WCAT Decision Number: WCAT-2004-00131
WCAT Decision Date: **January 13, 2004**
Panel: James Sheppard, Vice Chair

Introduction

On November 11, 2000, the appellant, working as a ranch hand, suffered an injury to her right hand when the knuckle of her right index finger was accidentally stuck with a vaccination needle.

The appellant appealed to the Workers' Compensation Review Board (Review Board) a March 26, 2001 Workers' Compensation Board (Board) decision to deny her claim because she was found to be exempted from (mandatory) coverage under the *Workers Compensation Act* (Act). No decision was made on the merits of the appellant's claim. The case manager based her decision on a legal opinion provided by a Board barrister and solicitor.

The Review Board panel, in findings dated February 7, 2003, accepted the opinion by the Board barrister and solicitor that the appellant was excluded from coverage under the Act. She has appealed those findings to the Appeal Division.

Issue(s)

Was the appellant excluded from coverage under the Act?

Jurisdiction

This appeal was filed with the Appeal Division. On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by an Appeal Division panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 39).

WCAT may inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal, but is not bound by legal precedent (see sections 250(1) and 254). WCAT must make its decision on the merits and justice of the case, but, in so doing, must apply a policy of the Board's board of directors that is applicable in the case. Policy relevant to this appeal is primarily set out in the *Rehabilitation Services & Claims Manual*, *Volume 1* (RSCM) which is pre-Bill 49, *Workers Compensation Amendment Act 2002*.

Procedural Matters

The worker received advice and assistance from the workers' advisers office. An oral hearing was requested on the worker's behalf because the worker's credibility as to her marital status and living arrangements were in question. This initial request was denied and the appeal proceeded by way of written submissions. Although it is still open to me to hold an oral hearing, I find that I can render a decision based upon a review of the evidence and information filed without an oral hearing.

The notice of appeal had two hand written statements (dated March 5, 2003 and November 12, 2002) from the worker attached, along with a copy of a separation agreement dated August 23, 1989 (sent in twice). The appellant's spouse, from whom the appellant had indicated she is separated, was notified of this appeal and invited to participate. No response from him was received by WCAT. The appellant was provided with disclosure by the Board of her electronic claim file. In a fax received on October 7, 2003 from the workers' adviser it was indicated that no further submissions would be provided to us.

Reasons and Decision

Prior to January 1, 1994 section 2(2)(d) of the Act excluded spouses of employers from coverage. This section was repealed by the *Workers Compensation Amendment Act, 1993 (Bill 63)* which amended the Act effective January 1, 1994. Section 2(1) of the amended Act then stated that Part One applied to "all employers, as employers, and all workers in British Columbia, except employers or workers exempted by order of the Board". The Act makes reference to three categories: an employer, a worker and an independent operator. The evidence does not suggest that the appellant was an employer. Even if she was an employer she would no have coverage without personal optional protection coverage.

The appellant indicated on her application for compensation (confirmed on the employers' report of injury) that November 11, 2000, the day of injury, was her first day of work for her spouse. As previously mentioned, she indicated that she was separated from her spouse at the time of her accident. The worker also indicated that her spouse had been working out of town and that she had agreed to care for the animals on the ranch while he was away. She was to work from 8 am to 5 pm, Monday to Friday for 8 hours a day. She indicated that her earnings were to be $2000 per month. The information provided does not suggest the appellant was an independent operator. If the appellant were found to be an independent operator, this would also have resulted in no coverage because she had not requested personal optional protection coverage from the Board prior to the accident on November 11, 2000.

The Board has developed, through policy, another category (apart from independent operator and worker both of which are referred to in the Act) called a labour contractor. A labourer contractor (unless an independent operator) is deemed to be the worker of the individual who retained him/her if he/she is not registered at the time of the accident.

However, I find that I do not have to determine whether the appellant was an unregistered labour contractor rather than a worker because being deemed the worker of her spouse would still raise the spousal exemption issue.

