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# **Compensation for Economic Loss: Impairment, Severe Disability, Loss of Career Progression**

## **In Support of the New Veterans Charter Review**

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## Table of Contents

Introduction .....	1
Key Messages.....	1
Results.....	2
Impairment, Severe Disability and Work Capacity .....	2
Evidence.....	2
Workers Compensation .....	3
Canada Pension Plan Disability .....	4
Career Progression.....	5
Canadian Armed Forces .....	5
Workers Compensation .....	8
Veterans Administration in the United Kingdom.....	9
Appendix A: Meeting with the Former Vice-President, Ontario Workplace Safety and Insurance Board ..	10

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## Introduction

In relation to compensation for economic loss, Veterans Affairs Canada (VAC), under its New Veterans Charter (NVC), offers: the Permanent Impairment Allowance (PIA) and the PIA Supplement benefits, paid in recognition of lost career progression, and the Totally and Permanently Incapacitated (TPI) designation, which continues earnings loss until earnings capacity exceeds 66 and two-thirds of pre-release salary or to age 65<sup>1</sup>. A recent VAC study pointed out that both TPI and PIA/PIAS use an all or nothing approach while many jurisdictions have moved to a structure of compensation which recognizes varying degrees of work capacity designed to encourage labour market engagement<sup>2</sup>.

This paper examines the link between impairment and work capacity, the earning trajectories among CAF members, and how other jurisdictions use the concepts of impairment, severe disability and loss of career progression in economic loss compensation.

## Key Messages

- The link between impairment and work capacity is weaker than commonly assumed. Even minor impairments can result in significant earning losses since factors such as gender, age, level of impairment, transferable skills, and labour market conditions may all bear on earnings capacity.
- Workers compensation boards (WCBs) in Canada have moved to a loss of earnings capacity approach (starting in early 1990s) to compensate for economic loss. This approach accounts for other factors bearing on earnings capacity.
- Severe disability is not specifically defined by WCBs. Instead, cases are typically triaged into short-term and longer-term for the purposes of case managing work reintegration. Non-economic loss compensation is still based on impairment ratings.

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<sup>1</sup> TPI means the Veteran is assessed as incapacitated by a permanent physical and/or mental health problem that prevents performing any occupation that would be considered "suitable gainful employment". "Suitable gainful employment" is defined as employment for which the Veteran is reasonably qualified by reason of education, training or experience and that provides a monthly rate of pay equal to at least 66 and 2/3% of the gross pre-release military salary adjusted to today's dollars or of minimum basic corporal salary at the time of application, whichever is greater.

<sup>2</sup> MacLean MB and Pound T, Compensating for Permanent Losses: Totally and Permanently Incapacitated, 2014.

- The Canadian Pension Plan Disability Program (CPPD) provides a basic level of compensation for “severe and prolonged” disability, while considering the applicants’ non-medical factors associated with employment such as age, education level, language proficiency and past work and life experience as well as medical factors. “Severe and prolonged” is assessed by physicians though they have indicated in a program evaluation<sup>3</sup> that assessing non-medical factors is not within their expertise.
- The growth rate in military earnings was found to be steepest among younger Regular Force members. While the majority of members progress beyond the officer cadet/recruit/private ranks prior to release, few continue in the military after age 55 and few reach the ranks of senior officer.
- Predicting career progression is difficult, yet a 1990 report on reshaping workers compensation in Ontario recommended that the board recognize “established job progression.” Also, the United Kingdom’s earnings loss benefits are adjusted to provide more for younger Veterans recognizing their steeper earnings trajectory.

## Results

### Impairment, Severe Disability and Work Capacity

#### Evidence

- Waddell and Burton (2004) found that the “link between disease or impairment and functioning or (in)-capacity is much weaker than commonly assumed.”
  - “Many people with severe medical conditions and/or permanent impairment do work. Conversely, many recipients of disability and incapacity benefits have little evidence of disease and/or impairment. Functioning and disability also depend on personal/psychological factors and interactions between the person and the environment. Indeed, in common health problems, psychological and psychosocial issues are often more important for incapacity than any underlying biological problem.”<sup>4</sup>
- A study by the Institute for Work and Health examined the link between impairment and labour market earnings over a 10-year period among workers compensation claimants in Ontario and British Columbia. The study found that while those in the higher impairment categories experienced greater earnings

<sup>3</sup> Summative Evaluation of the Canada Pension Plan Disability Program, Evaluation Directorate, Strategic Policy and Research, Human Resources and Skills Development Canada, January 2011.

