

Royal Commission - Average Earnings Briefing Paper

1. Introduction

From the time the first *Workmen's Compensation Act* was passed in British Columbia until the present time the calculation of benefits has been related to a worker's "average earnings." The phrase "average earnings" has always been defined in the *Act*. The current definition is found in Section 33(1). Section 33(1) is a single lengthy, complex, and compound sentence which provides that:

1. Average earnings must be determined with reference to the average earnings at the time of injury.
2. In determining what the average earnings at the time of injury are, the Board may have regard to:
 - a) the regular remuneration which the worker was receiving at the time of injury; or
 - b) the average yearly earnings of the worker for one or more years prior to the injury; or
 - c) the probable yearly earning capacity of the worker at the time of injury; or
 - d) the average amount earned by workers in the same or similar class of employment as that being done by the worker at the time of injury, if it would be inequitable, because of the shortness of time the worker was employed or because of the casual nature of that employment, to determine average earnings in the ways described in 2(a), 2(b), or 2(c).
3. The method selected from these alternative ways of determining average earnings must be the one that results in the figure that best represents the actual loss of earnings suffered by the worker by reason of the injury, although not in any case to exceed a maximum wage rate as defined in the *Act*.

These provisions, which are essentially unchanged from those in the average earnings section in the 1916 *Act*, reflect the recommendations of Mr. Justice Meredith in his report to the Ontario government in 1914. In that report he was considering proposals by the Canadian Manufacturers' Association regarding the scale of compensation. The Canadian Manufacturers' Association was proposing a tariff scheme whereby benefits would be paid in accordance with fixed schedules; ie. certain injuries would be compensated for by the payment of specified amounts for specified periods of time. Meredith rejected that proposal and concluded that "a just compensation law ... ought to provide that the compensation should continue to be paid as long as the disability caused by the accident lasts, and the amount of compensation should have relation to the earning power of the injured workman."¹

2. Royal Commissions

The topic of average earnings has not received any significant attention by previous Royal Commissions. This, in spite of the fact that in 1942 Chief Justice Sloan began his discussion of the issue of "average earnings" by saying it was "a controversial subject in this province."²

2.1 The first Sloan Commission of Inquiry into the B.C. Workers' Compensation system (1942)

The first Royal Commission to inquire into the Workers' Compensation system reported in 1942. The Commissioner was Chief Justice Sloan of the B.C. Court of Appeal. The criticism of labour, as it related to average earnings issues, was that in the exercise of its "unfettered discretion for the single purpose of arriving at the fair and just figure which truly represents the loss of earnings of an injured employee"³ the Board often understated the worker's loss. Sloan described the proposed solutions of labour as ones that would "imprison this discretion within the iron framework of arbitrary rules."⁴

¹ Final Report on Laws Relating to the Liability of Employers, The Honourable Sir William Ralph Meredith, CJO, Commissioner, (1913), p. 13.

² The Report of the Commissioner, Relating to the Workmen's Compensation Board, The Honourable Gordon McG. Sloan, CJ, (1942), p. 55.

³ *Ibid.* p. 65.

⁴ *Ibid.* p. 65.

Sloan spent some time discussing criticisms of the policy of relating benefits to average earnings on the basis set forth in the *Act*, and to the practices of the Board in administering that policy. Sloan essentially found that the criticisms of both the statutory policy and the Board's practices were unjustified.

2.2 The second Sloan Commission of Inquiry into the B.C. Workers' Compensation system (1952)

The second Commission of Inquiry, which reported in 1952, was also conducted by Chief Justice Sloan. The report contains a brief discussion of average earnings within a section entitled *Calculation of Compensation*. The average earnings issue is dealt with in the following passage:

In adjustments of time-loss compensation average earnings are taken for the first three months after the accident at the actual weekly rate of pay of the injured workman at the time of his accident; thereafter time-loss compensation is based on the workman's average earnings for the three months or one year prior to the accident, whichever is the higher, but if the workman has been employed less than two months and one week during the three month prior to the accident or less than nine months in the year prior to the accident, time-loss compensation is calculated on the average earnings for the same grade or class of employment.

This method of adjustment does not apply to workmen engaged in seasonal employment, that is, longshoremen or fishermen.

The average wages of fishermen are calculated on the year's earnings, and those of longshoremen in a class average of \$120 a month as the minimum and at the actual wages earned if higher than the minimum.

I see no just ground for criticism of this policy.⁵

2.3 The Tysoe Commission of Inquiry into the B.C. Workers' Compensation system (1966)

⁵ Report of the Commissioner Relating to the Workmen's Compensation Act and Board, The Honourable Gordon McG. Sloan, (1952), p. 173.

