

# Focus on the Individual: A Decade of Workers' Compensation Board Reform in Ontario

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The issue of employment and compensation for permanently disabled persons can be approached from a variety of perspectives. Catherine Frazee has provided us with an overview of the problem: the disabled want to work; they want to support themselves; they want to take pride in their own skills and achievements; and they want to be part of the mainstream "World of Work".

Earl Cherniak has set out the case for what David Baker has called "Classic (pure) Torts",<sup>1</sup> an approach in which the negligent perpetrator pays and the victims receive full recompense. But, of course, the reality is that the perpetrator pays indirectly through his or her insurer and one can only hope, after the length of time that the victim has had to subsist on limited means, that the insurance coverage is adequate and that there is a finding of liability against one or more of the parties. Unfortunately, these two circumstances are not always present and, as we have seen in several well publicized cases during the past two or three years, victims are sometimes left without further recourse unless they happen to be fortunate enough to have some other disability program available to them.

Terry Ison has presented a thoughtful discussion on rehabilitation and the value of permanent pensions. There are areas where we disagree and I will endeavour to emphasize those in my remarks. However, I join with him in emphasizing the need to make the issue of a more comprehensive disability program a major priority for public-policy makers in this country.

One option to actions based on negligence has been in place in Ontario since 1914. It is timely to remember that Workers' Compensation was the first system of income replacement for injured workers in Ontario and, indeed, in Canada as a whole, and, long before we had a variety of "safety nets", including medicare, one group in society did receive what we now look upon as basic social benefits — on a no-fault basis. As a result of this historic compromise between labour and management, employers became immune to lawsuits from injured employees, and employees, in turn, were assured of income replacement regardless of fault. Medical coverage and vocational rehabilitation assistance soon followed,

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1. In fact, Mr. Cherniak spoke about a mixed tort/no-fault system.

and all of these elements of the program have undergone significant change over the years. The end result is a system which provides prompt treatment when a worker is injured, a fair and reasonable income during a period of recovery and rehabilitation, a full range of medical and vocational rehabilitation services and, ultimately, vocational rehabilitation assistance in returning to employment.

In order to facilitate employees' return to employment, services are also available to employers to assist them in modifying the workplace or a particular workstation for a disabled employee and there are cost-shared, work training programs in which the board pays part of the worker's income during a period of assessment and training.

The 1980s in Ontario have been a decade of reform in the area of Workers' Compensation, and in my view, the current legal statutory and policy trends in Ontario are redefining and expanding not only the nature of the entitlement, but the rights and benefits that flow from those entitlements. The 1980s started with a series of reports from Professor Paul Weiler of Harvard Law School,<sup>2</sup> reports that have been termed by Professor Arthur Larson as "the finest set of background studies I have ever seen". These reports provided the underpinning, not only for the recent changes to benefits but also for the earlier and equally important administrative and structural changes that took place.

Although our focus now is on benefits and re-employment, it is important to gain some understanding of the 1984 amendments that brought about the changes in 1985.<sup>3</sup> In general, those administrative and structural changes were aimed at opening up the system and letting in some "sunshine". An independent Board of Directors representing workers, employers and the public brought fresh insights and new thoughts not only to the operation of the Board but also to its financial and policy areas, which were subjected to new scrutiny and discipline. This has been an extremely important contribution and I believe that the stakeholders in the system have appreciated the increased input that they have had into what was previously viewed as a closed system.

The establishment of an external and independent Workers' Compensation Appeals Tribunal was long overdue. It has imposed a new discipline on the Board's decision-making and policy-making processes. It would be wrong to underestimate the importance of the tribunal and I can say without hesitation that it has made the compensation system more vibrant, responsive and proactive. The addition of employer and worker advocates into the system has improved both the availability of representation and the quality of representation on behalf of injured workers and employers. Finally, the establishment of an industrial disease standards panel to give advice to the Board with respect to industrial disease is a step in the right direction that has been sorely needed. Occupational disease is one area that boards in

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2. Paul Weiler, three reports: a) *Reshaping Workers' Compensation for Ontario*, a report submitted to Robert G. Elgie, MD — Minister of Labour, November, 1980; b) *Protecting the Worker from Disability: Challenges for the Eighties*, a report submitted to Russell H. Ramsay, Minister of Labour, April 1983; c) *Permanent Partial Disability: Alternative Models for Compensations*, a report submitted to William Wrye, Minister of Labour, 1985.

