Noteworthy Decision Summary

Decision: WCAT-2006-01687-rb **Panel:** Jill Callan **Decision Date:** April 12, 2006

Section 251 referral to the chair – Fettering of discretion – Non-standard retirement age above age 65 – Worker was awarded a loss of earnings pension payable until he retires at age 70 – The fixed rule in policy item #40.20[1] of the Rehabilitation Services and Claims Manual, Volume I (RSCM I) that the rule of 15ths does not apply to workers who receive loss of earnings pensions beyond age 65 is not patently unreasonable and does not fetter the discretion under section 23 – Payments under the rule of 15ths constitute a retirement benefit that is additional to the compensation for permanent disability established under section 23 – The rule has a legitimate rationale – Sections 23(1) and 23(3) of the Workers Compensation Act

The issue in this section 251 determination was whether the fixed rule in policy item #40.20 of the Rehabilitation Services and Claims Manual, Volume I (RSCM I), that payments under the rule of 15ths will not be made to workers who receive loss of earnings pensions beyond age 65, is patently unreasonable under section 23 of the *Workers Compensation Act* (Act). The board of directors can establish policies that constitute fixed rules provided those policies are within the objectives of the Act and their authority under the Act. The current section 82 grants the board of directors broad authority to set compensation policies. Given that payments under the rule of 15ths appear to constitute a retirement benefit that is additional to the compensation for permanent disability established under section 23, and the fact that there is a legitimate rationale for the framework established under item #40.20, the impugned policy does not unlawfully fetter the discretion granted under section 23 or involve a patently unreasonable application of section 23.

The worker, who was injured at age 60, was granted a loss of earnings pension payable until he would have retired at age 70. Pursuant to item #40.20 of RSCM I, at age 70, his pension will be reduced to his physical impairment pension under former section 23(1), and he will not receive an additional amount under the rule of 15ths. Item #40.20 sets out a framework through which the duration of a loss of earnings pension changes depending on the age of the worker at the date of injury. It treats workers who are injured prior to age 65 and who establish a retirement age beyond age 65 differently from those who are injured prior to age 65 and intend to retire at or before age 65. The worker appealed, seeking payment under the rule of 15ths after he reaches age 70. The issue in this section 251(3) determination was whether the fixed rule in item #40.20, that payments under the rule of 15ths will not be made to workers who receive loss of earnings pensions beyond age 65, is patently unreasonable under section 23 of the Act.

The rule of 15ths results in the quantum of pensions for some workers for a specific period being based on a hybrid of the physical impairment method under section 23(1) and the projected loss of earnings method under section 23(3). There is no statutory provision requiring or specifically authorizing such a hybrid approach, and four aspects of section 23 appear to be

[1] This decision is noteworthy for the points discussed in this summary but should be viewed with some caution as policy item #40.00 was significantly amended on April 26, 2012. Click here for more information.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

inconsistent with the rule of 15ths. The scope of the vice chair's referral was limited to the question of whether the impugned policy is patently unreasonable and does not directly raise the question of whether the rule of 15ths is rationally supported by the Act. Accordingly, it was not necessary for the chair to decide that question in the context of this determination. For the purposes of this determination, it was assumed that the rule of 15ths is consistent with the Act.

In light of recent cases and the broad authority to set compensation policies granted under current section 82, the chair concluded that the board of directors may establish binding policies that constitute fixed rules provided that those policies are within the objectives of the Act and their authority under the Act.

Item #40.20 makes assumptions about the general impact of an injury on the worker's ability to save for retirement. In *Appeal Division Decision #2001-0318*, the panel noted that the wording in section 23(3) suggests it is appropriate for the Workers' Compensation Board (Board) to terminate a loss of earnings pension on retirement or deemed retirement of the worker; it concluded that the differential treatment in the policy does not constitute illegal discrimination. The chair agrees with the panel's analysis. While section 23(3) specifies that the Board may pay a pension on a projected loss of earnings basis when it is more equitable to do so, it does not establish a discretion or requirement to compensate the worker for loss of opportunity to accumulate retirement benefits.

It is apparent that the former commissioners established the rule of 15ths in *Decision No. 22*, which is now contained in item #40.20, because they felt the legislation was deficient in not compensating injured workers for their loss of retirement income. The framework in item #40.20 is based on general assumptions about the ability of workers at various ages at the date of injury to contribute to retirement plans such as the Canada Pension Plan or the injury employer's pension plan, rather than an analysis of a worker's actual retirement income from public and private pension plans. While it may have been possible to develop a policy that requires analysis of each individual worker's retirement situation, it seems that the administrative burden associated with such a process would render it impractical. The former commissioners recognized that the framework they were establishing would make compensation "roughly proportionate to actual loss". They recognized that workers who are injured when they are closer to retirement will be less disadvantaged in retirement than those who are injured at an earlier age. This principle has also been applied in item #40.20. The chair found this to be a legitimate rationale for the framework in the policy.

The differential treatment in item #40.20 appears to be based on an assumption that a worker who receives a loss of earnings pension after age 65 will be less disadvantaged in terms of his or her ability to save for retirement. It is questionable whether the worker is in a significantly worse situation than a hypothetical worker who is injured at age 60, retires at age 65, and thus continues to receive a pension under the rule of 15ths for life. In some cases, the impugned policy will be advantageous to workers who establish a retirement age beyond age 65 and in other cases it will disadvantage them. The ultimate outcome depends on a number of factors, including the worker's life expectancy, the amount the worker is able to earn by investing the loss of earnings pension from age 65 until retirement, and the advantages of receiving a greater amount until the age of retirement instead of a smaller amount for a potentially longer period of time. Given that payments under the rule of 15ths appear to constitute a retirement benefit that is additional to the compensation for permanent disability established under

section 23, and the fact that there is a legitimate rationale for the framework established under item #40.20, the chair found that the impugned policy does not unlawfully fetter the discretion granted under section 23 and is not patently unreasonable under the Act.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

WCAT Decision Number: WCAT-2006-01687-rb
WCAT Decision Date: April 12, 2006
Panel: Jill Callan, Chair

---

1. Introduction

This is a determination under section 251(3) of the *Workers Compensation Act* (Act).

