Injured Workers' Consultants
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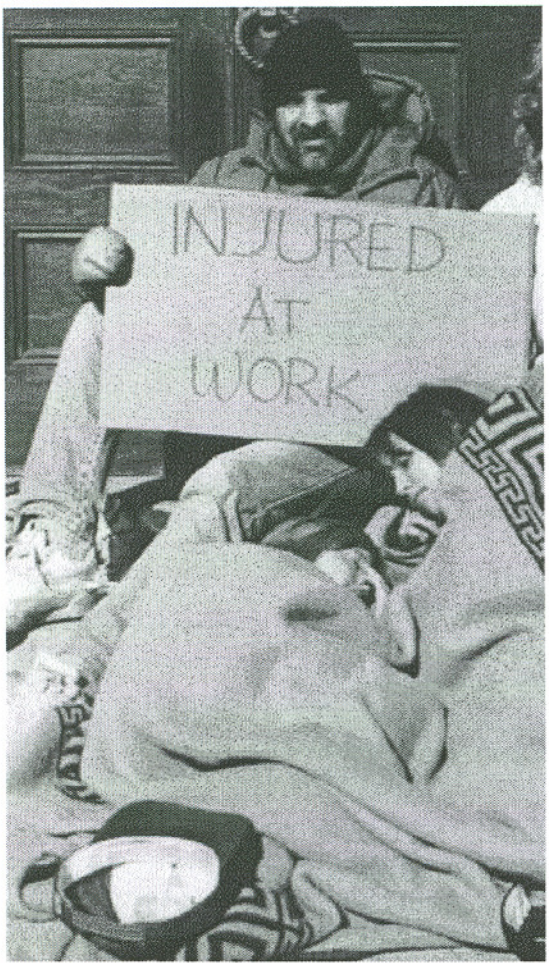
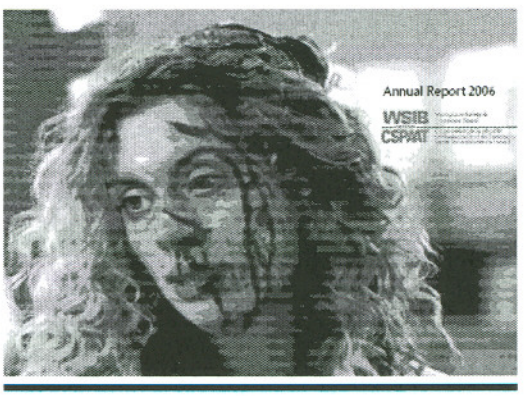
**Submission to the Workplace Safety and Insurance Board
on Bill 187 Interim Policies**



DEEMING ADDS INSULT TO INJURY



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~ A Community Legal Aid Clinic ~

Deeming Adds Insult to Injury

Submission to the WSIB
Regarding July 2007 Bill 187 Policies

The purpose of the compensation system is to provide a fairly simple, non-adversarial, administrative scheme to protect both injured workers and employers from negative financial consequences of workplace accidents and illness: most critically, poverty and loss of business. Workers protection is in the form of benefits, speedily rendered, for as long as the disability lasts; employer's protections is that they cannot be sued by the injured worker or his/her survivors and can thus readily pass the cost of the system on to their employees and customers.

The Wage Loss System

The current workers compensation legislation establishes a wage loss system: the primary compensation benefit is to compensate for loss of earnings resulting from a work-related injury or disease. The benefit is based on the difference between the pre accident wages and the post-accident wages.

Professor Paul Weiler, the author of the wage-loss system for Ontario and the concept of "deeming," was clear that wage loss was to be based on actual wage loss and that *deeming* was to be done based on actual job offers. He says in Reshaping Workers' Compensation in Ontario:

> *The Board should compensate such a claimant for the actual wages lost as a result of his inability to work because of his physical impairment. More precisely, the Board should pay this person 90% of the difference between his net disposable earnings before the injury (adjusted to take account of inflation) and his net disposable income afterwards.*
>
> *The basic assumption of this proposal is quite simple. The purpose of this facet of workers' compensation is to replace income which has been lost. There is no necessary correlation between a particular form of physical impairment and its impact upon the worker's earnings. The latter depends on a variety of features in the worker's situation which will influence the manner in which the physical impairment generates an occupational disability. A just compensation system must take account of the individual's age, job, education, skills, and the geographic and economic environment in which he lives and works.*
>
> . . .
>
> *The other concern, the economic one, is more substantial. What would be the effect of an "actual wage" loss benefit on the incentive of the disabled employee to return to work?*
>
> . . .

