

PERMANENT DISABILITY PENSIONS

A BRIEFING PAPER

ISSUE

This paper concerns sections 22 and 23 of the *Workers Compensation Act*. They provide compensation for permanent disability caused by occupational injury or disease.

BACKGROUND

Workers will in most cases recover fully from occupational injuries or diseases and return to work at no loss of pay. The Board pays temporary disability benefits ¹ during the disability. In some cases, the worker does not fully recover but is left with a permanent disability. The Board will then consider making a permanent disability award. Examples of permanent disabilities are amputations, and loss of vision, hearing or range of motion of the spine or limbs.

In 1995, 5635 permanent disability awards were granted compared with 73,762 claims where temporary disability payments were first made. However, the cost of the former was proportionately much greater: \$218,512,000 for permanent disability compared with \$329,221,432 for temporary disability. ²

Permanent disabilities may be partial or total. The Board provides two main types of partial award.

- *SECTION 23(1)* ³ The Board assesses a percentage of disability. It uses as a guideline its own Permanent Disability Evaluation Schedule which lists disabilities and assigns a percentage to each. ⁴ For unlisted parts of the body, the percentage is judged on the facts of each case, but schedules of other authorities may be used. ⁵ The pension amount is obtained by applying the percentage to 75% of the worker's average earnings up to the maximum wage

¹ Commonly called short term disability, wage or time loss benefits.

² 1995 WCB Annual Report, page 5.

³ Commonly known as physical impairment or loss of function awards.

⁴ #39.10 to #39.44 of the *Rehabilitation Services and Claims Manual*

⁵ #39.50 of the *Rehabilitation Services and Claims Manual*

rate.⁶ The pension is payable for life. The award does not attempt to measure the individual worker's loss but is intended to represent the average loss suffered for that type of disability.⁷

- *SECTION 23(3)*.⁸ The Board projects the type of work the disabled worker is able to do. The pension amount is 75% of the difference between the earnings in that work and the worker's pre-injury earnings up to the maximum. The award is payable for life but may be reduced at age 65 depending on the worker's age at the time of injury. The award is intended to reflect the individual worker's loss over the long term.⁹

A section 23(3) award is paid whenever the assessment produces a higher figure than the section 23(1) method. Otherwise, a section 23(1) award is made.

Where the worker is 100% disabled under the Section 23(1) method, a permanent total disability award is made under section 22. The pension amount is calculated in the same way but there is a minimum pension.¹⁰ Examples of permanent total disabilities are quadriplegia, paraplegia and total blindness.¹¹

Sections 22 and 23 grant pensions in the form of "periodic payments". However, for each pension the Board creates a capital reserve sufficient to fund the award over the worker's life. Section 35 allows the Board to commute a pension to a lump sum and pay this to the worker in place of the pension.¹²

Awards for disfigurement may be granted under section 23(5), either alone or in conjunction with a section 23(1) or (3) award.¹³

Decisions on permanent disability entitlement are made by Board officers in the Long Term Disability Department of the Compensation Services Division. Rights of appeal lie to the Workers Compensation Review Board, the Appeal Division and the Medical Review Panel.

The whole of sections 22 and 23 are set out in Appendix A.

⁶ Determined for each year under a formula set out in section 33 of the *Act*. The maximum is \$55,800 in 1997.

⁷ 1952 Sloan Royal Commission Report, Page 152, 155-156; Decision No. 8, (1973) 1 WCR 27, 30 to 33

⁸ Also commonly known as projected loss of earnings or dual system awards.

⁹ #40.00 to #40.31 of the *Rehabilitation Services and Claims Manual*

¹⁰ The amount is adjusted every 6 months according to changes in the consumer price index but, as of January 1, 1997, was \$1,200.91 per month

¹¹ #37.00 of the *Rehabilitation Services and Claims Manual*

¹² See #45.00 to #45.50 of the *Rehabilitation Services and Claims Manual*

¹³ #43.00 to #43.30 of the *Rehabilitation Services and Claims Manual*

History

For most of the time since 1916, the Board has only granted what are now section 23(1) awards, even though the *Act* has always authorized the other type. The 1942 and 1952 Sloan and 1966 Tysoe Royal Commission reports endorsed the Board's system but raised concerns about its application.¹⁴ Some of these concerns are still issues and are discussed in this paper.

