July 18, 2024 |

Briefs

Submission to the WCB regarding proposed amendments to Chapter 9, Average Earnings Policy

Background

The WCB is proposing changes to the RSCM II policies to improve readability and address key concerns raised by stakeholders and WCB subject matter experts.

Key changes include updates to guidance on:

- General rules for determining average earnings;
- The exceptions to general rules;
- Composition to average earnings; and
- Average earnings determinations on reopened files.

In the Discussion Paper the WCB proposes Option 1 and Option 2. Option 1 is maintaining the status quo and Option 2 would mean the policies in Chapter 9, Average Earnings would be updated and amended as laid out in Appendix A.

- Policies would be updated to improve readability.

- Key issues would be identified by stakeholders and the WCB subject matter experts would be addressed.
- Policy would be more consistent with current practice.
- The proposed changes are anticipated to result in minimal financial impact for the WCB.

While the BCFED agrees with the changes proposed in Option 2, we believe there are other areas where the WCB does not go far enough in addressing existing problems.

Submission

Worker centred-approach and the merits and justice of a case – the foundations for our compensation system.

We agree with CUPE BC that restoring and maximizing injured workers' earnings is one of foundational principles of a worker-centered workers' compensation system.

Paul Petrie defined "worker-centric" in his 2018 policy review report "Restoring the Balance" as:

> A worker-centred approach for injured and disabled workers is one that takes into consideration the worker's individual circumstances in applying policy and making decisions about benefit entitlement and rehabilitation measures. It is designed to maximize the worker's recovery from the injury or disease and to restore as close as possible the worker to his pre-injury employment status without a loss of earnings.[1]

And from the 2019 Patterson report "New Directions,"

> The fundamental principle of a worker-centric compensation system is that cases are decided on the merits and justice of a case, a principle which has been fundamental principle in all compensation systems. In B.C., section 99(2) of the Act requires the Board to make its decision based on the "merits and justice" of the case but in doing so must also apply Board policy. The additional requirement to apply Board policy was introduced in 2002 for the purpose of improving the quality and consistency of decision-making. Policy #2.20, which

> interprets these provisions, was recently revised, effective July 1, 2019, to provide clearer direction about how decision-makers are to address the “merits and justice” requirement in light of the dual requirements; that is, “merits and justice” are to be considered when Board policy is discretionary or does not apply. However, it is still the case that if Board policy is directive, the policy must apply regardless of the merits of a case.[2]

Many of the WCB’s policies are not directive, they allow for adjudicators discretion. Therefore, the merits and justice of each case must be applied.

The WCB Board of Director’s strategic plan provides another definition and a commitment to a worker-centred approach to compensation.

> Worker-centred approach for compensation
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> A worker-centred approach for injured and disabled workers is one that considers the worker’s individual circumstances in applying policy and making decisions about benefit entitlement and rehabilitation measures. This approach is designed to maximize the worker’s recovery from work-related injury or disease and to restore, as closely as possible, the worker to their pre-injury employment status without a loss of earnings. A worker-centred approach treats the worker with compassion, respect, and dignity and ensures WorkSafeBC is responsive to the needs of the worker, whose health and well-being is at the centre of the workers’ compensation system.[3]

The BCFED strongly believes the review of average earnings policy must consider robustly applying the worker-centred approach and implementing policy that allows for discretionary consideration of the merits and justice of each worker’s circumstances.

Determination of average earnings to set a wage rate must be set on every claim where a worker receives wage-loss benefits. The amount of benefits an injured worker receives determines the sustainability and stability of the worker’s financial and life circumstances while they recover from their injuries. We know that injured workers and their families can end up in poverty when their benefits do not meet their pre-injury needs.

We are profoundly disappointed the Discussion Paper is silent on consideration of the application of the worker-centred approach to the average earnings review.

The BCFED is generally pleased with the proposed changes to the average earning policy, but we believe there are areas where further changes need to be made.

1. Short-term average earnings: compensating workers who work only part-time of the year.

The policy can better address this. For example, if a trades person who works from March to August every year is injured in early March, the policy should compensate them for their actual loss from missing the initial ten weeks. Currently, the WCB will often give them a miniscule wage rate based on their limited earnings that year.

2. The updated definition of “apprentice” may be too narrow.

Employers will promise to register apprentices and backdate their ITA hours to the date of hire following a probationary-type period. The worker is injured, and the deal is off, or the worker is pressured not to file a claim. The policy needs to recognize that non-registered workers can be apprentices if at the time of injury, they were on track to be registered and have their time of injury hours counted towards their ITA apprenticeship.