> *There is a simple and direct response to this problem. The Workers' Compensation Board should be empowered to determine whether the disabled worker is capable of doing suitable work, whether that work is available to him, and whether he had refused to take such a job. If the response to these questions is positive, the Board will* deem *that the worker had earned the income payable in this job for the purposes of calculating the actual wage loss from his injury. Such a judgement by the Board would require a tangible indication that suitable work was in fact available to this worker, presumably through evidence that the employer, the Board, or some other agency had made a specific job offer to him.*
>
> . . .
>
> Reshaping Workers' Compensation in Ontario, Ontario Ministry of Labour, 1980 pp51 - 67.

When the wage-loss system was brought into law through Bill 162, the Bill was amended to provide clear direction and greater certainty through a regulation to be used in developing the meaning of the term "suitable and available." The Minister of Labour said:

> "*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*"
> [Remarks by the Hon. Gregory Sorbara to the Standing Committee on Resource Development. Clause by Clause, May 25th, 1989 3:30 p.m.]

The Deeming Problem:

Despite the principles of the wage loss system articulated by Professor Weiler and the intention of the legislature as expressed by the Minister of Labour, the practice of deeming was unrestricted. Most wage loss awards were not based on the real life situations of the workers. Deeming an injured worker to have an income that he or she does not have was the rule, not the exception. Deeming was not restricted to situations where a suitable job had been offered to the injured worker and declined.

Consider the case example of Ms. A, an injured worker who, with the Bright Lights group, lobbied for years to draw attention to problems of "deeming". She illustrated her problem to Glen Wright, Jill Hutcheon, Steve Mahoney and Labour Ministers Bentley and Peters. Her case is rather typical of the way "deeming" works.

A had a high school education and worked in the social service field. In her forties, she injured her right dominant hand and developed a permanent injury. At the time of her accident, she was a single mother earning $14.50 an hour. She received approximately 4 months retraining as a customer service representative. She did well. The LMR provider sent her a letter congratulating her on her successful retraining. But she was unemployed and looking for work. As in a cruel fantasy world, this did not matter. The Board deemed her to be working as a customer service representative at the rate of $9.50 an hour, the entry level wage for that field according to the wage data of the NOC (National Occupation Classification published by the

Federal government). This gave her a weekly "wage loss" award of $122.88 a week, based on deemed wages she did not have.

Although trying her best, no employer has hired her. Unable to live or support her child on $122.88 a week, she was forced to turn to social assistance. The WSIB reviews these decisions for six years after the accident. At the last review, she was still unemployed despite her best efforts. Rather than causing a reconsideration in her favour, the Board "deeming machinery" simply deemed that, by now, she should have been earning higher wages as an experienced customer service representative. She was not only deemed employed, but deemed better employed, deemed to get a raise to $14.35 an hour, the average wage for experienced customer representatives according to the NOC wage guide. Her wage loss compensation was reduced to $38.24 per week. She was still unable to obtain suitable employment.

Ms. A is not an isolated example. Ms. B was earning minimum wages when she suffered a bilateral hand injury. She too is permanently impaired, and is unable to obtain suitable work. However, the Board's position is that every worker who can do some work can at least earn the minimum wage on a full time basis. So the Board will not even offer any retraining to B because she is deemed to have a minimum wage job and that is all she had before the injury. The result is no job, no training and no compensation.

There are thousands of injured workers in Ontario who are deemed to have post injury jobs they do not have. Some are receiving 'wage loss compensation' based on a cruel assumption. Some are receiving nothing at all, pushed completely out of the system because they are deemed able to return to employment with no loss of earnings. Many of them spoke to Board officials and a string of successive Ministers of Labour and MPPs. The problem became evident from the outset of the wage loss system. Steve Mahoney, a former Liberal Labour critic, had criticized the policy and practice of deeming in his April 1994 report called "Back to the Future". The Board and the political leaders all listened, the injustice was evident, and injured workers anxiously awaited a proposed solution.

