

**Submission to the Standing Committee on Finance &  
Economic Affairs**

**Re: Bill 148 “Fair Workplaces, Better Jobs Act, 2017”**

July 21, 2017

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## **Introduction and Endorsements**

It is no secret that workers across Ontario are struggling with the effects of precarious and unstable work – job insecurity, low wages, and poor working conditions are widespread. For many years, workers have been advocating and organizing for meaningful changes to protect them from unfair working conditions.

We welcome Bill 148 as an important first step in responding to the needs and calls of these workers.

We endorse the submissions and amendments proposed by the Workers' Action Centre, \$15 and Fairness Campaign, Parkdale Community Legal Services, and the Ontario Federation of Labour.

We would also like to give particular recognition and commendation on the proposed increase to the minimum wage to \$15/hour by January 1<sup>st</sup> 2019. The increased minimum wage will benefit women, youth, racialized minorities, recent immigrants and other vulnerable people. Raising the floor for this demographic of workers also raises the floor for all workers, and we fully support this initiative.

Although Bill 148 will lead to many positive changes for workers, there is one highly vulnerable group of people who will face negative implications: those with work acquired disabilities. In the sections that follow, we set out the problem for the Committee, and our proposed solutions.

### **Impact on Benefits for Workers with Work Acquired Disabilities**

While we fully support increasing the minimum wage, it must be recognized that, because of the way the WSIB administers and reduces benefits to injured workers, the increase will have deleterious effects for people who have permanent disabilities due to a work injury. Unless additional steps are taken to protect this group of people from the WSIB's practices, there are thousands of Ontarians with permanent disabilities who will likely be forced further into poverty when the minimum wage goes up.

#### **“Deeming”: Using phantom jobs to reduce WSIB benefits**

The problem stems from the WSIB's practice of “deeming,” also referred to as “determining” wages. In essence, deeming is when the WSIB deems (pretends) that an injured worker has a job that they do not in fact have in reality, and then reduces their benefits based on the made-up wages of the phantom job. Many of the clients we serve are deemed to have minimum wage jobs such as customer service representatives or electronic assemblers. When the minimum wage rises, the WSIB benefits that the worker receives fall by the same amount because the WSIB deems the worker to be earning the new minimum wage.

A typical example of deeming looks like this:

- Harpreet is making \$20/hour when she suffers a permanent back injury and cannot go back to her old job.
- She receives loss of earnings benefits from the WSIB for a few weeks. The WSIB then “deems” Harpreet able to work as a customer service representative – even though she does not speak or read English, has no related work experience, and her doctor says she is not medically able to return to work.
- The WSIB deems Harpreet to be earning the current minimum wage of \$11.40/hour as a customer service representative, even though she has not been able to get a job and the WSIB knows she is not actually employed.
- Her benefits are cut by \$11.40/hour, and she now only gets about \$218.00 per week in workers’ compensation benefits.

Since the WSIB can still review Harpreet’s benefits, when the minimum wage increases, her deemed (pretend) wages also increase. At a minimum wage of \$15 per hour, her WSIB benefits are reduced to \$127 per week.

The fundamental impact of deeming people to have phantom jobs and phantom wages is that injured workers like Harpreet are forced into poverty, and forced to turn to publicly funded social assistance programs like OW and ODSP. In this way, the costs of work injuries are downloaded onto the public purse.

The problem also affects injured workers who are underemployed as well as unemployed. Workers who are unable to work full time, either because of their disabilities, or because they have been unable to secure full time, standard work will also have their benefits reduced. The WSIB generally assumes that these workers are “voluntarily underemployed”, even when there is extensive documentation of their job search efforts, and will deem them to be working full time, with benefits reduced accordingly.

To help explain the issue in more detail, we have attached a fact sheet and some scenarios that illustrate the impact of deeming.

It is important to note that we are not simply speculating as to what might happen in 2018 and 2019. When the minimum wage has gone up in the past, we have seen the WSIB use the increased wage to reduce the benefits of all workers deemed to be earnings minimum wage whose benefits were open to review.

This problem was identified in a recent review of the Alberta Workers’ Compensation Board. The review panel looked at how, as the average wage of a deemed job increases over time, the Compensation Board uses the higher wage to reduce benefits. They commented that the use of higher deemed wages to cut benefits “gradually cannibalizes the worker’s earnings loss benefits,

which are not currently adjusted for wage progression beyond COLA [cost of living adjustments].”<sup>1</sup>

The same “cannibalizing” effect takes place when the WSIB is allowed to deem injured workers to be earning a higher minimum wage.