At the time of the appellant's accident on November 11, 2000, Decision 60 of the former governors dated February 7, 1994 (10 WCR 175) constituted Board policy with respect to exemptions from automatic coverage as a "worker" under the Act. In Schedule "A" of this decision it stated:

> The governors of the Workers' Compensation Board of British Columbia make the following exemption orders, pursuant to section 2(1) of the *Workers Compensation Act*:
>
> ...2. Both spouses involved in unincorporated businesses are exempt where one or both own the business. "Spouse" includes common law and same sex spouses. The reasons for making this exemption order are set out in Appendix B of this Schedule.
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> [Reproduced as written]

Rather than restate Appendix A and B of Decision 60 I have attached them to this decision.

Assessment Operating Policy No. 20:10:20 (the relevant policy at the time of the accident on November 11, 2000) dated November/94 provided some elaboration on Decision #60. The policy did not define the word "spouse". It did not draw any distinction between separated and non-separated spouse. It did define common-law spouse to be people who are not married which suggests a spouse is someone who is legally married. The policy also defined same sex spouse.

There appear to be two main issues in this appeal: (a) At the time of the November 11, 2000 accident was the appellant living separate and apart from her spouse and (b) Does the reference to "spouse" in the Board's spousal exemption order include separated spouses? The appellant did not take issue with the factual finding that at the time of her accident, her spouse was the owner/proprietor of an unincorporated business. The employer's report of injury indicated the employer to be the appellant's spouse (by name and not by name of an incorporated entity). A Board barrister and solicitor in his February 21, 2001 opinion indicated that the appellant's spouse had been registered as a proprietor with the Board effective August 16, 2000. The appellant's spouse had obtained personal option protection for himself but not for anyone else. The appellant indicated to the client services representative that she had never proceeded to seek a divorce from her spouse. As previously mentioned she did provide a copy of a separation agreement made in 1989. The Board barrister and solicitor has indicated that it was unclear whether there was a court ordered separation. The appellant submits that though they were living in the same house at the time of the accident she was living separate and apart from her spouse.

Both the Review Board and the Board barrister and solicitor did not determine whether in fact the appellant was living separate and apart from her spouse at the time of the accident on November 11, 2000. It was recognized that the issue of whether the appellant was in fact separated from her spouse did not have to be resolved in order to address the issue of whether the appellant was exempted from coverage under the Act because of the Board's spousal exemption order. This is because both the Review Board and the Board barrister and solicitor found that the reference to "spouse" in the spousal exemption order included separated spouses.

I also find that it is not necessary to determine whether the appellant was separated from her spouse at the time of the accident on November 11, 2000 because I find that a viable interpretation of the Board's policy contained in Decision 60 is that the reference to "spouse" was intended to include separated spouses.

The word "spouse" is not exhaustively defined in Decision 60 but does include common law and same sex spouses. The word "spouse" is not defined by section 1 of the Act, the *Interpretation Act* R.S.B.C. 1996, c. 238 or Assessment Operating policy No. 20:10:20. The Concise Oxford Dictionary (sixth edition) defines the word "spouse" to mean husband or wife. As the Board barrister and solicitor has outlined in his February 21, 2001 opinion the same definition is contained in Black's Law Dictionary. He further cites the definition in the *Divorce Act* R.S.C. 1985, c.3 (either a man or a woman who are married to each other) and section 1 of the *Family Relations Act.* R.S.B.C. 1996, c. 128 which indicates a spouse includes someone who is married to another person and has been separated for less than two years. He states: "A review of Section 17 of the Workers Compensation Act, Section 98 of the Estate Administration Act R.S.B.C. 1996 c. 122 and the general law indicates that the term "spouse" generally includes separated spouses… In summary the law appears to be that the word "spouse" includes a spirited [he must mean separated] spouse unless the legislation specifically provides otherwise." However, I also observe that what I am doing is interpreting the governors' exemption order (which is policy) and not a statutory provision of the Act.