In 1973, the Board began granting what are now section 23(3) awards for spinal disabilities. The Board felt that the percentages assessed under section 23(1) were often significantly less than the real loss of earning capacity. No change was then made for non-spinal disabilities as there was no clear indication the percentages under section 23(1) were inadequate.¹⁵ However, in 1977, the Board decided to apply section 23(3) to non-spinal disabilities to cover exceptional cases where the section 23(1) award did not reflect the actual loss.¹⁶ The Board consolidated the policy on section 23(3) awards and made significant changes in 1985.¹⁷

Recent reviews of system

The Appeal Division of the Board has made several decisions suggesting that aspects of the current system are unlawful or require review. These cover, for example, the blanket denial of section 23(3) awards to workers over 65¹⁸ and the automatic cancellation of pensions on imprisonment of workers.¹⁹

The Administrative Inventory done in October 1991²⁰ stated that, while only 10% of permanent disability cases involved section 23(3) awards, the latter took about 45% of total pension reserves. The average reserve for section 23(3) awards was 7 times greater than for section 23(1) awards. The Inventory noted the general view that, typically in workers compensation cases, major disabilities are under compensated and minor disabilities over compensated. It concluded, however, that comment on the system's equity was not possible without a study

"to determine whether approximate horizontal equity is being maintained (i.e. whether similar disabilities are being compensated similarly), and whether vertical

¹⁴ Concern was expressed in the 1942 Sloan Report that the *Act* only authorized an award based on the worker's individual loss of earnings. The report recommended an amendment authorizing what are now section 23(1) awards. This was done but the 1952 Sloan Report questioned the wording of the new provision. The result was a further amendment in 1954 that brought the *Act* to essentially its current form.

¹⁵ Decision No. 8, 1 WCR. 27

¹⁶ Decision No. 297, 5 WCR. 11

¹⁷ Decision No. 394, 6 WCR. 32

¹⁸ Decision No. 94-0659, May 27, 1994, 10 WCR. 665; See also unpublished decisions 94-0660, 94-1199, 95-1210

¹⁹ Decision No. 93-1059, 93-1060, July 23, 1993, 10 WCR. 7; Decision No. 94-0324, March 10, 1994, 10 WCR. 621

²⁰ Page 156

equity goals are being met (i.e. are different levels of disabilities being compensated appropriately). This would include estimates of the proportion of lifetime earnings losses that are being replaced for a wide variety of injuries and illnesses."

The follow up Inventory in July, 1995, ²¹ noted that pension claims were growing faster than any other type. Many reasons were suggested for this, for example, inadequacy of section 23(1) awards was promoting claims for section 23(3) awards, but none could be proved. It stated:

"The contributions of secular trends, demographic forces, policy changes, and system performance variables need to be sorted out to establish the causes of the enormous level of growth in LOE pensions. It is difficult to attack the problem in a sensible way without a more adequate understanding of the underlying causes..."

Studies along these lines have been done in the United States ²² and Ontario. ²³ In November, 1994, the Governors of the Board approved the idea of a study and authorized a process to define its scope and how it should be done. Little further action has been taken.

DISCUSSION

The Board's present system raises several specific issues that are discussed later. It is first desirable to consider principles affecting the system as a whole.

General principles

The following basic questions may be asked. ²⁴

What consequences of permanent disabilities are compensable?

The consequences of a permanent disability may be divided into three types:

²¹ Page 255

²² For example, Berkowitz and Burton, "Permanent Disability Benefits in Worker's Compensation", 1987; California Workers' Compensation Institute, Economic Consequences of Job Injury, 1984; Richard E. Ginnold, "A Follow-up Study of Permanent Disability under Wisconsin Worker's Compensation", 1976; studies cited at page 113-115 of William Johnson, "Perspectives on Wage Loss Benefits for Workers' Compensation Pensioners in Ontario", included in Paul Weiler, "Permanent Partial Disability: Alternative Models for Compensation", 1986.

²³ William Johnson, "Perspectives on Wage Loss Benefits for Workers' Compensation Pensioners in Ontario, referred to in the immediately preceding footnote; William G. Johnson, Richard J. Butler and Marjorie Baldwin; "First Spells of Work Absences Among Ontario Workers", published in "Research in Canadian Workers' Compensation", Terry Thomason and Richard P. Chaykowski, Editors, 1995.

²⁴ These questions are derived from Berkowitz and John F. Burton Junior, Permanent Disability in Workers' Compensation, 1987

- monetary loss caused by a loss of ability to work,
- monetary loss unrelated to the ability to earn, for example, medical or rehabilitation expenses or increased expenses around the home or in recreation, and
- non-monetary effects such as pain and suffering and loss of enjoyment and expectation of life.

The Board covers monetary losses from loss of ability to work through permanent disability awards under sections 22 and 23.

Compensation is paid for increased expenses caused by a permanent disability but not through the pension system. The Board pays the bills direct, reimburses the worker or makes special payments such as clothing and independence and home maintenance allowances.²⁵

The Board does not pay compensation for non-monetary losses.

What is adequate compensation for the covered losses?

Ideally, full compensation for monetary loss from reduced ability to work would be calculated as follows:

Total earnings the worker would have received if the injury had not occurred

LESS

Total earnings the worker actually received or was capable of receiving.

