

FISHING INDUSTRY AND WORKERS COMPENSATION

A BRIEFING PAPER

INTRODUCTION

This is one of several briefing papers that the Policy and Regulation Development Bureau is preparing on topics that may fall within the Royal Commission's terms of reference. ¹ This paper discusses the application of the *Workers Compensation Act* to the fishing industry. Major questions have arisen over the years as to who in the industry is entitled to compensation and for what, who pays assessments and who is responsible for prevention.

BACKGROUND

The compensation, assessment and prevention systems set up by the *Workers Compensation Act* generally cover "workers" and "employers". ² They are distinguished from "independent operators". The latter are, in essence, persons carrying on independent businesses who do not have employees. Independent operators are not covered unless they request personal optional protection (POP).

Owners, masters and crews of fishing vessels are generally remunerated by receiving a certain share of the catch. They have traditionally been considered independent operators. ³

History

The fishing industry as a whole has always been compulsorily covered under the *Act*. In practice, for most of the Board's history, the Board provided compensation and assessment coverage only

¹ The purpose of the papers is to give background information that will orientate the Commission or others to some major issues. The Board does not expect the Commission to make decisions on the basis of these documents. Rather, the Commission will make its own inquiries.

The papers do not pretend to cover all the issues that the Commission or others might raise. The general nature of the papers also means that they cannot include detailed discussion of all the issues. There may be relevant factors that are omitted with regard to some issues. The explanations of some matters may be less than would be desired if the issues were being considered for decision.

The papers refer to sources of additional information where known. There has been no attempt to exhaustively research all the issues. The papers do not include recommendations for resolving issues, or take a position with respect to them. They may discuss known alternatives, particularly when other jurisdictions have adopted them.

² Section 2

³ Often called co-adventurers.

for the few fishers who receive a regular wage, rather than a share of the catch, or, since 1959, ⁴ who elected to be covered by POP.

Prior to 1976, the policy was that fishers employed on boats owned or rented by packing companies were "workers" covered by the *Act*. Fishers who owned their own boats, or who went out fishing with others who owned their own boat for a share of the catch, were independent operators. They were not covered as "workers" unless, after 1959, they obtained POP. Most fishers were in this category.

Coverage of fishers was considered in the 1942 ⁵ and 1952 ⁶ Sloan and 1966 Tysoe Royal Commission Reports. ⁷ On each occasion, the United Fishermen and Allied Workers' Union proposed compulsory compensation coverage for all fishers, with assessments being levied on commercial fish buyers. The proposal was rejected because:

- An employer-employee relationship was an essential feature of compulsory coverage. The *Act* did not cover relationships of buying and selling.
- Optional coverage was available to independent fishers. ⁸
- Fish buyers had no control over the operations of independent fishers and could not control the risk of injury or disease.
- The right to compensation was in lieu of an action for damages against the employer. No such action would lie against a fish purchaser.

Effective June 26, 1975, what is now Section 4 of the *Act* was enacted. It authorized the Lieutenant Governor in Council and the Board to make regulations for the fishing industry that modified the ordinary provisions of the *Act*. This was in response to a number of serious accidents in the industry.

On November 20, 1975, the Lieutenant Governor in Council passed regulations under Section 4. ⁹ They were similar to the current *Fishing Industry Regulations* but with some significant differences. They

- Created the category "commercial fisherman" and defined it to include virtually all fishers who would before have been independent. The fisher only had to contribute to the catching or landing of fish in B.C. ports "in the normal course of his occupation". ¹⁰ There was no restriction on overseas sales. In addition, it appears that a fisher whose total sales were outside of Canada might be covered if the fisher received payments in B.C. from a person engaged in the province in transmitting payments to fishers. ¹¹

⁴ An amendment to the *Workers Compensation Act* allowed the Board to grant POP to independent operators.