It could be argued that if the governors had intended to exclude separated spouses from the meaning of the word "spouse" they would have explicitly stated this (along with the meaning of separated for purposes of the exclusion) in the exemption order in Decision #60. Presumably, the governors were aware of the wording of some of the provisions of section 17 of the Act ("living separate and apart") and could have used such wording in this exemption order had they intended to exclude separate spouses from this order. It could also be argued that a worker should not be excluded from coverage under the Act unless specifically covered in an exemption order. Because the exemption order does not specifically refer to separated spouses (as it does common law and same sex spouses) it could be argued that they are not excluded.
However, there is a persuasive reason why I find that the word "spouse" was intended to cover both spouses and separated spouses. The rationale outlined in Appendix B for having a spousal exemption focuses on the need for predictability as to when an

unincorporated business run by one or both spouses has to be registered or when the earnings of a spouse should be included in the payroll of that business. This rationale for predictability supports the interpretation that the word "spouse" includes separated spouses. The Board barrister and solicitor also expressed the concern about what the test for a "separated spouse" would be and what would happen to coverage if subsequently spouses were no longer separated. The concept of separation would introduce a significant amount of uncertainty.

Although Appendix B focuses on the uncertainty in determining whether an employment relationship or a partnership exists (whether the spouse is a worker of another spouse or an independent operator) the rationale for the spousal exemption (like the one for domestic worker as outlined in Appendix A and referred to in Appendix B) exists so that there is an exemption process which provides predictability and avoids disputes. If an unincorporated business run by both spouses or one spouse had to determine whether or not spouses were separated or not (whatever that might mean for purposes of this exclusion) in order to determine whether they needed to seek an exclusion from the spousal exemption order this could lead to disputes and result in intrusion on the part of the Board to determine whether, in fact, spouses were separated.

Appendix A of Decision 60 states: "The line drawn by the exemption should make the Board's administration simpler, more effective and less intrusive." If I were to interpret the exemption order to exclude separated spouses, the intent as expressed by this quote from Appendix A (referred to in Appendix B) would not be met. Further item #1 (e) of Decision 60 states: "Since the W.C.B. is a tribunal charged with administering a statute, principles of good public administration should be applied." It would be simpler, more effective and less intrusive if the word "spouse" included separated spouses so that spouses involved in an unincorporated business are exempted where one or both own the business. It would then be up to them to contact the Assessment Department of the Board for a determination of whether the spouse is an independent operator in need of personal optional protection coverage or a worker who is excluded from coverage because of the spousal exemption (unless they made a request to the Board to be excluded from this general exemption order).

I find that the appellant at the time of the accident on November 11, 2000 was excluded from coverage under the Act because of the Board's spousal exemption order which includes separated spouses. No request had been made prior to this accident to exclude the appellant from the general spousal exemption order.

I note that the Board's barrister and solicitor in resolving the issue of whether the Board's spousal exemption order include separated spouses referred to and considered whether section 99 of the Act applied. Section 99 of the Act provided that an issue had to be resolved in accordance with that possibility which was favourable to the worker where there were disputed possibilities which were evenly balanced. It is not clear to me that this portion of section 99 (disputed possibilities option only) had any applicability to the issue of whether the Board's spousal exemption order (the exercise of a statutory

power) was intended to include separated spouses. This portion of section 99 appears to apply to the merits of a worker's claim and not to the resolution of whether a worker is exempted from coverage because of a Board order. Even if it were applicable, I would find, as did the Board barrister and solicitor, that the possibilities for and against this were not roughly equal. The rationale (predictability) for the spousal exemption outlined in Appendix B of Decision 60 (and as discussed above) supports a greater possibility that the spousal exemption order included separated spouses.

Conclusion

The appellant's appeal is denied. I confirm the February 7, 2003 Review Board findings for the reasons outlined above. The appellant was excluded from coverage under the Act by the Board's spousal exemption order (outlined in Decision #60 and Assessment Operating policy 20:10:20) at the time of her accident on November 11, 2000. I do not need to determine whether the appellant was, in fact, separated at the time of her accident because the Board's spousal exemption order included separated spouses.

James Sheppard
Vice Chair

JS/gwo

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