Royal Commission on Workers’ Compensation in BC

Compensation Services (Part 2)

Final Report

December 31, 1998

by

Victoria Macfarlane
TABLE OF CONTENTS

Executive Summary .................................................................................................................. 3
Main Report .............................................................................................................................. 7
1.0 Adequacy .......................................................................................................................... 7
  1.1 Introduction ..................................................................................................................... 8
  1.2 Overview of the Process and the Issues ................................................................. 13
  1.4 Eligibility: Coverage Issues and Disallowed Claims .................................. 19
  1.5 Immediate Wage-Loss Benefits .............................................................................. 24
  1.6 Average Earnings Established at 8 Weeks .......................................................... 33
  1.7 Pensions ....................................................................................................................... 39
  1.8 Survivor Benefits ......................................................................................................... 46
  1.9 Process Issues: Income Continuity and Termination of Benefits ............... 48
2.0 Equity ............................................................................................................................... 55
  2.1 Overview of the Process and the Issues ................................................................. 56
  2.2 Eligibility ....................................................................................................................... 58
  2.3 Immediate Wage Loss Benefits and Average Earnings ..................................... 61
  2.4 Pensions ....................................................................................................................... 62
  2.5 Personal Characteristics Affecting Benefit Levels ........................................... 66
3.0 Consistency ......................................................................................................................... 69
  Summary of Issues ............................................................................................................... 69
4.0 Effectiveness ......................................................................................................................... 72
  Summary of Issues ............................................................................................................... 72
4.1 Overview of Issues ........................................................................................................... 73
  4.2 Performance Indicators .............................................................................................. 74
  4.3 Client Satisfaction ......................................................................................................... 77
  4.4 Number of Appeals ...................................................................................................... 77
  4.5 Process Issues .............................................................................................................. 81
5.0 Efficiency ........................................................................................................................... 82
  Summary of Issues ............................................................................................................... 82
  5.1 Overview of Issues and Cost Containment Strategies .................................. 82
  5.2 Potential Unintended Impacts of Cost-Containment Strategies ................... 87
  5.3 Ongoing Issues with Respect to Efficiency ......................................................... 88
6.0 Accountability ....................................................................................................................... 90
Executive Summary

This phase of the Compensation Services project examined six major issues, as follows:

1. Adequacy
2. Equity
3. Consistency
4. Efficiency
5. Effectiveness
6. Accountability

This report is the second part of a three-part series of reports for the Royal Commission on Compensation Services and benefits. The first part provides a program overview, and the third part summarizes findings according to the twelve attributes of effectiveness developed by the Canadian Comprehensive Auditing Foundation.

Benefit Adequacy and Equity

Unlike most other Canadian jurisdictions, BC continues to provide workers compensation benefits on the basis of gross earnings rather than net earnings. If “adequate compensation” is defined as income equal to, or within 10% less than, take-home pay, this universal application of 75% gross results in some over-compensation.

Other Board policies and practices may result, however, in benefits that fall short of this 75% gross figure. As proposed elsewhere\(^1\), major disabilities may be more often undercompensated and minor disabilities overcompensated.

Where “overcompensation” may occur is in those cases where, because the benefits are based on gross rather than net income, workers have higher income and fewer dependants, placing them in tax brackets that normally result in deductions in excess of the 25% deduction universally imposed by workers compensation. The statutory

---

maximum results in undercompensation for workers at the highest income levels relative to workers at lower income levels.

For a substantial proportion of workers who remain on wage-loss for 8 weeks (about 40%, according to a Board Discussion Paper, or between 27% to 29%, based on data provided to the Royal Commission), the 8-week review of average earnings results in a reduction of temporary disability benefits. The principles, and resulting decision-making processes, underlying the calculation of average earnings may account for this effect. The extent to which these principles continue to be valid may need to be examined.

There is no compensation for non-economic loss within the BC workers’ compensation system, as there is in tort systems, and in some workers compensation systems. The extent to which the coverage provided for economic loss sufficiently compensates the worker who has endured a serious injury is questionable.

Functional pensions provide only a very narrow range of benefits; the majority (86.8%) of functional awards are based on a calculated disability of less than 10%, and fully one-third of all functional awards are at 2% or lower. Functional pensions are calculated on the basis of percent disability multiplied by earnings at the time of injury; LOE pensions are calculated on the basis of an actual or anticipated loss of earnings. Only about 13% of pensions are calculated on a basis other than functional disability – namely loss of earnings. Taken together, these LOEs, and the Functionals above 10%, are awarded to less than 1% of the 200,000 workers who file Workers’ compensation claims annually.

Legislation with respect to occupational diseases is more restrictive than legislation with respect to occupational injuries, particularly with respect to pensions where there is no “economic loss”.

The system for calculating benefits is complicated, and variations in benefit levels can occur as a result of age, number of dependents, marital status, and various other personal characteristics. Furthermore, some policies are extremely discretionary; determinations of eligibility and entitlement under these conditions could be subject to considerable variability.
The Board’s understanding of the adequacy of its benefits could be enhanced by a process whereby claimants and their conditions, including medical, economic, and social/psychological, were followed beyond the closure of the claim.

**Board Processes: Consistency, Effectiveness, Efficiency and Accountability**

Workers and employers complain of inconsistent decision-making with respect to claims adjudication, termination of benefits, and pension awards. Board statistics on disallow rates by region suggest that significant regional differences occur in the adjudication of complex claims and claims for occupational diseases. The Board has implemented a number of procedures recently in order to monitor consistency.

The Rehabilitation and Compensation Services Division has implemented a number of strategies to reduce costs and improve service delivery. The focus of the new strategies are on cost-containment and improved service delivery. Fundamental questions on benefit adequacy and equity, that continue create controversy and appeals, have not been resolved.

The Rehabilitation and Compensation Services Division is not collecting and analysing sufficient information upon which to assess effectiveness and determine strategic directions. For example, it would be useful for the Board to collect and analyse:

- basic information on claimant characteristics, including occupation, type of work (full-time, part-time, casual or seasonal), and work experience prior to injury
- for eligibility decisions, allow and disallow rates by the type of injury/disease; claims investigated for fraudulent activity, nature of fraudulent activity, and outcomes of investigations
- for wage-loss benefit decisions, extent to which workers’ STD benefits are terminated on the basis of actual return-to-work versus deemed return-to-work; nature of/reasons for re-openings
• for income continuity, extent to which eligible workers receive continuous benefits from time of injury through to first pension payment
• for pension decisions, extent to which long-term earnings loss decisions accurately reflect actual loss in the future; distribution of pension decisions for workers varying by nature of injury and personal characteristics
• for overall monitoring, number of, and reasons for, requests for Manager Reviews of adjudicator decisions, and outcomes of these decisions; analysis of appeal decisions with respect to specific decisions, including eligibility, wage rate calculations, termination of benefits and pension calculations (for example, issues related to legislation, policy, or procedure)

Dissatisfaction with the Board appears to be highest for those with complex claims. It is those with complex claims who will be most affected by benefit limitations (i.e., more likely to be off work for longer periods, and require rehabilitation and pension assessments). Complex claims are also more difficult to adjudicate and are subject to a higher rate of disallow decisions on adjudication than are simple claims.
Main Report

1.0 Adequacy

Summary of Issues

- unlike most other Canadian jurisdictions, BC continues to provide workers compensation benefits on the basis of gross earnings rather than net earnings.
- under the present system, some workers may be overcompensated (e.g., earning more than 100% of take-home pay in short-term disability benefits) whereas others may be undercompensated (earning less than 75% gross through combined income and pensions because they are deemed capable of working at a higher income); in fact, with this definition, a worker may be both over-compensated and under-compensated over the course of their claim.
- workers with the most serious injuries, who are on wage-loss payments for more than 8 weeks and who eventually assessed for pension awards, may be more likely to be undercompensated than those who are off work for a few days or weeks.
- there is no compensation for non-economic loss in workers’ compensation in BC; decisions based on economic loss exclusively may result in some undercompensation.
- the Board’s understanding of the adequacy of its benefits could be enhanced by a process whereby claimants and their conditions, including medical, economic, and social/psychological, were followed beyond the closure of the claim.
1.1 Introduction

*Underlying Principles*

Decisions about adequacy must start first with a recognition and endorsement of the basic principles that are expected to underlie workers’ compensation.

In BC, workers’ compensation is meant to cover economic loss. Furthermore, coverage for economic loss is expected to approximate, but not necessarily fully compensate for, actual loss. These principles are implied throughout the Act and throughout the Rehabilitation Services and Claims Manual (RSCM). Apart from associated health care costs and rehabilitation, there is no explicit recognition of a responsibility to compensate for other kinds of costs.

In cases of short-term disability where the worker fully recovers from his/her injury and returns to work after a few days or weeks, economic loss may be the only significant loss experienced. In cases of long-term disability, loss may include loss of enjoyment of life, ongoing pain and suffering, and other non-economic factors. If adequacy is defined in terms of compensation for economic loss, one set of conclusions about adequacy might be drawn. If adequacy is defined in terms of compensation for loss more broadly, another set of conclusions might be drawn.

The Board, in its briefing papers to the Royal Commission, often begins its discussion of issues regarding compensation with a discussion of “general principles”, as follows:

**Briefing Paper: Permanent Disability Pensions:**

The consequences of a permanent disability may be divided into three types:

- monetary loss caused by a loss of ability to work,
- monetary loss unrelated to the ability to earn, for example, medical or rehabilitation expenses or increased expenses around the home or in recreation, and
non-monetary effects such as pain and suffering and loss of enjoyment and expectation of life

The Board covers monetary losses from loss of ability to work through permanent disability awards under sections 22 and 23.

Compensation is paid for increased expenses caused by a permanent disability but not through the pension system. The Board pays the bills direct, reimburses the worker or makes special payments such as clothing and independence and home maintenance allowances.

The Board does not pay compensation for non-monetary losses.

Briefing Paper: Compensation and the Death of a Worker (p.6 of 11)

Where death results from an injury or disease, the consequences may be divided into three main categories:

- non-monetary affects such as the distress and suffering over the loss of a spouse, parent, etc.
- changes in expenses arising out of the death
- loss of present or future financial support from the deceased

The Act does not specifically provide compensation for non-monetary losses. The lump sum that is paid to all dependent spouses under section 17 (13) is likely too small to be seen in this light. …Section 16 (3) of the B.C. Act allows the Board to provide counselling to dependants.

Some increased expenses are covered through section 17 (2) which provides for the payment of expenses related to transporting the body, funeral and incidental expenses up to fixed amounts set out in the section. In addition, the lump sum under section 17 (13) is likely intended to cover immediate expenses arising after the death. On the other hand, the fact that survivors mostly receive only a percentage of the permanent total disability award that would have been paid to
the deceased may in part be to recognize that expenses previously incurred for the deceased’s personal needs will no longer be required.

The Act now compensates for loss of financial support by, for the most part, providing periodical payments that are related to the deceased’s earnings.

It is not clear that the Board and appellate bodies have settled on these basic principles however. The “economic test” is clear with respect to occupational diseases, which can only result in pensions where there is an economic loss; it is less clear with respect to occupational injuries. Certain decisions may reflect a desire to compensate for more than monetary losses. For example, the Board’s Briefing Paper entitled Permanent Disability Pensions states that:

Section 23 (3) awards are intended to remedy the situation where the section 23 (1) award is less than the worker’s actual loss. Where the section 23 (1) award is greater than the actual loss, the award may be perceived as compensating for the non-monetary effects of the permanent disability. There are, however, difficulties in rationalizing section 23 (1) awards in this way:

- workers receiving section 23 (3) awards will receive no such compensation for non-monetary effects; and
- workers with the same physical disability will receive different amounts because of different earnings, even though earnings levels appear to have no relevance to non-monetary effects

The Briefing Paper notes that since about 1980, most other provinces have changed their pension systems so that they provide two separate types of awards: a lump sum specifically for non-monetary effects, and a pension if an actual loss occurs.

Other implicit assumptions, for example, about “need” also appear to be considered in some calculations. In the Board’s Briefing Paper entitled Compensation and the Death of a Worker, it is noted that a major assumption in the Act appears to be that “spouses with children, disabled and older spouses are less adaptable, and lose more from a death than younger, non-disabled spouses without children, and should therefore have
greater entitlement to compensation.” On the other hand, distinctions on the basis of age have been ruled by the Appeal Division to be in violation of the *Charter of Rights and Freedoms*, which should perhaps be considered a basic framework of principles within which all other principles must reside.

**Multiple Aspects of Adequacy**

The 1996 Administrative Inventory entitled *The Workers’ Compensation System of British Columbia: Still in Transition*² points out that this area needs more attention than it has received to date (p.258):

There has been no general review of the adequacy and equity of the workers’ compensation benefit structure in British Columbia. Maximum benefits are among the best in North America, and this is a record to be proud of. But no one knows how injured workers at different earning levels and in varying family situations are faring. Since most other Canadian jurisdictions have gone to net earnings replacement formulas for basic income maintenance benefits, it seems important to review this policy area. The issue of benefit coordination or “stacking” is also relevant here. A simple comparison of how injured workers in various situations are compensated, particularly as compared to other Canadian jurisdictions, might be very enlightening. A generous maximum benefit is not enough, benefits should be both equitable and efficient across the entire injured worker population.

The “adequacy” of workers’ compensation benefits is a not a singular concept. Whether or not the benefits are adequate may be a function of:

- the nature of the work-related injury or disease (i.e., it may be more difficult to receive compensation for some work-related disorders, in part because determining causality is more difficult for these than for others)
- the duration of the injury or disease (i.e., benefits tend to be higher for the first few weeks of wage loss than for long-term loss)

---

• the severity of the injury and resulting loss (i.e., economic loss is covered, but non-economic loss, including pain and suffering and loss of enjoyment of life, is not covered)
• various personal characteristics (for example, workers earning at the maximum wage rate with no dependants receive a higher percentage of their pre-injury income than those who are at lower income levels and have several dependants; potential income growth over time, and work beyond retirement, may or may not figure in the calculations)  (Note: This issue will be discussed further in the section on Equity)

Additionally, while the overall “level” of the benefit may be adequate, the process whereby the recipient receives the benefit, may be inadequate. This can include, for example, delays in adjudication, discontinuity of benefits (for example, periods of no compensation from the time wage-loss is terminated to the time pensions are calculated), the lengthy appeal process, and so on.

The Board’s Briefing Paper entitled Compensation Rate also discusses the multiple factors that must go into a consideration of the adequacy of a compensation rate:

It is difficult to determine an adequate compensation rate in isolation from other structural factors such as maximum average earnings, minimum compensation, how average earnings are calculated, how fringe benefits are dealt with, whether there is a stacking or integration from other sources, including Canada Pension Plan and employer top-ups, whether there is a waiting period for payment of compensation and so forth. All these factors determine how much compensation a worker receives.

Types of Decisions

Finally, in discussing adequacy, it is necessary to consider the specific benefits that are made available under Workers Compensation in BC and the decisions that are made with respect to these benefits. The focus here will be on:

• eligibility
• immediate wage-loss benefits
• average earnings established at 8 weeks
• pension awards, including functional pension awards and loss-of-earnings awards
• survivor benefits

Issues with respect to other services and expenditures covered, including health care benefits, vocational rehabilitation, and medical rehabilitation, are not addressed. Provisions for these benefits are discussed in other Royal Commission reports.

Prior to discussing these specific types of benefits, an overview of the process for calculating benefits will be presented. Next, a discussion of benefits under other compensation schemes is provided. Benefits under other Workers Compensation schemes in other jurisdictions have been examined in a separate Royal Commission report\(^3\).

1.2 Overview of the Process and the Issues

When a worker makes a claim, and the claim is accepted, he/she may receive temporary wage-loss benefits according to the Rehabilitation Services and Claims Manual Section 34.00. These benefits amount to 75% of the worker’s gross earnings at the time of injury.

Workers who are off work for 8 weeks or less, and whose wage loss benefits are at 75% of what they were earning at the time of injury, and 75% of what they were expecting to earn over the next eight weeks, are probably for the most part, from this perspective, adequately compensated. This assumes, of course, that these benefits last until the worker is back at work, and that the additional medical and rehabilitation costs incurred as a result of the injury are covered. There is a potential for “overcompensation” at this stage, in that some workers will receive more than 100% of their net pay through workers’ compensation.
It is when benefits are determined for average earnings, and for pensions, where questions of adequacy start to become more apparent. When the initial wage rate is reviewed at eight weeks to establish average earnings, a substantial number of workers receive reduced benefit payments as a result of this review. There are a number of issues with respect to the way average earnings are calculated that account for this reduction.

There have also been concerns expressed about the adequacy of pensions. Pensions, like other benefits, are also based on economic loss exclusively. Consequently, a worker who suffers an occupational disease but who has no apparent economic loss that results from the disease, receives no compensation, even though he/she may be experiencing considerable discomfort and loss of enjoyment of life as a result of the disease.

Furthermore, the range of pensions provided appears to be extremely narrow in practice. For example, the Board has presented the Royal Commission with information to show that, over the past ten years, the majority of functional awards (86.8%) are based on a calculated disability of 10% or less, and fully one-third of all functional awards are at 2% or lower\(^4\). Only 4% of functional awards are above 20%. Based on additional data provided by the Rehabilitation and Compensation Services Division to the Royal Commission\(^5\) for 1997, about 13% of pensions are calculated on a basis other than functional disability – namely loss of earnings. Taken together, these LOEs (698 in 1997), and Functionals above 20% (192 in 1997), are awarded to less than 1% (890 of approximately 200,000 workers) who report their injuries to the WCB each year (or with 698 LOE’s and 710 Functionals greater than 10%, for a total of 1,408)\(^6\).

---


1.3 Coverage Under Other Schemes

In his review of Workers Compensation Ontario, Weiler (1980)\(^7\) points out that workers’ compensation occupies an intermediate position between tort liability and social welfare. He discusses the historic compromise, and argues that the fact that workers have given up their rights to court action entitles them to full compensation for the losses they suffer due occupational injuries (p.14-15):

Since this is the bargain which has been struck, then the workers’ compensation beneficiary must be viewed in quite a different fashion than a claimant for unemployment insurance or social assistance, who must appeal to the generosity of the community conscience. An injured worker does not enjoy his form of compensation as a matter of grace. He has been required to give up a common-law right of action enjoyed by everyone else. That right would now be worth a great deal. In return he must be considered entitled to full enjoyment of the statutory right he was promised in exchange. There still remains in workers’ compensation considerable dilution in the degree of income maintenance afforded disabled workers. My inquiry about the validity of such limitations begins with a strong principal (sic) of full redress for such income losses, a principle which should be overridden only for cogent and compelling reasons.

In Canada, there is a complex array of social assistance and disability plans that provide different levels of benefits to individuals who, for various reasons, are unable to work. What is most striking about this array of benefits is that the level of benefits is not necessarily affected by the amount of financial loss or the degree of need, but rather, by the cause of the injury. Furthermore, the variation in the amount of financial assistance or compensation, based on cause, is dramatic.

If the worker has a severe long-term disability as a result of an injury at home, and if he or she has a history of contributions to CPP, he or she is entitled to CPP benefits. If he

---


or she has elected to purchase private disability insurance (or, if this type of insurance is provided by his/her employer as part of the benefit plan at work), CPP can be topped up by these benefits for long-term disabilities, or can be a source of financial support for a short-term disability. In BC, if a person is injured in an automobile accident, he or she can collect benefits from the Insurance Corporation of BC. If he or she is injured in a criminal situation, he or she is entitled to pursue compensation through the courts. If he or she is injured at work, workers’ compensation is available. If the individual is temporarily unemployed due to an injury or otherwise, he/she may be entitled to unemployment insurance or welfare.

