

**DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL**

**Introduction**

- [1] The worker died in a motor vehicle accident in November 2019 when his vehicle left the highway. WorkSafeBC (the Board) found the worker's death arose out of and in the course of his employment. By letter dated May 26, 2020 the Board advised the worker's widow the claim was accepted and she would receive dependent benefits for herself and their children.
- [2] A Board officer also advised the employer in separate May 26, 2020 letter that the claim was accepted. The officer found that the criteria for the exclusion of the claim from the employer's experience rating under section 247 of the *Workers Compensation Act* (Act) were not met. The officer advised the employer that the actual cost of the workplace fatality claims was not used in calculating an employer's experience rating. Instead, the five-year moving average of the cost of all fatal claims was used. To lessen the impact on an individual firm's rating, the average cost was then reduced according to established per claim limit rules.
- [3] The amount of the claim would be charged against the classification unit the employer belonged to, for rate setting purposes.
- [4] The employer sought a reconsideration of this decision. The employer's representative argued that the worker's death was solely due to serious and wilful misconduct, and therefore the employer was entitled to relief of claim costs in accordance with Board policy. In particular, the worker was using his cellphone at the time of the accident, and was not wearing his seatbelt appropriately.
- [5] A Board officer advised the employer in a June 15, 2020 decision letter that she would not reconsider the May 26, 2020 decision. The officer advised the employer that the worker had no pre-existing conditions, disease or illnesses that contributed to his accident. The claim did not meet any of the criteria in Board policy to provide the employer with an experience rating exclusion. As the worker did not receive any wage-loss benefits, the employer's reference to relief of claim costs was not applicable.
- [6] The employer sought a review of that decision. A review officer denied the employer's request in *Review Decision #R0266446*, dated November 27, 2020. Of note, the review officer found the Board officer had reconsidered the May 26, 2020 decision, because she had considered new information provided by the employer. The review officer found the employer was not entitled to an exclusion of claims costs for the worker's fatality. The review officer also found

that the issue of whether the worker's death was solely due to the serious and wilful misconduct was not before him to consider.

- [7] The employer now appeals that review decision to the Workers' Compensation Appeal Tribunal (WCAT). The employer seeks a finding the worker's death was solely due to serious and wilful misconduct. The employer also seeks a referral to the WCAT Chair on the basis the policy regarding the employer's entitlement to relief of costs in these circumstances is patently unreasonable.

### **Preliminary Issue**

- [8] The employer's representative argued the employer was entitled to a relief of a portion of the claim costs from its employer's experience rating assessment on the basis the worker's death was solely due to his serious and wilful misconduct. He argued that as the worker's dependants received survivors' benefit, which is akin to wage loss, the employer ought to receive a percentage of cost relief.
- [9] The employer's representative argued that policy C3-14.10 regarding provision of cost relief when a worker's injury was solely due to wilful and serious misconduct was arbitrary and patently unreasonable. The policy applied only if more than ten weeks of wage-loss benefits were paid. An employer would not receive any relief if the worker recovered or died prior to that time, despite the injury being solely due to the worker's serious and wilful disregard.
- [10] The review officer declined to consider the employer's entitlement to a relief of costs on the basis the Board had not performed an initial adjudication on the issue of whether the worker's death was solely due to his serious and wilful misconduct.
- [11] I do not concur with this finding. Although the Board officer did not expressly address this issue in her May 26, 2020 decision or the June 15, 2020 reconsideration letter, I find that the Board officer considered the issue of serious and wilful misconduct and it is implicit in the decision letter. I refer to a memo dated May 6, 2020, in which the Board officer considered the whether the death was compensable, and in particular, the question of whether the worker's death was solely due to his wilful and serious misconduct.
- [12] The Board officer considered the policy, in addition to the coroner's judgment of inquiry and autopsy reports.
- [13] In the memo the Board officer reasoned that even if the worker was using his cell phone while driving, the injury was not attributable solely to this misconduct, as the worker died as a result of the extensive crush damage to the cab of his vehicle, and the fact his seat belt was not properly worn.

- [14] The Board officer found that the employer was therefore not entitled to any relief of costs or exclusion under the experience rating because the criteria were not met. In my view, finding the criteria were not met is an express acknowledgement the officer considered whether the worker's death was solely due to serious and wilful misconduct, and found that as it was not, there was no further need to consider the issue.
- [15] The employer also expressly raised the issue of serious and wilful misconduct in the request for reconsideration, and the Board officer confirmed her prior decision.
- [16] Therefore, I disagree with the review officer and find this issue was implicitly addressed in the two decision letters and is properly before me to consider in this appeal.

**Issue(s)**

- [17] There are two issues arising from the review decision under appeal:
- 1) Was the worker's death solely a result of his serious and wilful misconduct?
  - 2) If so, should the employer be provided with relief of costs associated with the worker's fatal injury claim? Consideration of this issue raises the question of whether policies C3-14.10 and 115.30(6) are so patently unreasonable that they are not capable of being supported by the Act and regulations.

