

## Deeming and the lock-in

### Backgrounder

#### **What is deeming?**

“Deeming” refers to the practice used by the workers’ compensation Board to decide the compensation that it will pay for loss of earnings as a result of workplace injury or illness. It reduces a permanently injured worker’s loss of earning benefits under the pretence that the worker is employed. This systemically leads to poverty among injured workers.

Most Ontarians are not aware that this is the way we treat injured workers who have a permanent disability. This approach began in 1990 when legislation ended the system of life long pensions for life long disability. The government claimed the new system would be better for injured workers because compensation would be based on “the real life situation of injured workers.” Unfortunately, this was not the case.

Compensation for loss of earnings is based on the difference between pre-injury earnings and the earnings that injured workers are able to earn in suitable and available employment after their injury.

Instead of looking at what the injured worker is actually able to earn in suitable and available employment, the Board deems (or dreams) most injured workers to have returned to full time gainful employment after their injury, regardless of their real life situation. As a result, there may be little or no compensation for loss of earnings even when an injured worker is never able to return to the workforce.

#### **Injured workers feel cheated by deeming**

Injured workers feel that when the WSIB reduces their benefits by overstating their earnings, it cheats them out of compensation that is justly owed. This reduction takes place even if the worker is not able to find employment after retraining. Essentially, the WCB dreams up a “phantom” job that it claims the worker could get, takes away wages the worker is deemed to be earning, and leaves the injured worker with little or no compensation benefits, regardless of whether the injured worker is employed or not.

If an injured worker tried to increase his benefits by misstating his earnings as lower than reality, he would be penalized for cheating. However, when the

WSIB misstates his earnings as higher than reality, it reduces benefits and keeps the money with impunity.

### **Unemployment is the reality of most permanently injured workers**

A 2009 audit of the WSIB vocational rehabilitation (labour market re-entry) program found that the process was not helping most injured workers. At 18 months after completing a retraining program, more than half of the ‘graduates’ were unemployed.

These statistics are similar to a recent study conducted by the Organization for Economic Co-operation and Development (OECD) which found that just over 40% of people with disabilities or health problems are employed. Quite simply, permanently disabled injured workers are likely to face unemployment. But invariably, the system pretends that they are working and pretends they have a good income and condemns them to suffering and poverty.

### **Case example**

A worker earns \$18 an hour when he suffers a permanent back injury and cannot return to his old work. Although he has limited education, no Canadian education, limited English skills, no related work experience and a ‘bad back’, the WSIB deems him able to work as a parking lot attendant. He is given a little English-as-a-second-language training. The Board is of the opinion that the worker could earn \$12 an hour as a parking lot attendant. The worker receives 85% of the difference between pre and post accident earnings. In this example it figures to be about \$5.00 an hour, \$175.00 a week, or \$752.50 a month. The worker is never able to get a job. He cannot live on the \$752 a month so he and his family go on social assistance. In 2009, there were 6,883 families on social assistance in Ontario because their workers’ compensation benefits were below the ‘welfare line.’

### **Deeming is a tough cookie**

Can deeming be eliminated? Political leaders of all types have agreed that “deeming” is an injustice. For example, in 2007, Labour Minister Steve Peters introduced legislative changes in Bill 187 that he said would eliminate deeming. Although the wording of the law was changed, the practice of deeming by the WSIB continued unchanged.

### **If you thought it could not get any worse...**

The WSIB has not only continued deeming unabated despite the new legislation, it has made it even worse. Policies developed by the WSIB after Minister Peters amendment have expanded deeming by inventing the concept of “underemployment.” Even when an injured worker finds employment in the

field that he has retrained for, the WSIB will ignore his actual earnings and deem him to be earning more than he actually does, if the WSIB believes there is higher paying work out there.

### **No lock-in means perpetual probation for injured workers**

When the deeming system was proposed, Canada's leading scholar on workers' compensation, Professor Terrence Ison, warned that it would effectively put injured workers on "perpetual probation;" injured workers would have to constantly be looking over their shoulder for fear of their compensation being cut based on deemed wages. In response, the Liberal government at the time introduced a 72 month lock-in, which meant that 6 years after the date of injury, workers could not be deemed and their benefits would be locked in. This at least provided some degree of protection and security at the 6 year mark.

In 2014, though, Premier Wynne directed the Minister of Labour to remove the 72 month lock-in. If this happens, it will mean that injured workers will live with the threat of deeming hanging over them for their entire lives. Any time after a workplace injury, the WSIB would be able to swoop in and reduce compensation based on phantom jobs or deem raises in the jobs they do not have. Injured workers will have the stress of being monitored, harassed, or even videotaped by the WSIB until age 65. They will, in effect, be put on perpetual probation, just as Professor Ison warned.

### **How could this be true?**

Who benefits by having injured workers cheated out of compensation for the earnings they have lost as a result of a permanently disabling workplace injury? As benefits continue to decrease, they will be downloaded onto our government funded social assistance programs and off of the workers compensation system that is paid for by the employers who caused the injuries.

The workers' compensation system was created to provide justice for injured workers in exchange for losing their right to sue their employer for damages. Deeming is not justice. It is wrong and unfair. It has no place in our workers' compensation system.

**Let us build an Ontario that includes justice for injured workers!**