Apart from the clear inequity that results from this system – for example, a system which can leave a totally disabled adult who normally earned $55,000 annually and who is injured in a fall at home living on $10,597.20 (based on the 1997 maximum monthly CPP disability benefit of $883.10\(^8\)), as compared with a totally disabled adult who normally earned $55,000 annually and who is injured in a fall at work living on $41,250.00 (based on 75% of gross earnings under workers’ compensation) -- this kind of a system can have a number of other perverse, unintended impacts. Some individuals who are aware of the dramatic differences in levels of compensation may try to claim a different cause for their injury than was actually the case. Other individuals who have legitimate claims based on cause, and who represent the majority, must struggle to prove the legitimacy of their cases, enduring policy and procedure established for the minority. Payers, such as employers, may try to argue that the injuries claimed by their workers were due to different, non-work causes in order to avoid costs. Agencies must set up complex procedures in order to assess cause in order to make decisions on eligibility, and costly appeal structures must be set up to provide options for reviews of these kinds of decisions. Individuals’ circumstances become defined in terms of partial causes – for example, part of the disablement may be seen as work-related and compensable by workers’ compensation, while part may be seen as a “pre-existing condition” that is not compensable. Costs for injuries become scattered across the array of compensation and assistance systems – with, for example, the publicly-subsidized medical system.

\(^8\) WCB of BC. Briefing Paper. *Benefit Stacking and Integration*. This briefing paper notes that the maximum monthly CPP disability benefit in 1997 was $883.10, consisting of a flat rate of $330.49 and a maximum of $552.61 earnings component. A disabled contributor’s child benefit of $166.63 for each child may also be payable.
picking up costs for treatments rejected by the workers’ compensation system. Some costs are borne by injured and disabled individuals themselves.

The fact that “cause” figures so prominently in decisions regarding compensation is particularly an issue when it comes to strains that may have developed over time, or that may have occurred suddenly because of a complex mix of factors. For example, an older worker, who is overweight and in poor physical condition, may be more likely to suffer an injury as a result of usual or unusual work activities than would be a younger, more fit worker. The older worker may have a mix of incidents both on and off the job that exacerbated his/her condition. Consequently, the older worker may be less likely to obtain a finding of work-relatedness.

Others have argued for an integrated system that removes cause from the criteria for eligibility. One of the benefits of providing equal compensation regardless of cause is a reduction in adjudication and appeals costs to agencies such as the WCB and ICBC which must determine cause. Costs to this approach include redistribution of funding, so that the costs to the public may increase to bring benefits more in line with those under different systems, and the costs incurred to determine how the funding would be proportionately distributed.

Financial coverage under social assistance and disability insurance plans must be considered in terms of (1) the maximum dollars involved and (2) the length of time these dollars are paid.

It might be argued that, ideally, social assistance and disability insurance plans would compensate fully the economic loss that an individual has experienced. It might also be argued that additionally, in a case of a disabling injury or disease, these plans should compensate for other non-economic losses, such as loss of enjoyment of life, pain and suffering.

Decisions regarding adequate and fair compensation, however, must also take into account the availability of funds. If welfare and unemployment insurance programs

---

attempted to provide ongoing income support at 100% the income level of the recipient prior to going on these plans, or even at some average income level, this would likely create a severe financial burden on those who fund the system. This would be even more true if the funding was unlimited – for the lifetime of the individual.

Private disability insurance plans often provide the individual with choice – cadillac plans with higher monthly premiums but higher payouts in the case of injury or illness versus basic plans. Indeed, in Workers Compensation, one of the assumptions behind the “maximum wage rate” is that people at higher income levels will top up their options with these private benefit plans.

Proponents of higher benefits under Workers Compensation would argue that employers are obligated to fully compensate workers, that these are the costs they have agreed to bear in lieu of more expensive litigation costs, and that comparisons with other types of social assistance programs are inappropriate. This argument deals with the obligation and responsibility of the payer, and effectively removes government-funded systems from the realm of appropriate comparison programs.

Weiler (1980)\textsuperscript{10} discusses the issue of cost-containment as follows (p.15-16):

> The typical argument advanced …in favour of restricting the generosity of workers’ compensation benefits, is one of cost. We are told that we simply can’t afford full compensation of disabled workers because the bill will be too high. …(However) In the final analysis, society can and does “afford” all the cost of industrial accidents. …It is illegitimate in principle to argue that the Workers’ Compensation Board must tighten up on claims and cut back on benefits because its total budget is growing too large, too fast, for the economy to afford. This should be unthinkable as would be a suggestion to the Chief Justice that the number and level of tort awards be restrained by his judges because insurance premiums are getting too high. In both cases, the same answer is appropriate: the only proper means of containing the bill for accident losses is to reduce the number of accidents themselves.

Furthermore, on the issue of who pays for Workers Compensation, Weiler (1980) argues, as do many economists, that (p.17-18):

True, it is the employers who are the immediate targets of WCB assessments. They must find the money to pay this bill. However, the employers pass the bulk of these expenditures on to others. ...Ultimately the incidence of workers’ compensation assessments must be distributed across three groups: the shareholders, the customers, and the employees of the enterprise. ...In the final analysis I believe that compensation benefits are paid for not by capital but primarily by labour: both as consumers of higher-priced goods and as wage earners in a competitive world. ...Richer benefits should not be advocated as a device through which workers as a class extract a larger slice of the national income pie from capitalists as a class. Rather, workers’ compensation is a vehicle through which able-bodied workers share their income with their disabled fellows.

1.4 Eligibility: Coverage Issues and Disallowed Claims

As discussed in Part 1, the Board’s rate of disallowed claims appears to be quite low, generally around 5%. The disallow rate had begun to increase in recent years, but appeared to have started to drop toward more average levels in 1997.11 Disallowed claims and issues around compensable injuries are the number one source of appeals by workers and employers. In his presentation to the Royal Commission in April, 1997, the Vice-President of Rehabilitation and Compensation Services stated that:

One of the things we keep a very close eye on is disallowed and rejected claims. ...the disallowed claims, which clearly we do the investigation on and decide that for whatever reason, they are not injuries arising out of or in the course of employment. ...So the disallow rate has risen from about 3 ½ to 3 ¾ per cent to 5 per cent and has bent over slightly, but we’re still in the 4 ¾ to 5 percent range.

We have done a number of studies on that particular issue, and one of the things that comes through when we look at the makeup of claims today versus several years ago is we’re seeing many repetitive strain type injuries, we’re seeing an increase in the chronic stress claims that are filed, which currently by policy we do not accept. We’re seeing fibromyalgias, chronic fatigue syndromes, those kinds of claims that are very difficult to adjudicate based purely on medical science.

One of the problems with cause-based schemes is that there may be greater scrutiny of certain types of claims – in particular, those where complaints are more “subjective” than objective and where there is limited scientific understanding of the disorder (for example, claims involving chronic pain, back strains, or psychological stress). While these kinds of claims may be more easily falsified than claims where there is clear, objective evidence of an injury (for example, amputations), the claimant likely is already suffering from lack of understanding, inability for traditional medical science to effect a cure, and so on, so that increased scrutiny may be particularly troublesome. One of the complaints of labour representatives has been that the Board does not provide sufficient compensation for occupational cancers. Similarly, there have been complaints that injuries that tend to manifest more as subjective complaints than objective symptoms, such as strains, are less likely to be accepted than are claims with an obvious causal link between incident and injury.

The Royal Commission asked the Board to provide the number of disallowed claims by type of injury, but was informed that this information is unavailable\(^\text{12}\). Nevertheless, there appears to be some information available on disallow rates for ASTD (Activity Related Soft Tissue Disorder) claims and on claims varying in complexity. For example, the Compensation Employees Union, in their January, 1998 submission to the Royal Commission, pointed out that statistical data on the handling of ASTD claims in various SDLs revealed variation in disallow rates for these types of claims ranging from 4.4% up

to 59.5%. These figures were consistent with figures provided by the Board to the Royal Commission\textsuperscript{13}.

Also, as discussed below, the Compensation Services monthly performance reports (Executive Summary, December, 1997) provide reject and disallow rates by region for claims overall, and by claim type (Z, B, C, Y, others). Claims classified as “Z” and “B” are the simplest claims. “C” claims are the more complex claims, and “Y” claims are claims for ASTD’s. The disallow rates for Z and B claims, those that are relatively straightforward claims, are very low, ranging from 0% to 1.8%. The more complex C and Y claims show much higher rates of disallow, with overall rates of 21.9% and 32.2% for C and Y claims, respectively. The disallow rates to November 1997 for C claims ranged from a low of 16.2% to a high of 46.9%, depending on the Area Office or SDL.

The 1966 Tysoe Commission report noted that: “the problem cases, of which the back cases form the greatest number, will still remain cases of some difficulty. The test applicable to them will be the same as it has always been – namely, that of work connection.” In unclear cases, such as back injuries, the Board may look for a single event that caused the injury. Allegedly, a claim may be denied if there is ongoing strain but no single isolated event that can be labeled as precipitating the injury. Yet, as pointed out in the Appeal Division report entitled \textit{Psychological Disabilities and Workplace Stress} (November 25, 1993) (p.275):

\begin{quote}
...the legislation does not distinguish between injuries that result from a relatively sudden trauma and injuries that develop gradually over time. Hence, there is no difference between a back injury resulting from a single lifting accident and a back injury occurring as a result of the cumulative effect of work activities. By the same token, there is no difference between a delusional disorder associated with one shocking incident and a gradually developing delusional disorder.
\end{quote}

Rehabilitation Services and Claims Manual Policy #14.20, Occurrence or Non-Occurrence of a Specific Incident, states that (p.3-5, 3-6):

Where an injury occurs at work as a result of any traumatic experience or external cause, it is usually from an accident to which the presumption in Section 5 (4) applies.

...Where there is no "accident", there is no presumption under Section 5 (4) and the evidence must support a conclusion that the injury arose out of the employment as well as a conclusion that it arose in the course of the employment.

It is not a bar to compensation when an injury occurs over a period of time rather than resulting from a specific incident. To be compensable, however, the evidence must warrant a conclusion that there was something in the employment that had causative significance in producing the injury. A speculative possibility that this might be so is not enough.

Work-related psychological stress claims may be similarly problematic, and the issue of single-event induced versus gradual onset is considered for these types of claims. As noted in a discussion paper produced by the Appeal Division entitled Psychological Disabilities and Workplace Stress (November 25, 1993) (p.268):

...the existence of an objective, work-connected trauma provides an intuitive guarantee that some alleged psychological impairment is employment-related. This has been referred to in a leading U.S. case in the following terms:

The danger of illusionary and fictional claims is as real and present in workers’ compensation as it is in the law of torts. Where a mental injury occurs rapidly and can be readily traced to a specific event, as in McLaren [McLaren v. Webber Hospital Association, Me., 386 A. 2d. 734 (1978)], there is a sufficient badge of reliability to assuage the Court’s apprehension. Where however, a mental illness develops gradually and is limited to no particular incident, the risk of groundless claims looms large indeed. Townsend v. Maine Bureau of Public Safety, 404 Atlantic Reporter, 2d series, 1014 (1979).
Issues of cause are also paramount when it comes to occupational disease. The rates of certain types of occupational disease accepted by workers’ compensation lag far behind the rates of these diseases in the general population. For example, in its February 2, 1998 submission to the Royal Commission, the BC Federation of Labour stated that (p.15):

Currently occupational cancers are significantly undercompensated. A very conservative estimate is that 10 percent of cancers are related to work, but few are recognized and compensated. In 1995, the Board accepted 15 cancers as work-related, with all but one as a result of asbestos exposure. We understand that there are approximately 14,000 new cancers of all kinds reported each year in BC. A gross calculation indicates that the Board is recognizing well below 1 percent of cancers as work-related, perhaps less than one-tenth of 1 percent.

Similarly, Herrington and Morse (1995)\textsuperscript{14} state that a number of studies have shown that a majority of workers with impairment from occupational diseases, such as pneumoconiosis, never receive workers’ compensation benefits (p.9):

In general, workers’ compensation data tend to underestimate the occurrence of occupational disorders. However, the degree of underreporting varies among conditions. For specific injuries (e.g., fractures and lacerations), the correlation between reported workers’ compensation claims and the true incidence of the injuries may be relatively good. However, with cumulative trauma and occupational disease the reported frequencies may bear little relationship to true incidence and prevalence. There are many reasons for this, including the following:

1. Long latency from exposure to clinical manifestations
2. Underdiagnosis by physicians
3. Difficulty in separating occupational factors from life-style stresses and aging
4. Compensability defined by statutes that may have little or no scientific basis

It is often argued that the health care system is having to absorb the costs that should be borne by workers’ compensation. Certainly the disallow rate for occupational diseases far exceeds the disallow rate for claims overall; as indicated above, it appears that about one in three claims for occupational diseases are disallowed. Perhaps by monitoring the incidence rates in the general population, and determining which proportion of these have been found in research to be partially or totally work-related, the Board could assess the extent to which it is making appropriate entitlement decisions with respect to occupational diseases. It their submission, the BC Federation of Labour recommended funding an independent study to determine the extent of occupational cancer in BC, and to identify circumstances where these should be compensable (p.15). An independent agency with responsibility for policy development as it relates to the recognition of new diseases, and the monitoring of diseases recognized as work-related, was also recommended (p.18).

While the RCSD does not appear to track disallowed claims by the nature of the injury, this information would be helpful to the Board in monitoring the extent to which its policies on what are and are not compensable injuries and diseases are in line with the kinds of problems that workers are reporting over time. The division might also benefit from reviews of accepted claims for certain types of injuries or diseases, in order to develop guidelines with respect to these claims.

1.5 Immediate Wage-Loss Benefits

The primary issues with respect to the level of initial wage-loss benefits concern:

- 75% gross versus 90% (or some alternative) net
- statutory maximums and minimums
- stacking of benefits
Also, there is the issue of expenses avoided and additional expenses incurred.

**Gross Versus Net**

Historically, most workers' compensation rates were set before income tax was in effect, and long before the graduated income tax rates of today. The first compensation rate in BC, set in 1917, was based on 55% of gross earnings\(^\text{15}\); this was adjusted from time to time to reach the current rate of 75% gross. As taxes have increased over the years, and other income deductions have been brought in (for example, CPP and Unemployment Insurance), concerns have arisen that workers' compensation payments may exceed some workers' take-home pay, and that this may serve as a disincentive to return-to-work. Employer submissions to the Royal Commission have called for reductions in benefits from the current level of 75% gross to a level that more closely reflects take-home earnings. Some have recommended, for example, a reduction to 80% of net earnings.

Most, but not all workers, receive 75% of the gross earnings they were receiving on the day of injury. RSCM Section 66 states that:

> Except in the cases set out in #66.10-34, wage-loss payments made at the outset of a claim are based on the worker’s rate of pay at the date of injury up to the maximum wage rate permitted by the Act. Compensation based on this rate will normally continue until the end of the worker’s temporary disability or the 8-week review, whichever comes first.

The exceptional cases referred to above include, for example, casual workers, seasonal workers, part-time and temporary workers, and volunteer workers. In these kinds of cases, a rate will be established on the basis of earnings over a longer period of time, rather than the day of injury. Otherwise, the 75% gross rate will be adjusted at the “8-week review”. The 8-Week Review, discussed in RSCM Section 67.20 states that:

> An 8-week rate review is made where wage-loss payments based on the worker’s rate of pay at the date of injury have continued for eight weeks. This
review consists of an enquiry and determination of what earnings rate best represents the long-term earnings loss suffered by the worker by reason of the injury.

The 8-week review, which involves the calculation of “average earnings” is discussed in detail below.

BC is unlike most other Canadian jurisdictions in continuing to provide workers’ compensation benefits on the basis of gross earnings rather than net earnings. According to the Board’s Briefing paper entitled Compensation Rate, only BC and the Yukon continue to base compensation on a percentage of gross earnings, and both use 75%. Four of the other Canadian provinces, including Ontario and Quebec, as well as the Northwest Territories, use 90% of net earnings; according to the Briefing Paper, Ontario recently introduced legislation to reduce its rate to 85% net. Manitoba uses 90% of net for the first two years followed by 80% of net thereafter. The remaining four Canadian jurisdictions use either 75% or 80% of net for an initial period (ranging from 26 to 39 weeks) followed by 80% or 85% thereafter.

With current federal income tax rules, as exhibited in the Board’s Briefing Paper on the Compensation Rate for a select sample of workers (i.e., those with 0 or 1 dependant), some workers receive greater than 110% of their net pay through workers compensation in BC. As will become clear below, this figure of 75% gross can be misleading, however, if not considered within the context of other legislation, as well as Board policy and procedure – especially the maximum statutory wage rates and the calculation of average earnings and pensions.

There is a general assumption that benefits should be somewhat less than actual earnings so as to provide an incentive to return to work. As discussed, several other jurisdictions have settled on 10% less than net earnings. If “adequate compensation” is defined as income equal to, or within 10% less than, take-home pay, this universal application of 75% gross results in some over-compensation and some under-compensation. (Note: “equitable compensation” may be defined differently than

“adequate compensation”. Standards of equity may not allow for a range of “equal to or within 10% of”. Equity issues with respect to the compensation rate are discussed below.

In its Briefing Paper\textsuperscript{18}, the Board presented data on two types of claimants – those with no dependants (i.e., single with no dependants) and those with one dependant (i.e., married with non-working spouse, or single with one dependant). This data showed that, based on 1996 figures, under a 75% gross system the following amounts are received:

<table>
<thead>
<tr>
<th>Amount Received</th>
<th>Single, no dependants</th>
<th>Married/Single, one dependant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over 110% net\textsuperscript{19}</td>
<td>earning $9,900 to $15,000\textsuperscript{20}</td>
<td>none</td>
</tr>
<tr>
<td>100-110% net</td>
<td>earning $17,000, and earning $31,000 to $61,000</td>
<td>earning $9,900 to $15,000\textsuperscript{21}, and earning $39,000 to $57,000</td>
</tr>
<tr>
<td>90-99% net</td>
<td>earning $19,000 to $29,000, and earning $63,000 to $69,000</td>
<td>earning $17,000, earning $23,000 to $37,000, and earning $59,000 to $67,000</td>
</tr>
<tr>
<td>Under 90% net</td>
<td>earning around $75,000 or more</td>
<td>earning $19,000 to $21,000, and earning around $69,000 or more</td>
</tr>
</tbody>
</table>

This table shows that, depending upon the extent of their other deductions, some workers may be “overcompensated” under a 75% gross system, in that they will receive more than their take-home pay. This tends to occur for workers in the middle-income ranges. As will be discussed below, the differences for those earning less than about $15,000, and those earning more than about $55,000, are accounted for by the statutory

\textsuperscript{17} WCB of BC. Briefing Paper. \textit{Compensation Rate}. April 4, 1997. (p.16)
\textsuperscript{18} WCB of BC. Briefing Paper. \textit{Compensation Rate}. April 4, 1997. (p.21)
\textsuperscript{19} Net was calculated on the basis of “gross income” less deductions for CPP, UIC and income tax.
\textsuperscript{20} Workers earning $17,000 received 105%.
\textsuperscript{21} Workers earning $17,000 received 95%; workers earning $19,000 to $21,000 earned 87% to 89%.
maximums and minimums and not by the net versus gross formula. In 1997, for example, the statutory maximum for average earnings calculations in BC was $55,800\textsuperscript{22}, and the statutory minimum was $14,409.20\textsuperscript{23}. (Note: workers earning less than $9,900.00 per year were not included in the table.)