**Jurisdiction and Proceedings**

- [18] This appeal was filed with WCAT under section 288(1) of the Act. Section 303(2) of the Act requires WCAT to apply Board policy.
- [19] This appeal does not involve the compensation of a worker and therefore the standard of proof is the balance of probabilities.
- [20] The employer requested the appeal proceed by way of written submissions. This appeal raises issues of law and policy and interpretation of medical evidence that do not, in my view, require an oral hearing. I find that this appeal can be decided based on a review of the claim file, along with written submissions and new evidence.
- [21] A member of the Employers' Advisers' Office represented the employer. The worker's estate was not notified of the appeal, as this decision has no impact on the dependents' benefits.

### **Evidence, Reasons and Findings**

- [22] In order to consider the employer's request for a referral of the lawfulness of the policy to the WCAT Chair, I must first consider whether the gateway requirement that the death was solely due to the serious and wilful misconduct by the worker is met.
- [23] I have reviewed the claim file and submissions in their entirety. I find the November 25, 2019 accident was solely due to the worker's serious and wilful misconduct. The following is a summary of the relevant evidence that I relied on in coming to my decision.
- [24] At the time of the accident, the worker was in the course of his employment as a delivery driver, supplying retail outlets with food products. He had performed a delivery and left that location at 08:15 hours, and was returning to the employer's warehouse in an adjacent municipality. He was travelling on a provincial highway.
- [25] At approximately 09:30 hours, a motorist who had been following the worker's vehicle saw a dust cloud ahead, and came upon the truck over the embankment. The vehicle had rolled and the worker was trapped inside and unresponsive. The truck was resting on its roof and there was extensive crush damage to the cab.
- [26] The motorist called 911 and requested an ambulance at 09:35, which attended with police at 09:48. The worker was extricated but was deceased. The police observed the worker was not wearing his seatbelt correctly. When the worker's body was removed, his cellphone was found in his lap.
- [27] The police examined the worker's cell phone, and determined he had been engaged in a text conversation with someone just prior to the accident. There were several texts, and the worker's last text, sent at 09:27:44, was in response to a photographic image he had received.
- [28] The police noted there were no skid marks or tire tracks on the road surface, indicating the worker had travelled straight into the ditch after a curve in the road. Road conditions were good and not considered a factor in the accident. Weather was not a factor. The truck was new and well maintained. It was examined after the crash and no mechanical issues were identified.
- [29] A forensic pathologist conducted an autopsy of the worker's body and identified the cause of death as mechanical asphyxiation due to the worker's positioning within the crushed cab of the vehicle. The pathologist noted the worker had multiple blunt impact injuries, with lacerations and contusions to his face, arms and legs. His 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> right ribs were fractured. The pathologist noted that mechanical asphyxiation specifies that external pressure on the chest prevented the body from taking in oxygen. Her opinion was based on photos from the scene and a description of how the worker was positioned when he was found, wedged within the crushed cab of the truck, and the lack of other lethal findings.

- [30] The coroner noted in his judgement of inquiry that at the time of the accident the roadway was dry and the sky was cloudy but there was full light. The highway at the location of the accident had a left sweeping curve. When the worker's body was removed from the vehicle, police observed he was "not properly wearing a seat-belt restraint." The coroner concluded distracted driving was likely a contributing factor to the accident.
- [31] The worker's medical records confirmed he did not have any known health issues that would cause him to lose consciousness and leave the road.
- [32] On September 16, 2020, the employer enquired of the police whether the text conversation was with a co-worker or supervisor. The police officer confirmed that the conversation was not in any way work related or with anyone from the worker's employment.
- [33] In its submissions to WCAT, the employer provided a copy of its employee handbook for drivers, which stipulated; "Use of hand held cellular phones while driving is prohibited. When using a cellphone or other handheld device, it must be in a fixed position and mounted to the vehicle."
- [34] The employee handbook also required drivers to wear seatbelts in accordance with the law. The handbook also stipulated that as a commercial driver, workers were required to know, obey, and comply with the relevant laws.
- [35] Workplace injuries are governed by section 134(1) and 134(3) of the Act, with the caveat set out at subsection (2) which provides:
- (2) As an exception to subsection (1), if the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in the worker's death or serious or permanent disablement.
- [36] Policy C3-14.10 provides direction on injuries that occur in the course of employment due to a worker's serious and wilful misconduct.
- [37] The policy states in part that a worker who deliberately and intentionally violates known rules, regulations or laws engages in serious and wilful misconduct. It is a voluntary act by a worker with reckless disregard for the worker's own safety and which the worker should have recognized as having the potential to result in personal injury.
- [38] If a worker's misconduct is found to be serious and wilful, the second question to be considered is whether the injury was attributable solely to this misconduct. The word "solely" in this situation means that, without the worker's misconduct, the injury would not have resulted.
- [39] I refer to the following WCAT decisions on this subject, which are not binding on me but do provide adjudicative guidance.

