

# SUBMISSIONS OF THE INDUSTRIAL ACCIDENT VICTIMS GROUP OF ONTARIO ON THE WORKPLACE SAFETY AND INSURANCE BOARD'S DRAFT EARLY AND SAFE RETURN TO WORK/LABOUR MARKET RE-ENTRY CO-OPERATION POLICIES

## **Introduction**

The Industrial Accident Victims Group of Ontario is a community legal clinic specializing in workers' compensation advocacy. We work with and for injured workers in Ontario, and have more than 20 years of experience in the legal and compensation issues surrounding return to work and labour market re-entry (vocational rehabilitation). We have reviewed the draft policy and guidelines along with the supplementary materials provided by Linda Jolley on February 10, 2000, February 28, 2000 and March 24, 2000. The following are our submissions on the proposed policies.

Before entering into a detailed discussion of the policies, we feel compelled to comment first on a number of general points. It is important when analyzing these policy documents to do so in a context. Historically, the Board was created to protect injured workers. A document from the 1930s reminds us:

The purpose of the *Workmens' Compensation Act*, which first came into effect in 1915, was to provide better recompense for accidents to workmen in their employment, to get rid of litigation, and to secure promptness and certainty of payment to the workman or his dependants without unduly burdening the employer.

The Workmen's Compensation Act Ontario  
Circular 2  
(15<sup>th</sup> Ed. January, 1930)

The Conservative government elected in Ontario in 1995 changed the above premise and, ideologically speaking, turned the Board upside down. This ideological turn is clearly demonstrated in the underlying assumptions present in these policies: injured workers are malingers who must be penalized harshly before they will return to work.

From our perspective as worker advocates, we see the issue of non-co-operation in terms of workers who are confused about both their rights and their responsibilities, and workers who have genuine medical and legal issues on which there are differing opinions. Let us offer an example, which is typical of the cases we see in our practice at IAVGO. Often a Board doctor, after a paper review of the worker's file, will determine the worker fit for work. At the same time, the worker's own doctor, who has examined the worker in-person and with whom the

worker has a trusting relationship, tells the worker to stay off work. Is it any wonder that the worker is confused about his or her ability to return to work safely and without the danger of re-injury? It is our position that the medical opinion of the worker's doctor, who has examined the person and not just the file, should override the opinion of the Board doctor.

We must comment too on the uneven effect these proposed policies have on workers and employers. The policies are punitive for both parties, however, the worker in an ESRTW/LMR dispute bears a disproportionate burden. When a worker's benefits are cut to zero, this often represents 100% of the income coming into the household. When 100% of the income is lost, the worker and his or her family face severe financial hardship, often to the extent of bankruptcy. The employer, on the other hand, even when faced with a substantial fine, does not lose everything. The employer is unlikely to go out of business because of the fine.

It is morally wrong to cut benefits to zero when there is genuine disagreement over medical and legal issues and the degree of the worker's impairment.

### **Secrecy of Process**

We have grave concern with the entire process surrounding this test sites project. The injured worker community has asked the WSIB for full disclosure and has been denied. Why was this project conducted in secrecy? Why were the workers in these test sites treated as guinea pigs? Were the workers and employers aware that they were involved in a test sites project? Why won't the WSIB disclose the full information regarding the project? We would like to know details such as: how were these test sites chosen? Where were the test sites? Were any of the sites unionized? What criteria were used to flag the cases in the first place? The overview dated March 24, 2000 from Linda Jolley indicates that two of the workers had representatives. Who were the representatives? I.e. were they OWA, legal clinics, unions, private bar lawyers, consultants? We request copies of the evaluation results. We cannot stress enough that it is unacceptable to us that this project was conducted in secrecy, without input from the broader community.

### **Impact**

In the document of March 24, 2000 sent out by Linda Jolley, a number of evaluative questions were included. One of them was: "Was there any impact on the behaviour of the workplace parties once they were informed of the policies and the possible consequences (i.e., were they more serious about their return to work efforts once they were made aware of the consequences of non-co-operation)?" In

ten of the twelve cases in which written notices were sent out, the maximum penalty was imposed because the workers were unable to co-operate. Therefore, there would appear to be little impact on the behaviour of workers. This leads us to the conclusion that the workers' issues must have been of such severity that they were unable to co-operate, even at the risk of their benefits being cut. This would counter the underlying assumption of these documents that workers are malingerers who wish to remain off work and on benefits as long as possible, with only the most trivial and frivolous reasons for not co-operating. So, despite the extremely punitive nature of the policies, they do nothing to bring the workers "in line". Are they then simply punitive for the sake of being punitive? Perhaps the Board should spend some effort in analyzing the reasons a worker may not co-operate at the risk of losing benefits. We suggest that the most immediately compelling reason is likely to be a disagreement over medical facts. If the worker's doctor has advised staying off work, the worker is not likely to risk further injury or harm by returning to work, despite the penalty imposed.