The worker was born in January 1937. In April 1997 (when he was 60 years old), he sustained a compensable right shoulder injury. Ultimately, he underwent a rotator cuff repair and was assessed for a permanent partial disability pension under section 23 of the Act, as it existed prior to the amendments that flowed from the *Workers Compensation Amendment Act, 2002* (Bill 49). The Workers' Compensation Board (Board) granted him a loss of earnings pension to age 65 under the former section 23(3) of the Act. However, as a result of an appeal to the Workers' Compensation Review Board (Review Board), he was granted a loss of earnings pension to age 70.

Under the "rule of 15ths" established under item #40.20 (Duration of Projected Loss of Earnings Pension) of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), if the worker had intended to retire at age 65, at that age, his pension would have been reduced to the aggregate of his physical impairment pension under the former section 23(1) and 5/15ths of his projected loss of earnings pension under the former section 23(3). That amount would have been payable to him for life. However, since the worker is receiving a loss of earnings pension until he turns 70, the following provision of item #40.20 is applicable:

> In cases where the worker presents clear and objective evidence that he or she would have worked past age 65 if the injury had not occurred, the projected loss of earnings pension may continue in whole past that age. In these situations, the formula provided in the table above [i.e. the rule of 15ths] does not apply. From the age of retirement, as determined by a Board officer, compensation will be established by the physical impairment method.

Accordingly, by operation of this provision (which I will call the "impugned policy"), at age 70, the worker's pension will be reduced to his physical impairment pension under the former section 23(1) and will be payable for life. He will not receive an additional amount under the rule of 15ths.

The worker appealed the Board's July 24, 2002 decision regarding this aspect of his pension to the Review Board, seeking payments under the rule of 15ths after he reaches age 70. On March 3, 2003, pursuant to the transitional provisions in Part 2 of

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63), the worker's appeal was transferred to the Workers' Compensation Appeal Tribunal (WCAT).

The WCAT vice chair assigned to hear the worker's appeal considers that the impugned policy is so patently unreasonable that it should not be applied in the adjudication of the appeal. Therefore, the vice chair has referred the matter to me under section 251(2) of the Act for determination. Under section 251(3) of the Act, I must determine whether the impugned policy should be applied in adjudicating the worker's appeal. In accordance with section 251(1), I am required to determine whether the impugned policy is "so patently unreasonable that it is not capable of being supported by the Act and its regulations". In this case, there is no applicable regulation.

As the worker was self-employed when he was injured, there is no employer participating in the appeal. Section 246(2)(i) enables WCAT to "request any person or representative group to participate in an appeal if the tribunal considers that this participation will assist the tribunal to fully consider the merits of the appeal". As I determined it would assist me to receive submissions from the perspective of the employer community, under that provision I invited the Employers' Advisers Office to provide a submission and an employers' adviser has done so.

The worker is represented by counsel, Murray Lott.

2. Issue(s)

The issue is whether the impugned policy in item #40.20 of RSCM I is so patently unreasonable that it is not capable of being supported by the Act.

3. Policy-making Authority

Prior to 1991, the policy-making authority under the Act was vested in the former commissioners of the Board. In 1991, a new governance structure for the Board came into effect and the policy-making authority was held by the governors of the Board. In 1995, a panel of administrators was appointed to perform the functions of the governors and, accordingly, the policy-making authority was vested in the panel of administrators.

The *Workers Compensation Amendment Act, 2002* (Bill 49) amended the governance structure of the Board effective January 2, 2003, establishing the board of directors under section 81 of the Act. Under the current section 82(1)(a) of the Act, the board of directors has the authority to "set and revise as necessary the policies of the board of directors, including policies respecting compensation".

Sections 250(2) and 251(1) of the current Act were among the new provisions that flowed from Bill 63 being brought into force. They provide:

> 250(2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.
>
> 251(1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Section 42 of Bill 63's transitional provisions states:

> As may be necessary for the purposes of applying sections 250 (2) and 251 of the Act, as enacted by [Bill 63], in proceedings under sections 38 (1) and 39 (2) of [Bill 63], published policies of the governors are to be treated as policies of the board of directors.

The appeal before the vice chair is a proceeding under section 38(1) of Bill 63. Accordingly, in connection with the requirement in section 250(2) that WCAT "must apply a policy of the board of directors that is applicable in that case", subject to section 251(1), the vice chair is required to apply the former policies of the governors (whose authority under section 82 was being exercised by the panel of administrators during the time frame relevant to the appeal) in deciding the appeal before him. Those policies included the policy that is now item #40.20 of RSCM I.

Pursuant to the board of directors' *Decision No. 2003/02/11-04* (Policies of the Board of Directors), dated February 11, 2003, published at 19 WCR 1[2], item #40.20 of RSCM I became a policy of the directors as of February 11, 2003.

4. Section 23 and item #40.20 of RSCM I

Throughout this determination, unless otherwise specified, references to section 23 of the Act are references to that section as it existed prior to the Bill 49 amendments. Otherwise, I will refer to sections of the Act as they existed prior to the Bill 49 amendments as "former sections" and sections of the Act as they currently exist as "current sections".

[2] Policy resolutions and decisions are accessible at: http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp.

Prior to the Bill 49 amendments, section 23 of the Act provided, in part:

> 23 (1) Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.
>
> (2) The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.
>
> (3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.

