

How the date of injury or the date of permanent impairment impacts on awards for permanent benefits

(A brief explanation of our date-driven system)

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Introduction

The 2002 Workers' Compensation Review Committee described date-driven compensation to have an element of "process lottery" resulting in like situations not being dealt with in a like manner. The committee concluded that while date-driven benefits control costs, they add complexity to the system, drive appeals, and create a sense of injustice amongst workers.

The purpose of this paper is to set out how this date-driven system came to be, and its impact on the award of permanent benefits. It is written for decision-makers and advocates who are knowledgeable of the system. It is intended to explain the historic context and the practical outcomes.

March 23, 1990 - The Hayden decision of the Court of Appeal

On March 23, 1990, the Nova Scotia Court of Appeal issued the *Hayden* decision which found that the Board's approach of basing permanent benefits on impairment instead of disability was not permitted by the wording of the former WCA.

Background

Since 1938, the WCB had used a clinical rating system (the meat chart) to assign a percentage of physical impairment (Permanent Medical Impairment rating) to most injuries. This percentage was then used to determine the extent of the worker's loss of earning capacity. In other words, permanent partial disability pensions were based on PI ratings, not actual wage-loss.

The result of the Hayden decision was to throw the workers' compensation system into disarray. It took six years for a new system for the payment of permanent benefits to be created.

March 23, 1990 to February 1, 1996 - a period of transition

The Board never paid disability pensions as directed by the Hayden decision. But, it was six years before the current WCA came into force. During that six-year "window period" the following happened:

Interim Earnings Loss and Amended Interim Earnings Loss Policy (AIEL)

Between March 23, 1990 and November 26, 1992, the Board continued to pay CRS Pensions as it had pre-Hayden.

In November of 1992, the Board suspended making new awards of permanent partial disability pensions for workers with no permanent loss of earnings. This suspension lasted until the new WCA came into force in 1996. So, if a worker was found to have a permanent impairment after November of 1992, they did not receive any pension for their permanent impairment until after the window period.

By policy, the Board paid interest on the retroactive awards to those workers. This is only instance of the Board paying interest on delayed compensation.

Between November 26, 1992 and November 24, 1993, workers were provided an “interim award” that was the equivalent of a CRS pension. Implicit was that this amount would be recalculated once a new system was created.

Between November 24, 1993 and February 1, 1996, workers were paid under the AIEL policy for half of their gross earnings loss. ($75\% \times \text{gross average earnings-loss} \times 50\%$). However, in cases where a worker’s permanent medical impairment rating was 60% or greater full earning loss was paid ($75\% \times \text{gross average earnings-loss}$).

February 1, 1996 - a new Workers’ Compensation Act is finally proclaimed

On February 1, 1996, the current WCA came into force. Under the current WCA, workers receive different levels of benefits based on date of injury.

Pre-Hayden (March 23, 1990)

Section 226 of the WCA deemed the old method to have been valid for workers with a permanent impairment before February 1, 1996 and whose injury occurred before March 23, 1990. Under s. 227, they get a pension based on the clinical rating system, sometimes this is referred to as a CRS pension (PI rating x 75% of gross average weekly earnings).

They are not entitled to wage-loss benefits (an extended earnings-replacement benefit). However, under ss. 227 and 10D, they may be entitled to supplementary benefits. Generally, supplementary benefits are paid to pre-Hayden workers who are receiving a CPP Disability Pension.

Window period (March 23, 1990 to February 1, 1996)

Section 228 of the WCA deemed compensation to have been properly awarded during the window period, but it topped-up those who would have received greater compensation if they had been paid a permanent impairment benefit (PIB) and an extended earnings-replacement benefit (EERB) after November 26, 1992.

It also provided that after February 1, 1996, all window period workers were paid a PIB and an EERB (if there was an earnings-loss) instead the types of compensation that were paid during the window period.

New Act (After February 1, 1996)

Worker’s whose permanent impairment arose on or after February 1, 1996 are paid a PIB that is based on their level of impairment.

If they have an earnings-loss, they may also be entitled to an EERB.

February 1, 1996 - effective date for FRP Regulations

Where a worker has more pain than one would expect from an injury, or the pain lasts beyond the apparent physical healing of the injury, it is considered to be “chronic pain”. Chronic pain is not the expected pain from an injury. Some workers have very painful conditions, like disc herniations or severe arthritis, but do not have chronic pain as it is defined in the WCA.

In March of 1996, the FRP Regulations were enacted effective the date the new WCA came into force. The FRP Regulations attempted to deal with chronic pain by

- Giving no permanent impairment rating for chronic pain, thereby excluding chronic pain sufferers from permanent benefits;
- Limiting compensation to a four-week functional restoration program once a worker was found to have chronic pain.