### **Measure of Success**

In undertaking any pilot project, such a project is evaluated as to its success. It is our view that the Board should be alarmed by the results of this test sites project. If the Board's goal is to create policy that enables a successful early and safe return to work and labour market re-entry, it has failed miserably with these draft policies. In the ESRTW part of the project, benefits were reduced in eight of fifteen cases, suspended in six of fifteen cases, and restored in none of fifteen cases. Surely these cannot be considered successful returns to work. Of the LMR examples, benefits were reduced in both of the two cases, suspended in both of the two cases, and restored in neither of the two cases. These cannot be considered successful LMRs.

We find it incredible that there were no cases of employer non-co-operation in the test sites project. This is certainly not reflective of what is reported to us in our legal clinic. One explanation for this may be the "advice" given by the Board to the employers. From our perspective it appears that employers have been told that all they have to do is offer a job, any job. Whether this job is suitable, available, and sustainable is another matter: by offering the job they have shown to be co-operative.

If the goal of these policies is to reduce benefits, then one could conclude that the project was a success. However, if the goal was to produce policy that is effective in facilitating early and safe return to work and successful labour market re-entry, then the project can only be seen as a failure and these draft policies should be re-examined accordingly.

One final point to consider in measuring the success of this project is that the results appear to run contrary to the usual line we hear from the WSIB. In a number of the meetings between Toronto Injured Workers' Advocacy Group/Union of Injured Workers and the WSIB's senior management team, the sentiment expressed by the top brass was that the Board was doing a good job and that legal clinics and injured worker groups see only the three to ten percent of claims that go wrong. In other words, our perspective is skewed. This test sites project shows a much higher percentage of claims which went wrong. Either the numbers expressed in our meetings were incorrect, or the numbers from the test sites project would appear to be out of whack. With such a high number of "problem" claims, one can only draw a negative conclusion about the success of the draft policies.

### **One Labour Market Re-Entry Plan**

We cannot let the opportunity pass to once again state that we are opposed to the current position that a worker has only one chance at a labour market re-entry plan (page 5 of LMR Draft Policy and Guidelines). If the WSIB is genuine in its concern for injured workers and the re-entry of these workers into the workforce, it would acknowledge a broader range of reasons why a worker may have to legitimately interrupt a Labour Market Re-entry Plan. It is punitive and unfair that a worker is given one chance and one chance only. Life is more complicated than that. Again, one can only draw the conclusion that the goal here is to reduce benefits rather than offer injured workers retraining and support to re-enter the workforce.

### **Evaluation of Mediation**

As requested by the injured worker community and agreed to by Linda Kelly and Jeff Farwell at a meeting/training session on ESRTW/LMR on May 19, 1999, we restate our request that the mediation process be evaluated and results made public. The data gained from the test sites project, although limited, would appear to indicate that mediation is not successful for workers.

### **Post Accident Non-Work-Related Conditions Policy**

Page 6 of the February 10, 2000 document from Linda Jolley makes reference to the policy on "Post Accident Non-Work-Related Conditions". Despite the assurance that this policy simply merges a number of existing policies and

therefore will not be circulated for external consultation, we request the opportunity to make written submissions on this policy. One of the central issues for the injured worker community is what constitutes a legitimate reason for non-co-operation. Any documents which relate to this definition are of interest to us, and we would, accordingly, wish to provide our perspective on any policies being developed.

### **Pending Claims**

The case example given on pages 12 and 13 is not uncommon; however it must be noted that the injured worker went without income for two months until benefits were awarded retroactively. In this example the worker suffered financial hardship due to the employer's misbehaviour. The WSIB seems to need a reminder that most working people cannot go two months without income and still pay the rent or mortgage and put food on the table. Under the draft policies, a "bad apple" employer has license to put a worker in a precarious financial situation simply through ill will and a mean spirit.

### **Legitimate Reasons for Not Co-operating**

The proposed policy sets out what the Board considers to be legitimate reasons for not co-operating (pages 13 and 14, ESRTW Draft Policies and Guidelines). These are very limited in scope. What if the worker becomes unexpectedly ill? What if the worker's doctor does not co-operate in providing medical reports in a timely fashion? It is our view that the legitimate reasons for not co-operating should be expanded with input from the injured worker community.

### **General Comments**

Notwithstanding our opposition to the proposed policies, and because we suspect that they will be implemented regardless of our criticisms, we have several general comments that we wish to make.