[40] In noteworthy decision *WCAT-2008-00166* the panel found section 134(2)<sup>1</sup> of the Act, is an exception to the general rule that compensation is a no-fault system. If all cases were considered from the basis that there was some employment factor involved in the injury or death, the effect would be to render this section of the Act meaningless. The panel found that a broader approach was required. Therefore, the worker's actions did not remove them from the course of employment, nor did the fact they were in the course of employment mean the injury could not be solely due to the worker's actions. When considering whether an injury was "solely" attributable to serious and wilful misconduct, the degree of responsibility in producing the injury was relevant.

[41] I concur with this reasoning and adopt it as my own.

[42] In *WCAT-2007-00596* the panel offered a discussion of the difference between poor judgement, error, and serious and wilful misconduct. The panel noted:

Terence Ison, in his widely utilized textbook *Worker's Compensation in Canada* (2<sup>nd</sup> Edition), states at page 64:

Also "misconduct" must be something worse than inattention, negligence, imprudence, or error of judgment. Moreover, the conduct must be "willful". Hence the bar does not apply to something done impulsively on the spur of the moment.

[43] The panel went on to summarize a number of other WCAT decisions that considered this issue. He noted that the serious and wilful misconduct was generally found when a worker was engaged in a very significant departure from the norm expected in performing a work activity. It was not generally found in cases where the worker had been injured because of poor judgment, carelessness, or even negligence in performing a regular work activity.

[44] The panel found on page 8 of the decision regarding the term "wilful misconduct:"

While none of those terms is defined in the Act or policy, the Concise Oxford Dictionary, 9th edition, defines "wilful" as "intentional" or "deliberate". "Misconduct" is defined in the same source as "improper or unprofessional behaviour". I take it from that definition that a worker would have to have a clear intent to engage in improper behaviour, and that improper behaviour would have to be serious, before that aspect of section 5(3) would be met.

[45] In *WCAT-2015-02853* the panel summarized several WCAT decisions considering the question of whether a death or injury was solely due to serious and wilful misconduct. At paragraphs 39 to 42, the panel found that in the context of the Act, the term "serious" implied the misconduct was something grave, severe in its effect, weight or significant. It was appropriate to have

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<sup>1</sup> At that time numbered section 5(3) of the Act.

regard to the order of magnitude of the misconduct. The circumstances surrounding a worker's actions should be considered in their totality. If placed on a spectrum, the situations in which a worker habitually travels in a motor vehicle without a seatbelt is misconduct on a greater order of magnitude than a momentary breach. A worker's impulsive action was not equivalent to an ongoing course of conduct that represented flagrant disregard for safety.

- [46] I concur with this reasoning and adopt it as my own.
- [47] The employer's representative submitted that the worker's death was solely due to his serious and wilful misconduct. The evidence supported a conclusion the worker was engaged in a series of texts shortly before his vehicle left the roadway. The worker was not wearing his seatbelt properly, and this likely contributed to his death.
- [48] I place weight on the employer's arguments. The worker drove a 5-tonne truck and delivered his products. I consider it reasonable to consider him a professional driver. His employer's handbook stipulated that he was to obey the law regarding rules of the road. This would include abiding by speed limits, not drinking and driving, and not texting and driving.
- [49] The law regarding texting and driving is well publicised in this province. It is also the subject of regular public education in the media and enforcement campaigns on the roads. In addition, using a cellphone was expressly forbidden by company policy unless in a hands-free capacity.
- [50] I find that the worker's decision to engage in a text conversation while he was driving was serious and wilful misconduct. The worker was undoubtedly aware that texting while driving is a breach of the distracted driving provisions in the *Motor Vehicle Act*, as well as the safety policies set out in the employer's handbook.
- [51] Given the phone was located in the worker's lap after the accident, I find he was not using it in a hands-free system, where the phone is attached to a holding device on the dash, for example.
- [52] The evidence does not indicate a single text message came in, or that the worker glanced at his phone for a moment. This would arguably be a brief lapse in attention, an error in judgement or inattention to the roadway.
- [53] The vehicle was in good mechanical repair, road conditions were good, and there were no skid marks on the roadway. The accident was discovered almost immediately after it happened by a motorist following the worker's truck on the highway.
- [54] The crushing of the cab that resulted in the worker's death was a direct result of the worker engaging in distracted driving, and the truck leaving the road and rolling over. The worker's cause of death was mechanical asphyxiation. It is unclear what role his failure to properly wear a seatbelt played in his death.