⁵ Pages 170 to 171

⁶ Pages 201 to 207

⁷ Pages 74 to 84

⁸ Only at the time of Tysoe

⁹ Decision No. 163, 2 WCR 223; B.C. Regulation 759/75

¹⁰ Regulation 1. Clause (d) of definition

¹¹ Regulation 1. Clause (e) of definition

- Stated that all provisions of the *Act* relating to workers applied to commercial fishermen.¹² They were entitled to compensation for work injuries, including injuries during voyages to fish for personal or family consumption.¹³ However, compensation was limited to earnings from fishing on which assessments had been paid, together with earnings from other occupations. Earnings from overseas sales on which no assessments were paid were excluded.¹⁴
- Obligated commercial fish buyers to pay assessments on payments for fish purchased from commercial fishermen as if they were employers. The same obligation was imposed on persons in B.C. engaged in transmitting payments to fishers for fish sales outside the province.¹⁵
- Deemed owners, charterers, mortgagees, and commercial fish buyers with contracts giving them control over the fishing operations or catch of a vessel, to be the employer for many purposes. This included the obligation to comply with the Board's health and safety regulations under sections 70 and 71 of the *Act* and to pay additional assessments levied under sections 70 and 73 for violations.

On April 30, 1976, the Board amended these regulations to delete the provision obliging persons transmitting payments from foreign sales to pay assessments. The provision was stated to be "unfair, impracticable and inequitable".¹⁶

On December 22, 1976, the regulations were replaced by the current *Fishing Industry Regulations*.¹⁷ These provisions

- Amended the definition of "commercial fishermen" to exclude "a fisherman who rarely contributes to the catching or landing of fish for arrival in British Columbia ports".¹⁸ The Board interprets this as excluding fishers who sell less than 10% of their catch in B.C..¹⁹
- Removed the limit that compensation was only payable on fishing earnings on which assessments had been paid.²⁰
- Removed the general deeming of certain owners, charterers, mortgagees and commercial fish buyers to be the employer. The regulations still make some of those persons responsible for certain employer obligations. In particular, first commercial fish buyers remain liable for assessments.
- Removed all requirements to comply with health and safety regulations made under Section 71 and to pay additional assessments for violations. This occurred because the Federal Government asserted jurisdiction. Obligations to comply with the occupational

12 Regulation 3

13 Regulation 5

14 Regulation 4

15 Regulation 7

16 Decision No. 187, 3 WCR 295

17 Decision No. 223, 3 WCR 58; B.C. Regulation 674/76

18 Regulation 1. Clause (g) of definition.

19 Policy No. 40:20:10 of the *Assessment Policy Manual*

20 Regulation 3

first aid regulations under Section 70 and to pay additional assessments for violations were retained.

The Board added a clause on August 8, 1979, which required diving operations incidental to fishing to comply with the *Industrial Health and Safety Regulations* made under Section 71.²¹

The position remained largely unchanged until a 1990 court decision in Ontario.²² This decision was accepted by the Federal Government as giving the provinces jurisdiction over labour relations and health and safety on fishing vessels.

In December, 1993, the Board published draft health and safety regulations for the fishing industry. The introduction included the following:

Over the next year the Board....will undertake further consultation and consideration of the matters that remain outstanding. The need to amend the fishing industry regulations..., so as to provide for a mechanism to enforce the regulations through penalty assessments will be examined. The manner in which assessments are paid by industry will also be examined. The larger issue of the assignment of responsibility for compliance with certain requirements of the Industrial Health and Safety Regulations including requirements for safety committees will continue to be examined by the Regulation Advisory Committee's Working Group on Responsibilities.

The Governors of the Workers Compensation Board intend to consult the communities in the fishing industry on these matters and have targetted December of 1994 for their resolution.

The draft health and safety regulations were eventually enacted as the *Fishing Operations Regulations* under Section 71 of the *Act*, effective January 1, 1995. They apply to "owners", "masters" and "crewmembers" of fishing vessels, and therefore avoid the problem of the lack of employment relationships.

Recent reviews of system

In late 1994, a Working Group on Fishing Sector Responsibilities was set up, comprising representatives of the fishing industry. It issued an April 12, 1995, report, making recommendations on applying additional assessments and sections 2 to 8 of the *Industrial Health and Safety Regulations*.

