April 13, 2022 |

Briefs

# Submission to the WCB on Suitable Occupation for LOE Assessment

A pdf of the complete submission can be found here(260 KB).

## Introduction

The BC Federation of Labour (“Federation”, “BCFED”) appreciates the opportunity to provide our submission with respect to the proposed policy amendments regarding suitable occupation for loss of earnings (“LOE”) assessment.

The Federation represents more than 500,000 members of our affiliated unions, from more than 1,100 locals working in every aspect of the BC economy. The Federation is recognized by the Workers’ Compensation Board (WCB) and the government as a major stakeholder in advocating for the health and safety of all workers in BC and full compensation for injured workers.

This submission was prepared in consultation with our affiliates.

### 1. B Section 196(3) Assessment - The principle of recognizing actual economic loss

As noted in the Petrie Report, *Restoring the Balance,* one of the key legislative changes introduced in 2002 by Bill 49 was "a dramatic reduction in loss of earnings (LOE) pensions by limiting access to only "exceptional cases." Petrie referenced research by the Institute for Work and Health that showed the Bill 49 changes reduced workers' compensation benefits by 15% overall with the greatest impact on injured workers in the 50-59 age bracket with the reduced LOE pension entitlement involving the "so exceptional" limitation.[1]

As a result of the recommendations in the 2020 Parr Report "*Consultation Report on Potential Amendments to the British Columbia Workers Compensation Act"* and the resulting changes enacted in Bill 23 removing the "so exceptional" limitation, all workers as of January 1, 2021, are entitled to have their permanent disability benefits determined using both the loss of function (LOF) and the LOE methods of assessment, and then to receive their benefits based on whichever method provides the greater amount of compensation. It is important to note that in making his recommendation, Mr. Parr emphasized that: "… consideration should be given to calculating permanent partial disability awards on the basis of a worker's actual economic loss."[2]

The BCFED supports the principle of calculating an LOE award on the worker's actual economic loss. The determination of suitable employment for making this calculation must adhere to the principle of recognizing the worker's actual economic loss.

**Recommendation**

We therefore recommend that the last part of B(5) in the draft policy that now reads, "…. of the selected suitable and reasonably available occupations that better represents the worker's loss of earnings after the injury" be amended to read, "… of the selected suitable and reasonably available occupations that **best** represents the worker's **actual** loss of earnings after the injury."

## 2. Policy Section C Suitable Occupation - Given all the worker's circumstances

The Petrie Report emphasized the importance of taking into account the merits and justice of the claim in the decision-making process as required by Section 339 of the *Workers Compensation Act* ("Act").

**Board decision making**

> ***339*** *(1) The Board may consider all questions of fact and law arising in a case, but the Board is not bound by legal precedent.*
>
> *(2) The Board must make its decision based on the merits and justice of the case, but in doing this the Board must apply the policies of the board of directors that are applicable in that case.*
>
> *(3) If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.**[3]***

WCB policy item #2.20 states that in making decisions, the Board must take into consideration relevant provisions of the Act and policy and must also take into consideration all facts and circumstances relevant to the case".[4]

At the heart of a worker-centred approach is the worker's own evidence about the suitability of an occupation to restore their own earning capacity, with the goal being to recover from impacts of the permanent disability to the fullest extent possible.

The BCFED therefore recommends that Section C Suitable Occupation be amended to include reference to the worker's own evidence regarding the suitability of the occupation designated by the Board.

The Petrie Report also emphasized the importance of the medical evidence from the worker's treating physician or specialist who have the most direct evidence of the worker's limitations. This is best illustrated in Petrie's Recommendations #22 and #23.[5]

**Recommendation**

The BCFED recommends that the WCB add a new sentence to the first paragraph in Section C Suitable Occupation to read: "In making this determination, the Board will take into consideration the worker's own evidence and the medical evidence from the worker's treating physicians regarding the suitability of the designated occupation."

## 3. Policy Section C (i) The meaning of "suitable occupation"

Section C (i) of the amended policy appropriately states that "Pre-existing non-compensable factors (including pre-existing medical conditions) will be considered when determining a suitable occupation." However, that policy goes on to state: "Non-compensable factors arising after the date of injury or disease will generally not be considered when determining a suitable occupation."

In some circumstances the worker's disability may interact with non-compensable factors after the injury and would merit consideration "in all the circumstances." This is a decisional matter and should be left to a weighing of the evidence rather than pre-empting the factor as generally non-compensable. If the evidence shows the non-compensable factor is not a relevant consideration regarding the suitability of the selected occupation, that should be the decision with reasons. Where the evidence shows the non-compensable factor is relevant, then it should be taken into consideration.

**Recommendation**

Therefore, we strongly urge the Board to delete this second sentence. It is not part of the previous policy and was not recommended by the Petrie review.

## 4. Policy Section C (ii) The meaning of "reasonably available"

Section C (ii) of the amended policy specifies that "An occupation is considered reasonably available when the worker is competitively employable for a job or jobs within it, meaning the worker has a reasonable chance of securing employment. The Petrie Report Recommendation 24, makes

reference to "… an actual employment in that occupation is reasonably available to the worker in the long term."

**Recommendation**

The BCFED supports the inclusion of the term "actual employment in that occupation" in Section C (ii) so that it reads, "An occupation is considered reasonably available when the worker is competitively employable for a job or jobs within it, meaning the worker has a reasonable chance of securing actual employment in that occupation."

## 5. Ongoing review of the LOE pension

The discussion paper notes that "All jurisdictions allow ongoing reviews of the LOE Benefit to determine whether the benefit remains reflective of the worker's loss of earnings after a specific period." The discussion paper also notes that a legislative change would be required to allow the LOE decision to be reviewed.

**Recommendation**

The BCFED wishes to flag this issue for future consideration when the legislative bar for reconsideration is appropriately removed from the Act as detailed in Janet Patterson's *New Directions: Report of the WCB Review 2019* Recommendations 22 to 24.

In the meantime, it would be appropriate for the Board to commission independent research to determine whether and to what extent the current LOE is meeting the goal of compensating the permanently disabled worker for the worker’s "actual economic loss."

## Conclusion

The discussion paper proposes two options only. Option 1 status quo and Option 2 to revise policy to emphasize and clarify suitable occupation factors.

The BCFED supports Option 2. However, we believe the proposed policy changes are limited in their scope and do not meet the intent of the Petrie recommendations. Therefore, we strongly urge the WCB to seriously consider our proposed recommendations and further amend the policy to provide fair and just compensation for injured workers. We also call on the Board of Directors to ensure there is appropriate resources and support for staff once these policy changes are implemented.

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

[2] https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/labour/jeff_parr_february_2020_report.pdf

[3] https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19001_08

[4] https://www.worksafebc.com/en/resources/law-policy/rehabilitation-services-and-claims-manual-volume-ii/rehabilitation-services-and-claims-manual-volume-ii/chapter-1?lang=en

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