



Volume II
Chapter 2



Fatality Benefits

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[Chapter 2]

Fatality Benefits

Introduction

Part of the terms of reference of the first phase of the royal commission's mandate was to "inquire into recurring issues pertaining to the operation and administration of the workers' compensation system without limiting the number, nature and scope of these issues to include ... 3(a) benefits for fatality claims." While the commission did address a number of issues involving fatality benefits in its October 31, 1997 first phase report, the commission concluded that it could not make recommendations at that time on several other aspects of fatality benefits because of their interaction with other terms of reference which were to be dealt with in the final report. These included the following issues:

- compensation levels for survivor benefits under Section 17, including minimum allowances;
- age distinctions currently set out in Section 17 (3) (c) to (e); and
- termination of benefits upon a surviving spouse's remarriage or entrance into a common law relationship.

The area of fatality benefits is particularly challenging. It is one in which a wide range of varying policy choices are available, as is evident from the varying approaches which have been taken throughout the evolution of the applicable provisions in British Columbia and the different approaches which continue to be applied in other Canadian jurisdictions. It is also an area which calls for sensitivity in its treatment of affected parties. The death of a worker is one of the most stressful occurrences in the life time of surviving family members. The law and policy dealing with the provision of benefits to surviving family members should

be structured in a manner which is sensitive to the grief and trauma caused by the work-related death, and which avoids unnecessary and undue intrusion in the survivors' lives. In the context of a workers' compensation system, this calls for an adjudication process based on reasonable administrative presumptions rather than an inquiry into the specific financial circumstances of surviving dependants. The administration of these benefits should likewise be approached with sensitivity and compassion for the emotional turmoil being experienced by the family.

Permanent Total Disability Recommendations

Portions of Section 17 of the Act base survivor benefits on amounts which would have been payable had the deceased worker sustained permanent total disability. The commission has recommended elsewhere in this report (*Volume Two, Adequacy of Benefits*) that permanent total disability pensions be paid on the basis of 90% of the net average earnings of the disabled worker. Throughout Section 17, where applicable, calculations should be based upon the recommended 90% of net average earnings (i.e., the current recommendation for calculation of permanent total disability pensions).

Benefits for Survivors other than Spouses and Children

Various subsections of Section 17 make provision for survivor benefits for other dependants and family members in certain circumstances, as discussed in the commission's *October 1997 Report*. For example, Section 17(3)(h) provides for survivor benefits for "other dependants" and Section 17(3)(i) provides for benefits for certain non-dependent family members who had a "reasonable expectation of pecuniary benefit from the continuation of the life of the worker." The commission dealt with these provisions in the *October 1997 Report*, but noted that to the extent that the provisions related to compensation levels, that aspect would be deferred to the final report.

The commission has now had an opportunity to consider compensation levels for this class of survivors in the overall context of the compensation scheme. It has concluded that current provisions are appropriate and recommends no variation.



Current Calculation of Benefits for Surviving Spouses and Children

By far the most controversial issues relating to survivor benefits arise in connection with benefits payable to surviving spouses. These benefits are often interwoven with benefits payable in respect of surviving dependent children. The current provisions of Section 17 of the Workers Compensation Act provide considerable variance in benefits payable to surviving spouses depending upon the presence and number of dependent children, the age of the surviving spouse, and whether the surviving spouse is an “invalid.” “Invalid” is defined in the Act as “physically or mentally incapable of earning.”

Under subsections 17(3)(a)-(c) and (f), benefits paid to surviving spouses and dependent children are based, at least in part, on a stated percentage of the pension the deceased would have received had he or she been permanently totally disabled. Subject to the discussion below, the commission supports the general approach of basing such survivor benefits, like permanent total disability benefits, on the deceased worker’s average earnings. This serves to relate the benefits, at least to some extent, to losses actually experienced by the surviving members, in that benefits will generally rise in proportion to the worker’s average earnings.

Basing survivor benefits on a percentage of the amount which would have been payable as a permanent total disability pension takes account of the fact that a portion of the latter would have gone toward payment of the worker’s own expenses in the event of total disability. Relating survivors’ benefits to permanent total disability pension calculations takes account of the fact that the family of a deceased worker will have lost the same earnings stream (not counting the worker’s personal consumption) as would have been experienced as a result of the worker’s permanent total disability.

As such, the commission recommends that calculation of pension entitlement for surviving spouses and other dependants under Section 17 of the Act continue to be calculated as a percentage of the pension the deceased worker would have received had he or she sustained permanent total disability.

The current Section 17(3) scheme sets out a complex range of benefits depending upon the circumstances of surviving spouses. Pursuant to Section 17(3)(c), surviving spouses of any age, with or without dependent children, who are “invalids” receive an amount equal to 60% of the amount which would have been payable if the deceased worker had at the date of death sustained a permanent total disability. That same amount is payable to any surviving spouse aged 50 or older as of the date of the worker’s death. Pursuant to Section 17(3)(e) and Schedule C, all childless non-invalid spouses between the ages of 40 and 49 receive



benefits which are calculated as the difference between a prescribed flat rate and 60% of what would have been payable had the worker sustained permanent total disability. The latter benefits decrease incrementally with each decreasing year of age, so that a 48-year-old surviving spouse receives slightly less than a 49-year-old spouse, and so on.

