WCAT Decision Number: WCAT-2015-02919
WCAT Decision Date: September 23, 2015
Panel: Joanne Kembel, Vice Chair

Introduction

[1] This is a referral to the chair of the Workers' Compensation Appeal Tribunal (WCAT) under section 251 of the *Workers Compensation Act* (Act). I consider an aspect of policy item #66.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) to be so patently unreasonable that it is not capable of being supported by the Act and its regulations. Specifically, I refer to the part of that policy that states that when workers covered under the *Government Employees Compensation Act* (GECA) are maintained on full salary, no ten-week rate review is carried out.

[2] Initially, the issue in this appeal was to decide what earnings should be used to calculate the worker's initial wage rate on the claim. However, in processing the appeal, it became apparent that the dispute involves the refusal of the Workers' Compensation Board (Board)[1] to conduct a ten-week rate review, and set a long-term wage rate on the worker's claim. In a December 2, 2014 summary decision, I referred that matter to the Board under section 246(3) of the Act.

[3] In a letter dated January 21, 2015 the Board determined the worker was not entitled to a ten-week review and therefore no long-term wage rate would be set on the claim. The case manager referred to policy item #66.00. As set out in section 246(4) of the Act, I must consider the Board's January 21, 2015 determination in the context of this appeal.

Relevant Background

[4] The worker commenced employment with the employer on a casual (temporary) basis as of March 2011. One year later, in March 2012, she accepted a permanent part-time letter carrier position. She was injured at work only weeks later, in April 2012, when she slipped and fell down some stairs. The Board accepted her claim for a right knee strain. The worker is an employee of a federal crown corporation and is covered by the GECA.

[5] In setting the initial wage rate on the claim, a client services representative in the Board's Wage Rate Setting Unit questioned why the worker's earnings in the three-month period prior to the date of injury were lower than expected. In this regard, the parties agree that the worker earned more while working on a casual basis than she did at the new part-time position.

[1] operating as WorkSafeBC

[6] In a calculation document dated May 17, 2012, the Wage Rate Setting Unit indicated the initial wage rate would be calculated using the worker's earnings between March 19, 2012 and April 24, 2012, as she was a regular worker.

[7] In a decision dated May 18, 2012, the client services representative told the worker the initial wage rate set on her claim was calculated using her average earnings from when she took the permanent position. The employer would continue to pay the worker's usual salary, and, therefore, wage loss benefits would be paid directly to the employer.

[8] According to the claim file, the worker began a graduated return-to-work program in November 2012. Over the course of the following months, she increased her working hours and functions.

[9] The worker requested a review of the May 18, 2012 decision, and submitted that when working at her casual position, she had worked at least eight hours per day, five days per week, and also worked overtime. She asked for the wage rate to be revised and calculated using earnings for the one-year period prior to the date of injury. The employer also provided submissions, and supported the Board's decision.

[10] On July 12, 2012, a union representative contacted the client services representative to discuss the wage rate. The client services representative explained the earnings that best reflected the worker's earnings were from the date she became a permanent employee, and told the union representative there would be no ten-week review of the wage rate.

[11] The worker now appeals an October 2, 2012 decision of the Board's Review Division (*Review Reference #R0144704*), in which a review officer confirmed the May 18, 2012 decision. The review officer concluded the general rule under section 33.1(1) applied to the worker's circumstances. The worker had variable earnings and the initial wage rate was calculated properly under policy item #65.01, *Variable Earnings.* That policy permits the Board to use a shorter period if the three-month period prior to the date of injury is not an accurate reflection of the worker's earnings at the time of her injury. The review officer was not persuaded that the one-year earnings prior to the date of injury would be an accurate representation of the worker's circumstances at the time of injury.

[12] The worker is represented by her union. On the notice of appeal, the union representative submitted the wage rate was incorrect. In further submissions, he explained that while an argument could be made regarding the calculation of the initial wage rate, the worker's appeal was more concerned with the fact that her benefits after the initial payment period had not been adjusted to reflect a long-term wage rate.

[13] The employer submitted the rate was set appropriately because of the worker's changed employment circumstances. The employer also provided submissions regarding the matter of why the Board had not conducted a ten-week review to establish a long-term wage rate on the claim; it referred to policy item #66.00.

