IMPLICATIONS OF BILL 165:

A Glimpse from the Injured Workers' Perspective

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(A Glimpse from the Injured Workers' Perspective)

Bill 165 is the NDP government's long awaited package of workers' compensation reforms. In the 1989 election campaign, Bill 162 had just been passed and was the target of much criticism by injured workers and their allies in labour and the NDP. Bob Rae promised that an NDP government would move swiftly to eliminate deeming, the practice of using fictional earnings to reduce the wage loss compensation payable to permanently disabled workers.

The government neither moved swiftly nor got rid of deeming, but it did introduce a package of amendments to the Workers' Compensation Act in May, 1994. Most of them were proclaimed effective January 1st, 1995. The package came from the negotiations in the Premier's Labour Management Advisory Committee, a hand picked group of business and labour leaders. Although they never reached the point of shaking hands on the deal, they were close enough that the government felt politically comfortable with legislating the main points.

There was widespread opposition to Bill 165. Injured worker groups, injured worker advocates and many labour organizations criticized the process and the result. The strongest criticism was directed at the removal of automatic cost-of-living adjustments to injured workers' benefits. Legislated by the Liberal minority government in 1985 at the insistence of the NDP, it was the only one of the four law reform demands by the Union of Injured Workers that was met in the UIW's 20 year history.

The Bill was also criticized because the additional $200 monthly payment was too restrictive. Linked to the temporary supplement, it would only be available to a limited number of the injured workers who are living in poverty. As well, it was liable to be taken away from injured workers at any time simply by cutting the supplement.

Highlights of the Bill

The following is a brief and editorialized overview. Those who are interested in the details of the Bill and the analysis that was done for the public hearings last summer can review Hansard from the hearings of the Standing Committee on Resources Development

and the briefs that were submitted to it. You can also find greater detail and commentary in the 1994 issues of the I.A.V.G.O. Reporting Service (published by the Industrial Accident Victims' Group of Ontario, another Toronto community legal clinic specializing in workers compensation matters). Section numbers refer to the amended Workers' Compensation Act.

Nomenclature

The old term "industrial disease" has been replaced by the more accurate "occupational disease". This was not controversial (except among I.D.S.P.(Industrial Disease Standards Panel) staff whose new acronym raises eyebrows when they are introduced as 'from the odious pee'). The W.C.B. has been formally given a more corporate image with touches like the introduction of the title "president" for the top brass (s.59).

Focus of the Board

Since you can never be too explicit with a bureaucracy, the Board has been given a legislative reminder that the purpose of the Workers' Compensation Act is to provide fair compensation(s.0.1), whatever that is. In a similar spirit, the Board of Directors is reminded to monitor developments in the study of the relationship between work, injury and compensation so that generally accepted advances in science are reflected in what the W.C.B. is doing (s.65(3.1)).

The Bill also establishes a bipartite Board of Directors with members representative of workers and employers (s.56). This was touted as the 'good news' injured workers were getting in return for the 'bad news' about losing protection against the effects of inflation. Unfortunately for the 'good news, bad news' analysis of the package, the section pertaining to the new Board of Directors was never proclaimed. Now that organized labour has pulled out of the W.C.B. and called for the firing of some top brass at the Board, these amendments seem unlikely to be proclaimed. In any event, injured workers will not be pleased because of the failure to ensure that injured workers were given a position on the Board of Directors.

Government Intervention

For a year, which happens to be an election year, the Minister of Labour is given the explicit authority to issue policy directives to the W.C.B. (s.65.1). This will come in handy, especially in light of the above noted failure to implement the governance provisions.

Employer Participation

Employers are brought further into the compensation process with new provisions giving them direct access to an injured workers' treating physician (s.52(2)), the right to their own vocational rehabilitation services (s.53(3)) and legislative expansion of experience rating for their assessments (s.103.1).

Mediation

The W.C.B. is given legislative authority to use mediation (s.72(1.1)), although this has already been done in practice for several years. There are explicit provisions for introducing mediation in vocational rehabilitation disputes, and for expediting the final decision if mediation fails (s.72.1). These have not been proclaimed yet, but the W.C.B. has been told to prepare for proclamation on April 3, 1995.