The History of This Legislative Reform: Bill 187

At the annual Christmas demonstration of injured workers of December 7, 2006 Minster Peters and Chair Mahoney announced that they were working on a solution to the deeming issue. In March 2007 the provincial budget Bill 187 was introduced, containing amendments to the Workplace Safety and Insurance Act. During the briefings and hearings on Bill 187 the government's position was that the intent of the legislation was to **eliminate** deeming. In fact, an amendment was introduced by the Liberals to make sure this intent was even more clearly stated.

In a letter dated April 27, 2007, to Peter Bird, Chair of the Board of Injured Workers' Consultants community legal clinic, Minister of Labour Peters explained the purpose of the legislative changes:

> *The amendments...would require the WSIB to determine the 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." (copy attached)

Minster Peters also sent a letter dated May 16, 2007, to the Bright Lights injured workers outlining the purpose of Bill 187. With respect to deeming, he clearly stated that the intent is to "**eliminate deeming".** The Minster's actual words were:

Additional enhancements proposed for injured workers would include the following:

- *Help injured workers retain benefits when work they could perform after rehabilitation is not available (eliminate deeming).* (copy attached)

On Injured Worker's Day, June 1, 2007 Minister Steve Peters addressed the crowd and told injured workers that he had listened and that a solution was forthcoming.

The Importance of the Legislative History

When drafting policy to implement legislation, and when applying legislation to a particular case, it is important to give consideration to the history of the legislation and the intention of the legislature in enacting it. The Ontario Divisional Court emphasized this in its recent decision in *Rodrigues v. WSIAT and WSIB* (10 September 2007, Court File 105/06). The court overturned a decision of the Appeals Tribunal that had upheld a WSIB decision regarding the definition of "earnings" in the Bill 162 legislation. The court found that the Appeals Tribunal had erred in law in failing to consider the evidence of the legislative history and purpose. The judgment states "What is striking in this case is the total failure by either the WSIB or the WSIAT to take the legislative history and the government's explanatory purpose into account in any way." In the case of Bill 187, we are fortunate to have the legislative history and purpose readily available. It should not be ignored.

The WSIB Bill 187 Interim Policies

Bill 187 has sought to correct a serious injustice in the compensation system—that is to get rid of *deeming.* Has it succeeded? What is the effect of the interim policies?

Consider the example of Ms. A with a permanent injury to her dominant hand but successfully completed her four month retraining program and tried unsuccessfully obtain suitable employment for many years since her accident. Document 18-03-06(page 2) suggests that when the final review takes place before the injured worker is able to find a job, the Board can use updated entry level wages for the deemed earnings. This would still reduce her LOE benefit when she has no prospects for employment. And the next heading "Adjusting earnings to that of an experienced worker" confirms that the Board can still adjust the deemed wages to that of an experienced worker even though they are not employed and never returned to employment since their accident. Ms. A still gets deemed. Under the interim policies she might end up with a slightly higher level of compensation but she will still get deemed to have a job and to be earning wages that do not exist for her.

Consider the example of Ms. B, who suffered a permanent bilateral hand injury while earning the minimum wage and was then deemed capable of earning the minimum wage without further training. She has been unable to secure a suitable job but receives no compensation for her loss of earnings. Nothing changes for her under the Interim Policies. She will still get deemed to have a job and to be earning wages that do not exist for her.

By removing the term "deem" and including the word "available" the legislative intention is to "help injured workers retain benefits when work they could perform after rehabilitation is not available." The policies subvert this intention. The interim policies only consider whether or not a job might be available to the injured worker at the point of determining the SEB. The policies ignore whether or not a suitable job is "available" at the more crucial point of determining and reviewing the loe. The purpose of the legislative change is not to deal with the SEB decision making. The intention of the legislature is to "help injured workers retain benefits when work they could perform after rehabilitation is not available or suitable." The legislative change was made to eliminate deeming in the calculation of LOE benefits.

In the interim policies, deeming continues completely unrestricted in determining the loe. It is our experience that in almost all cases, post accident earnings are determined without regard to the actual wages, if any. The policy explicitly provides for deeming injured workers to be fully employed at good wages when they are in fact unemployed and may never return to employment because no suitable job is available to them.

