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RE-EMPLOYMENT UNDER THE WORKERS' COMPENSATION ACT
ANDREW C. BOME

RESUMÉ
Conformément à la Loi sur les accidents du travail de l'Ontario, la Commission des accidents du travail doit déterminer les critères de retour au travail et le type de travail en tenant compte de la condition physique du travailleur accidenté. Il survient bien souvent des difficultés lorsque la Commission a fait une évaluation incorrecte de la condition physique du travailleur. L'auteur soutient que les procédures de réembauche et les normes utilisées par la Commission concernant ces critères comportent de sérieuses lacunes. Elle soutient également que la Commission devrait disposer de pouvoirs réparateurs accrus pour faire en sorte que les travailleurs accidentés soient réembauchés.

A. INTRODUCTION
The passage of Bill 162 in 1989 brought many changes to workers' compensation in Ontario. One of the more important changes was in the obligations that employers were given towards their injured workers; these obligations are contained in s. 54 of the Workers' Compensation Act (hereinafter "the Act"). This paper will attempt to examine some of the flaws in key areas of this section, both in the manner in which it is administered and interpreted, and in the manner in which the Act is drafted. This paper will suggest alternatives and solutions to these problems.

B. NOTICE AND THE DETERMINATION PROCESS
Section 54(2) of the Act outlines the Board's obligation to make a determination with respect to a worker's fitness. If an injured worker has not returned to
work, the Board must decide whether or not that worker can return to work, and if so, to which kind of work that worker can return.\(^2\) If the worker is healthy enough to be able to perform all of the important functions of his or her job, that worker will be determined fit to perform the essential duties of the pre-injury employment. If the worker is not healthy enough to do this, but could perform some kind of lighter work, that worker will be determined to be fit to perform suitable work. If the worker's health status changes, or new facts about the worker are discovered, the Board must re-determine the worker's level of fitness and adjust it accordingly.\(^3\)

In both of these cases, the employer has a duty to accommodate the workplace which must be examined when making the determination.\(^4\) In other words, if all that prevents an injured worker from being able to perform the essential duties of the pre-accident employment is an accommodation to the worksite, that worker will be determined to be fit to perform the essential duties of the pre-accident employment.\(^5\)

Once a determination is made, the Board must send notice of its determination to the injured worker's pre-accident employer.\(^6\) Upon receipt of this notice, certain obligations are imposed on the employer. If the employer receives a notice that the worker is fit to perform the essential duties of the pre-injury job, it must offer the pre-injury job, or some comparable employment.\(^7\) If the employer receives notice that the worker is fit to perform suitable employment, the employer must offer the first available suitable work.\(^8\)

This process was one of the more controversial topics in the field of re-employment rights under the Act.\(^9\) The controversy stemmed from the fact that early decisions of the Workers' Compensation Appeal Tribunal

2. Ibid. s. 54(2)(a).
3. Ibid. s. 54(2)(b); Decision 968(1990), 17 W.C.A.T.R. 334 at 349.
4. Ibid. s. 54(6).
6. Supra, note 1, s. 54(3).
7. Ibid. s. 54(4).
8. Ibid. s. 54(5).
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(hereinafter the "W.C.A.T.") indicated that if the Board did not make a proper
determination, or did not send notice of this determination to the employer
then there were no re-employment obligations upon the employer.\(^\text{10}\) Subse-
quint cases have refused to follow these early cases, and currently the
W.C.A.T. recognizes that there is a general re-employment obligation upon the
employer, whether or not the Board makes a determination of the fitness of the
injured worker.\(^\text{11}\)

However, the determination process still poses problems for injured workers
trying to enforce an employer’s obligation. In order for the re-employment
process to work, it is crucial that the Board makes a correct determination of
the worker’s level of fitness. A worker who is fit to perform only suitable
work, but who has been incorrectly determined to be able to perform the
essential duties of the pre-accident employment, could not use the re-employ-
ment obligations to encourage an employer to offer available light work.

In this case, the employer could defeat any potential application by offering the
pre-injury employment. Even if the employer did not do this, and the worker
won a re-employment application, the worker could have the benefits that he
or she received reduced because that worker has an obligation to actively look
for work that is consistent with his or her level of fitness.\(^\text{12}\)

Rights that depend upon the Workers’ Compensation Board correctly deter-
mining the workers’ level of fitness have to be seen as seriously flawed. Many
of the disputes that injured workers have with the Board revolve around the
fact that the Board believes that the injured worker is healthier than he or she
actually is. One of the fundamental purposes of s. 54 is to encourage employ-
ers to return injured workers to work as soon as they are able. Having a dispute
about the worker’s level of fitness stand in the way of re-employing an injured
worker, and giving an employer technical defences to its failure to re-employ
an injured worker, seriously undermines the purpose of s. 54.