On August 3, 1994, the Board's Senior Executive Committee set up a working group of Board staff from Prevention, Assessments and Compensation Services to examine the general issue of

²¹ Regulation 9.1; Decision No. 307, 5 WCR 32; B.C. Regulation 349/79

²² *504578 Ontario Ltd., et. al. v. Great Lakes Fishermen and Allied Workers Union*. The issue was whether fishermen working wholly within Ontario were subject to the Ontario labour relations legislation. The Supreme Court of Canada ([1990] 2 S.C.R.) denied leave to appeal from the Ontario Court of Appeal which on January 16, 1990, confirmed the decision of the Divisional Court. The Court of Appeal found "Parliament's authority under Section 91(12) is restricted to legislation for the protection and preservation of fisheries as a public resource. We agree...that it does not extend to the regulation of the business of commercial fishing".

responsibility to pay assessments. The group was scheduled to finish its work by November 15, 1994, but no final report was ever issued.

A draft policy, and amendment to the *Fishing Industry Regulations*, were prepared to implement the report of the Working Group. This was sent out for public comment in September 1995. On January 15, 1997, a revised draft policy was sent out for comment. It deals only with the application of sections 2 to 8.

OTHER JURISDICTIONS

The involvement of the Board in the fishing industry cannot be isolated from other major factors affecting the industry.

The current state of the industry was described as follows in the executive summary of a report of a Fish Processing Strategic Task Force set up by the B.C. Minister of Agriculture, Fisheries and Food in October, 1993:

The past several years, however, have been full of great uncertainty for the BC commercial fishing industry and its stakeholders. In just 20 years, global economic forces have significantly re-shaped the patterns of supply and the markets of this industry. In 1974, BC had twice the number of major processors than it has today. 20 years ago, the industry enjoyed a secure and stable supply of fish and reliable European, Japanese and domestic markets. But in 1994, just a few major processors remain in BC and those are concentrated in the major urban centres. The global supply of salmon meanwhile has risen by approximately 70 percent over the past decade, while basic salmon market prices have fallen accordingly. Changes in international trade law have resulted in significantly increased foreign competition to purchase and export BC's unprocessed fish. To make matters worse, the European frozen salmon market has collapsed due to competition from farmed salmon suppliers in Norway and elsewhere. And finally, there is considerable cost-competitive pressure in the markets BC still attempts to serve.

The obtaining of fish by aquaculture rather than through fishing vessels has become a major B.C. industry.

The basic ocean fish stocks, on which the industry depends, have been declining. The federal Department of Fisheries and Oceans initiated a Pacific Salmon Revitalization Strategy in 1996. This includes incentive programs to reduce the number of fishing licenses and vessels. Under the previous system, commercial fishers could fish anywhere along the B.C. coast. The Department found that this led to large concentrations of boats, which caused excessive pressures on the resources and the short duration of fisheries openings in the industry. This undermined the

economic viability of the fishing fleet. The new Strategy hopes to avoid these problems by restricting fishers to certain areas and limiting them to using one type of gear for each licence.²³

There is disagreement between the federal and provincial governments as to the best means of dealing with the problems in the fishing industry.²⁴

It may be desirable for the Board and the different levels of government involved to coordinate their activities in relation to fishing.²⁵

Other B.C. Labour Legislation

The position of fishers under the B.C. *Employment Standards Act* is discussed in "*Rights and Responsibilities in the Workplace*", a February 3, 1994, report to the Minister of Skills, Training and Labour by Mark Thompson . The report states at page 68:

The Commission recommends that the *Employment Standards Act*, cover fishers who work on vessels with remuneration by the value of the share of a catch, relying on the definition of "employee" in labour relations legislation covering the fishing industry. Coverage under the *Employment Standards Act* should not put fish processors into the status of employers under that Act.

In discussing this recommendation, the report questions whether 'either the existing definition of "employee" in the Act or the expanded definition recommended in this report would cover fishers'. It notes that Mr. Stephen Kelleher had been appointed by the provincial government to recommend a legal framework to regulate unionization and collective bargaining for fishers. The report suggests that Mr. Kelleher will recommend a definition of employee and that "in the interests of consistency across labour legislation, the same definition should be incorporated into the *Employment Standards Act*."

