WCAT Decision Number: WCAT-2004-00031-RB
WCAT Decision Date: **January 08, 2004**
Panel: Heather McDonald, Vice Chair

Introduction

The worker is appealing a Workers' Compensation Board (Board) decision dated February 28, 2001 that awarded him a pension award on his 1977 claim based on an assessment of 13 percent impairment of a totally disabled person. The Board claims adjudicator decided to base the pension on a functional award rather than on a loss of earnings basis. Effective May 2, 1977, the Board granted the worker a permanent partial disability award of $97.50 per month, based on the 13 percent functional impairment (PFI) assessment. In calculating the award, the Board used the personal optional protection (POP) coverage in effect at the time of the worker's injury, and used 75 percent of that as prescribed under *Workers Compensation Act* (Act)

The worker appealed the February 28, 2001 decision to the Workers' Compensation Review Board (Review Board), which the Workers' Compensation Appeal Tribunal (WCAT) replaced on March 3, 2003. The worker's position in these appeal proceedings is that the Board erred in denying him a loss of earnings pension. The worker alleges that in denying him a loss of earnings pension, the Board misinterpreted and misapplied policy in section 40.11 of the *Rehabilitation Services & Claims Manual, Volume 1* (RSCM). The worker also submits that he sustained reduced earnings in the 1980's and 1990's due to permanent aggravation of his 1977 injury, and that therefore he is entitled to payment of his pension on his 1977 claim, on a loss of earnings basis after 1988.

Issue(s)

Is the worker entitled to a loss of earnings pension, post-1988, on his 1977 claim? Did the Board err in applying policy in section 40.11 of the RSCM? In the alternative, is the worker entitled to an increased award on a functional basis?

Jurisdiction

The worker filed his appeal with the Review Board. As I earlier indicated, on March 3, 2003, WCAT replaced both the Review Board and the Appeal Division. As this appeal had not been considered by a Review Board panel prior to the transition date of March 3, 2003, I am deciding this appeal as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38).

The worker was self-employed, and accordingly there is no respondent in this appeal. I convened an oral hearing on November 18, 2003 at WCAT's Richmond premises. The worker appeared, with his legal representative, to give evidence and present argument.

Background and Evidence

The worker was self-employed as a partner in a logging firm. He injured his back in February of 1977 when a tree that he was falling hit a snag and fell on his back. He was 28 years old at the time. The worker suffered multiple lumbar fractures but in 1977 he was able to return to work in his logging firm. The Board accepted his claim for compensation in 1977, paying him wage loss and healthcare benefits, but did not award a pension on the claim in the years immediately following his injury, as the Board initially concluded that he would suffer no permanent impairment from the injury.

In 1988, the worker injured his back again when he slipped on a log and fell. There was a dramatic increase in his back pain. The Board accepted the worker's claim for an acute back strain, super-imposed on a pre-existing condition. A PFI examination of the worker in January of 1990 referred to post-traumatic degenerative arthritis at the L4-L5 level, related to the 1977 claim. The orthopaedic surgeon who conducted the examination believed that the 1977 injury had been serious, but that it had been significantly aggravated by the 1988 injury. The surgeon also observed that the worker should not return to the heavy stress of logging, and noted that the worker was currently employed in a supervisory capacity, coping as long as he was careful in how he moved and lifted objects. The surgeon stated:

> [The worker] has improved, but all who have seen him agree that he will never be pain free and also note there is a significant risk of further problems in the future as the degenerative changes progress. He has returned to work and is fortunate in obtaining suitable employment of a nature that does not require a lot of heavy lifting, jarring or bending activity.
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> [reproduced as written]

Subsequently, a different Board medical advisor acknowledged that the pathology was partly related to the worker's 1977 injury. His opinion was that the 1988 injury had been a "significant insult" as the worker's condition had been "relatively quiescent" until the 1988 injury. Thus there was no impairment awarded under the 1977 claim. Under the 1988 claim, the Board awarded him a 5 percent functional impairment pension, subsequently confirmed by the Review Board.