In practice, workers' compensation systems, including B.C., adopt something different from this ideal. For example,

- awards are normally based on pre-injury earnings rather than what the worker would have earned;
- 75% of earnings is used, or another percentage less than 100%, and there is typically a maximum;
- fringe benefits are commonly excluded from earnings;
- awards may be based on the level of disability shown by a schedule rather than an evaluation of individual loss;
- if individual loss is assessed, it will require a difficult assessment of what the worker is capable of earning; and
- in other jurisdictions, regard may be had to benefits of other agencies, for example, Canada Pension Plan benefits.

The reasons for these limits include:

²⁵ See Chapters 10 and 11 of the *Rehabilitation Services and Claims Manual*

- the need for incentives to return to work;
- the historic compromise between workers and employers that lead to the workers compensation system;
- the need to maintain the privacy and integrity of the worker;
- the effect of the income tax system;
- the need to treat workers consistently; and
- the administrative practicalities of adjudicating individual cases.

There is, therefore, no simple and absolute standard for evaluating compensation adequacy. Rather, a number of competing objectives must be weighed and judgment exercised.

Is the distribution of benefits among different workers equitable?

Equity may be vertical or horizontal. Horizontal equity exists where workers in similar circumstances are treated similarly; vertical equity where workers in different circumstances are treated proportionately.

The Section 23(1) method of assessment, particularly the use of the schedule,²⁶ should result in workers with the same physical disabilities and the same pre-injury earnings receiving the same amounts. This method may produce horizontal and vertical equity if only these factors are considered. However, as many studies point out,²⁷ the apparent equity disappears if additional factors are considered, notably the worker's actual loss. Because the award is intended to cover the average loss of the average worker, some workers will inevitably receive more than their actual loss, and others less.

Because Section 23(3) awards cover individual losses, and therefore consider all the circumstances of each worker, questions of vertical and horizontal equity do not seem so relevant. Equity concerns are more a matter of the policies and practices followed in the assessment, and the need for consistency.

Section 23(3) awards are intended to remedy the situation where the section 23(1) award is less than the worker's actual loss. Where the section 23(1) award is greater than the actual loss, the award may be perceived as compensating for the non-

²⁶ One study examined the degree of equity resulting in practice from the Board's Schedule by comparing the amounts of awards over a period of time. The aim was to test the hypothesis that, if the Schedule was working as expected, awards would show a recognizable pattern of tending to be grouped around the scheduled amounts for the different disabilities. See Terence J. Bogyo, "Long term disability benefits: horizontal and vertical equity in workers' compensation pensions in B.C., 1994.

²⁷ See, for example Decision No. 8, 1973 1 WCR 27, 30 to 32, "Reshaping Workers' Compensation for Ontario", Paul Weiler, pages 52-55, 1980; Manitoba "Report of the Workers Compensation Review Committee", pages 156-157, May, 1987; Alberta "Report of the Task Force on the Workers' Compensation Board", pages 36-37, November 7, 1988

monetary effects of the permanent disability. There are, however, difficulties in rationalizing section 23(1) awards in this way:

- workers receiving section 23(3) awards will receive no such compensation for non-monetary effects; and
- workers with the same physical disability will receive different amounts because of different earnings, even though earnings levels appear to have no relevance to non-monetary effects.

As Paul Weiler pointed out in his 1980 report on the Ontario System: ²⁸

"In a sense, the nub of our problem is that we have been trying to do two things with the one instrument. We want to make up the earnings which have been lost from work and at the same time to provide some redress for the serious impact of a permanent disability on an injured worker's non-working life. The result is that the permanent partial disability award performs neither of these tasks very well. In principle, the solution appears simple. We should have two distinct benefits in this situation, each tailored especially for its own purpose."

Since about 1980, most other provinces have changed their pension systems along the lines suggested in this report. These systems now provide two separate types of award: a lump sum specifically for the non-monetary effects and a pension if there is an actual loss. ²⁹

Is the system of delivering benefits efficient?

Efficiency cannot be considered apart from the questions considered above. An extremely efficient way of adjudicating pensions will have little value if it produces inadequate or inequitable payments. On the other hand, the need for efficiency may affect legislative/policy decisions on benefit adequacy and equity.

The 1995 Administrative Inventory points out how delayed pension assessments can create demand for interim payments and inhibit return to work. ³⁰

Specific Issues

A discussion follows of some major issues that have arisen concerning the existing permanent disability system.

²⁸ "Reshaping Workers' Compensation for Ontario", page 55, 1980; See also Manitoba "Report of the Workers Compensation Review Committee", page 156, May, 1987

²⁹ In 1983, the Board set up a task force of its staff to consider whether such a system should be introduced in B.C. The task force concluded that it should. A discussion paper was prepared and sent out for public comment in 1987. As the general response from worker and employer groups was negative, no further action was taken.

