

***Yukon Workers' Compensation Act***  
**Subsection 105.(1) Research Series:**

**Use of Deeming**

Commissioned by the Yukon Workers' Compensation  
Health and Safety Board of Directors in preparation  
for the 2003 *Workers' Compensation Act* Review

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### 1.0 Introduction

The Yukon Workers' Compensation Health and Safety Board is responsible for the administration of the *Workers' Compensation Act*. Subsection 105.(1) of the *Workers' Compensation Act* requires that a review of selected concepts embodied in the *Act* be initiated no later than January 1, 2003. The concepts identified for consideration include:

- (a) expansion of disability, within the meaning of the Act
- (b) the effectiveness and appropriateness of the board administering both the *Workers' Compensation Act* and the *Occupational Health and Safety Act*
- (c) the use of deeming
- (d) the effect of retirement on entitlement
- (e) the role and use of indexing of benefits
- (f) the method and limitations on calculating the maximum wage rate
- (g) the role and effectiveness of the workers' advocate
- (h) the adequacy of the system for spouses

This paper presents the results of the review undertaken by Vector Research in respect of concept (c), the use of deeming.

The main methodology employed in the study was a document review. Since many workers' compensation research issues are decades old, research efforts included the review of selected reports prepared by task forces and review committees in other jurisdictions over the last 20 years. The review of those reports was undertaken during a November 2002 visit to the British Columbia Workers' Compensation Library.

The analysis contained in this paper is fundamentally from a public finance perspective; the absence of discussion about the psychological and sociological impacts of worker injury and disability is not intended to diminish the importance of those impacts to workers, employers and their families.

The remainder of this research paper consists of four sections. The next section (2.0) looks at the underlying rationale for deeming. Section 3.0 describes deeming in the Yukon context. Section 4.0 presents a commentary on deeming from the perspective of workers, employers and administrators. The paper concludes in section 5.0 with the identification of some key issues thought to warrant further discussion by the Board.

### 2.0 Rationale for Deeming

Compensation benefit payments made by the Yukon Workers' Compensation Health and Safety Board are issued under a dual award approach. Under a dual award approach, disabled workers are paid wage loss benefits and, in the circumstance of permanent impairment, a lump sum amount.<sup>1</sup> The dual award system replaced a pension approach based on the degree of impairment suffered by a worker. Under the pension approach, an injured worker's degree of medical impairment was assessed according to a published rating schedule. The amount of compensation was calculated by applying the degree of impairment to a measure of the worker's earnings prior to disability.

Commentary concerning the transition from the pension to the dual award system noted that:

“The benefit of a wage loss system, plus an award for functional or physical impairment and loss of enjoyment, is that we can treat the injured worker as a person and consider the human needs. Under the pension system, the worker was paid a pension and basically forgotten, whereas in the wage loss system, each individual is treated in a more equitable manner, depending on his or her loss and we can provide the rehabilitation necessary to overcome that loss.”<sup>2</sup>

In terms of the dynamics of the two approaches, the pension system was static in nature. An injured worker's degree of medical impairment was assessed upon reaching a steady state and was then essentially assumed to remain the same for the rest of the worker's life. Compensation payments were based on the fixed assessment of degree of impairment and in turn became fixed pension payments. In contrast, the wage loss approach is inherently dynamic. Wage loss benefits are paid to the worker until such time as they are fully able to return to work in a suitable occupation.

Thus, the dual award system contains an legislated expectation about the future employability of disabled workers. Now, disabled workers would be, with the aid of rehabilitation provided or arranged by the board, expected to return to employment as their disabilities healed (to the extent that their disabilities were not permanent). Note that part of the expectation required a disabled worker to return to employment, and not necessarily the same job, or type of job, at which they were disabled. In addition, the board could determine what occupations would be suitable

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<sup>1</sup> The phrase “wage loss benefits” refers to the same concept described by the phrase “loss of earnings benefits” used in the Yukon *Workers' Compensation Act*. Both phrases are used interchangeably in this paper and throughout the Subsection 105.(1) Research Series.

<sup>2</sup> Brian Booth, former Chair and Chief Executive Officer of the Yukon Workers' Compensation Board, as quoted in Doug Bell's *History of the Yukon Workers' Compensation Board*, 1996, page 53.

for re-employment with regard to the abilities, skills and capabilities of the worker in question.

