Injured Workers' History Project
Bulletin #5

"Back To The Future"

"A just compensation law based upon a division between the employer and the workman of the loss occasioned by industrial accidents ought to provide that the compensation should continue to be paid as long as the disability caused by the accident lasts, and the amount of compensation should have relation to the earning power of the injured workman."

Sir William Meredith, Final Report, *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 to how far such laws are found to work satisfactorily (p.*15)

By any other name

The Ontario government recently passed a budget containing amendments to the Workplace Safety and Insurance Act (WSIA). One of the most anticipated changes concerned the controversial issue of deeming. After listening to the complaints of injured workers regarding what they considered to be the arbitrary and unjust nature of this process, the Minister of Labour, the Honourable Steve Peters, wrote in a letter to Bright Lights Injured Workers that the proposed amendments to the WSIA would "help injured workers retain benefits when work they could perform after rehabilitation is not available (eliminate deeming)."

In response to these amendments, the Workplace Safety and Insurance Board (WSIB) issued policy guidelines that not only fail to eliminate deeming, but further entrench it with the concept of "underemployment." Under these provisions, not only can injured workers be deemed into jobs that do not exist, but even if they somehow manage to get a job, they can be punished for 'choosing' to work for wages the WSIB says are too low.

Injured workers, especially those who have been deemed, are disappointed to see yet another bright promise lose its luster.

Injured workers remember

In Ontario, forms of deeming have gone hand-in-hand with dual award systems. An ad hoc form of a deeming/ dual award system appeared in 1974 when changes to the Workmen's Compensation Act (WCA) allowed for supplements to injured workers' pensions in situations where the "impairment of working capacities was significantly greater than usual for the nature and degree of injury." This was, in effect, a dual award system.

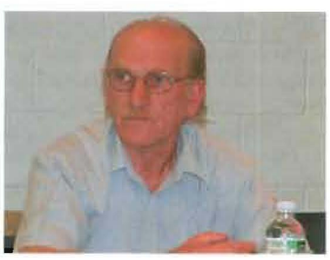
In practice, it became clear that this was an undefined and highly contentious concept. What degree of impairment constituted "significantly greater than usual?" Who was to make the judgment? The injured workers' doctor? The WCB doctor? Further, what was given could just as readily be cut back or taken away if it was determined by the WCB that the worker's condition had improved. This was, in effect, a form of deeming.

By the time Paul Weiler was appointed to investigate the workers' compensation system in 1980 pension supplements were a source of high tension. Weiler wrote that the issue of permanent injury was the source of what he termed "incipient class conflict" between injured workers and employers and the WCB. He argued that change was needed to this antiquated and unfair system, not because the WCB was being "insensitive" towards injured workers, as injured workers' organizations claimed, but rather because the system was "over-compensating" some workers, thus taking money from other injured workers who were being "under-compensated" as a result. His solution was a wage loss system that included deeming. It was a solution that dismissed one of Meredith's basic principles: Compensation as long as the disability lasts.

A Sentence of perpetual probation

Dual award systems statutorily underscored by deeming were especially worrisome to injured workers. They had heard about the troubling experiences of injured workers in other Provinces where such systems were in place. Terrence Ison, a respected law professor at York University, only added to their concerns when he wrote that a loss of earnings system was a civil rights issue in that "the position of a worker, including his medical condition, his work, and his work opportunities would be the subject of continuing investigation by the Board. It would be almost like a sentence of perpetual probation."

Injured workers defeated a proposed dual award system complete with deeming in the mid 1980s. However, the spectre of deeming re-appeared in the late 1980s with the introduction of Bill 162. Formulated by the Liberal Government under Premier David Peterson, Bill 162 proposed to do away with lifetime pensions in favour of the dual award system of Non Economic Loss (NEL) and Future Economic Loss (FEL). NEL was a one-time payment for the pain and suffering associated with injury. FEL was to be a wage loss system that, according to government officials, would result in injured workers receiving better compensation than with the lifetime pension system. There was a provision for deeming but the Minister of Labour, the Honourable Greg Sorbara, assured injured workers that "the purpose of this amendment is to ensure that the decisions concerning the future loss of earnings of injured workers are based on real-life situations of those workers in the real-life contexts that confront them following a workplace injury." Bill 162 was passed into law in 1989 and took effect January 1, 1990.



