WCAT Decision Number: WCAT-2013-00551
WCAT Decision Date: February 27, 2013
Panel: Elaine Murray, Vice Chair

Introduction

[1] This is a referral to the Workers' Compensation Appeal Tribunal (WCAT) chair under subsection 251(2) of the *Workers Compensation Act* (Act). Under subsection 251(1), I find that the material portion of policy item #40.13 incorporating the formula from policy item #51.00 of the *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM II)[1] to the calculation of a worker's loss of earnings pension results in the unnecessary creation of two disparate classes of workers and a deliberate move away from determining the actual or real loss suffered by the worker. This defeats the intention in subsection 23(3) of the Act and policy item #40.13 to determine the actual or real loss of earnings suffered by a worker and is therefore so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Appeal Background

[2] The worker was injured in January 2006. In November 2011, the Worker's Compensation Board (Board), operating as WorkSafeBC, determined that the worker was entitled to a loss of earnings pension under subsection 23(3) of the Act, effective January 24, 2007. That section provides that a loss of earnings pension is based on the difference between the average net earnings of the worker before the injury and whichever of the following two options better represents the worker's loss of earnings: (1) the average net earnings the worker is earning after the injury; or (2) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

[3] In calculating the worker's loss of earnings pension, the Board applied policy item #40.13. That item elaborates on the section 23(3) calculation and provides for taking the effects of inflation into account when determining the average post-injury earnings to be used in the section 23(3) calculation.

[4] Policy item #40.13 explains that since assessment of a loss of earnings pension will often be made some time after the original injury, it would not be fair to directly compare the worker's actual pre-injury average earnings with the earnings the worker might now earn in the occupations available. The effect of inflation upon earnings levels would mean that the "real loss" would not be properly determined in that way. Thus, policy

[1] All references to policy will be to the RSCM II, unless otherwise stated.

Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

item #40.13 provides that the Board is to use the earnings in the occupations available after the injury as they stood at the date of the injury for comparison purposes. Policy adds, however, that it occasionally happens that earnings in occupations at the time of the injury are not available (this is the worker's situation on this appeal). If this occurs, policy item #40.13 explains that it may then be necessary to use the earnings in those occupations as they were at another date and bring the pre-injury earnings into line by applying cost of living adjustments (COLA) **as described in policy item #51.00** [emphasis added].

[5] It is the incorporation of policy item #51.00 that is problematic. That policy and section 25 of the Act address COLA calculations. The COLA calculation adjusts the percentage change in the consumer price index (CPI) by subtracting 1% from the percentage change each year, capping the maximum COLA at 4%, and establishing a floor of 0% so that deflation has no negative impact on benefits.

[6] In keeping with policy item #40.13, the Board used this method to establish the historical value of the worker's average post-injury earnings as at the date of her injury for comparison to her average pre-injury earnings.

[7] The worker challenged this approach in a November 3, 2011 memorandum to the case manager and subsequently by seeking review at the Review Division. She argued that the Board's application of section 25 of the Act and policy item #51.00 did not produce a true comparison; rather, it produced an inflated figure for her post-injury earnings. The worker asserted that the Board should be using the unadjusted percentage change in CPI for purposes of establishing the difference under subsection 23(3), rather than using the COLA calculation in section 25 and policy item #51.00.

[8] By decision dated May 8, 2012, the Review Division denied the worker's request for review, finding that the Board must apply the policy as written. The worker has now appealed to WCAT and has challenged policy item #40.13 on the basis that by incorporating policy item #51.00, and thus section 25 of the Act, it is so patently unreasonable that it is not capable of being supported by the Act.

[9] The employer is participating in this appeal (as a deemed employer), and agrees with the worker for separate but concurring reasons.

Issues(s)

[10] Is the material portion of policy item #40.13 incorporating the policy item #51.00 COLA formula so patently unreasonable that it is not capable of being supported by the Act and its regulations?

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Statutory and Policy Framework

[11] Subsection 23(3) of the Act sets out the calculation to be used in determining the amount of a loss of earnings pension payable:

> (3) Subject to sections 34 and 35, if
>
> (a) a permanent partial disability results from a worker's injury, and
>
> (b) the Board makes a determination under subsection (3.1) with respect to the worker,
>
> the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between
>
> (c) the average net earnings of the worker before the injury, and
>
> (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
>
> (i) the average net earnings that the worker is earning after the injury;
>
> (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

[12] Policy item #40.13 elaborates on the section 23(3) calculation and provides for taking the effects of inflation into account when determining the appropriate average earnings to be used in making the comparison required by subsections 23(3)(c) and (d) of the Act. The critical paragraphs of policy item #40.13 state:

> Sections 23(3)(c) and (d) set out the process for determining a worker's entitlement to a permanent partial disability award under this method. These subsections provide that the Board may pay a worker compensation that is a periodic payment that equals 90% of the difference between the average net earnings before the injury, and either the average net earnings that the worker is earning, or that the Board estimates the worker is capable of earning, after the injury.
>
> ...
>
> Although assessment of a permanent partial disability award will often be made some time after the original injury, it would not be fair to compare directly the actual pre-injury average earnings with the earnings the worker might now earn in the occupations available. The effect of inflation

Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

> upon earnings levels would mean that the real loss would not be properly determined in that way. The practice of the Board is to use the earnings in the occupations available after the injury as they stood at the date of the injury. It occasionally happens that earnings in occupations at the time of the injury are not available. If this occurs, it may be necessary to use the earnings in those occupations as they were at another date and bring the pre-injury earnings into line by applying cost of living adjustments as described in policy item #51.00.

[13] Policy item #51.00 stems from section 25 of the Act. Section 25 sets out the COLA calculation to be applied prospectively to the payment of benefits under the Act:

> **25**(1) For the purposes of this section, the Board must, as of January 1 of each year,
>
> (a) determine the percentage change in the consumer price index for Canada, for all items, for the 12 month period ending on October 31 of the previous year, as published by Statistics Canada, and
>
> (b) subtract 1% from the percentage change determined under paragraph (a).
>
> (2) The percentage resulting from calculations made under subsection (1) must not be greater than 4% or less than 0%.
>
> (3) On January 1 of each year, the Board must adjust, in accordance with subsection (4), the periodic payments of compensation made in respect of an injury or a death occurring more than 12 months before the date of the adjustment.
>
> (4) For the purposes of subsection (3), the Board must adjust the periodic payments of compensation to be paid in that calendar year for the injury or death by the percentage determined under subsection (1).
>
> (5) If the Board starts or restarts periodic payments of compensation for an injury or a death that occurred more than 12 months before the payments are started or restarted, the Board must, under this section, adjust all periodic payments as if the payments were made continuously from the date of injury or death.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[14] The relevant part of policy item #51.00 explains how the COLA is calculated:

> The Board determines the indexing factor to be applied to periodic payments of compensation to a worker or a dependent in the following manner:
>
> - The Board compares the consumer price index for October of the previous year with the consumer price index for October of the year prior to the previous year.
> - One percentage point is subtracted from the percentage change between these two consumer price indexes.
> - If the percentage that results from this subtraction is greater than 4%, it is reduced to 4%. If the percentage that results from this subtraction is less than 0%, no adjustment to periodic payments of compensation is made.
>
> The resulting percentage changes determined annually are set out below:
>
> | Date | Percentage |
> | --- | --- |
> | January 1, 2013 | 0.158940 |
>
> If required, earlier figures may be obtained by contacting the Board.
>
> The resulting percentage change is applied on January 1 of each year to periodic payments of compensation made continuously in respect of an injury or a death occurring more than 12 months before the date of the adjustment.
>
> If the Board starts or restarts periodic payments of compensation on a date more than 12 months after the date of the worker's injury or death, the Board adjusts all periodic payments as if payments were made continuously from the date of injury or death. This means that if payments on a claim are started or restarted more than 12 months after the injury or death, the worker or dependant receives the benefit of any cost of living adjustments occurring in the interim period as if he or she had been continuously paid since the date of injury or death.

[15] For information purposes only, an appendix to this decision sets out the various calculations undertaken to determine the worker's entitlement to a loss of earnings pension, including calculations by the Board, the worker, and me.

Analysis and Reasons

(a) Purpose of section 25 of the Act and policy item #51.00

[16] Section 25 of the Act and policy item #51.00 are designed to adjust the payment of benefits by applying a COLA factor to future benefit payments. From reading subsection 25(4), it is clear that the intent of the Legislature was to have the Board apply the COLA formula prospectively to "periodic payments of compensation to be paid in that calendar year…."

[17] This approach is designed to be prospective. Even the calculation of the retroactive amount of the worker's loss of earnings pension, that is, from January 24, 2007 (the effective date of her loss of earnings pension) until November 1, 2011 (the date it was granted) is in reality a retroactive reconstruction of the prospective application of the formula.

[18] Because the base amount of the loss of earnings pension is awarded effective January 24, 2007, the first year that there is a COLA adjustment to the pension is 2008. However, this COLA is calculated for the period of **October 2006** to October 2007 (I emphasize the start date because that date is important for understanding the shortcomings of applying this formula in a truly retroactive fashion to the average earnings comparison calculation carried out by the Board).

[19] The second year for which COLA is applied to the pension is 2009 which is based on the CPI change from October 2007 to October 2008.

[20] The third year for which COLA is applied to the pension is 2010 and is based on the change in CPI from October 2008 to October 2009.

[21] Finally, the last year for which COLA is applied to the retroactive portion of the loss of earnings pension is from January 2011 to October 2011 and is based on the change in CPI from October 2009 until **October 2010** (I emphasize the end date because that date is also important for understanding the shortcomings of applying this formula to the average earnings comparison calculation carried out by the Board).

[22] The cumulative COLA amounts from October 2006 to October 2010, as calculated by the Board for purposes of the retroactive loss of earnings, produce factors to be applied in the calculation.

[23] Applying these factors to the loss of earnings pension calculation is mandated by policy item #51.00 and section 25 of the Act, and is explained in policy item #51.00.

[24] The application of policy item #51.00 to periodic payments of compensation benefits was endorsed by a WCAT panel in *WCAT-2008-02880* at paragraphs 29, 30, and 32, where the panel wrote:

> At issue in this appeal is the meaning of the phrase "compensation paid". I note that RSCM I[2] and II item #1.03(5) states "Regardless of the date of injury of [*sic*] death, the current provisions on indexing apply to compensation paid on or after June 30, 2002…."
>
> Section 25 of the Act requires the Board adjust the amount of the payments made to a worker when a worker is entitled to periodic payments of compensation. I agree with the worker's representative that the current provisions regarding indexing apply **only to periodic payments of compensation.** ...
>
> …
>
> In the decision under appeal, the review officer considered the Board's application of the Consumer Price Index to the worker's entitlement to benefits going forward from December 2003, or the effective date of the award. I agree with the review officer that there is no error in applying section 25 of the Act as it read after June 30, 2002 and RSCM II item #51.00 to the calculation of the worker's entitlement to retroactive periodic payments after December 2003. Both volumes of the RSCM at item #1.03(5) prescribe the use of the current provisions on indexing for compensation paid on or after June 30, 2002. **Once the worker's entitlement to a loss-of-earnings award is determined, the amount of the periodic payments he is entitled to receive is subject to the current provisions regarding indexing.** The calculation of the worker's entitlement to a loss-of-earnings award under the former provisions of the Act is not subject to the current provisions regarding indexing.
>
> [emphasis added]

[25] This understanding is further confirmed by the Board's FAQ (frequently asked questions) document on its web site:

> **What payments are subject to cost of living adjustments?**
>
> Cost of living adjustments **are applied to periodic payments of compensation**, including wage loss benefits and permanent disability awards, made continuously in respect of an injury or a death occurring more than 12 months before the date of the adjustment.

[2] The *Rehabilitation Services and Claims Manual, Volume I.*

> If payments on a claim are started or restarted more than 12 months after the injury or death, the worker or dependant receives the benefit of any cost of living adjustments occurring in the interim period as if he or she had been continuously paid since the date of injury or death.
>
> [emphasis added]

[26] There is nothing patently unreasonable in the application of policy item #51.00 to the payment of periodic benefits, and this is not being challenged by the worker. Rather, it is the application of that policy when determining the entitlement to a loss of earnings pension that is at issue.

(b) COLA specifically limited to section 25 of the Act

[27] Subsection 25(1) in the Act, which creates the current COLA formula, opens with the words "For the purposes of this section [25]...." Further, in section 25.2 the Legislature makes it clear that dollar amounts referred to in the Act are to be adjusted by the percentage increase in the CPI, and not by the COLA formula in subsection 25(1). Certain amounts are excluded by virtue of subsection 25.2(3).

[28] It is clear that the Legislature turned its mind to and differentiated between COLA and CPI adjustments for those matters expressly set out in the Act. It is also arguable that the Legislature expressly limited the use of the COLA formula for the purposes set out in section 25, namely, adjusting compensation benefits, and nothing more. As a result, one can argue that there is an express limitation in subsection 25(1) of the COLA formula to compensation benefits.

[29] In *WCAT-2012-01018* the chair faced a similar but not identical argument. She wrote at paragraph 133:

> The implied exclusion principle supports the conclusion that, if the legislature had intended that the Board be required to pay interest in circumstances beyond those expressly established by sections 19 and 258, there would be an express provision in that regard. Even if I accept that section 19(2) is a special provision relating to payments to surviving spouses, it would be rational to interpret the Act as not requiring the Board to pay interest in circumstances beyond those established in section 258. **Although it is rational to conclude that the Act does not require the Board to pay interest in circumstances that are not within the scope of the express interest provisions in the Act, it does not follow that the board of directors lacks discretion to make policies that grant interest in other circumstances.**
>
> [emphasis added]

Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[30] What flows from this is that the express provision of the COLA formula for calculating adjustments to compensation benefits does not raise a requirement in the Board to do the same for other types of payments or amounts. Of course, the same argument can be made regarding the application of the unadjusted CPI mandated by section 25.2 of the Act, namely, that as a result of an implied exclusion, there is no requirement for the Board to make CPI adjustments in other circumstances.