The third Commission of Inquiry was commenced by Chief Justice Des Brisay, and completed by Mr. Justice Tysoe in 1966. It reported in 1966.

Although the topic of average earnings was given a separate chapter by Tysoe⁶ there is only a brief review of the issues. Tysoe noted the objections of some labour unions that what is now Section 33(1) of the *Act* gave too much discretion to the Board in determining average earnings. The unions argued that average earnings should be paid on the basis of the rate of pay on the date of the accident, and that rate should continue throughout the life of the claim. In essence these were the same arguments that had been made to Sloan in 1942.

Tysoe did not recommend any changes in policy or practice. He basically concluded, as had Sloan, that it was necessary for the Board to retain its broad discretion in the calculation of average earnings. He merely cautioned the Board that "great care is required on the part of the persons concerned with the administration of this section if justice is to be done."⁷

3. Administrative Inventories

Since 1991 two Administrative Inventories that have been conducted of the B.C. workers' compensation system have discussed average earnings issues.⁸ The reference to average earnings in the first Inventory is in Chapter 5, which is entitled *Benefits*. The Inventory notes the practice of the Board to review and recalculate average earnings after eight weeks. (This is the same review that occurred after three months (13 weeks) when Sloan discussed average earnings). It notes that the eight week rate review may produce significant differences between the initial wage rate and the wage rate for disability extending beyond eight weeks, especially in the cases of casual workers, seasonal workers and workers who had recently obtained employment following a fairly lengthy period of unemployment. In most cases the rate adjustment results in a reduction of benefits to the injured worker. The only real comment in the Inventory expressing a value judgement is that:

Worker advocates allege that the WCB is not very flexible or understanding in determining average earnings. They feel that the WCB frequently uses the facts in a way that actually disadvantages the claimant.⁹

⁶ Commission of Inquiry, Workmen's Compensation Act, Report of the Commissioner, The Honourable Charles W. Tysoe, p. 302.

⁷ Ibid. p. 304.

⁸ The two inventories are Workers' Compensation in British Columbia, An Administrative Inventory at a Time of Transition, H. Allan Hunt, Peter S. Bath, Michael J. Leafy, 1991; and The Workers' Compensation System in British Columbia: Still in Transition, H. Allan Hunt, Peter S. Bath, Michael J. Leafy, 1996.

⁹ Ibid., Time of Transition, p. 63.

The second Inventory¹⁰ describes the system in similar terms to those used in the first Inventory. In addition, the second Inventory notes that in the 1992 Annual Report the Chair of the Board of Governors had indicated that an objective in 1993 was to carry out a “complete review and development of a revised average earnings policy.” The Inventory notes the length of time which had taken up to the summer of 1995 to do this review, at which time the review was not complete.

The value judgement expressed in the second Inventory relates, not to specific average earnings issues, but to the general issue of the process for revising average earnings policy:

The message with regard to policy on average earnings may reflect generally on the Board’s ability to change its policies and practices. First, on certain core issues relating to compensation, finding consensus can be a very slow process, and one that may not lead to change. And when change can be accomplished it may be limited by the reluctance to move in areas where one interest or the other will be discontent.¹¹

4. Process for revising average earnings policy (1989 to date)

In 1989, amendments to the *Workers’ Compensation Act* were passed which provided for a new governance structure. The *Act* did not come into force upon enactment. As a matter of policy the Board decided to impose a moratorium on policy changes until the new governance structure was in place.

During the moratorium one of the areas in which WCB staff identified a need for change was that of average earnings. Upon the new governance structure becoming functional in June 1991, the moratorium was lifted, and in early 1992 a paper was presented to the Governors which identified several issues regarding average earnings where it was felt that existing policy should be re-examined.

A Governors Committee was established to respond to this paper. To assist the Governors Committee, an Average Earnings Working Group, consisting of WCB staff, was established. This group reviewed material regarding average earnings from several sources, including the Rehabilitation Services and Claims Manual (RSCM), the Workers’ Compensation Reporter (WCR), internal memos and directives, training instructions, and appeal decisions.

¹⁰ Op cit, Still in Transition.

¹¹ Ibid. p. 98.

A paper entitled *Proposals on Average Earnings* was presented to the Governors Committee on October 15, 1992. Following their review of this document the Governors authorized the preparation and publication of a paper dated October 26, 1992 entitled *Average Earnings: A Discussion Paper and Proposals of the Average Earnings Working Group to the Governors Committee on Average Earnings*.

This paper was distributed widely amongst the public, including employers and their representatives; workers' representatives; MLA's; the provincial Ombudsman; and WCB staff. Comments were invited and received. On January 21, 1993 a document entitled *Summary of Submissions Concerning the Average Earnings Discussion Paper* was prepared.

