J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 1(3) 253-262, 1992-93

REEMPLOYMENT AND ACCOMMODATION OF INJURED WORKERS UNDER ONTARIO'S WORKERS' COMPENSATION ACT

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ABSTRACT

Recent amendments to Ontario, Canada's Workers' Compensation Act places an obligation upon employers to rehire workers injured in their workplace. The obligation extends for a period of two years after the date of injury. The act also requires that, where necessary, employers take actions or make investments to accommodate the injured worker's return to work, so long as these accommodative measures do not cause the employer undue hardship. Although the act appears to place reemployment obligations squarely on employers, the success of the reemployment provisions will also depend on the response of the other parties, namely injured workers and the workers' compensation board itself, to the obligations the act places on them. This article outlines the reemployment provisions of the act and examines the obligations the act sets out for each of the parties as well as the incentives to comply.

As part of a major overhaul of the Ontario workers' compensation system, Bill 162 mandated the employer's obligation to rehire injured workers following their injury and, where necessary, to make accommodations that facilitate their return to work. The intent of this legislation was, at least in part, to address the concern that injured workers may be unfairly excluded from the labor market, with all of the implications for loss of self-esteem and diminished economic security that such exclusion entails. Baker and Sones argued that, "(i)njured workers who become disabled experience the same stigma and disadvantage faced by persons who are disabled for other causes" [1, p. 31].

The reemployment and accommodation provisions outlined in section 54b of the Ontario *Workers Compensation Act* [2] (as amended in 1989 by Bill 162) are consistent with the broad principles of the legislation. These principles include

doi: 10.2190/G09J-FV09-QDU6-EWXJ
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proactive interventions that are intended to return injured workers more rapidly and to the fullest extent possible to their pre-injury situation, including the lifetime earnings profile that was anticipated prior to the injury. Further, the bill changed the way in which permanently impaired workers are compensated. Instead of being awarded lifetime pensions, workers receive a lump-sum payment for "non-economic" loss based on the degree of permanent physical impairment and the worker's age at the time of injury.[1] In addition, workers may be entitled to compensation for future loss of earnings or so-called "wage-loss" benefits.[2]

The emphasis that the act and board policy, in concert, places on returning injured workers to employment and as close as possible to their pre-injury earnings profiles is reinforced by statutory requirements on employers, injured workers and the Workers' Compensation Board. Since the provisions of the act do not include authorizing the board to order reemployment, much of the potential of this legislation with respect to meeting the objective of returning injured workers to employment will be determined by the effectiveness of the administration of the act, as it relates to each of the parties.

The purpose of this article is to draw together relevant sections of the act and stated board policy to gauge the potential effectiveness of the reemployment and accommodation provisions. The discussion proceeds with an outline of the requirements that the act places on employers and the explicit statutory and administrative incentives to comply. Obligations and incentives to comply will then be examined, in turn, for the Workers' Compensation Board and injured workers. Brief summary comments conclude the article.

EMPLOYER OBLIGATIONS

The Ontario Workers' Compensation Act obliges employers (with the exception of the construction industry and employers with fewer than 20 employees) to reemploy an injured worker, so long as the worker can return to work within two years of the injury. The employer must also maintain continuous employment for the injured worker for at least six months after his/her return. According to section 54b(4):

> Upon receiving notice from the Board that a worker is able to perform the essential duties of the worker's pre-injury employment, the employer shall offer to reinstate the worker in the position the worker held on the date of

[1] The award for noneconomic loss is equal to the percentage of the worker's permanent impairment multiplied by a lump-sum amount equal to $45,000 less (plus) $1000 for each year of age that the worker is over (under) age forty-five, to a maximum adjustment of $20,000. Thus a 25-year-old worker with a 100 percent permanent impairment rating would receive a noneconomic loss award of $65,000.

[2] The economic loss award is equal to 90 percent of the difference between the worker's pre-injury average net earnings less the net average earnings that the worker would be likely to earn in "suitable and available" postinjury employment.

> injury or offer to provide the worker with alternative employment of a nature and at earnings comparable to the worker's employment on that date.[3]

The obligation to reemploy goes beyond the pre-injury job. Depending on the nature and severity of the injury, a worker may not be able to perform his/her time-of-injury job. In such instances, section 54b(5) requires that:

> Upon receiving notice from the Board that a worker, although unable to perform the essential duties of the workers' pre-injury employment, is medically able to perform suitable work, the employer shall offer the worker the first opportunity to accept suitable employment that may become available with the employer.[4]

The act further requires the employer to be proactive in accommodating the workplace to special needs of the injured worker. Section 54b(6) describes the employer's duty to accommodate:

> In order to fulfill the employer's obligations under this section, the employer shall accommodate the work or the workplace to the needs of a worker who is impaired as a result of the injury to the extent that the accommodation does not cause the employer undue hardship.[5]

The board suggests that accommodation could take the form of improving accessibility, restructuring the job, altering work schedules, equipment modification and providing assisting staff, but is not restricted to these examples [3].