April 16, 1999 - Bill 90 proclaimed

In response to the report of a select Legislative committee (that was tabled on November 25, 1998) the WCA was amended by Bill 90. Bill 90 responded to several court decisions, as well as addressing several stakeholder concerns, including:

- reversing court decisions that had allowed for compensation for window period chronic pain sufferers under the general scheme of the WCA. Instead it provides those who, on November 25, 1998, had a decision under or appeal, or were receiving temporary benefits, specific compensation (s. 10E benefits).
- stating that outside the FRP Program and 10E benefits, no worker could receive compensation for chronic pain.
- Restoring AIEL benefits to some pre-Hayden workers (those who received less when they lost their AIEL pension, which was replaced by a CRS pension on February 1, 1996).
- providing survivor benefits consistent with the Charter.

January 1, 2000 - AMA Guides

Historically, the Board had used its Guidelines for the Assessment of Permanent Medical Impairment to rate a worker’s permanent impairment.

By policy, for injuries after January 1, 2000, it now uses the 4th edition of the AMA Guides to rate impairments.

October 3, 2003 - Martin decision of Supreme Court of Canada

On April 17, 1985, the equality provision of the *Charter* came into force, being s. 15 of the *Canadian Charter of Rights and Freedoms*.

In 2003, the Supreme Court of Canada issued its decision finding that certain of the chronic pain provisions of the WCA violated the equality provision of the *Charter*, as they excluded chronic pain from regular compensation under the WCA, instead providing no or limited compensation. This discriminated against chronic pain sufferers on basis of physical disability

July 22, 2004 - New Chronic Pain Regulations proclaimed

In response to the *Martin* decision the new *Chronic Pain Regulations* were enacted. They provide for a permanent impairment rating of 3% or 6% for chronic pain, if a workplace accident is a cause of the chronic pain.

Under s. 4 of the *Chronic Pain Regulations*, workers are eligible for compensation where on or after April 17, 1985 they had chronic pain, a cause of which was a compensable injury. There is presently dispute as to whether the chronic pain must have developed on or after April 17, 1985. The Board policy may conflict with the Regulations. However, Board staff have to apply the policy.

However, in applying the permanent impairment to actual benefits, the Regulations maintain the date-driven benefit entitlement scheme from the WCA. They do contain one further distinction. Pre-Hayden worker's whose PRI does not arise until after February 1, 1996 cannot be awarded an EERB for chronic pain.

The result of the history of the WCA is a system where date of injury can have a major impact on compensation. The following sets-out the current entitlements for permanent impairments:

Date of Permanent Impairment (PI) before March 23, 1990 (Pre-Hayden)

- A CRS monthly Pension for life (75% x pre-accident gross weekly earnings x PI rating)
- May also be entitled to supplementary benefits (if receiving CPP disability pension or would be entitled to one, but for insufficient contributions)
- No wage-loss benefits - not entitled to extended earnings-replacement benefit
- Worker may be entitled to a chronic pain PI of 3% or 6% payable from April 17, 1985 (there is dispute as to whether chronic pain benefits payable if PI developed before April 17, 1985).

Date of PI on of after March 23, 1990 and before February 1, 1996 (Window Period)

- Depending on the date of permanent impairment, different compensation was paid as follows:

- March 23, 1990 to November 23, 1993 - CRS pension and Interim award (75% x gross average weekly pre-accident earnings x PI rating)
- November 24, 1994 to January 1, 1996 - Amended Interim Earnings Loss Policy benefits (37.5% x gross average weekly pre-accident earnings).
- If the amount the worker would have received as an combined Permanent Impairment Benefit (PIB) and Extended Earnings-Replacement Benefit (EERB) (if any) was greater than what they were paid during the window period, then the Worker instead is topped-up to the retroactive PIB and EERB, effective from November 26, 1992.
- Workers who, on November 25, 1998 were receiving temporary earnings-replacement benefits or had an appeal in relation to chronic pain, and had developed chronic pain following the window period injury were awarded a permanent impairment rating of 12.5%, effective January 1, 1999. If the chronic pain resulted in wage-loss, they were also entitled to half an EERB [section 10E benefits], however:
 - If the worker had chronic pain before January 1, 1999, they receive a PIB (and possibly an EERB) based on a PI rating of 3% or 6% to January 1, 1999
 - If the PIB/EERB for chronic pain is greater then the 10E benefit, the worker receives the PIB/EERB effective January 1, 1999 [there is dispute as to whether the worker keeps the 12.5% PI rating or it is reduces to 3% or 6%]
 - If the PIB/EERB for chronic pain is less then the 10E benefit, the worker retains the 10E benefit.
 - If the worker had window period chronic pain, but did not meet the November 25, 1998 criteria, a chronic pain PI of 3% or 6% is payable
- February 1, 1996 - ongoing benefits paid as a Permanent Impairment Benefit and, if there is a wage-loss, an Extended earnings-replacement benefit.

Date of PI on or after February 1, 1996 (New Act)

- Worker entitled to a PIB (85% of net average pre-accident earnings x 30% x PI rating)
- Worker may be entitled to an EERB
- Worker may be entitled to a PI of 3% or 6% for chronic pain
- For injuries that occurred on or after January 1, 2000, PIs rated using the AMA Guides instead of the WCB created Guidelines for the Assessment of Permanent Medical Impairment.