

SUBMISSION
TO
WORKSAFEBBC

Permanent Disability Awards for Tinnitus

THE BC BUILDING TRADES POSITION

October 7, 2011



British Columbia and Yukon Territory Building and Construction Trades Council

#204-4333 Ledger Avenue, Burnaby, B.C. V5G 3T3

Tel: (604) 291-9020 Fax: (604) 291-9590

bcybtbc@bcbuildingtrades.org

www.bcbuildingtrades.org

He enjoys true leisure who has time to improve his soul's estate.

Henry David Thoreau



Preface

The BCYT-BCTC represents unionized construction workers. There are 40,000 highly skilled construction workers throughout BC and the Yukon. Our members include construction labourers, ironworkers, electricians, roofers, plasterers, cement masons, sheet metal fabricators, bricklayers, and heat and frost insulators. Given the dangerous as well as clamorous and oftentimes deafening environs in which our members work, the BCYT-BCTC welcomes the opportunity to comment on the Board's permanent disability awards for tinnitus.

Permanent Disability Awards for Tinnitus

THE BC BUILDING TRADES POSITION

Introduction

Under the existing legislative and policy regime, the Workers Compensation Board of British Columbia holds an untenable position with respect to permanent disability awards for tinnitus. Unfortunately, this is not unique. Many other jurisdictions, both in Canada and around world, take similar approaches when assessing compensation claims for tinnitus. Instead of supporting workers who suffer from tinnitus, the current system oftentimes turns them into untouchables. In British Columbia, the system does this in a number of ways.

To begin with, under sections 6, 23(1), and 23(3) of the *Workers Compensation Act*, a worker's *earning capacity* must be impaired in order to receive a permanent partial disability award. These provisions are integral to the purpose of Act, and, similar to holy writ, cannot be questioned. But workers suffering from tinnitus are compelled to question WCB laws because their condition, although detrimental, may not have a direct impact on their earning capacity. The question, of course, should not be whether their earning potential is strained, but whether the worker has been negatively impacted in the course of employment. The Board's failure to acknowledge this is indicative of its push to commodify workers.

Secondly, under existing practice, a permanent disability award for tinnitus is only available to a worker who has associated *noise-induced hearing loss*. Yet tinnitus can be present, permanent, and overwhelmingly painful and disorienting absent any hearing loss. This is particularly a serious problem in the building and construction trades where head injuries are common and tinnitus has resulted without hearing loss.

Thirdly, the Board's current practice is to calculate disability awards for tinnitus based on one-half of a worker's permanent disability award for hearing loss. Consequently, awards are issued in the range of 0.15% to 7.5% of total disability, and the majority of awards granted are in the range of 0.15% to 1.5%. This compensation formula ensures that those suffering from tinnitus will receive disability awards that are unconscionably low.

These shortcomings have formed the basis of the BCYT-BCTC's evaluation of, and response to, the key questions posed by the Board, namely: (1) when should partial permanent disability awards for tinnitus be available; and (2) how should permanent disability awards from tinnitus be rated? Central to our analysis is the belief that, contrary to the incessant bellowing of so-called corporate visionaries and professional liars, *not everything* of value can be quantified, a person *can* lose something of inestimable worth without a demonstrable earning loss, and tinnitus *can cause* serious damage similar to losing a limb or impairing one's mental faculties when it prevents one from experiencing the peace and solace that a quiet walk in the woods can bring. Simply put, the Council is opposed to the utilitarian perspective that forms so much of the *Workers Compensation Act* and the Board's policy directives. We are particularly opposed when it comes to disability awards for tinnitus because this condition can severely impact one's capacity to experience the totality of life.

Given the shortcomings of the existing compensation regime for tinnitus, the BC Building Trades are pleased to see that the Board is considering amending its policies. We believe that the analysis undertaken by Dr. Brian W. Blakely and his peer reviewers provide the Board and the workers they serve with a better understanding of tinnitus. We also believe that some of the options presented by the Board are constructive and should be strongly supported. However, the Board's policy proposals do not go far enough in remedying the far-reaching impact of tinnitus.

Characteristics of Tinnitus

Tinnitus is the perception of sounds in the absence of any external noise source. It may take the form of buzzing, ringing, clicking, pulsations, blowing, high-pitched whining, roaring, hissing, humming, and other noises. Tinnitus can be intermittent or continuous. The sound perceived may range from a quiet background noise to one that is heard even over loud external sounds; the latter, especially if continuous, can be the cause of great distress.