³⁰ Page 255

Defining disability

Sections 22 and 23 of the *Act* provide pensions for "permanent total disability" or "permanent partial disability". These phrases parallel "temporary total disability" and "temporary partial disability" in sections 29 and 30. In all these sections, the question arises what is meant by "disability", "permanent" or "temporary", and "total" or "partial". Except for "disability", the policy defines these terms as relating solely to the worker's physical state.³¹

"Disability" is not defined in the *Act*, and not clearly defined in policy. The *Act* and the policy do, however, use other terms that add to the uncertainty. Section 23(1) requires an estimate of the "impairment of earning capacity".³² The policy indicates that section 23(1) involves assessment of the degree of physical impairment or loss of function.³³

A permanent disability requires as a minimum an ongoing physical or psychological restriction or symptom. The question arises whether more is required, and if so, what. The policy also requires actual earnings loss for temporary disability.³⁴ Such a loss is not required for a permanent disability award under section 23(1). The policy recognizes that an award may be made even though the symptoms are subjective but that an award may be refused if the impairment is too minor to affect earning capacity.³⁵

The above policies may be criticized for inconsistency. For example, if "permanent" and "partial" refer only to the worker's physical condition, then logically the same should also be true of "disability". On the other hand, considering only the physical condition may be criticized for ignoring its effect on ability to work, which is the major reason for the right to compensation. The policies in this area have grown piece-meal in response to particular problems. They reflect a failure in the *Act* itself to use "disability" clearly and consistently.

Relationship of permanent to temporary disability and rehabilitation payments

The issue here is when temporary disability benefits should end and permanent disability benefits start. This issue is important as the pension rate may be different from the temporary disability rate.

As the policy considers "temporary" and "permanent" relate to the worker's physical condition, a temporary disability ends when the physical condition stabilizes. The policy has guidelines for deciding this.³⁶ However, a temporary disability may recur at any

³¹ #34.10 of the *Rehabilitation Services and Claims Manual*

³² Section 23(2) describes the Permanent Disability Evaluation Schedule as a "rating schedule of percentages of impairment of earning capacity".

³³ See, for example, #39.00 and #39.10 of the *Rehabilitation Services and Claims Manual*

³⁴ #34.10 of the *Rehabilitation Services and Claims Manual*

³⁵ #39.01 of the *Rehabilitation Services and Claims Manual*

³⁶ #34.54 of the *Rehabilitation Services and Claims Manual*; Decision No. 320, (1980) 5 WCR. 58

time after a permanent disability has been found. Temporary disability benefits may then be restarted. As the symptoms of many permanent disabilities fluctuate, a dispute often arises whether fluctuations are a normal incident of the permanent disability or a period of temporary disability.

Where a worker receiving a pension is paid temporary disability or equivalent rehabilitation benefits, the amount of the pension may be deducted.³⁷

Determining percentages of disability under section 23(1)

Section 23(1) directs that the "impairment of earning capacity shall be estimated from the nature and degree of the injury". Section 23(2) states:

"The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable for permanent disability."

The Board's Permanent Disability Evaluation Schedule is adopted under this section. The schedule is largely unchanged from the Tysoe Report in 1966.³⁸ The most notable change was including a section on the spine in 1990.

One issue is whether the Schedule measures accurately the average losses of earning capacity it is intended to measure. Since these losses inevitably change over time as occupations and economic conditions change, there is a further question how to keep the Schedule up to date.

Like other similar schedules, the Board's is not based on objective scientific data on the impact of different disabilities. Rather, it is based on the opinions of experts, primarily doctors. It has been questioned whether assessing percentages of average earnings loss is a matter of purely medical expertise and whether a different scientific approach could be followed.³⁹

³⁷ Sections 31 and 32 of the *Act*; #70.00 to #70.30 of the *Rehabilitation Services and Claims Manual*

³⁸ The report discusses the origin of the schedule at page 273.

³⁹ An Ontario study has considered the adequacy of the American Medical Association's, Guides to the Evaluation of Permanent Impairment (AMA Guides) as a measurement of loss of enjoyment of life. Under the Ontario *Workers Compensation Act*, a non-economic loss award is paid for this using the AMA Guides, in addition to a permanent partial disability award that may be paid for future earnings loss. The study had a group of disabled workers and of the general public view videos illustrating certain disabilities and giving their rating of the impact. The study concluded that the impairment ratings using the AMA Guides were not the most appropriate proxy measure of loss of enjoyment of life. The AMA Guides produced generally lower figures, particularly at the lower end. See Sandra Sinclair and John F. Burton Jr., "Development of a Schedule for Compensation of Non-economic Loss: Quality_of_Life Values Vs. Clinical Impairment Ratings", page 123, published in "Research in Canadian Workers' Compensation", Terry Thomason and Richard P. Chaykowski, Editors, 1995.

