WCAT Decision Number: WCAT-2016-00534
WCAT Decision Date: February 22, 2016
Panel: Joanne Kembel, Vice Chair

Introduction

[1] The worker was injured on April 24, 2012, when she slipped and fell down some stairs while working. She had been working for the employer for more than a year at that time, first as a casual worker and, as of March 2012, as a permanent part-time worker. The Workers' Compensation Board (Board)[1] accepted her claim for a right knee strain. The worker is an employee of a federal crown corporation and is covered by the *Government Employees Compensation Act* (GECA); the employer paid temporary disability benefits directly to the worker. The Board did not accept a permanent condition on the claim.

[2] The worker, represented by her union, appeals an October 2, 2012 decision of the Board's Review Division (*Review Reference #R0144704*) regarding the calculation of the initial wage rate on her claim. In the decision, a review officer confirmed a Board client services representative's decision from May 18, 2012 that set the initial wage rate for the worker's claim.

[3] The worker requested that this matter be heard by way of written submissions. The WCAT Registry made a preliminary decision that this matter would proceed on that basis, and both parties provided written submissions. Item 7.5 of the *Manual of Rules of Practice and Procedure* states that WCAT will normally conduct an appeal by written submissions where the issues are largely medical, legal, or policy based and credibility is not at issue. The issues under appeal require consideration of the relevant law and policy on largely undisputed facts, and I find I can decide the issue from the evidence on the claim file and the worker's written submissions. Therefore, I confirm the WCAT Registry's preliminary decision in this regard.

[4] The worker did not dispute the earnings to be used to calculate the initial wage rate on her claim. Her requested remedy relates to the January 21, 2015 determination, and requests a finding that she is entitled to a ten-week review and a determination setting a long-term wage rate on her claim.

[5] In a December 2, 2014 summary decision (*WCAT-2014-03557*), I referred to the Board for determination, under section 246(3) of the *Workers Compensation Act* (Act), the matter of whether the Board should conduct a ten-week rate review, and set a long-term wage rate on the claim.

[1] operating as WorkSafeBC

[6] 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. In arriving at that conclusion, the case manager referred to policy item #66.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). As set out in section 246(4) of the Act, I must consider the January 21, 2015 determination in the context of this appeal.

[7] 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 that in March 2012 she took the part-time job to secure a permanent position, and hoped that soon thereafter she would increase her working hours. 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, and that 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.

[8] I considered the worker'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 submissions from the parties on this issue. For the record, the relevant portion of policy item #66.00 states as follows:

> 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.[2]

[9] The Board declined to provide further information regarding the policy, but indicated the Policy, Regulation and Research Division would review the matter of the ten-week rate review for workers covered by GECA.

[10] In a July 21, 2015 resolution, the board of directors of the Board struck out the above (impugned) wording in policy item #66.00. However, this change would apply to all decisions made on or after January 1, 2016. In other words, it did not remedy the matter for this worker.

[11] In a September 23, 2015 decision (*WCAT-2015-02919*), which was a referral to the chair of WCAT under section 251 of the Act, I found that the portion of policy

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

item #66.00 that states that for workers covered under the GECA no ten-week rate review is carried out was so patently unreasonable that it was not capable of being supported by the Act and its regulations.

[12] The WCAT Tribunal Counsel Office then sought submissions from the parties regarding *WCAT-2015-02919.* The union representative responded, and essentially stated he agreed with the analysis in *WCAT-2015-02919.* The employer did not respond.

[13] In a November 25, 2015 resolution (Resolution number 2015/11/25-02), the board of directors of the Board, the chair of the board of directors stated, in part, that an appeal before WCAT raised the issue that workers with appeals in progress but decided on or after January 1, 2016 would not have the benefit of the policy change set out in the July 25, 2015 resolution. The board of directors repealed the part of the July 21, 2015 resolution that stated when it was effective, and replaced it with "This resolution is effective January 1, 2016 and applies to all decisions, including appellate decisions, on or after January 1, 2016."

[14] The WCAT Registry sought submissions from the parties regarding Resolution number 2015/11/25-02. Only the union representative responded to the invitation. The union submitted that with the amendments, the section 251 referral to the WCAT chair in *WCAT-2015-02919* could be withdrawn and the worker's appeal resumed. WCAT provided a copy of the union representative's submissions to the employer and invited its further submission by February 1, 2016. The employer did not respond.

Issue(s)

[15] The issues in this appeal are:

- Whether to withdraw the September 23, 2015 referral to the chair of WCAT under section 251 of the Act (*WCAT-2015-02919*);
- Whether the Board correctly determined the initial wage rate on the worker's claim; and,
- Whether the worker is entitled to a ten-week review and to have a long-term wage rate set on her claim.