On February 24, 1993, in response to a request from the Chairman of the Board of Governors, a legal opinion was received from Irwin G. Nathanson, QC¹² regarding several of the proposals in the October 26, 1992 paper. Over the next year the Average Earnings Working Group met with various interested parties for the purpose of drafting a revised Average Earnings chapter in the RSCM. The aim of the process was to produce a chapter that reflected the original proposals in the October 26, 1992 discussion paper; the responses to those proposals by the various interested parties; and the Nathanson legal opinion.

On May 9, 1994 a draft proposed revision of the average earnings chapter of the RSCM was distributed to the same interested parties who had reviewed the October 26, 1992 discussion paper. Again written submissions were invited and received. In spite of the public consultation and emphasis on achieving consensus that had been a part of the process that produced the proposed chapter, the responses made it apparent that certain proposals in the draft chapter remained contentious and consensus amongst the interested parties had not been achieved.

In October 1994 the Average Earnings Working Group was disbanded and the Policy and Research Department of the Board was assigned the responsibility for preparing a revised Average Earnings chapter for the RSCM. A draft revision of the Average Earnings chapter of the RSCM was prepared. While this paper drew upon much of the work of the Average Earnings Working Group and the public consultation which had been an integral part of that process, there was a significant difference between the proposals of the Policy and Research Department and the proposals of the Working Group.

¹² Irwin G. Nathanson Q.C., Letter to the Chairman, Board of Governors, Feb. 24, 1993.

The Working Group proposals for change had dealt with many practice matters and proposed to have the Governors approve those changes and include them in the revised Average Earnings chapter of the RSCM. (All material in the RSCM is “published policy of the Governors”, a phrase that appears on numerous occasions in the *Act*). The Policy and Research proposal recommended that as much practice material as possible be deleted from the RSCM and be placed instead in the Compensation Services and Claims Adjudication Handbook. Both the RSCM and the Adjudication Handbook would be available to the public. However making changes in practice and procedure would not require the direct involvement of the Governors, as is required to make changes in published policy of the Governors.

By the time the draft Policy and Research proposals were completed the Governors of the Board had been replaced by a Panel of Administrators, pursuant to Section 83.1 of the *Act*. In April, 1996 a Commission of Inquiry into the workers’ compensation system was announced by the government. It is expected that some average earnings issues will attract significant attention by the Royal Commission.

5. Issues

5.1 Gross v Net Earnings

One significant issue related to average earnings is whether benefits should be related to average “gross” earnings, or average “net” earnings (ie. gross earnings minus deductions for income tax, CPP, and EIC).

WCB policy has been to interpret earnings to mean gross earnings although there is no statutory provision that so provides, and no clear statement of that policy in the RSCM. The fact is, however, that from 1916 to the present time the WCB has always understood average earnings to be “gross earnings”. Average

earnings meant gross earnings in 1916 because there were at that time no deductions for income tax, CPP, or EIC, and it has continued to mean gross earnings to the WCB ever since. The Board’s position, therefore, is that to base benefits on net rather than gross earnings, would require specific legislative provisions.

In most Canadian jurisdictions the compensation rate is now applied to net earnings. The *Acts* in those jurisdictions explicitly state benefits are a percentage of net earnings.

There are two motivations for having the compensation rate applied to net rather than gross earnings. The first motive is to remove inequities that result from the fact that all workers' compensation benefits are equally tax free, regardless of the tax bracket a worker is in.

The second motive is to increase or decrease the benefit level. Paying benefits based on net rather than gross earnings will not by itself determine whether the level of benefits will increase or decrease. The compensation rate which is applied to earnings, whether net or gross, determines that issue. In all Canadian jurisdictions the compensation rate is stipulated in legislation.

Further discussion of this issue will be found in a separate briefing paper on Compensation Rates. The issue has been discussed in this paper only to the extent necessary to explain why, in B.C., the reference to "earnings" in the phrase "average earnings" is a reference to gross earnings.

5.2 Composition of Average Earnings

The Board is required to determine what forms of remuneration will be included in the composition of average earnings of workers for the purpose of calculating benefits. The Board has developed policies and practices to structure the discretion it exercises in determining the composition of average earnings. The policies and practices which have assisted the Board in determining this question have, for the most part, not been contentious. However there are two issues which have recently attracted significant comment.

5.2.1 Income replacement payments

The first issue is whether income maintenance or replacement payments by government agencies should be included in average earnings. These payments include such things as Social Assistance, Employment Insurance Benefits, and Canada Pension Plan benefits.

The Board's policy is that such amounts are not included in average earnings.