Item #38.00 (Permanent Partial Disability) of RSCM I provides:

> The Board has two basic methods of assessing permanent partial disabilities. These are:
>
> 1. Loss of function/physical impairment method.
> 2. The projected loss of earnings method.
>
> The use of these two methods is termed the "Dual System". These two methods are considered in every case where applicable, the amount of the pension being the higher of the two figures produced by the two methods.

Item #40.20 (Duration of Projected Loss of Earnings Pension) of RSCM I provides:

> Pensions assessed on a physical impairment basis are, under the terms of section 23(1), payable for life. It was suggested that projected loss of earnings pensions should also be payable for life in every case, but the Board does not accept this. Section 23(3) does not specifically require this, but rather gives the Board a discretion in the matter. Compensation is only payable under section 23(3) "Where the board considers it more

equitable". Since the section authorizes the Board to calculate a worker's actual loss of earnings resulting from the injury, it is reasonable for the Board to have authority to terminate benefits payable under the section at a time when, even if not disabled because of the compensable injury, the worker would not have been working.

The situation where this issue arises is when the worker reaches retirement age. The Board considers age 65 years to be the standard retirement age. Any direct loss of earnings the worker suffers because of the compensable disability will normally cease at that time. However, the Board does not, in practice, feel this is an automatic reason for terminating a projected loss of earnings pension. Rather, **it is recognized because of the compensable disability, the worker may be less able to accumulate retirement benefits. The Board, therefore, allows the projected loss of earnings pension to continue in whole or part past the standard age of retirement where the worker was under 65 years of age at the time of the injury. The portion of the pension so continued depends on how close the worker was to the age of 65 years, the assumption being that the older the worker, the less the ability to build up retirement benefits would be affected by the injury.**

The following principles apply:

1. Where, at the date of injury, the worker is at or below the age of 50 years, the pension is established based on the higher of the physical impairment and projected loss of earnings assessment, and the pension so established is payable for life.

2. Where, at the date of injury, the worker is at or above the age of 65 years, the pension will usually be established by the physical impairment method, and that pension is payable for life. No projected loss of earnings pension is awarded unless clear and objective evidence is presented that the worker would have continued to work past age 65 if the injury had not occurred. Where a projected loss of earnings pension is awarded, it will cease when the worker reaches retirement age, as determined by a Board officer, and compensation will thereafter be established by the physical impairment method.

3. Where, at the date of injury, the worker is in the age range of 51 to 64 years, and where a pension calculated by the projected loss of earnings method is payable, the pension so calculated, unless modified on a review, will usually continue until the age of 65 years. From the age of 65, the pension is at a rate calculated by the

physical impairment method, plus a proportion of the difference between the two methods according to the following table.

Age at Date of Injury	Proportion of Difference Between Two Methods
51	14/15ths
52	13/15ths
53	12/15ths
54	11/15ths
55	10/15ths
56	9/15ths
57	8/15ths
58	7/15ths
59	6/15ths
60	5/15ths
61	4/15ths
62	3/15ths
63	2/15ths
64	1/15th

The revised pension commences on the first day of the month following the worker's 65th birthday.

Where the projected loss of earnings pension is assessed following a recurrence of disability, the age at the date of the recurrence is used for the purpose of the above principles.

In cases where the worker presents clear and objective evidence that he or she would have worked past age 65 if the injury had not occurred, the projected loss of earnings pension may continue in whole past that age. In these situations, the formula provided in the table above does not apply. From the age of retirement, as determined by a Board officer, compensation will be established by the physical impairment method.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

4. Where an injury occurs in the age range 51-64 years, and full wage-loss payments are made from the date of injury up to or beyond the worker's 65th birthday, a pension will usually be established by the physical impairment method, and that pension will be payable for life.

   A projected loss of earnings pension may be awarded if the worker presents clear and objective evidence that he or she would have worked past the standard retirement age had the injury not occurred. In these situations, the projected loss of earnings pension will cease when the worker reaches retirement age, as determined by a Board officer, and compensation will thereafter be established by the physical impairment method.

In calculating a worker's projected loss of earnings, no account is taken of any disability or retirement pensions received from the employer to which the worker has contributed or any other source than the Board. However, a Board officer may take into account the fact that the worker has retired or is about to retire in deciding whether there is a projected loss of earnings in the first place. The formula set out above only applies when it has been determined that there is such a loss and the pension is assessed on the basis of that loss.

[emphasis added]

5. The Vice Chair's Referral

In his referral memorandum, the vice chair notes that, as the worker was injured at age 60, he did not have the opportunity to save for his retirement that he would have had if he had not been injured. He adopts Mr. Lott's arguments that the impugned policy is patently unreasonable under the Act. The vice chair notes the broad discretion to grant loss of earnings pensions established under section 23(3) of the Act and contends that the impugned policy fetters that discretion in an arbitrary and patently unreasonable manner. His specific comments include the following:

- While item #40.20 establishes a benefit for loss of retirement income, it arbitrarily denies that benefit to workers who establish a retirement age beyond age 65. The ability of those workers to save for their retirement is affected in the same way as that of workers with standard retirement ages.

- The equitable determination of entitlement to post-retirement loss of earnings pensions requires pensions to be granted under the rule of 15ths regardless of the worker's retirement age.

- Section 23(3) requires that the loss of earnings pension be equitable in the context of the worker's individual circumstances.

- The impugned policy cannot be rationally supported by the Act because "it creates a penalty to the individual planning to [work until a] non-standard retirement [age] who suffers [a] permanent functional impairment between age 50 and age 65".

6. The Standard of Patent Unreasonableness

Pursuant to the current section 251(2) of the Act, if, in the course of deciding an appeal, a vice chair considers that a policy should not be applied, the issue must be referred to me, in my capacity as chair of WCAT, for a determination as to whether the policy should be applied. In light of the current section 251(1), the standard of review is patent unreasonableness.