Under Section 17 (3) (d) of the Act, benefits to childless non-invalid surviving spouses under the age of 40 are confined to a capital sum, the current indexed value of which is \$37,490.84. No pension is payable. The fact that no pension is payable to surviving spouses under the age of 40 is a matter of considerable concern to the commission, as will be discussed further below.

Under Section 17 (3) (a) and (b), where a worker leaves both a spouse and a dependent child or children, pension benefits vary according to the number of children, but not the age or state of health of the surviving spouse. A surviving spouse and one dependent child receive 85% of the amount which would have been payable as permanent total disability benefits. A surviving spouse with two children receives 100% of the permanent total disability amount. Where there are more than two children, an additional \$243.62 per month is paid for each additional child. (This reflects the 1998 figure per child, as adjusted for the Consumer Price Index changes pursuant to Section 25.)

Benefits for orphaned dependant children are addressed in Section 17(3)(f). Again, amounts vary depending upon the number of children. Where a worker leaves no eligible surviving spouse and only one dependent child, the latter is entitled to a pension equal to 40% of the permanent total disability amount. Two surviving dependent children receive benefits equal to 50% of the permanent total amount, and three children an amount equal to 60%. More than three children receive 60%, plus an additional \$243.62 per child, as adjusted pursuant to Section 25.

All of the above provisions of Section 17(3) which provide for payments of pensions require that federal benefits be taken into account in calculating such pensions. Sections 17(3)(a)-(c), (e) and (f) provide for pensions which “when combined with federal benefits” equal the prescribed percentages of permanent total disability awards. Integration of federal benefits will be discussed further below.



Variation of Benefits upon Changes in Status

In addition, Section 17(4) allows for re-calculation of benefits where a surviving spouse ceases to be an “invalid” or where children cease to be dependent. The commission considers this approach a sound one. These are matters which are highly relevant to the appropriate levels of benefits. In the case of “invalid” status, such status may well be subject to change in the future, depending upon the nature of the condition which precludes the survivor from earning income. In the case of all children except those who are “invalids,” the status creating the entitlement to benefits is certain to cease in the future, making termination of benefits appropriate. Further, the “invalid” status of surviving spouses, as well as the age, “invalid” status and/or educational pursuits which define a “child” under Section 17(1), are matters which the commission considers can be monitored without undue intrusion into the lives of survivors in the years following a worker’s death.

Statutory Minimums

As with permanent total disability benefits, survivors’ pension benefits are subject to minimum levels, regardless of the average earnings of the deceased. These are adjusted pursuant to Section 25 of the Act twice a year based on the changes in the consumer price index, and those adjustments are reflected in the figures referred to below. Pursuant to Section 17(3)(c) the monthly minimum for surviving spouses aged 50 years and older as of 1998 was \$787.18. The Commission notes that this minimum amount is approximately 64% of the minimum amount payable to a permanently totally disabled worker pursuant to Section 22 of the Workers Compensation Act. This appears to reflect a personal consumption component (i.e., the amount which would have been spent on or by the worker).

Pursuant to Section 17 (3) (g), the minimum average earnings on which benefits are calculated under Section 17(3) (a), (b) or (f), where there are surviving dependent children, is \$26,243.64 (as adjusted to 1998 figures under Section 25). This results in a monthly minimum benefit of \$1640, a level that is not only more than is provided under Section 17(3)(c) but also more than the minimum monthly pension for a permanently totally disabled worker under Section 22 of the Act. This illustrates the very high “needs based” emphasis of fatality benefits compared to disability benefits under the current Act, deemed entirely appropriate by the commission, as discussed below.

The commission considers these minimums to be fair and reasonable and recommends no change.



Considerations of Need and Loss in Calculation of Survivor Benefits

The commission concluded that the current fatality benefits scheme takes account of both the financial needs of survivors and actual losses resulting from the worker's death.

For example, the historic justification for statutory minimum compensation levels appears to have been based solely upon considerations of need. The *1916 Pineo Report*, for example, placed the emphasis on need in considering minimum compensation levels for both workers and their dependants:

There are one or two minor points, however, that we would like to see amended slightly in favour of the lower-waged workmen and their dependents. From the evidence before us it would appear impossible for widows or invalid widowers to live in this Province on less than \$20 per month without becoming objects of charity....

For similar reasons we recommend that under sections 37 and 39 of the Bill a minimum be fixed of at least \$5 per week to workmen who are totally disabled. Under the scale of wages ordinarily prevailing in this Province such a minimum would very rarely be invoked but we feel that it should be provided to meet the needs in the few instances, mostly among apprentices and women workers, when it would be of advantage.

Similarly, the 1966 Tysoe report recognized the role played by need in relation to minimum and maximum compensation levels, as well as allowances payable per dependent child:

Need or presumed need plays a part in the setting of maximum and minimum average earnings to which the basic rate of 75 per cent of average earnings applies. So it does—at least to some extent—in the allowances for children of deceased workmen for they are payable for each and every dependent child. Thus the aggregate payments are greater or less according to the number of children. In these cases there may be a mixture or compensation for loss and provision for basic needs.

The substantially higher minimum monthly pension which is mandated by Section 17(3)(g) in cases where dependent children are involved emphasizes the strong needs-based approach to fatality benefits.



On the other hand, survivor benefits are calculated in many circumstances as a percentage of the net average earnings of the deceased. Benefits are thus loss-based in that they vary according to the worker's actual income. In most cases, the loss sustained by survivors will vary in direct proportion to the deceased worker's earnings.