It is also worth noting that in 2007, the Liberal government stated in a letter to our office that they were taking steps to eliminate deeming. Unfortunately, their promise fell far short, as they merely substituted the word “determining” for “deeming” in the Legislation, while the practice itself remained unchanged. For the Committee’s information, we have enclosed a copy of the letter in question from then-Minister of Labour Steve Peters.

### **How this is relevant to Bill 148**

The adverse impact on injured workers is directly connected to how the minimum wage increase will be used by the WSIB to cut the benefits of an already-vulnerable group of people. Given that the minimum wage increase is a central tenet of Bill 148, it is within the Committee’s purview to introduce a solution to the problem being described here.

To be clear, the problem is not the increase in the minimum wage. Rather, the problem is deeming. The solution, therefore, involves protecting injured workers from deeming.

Additionally, in light of the fact that a major impetus for the Changing Workplaces Review and Bill 148 was a recognition of the need for greater protection for the most vulnerable workers in Ontario, it is a paradox that the majority of injured workers who are deemed to have minimum wage jobs are women, racialized people, recent immigrants, and people with significant disabilities. As such, the people who will be affected by the heightened deeming are part of the very demographic of people who Bill 148 was designed to protect.

### **Proposed Remedies to the Deeming Problem**

Fortunately, there is still time to avert the negative consequences, and to ensure that injured workers with permanent disabilities are not left behind in a laudable initiative that was designed to raise the floor for all workers. It is critical that this issue be taken seriously and resolved quickly. We are suggesting a two-pronged approach.

The first step, which can be taken immediately, is to protect injured workers from having their benefits reduced when the minimum wage goes up in 2018 and 2019. This can be accomplished through a Direction from the Minister of Labour that the WSIB is not to increase deemed wages based on the change to the minimum wage.

While a Direction from the Minister of Labour may not be the preferred legal mechanism to protect injured workers from the practice of deeming, it is the most feasible given the timeframe and the scope of this Committee.

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<sup>1</sup> *Working Together: Report and Recommendations of the Alberta Workers’ Compensation Board Review Panel*, June 2017, p.76

The second step – a longer-term approach – is to eliminate deeming altogether. This can be accomplished through a legislative change to the *Workplace Safety & Insurance Act*.

Presently, Section 43(2) of the Act states:

*(2) Subject to subsections (3) and (4), the amount of the payments is 85 per cent of the difference between,*

*(a) the worker's net average earnings before the injury; and*

*(b) the net average earnings that he or she earns or is able to earn in suitable and available employment or business after the injury.*

The deeming problem could be addressed by inserting (c):

*(c) available employment means a bona fide offer of employment*

## **End the Incentive to Hire Temporary Workers for Dangerous Work**

Unfortunately, Bill 148 also leaves behind a solution that could prevent many precarious workers from being injured in the first place. Because the WSIB uses accident costs in calculating employer premiums (through experience rating programs), there is an incentive for employers to hire temporary workers to do the more dangerous aspects of their work. The incentive stems from the fact that the WSIB charges the accident to the temporary agency rather than the client employer.

This is nonsensical because the temporary agency has no control over the work conditions of the client employer. Temporary workers are also at heightened risk of injury for a myriad of reasons, such as being unfamiliar with the worksite and not having the same access to safety training as permanent staff. We have enclosed a study synopsis from the Institute for Work and Health which clearly documents the issue.

The Changing Workplaces Review identified this problem and recommended that the client company be responsible for the costs of the accident. We do not agree that this is the best solution because we see many cases of claims suppression driven by employers' motivation to reduce their WSIB costs, and the damage that this causes for workers. We recommend that the WSIB use health and safety initiatives rather than claims costs in setting premiums. However, short of stopping experience rating altogether, the recommendation of attributing costs to the client employer would lead to real improvements in safety. It would eliminate or at least reduce the incentive to outsource dangerous work to temporary employees.

## **Conclusion**

In closing, we support the initiative of Bill 148, with amendments as proposed by the organizations we have endorsed. We also agree with the Premier's sentiment that nobody in Ontario should be left behind. In order to make this sentiment a reality, we must ensure that

permanently disabled injured workers are not left behind either. They must be protected from the WSIB's practice of deeming, and its use of minimum wage increases to reduce benefits.

Additionally, in order to help prevent the high rates of injury among temporary agency workers, the experience rating incentive to outsource dangerous jobs to temporary agencies must be removed.

