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DEALING WITH THE AFTERMATH OF THE  
WORKPLACE SAFETY AND INSURANCE ACT, 1997  

GARTH DEE*  

INTRODUCTION: A TIME OF CHANGE  
There have been a huge number of changes brought about to workers’ compensation in Ontario by the passage of the Workplace Safety and Insurance Act, 1997, which came into effect as of January 1, 1998.1 These legislative changes have come into effect at the same time as the Workplace Safety and Insurance Board (the Board) has instituted a number of major administrative changes to reorganize the manner in which it adjudicates claims for compensation arising from workplace injuries.

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This article does not list and document in a comprehensive way all of the various changes that the compensation system has seen over the last year. Instead, this article focuses on a number of topics that I have found to be of interest over the last year. These topics are as follows:

1. The Workplace Safety and Insurance Act, 1997: Substance and Semantics
2. The Importance of Workers' Compensation: A Shrinking System
3. The Changing Nature of Workers' Compensation Advocacy
4. Finances of the Workplace Safety and Insurance Board: Creative Accounting II
5. The Workplace Safety and Insurance Board: More Corporate and More Uncaring
6. Appointments to the Workplace Safety and Insurance Appeals Tribunal: De-Skilling and Re-Politicising the Appeals Tribunal
7. Policy Issues and the Workplace Safety and Insurance Appeals Tribunal
8. The Workplace Safety and Insurance Board’s Policy Development and Publication Processes
9. Outsourcing Labour Market Re-entry Services
10. Holes in the Re-Employment/Wage Loss System
   A. Employer Hardball Tactics
   B. When Re-Employment Ends
   C. Loss of Liberty

1. **THE WORKPLACE SAFETY AND INSURANCE ACT, 1997: SUBSTANCE AND SEMANTICS**

The driving force behind the passage of the Act was money. Employers and the government both wished to reduce the size of the Board’s unfunded liability and the size of the employer assessments required to fund the workers’ compensation system. The government’s approach to achieving its objectives was twofold.

First, the government seized upon ideas and trends already present within the workers’ compensation system that were leading to drastically reduced workers’ compensation costs and appropriated those ideas as its own.

Second, the government cut the level of benefits available to injured workers. Amongst these changes were a lowered rate of inflation adjustment; a reduction of benefits from ninety per cent of net to eighty-five per cent of net; a cutting in half of the statutory protection against the loss of post-retirement income; and a prohibition on stress claims. The sleeper amongst the potential benefit reductions is the potential ability of

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the Board, through regulation, to restrict compensation for “chronic pain”. Chronic pain is not defined in the Act but is left to be defined by regulation.

Existing trends in cost reduction and in the improvement of the finances of the workers' compensation system would have in all likelihood continued even if the government had done nothing. However, what the government did instead of doing nothing or instead of just tinkering with the benefit system was to leave in place most of the substance of the existing wage loss and re-employment system that has been driving the cost reductions but change the language that is used to describe this system so as to appropriate credit for the concepts driving this cost reduction.

While there were some substantive changes introduced to the wage loss/re-employment system, the most obvious of the changes that were introduced were semantic. The name of the Act governing the workers' compensation system was changed and the Act has been completely reorganized. The legislative purpose clause in the Act was changed. The Workers' Compensation Board (WCB) became the Workplace Safety and Insurance Board. A similar name change took place with the Appeals Tribunal. The name of the statute itself changed. As well, the Act no longer provides for vocational rehabilitation services. It instead provides for “early and safe return to work programs (ESRTW's)” and “labour market re-entry plans (LMRP's)”.

The overall objective of the new semantics is to de-emphasize the role of compensation payments as a method of protecting workers from the potential for catastrophic loss due to injury and also to de-emphasize the importance of a government controlled centralized agency in administering the measures intended to provide this protection.

The substantial aspects of this “new” emphasis pre-date the WSIA. Ever since the adoption of a wage loss system in 1990, there has been an ever increasing shift in responsibility away from financial compensation from the Board and towards the workplace parties, most particularly individual employers, to find ways of reducing workers' compensation costs. This has been achieved through the increased re-employment of injured workers or at least through increased offers of re-employment to injured workers. These changes have been largely responsible for rapidly falling costs per claim within the workers' compensation system since 1990 and for increased rates of injured worker re-employment within reported claims. This shifting responsibility within the workers' compensation system has been in many ways similar to the shift in responsibility regarding occupational health and safety matters. This is a shift away from a centralized command and control model of enforcement towards a more decentralized internal responsibility model. The shift in focus is demonstrated most clearly in the changes that have taken place in the purposes clause.

The legislative purpose clause of the former Workers' Compensation Act, section 0.1, is as follows:

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3. WSIA, supra note 1, s.14(1) & (2).
4. R.S.O. 1990, c.W-11, as am. [hereinafter WCA].
The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:

1. To provide fair compensation to workers who sustain personal injury arising out of and in the course of their employment or who suffer from occupational disease and to their survivors and dependants.
2. To provide health care benefits to those workers.
3. To provide for rehabilitation services and programs to facilitate the workers’ return to work.
4. To provide for rehabilitation programs for their survivors.
5. To prevent or reduce the occurrence of injuries and occupational diseases at work.
6. To promote health and safety in workplaces.

