



Emphasis on early return to work in new workers' compensation legislation

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On November 26, 1996, the Harris government tabled legislation that substantially overhauls Ontario's workers' compensation system. The bill, the *Workers' Compensation Reform Act*, repeals the entire *Workers' Compensation Act* and replaces it with a new statute called the *Workplace Safety and Insurance Act, 1996*. Two other pieces of legislation, the *Blind Workers' Compensation Act* and the *Workers' Compensation Insurance Act*, are also repealed. The Workers' Compensation Board (WCB) and the Workers' Compensation Appeals Tribunal will be renamed the Workplace Safety and Insurance Board and the Workplace Safety and Insurance Appeals Tribunal respectively.

The bill is the culmination of the Conservative government's plans to revamp the WCB, plans that extend back to the party's days in opposition. It incorporates many of the suggestions put forth in a report by Minister Cam Jackson (see "[Jackson report on WCB: Targeting the unfunded liability](#)" on our Publications page; for more recent developments, see "[Less government involvement, more flexibility urged for Ontario's health and safety system](#)", "[New amendments to Workers' Compensation Act announced](#)" and "[New workers' compensation legislation in effect](#)" on our Publications page) and follows on earlier legislative initiatives implemented by the Harris government that changed the governance structure of the WCB.

A key objective in the government's strategy is to retire the system's unfunded liability of \$10.7 billion by the year 2014, while at the same time reducing premiums paid by employers. In its drive to achieve this objective, the government is proposing changes that are likely to be controversial in many quarters.

BENEFITS TO BE REDUCED

A number of measures are designed to increase the incentive to return to work. Foremost among these is the reduction of benefits paid to injured workers from 90 to 85 per cent of their pre-injury net average earnings. **43(2)** The government claims that, under the current level of compensation, injured workers often receive higher wages for being off work, due to the operation of the tax system. In determining the worker's average earnings for compensation purposes, the Board will be required to take into account any pattern of employment that results in a variation of the worker's earnings pattern. **53** Sanctions for non-cooperation with the Board will now include suspension of benefits during the period of non-cooperation. **43(5)**

Reductions are also made to retirement income benefits paid to injured workers. Currently, the WCB is required to set aside additional funds equal to ten per cent of each payment for an injured worker's



pension. This amount will be reduced to five per cent, payable after the worker has received benefits for 12 consecutive months. The worker will be given the option of contributing an additional five per cent from his or her benefits. **45**

Where a worker's impairment due to workplace injury is permanent, that worker is entitled to compensation for future loss of earnings. A common complaint under the existing Act is that the current timelines require the Board to determine whether a worker has suffered permanent impairment before this determination can accurately be made. The result is that a number of claimants without permanent impairment are paid economic loss benefits to which they are not entitled. Under the new legislation, however, the Board will not have to make the early determination of permanent impairment, and will be authorized to conduct periodic reviews of payments made for loss of earnings. **44**

Workers who are 100 per cent disabled and survivors of deceased workers will maintain fully-indexed benefits. All others will receive benefits indexed at a formula reduced from the one in current use. As is now the case, indexation will be capped at four per cent. **49**

NARROWER ENTITLEMENT FOR CHRONIC CONDITIONS

Under the new Act, there will be no compensation for claims of chronic mental stress, unless the stress results from an acute reaction to a sudden and unexpected traumatic workplace event. This is consonant with the approach taken by the WCB, but not the Appeals Tribunal, which awarded compensation for chronic mental stress. **12**

Benefits for chronic pain, or pain that persists beyond the usual healing time, are available under the current approach adopted by the WCB. Under the new Act, these benefits will be curtailed in accordance with criteria to be set out in regulations. **13**

INJURED WORKERS TO APPLY FOR BENEFITS

While there is currently a six-month deadline for making a claim for benefits, nothing requires an injured worker to actually apply for benefits, and the WCB is given a broad discretion to overlook the lateness of a claim. The new Act will impose an obligation on the worker to apply for benefits within six months of the accident, and to notify the employer of the claim. The Board may waive the time limit only where it is of the opinion that it is just to do so. **21**

ENCOURAGING THE RETURN TO WORK

The Jackson report was highly critical of the broad discretion given to the Board in matters of vocational rehabilitation, claiming that the system encouraged injured workers to remain off work and did not sufficiently involve the worker, employer or health provider in the return to work process. Jackson urged adopting a model based on the self-reliance of the parties, and supported by a series of statutory obligations and incentives.