Additional $200 Per Month

Pre-1990 injured workers with permanent disability pensions who are entitled to the 'old age supplement' (s.147(4)) will also be entitled to up to an additional $200 a month (s.147(14)). Although the 'old age supplement' is not payable after age 65, the $200 is supposed to continue. It is subject to the maximum benefit level in the claim. This amendment was prompted by evidence that many older injured workers had been unable to return to employment and were living in poverty on small pensions. For many of them, their pensions had been dwarfed by inflation because their accidents occurred in the '50s and 60's when wages were low and benefits were not indexed for inflation.

Inflation Adjustment

From 1985 to 1994, the Act required annual adjustments in accordance with increases in the Consumer Price Index. Now benefits will be adjusted by a formula known as the Friedland formula (s.148(1)). It was originally developed as a way to improve private insurance pension plans that were not indexed at all. Benefits are increased by 75% of the increase in the Consumer Price Index, minus 1%, up to a maximum increase of 4% in a year. Survivors and dependants benefits, 100% permanent disability pensions and FEL awards, and the pensions of those who receive the additional $200 are exempt. They will continue to receive full cost-of-living adjustments.

Implications for Injured Worker Advocates

Section 147(4) Supplements

An irresistible force is on a collision course towards an immovable object. On the one hand, at a time when most W.C.B. adjudicators are demonstrating acceptance of the prevailing myth that the W.C.B.'s accident fund is on the brink of financial disaster, the $385 supplement now costs the Board $585 a month.

On the other hand, about 20,000 injured workers receiving that supplement are coming up for review this year. In most cases, the issue is whether the supplement should be locked in to age 65 without further review, or cut-off without further review.

Predictably, supplements are being cut-off in droves. Unofficial estimates are that more than 25% of the supplements reviewed last month were cut. Also predictably, injured workers are very angry. This is proving to be the most common issue for which injured workers will seek legal advice and representation in the coming year.

Injured worker representatives should keep in mind the significance of the s.147(4) supplement beyond the $385 monthly value of the supplement. Even if the supplement is less than that due to the benefits ceiling in the claim, or if the injured worker is near or even past the cut-off at age 65, it will still be worth pursuing entitlement.

Entitlement to the supplement will mean entitlement to the additional $200 monthly payment. That does not stop at age 65. As well, for injured workers receiving General Welfare Assistance or Family Benefits, that additional payment is specifically excluded from deduction from benefits as income (Ont. Reg. 1/95 under the F.B.A. and Ont. Reg. 2/95 under the G.W.A.) It is a benefit that the injured workers on Welfare will actually receive.

Entitlement to the additional $200 payment will secure these injured workers an exemption from the de-indexation of their benefits. Protection of lifetime pensions against the erosion of benefits by inflation will be a significant lifetime benefit for injured workers. Under the Bill 165 formula, increases will be limited to 4% no matter how high the annual inflation rate. Over the last half century, there is no 20 year period in which the annual rate of inflation has not exceeded 10%.

The overall significance for injured workers is apparent from the $21.6 billion that the government predicts the W.C.B. will save as a result of de-indexation. The impact on individual injured workers is also striking if you project that inflation for the next 30 years will mirror the changes in the Consumer Price Index (CPI) over the past 30 years. For an injured worker on a pre-1990 pension today, in 30 years that monthly pension will be about 42% of what it would be if it was fully indexed to the CPI. Total lifetime payments to the injured worker would be reduced by nearly one-third if the pension was de-indexed (for more detailed analysis see "Does De-Indexing Violate the Charter" by Dave Wilken in the December, 1994 issue of the I.A.V.G.O. Reporting Service, and see the Sept. 8, 1994 submission of the Law Union of Ontario Workers' Compensation Committee to the Standing Committee on Resources Development).

It appears likely that there will be many thousands of injured workers seeking to appeal the termination of s.147(4) supplements. Based on the poor quality of reasoning that we have seen to date in decisions terminating supplements, and considering the long-term financial significance that entitlement has for most injured workers, it will probably be advisable to appeal in most cases.

Increased Employer Participation in Appeals

The re-employment provisions of Bill 162 brought more employers directly into the workers' compensation adjudication process. The expansion of experience rating in recent years has given employers a financial incentive to challenge initial entitlement and ongoing benefits for injured workers. At the same time, we have seen increased rates of claims denial, increased rates of appeal, increased rates of overturned decisions on appeal and a greater need among injured workers for representation.