The difference between net versus gross is greatest for single workers with no dependants, because their higher earnings cannot be offset by dependant deductions; for workers with multiple dependants, the 75\% gross would be expected to more closely approximate 90\% net.

The Board has no statistics on number of claimants in various income and dependant categories, but the Briefing Paper provided number of claimants by income only. Of 73,935 STD claimants in 1994/95\textsuperscript{24}:

- 2,684 or 3.6\% earned less than $14,000
- 9,519 or 12.9\% earned $14,000 to $19,999
- 16,887 or 22.8\% earned $20,000 to $29,999
- 24,113 or 32.6\% earned $30,000 to $39,999
- 14,785 or 20\% earned $40,000 to $49,999
- 3,494 or 4.7\% earned $50,000 to $55,999
- 1,740 or 2.4\% earned $56,000 to $69,999
- 713 or 0.96\% earned $70,000 or more

According to the Briefing Paper, a change to 90\% net in BC would result in a drop in benefits for virtually all single workers with no dependants, ranging from 0.1\% to 18.8\%, with workers at the highest and lowest income levels experiencing the greatest decreases\textsuperscript{25}. Those workers with one dependant at almost all income levels would experience decreases from 1.1\% to 15.5\%, with the largest decreases for those at the

\textsuperscript{22} WCB of BC. Briefing Paper. Compensation Rate. April 4, 1997. (p.8).
\textsuperscript{23} As discussed below, RSCM Section #34.20 Minimum Amount of Compensation specifies that wage-loss compensation could not be less than $277.10 per week (unless the worker’s average earnings were lower) in 1997 (to June 30); annual rate based on weekly rate of $277.10.
\textsuperscript{24} WCB of BC. Briefing Paper. Compensation Rate. April 4, 1997. (Data in Table 7, p.58). As noted in the Briefing Paper, these rates are based on weekly wage rates, and overestimate gross income levels because they assume all claimants work year round.
\textsuperscript{25} WCB of BC. Briefing Paper. Compensation Rate. April 4, 1997. (p.27)
highest income levels; among this group, those earning between $17,000 and $23,000 would receive about the same or slightly more under a net plan, up to 3.9%.

The Board’s Briefing Paper cites a number of issues to consider in making the decision to move from gross to net, and the level at which to set the rate. Several research reports are referenced, from a common body of research on economic incentives and disincentives under Workers Compensation, which provide strong evidence that benefit levels can affect both claim frequency and duration. In other words, as benefits increase, more workers file claims and remain on compensation for longer periods of time. The Briefing Paper notes that claims costs would decrease under a 90% net plan, as would employer assessments, while administration costs would be expected to increase somewhat.

Other issues to consider with respect to applying a net approach include the fact that calculations occur at one point in time, and there is no opportunity to adjust the benefits as workers’ situations change over time (for example, adding more dependants).

Statutory Maximums and Minimums

There is a statutory minimum on wage-loss payments specified in Section 29 (2) of the Act, as follows:

The compensation awarded under this section must not be less than an amount equal to $75 per week, unless the worker’s average earnings are less than that sum per week, in which case the worker must receive compensation in an amount equal to the worker’s average earnings.

RSCM Section #34.20 Minimum Amount of Compensation addresses this section of the Act and provides more current figures, specifying for example that wage-loss compensation could not be less than $277.10 per week (unless the worker’s average earnings were lower) in 1997 (to June 30)\(^{26}\).
It appears that if a worker’s earnings are equal or slightly higher than the minimum, but with the 75% adjustment his/her benefits would fall below the minimum, then the policy is that he/she receives the minimum.

Similarly, Section 22 (2) of the Act states that compensation awarded for permanent total disability cannot be less per month than a specified minimum. RSCM Section #37.20 Minimum Amount of Compensation specifies current minimum monthly rates ($1,200.91 in 1997, to June 30)\(^\text{27}\).

Section #37.21 Dual System of Measuring Disability states that “The statutory minimum only applies in cases where a worker is found to be 100% disabled on a physical impairment basis. It does not apply when the percentage of disability on a physical impairment basis is less than 100% but the worker is found to be totally unemployable under the dual system of measuring disability.”

Under Section 23 (4) of the Act, permanent partial disability awards are subject to a statutory minimum calculated on the basis of the percentage of disability:

Where permanent partial disability results from the injury, the minimum compensation awarded must be calculated in the same manner as provided by section 29 (2) for temporary total disability but to the extent only of the partial disability.

This section is addressed in RSCM Section #39.60 Minimum Pension. So, for example, a worker with a functional disability of 10% would receive either 10% of the minimum or 10% of his/her average earnings, if these were lower than the minimum.

There is also a statutory maximum under Section 33 (6) to (10) of the legislation. The statutory maximum in 1997 was $55,800\(^\text{28}\). The Board’s Briefing Paper on Benefit Stacking and Integration points out that prior Royal Commissions addressed the maximum with respect to the worker’s ability to purchase additional private insurance,

\(^{26}\) WCB of BC. Briefing Paper. Compensation Rate. April 4, 1997. (p.9)
\(^{27}\) WCB of BC. Briefing Paper. Compensation Rate. April 4, 1997. (p.8)
\(^{28}\) WCB of BC. Briefing Paper. Compensation Rate. April 4, 1997. (p.8)
and with respect to the burden on industry. Quotes from Sloane and Tysoe are provided, as follows:

1942 Sloane Royal Commission Report:

The reasons for the inclusion of the maximum principle and consequent exclusion of the highly paid wage-earner or salaried executive from the benefits of the Act are generally regarded to be, first, that the Act is designed to protect those who are unable, because of their low income, to carry any accident insurance. Those in the higher income brackets are considered able to protect themselves.

1996 Tysoe Royal Commission Report:

Sir William Meredith’s selection as a standard of the wage earnings of the highest paid wage earner is no longer followed but has given way to other considerations. When the matter is discussed now it is pointed out that men with large salaries should be expected to provide, in part at least, for their own insurance, and that, unless a maximum is set under the Act, assessment in some industries would become unduly burdensome.

The statutory minimum results in some workers being “overcompensated” relative to other workers and relative to their take-home pay. The statutory maximum results in some workers being “undercompensated”. As indicated above, somewhere around 5% of claimants earn more than the statutory maximum (Note: figures only roughly comparable, using 1997 statutory maximum and 1995 earnings).

Stacking of Benefits

Concerns have been expressed in submissions to the Royal Commission regarding the stacking of benefits in BC. Benefits are considered “stacked” when benefits or income from two or more sources are paid simultaneously for the same work-related disability or death (for example, CPP in addition to WCB), whereas integrated benefits involve
deductions from one or more of these multiple sources. In BC’s workers’ compensation system, workers benefits are stacked, but survivor benefits are integrated. According to the Board’s Briefing Paper entitled *Benefit Stacking and Integration*\(^{29}\), eight of the other eleven jurisdictions have integrated benefits for workers, and four other jurisdictions have integrated survivors benefits.

CPP pays retirement pensions, disability pensions for “severe and prolonged” disabilities (including benefits for dependant children) and survivor benefits. Stacking can also be considered with respect to unemployment insurance, employment benefits (e.g., maintaining full wages, paying top-ups to WCB, and retirement pensions), and private insurance (e.g., disability insurance or life insurance).

Stacking is dealt with in this section, because it may occur in the initial period of wage-loss, but it is also relevant to the issue of adequacy of pensions and of survivor benefits.

The Board’s Briefing Paper discusses some of the advantages and disadvantages of stacking versus integration, as follows:

Those who argue in favour of “integration” also regard employers as bearing the costs of the workers’ compensation system. By contributing to *Canada Pension Plan* or paying for employment-related benefits as well, employers compensate workers twice over for their disability. This increases the costs of doing business and diminishes employer competitiveness generally.

The argument for “stacking”, on the other hand, appears to be based on the view that workers are not sufficiently compensated for their compensable injuries in any event. The “stacking” of CPP disability benefits and employment-related benefits with workers’ compensation benefits goes some way in addressing this situation.

Opponents of “integration” argue that workers make direct financial contributions to the *Canada Pension Plan* and they and their survivors are therefore entitled to the disability benefits payable under the *Plan*. Employment-related benefits are

\(^{29}\) WCB of BC. Briefing Paper. *Benefit Stacking and Integration*. 
often negotiated through the collective bargaining process with workers giving up other financial benefits in exchange for them.

**Expenses Avoided and Additional Expenses Incurred**

Some have argued that a rate lower than normal take-home earnings should be adequate because some of the costs that a working person would normally incur, which might include, for example, transportation costs and child care costs, are not required while one is off on disability leave.

On the other hand, the disability itself may lead to certain additional costs that may or may not be covered as part of the workers' compensation benefits. Some of these additional expenses and services provided by the Board will be discussed in other Royal Commission reports. A worker may require, for example, live-in assistance with house cleaning and personal care beyond what the Board might be willing to cover. The worker's spouse may choose to work fewer hours, thus contributing less to the household income, in order to care for the worker. These kinds of additional costs must also be considered when making decisions about benefit adequacy. They are probably particularly relevant to determining the adequacy of benefits for workers with serious disabilities.

1.6 Average Earnings Established at 8 Weeks

Currently, workers are paid wage-loss benefits based on the same rate that they were earning at the time of injury (adjusted to 75%), up until the “8-week review”. When a worker has been on wage-loss for 8 weeks or more, the 8-week review is to be conducted, at which time “average earnings” are to be calculated. Average earnings calculations often result in a reduction from the initial wage rate.

Chapter 9 of the RSCM, and Section 33 (1) of the Act, deal with the calculation of average earnings. Section 33 (1) of the Act provides the Board with a variety of options for calculating average earnings. It states:
The average earnings and earning capacity of a worker shall be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of injury, or on the average yearly earnings of the worker for one or more years prior to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board to represent the actual loss of earnings suffered by the worker by reason of the injury, but not so as in any case to exceed the maximum wage rate..." 

The Act provides the Board with considerable latitude in calculating average earnings. The Board can decide whether or not to include earnings in the weeks prior to the injury or to look beyond this to earnings over any number of years into the past. It appears, however, that in most cases the one year prior to the injury is used. RSCM Section 67.20 states that:

As part of the Claims Adjudicator’s enquiries, information will be obtained as to the worker’s long-term earnings prior to the injury. Normally, earnings in the one-year period prior to the injury are obtained and used to reflect the worker’s long-term wage loss and the pension rate.

The RSCM goes on to say that in other cases, three months prior to the injury may be used, and in still other cases, three years or five years of prior earnings may be used.

Similarly, the Act allows the Board to choose to assess actual earnings or “probable yearly earning capacity”, and to calculate earnings that would “appear to the board to best represent the actual loss of earnings suffered by the worker by reason of the injury”. RSCM Section 65.00 instructs adjudicators that they are not, however, to “interpret ‘best’ to mean the highest rate possible, but rather to select the rate which most closely reflects the actual loss incurred”. Section 65.00 also notes that the general provisions of Section 33 (1) are modified in respect of particular situations by other provisions of the Act.
RSCM Section 67.20 states that where a permanent disability award is anticipated, the Claims Adjudicator is to consult with the Disability Awards Officer at the time of the 8-week review in order to provide consistency.

Concerns with respect to the calculation of “average earnings” revolve around the appropriateness of using one year of part earnings to predict long-term earnings in the future.

The Board’s Briefing Paper on Average Earnings notes that:

While there has been some controversy over the years for the 85% of cases where the only rate set is the initial rate, most controversy arises in the 15% of cases where the rate is adjusted following the 8 week rate review.

For cases where disability lasts longer than 8 weeks the normal practice is to determine the worker’s earnings in the one year prior to the injury and express them as annual earnings. These annual earnings then become the average earnings which determine the wage rate for the duration of the temporary disability (and in most cases, for a pension, if permanent disability results).

Advocates, the Ombudsman, and the Courts have criticized what they see as an over-reliance on one year of pre-injury earnings as the method of determining the average earnings for permanent disabilities and injuries that cause more than eight weeks of temporary disability.

…While, from an evidentiary point of view, a pre-injury earnings pattern may be a credible predictor of actual post-injury loss, this does not mean that the primary intent of the legislation is to have a compensation payment pattern that closely parallels the established earnings pattern before the injury. The primary intent of the legislation is to determine the actual loss following the injury.

This difference in focus, coupled with the fact that in practice the Board often routinely determines the pre-injury pattern on the basis of earnings in the one
year preceding the accident, has led to numerous appeals within the system, as well as at least one successful challenge on judicial review.

The Board has recently considered moving the 8-week review to 13 weeks, primarily because the 8-week review and drop in earnings acts as a disincentive to workers involved in the Continuum of Care. The Board's Discussion Paper on the 8-week review\(^{30}\) notes that (p.2):

The 8-week rate review currently occurs during the work conditioning program of the continuum of care. Approximately 16,000 injured workers are admitted to the program annually. It is estimated that the review results in a reduction in benefits to approximately 40% of workers. It is estimated that less than 10% of workers receive an increase in benefits. For the remaining 50%, the review results in no change in benefits. The estimated average change in benefits is a reduction of $58 per week.

Compensation Services has raised the concern that for a significant portion of workers this reduction in benefits midway through the work conditioning program may create a negative relationship between the worker and the Board which may hamper the worker’s effective participation in the work conditioning program.

The Board’s 1998 Priorities\(^{1}\) proposes that Average Earnings and the 8-week rate review be included among the policy issues addressed by the Board in 1998. This document notes that the timing of the 8-week review, which “is a reevaluation of the amount which best represents the worker’s longer term loss of earnings” (p.10), comes at an inopportune time in the work conditioning program of the continuum of care and may negatively affect workers’ participation in the program. (Note: In Board interviews, it was stated that the employer community had rejected the proposal to move to a 13-week review.) On a broader level, the document proposes a “complete reconsideration of the calculation of average earnings”, noting that (p.11):

The Act requires that the Board adopt the method which it considers “best to represent the actual loss of earnings suffered by the worker”. Some of
the many issues to be considered include: what payments to workers should be included in earnings; what time period to consider; and the timing and frequency of the calculation.

As discussed, the Board calculates average earnings by defining these as the average that a worker has earned in the past year. In many cases, in any one year, workers earn either the same or more than they had in previous years, with raises, cost-of-living increases, upward promotions and job changes. Averaging earnings over the past year would result in a reduced rate for some workers in these situations. Weiler (1980)\(^{31}\) discusses this issue, as follows (p.31):

For many workers, these earnings follow a cycle during a working career, ranging from the low starting salary paid to the inexperienced worker, to the earnings at middle age which may be sharply increased by additional overtime…to the later stages of a working life when one’s wage rate is at its peak”

The primary issue here, then, is whether future loss is accurately reflected in past earnings, or whether future loss should be assessed by using more than this. Options might include, for example:

- the use of past earnings to establish a baseline in terms of probable career path and initial (pre-injury) earnings level, with:
  - adjustments based on the norm for lifetime earnings increases, or;
  - adjustments based on earnings over the course of a lifetime for individuals with similar education, training, and probable career paths

In this way, loss of earnings could be considered in terms of the actual loss to the worker – the loss he/she experiences in terms of the income he/she was expecting to earn on a continual basis had it not been for the injury.


The fact that 40% of workers experience a drop in earnings at the 8-week review point, and that 10% experience an increase\(^{32}\), suggests that this calculation process may need to be reviewed. It should at least be determined whether or not the increases and decreases are justifiable and policies are being consistently applied. This is particularly relevant where the calculation for average earnings is used later for pension purposes which, according to the Briefing Paper, is the norm rather than the exception. In recent interviews with Compensation Services Senior Executive and Directors, it was indicated that in cases where workers benefits are reduced, it is often the case that workers have been casual, temporary or seasonal workers. The Board was unable to provide the Royal Commission with data on the proportion of casual and seasonal employees who submit claims\(^{33}\), however it was suggested in these interviews that the 40% accurately reflects the population served. Without the data, this conclusion is impossible to verify. It is important to also note that in other data provided to the Royal Commission, the percentage of claims where a rate decrease occurs at 8 weeks was calculated to be between 27% and 29%\(^{34}\).

Other issues of concern that have been raised with respect to the calculation of average earnings are the inclusions and exclusions with respect to income replacement payments and fringe benefits. With respect to income replacement benefits, the Board’s Briefing Paper entitled *Average Earnings* points out that:

The Board couples its policy of not including, as earnings, the income replacement benefits received (in the past year), with a policy of not excluding the period of time during which the income replacement benefits were received; i.e., if the Board determined that a worker’s wages in the six months prior to the date of the disability equaled $20,000 and in the immediately preceding six months the worker had received $12,000 in Employment Insurance benefits, the Board would conclude that “average earnings” for the 12 months were $20,000.

\(^{32}\) As discussed in the 8-Week Rate Review Discussion Paper (January 29, 1998) and as presented to the Royal Commission, Presentation on Compensation Benefit Levels. March 2, 1998.

\(^{33}\) WCB of BC. Rehabilitation and Compensation Services Division. Response to Royal Commission Request dated February 9, 1998. Response to Question 3 (4); Some data were subsequently provided for workers whose employers reported injuries through AIRS, but as these are large employers it is not clear that the rates are reflective of the general population. E-file reportedly does not capture this information.
With respect to fringe benefits, there have been concerns that the Board does not consider employer benefit packages that include, for example, group life insurance, accidental death or dismemberment insurance, dental coverage, medical coverage, vision/hearing care, pension plan, extended health plan and vacation entitlement, in the calculation of average earnings. The Board just recently clarified its policy in this area, explicitly stating that fringe benefits are not to be considered, as a result of inconsistent Appeal Division decisions that were occurring (i.e., one panel concluding that fringe benefits should not be included, while another panel on another case concluding that some fringe benefits should be considered).

Issues regarding the rate of compensation are among the top reasons for worker appeals. Analysis of these kinds of appeals and their outcomes would also provide useful information on the appropriateness of the average earnings formula.

1.7 Pensions

The Board provides pensions for permanent total disabilities and permanent partial disabilities.

There does not appear to be a definition of permanent total disabilities within the Act nor within the Rehabilitation Services and Claims Manual. Section #37.00 Permanent Total Disability states that: “Some examples of permanent total disability are paraplegia, quadriplegia, hemiplegia, total blindness, and severe loss of cerebral powers. Combinations of permanent partial physical impairments can also become permanent total disabilities, such as bilateral amputations of arms and legs.” Permanent total disability pensions are awarded for life, are subject to a minimum annual rate, and are based on 75% of average earnings.

Permanent partial disabilities can be assessed for Functional pensions or Loss of earnings pensions (Note: A detailed discussion of the calculation of Functional and LOE pensions is presented in the Appendix). The “Dual System” of pension assessment is addressed in Rehabilitation Services and Claims Manual Section #38.00:

The Board has two basic methods of assessing permanent partial disabilities. These are:

1. Loss of function/physical impairment method
2. The projected loss of earnings method

These two methods are considered in every case where applicable, the amount of the pension being the higher of the two figures produced by the two methods.

In BC, functional awards may or may not be based on a pre-determined schedule. The Board’s Briefing Paper on Permanent Disability Pensions discusses issues with respect to the schedule used to assess the percentage of functional impairment:

The schedule is largely unchanged from the Tysoe report in 1966. The most notable change was including a section on the spine in 1990.

One issue is whether the Schedule measures accurately the average loss of earning capacity it is intended to measure. Since these losses inevitably change over time as occupations and economic conditions change, there is a further question how to keep the Schedule up to date.

