

Bill 187
Schedule 41

DEEMING

Regarding determination of wage loss

The reintroduction of the concept of "availability" is important to injured workers and we very much appreciate the initiative that has been taken by the government. However, the form of the amendment that has been introduced will not produce the results we believe the government and injured workers desire and so desperately need. Furthermore re-introducing the concept of "availability" into the legislation is not enough on its own to fix deeming.¹

Despite the stated intention of the government to stop the unjust practice of deeming through the changes introduced through Bill 187, we regretfully assure you that this intention will not be realised. Indeed it gives no satisfaction; rather it is with regret that we remind you of our accurate predictions of how the Board would implement deeming when it was originally adopted.

We believe that some minor wording changes within the present Bill can significantly increase the chances of the legislation achieving the goals of the government and injured workers. These are discussed below.

In the event that there is now no possibility to amend Schedule 41 of Bill 187, we are counting on the Minister to play a significant role in making the will of the government clear to the Board. The clear authority to do so is granted to the Minister in the existing legislation.

This is the time to make the changes. While the current amendments have come later in the government's mandate than we would have preferred, they are much needed and the government must ensure that at the very least, they are interpreted and applied to successfully address the poverty of injured workers.

Below you will find our specific recommendations on the changes we believe are necessary to achieve our common goals on the issue of deeming.

¹ In 1994 the current Chair of the Board and former Liberal labour critic made a series of recommendations for the reform of the compensation system. At the time the legislative provision for deeming was based on an "available and suitable" test. Mr. Mahoney agreed with the criticisms made by injured workers and their advocates and suggested the deeming system be replaced.

Inclusion of "available"

- The term needs to be defined.
- The definition needs to clearly indicate the intent that a worker be employed (rather than deemed) and in order to make a realistic determination as to their future loss, job search must be included. If the drafting in section 43(4) is changed to "earns," that simple amendment will practically implement these other changes. However, it would be more effective to demonstrate the intent by adding the following amendments.

42(3) *change to* In deciding whether a plan is required for a worker, the Board shall determine the employment or business that is suitable and is available for the worker.

42(4) *add* The plan will include a period of job search which may be assisted job search.

42(6) *change to* The plan shall contain the steps necessary to enable the worker to secure suitable employment.

Definition of "suitable"

- This term is also not currently defined in the Act and is a subject of significant controversy at the Board because the intent of the legislators is not clear. The Government must ensure that its intention is clear and therefore direction to those who will implement the legislation is required.
- We proposes that a regulation be added which clarifies that "suitable" work must be defined to include:
 - the concept of sustainability of employment (the sustainability award used through policy under Bill 162 would help)
 - recognition that even though a permanently injured worker has returned to their pre-injury employment or a job that has an accommodation for their disability, the possibility exists that this job may, in the future, be lost. In such cases the injured worker must have a right to the restoration of benefits and assistance.
 - personal and vocational characteristics of the injured worker

- the concept of employment trajectory, so that a worker has chances of promotion and/or change and the worker is not relegated to a disability-employment ghetto.

Payment for loss of earnings

43(2) (a) The legislation should include a definition of "net average earnings before injury."

- While this is not within the scope of our current discussions it does need to be addressed. At present the Board has a highly complex system for this calculation. It is a process that carries a large administrative burden, produces many disagreements and related appeals, and unnecessarily increases stress and poverty for injured workers. The effective elimination of deeming, as result of the current proposals, will not be complete until the present policy on determination of net average earnings is also changed.

43 (2) (b) Determining earnings after injury

- In order to prevent deeming this section must be reworded to clarify that this determination must be made on the worker's actual employment situation. The LOE should to be based on the **actual** earnings. We suggest an amendment to make this important clarification.
- To properly protect the worker within the concept of the wage loss system, the actual wage loss needs to produce the calculation for the minimum LOE for adequate protection consideration can be made for a higher LOE payment, or a sustainability award or with a post 72 months review if there is a job loss for someone with a permanent injury.
- The only exception to LOE based on less than actual wages loss, can be where there is clear evidence of non-co-operation by an injured worker in attempting suitable and available job offers and/or refusing to engage in a job search that is part of the LMR plan. This can be achieved through a statement of presumption that the loss of earnings will be presumed to be compensable unless the non-cooperation is shown.

we suggest the following amendment:

Sec. 43 (4) *change* The Board shall determine the worker's earnings after the injury to be the earnings that the worker is earning in suitable employment or business.

note:

The current 43(4)(a) does not require amendment **if** the above change is made **and** as long as an LMR plan includes a job. Without these other relevant changes, this sub-section will unavoidably result in deeming.

