

# **MEASUREMENT OF EARNINGS LOSS**

**PROPOSED POLICY AMENDMENTS**



## ***BC BUILDING TRADES POSITION***

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One must speak for a struggle for a new culture, that is, for a new moral life that cannot but be intimately connected to a new intuition of life, until it becomes a new way of feeling and seeing reality.

Antonio Gramsci

## **MEASUREMENT OF EARNINGS LOSS**

### **BC BUILDING TRADES RESPONSE TO THE WORKERS' COMPENSATION BOARD'S PROPOSED AMENDMENTS TO WORKERS LOSS OF EARNINGS AWARDS**

#### **Introduction**

The BC labour movement in general, and the BC Building Trades in particular, are fully aware that the changes made to loss of earnings awards in 2002 as result of *Bill 49* were made at the behest of the business community for the sole purpose of reducing employers costs. To this end the changes have been remarkably successful. But sometimes, as G.K. Chesterton wisely advised, "nothing fails like success". For, when saving employers' money is done on backs of workers, as is the case with the 2002 changes to the loss of earnings awards, the changes fail. They fail workers; they fail the Meredith principles upon which the Workers' Compensation Board was established in 1917; and they fail society at large. Fortunately the BC Building Trades are not alone in this opinion. No less than the Workers' Compensation Appeal Tribunal has opined that the current policy respecting the measurement of earnings loss is "patently unreasonable".

#### **Issue**

The issue under review is whether the current method whereby the Workers' Compensation Board ("WCB") establishes a worker's loss of earnings award should be changed.

#### **Background**

Currently the WCB uses historical earnings (i.e., the worker's post-injury earnings as they stood on the date of injury) to compare pre-injury and post-injury earnings to establish a worker's loss of earnings award. On rare occasions the requisite historical earnings are unavailable. When such a situation arises, the WCB adjusts the post-injury earnings to account for inflation in keeping with the *Rehabilitation Services and Claims Manual, Volume 2, Policy Item #51.00*. Specifically, the policy employs a cost of living adjustment ("COLA") factor which is calculated by the percentage change in the consumer price index ("CPI") for Canada for the 12 month period ending on October 31 of the previous year minus one percent (1%).

The Board is reviewing two aspects of its current method for determining the measurement of earnings loss: (a) the approach to adjusting earnings when determining a worker's loss of earnings award; and (b) the factor used to adjust earnings.

## Discussion & Analysis

As noted in the Board's discussion paper, prior to the changes of *Bill 49* in 2002 the Workers' Compensation Act ("Act") provided that cost of living adjustments be made to compensation payment benefits twice a year based on the full percentage change in the CPI for Canada. The Act was silent regarding adjusting for inflation when comparing earnings in the calculation of a loss of earnings award.

The applicable policy prior to the 2002 changes provided that the CPI was used to adjust earnings for comparison purposes when calculating a loss of earnings award. This approach mirrored the general indexing factor set out in section 25(1) of the Act.

As noted, in 2002 the BC Legislature via *Bill 49* amended the indexing factor in the Act to provide yearly cost of living adjustments to periodic payments using a unique COLA factor instead of the CPI. Subsequently the policy was updated to replace the reference to adjusting earnings by the CPI with a reference to adjusting earnings using the COLA factor when comparing earnings to calculate a loss of earnings award. The Board's unique COLA factor is calculated by the percentage change in the CPI for Canada for the 12 month period ending on October 31 of the previous year minus 1%.

While the BC labour movement has railed against the aforementioned amendments for years, a WCAT Vice Chair's referral to the WCAT Chair under section 251 of the Act was more successful in capturing the Board's attention. The Vice Chair made the referral on the basis that "WorksafeBC policy on the measurement of earnings loss which provides for the use of the COLA factor to adjust earnings in the calculation of a worker's loss of earnings is so patently unreasonable that it is not capable of being supported by the Act and its regulations". More exactly, the Vice Chair opined that the use of the COLA factor (CPI minus 1%) to adjust for inflation artificially decreased the impact of inflation resulting in a less accurate representation of the worker's actual loss. Simply put, the COLA factor underestimated inflation and thus provided workers with a bogus loss of earnings award. From the Vice Chair's perspective, the CPI was a better measure than the COLA factor, even though she acknowledged that the CPI could only provide an approximation of actual earnings.