The legislative purpose clause in section 1 of the new Act states:

The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:

1. To promote health and safety in workplaces and to prevent and reduce the occurrence of workplace injuries and occupational diseases.
2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.
4. To provide compensation and other benefits to workers and to the survivors of deceased workers.

As a general approach to protecting workers from loss caused by work related injuries, the purpose clause is not a bad one. The clause reflects an approach to work related injuries which should be completely supportable by workers. First, reduce the number of injuries. Second, where injuries do occur, assist injured workers to return to work because the vast majority of injured workers would prefer a pay cheque to a compensation cheque. Third, where there is loss from injury, compensate the loss.

This type of approach is a great improvement on the old approach which did not recognize the extent to which both the occurrence of injury and the consequences of injury are heavily influenced by the adoption of appropriate management techniques.

However, there are at least two major problems with the purpose clause.

The first major problem with the purpose clause is that, as a practical matter, the scope of the WSIA provisions dealing with occupational health and safety are quite limited. While health and safety should be the primary focus for reducing the consequences that flow from work related injury, given the limited provisions dealing with health
and safety in the Act, it is not accurate to state that the primary purpose of the WSIA itself is health and safety. Placing the promotion of health and safety as the primary purpose of the Act diminishes the importance of the other objectives, such as re-employment and compensation, that do fall squarely within the desired purposes of the Act from an injured worker's perspective.

The second major problem with the purpose clause is that the word "compensation" is no longer qualified by the word "fair". Fair is hardly an exacting standard to be held to. It falls somewhere below "good" and is certainly much below "excellent". The word fair fits right in there with other such radical words as, for example, "reasonable". Given the limited practical uses of the purposes clause, the government's refusal to put the word "fair" back in to qualify "compensation" can most likely be seen as an effort to further emphasize the very limited role that it is willing to provide for financial compensation within the workplace insurance scheme.

2. **THE IMPORTANCE OF WORKERS’ COMPENSATION: A SHRINKING SYSTEM**

The single most notable change to the Ontario workers’ compensation system over the last decade is not the adoption of the wage loss system or the reaction of the workplace parties to the wage loss system. The single most notable change is the huge drop in reported injuries and the even larger drop in accepted lost time injuries.

According to the Board's 1997 Annual Report, reported injuries dropped from a total of 487,654 in 1988 to 339,476 in 1997. Lost time injuries dropped from 208,499 in 1988 to 101,806 in 1997. If self-insured Schedule 2 employers are excluded the drop in lost time claims is even more dramatic going from 185,585 in 1988 to 86,641 in 1997. Claims not allowed increased from nine percent of all claims in 1988 to nineteen percent of all claims in 1997.5

There is no one accepted reason for this drop having taken place. Possible explanations include:

- an actual decrease in work related injuries
- under reporting of injuries and abandonment of claims due to employer intimidation motivated by experience rating
- an increase in the percentage of claims denied by the Board
- worker frustration with dealing with the Board
- employer programs to avoid reporting claims as lost time injuries due to experience rating

There is plenty of anecdotal evidence from workers’ representatives and Board staff to allow any reasonable observer to conclude that under reporting of injuries due to

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employer intimidation is a reality. The question is to what extent does this under reporting take place and what can be done about it.

The Board has, in the past, done some research to determine whether or not there was any evidence of under reporting of workplace injuries (there was). However, there are no indications that the Board is presently concerned at all about the current trends in accident reporting.

The Board has also not provided any information in its annual reports about why the number of denied claims as a percentage of all claims is increasing or why the percentage of claims that are initiated and then abandoned is also increasing.

The sad reality of this situation is that the Board and its senior management appear to be solely focussed on the financial side of the workers’ compensation system: namely, reducing the unfunded liability and reducing assessment rates for employers. A drop in the volume of claims and allowed claims is obviously quite helpful to the Board in addressing its financial situation. Given the focus of the present Board management, the prospects for significant attention being paid to the under reporting of injuries in the near future are dim.

3. THE CHANGING NATURE OF WORKERS’ COMPENSATION ADVOCACY

The past year was a horrible year to be a workers’ compensation advocate. Aside from the necessity of learning a whole new Act, the introduction of limitation periods on appeals has significantly impacted the manner in which advocacy services need to be provided.

In the office where I work, and I expect in the workplaces of most other workers’ compensation advocates, a lot of hours were devoted in both January and June to ensuring that no decisions in active files were left unappealed if there was any chance that the worker would want to pursue those claims at a later date. On top of the existing case load, many more injured workers requested service due to the fact that they had to pursue their appeals or lose them.

Furthermore, many more hours were devoted to adopting office procedures to deal with workers’ compensation files in such a way as to minimize the potential for limitation period problems to occur while the files were active in the office.

One of the features of workers’ compensation that drew me to workers’ compensation advocacy as a law student was the informality of the system. There were few rules of evidence and an absence of legalistic procedures. The informality of process also allowed a lot of persons who are not lawyers to participate as legal representatives in workers’ compensation proceedings. Depending upon the training and the motivation of the individuals who provided advocacy services, a lot of good work could be done on behalf of an injured worker.
Another nice thing about the workers' compensation system that encouraged the involvement of new representatives was that a poorly trained, inexperienced, or disorganized representative, while perhaps not doing as well as a properly trained and motivated representative might have, would not all that often make things worse for the worker than the worker would have experienced in dealing with the Board on his or her own.