- [55] No other causative factors had been identified for the November 25, 2019 accident, and it would be speculative to conclude other factors contributed to it.
- [56] If the worker had not engaged in serious and wilful misconduct by texting while driving, and by wearing his seatbelt improperly, his risk of injury would have been mitigated.
- [57] The evidence supports a conclusion that the worker was engaged in a prolonged and intentional safety breach by engaging in a text conversation. Given the safety implications for the worker and other drivers when he was distracted while operating a 5-tonne truck on a provincial highway, I consider this to be intentional. I find this to be serious and wilful misconduct by the worker.
- [58] I also refer to *WCAT-2011-00401* in which the panel considered at length the interpretation of the term “solely” when considering whether a worker’s injury or death was caused by the misconduct.
- [59] The panel found this term implies that without the worker’s misconduct, the injury would not have resulted and the actions of another person were not a material cause in the occurrence of the injury. In that matter, although the worker was driving in an unsafe fashion, namely following the vehicle ahead too closely, a driver in a vehicle that was two ahead of the worker’s caused the accident by suddenly stopping. A chain reaction of collisions ensued. The panel found that but for the actions of the first driver; the worker would not have been injured, despite his own misconduct.
- [60] I concur with this reasoning. The evidence must show that there was no external factor that contributed to the workplace event.
- [61] In the present matter, the worker made a conscious decision to engage in a text conversation. It is not known who initiated the conversation. It is known that the worker and this person exchanged a series of texts, the last being the worker’s response to a photograph, approximately two minutes prior to the discovery of his vehicle off the road.
- [62] The worker could have chosen not to engage in the conversation, or disengaged from it at any time, but he chose to continue sending and receiving messages. His is the last message that was sent. In my view, the involvement of the other person in this matter does not reduce the worker’s responsibility to cease his own wilful misconduct and drive safely. The worker instead freely chose to engage in unsafe driving practices.
- [63] I find the evidence in the current matter supports a finding that the motor vehicle accident was solely due to the worker’s serious and wilful misconduct.
- [64] Without the worker’s action of driving in an unsafe manner, the accident would not have occurred. Weather and road conditions were not a factor, nor was there any indication the

worker swerved or braked suddenly to avoid an animal, for example. The worker appeared to have missed the curve in the roadway because of distraction.

- [65] The pathologist who conducted the autopsy found the cause of death was mechanical asphyxiation due to the manner the worker was suspended in the vehicle after the collision. Although the worker sustained rib fractures and contusions, none of the injuries were sufficiently traumatic to result in death, individually or in combination. The pathologist did not observe any natural disease process or causes for the worker to leave the road, such as a stroke or heart event. Toxicology results were negative, confirming drugs or alcohol did not impair the worker at the time of the accident.
- [66] The Board officer found that as the cause of death was mechanical asphyxiation, the worker's death did not result from his serious and wilful misconduct. I do not concur. The truck would not have left the roadway and rolled, crushing the vehicle's cab and holding the worker upside down, if he had been driving in a safe manner. But for the worker's actions in texting while driving, resulting in distraction, his vehicle would likely not have left the roadway. No other reason for the accident has been identified based on the investigation by the coroner and police.
- [67] In addition, wearing a seatbelt is a legal requirement when operating a motor vehicle. The worker was driving on a provincial highway at the time of his death. The coroner stated the police observed the worker "was not properly wearing a seat-belt restraint." I surmise either the worker was not wearing the seatbelt at all, or he had engaged only the lap portion of the seatbelt, but not the shoulder strap.
- [68] If he was not wearing the seatbelt at all, this was a deliberate and wilful act of the worker, in violation of known motor vehicle laws and the employer's policy. It was not a momentary lapse or error in judgement, but a decisive action on his part that he would have known was unsafe. If he was wearing the seatbelt incorrectly, the worker would have been aware that doing so could reduce the amount of protection he was provided in the event of an accident.
- [69] Given the positioning of the worker in the crushed cab and his inadequate use of the seatbelt contributed to his death, I find that this was the second instance of serious and wilful misconduct the worker engaged in. The worker was solely responsible for this act. The combination of distracted driving and improper seatbelt use were two instances of serious and wilful misconduct, and they were solely responsible for the worker's death, in combination or individually.
- [70] I find in the employer's favour on this issue.

*Are Policies C3-14.10 and 115.30 Patently Unreasonable?*

- [71] I now turn to consider whether the employer is entitled to a relief of costs. As part of that consideration I must consider whether the relevant policies are patently unreasonable.

