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Briefs

Submission to the WCB re Consultation on Duration of Benefits (Retirement Age)

A pdf of the complete submission can be found here(393 KB).

Introduction

The BC Federation of Labour (“Federation” “BCFED”) appreciates the opportunity to provide our submission with respect to the consultation on the policy on retirement age determination.

The BCFED 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” “Board”) 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 and their surviving dependents.

This submission was prepared in consultation with our affiliates. The BCFED thanks our affiliates and worker advocates for their submissions on this consultation.

Background – 2021 Policy Changes

In 2021, the BCFED made a submission with respect to the Board’s policy on retirement age determinations. At the time, policy changes were made to ensure consistency with the legislative

amendments of *Bill 23*, which amended the provisions governing the duration of a worker's permanent disability award in the *Workers' Compensation Act* by adding subsection 201(3):

> *A determination made under subsection (1)(a)(ii) as to a date on which a worker would retire after reaching age 65 may be made after a worker has reached age 63, and the Board may, when making the determination, consider the workers circumstances at the time of that determination.*

This amendment was informed by a recommendation from the Parr report (February 2020):

> *The Act provide authority to WorkSafeBC to make a final determination of the retirement age of an injured worker at a point when the worker is approaching normal retirement age.*

The Parr report concluded that a review of a worker's likely retirement age as the worker gets closer to normal retirement age would lead to more accurate and fairer decisions about the retirement age for injured workers receiving permanent disability benefits.

The amendments in *Bill 23* in 2020 were intended by government to move the WCB to a system that is fairer and ensures injured workers and their families get the support they need. The changes moved a bit closer to the worker-centred approach recommended in Paul Petrie's 2019 report on compensation policy. Indeed, the WCB Board of Directors has defined and committed to a worker-centered approach for injured and disabled workers:

Worker-centred Approach for Compensation

> *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 benefits entitlement and rehabilitation measures. This approach is designed to maximize the worker's recovery from work-related injury or disease and to restore, as close 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.

In our submission four years ago, the BCFED pointed out that this worker-centred approach was not as strongly reflected in the policy changes for retirement age determination as could be contemplated given the flexibility allowed by the legislation. In addition, we argued that aspects of the policies directly contradicted the intent of the legislation and the legislature.

The BCFED made several recommendations to ensure the policies were consistent with the Act and more aligned with a worker-centred approach. However, the Board did not adopt any of the BCFED's recommendations.

2024 Policy Changes and Current Consultation

The discussion paper acknowledges significant issues with the 2021 policy and practice changes. The paper notes that WCAT decisions following the 2021 revisions were "generally critical." In particular, the paper identifies that the interpretation of "would retire" disadvantaged workers living with the most severe disabilities, and there was a lack of policy guidance for workers aged 63 and older at the time of injury.

In response to these issues, amendments to the policies on retirement age determination were made in early 2024, again without consultation with stakeholders. According to the Board, the purpose of the changes was to avoid disadvantaging workers living with the most severe disabilities. The changes were:

- change the interpretation of "would retire" back to the pre-2021 approach - it means when the worker would have retired if the worker hadn't been injured
- explain that post-injury circumstances related to the injury are not relevant for most determinations, as these would not have occurred if worker had not been injured
- confirm that the same interpretation of "would retire" applies to workers age 63 and over at the time of injury, but WCB can consider relevant post-injury evidence, including evidence related to the injury when determining when these workers would retire

Now that the revised policies have been in effect for over a year, the discussion paper says that the Board is consulting about the effectiveness of the policy changes and whether further changes are necessary.

However, the discussion paper is silent about the policy's prohibition of a redetermination after a worker has reached a previously determined retirement age. After the new policy was implemented starting in 2021, appeals of retirement age decisions reached the Workers' Compensation Appeal Tribunal (WCAT).

Specifically, an appeal was made by a member of the Hospital Employees' Union (HEU) whose permanent disability pension had been ended at age 65, even though they continued to work. Then, the worker's condition worsened. The Board denied their entitlement to an increased permanent disability benefit and a redetermination of their retirement date because the worker had already reached age 65 (their previously determined retirement date). This was despite the fact that the worker was clearly still working, and not retired at all. We reiterate the conclusion of the HEU on this matter: it is an objectively absurd outcome.