With the passage of the WSIA and the adoption of limitation periods on appeal, it is now very likely that a disorganized or poorly trained representative will end up doing serious harm to an injured worker's claim.

My guess is that civil liability or the threat of civil liability due to missed limitation periods will drive out a number of representatives who used to provide workers' compensation services. Not too many will mourn the departure of a number of the fly by night ten per centers. However, the threat of liability, and the simple fear of screwing up, will also be experienced by unions and injured worker groups who provide a vital service to the injured worker community. This threatens to change the very nature of worker side advocacy in the workers' compensation system.

At a minimum, the steps required to deal with workers' compensation claims in an environment with limitation periods is as follows:

- Representatives must consistently refuse to do anything that might create an expectation that they are looking after an injured workers' claim until such time as the representative is fully aware of the timelines for appeals and is ready to accept the responsibility for meeting them. The representative must also ensure that if there is a time lapse between the first contact with the injured worker and the time that they take on responsibility for the file, that the injured worker is made aware of the importance of meeting any limitation periods that might expire in the meantime.

- Written agreements are required between the injured worker and the representative specifying exactly what services the representative is responsible for providing and what services the representative is not responsible for providing.

- A working environment must exist where no letters or faxes can be received without coming to the notice of the representative and there must be an adequate filing system for dealing with the correspondence.

- A tickler system and standardized follow-up system must be in place.

- Work loads must be controlled.

While it is possible and vital that non-lawyers continue to provide workers' compensation advocacy, it is no longer possible to approach workers' compensation advocacy on a casual basis. The days of the unsupported part-timer with a disorganized file cabinet full of files that he or she gets to when they have time has gone. If the threat of liability is to be survived, and services are to continue from non-profit sources, it is important that steps be taken by all such representatives to deal with the reality of limitation periods.
4. FINANCES OF THE WORKPLACE SAFETY AND INSURANCE BOARD: CREATIVE ACCOUNTING II

I have previously written about the significant under reporting of assets by the Board as a result of its use of carrying values instead of market values on its audited financial statements. I will not repeat my observations here except to state that for the years 1995, 1996, and 1997, the Board has seen improvements of its financial position of approximately a billion dollars per year. These figures are obtained before taking into consideration projected cost savings due to the new Act. Furthermore, the Board’s unfunded liability was by my estimate, at the end of 1997, approximately 6 billion dollars rather than the 8 billion dollars reported on the Board’s official balance sheet.

The observation that I would like to make at this point is with respect to workers’ compensation assessment rates in Ontario.

For quite a while it was very common for alarmist employer groups to go on about the average assessment rate in Ontario versus the average assessment rate in other provinces and American states. It was very common to see reported an average assessment rate in Ontario in excess of $3.00 per $100.00 payroll. This rate, the employer groups told us, was a disaster by comparison to the provincial and state jurisdictions that compete with Ontario, and this rate just had to come down. Almost always, the average assessment rate cited would be the inaccurate gross figure which did not include the extremely large New Experimental Experience Rating Plan (NEER) off balances that were rebated to employers.

The Board’s 1997 Annual Report indicates that, in 1997, assessment rates averaged $2.85 per hundred dollars payroll before experience rating net refunds. The figure net of experience rating refunds is typically not reported. However, based on information contained the 1997 Annual Report, it can be calculated that the net assessment rate for 1997 would have been approximately $2.52 per hundred dollars payroll.

Even net of experience rating rebates, this average assessment rate includes in it the assessment rate funds payable for health and safety associations and for funds used for the reduction of the unfunded liability. These costs, which are paid through the workers’ compensation assessments rates of Ontario employers, either do not exist in other jurisdictions or are not treated in the same manner in the assessment rates in other jurisdictions where workers’ compensation assessments are focussed more closely on recovering the compensation costs of current claims.

A more accurate picture of how “expensive” the current Ontario workers’ compensation system is for comparative purposes would be obtained by comparing current costs to current costs.


7. Supra note 5 at 20.
Based upon information in the WSIB’s 1997 Annual Report, for comparisons with the current costs of benefits paid in other jurisdictions, the average rate of $2.52 per hundred dollars payroll needs to be reduced by $0.84 per hundred dollars payroll for unfunded liability payments and $0.14 per hundred dollars payroll for other legislated obligations not involving workers’ compensation payments.

With these reductions, average assessments for current costs are approximately $1.54 per hundred dollars payroll. This amount is far below the $2.85 figure which would usually be used for purposes of comparison with other jurisdictions.

5. **THE WORKPLACE SAFETY AND INSURANCE BOARD: MORE CORPORATE AND MORE UNCARING**

The Board has never been a tremendously worker-friendly place and has never been completely free of the political agenda of the government of the day. However, prior to the present administration, the Board always maintained a certain civility in responding to worker concerns and always at least tried to maintain the appearance of neutrality in its dealings between workers and employers.

A number of separate incidents that have occurred in the last year or so that have left me with the very strong impression that the Board has become a very corporate kind of place and is completely consumed by a corporate agenda. The pretext of neutrality appears to be gone.