3. Exceptional circumstances.

The proposed policy should recognize for causal and other workers that the WCB would look at post-injury earnings and circumstances as a factor where the pre-injury earnings fail to reflect their actual losses. In many cases, especially where the worker continued working for an extended period before compensation benefits started, the post-injury work pattern and earnings demonstrate that they have a much stronger attachment to the workforce than their pre-injury earnings might reflect.

4. Workers with no earnings.

The WCB should recognize as an additional example that this section can include workers who become disabled by occupational diseases or find another method to address the problems.

Example: asphalt paver, young guy with a strong work history. He was laid off, was between jobs and suddenly became ill and was diagnosed with AML-leukemia, potentially terminal. The cancer was determined to be work-related. The claim was accepted and then WCB sends a decision, “you had no earnings at the time you became disabled by your cancer therefore you are not entitled to wage loss, vocational rehab etc. A second decision recognized that workers with no earnings can receive a wage rate and benefits. The seriousness of the case likely resulted in the reversal of the decision. This is an area the WCB ensures is addressed in policy.

5. The Patterson Report’s recommendations.

In Part IV Policies and Practices through GBA+ Lens of the “New Directions Report,” Janet Patterson addresses the issue of the calculation of average earnings for precarious work, for new, temporary or casual workers or the self-employed.[4]

Patterson is concerned with the different set of rules for calculating average earnings for the above-described workers from regular workers as set out in *Workers Compensation Act* (WCA) Sections 33.2 to 33.6.

To add insult to injury, WCA Section 33.4(2) does not allow a decision-maker to consider “exceptional circumstances” in these cases. Therefore, the WCB has no discretion to assess whether the average earnings rules are inequitable and whether they fairly estimate a worker’s earning capacity.

The WCA legislation allows for a “one size fits all” practice, discriminating against workers who are new, temporary, casual or self-employed.

This reality is even more concerning considering the findings of the Canadian Centre for Policy Alternatives 2023 report “But is it a good job? Understanding employment precarity in BC.”[5]

The report found only 49% of BC workers surveyed had standard jobs. Nearly 60% of Indigenous men, racialized women and Indigenous women were in non-standard jobs.

Under Bill 48, BC app-based workers will be eligible for compensation benefits as of September 2024. Many of these workers are racialized, work part-time and have multiple jobs. Patterson recommended amending WCA Section 33.4 to allow exceptional circumstance to apply to all workers and the removal of WCA Section 33.4(2) as an unfair restriction of the application of exceptional circumstances discretion to a group of vulnerable workers.

Recommendation

The BCFED opines there may be an opportunity for the WCB to fix this problem within the average earning policy and recommend they further amend the policy.

Consultation process for compensation policy reviews.

The BCFED is concerned with the lack of transparency in the consultation process for compensation policy reviews.

For example, the Summary Overview states the purpose of the Part 9, Average Earnings review is to address key issues raised by stakeholders and WCB subject matter experts.

The Summary offers no further information about who the stakeholders are and their specific issues. The BCFED does not recall any pre-consultation on the Part 9 review.

It is difficult to effectively respond to such a complex policy review when we don’t know the specifics of stakeholder issues.

Recommendation

The BCFED strongly urges the Policy, Regulation and Research Department of the WCB to implement the same process for regulatory reviews including issue identifying and/or the pre-consultation sessions to all further compensation policy reviews thereby improving the transparency of the compensation policy review process consultation process.

Conclusion

BCFED thanks the WCB for the opportunity to participate in this important consultation on Part 9, Average Earnings. We urge your serious consideration of our concerns and recommendations.

We also urge the WCB Board of Directors to ensure the necessary resources are provided for workers, WCB case managers and employers to effectively implement these changes.

[1] https://www.worksafebc.com/en/resources/law-policy/reports/restoring-balance-worker-centred-approach-workers-compensation-policy?lang=en

[2] https://www.worksafebc.com/en/resources/law-policy/reports/new-directions-report-wcb-review-2019/report?lang=en

[3] https://www.worksafebc.com/en/resources/about-us/reports/strategic-plan-2022-2026?lang=en

[4] https://www.worksafebc.com/en/resources/law-policy/reports/new-directions-report-wcb-review-2019/report?lang=en page 124

[5] https://policyalternatives.ca/publications/reports/it-good-job