



OUR HEALTH • OUR SAFETY

**Public Compensation Coalition**

## Comments on Loss of Earnings (LOE) Assessments

A SUBMISSION BY THE PUBLIC COMPENSATION COALITION TO  
THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

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## 1.0 About the PCC

The Public Compensation Coalition (PCC) is pleased to submit comments on Loss of Earnings (LOE) assessments for your review.

The PCC is an organization of working people and their unions, supported by students, injured worker advocates, and the general public. The PCC formed out of concerns that legislative and regulatory changes made primarily in 2002, but also in the following years, had tipped the balance of BC's workers' compensation system against the fair interests of workers.

Since its inception almost two years ago, the PCC has been working to support and defend public workers' compensation as the best way to keep workers safe in their workplaces, and fairly supported and compensated in the unfortunate event that they are injured or made ill in their workplaces. The PCC is a strong supporter of the original compromise from which public workers' compensation systems were created. That compromise fairly balances the rights of workers with the needs and obligations of their employers.

In 2006, the PCC identified changes to the Workers Compensation Act (the Act) governing pension benefits, as a particularly harmful component of the changes made in 2002. About a year ago, the PCC began distributing information to working people and their families about the real impacts of the changes to loss of earnings pensions and pensions after age 65 years. Response to the campaign has been strong and enthusiastic, as people see this issue as one that critically reflects on the idea of fairness.

Simply put, every worker leaves for work with the reasonable expectation that he or she will return home safely at the end of his or her shift. When that doesn't happen, a person's capacity to work and quality of life can be seriously affected. We believe, and we think that British Columbians believe, that workers should be fairly compensated. And when the consequence of the injury affects a person beyond the age of 65, that person should be compensated past the age of 65.

The legislative changes of 2002 do not fairly compensate the vast majority of permanently injured workers up to or past the age of 65.

While the Board has limited the scope of this review to policy, we believe that addressing the harmful consequences of the 2002 changes for people suffering permanent injuries requires both policy and legislative changes.

## 2.0 The values behind LOE and financial sustainability

The historic compromise struck in 1917 between workers and employers provided protection to employers from being sued for work related injuries, and introduced a no fault system where workers were assured compensation in the event of a work place accident.

This compromise was established upon principles outlined in a review by Sir William Meredith. He examined the issue of compensation for workplace injuries and delivered his final report and recommendations in 1913. The last two sentences of his report reflect his thoughts about what should be of primary importance when drafting workers' compensation legislation:

That the existing law inflicts injustice on the workingman is admitted by all. From that injustice he has long suffered, and it would, in my judgment, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but of what is the least he can be put off with; or if the Legislature were to be deterred from passing a law designed to do full justice owing to groundless fears that disaster to the industries of the Province would follow from the enactment of it.

The 2002 legislative change was premised on an incorrect impression that the WCB was unsustainable at the coverage levels in place before the 2002 changes. The fact that the WCB had operated at or near a fully-funded level for decades with those benefit levels was ignored. According to the WCB annual report for 2002 — the last year before the changes to LOE provisions started to be reflected in WCB statistics — the average assessment rate was \$1.99. This is six percent lower than the rate of \$2.12 reported in 1997 annual report. The WCB also commented, as follows, on the stability of its assessment rates over the previous ten-year period in the 2002 report:

The aggregate assessment rate is an important economic variable for British Columbia's employers and, as such, stability is a desirable feature of that rate. The WCB's aggregate assessment rate has been reasonably stable. Over the past 10-year period, the average aggregate rate has been 2.030 and the standard deviation was 0.202. During this 10-year period, the assessment rate was within 10 percent of the 10-year average six times out of 10.

The report also compared BC's rates to other Canadian provinces (Alberta, Quebec, and Ontario) over the previous ten years and made this observation:

While having the second lowest average rate for that period, British Columbia has had the least rate volatility among the larger Canadian jurisdictions.

Clearly, the system was sustainable based on the former legislation. Pension entitlements and benefits did not need to be reduced to ensure the financial sustainability of the WCB. In fact, these legislative and policy changes are exactly what Meredith's was warning against.

### **3.0 Policy 40.00 has resulted in a drastic decrease in LOE awards**

In 2002, 927 loss of earnings pensions were awarded under the former legislative provisions. In 2006, only 39 pensions were awarded under the new provisions. Was the intent of the new provisions to eliminate LOE or to ensure that a more critical review is given to those claims where the evidence is that the worker was not able to earn the same wage due to the injury? We find it ironic that the WCB decided to implement a policy that is detached from the worker's actual situation and that WCB staff have difficulty administering at the time the government was "cutting red tape" and attempting to streamline the system.

