WCB CONSULTATION

Submission on Proposed Changes to Measurement of Earnings Loss

January 2017

BCFED

Authority

This document is respectfully submitted on behalf of the Executive Officers of the BC Federation of Labour and represents the views of more than 500,000 affiliated members across the province of British Columbia.

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WCB Consultation

Submission on Proposed Changes to Policy Item #40.13: Measurement of Earnings Loss | January 2017

Introduction

The BC Federation of Labour (BCFED, Federation) appreciates the opportunity to provide our submission with respect to the Workers' Compensation Board's (Board) proposed amendments to the measurement of earnings loss in policy item #40.13 of the Rehabilitation Services and Claims Manual, Volume II (RSCM).

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 BCFED is recognized by the Board and the government as a major stakeholder in advocating for the health and safety of all workers in BC and the full compensation of injured workers and surviving family of workers killed because of their work.

The BCFED's submission was prepared in consultation with its affiliates and the greater workers' advocate community.

Background

The *Workers Compensation Act* (Act) provides that a worker that suffers a permanent partial disability is entitled to either a loss of function award or a loss of earnings (LOE) award. Section 23(3) outlines that the Board must use the difference between the average net earnings of the worker before the injury and the average net earnings the worker is earning after the injury, or capable of earning in a suitable occupation. The Act does not provide direction as to how the Board should compare pre-injury and post-injury earnings.

Although the Act does not compel the Board to account for inflation in these earnings comparisons, the Board recognizes the inherent unfairness of not accounting for it and provides

direction to decision-makers in policy item #40.13 of the Rehabilitation Services and Claims Manual, Volume II (RSCM), as follows:

> Although assessment of a permanent partial disability award will often be made some time after the original injury, it would not be fair to compare directly the actual pre-injury average earnings with the earnings the worker might now earn in the occupations available. The effect of inflation upon earnings levels would mean that the real loss would not be properly determined in that way. The practice of the Board is to use the earnings in occupations available after the injury as they stood at the date of the injury. *It occasionally happens* that earnings in occupations at the time of the injury are not available. If this occurs, it may be necessary to use the earnings in those occupations as they were at another date and bring the pre-injury earnings into line by applying cost of living adjustments as described in policy item #51.00. [emphasis added]

Policy item #51.00 of the RSCM gives direction on how to apply Sections 25 (1) and (2) of the Act respecting indexing of periodic payments of compensation to a worker to account for inflation. Prior to the legislative changes in 2002, periodic payments were adjusted by the Consumer Price Index (CPI) for Canada and this is what was used for the comparison of earnings for LOE awards.

In 2002, section 25 of the Act was amended requiring the Board to adjust periodic payments using a cost of living adjustment (COLA) factor of CPI minus one percent and the Board amended policy item #51.00 accordingly. As stated in the discussion paper, for the sake of consistency, the Board adopted this new method of comparison for LOE awards and changed the wording in policy item #40.13 to refer to the revised policy item #51.00.

In 2013, a decision by the Workers' Compensation Appeal Tribunal (WCAT) raised concerns about the Board's use of their own cost of living adjustment (COLA) factor instead of the Consumer Price Index (CPI) for Canada when adjusting workers' earnings for inflation back to

the date of injury for the purposes of a LOE award determination. Excerpts from this decision provide the following rationale:

> It is clear that the Legislature turned its mind to and differentiated between COLA and CPI adjustments for those matters expressly set out in the Act. It is also arguable that the Legislature expressly limited the use of the COLA formula for the purposes set out in section 25, namely, adjusting compensation benefits, and nothing more... [1]
>
> First, the application of the COLA factor does not preserve a fair apples-to-apples comparison because it requires a 1% deduction each year in the percentage change in the CPI. Further…the rote application of the policy item #51.00 prospective methodology retroactively…results in periods of inflation remaining unaccounted for...[2]
>
> The result is that…importing the policy item #51.00 COLA formula into policy item #40.13 introduces a significant distortion into the stated intention to assess the earnings in the occupations available after the injury as they stood at the date of the injury. Second, the distortion caused by the application of policy item #51.00 creates two classes of workers. One class receives the full benefit of an unadjusted change in the CPI.[3]
>
> While it is true that an unadjusted CPI comparison is still a proxy for actual figures, it is an attempt to get at the best representation of the real or actual loss…[4]

[1] WCAT decision #2013-00551 at para 28. February 27, 2013. Retrieved from http://www.wcat.bc.ca/research/decisions/pdf/2013/02/2013-00551.pdf. [2013-05551]
[2] *Ibid* at para 42.
[3] *Ibid* at para 45, 46.
[4] *Ibid* at para 67.