Objective tinnitus refers to noises generated from within the ear or adjacent structures that can be heard by other individuals. In contrast, the term subjective tinnitus is employed when the sound is audible only to the affected person.

Tinnitus is not a disease, but a symptom that can arise from a wide range of causes including abnormally loud sounds in the ear canal, ear infections, foreign objects in the ear, nasal allergies that prevent (or induce) fluid drain, or wax build-up. Moreover, tinnitus can be caused by natural hearing impairment (e.g., ageing), as a side effect of some medications, or as a side effect of genetic (congenital) hearing loss. It has also been known to arise from a traumatic event such as falling off a roof or being struck on the head by a falling object. While tinnitus is most often caused by noise-induced hearing loss, it by no means is limited to that source.

There is no objective method of assessing tinnitus. Consequently, objective tests such as by comparison with noise of known frequency and intensity, as in an audiometric test, or the highly respected Tinnitus Handicap Inventory used by the Workers Compensation Board, have significant limitations. As noted by Dr. Brian W. Blakely, "because of the limitations of available assessment tools, it is not possible to define a threshold measure or value below which an individual's tinnitus does not cause impairment." The doctor's finding does not mean that tinnitus does not cause impairment, only that the measurement and verification tools are inadequate.

Issue

The purpose of the Workers Compensation Board's policy review on permanent disability awards for tinnitus is to address three ambiguities in existing policy:

- the ambiguity with respect to the threshold amount of hearing loss required in order for an award to become payable;
- the ambiguity with respect to whether a permanent disability award for tinnitus is available when tinnitus results from a cause other than noise-induced hearing loss, such as acoustic trauma; and

- the ambiguity with respect to the range of appropriate awards for permanent disability from tinnitus when calculated under the loss of function method.

Currently the Board's policy on tinnitus is applied in practice so that permanent disability awards for tinnitus are only available where it is associated with noise-induced hearing loss of a magnitude sufficient to entitle a worker to a permanent disability award. In order to conduct a systematic review of the literature on tinnitus, the WCB Policy and Research Division commissioned Dr. Brian W. Blakely to review the medical/scientific literature on tinnitus. Blakely's review report was subsequently peer reviewed by two medical researchers. From this comprehensive review the Policy and Research Division has formulated two key policy issues to be resolved.

The first issue is: When should partial, permanent disability awards for tinnitus be available? Precisely, should a permanent degree of hearing loss for tinnitus be a prerequisite, and should awards be available for tinnitus that results from causes other than noise-induced hearing loss such as acoustic trauma.

The second issue is: How should permanent disability awards from tinnitus be rated? Currently the Workers Compensation Board calculates permanent disability awards for tinnitus as one-half of a worker's permanent disability award for hearing loss. As a result awards are available in the range of 0.15% to 7.5% of total disability, with the majority of awards issued in the range 0.15% to 1.5%.

Law & Policy

Two provisions under the *Workers Compensation Act* are of key relevance to the issue of tinnitus: Section 5 which provides that a worker who suffers *personal injury or death* arising out of and in the course of employment is entitled to compensation; and Section 6 which states that a worker suffering from an *occupational disease* due to his or her employment, and who is thereby disabled from earning full wages, is entitled to compensation. Although tinnitus, as noted, is not a disease, it is dealt with in Section 6 respecting occupational disease because tinnitus is a symptom of a wide range of causes, most commonly, but certainly not always, abnormally loud noise.

The *Rehabilitation Services & Claims Manual* Volume II policy item #31:00 sets out the policy on tinnitus within the more generic issue of hearing loss. It states:

Tinnitus alone is not considered to be a condition for which a permanent disability award can be granted. It is recognized, however, that tinnitus, in combination with a permanent degree of hearing loss, may have an impact on a worker's employability and affect the amount of the resulting award.

Under the loss of function method and in keeping with the *Workers Compensation Act* Section 7 and Schedule D, permanent disability awards for hearing loss range from 0.3% to 15% of total disability. However, because the Board calculates permanent disability awards for tinnitus as one-half of a worker's permanent disability award for hearing loss, this translates into permanent disability awards for tinnitus in a concrete range of 0.15% to 7.5%.

When should partial permanent disability awards for tinnitus be available?

The Workers Compensation Board has provided three options respecting when a partial, permanent disability award from tinnitus could be granted.

Option 1(a) presents no policy change respecting the circumstances in which permanent disability awards for tinnitus would be available. That is to say, permanent disability awards for tinnitus would continue to be available where tinnitus is associated with a permanent degree of noise-induced hearing loss.