In *WCAT Decision #2003-01800-AD,* dated July 30, 2003 (19 WCR 179)[3], which was also a determination under section 251(3), I noted the standard of patent unreasonableness requires a significant degree of deference. I quoted from Supreme Court of Canada judgments, which characterize patent unreasonableness as akin to being "clearly irrational" and "so flawed that no amount of curial deference can justify letting [the decision] stand".

In *WCAT Decision #2005-01710*[4], dated April 7, 2005 (see pages 12 to 17), I provided an overview of additional judgments of the Supreme Court of Canada related to this standard and the reasons given by Alan Winter in *Core Services Review of the Workers' Compensation Board* (March 2002)[5] (Core Review) for his recommendation of the standard of patent unreasonableness for the purposes of section 251. I concluded that "the application of the patently unreasonable standard requires the determination of whether the policy in question can be rationally supported by the Act and regulations". As I released that determination after submissions in this matter closed, I directed that Mr. Lott and the Employers' Advisers Office be invited to provide further submissions on the standard of patent unreasonableness. They both essentially agree with my analysis of the standard.

In the recent judgment of the Supreme Court of British Columbia in *Western Stevedoring Co. Ltd. v. W.C.B.* (*Western Stevedoring*), 2005 BCSC 1650[6], the Court noted that the standard of review to be applied by WCAT under section 251 is the

[3] Published Appeal Division decisions are available at: http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp.
[4] WCAT decisions are available at: http://www.wcat.bc.ca/research/appeal-search.htm
[5] Report available at: http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf.
[6] Judgment available at: http://www.courts.gov.bc.ca/jdb-txt/sc/05/16/2005bcsc1650.htm

standard of patent unreasonableness applied by the courts in judicial review proceedings.

The question before me in this determination is whether the impugned policy involves a rational application of the former section 23 of the Act.

7. Submissions and Analysis

(a) The origin of the rule of 15ths

Prior to 1991, the commissioners of the Board held the policy-making authority under the Act. The rule of 15ths had its origins in their practice directive set out in *Decision No. 22* (Re The Measurement of Partial Disability), dated January 9, 1974 (1 WCR 96). The commissioners considered the question of whether pensions assessed using the projected loss of earnings method should be payable for life or payable only to age 65, which was considered to be the standard retirement age. They noted that the Act did not provide for retirement income plans for workers who had been granted loss of earnings pensions. The commissioners stated, in part (at page 97):

> The problem might be considered by reference to two examples. First, take a worker who suffers a disabling back injury at the age of 63. He is in an industry in which the normal retirement age is 65. He will have already accumulated most of his entitlement to retirement benefits and may be eligible under both government and private plans. In this case, for the Board to pay him a disability pension for life based on the projected loss of earnings method without considering the short period during which he would actually suffer any loss of earnings would surely be open to the objection of over-compensation.
>
> Secondly, take an industrial worker who suffers a disabling back injury at the age of 43. With current rates of inflation, any eligibility to retirement benefits that he has accumulated by that age may be of trivial significance by the time he is 65. Thus in addition to his loss of current earnings during the years from age 43 to 65, he will be suffering a total or partial loss of opportunity to establish his eligibility for a retirement income. In that case, to continue his pension for life based on the projected loss of earnings method would seem to be reasonable compensation. If there appears to be over-compensation through the payment of a disability pension for a longer period than loss of "earnings" would be sustained, this is off-set (although not exactly) by the absence of compensation for loss of opportunity to accumulate an entitlement to retirement income.
>
> If compensation is to be kept roughly proportionate to actual loss, the solution should be a sliding scale that will result in disability pension

> benefits after retirement age being a higher proportion of the wage-loss rate for those who were disabled earlier in life than for those disabled in their later years.
>
> Of course, not everyone retires at 65. Some retire earlier, some later, some never. But it would not be feasible to base the decisions in these cases on evidence (which would often be of a speculative nature) of when the particular individual would have retired but for the disability. Moreover we do not feel that decisions based on an attempt to determine when a particular claimant would have retired would be likely to result in any higher level of justice than could be achieved by using a standard formula.

Accordingly, the commissioners developed the rule of 15ths scheme, which is now contained in item #40.20. The scheme is based on general assumptions rather than an analysis of the worker's actual retirement income from public and private pension plans.

In *Decision No. 394* (Re The Dual System of Measuring Disability), dated April 18, 1985 (6 WCR 23), the former commissioners revisited the duration of loss of earnings pensions and the rule of 15ths at pages 29 and 30 and decided to continue the policy established in *Decision No. 22.*

(b) The panel of administrators' 2000 amendment to item #40.20

Prior to April 1, 2000, item #40.20 did not authorize the payment of a loss of earnings pension after age 65 to workers who would have worked beyond the age of 65 had the compensable injury not occurred.

In *Appeal Division Decision #94-0659*, dated May 27, 1994 (10 WCR 665)[7], the panel considered whether item #40.20 was "contrary to section 23(3)" of the Act because loss of earnings pensions were not payable to workers who were 65 or older at the date of injury. The panel found that the policy's use of age 65 as the presumed age of retirement involved a viable interpretation of section 23(3). However, the panel concluded that the policy could not fetter the discretion of the decision-maker to grant a worker, who is 65 or older at the date of injury, a pension on a projected loss of earnings basis where it is more equitable to do so. The panel commented (at page 674) that, in order to be eligible for a loss of earnings pension after age 65, the worker would "need convincing evidence of actual plans to work".

By resolution dated March 16, 2000, *Resolution of the Panel of Administrators* 2000/01/21-03 (RE: Loss of Earnings Pensions Past Age 65) (17 WCR 45), item #40.20 was amended effective April 1, 2000 to allow for the payment of a pension on a projected loss of earnings basis beyond age 65 in circumstances in which there was

[7] Published Appeal Division decisions are available at: http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp.