In October 1992, the worker was assessed at a university back pain clinic regarding his chronic back pain. A clinical report dated October 8, 1992 related the worker's description of back pain flaring up with any significant physical activity, rendering him unable to function for several days. The worker advised that he had attempted to find light duty work but employers were reluctant to hire someone with a history of back problems. With only a grade 10 education, the worker was finding it difficult to find suitable employment.

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

In a letter dated April 6, 1994, the Board advised the worker of its decision not to grant him a loss of earnings pension under the 1988 claim. Memo #78 on the 1988 claim noted that with a 5 percent back impairment, the worker was involved in a variety of activities relating to a trail riding and tour operation, such as conducting trail rides, elk hunts, sleigh rides and even some falling and skidding of trees. A Board medical advisor noted that the evidence suggested that the worker was involved in these activities "at least to a medium strength range."

The worker appealed the April 6, 1994 decision to the Review Board, which issued its findings on June 8, 1995. The Review Board panel noted in part as follows:

> With respect to the issue of [the worker's] average earnings the panel observes that on February 22, 1991 the Review Board directed the Board to consider [the worker's] entitlement to a loss of earnings by using his personal optional protection for comparison purposes. As documented in memo #54 dated June 28, 1991…the claims adjudicator in the Board's Disability Awards Department, suggested that this finding was "quite clearly contrary to the Board's policy as outlined in Section 40.11 of the Rehabilitation Services and Claims Manual." The Review Board finding was not however not appealed further, and remains binding upon the Workers' Compensation Board, and upon this panel. This panel finds, therefore, that for purposes of assessing the worker's potential loss of earnings pursuant to Section 23(3) of the Act the Claims Adjudicator is bound to use [the worker's] personal optional protection of $2000 per month.
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> [reproduced as written]

In its June 8, 1995 findings, the Review Board observed that the Board's Vocational Rehabilitation Services Department had started to assist the worker to establish himself in a guiding and outfitting business. That business was a venture of the worker's personal choice. The Review Board found that the worker had "also clearly indicated that he is not interested in pursuing alternate vocational options" and that is why the Board vocational rehabilitation consultant (VRC) had decided to assist the worker with his personal preference of the guiding and outfitting business. The Review Board went on to conclude that:

> The potential income as an owner of a guiding and outfitting venture will equal or exceed the value of [the worker's] personal optional protection. There will not therefore be any loss of earnings pursuant to Section 23(3) of the Act.
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> [reproduced as written]

Claim memos dated August 31, 1995 and November 15, 1995 from the worker's 1988 claim file indicate that the worker was not satisfied with the Review Board's June 8 1995 findings. The memos indicate that the worker was of the opinion that he was totally unemployable, and that the jobs mentioned in the earlier employability assessment

(delivery driver, heavy equipment operator, self-service gas station attendant) were beyond his capabilities. As well, in his view the wage loss rate was too low. The VRC advised the worker that his personal optional protection on the 1988 claim amounted to $2,000 per month gross, but at 75 percent of gross this equalled $1,500.00 per month or $9.75 per hour. The Board's Vocational Rehabilitation Department was of the opinion that the worker was capable of finding employment at that rate of pay. The worker advised that his trail ride business was no longer in operation and that he was not making any money from that venture. He agreed to try to come up with some form of reasonable rehabilitation plan that would assist him to return to the work force. The worker's legal counsel at that time advised that the worker had difficulty sitting for any period of time, but that he felt most comfortable when riding a horse. The worker had made a chair for himself that consisted of a saddle placed in a semi-upright position.

The worker appealed the Review Board's denial of a loss of earnings pension on the 1988 claim to the Appeal Division, but his appeal was filed well beyond the statutory deadline for appeal. In a decision dated May 28, 1996, the Appeal Division denied an extension of time to appeal.

A February 12, 1998 memo from a Board medical advisor, referring to both the worker's 1977 and 1988 claims, observes that the worker's continued discomfort and pain, present for years, was "no doubt in keeping with the 5% PFI which appears to have been given with justification to the second injury in 1988." The Board medical advisor also indicated that the majority of the worker's complaints were related to the 1988 claim injury.