Subject to the discussion below of distinctions based on the age of surviving spouses, the commission has concluded that the present level of benefits payable under Section 17(3)(a), (b) and (f) are appropriate, and no change is recommended. These provisions cover a range of circumstances where surviving dependant children are involved, as well as situations where surviving spouses are "invalids." Children are not able to mitigate the effects of a worker's death or improve their own financial circumstances, and neither are "invalid" spouses, as long as the latter condition persists. Surviving spouses with dependent children may be similarly constrained by child care obligations from achieving greater financial independence.

The commission took note of concerns on the part of the employer community regarding payment of compensation in excess of actual losses resulting from a worker's death. However, the commission notes that where provisions under the current system address needs-based concerns, they tend to be designed to ensure that compensation does not fall below levels necessary to meet minimum basic requirements. While the social safety net has evolved considerably since the inception of the workers' compensation system, the commission considers it reasonable to infer that workers would have been correspondingly less likely to accept the historic compromise the more likely it became that their dependants might receive less than subsistence level benefits in the event of death arising from employment.

Perhaps more importantly, the commission notes that the Act also provides for maximum wage levels, by reference to which workers or dependants may receive compensation for *less* than actual losses. Thus while in some instances employers may be called upon to fund compensation in excess of actual loss, in other instances, the opposite will be true. The aim of the workers' compensation system has never been to measure the precise extent of loss in each individual case, but rather to attain collective justice. Retaining statutory minimum and maximum compensation levels allows the system to provide adequate benefit levels for all those affected by work-related disability or death. "Rough justice" for those funding the system is achieved through, among other factors, the counterbalancing effects of statutory minimums and maximums.



Distinctions Based on Age of Surviving Spouse

The commission's main concerns regarding the current provisions of Section 17 relate to the age-related distinctions between non-invalid childless surviving spouses.

The commission has concluded that it is appropriate to take some account of needs-based considerations in determining benefit levels for surviving spouses. The commission has also concluded that ability to achieve financial independence is relevant to need. As noted above, such ability will be affected by a spouse's "invalid" status and is also likely to be affected by the presence of dependent children and corresponding child-care responsibilities. Age is another relevant factor, in that older surviving spouses are likely to have fewer employment and/or retraining options which would enable them to replace income previously provided by the deceased worker. At least in the case of older female surviving spouses, a higher level of financial dependence on the deceased worker is statistically likely.

The commission has concluded that a pension based on 60% of permanent total disability payable to surviving spouses 50 years of age or older at the date of death of the worker is appropriate. Many spouses in this age group are likely to be in a similarly disadvantageous position to "invalid" spouses or those with dependent children with respect to their options for achieving financial independence.

As noted, Sections 17(3)(c), (d) and (e) make distinctions based on age and provide for a range of benefits payable to non-invalid childless surviving spouses which generally decrease with the spouse's age. These provisions were the subject of considerable criticism in submissions to the commission. Many of those representing workers and the surviving spouses of deceased workers argued that there should be no distinctions based on age and that all surviving spouses should receive the same level of benefits as those currently paid to non-invalid childless surviving spouses aged 50 or older.

These so called "age discrimination" provisions have also been the subject of considerable argument before both the Review Board and Appeal Division based on the Section 15 equality provisions of the Charter of Rights and Freedoms of the Canadian constitution. Until quite recently, these two bodies had reached contrary conclusions on this issue. For example, the Review Board held in Decision No. 95/557-A that the distinctions as to pension levels based on age contained in Section 17(c), (d) and (e) did not contravene Section 15 of the Charter. In contrast, the Appeal Division in decisions such as Decision #93-1222, reported at 10 W.C.R. 53, found that these provisions did violate Section 15 and were not justifiable under Section 1 of the Charter. Other surviving spouses' appeals to the Appeal Division were subsequently allowed based on the reasoning in the latter case. The Appeal



Division held that it did not have the jurisdiction to declare the sections to be of no force and effect under the Charter, and that its decisions on this issue were only applicable to each individual case before it at the time. Meanwhile, the Review Board continued to find that the provisions did not violate the Charter.

The differing results reached by the Review Board and the Appeal Division caused considerable controversy and dissatisfaction. An ad hoc group appointed by the governors issued a May 22, 1995 report entitled *Compensation and the Death of a Worker—A Discussion Paper*, which canvassed an alternative approach which eliminated the age-based distinctions among childless non-“invalid” surviving spouses and provided benefits based on 60% of permanent total disability to all of them. That alternative was not adopted. The commission notes that the *ad hoc* group estimated that such a change, along with several other unrelated changes to fatality benefits, would collectively result in an increase in annual reserves somewhat in excess of \$2 million.

Subsequent to the delivery of the commission's *October 1997 Report*, the Appeal Division of the Workers' Compensation Board revisited the “age discrimination” issue and concluded in a lengthy and reasoned judgment that, contrary to its earlier decisions, the provisions do *not* infringe equality rights guaranteed by Section 15 of the Charter. (Appeal Division Decision No. 98-0527, reported at 14 W.C.R. 113.)

