

Age-Based Discrimination in Ontario's Workers' Compensation Laws:

'Promises to keep, and miles to go before we sleep...'

(with thanks to Robert Frost for the imagery)

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Abstract

Ontario's workers' compensation system was virtually free from age-based limitations from its inception in 1915 until the system was changed from a permanent disability pension system to a wage loss system in 1990. Since then, older workers in Ontario have faced a number of age based limitations on their workers' compensation benefits. Compensation for lost wages ends at age 65, or after 2 years for injuries after age 63. The employer's obligation to re-employ a worker after injury ends at age 65. Workers injured after age 64 and receiving compensation for lost wages are not eligible for compensation for loss of retirement income. Compensation for non-economic loss for workers aged 65 years is less than half of the amount paid for the same injury to a worker aged 25 years. Workers on permanent disability pension supplements for injuries before 1990 have their workers' compensation benefits reduced annually by an amount equal to the increase in their Old Age security benefits.

When Ontario passed legislation to eliminate mandatory retirement in 2006 it stipulated that the new Human Rights legislation did not apply to the workers' compensation legislation. These limitations continue to affect older injured workers every day.

The paper argues that the Charter of Rights provides a long road to a remedy by the Supreme Court of Canada for someone who is permanently injured, over age 65, ineligible for workers' compensation and unable to continue working. Community support for legislative reform is needed to remove these vestiges of mandatory retirement and age based discrimination from our workers' compensation system.

The paper also briefly touches on a larger age-related issue. There has never been any compensation for the loss of ability to contribute to the Canada Pension Plan or the related loss of CPP benefits. Workers' compensation benefits are based on net earnings and there is no mechanism to maintain contributions or entitlement for those who are unable to work due to a workplace injury.

Introduction

Ontario's workers' compensation system is one of, if not the first major public social justice program in Canada and it was soon adopted in all Canadian jurisdictions and in many of the United States. It arose from the recommendations of a Royal Commission conducted from 1910 to 1913 by Sir William Meredith, Chief Justice of Ontario. This was a time when the courts and civil litigation were not providing satisfaction to injured workers or their employers. Injured workers had little access to justice: legal fees were

prohibitive, the process was lengthy and the results were uncertain because of a number of common law defences that judges had developed to insulate employers from liability. Employers were unhappy as well because lawsuits were unpredictable and difficult to budget for, and one successful lawsuit could bankrupt an establishment and shut it down.

Justice Meredith recommended a workers' compensation system in which injured workers were entitled to legislated no-fault benefits, speedily administered, related to their earning power and paid for as long as the disability lasts. In return, employers were protected from lawsuits by workers and funded the system on a collective liability basis through which their annual rates were easily incorporated into the cost of production and passed on to customers in the price of goods. This is often referred to as the "historic compromise".

The "historic compromise" is an important principle which underlies Meredith's recommendation to the government to legislate a system that provides "full justice to the workingman" and "not the least he can be put off with."¹ It remains relevant in the modern context of law reform. Reform proposals are often met with resistance based on financial concerns, some real and some imagined, as if the system were some sort of charity in which we give injured workers what the employers of the day feel they can afford. Under the historic compromise, employers are protected from lawsuits for work related injury and disease both in good economic times when employers could afford to be generous and in tough economic times when a lawsuit could shut down their enterprise. Injured workers are entitled to full compensation in good and bad economic times as well. Our workers' compensation system is a surrogate for our court system and must be governed by the same principles of justice and fairness.

The Introduction of Age-Based Criteria

The Canadian Charter of Rights and Freedoms came into effect in 1982 and section 15(1) provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on age and other personal characteristics.² As a result of the Charter and developing social philosophy behind it, the provinces began to enact legislation to ban the practice of mandatory retirement in the 1980's.

Ironically, Ontario's workers compensation was basically free of age based criteria until that time. From the 1915 until 1990, the workers compensation system was based around the permanent disability pension system. Injuries resulting in permanent disability would be rated for a pension that would result in a monthly payment of a portion of their pre-

¹ The Meredith Report, Final Report, 1913, Province Of Ontario: Laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily; The Hon. Sir William Ralph Meredith, C.J.O., Commissioner.

www.awcbc.org/common/assets/english%20pdf/meredith_report.pdf

² Section 15(1), Canadian Charter of Rights and Freedoms, Part I Of The Constitution Act, 1982; <http://laws.justice.gc.ca/en/charter/1.html>

injury earnings for life. The theory was that an assured monthly pension as long as the disability lasts provides some financial security and some incentive to make the best of one's remaining working life with whatever additional wages one is able to earn.