An April 21, 1998 memo on the 1988 claim, from a Board VRC, related a conversation he had when on vacation in Alberta, when a businessperson who, on learning of his city of residence, spontaneously began to tell him about a mountain trail and camping trip he had enjoyed with the worker's firm. The businessperson described the worker as being involved in strenuous manual labour and also described the worker's ability to gather wood, carry saddles, pack and unpack horses, and his proficiency as a rider.

The worker's legal counsel subsequently provided a written statement dated May 5, 1999 from Mr. B, an unpaid volunteer on the worker's trail trips. Mr. B wrote in part as follows:

> …I am in a position to provide a somewhat different perspective of the noted pack trip. [The worker] asked if I would accompany him to assist in the labour intensive aspects of running a camp and managing a string of horses in a remote camp. My role was to help with the heavier parts of the day to ease his discomfort and do the things that he is unable to do. Things like carrying full bales of hay and hoisting saddles on and off horses.

> There is no question that [the Alberta businessperson] would see that there was a great deal of work involved and that [the worker] was part of that work. What [the Alberta businessperson] did not observe was the absolute agony that [the worker] went through each day to ride and to assist in the normal camp related tasks of the trip…
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> [reproduced as written]

On December 4, 1998, a Board disability awards claims adjudicator advised the worker that the Board would not be granting the worker a pension under his 1977 claim. The adjudicator advised that the worker had returned to work in 1977 following the 1977 injury with no indication of a PFI, and at the time of his 1988 injury, he had indicated an absence of significant back problems (apart from some pain) between 1977 and 1988. The Board also concluded on the medical evidence that there had not been any increase in the worker's back impairment since the PFI assessment under 1988 claim of 5 percent of a totally disabled person. Accordingly, the Board denied the worker a pension under the 1977 claim. The worker appealed the December 4, 1998 decision to the Review Board.

Chart notes from the worker's attending physician, from January 1999 through to August 1999, indicate that the worker was employed during that period but having difficulty with chronic pain.

In findings dated October 2, 2000, the Review Board allowed the worker's appeal. The Review Board found that the worker was entitled to a pension award arising from his February 2, 1977 injury. Examining all of the medical evidence under both the 1977 and 1988 claims, the Review Board found:

> When noting all of the medical evidence shows the worker had a significant pathology prior to the 1988 injury, and clearly the 1988 injury aggravated the underlying deteriorating processes, we find that the worker at least had a 2.5% of disability per level when noting the fluctuating pain caused by activity and the ununited undisplaced transverse fractures. We note we must arbitrarily set the percentage for this award using the A.M.A. Guidelines for united fractures as a guide and our judgment, taking into account all of the medical evidence in the worker's history.
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> The panel finds that the worker is entitled to 2.5% per level for the actual physical ununited transverse fractures, and an additional .50% for the increased disability caused by fluctuating pain.
>
> Section 23(1) of the Workers Compensation Act (the Act) sets out the criteria for the establishment of pension awards for permanent functional impairment resulting in disability, we find that the worker does meet the requirements of this provision of the Act for his un-united transverse fractures and the resulting ongoing pain and impairment. *We also find that*

> *there may have been loss of earnings from 1977 to 1988*, since [the worker] did say that he modified his job duties and worked as a foreman which resulted in his loss of falling income.
>
> *The panel directs the board to consider as to whether the worker was left with a loss of earnings arising from the 1977 injury prior to the 1988 compensable injury.* If there is no loss of earnings, the worker is entitled to a functional award based on 2.5% of total disability for each fractured level for the 1977 disability dating back to the plateau date in 1977 and an additional .5% of total disability for disability caused by pain. The award should be made effective May 21, 1977, the date his wage loss was terminated.
>
> The worker is also entitled to interest on the award.
>
> [italic emphasis added]

The worker did not appeal the Review Board findings of October 2, 2000. In a letter dated November 22, 2000, the Board claims adjudicator noted that in the October 2, 2000 findings, the Review Board had directed the Board to consider whether the worker was left with a loss of earnings arising from "the 1977 injury prior to the 1988 compensable injury." In that regard, the adjudicator requested copies of the worker's income and expense statements, along with certified copies of his T1 forms, for the years 1974 through to 1988.

