

Workers' Compensation Do's and Don'ts

Rush Crane Guenther has represented thousands of injured workers over several decades, through changing Workers' Compensation legislation, and there are some problems that we continue to see time and again. This article will take a look at some of the pitfalls in the system along with some "do's and don'ts" that we hope will help you avoid some misery should you have an injury on the job.

Wage Rate

One of the real injustices those with a good income encounter is the cap on wage rate set by the WCB¹. The Board sets a maximum wage that can be paid to injured workers so regardless of the amount of money you were earning when you were injured, WCB will only pay you up to their maximum – currently \$80,600.

WCB pays 90% of the net amount of a worker's earnings, which, for high wage earners, means they pay 90% of the net amount of the Board's maximum. So, the most you can ever get from WCB for wage loss is \$1,074.62 per week. Even if you have an income that is below that amount but work a lot of overtime or premium pay work that takes you over \$80,600, that's the most you are going to get.

This maximum wage rate is used both for wage loss while you're off work and also for calculating your pension if you're permanently disabled. So if WCB assesses your permanent disability and tells you you're getting an award of 8%, that's actually 8% of the maximum wage rate – at best. Your pension is paid monthly until age 65, or later in some cases, but the amount is only indexed for inflation MINUS 1%! So in addition to the low wage rate, every year you're falling behind a little more because of the reduced inflation amount.

Lastly, if you are only able to return to work part-time after a serious injury, the WCB will also only top-up your wages to the Board maximum. This can be terrible for high wage earners - say you generally make \$100,000 a year working full time, but then are only able to work three days a week after your injury, the

¹ Legally, it's still the Workers' Compensation Board (WCB). In 2002, sweeping changes were made to the workers' compensation system (see our paper: Insult to Injury), which significantly reduced benefits for injured workers. It was at that time the WCB rebranded itself to be "WorkSafeBC", which is a marketing name, not a legal name. For us, "WorkSafeBC" represents the erosion of benefits for injured workers and the name, in our opinion, puts an onus on workers to 'work safe' rather than on employers to provide safe work. So for us, it remains the WCB.

WCB will only compensate you up to their maximum, which may end up being no top-up at all.

When You Don't Report an Injury

Unions try to get their members to report to the employer and the WCB whenever they are hurt. Many however, knowing that WCB benefits are very low, feel they can't take the hit and will just opt for lighter work or they may take fewer shifts until they "get better". Health care workers often fall into this trap because of the availability of alternate or part-time work.

The problem is: if you have been working fewer shifts or working at a lesser paying job while you are trying to recover, this could affect your wage rate on the claim.

For example, Laura normally works full-time (or more). One day she is lifting a box onto a high shelf when it slips. She catches it but jars her back in the process. She may not feel anything at first, feels okay when she goes home at the end of the shift, but the next morning wakes up with back pain. Laura figures her back is sore from the incident the day before but she doesn't want to make a claim. Her back is too sore to work full-time so she decides to take a few sick days or vacation days off to rest it. The following week it's still sore so she works only a couple of days. As she waits for it to recover, she may post into a lighter or part-time job.

To make a long story short, Laura finds after three or four months of working part-time that she actually had sustained a disc herniation. She now needs to have surgery and will be off completely for a few months. She now has two problems:

1. She didn't report the injury to the employer and the *Workers' Compensation Act* requires her to tell the employer "as soon as practicable". She's going to have trouble getting the claim accepted; and
2. Because she has been working part-time for the last few months, her wage rate is going to be affected. Unless she can convince the WCB that she's been working less, or posted into a lower paying job due to a compensable injury, she will now have a lower wage rate under the claim.

The moral of this story is: always, *always* report (even if you don't miss a day of work) because you don't know when an injury is going to turn out to be more serious than you thought. Secondly, if you are taking lower paying or fewer shifts due to an injury at work *make sure the employer knows!*

Returning to Work

One very important rule for dealing with the WCB is to make sure they know that you are still having symptoms if you return to work.

When a WCB Case Manager asks you how you are, and you answer, “better” that will NOT be interpreted to mean “better than when I was first injured.” It will be interpreted to mean, “BETTER, completely better! No problems at all”.

If you still have back pain, or headaches, or any other symptoms, say so. Make sure you continue to see your doctor regularly. If you return to work and nine months later your back (or whatever) is so bad that you have to go off again, unless you have been creating a good paper trail with visits to the doctor and first aid, the WCB will tell you that your current problems cannot *possibly* be related to your prior compensable injury. It’s just a coincidence that you are now having back problems in the exact area where you had your accident nine months ago. It’s amazing how many “coincidences” happen in workers’ comp world.

Psychological Consequences

Many workers have a self-image as resilient, strong, and impervious to psychological injury. This outdated idea often keeps those who are suffering a psychological condition from seeking help. In the case of serious injury (either to yourself or observing others being hurt), there may well be long term effects such as post traumatic stress disorder. You don’t usually know you have this condition until some time has passed. Again, see your doctor immediately if you suspect you are suffering psychological consequences! Tell your employer, and most importantly, seek treatment. The sooner you get help, the better your chances of recovery. It is not a reflection on you if you are having psychological problems after an incident.

Depression is another common consequence of injury. In cases where previously healthy individuals are now living with disability, and particularly chronic pain, it is normal to experience depression. We have represented many injured workers over the years who were struggling with PTSD, anxiety, depression, phobias, etc. These are all normal consequences of injury and they should be covered by the WCB if they result from a work-related incident. They are NOT a reflection on you if you suffer from them and you should remember that.

Accommodation

The employer has an obligation to accommodate a worker with an injury whether it happened at work or not. The employer must accommodate you to the point of undue hardship. This means, as the Supreme Court of Canada has said, that the employer is expected to absorb *some* hardship in order to allow people with disabilities to return to work. This doesn’t mean that you can bump somebody out of a job but it does mean that the employer must sit down with you and the

union to find out what kind of work they may be able to offer you that will fit your needs. Always go to your union first before seeking an accommodation.

Retirement Age

The law changed in Canada a few years back to abolish mandatory retirement at age 65. Workers can now work as long as they choose, and many are doing so.

Yet the Workers' Compensation Boards continue to terminate pensions at age 65 unless a worker can convince them that, in their individual case, the likelihood of working past age 65 is probable.

This is a very hard test to meet. The WCB has to be dragged kicking and screaming to grant a pension to a later age. We have been successful in many of our pension appeals at getting a later retirement date, but it's a long haul and you have to gather persuasive evidence to support your case.

There is something you can do **now** that could help you get a longer pension if you get injured: tell your employer, verbally and in writing that you intend to work to age 70 or 75 (or whatever date you plan to work to.) Tell your friends and co-workers. Make plans with your spouse.

All of this is good evidence that we can use to win a retirement age appeal. The WCB won't just take your word for it that you planned to work past age 65. You need to have evidence of your intent *before you were injured*. You can lay the groundwork for that now, just in case you need it.

Finally

When you are injured at work, always think in terms of where you may be down the road. Document, document, document. Report, report, report. See your doctor. Think paper trail. And most importantly, if you feel a WCB decision is unfair, appeal it! We win the majority of our appeals; but if you don't appeal, you can't win!

Rush Crane Guenther, Barristers & Solicitors,
Suite 300 – 111 Water Street, Vancouver BC V6B1A7
Telephone: 604.687.5611
www.rcga.com