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May 28, 2019

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Ms. Sheena Clarkson
Senior Policy and Legal Advisor
Policy, Regulation and Research Division
Workers' Compensation Board
P.O. Box 5350, Station Terminal
Vancouver, British Columbia
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Dear Sheena:

RE: Proposed Amendments to the Permanent Disability Evaluation Schedule

Thank you for the opportunity to provide feedback on the proposed amendments to the Permanent Disability Evaluation Schedule. The BC Building Trades submission is attached.

Respectfully submitted,

Merrill James O'Donnell, M.A., LL. B.
Workers' Advocate

MO/aa
MoveUP

SUBMISSION TO THE WORKERS' COMPENSATION BOARD
POLICY, REGULATION AND RESEARCH DIVISION

Permanent Disability Evaluation Schedule Discussion Paper

BC Building Trades Position

Written by Merrill James O'Donnell, M.A., LL. B.
May 28, 2019

The schedule which is to be applied is to be used solely as a guide, is designed to show in percentage, the approximate impairment in 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 for which upward revision may be considered.

Dr. D.E. Bell
Report to the Workmen's Compensation Boards (Canada)
August 22, 1960

A worker-centred approach for injured and disabled workers is one that takes into consideration the worker's individual circumstances in applying policy and making decisions about benefit entitlement and rehabilitation measures. It is designed to maximize the worker's recovery from the injury or disease and to restore as close as possible the worker to his pre-injury employment status without a loss of earnings.

Paul Petrie
Restoring the Balance: A Worker-centred Approach to Workers' Compensation Policy
March 31, 2018

Discussion Paper Regarding Proposed Amendments to the Permanent Disability Evaluation Schedule

BC Building Trades Position

Introduction

The BC Building Trades Council ("BCBT") represents 35,000 unionized building and construction trades workers – from cement masons to electricians to sheet metal fabricators to ironworkers – throughout British Columbia. Due to the dangerous nature of building and construction work, many of our members are injured on the job, some severely, and some fatally. Not surprisingly, the BCBT takes a keen interest in any proposed changes to the *Permanent Disability Evaluation Schedule* ("PDES"). We appreciate the opportunity to make our views known to the Policy, Regulation and Research Division ("PRRD").

Back in 2014 the Board of Directors approved the PRRD performing an annual review of the PDES to ensure it remained up to date, effective, and equitable. As a result of the PRRD's most recent review, it is proposing several changes: (1) setting the impairment rating for comminuted calcaneal fractures at 7%; (2) clarifying ratings related to nerve root conditions for sensory and/or motor loss affecting only part of the nerve's distribution; and (3) making several minor editorial and format changes.

According to the PRRD, these proposed amendments have several policy objectives. One objective is to increase impairment ratings for comminuted calcaneal fractures to ensure the nature and degree of the injury is captured by the ratings. Secondly, proposed changes to the PDES regarding nerve root conditions provide valuable guidance for evaluation purposes. Lastly, the two proposed housekeeping changes respecting the spine will add emphasis and thereby aid in clarity.

The BCBT applauds the PRRD for proposing these amendments. In particular, the proposed changes to the comminuted calcaneal fractures and nerve root conditions valuation will ensure improved and more accurate functional assessments and higher awards. Therefore, the BCBT supports *Option 1B* to set ratings for comminuted calcaneal fractures at 7% which will ensure workers with these impairments obtain 7% automatically instead of being assessed on a sliding scale of 0-7%. We agree that this change would better reflect the nature and degree of the injury which is commonly painful and debilitating. Moreover, the BCBT supports *Option 2B* which would ensure that nerve root conditions affecting the whole or partial distribution of the nerve will receive the maximum rating. Finally, we support the implementation of the housekeeping changes proposed in *Option 3B* to align terminology and bolster the clarity of the existing rating tables.