Like other similar schedules, the Board’s is not based on objective scientific data on the impact of different disabilities. Rather, it is based on the opinions of experts, primarily doctors. It has been questioned whether assessing percentages of average earnings loss is a matter of purely medical expertise and whether a different scientific approach could be followed.

It has sometimes been suggested that the Board replace its own schedule with a more widely recognized one, such as the American Medical Association’s, Guides to the Evaluation of Physical Impairment. However, the objective validity of the ratings in this schedule have also been questioned. An internal Board study in 1987 suggested that adopting this schedule would cause an increase in costs of between 25% and 35% for section 23 (1) awards.
The Briefing Paper also points out that Tysoe was concerned that the Board applied the schedule too rigidly, without taking other factors into consideration. These other factors might include, for example, age, occupation, subjective complaints, other disabilities. Current Board policy requires that other factors are to be considered only as they relate to degree of physical impairment.

A thorough comparison of various schedules has not been done. It is difficult, therefore, to make recommendations with respect to the BC schedule. A few observations are possible, however. The BC schedule was never developed on the basis of an analysis of actual economic (and non-economic) losses resulting from the various injuries that it lists. The same schedule has reportedly been used in BC since the 1960’s. This brings into question the extent to which this schedule accurately covers the types of injuries that are occurring in BC today.

The 1996 Administrative Inventory\(^\text{35}\) (p.106) suggested that in some cases there may be a sizable difference between the measure of impairment using the BC schedule as opposed to the AMA Guides to the Evaluation of Physical Impairment, particularly for spinal impairments. Additionally, the Administrative Inventory points out that there is no rating for pain, so that if there are no objective symptoms, a functional award cannot be established. The Board has advised the Royal Commission that while some awards may be lower under the BC schedule than under the AMA schedule, BC does not have the duration limits that other jurisdictions have with respect to pensions. Consequently, some awards under the BC schedule will be higher than under the AMA schedule.

Certain types of disabilities are more difficult to classify in terms of percent functional impairment than are others. In most cases, functional impairment is assessed in terms of actual loss. Visual acuity, however, is assessed in terms of “the best vision attainable after correction with compensable lenses.”. No similar calculation is made, for example, for hearing loss after using a hearing aid, or for an amputee after acquiring a prosthesis.

Functionals are payable for life “or in another manner the Board determines.” They are calculated irrespective of any loss of earnings (although average earnings are used in the calculations). To arrive at the value of a functional award, the percent of disability is multiplied by average monthly earnings, and then this amount is multiplied by 75%. So, if a worker has had an amputation at the middle of his/her forearm to her wrist, is assessed as having a 50% disability (according to the schedule), and has pre-injury average earnings of $35,000 per year ($2916.67 per month), the functional award would be $1093.76 per month, as follows:

\[
50\% \text{ of } $2916.67 = $1458.34 \\
75\% \text{ of } $1458.34 = $1093.76
\]

Of the nearly 200,000 claims reported annually, about 38% or 75,000 are serious enough to require time off work\(^{36}\). About 4,500 or 2.3% of reported claims, are serious enough to require permanent disability benefits\(^{37}\). As discussed above, based on data provided by the Rehabilitation and Compensation Services Division to the Royal Commission\(^{38}\) for 1997, about 87% of pensions are “functional” awards, and about 13% are loss-of-earnings awards.

Functional pensions provide only a very a narrow range of benefits; the majority (86.8%) of functional awards are based on a disability assignment under 10%\(^{39}\). About two-thirds of workers receiving functional awards receive awards based on a disability of less than 5%. Awards of less than 2% occur in 1 out of 3 cases. The average functional impairment rating for back injuries, one of the most common injuries, is about 4.5%\(^{40}\). For a worker with an annual salary of $35,000, a 10% functional award amounts to about $218.75 per month. Data recently provided by the Board to the Royal Commission


\(^{39}\) Data cited in this section was provided by the Board to the Royal Commission in a presentation on Pensions, March 5, 1998.

shows that the average functional award for 1997 was $28,385.00\textsuperscript{41} (Note: These are the capitalized values of the award, not the annual payments). Most workers who receive functionals choose a lump sum payment\textsuperscript{42}. Indeed, about 3 in 4 workers who receive pensions receive lump sum payments rather than monthly pensions. Still, these awards are often higher than they would be in other jurisdictions, according to the Board. Nevertheless, appeals regarding the size of pension awards are quite common, particularly in view of the small number of decisions made on this issue (i.e., relative to the total number of claims accepted).

In 1997, 698 LOE’s, and 710 Functionals greater than 10%, were awarded\textsuperscript{43}. Taken together then, LOEs, and Functionals above 10%, are awarded to about 1,408 of the 200,000 workers (or less than1%) who report injuries or diseases to the WCB annually. As discussed in the Board’s Briefing Paper on *Permanent Disability Pensions*, loss-of-earnings pensions (LOE’s) were introduced by the Board in 1973 to deal with injuries of the spinal column, because the Board at that time “felt that the percentages assessed under section 23 (1) were often significantly less than the real loss of earning capacity”. The policy was extended in 1977 to other injuries where section 23 (1) awards were seen as not reflecting the actual loss.

Some employers have expressed concerns to the Royal Commission that the LOE awards were intended to be used in exceptional cases, and over time they have been used more and more frequently. Employers are particularly concerned when the percentage of physical impairment is assessed as minimal, but the LOE is high. Costs for LOEs continue to grow, and represent a much greater per-pension cost to the employer than do functional awards. For example, according to the Board’s *Briefing Paper* on *Permanent Disability Pensions*\textsuperscript{44}, in 1991 the *Administrative Inventory* reported that LOE’s accounted for only 10% of pension awards but 45% of total pension reserves, with the average reserve being 7 times that of a functional award. Data provided by the

\textsuperscript{42} WCB of BC. Presentation to Royal Commission on Pensions, March 5, 1998.  
\textsuperscript{44} WCB of BC Briefing Paper *Permanent Disability Pensions* (p.3).
Board\textsuperscript{45} to the Royal Commission indicates that in 1997, LOE’s accounted for 13% of pension awards, and 53% of total pension reserves.

Deeming (discussed in detail in a subsequent section) is not an issue in determining functional awards, but it is used in determining loss-of-earnings awards. For loss-of-earnings, the degree of physical impairment is determined as outlined above. Next, the projected loss-of-earnings is calculated – on the basis of the “difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury”. Thus, if the above worker returns to his/her pre-injury job or another job at the same or comparable earnings, the functional award will be the higher of the two calculations and will be the basis of the pension awarded.

This system may be more adequate in clear-cut cases where disabilities are scheduled and where workers return to work at comparable earning levels. For other types of disabilities, it may be less adequate. Take, for example, a worker with a back injury assessed at 5% disability. At a pre-injury earning capacity of $35,000, the functional award would be assessed as $109.38 per month. If she/he is deemed capable of returning to work, in a different occupation but at comparable earnings, this would be the monthly pension he/she would receive – regardless of whether or not she/he had actually obtained this alternate employment. Clearly, functional awards are much more common than loss-of-earnings awards, which suggests that in most cases workers have either returned to work or have been deemed capable of returning to work, and that their post-injury earnings loss is less than the percentage of loss calculated through the functional assessment method. If a worker does not return to work, but is deemed ready to return-to-work and capable of returning at pre-injury wages, he/she will be entitled only to a functional pension.

The 1996 Administrative Inventory entitled *The Workers’ Compensation System of British Columbia: Still in Transition*\textsuperscript{46} stated (p.255):


Pensions have been growing faster than any other type of claim in the system. While there are many competing explanations for this, none of them can be proven correct. It is imperative to understand the nature of this trend. There are allegations that the functional award levels are not sufficient to compensate adequately for the actual degree of disability; but no information has been presented to demonstrate this in a comparative framework. We share a suspicion that the inadequacy of functional awards may be driving the growth in loss-of-earnings pensions, but we cannot prove this either.

There are various ways that comparative information might be obtained.

Comparative information from other jurisdictions may not be very instructive. Other jurisdictions may have lower benefit levels than BC overall, and one might conclude as does the Administrative Inventory that comparatively, BC provides "generous" benefits. Generous benefits may still, however, be inadequate if assessed in terms of the extent to which they are actually compensating for losses suffered by injured workers.

Comparative information for workers with various types of injuries and with varying backgrounds (i.e., age, education, income at time of injury) may be more instructive.

What is likely to be most instructive is a comparison of the actual circumstances of workers at some future point after their pensions have been established, with the assumptions made about what their circumstances were likely to be. So, for example, one could ask: "To what extent do those workers who receive pensions based on a 10% disability show an actual loss of earnings two years later that reflects a 10% loss?". The Board does not follow up to assess actual loss for workers who receive functional disability awards, but they do follow up to assess actual loss for workers who receive loss-of-earnings awards. The RSCD was asked to provide the Royal Commission with statistics on LOE recipients who were contacted two years after receiving their awards, and of these, the number who were actually earning less than, the same as, or more than what was expected when the LOE award was calculated. The data that were provided showed that there was wage information received on only a small proportion of LOE recipients at the two-year review. For 1997, 65 of 115 workers for whom wage information was received were earning more than post-injury earnings, and 35 were
earning less. These comparisons are limited in that they do not take into account non-economic loss.

1.8 Survivor Benefits

Survivor benefits can be up to 60% of the worker’s income prior to death. If an injured worker is receiving a disability pension before his/her work-related death, the family receives a reduction in this pension from 75% to 60%. Additionally, CPP benefits are stacked for permanent disability pensions but integrated for survivor benefits, so the WCB pension would be further reduced by the amount of CPP upon the worker’s death.

Section 17 (3) (c) of the Act states that:

where the dependant is a widow or widower who, at the date of death of the worker, is 50 years of age or over, or is an invalid spouse, a monthly payment of a sum that, when combined with federal benefits payable to or for that dependant, would equal 60% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability, but the monthly payments must not be less than $234.36

Different principles appear to underlie different kinds of compensation decisions. For compensation of injuries, the principle is loss-based, whereas for fatalities, it appears to be partly needs-based. Needs-based decisions take into account:

- how many people are relying on the worker (e.g., number of children and their ages)
- what other income-support is available to the family (e.g., CPP)
- changes in circumstances, including remarriage, which are presumed to result in reduced dependency

---

Furthermore, it is assumed that the benefit should be reduced somewhat from what would be received as a pension for a permanent total disability, since the worker is not among those depending upon the compensation (i.e., the rate is calculated as 60% rather than 75%).

The consequences of these kinds of “exceptions to the rule” are significant. For the family members of the worker, who may be only partially dependent or not at all dependent (for example, in the case of a young worker who leaves only his/her parents, sisters and brothers), the financial award may seem completely out of proportion to the loss. For the Board, decisions based on exceptions to the rule can result in appeals for similar exceptions or for challenges to the exceptions – as was the case with survivor benefits for widows who remarry -- so that retroactive benefits are paid by current employers for the deaths incurred by workers of employers who may or may not still be in business.

The Board’s Briefing Paper entitled “Compensation and the Death of a Worker” states that (p.3):

In June, 1993 the requirement that a spouse’s pension be terminated on remarriage was removed by Bill 63. Where the death occurred after July 1974, Bill 63 reinstated pensions to spouses who remarried on or after April 17,1985. A further amendment in 1994 reinstated pensions to spouses who remarried on or after April 17, 1985, and whose spouses died before July 1974.

The retroactive payment of survivor benefits to widows who remarried is expected to cost the Board approximately $400 million dollars, more than a third of its annual budget and a cost incurred by today’s employers for deaths occurring many years in the past.
1.9 Process Issues: Income Continuity and Termination of Benefits

**Income Continuity**

Some of the issues of concern with respect to the process of payment for workers' compensation include: delays in initial payment, delays in the appeal process, and lack of income continuity between the medical plateau and payment of pension benefits.

The Board is tracking timeliness of first payment and income continuity with respect to the first payment, and appears to be making some headway on this issue. The appeal bodies, including the Appeal Division and the Medical Review Panel, have reported that they are also making efforts to reduce the delays in their processes.

The Board does not appear to be tracking income continuity in terms of payment from last STD to first LTD payment. The Royal Commission has been told that workers' benefits can be terminated when they reach a “plateau” medically, but have not yet been assessed for a pension. The Board was asked to provide further data and information with respect to this issue. In particular, a request was made for data on time from last STD payment to first LTD payment, and where this is greater than one week, what options claimants have, e.g. Code R, unemployment insurance, the rationale for each, and the number of claimants who use each option. Only part of the requested data were provided.

The Compensation Employees’ Union explained this issue in their submission to the Royal Commission (p.8-9):

The Act was written with the intention that the benefit process be a continuum (but sometimes) …the transition between the discontinuation of wage loss benefits and the implementation of a pension is delayed. The Act only allows for payment of benefits under Sections 22, 23, 29, and 30. …Section 29 of the Act states wage loss benefits are paid “where temporary total disability results from the injury...” and benefits are “…payable only so long as the disability lasts.” …In other words, the Board has no authority to pay temporary wage loss to workers...
with permanent disability. To do so would be contrary to the Act. …As an interim measure, vocational rehabilitation benefits are instated; however, vocational rehabilitation benefits are not retroactive and they are discretionary rather than mandatory. Because of their discretionary nature, the worker may not meet the criteria… This means that the permanently disabled worker could conceivably not be paid benefits in the interim. …It is unfair that workers be penalized financially when, in reality, they remain unable to work because of a work place injury. There should be bridging benefits so that these workers no longer fall through the cracks.

This issue of interim benefits, including Code R, is addressed further in other Royal Commission reports.

Another issue raised in submissions with respect to BC’s system is the possibility of implementing a waiting period for benefits. Some other Canadian jurisdictions have a waiting period of one or more days, and since a large proportion of claims involve only a few days of wage loss, there is no question that the total number of claims registered would be reduced. This issue has not been explored further for this paper.

**Deeming**

Through the practice of “deeming”, the Board makes the judgment that the worker is capable of performing a particular job or occupation, and that the job is reasonably available to the worker. Deeming can allow workers who choose not to return to work, because they are near retirement or for other personal reasons, to receive a pension and to withdraw from ongoing intervention on the part of the WCB. Deeming is covered in the Board’s RSCM Sections 40.00 to 40.13.

Deeming in order to determine permanent partial disability awards is addressed in Section 23 (3) of the Act, as follows:

> Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the
worker is earning or is able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.

A claimant can be “deemed” ready to return-to-work even though he/she has not actually returned to work. A claimant can also be “deemed” capable of earning a particular income, even though he/she may actually be earning less than that. In these cases, decisions are made about the eligibility for continued compensation for economic loss, and about the amount of compensation that should be provided, based on presumed options and expected future states.

In the presentation on Pensions provided by the Board to the Royal Commission on March 5, 1998, an overhead entitled Deeming listed four conditions under which deeming could occur:

a) the worker does not have a job but is considered employable
b) the worker has a job but it does not maximize long-term earnings
c) the worker for personal reasons, decides to withdraw from the labour force
d) the worker fails to cooperate with the Vocational Rehabilitation Consultant

At the Board’s March 5, 1998 presentation, statistics were provided that showed that from 1993 through 1997, between 554 and 700 LOEs were granted per year, and between 39% and 59% of these awards were “deemed”. There appeared to be a steady increase from 1993 to 1996 (41.1%, 41.6%, 55.6%, 59.4%) with a drop in 1997 to 39%.

Deeming is used in many jurisdictions across Canada. The Board’s Briefing Paper entitled Permanent Disability Pensions states that “All other provinces that grant pensions for earnings loss have some kind of process for deeming earnings where the worker is found not to be earning as much as he could” (p.12). Further information on this issue is presented in the Royal Commission’s follow-up to the comparative review of other jurisdictions.
Deeming is used to make decisions regarding the termination of wage loss benefits and regarding the size of loss-of-earnings pension awards. The Board was asked to provide information on how often deeming was being used in various circumstances other than LOE’s, but indicated that this information was unavailable. The termination of wage loss benefits and, as discussed above, the size of pension awards, are among the top reasons for worker appeals of Board decisions.

In interviews conducted for the Royal Commission, it was stated that appeals of deeming decisions have been launched when:

- a worker is not back to work (or is back at a reduced income) but a decision is made that the worker is not eligible for a pension, because it has been deemed that there is no permanent disability and will be no loss of earnings;
- a worker is not back to work (or is back at a reduced income) but is deemed to not have a loss of earnings, and thus only be eligible for a functional pension award;
- a worker is not back to work (or is back at a reduced income) and is deemed able to earn at a particular rate in order to establish the size of the loss of earnings pension; and
- a worker whose pension is reviewed after two years is subsequently deemed to not have a loss of earnings.

Weiler (1980) makes the following points with respect to the role of rehabilitation and deeming in workers compensation (p.22-24):

- rehabilitation is a significant theme in any workers’ compensation board, aimed at limiting the extent and duration of the losses once the injury has occurred
- if the Board’s task is to maintain a decent income for the duration of a work-related injury, it must also be concerned with minimizing the length of time or the extent to which the injury prevents a return to work
- one recurring theme in the workers compensation debate is that this rehabilitative objective may be incompatible with the values of full income maintenance and fair and economic administration:

• if the system provides full redress for all income lost due to injury there may be a disincentive to return to work (this is the basis for low benefits through unemployment insurance)
• however, there is a significant difference between workers’ compensation and unemployment insurance: “A person receives workers’ compensation because he has lost his job due to a painful injury, one which has probably caused a variety of non-economic harms. It is highly unlikely that a person would deliberately inflict serious injury on himself in order to live on workers’ compensation. We should not design the program on the assumption that this is a widespread problem.”
• for some injuries, such as back injuries, the degree of impairment is highly subjective, and there is significant variation among people’s pain threshold and commitment to the work ethic
• one strategy is to reduce benefits to provide a financial incentive to return to work, but this approach “has the obvious problem that the shortfall in the general level of benefits penalizes those who are actually disabled and legitimately entitled to redress for their loss of income.”
• the alternative is to empower the WCB to decide “who is in fact capable of working but unwilling to take suitable and available jobs”

In conclusion, Weiler states that (p.25):

There should be minimal dilution of the principle of full compensation for currently injured workers in the pursuit of the objective of encouraging a return to work of those who have recovered. Instead, we should rely primarily on the administrative process to sort out the truly disabled from those who are tempted to malinger, recognizing the risk of error in and conflict about these judgments.

Ison (1994) 49 also discusses the issue of deeming (p.28):

The usual way in which benefits are terminated is by “deeming”. It comes about in this way. If the compensation for actual loss of earnings is calculated as a percentage of the difference between pre-morbid earnings (adjusted for inflation) and current earnings, there would be no financial incentive to vocational rehabilitation, unless a claimant could expect earnings significantly in excess of pre-morbid earnings. A claimant with a relatively minor disability could elect not to work and receive the same benefits as one with a total disability. The traditional “solution” is to calculate the current earnings of the claimant by including not only actual earnings, but also the earnings that could be obtained by the claimant in some suitable occupation. This use of “deemed earnings” has been one of the greatest causes of anger and injustice in the history of workers’ compensation.

