Worker Employability and Earning Capacity

Introduction

The Commission’s enquiry and research suggest that the highest objective of the workers’ compensation system is the best possible restoration of a worker’s health, employability and earning capacity. These three goals are intertwined, as a person’s physical and mental health are linked to his/her independence, activities, environment, relationships with others, place in the community and meaningful work.

The workers’ compensation system has a historic mandate to measure and justly compensate the losses sustained as a result of workplace injury. As discussed elsewhere in this report, the Commission has concluded that a compensation program should focus on a worker’s lost earning capacity, with ancillary compensation for permanent functional impairment.

A loss of earning capacity is linked to other losses for the worker - a reduction in economic power, sometimes altered life expectations and usually a change in occupation. In a compensation system that insures against such losses, long-term reductions in earning capacity represents an ongoing benefit cost. It is clearly in everyone’s interest to take the best measures feasible to mitigate these losses and reduce these costs, by restoring the worker’s earning capacity.

Coming to this point in the evolution of the British Columbia workers’ compensation system, we have the benefit of the experience of other jurisdictions which have in the past decade tailored their systems to focus on earning capacity compensation and restoration. Both the provinces of Ontario (ref: section 41 of the new Workplace Safety & Insurance Act) and Nova Scotia (sections 89 through 94 of the WCA) have implemented a re-employment program, twinned with a loss of earning capacity compensation system.

The Commission’s research demonstrates:

- a worker’s earning capacity is a function of the worker’s characteristics, mitigation effort and circumstances;

- a prolonged absence from productive employment is often as damaging to the worker’s prospects as the injury itself;

- the best opportunity for restoring earning capacity is to sustain it, specifically by returning the worker to employment with the pre-injury employer;

- the pre-injury employer often has the best information and ability to help the worker re-enter the labour market;
• the pre-injury employer’s incentives can be tailored, through cost methods and statutory obligations, to improve the re-employment rate of injured workers;

• where such re-employment cannot maximize a worker’s earning capacity, other measures should be taken to mitigate the worker’s loss by enhancing his/her employability;

• those measures, which include the services traditionally known as “vocational rehabilitation” should be funded by the Board and should entitle the worker to earn improved levels of compensation while working to enhance his/her employability;

• a worker’s earning capacity is not a function of his or her current earnings, past earnings or future earnings - it is measured by the range of occupations for which that person is qualified and can compete-for; hence the objective of the workers’ compensation system cannot be merely to place a worker in a specific job, but rather to equip that worker to compete in the labour market for the rest of his or her working life.

With the benefit of past experience, both positive and negative, British Columbia is uniquely positioned to tailor its workers’ compensation system to reflect the need for justice and continuing cost balance. That system stands on three pillars: the worker, the employer and the Workers’ Compensation Board.

The best system respects a worker’s independence, dignity and ability - asking that worker to be a full participant in his or her own future, respecting that worker’s reasonable choices and paying that worker for the work done in enhancing his or her own employability. The second key is to place upon the employer a like duty to mitigate the loss of earning capacity through re-employment, accommodation and other measures. Finally, the system must insist-upon superior service from the WCB, providing the direction and resources necessary to enable the Board to make a strong contribution to the process.

These three pillars, the worker, the employer and Board, together share the duty and effort of mitigating the loss of earning capacity through enhancing employability. Success in these efforts rewards the worker with a resumption of the self-sufficient, independent life he or she knew before the accident. By returning that person to the labour market, the system relieves the Accident Fund of greater long-term cost, enabling the Board to help the next worker while keeping employer premiums in reasonable balance.
Recommendation Overview

With all of the above in-mind, the Commission has determined that a six-part program of statutory and other measures would enable the Workers’ Compensation Board to offer improved assistance to the parties in enhancing worker employability and earning capacity.

Those measures are:

1. **re-employment** with the pre-injury employer;

2. **employability assessments**, measuring a worker’s current characteristics, likely employments and potential alternative employments after enhancement services;

3. **employment enhancement service eligibility**, determining the cost-benefit to the worker and the system of services traditionally known as “vocational rehabilitation” so as to help the worker become employable;

4. **earning capacity evaluations**, to gauge the wider range of earnings available to a worker with current or enhanced characteristics, resulting in a general earning ability award;

5. **employability enhancement services**, including the elements traditionally known as “vocational rehabilitation” where cost-effective and necessary to improve the worker’s earning capacity;

6. **participation benefits**, akin to the traditional vocational rehabilitation supplement, payable to a worker in consideration for work done to enhance his or her own employability.

