

Centre for Research on Work Disability Policy

Seed Grant Project Report : The Human Rights of Injured Workers: Social Protection Floors and the Canadian Work Disability System

January 10, 2017

Summary of Objectives, Methods, Results and Conclusions

The Human Rights of Injured Workers: Social Protection Floors and the Canadian Work Disability System is a Seed Grant Project that funded a Social Protection Floors student fellowship at the School of Industrial Relations at the University of Montreal. The objective of this project was to support a graduate student research project to explore the human rights dimension of social protection for injured workers within the Canadian context while working in partnership with injured worker groups in Canada to further advance their human rights agenda.

A Social Protection Floors student fellowship was awarded to an M.Sc. student at the School of Industrial Relations. The seed grant totaling \$9,000 was used to support the completion of an M.Sc. thesis research project. A stipend of \$8,000 was awarded to the student and \$1,000 was used by the student to defray travel and research costs. The research project method was a qualitative case study selected with the participation of Canadian injured worker groups.

The result of this seed grant project is a case study that examines recent changes to the benefit determination policy of the Ontario Workplace Safety and Insurance Board under international labour and human rights standards. The case documents key international human rights jurisprudence on employment injury and the legal / administrative burdens of proof faced of injured workers as claimants.

The primary conclusion drawn from this study is that the injured worker benefit policy changes made by the Ontario WSIB in 2015 appear to raise human rights concerns, but documenting these changes is not yet possible due to the lengthy appeals process faced by injured worker claimants. A secondary conclusion from this study is that international human rights jurisprudence does exist on the topic of the legal / administrative burden of proof faced by injured workers, but in order to find and cite this information one must study the relevant preparatory work of a key committee of the International Labour Organization dating to the 1960s.

Description of results, including description of linkages with partners

This Seed Grant Project, *The Human Rights of Injured Workers: Social Protection Floors and the Canadian Work Disability System*, originated from discussions held at the Research to Action Workshop held April 14-15, 2014 organized by the Bancroft Institute for Studies of Workers' Compensation and Work Injury. Participants at the workshop spoke of the need to deepen the human rights analysis as it related to workers' injury compensation in Canada. Breakout sessions of the workshop participants then proposed several strategies, including studying recent changes in the Ontario employment injury benefit system using international (UN) human rights standards as the basis for analysis and evaluation. The general consensus was that the Canadian system was not providing adequate protection for injured workers. Several presentations at the meeting documented the mistreatment of claimants within provincial-level employment injury benefit systems.

This project, *The Human Rights of Injured Workers*, was a \$9,000 grant to support a student fellowship in the School of Industrial Relations at the University of Montreal. The goal of the project was to connect the specialized international human rights jurisprudence to a concrete and specific concern in work disability policy in Canada and to document and analyze through a case study methodology the human rights dimensions of that specific concern. The project was organized as a partnership with the *Canadian Injured Workers Alliance*.

The student scholarship was awarded to Michel Noël at the start of the 2015 calendar year. At the time of his selection, Michel Noël was a full-time student in our M.Sc. program and he completed his coursework in the summer of 2015.

The first task to accomplish in 2015 was to determine the case study to be selected for the project. The basic objective was to select a Canadian case under the umbrella of an employment injury benefit regime that would help to highlight disparities with international human rights standards related to social protection for injured workers. This proved to be a challenge on two fronts. After a legal review, we learned the detailed jurisprudence in the international human rights system was, while clearly advocating adequate protection for injured workers, not as detailed as we would have hoped to find. At the same time, we were charged with selecting a case taken from across the various Canadian jurisdictions, another challenge given the range of issues injured worker advocates had raised about these systems.

By the end of May 2015, and after consultations with our partners in the injured worker community, it was decided to focus the attention of this project on a

recent policy change enacted by the Ontario Workplace Safety & Insurance Board related to the determination of benefits for injured workers. Several injured worker advocates considered the WSIB's *Benefit Policy on Pre-existing Conditions 15-02-03* to be a radical and possibly quite harmful change for injured workers. This new policy introduced the concept of pre-existing conditions to the employment injury benefit system in Ontario, an insurance concept taken from the private insurance industry in the United States that serves to limit claimant benefits where an injury has been found to pre-date the employment injury or illness. This policy change was adopted in 2015 and on paper is a departure from the *thin-skull rule* that has served as the basis for claims determination for workplace injury for many years.