> On the other hand, using the policy item #51.00 formula, which introduces a deliberate 1% reduction in the percentage change in the CPI and does not reflect the total material time period, represents a willful and unnecessary creation of two disparate classes of workers and a deliberate move away from getting to the actual or real loss suffered by the worker. There is no apparent rational basis for deliberate inaccuracy in light of the stated purpose in policy item #40.13 for loss of earnings pension purposes and the emphasis in the Act generally on determining the real or actual loss suffered by the worker. That is what arguably makes this approach patently unreasonable.[5]
>
> [emphasis added]

The panel found that the portion of policy item #40.13 that incorporated policy item #51.00 was so patently unreasonable that it was not capable of being supported by the Act and referred it to the Chair for consideration under section 251(2) of the Act. The referral was later withdrawn on the basis that historical earnings were available to use for comparison.

Notwithstanding the withdrawal, the Board's Discussion Paper, dated August 17, 2016, contemplates options to address the concerns raised in this decision.

Submission

The Federation is in concurrence with the concerns raised and arguments provided in the BC Building Trades' and other expert labour and workers' advocates' submissions and, to avoid extensive repetitiveness, should be considered as our own where not repeated in this submission.

Option 1: Factor for calculating loss of earnings

The WCAT decision quoted above was not the first or only decision to raise concerns about the use of the COLA factor for comparing pre-injury and post-injury earnings. Several appeals have

[5] 2013-00551, *supra* note 1 at para 68.

been heard at WCAT regarding the application of policy item #40.13, where the vice chairs either found issue with using the Board's COLA factor itself or with the practice of applying the COLA factor rather than using the available earnings data from the date of injury.

For example, in a September 29, 2008 decision, the panel noted the following:

> To apply the provisions of section 25 of the Act as amended and RSCM II item #51.00 to the calculation of a worker's pre-injury earnings in its current value distorts the value of the worker's pre-injury earnings, such that a true comparison of the worker's pre-injury earnings to his post-injury earning capacity is not achieved.[6]
>
> …the use of the Consumer Price Index tables with a discount of 1% to a maximum of 4%, as prescribed by section 25 of the Act, is not consistent with the intent of section 23 of the Act...[7]

Option 1A – Status Quo

The Federation is in full agreement with the arguments provided by the panel in the 2008 and 2013 decision that using the COLA factor identified in policy item #51.00 to compare pre-injury and post-injury earnings is unsupportable and inconsistent with section 23 of the Act and leads to the arbitrary unfair and disparate treatment of one class of permanent partially disabled workers. Additionally, it is clear from the level of attention being given to it by WCAT decision-makers and advocates that a successful section 251 referral is inevitable if this issue is not resolved. For these reasons, the BCFED cannot support in any way remaining with the status quo, Option 1A.

[6] WCAT decision #2008-02880 at para 29. September 29, 2008. Retrieved from http://www.wcat.bc.ca/research/decisions/pdf/2008/09/2008-02880.pdf. [2008-02880]
[7] 2008-02880, *supra* note 6 at para 31.

Option 1B – CPI for Canada

The Board suggests that amending the policy to use the CPI for Canada would address the concerns raised by WCAT; however, they note that there would then be a disparity between how earnings are adjusted for comparison for LOE versus other situations.

It is the position of the BCFED that this suggested "implication" is irrelevant. The WCAT decisions on file have provided extensive clear and rational arguments, which we accept, that the nature and purpose of the LOE earnings comparison is inherently different from the other situations in which policy item #51.00 must be applied. Therefore, the only consistency that must to be considered is the policy's consistency with the intention of section 23 of the Act.

As policy item #40.13 is currently being contemplated for amendment, the Federation has concerns with simply amending it to reflect CPI without further research.

For example, the BCFED is aware that another organization will be submitting expert evidence that supports that using CPI plus 1% would be the best method to estimate earnings value at the date of injury as wage rates generally grow slightly faster than price indexes. The Federation submits that this concept is worthy of serious consideration and review by the Board of Directors as an alternative option. It is accepted by experts in the financial community, industry and labour that CPI is not a good indicator of the fluctuation of wage rates and that if it is used, it should not be used solely, but in consideration of other factors in addition to CPI that affect wages.

