

2005/12/13-03

THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA**RESOLUTION OF THE BOARD OF DIRECTORS****RE: Benefits for Dependent Children****WHEREAS:**

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("*Act*"), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS:

On September 19, 2005, the Chair of the Workers' Compensation Appeal Tribunal ("WCAT") provided formal notice under section 251 of the *Workers Compensation Act* ("*Act*") that she had found a statement in policy item #55.40 of the *Rehabilitation Services & Claims Manual* ("*RS&CM*") Volume I to be patently unreasonable;

AND WHEREAS:

In accordance with section 251(6) of the *Act*, the Board of Directors has reviewed the policy statement to determine whether the WCAT may refuse to apply it;

AND WHEREAS:

The Board of Directors has considered how the policy amendment approved in this resolution should be implemented in light of the principles outlined in Governors' Decision No. 36;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The Board of Directors has determined that the WCAT may refuse to apply the policy statement and the Chair of the WCAT will be so advised.
2. Amendments to policy item #55.40 of the *RS&CM* Volume I, attached as Appendix A, are approved and apply to claims adjudicated on or after January 1, 1984.

3. No overpayments will be declared in cases where the impugned statement in policy item #55.40 of the *RS&CM* Volume I resulted in benefits at a higher level than would be granted under the policy as amended by this resolution.
4. This resolution is effective December 13, 2005.

DATED at Richmond, British Columbia, December 13, 2005.

By the Workers' Compensation Board

**DOUGLAS J. ENNS, CHAIR
BOARD OF DIRECTORS**

APPENDIX A

REHABILITATION SERVICES & CLAIMS MANUAL, VOLUME I

#55.40 Spouse Separated from Deceased Worker

Where, at the date of death, the claimant and the deceased worker were divorced, the claimant is not eligible for compensation as the deceased's widow or widower. A divorce does not, however, affect the claim of any children of the marriage.

Section 17(9) contains special provisions which apply where, though still married, the worker and dependent spouse were at the date of death living separate and apart. Section 17(9)(a) provides that, where there was in force a court-order or separation agreement providing periodic payments for support of the dependent spouse, or children living with that spouse, compensation is paid as follows:

- “(i) where the payments under the order or agreement were being substantially met by the worker, monthly payments must be made in respect of that spouse and children equal to the periodic payments due under the order or agreement; or
- (ii) where the payments under the order or agreement were not being substantially met by the worker, monthly payments must be made up to the level of support that the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred.”

Section 17(9)(b) provides that, where there was no court order or separation agreement in force at the date of death providing periodic payments for support of the dependent spouse, or children living with that spouse, and:

- “(i) the worker and dependent spouse were living separate and apart for a period of less than 3 months preceding the date of death of the worker, compensation is payable as if they had not been separated; or
- (ii) the worker and dependent spouse were separated with the intention of living separate and apart for a period of 3 months or longer preceding the death of the worker, monthly payments must be made up to the level of support which the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred.”

In circumstances where the spouses were living separately for a period of three months or longer preceding the death of the worker, and there was no court order or separation agreement in force at the date of death providing periodic

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payments for support of the dependent spouse, or children living with that spouse, the following guidelines are provided to assist in the interpretation of Section 17(9)(b)(ii):

1. Intention to Live Separate and Apart Absent

If it is concluded that the spouses, although living separately, did not have the "intention" of living separate and apart, Section 17(9)(b)(ii) does not apply. In these circumstances, the dependants' entitlement would be determined under the other provisions of Section 17.

2. Intention to Live Separate and Apart Present

If it is concluded that the spouses were living separately, with the "intention" of living separate and apart, Section 17(9)(b)(ii) is applicable. The benefits payable in these circumstances would be based on the level of support, which the Board believes the dependent spouse and children would have been likely to receive from the worker, if the death had not occurred.

3. Determination of Intention to Live Separate and Apart

Whether the worker and dependent spouse were separated with the "intention" of living separate and apart requires an examination of all the circumstances to determine whether the geographical separation is consistent with the normal continuation of the marriage, or whether these circumstances bring into question the continued existence of the marriage. The presence or absence of this mental element concerning the status of the relationship should be assessed both on an objective and subjective basis, rather than being solely based on the subjective views of the spouses.

The question is whether, on the basis of all the evidence, the spouses either treated the marriage as being at an end or, alternatively, whether it may be concluded on an objective or "de facto" basis that the marriage had no continuing existence.

It would be sufficient to support a conclusion that the spouses were living separate and apart if one spouse (not necessarily both) treated the marriage as being at an end. Also, it could be concluded on an objective basis that the spouses were living separate and apart, notwithstanding the subjective belief of both

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spouses that the marriage was continuing. This might be the case if the separation was for an indefinite period and there was no reasonable prospect of their being reunited in the foreseeable future. It might be considered that they had at least reconciled themselves to this situation, notwithstanding the subjective continuance of the marriage relationship. On the other hand, if the spouses viewed themselves as continuing in their marriage and intended to reunite, and it was considered that this would occur in the reasonably foreseeable future, then it might be concluded that they were not living separate and apart.

It would not normally be considered that the spouses were living separate and apart in circumstances where a period of temporary separation was necessitated by the worker's employment.

~~Section 17(9) also applies where there is no spouse eligible to claim benefits, but a claim is made by children of the deceased who were living separate and apart from the worker.~~

To be eligible to claim under Section 17(9), a spouse ~~or child~~ must first be found by the Board to have been an actual dependant of the deceased as discussed in #54.00. It is not sufficient that the claimant, though not actually dependent, had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased.

In no case can the compensation payable under Section 17(9) exceed the amount that would have been payable if there had been no separation. (15)

The full amount of the lump sum provided for in #55.10 is payable to a dependent widow or widower whose entitlement is governed by Section 17(9).

EFFECTIVE DATE: January 1, 1984

**APPLICATION: Applies to claims adjudicated on or after
January 1, 1984.**