Option 1(b) would amend the policy to state that permanent disability awards for tinnitus that are a compensable consequence of noise-induced hearing loss are available in the absence of a prerequisite degree of permanent hearing loss. Under this option, the hearing loss policy would be amended to remove the requirement that a worker have a “permanent degree” of hearing loss before a permanent disability award for tinnitus associated with noise-induced hearing loss can be granted.

Lastly, Option 1(c) amends the policy to state that permanent disability awards for tinnitus that is a compensable consequence of any accepted personal injury or occupational disease are available in the absence of a prerequisite degree of permanent hearing loss. Under this option, the hearing loss policy would be amended to achieve three things: remove the requirement that a worker have a “permanent degree” of hearing loss before a permanent disability award for tinnitus can be granted; expressly refer to the availability of permanent disability awards for tinnitus that is a compensable consequence of any accepted injury or disease; and change the Permanent Disability Evaluation Schedule (“PDES”) to set out percentages for tinnitus.

The BCYT-BCTC supports Option 1(c) above. From the Council’s perspective, and as noted by the Workers Compensation Board, this option has several positive implications. To begin with, there would be more clarity for workers, employers, WCB and WCAT staff with regard to tinnitus claims which, in turn, may result in a reduction of appeals, and corresponding savings to the public purse. Secondly, permanent disability awards for tinnitus would be consistently available to all workers with disabling permanent tinnitus which occurs as a symptom of a compensable condition thereby promoting fairness and equity between workers with similar conditions. Thirdly, this approach is similar to the approaches in Alberta and New Brunswick, two of the most progressive jurisdictions with respect to compensation for tinnitus.

Despite the fact that many other jurisdictions surveyed by Dr. Blakely provide scheduled awards for tinnitus associated with noise-induced hearing loss, it simply makes no sense to limit disability awards for tinnitus to those cases where it is causally connected to a permanent degree of noise-induced hearing loss. While the medical profession has opined that tinnitus is a symptom, not a disease, and this has led the Board to deduce that tinnitus neither falls within the ambit of an injury (in which case it is captured by section 5) or an occupational disease (in which case it is captured under section 6), the fact is it does arise absent noise-induced hearing loss. And if the condition is caused in the course of employment, it should be compensated. The failure to amend this policy earlier has compelled WCB and WCAT medical advisors, as well as adjudicators, to follow the most baffling and truly noteworthy decisions.

The leading case involved a construction carpenter who was struck on the head and face by a four-meter piece of scaffold tubing that fell from some distance above him. Even though he was wearing a hardhat, he experienced post-concussive symptoms of dizziness, poor balance, headaches, fatigue and cognitive difficulties; he also developed bilateral tinnitus several days after the accident. Fortunately, the worker's symptoms, with the exception of tinnitus, slowly resolved. About a year and a half after the accident a Board Medical Advisor stated that the worker's tinnitus was likely permanent, and that he had a mild permanent functional impairment with no medical restrictions or physical limitations. As a result of this opinion, the worker's claim was accepted for a permanent tinnitus. However, after considering policy item #31:00 of the *Rehabilitation Services and Claims Manual* Volume II, a disability officer concluded that the worker was not entitled to a pension for the tinnitus. Not surprisingly, the Review Division confirmed the Board officer's decision, and the case ended up at the WCAT.

In his submission to the WCAT, the worker described the impact of the tinnitus on his daily life. His tinnitus, he said, was a constant, high-frequency noise that frustrated and irritated him. It was painful in certain situations and affected his sleeping patterns. It affected his work, his ability to enjoy music, and disrupted the peace he used to experience on overnight sojourns in the wilderness. He also felt his hearing was affected.

Be that as it may, the WCAT Panel, after consulting the applicable law and policy, was compelled to opine:

Even if one accepts that policy item #31.00 applies only to tinnitus associated with or caused by occupational noise-induced hearing loss, this does not mean that tinnitus associated with other causes should be compensated on a completely different basis. It would be inconsistent, and unfair, to pay compensation for tinnitus, in itself, when it is caused by trauma, but not pay compensation for tinnitus, in itself, if it is caused by exposure to occupational noise. Accordingly, taking into account the one policy that does address tinnitus, it would seem that tinnitus, in itself, is not "a condition for which a permanent disability award can be granted," regardless of its cause.

Such policy-bound decisions are unconscionable because they turn workers with legitimate claims into untouchables.

How should permanent disability awards from tinnitus be rated?

The Workers Compensation Board has also provided three options with respect to rating permanent disability awards from tinnitus.