In the latter decision, the Appeal Division reviewed the history of Sections 17(30(c)-(e)), and described the purpose behind the current provisions which were enacted in 1974 as follows:

In 1974, the purpose of the amendments to Section 17 was to improve compensation for widows who suffered a loss of income because of the death of their spouses by taking into account the size of that loss and also by ensuring minimum levels of compensation. The widows' actual and potential access to various sources of income was taken into account so as not to overcompensate them. Thus, the purpose of the 1974 amendments was to replace income, in light of projected needs, so as to avoid overcompensation and undercompensation. Compensation was integrated with federal benefits. To avoid undue intrusion in the widow's lives, the legislature used a presumptive approach based on age, health and the presence of children to predict the opportunity for income from other sources, particularly employment, over the long term, rather than subjecting the widows to ongoing scrutiny and reporting requirements concerning their actual income.



The commission has concluded that the original purpose of the 1974 amendments, as analyzed by the Appeal Division, represents a valid approach to spousal benefits. The justification for the distinction between childless, non-invalid spouses of different ages is that younger spouses on the whole have better prospects for finding work or improving their earnings, and are more likely to be able to achieve financial independence than older spouses. The commission notes that the scheme of the Act is not confined to the provision of financial benefits but is also designed to provide rehabilitation and promote income replacement and independence. Section 16 of the Act authorizes the board to provide for vocational rehabilitation to surviving spouses, and the commission recommended in its first phase report that the provision of such services be made mandatory rather than remaining a matter of discretion.

The commission believes that the presumption underlying the age distinctions that younger surviving spouses have greater employment opportunities and lesser dependency is valid and is consistent with the underlying needs-based component of the fatality benefit scheme. The commission also believes that recognizing the different impact on spouses of different ages is appropriate from a cost-containment perspective, particularly in light of other recommendations which the commission is making which will result in increased spousal fatality benefits. The commission has therefore concluded that, as a matter of general principle, it continues to be appropriate to vary benefits to some extent according to the age of childless, non-invalid surviving spouses.

However, the commission has further concluded that the current age-related variations are not appropriately structured and result in too great a difference, both qualitatively and quantitatively, between the treatment of spouses under and over the age of 40. In that regard, the commission has some concerns about whether, in the event that a court disagrees with the Review Board and Appeal Division and finds that age distinctions do contravene Section 15 of the Charter, the current scheme is as likely to be justifiable under Section 1 of the Charter as a scheme which draws a less dramatic and more principled distinction between spouses of different ages, and is thus more proportional and rationally connected to the objective of recognizing differences between surviving spouses of different ages.

In the commission's view, it is more appropriate to provide pensions for all spouses and to vary the amounts for those under age 50 on a sliding scale which changes in small increments with each year of age, and subject to a minimum amount.

As a result of its research and the submissions made to it, the commission concluded that the current provisions should be replaced by an alternative scheme reflecting the current reality of participation of surviving spouses in the labour



market and changing social values, including the desirability of requiring younger non-invalid surviving spouses without children to pursue their own careers and become financially independent. In his November 1980 report, *Reshaping Workers' Compensation in Ontario*, Paul Weiler discussed what he called "the most ticklish issue in this area:"

The answer to this dilemma is to rethink and redefine our notion of "dependency", the historic rationale for survivors' benefits. It is common knowledge that women have entered the labour force in dramatically higher numbers in the past 20 years. This is true not simply of single women but also of married women. In the last few years it has become apparent that more and more married women are returning to work after staying home for a period of child-bearing and child-rearing. These socio-economic changes have recently produced major revisions in Ontario's matrimonial property and maintenance laws. In the cited case of the 25-year-old recently married woman, if there had been no fatal accident and instead the marriage had broken up because of domestic troubles (statistically not an improbable event) the wife could claim only little or no financial support from her spouse. Even in the case of longer marriages and older women, the assumption which now underlies the law of maintenance payments is that they are rehabilitative in nature, designed to facilitate re-entry into employment, and not a life-long source of support. In my view, as part of its overall rationalization of survivors' benefits, workers' compensation must accommodate this new concept of the marriage relationship and spousal dependency.

In addition, most Canadian jurisdictions have adopted a similar underlying principle in the family law context that a young divorced or separated dependent spouse without children should only receive maintenance for a transitional period in order for the spouse to return full time to the workforce and become self-supporting.

What Weiler observed in 1980 has become even more evident as we approach the year 2000. Recent labour market participation statistics indicate that 61% of married women now participate part-time or full-time in the workforce. To the extent that Section 17(3) and its precursors were designed to provide benefits for widows (which was initially their primary focus, as only "invalid" widowers historically qualified for corresponding benefits), it must be recognized that opportunities to achieve financial independence have increased exponentially for widows in recent decades. However, irrespective of gender, opportunities are not identical for all age groups. In addition, women of differing ages will have been affected



differently by increased opportunities for women in the workplace over the past few decades. On average, younger widows with good health and no dependent children are more likely than their older counterparts to be employed and relatively self-sufficient.

The commission believes that adjudication relating to benefits for surviving spouses should be done by a presumptive approach which acknowledges average levels of dependence and future retraining or employment opportunities, rather than by an inquiry into actual dependence at the time of a worker's death and into the future in each case.

A key problem with the current scheme created by Section 17(3)(c)-(e) is not that it creates distinctions between non-invalid childless surviving spouses of different ages, but that benefits for those under the age of 40 are calculated on a totally different conceptual basis than benefits for all others. In the case of all other spouses, pensions are payable rather than the lump sum payable to those under 40. Furthermore, the pensions are calculated with some degree of reference to the deceased worker's average earnings. Unless the statutory minimums or maximums apply, the latter benefits vary depending upon the worker's actual earnings. Thus, the system recognizes considerations of both loss and need for spouses aged 40 or older. In contrast, spouses under 40 receive a specified and unvarying flat rate pursuant to Section 17(3)(d). The amount is the same irrespective of spouse's actual losses or needs, and no account appears to be taken of either consideration.

