November 26, 2015

Via Fax & Mail

Clerk of the Committee
Room 1405, Whitney Block
Queen's Park, Toronto, ON
M7A 1A3

Re: Bill 109, Employment and Labour Statute Law Amendment Act, 2015

On behalf of the Schedule 2 Employers' Group, we would like to take this opportunity to comment specifically on the portion of Bill 109 that amends the *Workplace Safety Insurance Act*, *1997*, ("WSIA") and in particular the addition of section 48.1.

The Schedule 2 Employers' Group represents the interests of diverse large and small employers classified under Schedule 2 of the WSIA. Our member employers include the provincial government and Crown agencies, municipalities, school boards, federally regulated employers, and employers covered by the federal Government Employees Compensation Act (GECA). As Schedule 2 employers pay the actual costs of claims for as long as benefits are paid, rather then premiums based on experience ratings, our members and their stakeholders (including taxpayers and investors) have a long-term financial interest in how the WSIB adjudicates claims and applies its policies.

As we understand it, the section would enable WSIB to calculate survivor benefits based on the average earnings of a worker who is engaged in the same profession as the one in which the deceased worker received his or her injury, irrespective of whether the worker had any earnings at the date of claim (for occupational disease this is the date of diagnosis).

The focus of Bill 109 is clear (following a reading of the Bill, and the government's comments as noted in the Hansard transcripts from October 8, 2015); that the Bill has been proposed to provide support to first responders, and in particular firefighters. However, it is important to remember that the proposed amendments will impact all workers and employers in the province, and casts a far wider net, resulting in a greater impact on the workplace parties in the province then perhaps recognized to date.

In support of the Bill, the government has indicated that the amendments will allow the WSIB to "continue the practice that is in place" since 1998, the enactment of the current Worker's Compensation legislation (WSIA), and "enshrine it in legislation." While there is no doubt that WSIB's practice is to calculate survivor benefits based on the average annual earnings of a worker engaged in the same trade in which the worker's disease was contracted, there does not appear to be any acknowledgement that WSIB's "practice" has been routinely overruled by the Workplace Safety and Insurance Appeals Tribunal ("the Tribunal").
In our opinion, WSIB's practice provided an unintended windfall of benefits to workers and their survivors/beneficiaries, and the Tribunal correctly amended it. It is important to note that the

Tribunal's amendment did not eliminate the survivor benefit, but rather reduced it to the statutory minimum.

As you are aware, WSIA's basic premise has been to provide support, in the form of loss of earnings benefits, when a worker in unable to earn their pre-injury wage as a result of a workplace incident. In other words, the system is a wage based system.

The WSIB has enacted a number of policies which apply and interpret WSIA, including Operational Policy #18-02-01 entitled *Average Earnings – General*. A whole suite of specific policies flow from this 'master' policy and the overarching concept for these policies is the same. Each of these policies presupposes that there are, in fact, real earnings to start with; for example:

- Operational Policy #18-02-02 entitled *Determining Short-term Average Earnings* commences with the following:

> **Policy**
> Short-term average earnings **are the worker's earnings** from the accident employer and all other employment at the time of injury.

- Operational Policies #18-03-02: *Payment of LOE Benefits* and #18-03-04: *LOE Benefits for Workers 55 Years of Age of Older* stipulate that there must be a loss of earnings in order to qualify for the wage loss benefits, as noted by the respective opening **'Law'** descriptors, as follows:

> "A worker **who has a loss of earnings** as a result of a work-related injury *is entitled* to payment of loss of earnings (LOE) benefits beginning when the loss of earnings begins."; and
>
> "A worker **who has a loss of earnings** as a result of the injury *is entitled* to loss of earnings (LOE) benefits beginning when the loss of earnings begins."