Relevant Background

[16] 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.

[17] 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.

[18] 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.

[19] 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.

[20] 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.

[21] As noted above, in *Review Reference #R0144704,* dated October 2, 2012 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, which 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 her injury.

[22] On the notice of appeal, the union representative submitted the wage rate was incorrect. However, 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.

[23] The employer submitted the initial 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, and referred to policy item #66.00.

[24] According to the claim file, the worker began a graduated return-to-work program in November 2012, after which she increased her working hours and functions.

[25] 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.)

[26] 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.

[27] As noted above, I sought further information from the Board, and then further submissions from the parties on this issue.

[28] In reply, a Board representative said the Board declined to provide further information regarding the policy. However, the employer had reported that it paid its injured workers in accordance with the collective agreement. The Board representative indicated these salary continuance payments exceeded 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.

[29] The worker disputes the above information.

Law and Policy

[30] Section 4 of the GECA states:

> 4. (1) Subject to this Act, compensation shall be paid to
>
> (***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
>
> (***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.

[31] 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 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.

[32] As a result of Resolution number 2015/11/25-02, 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.
>
> ...
>
> 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.

[33] 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 must apply a policy of the board of directors that is applicable in that case." 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). Applicable policies are found in the RSCM II.

Findings and Reasons

[34] As noted above, the worker submits that with the amendments in Resolution number 2015/11/25-02, the section 251 referral to the WCAT chair can be withdrawn and the worker's appeal resumed. I agree. I find that within the context of the facts in this case, the amendments to policy item #66.00 via Resolution number 2015/11/25-02 fully address my finding, by deleting the impugned portion of policy item #66.00 that I found was so patently unreasonable that it was not capable of being supported by the Act and its regulations.

[35] Turning to the issue that arises from *Review Reference #R0144704,* I acknowledge the worker's submissions 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.

[36] I take the worker's submissions to mean that she does not dispute the initial wage rate set on her claim. I acknowledge that on the notice of appeal the worker said there might be some argument regarding the initial rate. However, the worker did not pursue that argument. In any event, I find that the worker's earnings after beginning the permanent part-time position best reflected the worker's loss during the first ten weeks of the claim. Since this was the only matter decided in *Review Reference #R0144704*, I confirm that decision.

[37] I consider that the worker's requested remedies relate to the January 21, 2015 determination that she was not entitled to a ten-week review and therefore no long-term wage rate would be set on the claim.

[38] Looking at the exclusions contemplated by policy item #66.00, the employer did not cease 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.

[39] At that time, the Board deemed the worker 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. For the record, I note the

evidence in this case indicates the worker did not have a secondary employment, and so that is also not a matter to be considered in this appeal.

[40] I find that as set out in policy item #66.00, as amended on November 25, 2015, the worker is entitled to a ten-week review and to have a long-term wage rate set on her claim.

[41] Finally, I acknowledge the information from the Board representative to WCAT that the employer had indicated it was paying the worker the difference between the worker's entitlement under the Act and the payments the employer had given to the worker. I also acknowledge the employer's submission from February 12, 2014 that the employer was required by the collective agreement to pay the worker an average weekly rate based on her earnings for the one-year prior to the date of injury. However, the worker submits copies of her wage statements, and argues that a long-term wage rate calculated using her 12-month earnings would be higher than the rate the employer is paying as the employer is maintaining her permanent part-time wage rate.

[42] It is beyond the scope of this appeal to ascertain whether the employer calculated correctly the worker's wage rate. Once the Board has concluded the ten-week review and set the long-term wage rate, then, as indicated by the Board representative to WCAT, the worker can complain to the Board if she continues to believe she did not receive her full entitlement under the Act.

Conclusion

[43] I hereby withdraw my September 23, 2015 referral to the WCAT chair under section 251(1) of the Act, as was set out in *WCAT-2015-02919*. I find that within the context of the facts in this case, the amendments to policy item #66.00 via Resolution number 2015/11/25-02 fully address my finding, by deleting the impugned portion of policy item #66.00 that I found was so patently unreasonable that it was not capable of being supported by the Act and its regulations.

[44] I confirm the October 2, 2012 Review Division decision (*Review Reference #R0144704*). I find the Board correctly determined the initial wage rate on the worker's claim.

[45] I vary the Board's January 21, 2015 determination. I find the worker is entitled to a ten-week review and to have a long-term wage rate set on her claim.

[46] There are no requests before me for reimbursement of expenses, and no reimbursable expenses within the meaning of section 7 of the *Workers Compensation Act Appeal Regulation,* B.C. Reg. 321/02 are apparent to me following my review. Therefore, I make no finding regarding appeal expenses.

Joanne Kembel
Vice Chair

JK/ml/lb

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