The commission reviewed approaches to surviving spouses' benefits applied in other Canadian jurisdictions. There is considerable variation, reflecting the range of policy options which are available in this area. Some jurisdictions pay benefits irrespective of age but only for a limited duration. Others, notably Ontario and British Columbia, pay benefits tailored to age but pay them for the life of the surviving spouse. Notably, no jurisdiction that pays benefits regardless of age also pays them for the life of the surviving spouse.

The commission has concluded that the Ontario model represents the fairest approach. The Ontario model recognizes that younger surviving spouses should receive pensions based on a lower percentage of the worker's average earning than older spouses. Ontario has established a sliding scale of pension entitlement depending on age for all childless spouses between the ages of 20 and 60, and does not create a sharp division in entitlements as Section 17(3)(d) currently does in British Columbia. In Ontario, if a spouse is 40 years of age at the time of death, he or she receives 40% of the net average earnings of the deceased. For each year the surviving spouse is under the age of 40, the pension diminishes by 1% to a minimum of 20%. For each year the surviving spouse is over the age of 40, the pension increases by 1% each year to a maximum of 60%.



The relevant provisions are at Section 48(3) of the Ontario's Workplace Safety and Insurance Act:

(3) If the deceased worker is survived by a spouse but no children, the spouse is entitled to be paid, by periodic payments, 40 per cent of the deceased worker's net average earnings,

(a) plus one per cent of the net average earnings for each year by which the spouse's age on the date of the worker's death is greater than 40; or

(b) minus one per cent of the net average earnings for each year by which the spouse's age on the date of the worker's death is less than 40.

However, the maximum percentage payable under this subsection is 60 per cent and the minimum percentage is 20 per cent. If the deceased worker's net average earnings are less than \$15,312.51, they shall be deemed to be \$15,312.51.

The scale of benefits provided under this provision are as follows:

Age	Percentage of worker's net average earnings
20	20%
25	25%
30	30%
35	35%
40	40%
45	45%
50	50%
55	55%
60	60%

It should be noted that while the Ontario scheme bases these pensions on a percentage of the worker's net average earnings, the British Columbia scheme bases pensions on a percentage of the worker's permanent total disability pension which, under recommendations in the *Adequacy of Benefits* chapter of this report, would be 90% of net average earnings.

The commission has concluded that Ontario's requirement that a spouse be age 60 or more at the time of the worker's death in order to receive 60% is inappropriately high, and that 50 is the appropriate age at which a childless, non-



“invalid” spouse should receive a pension of 60% of permanent total disability benefits. In the commission’s opinion, employment opportunities and levels of dependency for older surviving spouses are not likely to be significantly different at age 60 than at age 50. The commission therefore prefers the existing British Columbia scheme, which provides the maximum pension of 60% 10 years earlier than Ontario, at age 50.

The commission has concluded that otherwise, differentiation on the basis of age should be similar to the Ontario scheme, and suggests a schedule which would provide a periodic pension based on 60% of the permanent total disability amount for spouses aged 50 and over, and reducing this by 1% for each year the surviving spouse is aged less than 50, to a minimum of 30% of the permanent total disability amount for spouses aged 20 or under.

Therefore, the commission recommends that:

155. the Workers Compensation Act be amended such that the age-related distinctions in Section 17 (3) (c), (d) and (e) be repealed and replaced by a provision that states that:
- a) childless non-“invalid” surviving spouses age 50 and older at the time of the worker’s death, will receive 60% of the monthly amount which would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; and
 - b) surviving spouses below 50 years of age at the time of the worker’s death will receive 1% less than 60% for each year of age below 50 years of age to a minimum of 30%.

The provisions as amended pursuant to the above recommendations include reference to the statutory minimums and integration of federal benefits as discussed elsewhere in this chapter of the report.



Pensions for Life

The commission considered several alternative approaches to payment of pensions to surviving spouses. In a number of Canadian jurisdictions, pensions paid to surviving spouses cease as of the date when the worker would have reached the age of 65. In others, such benefits continue only for a period of a few years after the worker's death. In contrast, British Columbia, along with Ontario, provide for payment of pensions to surviving spouses for life.

The commission considered limiting the time frame during which surviving spousal pensions would be paid, as well as whether it might be appropriate to recommend an alternative scheme for surviving spouses similar to the one whereby pension entitlements at age 65 accrue to permanently disabled workers. The commission rejected these alternatives in favour of continuing the current practice of paying survivor's pension benefits for the lifetime of the surviving spouse. As a result of the death of the worker, the surviving spouse loses the benefit of the pension entitlements which would have been accumulated by the deceased worker up until age 65 and the benefits the surviving spouse would have received from that accumulated pension entitlement.

For example, in the case of a childless surviving spouse aged 50 at the date of the worker's death, the pension would amount to 60% of the permanent total disability pension. The commission considered that the loss of a surviving spouse in the circumstances can best be replaced by the continuation of that pension beyond the date on which the worker would have reached the age of 65. Under the commission's earlier recommendations, a non-invalid childless surviving spouse under age 50 would receive a pension reduced by 1% for each year he or she is below 50 years at the date of the worker's death. The commission recommends that these pensions at reduced rates also continue for the life time of the surviving spouse. The commission thus recommends that with one exception, pensions be payable to surviving spouses for the latter's lifetime.