[3] According to Workers' Compensation Board policy document #07-05-08 (May 10, 1991), determination of the ability to perform the essential duties of pre-injury employment requires consideration of the duties necessary to produce the "job outcome"—the overall objective of the job. The ability to perform the job is assessed after potential accommodations are considered.

The comparability of "alternative employment" to the pre-injury job is determined along dimensions of "the duties actually performed, the working conditions, including the working environment, geographical location, hours of work and right to work overtime, the degree of skill, effort and responsibility, the rights, privileges and perquisites, the opportunities for the worker continuing in, advancing in, and being promoted in the employment, and the required vocational qualifications." Comparable earnings have been taken by the board to be not less than 90 percent of the pre-injury earnings. (Workers' Compensation Board policy document #07-05-09 (May 10, 1991)).

[4] "Suitable employment" has been defined by the board to be "any job which the worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the worker or any co-worker." It should also be noted that the employer is obliged over the full reemployment period to offer the most suitable job, in terms of comparability to the nature and earnings of the pre-injury job, which is currently available. (Workers Compensation Board policy document #07-05-10 (April 30, 1991)).

[5] Workers' Compensation Board policy document #07-05-07 (May 1, 1991) notes that the board will have regard for the Ontario Human Rights Commission, *Guidelines for Assessing Accommodation Requirements for Persons with Disabilities*, in determining whether accommodation will cause undue hardship to an employer.

INCENTIVES FOR EMPLOYERS TO COMPLY

Baker and Sones suggested that because the Workers' Compensation Act does not empower the board to order re-instatement of injured workers, ". . . the injured worker's right to reinstatement under the Act may be determined solely by whether it is cheaper for the employer to refuse to reinstate than to make the accommodation" [1, p. 53].

The Ontario Workers' Compensation Board can impose penalties on employers who are determined by the board to have failed to comply with the reemployment provisions. According to section 54b(13) (a) and (b), the board may:

(a) levy a penalty on the employer of a maximum of the amount of the worker's net average earnings for the year preceding the injury; and

(b) make payments to the worker for a maximum of one year as if the worker were entitled to compensation under section 40, and subsections 40 (2) and (3) apply to the payments with such modifications as the circumstances may require.

The amount of the penalty under section 54b(13) (a) is not subject to any ceiling applicable for the calculation of any benefit under the act. Employers that fail to reemploy are also liable for any compensation payments made to the injured worker for a period of one year following the board's determination that the employer has failed to comply.

In choosing whether or not to comply with the reemployment provisions under section 54b, the employer will give some weight to the penalties on the one hand and the financial implications of compliance on the other. The costs of noncompliance include the penalty under section 54b(13) (a) and any benefits to which the worker is entitled under section 54b(13) (b). Weighing against these penalties are the costs of accommodating the injured worker and, if the employer participates in one of Ontario's three experience-relating programs, the proportion of future economic loss benefit costs (section 45a) for which the employer would be liable in the event that a worker was unable to return to his/her pre-injury earnings profile. In addition, the employer would consider the probability that the injured worker would pursue the employer's refusal to reemploy through the Human Rights Code, and the expected cost associated with such an action.

Board policy guidelines also indicate that only on rare occasions will section 54b(13) (a) penalties be reduced. The guidelines refer to instances where economic circumstances outside of the employer's control force company restructuring, and the reemployment of workers subsequent to the employer having been found by the board not to have complied, as possible situations for which penalty reductions could be considered [4].

Gunderson summarized studies which attempted to measure the costs of various types of employer accommodations for handicapped workers [5]. These studies

found that the average cost of an accommodating action, among employers who reported a non-zero cost, was just over $1300. He concluded that, " . . . the average cost of each accommodation is not large, and may entail almost no cost" [5, p. 16], and that, " . . . extremely costly examples that are often publicized are likely to be relatively rare . . . " [5, p. 17]. In instances where the costs of accommodation would cause the employer undue financial hardship, the board will provide the financing [2, §54; 6].

The employer is also invited to participate in determining an appropriate vocational rehabilitation program, where necessary, for the injured worker [2, §54a(10)]. This offers the employer an opportunity to plan possible accommodations, thereby reducing the disruptive impact that, for example, unanticipated scheduling changes could have on staffing administration.

Taken together, the cost of the noncompliance penalty, the low probability that penalties will be reduced, the modest cost of most accommodations, financial assistance for costly accommodations and participation in the workers' rehabilitation program appear to create a reasonably strong incentive for employer compliance.