<http://www.esdc.gc.ca/eng/publications/evaluations/income/2011/sp-983-02-11-eng.pdf>

<sup>4</sup> Waddell and Burton, “Concepts of Rehabilitation for the Management of Common Health Problems”, 2004.

losses compared to their uninjured counterparts there was high variability in earnings recovery within each category. Even minor impairments resulted in significant earning losses. The authors concluded that individual and contextual factors are very important to consider in the workers' compensation process. Factors such as gender, age, level of impairment, transferable skills, and labour market conditions may all bear on earnings capacity. The authors noted that particular attention might be paid to the adequacy of earnings replacement among those with low levels of impairment, as earnings losses appear to be sizeable even for those assessed as having impairment levels of five per cent or less.

- Many studies have considered earnings equity by examining the relationship between impairment and earnings replacement (labour market earnings plus benefits). Those in the highest impairment category in some cases had earnings replacement rates well in excess of 100% while those in lower impairment categories had lower replacement rates. This finding suggests that factors other than impairment play a role in explaining earnings replacement<sup>5</sup>. Average earnings replacement rates are for those deemed TPI or in receipt of PIA are not known, neither is whether labour market earnings recovery rates are poor for a significant proportion with low impairments.

### Workers Compensation

- Workers compensation boards (WCB) in Canada use impairment assessments for compensation of non-economic loss. These assessments are based on American Medical Association guidelines, which are also used by VAC. Those with permanent impairments are entitled to lump sum awards based on the degree of impairment with 100% being the most severe<sup>6</sup>. WCBs in Ontario, Manitoba and the Yukon adjust these payments for age providing greater benefits to younger injured workers.
- Since the early 1990s, WCBs in Canada have moved away from impairment-based lifetime earnings loss compensation, an approach similar to the previous VAC *Pension Act*. Paul Weiler was commissioned by the Ontario Minister of Labour in 1980<sup>7</sup> to recommend reforms to Workers' Compensation. The report resulted in sweeping changes to workers compensation that came about in two phases. In 1985, a dual award system (non-economic and economic loss) was implemented. Then, in 1990, non-economic loss benefits (based on impairment)

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<sup>5</sup> MacLean MB and Campbell L, Income Adequacy and Employment Outcomes of the New Veterans Charter, 2014.

<sup>6</sup> MacLean MB and Pound T, Compensating for Permanent Losses: Totally and Permanently Incapacitated, 2014.

<sup>7</sup> Weiler PC. Reshaping Workers' Compensation for Ontario, A report submitted to the Minister of Labour, November, 1980. [http://www.archive.org/stream/reshapingworkers00weil/reshapingworkers00weil\\_djvu.txt](http://www.archive.org/stream/reshapingworkers00weil/reshapingworkers00weil_djvu.txt)

were adjusted for age with the guiding principle that the younger the worker the higher the non-economic loss for the same impairment, and economic loss compensation moved from impairment based to a loss of earnings capacity approach<sup>8</sup>. Currently all workers compensation programs in Canada compensate for economic loss using a loss of earnings capacity approach<sup>9</sup>. In Ontario's WCB decisions on lost earnings capacity are made by case managers based on various factors (see Appendix A).

- In terms of severe disability, the Ontario WCB typically triages cases into short-term (work absence expected to last less than six months) and longer-term (more complex or catastrophic [no work capacity]). Higher impact decisions on capacity to work (for example no work capacity) require management approval (see Appendix A).
- In terms of defining severe disability, an Institute for Work and Health study found no standardized definition of long-term or complex claims across the seven workers compensation jurisdictions surveyed<sup>10</sup>. Instead, there is a range of approaches to differentiating cases that are short-term and relatively simple from those cases that are longer-term and more complex.
- The importance of case management practice was emphasized by the former Vice President of Ontario Workplace Safety and Insurance Board, Judy Geary. In a discussion on best practices, she noted that while sound policy is critical, case management practices are equally critical to successful outcomes. Factors such as early intervention, in both medical and work arenas, case planning and coordination, and evaluation are important. Communicating the ultimate outcomes, measuring these outcomes and holding providers and staff accountable will be important parts of a future culture shift (See Appendix A).