Accordingly, a series of obligations will be placed on the parties to cooperate in hastening the return to work. Workers and employers must remain in contact with each other throughout the period of the worker's recovery or disability, and must cooperate in identifying suitable employment that is consistent with the worker's abilities and restores pre-injury earnings. **40(1), (2)** Failure by the worker to cooperate in his or her safe and early return to work may result in reduction or suspension of benefits. **43(5)** Employers who fail to cooperate are subject to a monetary penalty. **84** These obligations will come into effect in three phases, from July 1, 1997 to July 1, 1998, depending on the size of the employer's work force.

The Board will be authorized to facilitate the return to work process through monitoring compliance with the obligations set out above. The Board will mediate and, if necessary, settle disputes about the return to work where these are brought to its attention by either of the parties. **40(5)-(7)**

In circumstances where it is not feasible for the worker to return to work with his or her own employer, the Board will be authorized to consider preparing a labour market re-entry plan for the worker. While the Board is directed to consult with the worker in preparing the plan, it will also be given the power to determine suitable employment for the worker, as well as the level of earnings from the employment. The worker will be under a duty to cooperate with the Board, and will be required to take the steps provided in the plan for enabling the return to the labour market. **42** Failure by the worker to cooperate may result in reduction or suspension of benefits. **43(5)**

Employers who modify the workplace so that an injured worker or surviving spouse can re-enter the labour force may be eligible for financial assistance from the Board. **153(2)(h)**

DISCLOSURE OF HEALTH RECORDS AND WORKER OBLIGATIONS

As part of the effort to get injured workers back to work, the new Act contains provisions concerning health care and health reports. When applying for benefits, an injured worker will now be required to consent to the disclosure to the employer of health records concerning the worker's functional abilities. Disclosure is for the sole purpose of facilitating the worker's return to work. Failure to consent to disclosure may result in the denial of benefits. **21(5), (6)**

The new Act places an obligation on workers claiming benefits to cooperate in any health care measures deemed appropriate by the Board. Failure to comply with this obligation may lead to the reduction or suspension of benefits for the period of non-compliance. **34** Further, such workers will be obliged to submit to health examinations by health professionals selected by the Board or the employer. In cases where the request for examination comes from the employer, the worker may object, and the employer will have 14 days to request that the Board direct the worker to submit to the examination. **35, 36**

Under the current legislation, health care professionals may be required to furnish the Board with reports on workers claiming benefits. Now, employers also will be entitled to receive health reports,



where these concern the worker's functional abilities. The information to be included in these reports will be set out in regulations. **37**

ADJUDICATION OF CLAIMS

Under the new legislation, the role of the Board will be strengthened, and that of the Appeals Tribunal weakened. Where the Board has a policy that applies to the case under appeal, the Tribunal will be required to apply the policy in making its decision. **118** The Tribunal's jurisdiction has been further restricted, for the most part by removing appeal rights with respect to narrow monetary issues.

117(2) Appeals of Board decisions will have to be filed in writing within six months, but the Tribunal will have discretion to waive this limitation. **119** In most cases, appeals will be heard before a one-person panel. **169**

WHSA, ODP TERMINATED

The Board will take on the functions of the Workplace Health and Safety Agency, which will be terminated under the legislation. This is consistent with the government's stated aim of emphasizing the Board's role in preventing workplace injury and illness. In this regard, the Board will be entrusted with educating the public about health and safety issues, developing standards for certification under the *Occupational Health and Safety Act*, and providing funding for health and safety research, among other tasks. **4** The Occupational Disease Panel will also be eliminated, and its functions transferred to the Board.

SUCCESSOR EMPLOYERS

The Board will be able to hold purchasers of a business liable for the former owner's unpaid debts to the Board. This change is aimed at employers who reorganize their business in order to avoid outstanding debts. **139**

IN OUR VIEW

While employers will likely welcome the proposed five per cent reduction in premiums, workers' organizations will probably condemn the duties and incentives designed to promote an early return to work. Although there are now strict requirements and penalties for employers and workers who fail in their obligations to hasten return to work, there is still no express requirement for unions to participate in the process.

The government has indicated its intention to hold a series of public hearings on the legislation. We will inform readers of *FOCUS* of the evolution of the bill as it emerges from the hearings process. (To subscribe to *FOCUS*, [click here](#)).

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