The exception arises where the deceased worker did not manifest any work-related disability until after the worker had retired. In such circumstances it cannot generally be said that any loss of wages or retirement benefits occurred and, on that basis, no compensation should be paid. However as will be discussed below, the commission believes that other kinds of losses not currently compensated under the survivor benefits scheme should be recognized and lump sum compensation paid to all surviving spouses, without regard to the earnings or retirement income of the deceased spouse.



Therefore, the commission recommends that:

156. the Workers Compensation Act be amended such that the benefits described in recommendation #155 not be paid to surviving spouses of workers whose work-related disability did not arise until after the worker retired.



Lump Sum Payments to Surviving Spouses

As discussed above, Section 17(3)(d) of the current Act provides for, in lieu of a pension, a lump sum benefit for non-invalid childless surviving spouses under 40. The figure, adjusted to 1998 is \$37,490.84. The commission has recommended above that surviving spouses under the age of 40 be entitled to pension benefits. The commission believes that a lump sum payment to all surviving spouses calculated independently of earnings and varied according to the spouse's age at the time of the worker's death would be an appropriate change to the existing system.

The purpose of the lump sum payment would be to defray the cost obligation of capital assets jointly purchased on the expectation of continuing income of the deceased spouse, and would also to some extent, provide recognition of non-economic losses associated with the death of the worker. These include generally non-quantifiable but no less real losses relating to services provided to the family by the deceased worker over and above financial contributions from earnings. Further, in light of the obligations which the system places on spouses to replace support previously provided by a worker with the spouses' own income, such a payment would assist surviving spouses with funding improvements in human capital in the form of higher education or other steps aimed at enhancing income-earning opportunities, which are otherwise unavailable or not covered through vocational rehabilitation services or allowances.

As younger spouses will tend to have fewer savings and higher debt obligations (such as mortgages), the need for this lump sum amount will generally be inversely proportional to the age of the surviving spouse, and should be structured accordingly. Therefore the commission recommends that all surviving spouses of deceased workers receive, in addition to pension benefits, a lump sum benefit dependent on their age at the date of death. This benefit should not be calculated on the basis of the worker's average earnings.

As noted above, the province of Ontario has a fatality benefits scheme which most closely resembles the British Columbia framework both as it currently exists and as the commission proposes that it be modified, insofar as it varies benefit levels depending upon the surviving spouse's age and pays pension benefits for the life of the spouse.

However unlike British Columbia, Ontario's periodic pension scheme is supplemented by a lump sum benefit payable to all surviving spouses without reference to the earnings of the worker but with regard to the age of the spouse at the time of the worker's death. The scheme is set out in Section 48(2) of the Ontario legislation:



(2) A surviving spouse who was cohabiting with the worker at the time of the worker's death is entitled to payment of a lump sum of \$55,555.55,

(a) plus \$1,388.88 for each year by which the spouse's age on the date of the worker's death is less than 40; or

(b) minus \$1,388.88 for each year by which the spouse's age at the date of the worker's death is greater than 40.

However, the maximum amount payable under this subsection is \$83,333.30 and the minimum amount is \$27,777.76.

The chart below illustrates the lump sum benefit scheme as awarded to surviving spouses in Ontario, with figures adjusted to 1998 levels. This age scale is similar in design to the Ontario periodic pension scheme as illustrated in the chart earlier in this chapter. It begins from a "midpoint" age of 40, varying benefits in equal increments for each year a surviving spouse is older or younger than that age.

Age	Lump Sum
20	\$84,583
30	\$69,444
40	\$56,388
50	\$42,508
60	\$28,194

The commission concluded that the Ontario scheme is sound, but that minor adjustments are necessary to make it more equitable. As noted earlier in connection with the pension scheme, the commission prefers the existing age 50 fixed by British Columbia legislation, rather than the age of 60 employed in Ontario, as the point where the periodic pension is maximized. That same age should be used as the demarcation for minimum lump sum benefits. As with the case of survivors' periodic pensions discussed earlier, an age scale ranging from 20 years to 50 years is appropriate.

The commission believes that an appropriate lump sum for surviving spouses aged 50 years or older at the time of the worker's death is \$45,000. This is roughly comparable to the lump sum currently paid to spouses aged 50 in Ontario. This sum should increase by \$1000 for each year the spouse is younger than age 50, to a maximum of \$75,000. These amounts should be adjusted pursuant to Section 25 of the Act for changes in the consumer price index. It should be noted that while this arrangement provides a somewhat lower maximum lump sum for younger spouses than Ontario, this would be offset by a somewhat higher periodic pension for such spouses under the British Columbia pension scheme.



Therefore, the commission recommends that:

157. the Workers Compensation Act be amended such that:

- a) a surviving spouse receives a lump sum payment equal to \$45,000 for a spouse aged 50 years or older at the time of the worker's death and increased by \$1,000 for each year the spouse is younger than 50 years, to a maximum of \$75,000; and
- b) to require that the lump sum payable be periodically adjusted for changes in the consumer price index (Section 25).