The arithmetic of the compensation equation provides that a disabled worker will continue to receive higher wage loss benefits for as long as it takes a compensation board to determine that their post-disability earning potential has improved. As a result, the worker is presented with a financial incentive to appear more seriously disabled than may actually be the case. The experience of compensation boards across Canada indicates that some individuals, when presented with such a financial incentive, will make use of it. As a result, some form of incentive is required to encourage workers to undertake rehabilitation activities and return to the labour force.

Two forms of work incentives are prevalent in North America. The first, more common in the United States than in Canada, is to select a replacement rate which guarantees that all workers receive less in the form of compensation benefits than they could from pre-disability employment earnings.<sup>3</sup> For example, the current Yukon replacement rate could be reduced to, say, 60 percent of gross earnings rather than the current 75 percent. All workers would receive lower wage loss benefits and all workers would have an increased incentive to return to the labour market in order to re-achieve pre-disability earning levels.

The second form of work incentive used to encourage workers to re-enter the labour force, deeming, is the focus of this paper. Deeming is the process by which a compensation board establishes earning capacity for workers who have suffered a residual loss of earnings. While subject to recognized problems of administrative discretion, deeming is a necessary feature of the wage loss approach to the payment of compensation benefits. Deeming is employed in all Canadian jurisdictions which use a wage loss approach to calculating compensation benefits.<sup>4</sup>

### 3.0 Deeming in the Yukon Context

The Yukon *Workers' Compensation Act* specifies in broad terms the requirement for a work incentive to be administered by the YWCHSB. However, the details which describe the work incentive mechanism are the subject of Board policy. Like all other jurisdictions in Canada which use a wage loss approach to calculating compensation benefits, the YWCHSB chose a work incentive mechanism of the deeming sort. Within that choice, the design of the deeming mechanism reflects the Board's

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<sup>3</sup> The actual comparison of employment earnings and compensation benefits is a rather complicated affair as the former is considered taxable income while the latter is not.

<sup>4</sup> Alan Winter, *Core Services Review of the Workers' Compensation Board*, 2002, page 266 (with reference to *For the Common Good*, Royal Commission on Workers' Compensation in British Columbia, January 1999, Final Report, Volume I: Chapter 6, page 25).

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response to a complex policy challenge. That challenge is to design a mechanism which "...compensates those who are legitimately disabled and hence in need of compensation and yet provides an incentive for them to return to work where feasible."<sup>5</sup> This section of the paper describes the current Yukon approach to deeming. A simple deeming example is shown in Table 1.

**Table 1: Deeming Example**

Worker's pre-disability earnings {as a truck driver}	\$50,000
less: workers' deemed post-disability earning capacity {as a dispatcher}	\$35,000
<i>equals</i> : worker's loss of earning capacity	\$15,000

Two preconditions must be satisfied before a workers earnings can be "deemed" for the purposes of making a compensation equation calculation. The first precondition concerns a worker's fitness for employment. The second involves the determination of a suitable occupation for an individual worker. Both preconditions, as well as the mechanics of deeming, are described in YWCHSB Policy Statement CS-08 (effective November 9, 1994). A summary of the policy is presented below.

### **Fitness for Employment**

The first precondition for deeming is that a worker be "fit for employment". This means that on the basis of medical evidence provided by a physician and assessed by a Claims Adjudicator, the worker is medically capable of returning to work in a suitable occupation.

### **Suitable Occupation**

The second precondition for deeming is the completion of a determination of suitable occupations. Such determinations are carried out on a case-by-case basis by a Rehabilitation Counselor in consultation with the worker. Vocational assessments are used to make determinations of a suitable occupation and may include the appraisal of aptitude, academic achievement, vocational interest and transferable skills.

The policy also requires that the initial attempts at a determination of a suitable occupation reflect the mix of occupations found in the Yukon. Subsequent attempts may reflect the mix of occupations found in the rest of Canada. Similarly, wage rates assigned to a suitable occupation are to be based on Yukon pay scales. In the event that an occupation does not exist in the Yukon, wage rates are to be assigned on the basis of the pay scale used in the rest of Canada.