"Under-employed": Deeming by any name is …

The interim policies introduce a new concept of being "under-employed" after an accident. Until now, the relatively few injured workers who are fortunate enough to find employment in their SEB have been considered a success story. The policy required their LOE/FEL to be based of their actual earnings and so they received relatively fair compensation. The introduction of the concept of under-employment expands the practice of deeming to reduce their compensation.

A worker is considered to be under-employed when he or she is employed in such a way that does not permit the use of his or her full abilities, skills and training in mitigating the loss of earnings resulting from the work related injury. The case example of Mary is given (18-04-14 pages 4-7). After successfully completing a LMR program, Mary begins working for her brother-in-law in the SEB-identified job as a bookkeeper earning $12/hr. Two years later, at the time of a periodic review, Mary reports that she is still earning $12/hr. What earnings should be used to calculate the LOE benefit: actual or SEB-identified? The policy says: "While Mary is employed in a SEB-identified job, she is obviously under-employed. Therefore, the LOE benefit would be calculated based on the SEB-identified wages of $20/hr; not Mary's actual wages of $12/hr."

Mary is deemed to be earning $8.00 per hour more than she is actually earning. Until now, this was not done. The example provides no adjudicative advice to determine if Mary is unreasonable in working with her brother in law. It provides no adjudicative guidance to look for evidence that sustainable, suitable work is actually available to Mary at $20.00 and that she

refused to seek it, without good reason, or she refused an offer, without good reason. Just because the average wages for her SEB are higher, her compensation is reduced.

Clearly that is a policy directive that instructs adjudicators not to use actual earnings. The new policy introduces the concept of deeming injured workers who we would call successful role models - working in their field - to be underemployed and reduces their compensation. In the real world, the "other reasons" this worker has for remaining employed by her brother-in-law have to do with the pervasive discrimination faced by injured and other disabled workers. Without a sympathetic relative willing to accommodate her needs, the most likely alternative by far is unemployment, not an $8 per hour raise. Far from eliminating deeming, the "under-employment" provisions affirm and codify its worst features.

This policy will make deeming more pervasive in the compensation system. And it will, as a result, worsen the economic situation of injured workers to a greater extent than ever before.

The Interim Policy "Disconnect"

When Ms. A, the other deemed injured workers, the ONIWG, our clinic and all who had been supposedly listened to saw the Board' proposed policy, we saw a stark "disconnect" with the stated intention of the Legislation. Our experience was that the Board is bound by legislation, and we often have to restrain our demands of the Board with that restriction in mind. Here, instead, we had the reverse. The Legislation was designed to eliminate deeming, yet the Board seemed intent on keeping and entrenching deeming. Some observations about the perceived "disconnect" were:

1) Did the Minister of Labour communicate the intention of the legislature to the Board?

2) Why is there not one example of the real problem with deeming, which the Minister identified as workers not having jobs after rehabilitation?

3) Is the Board not aware of the experience of rampant unemployment by injured workers after "successful LMR"?

4) Is the Board not aware of systemic barriers in the re-employment of injured workers and disabled people?

5) Given Mr. Mahoney's stated opinion that the injured workers are the Board's first priority, are the policy drafters not concerned about the unfairness and damage that deeming creates for the most vulnerable members of the compensation system?

6) How could the WCB/WSIB policy advisors, supposedly **closer** to the real life situation of injured workers, have been so distant from their suffering and repeated calls for redress?

A group of injured workers form across Ontario spoke to Minister Peters on October 3, 2007 in St. Thomas, as reported by the St. Thomas Times-Journal. When challenged by Karl Crevar that he had broken the promise to eliminate deeming, Minister Peters disagreed and said that the

policy's goal was to reflect the needs of injured workers. He said the process was ongoing and that the protesters had jumped the gun. We hope we will be proven wrong and that we can say, one day, that we had indeed "jumped the gun". We sincerely hope that the policy drafters at the Board have a change of direction that reflect both the intention of Bill 187 and the needs of injured workers, their first priority.

What should the policy say?

In his final report of October 31st, 1913, which lay the foundation of our workers' compensation system, Justice Sir William Meredith noted:

Half measures which mitigate but do not remove injustice are, in my judgment to be avoided. 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 determination of what is just to the working man, but of what is the least he can be put off with; or if the Legislature were to be deterred from passing a law designed to do full justice owing to the groundless fears that disaster to the industries of the Province would follow from the enactment of it.