The issue has been considered in a published decision of the Appeal Division.¹³ For disabilities extending beyond eight weeks the usual practice of the Board is to predict a disabled worker's actual loss on the basis of the worker's earnings in a specific period of time (usually one year) prior to the disabling injury. The Board couples its policy of not including, as earnings, the income replacement benefits received in that period, with a policy of not excluding the period of time during which the income replacement benefits were received; ie. if the Board determined that a worker's wages in the six months prior to the date of a disability equalled \$20,000 and in the immediately preceding six months the worker had received \$12,000 in Employment Insurance benefits, the Board would conclude that the "average earnings" for the 12 months were \$20,000. This as opposed to the alternatives of saying the average earnings were \$32,000 (\$20,000 wages plus \$12,000 Employment Insurance benefits) or \$40,000 (the wages earned in six months pro-rated to produce an annual rate of \$40,000).

Counsel in the case before the Appeal Division submitted that it was not fair, in calculating average earnings, to exclude Unemployment Insurance benefits but to include the period of time the worker was in receipt of those benefits.

The Appeal Division concluded that the policy which excluded Unemployment Insurance benefits from average earnings was not contrary to the *Act*.

The Appeal Division then considered, if the benefits were excluded, whether the time the worker was on Unemployment Insurance benefits should also be excluded in the calculation of average earnings. They noted the explicit policy of the Board which provides that that period of time is included, and stated as follows:

... In this worker's situation where he had received Unemployment Insurance benefits regularly in the past, if both the Unemployment Insurance benefits and the time during which he received those

benefits were excluded from the calculation of "average earnings", then, the average earnings figure could be highly inflated. In effect, the worker would be treated as if he worked full-time for the whole year when, in fact, he spent part of every year on Unemployment Insurance benefits.

On the other hand, to leave Unemployment Insurance benefits out of the calculation, but leave the time in, means that the worker's actual loss of "income" due to his compensable injury is undervalued In cases like the one before us, the most accurate measure of the "income" the worker lost due to his compensable injury would be achieved if both his Unemployment Insurance

¹³ Appeal Division Decision 91-1104, 8 WCR 81.

benefits and the time period during which he received those benefits were included in the calculation.¹⁴

Despite the Appeal Panel's own opinion as to what it considered to be the most accurate measure of loss, the Panel upheld the Governors' policy as not being contrary to the *Act* and dismissed the worker's appeal. The decision did not suggest however, that the Board was legally precluded from instituting a policy that would reflect the Appeal Division's opinion.

5.2.2 Fringe benefits

A second issue is whether fringe benefits should be included in the composition of average earnings.

The general practice of the Board since 1916 has been to exclude what are called "fringe benefits" as a component of average earnings. However the practice was not clearly expressed in published policy of the Governors until August 1996. In spite of the lack of clear policy, the Board's practice of not including fringe benefits in the calculation of average earnings had been upheld on the few occasions, prior to June 1996, when the issue was appealed to the Appeal Division.

In March 1995 an appeal was considered where the Appeal Division panel characterized the issue as follows:

... whether the Board should consider the amounts paid by the employer for the health and welfare plan and the pension plan as earnings in calculating the worker's wage rate for his pension.¹⁵

In that appeal the Appeal Division panel concluded that the fringe benefits in the form of health, welfare, and pension contributions were properly excluded by the Board in the calculation of average earnings.

In another Appeal Division decision, this one made in May 1996,¹⁶ one of the issues dealt with was whether the value of a benefit package which included group life insurance, accidental death or dismemberment insurance, dental coverage, medical coverage, vision/hearing care, pension plan, extended health plan, and vacation entitlement should have been included in the calculation of the worker's average earnings for the purpose of assessing a pension.

¹⁴ Ibid. p. 82.

¹⁵ Appeal Division Decision 95-0366 (March 31, 1995)

¹⁶ Appeal Division Decision 96-0885 (May 31, 1996)

The Appeal Division panel referred to the governing policy at the time (#71.20 - RSCM)¹⁷ and said that the policy did not “include fringe benefits which do not result in any supplement to the worker’s wages, although having value to the worker.”

The Appeal Division also referred to a leading text on workers’ compensation in Canada which says that employers’ contributions to Unemployment Insurance, Canada Pension Plan, any other pension plans, and any other fringe benefits, are generally excluded from the calculation of earnings.¹⁸

Finally, the Appeal Division referred to the American treatise, *The Law of Workmen’s Compensation*.¹⁹ The Appeal Division commented as follows:

In the *Law of Workmen’s Compensation* Professor Larson discusses “fringe benefits, training allowances, and the like” in Volume 2, paragraph #60.12(b), at pages 10-663 to 10-666. He notes that the leading case on whether “average wage” should include fringe benefits is the United States Supreme Court decision which overturned a circuit court’s decision in *Hilyer v. Morrison - Knudsen Construction Co.* The Supreme Court overturned the lower court’s decision which held that fringe benefits should be included in the calculation of a worker’s average wage. In his

analysis of this decision, Larson notes that the U.S. Supreme Court found that:

In spite of the well known upsurge of “fringe benefits”, Congress had never amended the definition [of “wages”] to include them Any such change would significantly alter the careful balance struck by Congress between the rights of employees and employers. It would also undermine the goal of promptness of payment, since the wage calculation process, which is now almost never a source of controversy, would be a focus of challenge and dispute in almost every case.