Under Option 2(a) there would be no policy change with respect to rating permanent disability awards from tinnitus. In other words, tinnitus would continue to be calculated as one-half of a worker's permanent disability award for noise-induced hearing loss. Thus the available range would be 0.15% to 7.5% of total disability, with the majority of awards granted in practice in the range of 0.15% to 1.5% of total disability. As mentioned earlier, this status quo option has several shortcomings from the Council's perspective. Most importantly, there would be no guidance on rating disability from tinnitus

under the loss of function method, and all tinnitus awards would continue to be calculated as one-half of a worker's permanent disability award for hearing loss.

Option 2(b) is a proposal to amend the policy to provide that permanent disability awards for tinnitus are available in the range of 0% to 2% of total disability. According to the Policy and Research Division, there are myriad implications to this change:

- The available range of permanent disability awards for tinnitus associated with noise-induced hearing loss would be reduced from 0% to 7.5% of total disability to 0% to 2% of total disability based on severity;
- Because the majority of awards currently granted fall between 0.15% and 1.5% of total disability, the amount of permanent disability awards for tinnitus associated with noise-induced hearing loss may actually increase;
- There would be greater clarity for workers, employers, WCB and WCAT staff which, in turn, may result in a reduction in appeals to the Review Division and the WCAT;
- This approach would be generally consistent with the approaches to rating tinnitus in Alberta, Ontario and New Brunswick which provide a maximum rating of 2% of total impairment for tinnitus; and
- Because tinnitus is a subjective condition, there may be issues raised as to whether the assigned ratings are appropriate.

Not surprisingly, the BC Building Trades does not support this option. Our reasons are set out in the last option below.

The Board's final option, Option 2(c), would amend policy to provide that permanent disability awards for tinnitus are available in the range of 0% to 5% of total disability. Similar to Option 2(b) above, this option has a number of implications:

- The available range of permanent disability awards for tinnitus associated with noise-induced hearing loss would be reduced from 0% to 7.5% of total disability to 0% to 5% of total disability based on severity;
- Because the majority of awards currently granted fall between 0.15% and 1.5% of total disability, the amount of permanent disability awards for tinnitus associated with noise-induced hearing loss may actually increase;
- There would be greater clarity for workers, employers, WCB and WCAT staff which, in turn, may result in a reduction in appeals to the Review Division and the WCAT;
- This approach would be consistent with the approaches taken to rating impairment from tinnitus in the majority of the jurisdictions surveyed by Dr. Blakely; and
- Because tinnitus is a subjective condition, there may be issues raised as to whether the assigned ratings are appropriate.

While the BC Building Trades Council prefers Option 2(c) to WCB's other options, it is opposed to several elements of this approach.

We are opposed, first and foremost, to capping a permanent disability award for tinnitus at 5% of the total disability award. This arbitrary percentage fails to reflect the devastating and oftentimes all-encompassing nature of the impairment when it is full-blown. As past WCB and WCAT cases have shown, tinnitus has the capacity to disrupt every aspect of a worker's life, from morning till night, from working to sleeping, from capturing a peaceful moment or being rejuvenated by the silence of nature. The failure to acknowledge the personal cost of tinnitus to those who suffer from this condition is patently unreasonable and unfair to workers. The fact that the majority of the jurisdictions reviewed by Dr. Blakely have set their cap for tinnitus disability awards at 5% or below is no defense. The issue is the *severity* of the condition, whether defined as an injury, an occupational disease, or whatever, caused in the course of employment.

Furthermore, under what situation does the Board believe that an award of 0% for a permanent disability from tinnitus is justified? Surely any impairment is worth a percentage of an award, even if it be small.

Thirdly, this proposed policy change will not remedy sections 6, 23(1), and 23(3) of the *Workers Compensation Act* which states that a workers' *earning capacity* must be impaired before he or she can receive a permanent partial disability award. The Council is fully aware that such legislative changes are not being contemplated at this time, but workers suffering from tinnitus without impairment to their earning capacity cannot wait. As noted, ad nauseam, the question is not whether their earning potential has been strained, but whether the worker has been negatively impacted in the course of employment.

Conclusion

The BCYT-BCTC appreciates the Workers Compensation Board reevaluating its tinnitus policy. The current permanent disability awards for tinnitus are insufficient, illogical, and unfair. Some of the Board's proposed options address a portion of the shortcomings in the existing system. Much remains to be done. We know that tinnitus can have far reaching ramifications that disrupt a wide range of a worker's human experience. The Board's compensation laws and policies need to reflect this fact.