If we bear these sentiments in mind in the case of the WSIB/WCB's role in development of policy regarding deeming, we will have a better footing to produce good policy.

In order to eliminate deeming within the context of Bill 187 and do so in a sensible, simple manner there are three key elements:

1. Actual wage loss is used to determine LOE/FEL. It will provide the minimum ongoing LOE/FEL in order to protect the worker from future losses. In general the policy needs to have a question: *If the worker loses this job for any reason what-so-ever, will he/she have difficulty securing another job due to the compensable injury in a whole person context?* If the answer to this is yes, the LOE/FEL needs to be increased to help cushion expected future losses related to the compensable injury (or else receive benefits after the 72 month period in the case of such a loss).
2. LMR must be provided to any injured worker who does not have a suitable job. An LMRP must include a significant period of job search with assistance as required. An exception is for the worker who is granted 100% LOE/FEL based on being totally disabled/competitively unemployable, in which case LMR is unnecessary. For a worker who is considered able to secure employment without training, the LMR can be solely job search with assistance. LOE would be reviewed when the period of job search has ended.
3. *Deeming* is maintained for instances where a worker refuses, without good reason, to participate in an LMR plan and/or unreasonably refuses offers of suitable work. In such situations, the Board must take care. Some workers are discouraged and require more help, not less. The offers being relied on must be closely scrutinized for actual suitability and sustainability. The deeming would be done using the actual wages of the job offer(s) as a maximum.

These elements are consistent with past practices and founding principles and with the current wording of the legislation. Even with these three key elements some rough justice will occur, however the vast majority of injured workers with permanent impairments should find they are served justly by the system. The system itself will accrue many benefits from this course.

Other matters to be addressed in the policies:

- In cases where deeming is to occur ensure that it is done justly and taking the whole person into consideration.

- Develop a policy on presumption along the lines of the former FEL presumption policy: "When work-injuries prevent workers from returning to their pre-injury jobs and in the absence of actual job offers, the WCB shall presume that the workers' future losses of earnings arise out of the injuries unless the contrary can be shown by evidence of lack of co-operation in either medical or vocational rehabilitation"

- Offers from accident employers must be carefully scrutinized as to their suitability and sustainability. Due to the distortion of offers from accident employers resulting from the pressures of experience rating, a high level of caution must be exercised. (Essentially it is incompatible to have a deeming system combined with employer incentives to reduce the FEL/LOE.)

- For clarity: SEBs must not be used for deeming purposes. This practice is completely inappropriate for a system which is avoiding deeming. The worker must be able to obtain actual, secure employment. Wage loss is to be determined based on the actual real-life situation of the worker in regard to employment that is available to the injured worker. The legislature introduced the reference to 'available employment' for the purpose of determining loss of earnings benefits, not for the purpose of determining the SEB for the LMRP.

Deeming and WSIB Research Obligations

The correspondence from the Minister of Labour shows that the pivotal tension that Bill 187 was intended to resolve was the fact that although injured workers may be "retrained" they face structural/systemic disadvantages in the labour market and face a significantly higher chance of either not being able to sustain employment or not getting hired in the first place. Yet they are deemed to be employed and their compensation is accordingly ended or reduced. In practice, the Board ignores the real life situation of injured workers. This is precisely what our Weiler principles for a wage-loss compensation system tried to avoid. Then Labour Minister Sorbara, in defending Bill 162, which heralded our "wage-loss system", was very emphatic about not "deeming" injured workers' to jobs they did not have.

The Board Needs to Know…

Our organization and the Ontario Network of Injured Workers' Groups have long requested that the Board do systemic research to find out what happens to injured workers in the labour market after their injury and Board sponsored retraining, if any. An organization that with the mandate to justly compensate for the effects of injury needs to ask the following questions about their permanently disabled injured workers:

1) If the Board has **not** retrained the worker, because of pre-injury low wages that do not 'justify' an LMR plan, did he or she actually find work after injury? Did this continue over time? What is the true wage loss?

2) If the Board has retrained the worker, did the worker actually find work? Did this continue over time? What is the true wage loss?

3) Given the reviews of FEL/LOE over time, what is known about the employment or unemployment of injured workers over time?