For injuries occurring in 1990 and later, Ontario's workers' compensation system is based around the "wage loss" system. Compensation for disability is based on a portion of the difference between pre-injury/illness earnings and what the injured worker is able to earn after the injury. In most cases future earnings are presumed, or "deemed" and not based on the actual employment situation of the injured worker. For example, a recent review of the Ontario Workplace Safety and Insurance Board's labour market re-entry process found that more than 50% of the injured workers who successfully completed their retraining program, and hence were deemed fully employed, remained unemployed 18 months after their program.³

A number of age-based criteria have been introduced into the Ontario legislation since 1990. Although there are two different Acts, one for injuries since January 1990 (the Workers' Compensation Act⁴), and one for injuries since January 1998 (the Workplace Safety and Insurance Act⁵), the benefit schemes and age distinctions are the same for the purposes of this discussion.

Briefly, the concerns about age-based discrimination arise from these five areas: age-based limitation of compensation for wage losses, age-based limitation of the employer's obligation to re-employ after injury, age-based limitation of loss-of-retirement income benefits, age-based reduction of non-economic loss benefits, and age-based reduction of pension supplements for pre-1990 injuries by Old Age Security benefits. A 6th area of age-related discrimination of a different nature is that there has never been any compensation for the loss of ability to contribute to the Canada Pension Plan or the related loss of CPP benefits.

In the next section, this paper discusses these areas where age-based criteria negatively affect older workers who become ill or injured as a result of their work. Ontario has some distance to go before it can claim to be free from the concept of mandatory retirement and truly open to the participation of older workers in the labour force.

1. Age-based Limits on Compensation for Lost Wages

As mentioned earlier, there was a major legislative shift in workers' compensation principles for injuries in 1990. Prior to that, those who suffered some degree of permanent disability from a workplace injury or disease were assessed for a permanent partial (or in rare cases, total) disability pension based on their level of disability and their

³ Page 23, WSIB Labour Market Re-entry (LMR) Program Value For Money Audit Report, December 3, 2009, KPMG LLP.

⁴ Workers' Compensation Act, R.S.O. 1990, CHAPTER W.11.

⁵ Workplace Safety and Insurance Act, 1997, S.O. 1997, CHAPTER 16, Schedule A.

prior earnings. For injuries occurring in 1990 and later, Ontario's workers' compensation system is based around the 'wage loss' system. Compensation for disability is based on a portion of the difference between pre-injury/illness earnings and what the injured worker is able to earn after the injury, or, in many cases, what the injured worker is presumed (deemed) capable of earning in suitable employment.

The wage loss system adopted the presumption that most people will retire at age 65. Compensation for lost wages is payable to age 65. If the worker is 63 years of age or older at the time of injury or illness, they are eligible for compensation for lost wages for up to two years.⁶ These limits are absolute; there is no provision that allows for any adjustment based on individual circumstances.

43. (1) A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,

...

(b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;

(c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;

This fits perfectly in a world where an employer can impose mandatory retirement at age 65. However, even though mandatory retirement has been abolished in Ontario, we still have these limitations in our workers' compensation law. Here are some examples of the impact of the current system:

1. Maria is a 58 year old skilled factory worker making \$25 an hour or \$875 a week. She was healthy, enjoyed her work and planned to keep working as long as her health permitted. In 2003 she suffers an injury at work and cannot continue in her field. After a year of treatment, the WSIB notes that she speaks English well, has a high school equivalent diploma and basic computer skills and deems her capable of a variety of office administration jobs starting at \$15 an hour. She receives compensation based on 85% of net of the \$10 an hour she is deemed to be losing as a result of the injury, so her compensation totals about \$240 a week, a little above what she would receive on social assistance. She applies for many jobs over the years but is not hired for anything. In 2010 she reaches age 65 and wage loss benefits end. She has already exhausted her retirement savings.
2. Harry is an electrician. He is 67 years old, self employed and enjoys his work. He does not have sufficient retirement savings and intends to carry on working as long as he can. He suffers a serious injury and is still in treatment 2 years later when his workers' compensation benefits cease. He receives nothing more from the WSIB.