The BCBT, then, fully supports the changes to the PDES as proposed by the PRRD. But, for reasons the professional team at the PRRD is fully aware, the BCBT must continue to object to the framework of PDES, most importantly, its failure to compensate for the impairment of injured workers' earning capacity in keeping with Sections 23(1) and 23(2) of the *Workers' Compensation Act*. This issue has been raised by many in the advocacy community. Back in 2013 and again in 2016, the BCBT submitted comprehensive papers disputing the validity as well as the legality of the PDES. Our submission drew heavily upon the meticulous research of Jim Parker of the BC Nurses Union. Parker's paper was also flanked with a submission by Dr. Robert D. Rondinelli, M.D., Ph.D. respecting the inadequacy of disability awards for the spine based on the range of motion method. The BC Federation of Labour as well as the Workers' Compensation Advocacy Group have also raised their voices in opposition to the existing PDES. To date, the PRRD has not responded to the advocacy community's call for fundamental changes to the PDES. As a result, the BCBT will take this opportunity to reiterate our earlier request for

amending the PDES in keeping with Sections 23(1) and 23(2) of the Act, and why it is important for our members.

Since the BC NDP was elected to public office, there have been meaningful changes to the Workers' our Compensation system. Countering the anti-worker/pro-business ideology of the former Liberals, our new government has taken serious substantive measures to improve the lives of workers. A solid example of this is the PRRD's ongoing work on the 41 recommendations that emerged from Paul Petrie's report, *Restoring the Balance: A Worker-centred Approach to Workers' Compensation Policy* (March 31, 2018). An important element of Petrie's paper was the proposed amendment to emphasize that the Board must consider the merits and justice of each individual case. On this issue Petrie made it very clear why considering the merits and justice of the case was so important.

> A case management system is an important component of an efficient workers' compensation system to ensure a level of consistency to decision-making. However, where that system does not have sufficient flexibility to consider the merits and justice of the individual worker's case, it erodes the principle of fairness and equity that is integral to the worker community's confidence in the system.

Nowhere is the principle of fairness and equity more important than when the Board adjudicates a disability award for an injured worker. Mr. Petrie understood this. And it was understood when Justice Meredith and the Pineo Commission advocated for a compensation system that compensated for *impairment of earning capacity*. To this end, Sections 23(1) and 23(2) of the Act stipulate that injured workers must be compensated for impairment of their earning capacity when determining the amount of a disability award. Strangely, while the legislation is categorical regarding the basis upon which the quantum of a disability award is to be based, the PDES is not. On the contrary, current awards for loss of function as determined by the PDES do not compensate injured workers for impairment of their

earning capacity. This has resulted in three fundamental problems: first, the Board is contravening the Workers' Compensation Act, Section 23(1) and 23(2); secondly, workers are receiving inadequate disability awards from the Board; and lastly, the merits and justice of every injured worker's case is not being considered by the Board as required by Section 99(2) of the Act.

Having scrutinized the impeccable research of Mr. Parker's October 18, 2013, submission entitled *The Permanent Disability Evaluation Schedule: A Legal Fiction* as well as our earlier submissions, the PRRD, as already mentioned, is aware of the disjunction between the requirements of Section 23 of the Act and its execution via the PDES. Moreover, the PRRD is also aware of the shortcomings of the functional assessment model which primarily focuses on assessing injured workers' range of motion when assessing impairment. Be that as it may, I will briefly regurgitate these shortcomings that have given rise to the advocacy community's persistent opposition to the existing PDES in the hope that a comprehensive overhaul of the PDES will eventually come to fruition and thereby reflect Section 23(1) and 23(2) of the Act, provide injured workers with equitable disability awards, and ensure the merits and justice of each and every case is fully considered in keeping with Section 99(2).

When Dr. D.E. Bell conducted his research and issued his reports in the 1960s regarding the use of disability award schedules, he followed closely in the footsteps of Justice Meredith and the Pineo Commission. That injured workers were to be compensated for impairment to their earning capacity was key. And, indeed, this has been an explicit requirement of the statute since its inception right up to today as currently articulated in Section 23(1) and 23(2). But Bell had no illusions about the specificity, or the lack thereof, of the schedule. The current PDES, which is essentially based on the schedules he developed in the 1960s, approximates the impairment of earning capacity of an *average unskilled worker*. Given the general nature of the schedules, he underscored the pressing need to apply personal

judgement when adjudicating individual workers claims; that is to say, he was of the opinion that consideration of the merits and justice of each case was fundamental to ensuring that the disability award would be equitable.