Mr. Kelleher's report regarding the *Labour Relations Code* was issued on March 11, 1994. It recommends at page 34 and 35:

- (a) The definition of "employer" should be broad enough to include Processors purchasing fish as well as vessel owners. The definition of "employee" should include commercial fishers....The Board's jurisdiction should include the power to determine that a fisher may be an employee for some purposes and an employer for others.....
- (e) The requirement in the Labour Relations Code that collective agreements contain a provision stipulating that employees may only be disciplined or dismissed for just and reasonable cause should only apply to the employment of crew members by vessel owners.

²³ The Pacific Salmon Revitalization Strategy and Highlights of Federal Initiatives for the Pacific Salmon Fishery, Department of Fisheries and Oceans Backgrounders, January 1997

²⁴ See, for example, the front page of the Vancouver Sun, February 4, 1997

²⁵ Report of Coverage for Commercial Fishers, Newfoundland and Labrador Fishing Industry, July 1994, Page 44

At page 23, the report explains recommendation (e) on the basis that the processor “maintains no control over the disciplining or dismissal of the ‘employee’”.

The Kelleher Report was implemented by the *Fishing Collective Bargaining Act* in 1994. The report on the *Employment Standards Act* was implemented by legislation that took effect on November 1, 1995.

Other Provinces’ Workers Compensation Acts

Fishers are excluded from coverage under the Prince Edward Island *Workers Compensation Act*, and under the New Brunswick *Act* in undertakings where less than 25 persons are at the same time usually employed. The Nova Scotia *Act* applies to the industry of fishing. Its definition of "employer" includes:

...any person operating a boat, vessel, ship, dredge, tug, scow or other craft usually employed or intended to be employed in an industry to which Part 1 applies and, with respect to the industry of fishing, the owner or operator of a boat or vessel rented, chartered or otherwise provided to a worker employed in the fishing industry and used in or in connection with an industry carried on by the employer to which Part 1 applies;

The definition of "worker" includes:

...in respect of the industry of fishing, a person who becomes a member of the crew of a vessel under any profit-sharing arrangement;

Newfoundland has a system similar to B.C.. Regulations give commercial fishers a special right to compensation and make the fish buyer responsible for assessments.²⁶ However, compensation is only payable for “earnings in relation to which assessments have been paid or are required to be paid to the time of injury”.²⁷ A July 1994 report prepared for the Workers’ Compensation Commission recommended keeping the present system for the time being. However, it suggested the situation should be reviewed from time to time. The industry was moving towards using larger boats, with a more professional and full time, regular workforce. A payroll based assessment system might become feasible for part or all of the industry in coming years.²⁸

Other Provinces’ Occupational Safety and Health Legislation

Most other Canadian jurisdictions enforce occupational safety and health legislation through orders, stop work orders and prosecutions. As they do not have power to levy additional assessments for violations, they have no need to identify an "employer" for that purpose.

²⁶ Newfoundland Regulation 330/83

²⁷ Section 9 of the Newfoundland Regulation

²⁸ Report of Coverage for Commercial Fishers, Newfoundland and Labrador Fishing Industry

None of the Maritime provinces specifically include or exclude fishing in their *Occupational Health and Safety Acts*. Nor have they enacted separate safety and health regulations for fishing. It appears that fishing is covered in the same way as any other industry.²⁹ Some provinces define "worker" or "employee" broadly to include, for example, "a person in a workplace for any purpose in connection therewith" (Prince Edward Island, New Brunswick) or "dependent contractors" (Nova Scotia). All the maritime provinces place specific obligations on "workers" or "employees" and, except for New Brunswick, "self employed persons" to comply with the legislation and regulations.

DISCUSSION

Employment Relationships in the Fishing Industry

"Worker" is defined in Section 1 of the *Workers Compensation Act* as **including**:

- a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise...

"Employer" is defined in Section 1 as **including**:

every person having in his service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;

None of the Board's regulations contain a special definition of "employer" or "worker" with regard to fishing. However, the *Fishing Industry Regulations* allocate some of the rights and responsibilities of "employers" and workers" under the *Act* to persons in the industry.