[31] Nonetheless, the emphasized portion of the quote illustrates the chair's view that just because the Board is not required to do something under other parts of the Act by virtue of the express/implied exclusion principle, does not mean that the Board cannot exercise its general policy-making discretion to apply the COLA formula or the unadjusted percentage change in CPI to other circumstances not enumerated in section 25 of the Act.

[32] As the chair concluded in *WCAT-2012-01018*, it then comes down to an exercise of discretion by the Board in creating policy and the manner in which it limits the retroactive adjustment of average earnings.

(c) The rationale in policy item #40.13

[33] The COLA formula established in subsection 25(1) of the Act makes its way into policy item #40.13 through policy item #51.00. The rationale provided in policy item #40.13 for making some sort of inflationary adjustment hinges on the unfairness of comparing post-injury earnings which arise several years after the injury and have been affected by inflation, to pre-injury earnings. So if a suitable post-injury occupation is identified, the Board will use the average earnings that such an occupation would command as at the date of the worker's injury. The policy states:

> Although assessment of a permanent partial disability award will often be made some time after the original injury**, it would not be fair to compare directly the actual pre-injury average earnings with the earnings the worker might now earn in the occupations available. The effect of inflation upon earnings levels would mean that the real loss would not be properly determined in that way**. **The practice of the Board is to use the earnings in the occupations available after the injury as they stood at the date of the injury.**
>
> [emphasis added]

[34] The problem arises when the wage rate or average earnings for the post-injury occupation are not available as at the date of injury. In those cases the Board has no choice but to use average earnings as of a date in the future, or several years after the injury. A straight up comparison would be like comparing apples to oranges. As a result, the Board adjusts the later average earnings to take inflation into account in

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

order to preserve fairness and a true apples-to-apples comparison. Policy item #40.13 states:

> It occasionally happens that earnings in occupations at the time of the injury are not available. If this occurs, it may be necessary to use the earnings in those occupations as they were at another date and bring the pre-injury earnings into line **by applying cost of living adjustments....**
>
> [emphasis added]

[35] As far as that goes there is no problem. It reflects the rationale of attempting to get at a fair comparison. The problems arise with the concluding phrase: **"as described in policy item #51.00"** [emphasis added].

(d) Problems in applying Board policy item #51.00 in the context of policy item #40.13

[36] Applying the policy item #51.00 COLA (in this case a 1.004927 COLA factor was applied to post-injury average earnings as of July 25, 2011 for comparison to pre-injury average earnings in January 2006) only captured inflation from **October 2006** until **October 2010.** This application missed eight months at the start of the relevant period and nine months at the end. The result was further impacted by artificial inflation caused by reducing the annual October to October percentage change in CPI by 1% each year. It results in significant inaccuracy.

[37] Using the COLA formula for purposes of policy item #40.13 was not endorsed by the WCAT panel in *WCAT-2008-02880*.

[38] In *WCAT-2008-02880*, the RSCM I was at issue. Policy item #40.13 in RSCM I did not include a reference to policy item #51.00. It simply provided:

> Although assessment of a pension will often be made some time after the original injury, it would not be fair to compare directly the actual pre-injury earnings with the earnings the worker might now earn in the jobs available. The effect of inflation upon earnings levels would mean that the real loss would not be properly determined in that way. The practice of the Board is to use the earnings in the jobs available after the injury as they stood at the date of the injury. It occasionally happens that earnings in jobs at the time of the injury are not available. If this occurs, it may be necessary to use the earnings in those jobs as they were at another date **and bring the pre-injury earnings into line by applying Consumer Price Index adjustments**.
>
> [emphasis added]

[39] This policy makes logical and common sense. However, there was some evidence that the Board nonetheless applied the COLA calculation from policy item #51.00. On this point the panel in *WCAT-2008-02880* said at paragraph 29:

> I have difficulty ascertaining on the face of the claim file whether the Board has in fact deducted 1% from the rate of inflation in each year since 2002 when calculating the worker's pre-injury earnings for the purpose of determining his entitlement to a loss-of-earnings award. The claim log entry of August 2003 does not reveal how the Board officer had arrived at the cost-of-living adjustment of 32.9628% and whether that rate included a reduction of 1% from the Consumer Price Index in 2002 and 2003. The worker's representative has provided some evidence in support of his argument by way of the e-mail correspondence between himself and a Board policy analyst. That document appears to confirm that the practice of the Board is to apply section 25 of the Act, as amended June 30, 2002, to calculate the current value of a worker's pre-injury earnings**. I find that such practice is not consistent with RSCM I item #40.13 or with the intent of section 23(3) of the Act. I recognize that there are some inherent difficulties in the Board's approach to calculating a worker's pre-injury earnings in today's dollars if section 25 of the Act as amended is applied. The effect of such a practice is to reduce the rate of inflation that would be applied to the worker's pre-injury earnings by at least 1% each year if the Consumer Price Index is applied. This is not prescribed nor required by the applicable legislation or Board policy.**
>
> [emphasis added]

[40] The fact that the application is sloppy or produces an inaccurate result may not in and of itself be sufficient to offend the Act or be found patently unreasonable. Yet, it does result in disparate treatment of workers under policy item #40.13.

(e) Differential results arising from using policy item #51.00 in policy item #40.13

[41] Applying the COLA formula from policy item #51.00 in the context of policy item #40.13 fails to achieve the stated purpose in policy item #40.13 and produces differential results leading to the disparate treatment of workers.

[42] First, the application of the COLA factor does not preserve a fair apples-to-apples comparison because it requires a 1% deduction each year in the percentage change in the CPI. Further, as was illustrated above, the rote application of the policy item #51.00 prospective methodology retroactively, as was done in this case, results in periods of inflation remaining unaccounted for. As a result, due to the distortion caused by the application of the policy item #51.00 COLA, the rationale within policy item #40.13 of achieving a fair and accurate comparison and identifying the worker's "real loss" is not achieved.