The adjudicator's claim memo dated February 13, 2001 summarizes the relevant evidence from the documentation provided by the worker in response to the request for earnings information:

1980 Business Net Income	$ 7,743	
1981 T4 Earnings		$16,125
1982 T4 Earnings are on file		$16,000
1983 T4 Business Net Income		$ 7,082
1984 T4 Earnings		$ 4,060
Business Net Income		$32,936
1985 Business Net Income	$10,147	
1986 Business Net Income	$ 3,035	
Total:		$97,128

The adjudicator then wrote:

> When averaged over eight years, this works out to a yearly average of $12,141.00; averaged over 7 years it is $13,875.43.

> I note that the worker's wage rate at the time of the injury in 1977 was based on his POP coverage of $1,000.00 per month.
>
> Usually for comparison purposes, we will use the worker's actual earnings at the time of injury for a loss of earnings. However, these were not available due to the time period involved.
>
> However, even using POP earnings of approximately $12,000.00 a year, it is apparent that the worker's earnings in the years between 1977 and 1988 actually exceeded the POP coverage purchase. Therefore, there would be no loss of earnings.
>
> For this reason, I will implement the Review Board findings, as they have indicated, "If there is no loss of earnings, the worker is entitled to a functional award based on 2.5% of total disability for each fractured level and an additional .5%.
>
> [reproduced as written]

For the functional impairment award, the adjudicator awarded the 12.5 percent (2.5 percent x 5 levels of back impairment) plus 0.5 percent for subjective complaints, for a total functional impairment award of 13 percent of a totally disabled person. The adjudicator also found that the worker had been covered by $1,000.00 per month under POP, and that set the wage rate on the claim.

By letter dated February 28, 2001 (the decision letter under appeal in these proceedings), the claims adjudicator advised the worker that the Board had awarded him a pension on his 1977 claim based on a functional impairment of 13 percent of a totally disabled person. On the loss of earnings issue, the adjudicator wrote:

> In reviewing the earnings information provided between 1980 and 1986, your yearly average exceeds the Personal Optional Protection (POP) in effect at the time of injury. Unfortunately, we do not have your earnings prior to 1977 for comparison purposes, as these were unavailable through Revenue Canada. However, your pension wage rate is limited by the Personal Optional Protection purchase at the time of injury. As it is apparent that your functional award exceeds any loss of earnings, your award has been calculated on this basis….
>
> In calculating your award, we used the Personal Optional Protection coverage in effect at the time of injury and used 75% of that as prescribed by the *Workers Compensation Act*.
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> [reproduced as written]

The Pension Calculation Sheet for Functional Loss indicates that the worker's monthly POP coverage was $1,000.00, and the monthly pension was calculated on that basis.

On appeal to WCAT, the worker submits that he is entitled to have his pension on his 1977 claim paid on a projected loss of earnings basis from July 1989 onward. He submits that the compensation should be the yearly difference between the class average of a full time faller/logger, plus consumer price index (CPI) and, what he actually earned in the periods from 1992 until he can complete a further Board rehabilitation program that reinstates him into permanent suitable employment (minus any earnings, section 16 or wage loss benefits). In the alternative, the worker submits that his pension should be calculated for the time being on the basis that he is able to maximize his earning capacity at minimum wage, until such time as the Board identifies suitable jobs reasonably available to him with appropriate financial and other support, at a higher rate.

The worker submits that the evidence establishes that his multiple compensable disabilities caused a permanent aggravation of his 1977 injury, further causing his reduced earnings in the 1980's and 1990's, and therefore he is entitled to a loss of earnings pension after 1988. The worker argues that his lost his ability to perform heavy work after 1988 and was limited to light or medium work, with limitations. The worker submits that the Board failed to provide him with timely and effective vocational rehabilitation assistance and that the jobs the Board determined he was able to do, were not "reasonably available."