⁶ Section 43, Workplace Safety and Insurance Act, 1997; S.O. 1997, CHAPTER 16, Schedule A

3. Dan had to leave his former job at age 65 but was healthy and not financially able to afford to stop working. Fortunately, he found employment in a retail store. In the year 2005, at age 67, he injured his shoulder lifting something at work. His employer arranged for temporary light duties so Dan did not receive any wage loss compensation. However, his injury did not heal. After a series of medical investigations including a long awaited MRI, the problem was identified and Dan was booked for surgery in 2007. He would need to be off work for 3 months to recover. He advised the WSIB but found he would not be entitled to any compensation for lost wages because 2 years had passed since the injury. Dan is in a bind because he needs the surgery but can't afford to go 3 months without his wages.

2. Age-Based Limit on Loss-of-Retirement Income Benefits

In addition to compensation for a portion of lost wages, our workers' compensation system establishes a loss of retirement income fund for injured workers who receive compensation for loss of earnings. An amount equal to 10% of the wage loss benefit was put in an investment fund and then paid out to the injured worker at age 65. This amount was reduced to 5% for injuries occurring since 1998. However, this benefit does not apply to workers who are injured at age 64 or older.⁷ Ironically, those who need to continue working past age 65 for economic reasons are not eligible for any compensation for loss of retirement income if they are injured. For example, in case #2 above, the WSIB was not setting aside an amount equal to 5% of the 2 years compensation benefits that Harry received.

3. Age-Based Limit on the Obligation to Re-employ Injured Workers

Along with the implementation of a "wage loss" system in 1990, our workers' compensation legislation also adopted a limited obligation among employers to re-employ their workers after injury.⁸ It applies to workers who have more than one year's service and who have lost time from work due to a compensable injury in workplaces with 20 or more workers. When an injured worker is able to return to their old job, the employer must offer it or a comparable job. If the injured worker is not able to perform the essential duties of their old job but can do other work, the employer is obligated to offer suitable work if it is available. In either case, the employer is obligated to accommodate the work to extent of undue hardship, our Ontario Human Rights Code threshold.⁹ In all cases, the employer's obligation continues for a maximum of 2 years, or one year after the injured worker is able to return to their pre-injury work.¹⁰

⁷ Section 45(1), Workplace Safety and Insurance Act, 1997; S.O. 1997, CHAPTER 16, Schedule A

⁸ *ibid*, Section 41

⁹ *ibid*, Section 41(6)

¹⁰ *ibid*, Section 41(7)(a), (b)

However, the re-employment obligation also ends when a worker reaches age 65.¹¹ The result is that anyone injured between age 63 and 65 is short-changed on the duration of their re-employment opportunity. And of course workers who are injured after 65 years of age have no re-employment rights at all. As was the case with the termination of loss of earnings benefits, this fits perfectly in a world where an employer can impose mandatory retirement at age 65. However, mandatory retirement has been abolished and we still have these limitations in our workers' compensation law.

4. Age-Based Reduction of Non-Economic Loss Benefits

Our workers' compensation system is referred to as a "dual award" system because in addition to the compensation for lost wages there is also a lump sum payment for non-economic loss for injuries resulting in a measurable permanent impairment. It is sometimes described as compensation for the loss of enjoyment of life. Unlike the wage loss benefit, this compensation is intended to be the same for the same injury. An electrician and a truck driver may experience different impacts on their earnings from losing a thumb, but could receive the same non-economic loss award. However, the award is age based. It is calculated by taking a percentage obtained by a medical assessment and multiplying it by a lump sum that is based on age.¹²

The lump sum payment amount for 100% permanent impairment ranges from roughly \$82,000 for a worker aged 25 or younger to about \$32,000 for a worker aged 65 or older.¹³ The percentage of impairment for a catastrophic injury such as the loss of an arm at the shoulder is 60%. So the non-economic loss award for a 25 year old would be about \$49,000 and for a 65 year old it would be about \$19,000.

In real life, such injuries are relatively rare. The median award is about 12%.¹⁴ So for the average 25 year old worker with a permanent disability, the non-economic loss award is about \$9,800 and for the average 65 year old worker with the same injury, the award would be about \$3,800.

It is difficult to come up with a convincing rationale for compensating the same injury differently on the basis of age. The theory is simply that younger people have longer to live and so have more enjoyment of life to lose. Many older injured workers could argue the opposite, that they should receive greater compensation because they do not have the opportunity change their lifestyles and seek ways of coping with their injury. Often their only option is to suffer.