WORKERS' COMPENSATION BOARD OBLIGATIONS

Much of the success of the reemployment provisions will depend on the extent to which the board is able to comply with the requirements placed upon it by the act, as well as compliance with the operational policies the board itself has established. The board's ability to effectively identify the injured worker's needs and begin the process of reintegration into the workplace at the earliest possible moment will have an impact on both the employers' obligation to reemploy and the injured workers' ability to pursue their right to reemployment, particularly given the two-year obligatory reemployment window.

Allingham and Sangster have outlined the obligations that the act places on the Workers' Compensation Board in assisting the injured worker's return to the workforce, both as early as possible, and at a point that is as close as possible to their pre-injury situation [7]. The obligations include early contact with injured workers to determine their need for vocational rehabilitation services [2, §54a(2)], offering a vocational rehabilitation assessment to those who have not returned to work within six months from the date of injury [2, §54a(5)(8)], timely decisions on determining the need to establish a VR program following the assessment [2, §54a(9)], and, where necessary, the design of a VR program in consultation with the injured worker, the worker's doctor and the time of injury employer [2, §54a(10)]. Allingham and Sangster also indicated that the board has focused attention on the establishment of early medical treatment, particularly for soft tissue injuries [7, pp. 534-536].

INCENTIVES FOR THE BOARD TO COMPLY

A central focus of the workers' compensation system after Bill 162 is to return the injured workers as close as possible to their pre-injury earnings profile, with a strong emphasis on the return to the pre-injury job and employer. Kaegi noted that [8, p. 28]:

> The emphasis on return to the pre-injury work is intentional and well-founded. If such a return is achieved, disruptions to the worker's life—and to the employer's operations—are minimized. The worker's dignity is maintained, his or her social support network continues, and the income level is relatively stable.

Kaegi added that "the Board has found that the maintenance of the worker-employer nexus is important and increases the likelihood of a successful return to work" [8, p. 28]. According to board policy, the injured worker's vocational rehabilitation "goal," in all instances, is the pre-injury wage. The vocational rehabilitation objective is defined as "an occupation that will bring the worker's earnings profile, after VR, as close as possible to the VR goal" [9].

To this end, a vocational rehabilitation policy was established that pursues a hierarchy of objectives: to return workers to: 1) their pre-accident job and employer, 2) a comparable job with their pre-accident employer, 3) a comparable job with a different employer, 4) a suitable job with the pre-accident employer, and finally, 5) a suitable job with a different employer [9]. This hierarchy is clearly linked to the reemployment provisions of section 54b, which place obligations on the employer to offer injured workers their pre-injury job, a comparable job, or a suitable job as appropriate.

The focus on the pre-injury earnings profile in both the determination of the VR goal and future economic (or "wage-loss") benefits under section 45a also reflects the financial importance of permanent disability benefit costs to the workers' compensation system. The closer workers are able to approximate their pre-injury earnings profile, the lower the cost of future economic loss payments.

There is a substantial degree of responsibility placed on the board under the new legislation, together with strong incentives to comply. Lengthy delays in assessing the vocational rehabilitation needs of injured workers may threaten their eligibility for reemployment. The two-year postinjury clock on the reemployment provisions adds to the board's incentives, since delays also increase the costs of the system, in terms of VR supplements and future economic loss benefits. The ability of the board to meet its VR obligations will be an important determining factor in success of reemployment and accommodation.

INJURED WORKER OBLIGATIONS

To qualify for reemployment rights under the act, workers must have been employed with the time-of-accident employer on a continuous basis, for a period of one year. Board policy states that [10]:

> If the worker was first hired by the employer at least one year before a work injury is suffered, any work cessation in the year before the injury will not be considered to have affected the continuity of employment, unless the Board is satisfied that it was not the intent of the parties to maintain the employment relationship over the year.

Situations including strikes, lock-outs and leaves do not affect the continuity of employment. Lay-offs of three months or less and of longer than three months, but during which the employer has indicated that the employment relationship was to be maintained, also do not affect the continuity of employment.

The act anticipates conflict with the return to work after injury provisions of some collective agreements, and section 54b(14) confers this section onto collective agreements in cases where collective agreement provisions are less generous. The idem to the subsection ensures that seniority rights under collective agreements are not displaced. If reemployment provisions in collective agreements offer greater protection for the worker than the act, the board will advise the worker to pursue reemployment through the grievance procedure [11].

Most importantly, section 54b(11) requires the injured worker to initiate any claim that the employer has not complied with any of the employer's obligations under section 54b.

INCENTIVES FOR INJURED WORKERS TO COMPLY

The wording of the reemployment and accommodation provisions focuses on the employer's obligations. However, the "wage-loss" component of compensation for permanent disability under section 45a and the supplements for injured workers who are cooperating with vocational rehabilitation may create incentives for some injured workers which could make them less likely to pursue their right to reemployment and, where necessary, accommodation.