In this instance, the WCAT vice chair found the policy's prohibition of a reconsideration after a previously determined retirement age to unlawfully restrict the discretion provided by the Act, which was intended to permit another determination regardless of prior decisions. The matter has been referred to the WCAT chair to review the lawfulness of the policy, a clear indication that there is an urgent need for revision.

Given this issue, the 2024 policy changes, and the changing reality for BC's workforce, the BCFED appreciates the opportunity to provide comments to the Board. We urge the Board to make additional revisions to improve, update and most importantly to ensure that the policies align with the Act and a worker-centred approach to compensation.

Recommendations

First, it is important to acknowledge the overall context in which the BCFED is responding to this consultation. Prior to 2002, permanent disability benefits were payable for the worker's life. The basis of the previous system was that the consequences of permanent disability were not only for life, but also significantly impaired the ability for disabled workers to provide for their retirement. The repeal of lifetime pensions in 2002 was part of a package of changes that sharply departed from the "historic compromise" underlying the workers' compensation system. The purpose of the changes was to minimize costs for employers at the expense of injured workers.

The BCFED's longstanding position is that lifetime pensions must be reinstated. The challenge of fairly adjudicating an injured worker's retirement age, combined with the significant energy and resources required to do so, are in stark contrast with the fundamental fairness and simplicity of lifetime benefits paid to workers whose disability also lasts for their lifetime.

The BCFED continues to call on government to take action on this issue, and we urge the Board of Directors to join us in identifying to government the pressing need to restore fairness to the compensation system by restoring the lifetime payment of permanent disability benefits.

Nevertheless, in the following the BCFED offers a number of concrete recommendations to strengthen the Board's policy within the existing, limited legislative framework.

Reconsiderations of a Worker's Retirement Age

The Board's 2021 policy changes included three criteria for the Board to revisit a determination of a worker's retirement age (Policy Item C6-41.00). A redetermination may be made after the worker has reached age 63 if:

- the worker was under 63 years of age on the date of injury,
- a previous determination was made under section 210(1) before January 1, 2021, and
- the worker has not reached the date of retirement as previously determined by the Board.

In our 2021 submission, the BCFED clearly identified that the policy's prohibition of a reconsideration after a worker has reached a previously determined retirement age would discriminate against many

workers beyond the age of 65 whose retirement age was determined earlier.

The BCFED pointed out that this limitation was not required or even mentioned in the legislation. Notably, the requirement was nowhere to be found in the transitional provisions of *Bill 23*. Rather, *Bill 23* stated:

> *A determination may be made under section 201(3) of the Workers Compensation Act, as added to section 18 of this Act, whether or not a determination has been made under Section 201(1) of that Act before the date section 18 of this Act comes into force.*

Unlike younger workers, workers who have reached the age of 65 are now excluded from having another determination. But just like workers below the age of 65, those over 65 may experience changes in their lives that would make them eligible for an extension of their pension. This could include continued employment.

This criterion was raised by the BCFED four years ago as being inconsistent with the legislation. And, as discussed earlier, the issue has subsequently reached WCAT, with a vice chair reaching the same conclusion in a specific case (WCAT A2200795). The issue is currently referred to the Chair of the Workers Compensation Appeal Tribunal for a decision on its lawfulness, a decision which has been outstanding for more than two years.

Given the discussion paper's silence on WCAT's lawfulness referral and the exclusion of this issue from the 2024 policy changes, it appears the Board is waiting for WCAT's (non-binding) decision on this matter before considering revisions to the policy. This approach is unnecessary, disappointing, and does not align with a worker-centred approach to compensation. Workers should not have to wait years for WCAT to make a decision when the Board can act to fix an unlawful policy right now.

Therefore, the BCFED again recommends this restriction be removed from policy thereby allowing workers beyond the age of 65 to be eligible for reconsideration of their retirement age, regardless of whether the WCB previously determined their retirement age.