In brief, the Workers’ Compensation Board would be responsible for assessing the medical functionality of any worker absent from work due to work-related injury, and to initiate that no later than 6 weeks post-injury.

Upon evaluating a worker’s functionality, the Board would initiate any program of re-employment possible with the pre-injury employer (as is its current practice) including new statutory provisions mandating the re-hire of workers.

Where such re-employment does not occur and disability persists, the Board would trigger a program of medical evaluation (including a decision on MMI), employability assessment, the need for vocational intervention and estimated earning capacity. The Board would convert the worker’s basic benefit from “temporary benefits” to a “earning capacity award” (reflecting the likely wageloss), and paying to the worker a “participation benefit” in consideration for the worker’s participation in efforts to enhance his or her own employability.
Re-employment

The Commission’s research has explored the mechanisms and results of various efforts to enable injured workers to resume work quickly with the pre-injury employer. The purpose of such programs is to reduce lost time, return the worker to the worksite rapidly, reintegrate the worker with his past productive environment, sustain the worker in that environment for a reasonable length of time and prevent the isolation, idleness and illness-focus sometimes caused by prolonged absences from work.

To these ends, the Commission endorses a re-employment program akin to those developed under the Ontario and Nova Scotia workers’ compensation systems in the past 8 years. Further, the Commission believes that the language and effect of new statutory provisions in the Workers’ Compensation Act should mirror and reflect the development of jurisprudence in the areas of human rights law. Thus, the program would include these elements:

- employers with the resources to re-hire injured employers (those with 20 or more workers) are required to do so, if the worker has at least 1 year’s tenure with that company prior to injury;

- a duty upon the Board to determine within 6 weeks of the original injury (and frequently thereafter if disability is prolonged), the worker’s fitness to work, and to report-upon that determination immediately to both the worker and the employer;

- a worker suffering residual impairment due to the work injury, but medically fit for the bona fide occupational requirements (BFORs) of any available position with the employer, is entitled to the first opportunity to accept such employment from the employer;

- a worker fit for the BFORs of the pre-injury employment is entitled to be re-employed in that position, or one comparable to it, upon notice from the Board;

- in either instance, the worker or Board may initiate the process of seeking re-employment by way of application;

- the employment offered must be sustained for a period of time so as to enable the worker to break the cycle of non-employment: as long as the suitable work is available up to the second anniversary of the injury, or for at least one year where the worker has recovered and resumed the pre-injury job;
that in all cases of re-employment rights, the employer and any participating trade union is obliged to accommodate the work or workplace in respect of the work-related injury so as to enable the worker to perform the BFORs of suitable alternative or pre-injury work;

that an employer be relieved of the obligation to accommodate where such accommodation imposes undue hardship on the employer or trade union, including in the understanding of “undue hardship” costs exceeding penalties for non-compliance, disruptions of the collective agreement, the bumping or layoff of other employees, hazards to the injured worker and others, marked interference with the normal productive activity of the enterprise and other factors;

where a worker has initiated a request for re-employment under these provisions, and is denied the employment due him/her, that worker is entitled to compensation benefits for a period equivalent to the re-employment entitlement if not otherwise in receipt of those benefits;

where a worker has initiated a request for re-employment under these provisions, the worker and employer may resolve the matter privately by agreement, whereby the worker withdraws the initiative and the employer is released from the obligation. In all such instances, however, the Board shall take into account the terms of such agreements in determining the duration and extent of a worker’s entitlement to employability enhancement service;

where an employer fails to accommodate a worker as expected under the law, or fails to re-employ in circumstances where the obligation exists, substantial penalties be levied upon the employer so as to indemnify the Accident Fund for the costs of that failure;

where a worker fails to co-operate-with or participate-in the re-employment process, the Board be entitled to reduce or suspend benefits otherwise payable under the Act.