Part 2 of the *Assessment Policy Manual* sets out guidelines for determining who are "workers" and "employers" under the definition in Section 1 of the *Act*. Policy No. 20:10:30 refers to *Workers' Compensation Reporter* decisions³⁰ containing guidelines that modify the common law rules for distinguishing employees from independent contractors. Policy No. 20:30:20 sets out the specific criteria used by the Assessment Department for determining who is required to register as an employer with the Board. These include criteria for who is a worker and who an independent firm. In addition, there are criteria for a "labour contractor" category. This is an intermediate category who are considered workers unless they choose to register as an employer/independent operator with the Board.

²⁹ Section 9.9 of the Prince Edward Island regulations sets out specific first aid requirements for an "inshore fishing boat".

³⁰ See Decision No.32, 1 WCR 127, Decision No. 138, 2 WCR 143, Decision No. 255, 4 WCR 155, and Appeal Division Decision No. 95-0565, 11 WCR 255

There appear to be three major situations in which persons may be working in the fishing industry:

1. *Wage earning employees may be used on boats owned or chartered by commercial fish buyers that are used to collect and transport fish from the persons who catch the fish.*

Wage earning employees would clearly be workers under the *Act* even if there were no *Fishing Industry Regulations*.

2. *Fishers may be working for a share of the catch on boats owned or rented by commercial fish buyers.*

Prior to the enactment of the first *Fishing Industry Regulations* in 1975, Board policy was to treat these fishers as "workers" and the commercial fish buyer as their "employer" for all purposes. Under the regulations, these fishers continue to be treated as workers for all purposes but the commercial buyers are only treated as employers for the purposes of paying assessments and certain other defined reasons.

3. *Fishers may be working for a share of the catch on boats owned or rented by someone other than the fish buyer.*

These persons were not automatically covered prior to the *Fishing Industry Regulations*. It has been argued that, even apart from these regulations, the commercial fish buyers should be considered the employer of these persons because of economic control they exercise over the fishing boats and their crews. This has not been accepted by the Board.

It might be difficult for the Board to find that commercial fish buyers fall within the normal meaning of the term "employer". Whatever economic power fish buyers have over fishers, it may be questioned whether they control the detailed operation of vessels. The relationship is one of buying and selling. If the Board found an employment relationship, there could be significant ramifications in other areas where buying and selling relationships exist. Mr. Justice Sloan pointed out in his 1952 report that, on the same principle, a wholesaler could become the employer of a farmer from whom he or she buys potatoes.³¹

The courts have held there is no employment relationship between owners of vessels and fishers receiving a share of the catch.³² However, the Board is not bound by court decisions. It might be able to determine that the owner or master is the "employer" for the purpose of the *Workers Compensation Act*. The Board could recognize the control exercised by the owner or master in owning or operating the major equipment used, selecting the crew and in conducting the vessel during the voyage. Against this would be the fishers' receiving a share of the catch rather than a fixed wage and being able to suffer a loss from the voyage.

³¹ Page 205

³² *Re Lunenburg Sea Products, Re Zwicker*, [1947] 3 D.L.R. 195; *Mark Fishing Co. Ltd. et al v. United Fishermen and Allied Workers' Union* (1972) 24 D.L.R. (3d) 585

Furthermore, the Board's administrative costs would increase if it had to collect assessments from every boat owner or master rather than a few commercial buyers.

Apart from the *Fishing Industry Regulations*, anyone found to be an "employer" under the definition in Section 1 is the "employer" for all purposes under the *Act*. That person would have to pay assessments, report injuries suffered by their workers and comply with regulations governing safety and health in the workplace. A person other than an "employer" does not have these responsibilities except to the extent the *Fishing Industry Regulations* impose them.

Assessments

The assessments that fund the workers compensation system are normally paid by employers. Because of the lack of employment relationships in the fishing industry, the coverage of fishers inevitably requires a special assessment system. Someone must be deemed the employer or required to pay assessments. The current system requires the commercial fish buyer to pay assessments.