3. *Bill 101*, an Act to amend the Workers' Compensation Act. The Hon. R. H. Ramsay, Minister of Labour, 1985.

general do not handle well, and any assistance that we can obtain from a group such as this is welcome.

The 1989 reforms to the *Workers' Compensation Act*,<sup>4</sup> which became effective on January 1, 1990, addressed benefit and rehabilitation reform. Compensation at 90% of net average earnings remained unchanged from 1985, but the ceiling on such eligible earnings was raised to 175% of the average industrial wage — in January 1991, that put the ceiling at \$42,000. That means that approximately 80% to 85% of workers will have their incomes covered, but it certainly begs the question of the need for further debate on raising or eliminating the ceiling — a public policy issue that is beyond the scope of this present discussion.

One major area of change was in the compensation provided to workers with permanent disabilities. Although the Workers' Compensation Act of 1914<sup>5</sup> established a compensation system based on wage loss, the Ontario Board of the day quickly came to believe that a compensation system that did not permit any recognition of the clinical impairment an individual might have, regardless of his or her earnings capability, produced an unsatisfactory result. Commentators since that time have acknowledged that such a result was inherent in a system that did not provide any payment for the non-economic impact of an injury on one's non-working life. The result was a move to a clinical rating schedule in which wage loss was presumed from the nature and degree of the injury regardless of the real impact of the impairment on an individual's earnings capacity. Professor Arthur Larson has expressed the view, in his 1988 Meredith Memorial Lecture, that:

*The early Ontario experience confirms my thesis that the reason for resorting to the schedule was avoidance of administrative difficulty. After only about a year of experience — the Ontario Board prepared a report announcing it was administratively impossible to keep up with permanent partial cases and proposing a procedure, similar to that in Washington, for evaluating such cases on the basis of relative impairment.*<sup>6</sup>

The clinical rating schedule, more commonly known by its critics as the "meat chart", has been vociferously criticized, particularly over the past two decades, because it has not proven to be a good proxy for the true impact of the impairment on an individual's earnings capacity. For example, the transition provisions in Bill 162 allowed for some wage loss replacement when the impairment rating did not accurately reflect earnings loss. The fact that approximately one third of persons of employment age on permanent disability pensions are now in receipt of this additional benefit carried its own message about a process that provided "rough justice". On the other hand, there will, of course, be a number of workers for whom the benefit more than replaced their income loss and the perception, if not the reality, of unequal treatment has been the subject of controversy.

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4. *Bill 162*, An Act to amend the Workers' Compensation Act. The Hon. G. Sorbara, Minister of Labour, 1989 [hereinafter the *Act*].

5. *The Workmen's Compensation Act*, S.O. 1914, c. 25.

6. Proceedings of the Association of Workers' Compensation Boards of Canada, Yellowknife, NWT, 1988.

These reforms have accordingly moved away from a system that offered average rough justice with vocational rehabilitation assistance to those who were left under-compensated, to an income replacement system aimed at the individual's own circumstances. Lost income can be replaced in a number of ways, and the 1989 legislation has brought us what might be called a limited prospective wage loss system. Although there are proponents of a single projection approach to one's loss of earning capacity, its critics are as outspoken about the inaccuracy of such an approach as they are about the inaccuracy of the clinical rating schedule.