The BC Building Trades concurs with the findings of the WCAT Vice Chair, that is, we believe the CPI for Canada is a better measure of inflation on workers' wages than the Board's existing COLA factor. Indeed, we would go one step further. If the goal is to provide the most accurate measure of a loss earnings resulting from inflationary pressures, the WCB should use the formula of CPI for Canada plus 1% because research has shown that earnings (i.e., wages) tend to increase faster than prices.

In the world of policy and politics, words are used as much to clarify as they are to obfuscate. We see this in the Board's reasoning for employing their COLA factor to estimate the impact of inflation on workers' earning loss awards.

On page 9 of the discussion paper, the Board says:

*Where historical earnings are not available when comparing pre-injury and post-injury earnings, the COLA factor is currently used to adjust earnings. This approach reflects WorkSafeBC's efforts to obtain a better representation of the worker's loss of earnings than would be possible without accounting for inflation at all.*

Yes, indeed! The Board's use of the COLA factor is a better representation of the worker's loss of earnings than would be possible without accounting for inflation at all! It's hard to argue with that. But, of course, we all know that it would be totally unacceptable - by any standard - not to account for inflation when calculating a loss of earnings award or any item which is inextricably linked to the rise or fall of a currency. Clearly, then, the impact of inflation on a worker's earning loss must be accounted for, and the most accurate method for doing so should be employed.

Page 9 of the discussion paper continues as follows:

*As set out above, the Act provides that the COLA factor is used to adjust prospective periodic payments of compensation benefits to workers. Using this approach for measurement of earnings loss ensures a consistent approach to how WorkSafeBC adjusts earnings.*

The issue is not consistency; the issue is accuracy; the issue is fairness; the issue is to ensure workers are compensated as required by the realities on the ground where they live and work and provide for their families. It matters not that replacing the current COLA factor with the CPI makes it out of sync with other periodic compensation benefits. Ideally, they, too, should be amended to employ the CPI. But if this cannot be done in the foreseeable future (as we suspect), the BC Building Trades fails to see why the immediate problem with the loss of earnings measurement should not be remedied.

Recent research undertaken by our colleagues in the labour movement indicates that replacing the COLA factor with the CPI for Canada would better reflect the impact of inflation on workers' loss of earnings awards. In fact, as noted above, research performed by *George & Bell Consulting* indicates that the most accurate inflation factor would be the CPI plus 1% because wages tend to increase faster than prices. While this option was not proposed by the WCB, it is the option the BC Building Trades proposes.

Heretofore this paper has focused on the appropriate factor to be used when calculating loss of earnings. A few words need to be said also with respect to the process for calculating loss of earnings. Most importantly, we wish to strongly encourage the Board to revise the existing policy

to clarify that the WCB needs to use historical earnings in the suitable occupation as they stood at the date of injury. Historical earnings are typically available and the WCB needs to impress upon their officers to make diligent efforts to unearth the historical earnings data. Most times the data can be easily obtained by contacting the relevant employers, businesses, or unions, who possess the requisite records. Only after such efforts have been exhausted should the WCB employ the factor for calculating loss of earnings awards using the CPI for Canada plus 1% (or whatever factor the WCB ultimately resolves upon).

Currently the Board does not undertake the necessary research to determine the historical earnings, and simply applies the existing COLA factor (CPI minus 1%) thereby ensuring that workers are shortchanged. And the longer the loss of earnings duration, the more they are shortchanged! This practice must be stopped because it is, as the WCAT Vice Chair said, patently unreasonable.

### **BC Building Trades Proposed Changes to Measurement of Earnings Loss**

Therefore, the BC Building Trades proposes the following changes to the Measurement of Earnings Loss regime.

With respect to the *factor* to be used in calculating loss of earnings, and if the goal is to provide the most accurate measure of a loss earnings resulting from inflationary pressures, the BC Building Trades proposes using the formula of CPI for Canada plus 1% because research indicates that wages tend to increase faster than prices.

With respect to the process for calculating loss of earnings, the BC Building Trades proposes the policy be revised to clarify that the earnings in the occupation as they stood at the date of injury must be used unless the earnings are unavailable. In the event the earnings at the time of injury are not available the earnings at a different date may be used with a factor of CPI plus 1% to adjust to the earnings at date of injury.

### **Conclusion**

The BC Building Trades Council appreciates the opportunity to provide feedback to the Board on the measurement of earnings loss. We are hopeful that changes will be made to better reflect the impact of inflation on workers' loss of earnings awards.