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<sup>5</sup> Dwayne Benjamin et. al., *Labour Market Economics*, 2002, page 93.

### Deeming

Deeming is not a “first resort” solution; it can be applied only after other solutions have been tried. Thus, certain additional conditions must be demonstrated to have been met by compensation board staff before a worker can be deemed. The conditions are outlined in section D of Policy No. CS-08:

“Deeming” shall occur when medical rehabilitation has progressed to the point that the worker is capable of safely performing the duties of either his/her pre-accident employment, modified employment or alternate employment.

"Deeming" shall also occur when no further medical or vocational rehabilitation plan is necessary or feasible.

Or when all of the following criteria are met:

1. no further intervention by the Workers' Compensation Health and Safety Board will assist a worker;
2. the worker's disability has stabilized;
3. every reasonable effort has been undertaken to assist a worker in his/her recovery and return to work;
4. the worker is assessed fit for employment;
5. an assessment has been considered to determine a worker's functional and/or vocational abilities;
6. suitable occupations have been identified;
7. the vocational rehabilitation plan is terminated; and
  - i) the worker has a decreased earning capacity; or
  - ii) has failed to return to work; or
  - iii) is underemployed; or
  - iv) has a non-compensable illness which keeps the worker off work.”

A further condition to the use of the deeming mechanism is that the YWCHSB demonstrate that a worker's estimated earning capacity in a suitable occupation is reasonable given current wage scales. It must also be demonstrated that the occupation for which a worker is deemed capable is reasonably available to the worker. The term “reasonably available” means that a job for which the worker is determined capable of performing the duties of must exist but does not have to be vacant at the time of deeming.

Just as the wage lost benefit approach to calculating wage loss benefits is dynamic in nature, so is the deeming process. Workers for whom deeming has been used to recalculate their wage loss benefits are entitled to have their claim files reviewed on an

annual basis. The purpose of the annual review is to identify any changes in the worker's employment or earnings status which may affect the dollar amount at which they have been deemed.

### **3.1 Scale of Deeming in the Yukon**

On the basis of information supplied by the Yukon Workers' Compensation Health and Safety Board, approximately one to two workers have been deemed each year under the provisions of Policy Statement CS-08 since it was implemented in 1994. Note that as the YWCHSB's current information system does not contain a field code for workers deemed under CS-08, a more accurate estimate of the number of individuals deemed under CS-08 on a historical basis is not readily available.

According to the YWCHSB 2001 Annual Report, a total of 948 claims were accepted in 2001. Thus, in terms of the scale of deeming, on the basis of the information provided by the YWCHSB, significantly less than 1% of injured and disabled workers were deemed under CS-08 in that year.

## **4.0 Composite Perspectives on Deeming: Workers, Employers and Administrators**

As previously noted, all jurisdictions which use a wage loss approach to calculating compensation benefits must by necessity use some form of deeming mechanism. Notwithstanding such necessity, documentation which describes the various mechanisms is surprisingly scarce. At the same time, it would appear, on the basis of the document review undertaken in the course of research for this project, that all jurisdictions struggle with very similar deeming issues. As a result, the approach used in previous papers, namely a table identifying distinctions between jurisdictions, is perhaps not so useful here. As an alternative, an excerpt from a report prepared for the Workplace Health, Safety and Compensation Commission of New Brunswick which summarizes the perspectives of workers, employers and administrators is presented in Table 2. The perspectives presented are composites of interview responses received during an examination of deeming in that jurisdiction.