- The Chair of the Board appears to have stopped answering letters of concern about the Board’s policies that are addressed directly to him (or at least my letters). Replies are routinely delegated to subordinates who have the technical knowledge of the policies in question but lack the control of the board’s corporate agenda. While the chair is no doubt a busy person, this approach stands in stark contrast to the approach of previous chairs Star, Alexander, Elgie and DiSanto, who would at least sign the responses prepared for them by underlings. If nothing else, the approach of the former chairs allowed them to keep on top of the concerns of their constituents.

- The Board is organized along industry sector lines with absolutely no discussion about, or safeguards put in place to protect against industry capture of Board employees.

- The Board appoints customer service representatives to look after the needs of its customers – defined as employers – without even acknowledging or apparently recognizing how offensive this is to the concept of Board neutrality between workers and employers.

- At a regional conference arranged by the Board to allow it to communicate with its stakeholder community, a senior representative from the Operations Division of the Board addressed the audience as the keynote speaker. The Board’s representative was unabashedly supportive of zero injury programs which are often promoted by corporations but hated by unions and workers due to the pressures
they create not to report or to hide any and all work related injuries. There did not appear to be any awareness at all by the Board’s representative that there might be some problems with the Board promoting corporate zero injury programs.

- The Board continues to drag its heels in even reviewing its completely unjustifiable policy of stacking deemed employment earnings with income from Canada Pension Plan disability benefits when estimating the projected post-injury earnings of injured workers.

- I wrote to the Board about the termination of job search assistance supplements. These supplements previously allowed a worker to survive a period of job search as part of a labour market re-entry plan without resort to social assistance benefits or without losing his or her house. The Vice President of the Board’s Policy and Research Division wrote back as follows:

In summary, the Board believes that the arbitrary 6 or 12 month extension of “job search assistance” was a hollow benefit that did not guarantee an injured or ill worker would be employed.8

The Board is now apparently of the view that protecting injured workers from foreseeable, unavoidable, catastrophic loss resulting from injuries is not a core responsibility of the workers’ compensation system but is instead an unnecessarily expensive “hollow benefit” that needs to be eliminated.

In summary, the Board has become more distant and remote, less neutral, more employer oriented and much more callous in its willingness to abandon injured workers who are in need of financial support as a result of unavoidable losses due to workplace injuries.

6. APPOINTMENTS TO THE WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL: DE-SKILLING AND RE-POLITICISING THE APPEALS TRIBUNAL

The former Chair of the Appeals Tribunal, Ron Ellis, has spoken out extensively on the threats presented by the recent trends in appointments to the Appeals Tribunal.9 I will not attempt to go over this topic in any detail given the much more detailed knowledge of this subject that Mr. Ellis has. However, I didn’t think that this issue should go without notice in this paper and I wish to add some personal observations.

I have been active in the workers’ compensation system since prior to 1985 and I was unfortunate enough to experience the way that the final level of appeals before the former Appeal Board were run at that time. The first formal hearing in the appeal process took place before a Board staff member and was, generally speaking and within understood limits, a quite satisfactory hearing. The final level of appeal, on the

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other hand, took place before largely part time panel members primarily chosen on the basis of their political affiliation. This final level of appeal before the Appeal Board was genuinely horrid. The contrast between the quality of the first appeal and the awfulness of the second appeal had nothing to due with independence. Decision makers at the first level of appeal had even less independence than the Appeal Board members did. What the first level decision makers did have was experience derived from long term employment by the Board and a sense of professionalism in their approach to their duties.

The quality of decisions before the old Appeals Board was in fact so bad that when the Appeals Tribunal was first created in 1985, special provisions were written into the WCA to allow for the Tribunal to hear applications for reconsiderations of old Appeal Board decisions. Much of the caseload of the Tribunal in its first years of existence consisted of applications for reviews of old Appeal Board decisions. It took a lot of effort to try to clean up the mess of human lives that had resulted from the old Appeal Board decisions.

The current government of the day appears to be willing to risk repeating the errors of the past. Fewer and fewer appointments to the Tribunal are now full-time. Experienced full-time, qualified decision makers are being moved out or made part-time. Part-time inexperienced members are being moved in. There is now a much greater possibility that an appeal will be decided by a decision maker who is inexperienced. Even with the passage of time, there is simply no way that these part-time members will ever achieve the same level of competence as a full-time member would.

What is worse is that, true or not, there are rumours in existence that the reasons for removals have to do with whether or not the members are viewed favourably by employer side lawyers whose firms appear before the Tribunal and who also have the ear of the Premier’s office. The possible existence of patronage, while disappointing, is not surprising. The possible existence of patronage undiluted by concerns of competence and tainted with bias is greatly distressing. Even if the rumours do not reflect reality, these rumours are certainly a point of discussion in the worker advocate community and faith in the administration of justice has been undermined. What is certain is that the government has done nothing effective to dispel the rumours.

7. **Policy Issues and the Workplace Safety and Insurance Appeals Tribunal**

The Board has never been completely happy that there is an independent tribunal in existence that can challenge its inherent right to interpret and administer workers’ compensation legislation. The Board was particularly unhappy with the lack of an effective means of emerging triumphant when differences of opinion occurred between itself and the Tribunal over matters of law and policy.
While the passage of the WSIA left in place an Appeals Tribunal that is separate and distinct from the Board itself, through the passage of section 126 the Board was granted the authority to require the Appeals Tribunal to adhere to its policies.\(^{10}\)

Having achieved the right to make its policies stick, it has been interesting (and distressing) to see just how quickly the Board has moved to expand its demands for authority over the Appeals Tribunal and further subvert its independence.