Assessments are normally paid on payroll. Payroll is the amount the employer pays for the labour he or she employs. The proceeds of fish sales include a labour component but also reflect the capital invested in the vessel and equipment and other expenses of vessel operation. The Board only requires payment of assessments on the portion of fish sales representing labour and has criteria to determine this.³³

Because commercial fish buyers may also have employees in the normal sense, the Board has created two subclasses to which a buyer may belong. Payroll for the regular employees is assigned to subclass 0906 - fish processing. The fish sales on which assessments are paid for fishers under the *Fishing Industry Regulations* are assigned to subclass 0911 - fish processing.³⁴

A number of concerns have been expressed regarding the payment of assessments by commercial fish buyers:³⁵

- As fish buyers do not normally operate the vessels, they have no control over claim costs and the amount of their assessments. They cannot, for instance, take measures to improve safety or to ensure that claims made by crewmembers are legitimate. The experience rating system (ERA) is not applied to subclass 0911
- Sales of fish are often made direct to foreign buyers outside the Board's jurisdiction. No assessments are paid on those sales. However, if an injured fisher files a claim, the fisher is usually entitled to compensation based on all fish sales, inside or outside the province.

³⁶ Only a fisher who rarely contributes to the catching or landing of fish in B.C. is

³³ Policy No. 40:20:10 *Assessment Policy Manual*

³⁴ Policy No. 40:20:10 *Assessment Policy Manual*

³⁵ See pages 27 to 32 of the Report of Coverage for Commercial Fishers, Newfoundland and Labrador Fishing Industry, July 1994, for a discussion of the advantages and disadvantages of assessments on fish sales as opposed to assessments on payroll

³⁶ Regulation 2 of the *Fishing Industry Regulations* states the provisions of the *Act* relating to workers apply to commercial fishermen. #66.02 of the *Rehabilitation Services and Claims Manual* states that earnings in

excluded from coverage.³⁷ As a result, fish processors or purchasers within B.C. are in effect subsidizing competitors outside the province. While out of province sales have always occurred, there are concerns regarding an increase in recent years that is putting additional financial pressure on the B.C. industry.³⁸

The following table sets out information regarding the assessment rate,³⁹ assessment and investment income and surplus (unfunded liability)⁴⁰ for subclass 911 in the years 1991 to 1995.

	1992	1993	1994	1995
Assessment rate	2.08	2.50	3.00	3.60
Surplus (Unfunded) on January 1	6,265,000	2,239,000	(1,677,000)	(4,464,000)
Assessment Income	2,026,000	6,642,000	7,258,000	9,089,000
Claim costs-Current claims	6,424,000	6,376,000	7,753,000	7,378,000
Claims costs-Past claims	2,768,000	7,446,000	5,168,000	9,732,000
Other expenses⁴¹	1,436,000	1,786,000	1,676,000	2,405,000
Investment income	4,576,000	5,050,000	4,552,000	5,743,000
Surplus (Unfunded) at year end	2,239,000	(1,677,000)	(4,464,000)	(9,147,000)

This table shows a trend of claim costs accelerating faster than increases in assessment and investment income, resulting in a rising unfunded liability. This is consistent with an increase in out of province fish sales but may also be due to other factors, for example, declining fish sales due to a general downturn in the industry. Some of the increased costs are due to temporary factors, notably government actions since 1993 to retroactively reverse the previous rule that terminated the pensions of widows and widowers on remarriage.⁴²

Alternative systems

Three alternative systems have been proposed to deal with concerns regarding the current system.

1. *Require fishers to sell substantially all (at least 90%) of their catch to B.C. buyers before they have compulsory coverage.*

This alternative will mean that fishers selling a substantial amount of fish in B.C. but less than 90% have no coverage unless they take out POP. It will substantially change the decision made in

employment outside the Board's jurisdiction are included for the purpose of determining the amount of compensation.

³⁷ Clause (g) of the definition of "commercial fisherman" in regulation 1 of the *Fishing Industry Regulations*. This provision is interpreted in Policy No. 40:20:10 of the *Assessment Policy Manual* as excluding those who sell less than 10% of their catch in B.C.