One simple solution to this problem would be for Re-employment Hearings
Officers to hear arguments with respect to the workers’ level of fitness. As long
as there is a legitimate re-employment issue to be dealt with at the hearing,
there is no reason that the hearing cannot also deal with the issue of the
worker’s level of fitness. This could eliminate many of the procedural hurdles
that currently exist in bringing a re-employment application.

12. Reinstatement Branch 51 (1992) [unreported].
But more is required than simply a change in the processes at the Workers’ Compensation Board. There has to be an understanding by Re-employment Hearings Officers and the W.C.A.T. that a dispute with respect to the level of fitness should not stand in the way of the employer re-employing injured workers. If an injured worker feels that he or she is only capable of performing suitably modified employment, and if the employer has this employment available, then the employer ought to be obligated to offer this employment, regardless of what the Board determines the worker’s level of fitness to be.

This position would be a direct corollary of the W.C.A.T.’s position with respect to the general obligation to re-employment contained in s. 54(1) of the Act.13 There exists a general obligation to re-employ an injured worker “in accordance with” s. 54 that is independent of the Board’s determination process. Given this, the substance of the employer’s general obligation to re-employ would be independent of any determination that the Board has made; this obligation would exist concurrently with any obligations that arise from the Board’s determination process. A failure to re-employ an injured worker pursuant to this general re-employment obligation would trigger a breach in the Act, which would result in the appropriate penalties being assessed against the employer and the appropriate benefits being awarded to the injured worker.

This position should not seriously prejudice the employer, as it would only arise in the situation where the injured worker was incorrectly determined to be fit to perform the essential duties of the pre-accident employment, and where modified employment was available. In that case, all parties agree that the worker could return to work; the only dispute would be which type of work the injured worker is capable of doing. The employer could easily fulfill both its obligations by offering both the pre-accident employment and the available modified employment to the injured worker. This would save the system the amount of the benefits that the Board would have to pay to the worker as a result of the incorrect determination, and would have the injured worker back at work.

C. OBLIGATIONS THAT ARISE UPON RECEIPT OF NOTICES OF FITNESS

As was stated in the last section, once a determination is made and the employer is given notice of this determination, certain obligations arise upon the employer. As can be seen from looking at the nature of the obligations, the

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obligation imposed upon an employer when the injured worker is fit to perform the essential duties of the pre-injury job is much stronger than the obligation imposed when the worker is only fit to do suitable work.

When a worker is fit to perform the essential duties of the pre-accident employment, the employer has no choice but to offer the worker the pre-injury job, or some comparable job. While there may be some question as to what constitutes the pre-injury job\(^{14}\), and what constitutes a comparable job,\(^{15}\) there is little question that the obligation imposed is almost absolute. The only defence that is given to employers for failing to offer employment in these cases is that the employer had just cause to terminate the injured worker prior to the accident.\(^{16}\)

The obligation imposed upon the employer when an injured worker is only found fit to perform suitable work is anything but absolute. The employer only has to offer suitable work if it becomes available.\(^{17}\) There is no requirement that the employer make suitable work available to the injured worker. In one case, the Re-employment Hearings Officer held that if the suitable work stopped being available, then the employer could stop employing the injured worker; if suitable work became available in the future, the employer would again have to offer it.\(^{18}\)

Given the nature of this obligation, in order for the injured worker to success in a re-employment application, the worker would have to show that the employer did not offer suitable work, and that the suitable work was available. In a non-unionized environment, this second requirement places substantial evidentiary burden on the injured worker, since that worker would not always have access to information as to which suitable jobs became available, and when these jobs became available.

The limited obligation placed upon an employer when the worker is only fit for suitable work and the evidentiary problems that come with this are unjustifiable weaknesses in the legislation. Injured workers most in need of vocational rehabilitation are those who are unable to return to their pre-injury jobs, and

\(^{14}\) For an example of where this arose, see “Reinstatement Branch 2 (1992) [unreported].


\(^{16}\) Reinstatement Branch 50 (1992) [unreported]; Reinstatement Branch 44 (1992) [unreported].

\(^{17}\) *Supra*, note 8.

\(^{18}\) Reinstatement Branch 54 (1991) [unreported].
the most important aspect of vocational rehabilitation is the return to work. It is a flaw in the legislation that the injured workers that need the most help in returning to work have the fewest rights under this section. Because of this, the legislation should be amended to strengthen the obligation of employers towards injured workers who are only fit to do modified work.