It has sometimes been suggested that the Board replace its own schedule with a more widely recognized one, such as the American Medical Association's, Guides to the Evaluation of Permanent Impairment . However, the objective validity of the ratings in this schedule have also been questioned.⁴⁰ An internal Board study in 1987 suggested that adopting this schedule would cause an increase in costs of between 25% and 35% for section 23(1) awards.

The Tysoe report was concerned that the Board applied its schedule too rigidly. It did not take enough account of other factors such as age and occupation.⁴¹ This raises the question what additional factors should be considered in deciding each case, for example, age, subjective complaints, prior occupation, the existence of other disabilities. The policy states that other factors can be looked at but only those relating to the degree of physical impairment.⁴² The policy sets out guidelines on subjective complaints,⁴³ age,⁴⁴ and enhancement⁴⁵ and devaluation⁴⁶ factors where the worker has existing disabilities. The policy prevents the worker's occupation or actual loss of earnings being considered, as this is covered by section 23(3).

A non scheduled award is made if the disability is in a part of the body not listed in the schedule. An example is psychological disability. These are basically judgment decisions but schedules from other authorities may be used.⁴⁷ The policies on age, enhancement and devaluation do not apply but the principles behind them must be considered in exercising judgment.

Whether an award is scheduled or not, a Board medical adviser normally examines the worker. The adviser will describe the physical condition and usually assign a percentage. The adviser does not make the decision on the award. The policy recognizes the decision maker must consider other, non-medical factors.

⁴⁰ Ellen Smith Pryor, "Flawed Promises: A Critical Evaluation of the American Medical Association's Guide to the Evaluation of Permanent Impairment", Harvard Law Review, Volume 103, Page 964

⁴¹ Page 276, 281 to 284

⁴² #39.10 of the *Rehabilitation Services and Claims Manual*

⁴³ #39.01 of the *Rehabilitation Services and Claims Manual*. Subjective complaints include the question of "chronic pain". There is an outstanding policy issue regarding the extent to which the Board should consider this when assessing pensions.

⁴⁴ #39.11 of the *Rehabilitation Services and Claims Manual*

⁴⁵ Enhancement occurs when the current disability is worse because of the combined effect with another disability in a different part of the body. #39.12 of the *Rehabilitation Services and Claims Manual*. This policy was said to be unclear in a May 11, 1995, Appeal Division decision, No. 95-0516.

⁴⁶ Devaluation occurs when a when a worker has more than one disability in the same part of the body. The percentages listed in the schedule assume that the disability is the only one. If the amounts for separate disabilities are simply added, they may produce an amount larger than the amount allowed by the schedule for the total loss of that part of the body. #39.13 of the *Rehabilitation Services and Claims Manual*

⁴⁷ For example, the AMA Guides are used for psychological disability but, since the policy (#22.33 of the *Rehabilitation Services and Claims Manual*) is unclear, there is a current project to state how exactly the AMA Guides are applied by the Board.

Notwithstanding the policy, there is a long-standing concern whether Board officers do properly consider these factors or simply adopt the medical adviser's assessment.⁴⁸

The Board may provide prostheses or other devices to reduce the impact of a disability. This includes such items as eyeglasses, hearing aids and artificial limbs.⁴⁹ Normally, the Board assesses the disability before the device is in place. However, loss of visual acuity is assessed with the eyeglasses in use.⁵⁰ The Appeal Division has questioned the legal validity of this policy.⁵¹

Determining employability under section 23(3)

Section 23(3) requires the Board to decide the average amount that the disabled worker "is earning or is able to earn in some suitable occupation after the injury". This gives rise to the main issues for section 23(3) awards.

One issue concerns what is commonly known as "deeming". This is a process by which the Board decides that a disabled worker, who has not returned to work, could return if he or she so wished or, if the worker does return to work, could have returned to a higher paid job. The Board's policy has guidelines for these decisions.⁵² The main principle is that the job used in the decision need not now be available as long as it will reasonably be available over the long term.⁵³

Factors other than the compensable disability can affect the worker's post-injury earnings, for example, age, education, language ability, experience, willingness to retrain, other medical conditions, place of residence, and general economic conditions. The Board has no clear policy on how it will consider many of these factors in deciding what a worker can earn.

Decisions on these issues cause controversy and appeals. Workers contend the Board uses jobs that are not available or suitable in order to reduce costs; employers allege the Board is too concerned with the worker's preferences, and that workers should be more responsible for their own future. Employers also criticize the making of large section 23(3) awards where there is only a small section 23(1) award. They suggest the loss in such cases is often due to factors unrelated to the disability, for example, the worker's age or the declining nature of the worker's industry. Workers' response is that these awards simply reflect the reality that small disabilities can cause large losses.