- [72] I found that the worker's death did arise solely due to his serious and wilful misconduct. Given the worker died at the time of the accident, it follows that the ten-week qualification period required in policy C3-14.10 would prevent any relief of costs.
- [73] The employer's representative submitted that policy C3-14.10 at item D was patently unreasonable. The policy was arbitrary because it provided some employers with cost relief but denied it to others for claims accepted under section 134(2) of the Act.
- [74] The employer's representative argued that tying relief of costs to a period of wage-loss benefits was arbitrary and there was no sound justification in the policy for the difference between a worker who died after 20 weeks compared to a worker who succumbed to injury immediately.
- [75] In either situation, the death resulted solely from the actions of the worker. The employer remained without involvement in the worker's actions that caused the injury, and the employer did not have any control over the resulting outcome. The employer's representative submitted this was unfair and likely not the intent of the legislature or the board of directors.
- [76] Section 304 of the Act provides that:
- The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by this Act and the regulations under this Act.
- [77] The meaning of "patently unreasonable" has been discussed in several decisions of the former WCAT Chairs and it is not necessary for me to repeat that analysis here. Where a policy is not supportable by a rational interpretation of the Act, the policy will be patently unreasonable.<sup>2</sup>
- [78] The British Columbia workers' compensation system is funded like an insurance scheme. The basic framework is set out in Part 5 of the Act, Accident Fund and Employer Assessment. In summary, the Board assesses contributions from employers, and these contributions are paid into the accident fund, which in turn funds the whole of the Board's operations, including the cost of compensation claims.
- [79] Section 239(2) of the Act provides that the Board must manage the fund with a view to the best interests of the workers' compensation system.
- [80] The Act establishes that the size of an employer's assessments depends mainly on three factors: the size of the insured loss, risk, and fairness. This is captured by the employer's payroll, a sub classification and experience rating system, and specific sections of the Act that protect employers from the full effect of disasters,<sup>3</sup> assigning financial liability to employers who

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<sup>2</sup> See *Glover v. British Columbia (Workers' Compensation Board)*, 2007 BCSC 1878 at paragraph 56.

<sup>3</sup> section 240(1)(c) of the Act

engage in serious misconduct,<sup>4</sup> and minimizing the disincentive to hire workers with pre-existing conditions.<sup>5</sup>

- [81] The system contains elements of both individual and collective responsibility, and strikes a balance between pure collective responsibility and pure self-insurance. For this reason, it is sometimes referred to as a system of modified collective liability.<sup>6</sup>
- [82] Section 244 of the Act sets out a system of classifications, and section 247(2)(b) provides that the Board may adopt a system of experience rating regarding industries or plants relative to the hazard or cost of compensation. It is the Board's long-standing practice to use an experience rating system consistent with the best interests of the workers' compensation system, as referenced in section 239(2). The policies concerning employer assessments are contained in the *Assessment Manual* and the numbering system begins with "AP."
- [83] Policy AP5-240/241-1 provides a description of the modified collective liability system that divides employers into self-sufficient groups based on similar cost rates.
- [84] In summary, to establish an employer's assessment amount, differentiation between groups of employers is made through rate groups, and further differentiation between employers within a rate group is made through experience ratings.
- [85] Policy AP5-247-1 sets out some of the main features of the experience rating program. Among these is the proviso that the "cost used for fatal claims is the five-year moving Board-wide average rather than the actual cost of each claim."
- [86] Further detail on how the employer's experience rating is calculated is set out in policy AP5-247-2 which provides that some types of claims costs are excluded from consideration, as detailed in policy 115.30, contained at Chapter 17 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).
- [87] As an aside, I note that it is not clear why the Board has placed an entire chapter of policy that pertains to assessments in the RSCM II, which pertains to the compensation of workers. It is not necessary for me to resolve this question.

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<sup>4</sup> sections 249 and 251 of the Act

<sup>5</sup> section 240(1)(d) of the Act

<sup>6</sup> For examples, see policy AP5-240/241-1; *Western Stevedoring Co. Ltd. v. W.C.B.*, 2005 BCSC 1650; and *WCAT-2005-01851*.

[88] Nevertheless, Chapter 17, Charging of Claims Costs, begins with policy 113.00, Introduction, which reads in part:

The general practice followed by the Board is that the cost of any compensation paid out on a claim is charged to the class or subclass of employers of which the worker's employer is a member. These costs are not paid directly by the employer. Rather, the employer will, through the assessment rate, pay a proportion of the total costs incurred on all claims made by employees of all the employers in the subclass. The proportion paid is the proportion which the employer's payroll bears to the total payrolls of all employers in the subclass. This may be adjusted through a system of experience rated assessments.

...

Generally speaking, whether or not an employer was at fault is not a material factor when determining how the costs of a claim are to be charged. The general practice set out above applies both when the employer's negligence or misconduct caused an injury and when the injury was due to circumstances beyond the employer's control.

There are certain provisions in the Act which result in exceptions to the above rule. An individual employer or the class or subclass may be relieved of the costs of compensation incurred on a particular claim. Alternatively, an individual employer may be charged with costs additional to the employer's ordinary liability as a member of a class or subclass.

