

**SUBMISSION TO WORKSAFE BC**

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# **DETERMINATION**

**OF**

# **RETIREMENT DATE FOR PERMANENT DISABILITY AWARDS**

## **BC BUILDING TRADES POSITION**

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## Determination of the Retirement Date for Permanent Disability Awards

### *THE BC BUILDING TRADES POSITION*

#### INTRODUCTION

The way in which a society treats its most vulnerable – its poor, its elderly, its physically and mentally disabled – reflects the depth of its collective social conscience. A tree is known by its fruit.

Prior to the changes to this province's workers' compensation system in 2002, it was understood that a worker's disability pension would be paid for *life* because their permanent impairment impacted their *historical earning capacity* which, in turn, reduced their ability to build retirement income. In a word, law and policy respecting an injured worker's pension mirrored a society that cared for its most vulnerable.

The release of the *Core Services Review on the Workers' Compensation Board* by Alan Winter in 2002 marked the death knell for life time disability pensions. Overturning the longstanding rationale for granting workers their disability pensions for life, Alan Winter's argued that:

Th[e] lifetime payment of the worker's pension award appears to assume that the worker's loss of earning capacity will be the same during his/her retirement years as it was during his/her pre-retirement years, since the compensation level paid by the WCB remains the same throughout both. In my opinion, that assumption is unreasonable and must be rectified.

And so it was. Soon thereafter the longstanding "unreasonable" retirement provision was "rectified" by the Liberal Minister of Skills Development and Labour Graham Bruce who introduced Bill 49 to amend the *Workers' Compensation Act*.

While business organizations such as the Council of Construction Associations (COCA) celebrated yet another victory against workers and the new Liberal government gained additional bragging rights for representing the interests of capital, the BC Building Trades Council vehemently opposed Bill 49. We opposed it then and we oppose it now. No minor policy changes like those proposed by the Board will rectify this fundamental shortcoming; anything less than disability pensions for life will not be equitable to injured workers and, therefore, is not acceptable to the BC Building Trades Council.

While our longstanding opposition to the post-2002 disability award retirement regime negates the possibility of endorsing the Board's policy options in their entirety, we do, however, support select elements of the options presented, as well as possess a host of ideas on how the existing regime could be strengthened within the limited horizon of the Liberal government's WCB framework.

## **WHAT IS RETIREMENT?**

Neither law nor policy defines the term “retirement” or “retire” in reference to our provincial *Workers’ Compensation Act*. We are not alone. No other jurisdiction in Canada has defined “retirement” in their legislation or policy either. This suggests that the general understanding of the term may be sufficient, and that the context may be the more important issue. Certainly the *full implications* of defining the term “retirement” in reference to a disability award cannot be assessed prior to mapping the contextual terrain in which that definition will function.

With that proviso in mind, the BC Building Trades Council is not necessarily opposed to the Board’s proposed definition that a worker is generally considered to be retired when the worker substantially withdraws from the workforce and receives retirement income from one or more retirement sources (e.g., CPP, OAS, employer’s pension plan, RRSP or other personal savings).

## **WHAT TYPES OF EVIDENCE SHOULD BE CONSIDERED?**

### **Worker’s Subjective Statement of Intention**

We find the Board’s proposed language respecting a worker’s subjective statement of intention to be too stringent as it will encourage decision-makers to put less weight on the worker’s stated intentions. A more balanced approach could be manifested by combining key parts of the existing and proposed provisions. Precisely, the Building Trades Council suggests the following language:

The issue for the Board to determine is whether there is sufficient positive evidence that it is more likely than not that the worker would have retired after age 65. In order to make this determination, the Board considers a worker’s statement of intention to retire after age 65 and looks for evidence that is verified by an independent source to support the worker’s statement. If the worker’s statement is not independently verifiable, the Board will make a determination based on the evidence available, including information provided by the worker.

### **Examples of Independent Verifiable Evidence**

The BC Building Trades Council supports expanding the list of examples of the kinds of independent verifiable evidence that supports a worker’s claim of planning to work beyond the age of 65. Moreover, we support separating this list of examples between those that, on their own, support a worker’s contention of working beyond the age of 65, and other examples that, while important, are not determinative on their own. Specifically, we support the following language proposed by the Board set out in italics below.

*Examples of the kinds of independent verifiable evidence that may support a worker's statement that he or she would have worked past age 65, and to establish the date of retirement, include the following:*

- *names of the employer or employers the worker intended to work for after age 65, a description of the type of employment the worker was going to perform, the expected duration of employment, and information from the identified employer or employers to confirm that he or she intended to employ the worker after the worker reached age 65 and that employment was available;*
- *a statement from a bank or financial institution outlining a financial plan and post age 65 retirement date, established prior to the date of the injury; and*
- *an accountant's statement verifying a long-term business plan (for self-employed workers) established prior to the date of the injury, indicating continuation of work beyond age 65.*

*Where the above type of evidence is available, this would be evidence in support of a determination that a worker would have worked until after age 65.*