⁴⁸ See Tysoe Report at page 279.

⁴⁹ Section 21 of the Act; #77.00 to #77.29 of the *Rehabilitation Services and Claims Manual*.

⁵⁰ #39.42 of the *Rehabilitation Services and Claims Manual*

⁵¹ Decision No. 93-1140, August 12, 1993, 10 WCR. 225

⁵² #40.12 of the *Rehabilitation Services and Claims Manual*

⁵³ #40.12 and #89.11 of the *Rehabilitation Services and Claims Manual*

All other provinces that grant pensions for earnings loss have some kind of process for deeming earnings where the worker is found not to be earning as much as he could.⁵⁴

Benefits from other agencies

Benefits from other agencies are generally not considered in determining compensation under the B.C. Act. However, an offset for Canada Pension Plan benefits is required in calculating survivors' benefits under section 17. There is an issue whether the treatment of survivors' benefits should be made consistent with workers' benefits, and if so, how.

A major review of the Canada Pension Plan is currently being conducted by the federal government. In February, 1996, the federal, provincial and territorial governments of Canada issued "An Information Paper for Consultation on the Canada Pension Plan". The paper states that "reducing CPP disability benefits to take account of Workers' Compensation Benefits would reduce the current overlap. It would also remain consistent with Worker's Compensation principles that the employer - not the CPP - should bear the cost of a work injury".⁵⁵

A related issue is whether to consider benefits provided by the worker's employer during the disability. The Board has authority to do this under section 34 of the Act but only uses it for temporary disability benefits.⁵⁶ Appeals have been made by employers on whether benefits under sickness, long term disability or occupational pension plans should be considered in regard to permanent disability awards.⁵⁷

Commencing and terminating pensions

Permanent disability awards generally begin at the date when the disability starts. There are exceptions. A delay in filing an application for compensation may result in compensation being paid (if at all) from the date of filing.⁵⁸ Another exception relates to occupational hearing loss.⁵⁹ The Appeal Division has questioned the validity of this exception.⁶⁰

⁵⁴ For a discussion of the experience of other Boards concerning "deeming" see "Fact Finding Analysis on Issue of Deeming", prepared for New Brunswick WHSCC Board of Directors, October, 1995

⁵⁵ Page 38

⁵⁶ #34.40 to #34.41 of the *Rehabilitation Services and Claims Manual*

⁵⁷ Appeal Division Decision No. 92-1717, October 26, 1992, 8 WCR. 715 (Judicial review petition dismissed - See *City of Vancouver v. W.C.B.*, March 25, 1994, 10 WCR. 709); Appeal Division Decision No. 92-0922, May 1, 1992, 9 WCR. 39 (Policy issue was referred to governors of board); Appeal Division Decision No. 95-0165, February 20, 1995, 11 WCR. 13

⁵⁸ Section 55 of the Act, #93.22 of the *Rehabilitation Services and Claims Manual*

⁵⁹ #31.80 of the *Rehabilitation Services and Claims Manual*

⁶⁰ Appeal Division Decision No. 93-0658, May 7, 1993 (unpublished)

Permanent disability awards are generally payable for life but again there are exceptions. For example, a pension will be ended if the worker recovers from the permanent disability.⁶¹

The policy provides that no section 23(3) award will be made to a worker at or above age 65. Where the worker is above age 50, the award is reduced after the worker reaches 65 by a proportion depending on the worker's age at the time of injury.⁶² The policy assumes that older workers' ability to save for retirement is less affected by a disability than younger workers'.⁶³ The Appeal Division has found the policy contrary to the *Act* to the extent it prohibits awards at or after age 65. It was, however, acceptable to have a rebuttable presumption of no loss of earnings at age 65 and above.⁶⁴

All other provinces end or reduce earnings loss pensions at age 65. Usually, some other benefit follows, for example, an annuity based on a percentage of prior pension payments⁶⁵ or payment of an amount by which Canada Pension Plan or employer pension benefits were reduced by the disability.⁶⁶

The Board may reduce, suspend or cancel compensation in certain situations.⁶⁷ The Board has a policy of always cancelling permanent disability awards under section 98(3) of the *Act* when the worker is "confined to jail or prison".⁶⁸ The Appeal Division has found the policy contrary to the *Act* with respect to section 23(1) awards.⁶⁹ Since these awards are paid for life, regardless of whether the worker has a loss of earnings, it is asked why it should make a difference that the worker is prevented from working by imprisonment.

Manner of payment

Sections 22 and 23 provide for payment of pensions in the form of periodic payments. In practice, the Board pays pensions monthly. Section 35(2) gives the Board authority to commute a pension in whole or part into a lump sum and pay this to the worker in place of the pension.⁷⁰

⁶¹ #42.20 of the *Rehabilitation Services and Claims Manual*

⁶² The proportion is one fifteenth for each year from age 51 to 64.