¹¹ *ibid*, Section 41(7)(c)

¹² Calculating NEL Benefits, Document No. 18-05-04, Operational Policy Manual, Workplace Safety and Insurance Board.

¹³ Benefit Dollar Amounts - Accidents from 1998 Document No. 18-01-02, Operational Policy Manual, Workplace Safety and Insurance Board.

¹⁴ Page 28, Statistical Supplement to the 2009 Annual Report, Workplace Safety and Insurance Board.

5. Reduction of Pension Supplements for Pre-1990 Injuries

Unfortunately, this is a problem that is difficult to explain in a few words. Basically, a group of permanent disability pensioners who were injured before 1990 have their workers' compensation benefits reduced every year by the amount that their Old Age Security benefit increases for inflation. They view this as the WSIB 'stealing' the small amount that the Federal government is giving them to help keep up with the cost of living. There are about 40,000 permanent disability pensioners who face this reduction¹⁵ although we do have the data for the number whose benefits are reduced each year.

For those who wish to understand this issue in more detail, changes to Ontario's workers' compensation system have been made on a 'going forward' basis. Injuries after the new system comes into force are dealt with under the new system, but claims existing under the prior systems continue to be governed by the old legislation. As time moves on, various legislative tweaks continue to be made to the old system because many injured workers depend on it. Injured workers continue to organize and lobby for changes to the system that applies to them.

People with disabilities face major barriers in finding employment in Ontario. If they are fortunate enough to get a job, they are often the last hired and the first to be 'let go' when economic challenges arise. Older adults face similar barriers when seeking employment. By the mid 1980's, the Workers' Compensation Board and the Ontario government acknowledged the often insurmountable obstacles faced by older injured workers with a permanent disability who were trying to find new employment. They developed a supplement, the "older workers' supplement," which was an amount equal to the Federal Old Age Security payment. The intent was that it would be a bridge until age 65 when the injured workers would begin to receive the OAS benefit. This is an early example of what the Law Foundation of Ontario later described for other programs as the constructive use of age based criteria. "[A]ge based criteria can be very effective in addressing circumstances where older adults do face unique barriers or difficulties ... older adults may face significant age-related barriers in finding employment ..."¹⁶

The older workers' supplement was an improvement, but many of these pensioners had been injured in the 1950's and '60's before the massive period of inflation that began in the mid 1960's. Workers compensation benefits were not adjusted for inflation at all before 1974. By that time, a pension based on a fraction of a 1960 wage was worth very little. There were ad hoc adjustments made between 1974 and 1985 when the legislation was amended to automatically adjust benefits according to the consumer price index. That did not last long. The next recession arrived in the early 1990's and the government got cold feet and retreated from full cost of living adjustments. This was particularly tough for the older injured workers whose permanent disability pensions had already been ravaged by inflation before the advent of inflation adjustment in 1985. There were

¹⁵ There were 40,220 injured workers receiving the s.147(14) supplement in 2009: Page 31, Statistical Supplement to the 2009 Annual Report, Workplace Safety and Insurance Board.

¹⁶ Page 14, The Law as it Affects Older Adults: Moving the Project Forward, Report on the Preliminary Consultation, December 2008.

about 150,000 injured workers on pre-1990 pensions so an individualized inflation 'catch-up' was administratively impossible. Instead, the government established an additional \$200 a month supplement in 1994 for those who received the older workers' supplement but were still undercompensated. This \$200 supplement would continue after age 65, whereas the older workers' supplement ceased when the Old Age Security benefit began. This was a last minute amendment to a controversial bill (Bill 165, 1994) that eliminated automatic full cost of living adjustments for most injured workers and the latter feature was the main focus of the public debate.

However, a ceiling on the benefits payable soon began to impact injured workers over 65 years of age. Basically, the total of the pension, the \$200 supplement, and the injured worker's OAS benefit could not exceed the pre-injury earnings. It is an anomalous concept in workers' compensation to reduce compensation for the work injury because of the OAS benefit which has nothing to do with the work injury or any disability.

Additional amount

147.(14)The Board shall pay an additional \$200 per month to a worker who is receiving an amount awarded for permanent partial disability or who received a lump sum commuted from such an amount if the worker is entitled to a supplement under subsection (4) or would be but for subsection (7). (S.O. 1994, c. 24, eff. Jan. 1/95)

...