Another option, an actual wage loss system, was proposed in a 1981 White Paper — a proposal that met with outspoken criticism as one that would keep the "Sword of Damocles" hanging over the head of an injured worker on an annual basis. Accordingly, in his 1986 report, Professor Weiler recommended a limited prospective wage loss system — and that's what we have — a system that requires the first estimate of wage loss to take place twelve months after the injury and then mandates reviews of that estimate after two years and once again three years later. In that final year, the sixth year, the amount is locked in for the balance of the individual's working life. To replace pension income that might otherwise have been available upon retirement there is a provision that requires the payment of 10% of the regular wage loss award into a retirement fund that, in conjunction with the accumulated investment income, will be available for the worker to supplement other retirement income.

An important addition to the benefit package was the provision for a non-economic award to reflect the loss of enjoyment of life that a worker sustains as a result of a particular impairment. The maximum amount payable is \$65,000 — an indexed amount that varies with the age of the worker. In certain circumstances, the worker may elect to take that amount of money as a lifetime pension.

Innovative and important changes were also made in the area of vocational rehabilitation. A mandatory obligation is imposed upon the Board to contact injured workers within specific time frames in order to facilitate earlier intervention.

This process must commence at least 45 days after the claim is registered and, as a matter of practice, will be followed up at least every six weeks. Six months after the injury, if the worker has not yet returned to work or is not already in a vocational rehabilitation program, the Board is obliged to offer him or her a vocational rehabilitation assessment, and if indicated, to provide a vocational rehabilitation program. Two other principles of the legislation are, I believe, particularly important public policy pronouncements about a worker's attachment to the workplace. The Act spells out the right of a worker to return to his or her former employment for a period of up to two years (or one year from maximum medical recovery) and it requires employers to maintain specified benefits for a period of one year after the injury.

The employer is obliged to offer the worker his or her original job so long as the essential duties of the job can be performed. In the alternative, the employer must offer the worker a comparable job. As a final position, in the event that neither of those two options is appropriate to the worker's capabilities, the employer is required to offer a suitable job that becomes available. There is also an obligation on employers to provide reasonable accommodation where such accommodation would allow the worker to perform the essential

duties of the job. As with the *Human Rights Code*,<sup>7</sup> the limit on the accommodation obligation is one of undue hardship, and the Board has adopted the Human Rights Commission criteria for undue hardship.

Is the re-employment obligation an important one? Clearly I am not in the same ball park as Terry Ison on this issue, because I happen to believe that it is an extremely important provision that not only makes a public policy pronouncement about employer obligations to a workforce, but also upon a worker's right to be considered on an individual basis by an employer. It is also a public policy that is in keeping with the need to address the broader issue of labour — management relations and power sharing in the workplace — and it highlights the importance of accepting and accommodating people with disabilities in today's "World of Work".

Although our experience to date is limited, approximately 48 workers have completed the initial process of mediation and, of those, close to two thirds have been returned to their former employment or a comparable job without the necessity of a hearing. Eight applications were withdrawn, and of the nine that have been scheduled for a hearing, two decisions have been rendered and, in each case, the employer was found to be in non-compliance and a penalty was levied.

There are some who are concerned about a potential conflict between the Human Rights Code remedy for disabled workers and the right to this reinstatement remedy. For me, the answer is very straightforward: there is no doubt that the Human Rights Code has primacy over all other Acts.

But the reinstatement provision does provide a number of benefits that I think warrant its use in the first instance: there is a process available that is relatively expeditious, that is conducted by an agency familiar with both the employer and the worker. The obligation relates not only to the right to the previous job but, if that is not possible, then to a comparable job and, as a final alternative, to a suitable job — so there is a variety of options available. Finally, if a worker does return to the job, there is a presumption that termination occurring within the first six months means non-compliance and would, therefore, lend considerable support to a claim that the employer is in contravention of the legislation.

In summary, I would conclude with the thought that policy and decision-makers should view the fashioning of progressive social legislation to improve the working life and possibilities for Canada's disabled as an ongoing priority, a challenge and a wondrous opportunity.

People with disabilities have led the way with their courage and tenacity in showing us all the vital role they can and must play in our workforce. It is our challenge and our duty to help them level the playing field.

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7. *Human Rights Code, 1981*, S.O. 1981, c. 53.