1. We have noted the continued absence of Social Rehabilitation Counseling which was included in *Document No. 07-04-02* of the *Operational Policies Manual*. We urge the WSIB to again include this service when needed by the injured worker.
2. We have concern regarding the oral component of the definition of Date of Notice (page 1 of LMR Draft Policy and Guidelines). It is not fair to

workers, especially those workers for whom English is not their first language, to have such important information imparted orally. The combination of oral and written notice is appropriate, however the date of notice should be a point after the written notice is received by the worker. In our opinion, this should be significantly greater than that proposed, i.e. 3 days from the date which appears on the letter. A minimum of 10 days from the date which appears on the letter would allow for delays in mailing, and give the worker time to obtain translation and legal advice or representation.

3. The proposed position that benefits are not restored retroactively (page 2 of LMR Draft Policy and Guidelines and page 6 of ESRTW Draft Policy and Guidelines) is extreme and unnecessarily punitive to workers. It assumes that the worker is always to blame in a dispute and does not allow for genuine disagreement on legal and medical issues. What if the WSIB makes an administrative error, or the employer does not co-operate? The worker is penalized regardless of where the “blame” lies.
4. We are opposed to the concept that a worker’s benefits may be affected without the 7 day grace period and the LMR assessment or plan terminated immediately (pages 4 & 5, LMR Draft Policy and Guidelines). It is, in our opinion, extremely punitive and unfair to allow no grace period for workplaces with established RTW programs. This treats one class of workers differently from the others. It also presupposes that these workers could not possibly have genuine disputes about legal or medical issues in their claims.
5. Bill 99 focussed on the concept of “suitable” work to the exclusion of “suitable and available”. We submit that the Board should solicit written submissions regarding the definition of “suitable” and that the sustainability of the job must be given equal weight to the suitability of the job. In considering whether or not a job is suitable, a Physical Demands Analysis as well as a written job description must be available to the worker. The Functional Abilities Evaluation form must be available to worker. The Form 7 must be available to the worker. In other words, the worker must have at his or her disposal the same information that the employer has so that the worker can discuss with his or her doctor the suitability of the job offered.
6. Given the imbalance of power already existing in the employer/worker relationship, it is important that the Board provide workers with similar information it provides employers in this situation. We suggest the addition of: “advise workers of return to work resources that they may choose to

access” to mirror the support given to employers (page 2, ESRTW Draft Policy and Guidelines).

7. We have concern under “Duration of Penalty” (page 6, ESRTW Draft Policies and Guidelines) which states:

If the worker has started an LMR plan and the employer subsequently demonstrates co-operation, the decision-maker re-examines the appropriateness and cost-effectiveness of the LMR plan and determines whether the worker should continue with the plan or return to work with the accident employer.

Injured workers are entitled to greater security over their futures than this proposed policy provides. It gives rise to a question of good faith on the part of the employer (i.e. suddenly they have a suitable modified job that they didn't have before) and opens the door to bad feelings and the creation of a hostile workplace. A worker who has entered into a retraining program is quite likely to be suspicious of such a job offer, and rightly so. It is disrespectful to treat people like this. And further, what happens then, in such a case, with one shot at LMR? We would hope that LMR would be reopened willingly if the return to work was not successful.

Once again, the discrepancy between how workers are treated under these proposed policies and how employers are treated must be pointed out. There is one shot for the workers while there are multiple chances for the employers.

8. Under “Non-co-operation, both parties” (page 11, ESRTW Draft Policies and Guidelines) it is unduly and disproportionately severe to penalize the worker by reducing benefits to 50%. Will the WSIB be tracking employers who are frequently non-co-operative? This would be indicative of poor workplace practices by the employer and should be noted, monitored, and penalized accordingly.
9. The focus of these draft policies has been on organic injuries. Consideration must be given to workers whose return to work and labour market re-entry may be complicated by a psychological or psychiatric condition resulting from the organic injury.
10. It is grossly unfair that in cases of worker non-co-operation in LMR, benefits could be reduced to reflect deemed earnings from a SEB and if no SEB identified, benefits could be reduced to zero.

11. Linda Jolley's letter of February 10, 2000 (page 1) set out the objectives of the draft policies. It is our position that these goals were not achieved. The reasons for why each of these six objectives were not met has been addressed throughout this submission.

## **Conclusion**

The proposed policies are flawed, and even the limited information made available to us from the test sites project shows this to be so. The Board's increased inclination to punish must be balanced by a fairer system of distinguishing between genuine disputes over medical and legal issues and willful non-cooperation. And, although we have no faith that our concerns will be taken into consideration (the fact that our input was solicited at such a late date indicates to us that the Board is launched in a direction from which it does not wish to be diverted), we respectfully make this submission with the faint hope that our perspective as worker advocates will at least be heard, if not heeded.