Burton noted that a "problem with a pure wage-loss approach is that since the amount of benefits . . . is dependent on the extent of wage loss, there is less incentive for an employee to return to work (since that will reduce benefits)" [12, p. 34-35]. Studies for the United States have found that increasing the generosity of disability transfer programs has an inhibiting effect on the choice of disabled workers to participate in the labor market, controlling for the wage rate that

workers would be expected to earn in their disabled state.[6] The potential behavioral influence of a wage-loss system was expressed by Weiler in making recommendations that would greatly influence the content of Bill 162. With respect to workers, Weiler noted [15, p. 18]:

> Another recurring objection to the wage loss system concerned the way in which a promise of near full compensation for lost wages might detract from the disabled worker's incentive to seek and keep alternative jobs, since the wages for these jobs would reduce, dollar for dollar, the benefits otherwise payable by the WCB. That was and is a major concern to me. It was the reason for the elaborate set of directives to both the worker and his employer to provide suitable and available employment that might reduce the payments the board must make.

The potential incentive effects of pure wage-loss benefits were anticipated by the act. Section 45a(3) defines the amount of compensation for future loss of earnings as 90 percent of the difference between:

(a) the worker's net average earnings before the injury; and
(b) the net average earnings that the worker is likely to be able to earn after the injury in suitable and available employment.[7]

Section 45a(7) outlines a number of factors the board will consider in determining how much a worker can earn in suitable and available employment. Among these are:

(c) the personal and vocational characteristics of the worker;
(d) the prospects for successful medical and vocational rehabilitation of the worker;
(e) what constitutes suitable and available employment for the worker.

The initial determination of the future economic loss awards is made twelve months following the date of accident, with reviews at twenty-four months and again at sixty months after the initial determination. For more severely injured workers, a return to work may not have been possible in the first twelve months following the injury, perhaps implying that the wage associated with the workers'

[6] While these studies find a negative impact of disability transfers on labour force participation, they vary widely in their findings with respect to the magnitude of the effect [13-14].

[7] It should be noted that Weiler also expressed concern over the prospective wage-loss approach [15, p. 18]:

> But one cannot ignore the other side of this coin. A projected wage loss benefit will also influence, and perhaps distort, the decisions made at or around the time when the pension is to be set for the future. Because the long-term payoff in the value of the pension is so great at this, the most crucial stage in the vocational rehabilitation efforts of all parties, there is likely to be far more incentive for each side to "jockey" for a favourable position here.

vocational rehabilitation plan, which would have been based on factors like those in section 45a(7) (c), (d) and (e), would be used to determine their future economic loss award.

Section 45a(9) provides for supplements for injured workers who are cooperating in a board-sponsored vocational rehabilitation program. Thus, earnings from suitable and available employment determined with the guidance of section 45a(7), would be used to determine the economic loss award, with a supplement being added to bring the worker to 90 percent of net pre-injury wages.

Workers who fail to cooperate with VR would lose their supplement under section 45a(9) and face an economic loss award based on what they would have likely been able to earn in suitable and available employment. Note that the incentive for the worker to cooperate with VR is enhanced if the amount the worker would have been likely to earn in suitable and available employment was taken to mean the likely earnings after the successful completion of the VR program. The economic loss benefit will, presumably, also be based on the earnings available upon attaining the VR objective. This creates a strong incentive for workers to cooperate in achieving their VR objective and to pursue reemployment under section 54b.

CONCLUDING REMARKS

The provisions of the Workers Compensation Act place explicit requirements the employer to reemploy and accommodate workers who are injured in the workplace. Employers who fail to comply are subject to penalties, but their incentive to comply is buttressed by administrative policies including the small likelihood of penalty reductions, financial assistance for costly accommodations and the opportunity to be actively involved in sketching the worker's vocational rehabilitation program.

The act and the policies of the board also recognize the obligations of the other parties in giving substance to the reemployment and accommodation provisions. The board is charged with proactive medical and vocational rehabilitation responsibilities within a hierarchy of objectives consistent with section 54b reemployment. Injured workers receive benefits that reflect their participation in VR programs and their active pursuit, where possible, of returning to employment. The potential success of the reemployment provisions rests not only with employers, but also with the board and injured workers.

Ultimately, however, much of the realization of this potential rests with the effectiveness of the board in fulfilling the objectives of its vocational rehabilitation policies. For many workers, timely and effective vocational rehabilitation will be the critical determinant of their ability to return to work.

ACKNOWLEDGMENT

I am indebted to Morley Gunderson for comments on an earlier draft of this article and to the Social Sciences and Humanities Research Council of Canada for financial support.

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