

Via Email

April 2, 2018

Ms. Kate Lamb, Chief Corporate Services Officer
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Lamb:

Re: Ontario's minimum wage as at January 1, 2018

Thank you for your February 20, 2018 letter (**Appendix A**) which responded to my correspondence to Elizabeth Witmer and Tom Teahen of January 11, 2018 (**Appendix B**).

As you know, it is my opinion that the WSIB lacks the legal authority to proceed as you have outlined in your February 20, 2018 correspondence.

While I appreciate and value our discussions on this and your subsequent correspondence, you have not directly addressed my question posed in my January 11, 2018 letter: "*Please advise where the Board concludes it has the legal authority to develop this policy*".

It would be appreciated if you could cite your legal authority. As you know, my opinion is that the Board does not have such discretionary authority.

As always, I thank you for your attention to this.

Regards,



L.A. Liversidge

cc: Elizabeth Witmer, Chair
Tom Teahen, President & CEO

Appendix A

Kate Lamb
Chief Corporate Services Officer
Chef des services généraux



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February 20, 2018

L. A. Liversidge, LL.B.
Barrister & Solicitor, Professional Corporation
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**Workplace Safety
& Insurance Board**

**Commission de la sécurité
professionnelle et de l'assurance
contre les accidents du travail**

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Dear Mr. Liversidge,

Thank you for your letter of January 11, 2018 regarding the WSIB's response to the minimum wage increase which you sent to Ms. Elizabeth Witmer, WSIB Chair, and Mr. Thomas Teahen, WSIB President and CEO. They have asked me to respond on their behalf.

As you know, the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148) increased the minimum wage from \$11.60 to \$14 on January 1, 2018 and will increase it again to \$15 on January 1, 2019. The minimum wage increase is the largest in Ontario's history - a 32% cumulative increase in 15 months.

The WSIB identified that the minimum wage increase would have a consequential impact on a small cohort of workers - those that are not employed and are currently receiving partial loss of earnings (LOE) benefits based on determined wages below the new minimum wage in 2018. Those workers could not have anticipated the impact it could have on their LOE benefits over a short period.

To implement the minimum wage increase, the WSIB conducted a comprehensive analysis including operational and compliance risks, and concluded that it would proceed with the option of applying a special measure to phase in the minimum wage increase. The special measure ensures the new minimum wage is fully reflected in injured worker LOE benefit calculation within 3 years for the majority of cases. This also ensuring they have sufficient time to adjust to potentially significant reductions in their LOE benefits.

I would like to thank you for your interest in this topic.

Regards,

Kate Lamb
Chief Corporate Services Officer

Appendix B

L. A. Liversidge, LL.B.
Barrister & Solicitor, Professional Corporation

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Via Email
January 11, 2018

Ms. Elizabeth Witmer, Chair
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

and

Mr. Tom Teahen, President & CEO
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Witmer and Mr. Teahen:

Re: Impact of Ontario's minimum wage on LOE benefit levels

You will recall I raised this issue at a recent Chair's Advisory Group meeting. The CAG was advised that the WSIB had developed a policy to "phase in" the impact of the new Ontario minimum wage for workers who, while able, have not returned to a minimum wage job. Since, the Board posted this process/policy on the Board's website (see a copy at **Appendix A**). As I expressed at the time, it is my opinion that the Board's approach is not legally permissible.

The *Workplace Safety and Insurance Act* expressly sets the level of loss of earnings ["LOE"] benefits at 85% of the difference between the worker's net average earnings before the injury and the net average earnings that the worker *earns or is able to earn* in suitable and available employment or business after the injury [s.43(2)].

Now, with the Board's approach in motion, a systemic and unconscionable distinction is made between the worker who has returned to a minimum wage job and the worker who, while able, has refused to return to a minimum wage job. Before January 1, 2018, both workers would receive the same LOE benefit level. After January 1, 2018 the former will have benefits set at actual wages, i.e., at the increased wage level, and thus, will experience a stark reduction in LOE benefits. Incongruously, the latter will now experience a much higher LOE benefit level than the former. The unfairness of this is self-evident. Moreover, and my broad point, the WSIA is designed to avoid this very result. I argue that the Board lacks the lawful discretionary authority to formulate its policy.

This letter does not advance a full legal analysis but simply is designed to set the stage for this question: In the opinion of the Board, under what express provision of the WSIA does the Board find the discretionary authority to set benefits in this fashion? As always, I appreciate your attention to this matter.

Regards,



L.A. Liversidge

Appendix A



Minimum wage increase

Starting January 1, 2018, the minimum wage in Ontario will increase to \$14/hour. On January 1, 2019 it will again increase to \$15/hour.

Who is affected?

The minimum wage increase will impact the loss of earnings benefits that some people are currently receiving.

Where a person is employed and their wage increases due to the minimum wage increase, the wage increase is a material change in circumstances that must be reported to the WSIB. After it is reported, we will determine whether their loss of earnings benefit is adjusted.

Where a person is not employed, but we have determined they are capable of working in a suitable occupation with a wage below the new minimum wage, we will consider the new minimum wage at their next annual case review and determine whether their loss of earnings benefit is adjusted at that time.

We've come up with a process.

To make sure that people who are not employed and are currently receiving loss of earnings benefits based on determined wages below the new minimum wage in 2018 do not experience significant reductions in loss of earnings benefits over a short period, we will generally phase in the new minimum wage for them. Specifically, an eligible person's gross determined wage will only be allowed to increase a maximum of 10% at each annual case review. This means their loss of earnings benefit may be adjusted by a lesser amount when compared with how it may be adjusted if the new minimum wage was used.

Questions?

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