The current 43(4)(b) also requires no amendment if the above change is made and this sub-section will therefore apply to workers who are employed in work which is considered suitable, and to workers who are determined to be competitively unemployable.

Regarding the impact of the minimum wage increase.

- Any unemployed or underemployed injured worker who has been deemed to have a wage loss based on wages under \$10.00 per hour and has not had their final LOE or FEL determination made, **WILL** see their benefit reduced. Generally this will affect workers with accidents going back to 2001.
- The Board has already begun this process. It is already operating under the assumption of an increased minimum wage although the legislation has not passed. Furthermore, it is taking the negative impact a step further in assuming wages slightly above the minimum wage will be also be increased.

Only two days ago we received the following report from one of our colleagues:

“I just got off the phone with a WSIB Manager who argued that one reason to deem my client at the high (i.e. top 10%) wage of \$11.25 per hour in her SEB rather than the average (i.e. middle 80%) wage of \$9.55 per hour was because of the proposed minimum wage increases.”

The potential consequences of this type of administration of the Act are even worse than we predicted. The minimum wage increases are already

affecting more injured workers than those deemed at less than \$10 per hour, and may result in deeming at more than \$10 per hour.

- There appears to be nothing in Bill 187 that prevents this kind of application of the law. If there is some form of protection, then we have not found it.
- The more fundamental problem is the clear indication of how the Board, if left to its own devices, will implement the changes in the legislation. These are practical administrative choices that run counter to the intent the government has promoted.
- **An amendment is required which will direct the Board not to reduce any FEL/LOE payments on the basis of deemed increases.**

Regarding the 72 month review provision.

- The amendments are a very welcome effort to protect injured workers over the long-term.
- There are a number of improvements to wording that could be adopted and certainly more retroactivity would help to bring justice to those who were pushed into poverty as a consequence of Bill 99.
- However, we want to focus on the problem of the worker with a permanent impairment who is successfully employed at the final review, but who, as a result of their injury and/or in combination with their personal characteristics is not competitively employable. Such a worker, if they were to lose that job, would have questionable success in securing another job.
- The most effective way to encourage injured workers to attempt jobs about which they are uncertain, and to encourage employers to gamble on a potentially less productive worker, is to ensure that they both feel secure that if it does not work out, they will not be hurt financially.
- **We propose an addition to the Bill 172 amendments on the review of loss of earnings to section 44 to allow for benefits and the Board's assistance in these situations.**

Making the change

As we have stated both publicly and privately, we believe the government is attempting to fix the current problem of deeming under the WSI Act. We share this goal and support the initiative. Unfortunately, as we have pointed out in this submission, the current changes are not sufficient to achieve this goal. The Board has, even before the changes are adopted, provided proof of their own policy direction and the negative effect it will have on injured workers.

We strongly believe further amendments or additional Regulations are the most appropriate and effective way forward.

However, if such changes cannot be made, there is another way to achieve the desired result. The Minister has the following authority under section 167 of the Act:

167.(1) The Minister may issue policy directions that have been approved by the Lieutenant Governor in Council on matters relating to the Board's exercise of its powers and performance of its duties under this Act.

Same

(2) In exercising a power or performing a duty under this Act, the Board shall respect any policy direction that relates to its exercise.

Report

(3) The Board shall report to the Minister whenever it exercises a power or performs a duty that relates to a policy direction. 1997, c. 16, Sched. A, s. 167.

While we believe that a policy direction under section 167 is not the preferred legal mechanism. We recognize that in the current time frame it may be the most expedient.

By using an existing provision in the Act, the Minister has the power to inform the Board of the Government's intention and also, more importantly, to provide clear policy direction on how the legislative changes are to be implemented and administered.

We are, of course, willing to continue this dialogue with you and your officials in order to help find an acceptable solution to this issue.

Respectfully submitted
to the Minister of Labour, Hon. Steve Peters
on behalf of the Ontario Network of Injured Workers Groups
by Marion Endicott

Wednesday, April 18th, 2007