[43] This point is reflected in the appellant's argument, as presented in paragraphs 24 and 25 in *WCAT-2008-02880*:

> The worker's representative submitted that RSCM I item #1.03 does not mandate the use of any particular policies in the facts of this case. The application of the current provisions of section 25 of the Act or RSCM II items #40.13 and #51.00 result in a 1% per year reduction to the Consumer Price Index, which is to subvert the very purpose of RSCM I item #40.13. He noted that section 23(3) of the Act does not provide specific direction on how to reconcile the actual value of earnings after the injury with those at the time of the injury, in particular regarding the effect of inflation; however, that is remedied by the direction in RSCM I item #40.13. Section 25 of the Act provides direction regarding the general indexing of periodic payments of compensation, after the amount of those payments have been calculated and awarded. The worker's representative argued that section 25 of the Act does not apply to the actual calculation of compensation entitlement, but to the payment of compensation.
>
> The worker's representative noted that RSCM II item #40.13 was amended such that RSCM II item #51.00 applies. He submitted this provision is unlawful and inconsistent with the meaning and intent of section 23(3) and section 25 of the Act, and requested the panel refer this issue to the chair of WCAT pursuant to section 251(2) of the Act. The worker's representative argues RSCM II item #51.00 was created from section 25 of the Act to mitigate the future effects of inflation on periodic payments of compensation, which has a valid role to play regarding the effects of inflation on periodic payments. However, those provisions do not have a statutory or valid role to play when calculating the comparison between a worker's pre-injury earnings and deemed post-injury earnings in the context of section 23(3) of the Act and RSCM II item #40.13. To do so unfairly reduces a worker's pre-injury earnings by at least 1% each year, such that there is not a fair comparison between a worker's pre-injury earnings and the deemed post-injury earnings. This defeats the intent of RSCM II item #40.13. He submitted the intent of section 23(3) of the Act and policy item #40.13 is to ensure fairness and prevent erosion by inflation of the worker's pre-injury earnings calculation as opposed to his earning capacity after the injury. In contrast, the intent of section 25 of the Act and RSCM II item #51.00 is to mitigate the effects of inflation on future periodic payments of compensation. The direction in RSCM II item #40.13 to apply policy item #51.00 to the calculation of a worker's pre-injury earnings for section 23(3) purposes is inconsistent with the intent of both section 23(3) and section 25.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[44] On this point the panel in *WCAT-2008-02880* said at paragraph 29:

> I find that the process of measuring a worker's loss of earnings, as set out in RSCM I item #40.13, is not "compensation paid". The process of converting a worker's pre-injury earnings to its current value does not represent an amount that is payable to the worker. To apply the provisions of section 25 of the Act as amended and RSCM II item #51.00 to the calculation of a worker's pre- injury earnings in its current value distorts the value of the worker's pre-injury earnings, **such that a true comparison of the worker's pre-injury earnings to his post-injury earning capacity is not achieved.** Similarly, to apply the current provisions of section 25 of the Act and RSCM II item #51.00 to the calculation of the value of a worker's deemed post-injury earnings capacity at the effective date of entitlement to a loss-of-earnings award **will also distort the value of the post-injury earnings**.
>
> [emphasis added]

[45] The result is that the Board's calculation based on importing the policy item #51.00 COLA formula into policy item #40.13 introduces a significant distortion into the stated intention to assess the earnings in the occupations available after the injury as they stood at the date of the injury.

[46] Second, the distortion caused by the application of policy item #51.00 creates two classes of workers. One class receives the full benefit of an unadjusted change in the CPI. The other class gets the policy item #51.00 COLA, which is a negatively adjusted change in the CPI. Policy item #40.13 states: "The practice of the Board is to use the earnings in the occupation available after the injury as they stood at the date of injury." It is only if earnings in those post-injury occupations are not available that resort is had to using COLA adjusted post-injury earnings as a proxy for what they actually were at the date of injury.

[47] Because the COLA adjustment process is not used in all cases, the disparity is obvious. In those cases where the actual average earnings in a post-injury occupation as they stood as at the date of injury are available and are used for the purposes of policy item #40.13 and subsection 23(3) of the Act, the worker gets the full benefit of accounting for inflation. The reason is that the actual figures inherently account for inflation – they are the actual figures. As a result, a worker who falls into this category benefits from a full accounting for inflation producing a fair comparison resulting in a proper assessment of the worker's "real loss."

[48] On the other hand, there is a second class of workers in those cases where the actual average earnings in a post-injury occupation as they stood as at the date of injury are not available for use for the purposes of policy item #40.13 and subsection 23(3) of the Act. In such cases, the worker does not get the full benefit of accounting for inflation. The reason is that the COLA factor produced by the policy item #51.00 formula is

designed for prospective use (the factor applies prospectively for the next year beginning two months after the relevant period of calculation) and does not account for a portion of the relevant time period when applied in retrospect. It is missing the period of time from the end of October in the previous year to the date of its application. Additionally, the COLA formula artificially removes a portion of the impact from inflation by subtracting 1% from the yearly percentage change in the CPI.

[49] As a result, a worker who is unfortunate enough to work in a post-injury occupation for which average earnings as they stood at the date of injury are not available is stuck with the policy item #51.00 COLA formula as a proxy. This does not give a full accounting for inflation and thus it does not produce a fair comparison, result in a proper assessment, or reflect the worker's real loss.

[50] In short, policy item #40.13 treats workers differently based entirely on whether a worker is lucky to be employed in a post-injury occupation for which average earnings as at the date of injury are available versus a worker who has the misfortune of working in a post-injury occupation for which actual average earnings as at the date of injury are not available. This stroke of chance determines whether the worker gets the full benefit of inflation accounting and a proper assessment of the real loss, or whether the worker is subjected to the COLA proxy resulting in a significant distortion and no determination of the real loss.

[51] Historically, this was not the case. First, prior to the 2002 amendments, section 25 of the Act read differently as illustrated in policy item #51.00 of the RSCM I:

> **#51.00 CONSUMER PRICE INDEX**
>
> Section 25(1) of the Act provides that "As of the first day of July in each year the Board must determine a ratio by comparing the consumer price index for April in that year with the consumer price index for October in the preceding year; and as of each first day of January, the board must determine a similar ratio by comparing the consumer price index for October in the preceding year with the consumer price index for April in the preceding year." The ratios which the Board has determined under this provision are set out below.

Date	Ratio
July 1, 2000	1.00807175
January 1, 2001	1.01957295
July 1, 2001	1.01570681
January 1, 2002	1.00343643

> If required, earlier figures may be obtained by contacting the Board.

[52] Similar to today's world, subsection 25(2) of the Act directed that: "As of July 1 and January 1 in every year, the board shall, by applying the ratio determined under subsection (1), adjust **all periodic payments of compensation** then being paid or payable in respect of every injury or death occurring, and every disablement from industrial disease sustained, prior to 6 months before the date the adjustment is being made" [emphasis added].

[53] Further, policy item #40.13 in the RSCM I referred to using the CPI adjustment without any mention of policy item #51.00. There was no 1% reduction in the percentage change in the CPI. This allowed the Board to calculate the actual change in percentage in the CPI over the whole of the relevant period of time and thus assess the real loss of the worker. If the Board used the old policy item #51.00 for the purpose of policy item #40.13 in the RSCM I, the distortion introduced would not be as great as it is under the new policy item #51.00 in the RSCM II. The reason for the lesser degree of distortion is twofold: (1) as noted, there was no 1% reduction in the yearly percentage change in the CPI, and (2) if there is retroactive application of the ratio which results in a relevant period being omitted, the impact of the omission is likely to be less because the ratio is calculated more frequently (every six months).