[14] In March 2013, the Board declared the worker recovered from her compensable knee injury, and fit to return to full pre-injury duties and hours. The Board accepted no permanent condition as a result of the worker's compensable right knee strain injury. (In August 2013, the Review Division confirmed this decision. The worker appealed, but later withdrew her appeal.)

[15] The worker asks WCAT to vary the October 2, 2012 Review Division decision so that, effective July 3, 2012, her benefits are based upon a long-term wage rate, calculated using her average earnings for the 12-month period prior to the date of injury. She submits she took the part-time job to secure a permanent position, and hoped to increase her working hours soon thereafter. Thus, she argues that using the initial wage rate beyond the first ten weeks of the claim does not reflect her wage loss as a result of her injury; her loss would be best reflected by the hours she had worked over the one-year period prior to the date of injury. With respect to policy item #66.00, the worker submits the Act should override the Board's policy, as the Act compels the Board to prescribe a long-term wage rate.

[16] I considered the union representative's submission to be an argument under section 251(1) of the Act. As a result, I sought further information from the Board, and then further submissions from the parties on this issue.

[17] The Board declined to provide further information regarding the policy, but indicated the employer had reported it paid its injured workers in accordance with the collective agreement. The Board representative indicated these salary continuance payments exceed the benefit entitlement under the Act. In the rare case where the employer's payments were less, the Board would ensure workers received their full entitlement (either the employer would pay the difference directly to the worker, or the Board would pay the difference to the worker). In this case, the employer had informed the Board it paid the difference directly to the worker. The worker could complain to the Board if she was not receiving her full entitlement under the Act. The Board representative also indicated the Policy, Regulation and Research Division would review the matter of the ten-week rate review for workers covered by GECA.

[18] WCAT then sought submissions from the parties regarding policy item #66.00.

[19] At the suggestion of the employer, in May 2014, WCAT invited a potential interested third party to participate in this appeal. The third party did not respond.

[20] In the December 2, 2014 summary decision, I concluded the Board's decisions thus far (the Wage Rate Setting Unit decision, the Review Division decision, and the July 12, 2012 telephone conversation with the union representative) were not sufficient to constitute a determination on the matter of whether the worker was entitled to a ten-week rate review. As noted above, I referred the matter to the Board under section 246(3) of the Act to determine whether the worker was entitled to a ten-week review and to have a long-term wage rate set on her injury claim.

[21] WCAT invited submissions from the parties in response to the Board's January 21, 2015 determination. They provided no further submissions.

[22] In a July 21, 2015 Resolution of the Board of Directors, the Board struck out the impugned wording in policy item #66.00 (see below highlighted in bold font). However, this change will apply to all decisions made on or after January 1, 2016. In other words, it does not remedy the matter I have identified in the context of this appeal.

Law and Policy

[23] Section 4 of the GECA states[2]:

> 4. (1) Subject to this Act, compensation shall be paid to
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> (***a***) an employee who
>
> (i) is caused personal injury by an accident arising out of and in the course of his employment, or
>
> (ii) is disabled by reason of an industrial disease due to the nature of the employment; and
>
> (***b***) the dependants of an employee whose death results from such an accident or industrial disease.
>
> **Rate of compensation and conditions**
>
> (2) The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who
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> (***a***) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or
>
> (***b***) are disabled in that province by reason of industrial diseases due to the nature of their employment.

[24] Section 33 of the Act states that the Board must determine the amount of average earnings and the earning capacity of a worker with reference to her average earnings

[2] All quotes are reproduced as written except where indicated.

and earning capacity at the time of injury. These average earnings are to be in accordance with sections 33.1 to 33.7.

General rule for determination of average earnings

33.1 (1) Subject to sections 33.5 to 33.7, the Board must determine, for the shorter of the following periods, the amount of average earnings of a worker based on the rate at which the worker was remunerated by each of the employers for whom he or she was employed at the time of the injury:

(a) the initial payment period;

(b) the period starting on the date of the worker's injury and ending on the date the worker's injury results in a permanent disability, as determined by the Board.

(2) Subject to sections 33.2 to 33.7, if a worker's disability continues after the end of the period referred to in subsection (1) (a) and (b) that is shorter for the worker, the Board must, for the period starting after the end of that shorter period, determine the amount of average earnings of the worker based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.