⁶³ #40.20 of the *Rehabilitation Services and Claims Manual*

⁶⁴ Appeal Division No. 94-0659, May 27, 1994, 10 WCR. 665; See also unpublished Appeal Division Decisions No. 94-0660, 94-1199 and #95-1210

⁶⁵ See Alberta, Manitoba, Nova Scotia, Ontario, Saskatchewan and the Yukon

⁶⁶ See New Brunswick, Newfoundland and Prince Edward island.

⁶⁷ Section 15(1) (Money owed to the Board or the Ministry of Social Services); section 35(5)(worker in custodial care in hospital); Section 57(1) (failure to attend a medical examination); section 57(2) (insanitary practices or refusal of treatment); section 98(3) (imprisonment); section 98(4) failure to support family)

⁶⁸ #49.20 of the *Rehabilitation Services and Claims Manual*

⁶⁹ Appeal Division Decision No. 93-1059, 93-1060, July 23, 1993, 10 WCR. 7; Appeal Division No. 94-0324, March 10, 1994, 10 WCR. 621

⁷⁰ Section 35(3) requires the consent of the worker where the award is greater than 10%.

The Board does not in practice commute section 23(3) awards. The Board may commute section 23(1) awards in accordance with the following criteria: ⁷¹

Description of award	Commutation guidelines
Disability 10% or less, pension \$100 per month or less, and commuted value \$40,000 or less.	A lump sum is awarded
Outside above category, pension \$125 per month or less, and commuted value \$60,000 or less.	Worker is "usually" offered a choice of a monthly pension or a lump sum.
Pension more than \$125 per month or capitalized value more than \$60,000.	Award is a monthly pension and a commutation is not normally given. A commutation may sometimes be granted under additional criteria set out in the policy.

The Board has traditionally been reluctant to grant commutations. A pension is seen as the best way of compensating for lost wages that were paid weekly or monthly. The ability to grant pensions is considered an advantage over the court system that only provides lump sum awards for personal injury. A concern also exists that workers may invest or use capital sums unwisely and so become a charge on the public welfare system. However, there is an issue whether the Board should raise the levels at which it automatically grants commutations. This is both because it is administratively simpler to pay a lump sum and because disabled workers often prefer a lump sum. It may promote their well being to sever their connection with the Board as much as possible.

Pension reviews

The Board will reassess a pension if the level of permanent physical impairment changes. ⁷² The Board will not reassess a section 23(3) award if the worker's physical condition has not changed but earnings have simply turned out different than expected. ⁷³ The basic idea behind these awards is for a single lifetime projection of earnings loss to be made. This avoids the disadvantages of systems that consciously attempt to monitor and compensate for the actual loss of earnings experienced by workers over their lifetime. ⁷⁴

In 1985, the Board modified its position on reviews of section 23(3) awards. ⁷⁵ The policy ⁷⁶ now requires one review after two years and gives Board officers a discretion to set up more reviews. This has been criticized as unfairly allowing the Board, but not

⁷¹ #45.10 of the *Rehabilitation Services and Claims Manual*; #45.61 creates special criteria for where a permanent disability award is due under an appeal decision.

⁷² #42.20 of the *Rehabilitation Services and Claims Manual*

⁷³ #40.30 of the *Rehabilitation Services and Claims Manual*

⁷⁴ Decision No. 8, 1973, 1 WCR. 27, 29, 33-34; See, however, "Reshaping Workers' Compensation for Ontario", 1980, where Paul Weiler criticized the Board's approach as sacrificing the major advantage enjoyed by WCBs over the courts.

⁷⁵ Decision No. 394, 1985, 6 WCR 32

⁷⁶ #40.30 of the *Rehabilitation Services and Claims Manual*

the worker or employer, to initiate a review. Most other provinces have annual or periodic reviews of loss of earnings awards.

Sections 24 and 26 of the *Act* contain special provisions for reviews of certain permanent disability awards. They were enacted in 1974 and 1975 to deal with particular historical situations: the fact that the Board did not previously grant section 23(3) awards and had commuted awards that would, if they had continued, have become eligible for consumer price index adjustments. ⁷⁷ There is a question whether these sections still serve a useful purpose.

Pension Costs

The following table sets out the number of permanent disability awards and their costs in the years 1991 to 1995. ⁷⁸

Year	Section 23(1)			Section 23(3)			All Awards	
	No.	Ave. cost	Total cost	No.	Ave. cost	Total cost	No.	Total Cost
1991	4,048	21,739	87,999,472	453	158,940	71,999,820	4,501	159,999,292
1992	4,155	24,308	100,999,740	647	205,564	132,999,908	4,802	233,999,648
1993	4,400	26,500	116,600,000	650	230,800	150,020,000	5,050	266,620,000
1994	4,765	24,000	114,360,000	571	231,000	131,901,000	5,336	246,261,000
1995	5,082	21,800	110,787,600	553	194,800	107,724,400	5,635	218,512,000

The 1995 Administrative Inventory examined a different set of data covering the period 1981 to the first half of 1995 and found: ⁷⁹

- the number of permanent disability pensions had grown more rapidly than the number of temporary disability claims,
- growth in section 23(3) awards had grown faster than in section 23(1) awards, and
- the real average cost of all pensions had declined but the cost of the average section 23(1) award was declining relative to the cost of the average section 23(3) award.

