

Brief Commentary on Occupational Disease Benefits Issues and Bill 76

There are 2 problems when people become entitled to workers' comp. for fatal occupational diseases (like cancer and asbestos related conditions) after they have retired or left the workplace.

1. The WSIB used to pay benefits to the injured worker, I believe based on the current wages of an equivalent worker, on the basis that there is no mandatory retirement and the worker, if not sick now, could have chosen to return to employment and presumably had the same earning capacity to do their old job. They lost that due to the occ. disease.

WSIAT decisions have said no, no earnings on the date of accident/diagnosis, no earnings lost, so no benefits for workers dying of occupational disease. This has been the case since 2009.

The government did not address this in their announcement last fall about survivors, nor is it part of Bill 76. They should!

2. When the worker passes away, there are survivor's benefits for the spouse or other dependants. The WSIB's practice was to base the survivor's benefit rate in such a situation on the average earnings of a comparably placed worker today. Then there was a series of Tribunal decisions stating that, if the worker was not working at the accident date, the law requires the survivor's benefit rate to be based on the minimum statutory amount.

The WSIAT decisions result in many widows and other surviving family members of the victims of occupational diseases receiving significantly reduced benefits compared to real earnings. This is what the MOL was talking about fixing last fall when they announced they would change the law to stop the 72 month lock-in for LOE benefits as well as fixing survivors' benefits..

Bartolucci's private member's Bill 76 is better than nothing, but can be said to be a half-measure at best.

First of all it does not address the injustice that, before they pass away, these workers dying of compensable illness receive no compensation. They may have retired or stopped working earlier than they intended because they could feel that they were not well. These diseases have long, slow latency periods and do not spring out of nowhere. But if they are not working when the condition was diagnosed, there is no compensation for lost earnings.

It does address the issue of low survivors benefits, but is not as fair as the WSIB used to be before they were overruled by the WSIAT. The bill says that the earnings of a deceased worker who was diagnosed with an occupational disease after he or she retired are based on the wages at the time of the deceased worker's last exposure to the agent that caused the occupational disease. So survivors benefits will be based on the wages when the worker left the workplace.

The WSIB used to base the compensation on the earnings of a current worker in that job then the condition is diagnosed. That makes sense because that is the earning capacity that the worker has lost. The worker may have left the workforce long ago, or may have taken lighter work at lower pay because they did not feel well enough to carry on the exposure work.

If you are going to change the law to make it fair, you should do so, no half measures. The fairest solution would be to change the law to provide that the compensation for a worker who died or was diagnosed with an occupational disease after he or she retired is to be based on the wages of a similarly employed worker at the time of the diagnosis or death. That solves everything.

One could argue that it can be tough to conclude what that equivalent wage is – the employer may be out of business, the job may have changed etc. It may invite appeals. A fair alternative is to fully index the old wage, and make the section apply to both ill and deceased workers. You don't change section 48, the death benefits section, you change section 43, the loss of earnings section. Here is how it could be changed:

1. Section ~~48~~ 43 of the Workplace Safety and Insurance Act, 1997 is amended by adding the following subsection:

Net average earnings, occupational disease diagnosed after retirement

—~~(25)~~ (8) For the purposes of this section, the net average earnings of a ~~deceased~~ worker who was diagnosed with an occupational disease after he or she retired are to be determined as of the date of the ~~deceased~~ worker's last exposure to the biological, chemical or physical agent that caused the occupational disease adjusted by the alternate indexing factor.

The above would amend the Workplace Safety and Insurance Act, 1997 to provide that if a worker was diagnosed with an occupational disease after he or she retired, the worker's net average earnings shall, for the purposes of calculating loss of earnings benefits, be determined as of the date of the worker's last exposure to the biological, chemical or physical agent that caused the occupational disease, as adjusted by the rate of inflation.

FYI – here is the private members bill:

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2799&isCurrent=false&ParlSessionID=

Bill 76

2013

An Act to amend the Workplace Safety and Insurance Act, 1997 to protect benefits for spouses of deceased, retired workers

Note: This Act amends the Workplace Safety and Insurance Act, 1997. For the legislative history of the Act, see the Table of Consolidated Public Statutes – Detailed Legislative History at www.e-Laws.gov.on.ca.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Section 48 of the Workplace Safety and Insurance Act, 1997 is amended by adding the following subsection:

Net average earnings, occupational disease diagnosed after retirement

(25) For the purposes of this section, the net average earnings of a deceased worker who was diagnosed with an occupational disease after he or she retired are to be determined as of the date of the deceased worker's last exposure to the biological, chemical or physical agent that caused the occupational disease.

Commencement

2. This Act comes into force on the day it receives Royal Assent.

Short title

3. The short title of this Act is the Workers' Death Benefits Protection Act, 2013.

EXPLANATORY NOTE

The Bill amends the Workplace Safety and Insurance Act, 1997 to provide that if a deceased worker was diagnosed with an occupational disease after he or she retired, the deceased worker's net average earnings shall, for the purposes of calculating death benefits, be determined as of the date of the deceased worker's last exposure to the biological, chemical or physical agent that caused the occupational disease.