Permanent Disability Evaluation Schedule

2016 Review

BC BUILDING TRADES POSITION

BC BUILDING TRADES
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Half measures which mitigate but do not remove injustice are, in my judgment, to be avoided. It would be the gravest mistake if questions were to be determined not by a consideration of what is just to the workingman, but what is the least he can be put off with.

William Ralph Meredith, C.J.O., Commissioner

The schedule which is to be used solely as a guide, is designed to show in percentage, the approximate impairment of earning capacity of an average unskilled workman.

Report of D.E. Bell, M.D. to the Association of Workmen's Compensation Boards of Canada, August 22, 1960

While intended to apply to an average individual there will be cases when the rating level provides inadequate compensation to cover the economic hardship occasioned by an injury. This happens mainly in the skilled trades where certain injuries impose particular hardship.

Report of D.E. Bell, M.D. to the Association of Workmen's Compensation Boards of Canada, August 22, 1960

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Introduction

Given that the BC Building Trades Council ("BCBT") represents tens of thousands of construction workers throughout British Columbia, it is not surprising that we take a keen interest in any changes to the *Permanent Disability Evaluation Schedule* ("PDES"). Our interest arises from two fundamental realities: first, our members are employed in the most physically demanding and life threatening occupations in the province which put them at high risk of injury; and secondly, the disability awards granted pursuant to the PDES impact the standard of living of our injured members for the rest of their natural lives. Consequently, it is incumbent upon the BCBT to candidly voice its opinion with respect to any proposed changes to the PDES in the interest of our members.

Background

In response to the Board's last review of the PDES in 2013, the BCBT submitted a comprehensive document which expressed myriad criticisms of the PDES (See *The Permanent Disability Evaluation Schedule – BC Building Trades' Position*, September 2013, 18 pp). Among other things, the BCBT was critical of the existing disability evaluation approach, the range of motion method, the inter-jurisdictional comparisons, and the Psychological Disability Award Committee. Despite these criticisms, with the exception of the ongoing policy review of the range of motion method in assessing disabilities of the spine by the Policy, Regulation and Research Division ("PRRD"), the Board appears to have ignored our concerns and proceeded with business as usual. This is highly unfortunate.

Discussion

Considered within the four posts of the Board's chosen parameters of discussion on the PDES, the BCBT is not opposed to adopting the changes to the PDES as captured in Option 2 of the discussion paper. The proposed changes to the permanent tracheostomy value (from 2 percent to 10 percent) and inclusion of the impairment of the obturator nerve are positive steps. Moreover, the BCBT also welcomes the ongoing policy review of the chronic pain policies and range of motion methodology with respect to the spine.

The problem, however, is that the Board's proposal fails to address *the fundamental defect* of the PDES.

After consulting with stakeholders, the Board of Directors ("BOD") has determined that the PDES should be reviewed on an annual basis "to ensure that the PDES stays current with developments in the medical and scientific literature and other jurisdictions regarding disability". The BCBT applauds the BOD for their commitment to this laudable goal. But this goal can only be realized if the current disability award rating methodology is reconfigured to provide a true estimate of *impairment of earning capacity* from the nature and degree of the injury in keeping with section 23(1) of the Act. This is our longstanding opinion, and many of our colleagues in the labour movement, most notably the BC Federation of Labour's Occupational Health and Safety Standing Committee as well as the Workers' Compensation Advocacy Group, are of a similar opinion. The BCBT and the wider labour movement have raised this critical issue with the Board during the last PDES review. Unfortunately, the section 23(1) issue was not resolved and, as a result, we are compelled to raise the matter again.

The BC Legislative Assembly is tasked with promulgating legislation that provides the skeletal framework pursuant to which regulations, policies, and practices are crafted within the bowels of the bureaucracy. No regulation, policy, or practice can contravene a statutory instrument if it is to remain *intra vires*. If a regulation, policy, or practice contravenes the statute, it is *ultra vires* and will eventually be struck down by the courts. This is "Law 101" and everybody – certainly everybody in government - is aware of these facts. Yet, when it comes to the PDES, this common knowledge is conveniently forgotten, and our calls for changes to make the PDES congruent with the law have fallen on deaf ears.