[89] Exclusions from the general rule are listed in policy 115.30, Experience Rating Cost Exclusions, as follows:

As a general rule, all acceptable claims coded to a particular employer are counted for experience rating purposes. It makes no difference whether the injury was or was not the employer's fault. There are, however, some types of claim costs which are excluded from consideration. These are:

1. Costs recovered by way of a third party action (see policy item #111.25)<sup>7</sup>.
2. Investigation and/or compensation costs paid out prior to the disallow of a claim or reversal of a decision by the Board, or the Workers' Compensation Appeal Tribunal (see policy item #113.10).
3. Costs transferred to the rate group of another employer under section 249 [on the grounds of fault] (see policy item #114.10).

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<sup>7</sup> Comments in round brackets appear in the policy; those in square brackets have been added by the writer for the sake of clarity.

4. Costs assigned to the funds created by section 240(1)(c) and (d) (see policy item #114.30, and policy item #114.40).
5. Occupational disease claims which on average require exposure for, or involve latency periods of, two or more years before manifesting into a disability. The diseases presently excluded on this ground are:
  - Non-traumatic hearing loss, excluding hearing loss resulting from other injuries
  - Silicosis
  - Asbestosis
  - Other diagnosed pneumoconioses, for example, anthracosis and siderosis
  - Pneumoconioses not specifically diagnosed
  - Heart disease
  - Cancer
  - Hand-arm vibration syndrome, vinyl chloride induced Raynaud's phenomenon, disablement from vibrations  
(see policy item #113.20)
6. Until September 27, 2002, costs after 13 weeks where section 134(2) applies (see Item C3-14.10). Effective September 28, 2002, costs after 10 weeks where section 134(2) applies (see Item C3-14.10).
7. Costs from accidents substantially due to personal illness, e.g. epilepsy (see Item C3-16.00).
8. Injuries covered by Items C11-88.10, C11-88.40, and C11-88.50 [relating to vocational rehabilitation programs].
9. The situations covered by policy item #115.31 [harm resulting from treatment and Board-sponsored programs] and policy item #115.32 [claims involving both permanent disability and fatality]....
10. The situation covered by policy item #115.33 [claims involving subsequent non-compensable incidents].
11. The costs of certain compensable consequences that occur at a place, or en route to or from a place, of treatment, surgery, or Board-related assessment, as set out in policy item #115.34.

[90] These exclusions are arguably related to fairness and risk and are consistent with factors set out in Part 5 of the Act. The exclusions capture situations where there is a long latency period,

such as cancer or silicosis, or when a worker may have had several employers at which the exposure occurred. The employer does not have the ability to ensure safety and reduce its risk when a worker is travelling to treatment or in participating in vocational rehabilitation with a different employer. Protecting employers from the risk of claim costs associated with an injury largely caused by a pre-existing condition promotes fairness.

- [91] Of relevance to this appeal, item 6 serves to protect an employer from the full effect of a claim for serious injury resulting solely from a worker's serious and willful misconduct. Such misconduct may be difficult or impossible for an employer to control, so including the costs associated with such injuries in the calculation of an employer's experience rating could seem unfair. Also, such misconduct may be extraneous to the degree of risk which is truly inherent to the nature of employer's business, or the manner in which the employer carries on that business.
- [92] Item 6 provides that ten weeks of costs are still chargeable in such circumstances. Since the fundamental revision of the Act in 2002, ten weeks has served as the "initial payment period" during which the short-term wage rate applies.
- [93] Of interest, until 1986, the initial or short-term payment period was for 13 weeks, at which time the period was reduced to eight weeks. The list of exclusions was added to policy 115.30 in February 1993, and item 6 cited 13 weeks. Prior to that, the list was contained in the Assessment Manual. If the intention was to have the period of costs equal to the period of the short-term wage rate, it is not clear why the Board chose to leave policy 115.30(6) at 13 weeks rather than eight weeks. The item simply refers to "costs" and not "wage loss benefits," so a rationale for the references to ten weeks and 13 weeks appears to be a matter of conjecture. The failure to change policy 115.30 to from 13 to eight weeks could simply have been an oversight.
- [94] It is notable that the ten-week minimum period also appears to coincide with the first criteria for relief of claim costs to be applied under item 115.30(4), which pertains to relief of claim costs for temporary disability when a worker has a pre-existing condition, disease or disability that has enhanced the compensable injury. That is part of the criteria set out in policy 114.30 of the RSCM II regarding these situations.
- [95] Item 6 also refers the reader to policy C3-14.10, which is located in the RSCM II at Chapter 3, Compensation for Personal Injury. The anomaly regarding provisions concerning an assessment issue being contained in this manual, and in a chapter pertaining to personal injury adjudication is again noted.
- [96] Policy C3-14.10, Serious and Wilful misconduct, provides in part at item C:

If a worker's injury that was attributable solely to the worker's serious and wilful misconduct did result in death or serious or permanent disablement, it is

compensable, and the employer may be eligible to have **some of the costs of the wage-loss benefits** excluded from its experience rating.