Ison provides a number of examples where complaints about deeming can occur:
- female claimants have been told they could become telephone canvassers, an occupation that is a form of public nuisance, and are deemed if they decline
- male claimants are told they could be employed as night clerks in a motel and are deemed if they object that this would disrupt family life
- deeming of workers to be capable of earning income in jobs that are not available (e.g., high unemployment rate, mix of industries locally)

In 1983, the Board’s Task Force report on Compensation for Permanent Disability\textsuperscript{50} reported that, with respect to “deeming” (p.X-1):

This is one of the most controversial areas involved in the loss-of-earnings concept. Decision #160 of the Reporter Series sets out the policy used to determine whether a disabled worker is capable of doing suitable work, whether that work is available and whether the worker has unreasonably refused available work. In practice, this applies to workers who have failed to return to work when it is believed they can, and workers who are not maximizing their earnings potential.
The Board’s Briefing Paper on *Permanent Disability Pensions* notes that, with respect to deeming, workers contend that the Board uses jobs that are not suitable or available in order to avoid costs, and that employers contend that the Board shows too much consideration for workers’ preferences. Also at issue, according to the Briefing Paper, are awards where the Section 23 (3) (LOE) portion is large and the Section 23 (1) Functional portion is small; employers argue that the award has less to do with the disability than with the worker’s age or the declining industry, whereas workers argue that small disabilities can cause large losses.

The Compensation Employees’ Union, in its January, 1998 submission to the Royal Commission, stated that (p.9-10):

Current loss of earnings policy uses two key factors in considering loss of earnings: (1) jobs must be “suitable” and “reasonably available” to the worker, and (2) that job would “maximize” the worker’s earnings capacity in the long term.

Under the provisions of current policy, the worker does not have to be in the actual job. The Board can “deem” that certain jobs are “suitable” and would be “reasonably available”. The “deeming” process is extremely judgmental and open to numerous interpretations. Additionally, workers constantly complain vociferously about this policy – they regard it as fundamentally unfair.

The primary advantage of deeming is that closure can be obtained for those workers who choose to retire early, or to work at a reduced rate. In those cases where workers would choose to stay off work and collect compensation benefits, compensation does not serve as a disincentive to return-to-work. The primary disadvantage of deeming is that workers who would choose to return to work or take a higher paying job, but are unable to do so for various reasons, do not receive compensation to cover their economic loss. In some cases these reasons may have to do with a mix of choice and opportunity.

The RSCD has not had in place an effective process for monitoring the extent to which workers who are deemed able to return to work actually return, nor the extent to which

---

workers who are deemed capable of earning a particular income in the future are indeed earning that income. The RSCD was unable to provide any information on deeming decisions for STD claimants, nor on return-to-work outcomes for these claimants\textsuperscript{51}. Additionally, the RSCD reported to the Royal Commission that it is unable to provide statistics on the number of claims that have been investigated for fraud and the outcomes of these investigations\textsuperscript{52}. While the RSCD has a process to follow-up LOE claimants two years after awards have been established, this process has been problematic. Audits conducted by the Board’s Internal Audit Department suggest that when claimants do not respond to the request for information at this two year review, the investigation may end there, and that the earnings information provided by workers at these reviews are not independently verified through T4’s or other means.

\textbf{2.0 Equity}

Summary of Issues

- under the current system, a variety of personal characteristics may affect entitlement
- broad discretion and lack of clarity in policy may result in inconsistent decision making, with different benefit decisions depending upon the particular adjudicator or manager making the decision
- workers with the same physical injury receive different benefits depending upon pre-injury income; there is no provision for some common benefit for common injury, which recognizes similarity in loss of function over and above income loss
- subjective judgments about availability of suitable jobs, skills, etc., can result in different outcomes for similar workers that may be difficult to justify
- compensation only for economic loss may not be the most fair and equitable approach; since significant non-monetary losses, particularly in the case of serious injuries, can also occur (for example, pain and suffering; loss of


enjoyment of life), it may be appropriate to consider ways of compensating for these losses

2.1 Overview of the Process and the Issues

As discussed above, workers' compensation may provide adequate benefits for workers with certain types of injuries, and inadequate benefits for workers with other types of injuries. The 1991 Administrative Inventory entitled *Workers' Compensation in British Columbia: An Administrative Inventory at a Time of Transition* stated (p.3)

> It is generally agreed in workers' compensation circles that, typically, the major disability cases are undercompensated and the minor disability cases are overcompensated, relative to lifetime earnings losses. The British Columbia system may have very different characteristics. Unfortunately, it is impossible to make any statement about the equity of compensation across these cases in British Columbia without a full study. However, the potentially large disparity in costs and the relatively “soft” evidence from which such differences in compensation arise, convince us that this is an area that needs further attention. The WCB should launch a study to determine whether approximate horizontal equity is being maintained (i.e., whether similar disabilities are being compensated similarly), and whether vertical equity goals are being met (i.e., are different levels of disability being compensated appropriately). This would include estimates of the proportion of lifetime earnings losses that are being replaced for a wide variety of injuries and illnesses.

Equity may be defined as the extent to which similar claimants are treated similarly and different claimants are treated differently. This includes equity in the process of distribution (i.e., so that the same procedures are followed in determining benefits), as well as equity in the benefits received (i.e., so that workers in similar situations ultimately receive similar benefits). Issues of equity, however, are not always easily untangled from issues of adequacy and issues of consistency. Furthermore, employers and workers have different definitions of what constitutes “fair compensation”. The Coalition
of BC Businesses\textsuperscript{53}, in their submission to the Royal Commission, discussed “fair compensation” in terms of ensuring that benefits are only paid when the injury or disease can be directly related to the worker’s employment, ensuring that workers’ compensation benefits do not exceed a worker’s take-home pay, and ensuring that maximum fatality benefits for dependants do not exceed the maximum permanent disability benefits the worker would have received. Similarly, the British Columbia Construction Association\textsuperscript{54} discussed “fair compensation benefits” in the context of overcompensation resulting from the 75% gross formula and benefit stacking, and called for a variety of changes including reduction to 80% net, introduction of a waiting period, and prohibition of retroactive changes to benefits, “topping up” by employers, and stacking.

The Board has a number of rules, and exceptions to the rules, that it uses to estimate wage loss and benefit entitlement. These rules are established to be sure that decisions made are as accurately as possible (i.e., to most closely approximate actual loss) and that are as fair as possible (i.e., that most often result in similar outcomes for similar individuals and different outcomes for different individuals). One difficulty with this approach is that there will always be exceptions to the rule, and it would be impossible to try to create policy to cover all exceptions. Consequently, one is left with the impression that some exceptions have been covered, others haven’t, and the overall formula has become so complex to accommodate some of the exceptions that unless the claimant has the most straightforward of cases, he/she is going to have great difficulty understanding how the calculation was ultimately made.

A review of Compensation Services policy clearly illustrates how exceptions have arisen over the years, probably during prior Royal Commissions or specific appeal cases, and how the Board has attempted to accommodate these exceptions. However, there will always be exceptions, and it is impossible to try to write policy to cover all possible circumstances. Furthermore, in some cases, exceptions that may seem fair on one instance may be viewed at a later point and under different circumstances as discriminatory. Claimants or their survivors who receive less or more as a result of their


age, for example, may view this as discriminatory. The review of policy leads one to question the extent to which the exceptions that have been introduced have sometimes created more problems than solutions.

On the other hand, the Board appears to have had broad discretion over the years in many areas of service delivery. There may have been many reasons for endorsing this broad discretion. Binding public agencies to unyielding policies may at times result in decisions that are unreasonable in exceptional cases. However, broad discretion can result in decisions that reflect the attitudes and values of existing managers or staff members, and as such, can result in inconsistent decision-making and the perception of inequity. For example, in unclear situations, an executive strategy that places financial aspects of the business as the first priority may result in decisions that favour lower benefit allocations.

As with adequacy, equity can be assessed in terms of the decisions about:

- eligibility
- immediate wage-loss benefits
- average earnings established at 8 weeks
- pension awards, including functional pension awards and loss-of-earnings wards
- survivor benefits

2.2 Eligibility

The Compensation Employees’ Union, in their submission to the Royal Commission, pointed out that, unlike the provisions for occupational injuries, the provisions in the Act do not allow for pensions for occupational diseases if the worker returns to work earning full wages (p.5):

Under Section (1) of the Act, a worker who suffers from an occupational disease but is not disabled from earning full wages at the work at which he was employed, is not entitled to an award under Section 23 even if there is evidence
of a permanent functional disability. The worker does not make it through the “gateway” to entitlement under 6 (1) which contains this “economic test”.

(Example of a worker who) is a faller who develops Hand-Arm Vibration Syndrome (Raynaud’s phenomenon) as a result of using vibrating tools. The claim is adjudicated and accepted under Section 6 of the Act. Because the condition is “permanent” in nature, no short term disability benefits are paid. The worker is left with a measurable permanent disability but returns to falling without suffering any time loss. Under 6 (1) of the Act, this worker does not meet the requirements of being “disabled from earning full wages” by way of the occupational disease; therefore the worker does not qualify for a disability award.

Similarly, occupational diseases are often long-latency. A worker who develops an occupational disease after he retires is not entitled to a functional pension. For example, a case was brought before the Appeal Division some years ago by a firefighter who suffered a myocardial infarction within a few months of retiring after 37 years of duty. It was the policy of his employer that firefighters retire at 60 years of age. Initially there was some question of causative significance and the claim was disallowed. On appeal to the WCRB the claim was allowed, since the myocardial infarction occurred so shortly after the cessation of work that it was determined to be work-related. The worker was granted a 17.5% pension, which was then appealed by his employer. The WCRB allowed the employer appeal, referring to Section 33 (1) of the Act for their decision, and concluding that there was no earnings loss due to the heart attack because the worker had already retired. The worker appealed to the Appeal Division, which came to their conclusion with a divided Panel. The majority agreed to deny the worker’s appeal, on the basis of the wording of Section 6 (1) (a) of the Act pertaining to occupational diseases which states that compensation is payable when “a worker suffers from an industrial disease and is therefore disabled from earning full wages at the work at which he was employed…”

The Appeal decision in this case contained a discussion of provisions for other kinds of “occupational diseases” such as silicosis and hearing loss. These specific conditions are addressed in entirely separate sections of the Act, each as an amendment after prior
Royal Commissions but not because of decisions by these commissions (in fact, the decisions by the commissioners had been to leave the section as it was), and they do not require that the worker be earning income at the time of disablement.

In its discussion of the decision, the Appeal Division decision stated that:

It may seem unfair that (the worker) worked so long at a job which caused him a permanent impairment, but receives no compensation for that impairment. Undoubtedly he planned to do things during his retirement that he could no longer do once he suffered his permanent disability. However, Section 6 (1) (a) of the Act is based on the concept of compensation for actual loss of earnings. That is not the same concept that underlies Section 6 (8), 7 or even 23 (1). This may appear to be unfair. The Ontario Act was amended to remove the economic test for all industrial diseases. Our Act was changed to remove the economic test for silicosis and hearing loss claims only. It is beyond our jurisdiction to interpret the Act as if it had been amended to remove the economic test for all industrial diseases.

As discussed above, benefits are easier to obtain for workers who have straightforward injuries where there is no question of work-causation.

Another issue that has been raised in submission is the eligibility for benefits for workers with allergies and sensitivities. The BC Federation of Labour argued, in their February 2, 1998 submission to the Royal Commission, that

The current system for compensating workers with allergies and sensitivities to substances at work is not fair or appropriate. A worker who develops an allergy or sensitivity from exposure has it only because of the exposure at work and often cannot return to that work. The same person will have lost some physical capacity but is only symptomatic while being exposed to the particular substance that causes the sensitivity or allergy. Since the symptoms are present only when the worker is exposed to the substance in question, the Board does not consider

---

55 Decision of the Appeal Division, #92-1314.
the worker to suffer from a disability when not exposed to the agent. A person may be entitled to retraining from the Board but he/she is not entitled to a pension because, according to the Board, there is no permanent disability.

2.3 Immediate Wage Loss Benefits and Average Earnings

The Board’s Briefing Paper entitled *Compensation Rate* discusses the issue of 75% gross versus 90% in terms of equity:

Three factors have been cited in moving from “75 % gross” to “90% net” and then to lower percentages of “net”:

- equity
- incentives/disincentives for returning to work
- costs

The Briefing Paper defines equity in terms of horizontal and vertical equity, as follows:

- “horizontal equity” which requires that workers with equal losses of earnings (or losses of earning capacity) should receive equal benefits, and
- “vertical equity” which requires that workers with different losses should receive benefits proportional to their losses

If equity is considered as equality in terms of the proportion of income earned then, the Briefing Paper points out, 75% gross provides both vertical and horizontal equity. If equity is considered as equality in terms of the proportion of net income or take-home pay, then BC’s plan results in neither horizontal nor vertical equity.

Fairness is also discussed in the Board’s Briefing Paper *Average Earnings*, which deals with the issue of discretion in average earnings policy, as follows:

---

Difficulties in determining the future loss in each individual case while at the same time ensuring that similar situations are treated in a similar manner, and that statutory and policy requirements are complied with, are significant. Particularly difficult problems of how to best determine the average earnings of, for example, principals of limited companies, or new entrants to the workforce, or variable shift workers, create controversy and attract criticism.

The temptation is to try to create policy rules to cover all eventualities, but it is noteworthy that all three prior Royal Commissions cautioned against creating what Sloan described above, as “an iron framework of arbitrary rules” that would interfere with the Board’s discretion in determining average earnings. Where policies are necessary to interpret the Act or to structure the discretion of Board officers in the exercise of their adjudicative duties, it is important that the policies be consistent with the Act; unambiguous; and that they further the purpose of enabling the Board to arrive at the “fair and just figure which truly represents the loss of earnings of an injured employee.”

2.4 Pensions

In 1983, the Board prepared a report examining its current pension system. The Task Force Report: Compensation for Permanent Disability looked at issues such as lump-sum payments, reviews of earnings-loss pensions, consideration of fringe benefits and retirement income in earnings loss, and whether earnings-loss pensions should stop at age 65. The Executive Summary states that (I-1):

This study deals with compensation for workers who sustain permanent disability. The primary objective is to determine if there are more equitable ways of compensating workers for the consequences of disability.
The Task Force observed that (p.I-4)

Awards made under the present system usually bear little relationship to the actual loss of income. This appears incompatible with the fundamental principles of workers' compensation…

The report concluded that the disability award system did not achieve equity in compensation for the following reasons:

• about 80% of awards in BC are for 10% disability or less, and the vast majority of these workers return to their regular employment with no loss of earnings
• the disability schedule needs updating to account for improvements in rehabilitation, prostheses, social attitudes and employment programs for the disabled
• results are inequitable for the same disability (for example, functional awards that don’t have a loss-of-earnings component mean that two workers with the same leg amputations and the same earnings at time of injury, but with different earnings after injury receive the same pension)

The report also concluded that:

• the present system placed too much emphasis on physical disability and not enough on earnings loss
• compensation for physical impairment should be addressed separately from compensation for loss of earnings
• the present system is too paternalistic and workers believe they should receive lump sum payments where no earnings loss occurs
• awards paid on a loss-of-earnings basis don’t compensate for non-economic consequences of disability
• the Board is obligated, under Section 23, to accurately estimate the impairment of earnings; in many cases the estimate provided by the schedule is inaccurate “thus raising the possibility of judicial review in cases of overcompensation.”

The Task Force offered 17 recommendations. Some of these were:
• that workers’ compensation benefits be paid for pain, suffering, loss of
  enjoyment and expectation of life, actual loss of income and unquantifiable
  economic losses
• that actual loss of income be measured by a projected loss-of-earnings
  system such as the Board presently uses but with review
• that non-pecuniary and unquantifiable economic loss be measured by means
  of a schedule
• that compensation benefits measured by schedule for non-pecuniary and
  unquantifiable economic loss be paid by a single lump-sum payment subject
  to Section 35 of the Act
• that compensation benefits for earnings loss be measured by a projected
  wage-loss system with review for earnings loss and paid by periodic
  payments
• that there be a minimum of two obligatory reviews for all loss-of-earnings
  cases
• that Decision #160 of the Workers’ Compensation Reporter Series be revised
  to deal with the effects on the deeming process of a poor economy and high
  unemployment
• that the matter of employability assessments be referred to Compensation
  Services for immediate consideration of more definitive guidelines

A few changes were made after the release of this study, such as the implementation of
the two-year review of LOE pensions. Many of the same issues remain today. Some of
the recommended changes would describe pension systems currently in place in other
jurisdictions across Canada.

As discussed above, there is a very narrow range of disability pensions paid. Currently,
the distribution of functional pensions (i.e., the vast majority below 10%) suggests that
most workers with a range of permanent disabilities but similar incomes only experience
actual differences in loss that range from between 1% and 10%. In order to determine
whether or not this is true, the Board would need to conduct a study assessing the actual
losses experienced by workers who have different types of disabilities. For example,
does a worker with a back injury and associated chronic pain report similar losses two
years or four years after the pension was established as does a person who lose two
fingers or has some immobility of the knee or ankle? How do age, education occupation at the time of injury, and other factors, interact with these outcomes? Once again, the issues to examine and conclusions to be drawn will also be strongly influenced by how loss is defined (i.e., economic loss exclusively, versus loss of enjoyment of life, loss of opportunity to participate in leisure activities, and so on).

With functional awards only, workers with the same disability and the same income at the time of injury will receive the same functional award. However, if the first worker goes back to the same job earning the same amount after injury, and the second worker cannot return to his/her pre-injury job because the disability is more of a factor for his/her job than for the first worker (for example, an office worker with a back injury versus a nurse with a back injury), with functional awards only there is no adjustment for the second worker’s loss of income. Another way that functionals can produce benefits that may appear inequitable is when workers with precisely the same injury (e.g., arm amputation at 50%), but different pre-injury earnings (e.g., $25,000 versus $50,000), receive substantially different pension awards (e.g., $781.25 monthly versus $1562.50 monthly).

As discussed above, functional awards are for the most part based on a schedule of impairment ratings that may or may not accurately reflect earnings loss. LOE pension awards based on actual earnings loss at the time the decisions about pension entitlement are made may be somewhat more accurate and thus fair for those who do suffer earnings loss. Those who are deemed (between 40% and 60% based on the last few years of data on deeming for LOEs) are dependant upon the judgments of Disability Awards officers regarding their capacity and of the opportunities available. The Board’s Briefing Paper entitled Permanent Disability Pensions states that (p.11)\(^57\):

Factors other than the compensable disability can affect the worker’s post-injury earnings, for example, age, education, language ability, experience, willingness to retrain, other medical conditions, place of residence, and general economic conditions. The Board has no clear policy on how it will consider many of these factors in deciding what a worker can earn.
2.5 Personal Characteristics Affecting Benefit Levels

The 1992 Administrative Inventory entitled *Workers’ Compensation in British Columbia: An Administrative Inventory at a Time of Transition* states that (p.154):

> The province also stands out as having a very complicated scheme of benefits. The alternative benefits depending upon a surviving spouse’s age and the number of dependant children are examples in this regard. Benefit adjustments in cases of permanent partial disability that relate to a worker’s age are also notably complex. Fairness in compensation may sometimes require complicated benefit schemes to insure that the social objective is accomplished. However, there is also a virtue in being able to explain to a worker or dependant what the basis is for a given level of compensation. Some elements of the current system are not well understood, perhaps even by those adjudicating the claims. The existing degree of complexity may not itself warrant change, but in considering any future alterations of benefits, the issue of simplicity should be kept in mind.

The WCB of BC’s decisions about benefit levels are affected by several factors which may or may not be appropriate. Some of these have led to reversals on appeal, and others have led to substantial changes in policy or legislation. Still others remain controversial but continue to be applied by the Board. The kinds of personal characteristics that have affected benefit decisions include, or have included until recently, age, number of dependents, training and education, retirement, marital status, and incarceration.