Reduction

147.(17)The payment under subsection (14), for a worker with a pre-1989 injury, shall be reduced, if necessary, so that the sum of the following amounts does not exceed 90 per cent of the worker's pre-injury net average earnings: (S.O. 1994, c. 24, eff. Jan. 1/95)

...

4. Any pension for old age security that the worker is eligible for under section 3 of the Old Age Security Act (Canada). (S.O. 1994, c. 24, eff. Jan. 1/95) ¹⁷

Since many of these injured workers' pensions are based on low wages from the 50's, 60's and 70's and were not fully adjusted for inflation, they have reached the stage where their pension plus the \$200 plus their OAS benefit has reached the ceiling based on their old wages. Every year they receive a letter from the Federal government proudly announcing the adjustment of the OAS for inflation and then they receive a letter from the WSIB announcing that their workers' compensation benefits are being reduced by the amount that the OAS went up. To many injured workers, this appears to be a case of the WSIB 'stealing' the cost of living adjustment that the Federal government has decided to give old age pensioners.

¹⁷ Workers' Compensation Act, Chapter W. 11. (pre 1990 Act as amended)

6. No Compensation for Loss of Contributions to the Canada Pension Plan

This is a longstanding area of age-related discrimination of a different and admittedly more complex nature. The Canada Pension Plan is an earnings based social program that provides benefits when a contributor to the plan retires or becomes disabled.

Workers contribute a part of their gross wages to the Canada Pension Plan. In the future, they have entitlements to disability and retirement benefits based on their contributions and lifetime income. When you are unable to work due to a workplace injury or illness, all of this disappears without compensation.

Injured workers' compensation benefits are equal to 85% of their net wages. The WSIB uses the gross wage and deducts an amount equal to the standard deductions including an amount equal to CPP contributions. So the impact on injured workers is the same as if they were still paying their contribution to the CPP. It would make sense that, while receiving those benefits during the period of inability to work, the employer and WSIB would continue contributions to the CPP to ensure there is no accident related loss of entitlement.

However, there is no mechanism for the employer or WSIB to continue making contributions on behalf of the injured worker or otherwise prevent the loss of entitlement under the CPP for lack of contributions. The gap in contributions to the CPP caused by a workplace injury often results in the loss of qualification for the CPP Disability Benefit and substantially reduced retirement benefits.

Injuries frequently result in deteriorating or episodic disabilities. Injured workers may cycle between working for a period and then be off work due to a recurrence or aggravation. They may be off and on workers compensation for treatment or rehabilitation for a period of years before it is clear they can no longer continue in gainful employment. At that point in time they may meet the definition of "disabled" for the Canada Pension Plan disability benefit. However, they no longer have sufficient recent contributions to be able to claim the benefit.¹⁸ Years later, when these injured workers reach age 60 and can apply for the retirement pension, they discover that they will receive a substantially reduced pension amount because the years of "0" earnings after their injury have brought their average lifetime income down.¹⁹

The Canada Pension Plan was established in 1966 to provide benefits in the event of disability and retirement. Unfortunately, entitlement may be lost or reduced as a result of a work-related injury or disease and there has never been any compensation for injured workers for the loss of ability to contribute to the Canada Pension Plan or for the related loss of CPP disability and retirement benefits. The WSIB loss of retirement income

¹⁸ You must be employed and have a minimum level of earnings to make contributions to the CPP. You must also have contributed to the CPP in four (three in some cases) of the last six years at or above the minimum level of earnings to be eligible for the disability benefit.

¹⁹ The CPP retirement pension is based on age at the time of application and how much, and for how long, a person contributed to the CPP from earnings over their adult life.

benefit was cut in half in 1998 and the benefit amounts to a pittance compared to the CPP retirement income that is actually lost due to the lack of contributions.

