



Community Services,
Seniors and Labour
Office of the Employer Advisor
www.gov.pe.ca/go/oea

The Employer Advisor

July 2011
Vol. 7 Issue 7

40 B Burns Avenue, PO Box 2000, Charlottetown, PE C1A 7N8 Tel: 902-368-6132 Fax: 902-368-4382 Email: pmmcphail@gov.pe.ca
An electronic newsletter for Island employers on Workers Compensation and Occupational Health and Safety Matters

WORKERS COMPENSATION POLICY REVIEW

The Workers Compensation Board of PEI has posted a draft of policy **POL-83, "New Evidence"** for review and comment on their policy consultation page. If you have feedback or suggestions for improvements to this policy they should be forwarded to the Board prior to **August 7, 2011**.

The policy can be found under the Policy Consultation section of the Board's website at: <http://www.wcb.pe.ca/Information/PolicyConsultation>

If you have any questions or comments about this policy you can also contact Danny Miller, WCB Policy and Planning Coordinator, at 902-569-7713 or jdmiller@wcb.pe.ca

REVISED WCB POLICIES

The WCB policy, POL-75 "Fees for Health Care Services" has been rescinded, with its content now incorporated in to policy, POL-64 "Health Care Providers". The following WCB policies have also been amended:

POL-85 "Review of Benefits"

POL-92 "Medical Aid"

Details about the revisions are included in the *History* section at the end of each policy and can be found at:

<http://www.wcb.pe.ca/Information/Policies>

COURT OF APPEAL RELEASES DECISION

The PEI Court of Appeal released its decisions for *Workers' Comp. Board (PEI) v. Mullen*, 2011 PECA 10, in June. The Court of Appeal decision dealt with two grounds of appeal by the Workers Compensation Board (the Board) from Workers Compensation Appeal Tribunal (WCAT) decision number 121. The first ground of appeal pertained to procedural fairness and the second to calculation of the worker's average earnings before the accident.

The worker had been employed with CN for 26 years, ending in 1997 when the worker accepted a severance package. A work-related injury occurred in August 1998, some 14-15 months later, while the worker was employed as a transport driver. The Board calculated the temporary wage loss (TWL) benefits based on the worker's average earnings over the 12 months immediately prior to the date of the accident. This included earnings from part-time

work as a school bus driver and trucking for various companies. The worker later requested the Board review the calculation of his TWL benefits so that they were calculated to reflect his higher rate of earnings from prior employment with CN, as that would be a fairer representation of his earning capacity. The Board denied this request and the Internal Reconsideration Officer upheld the Board's decision. The worker appealed to WCAT and was successful in his appeal. The Board then appealed the WCAT decision to the Court of Appeal.

The Board was unsuccessful with regards to the procedural fairness ground of appeal. The question posed to the Court was whether there was a reasonable apprehension of bias from WCAT. The worker, in his WCAT appeal, initially plead conflict of interest on the part of the Internal Reconsideration Officer. However, this matter was withdrawn by the worker at the outset of the WCAT hearing. Despite the withdrawal of the matter, the WCAT panel chair made comment on the record that the worker probably did have a good chance on the conflict of interest matter and, in the written decision, he referred to "an apparent conflict of interest". However, the Court found that there had been no pre-judgment of the substantive issues based on the comments by the WCAT chair and dismissed this ground of appeal.

The Board was successful in their second ground of appeal, calculation of the worker's average earnings before the accident. The Court of Appeal found that WCAT made a legal error by obligating the Board to use a rate of pay from a previous employer to calculate the worker's net average earnings before the accident. The Court of Appeal found that "A requirement [by WCAT] to place a large amount of emphasis on historical earnings that are not reflective or tied in any way to the Worker's earnings at the date of the injury does not follow the directions of the Act. Such a requirement would preclude the Board from performing the statutory test of fair and just to both the Worker and the accident employer..." The Board's decision not to use earnings from prior employment with CN and to only use earnings from the 12 months prior to the accident was therefore re-instituted.

The Office of the Employer Advisor is open from 8:00am-4:00pm during the summer months to assist PEI employers with claims management, classifications and assessments, workplace health and safety, and appeals. We look forward to hearing from you.