"clear and objective evidence" that the worker would have continued to work beyond age 65 had the injury not occurred. However, the policy did not provide for an ongoing payment under the rule of 15ths to such workers after they reached their retirement age. This revised provision is the impugned policy under consideration in this determination.

(c) The statutory framework for the rule of 15ths

In order to consider whether the impugned policy is patently unreasonable, it is useful to consider the rule of 15ths in the context of section 23. There are four aspects of section 23 which appear to be inconsistent with the rule of 15ths. They are:

- Pensions under section 23 compensate workers for impairment of earning capacity. The section does not provide for compensation for loss of opportunity to accumulate retirement pensions.

- Section 23(3) requires that the compensation paid under that section "**must** be a periodic payment of 75% of the difference [emphasis added]" "between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury". Since section 23(3) uses the mandatory word "must" and does not include any words, such as "up to", that modify the phrase "75% of the difference", it does not appear that the section supports the rule of 15ths, which operates to provide for ongoing payments in an amount other than 75% of that difference.

- Section 23(3) provides that the amount of the pension payable is established by reference to the "difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury". This language could be interpreted to limit the payment of loss of earnings pensions to the period during which workers would have been working had they not been injured.

- Section 23(3) starts with the phrase "[w]here the board considers it more equitable". I interpret those words to mean that the Board may exercise the discretion to pay pensions on a loss of earnings basis under section 23(3), when it is more equitable to establish the pension on that basis rather than as a physical impairment pension under section 23(1). Item #38.00 of RSCM I and the policies in RSCM I related to awards under section 23(3) indicate that such awards are an alternative to awards under section 23(1). However, awards under the rule of 15ths are hybrid awards based on the aggregate of the physical impairment award under section 23(1) and a portion of the projected loss of earnings award under section 23(3). It does not appear that there is specific authority to grant a hybrid award under section 23.

In order to fully explore how the statutory framework of section 23 supports the rule of 15ths, I directed that Mr. Lott and the Employers' Advisers Office be invited to make further submissions regarding this question. The Employers' Advisers Office suggested that the former commissioners developed the rule of 15ths in order to ensure that workers were compensated for their "actual loss". Mr. Lott contends that the rule of 15ths is supported by section 23(3) because the formula in that section is "an integral component" of the formula for establishing pensions using the rule of 15ths.

In *Decision No. 22*, the former commissioners did not explain how the rule of 15ths was supported by section 23(3) of the Act. It is apparent that they established the rule of 15ths because they felt that the legislation was deficient in not compensating injured workers for their loss of retirement income. I am not aware of there ever having been a challenge to the lawfulness of making such payments to injured workers. The policy objective of the former commissioners has ultimately resulted in the establishment of a legislated retirement benefit in the Act as amended by Bill 49.

The rule of 15ths results in the quantum of pensions for some workers for a specified period being based on a hybrid of the physical impairment method under section 23(1) and the projected loss of earnings method under section 23(3). Although such a hybrid approach is not specifically contemplated by the Act (in fact, based on the wording of section 23(3), it appears that the methods established under sections 23(1) and 23(3) are two distinct alternatives), for the purposes of this determination, I will assume that the rule of 15ths is consistent with the Act.

The scope of the vice chair's referral is limited to the question of whether the impugned policy is patently unreasonable. The referral does not directly raise the question of whether the rule of 15ths is rationally supported by the Act. Accordingly, it is not necessary for me to decide that question in the context of this determination.

(d) Fettering of discretion – common law principles

A useful discussion of the general common law principles regarding fettering of discretion is found in *Sullivan and Driedger on the Construction of Statutes*[8] at pages 92 to 93. Professor Sullivan states, in part:

> Discretion, once conferred, may not be restricted or fettered in scope.
>
> Often, for ease of administration and in the interest of consistency, tribunals have issued guidelines indicating the considerations and criteria by which they will be guided in the exercise of their discretion. A policy may be issued to explain how a tribunal interprets a particular statutory provision. The publication of policies and guidelines is an admirable

[8] Ruth Sullivan, ed., *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002).

> practice. It gives those in the industry advance knowledge of the tribunal's opinion on various subjects so that they may govern their affairs accordingly. …
>
> However, care must be taken so that guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost. A balance must be struck between ensuring uniformity and allowing flexibility in the exercise of discretion. The tribunal cannot fetter its discretion by treating the guidelines as binding rules and refuse to consider other valid and relevant criteria. "The discretion is given by statute and the formulation and adoption of general policy guidelines cannot confine it". …
>
> Conversely, because people may arrange their affairs in reliance on published policy, departures from policy in specific cases should be explained.
>
> [footnotes deleted]

The policy options that arise when a statute grants a discretion are reviewed in *Skyline Roofing* v. *Alberta (WCB)* (*Skyline Roofing*), [2001] 10 W.W.R. 651 (Alta. Q.B.). At page 685, the Court stated:

> A policy could potentially operate in a number of ways:
>
> (a) The policy could be a fixed and inflexible rule that applies in every case. The policy exhausts the discretion.
> (b) The policy could create a presumption, but each Applicant could argue why the policy should not apply in a particular case.
> (c) [T]he policy could be a summary and weighing of factual and discretionary factors that apply in most cases, but in each particular case the decision-maker must decide if the policy should be applied, an exception should be made, or the policy should be modified.
> (d) The policy could be considered along with all other relevant factors, but it should not be given special weight in individual cases.

In this case, the impugned policy sets a fixed and inflexible rule that the rule of 15ths does not apply to the pensions of workers who are granted a loss of earnings pension beyond age 65.

(e) Is the impugned policy patently unreasonable under the Act because it constitutes a rule?

