receive benefits as they would in a temporary work disruption, until recall occurs, or the worker chooses to sever the employment relationship.

Finally, the policy should not treat strikes or lockouts differently from all the other forms of work disruptions. The impact of strikes or lockouts on vulnerable injured workers is real. During a lockout or strike, able-bodied workers are able to find alternate work to supplement their strike pay. For vulnerable injured workers, this is not an option. The policy should not distinguish between strikes or lockouts and other work disruptions for determining an injured workers entitlement to benefits and services.

Conclusion

The draft policy should be consistent with principles found in the framework document, by ensuring that in deciding injured workers entitlements under the Act decision-makers assess the real impact of their disabilities on their prospects in the general labour market.

All of which is respectfully submitted,

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