The worker testified that he failed three grades in school, only completing grade 10, and that he has difficulty with reading and spelling. He worked as a logger for most of his life until after the 1988 injury. From July 1989 to March 1990, he worked as a foreman for a construction company on a road-widening project, but he had a crew and did no physical work himself. After the road project ended, the company kept him on as a CAT operator for some time, but subsequently the company went out of business and there was no more work for him. The worker testified that he tried to find similar jobs but was told that he had to be a working foreman, with heavy physical work involved, so that he did not apply for such jobs.

The worker referred to his T4 earnings from 1987 through to 1998. In 1988, the worker reinvested substantial profits from his logging operation into a mining operation in which he was also a principal. This was a reasonable venture as in 1981, the net income from the mining operation was $181,903.00. However, the 1988 investment ultimately turned out to be unprofitable, as the mine development ultimately did not produce income. The worker did earn over $60,000.00 in business income from selling land in 1992, 1993 and 1994, but his T4 employment earnings from 1987 to 1998 were low.

The worker testified that the decision of the VRC under the 1988 claim was not realistic in expecting him to find steady employment. A letter dated October 19, 1995 that the worker wrote to the Board explained his position that opportunities for employment are

extremely limited in his area of residence, and that relocation is not a reasonable option as the worker's wife has a long-standing employment position in a bank, earning a good income, and their house (a four-bedroom home on 30 acres) is fully paid for, which would not be the case if he had to relocate to a larger city and purchase another home. The worker went on to write as follows, in part:

> It is realistically out of the question to suggest that we relocate. The amount of money I could earn trying to find a minimum pay job, if I could find one, would not compensate for the loss of my wife's earnings. I have no school training which permits me to change from physical work. The injury to my back totally removes me from the labour force which I formerly was part of. I suffer significant discomfort when I drive…The result is that I can not realistically attend any work which is a significant distance from my home.
>
> I know you had discussions with my lawyer about my trying to be in the outfitting business. I shall describe for you how that continues. Firstly, it has been going on now for four years. In the first year it lost $7,000.00 and I have never received one cent in wages from that operation. The only way it can continue is because we have two other people involved, one of whom is very young and does most of the physical work. I don't have to lift and I am involved largely because I own the land on which the base camp is operated. Our hay generally is loaded by an elevator and when it arrives if I am by myself I have to hire people to help unload it. Although I have tried for four years to make this into a viable business it is simply not going to produce any significant income from all I can tell. It is a way to occupy my time not a way to earn a living. I find it very difficult to not be able to work. There are many days I am so sore that I can be of no assistance whatsoever. I largely stand around because standing is more comfortable than sitting. My lawyer mentioned to me that you spoke of me riding a horse. While it is true that I have gotten on a horse from time to time I can say openly that I doubt I was on a horse more than twice all of last summer.
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> [reproduced as written]

The worker testified that his business is a trail ride operation with 90 percent of business in June, July and August, being trail rides for children. There have been only two overnight "outfitting" trips in total, and the worker hired other adults to assist with the physical labour involved on the trips. The worker sold his shares in the business in August 1998 for $1.00 to his business partner. The worker testified that the jobs suggested by the Board were not physically suitable for him, or not reasonably available.

On his behalf, the worker's legal representative submits that the February 18, 2001 pension decision on the 1977 claim under-compensates the worker because it

"overlooks his disabilities and work limitations from his 13 percent disability for his L1 to L4 fractures; his 5 percent low back; his bilateral compensable hearing loss requiring hearing aids; and his pending decision for vibration white finger and cold sensitivity".

The worker submits that the Board breached section 40.11 in the RSCM, as it used POP instead of actual pre-injury earnings to assess a projected loss of earnings. The worker says that the Board's inability to obtain his actual earnings in 1976-1977 from Revenue Canada is directly attributable to its blatant error in overlooking his pension entitlement in May 1977 and thereafter. The worker submits that his actual earnings in 1977 as a faller were considerably more than his purchased POP coverage of $1,000.00 per month, and this is corroborated by his tax returns in the early 1980's. The worker submits that it is reasonable to conclude that were it not for his four back fractures in 1977, he would have continued working as a faller into the 1980's and 1990's making earnings at least to the Act's compensable maximum. Therefore he submits that the Board should use the class average of a full time faller/logger in 1988 plus CPI for projected loss of earnings purposes.