One solution to this would be to force the employer to make any suitable work that existed in the workplace available to the injured worker, even though this would mean the displacement of an able bodied worker. While on the surface this extreme position may seem to be attractive, it has its problems. It is disturbing to contemplate the use of provisions in the Act, which are to benefit workers, in an attempt to pit injured workers against able bodied workers. The resentment that would arise against injured workers who displace employees cannot be beneficial for the workplace.

What is needed in this situation is some form of middle ground between the extreme position of forcing the employer to make any suitable job available, and the existing weak obligation. One way of doing this might be to restrict the kinds of suitable work that an employer would have to make available to the injured worker. One limitation might be to have the employer make available only those suitable jobs that are being performed by workers who were hired on or after the date of the injury. This would have the effect of lessening the resentment towards injured workers by narrowing the number of workers who could possibly be displaced by injured workers returning to the job.

D. THE PRESUMPTION AND JUST CAUSE
Subsection 54 (10) of the Act, probably the most controversial subsection of 54, states:

(10) An employer who, having re-employed a worker in accordance with this section, terminates the employment within six months, is presumed, unless the contrary is shown, not to have fulfilled the employer’s obligation under this section.

The controversy stems from the fact that the section does not indicate what must be shown in order for the employer to rebut the presumption that the employer has not fulfilled its obligations under the Act. As a result of this, the

Workers' Compensation Board and the W.C.A.T. have taken radically different approaches in deciding these cases.

The Board has taken the position that in order for an employer to rebut the presumption, it must be shown that the reasons for the termination are unrelated to the accident or the disability, and those reasons must give the employer "just cause" to terminate the employee. The W.C.A.T. has expressly rejected that approach and has instead adopted a standard that makes it much easier for an employer to justify the termination of an injured worker; this test may be called the "non-discrimination" test. According to the W.C.A.T., the employer may terminate an injured worker within six months of re-employment if the true reasons for the termination have nothing to do with the accident, the claim for Workers' Compensation, or the ongoing disability.

There are two reasons that the W.C.A.T. give for rejecting the "just cause" test and using a "non-discrimination" test. The first is that the W.C.A.T. believes that their test is consistent with the purpose of the legislation, which they have indicated is to protect injured workers from employer discrimination.

In our opinion, that general purpose implies a defence to the effect that the work-related injury or disability did not contribute in a significant way to the termination of the worker's employment.

The second reason for rejecting the just cause standard is that the W.C.A.T. feels that it is not consistent with the language of the Act. Various panels have held that s. 54 contains a complete code for the adjudication of re-employment disputes, and any questions surrounding re-employment issues must be determined only within the confines of s. 54. To use a "just cause" standard from labour relations or employment law would be to import a standard that is outside the confines of s. 54, and therefore would be beyond the scope of the legislation. One decision went so far as to say that to import tests from other

legislative regimes or from the common law would be contrary to s. 54(1) of the Act which creates the obligation to re-employ "in accordance with this section".26

Both of these reasons for rejecting the "just cause" standard and adopting the lesser non-discrimination standard are flawed. It is respectfully submitted that the argument that s. 54 provides a complete code for the adjudication of re-employment issues, and thus prevents the importation of a "just cause" standard from outside the legislation, is a circular argument. It assumes a priori that the "just cause" standard does not fall within the confines of the statute; however, the question of whether the "just cause" standard is contained within the confines of s. 54 is exactly the question that the W.C.A.T. is trying to answer.

There are also some problems with the idea that s. 54 is a complete code for the determination of re-employment disputes. Subsection 54(13)(b) imports the benefit structure from s. 37 in adjudicating the level of benefits that an injured worker would receive as a result of an employer's breach of their re-employment obligations. Furthermore, it is difficult to see how s. 54 can be a complete code for adjudicating a re-employment dispute, when a very important question, namely the standard used for rebutting the presumption in s. 54(10), is not contained anywhere within the section.

In any event, the W.C.A.T.'s test does not come completely within the confines of s. 54 of the Act. Their test looks at whether the injured worker's termination was in any way motivated by the injury, the disability, or the claim for workers' compensation. This test would be exactly the one used by the Ontario Human Rights Commission in determining whether an employer has breached its obligations under the Ontario Human Rights Code.27 If importing a test from labour relations and employment law is contrary to the Act because it is not within the confines of s. 54, then importing a test from the human rights jurisprudence may be just as contrary to the Act.