[97] It goes on to state at item D., Employer's Experience Rating:

Where wage-loss benefits were paid between January 1, 1994 and September 27, 2002 on a claim where the injury is attributable solely to the serious and wilful misconduct of the worker, but resulted in **death or serious permanent disablement**, the cost of compensation paid after the first 13 weeks of wage-loss benefits is excluded from the employer's experience rating.

Where wage-loss benefits are paid on or after September 28, 2002 on a claim where the injury is attributable solely to the serious and wilful misconduct of the worker, but resulted in **death or serious permanent disablement**, the cost of compensation paid after the first 10 weeks of wage-loss benefits is excluded from the employer's experience rating.

If wage-loss benefits were not paid because the claim that was attributable solely to the serious and wilful misconduct of the worker resulted in **immediate death**, no costs are excluded from the employer's experience rating.

[emphasis added]

[98] Considering only the currently applicable section of the policy, Section C and D could be read in two ways in relation to fatal cases:

- Once ten weeks of wage-loss benefits are paid, all further costs are excluded, regardless of type; however, where death is immediate, no costs are excluded.
- Once ten weeks of wage-loss benefits have been paid, all further wage-loss benefits are excluded; where death is immediate, there are no wage-loss benefits to exclude.

[99] I recognize that in the present case, either reading indicates that there is no cost relief but have considered the effect of these provisions in other scenarios for determining the intention and validity of the policy. The policy is silent on situations where a worker is seriously injured but does not die immediately, but dies before ten weeks of wage-loss benefits are paid, for example.

[100] As set out in policy AP5-247-1, an employer is assessed an average cost rather than the actual cost for a fatality. This cost would reflect survivor benefits, funeral benefits, in addition to any medical treatment and wage loss prior to the worker's death. It is therefore unclear why the serious and wilful misconduct policy references only "wage-loss benefits."

- [101] Given the cost averaging in policy AP5-247-1 applies only to fatal claims, but policy C3-14.10 applies to all claims solely due to serious and wilful misconduct, there does not appear to be an obvious choice regarding which provision should be determinative in assessing the nature of the cost relief.
- [102] It is worth reiterating that under this C3-14.10, a claim is not accepted for compensation unless the worker dies or experiences serious or permanent injury. A minor injury of less than ten weeks of temporary disability would not be accepted and the employer would not be assessed any claim costs.
- [103] Item C of policy C3-14.10 describes a “serious” injury as implying the physical, not the economic sense. A worker with a sprain injury may lose only two or three weeks of wages. This may not be a serious disablement, although it may be a serious financial problem for the worker. An injury may initially appear minor, but results in a prolonged disability and would therefore be considered serious.
- [104] At item D, the policy is silent on what constitutes a “serious permanent disablement.” Arguably, a worker may have a disability that results in more than ten weeks of temporary disability (wage-loss) benefits, but does not ultimately have a serious permanent disablement. The wording of the policy implies relief of costs would not be applicable in that circumstance.
- [105] Such an interpretation does not explain why the Board chose to specify that immediate fatalities are excluded from cost relief, rather than simply state that all cases entailing less than ten weeks of wage loss are excluded.
- [106] The wording at item D is also inconsistent with that of section 134(2) of the Act, which stipulates that if the injury is attributable solely to the worker’s serious and wilful misconduct, compensation is not payable unless the injury results in the worker’s “death or serious or permanent disablement.”
- [107] By limiting cost relief to situations where the worker either dies or has a serious permanent disability, policy C3-14.10 at item D further limits the instances under which an employer may receive relief of costs. The wording in the policy is internally inconsistent, as it is more expansive at item C but restrictive in item D. Item D does not capture all the scenarios described in the Act, and thus there is further ambiguity between the policy and the Act.
- [108] In addition, the reference at item C that “the employer may be eligible to have some of the costs of the wage-loss benefits excluded” from the experience rating is the only instance in the policies regarding rating exclusions and cost relief specifies a particular form of benefits. Elsewhere the policies regarding relief of costs reference only “costs” or “claim costs” which are more inclusive terms and would arguably reflect health care benefits, permanent as well as temporary benefits, vocational rehabilitation expenses, and the like.