(f) Is the Board's importation of policy item #51.00 into policy item #40.13 so patently unreasonable?

[54] I find that the part of policy item #40.13 which incorporates the COLA formula from policy item #51.00 found in the RSCM II treats workers differentially and is internally inconsistent with other parts of policy item #40.13 when weighed against the stated objectives in the policy. Nonetheless, whether a policy is internally inconsistent, or whether the use of one policy fails to achieve the ends of another, or whether it results in differential treatment of workers in and of itself is not the test in section 251 of the Act. Section 251 poses the question whether the policy is capable of being supported by the Act and its regulations.

[55] The chair faced a similar question of disparate treatment of workers in *WCAT-2012-01018*. At paragraph 147 she wrote:

> Under item #50.00, two workers who suffer the same period of delay in receiving compensation to which they are entitled may be treated quite differently. If there has been a blatant Board error in adjudicating the compensation of one of the workers, the Board will pay interest but, in the absence of such an error, the Board will deny interest to the other worker. I must determine whether it is patently unreasonable to establish an interest policy under which one of the workers receives interest while the other one does not. In my view, **this question turns on whether there is a rational basis for treating the two workers differently.**
>
> [emphasis added]

[56] Similarly, in the present case, two workers who face the very same kind of section 23(3) assessment may be treated quite differently. Generally speaking, whether this disparate treatment amounts to being so patently unreasonable that it cannot be supported by the Act and its regulations turns on whether there is a rational basis for treating the two classes of workers differently.

[57] The question in the present case is more nuanced, however. The reason is that the Board has no choice but to treat the two workers differently if the actual amount of average earnings for a post-injury occupation as it stood at the date of injury is available in one case, but not in the other. So the question becomes whether there is a rational basis underpinning the Board's solution to the problem of applying the COLA formula as a proxy for the unavailable average earnings.

[58] As was noted by the panel in *WCAT-2008-02880* respecting the use of policy item #51.00 for section 23(3) purposes: "**Such practice is not required nor prescribed by section 23(3)...**" [emphasis added].

[59] The problem is that subsection 23(3) of the Act is silent on this point and does not prescribe any particular method for comparing average earnings. It appears that it falls within the Board's discretion to enact policy to that end. In the absence of policy, and given the silence in subsection 23(3), it would arguably be open to the Board to compare the actual post-injury average earnings at the later date to pre-injury average earnings without taking inflation into account at all.

[60] Also, it is arguable that even if one uses the actual percentage change in the CPI covering the full relevant period, it still remains a proxy for the actual figures which are not available. Is there a basis to say that one proxy is patently unreasonable and another is not? Guidance for answering this question may be had from the Act and the impugned policy.

[61] Section 23 of the Act turns on the determination of pre- and post-injury average earnings and subsections 23(3)(c) and (d) of the Act emphasize getting to a "better" representation of the worker's loss of earnings:

> (3) Subject to sections 34 and 35, if
>
> > (a) a permanent partial disability results from a worker's injury, and
> > (b) the Board makes a determination under subsection (3.1) with respect to the worker,
>
> the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between
>
> > (c) the **average net earnings** of the worker before the injury, and

> (d) whichever of the following amounts the Board considers **better represents the worker's loss of earnings**:
>
> > (i) the **average net earnings** that the worker is earning after the injury;
> > (ii) the **average net earnings** that the Board estimates the worker is capable of earning in a suitable occupation after the injury.
>
> [emphasis added]

[62] With regard to the determination of average earnings in other parts of the Act, the emphasis is on arriving at an amount that "**best** reflects the worker's circumstances" (subsection 33.1(3)) and "an amount that the Board considers **best** reflects the worker's loss of earnings" (section 33.4) [emphasis added].

[63] Policy item #64.00, which addresses calculating average earnings as required by subsection 33(1) of the Act, provides:

> This section provides the general direction for determining a worker's average earnings.
>
> The *Act* provides two general rules for determining average earnings and a number of exceptions for which average earnings is calculated differently. The exceptions relate to a casual worker, a person who purchased coverage under section 2(2) of the *Act*, a worker with no earnings on the date of injury, a worker who is an apprentice or learner, a regular worker who has been employed less than 12 months, and a worker with exceptional circumstances.
>
> In determining a worker's average earnings, the Board must apply one of the general rules unless one of the exceptions in the *Act* applies to a worker. Where more than one exception applies to a worker, the *Act* provides that the Board must determine the section that **best reflects** the worker's circumstances and apply that section. In making this determination, "best" does not mean the highest rate possible, **but rather, the rate that most closely reflects the actual loss incurred.**
>
> Set out below are the Board's policies with respect to the calculation of a worker's short-term average earnings; the application of a 10-week average earnings rate review; the calculation of a worker's long-term average earnings; and the composition of average earnings.
>
> [emphasis added]

Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[64] As already noted, in the formula found in subsection 23(3)(d) of the Act there is an emphasis on using post-injury average net earnings that **better** represent the worker's loss of earnings. This is not unlike the provision in subsection 33.4(1) that says the determination of a worker's average earnings may be based on an amount that the Board considers best reflects the worker's **loss of earnings**. A good argument may be made based on the language of the Act that as accurate a calculation as possible is mandated. The word "best", which is nothing more than the superlative of the word "better", used by the Board in the requirement of determining an amount that best reflects the worker's circumstances, has been described by the Board in policy item #64.00 as the rate that most closely reflects the **actual** loss incurred. Accuracy is underscored.

[65] Policy item #40.13 does not use the word "actual". Rather, it expresses a concern that if the comparison is not adjusted for inflation, then "**the real loss would not be properly determined in that way**". In the dictionary, "actual" means existing in fact or **real**. It is an easy step to conclude that the emphasis on determining **actual** loss is the same as determining the **real** loss.

[66] If the emphasis at the stage of determining average earnings is to find the number that **best** reflects the worker's circumstances, meaning, the number which most closely reflects the real or **actual** loss incurred, then the introduction of policy item #51.00 calculations into policy item #40.13 deliberately undermines that purpose.

[67] While it is true that an unadjusted CPI comparison is still a proxy for actual figures, it is an attempt to get at the best representation of the real or actual loss. If two classes of workers result, it is an unfortunate but unavoidable by-product of the effort to get at the real loss by the best means available. It may be inaccurate, but arguably not patently unreasonable.

[68] On the other hand, using the policy item #51.00 formula, which introduces a deliberate 1% reduction in the percentage change in the CPI and does not reflect the total material time period, represents a willful and unnecessary creation of two disparate classes of workers and a deliberate move away from getting to the actual or real loss suffered by the worker. There is no apparent rational basis for deliberate inaccuracy in light of the stated purpose in policy item #40.13 for loss of earnings pension purposes and the emphasis in the Act generally on determining the real or actual loss suffered by the worker. That is what arguably makes this approach patently unreasonable.