The Board has taken the view that the Tribunal must adhere not only to officially minuted Board policy but also must adhere to any position that the Board solicitor says is a Board policy, even where the position in question has not been approved by the Board of Directors of the Board or by anyone delegated the authority from the Board of Directors to approve policy.

For reasons known only to the Board, the Board has steadfastly maintained that it will not recognize chronic stress claims made for workplace exposures prior to January 1, 1998, while at the same time it has refused to minute a policy that states this.

In the context of an appeal to the Appeals Tribunal regarding a pre-1998 stress claim, the Board's solicitor wrote the following in a letter:

In addition, the Board's policy on claims for chronic stress prior to 1998 is as follows: the Board only compensates for claims of mental stress/psychological disability resulting from an event that was sudden, shocking or life-threatening in nature. In the absence of such an event, the Board does not compensate.\(^{11}\)

When this attempt to assert that there was a Board policy was questioned by injured worker advocates (including myself) the Appeals Tribunal wrote to the Board for clarification regarding precisely what the Board believed its policy to be for the purpose of section 126 of the Act. The Board solicitor's response included the following:

In your letter, you suggested that the Board make generic submissions on what constitutes Board "policy" for the purposes of s. 126 of the Workplace Safety and Insurance Act. After careful consideration, the Board is declining this invitation. In the Board's view, no useful purpose would be served by engaging in a general debate over what constitutes "policy" within the meaning of s. 126. The Board's concern is, that in dwelling on a preliminary issue, the process is side-tracked from the legislated response for addressing any concerns about Board policies. Moreover, a protracted debate over the meaning of "policy" would only delay decision-making in the cases before the Tribunal, thereby prolonging the strain, both emotional and financial, on the parties to these appeals. In the Board's opinion, it is in the best interests of all participants in the process to focus on the statutory scheme for resolving policy concerns between the Board and the Tribunal.

\(^{10}\) WSIA, supra note 1, s.126.

\(^{11}\) As cited in Letter from P. Holyoke to I. Strachan (16 December 1998). Paul Holyoke is the Board's General Counsel. Ian Strachan is the Appeals Tribunals' Chair.
It is the role of the Board, under s. 126 of the Act, to state what policies apply in an appeal before the Tribunal. Once the Board has stated the applicable policies, it is up to the particular panel hearing the appeal to determine whether a stated policy is "inconsistent with, or not authorized by, the Act or does not apply to the case". If the panel determines that the policy falls within one of these categories, s. 126 provides a mechanism for the panel to refer the policy back to the board for review. In the Board's view, this statutory process is the fastest and most efficient way to ensure that matters before the Tribunal are resolved.12

As of yet, the Appeals Tribunal has not responded to this attempted power grab by the Board.13

8. THE WORKPLACE SAFETY AND INSURANCE BOARD'S POLICY DEVELOPMENT AND PUBLICATION PROCESSES

The Board's failure to understand and act upon its obligation to communicate the rules it uses to decide claims is an ongoing one.

In January 1998 the Board published a soft bound book entitled Bill 99 Operational Policies14 to be used to help interpret and apply the provisions of the WSIA.

The policies contained in this book were not minuted. There is no indication of why the Board believes these policies to be authorized by its Board of Directors or any other individual delegated authority from the Board of Directors "in writing" to approve of these policies.15 There is no explanation of how these unminuted policies, some of which are inconsistent with earlier minuted policies, are intended to interact with the earlier minuted policies.

When the policies first came out there were questions about why these policies were bound. Certainly the Board expected there to be a need for further policies or the revision of the existing ones as the Board's experience with the new Act grew. However, more than a year has now passed and no updates or revisions to the book have been issued despite rumours of impending releases that have existed for over nine months now.

The absence of published policies does not, however, mean that the Board has been inactive on the policy development front. Whether authorized by the Board of Direc-

12. Ibid.
15. Under s.164, WSIA, supra note 1, the Board of Directors is given the authority to delegate any of its powers or duties to a member of the Board of Directors or to an officer or employee of the Board. However, "The delegation must be made in writing." Under s.159(2), ibid., the Board of Directors is given the power to establish policies.
tors or not, the Board employees have been generating documents that are intended to be used in the adjudication of claims by other Board employees. Other communications to external stakeholders make reference to standards in adjudication used by the Board that do not appear anywhere else but the communications themselves.

If you wish to know what the Board’s approach is to the entitlement of an injured worker to further services and benefits following layoff from an employer, for example, it would be unwise to rely on the Board’s policy manuals or the more recent *Bill 99 Operational Policies* alone. You should also look at the letter from Linda Jolley, Vice President, Policy and Research, to Michael Green, a Toronto lawyer.\(^\text{16}\)

If you want to know the Board’s approach to applying the new limitation periods contained in the *Act* you must track down a copy of the internal memorandum co-authored by Paul Gilkinson, Acting Director, Appeals Branch, and Pat Lamanna, Director, Small Business Services, Ottawa Office.\(^\text{17}\)

Similarly, for the Board’s required response to federal government orders to pay, you must look at a memorandum from Paul Holyoke, General Counsel, Legal Services Division.\(^\text{18}\)

In case you think that this is a new problem for the Board, think again. For example, perhaps the most influential document regarding the termination of section 147(4) supplements at review periods is an undated document from around March 1995 again from Paul Gilkinson, who was then temporarily performing the work of “The Review Team Co-ordinator”. The document is entitled “Operating Principles 147(4) 60 Month Reviews” and not published or minuted.