³⁸ Some Compensation Perspectives on the Fishing Industry in British Columbia, Margaret MacLennan, June 1994, page 5; August 17, 1994, letter from the Department of Fisheries and Oceans indicating that between January and August, 1994, about 15% of the groundfish taken by trawl vessels was sold in the United States.

³⁹ WCB Classification and Rate Lists

⁴⁰ Schedule 1(b) WCB Annual Report

⁴¹ For example, administration costs

⁴² See briefing paper on "Compensation and the Death of a Worker"

1975 to cover commercial fishers. It may be seen as derogating from the principal of universal coverage by the *Workers Compensation Act* .

This alternative may be impractical as involving too many difficulties for commercial fish buyers or Board officers to identify which fishers are covered. The 90% B.C. sales requirement will have to be decided fisher by fisher. It cannot be done vessel by vessel, as individuals may move from one boat to another during the season. Fishers may make sales to different B.C. and overseas buyers.

2. *Limit the earnings on which compensation is based to the proceeds of fish sales to B.C. buyers.*

This alternative will avoid the problems created by option 1. The difficulties arising from this option will be similar to those that now arise in determining earnings of many workers who do not receive a regular wage from one employer, for example, principals of small limited companies. However, fishers do receive from B.C. buyers fish slips recording each sale and the equivalent of T4s at the end of the year that are used for income tax purposes. If fishers themselves do not keep good records, information may be obtainable from the persons to whom they have sold fish.

3. *Make the seller rather than the buyer primarily responsible.*

The Board might take the approach followed under the Nova Scotia *Workers Compensation Act*; the operator of the vessel would be deemed the employer and required to pay assessments. This would be more consistent with the Board's general approach by which the employer operating a business is responsible for assessments. The reason for not doing this in 1975 was the difficulty of enforcing the obligation to pay against many small boat operators who will likely be constantly changing and moving from place to place.

The July 1994 Report of Coverage for Commercial Fishers, Newfoundland and Labrador Fishing Industry, points out that a change to a payroll system of assessment would significantly increase administration costs. It would add to the number of assessment paying accounts to be managed and require more staff.⁴³

A variant of this alternative is to use commercial fish buyers as a means of collecting the assessments owed by the boat owners or operators. This would be analogous to using retail stores to collect provincial sales tax owed by their customers. It would remove many of the administrative problems of collecting direct from the owner or operator. However, it may not solve the underlying problem since the assessments due on out of province sales would have to be collected directly from the owner or operator. The difficulties of collecting from small operations of this type would be compounded for out of province sales. The Board would not, for example, be able to audit the overseas purchaser to verify reported amounts.

⁴³ Pages 31 to 32.

Compensation

The following table sets out statistics concerning claim numbers ⁴⁴ and costs ⁴⁵ for subclass 0911 since 1992.

	1992		1993		1994		1995	
	No.	Costs	No.	Costs	No.	Costs	No.	Costs
Health care	322	1,440,000	274	1,453,000	269	1,246,000	340	1,633,000
Short term disability	344	1,929,000	280	1,950,000	263	1,675,000	306	2,078,000
Long term disability	46	2,182,000	44	2,068,000	45	1,736,000	52	1,914,000
Survivors benefits	3	569,000	7	634,000	8	2,793,000	10	1,314,000
Rehabilitation		304,000		271,000		303,000		439,000
Total	715	6,424,000	605	6,376,000	585	7,753,000	708	7,378,000

Two main issues have arisen in connection with fishing. These relate to scope of activities covered and the earnings used to determine benefits.

Scope of coverage

Regulation 2(2) of the *Fishing Industry Regulations* states that a “commercial fisherman’s employment is his occupation as a commercial fisherman”. The question commonly arises whether coverage extends to onshore activities.

Assessment policy ⁴⁶ deals with repairing or constructing fishing vessels or equipment. Another issue is whether coverage extends to travelling on land, for example, to transport the vessel from one port to another. The need for this may arise because the different openings for fishing permitted by the Federal Government may be at scattered times and locations. The Board has no specific policy on this but the issue has arisen in particular claims.