Another example can be found in an August 23, 2013 decision. In this decision, the panel appeared to accept the arguments provided in WCAT decision #2013-0551 and chose not to use the Board's COLA factor or CPI, but rather used the Board's maximum wage rates to determine the factor for comparison of earnings:

> Bearing in mind WCAT-2013-00551, I consider it appropriate in this case to rely on the maximum wage rate in 2010 for comparison purposes with respect to the worker's post-injury actual earnings in 2010. While recognizing that a worker's eligibility for a loss of assessment is not based

> on a precise formula, the maximum wage rate in 2010, which is still well below the worker's gross annualized earnings of $75,251.64, provides, in my view, the most accurate estimation of the worker's loss by working as a meter reader.[8]

The Federation supports the logic that the panel applied in this case, as it was a comparison of *wages*, rather than price.

The Board adjusts their maximum wage rate each year pursuant to section 33 (8) and (10) of the Act, not by using the COLA factor provided in section 25.2. The fact that the legislature intentionally excluded the maximum wage rate from the application of section 25.2 is pertinent to this consultation. The COLA factor was only ever intended to be used as explicitly expressed in the Act—for periodic payments of compensation and all dollar amounts reflected in the Act **except** the maximum wage rate. It seems evident that the legislature understood at that time that applying the COLA factor to the annual maximum wage rate adjustment would not fairly or accurately represent the growth in wages in the province for that year.

Although the factor or model used to calculate the increases to the maximum wage rate is not transparent in policy or the Board's minutes of the decision[9], section 33(8) of the Act prescribes that it is calculated in some way in relation to "the annual average wages and salaries in the Province". Further, policy item #69.00 of the RSCM II provides that the Board may use data published or supplied by Statistics Canada. It would seem then, that this would be the most rational approach to mimic in the adjustment of post-injury earnings to the date of injury value.

Firstly, the calculation is based on the fluctuations in provincial average wages rather than consumer prices. Secondly, as it is used to adjust the maximum compensation wage rate it is

[8] WCAT decision #2013-02358 at para 33. August 13, 2013. Retrieved from http://www.wcat.bc.ca/research/decisions/pdf/2013/08/2013-02358.pdf.

[9] Information regarding the Board's maximum wage rate, including the Board's minutes of their decisions, can be found on their website at: https://www.worksafebc.com/en/law-policy/claims-rehabilitation/compensation-related-maximum-wage-rates.

directly relative to the changes in the wage rates in suitable occupations. And, thirdly, this information should be readily available for Board adjudicators to use.

In lieu of all this, the Federation strongly urges the Board of Directors to adopt the existing method of adjusting their maximum wage rate to adjust earnings back to the date of injury rather than adopt the proposed option to use CPI.

Option 1C – BC CPI

The Federation cannot find any rationale to support introducing BC CPI as a new indexing method to this already complex system. The Act has already established CPI for Canada to use in section 25(1)(a) and the alternative indexing method provided for the Board maximum wage rate in section 33. As submitted above, one of these existing methods makes more sense as a basis to determine an appropriate factor for calculations.

Option 2: Process for calculating loss of earnings

Policy item #40.13 provides that the Board uses earnings in occupations available after the injury as they stood at the date of the injury, except for "occasionally" when these historical earnings are not available. Despite this policy, binding on decision-makers, the Board indicates in their discussion paper that in practice they do not usually use historical earnings as they are frequently unavailable.

This practice has been met with opposition by workers' advocates and WCAT decision-makers that opine that the Board should spend more time researching and using historical, date of injury earnings in most cases. As noted, the section 251 referral discussed above was withdrawn on the basis that it was determined that the Board should have used the earnings information available at the time of the injury. It is true, in fact, that a referral would never have been initiated if the Board had followed their own policy with respect to using the available date of injury earnings.

Since that time, there have been several WCAT decisions that have found the same and directed the Board to recalculate the loss of earnings as such. For example, in the WCAT decision dated July 23, 2014, the panel noted that post injury earnings as they stood at the time

of the injury were available, however the Board chose to use the COLA factor. The following excerpt from that decision highlights our concerns with this practice:

> I also find it striking that the three sources for post injury earnings as they stood at the time of injury are all basically within a range of $100.00 net per month, whereas the figure arrived at by using the 2012 labour market survey and then applying a cost of living adjustment is significantly different. Finally, in reviewing the labour market information that was placed on file, it is not apparent to me how the vocational rehabilitation consultant arrived at the "average range earnings" of $18.19 per hour. That figure resulted in a net monthly figure of $2,715.84 per month in 2012 dollars, adjusted to $2,441.42 in 2006 dollars. The difference between these two methods is so substantial that it results in the worker not being entitled to a partial loss of earnings award under the method used by the Board, whereas he is entitled to an award under the method subscribed by the policy.[10]

The panel in the decision dated February 23, 2015, considering the resources available to the Board, points out that the situations in which earnings are not available are limited:

> In my view, this is not one of those situations where the earnings in the occupations at the time of injury are not available. This is despite what was stated in *obiter* in WCAT-2014-02222, a recent WCAT decision which has been designated as "Noteworthy". In that case, the panel concluded that the Board should have used the available earnings at the time of injury. In paragraph 30, the panel outlined the types of cases where earnings at the time of injury would not be available.