Stacking and Integration of Federal Benefits

As noted earlier in this report, pension benefits paid to surviving spouses and children under subsections 17(3)(a),(b),(c) and (f) are adjusted to take account of federal benefits payable to survivors, so that “*when combined with federal benefits*,” pensions will equal the prescribed percentage of amounts which would have been payable in respect of permanent total disability.

The commission was advised that pursuant to this directive to combine workers’ compensation and federal benefits, the board’s practice is to deduct from surviving spouses’ pensions not only CPP benefits which a spouse receives by virtue of the death of the deceased spouse, but also CPP benefits which the spouse receives as a result of the spouse having retired or reached retirement age.

The commission concluded that whether one adopts a needs-based or loss-based perspective, it makes sense to deduct from the surviving spouse’s pension those CPP amounts which have become payable to the surviving spouse as a result of the worker’s death. Such an adjustment simply takes into account that both the needs of, and losses sustained by, the surviving spouse have been offset by the payment of such CPP benefits. The commission therefore recommends no change with respect to the integration of those benefits with pensions payable under the Act. (Consistent with this, in the chapter *Volume Two, Adequacy of Benefits*, the commission recommended that CPP benefits received by workers as a result of their disability be integrated with workers’ compensation benefits.)

However, a similar justification does not apply with respect to CPP benefits payable to the surviving spouse as a result of the latter’s retirement. These are benefits which have independently accrued to the surviving spouse as a result of his or her own contribution to the Canada Pension Plan. In many cases, these will already have accrued to the survivor at the time of the worker’s death and they have no effect on offsetting either the surviving spouse’s resulting losses or existing needs. The commission therefore recommends that no deduction in respect of such benefits be made from pensions payable under the Act.

The above recommendations will require some additional investigation and adjudication regarding the appropriate adjustments in some cases, as it will not always be immediately apparent which CPP benefits received by a spouse are death benefits and which are retirement benefits. Under the Canada Pension Plan scheme, retirement benefits and spousal death benefits may be combined, but only up to a stipulated amount which cannot exceed the maximum retirement benefit of \$744.79 in 1998. Therefore, while the Canada Pension Plan administration does not notionally divide the blended cheque, the Workers’ Compensation



Board will have to define how much of the cheque is death benefit, and how much is a retirement benefit to which the surviving spouse was entitled irrespective of the worker's death. The fair approach is to continue to integrate only the amount attributable to the death benefit.

Therefore, the commission recommends that:

158. the Workers Compensation Act be amended such that:

- a) Canada Pension Plan periodic benefits which become payable to a dependant as a result of the death of the worker should be integrated with survivor benefits payable under the Act; (Dissent: Commissioner G. Stoney); and
- b) Canada Pension Plan periodic benefits to which a dependant becomes entitled as a result of the dependant's own contribution to the plan not be integrated with survivor benefits payable under the Act.

DISSENT: RECOMMENDATION #158(A)

The proposal to integrate workers' compensation and CPP benefits payable to surviving spouses raised a number of issues dealt with in the dissent following recommendation number 151.

CPP is paid for non-work related disabilities. It is a mandatory and separate scheme operated by the federal government that bears no relationship to the incidence of compensation for work-related injuries or illnesses. Ensuring coverage for work-related injuries and illnesses is a provincial responsibility and it is paid for by employers as part of the cost of production.

Currently a family contributes to CPP through the spouse; this provides a pension in the event that a non-work related disability stops the insured from working. Integrating this pension with compensation payments would transfer some of the costs of the work-related injury or illness to the worker and, following the workers' death, to the family.



Effect of Remarriage or a Common Law Marital Relationship on Benefits

In the following discussion, the commission is using the term “remarriage” to refer to both situations involving formal marriage and those where parties enter into a common law relationship. In recommendation number 56(c)(ii) of the commission’s first phase report, the commission recommended that “spouse” be defined to include a person who has lived with another person in a marriage-like relationship for a period of two years where there are no children or a period of one year where there are children. This is what the commission has in mind with respect to common law relationships for the purposes of this discussion.

As discussed at pages 149 to 150 of the commission’s *October 1997 Report*, the Act previously provided for termination of a surviving spouse’s pension benefits upon remarriage. In 1993, the Act was amended to remove the termination provision and to reinstate benefits for those who had remarried after April 17, 1985, the date on which the Section 15 equality provision of the Charter of Rights came into effect. The British Columbia Supreme Court ruled that this distinction between spouses who remarried before the prescribed date and those who remarried after it resulted in a breach of Section 15 of the Charter by discriminating on the basis of marital status. (*Grigg v. British Columbia* (1995), 138 D.L.R. (4th) 548 (B.C.S.C.)) Following this ruling, the provincial government retroactively reinstated benefits for all surviving spouses, irrespective of the date of remarriage.

Thus, pension benefits for surviving spouses in British Columbia currently continue for life for all spouses, irrespective of whether they remarry.

The commission is mindful of the fact that it is addressing this issue in the face of recent legislative amendments which were based on policy decisions of the government and the litigation process. Notwithstanding the circumstances, the commission is obligated by its terms of reference to deal with the issue of whether benefits should cease upon remarriage.

It is difficult to understand the reversal of the termination upon remarriage provision on the basis of either loss-based or needs-based principles. The Appeal Division of the Workers’ Compensation Board states the issue clearly in Decision 98-0527 (14 W.C.R. 113):

The 1993/94 amendments to Section 19, which provided for the continuation of pension benefits after remarriage (or involvement in a common law relationship), may be reconciled with the original purpose of Sections 17 (3) (c) to (e) (income replacement in light of need), only if one assumes that remarriage (or involvement in a common law relationship) will bring no financial benefits to the surviving spouse.



