May 27, 2003

Memo To: Jill Callan, Chair
Workers' Compensation Appeal Tribunal

Memo From: Rob Kyle, Vice Chair

Re: Section 251(2) referral with respect to Rehabilitation Services and Claims Manual, Vol. I, Policy Item #67.21

---

I am forwarding this memo under the provisions of item 12.40 of the Workers' Compensation Appeal Tribunal Manual of Rules, Practices and Procedures, and sections 251(1) and 251(2) of the Workers Compensation Act ("Act"). This concerns an appeal of a Review Board finding which is now in front of a Workers' Compensation Appeal Tribunal panel.

This is an appeal of a long-term wage rate determination in which the worker is seeking to have the panel apply a "class average" as described in policy item #67.21 of the Rehabilitation Services and Claims Manual, Vol. I. There is a section of policy item #67.21 that I consider should not be applied as it is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

By way of a short background, at the time of the injury leading to this appeal the worker was employed in a wood re-manufacturing plant producing value added wood products. On December 28, 1999, the worker was operating a chop saw when he amputated his left index finger.

The worker reported the incident to the Board shortly after and the Board accepted his claim. At the time of the injury, the worker was 28 years old and had immigrated to Canada in January 1999 from India. He had worked for the accident employer since March 22, 1999; before that, he had worked as a farm labourer, although it is unclear whether that was in his native country, or on arrival in Canada, or both.

The worker was eventually assessed for a permanent partial disability award on a functional basis under section 23(1) of the Act. The disability awards claims adjudicator accepted the initial wage rate of $433.74 per week as representing the worker's long-term earnings. The Board issued its pension decision letter on August 11, 2000. In it, the Board informed the worker that he would receive a

functional impairment award equal to that of 2.5% of a totally disabled person. This was based on a monthly wage rate of $1885.00 and a pension effective date of April 29, 2000. The Board paid the worker a lump sum amount of $10,529.20, which was consistent with the Board's general practice of paying small permanent disability award pensions in a lump sum.

The worker appealed the long-term wage rate decision, among others, to the Review Board. He requested that the panel consider the use of a class average for laborers in processing, manufacturing and utilities. The worker's legal counsel submitted that the panel use a different classification than that normally employed by the Board to determine the class average in this case.

In its October 31, 2002 findings, the Review Board panel found that the Board had correctly calculated the worker's long-term earnings. The panel stated that the worker's actual earnings at the time of injury best represented the worker's earnings for pension purposes in accordance with the Act.

**Issue to be Clarified**

The provision of the *Act* in effect at the time of the decision under appeal, and which provides for utilizing class averages under certain circumstances, is section 33(1). The particularly relevant clauses are bolded:

> The average earnings and earning capacity of a worker must be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the Board best to represent the actual loss of earnings suffered by the worker by reason of the injury, but not so as in any case to exceed the maximum wage rate, **except that where, owing to the shortness of time during which the worker was in the employment of his or her employer, or in any employment, or the casual nature of his or her employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period**

> **previous to the injury by a person in the same or similar grade or class of employment.**

Board policy concerning long-term wage rate determination for such categories of workers as recent entrants into the labor force and new immigrants is found in Rehabilitation Services and Claims Manual, Vol. I, policy #67.21. The section of the policy that is of concern in this referral is bolded:

> The persons covered by this provision are those whose actual earnings record is not sufficient to allow a determination of what best represents their long-term loss of earnings. For example, it may cover recent entrants into the labour force or new immigrants. In these cases, a class average is obtained when an 8-week review is being considered. **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.**

Section 33(1) provides for the use of class averages in circumstances in which it would be inequitable to calculate the worker's average earnings in the manner prescribed in the initial part of section 33(1). The use of a class average, according to Board policy, is generally restricted to young workers who have recently entered the labor force or new immigrants. Those classes of workers are generally employed in entry-level positions and are generally paid at the lowest levels for the job categories in which they find themselves. The intent of the class average provision is to recognize that as workers gain experience and skills they will generally move on to higher paying positions. Utilizing a class average is designed to prevent a young worker or a new immigrant who suffers a permanent functional impairment from having any monetary award that impairment may attract from under-representing his or her long term earning capacity because of his or her low average earnings at or around the time of injury or onset of occupational disease.

The sentences emphasized above from policy #67.21 appear contrary to the intent of the class average concept as set out in the legislation. A plain reading of those two sentences in essence puts an "equal to or less than" restriction on the use of class averages. As currently written, it means that any class average that is higher than the worker's rate of pay at the date of injury will result in a capping of the worker's long-term wage rate at the level of the provisional wage rate determined by the Board, if the provisional rate was set based on the date of injury earnings. Any class average that is lower than the worker's rate of pay at the date of injury will result in a reduction in the worker's average earnings.

Generally, the wording of that segment of the present policy is entirely inconsistent with the intent of the legislation.

The section of the policy under scrutiny is plainly worded and there appears to be little room to stray from an interpretation of those sentences from that set out just above. That section of the policy appears to be a patently unreasonable interpretation of the legislation. In stating that, I am using the definition of "patently unreasonable" as set out in *National Corn Growers Assn. v. Canada (Import Tribunal)* [1990] 2 S.C.R., which states that an interpretation (in that case, of a tribunal decision) is "patently unreasonable" when "its construction cannot be rationally supported by the relevant legislation." I consider that definition applicable to this circumstance.

This particular policy segment has drawn comment by at least one Appeal Division panel, which made the following observations in Appeal Division decision #2000-0761:

> The issue is not directly before us, and we are not as a matter of law addressing the lawfulness of policy item #67.21. However, we specifically note the statements in the policy item providing:
>
> > 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.
>
> These two sentences appear, to us, to conflict with the stated purpose of :class averages" in section 33(1), which is to arrive at a more equitable method of calculation. We consider that these two sentences fetter the Board's section 33(1) discretion to provide the worker with the higher rate determined by the class average. We note that the sentences use permissive language, such as "no change is usually made" and "may be reduced accordingly." However, it is clear that the intent is to use the class average only to reduce a worker's rate, and not to increase it. The only sensible interpretation of those two sentences is inconsistent with section 33(1) and, we suspect, with actual Board practice regarding class averages. We recommend that policy item #67.21 be reviewed.

The panels in Appeal Division decisions #00-0989 and #2001-2064 both referred to the above quote from decision #00-0761 and stated their agreement with the conclusions reached.

For the above reasons, I consider that the above segment of policy item #67.21 is so patently unreasonable that it is not capable of being supported by section 33(1) of the Act. I am therefore referring this issue to the chair pursuant to section 251(2) of the Act.

Rob Kyle
Vice Chair