(3) If 2 or more sections of sections 33.2 to 33.7 apply to the same worker for the same injury, the Board must determine the section that best reflects the worker's circumstances and apply that section.

Exception to section 33.1(2) — exceptional circumstances

33.4 (1) If exceptional circumstances exist such that the Board considers that the application of section 33.1 (2) would be inequitable, the Board's determination of the amount of average earnings of a worker may be based on an amount that the Board considers best reflects the worker's loss of earnings.

(2) Subsection (1) does not apply in the circumstances described in section 33.2, 33.3, 33.5 or 33.6.

[25] Section 97 of the Act states:

Statutory powers

97 The Board may exercise any power or duty conferred or imposed on it by or under a statute of Canada or agreement between Canada and the Province.

[26] Policy item AP1-97-1 of the Board's Assessment Manual addresses coverage under federal statutes or agreements between the provincial and federal governments. It states, in part:

> The Board administers coverage for Provincial Emergency Program and Federal Government workers on behalf of the Provincial and Federal Governments, who are assessed on a cost plus administration basis.

[27] Policy item #66.00 states, in part, as follows:

> ...
>
> After a claim has lasted five weeks, the Board considers whether it is likely to last for ten weeks and, if the Board has not done so already, sets in motion any enquiries necessary for a possible 10-week average earnings review.
>
> As part of the Board's enquiries, information will be obtained as to the worker's earnings for the 12-month period immediately preceding the date of injury. Information will also be obtained about the worker's tax status for the previous year.
>
> ...
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> If, at the earlier of: the day after 10 cumulative weeks of benefits have been paid to the worker; or the effective date of a permanent disability award there is insufficient information on which to complete the 10-week rate review, a provisional rate may be set until sufficient information is received. (3)
>
> In situations where a worker is being maintained on full salary by the employer, the Board will still be required to carry out a rate review of this kind and, if a reduction is warranted, to make the necessary adjustment. If the worker's long-term earnings average out in excess of the rate set at the time of the injury and the figure being paid by the employer, it is conceivable that the worker could be in a less advantageous position than other workers with a similar earnings pattern. As such, a rate increase can be initiated and the difference between the new rate and what is being refunded to the employer made payable to the worker. This would not apply if the employer is paying the worker at the maximum applicable to the claim. If an employer ceases to make payments to a worker, the Board will begin to pay the worker directly.
>
> **No refunds are made to the employer when workers covered under the *Government Employees Compensation Act* are maintained on full**

> **salary, no 10-week rate review is carried out and no payments are made to the worker. If payments made by the employer are discontinued at any time beyond ten weeks of disability and a worker is still disabled, a 10-week rate review is carried out at that time. Long-term earnings data is normally obtained where there is an indication that a permanent partial disability pension may be payable.**
>
> [emphasis added]

[28] In this case, the worker's injury occurred in 2012, and her entitlement adjudicated under the provisions of the Act as amended by the *Workers Compensation Amendment Act, 2002* (Bill 49), and under policies found in the RSCM II.

[29] Section 250(2) of the Act states that WCAT "must make its decision based on the merits and justice of the case, but in so doing [WCAT] must apply a policy of the board of directors that is applicable in that case."

[30] Section 251 provides that:

> 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.
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> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.
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> (3) As soon as practicable after an issue is referred under subsection (2), the chair must determine whether the policy should be applied.
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> (4) If the chair determines under subsection (3) that the policy should be applied, the chair must refer the matter back to the appeal tribunal and the tribunal is bound by that determination.
>
> (5) If the chair determines under subsection (3) that the policy should not be applied, the chair must
>
> (a) send a notice of this determination, including the chair's written reasons, to the board of directors, and
> (b) suspend any other appeal proceedings that are pending before the appeal tribunal and that the chair considers to be affected by the same

> policy until the board of directors makes a determination under subsection (6).
>
> (6) Within 90 days after receipt of a notice under subsection (5) (a), the board of directors must review the policy and determine whether the appeal tribunal may refuse to apply it under subsection (1).