## Minimum wage and “deeming”

### 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 - when the reality is that they do not have a job and, in many cases, are not able to work due to their injuries. This systemically leads to poverty among injured workers.

#### Case example

Vinay earns \$18 an hour when he suffers a permanent back injury and cannot return to his old work. While recovering from his accident he receives full loss of earnings benefits (85% of net earnings) of \$2163 per month. But soon the WSIB says it’s time to go back to work. Although he has limited education, no Canadian education, limited English skills, no related work experience and a ‘bad back’, the WSIB deems Vinay able to work as a parking lot attendant. He is given a little English-as-a-second-language training. The Board says he could earn minimum wage of \$11.40 an hour as a parking lot attendant. Vinay’s benefits are cut to \$726 per month. But Vinay is never able to get a job. His family cannot survive on this and must go on social assistance.

Thousands of Ontario families are forced onto our publicly funded social assistance programs because their workers’ compensation benefits were below the ‘poverty line.’

#### Injured workers feel cheated out of compensation justly owed

Instead of looking at what the injured worker is actually able to earn in suitable and available employment, the Board deems most injured workers to have returned to full time gainful employment after their injury, 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.

Who benefits from the practice of deeming? As benefits continue to decrease, they will be downloaded onto our government funded social assistance programs and off the workers' compensation system that is paid for by the employers who caused the injuries.

### **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 those in a Statistics Canada 2014 report which found that only 49% of people with disabilities 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.

### **Deeming, the Minimum Wage and Bill 148**

Although more than 50% of Canadians with disabilities are not employed, the WSIB believes that almost every injured worker can get back to work at minimum wage. The WSIB can review this decision at any time for 6 years after the accident. When the minimum wage goes up to \$14 an hour in January 2018 under Bill 148, Vinay's WSIB benefits will be cut again to \$440 a month and social assistance has to make up the difference. A year later the minimum wage increases to \$15 an hour and Vinay's WSIB benefits will be cut down to \$330 per month, but he is not able to work.

The demand to raise the minimum wage to \$15/hour is of central importance to all workers. But there is a dilemma in how injured workers relate to this demand. Because of "deeming" - one of the WSIB's more insidious mechanisms to cut people off benefits - when the minimum wage goes up, injured worker benefits go down.

### **What justice calls for from Ontario's government**

- Urgent action to prevent all injured workers from being negatively affected by any increase in the minimum wage, due to "deeming."
- Reform to ensure that our workers' compensation system is no longer based on "deemed" or "phantom" jobs and earnings, but based on actual or real wage losses incurred by permanently disabled injured workers.

# Effects of WSIB's DEEMING policy

| Pre-injury Wage<br><br>Single no dependants | Net Average Earnings - (40 hour work-week avg.) | Loss of Earnings is calculated at 85% of net | Impact of Deeming Min Wage Deducted  | Impact of Deeming Min Wage Deducted  | Reliance on Social Support Systems (Municipalities, OW, ODSP)<br><i>*if eligible</i>   | Impact to Injured Worker  |
|---|---|--|--|--|--|---|
| \$13.00 per hour                            | \$520.00 - deductions = \$437.88                | 85% of \$437.88 = \$372.20                   | \$372.88 - \$332.26 =<br><b>\$40.62</b><br>Loss Of Earnings paid (weekly)  | <b>\$0</b><br>Loss Of Earnings paid (weekly)                               | Worker <b>heavily reliant*</b> on provincial and municipal systems and becomes <b>fully reliant*</b> based on \$15.00 min wage | Esteem plus abject poverty and all ailments and afflictions associated with it. |
| \$28.00 per hour                            | \$1120.00 - deductions = \$864.31               | 85% of \$864.31 = \$734.66                   | \$734.66 - \$331.57 =<br><b>\$403.09</b><br>Loss Of Earnings paid (weekly) | \$734.66 - \$422.92 =<br><b>\$311.68</b><br>Loss Of Earnings paid (weekly) | Worker may* qualify for some social assistance.  |   |
| \$20.00 per hour                            | \$800.00 - deductions = \$647.02                | 85% of \$647.02 = \$549.97                   | \$549.97 - \$331.58 =<br><b>\$218.39</b><br>Loss Of Earnings paid (weekly) | \$549.97 - \$422.99 =<br><b>\$126.98</b><br>Loss Of Earnings paid (weekly) | Worker may* qualify for some social assistance but becomes <b>partially reliant*</b> based on \$15.00 min wage                 |   |

## Ministry of Labour

## Ministère du Travail



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RECEIVED APR 30 2007

APR 27 2007

Mr. Peter Bird, Chair  
Injured Workers' Consultants  
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Toronto, Ontario  
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Dear Mr. Bird:

Thank you for your letter about how increases to the minimum wage could affect injured workers.