[69] In commenting on the relationship between the use of this COLA formula and subsection 23(3) of the Act, the panel in *WCAT-2008-02880* said at paragraphs 29 and 31:

> In the present case, the Board officer adjusted the value of the worker's earnings in 2006 ($1,955.36 per month) to its value as of December 1, 2003 ($1,889.00 per month), the effective date of the worker's entitlement

> to a loss-of-earnings award. It is not clear whether the Consumer Price Index of 1.035382 the Board officer applied had been reduced by 1%. **Such practice is not required nor prescribed by section 23(3)** or RSCM I item #40.13***.***
>
> ...
>
> The calculation of a worker's pre-injury earnings for comparison purposes to the worker's post-injury earnings is not a "periodic payment of compensation". It is a calculation performed only to achieve the purpose of determining the worker's actual loss of earnings by reason of his injury, or to achieve the purpose of section 23(3) of the Act. I agree with the worker's representative that the use of the Consumer Price Index tables with a discount of 1% to a maximum of 4%, as prescribed by section 25 of the Act, **is not consistent with the intent of section 23 of the Act** or with RSCM I item #40.13.
>
> [emphasis added]

[70] From the perspective of the analysis above, these comments are *a propos*.

Conclusion

[71] In summary, I find that the material portion of policy item #40.13 incorporating the policy item #51.00 COLA formula, which introduces a deliberate 1% reduction in the percentage change in the CPI and does not reflect the total material time period, results in a willful and unnecessary creation of two disparate classes of workers and a deliberate move away from determining the actual or real loss suffered by the worker. This defeats the intention in subsection 23(3) of the Act and policy item #40.13 to determine the actual or real loss of earnings suffered by a worker and is therefore so patently unreasonable that it not capable of being supported by the Act and its regulations.

Elaine Murray
Vice Chair

EM/hb

Appendix (this is provided solely for informational purposes – there may be inaccuracies in the calculations provided)

(a) What the Board did

[1] The Board's section 23(3) calculation of the loss of earnings pension is found in the case manager's October 21, 2011 recommendation to the Disability Awards Committee.

[2] In the first part of the calculation, the case manager determined the date of injury value of the worker's average earnings in her post-injury occupation, as required under policy item #40.13. To carry out this step in the calculations, the case manager used what she referred to as a "CPI factor"[3] of 1.044927.[4] This factor was the policy item #51.00 COLA which policy item #40.13 directs the Board to use and which the Board also applied in calculating the inflation adjustments to the worker's compensation benefits.

[3] The first step in the case manager's calculation is as follows:

> Earnings comparison
> <u>Loss of function [PFI] award</u>
> 2.5% of total disability; effective Jan, 24, 2007; base value $76.20
>
> <u>Deemed [Pre-Injury] Earnings</u>
> $51,256.65 yearly (gross); monthly $4,271.39 (gross); $3,386.47 (100% net); $3,047.82 (90% net)
>
> <u>Post injury Earnings</u>
> Current Care Aide (actual earnings)
> $21.53 X 40 = $861.20 weekly (2011 Dollars); adjusted by CPI factor of **1.044927** = $824.17 weekly (gross)/ $42,974.58 (yearly gross); netized to $34,935.45 (100% net) (**dependent & infirm tax**)/12 = $2911.29 (100% net) monthly
>
> Companion
> $13.95 X 7.5 = $104.63 monthly (2011 dollars); adjusted by CPI factor of **1.044927** = $100.13 (gross); working 7.5 hours a month = $1,201.56 gross netized to (**dependent & infirm tax**) $1,178.13/12 = $98.18 monthly (100% net)
>
> [some emphasis in the original; some emphasis added]

---

[3] Despite the reference being to a CPI factor, this is actually the COLA factor as established by the formula in policy item #51.00.

[4] The COLA factor of 1.044927 represents the COLA factor from January 16, 2006 (or possibly January 24, 2007, the effective date of the loss of earnings pension) to October 31, 2010 and the amount determined by applying that factor to the original (January 24, 2007) amount of the award is paid only from January 1, 2011 until December 31, 2011. This accords with policy item #51.00.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[4] Having determined the value of the worker's post-injury average earnings as they would have stood at the date of injury, the case manager then performed the loss of earnings pension calculation outlined in subsections 23(c) and (d) of the Act. This second step in the case manager's calculation is as follows:

> LOSS OF EARNINGS CALCULATION
>
> Current Care Aide (actual earnings)
> $3,386.47 – $2,911.29 = $**457.18**[5] (100% net) loss of earnings
>
> Current Care Aide (actual earnings) Plus Companion
> $3,386.47 – ($2,911.29 + $98.18) = **$377** (100% net) loss of earnings
>
> [some emphasis in the original; some emphasis added]

[5] The case manager's loss of earnings pension calculation produced two results shown under a heading "Loss of Earnings Calculation".

[6] First, based on post-injury earnings from the worker's current care aide occupation, the loss of earnings pension is $475.18 at 100% net. The actual payment would be 90% of that amount and is shown on the Board's Loss of Earnings Calculation Sheets[6] as $427.66.

[7] Second, based on post-injury earnings from the worker's current care aide occupation together with the current companion occupation, the loss of earnings pension is $377 at 100% net. The actual payment would be 90% of that amount and is shown on the Board's Loss of Earnings Calculation Sheets as $339.30.

(b) Where does the COLA factor of 1.044927 used by the case manager in her calculations come from?

[8] The answer to this question may be found in Loss of Earnings Calculation Sheets and the Board's FAQ explanation of COLA.

[9] The Board's Loss of Earnings Calculation Sheet shows a CPI base date of January 16, 2006. The effective date of the loss of earnings pension is January 24, 2007, however. The calculation of this award was done with a calculation date of November 1, 2011. Consequently, the loss of earnings pension was COLA adjusted to November 1, 2011 for the purposes of determining the retroactive amount and the current payment amount

[5] This number is in error. The 5 and 7 have been transposed. The actual amount is $475.18.
[6] The Board produced two Loss of Earnings Calculation Sheets. The reason for this is that in the first sheet the Board used only the 100% net amount of $475.18 in its calculation based on the care aide occupation and omitted the post-injury part-time "companion" earnings. This omission is corrected in the second Loss of Earnings Calculation Sheet, which on the top half shows the care aide only calculation, and on the bottom half shows the combined care aide and companion occupations.

as required by policy item #51.00. The COLA factor used for calculating the payment for the period of January 1, 2011 to November 1, 2011 was 1.044927.[7] The same factor was used to establish the loss of earnings pension amount going forward. This amount would be adjusted again as of January 1, 2012.

(c) How is the COLA factor of 1.044927 calculated, and what does it represent?