The Human Rights Code Amendments

When the government vowed to eliminate mandatory retirement at age 65, it was clear that the Workplace Safety and Insurance Act required revision. The Ontario Human Rights Commission, the Canadian Association of Retired Persons, the injured worker advocates all argued that the age based limitations in workers compensation are offensive to human dignity. However, rather than remove the age-based limits on benefits, the Ontario government chose to exclude the workers' compensation system from the changes to the Human Rights Code. The *Workplace Safety and Insurance Act* states:

Human Rights Code

2.1 (1) A provision of this Act or the regulations under it, or a decision or policy made under this Act or the regulations under it, that requires or authorizes a distinction because of age applies despite sections 1 and 5 of the Human Rights Code. 2005, c. 29, s. 7.²⁰

It appears that the changes needed to bring the workers' compensation system into alignment with the elimination of mandatory retirement were just 'too much' for the government of the day to deal with. Injured workers' organizations were calling for a return to the pre-1990 permanent disability pension system. Employer organizations complained that removing the age 65 limit on benefits would threaten the financial stability of the system. The Government's response was basically to throw up its hands and do nothing. The Minister of Labour noted that the workers' compensation system is a complex program and "to preserve the integrity of this insurance plan ... age based provisions under the WSIA would remain."²¹

Challenges Using the Canadian Charter of Rights

When draft legislation for the wage loss system was introduced as Bill 162 in 1988, injured worker organizations immediately identified the age based termination of benefits as unlikely to survive a challenge under the equality provisions of the Charter of Rights. However, the impact was obscured until 1998 by the provision to pay temporary disability benefits until an injured worker reached maximum medical recovery. Temporary disability benefits were the same amount as wage loss benefits but there was no age limit on the payment of temporary disability benefits. Seriously injured older workers could receive full benefits throughout an extended period of treatment and recovery. Benefits were not cut-off like clockwork with letters telling workers they could

²⁰ Section 2.1 of the Workplace Safety and Insurance Act, 1997, S.O. 1997, CHAPTER 16, Schedule A

²¹ Statement by the Hon. Steve Peters on second reading of Bill 211, An Act to amend the Human Rights Code and certain other Acts to end mandatory retirement; October 19, 2005.

not receive any more compensation due to their age. Instead, when the time came, they would be informed that they had reached maximum medical recovery and would be assessed for a non-economic loss award, often unaware that they were not eligible for wage loss compensation due to their age.

In 1998, the legislation was amended and the category of temporary disability benefits was eliminated. All compensation payments were made under the wage loss provisions, which were age limited. Older injured workers began to be cut-off like clockwork with letters telling workers they could not receive any more compensation due to their age. A few cases challenging the age-based limitations under the Charter of Rights are working their way through the appeals system. In one such case being brought (ironically) by the Ministry of Labour's Office of the Worker adviser, extensive use was made of an expert report by Prof. Thomas Klassen who provided an extensive review of the social policy and demographic changes relating to labour force participation of older workers.²²

The Charter of Rights provides a long road to the Supreme Court of Canada. Getting through the workers' compensation appeals system takes at least a couple of years, the Ontario superior courts will take another few years, and then another year or two to get permission to appeal from the Supreme Court of Canada and then get the matter to a hearing. Let us hope that this is not the only recourse for someone in Ontario who is permanently disabled, over age 65, unable to receive workers compensation and unable to continuing working to support themselves.

What is to be done?

In his recent review of this subject for previously mentioned case before the Ontario Workplace Safety and Insurance Appeals Tribunal, Prof. Thomas Klassen concludes:

The general trend in all jurisdictions is to avoid making arbitrary distinctions between workers based on age, or indeed other characteristics not related to workplace performance. Rather, there exists a broad public policy consensus that workers should be encouraged and allowed to work longer if they are able, and wish, to do so; and that workers should be granted the necessary legislative protection to do so."²³

Unfortunately, the core elements of the old 'mandatory retirement at age 65' concept remain embedded in our workers' compensation system. Surely there is some social consensus that it is an unacceptable contradiction when a public program for the protection of workers is in conflict with our public policy towards labour force participation by older workers. Prof. Klassen notes that studies show that Canadians

²² Expert Report to the Ontario Workplace Safety and Insurance Appeals Tribunal, Feb. 23, 2009, Prof. Thomas R. Klassen, School of Public Policy and Administration and Department of Political Science, York University.

²³ Ibid, Page 37.

increasingly wish to work longer. He refers to a December 2008 survey that found that 48% of employed Canadians believe they will work beyond age 65.²⁴ Solutions must and can be found to eliminate the age based distinctions in workers' compensation benefits.

However, the government has shown no interest in returning to the unfinished business that mandatory retirement left behind in our workers' compensation system. Legislative changes were made to the Workplace Safety and Insurance Act in 2007 but there was no mention of resolving the age-based discrimination.²⁵ In October 2010, the Ontario government announced proposed legislation on the issue of funding the system, but there has been no mention of resolving the age discrimination issues.²⁶

Perhaps with a little help from human rights advocates and the elder law community, the injured worker community will convince the legislators to eliminate these last vestiges of mandatory retirement and age based discrimination from our workers' compensation system.