As I understand the submissions of Mr. Lott and the memorandum of the vice chair, they contend that policies that eliminate the discretion of the decision-maker by establishing a fixed rule that is applicable in every case are patently unreasonable under the Act. I agree with Mr. Lott's characterization of the impugned policy as "categorical and unconditional". The impugned policy does not leave room for the decision-maker to determine that a worker, who is injured before age 65 and is granted a loss of earnings pension payable to a retirement date beyond age 65, is eligible to receive a payment under the rule of 15ths beyond his or her retirement date.

The question of whether the board of directors can establish a fixed and inflexible rule that applies in every case must be considered in the context of the current sections 99(2) and 250(2) of the Act. Those sections respectively require Board officers and WCAT, in making their decisions in individual cases, to "apply a policy of the board of directors that is applicable in that case".

In *Yukon (Workers' Compensation Appeal Tribunal)* v. *Yukon (Workers' Compensation Health and Safety Board)*, 2005 YKSC 5 (*Yukon*), the Yukon Territory Supreme Court considered whether the members of the Workers' Compensation Health and Safety Board had fettered their discretion in establishing a policy. The Court stated:

> 55 The classic definition of the fettering of discretion can be found in H.E.U. Local 180 v. Peace Arch District Hospital (1989), 35 B.C.L.R. (2d) 64 (B.C.C.A.) where the Court quoted S.A. de Smith, Judicial Review Administrative Action, 4th ed. at page 311 as follows:
>
> > A tribunal entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. Thus, a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied indiscriminately to all cases before it; but its statutory discretion may be wide enough to justify the adoption of a rule not to award any costs save in exceptional circumstances, as distinct from a rule never to award any costs at all.
>
> 56 **It is my view that the concept of fettering one's discretion is a common law principle that could apply to the board or an appeal committee. Under this Act however, the concept of fettering has a much reduced scope or application. The board is empowered to**

> **make policy and the policy is binding upon the appeal committee.** In circumstances where there was no statutory authority to make binding policy, it would be appropriate to argue that an administrative policy could result in fettering the discretion of a board or tribunal. **The concept of fettering, in my view, cannot apply to the policy itself which is mandated by legislation so long as it is within the objectives of the Act or "the margin of manoeuvre contemplated by the legislature".** See Re Lewis and Superintendent of Motor Vehicles for British Columbia, [1980] B.C.J. No. 1433, at page 528.
>
> 57 I do not rule out the application of fettering to a board or appeal committee decision but simply state that the board policy itself cannot be a fetter by virtue of its statutory mandate.
>
> [emphasis added]

In light of this judgment and the board of directors' statutory authority to establish binding policies, a question arises regarding the extent to which the common law principles regarding fettering of discretion are applicable to their policy-making function. The Court in *Yukon* appears to accept that the board of directors could establish a policy that is a fixed and inflexible rule that exhausts the discretion granted by the Act, provided the policy is "within the objectives of the Act or 'the margin of manoeuvre contemplated by the legislature'".

In *Western Stevedoring*[9], the Court made the following statement regarding the extent to which the board of directors can establish policies that fetter the discretion of decision-makers:

> [10] Under section 82 of the *Workers Compensation Act*, the board of directors of the Board is required to establish "policies" regarding compensation. The word "policy" may be somewhat misleading, since the "policies" are effectively inflexible rules. Their existence is authorized by statute, so as long as the policies adopted are within the board of directors' jurisdiction, no issues of unlawful fettering of discretion arise.

I invited further submissions from Mr. Lott and the Employers' Advisers Office on the application of *Yukon* on the question before me. At that time, the judgment in *Western Stevedoring* had not been released.

In light of *Western Stevedoring*, I considered whether I should invite further submissions on the question of whether the board of directors can establish policies that fetter discretion. While that judgment relates to the Act and is, therefore, more relevant to the matter before me than *Yukon*, in my view, the principle articulated by the

[9] Cited earlier. See footnote no. 5.

Court is sufficiently similar to the statements made by the Court in *Yukon* already canvassed in the submissions. In both cases, the Court concluded that, in light of the policy-makers' authority to establish policies that bind decision-makers, the concept of fettering does not apply so long as the policy established is within the objectives of the Act and the policy-makers' authority under the Act.

Mr. Lott contends that *Yukon* is distinguishable because, in the situation before me, the impugned policy was established before the Act was amended to require decision-makers to apply policies. Item #40.20 was a policy of the governors. Section 42 of Bill 63's transitional provisions requires WCAT to treat it as a policy of the board of directors when deciding appeals transferred to WCAT from the Review Board. Section 42 and the current sections 99(2) and 250(2) all became effective on March 3, 2003.

Mr. Lott also submits that *Yukon* is distinguishable because the applicable legislation requires the policy-makers to go through a public consultation process when developing policies and the Yukon appeal tribunal or the Yukon board can refer the policy to court for a determination of whether it is consistent with the Act. However, in my view, the most important factor considered by the Court was the Yukon board's ability to make binding policies. I note that, while the Act does not require the board of directors to engage in a public consultation process prior to establishing policies, as a matter of practice, the Policy and Research Division of the Board engages in such a process when policy amendments are being considered. While the Act does not enable the Board or WCAT to refer policies to court, a WCAT decision regarding a policy may be referred to the British Columbia Supreme Court through a judicial review proceeding. In *Western Stevedoring*, the Court concluded the policy in question could be considered by the Court, without a prior determination having been made under section 251.

The Employers' Advisers Office submits that a policy that fetters discretion is not necessarily patently unreasonable under section 251. They state that a policy is lawful if it "is in keeping with the overall mandate of any given authority and justified by the legislative intent of the law givers".