¹⁷ Item #71.20 was entitled “Fringe Benefits” but merely stated that when certain cash payments (travel allowance, vacation allowance, and statutory holiday payments) were made to a worker they would be included in calculating average earnings.

¹⁸ T.G. Ison, *Workers Compensation in Canada*, 2nd edition, p. 84.

¹⁹ Arthur Larson, *The Law of Workmen’s Compensation* (1996).

The Appeal Division decision concluded that:

Upon consideration of the list of matters included as earnings under Governors' policy at #71.00, I find that such fringe benefits are implicitly excluded. I find no basis for departing from Governors' policy in this regard. On consideration of the wording of Section 33 of the *Act* and Governors' policy, I do not consider that the calculation of the worker's average earnings should be increased to take into account the value to him of the fringe benefit package provided to him by his accident employer.²⁰

Shortly after Appeal Division decision 96-0885 was made a different Appeal Division panel concluded that the value of 100% employer paid health and dental plans should be included in the calculation of a worker's average earnings.²¹

The fact that the Appeal Division had arrived at different conclusions in attempting to interpret the *Act* and published policies of the Governors, was considered sufficient reason for the Panel of Administrators to act quickly to create the current policy which reads as follows:

The Board does not include fringe benefits as a component of average earnings. Fringe benefits include, but are not limited to, employer payments for or contributions to CPP, UIC, retirement, pension, health and welfare, life insurance, training, or other employee or dependant benefit plans.

In the presentation to the Panel of Administrators which recommended adoption of the above policy, the following was stated:

Adoption of the recommendation provides an explicit statement that the longstanding practice of the Board is published policy of the Governors. Failure to adopt the recommendation may encourage more appeals of this issue

It is recognized that the way in which the Board calculates average earnings has been a subject which has attracted significant attention by stakeholders and will probably be a subject the Royal Commission will examine.

Implementation now of this recommendation regarding fringe benefits, since it merely affirms the status quo, is not intended to pre-empt the Royal Commission's consideration of average

²⁰ op cit, Appeal Division Decision 96-0885.

²¹ Appeal Division Decision 96-0943 (June 12, 1996).

earnings. It merely means that consistent adjudication can take place pending any recommendation that the Royal Commission may ultimately make regarding the calculation of average earnings.

It is noted that including fringe benefits as a component of average earnings is only relevant if the “value” of the fringe benefits is lost as a result of a work caused injury. In many cases employers voluntarily maintain injured workers on fringe benefits during their compensable disability. In some cases, legislation requires employers to continue fringe benefit coverage during the period of compensable disability.²² In either case the value of the fringe benefits is not lost as the result of the injury and there is therefore no need to include it as a component of average earnings.

5.3 Administering Average Earnings Policy

All benefits for temporary or permanent disability are based on a calculation that requires the determination of an injured worker’s “average earnings.” This determination is required to be made at least once, and in several circumstances, more than once, on every claim that involves any loss of earnings. The benefits must compensate for future economic loss through periodic payments that continue so long as a compensable disability lasts.

Difficulties in determining the future loss in each individual case while at the same time ensuring that similar situations are treated in a similar manner, and that statutory and policy requirements are complied with, are significant. Particularly difficult problems of how to best determine the average earnings of, for example, principals of limited companies, or new entrants to the workforce, or variable shift workers, create controversy and attract criticism.

The temptation is to try to create policy rules to cover all eventualities, but it is noteworthy that all three prior Royal Commissions cautioned against creating what Sloan described above, as “an iron framework of arbitrary rules” that would interfere with the Board’s discretion in determining average earnings. Where policies are necessary to interpret the *Act* or to structure the discretion of Board officers in the exercise of their adjudicative duties, it is important that the policies be consistent with the *Act*; unambiguous; and that they further the purpose of enabling the Board to arrive at the “fair and just figure which truly represents the loss of earnings of an injured employee”.²³

²² For example, in Ontario, Section 24 of Bill 99 requires, subject to some limitations, that throughout the first year after a worker is injured, the employer shall make contributions for employment benefits in respect of the worker where the worker is absent from work because of a compensable injury.

²³ See note 3 above.