The solutions, for the most part, are neither complex nor expensive and do not threaten the integrity of our workers' compensation system:

1. Duration of Wage Loss Benefits

The current termination at age 65 or 2 years after the injury for those injured at 63 years or older is completely arbitrary. Injured worker organizations argue that the wage loss system has been a failure in many respects and benefits should continue for life as they did before 1990. While that may require a larger policy debate, in the meantime we could adopt the British Columbia solution. A note on the website for their workers' compensation board, Worksafe B.C., proudly proclaims:

Workers' compensation coverage extends to those employed past age 65. Universal coverage is a basic principle of workers' compensation law in B.C., and includes those who work past the standard retirement age of 65.²⁷

Although their legislation contains age 63 and 65 based limitations similar to those found in the Ontario Act, there is also an opportunity for injured workers to present their individual circumstances.²⁸ Where the Board is satisfied that the worker would have retired later than 65 years of age, or more than 2 years after the injury, the legislation allows the Board to pay workers' compensation benefits up to the date the worker would retire. The British Columbia legislation states:

²⁴ Ibid, page 32.

²⁵ The amendments dealt with cost of living adjustments and issues related to deterioration of permanent impairments: Bill 187, An Act respecting Budget measures, interim appropriations and other matters, Third Reading Thursday May 16, 2007.

²⁶ On September 30, 2010, the Minister of Labour announced a review of WSIB funding that would be implemented with proposed legislation but no mention of other amendments. See <http://www.wsib.on.ca>.

²⁷ See: http://www.worksafebc.com/insurance/insurance_faqs/default.asp

²⁸ Section 23.1, Workers Compensation Act, [RSBC 1996] CHAPTER 492

Period of payment for total or partial disability

23.1 Compensation payable under section 22 (1), 23 (1) or (3), 29 (1) or 30 (1) may be paid to a worker, only

(a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:

(i) the date the worker reaches 65 years of age;

(ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and

(b) if the worker is 63 years of age or older on the date of the injury, until the later of the following:

(i) 2 years after the date of the injury;

(ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

While one can anticipate difficulties with the evidentiary process, it is certainly simple and preferable to doing nothing. This has not undermined the financial stability of the British Columbia workers' compensation system.

2. Compensation for Loss of Retirement Income

The provision that the WSIB is required to set aside an amount equal to 5% of wage loss benefits for loss of retirement income for workers who become injured on the job before age 64 but nothing for those injured at age 64 or later is simply punitive and should be repealed. Even in a society with mandatory retirement it made no sense to short-change the workers' compensation benefits of those older workers.

Ontario's workers' compensation system is wholly funded by assessments collected from employers; there are no government funds involved. Employers pay a certain percentage of their payroll based on the type of industry; there is no adjustment for the age of the workers. So it is not only the injured workers who are treated unfairly by this age based discrimination. Employers are getting short changed too, paying the same rate when they get much less compensation for their older workers who become injured.

The remedy is a simple deletion that does not undermine the legislative scheme:

Payments for loss of retirement income

45. (1) This section applies with respect to a worker who is receiving payments under the insurance plan for loss of earnings. [Delete:] ~~However, it does not apply with respect to a worker who was 64 years of age or older on the date of the injury.~~ 1997, c. 16, Sched. A, s. 45 (1).²⁹

²⁹ Suggested amendment to Section 45(1) of the Workplace Safety and Insurance Act, 1997, S.O. 1997, CHAPTER 16, Schedule A

The result will be that all injured workers receiving compensation for lost wages will have funds set aside for loss of retirement income, regardless of age.