A number of the provisions in Bill 165 will serve to accelerate the rate of employer involvement in injured workers' claims. The expanded provisions for experience rating, the right of access to an injured worker's physician and the expansion of mediation into vocational rehabilitation and possibly other appeals will further entrench the employer in workers' compensation as a party with different, if not adverse interests to the injured worker.

Past experience suggests that this will produce even higher rates of claims denial, higher rates of appeal by both employers and injured workers and an even greater need among injured workers for representation because the employer is participating. Most injured workers whose claim has been denied by the W.C.B. view themselves as fighting the Board. When the employer steps in, there is a feeling that it is now two against one.

Although good news for the legal profession and the growing number of private workers' compensation consultants, Bill 165 will accelerate the transformation of workers' compensation into a process that is more adversarial than ever, and less accessible to those whom it was designed to serve. It has come a long way from Sir William Meredith's 1915 proposal to improve and simplify the compensation of those injured on the job and to escape the delays and costs of lawyers and litigation.

Ramifications for the Appeal System

The immediate impact will be felt on appeals when s.72.1 is proclaimed and the full range of vocational rehabilitation issues are subject to mediation and an expedited final decision. The W.C.B. Hearings Branch has developed systems to implement this for an expected proclamation date of April 3, 1995. They have apparently established a more formalized notice of objection to trigger the involvement of the Hearings Branch. They are planning to set a hearing date when the notice of objection is received, in order to comply with the requirement to reach a final decision within 60 days of the objection (s.72.1(3)).

Workers' compensation representatives should be aware of this because it is intended to ensure that the parties do not start the appeal until they are ready to proceed with it. They are not planning to allow adjournments simply because the representatives consent. Until now, delays in scheduling hearings have made it feasible to request an appeal even prior to obtaining a copy of the claim file.

At the outset of the appeal process, parties will be asked to decide whether they consent to the final decision being made by the mediator in the event that mediation does not resolve the matter in time. There will be some options regarding oral hearings or written submissions.

There may be a tendency for this approach to allow the Board to wash its hands of the issue and leave it up to the 'workplace parties' to sort out some form of a compromise. Hopefully, representatives will resist the temptation to see the situation that way. In many cases, the decision is being challenged for reasons that have nothing to do with the employer. Where the dispute is with the claims adjudicator, caseworker or section medical advisor, the strategy must be to hold the Board accountable to do the job correctly. That could involve reinstating benefits so that necessary further investigation is done.

However, there will also be a long term impact on the W.C.B. appeals system. Decision making in workers' compensation claims has become more complex and more

difficult. The legislative changes for post-1989 injuries reflect a shift from a concrete, rights based approach to a system of discretionary payments. The formal introduction of mediation into the system will continue to introduce more discretion into the outcome for injured workers.

Although the introduction of the W.C.A.T. and the increased formalization at the Hearings Branch over the past decade have increased the quality of the appeal system, the same cannot be said for the initial decision making levels. The position of vocational rehabilitation counsellor was downgraded to "caseworker". Likewise, there has been a reduction in the experience levels, knowledge and commitment of the other front line decision makers. The increasing number of denials and overturns on appeal bolsters the impression given by front line adjudicators that the prevailing method of operation is to deny the claim if it is tough to decide. But tell the injured not to worry, 'you have the right to appeal'.

Apparently swamped by the rising rate of appeals, the Board has proposed to revamp the appeals system rather than deal with the problem of poor quality initial decision making. A recent W.C.B. proposal is to have a one tier appeal system, combining the Decision Review and Hearings Officer levels. It would also make use of the new authority to expand the use of mediation found in Bill 165. With the consent of the "parties", the mediator could give the final decision of the Board where mediation is not successful.

"If it ain't broke, don't fix it" may be sage advice, but it appears that the W.C.B. has seized on Bill 165 and appeals reform as a way out of the difficulties resulting from the growing numbers of people unhappy with decisions in their claims. Combining the two appeal levels into one final decision making authority at the W.C.B. is bound to substantially increase the rate of production of final decisions. If the Board does not 'get it right' the second time, it will not be long before the problem with initial decision making is then dumped on the doorstep of the W.C.A.T. Although a Royal Commission has begun to look into what needs to be done to improve the system, it appears that neither the government nor the W.C.B. is going to wait and listen to what the Commission may recommend.

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