Our opinion is supported by a plain reading of the law and policy, as expressed emphatically by the Tribunal in *WSIAT Decision 1406/10*:

> *"In this case,* ***we could find no basis to depart from the statutory imperative that a worker must suffer a loss of earnings in order to be entitled to LOE benefits****. There are no unusual circumstances in this case that sets it apart from other cases such that consideration of the real merits and justice should apply to produce a different result." (our emphasis added)*

Subsequently, there have been additional cases on point, including: *Decision Nos. 1364/12, 2368/12, 580/12, 1467/12, and 1740/13I.* Each of these decisions can be summarized consistently by the following reasoning as set out in *Decision No. 1740/13I* at paragraph 29:

> *"...there is now a consistent line of Tribunal decisions that find that the earnings basis for a retired worker for the purposes of sections 48 and 53 of the WSIA is* ***zero****. See the analysis of Decision Nos. 1364/12 and others. The result, even assuming that the worker's laryngeal cancer was a significant contributing factor in his death, is that the widow's entitlement to survivors' benefits is restricted to the minimum amount set out in section 48(3) of the legislation, of $15,312.51. I adopt the analysis of December No. 1364/12 and the prior Tribunal decisions on this issue."*

This same approach was most recently confirmed in *Decision No. 1126/15*, dated June 24, 2015. Restricting survivor benefits to the minimum amount set out in section 48(3) is also consistent with section 43 of WSIA, which indicates that payment of LOE benefits should be directed to actual loss of income, (i.e. wage loss) that results from a work-related injury or disease. In other words, where a worker, while healthy, has retired from the employer, and the workforce-at-large, any eventual work-related disablement or disease does not result in any actual loss of income.

According to the Hon. Kevin Flynn, Bill 109 is based on the principles "of fairness, balance and justice". However, it is not clear (to us), how increasing the amount of survivor benefits for a worker, who has already retired, is not losing any income as a result of a disablement/disease is either "fair" for all workplace parties, or balanced. Further, we fail to see how these increased benefits "protects" workers, as suggested by the Hon. Kevin Flynn. This approach will however, result in a significant financial impact on employers, including Schedule 2 employers (e.g. Ontario Public Municipalities) in particular who have to directly pay the costs of benefits, and the WSIB, which has a well-documented Unfunded Liability. While questions have been asked of the government as to the actual financial impact on employers, including direct costs for Schedule 2 employers and the potential premium increases for Schedule 1 employers, and how increases costs will impact the Unfunded Liability, no quantifiable answers appear to have been given to date. While we trust a detailed financial analysis has been conducted by the government, we submit there should be greater dialogue and discussion on the potential impact of these costs to the employers and general public.

One could also argue that increase these benefits would put the dependants of a retired worker who develops a work related disablement/disease in a better position than the dependants of a retired worker who develops a non-work related disablement/disease. Neither retired worker has a loss of income at the time of disablement/death, yet the survivors of one will now receive a significant benefit, while the others will not. Again, this does not appear to be "fair" or "balanced" to all workers in the province.

In our opinion, the current formula, as supported by the Tribunal, which provides benefits at the statutory minimum coupled with health care benefits, strikes the most appropriate, and fairest balance of interests. To find otherwise provides an unintended windfall of benefits to workers (and their survivors/beneficiaries) who had voluntarily retired and had no loss of income at the time of their disablement. A windfall in benefits that would continue for the life of the survivor.

In the alternative, we submit that consideration should be given to an "opt-in" scheme similar to the one already provided for Volunteer Forces (Fire Brigades, Ambulance Brigades, Auxiliary Members of a Police Force). We note these are the same type of workers that Bill 109 was intended to protect.

Under Operational Policies #12-04-02 and #14-02-11, deemed Schedule 1 employers of Volunteer Forces, including municipalities, select an amount to calculate their insurable earnings, and Schedule 2 employers select an amount of earnings. The amount selected by the employer, which must be at least half the annual maximum on insured earnings – not the actual earnings in regular employment – is used to calculate the volunteer's net average earnings in case of injury, but cannot be higher than the maximum annual ceiling. Other earnings are not considered. In other words, the employers are entitled to "opt-in" for additional coverage by selecting a higher wage for workers, then they might otherwise provide.

In our view, allowing employers to "opt-in" and provide survivor benefits greater than the statutory minimum, would strike an appropriate balance between the rights of workers, employers and the general public at large. In essence, it would allow employers to make a conscious decision to provide additional benefits to workers where it is deemed necessary.

We thank you for the opportunity to provide a position on some of the proposed amendments to the *Workplace Safety and Insurance Act, 1997*. Please feel free to contact us should you have any questions or would like to discuss further.

Yours truly,

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