[10] The answer to this question is found in the Board's FAQ of COLA. It provides an example of how the COLA is determined under section 25 of the Act and policy item #51.00:

> **How are cost of living adjustments calculated for WorkSafeBC periodic payments of compensation?**
>
> WorkSafeBC calculates Cost of Living Adjustments using the formula provided by Section 25 of the *Act*. This formula is **[the percentage change in]** CPI minus 1% (to a maximum of 4%). If the formula results in a percentage of less than 0%, no adjustment is made to the periodic payments. If the formula results in a percentage greater than 4%, it is reduced to 4%. To determine the CPI percentage to be applied in January of a given year, WorkSafeBC compares the national CPI for October of the previous year with that for October of the year prior to the previous year.
>
> For example: WorkSafeBC's cost of living adjustment in January 2004 was 0.58%. This was determined by taking the CPI change from Oct 2002 to Oct 2003 **[and dividing by the CPI as at Oct 2002, multiplying by 100]** and **[then]** subtracting 1%:
>
> The CPI at Oct 2003 = 122.4
> The CPI at Oct 2002 = 120.5
> The CPI **[percentage]** increase based on WorkSafeBC's method is (122.4 - 120.5)/120.5 **[X 100]** = 1.58%
>
> Therefore, the increase at Jan 1, 2004 was 1.58% minus 1% = 0.58%
>
> [comments in bold are added]

[11] First, the Board's description is not as precise as it should be. The adjustments are shown in bold. Second, the current published data from Statistics Canada establishes a CPI base of 100 for 2002 so the CPI numbers used by the Board in its example do not

[7] The payment amount in that period was the base loss of earnings pension less the base functional award, then COLA adjusted by the 1.044927 factor. The payment amount going forward from November 1, 2011 is the base loss of earnings pension COLA adjusted by the 1.044927 factor.

reflect the current statistical data. They are nonetheless accurate. This may be confirmed by using the current published CPI numbers in the same calculation:

CPI at October 2003 = 102.8
CPI at October 2002 = 101.2

The percentage increase in CPI based on the Board's method is (102.8 – 101.2)/101.2 X 100 = 1.58102766798419%

Therefore, the increase at Jan 1, 2004 was 1.58102766798419% - 1% = .58102766798419 or rounded to .58%

[12] In its FAQ on COLA, the Board has also set out its COLA from 2003 to 2013:

Date	**Percentage**
January 1, 2003	2.17
January 1, 2004	0.58
January 1, 2005	1.29
January 1, 2006	1.64
January 1, 2007	0.00
January 1, 2008	1.39
January 1, 2009	1.60
January 1, 2010	0.00
January 1, 2011	1.44
January 1, 2012	1.90
January 1, 2013	0.16

[13] Using this data, I have set out the percentage COLA in Chart A. The above data for the relevant years appears in the Column titled "Yearly COLA". The column titled "Cumulative COLA" reflects a running total for the years used by the Board in calculating the COLA factor applied in calculating the retroactive portion of the loss of earnings pension.

CHART A

Date	**Yearly COLA (%)**	**Cumulative COLA (%)**
January 1, 2007	0.00	0.00
January 1, 2008	1.39	1.39
January 1, 2009	1.60	2.99
January 1, 2010	0.00	2.99
January 1, 2011	1.44	4.43

[14] The numbers in the Board's FAQ on COLA are set out to two decimal places. The resulting COLA factor for 2011 based on these numbers would be 1.0443 ((4.43%/100) + 1 = 1.0443). However, the Board used numbers in its calculations taken to more

decimal places than the data published on the Board's web site. The cumulative COLA totals set out in the Board's Loss of Earnings Calculation Sheets on the worker's file are summarized in Chart B as follows:

CHART B[8]

Date	Yearly COLA (%)	Cumulative COLA (%)
January 1, 2007	0.00	0.00
January 1, 2008	1.3853 **(eg. (111.6-109)/109 =.023853 X 100 = 2.3853% - 1% = 1.3853%)**	1.3853
January 1, 2009	1.6207	3.0060
January 1, 2010	0.00	3.0060
January 1, 2011	1.4867	4.4927

[15] The resulting COLA factor for 2011 based on these numbers would be 1.044927 ((4.4927%/100) + 1 = 1.044927).

[16] As noted above, the COLA factor applied by the Board in calculating the value of the retroactive portion of the loss of earnings pension award from January 1, 2011 to November 1, 2011 as well as the amount going forward from November 1, 2011 was 1.044927.

[17] The COLA factor of 1.044927 is a multiplier representing the cumulative percentage change in the CPI as adjusted per policy item #51.00 from the effective date of the pension to October 2010 and applied as of January 1, 2011. This multiplier is applied by the Board to the base amount of the loss of earnings pension. The loss of earnings pension award at the base date (which for the purposes of the calculation is the same amount as at the effective date) is $339.30 (90% net) per month. This monthly base amount is reduced to $263.10 because the worker received her PFI award of $76.20 during the retroactive period.

[18] The calculation looks like this, as shown on the Board's second Loss of Earnings Calculation Sheet:

$263.10 X 1.044927 = $274.92

[8] Please note: while the yearly COLA effective January 1, 2007, 2008, and 2010 is consistent with both the Board's FAQ on COLA and the Government of Canada CPI Tables, I cannot vouch for the numbers for 2009 or 2011. The latter two appear out of sync with the published data on the website, but not by much. It may be that the higher numbers may be accounted for by the cumulative inclusion of the COLA in subsequent principal amounts (see footnote 7).

[19] This represents the monthly loss of earnings pension from January 1, 2011 to November 1, 2011.[9] Because the functional pension stops when the loss of earnings pension is awarded (in this case, as of November 1, 2011), the COLA factor of 1.044927 is applied to the original base loss of earnings pension of $339.30. The calculation looks like this:

$339.30 X 1.044927 = $354.54

[20] This represents the monthly loss of earnings pension going forward from November 1, 2011 until December 31, 2011. As of January 1, 2012, a new COLA factor is applied.

(d) How is the COLA factor used under policy item #40.13?

[21] Pursuant to policy item #40.13 the case manager used the same COLA factor to adjust the average earnings of the worker as at July of 2011 to January of 2006 for comparison to the worker's pre-injury average earnings for the purposes of subsection 23(3) of the Act and for establishing the base amount of the loss of earnings award, as reflected in the case manager's calculations reproduced above.

[22] The basic formula is this: $xy = z$, where z is the known post-injury earnings, y is the COLA factor, and x is the unknown pre-injury equivalent. To solve for x, divide each side of the equation by y so that $x=z/y$.

[23] In the case manager's calculations the COLA factor $y = 1.044297$. The basic formula is $1.044297x = z$. Therefore: $x = z/1.044297$.

(e) The worker's complaint

[24] The worker has no quarrel with the basic formula. However, she disagrees with the case manager's use of the COLA factor of 1.044297 in the application of the formula.