5.3.1 Determining Average Earnings on new claims

The RSCM says that for most cases wage loss payments made at the outset of a claim are based on the worker's "rate of pay at the date of injury"²⁴ (subject to the maximum wage provision of the Act). The phrase "rate of pay at the date of injury" is a somewhat ambiguous expression but has been applied in practice to mean the daily wages the worker was receiving on the day of injury. Compensation based on this rate continues until the end of the worker's temporary disability, or until an adjustment is made following an 8 week rate review, whichever date comes first.

For workers who are paid on a regular periodic basis this is a straightforward calculation which accurately represents the actual loss of earnings caused by the injury, especially if the disability is of short duration. However it can be an inaccurate representation of actual loss of earnings in certain circumstances. Board policy deals with these exceptions in one of two ways.

- If the Board determines that a worker meets the Board definition of a "casual worker" at the date of injury, benefits are not normally based on the rate of pay on the date of injury. For casual workers the initial rate is based on the worker's earnings over a specified period of time prior to the date of injury. This time is usually one year.

Difficulties arise in determining whether employment is casual. One of the difficulties is distinguishing whether the nature of a particular job is intrinsically casual, or whether the particular worker's relationship to the workforce is casual. Some workers have a regular attachment to the workforce even though this attachment does not consist of one "regular" job. The problems determining whether a worker has a regular attachment to the workforce or is a casual worker are particularly difficult where the attachment to the workforce is in occupations that are considered to be seasonal occupations.

In addition to the problems related to classification, when a decision is made to classify someone as a casual worker, the payment of benefits may be delayed because of the time required to gather the necessary information to confirm the earnings in the one year prior to the date of injury.

²⁴ #66.00 RSCM.

- For workers the Board does not classify as “casual workers”, a review of the initial rate is conducted after 8 weeks if the disability has persisted for that length of time. The rate review gets conducted in approximately 15% of the cases.²⁵

5.3.2 Rate changes

While there has been some controversy over the years for the 85% of cases where the only rate set is the initial rate, most controversy arises in the 15% of cases where the rate is adjusted following the 8 week rate review.

For cases where disability lasts longer than 8 weeks the normal practice is to determine the worker’s earnings in the one year prior to the injury and express them as annual earnings. These annual earnings then become the average earnings which determine the wage rate for the duration of the temporary disability (and in most cases, for a pension, if permanent disability results).

Advocates, the Ombudsman, and the Courts have criticized what they see as an over-reliance on one year pre-injury earnings as the method of determining the average earnings for permanent disabilities and injuries that cause more than eight weeks of temporary disability. In 1984 the provincial Ombudsman initiated

a *Preliminary Report* pursuant to Section 16 of the *Ombudsman’s Act* in furtherance of a complaint from a widow of a fatally injured worker regarding the way in which average earnings had been calculated for the purpose of establishing the widow’s pension. Nearly ten years later, when a successor Ombudsman was invited to participate in the review of the proposals of the Average Earnings Working Group, the response by letter of January 5, 1993 included the correspondence with the Board that had ensued on the original inquiry conducted in 1984 by the predecessor Ombudsman. The Ombudsmen were concerned that in practice, the Board rarely applied the notion of “earning capacity” in determining average earnings.

The published policy in Item #65.00 of the RSCM correctly states that the Board is obliged “to select for each claim the method which most accurately represents the worker’s actual loss of earnings by reason of the injury”. However, a reference in item #65.00 to a “framework of principles” which adjudicators are required to follow in order to ensure that the application of Section 33 of the *Act* is consistent between different claims has been interpreted to mean that:

²⁵ Data over the years is consistent in showing that approximately 35% of all wage loss claims result in wage loss of 1 week or less; approximately 65% result in wage loss of 3 weeks or less; and approximately 85% result in wage loss of 8 weeks or less.

... The primary intent of the legislation is to try and reflect after the injury a compensation payment pattern that will closely parallel the established earnings pattern before the injury. Our policies are therefore designed to implement this primary intent.²⁶

While, from an evidentiary point of view, a pre-injury earnings pattern may be a credible predictor of actual post-injury loss, this does not mean that the primary intent of the legislation is to have a compensation payment pattern that closely parallels the established earnings pattern before the injury. The primary intent of the legislation is to determine the actual loss following the injury.

This difference in focus, coupled with the fact that in practice the Board often routinely determines the pre-injury pattern on the basis of the earnings in the one year preceding the accident, has led to numerous appeals within the system, as well as at least one successful challenge on judicial review.²⁷

In the judicial review case the B.C. Court of Appeal held that the “rigid application” of the policy of basing the determination of average earnings on the actual earnings of the injured worker for the year preceding his injury produced a patently unreasonable result and the Board was directed to reconsider that issue.²⁸

In the case before the Court the proper exercise of the Board’s discretion would have required an evaluation of such matters as the likelihood of continued employment in the year following the injury if the injury had not occurred, rather than automatic application of the one year pre-injury earnings rule. Published policy of the Governors’ does not prevent adjudicators from considering such matters as the likelihood of continued employment, and there is even one explicit direction that this should be done.²⁹ However, in seeking consistency in decision making, adjudicators tend to the view that the objective evidence represented by past earnings history is a more reliable predictor of future loss.