To recapitulate, the termination of pension benefits upon the spouse's remarriage (or involvement in a common law relationship) was consistent with the notion that the benefits were intended to compensate for loss of income relative to needs, if one assumed that the new relationship would be as beneficial financially as the first relationship. The continuation of pension benefits after remarriage (or involvement in a common law relationship) is consistent with that notion, if one assumes that the new relationship will not be beneficial at all. Both assumptions are problematic in their own way. Both assumptions are inconsistent with how the courts deal with remarriage or involvement in a common law relationship when they assess damages for wrongful death. While the two assumptions are logically symmetrical, the assumption that the new relationship will not be beneficial at all is intuitively less plausible than the assumption that the new relationship would be as beneficial financially as the first relationship.

In the same decision, the Appeal Division recognizes that support provided by a new spouse upon remarriage is a form of income replacement. The panel distinguished between this form of income replacement and other types of income which might arise irrespective of the worker's death and are thus unrelated to the surviving spouse's loss (although they will impact on need):

The question may be raised as to why the [previous] Act included provisions terminating pensions if the surviving spouse formed a new relationship, but not if she found remunerative work or was promoted. The continuation of pension benefits where the surviving spouse finds a job or is promoted is consistent with the notion that the payment of benefits is intended to compensate the surviving spouse for the loss of her partner's income. The surviving spouse may have started working or may have been promoted, even if her partner had not died. Her additional income would not have cut her off from her partner's income. However, the continuation of pension benefits where the surviving spouse finds a job or is promoted is less consistent with the notion that the payment of benefits ought to depend to some extent on the recipient's needs.

A particularly clear illustration of this point arises where a surviving spouse subsequently remarries and the new spouse has the same income and the same legal support obligations and actually makes the same contribution towards the support of the surviving spouse as the deceased worker. In such circumstances,



the surviving spouse's loss of financial support previously provided by the deceased worker has been fully offset. Financial need arising from the loss of support from the deceased worker is similarly offset. Where benefits continue in full following remarriage, this effectively ignores the remarriage's impact on both loss and need.

However, it must be borne in mind that there will also be circumstances where a surviving spouse's remarriage has little or no effect on the needs or losses arising upon the worker's death. For example, the new spouse may not be gainfully employed or may earn considerably less than the deceased worker. Alternatively, a remarriage may not last for a variety of reasons, and the surviving spouse may find himself or herself back in the same position as that faced immediately after the worker's death.

There are two opposing administrative approaches to the issue of remarriage.

1. The board could investigate and adjudicate in each individual case the actual effects of remarriage on the financial circumstances of the surviving spouse of the deceased worker. As those effects might vary over time, it might also be necessary to monitor and review the issue into the future depending on the continuation of the new marriage. Decisions would then be made in each individual case whether to terminate or continue the surviving spouse's pension. Alternatively, decisions might be made to adjust the pension rather than terminate it altogether or continue it in full.
2. Legislation and policy could be developed based on rational presumptions and the underlying principles of the workers' compensation system. The Act has alternated between terminating benefits upon remarriage altogether, and leaving benefits in place in their entirety, notwithstanding remarriage.

The commission has concluded that the first approach is not a viable option. While it might result in lower costs to the system in terms of benefits paid, it would add considerable administrative costs associated with carrying out the necessary adjudication. It is also very much at odds with the basic goals identified at the outset of this chapter regarding the need to avoid undue intrusion into the lives of survivors and inquiry into their financial circumstances. The commission concludes that this issue should be addressed by the application of reasonable presumptions rather than individual adjudication.



The question is then whether the system should return to the prior presumption that remarriage has offset a surviving spouse's loss and/or needs (and thus terminate pension benefits), or instead apply a presumption that there is residual loss or need which has not been offset by remarriage (and thus continue pension benefits). The legislature has opted for the latter course (and, as noted, has made that course retroactive in its application). The commission agrees that this is the preferable approach. There are a number of sound policy reasons for continuing survivor benefits upon remarriage, including the following:

- Remarriage may or may not financially improve the surviving spouse's economic circumstances. A presumption which results in termination of benefits will leave some surviving spouses under-compensated.
- Termination of benefits upon remarriage would require that the system keep track of the status of surviving spouses following the worker's death. A system placing the onus on spouses to report marital status might be of dubious reliability. "Policing" the circumstances of surviving spouses in receipt of pension benefits to determine whether they have remarried (which includes entering into a common law relationship) would be intrusive, as well as costly to the system and difficult to administer.
- If the rationale for termination of benefits is that remarriage results in replacement of financial support, it can be argued that this would only be true as long as the new marriage continues and that benefits should therefore be reinstated should the new marriage end as a result of divorce or death of the new spouse. This would require further tracking of the status of surviving spouses and adjustments and re-adjustments of benefits, again leading to impractical and undesirably intrusive inquiries and increased associated administrative costs.
- The threat of the termination of a pension may deter some surviving spouses from entering into permanent relationships or marriages for fear of the loss of the survivor benefits.

Therefore, the commission recommends that:

159. the Workers Compensation Act be amended such that pension benefits payable to surviving spouses continue regardless of changes in the surviving spouses' marital status, either through lawful marriage or qualifying common-law relationships.