The worker notes that when he returned to his logging business after his 1977 injury, he performed lighter foreman duties and hired a faller, working with crews of up to eight persons. The worker felt he could no longer perform falling duties all day due to his pain symptoms. The worker states that he had decreased earning ability after his 1988 injury that permanently aggravated his 1977 injury. His total income from employment from 1985 to 1992 was summarized in claim memo #78 (1988 claim) as follows:

1985	$10,147.00
1986	3,566.00
1987	6,540.00
1988	9,895.00
1989	33,761.00
1990	14,171.00
1991	2,468.00
1992	2,738.00

The worker submits that the February 28, 2001 decision is wrong because it relied on employability assessments that overstated the worker's residual employability which has been light sedentary since 1989. From March 1990 onwards, physically suitable work as a foreman/supervisor (non-working) was not reasonably available to the worker within the meaning of section 40.12 the RSCM. Thus the worker submits that he is entitled to have his 1977 claim paid on a projected loss of earnings basis from July 1989 onwards, with the compensation being the yearly difference between the class average of a full-time logger in 1988 plus CPI and, what he actually earned in the periods from 1992 until he can complete a further Board rehabilitation program that re-instates him into permanent suitable employment. In the alternative, the worker requests that his pension be calculated for the time being on the basis that he is able to maximize his earning capacity at minimum wage, until such time the Board identifies suitable jobs

reasonably available to the worker with appropriate financial and other support, at a higher rate.

In the further alternative, if a loss of earnings pension is not granted, the worker submits that the 13 percent functional award does not appropriately compensate him under Board policy.

Reasons and Findings

My analysis of the worker's submissions leads me to conclude that most of the arguments on his behalf in these appeal proceedings were made in an effort to, in the guise of an appeal of the Board's February 28, 2001 decision under the 1977 claim, in effect appeal the Review Board findings dated June 8, 1995 under the 1988 claim. I have concluded that I do not have jurisdiction to deal with the worker's arguments directed at obtaining a loss of earnings pension from July 1989 onwards. The worker's arguments regarding the Board's failure to provide him with appropriate vocational rehabilitation assistance, his lack of employability post 1989, and his entitlement to a loss of earnings pension from 1989 onward were issues before the Review Board under the 1988 claim, dealt with in the June 8, 1995 findings that the worker attempted, unsuccessfully, to appeal to the Appeal Division in 1996.

By contrast, the February 28, 2001 Board decision at issue in these appeal proceedings was implementing Review Board findings of October 2, 2000 that were dealing with the worker's entitlement under the 1977 claim, not the 1988 claim. The Review Board was specific in directing the Board to assess whether the worker had suffered a loss of earnings from 1977 to 1988 (not post-1988), before the 1988 injury with its serious effect on the worker's back and ability to function. In these proceedings, a lot of energy has been directed at providing evidence about the worker's earnings and ability to work after 1989, rather than evidence of pre-1977 injury earnings and earnings, for comparison purposes, from 1977 to 1988. It is the latter type of evidence, for the period before the worker's injury in 1977, and for the period after his injury and before the 1988 injury, which would have been relevant and helpful in these appeal proceedings.

Having said that, however, I do agree with the worker's legal representative that the Board erred in policy in its February 28, 2001 decision. I have found that the Board erred in interpreting and applying section 40.11 the RSCM. Section 40.11, at the time relevant to this appeal, provided as follows:

> When calculating the pre-injury earnings of a person covered by personal optional protection, a departure is made from the normal rule of using the rate of earnings for which coverage has been purchased. For the purpose of the projected loss of earnings assessment, actual pre-injury earnings are used, but the amount of the award can never exceed the amount of earnings for which the coverage was purchased.