If the system does not keep track of this data, it sends out, de-facto, a clear message to injured workers: *'The Board does not care about the real consequences of injury to you and your family. The Board discharged its responsibility by "retraining" you or by determining that you do not need retraining. If you are having trouble it is now "your fault." You should be able to compete equally with non-disabled workers in the labour market.*

Of course the Board has never said such thing, that would be a public relations disaster and seen as very offensive to the people the Board was created to serve. However, the **actions** of the Board, emanating from the interim policy which continues to ignore the real life situation of injured workers after LMR, amount to the same de-facto insult after injury. This is particularly so after the Minister's stated intention to finally deal with the real life situation of workers after the LMR stage.

How many Ontario injured workers with permanent injuries successfully return to employment? How many Ontario injured workers with permanent injuries have not returned to employment but receive no compensation for loss of earnings because they are deemed to have returned to employment at no loss of earnings? How many Ontario injured workers with permanent injuries have not returned to employment but are receiving partial compensation on the basis that they have returned to employment at a lower wage? The Board can get the answers and the answers will show us how the system is working for injured workers.

Review of the Existing Research

Even if there has not been systemic research by the Board, there is enough research to tell us that the return to employment situation of injured workers after permanent injury and LMR (if any is offered) is indeed grim: In the article "Early and Unsafe Return to Work: Research Shows Return To Work After Injury can be Dangerous to your Health" (IAVGO Reporting Service,

October 2007) John McKinnon reviews existing research, including the seminal work by Johnston, Butler and Baldwin pointing to the need for long term study of post-injury work experience. He further reviews recent statistics from the study of back injuries in Sherbrooke, Quebec and concludes that "38%-50% of permanently disabled workers are not expected to be able to return to employment." Our experience is that most injured workers are deemed to have returned to full time employment after their injury.

The Board must resume its own collecting and reporting of data. In the past, the real life experience of workers was documented by the Board in the 1994 study of people at the two year FEL Review (R1). The study was entitled "Study of 12-Month Qualifying FEL Recipients: Employment, Occupation and Income Transition, Research and Evaluation Branch, Ontario Compensation Board, July 1994). This was a very important exercise as approximately 3 years after the injury had passed. The result showed that 77.7% of injured workers in this group were unemployed at R1.

The November 1, 2002 Deloitte & Touche Value for Money Audit of the ESTRW Process gave looked at the employment of injured workers after successful LMR. An analysis of the findings indicate that 55.7 % of injured workers do not find work after LMR, yet they are all deemed to be employed, either with no wage loss (22.7%) or a partial wage loss (33%).

The Research vs. Policy Disconnect

The Board knows that there is a disproportionate level of unemployment among injured workers who are not able to find and or sustain work after permanent injury. This should come as no surprise, as it is generally accepted as fact that that people with disabilities are disadvantaged in the labour market compared to able bodied workers. Injured workers successfully convinced the government that it was patently unfair for the system to "wash its hands" of responsibility by simply offering LMR and deeming workers to be earnings wages accordingly. Bill 187 was explicitly stated to be intended to eliminate deeming. Unfortunately, the WSIB Bill 187 Interim Policies continue the old way of ending the story at LMR and deeming injured workers, with no regard to their real life situation, available employment or actual earnings. The disconnect between policy and the reality of injured workers, despite the intention of Bill 187, unfortunately continues.

Injured Workers Get "Deeming", Employers Assured "Predictable Rates"

The different treatment that employers and injured workers receive is not lost to our community.

One of the principles of the Board's funding strategy is "stable and predictable premium rates, designed to moderate excessive changes in premium rates from year to year" (WSIB Annual Report 2005, p. 17.) This principle and other initiatives have benefited the employer community.

While stability and predictability is a principle used towards employers, the deeming system brings extreme instability and unpredictability in people's lives. For example, C. was receiving $2,145.78 a month in his LMR plan but was reduced to $ 203.39 a month when he was deemed to have work he did not have. No company has had to close due to a Board decision about

premiums due, yet many workers go from full benefits to the food bank, or extreme poverty, due to deeming.

Would employers tolerate deeming?