Authorized Board policies that are published and maintained and amended when required are the main tool that the Board has of ensuring consistency of adjudication and adherence to the rule of law. It is also the main tool that the Board’s senior management can provide to give guidance to its adjudicative staff in how they carry out the decisions that they must continually make on a day by day basis.

In the absence of leadership from the Board of Directors or senior management of the Board, it is inevitable that Board staff will generate documents to fill these gaps. However, being “unofficial” documents, there is no method for these documents to achieve formal distribution outside of the organization. The Board’s neglect of its requirement to make and publish its rules of entitlement in a timely manner, speaks volumes about the priority it currently provides to quality adjudication and the proper management of its adjudicative staff.

\(^\text{16}\) Letter from L. Jolley to M. Green (28 May, 1998).

\(^\text{17}\) Memorandum from P. Gilkinson & P. Lamanna titled “Update – Appeal Time Limits” (August 1998).

\(^\text{18}\) Memorandum from P. Holyoke to Managers and Above titled “Diversion of Compensation Benefits to Revenue Canada” (23 November 1998).
9. **OUTSOURCING LABOUR MARKET RE-ENTRY SERVICES**

There are at least two potentially positive aspects to the Board’s decision to outsource the provision of vocational rehabilitation (VR) services.

First, by distancing themselves from the rehabilitation process, the Board has finally found the courage to identify re-employment as the performance objective for vocational rehabilitation.

While it might appear quite obvious that re-employment should be the objective of vocational rehabilitation, since the advent of the wage loss system, the Board has always feared the consequences of such a position. If the Board accepted that its obligation was to actually achieve re-employment as opposed to achieving re-employability, the Board feared that it would become responsible for all of the wage loss associated with those workers who did not become re-employed. Good bye deeming. Hello increased assessment rates.

In order to maintain the ability to deem, the Board felt the need to state that having provided the worker with employability that their responsibility was ended.

The negative consequences of the employability charade, beyond allowing the Board to dump the costs of work related injuries onto the backs of injured workers and away from the Board, is that it prevented the Board from effectively targeting programs that were specifically designed to break down employment barriers external to the worker in order to achieve re-employment. It also prevented the Board from evaluating the success of rehabilitation programs on the criteria used by injured workers (namely, employment and not employability).

The Board has now stated to its external vocational rehabilitation service providers that, while the Board’s goal continues to be employability (and therefore implicitly that deeming will continue), the providers will be evaluated not upon their success in obtaining employability but instead upon their success in achieving actual re-employment. This must be regarded as a good thing for injured workers.

This brings us to the second potentially positive aspect of the outsourcing of rehabilitation services. The Board is apparently proceeding with attempts to reliably evaluate the performance of its service providers in achieving re-employment.

While the provision of information does not guarantee information based management, it is at least a necessary first step. Assuming that an appropriate evaluation program is fully implemented, the real issue will then become whether or not the Board is willing to act upon the information it obtains through the evaluation process. This would ensure that the outsourcing of vocational rehabilitation services goes to those service providers that are most successful at achieving injured worker re-employment.

10. **HOLES IN THE RE-EMPLOYMENT/ WAGE LOSS SYSTEM**

When the re-employment provisions of the workers’ compensation system work well, the pre-injury employer can play a beneficial role in the rehabilitation and re-employ-
ment of the injured worker that in many instances could not be duplicated by any other means. However, when the re-employment provisions do not work well, the result of the WSIB's approach to compensation can cause absolutely brutal consequences for an injured worker.

I would like to focus on three aspects of the wage loss system in which serious problems occur whenever there is a break down of the re-employment process. These aspects are:

- dealing with employer hardball tactics
- failure to adequately compensate when the re-employment relationship ends; and
- the injured worker's loss of liberty.

A. Employer Hardball Tactics

The extent to which employers resort to hardball tactics in workers' compensation matters is a topic that is hotly contested. For the purpose of this paper it is not necessary to speculate on the extent to which employers resort to such tactics, it is only necessary to state that they do exist to some undetermined extent and that when used, these tactics can effectively deny workers' compensation assistance to those injured workers who should in fact receive such assistance.