5.3.3 Determining average earnings on reopening

Section 33(1) says that average earnings shall be determined with reference to the average earnings at the time of injury. In the absence of any other statutory provision this would mean that the compensation rate initially established on a

²⁶ Address prepared by Executive Policy Advisor, on June 27, 1989, for an annual adjudication seminar.

²⁷ Testa v. British Columbia (Workers’ Compensation Board) (1989), 58 DLR (4th) 676.

²⁸ Ibid, p. 685.

²⁹ see Item #67.20 (RSCM) p. 9-15.

claim, as modified at the time of the eight week rate review if that should occur, would never change (except as adjusted to reflect changes in the Consumer Price Index pursuant to Section 25). This would be so even if changes in the nature and degree of injury required the Board to reopen a claim for the purpose of paying further wage loss or pension benefits. However Section 32 creates an exception to this requirement and grants the Board a discretion to recalculate the average earnings in certain circumstances.

Section 32(1) provides, where there is a recurrence of temporary disability more than three years after the occurrence of the original injury, that benefits when the claim is reopened may be calculated by reference to the average earnings of the worker at the date of the recurrence of temporary disability.

Section 32(3) provides that where permanent disability (or an increased degree of permanent disability) occurs more than three years after an injury, that benefits payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.

The issue that requires determination by policy is whether the rate on reopening will be the rate established at the outset of the claim (plus applicable CPI

adjustments) or whether the rate will be based on the average earnings at the time of reopening. The Board's policies are that:

- Where the average earnings are higher on the reopening date the benefits are calculated by reference to the average earnings on the reopening date.
- Where the average earnings are lower on the reopening date the reason for the reduced earnings is determined. If the reduction in earnings is significantly attributable to the compensable injury benefits will be calculated using the original average earnings. If the reduction in earnings is not significantly attributable to compensable injuries, the benefits will generally be calculated using the average earnings on the reopening date.

The policies themselves do not attract criticism, although the finding of fact made by an adjudicator as to whether the reduction of earnings is significantly attributable to compensable injuries may attract criticism.

5.4 Maximum wage rate

Compensation benefits are limited by the fact that the average earnings figure shall not “exceed the maximum wage rate”.

The statutory requirements involved in determining the maximum wage rate are contained in Sections 33(6), (7), (8), (9), (10). The amount is expressed as an annual rate. This is in contrast with the provision for minimum wage rates (see Section 29) where the amount is expressed as a weekly rate.

While the *Act* does not refer to a maximum weekly rate, Board practice is that a maximum weekly rate is derived, on a pro-rata basis, from the maximum annual rate, and applied in calculating benefits.

There is no clear policy statement authorizing this practice. Item #69.00 in the RSCM contains little or no policy, and is essentially a restatement of what the *Act* says the maximum wage rate is. In Item #66.01 of the RSCM there is a passing reference to the fact that, for variable shift workers who suffer short term disabilities, “the application of the statutory maximum entitlement is determined by the computer by reference to the amounts paid over each calendar week”.³⁰

In most cases, since a worker’s earnings are expressed in terms of regular periodic payments (e.g. daily, weekly, monthly), converting the maximum annual wage rate to a weekly maximum rate is the best way of ensuring that the total benefits which must be paid “so long as the disability lasts” will best represent the actual loss caused by an injury.

However, when a worker’s regular remuneration on the date of injury is not accurately represented by a regular periodic wage, difficulties can arise. For example, converting the annual earnings of a seasonal worker to a maximum weekly rate based on the assumption that the earnings are received in equal weekly increments when that is not so, and then paying the benefits so calculated for “so long as the disability lasts” results in inequities. Unless the disability lasts for a full year, the practice results in undercompensation if an injury occurs at the start of a season, and overcompensation if an injury occurs at the end of a season.

It therefore may not be appropriate in all cases to convert the maximum amount of earnings, which is expressed in the statute as an annual rate, into a maximum rate of earnings for a week on a pro-rata basis.

³⁰ #66.01, RSCM, p. 9-2.

The problem has been considered, although without specific reference to the impact of the Board's practice of converting the annual maximum wage rate into an maximum weekly wage rate, by the Appeal Division in decision 91-0021.³¹

5.5 Personal optional protection

Section 2(2) authorizes the Board, at its discretion, to provide coverage to persons who are not covered as workers under the mandatory provisions of Section 2(1). The Board describes such coverage as personal optional protection (POP).