It is clear from the adjudicator's claim memo dated February 13, 2001 that the adjudicator denied the worker a loss of earnings pension on the 1977 claim on the basis that after the 1977 injury and before his 1988 claim injury, the worker was capable of earning equal to the level of his POP coverage on the 1977 claim. But the policy in section 40.11 provides that consideration of a loss of earnings pension award for a worker with personal optional protection is based upon the difference between the worker's actual pre-injury earnings, compared with the actual earnings the worker might obtain after the injury in suitable and available employment. The pre-injury earnings rate is not established by the level of personal optional protection. Rather, the earnings figure for which coverage has been purchased establishes the maximum loss of earnings for which an award will be made. In *Appeal Division Decision #96-0483* (March 11, 1996), the panel also referred to section 66.20 of the RSCM. At the time relevant to this appeal, section 66.20 read in part as follows:

> When assessing a permanent partial disability on a projected loss of earnings basis, the actual pre-injury earnings of persons who have purchased personal optional protection are compared with the actual earnings they might obtain after the injury in jobs which they are able to do. However, the maximum loss of earnings for which an award will be made will be the earnings figure for which coverage has been purchased.

In *Decision #96-0483*, the panel illustrated the policy as follows:

> To illustrate, a worker with POP coverage of $1,000 per month, with actual pre-injury earnings of $2,500 per month, and a post-injury earning capability of $1,500 per month, could receive a loss of earnings pension of $750 per month (i.e. 75% of the diminished earning capacity). In other words, a worker with POP coverage of $1,000 per month has coverage in respect of a decrease in earning capacity, even though the worker is able to earn in excess of the POP coverage amount after the injury. The review board majority erred in its consideration of the worker's appeal in this case, in looking only at whether the worker is capable of earning $28,200 per annum (the amount of the worker's POP coverage) after his injury.
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> [reproduced as written]

In this case, the adjudicator did not use evidence of the worker's pre-1977 injury earnings, stating that "these were not available for the time period involved." (I note that a letter dated February 27, 2003 from Revenue Canada to the worker's advocate states that the worker's tax returns prior to 1979 are no longer available.) Section 40.11 of the RSCM policy provides that average earnings prior to injury are calculated according to the normal rules set out in section 68.00 of the RSCM. Section 68.00 provides that a class average may be applied in suitable cases, and if "no earnings data is received, the pension may be based on the statutory minimum or lower." In circumstances where the worker is unable to provide income tax earnings information or other earnings

information prior to the injury date in question, due to circumstances largely beyond his control such as a twenty-year hiatus, I am satisfied that after exhausting best efforts to obtain such data, it would be appropriate for the Board to use a class average to best represent a worker's earnings prior to a claim injury. In this case, it would have been appropriate under Board policy to use the "all workers' class average for loggers in 1977" as a comparison with the worker's earnings after he went back to work, post-injury, in 1977, in order to best determine, according to the Review Board's direction in its October 2, 2000 findings, whether the worker had suffered a loss of earnings before 1988 as a result of his 1977 claim injury. Instead, the adjudicator decided to use the worker's POP coverage of $1,000 a month to compare with his 1977-1988 earnings to determine whether he had suffered a loss of earnings. I am satisfied that this was contrary to Board published policy in section 40.11 of the RSCM, as well as unfair to the worker as it did not appropriately assess whether he had suffered a loss of earnings as a result of his 1977 claim injury.

Conclusion:

Accordingly, for the foregoing reasons, I allow the worker's appeal in part and vary the Board's February 28, 2001 decision by directing the Board to re-adjudicate the issue of whether the worker suffered a loss of earnings between 1977 and 1988 due to his 1977 claim injury. Specifically, I direct the Board to use its best efforts to determine the worker's actual earnings prior to his 1977 claim injury. If these efforts fail, the Board should use the "all workers' class average for loggers in 1977" to compare with the worker's earnings between 1977 and 1988. The Board should not use the worker's POP coverage of $1,000 per month to compare with his earnings between 1977 and 1988, to determine whether he suffered a loss of earnings on the 1977 claim. The issue of the worker's functional award is moot until the loss of earnings issue is determined.

Heather McDonald
Vice Chair

HM/mak

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