Communicating retirement age determinations clearly to workers

When WCB consulted on policy related to retirement date determinations in 2021, the BCFED told the Board that injured workers are often unaware the WCB has decided their retirement age and what the consequences of the determination may be. We understand that in some cases, retirement age decisions continue to be communicated in letters about other details of the claim. A requirement for clear communication in a way that workers will understand the decision and the consequences should be included in the retirement age policies.

Therefore, the BCFED recommends the policies should explicitly require the WCB to clearly communicate and explain decisions about retirement age in a manner that workers will understand.

Further, the BCFED recommends that the Board develop a variety of accessible resources, including plain language brochures, notices and other guidance that will assist workers to understand the process, its consequences, and the information that is important to provide for making a retirement age determination.

Evidence gathering requirements

Another issue the BCFED raised in 2021 was about evidence gathering. The policy includes a list of the kinds of evidence the Board may consider in determining whether a worker would retire after age 65.

The BCFED remains concerned that decisions are often based on a lack of evidence from the non-conclusive list of examples set out in the retirement age policies. Although the policy states that the WCB will look at other relevant information, the absence of evidence from the list may result in the decision maker discounting other evidence the worker may bring forward as insufficient. At the same time, it is an ongoing reality that many injured workers, particularly those who are precariously employed, may not be able to provide some of the evidence on the list.

In this context, it is important that WCB has an ongoing obligation to proactively seek out and assist in evidence gathering, rather than make a decision based on the absence of evidence. Policy item #97.00 of the Rehabilitation Services and Claims Manual, Vol. ll, sets out the evidence gathering requirements and requires WCB decision makers to actively seek out all evidence that will fully inform

their decision. Policy item #97.00 says:

> *The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the Adjudicator should consider what other evidence might be obtained, and must take the initiative in seeking further evidence.*

In the duration of benefits policies and related practice directive (#C5-1), there is reference policy item #97.00 in relation to the standard of proof (“as likely as not”), but not in relation to the Board officer being expected to assess the completeness of evidence and take initiative to gather additional evidence as needed.

Retirement age decisions must be based on an abundance of evidence not on an absence of evidence from the list. If the evidence found in the claim file or provided by the worker is not good enough, then the decision maker must actively find the evidence they need. This approach is required by policy item #97.00, and supports the Board’s commitment to a worker-centred compensation system.

Therefore, the BCFED recommends the retirement age policies specifically reference the evidence gathering requirements of policy #97.00.

The meaning of “would retire” and evidence

Overall, we agree with changing the interpretation of the phrase “would retire” back to “would have retired if the worker had not been injured”. And, we agree that other post-injury circumstances that would have occurred even if the injury did not should also be considered. In our view, this was the intent of the Bill 23 changes to the Act.

However, the Board should consider all relevant evidence, including both post-injury and current circumstances for all workers, not just those aged 63 and over at the time of injury. The BCFED, along with other worker advocates, urges the Board to adopt a practical, common sense approach through policy that is focused on the actual circumstances of the worker. If a workplace injury means

that a worker is no longer able to work, this should not be used to deny them a later retirement date. At the same time, where a compensable injury has financial consequences that mean a worker must work longer than planned, that also cannot be ignored in determining the worker's retirement date.

Therefore, the BCFED recommends that the Board incorporate into the policy a practical approach that considers all relevant evidence for all workers in the adjudication of a worker's retirement date.

Board practice on retirement age determination

The BCFED is concerned about delays in the Board reaching out to younger workers that have turned 63. It is important that both workers and Board officers are given enough time to gather and provide information to support a fair decision about retirement age for a worker receiving permanent disability benefits. Where workers or the Board need to contact previous employers or other parties, beginning the process at age 64 or 64.5 just does not allow enough time to gather evidence.

Therefore, the BCFED recommends that the policy require the Board to begin the assessment for determination of duration of benefits for workers injured under the age of 63 within 6 months of the worker turning 63.

Again, the BCFED appreciates the opportunity to comment on these policies. We urge the WCB to give serious consideration to our recommendations for amending the current age of retirement determination policies, ensuring that the policies are consistent with the Act and a worker-centred approach to compensation.