Our government is committed to creating a brighter future for injured workers. One of our first steps as a government was to undertake an independent audit of the Workplace Safety and Insurance Board (WSIB). Given a more stable WSIB, we can do more to help injured workers who have not seen any meaningful increases in WSIB benefits for 12 years.

As you are aware, as part of the Ontario budget of 2007, the government is proposing a number of improvements to increase WSIB benefits and provide greater fairness and flexibility to the workplace safety and insurance system. The amendments to the *Workplace Safety and Insurance Act, 1997 (WSIA)*, if approved by the legislature, would require the WSIB to determine loss of earnings (LOE) benefits on both suitable and available employment. This change would help injured workers retain benefits when work they could perform after rehabilitation is not available or suitable. In essence, we are proposing to eliminate "deeming" from the *WSIA*.

Additional enhancements proposed for injured workers would include the following:

- Increases to the indexation of benefits amounting to three adjustments of 2.5 per cent each, on July 1, 2007, and on January 1 in each of 2008 and 2009.
- Allow a review of benefits for some workers who suffer a temporary or permanent deterioration in their condition once their benefit level is fixed 72 months after injury
- Give workers who reach the age of 65 greater financial control through a lump sum payment in lieu of monthly payments in cases where a recipient's loss of retirement income benefits would be less than \$3,000 a year
- Add \$810,000 a year in ongoing funding to the Office of the Worker Adviser to allow it to improve and expand services to injured workers and their survivors
- Provide greater representation on the WSIB Board of Directors by increasing the size of the board and clarify that the positions of Chair and President are separate

.../2

I have noted your comments about how the proposed increases to the minimum wage may affect the calculation of WSIB benefits. The calculation of such benefits falls under the jurisdiction of the WSIB. You have therefore appropriately sent a copy of your letter to Mr. Steve Mahoney, Chair of the WSIB, for his consideration.

Over the last few years, our government and the WSIB have worked with injured workers' groups, labour and the business community to ensure a strong and financially stable WSIB that is focused on the prevention of workplace injuries and is sustainable for future generations of Ontario workers and their families. Together, we are making progress.

Thank you again for writing to me on how increases to the minimum wage could potentially affect injured workers' benefits.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Peters". The signature is stylized and cursive.

Steve Peters  
Minister

c. Mr. Steve Mahoney, Chair, WSIB



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## **Temp agency workers falling through cracks in OHS system**

The complex employment relationship between temporary agency workers, temp agencies and client employers creates loopholes and incentives that may leave low-wage temp agency workers more vulnerable to workplace injuries, says new research from the Institute for Work & Health.

Stephen, a construction site manager, is forthcoming about his use of temporary agency workers. "I'll hire a couple of guys for a half a day to unload a container," he says. "It's just heavy-duty work that I'd rather not have *my* guys doing."

Vince, the owner of a large temp agency, agrees that the use of agency workers to take on the more hazardous work is not out of the norm: it helps his clients keep their own workers' compensation records clean. He remembers being asked to provide industrial labour to a client who happened to be receiving an award for best health and safety practices. "That day, I had two people ... rolled out the back door in an ambulance," he says. "The client kept his health and safety record up high because he outsourced to staffing companies all the ... jobs that required any type of dangerous work ...."

These were among the comments heard by Institute for Work & Health Scientist Dr. Ellen MacEachen and her team during their research into job safety and return to work in temporary work agencies. They highlight the structural problems that underpin occupational health and safety (OHS) in these agencies, as reported this spring in *Policy and Practice in Health and Safety* (vol. 10, no. 1, pp. 77-95).

"Our main finding was that low-wage temp agency workers are less well protected because of the complex working relationship in which they find themselves," says MacEachen.

As she explains, agency workers have two employers: the temp agency and the client employer. But temp agencies don't have control over the worksites to which workers are sent, and often don't fully know the risks. While both temp agencies and client employers have responsibilities under Ontario's *Occupational Health and Safety Act*, only temp agencies are considered the employer under the province's workers' compensation legislation, which weakens the incentives for client employers to protect these workers.

"This is not about bad apples," MacEachen adds. "It's about a structural weakness in the regulatory system that leaves temp agency workers without the same protection as regular workers."