### Canada Pension Plan Disability

- According to the *Canadian Pension Plan Act* (CPP), a disability is considered severe only if a person is regularly incapable of pursuing any substantially gainful

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<sup>8</sup> The move away from impairment-based was likely related to the following statement. Weiler 1980 stated that "it is apparent that precisely the same physical injury can produce radically different losses in earnings as a result of a variety of contingencies: personal characteristics of the injured worker (his age, education, skills or experience); economic conditions (slack or tightness in the labour market); or the social environment (attitudes towards and efforts on behalf of physically handicapped workers)."

<sup>9</sup> BC uses the higher of impairment based or loss of earnings capacity approach. MacLean MB and Pound T, *Compensating for Permanent Losses: Totally and Permanently Incapacitated*, 2014.

<sup>10</sup> Institute for Work and Health. "Cross-Jurisdictional Survey of Case Management Services for Long Term and Complex Workers Compensation Claims", April 2009.

occupation. It is important to note that the ‘severe’ component of the definition criterion has been interpreted inconsistently. In some cases, the interpretation has been quite narrow and restrictive, while in other cases, ‘real life’ circumstances related to inability to work have been taken into account. These circumstances include age, education level, language proficiency, past work and life experience. With respect to appeals, a recent Federal Court judgment questioned the stringent interpretation of ‘severity’ and argued that the inclusion of real life factors appeared to be more consistent with the original intent of the CPPD legislation.

- In the process of establishing eligibility for CPPD pension, applicants must have a “severe and prolonged” disability that prevents him or her from working at any job on a regular basis. Definitions and concepts of severe and prolonged disability are communicated to physicians through a “Physician’s Guide”. Feedback identified various problems associated with these definitions. Some definitions are difficult to quantify, some are open to different interpretations, and some entail information that is unknown to physicians and therefore that is not within physicians’ expertise to assess. The definitions were reported to be particularly difficult to apply to patients with more subjective symptoms such as mental health problems and chronic pain.

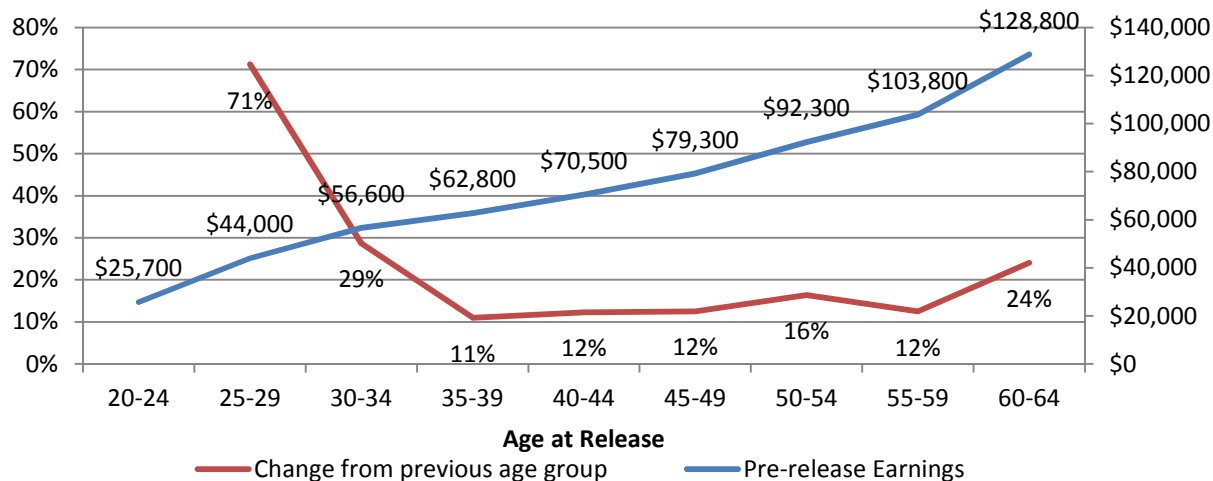
## Career Progression

### Canadian Armed Forces

- While earnings increase with age, the growth in earnings is steepest among younger members (20s to early 30s). As seen in Figure 1, Regular Force Veterans who released in their late 20s had average pre-release earnings that were 71% higher than those released in their early 20s and from late 20s to early 30s the growth rate was 29%. Together, this represents a more than doubling of earnings over about the first 10 years of service, from \$25,700 (early 20s) to \$56,600 (early 30s). Growth in earnings after this first 10 years was much more moderate (11% to 16%), except for a 24% increase from late 50s to early 60s.