**Table 2: Worker, Employer and Administrator Perspectives on Deeming: New Brunswick Interview Composites**

<b>Workers:</b>	<b>Employers:</b>	<b>Administrators:</b>
<p>“We understand the need for deeming. We were aware of it when the Act was changed. It was a price we paid to get the Board introduce rehabilitation and to get away from the "meat chart." Deeming, with a progressive administration, is not bad, and is a necessary part of a wage-loss system, but there are some necessary conditions to ensure fairness which we believe the administration is ignoring. There are only a few of these but they are crucial.”</p> <ol style="list-style-type: none"> <li>1) Deeming must be the last resort. Rehabilitation must come first.</li> <li>2) The worker must be involved throughout the rehabilitation process.</li> <li>3) The employer should not be allowed to use deeming to avoid rehiring.</li> <li>4) A suitable occupation must match the real employment expectations of the worker. It must be a real job which the worker can reasonably compete to be hired for.</li> <li>5) The salaries established for a suitable occupation should be based on realistic labour market value.</li> </ol> <p>You must remember that, prior to the injury, the injured worker had a job. Therefore, the focus of the effort should be to replace the job. There is always a danger that deeming can be used as a way to avoid that responsibility and when that happens the system loses. So when everybody is deemed a parking lot attendant or a telemarketer, or deeming comes out of the blue with minimal previous contact, we know we're not talking about rehabilitation but about cost avoidance. Do your homework first and you'll have a lot fewer problems. What we want is a compensation system that, yes, watches the bottom line, but cares about injured workers too.”</p>	<p>“We've been through this before. The worker has to take some responsibility for their own rehabilitation and we agreed from the start that workers' compensation was not to be a replacement for unemployment insurance. Deeming was never intended to be anything more than a way to replace the "meat chart" with an assessment that is based on economic factors rather than physical ones. If we accede to this pressure, the outcome of this move will simply be to get us back to the point where we are carrying people forever with no resolution in sight. Let's deem them and at least that way there's a resolution and we can put our efforts where they belong. We just want the system to work efficiently so we know what our costs are and we can develop our corporate plans.</p> <p>Our problems are in four areas. These are:</p> <ol style="list-style-type: none"> <li>1) The time delay until deeming is done.</li> <li>2) The lack of consistency and objectivity so that people have some understanding of how the figure was arrived at.</li> <li>3) The lack of documentation which means that legitimate deems are overturned in appeal or that workers in the same circumstances are treated differently.</li> <li>4) The way the issue of job availability keeps creeping into the system. Deeming is about the worker's capability and the issue of availability keep coming back in.”</li> </ol>	<p>“The focus has to be re-employment - we know that - but we also know that sometimes you need an incentive to focus the worker on the issue. The trouble is that deeming is not easy. Establishing a suitable occupation is very complex since it involves a sophisticated match of the worker's present abilities and future goals with an understanding of the past present and future labour market. We know we don't do that as well as we, as professionals, would like, but we also know that we don't have the supports. Besides, any occupation chosen can be attacked on some basis so we'll never be particularly popular. The only definition of a suitable occupation is in the Act and we abide by it. The trouble is that we are still placed in the position of receiving confusing and contradictory objectives from the other participants in the system. Employers, workers, workers' advocates and external appeal tribunal members all expect us to meet their vision of deeming and the visions are different. A big part of the problem is catching up on the backlog and that affects what we do. Deeming is no problem when there has been a well-developed rehabilitation program and when everybody agrees to the goal, we've done the work to get the skill-set, and the market sets the wage. The problem comes when the most realistic choice is to accept that the worker can do a minimum wage-type job but there is no real advantage to extra training. Picking one job at minimum wage is a fiction and we know it but it is in the nature of the statement about "a suitable occupation".”</p> <p><i>Adapted from A Fact Finding Analysis on Issues of Deeming, report prepared for the Workplace Health, Safety and Compensation Commission of New Brunswick (1995). The perspectives presented are composites of interview responses.</i></p>

### 5.0 Issue Identification: Deeming

In terms of the number of workers affected by the deeming practices of the YWCHSB, very few workers are deemed each year. However, any administrative practice which appears to single out only a few individuals will likely always be subject to questions of fairness. Accordingly, it is important that deeming decisions are well documented so that fairness and consistency can be demonstrated. As it would appear that even the most basic statistical information on deeming is not readily available, the Board may wish to ensure that data collection practices are improved.

Deeming is a necessary feature of any wage loss compensation system. Its practice, however, requires not only that the effects of permanent impairment be estimated but also that the current and future labour market implications of that impairment be evaluated. As a result, it is highly dependent on subjective interpretations of suitability and availability of employment and the capability of the disabled worker.

Operating practice has evolved in response to questions of similar methodological difficulty in other administrative areas. For example, actuarial science provides certainty in the calculation of present values in the insurance and pension industries; there is no such equivalent in the “field of deeming”. While the use of the wage loss approach is still relatively new across Canada, the monitoring of developments in this area in other jurisdictions may have useful application to the Yukon in future years.

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