3. Duration of the Re-employment Obligation

When the re-employment obligation was created in 1990, it could not apply beyond age 65 because employers were permitted by law to terminate workers when they reached age 65. When mandatory retirement was abolished, there was no reason for the re-employment provisions not to apply equally to all workers regardless of age. This can be achieved simply by deleting s.41(7)(c) regarding the duration of the re-employment obligation:

Duration of obligation

(7) The employer is obligated under this section until the earliest of,

(a) the second anniversary of the date of injury;

(b) one year after the worker is medically able to perform the essential duties of his or her pre-injury employment; and

[Delete:]

(c) the date on which the worker reaches 65 years of age. 1997, c. 16, Sched. A, s. 41 (7); 2000, c. 26, Sched. I, s. 1 (3).³⁰

4. Compensation for Non-Economic Loss

The argument that awards for non-economic loss should be less for older workers undermines their human dignity and demeans the value of the life of older people. It is no more compelling than its opposite, that awards should be less for younger workers with same injury. There is no reason to vary the compensation for non-economic loss on the basis of the age of the injured worker and it is simpler to use the same amount regardless of age. This too can be accomplished with a simple deletion:

Compensation for non-economic loss

46. (1) If a worker's injury results in permanent impairment, the worker is entitled to compensation under this section for his or her non-economic loss. 1997, c. 16, Sched. A, s. 46 (1).

Amount

(2) The amount of the compensation is calculated by multiplying the percentage of the worker's permanent impairment from the injury (as determined by the Board) and,

³⁰ Suggested amendment to Section 41(7) of the Workplace Safety and Insurance Act, 1997, S.O. 1997, CHAPTER 16, Schedule A

(a) \$51,535.37 [Delete:] plus \$1,145.63 for each year by which the worker's age at the time of the injury was less than 45; or

(b) \$51,535.37 less \$1,145.63 for each year by which the worker's age at the time of the injury was greater than 45.

However, the maximum amount to be multiplied by the percentage of the worker's impairment is \$74,439.52 and the minimum amount is \$28,631.22. 1997, c. 16, Sched. A, s. 46 (2).³¹

Of course, as an advocate for injured workers, I would argue that the base lump sum amount should be the current maximum and not the median of \$51,000.

5. Pension Supplements for Older Workers

The Old Age Security benefit is unrelated to workers' compensation or disability and should not be used to offset workers' compensation benefits. The reference can simply be deleted from s. 147(17) para. 4 of the legislation.³²

6. Compensation for Loss of Entitlement Under the Canada Pension Plan

Unfortunately, there are no simple solutions for this problem. The solution will require amendments to both workers' compensation legislation and the Canada Pension Plan. Amendments to the CPP require approval of the federal government and provincial consent from two thirds of the provinces with two thirds of the Canadian population. The CPP has been amended many times and that gives reason to hope this injustice can be remedied. However, it will not be addressed until we develop a national understanding of this problem.

Conclusion

More people are working past age 65 and so there will be more injuries among this age group. However we are certainly looking at a relatively small number of injured older workers. The number of lost time claims by workers injured at age 65 and older has increased steadily from 398 in 2000 to 881 in 2009. That compares to about 65,000 lost time claims for all ages in 2009.³³ Considerations of justice, fairness and respect for dignity should prevail over unfounded fears of financial crisis for the WSIB.

Our workers' compensation system is a surrogate for our court system and must be governed by the same principles of justice and fairness. But we have a long way to go before it is freed from the vestiges of mandatory retirement and fair to the older workers

³¹ Suggested amendment to Section 46(2) of the Workplace Safety and Insurance Act, 1997, S.O. 1997, CHAPTER 16, Schedule A

³² See page 9, above.

³³ Page 10, Statistical Supplement to the 2009 Annual Report, Workplace Safety and Insurance Board.

in the labour force. We should respect Meredith's recommendation to the government to legislate a system that provides "full justice" to the worker and "not the least he can be put off with."

John McKinnon,
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October, 2010

Age-Based Discrimination in Ontario's Workers' Compensation Laws

Human rights legislation to eliminate mandatory retirement in 2006 exempted the workers' compensation legislation.

1. Compensation for lost wages ends at age 65, or after 2 years for injuries after age 63.
2. Workers injured after age 64 are not eligible for compensation for loss of retirement income.
3. The obligation to re-employ an injured worker ceases when a worker reaches age 65.
4. Compensation for non-economic loss for a worker aged 65 is less than half of the amount paid for the same injury to a worker aged 25 years.
5. Compensation is reduced annually by an amount equal to the increase in their Old Age Security benefits for workers with permanent disability pension supplements (pre - 1990 injuries).
6. Since the inception of the CPP there has been no workers' compensation for the loss of contributions and entitlement under the Plan

Injured workers affected by these limits do not have the energy, time and resources to take a legislative challenge to the Supreme Court of Canada. Community support for legislative reform is needed to remove these vestiges of age discrimination from our workers' compensation system.