**Employability Assessments**

Where a worker has a likely permanent impairment past MMI, does not qualify-for, is physically unable to perform, or is denied re-employment with the pre-injury employer that worker is entitled to a comprehensive and early assessment of his/her:

- functional ability, including: extent of residual impairment; prospects for improving the residual impairment; prospects for improving other physical functionality; skills lost to the compensable impairment and methods for retrieving those skills (if any), residual skills;
• immediate employment prospects, based upon current functionality or functionality likely to be achieved within several weeks, taking into account the availability of employment in the worker’s home area by identifying suitable occupations, area employers which employ people in those occupations, known vacancies in those occupations and the worker’s likely competitive standing in his/her area labour market;

• current earning capacity based upon the above considerations;

• potential employment prospects, based upon predicted functionality and achievable improvements in the worker’s employability through training, education, co-op placements, counselling, support services and other “vocational rehabilitation” efforts, the forms of employment in which the worker is likely to be competitive in the labour market, taking into account all of the employment availability issues considered in measuring “immediate employment prospects;”

Employment Enhancement Service Determination

• a Board assessment as to whether employability enhancement services will be a cost-effective means of mitigating the worker’s loss of earning capacity, taking into account the likelihood of the worker securing employment after completing services, the cost of those services (including benefit costs throughout) and the likely cost of benefits absent those services;

• a Board determination on entitlement to employability enhancement services, taking into consideration all of the above along with the reasonable service requests of the worker.

Earning Capacity Determinations / Earning Capacity Award

Examining the broad range of employments currently, or potentially open to the worker based upon the results of the employability assessment:

• the Board estimates current wages associated with suitable occupations in the labour market;
• the Board establishes a “wage range” for the worker, taking into account all those current and potential employments;

• where a worker is considered immediately employable and is not granted employability enhancement services, only the wages associated with currently suitable occupations are taken into account;

• where a worker is granted employability enhancement services, the wages associated with currently suitable and potentially suitable employments are taken into account;

• in all instances, wages taken into account are averaged and the result is used as the worker’s estimated earning capacity;

• the Board pay to the worker, for periods of time subject to review, an award equivalent to 90% of the difference between pre-injury net average earnings and 90% of the net average earnings associated with the worker’s estimated earning ability.

The Commission believes that it is necessary to establish the earning capacity award at the earliest possible time subsequent to MMI, whether based upon current employability or potential employability after employment enhancement services are completed. Timeliness is critical to breaking the historic pattern of prolonged temporary disability, and to turning the focus of the system and parties to the question of ability, rather than restrictions and losses.

Further, the Commission believes that the earning capacity award should be based upon as wide a range of suitable occupations as possible, so as to reflect the reality of people’s lives that they typically seek a variety of possible employments and achieve a variety of possible earning outcomes. By embracing this wide range of occupations in the determination and by using an average of the associated wages to set the worker’s deemed earning ability, the process avoids distortions and inappropriate incentives to minimize earning ability.

Employability Enhancement Services

“Employability enhancement” recognizes that most people can perform gainful, meaningful work that adds value to the employer’s productive operation, provided current skills are honed and necessary new skills are added to the worker’s repertoire. This service also measures the reality of the labour market, acknowledging that an injured worker often returns to the workforce facing unique barriers and problems. As a result, a program which measures and enhances employability must aim to make the worker the most competitive he or she can be in the market.
Unlike the earning capacity award determination, which examined a wide range of possible occupations and wages to gauge the worker’s possible earning ability, this program focuses the worker and the Boards’ resources on preparing the worker to compete as a superior candidate for a limited number of specific occupations. Including, but not limited to the traditional scope of vocational rehabilitation services, employability enhancement seeks first to improve a worker’s current marketable skills, to identify the functional areas where a worker can continue to improve in order to be more employable and develops a complete program for achieving these ends.

In shaping the program and services, the Board must consider how these elements affect a worker’s competitiveness in the labour market:

- The worker’s personal characteristics, including education, age, skills, experience, employment history, personal support systems including family, community, industry connections, etc.

- The occupations in which the worker is most likely to be superior, in terms of performance and appeal to prospective employers;

- The functional and marketability impact of the permanent impairment, recognizing the fact that the employment market sometimes discriminates against people on the basis of handicap;

- The identity, location, size and prospects of the businesses judged to be likely possible employers of the worker upon completion of the program, recognizing that it is insufficient for the Board to declare jobs “available” to the worker simply because those jobs have been or are performed by other persons in the economy generally;

- Incentives available to employers to recruit, train, share the cost of training and maintaining the worker. That said, the Commission is mindful of the cost-inefficient and short-lived results derived merely from subsidizing jobs, and as a result encourages more sustainable programs such as shared training initiatives with guaranteed probationary jobs, funded accommodations and ongoing worker education subsidies so as to get the worker a foothold in the labour market and providing the means to remain “superior” to the competition.