Section 23(1) of the Act is the foundational provision respecting the establishment of a disability award for those workers sustaining a permanent partial disability resulting from a workplace injury. It states:

> *23 (1) Subject to subsections (3) to (3.2) and sections 34 and 35, if a permanent partial disability results from a worker's injury, the Board must*
>
> *(a) Estimate the impairment of earning capacity from the nature and degree of the injury, and*
>
> *(b) Pay the worker compensation that is a periodic payment that equals 90% of the Board's estimate of the loss of average net earnings resulting from the impairment.*
>
> *(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.*

Clearly, the BC Legislative Assembly has directed the Board to construct a rating schedule based on *the impairment of earning capacity* for specific injuries which may be used as a guide for determining a permanent disability award. But is this what the PDES does? That is to say, is the PDES a rating schedule based on the impairment of earning capacity for specific injuries which may be used as a guide for determining a permanent disability award? Regrettably, the answer is: No.

Historical evidence reveals that the Board's PDES does not reflect an accurate rating for the impairment to an individual worker's earning capacity. This evidence forms a central piece of Canadian workers' compensation historiography. This important story begins with Mr. Justice Meredith's Royal Commission in 1913, followed by Dr. Bell's reports to the Association of Workmen's Compensation Boards of Canada in the 1960s, and reached its zenith with *Decision No. 8* by the Commissioners in 1973. A summary of this history must be told here to drive home the true nature of the Board's PDES and why it is not, contrary to section 23(1) of the Act, a rating schedule based on the impairment of earning capacity. For the complete history as well as a compelling argument, one must turn to Jim Parker's submission to the Board entitled *The Permanent Disability Evaluation Schedule: A Legal Fiction* (October 18, 2013). Mr. Parker is an authority on this subject and I have drawn heavily upon his pioneering work.

Justice Meredith's 1913 Royal Commission report established the foundational principles for our modern workers' compensation systems throughout Canada. In addition to the principles of no-fault compensation, security of benefits, collective liability, independent administration, and exclusive jurisdiction, Meredith noted that the compensation for permanent disability should be based on the impairment of the worker's earning capacity. For Justice Meredith this was the *sine qua non* of a "just compensation law". In his words:

> *A just compensation law based upon a division between the employer and the workman of the loss occasioned by industrial accidents 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.***

In 1960, Dr. Bell was tasked by the Association of Workmen's Compensation Boards of Canada to survey the permanent disability rating schedules in every province. Following his extensive consultation and analysis, Dr. Bell set out his recommendations, including a proposed schedule, in a series of reports in the 1960's. In reviewing the genesis of rating schedules for permanent disabilities, Dr. Bell noted in his 1960 report:

> *The schedules adopted by the Canadian Provinces were offshoots of American schedules, none of which had any scientific background. A study of the early history of schedules in the United States show that the first in existence was compiled by the New Jersey Industrial Commission about 1910. Figures given*

the various items were said to have been determined by a study of European schedules, court judgements and insurance settlements. As State after State enacted compensation laws, schedules were copied one from another without any serious concern as to their soundness in any case.

And while Dr. Bell felt that his proposed schedule was superior to those in existence, he acknowledged its limitations.

The schedule here presented is considered to be an improvement on existing schedules but should in no sense be assumed to represent the ultimate. Usage will no doubt bring to light inconsistencies not immediately evident which will lead to further revision from time to time. Indeed an on-going study of this important facet of compensation work would be highly desirable.

The schedule which is to be used solely as a guide, is designed to show in percentage, the approximate impairment of earning capacity of an average unskilled workman.

In applying the schedule regard should always be had to whether the award adequately compensates the workman for his loss of earning capacity failing which upward revision may be considered.

The key point here is Dr. Bell's emphasis on rating schedules, his included, being flawed, that they were to be used simply as guides, and that adequate compensation must be based on the worker's loss of earning capacity.

By the 1970's there was rising concern about the veracity of the loss of function method and the PDES as a single system for compensating permanent disabilities. As a result, on October 2, 1973, the Commissioners issued Decision No. 8 which would leave no doubt as the degree of validity in the rating schedules.

The Commissioners in Decision No. 8 explored workers' claims who had experienced severe impairment of earning capacity but given only small award ratings under the PDES method of assessment for spine injury which was primarily based on range of motion measurements. In their decision they say:

In the course of adjudication on a recent appeal involving a spinal column injury, we were disturbed to find that a permanent partial disability based on 7.5% of total disability had been awarded notwithstanding that the loss of earning capacity, on any view of the case, seemed to be at least 50%. We were assured that the award was in line with other pension awards in back injury cases. We

> *felt, therefore, that the matter could not be approached simply by changing the particular award, but that we should consider the principles being applied to the measurement of partial disability. We are concerned now, therefore, with the practice being followed in other cases.*

Very importantly, the Commissioners also opined that there was a natural and great variability in the impact of a spinal injury on the earning capacity of those in different occupations. Using the example of a stone mason and a salesman, the Commissioners asserted that if both workers experienced a spinal injury that limited their lifting to no more than 25 pounds, this functional impairment would leave the stone mason totally unable to perform the pre-injury occupation, whereas this same impairment would have little to no impact on the earning capacity of the salesman.