The WSIB could use deeming to create a quick and easy premium setting process that would not require the Board to spend time on investigation and fact finding to make decisions about employer premiums. Employers pay for workers' compensation coverage based on a percentage of their assessable payroll every three months. The WSIB could simply ask the number of employees during each reporting period and deem the company payroll using a formula such as multiplying the number of employees by the average industrial wage. This is not done because employers insist that their payments are based on their actual financial circumstances, the actual payroll for their workers. Injured workers are seeking the same consideration when it comes to determining their benefits.

Minimum Wage and Deeming

Injured workers should not be penalized by the fact of increases in the minimum wage for people who are employed. Yet it happens, since every injured worker is deemed to be capable of working full time at minimum wage.

IWC received the following letter, dated September 14, 2007, regarding an injured worker: "Your pre-accident wage under this claim is $8.00 an hour". Please note that the accident was June 16, 1999. The letter went on to say: "The recommended suitable employment or business (SEB) is in retail sales. The entry level wage or jobs in this category is $ 8.00 an hour." The decision is therefore to award no wage loss for a job that the injured worker does not have. Note the effect of minimum wage increases on "deeming".

At the time of the worker's injury the minimum wage was $6.85 per hour. Her actual salary was $1.15 above the minimum wage. Today she is deemed to work at today's minimum wage, which is $8.00 an hour. Even accepting the deeming system for one minute, any reasonable observer would conclude that she is being "ripped off". Her job was above the minimum wage then, she should be at least deemed to have a wage loss by the same degree that her earnings were above the minimum wage at the time of injury.

The injured worker might have had a minimal wage-loss award if the calculation had been made in 1999. She would have suffered a further cut later on, on review, if the minimum wage had pushed up the theoretical wage of a sales employee. Here, 8 years have gone by, and the Board is reducing a FEL simply by the increase that has occurred in the minimum wage over time.

This is 'asymmetrical deeming.' Not only is the board deeming injured workers to have jobs they do not necessarily have. It makes the situation worse by comparing apples and oranges: in this case a pre-injury wage above the minimum wage with a deemed future job when the minimum wage has increased. A legislative change to the minimum wage that was needed to support the most vulnerable workers is being used by the WSIB to penalize a group of more vulnerable workers: the injured.

The end result is quite unfair:

1) deeming is abhorrent in itself.
2) increases in the minimum wage are meant to help the lowest paid workers' actual earnings.
3) In a Kafkaesque twist, increases of the minimum wage for the working poor penalize injured workers when used as deemed wages to reduce compensation for even more unfortunate people, i.e. unemployed or unemployable injured workers.

A copy of the letter from the WCB/WSIB, dated September 14, 2007 is attached.

End All Deeming, Asymmetrical or Not

We believe that the intention of Bill 187 was to eliminate all deeming, symmetrical or not. We see, instead, that the Board has kept the old deeming system intact as if Bill 187 had never seen the light of day.

Labour Market "Possibilities" as a Conscience Soother

Each Labour Market Re-Entry Plan contains information about the number of jobs in the SEB/"deemed job" in the local labour market. Inevitably, they record that there were some available jobs in this category or the SEB would not be approved. The fact that there are available jobs in the labour market is a wonderful "conscience soother": The WSIB and LMR provider have done their job, now it's up to the injured worker to help himself or herself. However, the statistics jobs available are misleading about the prospects for people with permanent disabilities. Our "compensation conscience" should be disturbed.

The statistics talk about jobs available to all workers. Another important statistic that should be factored in is the extra difficulty that injured workers have in being hired and being able to sustain work. The Board must not ignore this reality and simply wish injured workers "good luck" after completion of LMR. It needs to face up to the reality that permanently disabled injured workers are chronically unemployed at much higher rates than able bodied workers. To ignore this reality and to assume "full employment" by deeming all workers who undertake LMR is not only inconsistent with the legislation, but also a cruel form of abandonment of injured workers.

Next Steps

The net effect of the new policies of the WSIB will be greater injustice for injured workers. We cannot emphasize enough that the consequences of deeming are going to be more negative and more widespread than they were before these interim policies. The policies must be made consistent with the purpose of the legislation and the intention of the legislature.