The July 1994 Report of Coverage for Commercial Fishers, Newfoundland and Labrador Fishing Industry, discusses the issues that have been raised with respect to compensation coverage. It concluded that no special rules should be enacted for fishing. Individual claims should be adjudicated using normal compensation principles. ⁴⁷

⁴⁴ Number of claims first paid in each year taken from Table A1 of WCB Annual Report.

⁴⁵ Costs incurred in each year for that years claims taken from Schedule 1(a) of WCB Annual Reports. Does not include costs incurred in a year for past years claims.

⁴⁶ Policy No. 40:20:10 of the *Assessment Policy Manual*

⁴⁷ Pages 17 to 23.

Determining Earnings

Fishers work for short seasons during the year in which they may earn a large amount. They may be unemployed for much of the year between fishing seasons. This means that the actual earnings loss incurred by an injured fisher will depend not only on the length of the disability but also on whether the injury occurs toward the beginning or end of the season. However, the length of the disability will often be unknown at the time when compensation is commenced.

These difficulties are compounded by the fact that fishers commonly do not receive a regular wage. They are paid a share of the catch, of which the amount is unknown until the season end.

The Board's policy treats fishers as casual workers for the purpose of determining their earnings. Compensation is normally based on the prior 1 year's earnings.⁴⁸ However, where the injury occurs in a season that would have lasted more than 3 months, the fisher may be treated as a seasonal worker. Seasonal workers are normally compensated on the basis of their rate of pay at the date of injury for the first 8 weeks or until the temporary disability ceases.⁴⁹ Significant difficulties have been experienced in applying these policies to fishers.⁵⁰

As noted above, one of the proposed methods of dealing with the issue of overseas fish sales is to limit compensation entitlement to B.C. sales. Any difficulties in doing this would be additional to those already experienced in determining fishers' earnings.

Prevention

The *Fishing Operations Regulations* make "owners", "masters" and "crewmembers" responsible for health and safety. These are accurate descriptions of persons in the industry that are simple to apply. The difficulty comes in attempting to apply other provisions of the *Act* or other regulations made under the *Act*. These provisions are commonly limited to "workers" and "employers" or "employment" relationships.

The effect of the *Fishing Industry Regulations* is to designate as "workers" and "employers" persons otherwise outside the definitions in Section 1 of the *Act*.

- Regulation 2 states that "all provisions of Part 1 relating to workers shall apply to commercial fishermen". This has been interpreted as meaning that all health and safety regulations applying to "workers" apply to commercial fishermen. However, there is no similar provision relating to "employers". Most of the responsibilities created by the regulations fall on "employers".
- In connection with first aid requirements under Section 70 of the *Act*, Regulation 8 allows the Board to select an appropriate "employer" from a list that includes the owner, master, a commercial fisherman or charterer and issue orders against that person. There is no provision for regulations under Section 71 in relation to matters other than first aid.

⁴⁸ #66.13 of the *Rehabilitation Services and Claims Manual*

⁴⁹ #66.14 of the *Rehabilitation Services and Claims Manual*; The 8 week rate review is a review of the worker's longer term earnings, usually over one year before the injury.

⁵⁰ See Appeal Division Decisions at 7 WCR 61, June 13, 1991; 11 WCR 495, June 29, 1995

- Regulation 9 allows the Board to levy a special rate of assessment on a person against whom a first aid order has made under Regulation 8 and to collect the amount from a commercial fish buyer to the extent the buyer owes money to the person penalized. There is no provision for applying additional assessments under 73(1) of the Act for violations of health and safety regulations other than first aid.

The difficulties in applying the health and safety regulations and additional assessments to the fishing industry could be solved by appropriate amendments to the *Fishing Industry Regulation*.

The government measures now being implemented or considered to reorganize the fishing industry may indirectly promote prevention by allowing a more planned approach to fishing operations.⁵¹

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⁵¹ See page 45 of the Report of Coverage for Commercial Fishers, Newfoundland and Labrador Fishing Industry, July 1994,

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