Injured Workers' History Project
Bulletin #4

DEEMING: IT'S JUST WRONG!

"To limit the period during which the compensation is to be paid regardless of the duration of the liability, as is done by the laws of some countries, is, in my opinion, not only inconsistent with the principle upon which a true compensation law is based, but unjust to the injured workman for the reason that if the disability continues beyond the prescribed period he will be left with his impaired earning power or, if he is totally disabled, without any earning power at a time when his need of receiving compensation will presumably be greater than at the time he was injured, to become a burden on his relatives or friends or upon the community."

Sir William Meredith, *Final Report On 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*, Toronto 1913.

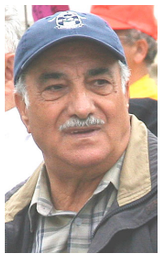
DEEMING?

Imagine the unimaginable. You are seriously injured on the job. After receiving payments from the Workers' Compensation Board (now the Safety and Insurance Board -WSIB) for a period of time, you are informed that you that you must look for "suitable " work.

But, what if your injury has left you with a permanent disability that prevents you from returning to your former job? And, what if the "suitable job" the WSIB says you can does not really exist in the labour market in your community? Or, what if no one will hire you at this point in your life with your disability?

All too often, none of these 'what ifs' matter to the WSIB. Rather, what matter is lowering the costs of payments going to injured workers.

Enter deeming. In theory, deeming is based on the idea that workers who were underemployed or unemployed due to a compensable injury or illness needed greater protection. In practice, this idea has been turned on its head. If you are unable to find a suitable job, the WSIB will deem you to have a job. The WSIB then has the power to reduce or eliminate your benefits by deeming you to be receiving the wages from a job that you do not have and have no real hope of getting.



What you are now confronted with is the unimaginable. You have a phantom job with phantom wages. What is real, though, is the grinding poverty and emotional hardship you must now endure. So, too, are your injury or illness.

MODERN WORKMEN'S COMPENSATION

Is this the situation desired by those who fashioned Ontario's first workers' compensation laws?

Late 19th century laws with workers' compensation in their titles were designed to protect employers in the event they were sued by their injured employees. The protection such "common laws" offered to employers was virtually foolproof.

A dramatic increase in the number of workplace accidents and consequent serious injury in the early 1900s convinced workers, unions, employers and the government that the compensations laws needed to be modernized.

Workers and unions who had watched their co-workers, family members and friends gets injured and left to lives filled with pain and destitution, wanted a system that provided permanent compensation for for permanent injury.

Employers, witnessing working class juries return verdicts - and ever-larger - financial settlements in favour of injured employees, wanted protection from being sued, built-in incentives for injured workers to return to work, and, a cheap form of insurance through collective liability.

The ruling Conservative Government wanted a solution to the gathering worker and political unrest associated with workplace accidents and conflicts between labour and capital more generally.

ROYAL COMMISSION

Somewhat surprisingly, the demands of workers and unions found strong support in the person of Sir William Meredith. A one-time leader of the provincial Conservative Party, Meredith was an Ontario Supreme Court judge when he was asked in 1910 to head a Royal Commission into workmen's compensation.

Meredith took the task before him seriously – traveling to various Canadian provinces, American states, the United Kingdom and countries in Europe collecting information on their workmen's compensation systems. In Ontario, he held hearings that ultimately filled over 2,000 pages of testimony.

While we do not know what Meredith thought or felt before his inquiry, we do know what he believed at its conclusion. In his Final Report, he wrote:

∆ that the existing law inflicted injustice on injured workers

∆ the workers' compensation system should be paid for only by employers – workers paid enough with their injuries

∆ that compensation given to injured workers for a permanent disability should be given to them for life

∆ that the system should not be adversarial and employers should not be able to chal lenge the decisions of the WCB

OVERCOMPENSATION?

By the 1970s some improvements had been made to the workers' compensation system and Ontario workers had access to unemployment insurance, free hospital care, private and government pensions, and, as a last resort, social assistance.

Once again, though, increasing numbers of workers were being injured and permanently disabled due to workplace accidents. Employers and WCB officials raised the spectre of rising costs undermining the viability of the system. They suggested that costs were rising in no small part because many injured workers were being over-compensated. They had jobs and they had compensation pensions.

Their solution was to take a page from William Shakespeare's Hamlet who began his famous soliloquy with the question "To be or not to be?" In their hands the question became: "To deem or not to deem?"

Deeming was already in place in Saskatchewan and Quebec and injured workers were highly critical of this proposal. First, they wondered, given the past difficulties between the Ontario WCB and injured workers regarding the nature and extent of permanent disability, how would WCB officials determine what was, and what was not, an appropriate job? Second, what if no such job actually existed? Would they still be deemed to have that job?

Bill 162, passed by the Liberal Government in 1988 formally introduced deeming into Ontario. At the time, Liberal Ministers stated that deeming would be implemented only when "suitable and available" employment could be found.

Defeated in the 1990 election, the Liberals did not have to opportunity to match word and deed. For its part, the new Bob Rae NDP government failed to follow through on its written promise to rescind the deeming provision. It was, thus, still in place in 1997 when the Conservative government of Mike Harris revamped the workers compensation system with the passage of Bill 99.

TO DEEM OR NOT TO DEEM?

This is no longer even a question. Bill 99 deleted the word "available" employment. Only "suitable" remains. Legal clinics and unions who handle the claims and appeals of injured workers have witnessed a steady rise in the devastating effects of deeming. Working in close association with private sector Labour Market Re-entry training programs that all too often fail to provide injured workers with generic skills and timely knowledge, compensation board adjudicators are not only deeming injured workers into phantom jobs, they are deeming wage increases for workers in these non-existent jobs.

The results are crystal clear: Imaginary jobs + Imaginary wages = Poverty, Isolation, Deteriorating Physical & Emotional Health.

Deeming is now the cornerstone of Ontario's adversarial workers' compensation system. It is an employers' model highly reminiscent of the one they placed before Sir William Meredith. It is based on an assumption that injured workers do not want to work - an assumption that ignores the fact these women and men were working, often in low-wage jobs, when they got injured. It is, finally, an assumption that conveniently ignores that most employers do not want to hire injured workers.

IT'S JUST WRONG!

Before the 1915 Workmen's Compensation Act injured workers had no assured access to compensation. Along with their families they were left to their own devices and the compassion of their communities. Workers' compensation in Ontario has come full circle.

One cannot help but think that as Sir William Meredith believed compensation should be paid for as long as the injured worker lived, he would consider deeming to be unjust. He would not be alone. As a young child innocently stated upon finally understanding how deeming worked: "It's just wrong."

****

The IWHP is a group of injured workers, advocates and researchers who are uncovering and writing the history of injured workers in Ontario. You can contact the IWHP at: The Bancroft Institute for Studies in Workers' Compensation and Workplace Health and Safety (416-461-2411; Robert Storey, Labour Studies & Sociology, McMaster University, 905-525-9140, Ext. 24693.