Generally, the PPD amount assessed under section 23(1) does address the impact on future earning capacity for the average claim. The discussion paper comments that 83 percent of workers in 2000 received a loss of function award (PPD) only. So even pre-legislative change, the PPD assessment adequately compensated those 83 percent. If this percentage remained constant, we would be looking at about 17 percent of claims that would require a more individualized look. We believe the 17 percent figure demonstrates that these claims already meet the exceptional criteria.

### **4.0 Policy 40.00 introduces additional barriers to LOE**

Although the new legislation has not removed consideration for loss of earnings, access to it has been severely curtailed through Policy 40.00 of the WCB's Rehabilitation Services & Claims Manual (RS&CM) adopted since the 2002 changes were made to the Act.

*Section 23 of the Act outlines a two-step process for determining if LOE should be considered:*

1. A determination is made under section 23(1) as to whether the worker has a Permanent Partial Disability (PPD). The Board must then estimate the impairment of earning capacity resulting from the PPD.
2. If the Board determines that the worker has a PPD, then section 23(3) allows for a more accurate

assessment to determine whether the compensation received under 23(1) adequately addresses the impact of the PPD on that specific individual's ability to earn the same wage earned pre-injury. This is done by "comparing the average net earnings before the injury" and the average net earnings after the injury, or the average net earnings the Board estimates the worker is capable of making.

*Section 23(3) can only be applied if:*

1. The "combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so exceptional that an amount determined under sub-section (1) does not appropriately compensate the worker"

and

2. The Board determines that the worker does not have the ability to continue in the same occupation or adapt to another suitable occupation.

Policy 40.00 introduces a sequential process containing tests that the worker must meet for consideration of LOE. If the worker does not meet one of tests, the consideration for LOE goes no further. The PCC sees these tests as barriers that further limit workers' access to the LOE consideration in section 23(3) of the Act. These barriers are discussed below.

## **4.1 Ability to continue in the same occupation**

The amended Act specifically refers to "the worker" several times under section 23. Thus, the Board should be looking at the individual worker's specific circumstances when determining "if the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so exceptional that an amount determined under sub-section (1) does not appropriately compensate the worker".

Policy 40.00, however, removes that specific assessment of "the worker's" earnings and occupation. Instead, it gives this direction to Board officers:

...the sole fact that a worker may experience a loss of earnings as a result of a work injury is not sufficient to meet the test set out in section 23(3.1) of the Act and does not mean the worker is entitled to an award under section 23(3).

This contradicts the legislation, which does allow for assessment under section 23(3) in this instance.

The legislation also does not direct the Board to look at general categories of occupations to determine whether there is an impact on earnings. It directs the Board to look at "the worker's occupation".

Under Policy 40.00, occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills. This clearly takes the Board officer away from looking at the specific job and skills set in the worker's current occupation.

Occupation should be defined as the position the worker holds at the workplace where the injury occurred, not a generic National Occupational Classification (NOC). The NOC listing does not necessarily reflect the worker's skills set. An electrician working in residential construction may have a different skills set than an electrician working in a mill.

Let us look at the example of a millwright. This occupation falls under the following NOC codes:

731 Machinery and Transportation Equipment Mechanics (Except Motor Vehicle)

7311 Construction Millwrights and Industrial Mechanics (except textile)

7312 Heavy-Duty Equipment Mechanics

7313 Refrigeration and Air Conditioning Mechanics

7314 Railway Carmen/women

7315 Aircraft Mechanics and Aircraft Inspectors

7316 Machine Fitters

7317 Textile Machinery Mechanics and Repairers

7318 Elevator Constructors and Mechanics

The wide range of occupations within this three-digit NOC code demonstrates that this approach of looking at occupations unnecessarily restricts the worker from moving to assessment for LOE. It should be clear in this example that a millwright could not easily change jobs to another category under this NOC.

In addition, as the writers of the NOC Career Handbook warn:

...the Career Handbook is intended for career counseling, development and exploration uses. HRDC neither condones nor recommends the use of this information for other purposes. The profiles presented here are not appropriate for other uses such as screening applicants for particular positions or determining insurance benefits.

## 4.2 Earnings used may not reflect the worker's actual loss

The Board uses the wage range of those within the three-digit occupational code to determine if a loss of earnings is occurring. Once again, policy directs the Board officer away from looking at the individual's circumstances. Obviously, the earnings within the broad occupation range could be vastly different from what the individual worker is earning.

The Board does not gather earnings information using NOC codes. Wages are drawn from the Standard Occupational Classification. In many instances, the job categories of these two systems do not correlate and, therefore, the earnings used may not accurately reflect the earnings possible in that worker's specific occupation.

In determining whether the PPD has affected earnings, the Board should be considering the question: "were it not for the injury", what would this worker's earnings situation be? This means that consideration should be given to factors other than the PPD that affect employability. These should include age, other physical limitations, ESL, labour market factors, etc. The worker's actual earnings from his employment should be used.