Given the authority of the board of directors to establish binding policies, I am satisfied that they may establish policies that constitute rules. However, those rules must be authorized by the board of directors' general policy-making power. In light of the broad authority granted to the board of directors under the current section 82 of the Act, I am satisfied that the board of directors can establish binding policies regarding compensation matters provided that those policies are not patently unreasonable under the Act. In this determination, I must consider whether, in light of *Yukon*, establishing the impugned policy as an inflexible rule, is patently unreasonable under section 23 of the Act.

(f) Is the impugned policy patently unreasonable under section 23?

Mr. Lott submits that the impugned policy fetters the discretion established under section 23(3) to grant a loss of earnings pension when it is "more equitable" to do so. Specifically, he contends that the policy-makers fettered that discretion by not providing the flexibility in the policy to make payments under the rule of 15ths to workers with non-standard retirement ages above the age of 65.

Mr. Lott relies on my previous determination in *WCAT Decision #2003-01800-AD* as support for the general proposition that policies must include language that leaves room for decision-makers to exercise the discretion granted by the Act. In that determination, I considered whether item #67.21 of RSCM I (Class Averages/New Entrants to Labour Force) was patently unreasonable under the former section 33(1) of the Act. That decision predated *Yukon* and *Western Stevedoring*.

The former section 33(1) sets out a number of options for the Board to consider in establishing the average earnings and earning capacity of a worker based on historical earnings. It also provides the discretion to set average earnings by reference to a class average in certain specified circumstances where it is more equitable to do so.

A WCAT vice chair referred item #67.21 to me under section 251 because it appeared it might fetter a decision-maker's discretion to apply a class average that results in an increase in a worker's average earnings, because it states:

> If the class average is equal to or greater than the worker's rate of pay at the date of injury no change is **usually** made in the compensation rate. If the class average is lower, the compensation **may** be reduced accordingly.
>
> [emphasis added]

I concluded that item #67.21 was not patently unreasonable because the use of the words "usually" and "may" left sufficient discretion with the decision-maker to apply a class average in the circumstances contemplated by the former section 33(1). Had these words been absent from the policy, I may have found it to be patently unreasonable under the Act because the policy would have the effect of eliminating the discretion explicitly granted under the former section 33(1) to apply a class average where it will increase the compensation wage rate. In applying the principles derived from *Yukon* and *Western Stevedoring*, I would have likely found that a fixed rule that prevented the use of a class average when it would increase the wage rate would be *ultra vires* or beyond the power and authority of the board of directors.

In my view, the circumstances in *WCAT Decision #2003-01800-AD* are significantly different from those that are before me in this determination. In that case, there was very specific language in the Act granting the Board the discretion to use the class

average where it is more equitable to do so. In this case, section 23(3) of the Act does not specifically grant the Board the discretion to make the hybrid payments established by the rule of 15ths. The question is whether the fixed rule that payments under the rule of 15ths will not be made to workers who receive loss of earnings pension beyond age 65 is outside the authority granted by and the objects of section 23.

In *Appeal Division Decision #2001-0318*[10], the panel considered an appeal from findings of the former Review Board. The worker, who had been 65 years old at the time of the injury, had been granted a loss of earnings pension to age 70. At age 70, his pension was reduced to the level of his permanent partial disability under section 23(1) of the Act. On appeal to the Appeal Division, the worker sought a pension under the rule of 15ths. The circumstances of the worker in that case are distinguishable from those of the worker in this case because in this case the worker was under 65 when he was injured. However, the analysis of the Appeal Division panel is of interest.

The Appeal Division panel identified the following questions (at paragraph 30):

> Are the general principles in the [item #]40.20 formula so discriminatory or unfair as to render the policy illegal? Do they conflict with the *Act*? Does the lack of a "means test" to assess pensioners' individual circumstances render the policy illegal under Section 23(3) of the *Act*?

In considering those questions, the panel made the following comments and concluded that the policy did not conflict with the former Act:

> (32) The [workers'] advisor argues that it is unfair and discriminatory for a worker to completely lose his loss of earnings pension at the age of retirement, even if that retirement age is beyond the age of 65 years. Differential treatment in and of itself, however, is not unfair. In our view, the differential treatment in [item #]40.20 is based on reasonable expectations of factors affecting loss of earnings entitlement and a loss of ability to accumulate retirement income *until the standard retirement age of 65*. And any benefit on a loss of earnings basis beyond the age of retirement, whether it be 65 or older, is an additional benefit which the *Act* does not oblige the Board to award.
>
> ….
>
> (40) … Section 23(3) provides the Board with a discretion, where the Board considers it more equitable, to award a worker a pension on a loss of earnings basis rather than the functional impairment method. The statute does not require the Board to pay a loss of earnings pension to workers. It does not require the Board to pay a projected loss of earnings

[10] Appeal Division decisions are available at: http://www.worksafebc.com/claims/review_and_appeals/search_appeal_decisions/appealsearch/advancesearch.asp

> pension for life or indeed, for any period of time past the worker's retirement. **Section 23(3) refers to the average amount "which the worker is earning or is able to earn in some suitable occupation after the injury". This suggests that it is entirely appropriate for the Board to terminate a loss of earnings pension on retirement or deemed retirement of the worker.**
>
> (41) Section 23(3)'s reference to equity, in our view, does not require the Board to assess equities between different workers injured at different ages with different retirement or deemed retirement ages, and somehow devise a formula that provides a perfect allocation of benefits between them. Instead, Section 23(3) requires the Board to decide which is fairer to the individual worker: pension entitlement based on the functional impairment method, or pension entitlement based on the loss of earnings method? **There may be differential treatment in the formula under [item #]40.20 of the *Manual* with respect to persons in different categories of age at the date of injury and age at the date of retirement. But differential treatment for different circumstances does not, in and of itself, constitute illegal discrimination.**
>
> [italics in original; emphasis added]

Item #40.20 makes assumptions about the general impact of an injury on the worker's ability to save for retirement. While section 23(1) specifies that pensions established on a physical impairment basis are payable for life, section 23(3) is silent on the duration of pensions paid on a loss of earnings basis. Item #40.20 sets out a framework through which the duration of a loss of earnings pension changes depending on the age of the worker at the date of injury and which establishes the rule of 15ths. I agree with the analysis of the panel in *Appeal Division Decision #2001-0318*. While section 23(3) specifies that the Board may pay a pension on a projected loss of earnings basis when it is more equitable to do so, it does not establish a discretion or requirement to compensate the worker for loss of opportunity to accumulate retirement benefits.