[31] The Board's Practice Directive #C9-4 states little on the subject, other than to refer to the policy discussion in policy item #66.00 and to say the Board's policy relating to Federal Government claims remains the same, in that*: "where no refunds are made to the employer concerning workers who are covered under the Government Employees Compensation Act, no rate review should be undertaken."* Therefore, where a worker's employment is with the Federal Government and they are kept on full salary, neither a "gross" nor a "net" average earnings review is conducted at 10 weeks. However:

- If the worker has secondary employment, a "gross" and "net" review of the total employment earnings should be conducted at 10 weeks.
- If payments made by the employer are discontinued at any time beyond 10 weeks of disability and a worker is still disabled, a 10-week rate review is conducted at that time.

Analysis

[32] In her submissions, the worker cites section 33.4 of the Act, which discusses exceptional circumstances. However, her appeal relates to Board's refusal to conduct a ten-week rate review and set a long-term wage rate on her claim. According to sections 33(2) and 33.1(2), section 33.4 of the Act only applies when calculating the long-term wage rate. If, as a result of the section 251 process, I am not required to apply the highlighted portion of policy item #66.00, the worker would be entitled to a ten-week review, and the Board can then consider her argument regarding section 33.4 of the Act. However, section 33.4 does not apply at this stage of decision-making.

[33] Looking at the exclusions contemplated by policy item #66.00, the employer did not discontinue payments while the worker was still disabled. Rather, the evidence on the claim file indicates the employer paid temporary disability benefits from April 25, 2012 through March 8, 2013, after which the worker returned to her full duties and hours at work. At that time, the Board deemed her to have recovered from her compensable knee injury. In light of this, and the Board's denial of a permanent condition on the claim, the second exclusion – where there is an indication that a permanent disability pension may be payable – also does not apply in this case.

[34] Looking at other factors discussed in Practice Directive #C9-4, the evidence in this case indicates the worker did not have a secondary employment.

[35] The worker submitted copies of her wage statements. She argues long-term wage rate calculated using her 12-month earnings would be higher than the rate the employer is paying by maintaining her permanent part-time wage rate. However, it is beyond the scope of this appeal to ascertain whether the employer calculated correctly the worker's wage rate. That is, if the employer is not paying at least the initial wage rate as calculated by the Board, the worker can complain to the Board regarding that matter. If, as a result of the section 251 process, I am not required to apply the highlighted portion of policy item #66.00, the worker would be entitled to a ten-week review and she can submit her evidence to the Board for consideration during that process.

[36] I find the impugned part of policy item #66.00 prevents me from finding the Board must conduct a ten-week review of the worker's wage rate. This creates disparity, since, were the worker not covered by GECA, I would find she is entitled to a ten-week rate review. The question is whether this disparity means this aspect of policy item #66.00 is patently unreasonable.

[37] The meaning of "patently unreasonable" for the purposes of section 251 of the Act has been discussed in several decisions of the former WCAT Chair and therefore I need not repeat that analysis here. I consider that if a policy is clearly contrary to the Act, that policy is patently unreasonable.

[38] I acknowledge the employer's submissions regarding the provisions of the collective agreement. The parties disagree on the question of whether the employer has paid the worker in accordance with the collective agreement. However, I find the outcome of such disagreement does not mean that policy item #66.00 is not patently unreasonable as contemplated by section 251 of the Act.

[39] In considering this policy, I referred to the former provisions of the Act (pre-Bill 49) and its related policies, as set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I). In particular, I note the former provisions provided for an eight-week rate review, and related policy was found at item #67.20 of the RSCM I. Prior to 1990, policy item #67.20 made no reference to GECA. Thereafter, it provided similar discussion as the current policy item #66.00 of the RSCM II.

[40] Section 33.1 sets out the general rule for determining average earnings when paying compensation to injured workers in the province. Since GECA employees must receive compensation under the same conditions as provided by provincial law, section 33.1 applies to them. If the date of permanent disability occurs earlier than the date specified by the Board under section 33.1(1)(a), then a ten week review is done immediately, resulting in a long term wage rate. For GECA employees, policy item #66.00 provides that "long-term earnings data is normally obtained where there is an indication that a permanent partial disability pension may be payable."

[41] However, under section 33.1(1)(a) there is a distinction made between GECA employees and provincial workers. For provincial workers, the Board has set the initial payment period at ten weeks:

> After a claim has lasted five weeks, the Board considers whether it is likely to last for ten weeks and, if the Board has not done so already, sets in motion any enquiries necessary for a possible 10-week average earnings review.