All did not seem to be lost, however. After Bill 162 became law, Bob Rae, then leader of the provincial NDP, wrote in a letter to Injured Workers' Consultants that, if elected, his party "would move swiftly to eliminate deeming."

To deem or not to deem?

Once in power, Bob Rae's NDP did not live up to its promise to eliminate deeming. Pensions to workers injured before 1990 went up $200.00 a month, but deeming remained in place and the annual full indexing of benefits was reduced for the first time since 1986.

This decision to continue with deeming provoked further criticism in the form of a Liberal Party document entitled "Back to the Future." The product of a task force headed by Liberal MPP, Steve Mahoney, the document stated that "Deeming places the WCB in the position of determining what a worker with a disability, who is unable to return to his/her pre-accident employment may potentially earn in another job up to successful completion of vocational rehabilitation... This method of assessment often serves as a disincentive to rehabilitation and places severe limitations on the development and re-employment potential of an injured worker."

Injured workers had helped the Liberal task force reach these conclusions. According to the document, "[t]hroughout the Outreach consultations, injured workers and their advocates presented a most compelling case against the practice of deeming. It was felt that the subjective nature of job-readiness produces far too many inequities. Injured workers and their advocates referred to deeming as 'phantom job placements.'"

Addressing the question of what to do, the authors of the task force report recommended that "[t]he concept of deeming be replaced with a comprehensive STEP Program ... with the ultimate goal being re-employment of the injured worker."

Deeming was not replaced. The 1995 election brought the Conservative Party to power and yet another document - "New Directions For Workers' Compensation Reform: A Discussion Paper" - took centre stage in the now ongoing deeming debate. Under the signature of Cam Jackson, Minister Without Portfolio Responsible for Workers' Compensation Reform," the document stated that "in any wage loss system... the WCB must determine post-injury wages based on what the worker is likely to be able to earn in suitable and available employment. Although in these cases the WCB is required to take into account the individual worker's personal, medical and vocational characteristics in estimating the worker's post-injury earning capacity, a concern has been expressed that too many workers are having jobs imputed to them that may not exist in the labour market."

Alas, poor deeming, we know him well

This concern did not find positive expression in Bill 99. Indeed, not only did Bill 99 fail to eliminate deeming, it increased deeming by deleting the requirement that the job used to calculate loss of earnings be "available." The result has been that over the past decade an ever-growing number of injured workers have come to experience, first hand, that WSIB adjudicators and senior officials have determined "suitable" employment to include jobs that do not exist. Phantom jobs with phantom wages and, lately, compensation for loss of earnings has been further reduced by phantom (deemed) wage increases.

Half Measures

A strong thread ties together three decades of broken promises and unjust and heartless policies. From the moment dual award systems became a part of Ontario's workers' compensation system, arbitrary decision making and deeming have been used by the WCB/WSIB to respond to employer's requests to reduce the costs of the compensation system.

If it was the intent of the present Liberal government to eliminate deeming with Bill 187, then questions need to be asked about the relationship between governments and the WCB/WSIB.

Is the WCB/WSIB bound by legislation? Historically, this is what WCB/WSIB officials have told injured workers when they complained about policies and benefit levels that reduced them to poverty. Now that the law has been changed, the WSIB is saying that the law does not matter.

Did the MInister of Labour neglect to clearly communicate the intention of the Ontario Legislature to the WSIB? This would not seem to be the case as the letter written by the Honourable Steve Peters to Bright Lights Injured Workers was copied to Steve Mahoney, Chair of the WSIB.

Is it the case that the wording of the deeming amendment in Bill 187 leaves too much room for interpretation by a workers' compensation board that historically has favoured powerful employers over workers made vulnerable through injury?

In outlining his proposal for a modern workmen's compensation system, Sir William Meredith wrote that he believed "half measures were to be avoided." Although speaking of the changes needed to the system of employer's liability operating in his time, one can see Meredith's following words as applying to the present moment:

"That the existing law inflicts injustice on the workingman is admitted by all. From that injustice he has long suffered, and it would, in my judgment, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but what is the least he can be put off with..."

Back to the future. Eliminate deeming.

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); email storeyr@mcmaster.ca)