Two presentations were made from May to June 2015 to engage academics and injured worker advocates about the WSIB's *Benefit Policy on Pre-existing Conditions*. A formal presentation was given as part of a panel at the 2015 Annual Meeting of the Canadian Industrial Relations Association. A talk was given to the joint conference on worker's injury compensation in Toronto organized by the Ontario Federation of Labour and the ***Ontario Network of Injured Worker Groups***.

Starting in September 2015, Michel Noël began collecting primary source documents related to the creation and implementation of the WSIB's *Benefit Policy on Pre-existing Conditions*. These included legal and administrative documents, public comments made during administrative rulemaking, related media reports, etc. Starting in January 2016, a number of semi-structured interviews with key informants were also conducted by Michel. These interviews were transcribed and added to the documentary evidence, deepening Michel's knowledge of the case.

During the summer of 2016, Michel was preparing for the formal defense of his research project proposal for a committee of faculty members at the School of Industrial Relations. Given the challenge facing the project given the absence of detailed international human rights norms on injured worker protection, the choice was made to focus on the ILO Employment Injury Benefits Convention No. 121 of 1964, and to research the preparatory work behind this convention to get a better sense of the debate that unfolded with this key international labour standard. The ILO's Convention No. 121 has been more recently cited by the UN Committee on Economic, Social and Cultural Rights as a key human right for injured workers. As a part of this study of the preparatory legal work, it was discovered that the drafters of this key ILO convention had indeed prioritized limiting and then eliminating the burden of proof faced by injured workers in the process of benefit determination.

By the end of the summer of 2016, Michel Noël had successfully defended his project proposal in front of his thesis committee. The faculty committee raised questions about the study and challenged the idea of international human rights as a theoretical basis for an M.Sc. thesis project. The fall of 2016 was in part spent redrafting the thesis project text in relationship to the concerns of the committee.

Next steps and the importance of the findings

In September 2016, Michel Noël accepted a full-time job as a specialist and trainer in occupational safety and health. He is currently working on drafting the final thesis manuscript which he hopes to defend in May 2017. The original plan for this project was to draft the final research study in English. Michel decided to exercise his right as a student at the University of Montreal to write the document in French. As a result we are discussing how a translation summary of his M.Sc. thesis might be made available to the English speaking injured worker community in Canada upon the conclusion of his final M.Sc. thesis defense.

There are important findings related to this study. The investigation this study has made into the background preparatory work of the key ILO convention governing employment injury benefits, Convention No. 121, clearly indicates a recognition by the international community that the legal burdens of proof faced by injured workers must be controlled and if possible eliminated in the benefit claims process. This is a clear international standard recognized by human rights bodies. This normative viewpoint is a stark contrast to the direction taken by the Ontario WSIB in their 2015 policy change *Benefit Policy on Pre-existing Conditions*.

Given the slow nature of the adjudication process for injured workers in the Ontario employment injury benefit system (cases take 2-3 years to work their way through the formal appeals process) there is, however, a lack of case data available at the present time to document how the new WSIB policy is impacting injured workers in practice across Ontario. These cases will not be available for another year or two at the very earliest. As a result of this project, however, injured worker advocates are in a better position to evaluate the impact of the 2015 policy changes introduced by the WSIB against basic international human rights norms outlining protections for injured workers and the burdens of proof they face as claimants.

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Annex: Key Project Dates - The Human Rights of Injured Workers: Social Protection Floors and the Canadian Work Disability System

Seed Grant Application Submitted	June 30, 2014
Funding Decision Received	October 24, 2014
M.Sc. scholarship awarded to Michel Noël	January 15, 2015
Case study selection concluded	May 15, 2015
Presentation at the 2015 Annual Meeting of the Canadian Industrial Relations Association in Montreal	May 25-27, 2015
Presentation at the Joint Conference on Workers' Compensation of the Ontario Federation of Labour / Ontario Network of Injured Worker Groups in Toronto	June 1-2, 2015
Call for participation of WSIB case workers sent to Ontario Federation of Labour, Office of the Worker Advisory and other injured worker WSIB case workers	August 27, 2015
Primary source document collection begins related to the WSIB Benefit Policy on Pre-existing Conditions (15-02-03)	Sept. 1, 2015
Interviews with key informants begins focusing on individuals involved in the development of Policy 15-02-03	January 1, 2016
Began collection of historical documents related to the preparatory debates of ILO Convention No. 121 of 1964.	May 1, 2016
Successful M.Sc. project defense - Michel Noël	August 16, 2016
Anticipated final M.Sc. defense - Michel Noël, translation work of summary of key analytic chapter to follow.	May 2017