[42] Yet, for GECA employees the Board has set the termination of injury on duty leave as the trigger point for the average earnings review:

> If payments made by the employer are discontinued at any time beyond ten weeks of disability and a worker is still disabled, a 10-week rate review is carried out at that time."

[43] As noted above, in this case, the evidence indicates the employer did not discontinue payments at any time beyond ten weeks of disability. Even if it did at some point, such as in November 2012 when the worker commenced a graduated return-to-work program, the evidence supports a conclusion that it did not discontinue payments at a time when other workers in the province would have been entitled to a rate review and calculation of a long-term wage rate.

[44] Disparate treatment of classes of workers has been discussed in previous WCAT decisions. For instance, in *WCAT-2012-01018,* the former WCAT chair wrote:

> Under item #50.00, two workers who suffer the same period of delay in receiving compensation to which they are entitled may be treated quite differently. If there has been a blatant Board error in adjudicating the compensation of one of the workers, the Board will pay interest but, in the absence of such an error, the Board will deny interest to the other worker. I must determine whether it is patently unreasonable to establish an interest policy under which one of the workers receives interest while the other one does not. In my view, **this question turns on whether there is a rational basis for treating the two workers differently.**
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> [emphasis added]

[45] Similarly, in *WCAT-2013-00551*, a WCAT panel wrote:

> ...the calculation of a worker's loss of earnings pension results in the unnecessary creation of two disparate classes of workers and a deliberate move away from determining the actual or real loss suffered by the worker. This defeats the intention in subsection 23(3) of the Act and policy item #40.13 to determine the actual or real loss of earnings suffered

> by a worker and is therefore so patently unreasonable that it is not capable of being supported by the Act and its regulations.

[46] I agree with the above decisions and I find that disparate treatment of classes of workers is patently unreasonable. As it applies in this case, the Act does not empower the Board to discriminate amongst workers by setting different initial payment periods for different workers.

[47] The Board did not explain the rationale in policy item #66.00. However, it appears to hinge on the fact that as long as workers are being maintained on full salary by the federal employer, there is no need for a ten-week review and no payments. However, this treats workers covered by GECA differently than their provincial worker counterparts who are being maintained on full salary. That is, the policy expressly states that a ten-week review is done for provincial workers. In such circumstances, any increase is paid by the Board to the worker, and any reduction in the rate affects how much is refunded to the employer.

[48] I can see no obvious justification for treating the two classes of workers differently and not conducting the ten-week review in the case of GECA workers.

[49] I could find no previous WCAT decisions that addressed this issue regarding policy item #66.00.

[50] I next considered how I might remedy this disparity.

[51] I considered whether I might find that the impugned portion of policy item #66.00 is *ultra vires* the Board. This would not engage section 251. That is, I might conclude the Board has no authority to make policy that offends the section 4(2) GECA requirement of equal treatment, and then apply the balance of the policy and direct the Board to conduct a ten-week review in this worker's case. However, I consider this inconsistent with the requirement in section 250(2) that requires that WCAT must apply a policy of the board of directors that is applicable in that case.

[52] I then considered a second option of whether I could find that, because the impugned portion of policy item #66.00 offends section 4(2) of GECA, it is simply inoperative and therefore inapplicable. However, such a conclusion is contrary to the wording of policy item #66.00, which indicates clearly that it applies to GECA workers.

[53] In light of the above, I find that under section 250(2), I must apply the impugned portion of policy item #66.00 unless I find it to be so patently unreasonable that it is not capable of being supported by the Act and its regulations.

[54] For the reasons set out above, I find the impugned portion of policy item #66.00 is so patently unreasonable that it cannot be supported by the Act and its regulations because it creates two disparate classes of workers under section 33.1 of the Act

without a rational justification for the disparity. To follow policy item #66.00 in this case would contravene section 97 of the Act under which the Board agreed with the federal government to apply the Act equally to GECA claims as required by section 4(2) of GECA.

Conclusion

[55] Pursuant to section 251(1), I consider policy item #66.00, which states that for workers covered under the GECA, no ten-week rate review is carried out, to be so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Joanne Kembel
Vice Chair

JK/ml/lb

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