The former requirement that survivor benefits be terminated for spouses once they remarry was removed from the *Act* in June, 1993, and as a result retroactive benefits of approximately $400 million were paid to over 1,000 widows across BC. Other Board decisions have recently been overturned by the Appeal Division with respect to determining survivor benefit entitlement on the basis of a spouse’s age (i.e., under

---

section 17 (3) (d), rather than a greater amount under section 17 (3) (c), because the spouse was under age 40; discussed in Appeal Division Annual Report, 1995\(^{58}\).

The Board’s Briefing Paper entitled *Compensation and the Death of a Worker* states that a pressing issue is:

... the Appeal Division decisions that the age distinctions governing payments to spouses are contrary to the *Charter of Rights*. Because of uncertainty whether the Board could adopt a policy contrary to the express terms of section 17, the Board continues to adjudicate claims in accordance with the section as written. These decisions are often appealed but are usually confirmed by the first level, the Review Board. The Review Board has issued several decisions disagreeing with the conclusion of the Appeal Division. These decisions are often appealed to the Appeal Division which, to date, has always allowed the appeal. The result is inconsistent treatment of surviving spouses, depending on whether and how far they appeal.

If a worker is 65 at the time of injury, it is projected that he/she will have no loss of earnings as a result of the injury (because 65 is generally considered to be the “retirement age”); one important consequence of this decision is that the worker then becomes eligible only for a “functional” award, which tend to be much lower than loss-of-earnings awards. The *Rehabilitation Services and Claims Manual (#40.20)* states that:

Where, at the date of injury, the worker is at or above the age of 65 years, the pension is established by the physical impairment method, and that pension is payable for life. No projected loss of earnings pension is awarded. (p.6-28)

This excludes LOEs for workers who would otherwise choose to work longer than age 65.

\(^{58}\) Appeal Division Annual Report.1995. (no page numbers: under Section 9: Policy of the Governors re. 15 Decision issues referred by the Chief Appeal Commissioner to the WCB board of governors or panel of administrators).
The Rehabilitation Services and Claim Manual (#40.20) further states that:

Pensions assessed on a physical impairment basis are, under the terms of Section 23 (1), payable for life. It was suggested that projected loss of earnings pensions should also be payable for life in every case, but the Board does not accept this. Section 23 (3) does not specifically require this, but rather gives the Board a discretion in the matter. Compensation is only payable under Section 23 (3) “Where the board considers it more equitable”. Since the section authorizes the Board to calculate a workers’ actual loss of earnings resulting from the injury, it is reasonable for the Board to have authority to terminate benefits payable under the section at a time when, even if not disabled because of the compensable injury, the worker would not have been working. (p.6-27)

The Board’s Briefing Paper entitled Permanent Disability Pensions states that:

The Appeal Division of the Board has made several decisions suggesting that aspects of the current system are unlawful or require review. These cover, for example, the blanket denial of section 23 (3) awards to workers over 65 and the automatic cancellation of pensions on imprisonment of workers.

Not mentioned in the Briefing Paper, however, is that a recent internal memo directs staff in Disability Awards not to follow this policy of blanket denial of LOE’s to workers over 65 under certain circumstances, such as when a worker is already past age 65 and is working at the time of injury (see appended discussion of LOE and Functional calculations). The policy itself has not been changed.

Section 33 (3) of the Act, and RSCM Section 67.10, Adjustments to Earnings of Learners, address average earnings adjustments that could be made by reason of a claimant’s age or educational program at the time of injury. Section 33 (3) of the Act states that:

33 (3) Where the board is satisfied that the average earnings of the worker at the time of injury by reason of the worker's age or the worker being in the course of
learning a trade, occupation, profession or calling do not truly represent the worker's average yearly earnings or earning capacity, it may, in the case of temporary disability, adjust from time to time the payments of compensation to take into account the probable increase in average earnings and may, in the case of permanent disability, calculate the award by taking into account the probable increase in average earnings.

RSCM Section 67.10 states that this adjustment does not automatically apply because a worker is young; there must be evidence that the low earnings were because of the worker's youth, and that if it had not been for the injury, these earnings would have increased.

This appears to be the only case where policy states that average earnings can be adjusted upwards because there is an expectation that earnings in the future will be higher than earnings in the past. As discussed previously, this may not be the case, and an increase earnings over time may be just as likely for an individual in mid-career as it is for one at the start of their career.

### 3.0 Consistency

**Summary of Issues**

- with respect to eligibility decisions, the overall rate of allow/disallow appears to be relatively consistent across regions; however, these overall rates obscure the significant variability that exists when it comes to complex claims.
- staff complain that vague legislation and policy, poor management direction, and minimal training account for inconsistencies in adjudicative decisions
- the RSCD reports that a variety of initiatives have been put in place to monitor the consistency of decision making and to improve the quality of decision making
Issues with respect to consistency in decision-making, as with adequacy and equity, can be considered with respect to:

- eligibility
- immediate wage-loss benefits
- average earnings established at 8 weeks
- pension awards, including functional pension awards and loss-of-earnings awards
- survivor benefits

The Board is often criticized for inconsistency in decision making, by employers and workers alike. The Compensation Employees’ Union, in their submission to the Royal Commission dated January 29, 1998, stated that this kind of inconsistency can be traced to lack of clarity in the legislation, contradictory and vague policy, insufficient administrative direction, and minimal training. The submission discussed in some detail the problems with consistency with respect to the adjudication of ASTD claims, and with respect to the adjudication of claims involving natural body movement versus work required motion. In terms of ASTD claims, it was noted that the recent decision to decentralize ASTD claims from ODS to the regional offices had already been tried in 1985 and failed, which led to ASTD claims being re-centralized (p.16-17):

The reason for the historic failure was inconsistency of adjudicative practices and medical opinions in dealing with ASTDs. Recently, statistical data on the handling of ASTD claims across the province revealed a significant variation in disallow rates, ranging from 4.4% to 59.5% across Service Deliver Locations and Area Offices. The inconsistent handling of these often difficult claims speaks volumes about the lack of proper training around an inherently complex subject matter prior to roll out and in follow up. ...Adjudicators are dissatisfied because they are unable to provide quality service to workers and employers. The public is dissatisfied because there is no consistency around the decision making process, resulting in workers wither being under or over compensated.

Similarly, with respect to claims involving motion, the Compensation Employee’s Union, stated that (p.7):
Notwithstanding that the Board has been adjudicating “causation” for the past eighty years, there is no consistency of decision making around the issue of “natural body movement” as opposed to a “work required motion”. If you were to present a claim involving a “natural body motion” which is also a “work required motion” (such as bending over to pick up a pen) and present it to one hundred adjudicators, you would likely get a 50/50 split on whether that claim should be accepted. …The organization chooses not to acknowledge or deal with such inconsistencies that allow adjudicators to arrive at polar opposite conclusions based on the same fact pattern.

The Compensation Employees’ Union, in their January 29, 1998 submission to the Royal Commission, also expressed concerns about Board leadership, which they felt (p.13):

…appear to acquiesce to pressure by influential representatives and vociferous parties to alter decisions regardless of the merits of the claim or the requirements of law and policy. In some cases adjudicative decisions are reversed by management as a result of outside pressures rather than the merits of the claim. …the majority of managers hired have no compensation background and… (t)his basic lack of understanding causes inconsistency within the system as decisions are overturned simply on the basis of complaints and without consideration of their implications. Sometimes managers verbally direct adjudicators to change decisions but refuse to put that direction in writing. …Board policy is so vague it is possible for management to alter it on an informal basis by verbally suggesting staff should or should not be providing certain types of benefits or assistance.

Some data provided by the Board illustrates the kinds of regional differences that occur with respect to eligibility decisions. The Compensation Services monthly performance reports (Executive Summary, December, 1997) provides reject and disallow rates by region for claims overall, and by claim type (Z, B, C, Y, others). Overall, the disallow rate that had been as high as 4.9% as of November 1996 had dropped to 4.5% as of November, 1997. The overall rate ranged from a low of 2.3% in Coquitlam, to a high of 8.0% in Nelson as of November, 1997. The disallow rates for Z and B claims, those that are relatively straightforward claims, were extremely low, ranging from 0% to 1.8%. The
more complex C and Y claims showed much higher rates of disallow, with overall rates of 21.9% and 32.2% for C and Y claims, respectively. The disallow rates to November 1997 for C claims ranged from a low of 16.2% in Abbotsford to a high of 46.9% in Courtenay. The disallow rates for Y claims ranged from 12.4% in Courtenay to 53.5% in Nelson. Among the 7 Lower Mainland and 10 Area Offices, 3 offices showed disallow rates for Y claims over 40%, and 2 offices showed disallow rates of less than 20%. Central Services showed disallow rates of 37.3% and 22.6% for C and Z claims, respectively.

The RSCD has indicated that it has a number of consistency checks in place as part of its Quality Management process. Board interviewees suggested that while a quality control template had been developed, the division had not yet implemented it. The present focus of the division’s quality control activities is on building quality management into its new processes. While this transition takes place, line managers bear primary responsibility for ensuring that claims are being administered well. In addition, individual managers with an interest in monitoring specific issues were reportedly doing so at their own initiative.

4.0 Effectiveness

Summary of Issues

- the RSCD, like other Divisions of the Board, is lacking in sufficient research to evaluate the effectiveness of its programs
- based on worker surveys and performance indicators, there is some indication of improvements in service as result of the new initiatives
- dissatisfaction appears to be greatest among workers who have complex claims and who experience more serious disabilities
4.1 Overview of issues

As with preceding issues, effectiveness of the Compensation Services Division of the RSCD should be considered in terms of the decisions about:

- eligibility
- immediate wage-loss benefits
- average earnings established at 8 weeks
- pension awards, including functional pension awards and loss-of-earnings wards
- survivor benefits

In particular, effectiveness might be measured in terms of the extent to which the Division:

- ensures that the right decisions are being made on claims eligibility
- ensures that benefits are adequately compensating workers for their losses
- ensures that benefits are fairly compensating workers for their losses
- ensures that the quality of service, in terms of courteousness, accessibility, consistency, timeliness of decisions, and so on, is high
- ensures that service is provided as efficiently and cost-effectively as possible

The RSCD has conducted a number of studies of its processes, and has in place an ongoing survey of worker satisfaction. The division also has conducted focus groups and surveys specifically to assess the effects of its new initiatives, such as Case Management. The Division does not currently have in place a process for ongoing evaluation of effectiveness. There is insufficient time to conduct a complete evaluation of the effectiveness of the Board’s Compensation Services program, and this is beyond the scope of the Royal Commission. Instead, this report will summarize the research, performance data and survey information that the Board currently collects (other than the research conducted on new initiatives such as Case Management and E-File, which are being addressed in another Royal Commission report). Further discussion of efficiency, effectiveness and accountability can be found in the Compensation Services Part 3 report.
The 1996 Administrative Inventory\textsuperscript{59} stated that (p.263):

In 1991, we urged the WCB to recognize the need for research and evaluation in policy development. …There is still no unit at the WCB that is asking the critical policy questions, the “why” questions, and then gathering the information and doing the analysis required to answer those questions. We believe that this is a major deficit. …Ultimately the WCB cannot take control of its destiny unless it can define its own problem areas and ways to resolve them. Without an effective policy research function, the WCB is dependent on others to define its failures.

For example, one of the issues that the authors of the Administrative Inventory felt should be sorted out included why there has been such an increase in pensions, such as the extent to which inadequacy of functional awards has resulted in increased use of LOE awards, and the contributions of secular trends, demographic forces, policy changes and system performance variables.

At present, the available indicators of the effectiveness of Compensation Services include:

- achievement of program objectives measured through the division’s Key Performance Indicators
- satisfaction levels of clients, measured through the Angus Reid Surveys
- number and nature of appeals

These will be discussed separately below.

4.2 Performance Indicators

The Rehabilitation and Compensation Services Division has developed a set of Key Performance Indicators, with subsets for STD claims, Rehabilitation Centre claims, and

LTD claims, and with additional indicators for Fraud and Service (i.e., Client Satisfaction).

STD claim indicators focus on the number and duration of claims, timeliness of payments, number and rates of disallowed and rejected claims, number of appeals and outcomes of these appeals. Rehabilitation Centre indicators cover, for some but not all of the Rehabilitation Centre programs, number of discharges, occupancy, client satisfaction, days from injury to admission, fitness to return-to-work at discharge, and durable return-to-work at post-discharge. LTD indicators address number and average cost of awards (including fatals), timeliness, number of claims awaiting a determination by Disability Awards, and the conversion rate from STD to LTD.

Fraud indicators provide number of Field Investigations and total dollars recovered, and are expected to eventually provide referrals to Crown, convictions and pending convictions.

Client satisfaction indicators include overall satisfaction rates by SDL, and satisfaction broken down by specific attributes that deal mostly with care and understanding (i.e., ability to understand needs, helpfulness, care and concern, courteousness, respect, patience), and that also address competence and knowledge (e.g., ability to provide required information, professionalism, knowledge of claims process), access and individualized attention (i.e., availability, individualized attention, familiarity with case), timeliness (i.e., speed of service), and fairness.

The Key Performance Indicators reports show that on several dimensions the RSCD is showing improvements in service delivery. Income continuity (measured in terms of % of claims paid within 17 days) has increased, as has timeliness of this first payment. Duration appears to have also decreased for a time, but is now showing an increase. Findings on duration should be interpreted carefully. Until the Board has accurate data on the outcomes at claims closure (i.e., the extent to which these claims of shorter duration were of shorter duration because they ended in a safe and effective return to work, without re-opening) it is difficult to determine the extent to which the reduced duration was a result of improved service effectiveness, or the result of changes in
practices with respect to case closure and termination of STD benefits. Some of the other performance indicators show minimal change.

Based on a review of the Board’s existing performance indicators, and on the response from the Board to date regarding data requested by the Royal Commission, it appears that the Rehabilitation and Compensation Services Division continues to collect insufficient information upon which to assess effectiveness and determine strategic directions. Many of the performance indicators are focused on efficiency and costs (for example, timeliness of decisions and total costs of pension and LOE awards) which are important but may be difficult to interpret (see discussion of efficiency below), rather than effectiveness in terms of accuracy of decisions. Appeal data is aggregated and not of much use in determining what kinds of decisions are being appealed, allowed and disallowed.

It would be useful for the Board to also collect and analyse, for example:

- basic information on claimant characteristics, including occupation, type of work (full-time, part-time, casual or seasonal), and work experience prior to injury
- for eligibility decisions, allow and disallow rates by the type of injury/disease; claims investigated for fraudulent activity, nature of fraudulent activity, and outcomes of investigations; analysis of appeal decisions with respect to eligibility (for example, issues related to legislation, policy, or procedure)
- for wage-loss benefit decisions, differences between initial wage rate and average earnings rate, and reasons for these differences (e.g., proportion of full-time versus casual/seasonal workers); extent to which workers’ STD benefits are terminated on the basis of actual return-to-work versus deemed return-to-work; nature of/reasons for re-openings; analysis of appeal decisions regarding the rate of compensation and regarding termination of wage-loss benefits (for example, issues related to legislation, policy, or procedure)
- for income continuity, extent to which eligible workers receive continuous benefits from time of injury through to first pension payment

---

• for pension decisions, extent to which long-term earnings loss decisions accurately reflect actual loss in the future; analysis of the distribution of pension decisions for workers varying in terms of injury and personal characteristics; analysis of appeal decisions with respect to size of pension awards
• for overall monitoring, number of, and reasons for, requests for Manager Reviews of adjudicator decisions, and outcomes of these decisions

4.3 Client Satisfaction

The Rehabilitation and Compensation Services Division has used Angus Reid surveys to track claimant satisfaction since 1996. These surveys have shown an increase on several dimensions from the start of the first wave to the most recent wave. For example, satisfaction with overall service appears to have increased, and satisfaction with specific dimensions of service, such as perceived helpfulness, patience, and ability to provide required information, have increased. Some of the sample sizes were small, and should be interpreted with caution. Clients with complex claims are less satisfied than clients with more simple claims.

The Angus Reid survey reports contain the following caution with respect to 10-point satisfaction rating scales: “Research has shown that rating scales skew toward the positive end of the scale. On a ten-point rating scale, a rating of 6 or 7 is interpreted as neutral while 5 and below indicate dissatisfaction and 8 or more satisfaction.” Overall satisfaction rates reported by the Board, however, appear to include ratings at 6 or above.

4.4 Number of Appeals

The 1996 Administrative Inventory The Workers’ Compensation System of British Columbia: Still in Transition stated that (p.206):
…appeal activity at the Workers’ Compensation Review Board (WCRB) grew rapidly during the period 1981 to 1994. It reflects an annual increase of nearly 9 percent in appeals received at the WCRB, 7 percent annually when corrected for employment levels. In other words, disputed claims are increasing more than four times as fast as employment in British Columbia and more than eight times as fast as new claims registered with the WCB. …this increase has also been much greater than that of the underlying wage-loss claim population at the WCB, as shown in an increase of 8 percent annually in the WCRB appeal rate per 100 wage-loss claims first paid. Appeal activity has also increased at the Appeal Division level, although the record is not so long nor so clear.

In view of all of the decisions that are made at the Board, nearly 200,00061 on eligibility with respect to claims registered, 70,000 to 80,000 on wage-loss, another 5,000 on pensions, and about between 150 and 200 on fatalities, there appear to be relatively few decisions that are appealed. For many claims, there are multiple decisions made on the claim, each of which could potentially lead to an appeal. The fact then that only about 10,00062 appeals are pursued each year might be seen as indicative of the fact that decisions are being made effectively by the Board.

On the other hand, the Board accepts about 95% of claims that are registered. In 1997, 8,358 claims were disallowed out of a total of 185,852 claims reported in the year63. This represents 4.5% of total reported claims. There was a trend through the 1990’s where the disallow rate was on the rise; the disallow rate in 1993 showed increases

62 WCB of BC. Rehabilitation and Compensation Services Division. Response to Royal Commission Request dated February 9, 1998. Response to Questions 12 (1). Data provided by Workers’ Compensation Review Board, Appeal Division, and Medical Review Panel. WCRB worker appeals for 1995, 1996, 1997: 10,802, 12,473 and 10,221. A small number of appeals are also initiated by dependants, and by employers. Not all appeals initiated proceed to a decision. Some WCRB decisions are subsequently appealed at the level of the Medical Review Panel and/or the Appeal Division. The number of appeals is not the same as the number of claimants who appeal – several appeals can be registered on a single claim, and one appeal may involve several issues.
each year to a high of 4.9% in 1996. Whether or not the claim is compensable is the most common reason for appeals to the Workers’ Compensation Review Board. If, for example, 2,000 of the 10,000 WRCB appeals initiated were from among the 8,358 claimants whose claims had been disallowed, this would represent an appeal rate of 24%, which is significantly higher than the 5% figure that would be arrived at by looking at the total number of appeals over the total registered claims (i.e., 10,000/200,000). It is also important to note that denied re-openings are one of the highest reasons for appeal. Statistics provided by the Workers Compensation Review Board show that in 1997, 10,221 appeals were received from workers, of which 1,175 concerned “no compensable injury”, and 571 concerned “reopening of claim denied”.

The other frequently appealed decisions appear to concern the termination of wage-loss benefits, the rate of compensation, insufficiency of pension benefits, and insufficiency of other benefits and services (such as vocational rehabilitation, health care benefits, etc.).

Reporting on reasons for appeals by the WCRB and the Appeal Division is limited. In its 1995 Annual Report, the WCRB stated that (p.1):

The types of issues brought to the Review Board generally break down into four categories:

- disputes over the initial acceptance of a claim or the re-opening of a claim.
- disputes over the ongoing management of a claim, including issues such as the average earnings upon which the compensation rate should be based and termination of benefits.
- rehabilitation matters including assistance in returning to work in the pre-injury occupation, modified job duties, or retraining for other occupations.
- the existence of a permanent partial disability and the amount of compensation for that disability.

