

October 15, 2002

Consultation on the CPP Policy Review
c/o Slavica Todorovic
Director, Benefits Policy Branch
18th Floor 200 Front St. W. Toronto ON M5V 3J1

Dear Ms. Todorovic:

Re: CPP Policy Review

As you know, the Industrial Accident Victims Group of Ontario (I.A.V.G.O.) is a community legal clinic funded by Legal Aid Ontario. We have been representing injured workers and their survivors for over a quarter century. Our client group includes many workers who have been rendered unemployable by their injuries, and the integration of CPP disability benefits is therefore a major concern for us.

At the outset, we note that the proposal contained in the policy review document is a significant improvement on the Board's current treatment of CPP disability benefits. Unfortunately, this is a commentary more on the glaring deficiencies of the current practice than on the sufficiency of the proposal. It is disappointing to once again receive a Board proposal that takes only limited corrective action in the face of a glaring injustice. In the present case, the failure to directly address the implications of unemployability or to properly tackle the issue of retroactivity must be addressed.

Question #1: Do you agree with the criteria of fair compensation?

No. Even if the *Act* does require a reduction of workers' compensation benefits in some cases, the Board is left with broad discretion. No provision of any applicable *Act* requires the use of either the compensation rate or maximum covered earnings to enforce an overall cap on the total amount received in workers' compensation and CPP disability benefits.

On the contrary, at least one *Act* makes it clear that no such cap applies. Subsections 147(9), (10), (16) and (17) limit the amount of supplements under this section in accordance with the compensation rate in effect at the time of the worker's injury. However, these subsections mention only workers' compensation benefits, Old Age Security benefits and earnings from employment. CPP disability benefits are notable by their absence. Subsection 147(11) requires the Board to "have regard to" them, along with the effect of inflation on the worker's pre-injury earnings.

Not only is an overall cap based on the compensation rate not required by the *Act*, it is not fair. The same applies to any cap based on the maximum covered earnings. Fair compensation is full compensation – 100% of net losses. The limitations on full compensation in the *Act* have

historically been justified as incentives to mitigation (in the case of the compensation rate) and a simple limit on what is insured by the workers' compensation system (in the case of maximum covered earnings). Neither justification applies here.

First of all, since CPP disability benefits are paid only to workers who have been recognized as permanently or at least indefinitely unemployable, it is absurd to speak of an incentive to return to work. Although it may be objected that the Board is not bound to this finding of unemployability, it is bound to recognize – as the new proposal does – that the worker cannot maintain both the CPP disability payments and income from employment. Also, an actual reduction of benefits is only likely to occur in those cases where the Board has confirmed this finding. Even the highest possible CPP disability benefit is less than a minimum wage job. As a practical matter, workers are not deemed to have earnings at less than this rate, except where the Board is confirming the worker's actual earnings at a part-time job. There is no “incentive” justification for beginning any clawback before 100% of net pre-injury earnings have been paid to the worker.

Second, even 100% of pre-injury earnings is not a fair cap, insofar as this does not fully reflect the losses suffered by permanently unemployable injured workers. These workers suffer many uncompensated losses in terms of future retirement income, future wage increases and career changes and employment benefit packages. They also suffer losses due to increased living expenses. Although the Board has instituted an Independent Living Allowance, the criteria are so restrictive that even workers receiving maximum awards for low back injuries are nowhere near to qualifying. The policy review document provides no evidence whatsoever that there are more than a handful of workers – or even any at all – who would be overcompensated in any real sense if allowed to keep all of their CPP disability benefits.

Third, even reference to other uncompensated losses is not necessary to demonstrate the unfairness of using maximum covered earnings as a cap for clawing back CPP disability payments. Workers should not face clawbacks when they are already being compensated at a rate significantly less than their pre-injury earnings or even the percentage of their pre-injury earnings represented in the compensation rate. It is not merely inaccurate, but profoundly offensive to suggest that workers would be overcompensated by receiving a dollar in return for each dollar that everyone, including the Board, must agree that they have lost for no reason other than their injuries.

Question #2: Do you agree that the WSIB should offset 100% of CPP benefits received for the same illness/injury?

No. The Board is undoubtedly correct that there is no violation of s. 155 involved in offsetting 100% of the benefits received for the same illness or injury. However, it is also incorrect to state, as the policy review document does, that CPP disability benefits are meant to compensate for a wage loss and are therefore significantly different from insurance payments. In fact, the amount paid to a CPP disability claimant is based on contributions, not on earnings at the time of the injury. This has much more in common with a private insurance policy than with the workers' compensation system, and that portion of the CPP disability benefit funded by worker contributions should be dealt with in the same way as other worker-funded insurance payments – and be ignored.

The Board simply has not made the case for deducting more than 50%. This is so even without taking account of the instances of systematic undercompensation mentioned in our answer to Question #1 above. As noted in the policy review document itself (at pages 12-15), fully 8 provinces and territories deduct less than 100% of CPP disability benefits from wage loss payments. Although legislation differs from jurisdiction to jurisdiction, the wording of our *Act* is certainly broad enough to allow the Board to deduct *only* 50% of the amount paid for the same injury or illness.

Question #3: Do you support the recommended changes to the formula for offsetting CPP disability benefits when the worker has deemed earnings? If not, what other options would you recommend that still meet the criteria for fair compensation?

We support the general movement from stacking to offsetting, noting that this is the minimum that the Board can do within the confines of the *Act*. The current practice is clearly illegal, as it systematically deems workers injured after 1990 as “likely to be able to earn” an amount that the Board agrees they cannot possibly earn. However, for reasons stated above, the method of the offset is deeply flawed in that it sets artificially low criteria for distinguishing fair compensation from overcompensation.

Question #4: Do you agree that the WSIB should not offset CPP survivors' benefits paid to dependents from WSIB survivors' benefits paid to the spouse?

Yes, although it must again be noted that this is the minimum that the Board can do. Any attempt to offset these benefits would run afoul of the rights of both the dependents and the spouse under the *Ontario Human Rights Code* and the *Charter*, both of which must be used in interpreting the *Act*.

Retroactivity

Finally, insofar as the Board's proposal for offsetting rather than stacking CPP disability benefits is the minimum required by the *Act*, all workers who have been adversely affected by the Board's current, illegal practice must have their benefits adjusted accordingly. There is no justification for failure to do so. In particular, the fact that a worker may have passed a final review date does not prevent the Board from using its reconsideration power to rectify past errors of law.

All of which is respectfully submitted,

INDUSTRIAL ACCIDENT VICTIMS GROUP OF ONTARIO

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