- Viable self-employment opportunities, which in particular can permit a worker to truly forge an independent and sustainable career. Services in this domain can include: market testing of the business, a business plan, limited financing of the business or the planning stage, assistance with obtaining sustainable credit, pairing the worker with a business mentor, providing or helping the worker obtain key support services such as accounting, etc. The Commission supports this form of service to workers, but encourages the parties to make realistic choices and to focus on the patterns of employment which are familiar and more available to the worker, particularly in cases of more experienced workers.
**Participation Benefits**

The worker has a clear duty to him or herself, and the system, to participate genuinely and vigorously in the work of mitigating the loss of earning ability and enhancing employability. To encourage the worker to take-up that work, and to reward that effort the Commission believes that the Board should pay the worker a participation benefit.

Such a benefit, known in many jurisdictions as a “vocational rehabilitation supplement”, would bridge the distance between the worker’s basic earning capacity award and the total compensation possibly available to the worker, 90% of net average earnings (subject to the statutory maximum).

The Commission believes that this form of benefit, characterized as a “payment” in consideration of the worker’s participation and co-operation, is consistent with the notion of a system geared to enhancing employability and respecting the worker’s effort. It is not always an easy thing to move from a previously established employment pattern to a new endeavour which can include evaluations, testing, vocational goals, programs and training. Further, the worker undertakes this in the wake of a disabling injury, which has left permanent functional impairment and the specific medical needs related thereto. The Commission is sensitive to the challenge this presents to many people, and recognizes that for all involved they have not come to this point voluntarily.

At the same time, the Commission recognizes in each injured worker a person who, prior to the injury, successfully obtained and maintained employment. Few, if any, workplace injuries can rob a person of their fundamental character and initiative; hence the need to respect each worker’s ability to meet the challenge of medical and vocational rehabilitation, and to participate actively in any employability enhancement services useful to improve his or her earning capacity.

**Participation benefits - eligibility and limitations**

Participation benefits, mirroring the traditional vocational rehabilitation supplement, should be paid to the worker at the same frequency as the earning capacity award. The PB should be treated by all concerned as a wage, and the terms of the employment earning this wage should be spelled-out in an agreement between the worker and Board, including wherever possible the input of the pre-injury employer, articulating the occupational goals.
The duration of the benefit should reflect the projected duration of the program, and the Board has a duty to the worker at the outset to state that when the program is completed the PB will come to an end. The Commission notes the powerful evidence of how prolonged, subsidized periods of low activity and absence from the labour market sap the confidence, erode the skills and diminish the marketability of workers; to this end, the Commission strongly recommends that any employability enhancement program be time-limited.

To this end, the Commission recommends that while an employability enhancement program may be scheduled to take any period of time necessary to achieve its ends (for example, a three year college program), the full-time wage supplement portion of the participation benefit be limited to a single person lifetime maximum of 24 months. For programs exceeding that duration, all other program costs would continue to be supported by the Board but the worker would not receive the “top up” benefit supplementing the earning capacity award. This limitation signals the fundamental precept that the system is prepared to respect and remunerate a worker’s investment of effort in the program, but that the worker assumes increasing responsibility for his or her own well-being while involved in the program.

**Part-time participation benefits while employed**

The historic problem of participation benefits is that they can provide workers a dis-incentive to take jobs, and that is understandable given that the worker is asked to exchange a known and secure benefit for an unknown and sometimes uncertain employment future. To alter these incentives, the Commission believes that a feasible system of “part-time” participation benefits could enable a worker to accept the risk of resuming employment, or ease the worker’s transition to unemployed competition in the labour market.

Such “part-time” participation benefits could include a “part-time wage” associated with certain of those activities, paying to the worker a pro-rated income supplement for a sharply defined and limited period of months subsequent to completing the full-time portion of the employability enhancement program. To increase the incentive value of this benefit, the Commission believes it should be paid only to those persons who secure employment. The part-time benefit should also be capped, to an amount no greater than the worker’s basic earning capacity award and should not be paid to persons who have exhausted the 2 year lifetime full-time PB entitlement.
**Post-program assistance**

Subsequent to completing a full-time program, the Commission considers it valuable to assist a worker in continuing his or her employability enhancement effort, through such means as:

- on-going payment for school courses and other forms of training continued by the worker subsequent to completing the full-time portion of the employability enhancement program;

- on-going services from placement agencies and other resources to assist the worker now competing in the labour market;

- follow-up programs to interview the worker, provide counselling and assist the worker in steering his or her career (available to working or unemployed persons).