The W.C.A.T.'s idea that the whole purpose behind s. 54(10) is to prevent employer discrimination against re-employed injured workers is also flawed. Section 54 is not about employers discriminating against injured workers. The obligation upon the employer is to offer to re-employ an injured worker, and once the employment is offered and accepted, to continue to employ that injured worker. There are procedural requirements and definite time limits to

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these obligations but the effect of the obligation is to re-create and maintain an employment relationship between the injured worker and the employer. Clearly, the re-creation and the maintenance of the employment relation between the injured worker and his or her pre-injury employer is the purpose behind s. 54 of the Act.

It is entirely consistent with this purpose to import a standard for scrutinizing the termination of an injured worker from labour relations and employment law. Conversely, it is inconsistent with the obligation to employ and to continue to employ an injured worker to ask whether the employer has discriminated against the injured worker because of the injury, the disability or the claim for compensation. For these reasons, the "just cause" standard from labour relations and employment law would be the only standard that would be consistent with the purpose of the s. 54 of the Act.

The best way of interpreting s. 54(10) is to use the "just cause" test; unfortunately, the W.C.A.T. has not done this, and the tribunal seems set on this interpretation. While s. 93 of the Act allows the Board of Directors of the Workers' Compensation Board to review a decision of the W.C.A.T., there are major problems with the use of a s. 93 review in requesting the Board to change the mind of the W.C.A.T. In most cases regarding the interpretation of the Act, the W.C.A.T. takes a more liberal attitude than the Board does; because of this, the independence of the W.C.A.T. must be preserved. Use of s. 93 in one of the few instances that the tribunal takes an anti-injured worker stance would jeopardize this independence, and in the long run, harm injured workers.

Probably the easiest and most sensible way to implement the just cause standard would be to redraft the section so that the test is explicit in the Act. In other words, an employer would be presumed not to have fulfilled its obligations under the Act unless it can be shown that the employer had just cause to terminate the employee within six months of the re-employment.

E. REMEDIES

There are certain consequences to an injured worker successfully pursuing a re-employment application; these consequences are contained in s. 54(13) of the Act. Subsection 54(13)(a) gives the Board the authority to impose a maximum penalty of the injured worker's net average earnings for the year. The general rule is that the maximum penalty should be levied, but there are numerous mitigating factors that are used to reduce this penalty. 28 Subsection

28. Worker's Compensation Board, Operational Policy, Doc. 07-05-13; Decision 561 (1991) [unreported].
54(13)(a) gives the worker the right to receive benefits as if he or she were entitled to temporary benefits pursuant to s. 37. Benefits under s. 54(13)(a) are given only to workers who are not receiving temporary disability benefits since workers are not entitled to benefits under both s. 54 and s. 37 of the Act; in cases where the worker is temporarily disabled, the Board continues to pay benefits under s. 37.29

The important part of this section is the penalty section. The theory behind levying a large penalty on an employer who breaches its re-employment obligations is that the threat of the penalty will encourage most employers to offer to re-employ its injured workers in order to avoid paying these penalties. This is eminently sensible, and probably does work to encourage employers to re-employ injured workers.

However, the mere threat of a penalty does not go far enough towards making employers re-employ injured workers. An employer that does not wish to re-employ its injured workers can continue to refuse to do so, as long as that employer is willing to pay the appropriate penalty. In cases such as these, the Board can do nothing except levy the penalty on the employer and award the benefits to the injured worker. While the benefits awarded to an injured worker are helpful, they can never be a substitute for employment.

Since the purpose of s. 54 is to return injured workers to work, the Board needs broader remedial authority in order to ensure that injured workers actually get back to work. The Board should have the authority to order the employer to offer employment that is consistent with the employer's obligation pursuant to s. 54. The Board also ought to have the authority to order any reasonable accommodation to the job that would be necessary in order for the employer to fulfil its obligations under the Act. This broader remedial authority would be in addition and complementary to the Board's current power to grant benefits to the worker and levy a penalty against the employer.

There is no reason that the Board could not exercise this authority. Other provincilal tribunals have similar remedial authority. The Ontario Labour Relations Board has broad remedial powers in order to enforce worker rights under the Labour Relations Act,30 which includes the power to re-instate employees who have been terminated contrary to this Act.31 The Ontario Human Rights Commission can order a party in breach of the Ontario

31. Ibid. s. 91(4).
Human Rights Code 32 to do anything it ought to do in order to achieve compliance with the Code. 33 It stands to reason that the Workers' Compensation Board ought to have similar remedial authority when dealing with similar situations under the Worker's Compensation Act.

Unfortunately, the Act does not give the Board these powers. In order for the Board to obtain these powers, an amendment to the Act is required. It is crucial that re-employment rights under the Act are drafted to benefit injured workers to the fullest, and in a manner that is consistent with returning them to work.

33. Ibid. s. 41.