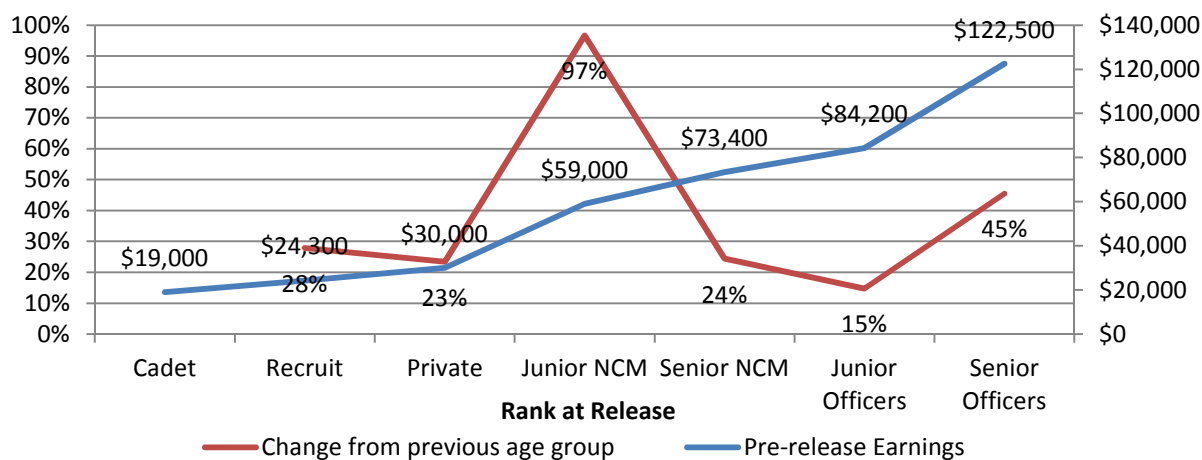
Figure 1: Pre-Release Earnings in 2007\$ by Age at Release



Source: MacLean et al, Income Study: Regular Force Veteran Report, January 2011.

- Earnings also increase with rank, with the growth rate being steepest from private to junior NCM (97%) followed by from junior to senior officer (45%) (Figure 2). The remaining movements in rank involve less than a 30% increase in earnings.

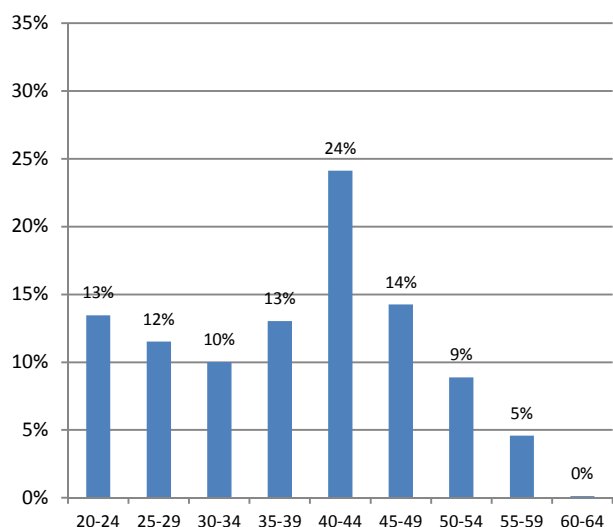
Figure 2: Pre-Release Earnings in 2007\$ by Rank at Release



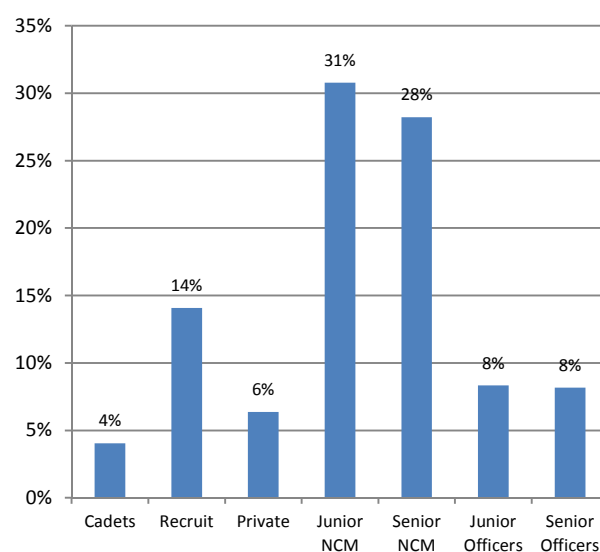
Source: MacLean et al, Income Study: Regular Force Veteran Report, January 2011.