The following examples illustrate some of the unfair tactics that may be utilized by those employers who choose to aggressively pursue the minimization of compensation assessments.

i) The Bogus Job Offer

A bogus job offer might be used by an employer in the situation where an injured worker has strong reservations about his or her ability to return to work but where the Board is convinced that the worker could return to work although likely at the minimum wage. This tactic usually involves a highly modified (and sometimes quite unrealistic) job that barely meets all of the worker's physical restrictions. The offer is usually for wages at or near the pre-injury wage. The offer is made in the hopes that it will be rejected. If the job offer is refused, future loss of earnings benefits are based on the wages offered by the employer. If the job offer is accepted, the employer develops second thoughts and suddenly finds that the job is either a) not authorized by senior management, b) unrealistic in the long run, or c) suddenly unavailable due to unforeseen circumstances. Alternatively, the employer may actually follow through with the job offer for a short period of time until financial circumstances that are "unrelated to the injury" require a downsizing of the workforce. There are no negative repercussions to an employer for making a bogus job offer. There are serious repercussions to an injured worker in refusing one.

ii) The Suddenly Permanent Job Offer

The suddenly permanent job offer is similar to the bogus job offer. In this scenario the employer brings the worker back to temporary modified work which may or may not be part of a legitimate return to work program offered by the employer. In reality, there
are no prospects of the job becoming permanent. However, should the worker decline to perform the work, the job suddenly becomes permanent.

iii) The Physically Suitable But Otherwise Not Suitable Job Offer
This tactic is perhaps the most prevalent tactic used to achieve the aggressive employer’s objective of reducing workers’ compensation assessments without actually having to keep the injured worker employed. The idea is to offer a job that is physically suitable but which will be refused by the injured worker either immediately or after a predictably short period of performance. Even where the employer’s intentions are genuine, the dilemma posed to injured workers remains the same when work is offered that is physically, but not otherwise, suitable. Examples abound:

A single parent or older worker is offered a job on the night shift, or on erratically variable shifts when the pre-injury work was straight days.

Work is offered at another location of the employer that requires an extensive commute or relocation inconsistent with the worker’s family obligations or the continued employment of the worker’s spouse.

A high skilled, high wage worker is offered a low status menial job paid at a premium but performed before, or for, co-workers or former subordinates.

A position with a high rate of turnover due to its boring, menial nature is offered on a sequential basis to a series of permanently injured workers.

Formerly, Board policies under the WCA provided some protection against this potential abuse in providing for restrictions on the geographic area that a worker was required to look for or accept work in and by requiring an employer, during the period of the re-employment obligation, to offer the “most suitable job” that is “most comparable in nature and earnings to the worker’s pre-injury job”. Former vocational rehabilitation policies also provide other indications that the worker’s skills and attributes should be taken into consideration in establishing vocational rehabilitation goals.

Currently Board policies under the WSIA define suitable work as follows:

... Any work that:

- the worker has the necessary skills to perform, or the worker is able to acquire the necessary skills to perform, and
- does not pose a health or safety risk to the worker or co-workers.

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The restrictions contained in the previous Board policies referred to above have not been continued into the Board's new policies. The potential for unacceptable job offers has increased substantially.

B. Failure to Adequately Compensate When the Re-Employment Relationship Ends

Often the work that the worker returns to with the accident employer is modified in some way to meet the needs of the injured worker. Common accommodations might include:

- variations in the manner in which a job is to be performed;
- the provision of assistive devices to allow the job to be performed;
- a lessening of performance requirements in the job;
- the employer's maintenance of higher than usual wages in the post-injury employment.

So long as the worker remains employed, the Future Economic Loss (FEL) payments or Loss Of Earnings (LOE) payments provide adequate compensation to the injured worker to compensate for the loss of wages, if any. The difficulty occurs when the employment relationship ends. Despite the fact that the termination of the employment relationship may have been beyond the control of the worker and there is no reasonable prospect of obtaining a job with the same rate of pay with some other employer, there is no right to a redetermination of the wage loss benefits based on the change of circumstances.

The recalculation of FEL payments in these circumstances is governed by Board policy, the relevant portions of which indicate as follows:

If workers are unemployed at the time of the review because of circumstances not related to the work injury, and they were employed at D1, the decision-maker bases the FEL on the greater of

- the most recent report of a material change of circumstances, or
- the gross wages of the suitable job the worker was performing at D1 [i.e., sixty months from the date of determination] or the last 24 month variable review.\(^{22}\)

In other words, the worker's FEL benefits are based on a job that the worker no longer has and at wages that the worker cannot realistically hope to repeat.

The recalculation of LOE payments in these circumstances is governed by a different Board policy. The section of this policy dealing with potential increases in the LOE states the following:

The LOE benefit is increased, based on the 5% threshold, if the reduction in post-accident earnings is due to the work-related injury. This could include, but is not limited to a

Again, the likely result of this policy is that LOE benefits will not be increased despite the lower earnings that can be expected upon the loss of the modified employment.

The difficulty with both of these policies is that they focus on the reason for losing employment. While the work related injury may not have had any role to play in bringing about the termination of the re-employment relationship, the work related injury is very likely playing a profound role in the diminution of the injured worker's ability to replicate the wage achieved in re-employment.

In addition to the above policies, there is a letter from Linda Jolley, the Board's Vice President of Policy and Research, which indicates a slightly different approach. It is not clear what status this letter has as Board policy (see the discussion in Section 8, above). According to this letter:

If a worker successfully returns to modified work under s. 40 but is subsequently laid off, the decision-maker must ascertain the reason for the lay off when considering any further entitlement under the Act. Primarily, the decision-maker must determine whether the lay off is employment related, i.e. plant closure, or related to the injury; for example the job is not within the worker's functional abilities.

In most cases, if a worker becomes unemployed for reasons unrelated to the work-related injury, the Board will not provide benefits or services because the worker would have been in the same position in the absence of an injury. However, if the worker has a significant impairment and the post-injury job was heavily accommodated, the Board will assess the worker with regard to entitlement to [a Labour Market Re-entry] plan. In these cases the worker may be entitled to benefits and services following lay off.