In developing the framework in item #40.20, the policy-makers have had to make some assumptions about the ability of workers at various ages at the date of injury to save for retirement. The framework recognizes that workers who are disabled from returning to work are unable to contribute to plans such as the Canada Pension Plan or the injury employer's pension plan. While it may have been possible to develop a policy that requires analysis of each individual worker's retirement situation, it seems that the administrative burden associated with such a process would render it impractical. In *Decision No. 22,* the former commissioners recognized that the framework they were establishing would make compensation "roughly proportionate to actual loss". They recognized that workers who are injured when they are closer to retirement will be less disadvantaged in retirement than those who are injured at an earlier age. This principle

has also been applied in item #40.20. I find it to be a legitimate rationale for the framework in the policy.

There is no doubt that, under the framework set out in item #40.20, some workers will be more generously compensated than others for loss of retirement earnings. This will depend on their age at the date of injury and on their other retirement income.

Mr. Lott and the vice chair contend that the worker is being disadvantaged because, as a worker with a non-standard retirement age above age 65, he will not receive payments under the rule of 15ths after his loss of earnings pension ceases when he turns 70. I acknowledge that such payments would potentially compensate him for his inability to accumulate pension plan benefits from the time of his injury at age 60 to age 65. However, it is questionable whether the worker is in a significantly worse situation than a worker who was injured at age 60 and intended to retire at age 65 (the hypothetical worker). While my determination as to whether the policy is patently unreasonable must be based on general principles and not its application in a particular case, it is helpful to consider the two situations.

In the hypothetical case, from age 65 to 70, the hypothetical worker will receive a pension that is the sum of the section 23(1) award and one-third of his projected loss of earnings pension. However, in the worker's case, from ages 65 to 70, he will receive 100% of his loss of earnings pension. I acknowledge that the hypothetical worker would continue to receive a pension under the rule of 15ths for life. However, it seems to me that the continuation of 100% of the loss of earnings pension to age 70 provides the worker in this case with an opportunity to save for his retirement even though he will not be accumulating retirement pension benefits for that period. The question of whether the worker will be in a better position in the long term than the hypothetical worker will be based on a number of factors including:

- The worker's life expectancy. (According to Statistics Canada[11], the average 65-year old British Columbian male will live to age 82 and the average female will live to age 85);

- The return that the worker is able to earn by investing the loss of earnings pension received from age 65 to 70; and

- The advantages to the worker of receiving a greater amount until age 70 rather than a lesser stream of income for a potentially longer period.

I recognize that it is possible that the worker might have been better off financially if he had received a loss of earnings pension to age 65 followed by a pension under the rule

[11] Statistics Canada, "Life Expectancy at Age 65," online: Canada E-Book <http://www.statcan.ca/english/freepub/82-221-XIE/01201/high/lifeat65.htm> (last modified: 21 December 2001).

of 15ths. I also realize that the financial impact of not receiving a pension under the rule of 15ths might be very significant for a worker who is injured at age 50 but is granted a loss of earnings pension to age 70. However, it seems unlikely that such a situation would arise because, in light of the intervening events that could occur, it would be difficult to establish that an individual who was injured at age 50 would have likely worked beyond age 65.

Section 23 of the Act does not require the Board to make payments to a worker to compensate for the loss of his or her opportunity to accumulate retirement benefits as a result of the injury. In contrast, under the current Act, the current section 23.2 provides for the accumulation of retirement benefits and the current section 23.3 provides for such payments. While the former section 23(3) grants the Board the discretion to pay a projected loss of earnings pension as an alternative to granting a pension under section 23(1), there is no statutory provision requiring or specifically authorizing the Board to make payments under the rule of 15ths. Item #40.20 treats workers who are injured prior to age 65 and establish a retirement age beyond age 65 differently than those who are injured prior to age 65 and intended to retire at or before age 65. It appears that this is based on the assumption that a worker who receives a loss of earnings pension after age 65 will be less disadvantaged in terms of his or her ability to save for retirement. In some cases, the impugned policy will be advantageous to workers who establish a retirement age beyond age 65 and in other cases it will disadvantage them. The ultimate outcome depends on a variety of circumstances.

Given that the payments under the rule of 15ths appear to constitute a retirement benefit that is additional to the compensation for permanent disability established under section 23, and, in light of the fact that there is a legitimate rationale for the framework established under item #40.20, I do not find the impugned policy unlawfully fetters the discretion granted under section 23 or is patently unreasonable under the Act.

8. Conclusion

In summary:

- The board of directors can establish policies that constitute fixed rules provided that those policies are within the objectives of the Act and their authority under the Act;

- The current section 82 of the Act grants the board of directors broad authority to set compensation policies; and

- Item #40.20 of the RSCM I does not unlawfully fetter the discretion granted under section 23 of the Act or involve a patently unreasonable application of section 23.

I find the impugned policy in item #40.20 of RSCM I is not patently unreasonable. Pursuant to section 251(4) of the Act, I return this matter to the vice chair who must apply the policy in rendering the decision on the worker's appeal.

Jill Callan
Chair

JC/dlh