---

The 1991 Administrative Inventory *Workers' Compensation in British Columbia: An Administrative Inventory at a Time of Transition* presented data from a sampling of appeal cases decided by the WCRB between January 1990, and May 1990. These data showed that 25% of appeals to the WCRB concerned disallowed claims, 19% concerned denied re-openings, 13% concerned termination of wage loss benefits, and 12% were with regard to insufficient pension awards.

These early statistics are generally consistent with the numbers provided to the Royal Commission by the Workers' Compensation Review Board for recent years66. For example, data from the Workers' Compensation Review Board for 1997 show that 10,221 appeals were received from workers, and 4,738 of these appeals were coded by issue. Of those coded, 1,175 (25%) were coded as “no compensable injury”, and 571 (12%) were coded as “reopening of claim denied”. A total of 626 (13%) were coded as “permanent partial disability insufficient”, and 170 were coded as “permanent partial disability denied”. In addition, 461 (10%) concerned termination of wage loss benefits, and another 165 were coded as “wage loss benefits denied”.

If 10,000 appeals were pursued by workers with the WCRB in a year, and 13% of these concern appeals of pension decisions (i.e., 1,300), this would represent more than 20% of claims on which pension decisions were made. It is important to note again, however, that not all of these 10,000 appeals are carried through to completion.

Manager Reviews in Compensation Services appear to have been focused on the same major issues. In a Policy Discussion Paper on Manager Reviews presented at a SEC meeting on March 14, 1994 entitled *Manager Reviews of Compensation Decisions: A Policy Discussion Paper*, Draft 1.0 states that for 1993, reviews concerning disallowed claims, denied re-openings, levels of functional impairment awards, and termination of wage loss benefits amounted to 51.4% of analyzed reviews (i.e., the reasons for reviews), with modified and reversed rates for these types of decisions at 16.6%, 20%, 0.6% and 30.3% respectively (i.e., outcomes of reviews by reason for review).

---

Similarly, the total number of appeals regarding the termination of wage loss benefits need to be considered in light of the total number of people who could be affected by the termination of wage loss benefits. Of the 200,000 registered claims each year, about 75,000 receive wage loss benefits. In most cases, these workers return to work shortly after their injury. Termination of wage loss benefits occur either when a worker has returned to work, or is deemed ready to return-to-work.

Without accurate data from the Board on basic issues, such as how many workers on wage-loss benefits, at the time of closure of the file: have returned to work, have not returned to work but are deemed ready-to-return, or have not returned to work because they are determined unable to return, it is impossible for the Royal Commission to determine the proportion of workers who might have wage loss benefits terminated and thus be in a position to appeal. The Board has notified the Royal Commission that it is unable to provide neither this return-to-work information nor the number of STD closure decisions based on deeming, so it is unlikely that it can provide statistics on when these deeming decisions are made. Nevertheless, based on our understanding of deeming decisions, it seems unlikely that in most cases they would be made very early on in a claim. The Board indicates that after 4 weeks, about 69% or 52,000 workers are no longer on wage loss benefits. If even half of these remaining 23,000 workers on wage loss go back to work and their wage loss benefits are terminated because of this, then that leaves about 11,500 workers who may have wage loss benefits terminated on the basis of deeming.

4.5 Process Issues

Calls for increased research and program evaluation within the Workers’ Compensation Board, including the Compensation Division, have come from many sources over the years, including various Administrative Inventories, the Auditor General’s Accountability report (discussed below), and in submissions to the Royal Commission. For example, the Business Council of British Columbia, in its submission, recommended that (p.18):

---

There has been insufficient program evaluation within the system – the Workers’ Compensation Board must more effectively manage and evaluate all resources used within the system. The Royal Commission should issue a recommendation that would require the Workers’ Compensation Board to “institutionalize” the use of program evaluation (based on quantitative and qualitative measures) on an ongoing basis. On the basis of these evaluations, the WCB should institute policy and procedural changes where required.

5.0 Efficiency

Summary of Issues

- the RSCD has had a number of problems with efficiency in the past, including delays in initial payment, delays in intervention, delays in pension calculations and errors in pension calculations, inadequate follow-up on pension decisions, and so on
- major changes have taken place in recent years to improve efficiency and effectiveness, including E-File and Case Management
- these strategies seem to be having some benefits in terms of timeliness of decision-making and timeliness of receipt of services
- there may be unintended impacts that the Division should be monitoring

5.1 Overview of Issues and Cost Containment Strategies

Efficiency can be assessed in terms of decisions with respect to eligibility, provision of wage-loss benefits, calculations of average earnings, and determination of pension awards and survivor benefits. Measures of efficiency might include, for example, the number of staff relative to the number of claims processed, caseloads for different staff positions, timeliness of various decisions, and timeliness of benefits provided. Some of these measures are included within the performance indicators discussed above.

Several concerns have been expressed by stakeholders with respect to rising costs within the Board. Despite substantial increases in staff over the past ten years, there appears to have been little change in service delivery timeliness or quality. For example, according to the 1996 Administrative Inventory\(^69\) “(t)he staffing growth in the Compensation Services Division over the last several years cannot be demonstrated to have resulted in significant performance gains in the adjudication or management of claims” (p.261). Employers express concerns that their workers’ compensation assessments continue to rise despite reductions in claims.

There were a number of issues discussed in the Attention Points of the 1996 Administrative Inventory\(^70\) which relate to cost containment and efficiency of processes. These included:

- increasing pension costs, and the need for research to understand these trends
- slow movement to control medical care costs, and perverse incentives in the form fees negotiated between the WCB and the BCMA
- increasing duration of disabilities and the need for research to understand this trend
- a continuing deterioration of the paylag situation despite the addition of considerable resources to Compensation Services
- staffing growth in Compensation Services with no demonstrated performance gains in the adjudication or management of claims

The Administrative Inventory also referred to the Boards cyclical pattern in efforts to contain costs (p.260):

The WCB has compiled a very uneven record in controlling administrative costs. During the contraction of the mid 1980s, administrative costs were probably too


tightly controlled. The result was a rebound that began well before the implementation of the new governance structure in 1991. Now the WCB has entered a period of stringent cost control again. This cyclical pattern is unfortunate and ultimately counter-productive. But the annual budgeting and strategic planning process that has been introduced over the past two years at the WCB should make a major contribution by providing the predictability to resolve the stop-go method of funding. This has been long overdue and the WCB deserves credit for this substantial improvement.

The Board has moved in recent years to contain costs and slow the rate of costs that appeared to be increasing at “alarming” rates. Cost-containment strategies within Compensation Services have included efforts to intervene early in the life of a claim, and working more closely with employers and others to facilitate early return-to-work through Case Management. Another important strategy aimed to improve efficiency of processes and control administrative costs is E-File (Note: As E-File and Case Management are the subject of other Royal Commission reports, they will not be discussed further here). Other strategies include the Call Centre for direct reporting of injuries, and ARCON, for the measurement of functional impairment. As discussed above, preliminary indications are that some changes in the efficiency of service delivery are occurring, particularly for increased timeliness of payment.

The Board is also reporting on overall “administrative cost efficiency”, which it defines as cents per $100.00 of assessable payroll, as part of its Strategic Plan. This measure appears to be based on the sum of administrative expenses for all divisions, divided by total assessable payroll for registered employers. As noted in the 1997 Annual Report (p.10), total expenses for operating the Board net of recoveries and allocation to self-insured employers was 44.4 cents per $100 of rateable payroll compared to 43.7 cents in 1996. According to the Board’s Key Performance Indicator reports, the Board’s objective was to reduce administrative cost efficiency to $0.43 by 1997.

The Board also has recently put in place a 35% “hurdle rate” for capital spending. With respect to the hurdle rate, the Board evaluates business cases submitted in terms of the project’s capacity to deliver a 35% internal rate of return. Cost reductions may be achieved, for example, by reductions in claim rates and costs associated with the
project. So far, there appears to be no information available on whether or not the Board’s projects have achieved the hurdle rates they anticipated; in the latest Key Performance Indicator report (February, 1998), it is stated that (C-4):

Corporate Controller’s has implemented a system to track the experienced internal rate of return on investment capital expenditures for ISRC approved projects. These figures will be reported as projects are completed.

The 1998 Draft Auditor General’s Report on the Board’s accountability\(^71\) discusses the administrative cost efficiency and hurdle rates, as follows (p.30):

The WCB’s overall efficiency can best be determined by comparing the costs of the organization to workloads and to the level of service quality provided.

Current reports on cost are contained in the monthly financial statements to the Panel and in the annual report, and show “administrative expenses” by division. Both reporting mechanisms also include a measurement for administrative efficiency (i.e., cents per $100 covered payroll).

In our view, however, this area needs some refinement. A definition of what constitutes “administrative” should first be made. Investments in client service upgrades or information enhancements to improve performance should be separated from routine maintenance expenditures. As well, the reporting should correlate administrative expenses to service quality outputs and outcomes.

Another efficiency measure is the “hurtle rate” of 35% for capital spending decisions. The July edition of the Key Performance Indicators report states that “an average internal rate of return of 35% for all investment type expenditures is required.” Nevertheless, we are concerned that, on its own, this criterion would not allow the WCB to consider projects that would meet other less quantifiable but still desirable criteria such as enhancement of service. However, we understand that, in practice, other factors than simply a hurtle rate are used to

select and report on capital projects to the Panel (e.g., whether the project helps satisfy one or more of the WCB’s strategic goals). We believe this information should also flow to the annual report.

In recent years, the Board has also begun to pilot test new initiatives rather than implementing them full-scale throughout the organization. The 1996 Administrative Inventory\textsuperscript{72} endorses the notion of pilot testing the new initiatives to “effectively prove out concepts before widespread implementation.” (p.261). However, there have been concerns expressed about whether or not sufficient efforts are made to truly assess the new initiatives prior to roll-out. The Administrative Inventory offers a warning regarding the new initiatives, based on past experience (p.261):

The promise of the new initiatives in the Division is great, but past performance must temper our enthusiasm for these changes. The Transition Project was also launched with great expectations in the Division and it ended as a costly and demoralizing failure. The entire SDS effort needs to be carefully managed and nurtured as a critical part of the WCB’s long-term commitment to customer service and value, as well as employee satisfaction and productivity.

In its “Attention Points”, the 1996 Administrative Inventory\textsuperscript{73} discusses a number of system performance issues and states that (p.254):

Some are beyond the reach of the WCB and would require statutory action. Others are a matter of policy implementation that is under the control of the WCB. One underlying theme that characterizes nearly all of these issues is a lack of adequate analysis about causes and consequences. The information generally is available, but it has not been analysed and presented in a way that can contribute to resolving issues.


5.2 Potential Unintended Impacts of Cost-Containment Strategies

Weiler (1980)\textsuperscript{74} argues that the ongoing conflict and protest with respect to workers compensation can be understood within the context of simultaneous and at times competing objectives (p.21):

….there are several valid objectives in fashioning any kind of decision-making procedure. We want that procedure to be economical in its use of the program’s resources and time. We want it to be accurate and reliable in the judgments which it makes about the difficult cases. We want the process to operate fairly and legitimately in the eyes of interested parties. But none of these can be pursued single-mindedly, without regard to the others. Unhappily, in the real world these objectives too often come into conflict.

The Compensation Employees Union addressed the issue of the focus on speed at the expense of quality. The 1996 Administrative Inventory entitled \textit{The Workers’ Compensation System of British Columbia: Still in Transition}\textsuperscript{75} also noted that:

…the encouragement of quick decisions by initial adjudicators clearly creates a subtle bias in favour of granting benefits. No one will complain if the initial adjudicator just says yes, but eventually someone will have to deal with the expectations that have been created. (p.263)

Thus, one concern with respect to the RCSD current strategies is the extent to which there will be a trade-off in terms of cost-containment versus quality service to workers. If efforts to control costs in the short-term result in changes in allow/disallow rates, reduced benefits to eligible claimants, or increased risk of re-injury, there may be longer-term cost impacts that are difficult to quantify. Some of these potential unintended impacts have been raised in submissions to the Royal Commission.


According to the Compensation Employees Union, the division’s statistics on efficiency of processes may be misleading (p.16):

A prime example of interdepartmental goal conflict within Compensation Services centers on management’s current emphasis on statistics such as paylag (the length of time from date of injury to first payment processed) and duration (the length of time the worker remains on short term disability benefits) rather than quality decision making. Such an emphasis forces adjudicators to make quick decisions based on limited evidence to meet paylag statistics and to terminate benefits as quickly as possible to meet duration statistics. Pressure to meet “paylag” statistics means claims are being routinely accepted unless the employer has “protested”. This seems to be a change and abandonment of the historical inquiry role. If this is what is wanted by the system, then the change should be the result of proper public legislative and policy amendments, not management’s need to demonstrate impressive but extremely selective and misleading statistics.

As discussed above, if deeming decisions are made with increasing frequency, the duration of wage-loss payments and the size of pension awards would be expected go down as a result. On the other hand, re-injuries may be more likely to occur and re-openings increase. Additionally, there are the unmeasured effects on claimants in terms of self-sufficiency and actual economic loss.

5.3 Ongoing Issues with Respect to Efficiency

The RSCD has undertaken many new initiatives over the course of the past two years, to the extent that virtually all processes with respect to eligibility and entitlement have undergone or are about to undergo change. The extent to which these processes prove to be more efficient over time remains to be seen, but the rationale for many of these initiatives appears sound. Furthermore, as discussed above, findings on timeliness and duration appear positive (though it is difficult to consider them separate from the quality of decisions). A few ongoing issues with respect to efficiency surfaced over the course of this review that relate to existing processes. One issue concerns the validation of
information received by the Board in making decisions on pensions, and the other involves the process of monitoring decisions through Manager Reviews.

The Board’s policy with respect to Manager Reviews has recently changed. The following explanation was provided to the Royal Commission by the Board:

Prior to January 9, 1996 then item 108.31 of the Rehabilitation Services and Claims Manual essentially provided the right to a Manager’s Review. Generally a paragraph advising such was included in every case of a decision resulting in a disallow, a reopening refusal, a termination of benefits, a payment of a lesser pension than expected, or when advising employers that a protested claim/decision was considered acceptable.

On January 9, 1996 the Panel of Administrators decided that item 108.31 should be rescinded. The paragraph in decision letters as described above was no longer included. However, Practice Directive #5 was then issued to apply to all decisions made on or after January 15, 1996. It states that Managers still have in any case the general power to rehear and redetermine any decision of a Board officer pursuant to Section 96 (2) of the WC Act and 108.30 of the Manual. It goes on to outline that where a written request specifying the grounds of objection is received by a Manager, the procedure is as follows:

- If new evidence was obtained/provided since the decision of the officer, the Manager refers the matter back to the officer to consider the new evidence and render an appropriate decision.

- If the objection to the decision is on the basis it is contrary to law or policy the Manager will make a decision on the issue.

- If the objection to the decision is on the basis of the officer’s weighing of the evidence the Manager will decline to reconsider the matter and refer the party to the Review Board.

---

6.0 Accountability

The Auditor General of BC recently completed a review\textsuperscript{77} of the accountability information provided to the Panel of Administrators, and the information to external stakeholders through the Annual Report. The report had a number of recommendations regarding the mandate and direction of the WCB, outputs and outcomes, and organizational capacity. Among the recommendations of relevance to the RSCD either directly or as part of the overall recommendations to the Board were that the Board:

- identify key cultural and value dimensions, and key service and performance values, competencies, and principles for each key decision making role, and report on activity and client perceptions regarding the exercise of these values (i.e., whether claims are handled fairly, compassionately, courteously and expeditiously)
- report on the continued relevance of its rehabilitation and compensation programs
- enhance its reporting on key corporate outcomes, including adequacy of compensation to injured workers (pre- and post-injury incomes), and restoration of injured workers to pre-injury status (physical and mental)
- report on the results of a comprehensive return to work analysis that includes return-to-work results by: type of claim, type of injury, type of injury and deemed versus actual return-to-work cases; durability; and information on reopenings
- provide an inventory of the key internal controls and annual assurance about the integrity of the internal controls, including mechanisms that exist to prevent and detect fraud
- enhance its reporting on the quality of the adjudication process, with indicators such as allow/disallow rates and appeal rates; additionally, factors that affect this quality like corporate culture, policies, quality assurance processes and the skill base of staff handling the claims, should be included

• report on number of appeals and outcome of these appeals from all appellant bodies, including number of claims allowed, disallowed or rejected, and overall disallow rates for all types of claims
• report on timeliness of client service beyond simply the first short-term disability payment, and beyond simple averages (including ranges and frequencies)
• periodically measure and report on client satisfaction, including a broader range of clients (e.g., employers, medical community, non-injured workers), segmenting the market and examining other issues such as communication and complexity of the process
• define “fairness” in relation to access to services and develop an indicator to measure and report on fairness
• explore the possibility of developing and reporting on more meaningful efficiency measures, such as performance measures that attempt to correlate administrative expenses with service quality
• identify potential secondary impacts (e.g., psychological well-being of long-term claimants), and assess which ones are worthy of investigation and reporting, and report on those selected
• inventory required competencies for key functions (e.g., benefit entitlement and rehabilitation), assess the skill base of incumbents, and report on results

With respect to adequacy of compensation, the report stated that the most important indicator of adequacy of compensation, from the perspective of the report’s authors, would be a comparison of pre- and post-injury income, yet there were no current measures of this used or reported on by the Board. The Auditor General’s office had also expected that WCB management would provide the Panel and stakeholders with periodic analyses of the relevance and clarity of the legislation governing the WCB, and that management would provide periodic assurance that the WCB is in compliance with the governing legislation. The Board indicated that some analyses of the relevance and clarity of the legislation did occur on an as-needed basis; however these kinds of reviews appear to be infrequent and not part of regular reporting. The report’s point regarding segmentation of the market is also particularly important; only recently have statistics been presented on “complex claims” versus other types of claims, but this kind
of analysis has not gone further to examine various kinds of injuries, and reporting tends to be in aggregate figures for the most part.

The Board has developed a preliminary response to the recommendations of the Auditor General's report. Seven of the recommendations were accepted jointly by the Senior Executive Committee. Assignment of responsibility for the remaining recommendations went to various departments and divisions.

In most cases, where the SEC has accepted joint responsibility, it is noted that a specific management action plan will be formalized by the end of the second quarter of 1998. Within respect to one of these recommendations – the one related to timeliness measurement – the Board’s response was that “there are several points throughout the claim lifecycle” where these kinds of measurements can be adopted (e.g., timeliness of admitting injured workers into clinical programs; timeliness in responding to appeal decisions) and that these and other measures will be incorporated as part of several projects being developed, such as the Case Management project and the integrated MIS system. The remaining responses vary in terms of the extent to which they specifically define steps that will be taken to address the objective, as opposed to reiterating what steps are already in place, or committing to exploring the feasibility of responding to the recommendation. For example, with respect to the recommendation to assess and report on pre- and post-injury incomes, in order to provide assurance of benefit adequacy, the Board’s response was as follows:

Currently, information on post-injury income is not captured by the Board’s legacy operating systems. The Compensation Services Division will explore the feasibility of acquiring and recording this information.

