May 13, 2004

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

Memo from: Timothy B. Skagen, Vice Chair
Workers' Compensation Appeal Tribunal

RE: Section 251(2) Referral

I have concluded that I am unable to apply a policy of the Workers' Compensation Board (Board) to the facts of the case underlying this appeal as I believe that the policy is so patently unreasonable that it is not capable of being supported by the *Workers Compensation Act* (Act) and its regulations pursuant to section 251(1).

The appeal is with respect to the application of policy item #40.20 of the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) and specifically, the direction contained in the following paragraph:

> 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.

Background information:

The worker was a 60-year-old painter who was also the principal of the employer when in 1997 he suffered a compensable injury to his shoulder that precluded him from continuing in his employment.

The worker was awarded a permanent partial disability pension on January 4, 2001 that was effective November 1, 1999. The worker was granted a partial loss of earnings (LOE) pension pursuant to section 23(3) of the Act. In setting out his entitlement the officer explained that at age 65 his LOE pension entitlement would be reduced to 38.54859% of the monthly amount reflecting the application of policy item #40.20. This amount would then be payable for life.

The worker successfully appealed that decision to the Review Board and in a decision of January 7, 2002 it was found that the worker would have likely continued working to age 70 and was therefore entitled to receive his loss of earnings pension to age 70.

Upon the implementation of the Review Board decision, the officer clarified that as of the first month following his 70th birthday the term (LOE) portion of the pension would cease to be paid.

The worker's representative submits two arguments in support of finding that policy item #40.20 is so patently unreasonable that it is incapable of being supported by the Act and its regulations. These arguments are contained in his appeal brief dated January 12, 2004 and attached to the file. The arguments and my initial comments are as follows:

As a right of appeal of a serious issue to be tried:

The representative argues that if the issue is raised, it is of such a nature that failure to refer the matter for consideration by the chair would be to render a *de facto* decision that precludes the party from the process of review. This is submitted as being similar to an interlocutory application or a *voir dire* that raises a serious issue to be tried. The argument is that it is the raising of the issue that warrants a referral as a serious issue to be tried and that a referral may be warranted even where the refusal to apply the policy is "incorrect in law".

Comments

I reject this argument as I find that the statute is clear that the hearing of the appeal and all issues of fact and law are properly before the panel as set out in section 254 and 255 of the Act. I consider that it is within the scope of the appeal for the parties to raise the lawfulness of a policy for consideration by the panel, but this does not confer a right of appeal to the chair at the initiative of the party. It is the panel that decides if it can apply the policy. It is only when it cannot apply the policy, based on the provisions of section 251(1), that the referral is made to the chair.

That the policy is an unlawful fettering of discretion:

The representative argues that section 23(3) of the Act is discretionary in its power to confer LOE pensions as defined by the phrase "Where the board considers it more equitable". The statute directs that 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. It is argued by the representative that policy item #40.20 sets out that further consideration must also be given to the worker's retirement circumstances. This appears to be the basis of the policy provisions of item #40.20. However, while the policy provides for recognition of a loss of retirement provision due to the impairment, the policy arbitrarily precludes individuals from this benefit if they have a non-standard retirement period. It is submitted by the representative that the arbitrary delineation of benefits set out in the policy is inconsistent with the discretion contained in the statute.

The representative submits that policy item #14.20 was created in response to *Appeal Division Decision #1994-9659* where the use of an arbitrary retirement age was found to fetter of the Board's discretion contained in section 23(3) of the Act. The subsequent recognition of non-standard retirement dates gave rise to the paragraph in policy item #40.20 that precluded those workers from the benefits of the proportional continuation of the loss of earnings pension past retirement. The representative argues that the equitable determination of loss of earnings entitlement post retirement requires entitlement to proportional pension continuation regardless of the retirement age.

The argument cites two *Appeal Division Decisions, #2001-0318 and #2000-1147* which both found non-standard retirement age was appropriate. However, neither of these addressed the fettering of discretion issue. However, *#2001-0318* found that the "more equitable" consideration contained in section 23(3) of the Act refers to the determination of which pension is more equitable for the specific worker, not for the determination of assessing equities between workers.

Comments

I find that this argument has some merit.