[10] WCAT decision #2014-02222 at para 31. July 23, 2014. Retrieved from http://www.wcat.bc.ca/research/decisions/pdf/2014/07/2014-02222.pdf.

> As there were available earnings as they stood at the time of injury, those are the earnings that the Board should have used. As I interpret the policy, it is only in those occasional cases where earnings as they stood at the time of injury are not available that earnings at another date are used and a cost of living adjustment then applied. *There are many cases when earnings as they stood at the time of injury are not available, such as when the worker is limited to a certain number of hours per week* or an appellate decision determines that the worker is only capable of attaining a certain rate in the long run. However, this is not one of those cases. [my emphasis]

With respect, I disagree that in cases where a worker is limited to a certain number of hours per week, as was determined in the case before me, that the earnings as they stood at the time of injury are not available. Although I can appreciate that it would be more difficult to determine earnings for loss of earnings award purposes using statistical figures for class average wage rates for all workers or for full-time workers, I find that with some simple calculations using the statistical figures it is possible for the Board to calculate these earnings. For example, in the present case, a 25-hour work week equates to 62.5% of a 40-hour work week or full-time work week. In this way, this percentage can be used with the occupational class average earnings for full-time workers at the date of injury to determine this worker's earnings as they stood "at the time of injury".

In addition, given the many resources available to the Board, the Board may obtain other reliable evidence from other sources, aside from the statistical occupational class average earnings, in order to determine earnings in the occupation after the injury as they stood at the date of

injury. Those other sources may provide hourly wage rates for the occupation at the date of injury.[11] [12]

Option 2A: Status Quo

It is the Federation's position that the status quo practice of the Board deferring to current earnings adjusted back to determine the loss of earnings is simply unacceptable and must be stopped. It is evident in reviewing countless cases and decisions, that this practice is unfair as it consistently undermines the true loss of earnings that the injured worker has suffered.

Option 2B: Historical earnings

Per Section 23 of the Act, it is incumbent upon the Board to pay the injured worker based on the amount that "better represents the worker's loss of earnings". Various decision-makers at WCAT and through judicial review have established that "better" is equivalent to "best" or "most accurately". It is obvious even to laypersons that, in most cases, the historical earnings information would be more representative than current earnings adjusted back by a fictional factor that is based on a consumer **price** index.

The Board's discussion paper notes that finding historical information is not always practicable, meaning not capable of being done. However, in the experience of many advocates, and as borne out in many appeal decisions, the historical earnings were readily available and often already included on the file through the process of the eligibility assessment for the LOE. Therefore, it seems that the Board routinely adjusts earnings back out of convenience—or perhaps as a method to reduce the LOE compensation due to the worker—rather than based on practicability.

As noted above, the wording of the Act places a significant responsibility on the Board to research the best, most accurate earnings for comparison to ensure that the worker is being

[11] WCAT decision #2015-00577 at para 33 - 35. February 23, 2015. Retrieved from http://www.wcat.bc.ca/research/decisions/pdf/2015/02/2015-00577.pdf.

[12] In the WCAT decision #2014-03610 (para 34), dated December 5, 2014, the panel noted that some of the sources of data other than occupational class averages include WorkBC information and wage rates in historical collective agreements, where appropriate.

appropriately compensated for their true loss of earnings. Therefore, the Board's level of effort to research the historical, date of injury earnings, and properly consider and account for the factors that may vary that base amount, must go beyond mere convenience or adjudicative efficiency.

The Federation agrees with other worker advocates' submissions that it is imperative that the language in policy item #40.13 be amended to clarify that the Board *must* use the historical, date of injury earnings, unless those earnings are truly unavailable or rationally inappropriate; in which case, the rationale should be clearly outlined in the decision.

Conclusion

The Federation appreciates the opportunity to provide a submission regarding the measurement of earnings loss. We are confident that the Board of Directors will seriously consider this submission and revise the proposed changes based on our recommendations.