- [109] As the policy does allow for relief of costs if a worker were to succumb to injuries after the ten-week mark, I presume the intention, although not clearly worded, is to relieve the employer of claim costs as stipulated by policy AP5-247-1, not only wage-loss benefits.
- [110] Policy C3-14.10 has been in effect since 2010. Prior to 2010, the compensation policy on serious and wilful misconduct was policy 16.60. That policy had the same title and general subject matter as the current policy, but in addressing costs its wording mirrored that of policy 115.30 at item 6. That wording references the cost of compensation paid “after the first 10 weeks of disability.” It could be argued this was a more generic statement intending to reflect temporary disability or wage-loss benefits. There was no mention of relief for fatal claims.
- [111] Thus, the change in language at C3-14.10 regarding costs was clearly deliberate, and represents a conscious choice by the board of directors of the Board to narrow the scope of cost relief in cases of serious and wilful misconduct. No rationale for this limitation could be identified on the Board’s website materials, such as in discussion papers or stakeholder feedback related to the updates of Chapter 3.
- [112] Accordingly, it appears that the most that can be said with certainty about the *prima facie* effects of policy C3-14.10 is that:
- In cases where more than ten weeks of wage-loss benefits are paid, some or all subsequent claims costs are excluded; and
  - Where death is immediate, or within less than ten weeks, no costs are excluded.
- [113] The net effect is that in cases where the injuries are due solely to the serious and wilful misconduct of the worker, and the worker suffers “death or serious permanent disability,” employers are treated differently for experience rating/relief of costs purposes based on the duration of wage-loss benefits paid.
- [114] This differential treatment will occur regardless of the amount of time the worker was temporarily disabled, the type or amount of any other benefits paid, or the overall cost of the claim.
- [115] Section 239(2) of the Act requires that the Board manage the accident fund with a view to the best interests of the workers’ compensation system. These interests include fairness and risk assessment, as well as providing an incentive to employers to promote workplace safety, and removing a disincentive to employers to hire workers with pre-existing conditions.
- [116] Treating employers differently based on whether the cost of one class of benefits paid on a section 134(2) claim exceeds a ten-week threshold, without regard to the overall cost of the claim, does not appear to serve any of these purposes, or any other purposes connected to the

best interests of the workers' compensation system. Such differential treatment appears to be entirely arbitrary.

- [117] I find that these portions of policy C3-14.10 are patently unreasonable and should not be applied.
- [118] The various instances listed in policy 115.30 reflect a number of circumstances where the Board considers it fair to alleviate the employer's experience rating of the claim costs. There is no minimum amount of compensation payable prior to the employer being eligible for relief of costs under those claims, with the exception of item 4.
- [119] It appears the ten-week limitation at 115.30(6) and in policy C3-14.10 mimics policy 114.40, Enhancement of Disability by Reason of Pre-Existing Disease, Condition or Disability, which pertains to relief of costs for temporary disability. Relief of costs in these situations is facilitated by the Board through the creation of a special fund, in accordance with section 240(1)(c) and (d) of the Act.
- [120] Presumably, the ten-week limitation reflects the norm for most temporary disabilities, which the Board recognizes through its short-term wage rate. After this mark, workers remain on temporary disability benefits, but at a wage rate that reflects the worker's pre-injury earnings in the longer term.
- [121] Under policy 114.40, the employer is relieved of the costs associated with the enhanced or prolonged disability beyond the expected norm for a relatively simple injury. The employer is rarely relieved of all costs on the claim, because the employment duties played a role in the injury. Therefore, the employer bears some but not all responsibility for the injury or occupational disease.
- [122] This is consistent with the intent of section 239(2) of the Act and the ER system, which relies in part on fairness to the employers.
- [123] As noted above, section 134(2) of the Act applies only to cases where the injury is serious, permanent or fatal, and these claims are rare. The ten-week threshold would rarely be exercised to exclude an employer from costs.
- [124] Nonetheless, since section 134(2) applies only when the injury is attributable solely due to the worker's serious and willful misconduct, why should the employer's experience rating be impacted by the claim at all?
- [125] A claim accepted under section 134(2) of the Act by wording of the statute involves death, serious injury, or permanent impairment that is solely due to the worker's serious and willful misconduct. The employer's only connection in these circumstances is that the worker was in the course of the employment.

- [126] There does not appear to be any rational basis in the policy for the employer to be subjected to a ten-week hurdle prior to being relieved of costs for a claim involving immediate death that was outside of its control.
- [127] I find therefore that 115.30(6) is therefore also arbitrary and cannot be supported by the Act and should not be applied. I must therefore refer this issue to the WCAT Chair to complete the remainder of the process as set out in section 304 of the Act.

**Conclusion**

- [128] For the reasons set out above, I find the impugned portions of policy C3-14.10 and 115.30(6) of the RSCM II are patently unreasonable and I cannot apply them.
- [129] In the event of a claim that falls under section 134(2) of the Act, the exclusion rating policies afford some employers with cost relief but not others in situations where the employer equally has no ability to prevent the worker's death, serious injury, or permanent impairment. The policies impose a minimum period of eligibility for cost relief that is not contained in any of the other grounds for exclusion from the experience rating, with the unique exception of policy 114.40 pertaining to workers with pre-existing diseases, conditions and disabilities. The impugned policies are arbitrary and not consistent with the Act.
- [130] I must therefore refer this issue to the WCAT Chair to complete the remainder of the process as set out in section 304(2) of the Act. In accordance with item 8.4.3 of the WCAT *Manual of Practice and Procedure* (MRPP) the appeal is now suspended. The process for WCAT's actions, notifications and further submissions is set out at item 10.1 of the MRPP.

Sherryl Yeager  
Vice Chair