In light of this, MacEachen proposes three key changes:

- experience rating prevention incentives should be applied to client employers;
- the requirement to set up joint health and safety committees should be applied to temp agencies; and
- workplaces that regularly hire large numbers of temp agency workers should be

subject to proactive inspections by health and safety officers.

## **Study looks at OHS/RTW in temp agencies**

The temp agency sector is an established part of today's flexible labour market. Yet temp agency work can be risky. For example, in the United States, temp agency workers have higher injury claim rates than those in standard work arrangements, and double the rates in construction and manufacturing. (Comparable statistics for Canada are not collected.)

IWH researchers wanted to understand how temp agencies manage health, safety and return to work, with a specific focus on low-wage workers. They undertook a study that included legal and documentary analysis, as well as focus groups and interviews with agency workers, temp agencies (both multinational and smaller agencies), client employers and key informants, such as inspectors and policy-makers. Sixty-four people took part, in four Ontario locations.

The research team made a number of important findings.

**Temp agency efforts to prevent injuries are largely ineffective.** This is the case because:

- they can't adequately manage health and safety risks when they don't control the work or own the equipment;
- although temp agencies may inspect a worksite before placing a worker, work conditions may change from day to day; moreover, temp agencies are not trained to recognize hazards or enforce changes when hazards are found;
- temp agency workers often face the challenge of being new to worksites and unfamiliar with the work flow, hazards, etc.;
- agencies rely on workers to report hazards at client worksites, but low-wage temp agency workers may not speak up for fear of losing their job placement or chance of being hired on permanently;
- even when agencies learn of a hazard, they can do little but withdraw from the workplace (thereby giving up the contract) or "ask nicely" for improvements, leaving workers exposed; and
- agency workers have no systematic way to provide input on their OHS conditions because temp agencies are not required in practice to have joint health and safety committees.

**Client employers have little incentive to improve safety for temp agency workers.** Because temp agencies are the employers under Ontario's *Workplace Safety and Insurance Act*, they are the ones subject to experience rating surcharges when worker injuries occur—not client employers who actually control the worksite.

**Temp agencies can manage work accident costs.** Temp agencies, by and large, prefer to maintain responsibility for claims and costs because it increases business. And they can generally manage accident costs and consequences, as follows:

- some agencies (involved in this research) discourage injury reports by requiring extensive written accounts of the accident and/or questioning the injury's legitimacy;
- agency workers are mostly short-term and rarely subject to the duty to rehire after a workplace injury, and, in any case, rehiring only means putting workers back on the roster, not into jobs with clients;
- because temp agencies can operate with very little physical infrastructure—"you can run one with a Blackberry," noted one workers' compensation regulator—smaller agencies can close and reopen in the face of very high fines or experience rating surcharges, thus avoiding these costs if company directors have no identifiable assets; and
- because their workers' comp premiums are sometimes lower than those of their client employers, temp agencies can build these premiums into their contract prices.

"Low-wage temp agency workers are less well protected than workers in a standard employment relationship," MacEachen says. "Our research identifies ways that legislation and policies need to catch up with the reality of today's work conditions."

For more information, see the research presentation at: [www.iwh.on.ca/plenaries/\(http://www.iwh.on.ca/plenaries/\)](http://www.iwh.on.ca/plenaries/(http://www.iwh.on.ca/plenaries/)2012-apr-10)2012-apr-10. To order the article in *Policy and Practice in Health and Safety*, go to: [www.ingentaconnect.com/content/iosh/pphs/2012/00000010/00000001/art00006](http://www.ingentaconnect.com/content/iosh/pphs/2012/00000010/00000001/art00006)(<http://www.ingentaconnect.com/content/iosh/pphs/2012/00000010/00000001/art00006>).

**Source:** *At Work, Issue 69, Summer 2012*: Institute for Work & Health, Toronto

**Watch a video:** [Health and safety issues for low-wage temp agency workers](http://youtu.be/mM2vGZ5QU7U?list=UUia0-nwDj15h59CigjcM1HQ)(<http://youtu.be/mM2vGZ5QU7U?list=UUia0-nwDj15h59CigjcM1HQ>), featuring Dr. Ellen MacEachen

**See also:**

- [Prevention and return to work in temporary work agencies: Summary of study findings and policy implications](http://www.iwh.on.ca/temp-agency-study-summary-of-findings-and-policy-implications)(<http://www.iwh.on.ca/temp-agency-study-summary-of-findings-and-policy-implications>)
- [Temporary work agencies and workplace health and safety](http://www.iwh.on.ca/topics/temporary-work-agencies)(<http://www.iwh.on.ca/topics/temporary-work-agencies>)