With respect to recommendations on measuring restoration to pre-injury status and return-to-work outcomes, the Board’s response was that the Case Management Strategy aims to address these issues and that relevant information will be incorporated into the management information system. With respect to recommendations regarding reporting on quality of adjudication, the Board referred to the quality management checks that are already in place, as well as future plans already laid out in a comprehensive quality management program recently prepared, and indicated that results of these existing
efforts would be reported to the Panel and in the annual report. Finally, with respect to recommendations regarding timeliness information, the Board responded that measures of timeliness at other points in the claim life cycle will be incorporated as part of several projects being developed over the next two years, such as Case Management and the integrated management information system.

In its Annual Reports, the Board provides only basic information on claims pattern, such as the number of claims of various types that were paid in the year, with distributions by subclass and a few distributions by claimant characteristics. Other information relevant to stakeholders, such as the number of claims disallowed, the number of workers who have returned to their pre-injury jobs or other jobs, and the number and distribution of LOE and functional pension awards (other than aggregated totals), would probably be useful to report. Very often, the Board goes to great lengths to consult with stakeholders. There have been several significant legislative and policy issues that have arisen and that the Board has consulted with stakeholders on, often with no ultimate change because of the polar views of the stakeholder groups and failure to reach consensus. The Board appears to have taken more initiative in recent months to move ahead on policy issues even where consensus has failed.

Further discussion of these issues can be found in the Royal Commission’s report on Performance Measures, and in the Compensation Services Part 3 report.
APPENDIX

Additional Pension Information
CALCULATIONS

- The Board provides Functional and Loss-of-Earnings pensions. For pensions where there is no potential loss of earnings, only Functional calculations are made. For pensions where there is a potential loss of earnings, Functional and Loss-of-Earnings calculations are made.

When a worker is to be considered for a pension, a referral memo is sent from Claims to Disability Awards. Through a front-end screening process based on these memos, referrals are sorted into those that will require Functional awards, versus those that have a potential for loss-of-earnings.

Functional awards with no potential loss of earnings are determined through one set of calculations only – i.e., calculations that determine functional impairment.

However, for every case where there is a potential loss of earnings, two sets of calculations are made:

1) calculation of functional impairment (the “loss of function/physical impairment method”)
2) calculation of loss-of-earnings (the “projected loss of earnings method”)

The Rehabilitation Services and Claims Manual (RSCM), Section #38.00, states that these two methods are considered “in every case where applicable”, with “the amount of the pension being the higher of the two figures produced by the two methods.” It also states that “Physical impairment and projected loss of earnings assessments are made at the same time. It is not proper to establish a physical impairment pension alone and delay a projected loss of earnings assessment on the grounds that it is difficult at the time to assess the claimant’s potential loss of earnings.”

- The decision about which award to make is always based on which calculation has resulted in the higher award; the higher of the two calculations – LOE or Functional – is always selected over the lower of the two calculations.

As discussed above, RSCM Section #38.00 states that the higher of the two figures is always awarded.

Functional award calculations are usually higher than what the LOE award calculations would have been, because injured workers usually return-to-work or are deemed capable of earning comparable earnings post-injury. If the worker has returned to work or is deemed capable of returning to work at pre-injury earnings, the Functional award calculation would exceed the LOE calculation (which would be zero).

The number and size of LOE pensions may increase or decrease depending upon the actual or deemed jobs available to workers.
• Both Functional and LOE Awards assume some current or future economic loss

Section 23 (1) of the Act refers to estimated loss of average earnings, and it is Section 23 (1) of the Act on which functional impairment awards are based. However, actual loss of earnings are not considered when calculating functional awards; rather, these awards, and the Schedule upon which most are based, assume some “average loss” that workers with similar injuries will incur. As stated in Section #39.00 of the RSCM:

Section 23 (1) provides that “Where permanent partial disability results from the injury, the impairment of earning capacity shall be estimated from the nature and degree of the injury, and the compensation shall be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and shall be payable during the lifetime of the worker or in another manner the board determines.” The physical impairment method is the primary one used for measuring permanent disabilities. It is the method provided for in Section 23 (1). In applying this method, the Board does not normally have regard to the individual worker’s actual loss of earnings.

• Functional awards are provided for under Section 23 (1) of the Act; LOE awards are provided for under Section 23 (3) of the Act

As noted in RSCM Section #40.00, Projected Loss of Earnings Method, the LOE method implements Section 23 (3) of the Act, as follows:

Section 23 (3) provides that “Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which he is earning or is able to earn in some suitable occupation after the injury, and the compensation shall be a periodic payment of 75% of the difference, and regard shall be had to the worker’s fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business.”

• Functional awards are calculated by first multiplying average earnings by 75%, then multiplying this amount by the % of disability. Awards are subject to the maximum specified in the Act.

For both Functional and LOE pensions, the worker’s average earnings prior to the injury are determined first. Functional impairment awards apply the percent of disability, determined either through a Scheduled or Non-Scheduled method, to 75% of the worker’s average earnings. For example, a worker who has had an amputation at the middle of his/her forearm to her wrist, is assessed as having a 50% disability (according to the schedule), and has pre-injury average earnings of $35,000 per year ($2916.66 per month), the functional award would be $1093.75 per month, as follows:

75% X $2916.66 = $2187.50
50% X $2187.50 = $1093.75
• LOE pensions are calculated by determining the difference between the worker's pre-injury average earnings and his/her post-injury actual or projected earnings,

For LOE calculations, there is a determination made with respect to the types of jobs that the worker is capable of (defined as jobs which are: suitable, reasonably available, and which would maximize earnings potential in the long-term), and the associated earnings that the worker is capable of. Next, the difference between pre-injury average earnings, and post-injury projected (or actual) earnings, is calculated. The pension awarded is then 75% of the difference between the pre-injury and post-injury earnings calculations.

So, for example, a worker who has had pre-injury average earnings of $35,000 per year ($2916.66 per month), and post-injury projected earnings of half that at $1458.33, the loss-of-earnings award would be $1093.75 per month, as follows:

\[
\begin{align*}
\text{$2916.66$ pre-injury earnings minus $1458.33$ post-injury earnings} &= $1458.33 \\
75\% \text{ of } $1458.33 &= $1093.75
\end{align*}
\]
AGE DISTINCTIONS

• All Functional awards last for life

Functional awards are payable for the life of the worker. Under Section 23 (1), functional awards are “payable during the lifetime of the worker or in another manner the board determines.” The only alternative to “payable during the lifetime” is payable in a “lump sum”; commutations are based on the assumption of life payment (i.e., the actuarial principles used assume that the payments would continue for the life of the worker, and they use average life expectancy figures).

• LOE awards last for life for workers aged 50 or under

LOE awards continue in their entirety (assuming no changes occur as a result of subsequent reviews) for workers who are at or below age 50 at the time of injury.

RSCM Section #40.20 states that:

Where, at the date of injury, the worker is at or below the age of 50 years, the pension is established based on the higher of the physical impairment and projected loss of earnings assessment, and the pension so established, unless modified on a review, is payable for life.

• For workers over age 50 at the time of injury, part of their LOE award will be terminated at age 65, however part will continue on after age 65. According to Board policy, workers at or above age 65 are not eligible for LOE awards. Interim measures in place since 1994, however, allow for LOE pensions for some workers over age 65 (special circumstances outlined in the section below).

RSCM Section #40.20 states that:

Pensions assessed on a physical impairment basis are, under the terms of Section 23 (1), payable for life. It was suggested that projected loss of earnings pensions should also be payable for life in every case, but the Board does not accept this. Section 23 (3) does not specifically require this, but rather gives the Board a discretion in the matter. Compensation is only payable under Section 23 (3) “Where the board considers it more equitable”. Since the section authorizes the Board to calculate a workers’ actual loss of earnings resulting from the injury, it is reasonable for the Board to have authority to terminate benefits payable under the section at a time when, even if not disabled because of the compensable injury, the worker would not have been working.

The situation where this issue arises is when the worker reaches retirement age. Any direct loss of earnings the claimant suffers because of the compensable disability will normally cease at that time. However, the Board do not, in practice, feel this is an automatic reason for terminating a projected loss of earnings pension. Rather, it is recognized because of the compensable disability, the claimant may be less able to
accumulate retirement benefits. The Board, therefore, allows the projected loss of earnings pension to continue in whole or part past the age of retirement where the worker was under 65 years of age at the time of the injury. The age of 65 years is set as the age of retirement used in all cases. (p.6-27, 6-28)

RSCM Section #40.20 also specifies the principles under which different LOE calculations are to be made as a function of age. These principles are basically as follows:

1) If the worker is below age 50 at the time of injury or disablement, his/her LOE is payable for life
2) If the worker is at or above age 65 at the time of injury or disablement, he/she is not eligible for an LOE award and is only eligible for a Functional award
3) If the worker is between 51 and 65 at the time of injury or disablement, the LOE pension continues until the worker reaches age 65. Once the worker reaches age 65, the worker begins to receive the Functional portion of his/her pension only, plus a proportion of the difference between the Functional and the LOE that is established using the “15ths formula”.

The 15ths formula works as follows:

Workers injured between the ages of 51 and 65 receive their full LOE until they reach age 65. Once reaching age 65, a worker who was injured at age 51 will start to receive 14/15ths of the difference between the Functional and the LOE award, a worker injured at age 52 will start to receive 13/15ths of the difference, and so on, with a worker injured at age 64 receiving 1/15th of the difference. Thus, the proportion of the difference between the Functional and LOE, which will be received after age 65, decreases by 1/15th for each year between the ages of 51 and 65.

For example, a 55-year old worker earning $35,000 at the time of injury (considered to be average earnings of $2916.66 per month):

- is eligible for a 10% Functional award, which is $2916.66 X 75% (i.e., the Board’s 75% gross compensation factor) X 10% = $218.75
- is earning/capable of earning $2000.00 per month according to the LOE assessment, which is $916.66 less than the pre-injury earnings
- is eligible for a LOE award of $916.66 X 75% (i.e., the Board’s 75% gross compensation factor) = $687.50

Pension awards are not additive, but rather the higher of the two amounts is awarded. In this case, the LOE is higher than the Functional, so the worker receives the LOE award of $687.50.

The difference between the Functional Component and the LOE component is as follows:

- $687.50 - $218.75 = $468.75

Adjusting this amount using the 15ths formula for a 55-year old:

- 10/15ths X $468.75 = $312.50
This 55-year old will therefore receive:

- $687.50 until age 65
- $531.25 after age 65, which is made up of:
  - $218.75 (or the Functional component)
  - $312.50 (or the life component of the LOE calculated with the 15ths formula)

There is also an age adjustment made on Functional awards for workers over age 45. This adjustment was not included here for purposes of simplicity. This example is repeated below with the Functional award age adaptability factor included.

Based on the above, it appears that

- LOE awards may have:
  - a Functional “life” component and an LOE “life” component, OR
  - a Functional “life” component, an LOE “term” component, AND an LOE “life” component

- According to the Rehabilitation Services and Claims Manual policy, workers over age 65 are not entitled to LOE pensions; they are only entitled to Functional pensions. However, an interim policy was put in place in 1994 which allows some exceptions to occur. In particular, workers who have “conclusive, compelling, and specific evidence” that they are working or would have continued to work past age 65, may be entitled to LOEs past age 65.

The Rehabilitation Services and Claims Manual (#40.20) states that:

> Where, at the date of injury, the worker is at or above the age of 65 years, the pension is established by the physical impairment method, and that pension is payable for life. No projected loss of earnings pension is awarded. (p.6-28)

This excludes LOEs for workers who would otherwise choose to work longer than age 65.

The Board’s Briefing Paper entitled Permanent Disability Pensions states that:

> The Appeal Division of the Board has made several decisions suggesting that aspects of the current system are unlawful or require review. These cover, for example, the blanket denial of section 23 (3) awards to workers over 65…

Because of these Appeal Division decisions, “interim measures” were put in place in 1994. According to Board interviewees, Disability Awards staff were instructed to follow the procedures outlined in the memo, however these interim measures were never approved as policy by the Board of Governors. As outlined in memo, the measures
were meant to be in place until a comprehensive analysis of the policy was carried out through Policy and Research. These interim measures state that (p.3):

- Age 65 will continue to be used as the presumed date of retirement and loss of earnings pensions established on the basis of existing policy set out in item 40.20 of the Manual.
- Age 65 is a rebuttable presumption.
- An exception to the presumption is permissible where the worker’s age at date of injury is 65 or beyond. Employment beyond 65 is generally conclusive evidence to rebut the presumed date of retirement.
- Where LOE benefits extend beyond the age of 65, a determination will have to be made in each case with respect to the likely retirement age had it not been for the injury.
- The 15ths formula will not be applied when LOE benefits are paid beyond age 65. The pension will revert to a Loss of Function Award at the determined age or retirement. Where this occurs, claims will be recorded and available for review in the event that a different policy direction is eventually established.
- Claims will be referred to the Director, Central Client Services for direction, where at the date of injury the worker was at or near the age of 65 and where the worker submits conclusive, compelling, and specific evidence of work beyond the presumed retirement age. Referral guidelines will be issued through the Client Service Manager, Disability Awards, by December 1, 1994.

- The “age adaptability factor” for Functional awards effectively increases scheduled Functional awards with age

RSCM Section #39.11 states that:

The percentage rate derived by use of the simple physical impairment method is modified by the application of an age variable. This age adaptability factor is used for claimants over the age of 45 where the disability is calculated in accordance with the schedule. The disability is increased by 1% of the assessed disability for each year over 45 up to a maximum of 20% of the assessed disability.

Example:

Award effective at age 55
Scheduled disability 50% of total disability
Age adaptability factor 10% of 50% = 5% of total disability
Disability assessed at 55% of total disability

This section states that the “age adaptability factor” applies only to scheduled awards, and not to non-scheduled awards. For non-scheduled awards “the worker’s age is one of the overall considerations in making the judgment.”

---

Using the example discussed above of the 55-year old worker earning $35,000 at the time of injury (considered to be average earnings of $2916.66 per month):

- is eligible for a 10% Functional award, which with the age adaptability factor is 10% X 10% = 1%, for a total of 11%
- the Functional award is then $2916.66 X 75% X 11% = $240.62
- is earning/capable of earning $2000.00 per month according to the LOE assessment, which is $916.66 less than the pre-injury earnings
- is eligible for a LOE of $916.66 X 75% = $687.50

The difference between the Functional Component and the LOE component is as follows:
- $687.50 - $240.62 = $446.88

Adjusting this amount using the 15ths formula for a 55-year old:
- 10/15ths X $446.88 = $297.92

This 55-year old will therefore receive:
- $687.50 until age 65
- $538.54 after age 65, which is made up of:
  - $240.62 (or the Functional component)
  - $297.92 (or the life component of the LOE calculated with the 15ths formula)

Unlike the 15ths formula for LOE, which reduces the pension amount with age, the age adjustment factor for Functionals effectively increases the pension amount with age.
OTHER ELIGIBILITY ISSUES: OCCUPATIONAL DISEASES AND SPECIFIC TYPES OF IMPAIRMENT

• There can be no LOE pension awarded if there is no Functional award; all LOE awards have a Functional component AND a LOE component

If the Board determines that the worker has no functional impairment, there is no LOE calculation conducted and no LOE pension will be awarded. In other words, if a worker does not return to work at pre-injury earnings after the injury, but the Board does not establish that a Functional impairment exists, the worker is not eligible for a pension.

RSCM Section #40.00 states that:

It is not the policy of the Board to grant an award under the dual system without regard to the nature of the condition or disability causing the unemployability or loss of earnings. The worker must not only have a disability accepted by the Board, but the disability accepted by the Board must be a significant factor in the reduced employability or loss of earnings potential. …Where a Disability Awards Officer or Adjudicator in Disability Awards decides that no pension can be awarded on a physical impairment basis because the impairment is unlikely to affect the worker’s earning capacity, no pension can be awarded on a projected loss of earnings basis.

Consequently, workers with allergies or sensitivities within particular work environments but not others are not entitled to pensions. Similarly, workers who experience “pain” with no clear “objective disorder” may not be entitled to pensions, although the policy is not black and white on this issue. Policy 39.01 states that:

In making a determination under Section 23 (1), the Disability Awards Officer or Adjudicator in Disability Awards will enquire carefully into all of the circumstances of a worker’s condition resulting from a compensable injury. This means that both the objective physical findings noted by the doctors who examined the claimant and the subjective complaints of pain will be considered. The fact that the complaints are largely subjective does not automatically preclude a finding that a worker has a disability within the meaning of Section 23 (1). Nor, on the other hand, does the fact that subjective complaints exist automatically warrant a finding of disability. In all cases, a decision must be made on the particular facts of the claim as to whether or not a disability exists.

The policy also warns that, “Where there is little clinical evidence of objective impairment, extreme caution must be exercised in concluding that there is a permanent disability resulting from that injury.”

• Due to Section 6(1) of the Act, an occupational disease can only result in a pension where there is an economic loss defined in terms of the worker being “disabled from earning full wages at the work at which the worker was employed”; there will be no calculation of, nor eligibility for, a Functional pension, for a worker with an occupational disease if he/she is working and earning his/her usual wages after reporting an occupational disease

Section 6 (1) of the Act states that:
Where
(a) a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which the worker was employed or the death of a worker is caused by an occupational disease; and
(b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments, compensation is payable under this Part as if the disease were a personal injury arising out of and in the course of that employment. A health care benefit may be paid although the worker is not disabled from earning full wages at the work at which he or she was employed.

Consequently, a worker with an occupational disease claim must be disabled from earning full wages “at the work in which he was employed” in order to receive a pension, even if there is evidence of a permanent functional disability. This effectively means that workers below age 65 with occupational diseases who return to work at full wages are not eligible for pensions, and that workers over age 65 with occupational diseases are not eligible for pensions. If the interim measures discussed above apply to occupational diseases as well, which they do according to Board interviewees, then there may be some exceptions for workers over 65 with occupational diseases (i.e., they may be eligible for LOE pensions if they have compelling evidence that they would have continued to work beyond age 65 had it not been for their occupational disease).

There are some specific sections of the Act that have been amended for certain types of diseases (such as Section 7 for hearing loss) and where it is not required that the worker be earning income at the time of disablement. For most occupational diseases, however, the “economic test” is required for pension eligibility.

• **Deeming** is used for LOE pensions only; if a worker is deemed capable of earning pre-injury wages, he/she will receive a pension based on the Functional impairment only

If a worker is deemed capable of returning to work at pre-injury earnings, regardless of whether or not he/she has returned, he/she effectively is entitled to a Functional pension only. The LOE calculation in this case would be zero.

• **A worker with no actual loss of earnings, and no projected loss of earnings**, can receive a functional award, but not an LOE award; this means that:
  • a worker who is at or past retirement age (set at 65) when he/she makes a claim is only eligible for a Functional award
  • Because of section 6 (1), a worker who suffers an occupational disease is only entitled to a pension if he/she experiences economic loss as a result of the disease, defined in terms of being “disabled from earning full wages at the work at which the worker was employed”: a worker who has no such economic loss that results from the injury or disease is not eligible for a pension
  • while a worker may be ineligible for a pension based on his/her disease, but after he/she dies from the disease, his/her family is eligible for a survivor’s pension
CAPITALIZED VALUES

The decision about which method (i.e., functional impairment or loss-of-earnings) results in a higher value, and therefore which type of pension to award, is based on a comparison of MONTHLY payment amounts for each type of award, not the capitalized values of each type of award.

Theoretically, even if the LOE method showed a higher monthly amount than the Functional method, the capitalized value of the LOE might be lower than the capitalized value of the Functional, since the Functional lasts for life and part of the LOE ends at age 65.

However, because there is a Functional component to each LOE award, and this component continues past age 65, the capitalized value of the total LOE award (i.e., the Functional amount for life and the remaining LOE amount to age 65) will always exceed the capitalized value of the Functional award on its own.