- The majority do progress beyond the lower ranks. Both younger Veterans (29 and under) and lower ranks (cadets, recruits and privates) accounted for a minority of releases, 25% and 24% respectively. Few members (5%) continue to serve after age 55 and the majority of members progress beyond the lower ranks to at least the junior NCM level (See Figure 3).

Figure 3: Proportion of Releases by Age Group and Rank



Source: MacLean et al, Income Study: Regular Force Veteran Report, January 2011.



Source: MacLean et al, Income Study: Regular Force Veteran Report, January 2011.

- Over the five-year period, from April 1, 2007 to March 31, 2012, 30% of officers released as officer cadets (18%), 2<sup>nd</sup> lieutenants (9%) or lieutenants (3%). The majority (70%) released as captains (31%) or at higher ranks (major to general, 39%). The average lengths of service were: 19 years for a captain, six years for a lieutenant, and three years for a 2<sup>nd</sup> lieutenant (Table 1)<sup>11</sup>.
- Over the same five years, 37% of NCMs released as recruits or privates while the majority (63%) released as corporals or at higher ranks. Average lengths of service were: 11 years for a corporal, three years for a private trained, one year for a basic private and one-tenth of a year for private recruits (Table 2).

<sup>11</sup> Data provided by Jamie Morse, Liaison Officer to Veterans Affairs Canada, February 20, 2014.

Tables 1 and 2: For a career that terminates at a given rank, the percentage of releases at that given rank and the average years of service (YOS), 1 April 2007 to 31 March 2012

Table 1: Officers		
Rank at Release	Percent Released at this Rank	Average YOS at Release
GEN	0.04%	37.5
LGen	0.3%	36.1
MGEN	0.4%	35.0
BGEN	0.7%	33.4
COL	3.8%	32.9
LCOL	11.1%	29.3
MAJ	22.8%	24.7
CAPT	31.0%	19.3
LT	2.6%	6.4
2LT	9.1%	2.5
OCDT	18.2%	0.9
	100%	

Table 2: NCMs		
Rank at Release	Percent Released at this Rank	Average YOS at Release
CWO	2.0%	32.6
MWO	6.0%	29.2
WO	8.5%	25.3
SGT	12.9%	22.4
MCPL	11.5%	18.5
CPL	21.4%	10.5
PTET	6.7%	3.3
PTEB	10.3%	1.4
PTER	20.8%	0.1
	100%	

- The majority of those releasing from the military are still working age, owing to factors such as mandatory retirement age, medical release related to occupational requirements, and eligibility for full pensions after 20 years of service. In fact, the Survey on Transition to Civilian Life found that 89% worked after release.

### Workers Compensation

- The problem of predicting future earnings loss was pointed out in the Weiler report “...in principle, that the Board should take greater account of the fact that a totally disabling injury to a young worker will often produce an income-related pension which is much lower than what he would have earned if he had stayed at work and moved up the salary scale. I recognize the difficulties of predicting what might have happened, and the opportunities for endless litigation. The Board should not be required to speculate about future promotions.” The recommendation was that the Board should recognize the “established job”

progressions scheme or salary grid encompassing the position actually occupied by the injured worker” and “take this into account in calculating the benefit which is intended to replace income lost as a result of the injury.”

### **Veterans Administration in the United Kingdom**

- One important factor influencing future earnings is age. For example, younger members released for medical reasons would have the highest future earnings losses as their earnings would be expected to increase faster than older members who may have reached the top end of their career progression. Earnings loss benefits for UK Veterans are adjusted to provide more for younger Veterans. The adjustment factor is based on the following assumptions: a 3% discount rate to produce a net present value; assumed retirement of aged 65; assumed average age of death to be 86; and a factor for promotions foregone. This factor is 1.207 at age 16, declines each year to 1.000 at age 37 and continues to decline to 0.705 at age 55 and older<sup>12</sup>.