Seven years after Dr. Bell's schedules were adopted as the PDES, the Commissioners of the BC Workmen's Compensation Board issued the landmark Decision No. 8 (1973). According to this decision, the PDES does not reflect impairment of injured workers' earning capacity in keeping with Sections 23(1) and 23(2). The commissioners did not equivocate:

> *…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.*

It was only pursuant to Section 23(3), as required under the dual system, that a loss of earnings assessment was made. Unfortunately, in 2002 the Liberal government eliminated the dual system which provided a modicum of equity respecting a loss of earnings. Under the current system disability awards pursuant to Sections 23(1) and 23(2) are calculated by using the standard permanent functional impairment method, while Section 23(3), providing the all-too-rare loss of earnings award, can only be triggered if the disparity between the pre-injury earnings and post-injury earnings coupled with the functional award is "*so exceptional*" that it "does not appropriately compensate the worker for the injury".

The term "so exceptional" speaks to the degree of the disparity that must exist to trigger the loss of earnings provision. It is made concrete by way of a well-hidden formula that the Board applies when assessing the magnitude of the disparity. Specifically, if the disparity between the pre-injury earnings

and the post-injury earnings is 5% or less, it is deemed insignificant. If the disparity is 25% or more, it is deemed significant and Section 23(3) providing for a loss of earnings evaluation is triggered. But if the disparity is anywhere between 6% and 24%, the Case Manager will exercise his discretion to determine whether it is significant or not.

Interestingly, I recently represented a member whose case manager argued that a 23% difference in the worker's pre-injury and post-injury earning capacity was *insignificant*. Not surprisingly, the worker and I were flabbergasted with the case manager's so-called reasoning. On appeal I argued, among other things, that the case manager's salary should be reduced by 23% in order to test whether what was "good for the goose, was good for the gander". Unfortunately, I never heard back from the Review Officer on this matter. As a result, I am still curious to know whether the case manager, if faced with such a reduction in his salary, would experience a rapid increase in his heart palpitations or acquiesce peacefully. I suspect it would be the former, that is, he would not be "so exceptional" not to protest - loudly! Fortunately, the case manager's absurd decision was reversed on appeal, but this is the kind of nonsense workers can be faced with under the existing PDES system.

Making matters worse, the PDES cannot be relied upon to provide an accurate assessment of functional impairment. This fact was demonstrated by Dr. Robert Rondinelli, an expert in the field of assessing functional impairments, who the BC Nurses Union contracted to scrutinize a segment of the PDES. His findings, which were related to the PDES's method of assessing the spine, resolved that the PDES lacked reliability and validity as a measure of spinal function. The BCBT believes his findings are only the "tip of the iceberg" and that many, perhaps all, of the functional valuations set out in the PDES are inaccurate. There is only way to find out, and that is to undertake a comprehensive review of the PDES schedules.

This brings us back to the main point of my excursion into the history of the PDES, namely that the PDES should only be used as a guide, and that the merits and justice of the case must always be considered. Indeed, this is precisely what Dr. Bell advised back in the 1960s:

> *The schedule which is to be applied is to be used solely as a guide, is designed to show in percentage, the approximate impairment in 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 for which upward revision may be considered.*
>
> *Present rating schedules are assumed to show the average percentage of disability for each condition listed, but if such is the case, 50 per cent are receiving more and 50 per cent are less than enough to meet their needs. In all fairness, especially to the latter group, an effort to correct this disparity would be worthwhile.*

Despite the historical record revealing a lack of statutory support for the PDES, despite the myriad shortcomings of the functional assessment model, and despite the inequitable quantum granted to injured workers as a result of failing to compensate them for their impairment of earning capacity, the Board continues to use this blunt PDES assessment tool. These are serious problems. As before, the BCBT strongly encourages the PRRD to undertake a comprehensive review of the PDES which we believe will verify many of the shortcomings noted above. Only then will the PRRD know what substantive amendments are necessary to make the PDES legislatively, financially, and medically sound.