Appeal Division Decision #2001-0318 dealt concluded that the extension of proportional benefit reflected in policy item #40.20 is in addition to the statutory requirement. Therefore it found that the term "considers more equitable" is with respect to the provision of the LOE pension, and is to provide an equitable payment based on the individual circumstances. The panel found that the provision did not require that the worker's entitlement be equitable with respect to the entitlement of all other workers. The panel found that in the circumstances of that case, the worker who was 66 at the date of injury was not prejudiced by the application of policy item #40.20. The panel determined that the provisions of #40.20 were to recognize the loss of opportunity to contribute to retirement

savings between the ages 50 to 65. Because the worker was 66 at the date of injury he was not prejudiced in his retirement savings by his injury. The worker, once having had the opportunity to work to the standard retirement age, is not prejudiced in his savings for retirement by his injury. However, this is not the case before me.

In this case, the worker was age 60 at the date of injury and therefore was prejudiced in his savings by the injury for the years between ages 60 to 65. This was recognized by the Board when, as part of his initial pension award, found that the worker was entitled to a continuation of approximately one-third of his LOE after age 65. However, when the Review Board decision accepted that he was expected to work to age 70, he lost his entitlement to the continuation of the LOE by the arbitrary exclusion contained in the policy. Therefore, in this case the worker is penalized by his working to age 70 because he lost a benefit that he was entitled to had he retired at age 65.

I find that this arbitrary denial of an entitlement to a proportional LOE pension as set out in the policy is a fettering of the Board's discretion as set out in section 23(3). Specifically, this is a fettering of the Board's discretion as clarified in *Appeal Division Decision #2001-0318* that the discretionary provision of pension is to be based on the equity of the individual case and not on equity as between all workers. Because the policy arbitrarily changes the quantum of the LOE simply because the worker has a non-standard retirement age it creates an inequity between this specific worker's entitlements based entirely on his retirement date as determined by the Review Board.

The worker's representative argues that the chair's decision in *WCAT Decision #WCAT-2003-10800-AD* reviews this issue with respect to the fettering of discretion in the context of a review of policy item #67.21. In that decision the chair determined that the provisions of the policy item were sufficiently permissive to support the conclusion that the discretion had not been unlawfully fettered. In policy item #40.20 there is no such permissive language with respect to the application of the limitation. It states that "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". It is therefore submitted by the representative that this policy therefore unlawfully fettered the discretion provided under section 23(3) of the Act.

I find that on a strict reading of the limitation provision of policy item #40.20 would unlawfully fetter the discretion provided under the section 23(3) of the Act contrary to the principles referred to in *WCAT Decision #WCAT-2003-01800-AD*.

The further question is then whether this arbitrary policy limitation of discretion is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

In *Voice Construction Ltd. V Construction & General Worker's Union, Local 92* [2004] S.C.J. No. 2 2004 SCC 23, the honourable Justice Major, for the court discussed the application of a patently unreasonableness test stating at paragraph 18 that "A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd". The honourable Justice LeBel, in additional comments concurring with the court stated in paragraph 40 that "Patent unreasonableness is an inadequate standard that provides too little guidance to reviewing courts, and has proven difficult to distinguish in practice from reasonableness simpliciter". Justice LeBel goes on in paragraph 41 to summarize Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2S.C.R. 227*, at p. 237, as the seminal judgement in the law of judicial review. "Rather than contemplating the metaphysical obviousness of the defect, he explained that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation.""

I find that to apply the limitation of policy item #40.20 to this worker effectively denied a previous entitlement because he has a non-standard retirement date. I believe that this policy cannot rationally be supported by the legislation as it creates a penalty to the individual planning to non-standard retirement who suffers permanent functional impairment between age 50 and age 65. Clearly this worker would also suffer a negative effect on his ability to save for his retirement in the same way as a worker with an expectation of standard retirement.

Therefore, I am forwarding this matter to the chair for consideration pursuant to section 251(2) of the Act and item #14.40 of the WCAT *Manual of Rules, Practices and Procedures* (MRPP) for a chair's determination pursuant to section 251(4) of the Act.

Note:

This has been resolved with the entitlement changes contained in Bill 49 as there is not entitlement to LOE after the later of two years post injury or age 65. This effectively eliminates any future occurrences of this conflict because it does not provide for a two tier entitlement.

This is a Review Board appeal transfer to WCAT where the worker is the principal of the employer. To ensure that there is fair argument put forward, and given the implications of reopening of previously decided non-standard retirement pensions, there may be a need for the appointment of an deemed employer as the employer of record is probably no longer active (indicated by the submission).

Respectfully submitted

Timothy B. Skagen
Vice Chair

Attachments:

Voice Construction Ltd. V Construction & General Worker's Union, Local 92 [2004] S.C.J. No. 2 2004 SCC 23,
Decision of the Appeal Division #*2001-0318*
Decision of the Appeal Division #*2001-2111/2112*