*The following are examples of other kinds of independent verifiable evidence that alone may not be determinative of whether a worker would retire after reaching 65 years of age:*

- *information provided from the worker's pre-injury employer, union or professional association to confirm regarding the normal retirement age for workers in the same pre-injury occupation and whether there are incentive plans for workers working beyond age 65;*
- *information from the pre-injury employer about whether the worker was covered under a pension plan provided by the employer, and the terms of that plan;*
- *information regarding whether the worker would have the physical capacity to perform the work;*
- *financial obligations of the worker, such as a mortgage or other debts;*
- *family commitments of the worker; and*
- *an outstanding lease on a commercial vehicle (for self-employed workers).*

*These are not conclusive lists of the types of evidence that may be considered. The Board will consider any other relevant information in determining whether a worker would have worked past age 65 and at what date the worker would have retired.*

## WHEN SHOULD A WORKER'S DATE OF RETIREMENT BE DETERMINED?

If the setting of a worker's date of retirement for the purpose of a disability award is to be *equitable*, it must be done close to the age of 65. There is no way around this thorny issue *if* fairness is to be a hallmark of the workers' compensation system. Young workers and those a long way away from retirement simply cannot know when they will retire. As a result, the Board must accommodate this reality. The Board's convoluted counter claims against this approach, summarized in the discussion paper, are indefensible.

The Board argues, for example, that it would not be appropriate to direct in policy that the retirement age determination be made either as a preliminary determination or deferred until the worker reaches age 65 because "a preliminary determination is not a 'decision' and, therefore, not reviewable or appealable. Why need the matter be appealed? No decision is being made. And no decision is being made because the requisite evidence to make an *equitable decision* is not available.

Further, the Board argues that preliminary determinations are usually done in the connection with wage rate setting, and are only a stop-gap measure until the necessary data is obtained. This argument is perplexing. Preliminary determinations in one context need not mirror determinations in another. The *context* is all-important. Has the Board forgotten that the context at issue is the setting of an appropriate and equitable retirement date for injured workers to receive their disability awards, and that these awards determine, to a great extent, the workers' standard of living until they die?

The Board also opposes setting the retirement date decision near the worker's sixty-fifth birthday as it would necessitate raising the issue anew many years subsequent to the initial decision in some cases. This, of course, is true, but what does it matter and for whom does it raise concerns? Certainly it doesn't raise concerns for workers; they fully understand why the decision must be postponed. Nor should it raise concerns for the Board. Established in 1917, the product of an "historic compromise", the Workers' Compensation Board is an enduring tripartite organization that will not disappear anytime soon. Hence the common refrain of WCB decision-makers – a refrain grounded in the institutional realities of the Board as well as their legal responsibility under the *Workers' Compensation Act* – that, strictly speaking, "a worker's claim is never closed". Correct. The Board's responsibilities for a worker's accepted injuries are never extinguished under the Act.

Lastly, it simply makes no sense to argue, as the Board and WCAT do, that all determinations with respect to a worker's claim *must* be made at the time of injury. Why? Scrutiny of this argument reveals that it rests solely on the government's initial shortsighted decision to terminate disability pensions at age 65 and a decade of convention that followed. There is no logic or equity here. And *convention*, as Plato never tired of reminding us, is a sure-fired recipe for disaster in matters of governance. Only reason and equity can provide a solid foundation on questions of "who gets what, where, and how".

Importantly, too, trends in retirement suggest that more and more Canadians may be retiring after reaching the age of 65. While the federal charter regime and *British Columbia Human Rights Code* support mandatory retirement in certain contexts such as age-related benefits, data released by Statistics Canada indicates that the age of retirement tends to rise with improved education, better health, and the inexorable downward trajectory of the capitalist market. As noted in the Board's discussion paper, in 2008 the average retirement age in Canada was 62 and within four short years it climbed to 62.5.

This trend is exacerbated by the Harper government's amendments to the Canada Pension Plan (CPP), Old Age Security (OAS), and the Guaranteed Income Supplement (GIS). Phased in over a six-year period beginning in 2011, the new CPP system encourages citizens to delay their retirement in the hope of receiving more CPP benefits before they die. While the new CPP regime may provide increased retirement income over the long-term for those who can afford to delay receiving benefits or are compelled to do so for financial reasons, doing so will push the retirement trend higher. An increasing number of workers will work beyond the official retirement age when, for example, CPP benefits at age 70 are 42% above the standard rate! Moreover, starting in 2023 the eligibility age for an Old Age Security (OAS) pension and Guaranteed Income Supplement (GIS) will increase from age 65 to 67. This translates into less money in workers' pockets at the age of 65 which, in turn, means working longer to make up the difference.

## CONCLUSION

Both reason and equity support the long-standing policy positions advanced in the BC Building Trades Council's position. Minor changes will not repair the draconian changes brought in by Bill 49. Disability pensions must be for life because injured workers' ability to build a pension prior to reaching age 65 is negatively impacted from the moment of injury.

We appreciate the opportunity to respond the WorkSafe BC's proposed changes to the retirement date for permanent disability awards.