Persons who purchase POP thereby become entitled to receive benefits for occupational injury and disease and it is necessary to calculate average earnings for the purpose of determining their benefit levels. However the *Act* authorizes the Board, when it allows people to purchase POP, to do so on terms and conditions the Board considers adequate and proper. A condition the Board has authorized is that Section 33 is not applied in determining average earnings in most POP cases. Rather, the Board's policy³² is that the "average earnings"

of a person who purchases POP are the earnings for which coverage has been purchased. Thus, in calculating benefits for total temporary disability, the benefit is 75% of the amount of earnings for which coverage has been purchased. Similarly, in the case of a permanent disability, a pension pursuant to Section 23(1) is calculated using the coverage purchased as the average earnings.

When assessing a permanent partial disability pursuant to Section 23(3) for a POP purchaser, the Board's policy is that it is necessary to determine the average earnings prior to injury and the average earnings after the injury in accordance with the normal application of Section 33. When the actual loss is determined by calculating the difference between the pre and post injury average earnings, benefits are paid as for any other Section 23(3) pension. The relevance of the POP coverage in such a case is that the maximum pension payable is limited to the amount of POP coverage purchased.

The legality of determining average earnings for POP purchases by reference to the coverage purchased rather than by reference to Section 33 was considered by Nathanson who expressed his legal opinion that:

... persons who elect to receive personal optional protection are not in the same position as workers who are obliged to accept compensation under the Act. Personal optional protection is

³¹ A Fisherman's Wage Rate, 7 WCR 6.

³² #66.20 RSCM.

equivalent to a policy of disability insurance, voluntarily purchased. The Board is at liberty to fix the rates at which the insurance is to be purchased. I see no reason why the Board cannot stipulate as a condition of coverage that applicants will only be compensated on the basis of "earnings" declared to the Board at the time coverage was purchased or renewed and upon which assessments have been levied.³³

While there are some perceived problems related to the POP program they are really driven by administrative concerns, rather than problems related to average earnings policy concerns. For instance, some adjudicators are concerned that basing benefits on the coverage purchased either over or under represents the actual loss. However this is the same problem that occurs with any insurer selling coverage. The insurer must be careful not to let a purchaser over-insure, but if that does occur, the price to be paid for allowing that, in the absence of fraud, is borne by the insurer. In the case where there is under-insurance that is the choice of the purchaser and the Board need feel no responsibility for the fact that the benefits paid are not equivalent to the actual loss. On the other hand, for Section 2(1) workers, where coverage is mandatory, Section 33 must be applied in determining average earnings, and applied in the way that results in the figure that best represents the worker's actual loss of earnings.

5.6 Average earnings and occupational disease claims

Section 6 creates entitlement to benefits for workers who suffer from an occupational disease. In many cases the onset of such a disability is unrelated to a specific incident and may not occur until the worker has retired or is otherwise unemployed.

Section 6(2) says that the date of disablement for an occupational disease shall be treated as the occurrence of the injury. It is therefore possible for a worker to suffer a compensable disease, but at the time the injury occurs, not to be in receipt of any remuneration for work. Section 33(1) requires that average earnings shall be determined with reference to the average earnings at the time of injury. Situations occur where a worker who has a compensable physical impairment that has the potential to impair future earnings, is found not to be entitled to benefits because the Board, using its one year pre-injury earnings rule, concludes that the average earnings are nil at the time of injury.

The Average Earnings Working Group proposed that the solution to this problem would be to require that:

³³ op cit, note 12.

The average earnings of an unemployed or retired worker who becomes disabled from an industrial disease caused by exposure should be based on the earnings in the job or jobs in which he or she was last employed, or by using a class average or other method that may be appropriate in the circumstances of the case.

This proposed solution was considered in the legal opinion from Nathanson and he concluded that such a policy, if implemented under the existing legislation, would probably withstand judicial review if challenged.

The problem results, as with the problems discussed earlier regarding rate changes, in the Board's reliance on the one year pre-injury earnings method of determining average earnings. The fact is that Section 33 provides that another way of determining average earnings is to assess the earning capacity at the date of injury.³⁴ Earning capacity is not synonymous with pre-accident earnings. Earning capacity is also not extinguished by the fact that there is a history of retirement or unemployment, although in determining what that earning capacity

is the facts of retirement or unemployment will be relevant matters to be considered. It may therefore be that nothing is required to resolve the problem that the Board perceives in these cases other than to train adjudicators that the provisions of Section 33 permit average earnings to be based upon earning capacity in appropriate circumstances.

³⁴ see page 1 above.