The Commissioners focused on three major shortcomings in the PDES: absence of content validity, the injustice of "average impairments", and the narrowness of the compensation evaluation model. More specifically, then, and as already mentioned, the Commissioners found there was no theoretical or empirical foundation for correlating a particular level of physical impairment to a particular impairment of earning capacity. In the Commissioners words:

> *It has long been recognized and objected that, except by coincidence that this method bears no relation to the real loss of earning power. What less often recognized is that this method does not, except by coincidence, bear any relation to the average loss of earning capacity. So far as we can discover from other Canadian Boards, it does not appear that the percentages rates currently used for the measurement of physical impairment are based on any statistical research done within living memory, and there is really nothing to connect the percentage rates of physical impairment currently used with the impairment of earning capacity either in the individual case, or even on an average.*

Secondly, the PDES was also found wanting by the Commissioners because the estimated impairment of earning capacity was based on mass averages.

> *If one claimant is being grossly under-estimated in comparison with the actual loss of earning capacity, and if another claimant is being grossly over-compensated to the same extent, should we really take any comfort in the thought that the average claimant is being fairly treated, or that the right amount is being paid out in total? There is no such thing as justice on average.*

Lastly, the Commissioners held that compensation for impairment should not only apply when there has been an impairment of earning capacity because an injured worker suffers an intrinsic loss by physical impairment itself, irrespective of its impact on his or her income earning potential.

> *There seems to be a generally accepted feeling that if a man has suffered say the loss of an arm at work, he ought to receive compensation whether or not there is any actual impairment of earning capacity; and this view seems to have prevailed under most systems no matter what the wording of the particular legislation.*

In sum, the Commissioners resolved that the existing rating schedules could not reasonably estimate the impairment of earning capacity as required by statute. As a result, the Commissioners took steps to introduce the "dual system" to rectify the shortcomings. Employing this new system, Board policy paid the higher of a functional impairment and a loss of earnings for spinal injuries. By October 1, 1977, the dual system was extended to injuries not involving the spinal column. This dual system remained in place until 2002 when, at the behest of the business community, the BC Liberal government amended the *Workers' Compensation Act* and its myriad policies in the *Rehabilitation Services and Claims Manual* ("RSCM").

With the newly promulgated section 23(3) of the Act, loss of earnings awards can only be paid if the combined effect of the worker's occupation and the worker's disability is "so exceptional" that the functional award fails to appropriately compensate the worker for the injury. Using a very narrow and oftentimes mean-spirited interpretation of the term "so exceptional", the Board has effectively eviscerated loss of earnings awards for injured workers. And they have done this despite the advice of Mr. Winter who authored the Core Review, and recommended retaining the dual system, undertaking regular reviews to ensure evolving scientific knowledge was incorporated into the ratings, and, last but certainly not least, rectifying the schedule to make it reflect the impairment of the worker's earning capacity.

> *Pursuant to Section 23(1) of the Act, the percentages set out in the PDES must reflect the estimated impairment of the worker's earning capacity arising from the nature and degree of his/her injury. The specified percentage should not simply reflect the percentage of medical impairment which the injury represents vis-à-vis the total disability of the person.*

Despite this long historical record proving that the PDES fails to rate the impairment of workers' earning capacity as directed by section 23(1) of the Act, the Board has continued for almost 15 years to contravene the statute. The end result, when coupled with the introduction of the "so exceptional" clause, is reduced disability awards across the board for injured workers, the very people the WCB system was created to support in their time of need.

In response to earlier discussion papers on the PDES, Mr. Parker has provided enlightening numbers showing a troubling reduction in Long Term Disability ("LTD") Expenses for the period 2004 to 2012, that is, the period from when the financial impact of Bill 49 on disability awards

started to reveal themselves to the most current data at his disposal. Using the WCB's *Ten-year Summary of Consolidated Financial Statements* for the said period, and employing the figure of $700,000 for the baseline LTD expenses prior to the impact of Bill 49 took hold, Mr. Parker found that the Board had reduced disability awards by approximately three million dollars ($2,937,238) from 2004 to 2012. This is a shocking reduction in disability benefits to injured workers.