Revised policies should be based on the three key elements proposed above:

1. Actual wage loss is used to determine the minimum ongoing LOE/FEL in order to protect the worker from future losses.
2. LMR must be provided to any injured worker who does not have a suitable job. An LMRP must include a significant period of job search with assistance as required, unless the worker is granted 100% LOE/FEL based on being totally disabled/competitively unemployable. LOE would be reviewed when the period of job search has ended.
3. *Deeming* is retained for instances where a worker refuses, without good reason, to participate in an LMR plan and/or unreasonably refuses offers of suitable work. In such situations, the Board must take care. Some workers are discouraged and require more help, not less. The deeming would be done using the actual wages of the job offer(s) as a maximum.

Further research is needed. The Board should produce the data that will show how well the system is doing. How many Ontario injured workers with permanent injuries successfully return to employment? How many Ontario injured workers with permanent injuries have not returned to employment but receive no compensation for loss of earnings because they are deemed to have returned to employment at no loss of earnings? How many Ontario injured workers with permanent injuries have not returned to employment but are receiving partial compensation on the basis that they have returned to employment at a lower wage? The Board should resume recording and publishing that data.

Respectfully Submitted
7 November 2007,

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cc: All Staff

Ministry of Labour

Office of the Minister

Ministère du Travail

Bureau du ministre

Ontario

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RECEIVED APR 30 2007

APR 27 2007

Mr. Peter Bird, Chair
Injured Workers' Consultants
411 - 815 Danforth Avenue
Toronto, Ontario
M4J 1L2

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,

Steve Peters
Minister

c. Mr. Steve Mahoney, Chair, WSIB

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MAY 16 2007

Bright Lights Injured Workers
c/o Mr. Theodore Koinis
95 Heatherley Road
Toronto, Ontario
M6E 1W3

Dear Bright Lights Injured Workers:

Thank you for your letter supporting the government's efforts to improve the situation for injured and disabled workers in Ontario. On behalf of the government, I thank you for your contribution to the dialogue on these important issues.

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 know, as part of the Ontario budget 2007, the government is proposing a number of improvements to benefits for injured workers. The proposed amendments to the *Workplace Safety and Insurance Act, 1997 (WSIA)* would include 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. The amendments would also provide for Lieutenant Governor in Council regulation-making authority to prescribe indexing increases to benefits after the end of 2009. This means that injured workers would not have to wait until the legislation is reviewed for future and timely increases.

Additional enhancements proposed for injured workers include the following:

- Help injured workers retain benefits when work they could perform after rehabilitation is not available (eliminate "deeming")
- 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

With respect to the elimination of "deeming" of lost wages, on further review of the draft legislation, the government introduced a motion at committee to amend Bill 187 to link an injured worker's post-injury earnings to the worker's "ability" to earn, rather than the "likely ability" to earn. As well, the WSIB has indicated its commitment to develop policies that define how these concepts would work in practice to ensure that they support and meet the spirit of the proposed legislation.

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 these important issues.

Sincerely,

Steve Peters
Minister

WSIB Workplace Safety & Insurance Board
ONTARIO
CSPAAT Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

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September 14, 2007

MS. [redacted]

CLAIM [redacted]

When writing the WSIB please quote the above file number.

Indiquez le numéro de dossier dans toute correspondance avec la CSPAAT.

Dear Ms. [redacted]

I am writing to advise you of the status of your claim.

I have conducted a further file review and note that you are partially impaired. Your file was referred in July 2007 for a Labour Market Re-Entry (LMR) assessment. Full loss of earnings (LOE) benefits have been paid during the LMR assessment phase from July 26, 2007 to present. It is noted that your pre-accident wage under this claim is $8.00 per hour at 37.5 hours per week. The recommended Suitable Employment or Business (SEB) is in retail sales. The entry level wage for jobs in this category is $8.00 per hour. I have accepted this LMR proposal and have requested the Service Provider include a four week job search training program. Once the Service Provider has added the job search onto the plan I will approve it.

[redacted], noting that an impairment exists that prevented you from returning to your pre-injury employment and no suitable employment was available, and noting that since 2000 to present you have made reasonable efforts to secure employment I am granting entitlement to full LOE. In order for me to process payment I need to confirm the date you last worked in 2000. Please forward this information to the WSIB as soon as possible.

I also wish to inform you that the Workplace Safety and Insurance Act, 1997, imposes time limits on appeals. If you plan to object to the decision, the Act requires that you notify me in writing by March 14, 2008.

Yours sincerely,

[redacted]
Claims Adjudicator
Operations Division

1-800-387-0750 [redacted]