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<sup>12</sup> Communication with Angela Page, Armed Forces Compensation Chief of Defence Personnel – Remuneration and Pensions, The Armed Forces and Reserve Forces (Compensation Scheme), Order 2011 No. 517.

## **Appendix A: Meeting with the Former Vice-President, Ontario Workplace Safety and Insurance Board**

### **February 11, 2014 meeting with Judy Geary**

Attendance: Mary Beth MacLean, Mary Beth Roach, Teresa Pound, Cheryl Dalziel and Barbara Mayhew

Prepared by Mary Beth MacLean, February 24, 2014

### **Background**

Article from the Institute for Work and Health on her recent retirement as vice-president of the Ontario Workplace Safety and Insurance Board in Ontario. She relied on evidence to overhaul the policies and practices of the board to put work at the centre. <http://www.iwh.on.ca/at-work/71/the-making-of-an-influential-knowledge-user-how-judy-geary-used-research-to-improve>

She appeared at ACVA on Nov. 26, 2013

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=2&DocId=6334542&File=0>

### **Meeting Notes**

Earnings capacity is assessed using a number of pieces of information. Sometimes it is catastrophic and any ability to work is gone. These cases are handled by a special group that assesses the extent of the impact and this group are awarded full wage-loss replacement benefits. If it is not a total loss of earnings capacity then the degree of work capacity is assessed. Work capacity is calculated on an individual basis, adjudicated by case managers, and assessments include:

- a lot of medical information (family doctors, specialists);
- multi-disciplinary evaluations at their network of clinics (occurs within 3 to 4 months and some cases 6 months to a year);
- if recovery is not occurring they put in lots of medical resources;
- gather information on the work they were doing from the workplace;
- the general labour market for those not returning to the same employer (transferable skills analysis); and
- vocational assessments (industrial psychologists, sometimes use IQ, literacy and aptitude tests, cognitive assessments related to mental health, learning disabilities).

These assessments look at the whole person and their degree of ability to work not just the injury itself. They take into account the persons views on their ability to work. Often it is a matter of motivation. Just because they believe they are unable to work does not mean this is

so. In these cases, the focus on transferable skills analysis can build self-awareness and confidence.

There was recognition from the start that the culture of the organization needed to be changed to focus on work. They spent a lot of time encouraging “activating partial work capacity” and making part-time work acceptable as well as spreading the knowledge of the link between work and health. They took the viewpoint that work disability is human waste and harmful. The Organisation for Economic Co-operation and Development (OECD) talks about moving from passive payer to case management and workplace reintegration.

Service delivery and providers were key in this culture change. Providers (e.g., physiotherapists, chiropractors) were being compensated on a fee-for-service basis. They moved to outcomes based compensation. They developed a practice document on assessing work capacity which includes what types of information is needed, to what degree, how would the adjudicator decide, and consistency. If there is doubt they would get more information.

In terms of case management they triage cases into short-term (six months) and long-term (more complex). Higher impact decisions on work capacity require management approval. We mentioned that the health care team in the field is now reviewing TPI decisions. She said this would work if the team and management are all focused on activating work capacity and not entitlement to benefit. The longer-term claims have a series of reviews that end after six years at which time the work capacity decision is locked-in. The case plan may end prior to the six years if the person returns to work, gets back on the trajectory of earnings which would be a good proxy for earnings capacity. Maximum medical recovery is expected within three to six months and if not flags go up (are they waiting for an MRI, did they get the right referrals, etc). The multi-disciplinary assessment clinics (possibly similar to OSI clinics) keep the family doctor in the loop.

In response to questions regarding ensuring timely medical treatment, Judy indicated that via a procurement process the WCB had agreements with medical specialists in various treatment facilities (usually associated with a teaching hospital or University). These agreements ensured that WCB clients would be seen by a medical specialist within one to three days. This timely access to such a high level of medical expertise greatly improves the health outcomes and the return to work capacity.

Judy indicated CPP is not deducted from WCB income replacement benefits, but rather at age 65 the payment of 5%-10% of income replacement benefits received recognizes that WCB claimants will have less likelihood to save for retirement, especially since the wage replacement benefits were based on net earnings (which would be reduced by CPP contributions). She also mentioned that for the first year a WCB claimant is receiving benefits, his/her employer is required to make CPP contributions on the claimant's behalf provided there was an employment relationship of two years or more prior to the workplace injury.