Reflecting upon the most updated *Ten-year Summary of Consolidated Financial Statements* for the period 2004 to 2013, it appears that the Board may be attempting to return to their pre-Bill 49 baseline expenditure of $700,000 on LTD (2013 LTD expenditures were $655,089). Be that as it may, the BCBT and its labour colleagues are troubled by the increasing expenditure spread between the Board's loss of function ("LOF") payments and its loss of earnings ("LOE") payments.

At the BCBT's request the Board undertook the necessary data manipulation to separate their LTD expenditures from 2006 to 2015 into LOF and LOE payments. The results, as summarized below, is a growing reduction in LOE awards vis-à-vis LOF awards.

YEAR	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
LOF Payments (Millions)	181	184	191	225	231	253	308	302	319	323
LOE Payments (Millions)	188	175	181	137	139	148	159	167	172	173
Difference Spread (Millions)	7	9	10	88	92	105	149	135	147	150

The increasing spread or difference between the LOF and LOE disability awards over the last ten years reveals a thrust within the Board to reduce LOE awards. When we combine this reduction in LOE awards with the reduction in LTD awards more generally since the promulgation of Bill 49, we must conclude that the Board is on a mission to steadily reduce benefits for injured workers. Given the far reaching ramifications of this policy thrust on injured workers, the BCBT will continue to voice its vehement opposition to this Board objective.

From our perspective, the Board's persistent failure to reconfigure the PDES to ensure it provides a true (or at least a truer) estimate of a worker's impairment of earning capacity in keeping with Section 23(1) of the Act has eviscerated LOE awards. It is for the reason that we will continue to push for significant change to the PDES, that is, change that will enable workers to recover what they have lost by way of earning capacity as a result of their workplace injuries.

The BCBT is also troubled by the Board's PDES review process. Similar to the last PDES review, the Board's 2016 review was "led by a committee including staff from Clinical Services (Chief Medical Officer, Disability Awards Medical Advisor, Senior Manager), Disability Awards, Client Services, as well as the Evidence Based Practice Group". While we acknowledge the knowledge and experience

each of these parties bring to a review, the Board must acknowledge their glaring lack of independence. We believe a more objective medical analysis would be provided by a team of independent medical experts, the members of whom should be vetted by a tri-partite body made up of WCB, labour, and the business community. The particulars of such an arrangement should be the topic of a future tri-partite discussion. For the moment, suffice it to say that the goal of this arrangement should be to give structure to a group of medical experts whose task it would be to provide ongoing professional guidance to ensure scientific knowledge, equity, and the principles of the historic compromise as articulated by William Ralph Meredith are infused into the more prosaic aspects of the PDES. A rating schedule based on *the impairment of earning capacity* would form a cornerstone in this disability assessment and award process.

Conclusion

The BCBT appreciates the opportunity to provide feedback on the Board's discussion papers. We are particularly concerned about any proposed changes to the PDES, and believe significant changes are in order. Without these changes injured workers will be persistently shortchanged as our empirical data indicates. The Board has been instructed by the BC Legislature to construct a rating schedule based on the impairment of earning capacity. Until this is done, the PDES cannot live up to the Meredith principles.

Historical Long Term Disability Payments by Type 2006 - 2015

Table 1 - Expenses for Claim Costs: Long Term Disability

(In $ millions)	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Long Term Disability Expenses	376	295	306	235	216	419	548	655	638	540
Less: Actuarial Valuation Adjustments	9	(63)	(65)	(127)	(152)	17	81	186	146	43
Long Term Disability Payments (in $ millions)	367	358	371	362	368	402	467	469	492	497

Table 2 - Breakdown of Long Term Disability Payments

(In $ millions)	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Loss of Function Payments	181	184	191	225	231	253	308	302	319	323
Loss of Earnings Payments	188	175	181	137	139	148	159	167	172	173
Long Term Disability Payments (in $ millions)	370	359	371	362	370	401	466	469	491	497

Notes

The figures shown represent actual annual payments.

The LTD Expenses in Table 1 are as per the 2015 Ten-year summary of consolidated financial statements.

The LTD Payment totals in Table 1 also include other classifications of LTD expenses. These are: disfigurement, retirement benefits, section 24 of the Act (reconsidering benefits), section 25 of the Act (general indexing factor), interest, and inter-jurisdictional amounts.

For information on the Actuarial Valuation Adjustments, refer to Note 10 in the 2015 Annual Report (pages 114-115).