

April 29, 2014

Injured Workers' Consultants is a community legal aid clinic that specializes in workers' compensation matters. It has represented injured workers free of charge since 1969. In addition to individual representation, we work with the injured worker community and injured workers' organizations on public education and the improvement of laws and policies that affect injured workers.

Injured workers represent a significant portion of the disabled community and it is one segment that is often not thought about. The AODA definition of disability, like the Human Rights Code, specifically includes injured workers:

s. 2 "*disability*" means,

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; ("handicap")

This is a very large group of Ontarians. In 2012, there were over 233,000 WSIB claims. Although most of these injuries are temporary and may not involve lost time from work, each year the WSIB recognizes about 15,000 new cases of permanent impairment. So every year 15,000 more injured workers are added to the community of people with disabilities for the rest of their life.

It is this group of injured workers, people with permanent disabilities that we wish to highlight in this submission. The purpose of the AODA is to remove existing barriers, and prevent the introduction of new barriers. For injured workers, however, even with both the Ontario Human Rights Code and AODA in place, new barriers are being introduced by the WSIB that further hurt injured workers. In his 1913 report setting out the founding principles of our workers compensation, Sir William Meredith said: "The true aim of a compensation law is to provide for the injured workman and his dependents and to prevent their becoming a charge upon their relatives or friends, and upon the community at large." (p. 4, Final Report).

There are important issues affecting this large segment of the disability community that deserve mention in your report. How many are getting back to employment? What is the barrier? Are compensation benefits adequate? What is the barrier?

How many injured workers get back to employment?

There was no dispute that, at least until recently, the numbers were shocking. Studies done under prior WCB/WSIB vocational rehabilitation schemes found unemployment of injured workers with permanent disabilities was about 75%. The WSIB's figures claimed an "employed rate" between 36% and 41%.

According to the WSIB, under the most recent "Work Re-integration" scheme, nearly 92% of injured workers with lost time claims return to their full pre-accident earnings within a year of their injury.

The problem is the WSIB doesn't actually track the return to work experience of injured workers. It doesn't have to, because of the practice of "deeming." When an injured worker approaches the 'usual healing time' for their injury, they will be informed by letter that they are expected to be able to return to their old job by a certain date and benefits for loss of earnings will cease. On the WSIB's books, that is another injured worker back to pre-accident earnings, case closed.

There is no doubt that 92% of injured workers with lost time claims are deemed able to return to their full pre-accident earnings within a year of their injury. Whether the injured worker ever gets back to work is irrelevant, except for the tenacious few who manage to get legal advice and representation and challenge the decision through the appeals process.

What is the barrier?

The WSIB practice of deeming is a barrier to employment for injured workers. It lets the WSIB off the hook from its obligation to assist injured workers to return to gainful employment.

Deeming comes from the WSIB's interpretation of the Workplace Safety and Insurance Act. From 1998 to 2007, benefits for loss of earnings were based on the difference between the injured worker's earnings before the injury and what he or she "earns or is able to earn in suitable employment" after the injury (former WSIA s.43(2)). The WSIB would simply decide the worker is able to do their old job or another job at equivalent wages.

Even when the injured worker is accepted by the WSIB as unable to return to their old job and only able to return to a lesser paying job, what actually happens to the injured worker is considered irrelevant. He or she will be deemed to be working full time in a lesser paying job and will receive a small benefit for loss of earnings when they actually have a total loss of earnings. Deeming is a barrier to employment even for those accepted by the WSIB as requiring assistance in returning to employment.

This problem was addressed by the Ministry of Labour in 2007 when the section was amended to eliminate deeming, according to the Minister of Labour. Now, the WSIB

should consider the difference between the injured worker's earnings before the injury and the "earnings that he or she earns or is able to earn in suitable and available employment" (emphasis added, current WSIA s.43(2)).

However the practice of deeming continues unchanged and the WSIB has no interest in tracking whether employment is actually available to the injured worker or what sort of employment or wages they are able to obtain, if any.

Are WSIB benefits adequate?

When an injured worker is "deemed" to be back at their old job, benefits for loss of earnings are drastically cut or cease altogether. Many never get back to employment. They are forced to rely on the provincial health care system and support programs such as Ontario Works, ODSP or the Canada Pension disability benefit. Deeming is not only a barrier to employment but also the mechanism by which substantial costs are downloaded from the employer funded workers' compensation system to publicly funded programs. This is part of the trend identified by John Stapleton in his studies of the welfarization of disability.

For example, figures from the Ministry of Community and Social Services for 2012-2013 show more than 4000 OW and ODSP cases were also receiving WSIB benefits. These are people who the WSIB has acknowledged will have a loss of earnings from their injury but has cut their benefits and "deemed" them to be employed when they are not employed. If each injured worker was receiving an average of \$1000 a month from social assistance, that amounts to \$4 million every month downloaded from the workers' compensation system to the public. Deeming is not only a barrier to employment for those with work injuries, it is also creates a barrier for access to scarce public assistance resources by other people with disabilities with no alternative support systems.

A study of benefits adequacy by the Institute for Work and Health found that about 30% of injured workers with permanent impairments rated less than 50% had incomes of less than 75% of their pre-injury earnings.

The lack of universal coverage is a barrier

While the WSIB's treatment of injured workers is problematic for some, it is at least a partial safety net. Many workers in Ontario are not covered by workers compensation and don't even know it. Workers' compensation coverage is only mandatory for employers listed in 2 schedules to the WSIA. It remains optional for all other employers. The schedules are virtually never amended with the result that many archaic types of industry are listed but modern types of work such as call centres and high tech industries are not. Only about 60% of Ontario workers are actually covered by workers compensation. Two independent inquiries conducted by the WSIB, one chaired by Brock Smith and one by Harry Arthurs, both recommended the WSIB to

provide universal coverage for all workers, as was done in British Columbia and other provinces. The WSIB has not implemented these recommendations.

Without workers compensation coverage, workers who become disabled by workplace injuries have the right to sue a negligent employer but this is not a viable option for most. If they are lucky, their workplace may have short or long term disability benefits. But for many, social assistance is their sole support.

The failure of the WSIB to implement universal coverage for all Ontario workers is a barrier for access to disability income support and health care benefits.

While documented the old and newer barriers to injured workers' full integration into Ontario, we want to encourage the swift removal of these barriers. As injured workers and family members often say, "my Ontario includes injured workers and all disabled people".

Injured Workers' Consultants

Orlando Buonastella