[25] In an e-mail memo to the Board dated November 3, 2011, the worker's representative wrote that: "The worker's current 2011 earnings (July 2011) of $21.53 per hour have been utilized to determine her post injury earnings capacity (in her primary job). These earnings have been adjusted by a **CPI factor of 1.044927**. It is apparent to me that **this CPI factor does not properly represent an appropriate inflation adjustment for the calculation of this workers post injury earnings capacity**." [emphasis added]

[26] The worker's representative set out his own calculation as follows:

> In the present case, the worker's post injury earnings are being calculated on the basis of the $21.53 per hour she reported to the VRC [vocational

[9] It is unclear whether the approach used by the Board includes COLA on COLA. The higher numbers in Chart B may account for COLA on COLA calculation, but the methodology is unclear.

rehabilitation consultant] on July 25, 2011 (as documented on the claim file). As such, I believe it is appropriate to use the CPI factor for July 2011. This factor needs to be compared with the factor at the time at the date of her original injury which was in January 2006. (Again, it is inappropriate to use the -1% per year in the present calculation as the goal of the present calculation is simply to achieve inflation adjusted equivalency). The total CPI factor in January 2006 is 108.2. The total CPI factor in July 2011 is 120.0. I have applied the formula below:

(120.0 -108.2)/108.2 = 10.90%

The 10.90% represents the CPI increase between January 2006 and July 2011. In order to achieve an accurate comparison between the workers deemed post injury earnings and her original earnings one must apply this CPI increase to the current deemed earnings.

In my view, the formula should be:

$21.53 x 40 hours per week = $861.20 **weekly** (July 2011); adjusted by **CPI factor of 1.109** = $776.56 gross earnings **per month** (January 2006) I believe that the figure of $776.56 **per week** properly represents her post injury deemed earning capacity in her primary job.

I have also applied the formula to her second job as follows:

$13.95 x 7.5 hours per month = $104.63 monthly (July 2011); adjusted by CPI factor of 1.109 = gross earnings $94.35 per month (January 2006); As such, the total post injury gross earnings (before further net calculations, including dependent and infirm tax) are $756.56 **per month** + $94.35 per month = $850.91.

This compares to the current Board calculations of $824.17[10] and $100.13[11] = $924.30.

As a result, it is my view that the workers post injury gross earnings capacity has been incorrectly inflated by the difference between these two figures, i.e. ($924.30 - $850.91) = **$73.39 per month**

[some emphasis in the original; some emphasis added][12]

[10] This is a weekly amount.
[11] This is a monthly amount.
[12] There is an obvious error in the worker's representative's calculations in attributing the weekly sum of $776.56 to a month's worth of earnings. The result understates the impact of the worker's position.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

[27] The Board rejected the worker's representative's analysis and continued to apply the policy item #51.00 COLA formula.

[28] The worker's representative argued in his November 3, 2011 memo to the Board, noted above, that the true change in the CPI was 10.9% based on Board data. The representative took the period of January 2006 until July 2011 into account. The representative also did not subtract the 1% from each year of percentage change in the CPI. The worker's calculations cover the full period of inflation and do not inflate the outcome.

[29] The unadjusted change in the CPI factor used by the worker's representative is 1.109, which reflects an unadjusted increase in the CPI from January 2006 to July 2011 of 10.9%.

[30] However, in calculating the inflation adjustment to the worker's post-injury full-time job average earnings as at July of 2011 for purposes of comparison to January of 2006, the worker's representative used the derived weekly figure as a monthly amount in his calculations in error. By attributing the weekly sum of $776.56 to a month's worth of earnings, the result understates the impact of the worker's position, and underestimates her loss. The representative made the same error with the Board's numbers.

(f) Correcting the worker's calculations[13]

[31] The worker's calculation (eliminating the error made by her representative in his November 3, 2011 memorandum) replicating her representative's methodology would look like this:

> In the present case, the worker's post injury earnings are being calculated on the basis of the $21.53 per hour she reported to the VRC on July 25, 2011 (as documented on the claim file). As such, I believe it is appropriate to use the CPI factor for July 2011. This factor needs to be compared with the factor at the time at the date of her original injury which was in January 2006. (Again, it is inappropriate to use the -1% per year in the present calculation as the goal of the present calculation is simply to achieve inflation adjusted equivalency). The total CPI factor in January 2006 is 108.2. The total CPI factor in July 2011 is 120.0. I have applied the formula below:
>
> (120.0 -108.2)/108.2 = 10.90%
>
> The 10.90% represents the CPI increase between January 2006 and July 2011. In order to achieve an accurate comparison between the worker's

[13] These are simply for purposes of demonstration, and I cannot vouch for their complete accuracy.

deemed post injury earnings and her original earnings one must apply this CPI increase to the current deemed earnings.

In my view, the formula should be:

$21.53 x 40 hours per week = $861.20 **weekly** (July 2011); adjusted by **CPI factor of 1.109** = $776.56 X 4.33 = 3,362.40 gross earnings **per month** (January 2006)

I believe that the figure of $3,362.40 **per month** properly represents her post injury deemed earning capacity in her primary job.

I have also applied the formula to her second job as follows:

$13.95 x 7.5 hours per month = $104.63 monthly (July 2011); adjusted by CPI factor of 1.109 = gross earnings $94.35 per month (January 2006); As such, the total post injury gross earnings (before further net calculations, including dependent and infirm tax) are $3362.40 **per month** + $94.35 per month = $3,456.75.

This compares to the current Board calculations of ($824.17 X 4.33) $3,568.66 and $100.13 = $3,668.79.

As a result, it is my view that the workers post injury gross earnings capacity has been incorrectly inflated by the difference between these two figures, i.e. ($3,668.79 – 3456.75) = **$212.04 per month**

[32] As a result, the gross monthly difference is not the **$73.79** as suggested by the worker's representative, but is in fact **$212.04** per month (roughly three times greater).

[33] The worker's calculation (again eliminating the error made by her representative), but using a methodology similar to the Board's would look like this:

Pre-injury total earnings = **$3,386.47 per month 100% net**

Post injury full-time earnings as a care aide
$21.53 X 40 = $861.20 per week gross (2011 dollars) adjusted by true CPI 861.20/1.109 = $776.56 X 4.33[14] = $3,362.40 per month gross = approximately **$2,733.41**[15] **(100% net)**

[14] There are approximately 4.33 weeks in a month.
[15] To calculate the net, I used the net-to-gross ratio in the Board's calculation. This may not be entirely accurate.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Post injury part-time earnings as a companion
$13.95 X 7.5 = $104.63 per month gross (2011 dollars) adjusted by true CPI 104.63/1.109 = $94.35 per month gross = **$92.51 (100% net)**

Total post injury earnings per month at 100% Net = **$2,733.41 + $92.51 = $2,825.92**

Loss of earnings = **$3,386.47 - $2,825.92 = $560.55 @ 100% net per month**

Loss of earnings awarded = **$377.00 @ 100% net per month**

Difference = **$560.55 – 377.00 = $183.55 @ 100% net per month**

[34] The amount of $560.55 per month compared to the Board's calculation of a loss of earnings pension of $377 per month represents almost a 50% difference (loss to the worker) in the pension awarded.