## 5.0 The Permanent Functional Impairment Chart (PFI)

The Core Reviewer recommended that the dual system be maintained. He also recommended that the PFI chart used in calculating functional awards be reviewed so that it doesn't just reflect a physical impairment, but also reflects the impact the injury may have on earning capacity. This is what he said in his report:

Based upon my recommendation that the Dual System should be retained, I further recommend that the WCB conduct a review of the Permanent Disability Evaluation Schedule ("PDES") to ensure it is reflective of current medical/scientific knowledge, and can be readily understood by the decision-makers who

must utilize it. I raise the following comments for the WCB's consideration when conducting this review: (i) Pursuant to section 23(1) of the Act, the percentages set out in the PDES must reflect the estimated impairment of the worker's earning capacity arising from the nature and degree of his/her injury. The specified percentage should not simply reflect the percentage of medical impairment which the injury represents vis-à-vis the total disability of the person".

Since the Core Reviewer made this comment, there has been no significant change to the percentages listed in the chart.

## **6.0 Look at the average first, then focus on the individual**

Reporter decision 394, clearly outlines how the words "impairment of earning capacity" (measured by the PPD) were interpreted under the former legislation. It states:

...under this method, the Board does not attempt to measure the individual worker's actual loss of earnings resulting from his permanent disability. It concentrates rather on the worker's physical condition and results in a percentage of disability being allocated. Although this percentage can be modified in respect of the worker's individual circumstances, it is primarily a measure of the loss which on average is expected to result for this type of injury.

Once the average loss through the section 23 (1) award (PPD) has been determined, then consideration should be given to the specifics of that individual's circumstance, i.e., age, ESL factors, geographic location, skill sets.

When the additional factors listed above are considered and there is clear evidence that the worker is going to incur a loss of earnings as a result of the injury, the case should be considered exceptional. Injured workers referred for LOE, deserve to have a fair consideration of the impact the injury has had on their ability to earn.

The discussion paper says that only four percent (or 76 cases) met the so exceptional test between February 2006 and June 2007 to allow them to be assessed for an LOE — and not all of these were actually awarded an LOE.

Consider the example of the roofer used in the discussion paper. It defies logic that a roofer still able to apply shingles, but no longer with the physical ability to climb ladders as a result of his injury, would still be considered to hold the "essential skills" of the occupation of roofer. Such a decision also means that the worker would only be eligible for limited vocational rehabilitation assistance to secure alternate employment — without consideration of the earnings he would make in an alternate job, or for the fact that he is 55 years of age, ESL, has only ever worked as a roofer, and lives in Oliver.

The Policy 4:00 process for the so exceptional with its impossible doorways is nonsensical. Once again, we note the irony in implementing an administrative process that Board staff have difficulty working with and injured workers have difficulty understanding, at the time the government was very determined to reduce "red tape". It appears that the main focus of the policy is to ensure that the injured worker is not considered for any loss of earnings — even when earnings are being lost.

## 7.0 Appropriate compensation

If the worker were appropriately compensated, he or she would not be left with a reduced earning capacity due to a work place accident. If a PPD amount equates to 6 percent of the worker's earnings, assistance should be provided to ensure that the worker secures alternate employment to return to a comparable job with a salary no more than 6 percent less than the salary at the pre-injury job.

Adequately compensate should also mean providing the appropriate level of vocational rehabilitation assistance to ensure the worker enhances or acquires the skills necessary to be able to secure comparable and suitable work with a wage no less than 6 percent of the pre-injury salary.

*Under Reporter Decision 394 the Commissioners stated:*

The loss of function method does not take into account the actual impact which the disability may have on each worker's earning capacity based upon his/her individual circumstances...If properly applied, the loss of earnings method should compensate the worker for his/her loss of earning capacity — i.e., the pension award granted to the worker should not result in his/her being under compensated or over compensated....We feel that Disability Awards Officers, and the Disability Awards Committee, should have the power in such exceptional cases to investigate, consider, and where appropriate, implement a pension based on the potential loss of earnings of the worker...The mandatory application of the loss of earnings method, in addition to the loss of function method, should substantially rectify the under compensation which results for those workers who suffer a greater loss of earning capacity than is provided for under the loss of function method.

The Commissioners understood that the exceptional case would be the one where, based on the individual worker's circumstance, there is evidence the PPD does not adequately compensate the worker. The Board should continue to protect injured workers as intended by the Commissioners.

## 8.0 SUMMARY

The Board's current policies have resulted in a move away from determining the effect the injury has on the individual worker's earning capacity. That move has resulted in increased savings for the Board and additional rate reductions for employers. In order to ensure the system remains a balanced one, policies must be put in place that do not just result in academic exercises in considering generic impacts. If the Board truly wants to make a difference "one worker at a time", policy must require consideration of individual circumstances and provide compensation that lives up to the historic compromise.