While the contents of this letter, if followed, might provide some relief for some injured workers, for the most part an injured worker returned to work in accommodated employment is at considerable risk of significant under compensation if for any reason, including reasons completely beyond the control of the worker, the accommodated employment should come to an end.

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23. Ibid., “Loss of Earnings (LOE): Reviewing LOE Benefits”, Document 5.5 at 2. The “5% threshold” referred to above is explained at 1:
   In determining whether a change in earnings is material or not, decision-makers compare the recently reported gross earnings with the escalated gross earnings being used to pay the LOE benefit. If the comparison demonstrates that there is a 5% or greater change in the gross earnings, this is considered a material change and leads to either an increase or reduction in the LOE benefits. Each time new gross earnings are reported, they are compared to the escalated gross earnings used to calculate the current LOE benefit, and the 5% or greater threshold is applied.

24. Supra note 16.
C. **Loss of Liberty**

It is not possible to credibly dispute the need to make injured workers responsible for ensuring that they make reasonable efforts to mitigate their losses. It would be a distortion of the workers’ compensation system to require compensation for self-imposed financial losses. However, it is very evident that in the present workers’ compensation process, the standard imposed upon injured workers is not a reasonableness standard but is instead a standard which requires injured workers to maximize post-injury earning capacity, regardless of personal consequences.

This issue has already been touched on to some extent in the preceding section of this paper dealing with the obligation to accept work which is physically, but not otherwise, suitable. It is also an issue which arises outside of the re-employment context in labour market re-entry plans where the plans are accepted or rejected solely upon the potential of the plan to create the smallest possible financial outlay by the Board.

Within the re-employment process, where workers have returned to work, there often develop situations where the injured worker would like to (need to) take a temporary leave from the work force (unpaid) or quit their job to go to another but cannot do so as they have no prospects for obtaining employment elsewhere at similar wages due to the effects of their work related injuries. The lack of an option to obtain alternative work at similar wages leaves the worker vulnerable to abuse from both the accident employer and co-workers.

In the present re-employment process, a permanently injured worker cannot under any circumstances voluntarily quit a job and then have wage loss benefits redetermined based on a fair determination of his or her earning potential in the job force without reference to the wages that were being earned in re-employment with the accident employer. This would even include situations of racial discrimination, emotional abuse and sexual assault.

Contrast this approach with that of the employment insurance system which shares the same concern of ensuring that workers are not rewarded for self-imposed wage loss. In the employment insurance system, there are a number of prescribed circumstances wherein a worker might quit a job and still remain eligible for employment insurance benefits.

Section 30(1) of the *Employment Insurance Act*,\(^\text{25}\) reads as follows:

30(1) A claimant is disqualified from receiving benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause...

Section 29(c) of the *Employment Insurance Act* defines “just cause” as follows:

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29(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,
(ii) obligation to accompany a spouse or dependent child to another residence,
(iii) discrimination on a prohibited ground of discrimination within the meaning of the Canadian Human Rights Act,
(iv) working conditions that constitute a danger to health or safety,
(v) obligation to care for a child or a member of the immediate family,
(vi) reasonable assurance of another employment in the immediate future,
(vii) significant modification of terms and conditions respecting wages or salary,
(viii) excessive overtime work or refusal to pay for overtime work,
(ix) significant changes in work duties,
(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
(xi) practices of an employer that are contrary to law,
(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
(xiii) undue pressure by an employer on the claimant to leave their employment, and
(xiv) any other reasonable circumstances that are prescribed.26

While this list in its entirety may not be precisely what is appropriate for the workers' compensation system, there is no reason why the principles that are intended to be achieved by this list should not be incorporated into the Ontario workers' compensation system.

At the present time these principles do not apply in the workers' compensation system. The standard of mitigation expected from injured workers who are dependent for their earnings on the accident employer is instead set so high as to require injured workers to suffer abuse, ignore health and safety issues and ignore reasonable family needs if they wish to maintain the same level of income as they did prior to their injury. For the individual worker, this is a serious deficiency in the re-employment process.

26. Ibid.
CONCLUSION

Workers' compensation in Ontario has gone through a tremendous number of changes in the recent past. These changes have been motivated by the desire to lessen employer assessment rates and to improve the Board's balance sheet.

Unfortunately, in order to achieve these objectives of the employers of the province, the government and the Board have chosen to minimize or ignore a number of legitimate expectations that workers have of the workers' compensation system. Basic protection against the catastrophic loss from work related injury is worse now than it has been for many years.

Employer side objectives for competitive assessment rates and higher funding ratios are not going to go away and cannot be ignored. In my opinion it is vital to attack these issues, not by denying the validity of the employer objectives, but instead by attacking the misinformation produced by employers and the Board that has predominated this debate and exaggerates the extent and urgency of the problems that the employer community complains about.

While there are a number of process issues pertaining to such matters as the dissemination of policy and the legitimacy of the appeal process that workers and employers should be able to work on together in dealing with the Board and the government, it is also of vital importance that the worker community continue to fight back on its own, in order to ensure that its legitimate interests in the workers' compensation system are no longer ignored.