⁷⁷ Consumer price index were not granted until after the Tysoe Royal Commission Report in 1966.

⁷⁸ The numbers in the table were obtained from the "Management Discussion and Analysis" of the 1993 to 1995 Annual Reports. The equivalent figures for 1991 and 1992 were obtained from the Disability Awards Department.

⁷⁹ Pages 111 to 113, 123 and 124. The data was derived from the Board's Actuarial Department. The differences in the data result in part from computer reports being run at different times, the reports also count different things. For example, the Actuarial Department counts one pension award as "2" if the costs are split between two classes of employer or part of the costs is assigned to the relief fund set up by section 39(1)(e) of the *Act*.

A study was suggested to determine the causes of these trends.⁸⁰

SOURCES

Commission of Inquiry Workmen's Compensation Act, Report of the Commissioners, the Honourable Mr. Charles W. Tysoe, 1966

Development of a Schedule for Compensation of Non-economic Loss: Quality_of_Life Values Vs. Clinical Impairment Ratings, page 123, Sandra Sinclair and John F. Burton Jr., published in "Research in Canadian Workers' Compensation", Terry Thomason and Richard P. Chaykowski, Editors, 1995.

Fact Finding Analysis on Issue of Deeming, prepared for New Brunswick WHSCC Board of Directors, October, 1995

Flawed Promises: A Critical Evaluation of the American Medical Association's Guide to the Evaluation of Permanent Impairment, Ellen Smith Pryor, Harvard Law Review, Volume 103, Page 964

Long term disability benefits: horizontal and vertical equity in workers' compensation pensions in B.C., Terence J. Bogyo, 1994.

Permanent Disability in Workers' Compensation, Berkowitz and John F. Burton Junior, 1987

Perspectives on Wage Loss Benefits for Workers' Compensation Pensioners in Ontario, William Johnson, included in Paul Weiler, "Permanent Partial Disability: Alternative Models for Compensation", 1986.

Rehabilitation Services and Claims Manual, Workers Compensation Board of British Columbia

Report of the Commissioner, The Honourable Mr. Justice Gordon McG. Sloan relating to the Workmen's Compensation Board, 1942

Report of the Commissioner, The Honourable Gordon McG. Sloan, Chief Justice of British Columbia relating to the Workmen's Compensation Act and Board, 1952

Report of the Committee of Investigation on Workmen's Compensation Laws, March 1, 1916 (Pineo Report)

Report of the Task Force on the Workers' Compensation Board", Alberta, November 7, 1988

⁸⁰ Page 255.

Report of the Workers Compensation Review Committee", Manitoba, May, 1987

Reshaping Workers' Compensation for Ontario", Paul Weiler, 1980

The Workers' Compensation System of British Columbia: Still in Transition, H. Allan Hunt, Peter S. Barth and Michael J. Leahy, March, 1996

Workers' Compensation in British Columbia, An Administrative Inventory at a Time of Transition, H. Allan Hunt, Peter S. Barth and Michael J. Leahy, November, 1991

Workers Compensation Reporter

APPENDIX A
SECTIONS 22 AND 23 OF THE *WORKERS COMPENSATION ACT*

PERMANENT TOTAL DISABILITY

22. (1) Where permanent total disability results from the injury, the compensation shall be a periodic payment to the injured worker equal in amount to 75% of his average earnings, and shall be payable during the lifetime of the worker.

(2) The compensation awarded under this section shall not be less than \$325 per month. [Note: \$325 amount changed periodically by regulation pursuant to section 25 (4).]

PERMANENT PARTIAL DISABILITY OR DISFIGUREMENT

23. (1) Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and shall be payable during the lifetime of the worker or in another manner the board determines.

(2) The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

(3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which he is earning or is able to earn in some suitable occupation after the injury, and the compensation shall be a periodic payment of 75% of the difference, and regard shall be had to the worker's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business.

(4) Where permanent partial disability results from the injury, the minimum compensation awarded shall be calculated in the same manner as provided by section 29 (2) for temporary total disability but to the extent only of the partial disability.

(5) Where the worker has suffered a serious and permanent disfigurement which the board considers is capable of impairing his earning capacity, a lump sum in compensation may be paid, although the amount the worker was earning before the injury has not been diminished.