

August 20, 2004

Memo To: Jill Callan, Chair

Memo From: Susan Marten, Vice Chair

Re: Section 251(2) Referral – RSCM I, items #55.40 and #59.22

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I am referring this file to you under the provisions of section 251(2) of the *Workers Compensation Act* (Act) and *Manual of Rules, Practices and Procedures* (MRPP) item #12.40. I am referring *Rehabilitation Services and Claims Manual I* (RSCM I) policy items #55.40 and #59.22. I consider those policies so patently unreasonable that they are not capable of being supported by the Act and its regulations.

### **The Issue**

In my view, these policies require the application of the wrong subsection of the Act and result in a substantially lower level of benefits being paid to children of this deceased worker. Policy requires that section 17(9) be used to determine the level of children's benefits in situations where there is no spouse eligible to claim benefits. Another subsection (section 17(3)(f)(ii)) is more appropriate, in that it provides for benefits to be paid to dependent children where there is no surviving spouse or common law spouse eligible for monthly benefits.

The two children of this deceased worker now receive an award of \$670.00 per month. The calculation sheets clarify that each child was awarded \$335.00 per month. The children receive CPP dependant benefits. The employer reported the worker earned \$48,260.38 in the one year before his death. Fifty percent of the worker's permanent total disability rate of approximately \$3,016.24 per month is about \$1,508 per month. This does not account for the deduction of federal benefits. This is a very rough calculation to illustrate the difference, if the children had been provided benefits under section 17(3)(f)(ii).

### **Background**

The worker died in December 2001 in a work-related accident. The worker was not married. The worker has two children who were born in 1992 and 1995. The children live with their mother.

The Board concluded that children's mother was not eligible for benefits as a common-law wife. WCAT Decision #-2004-04372-RB denied her appeal of that decision.

The worker's mother received benefits under section 17(3)(i), as a dependent parent.

The Board provided the worker's children with benefits under section 17(9)(b). Although not expressly indicated on the claim file, the award was granted under section 17(9)(b)(ii). No court order was in place. The case manager concluded the worker kept a separate address and had an intermittent relationship with the children's mother in the last year of his life.

The case manager awarded the children benefits at the level they would have received under the federal guidelines for child support if a court order was in place. As noted above, the children now receive an award of \$670.00 per month. The children's mother appealed that decision on their behalf. WCAT is now considering the appeal of the benefits provided to the worker's children in the Board's March 13, 2002 decision.

The appeal issue before WCAT is whether the Board correctly calculated the children's benefits.

### **Reasons for Referral**

Section 17(9)(b)(ii) states:

Where compensation is payable as the result of the death of a worker, or of injury resulting in death, and where at the date of death the worker and dependent spouse were living separate and apart, and

....

(b) 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

....

(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.

Section 17(3)(f)(ii) states:

Where compensation is payable as the result of the death of a worker or of injury resulting in such death, compensation must be paid to the dependants of the deceased worker as follows:

....

(f) where there is no surviving spouse or common law spouse eligible for monthly payments under this section, and

....

(ii) the dependants are 2 children, a monthly payment of a sum that, when combined with federal benefits payable to or for those children, would equal 50% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability;

The case manager's decision to award benefits under section 17(9) is in accordance with RSCM I item #55.40, "Spouse Separated from Deceased Worker", which provides:

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.

Item #55.40 contains the phrase "no spouse eligible to claim benefits". That phrase does not appear in section 17(9) and appears to be a reference to section 17(3)(f).

Section 17(9) requires that there be a dependent spouse who is living separate and apart from the worker before benefits are awarded under this section. No dependent spouse exists in this case. A plain reading of section 17(9) indicates that benefits should not have been awarded under this section of the Act.

Section 17(3)(f) describes a situation and resultant levels of entitlement that would appear to describe more appropriately the circumstances of this deceased worker's children.

Two conditions (no surviving spouse or common law spouse and no eligibility for monthly payments) are set out in the introductory phrase in section 17(3)(f). Issues arise about whether emphasis should be placed on the requirement of no survival, without more, or whether the requirement of no eligibility for monthly payments is the requirement that has to be met. In other words, which requirement should govern and whether the introductory phrase should be read as a whole to give it full meaning and effect. Clearly there is no entitlement to a spouse who does not

survive. The second phrase concerning eligibility for monthly benefits has to be given some meaning.

In the particular circumstances of this case, there is no common-law wife that is eligible for monthly payments, but the deceased worker's children are not orphans. Their mother continues to care for them.

RSCM I item #59.22, "No Surviving Spouse or Common-Law Wife/Husband", describes the computation formulas in section 17(3)(f), with no additional explanation about the application of this section of the Act. However, RSCM I item #59.21, "Surviving Widow, Widower, Common-Law Wife or Common-Law Husband", provides some interpretive guidance. The final paragraph in item #59.21 states:

Where there is a widow or widower and a child or children, and the widow or widower subsequently dies, the allowances to the children shall, if the children are in other respects eligible, continue and shall be calculated in like manner as if the worker had died leaving no dependent spouse. (36) The rules described in #59.22 will apply to determine the children's entitlement.

The reference in Note #36 is to section 17(5) of the Act and the requirement to calculate the children's benefits in the same manner as if the worker had died leaving no dependent spouse. The reference to item #59.22 and the requirements of section 17(3)(f) suggests the Board places emphasis on survival and views section 17(3)(f) as an orphans' section.

RSCM I item #59.22 – "No Surviving Spouse or Common-Law Wife/Husband", when read together with the above cited excerpt in item #55.40 and the final paragraph in item #59.21 strongly suggest the Board has placed emphasis on the requirement of no survival over the requirement of no eligibility for monthly benefits. In other words, that the Board has read out the subsequent condition about eligibility and views section 17(3)(f) as an orphans' section. In other words, that it has narrowly interpreted section 17(3)(f). I again refer to the fact that the introductory phrase concerning eligibility for monthly benefits appears in item #55.40.

In my view, the entitlement of the minor children of a deceased worker strikes at the heart of the intent of section 17 of the Act. I question the Board's interpretation of section 17(9) in RSCM I #55.40, in providing benefits to dependent children under that section when the express requirement for a dependent spouse who is living separate and apart from the worker at the time of the death is not met. Item #55.40 also states that a spouse or child must first be found dependant before eligibility is

established under this section. The opening requirements of section 17(9) do not describe a situation where children can be declared eligible without the presence of a dependent spouse. The provision in item #55.40 appears to extend beyond the plain wording of section 17(9). I consider this policy patently unreasonable and not capable of being supported by the Act or its regulations.

I have difficulty reconciling the applicability of a section of the Act that requires a dependent spouse and the non-applicability of a section that I consider more accurately describes the circumstances raised by this case (section 17(3)(f)(ii)). The heading of item #59.22 and the last paragraph of section #59.21 suggest this section is interpreted as limited to orphans. A plain reading of section 17(3)(f) does not require an emphasis to be placed upon the requirement for no survival over the requirement for no eligibility to monthly payments. To view this section as only applying to orphans is too narrow and limiting. Where there is a surviving spouse or common-law spouse who is not eligible for monthly benefits under this section, that is, no eligible surviving spouse or common-law spouse, a deceased worker's dependent children should meet the conditions in the introductory phrase in section 17(3)(f). I consider that such a narrow interpretation of section 17(3)(f) is also patently unreasonable and not capable of being supported by the Act or its regulations.

For the above reasons, I most respectfully refer this matter to you under section 251(2) of the Act.

Susan Marten  
Vice Chair