Noteworthy Decision Summary

Decision: WCAT-2003-01800-AD **Panel**: Jill Callan, Chair **Decision Date**: July 30, 2003

Lawfulness of Policy - Sections 33(1) and 251 of the Workers Compensation Act - Item #67.21 of the Rehabilitation Services and Claims Manual, Volume I

Pursuant to section 251(2) of the *Workers Compensation Act* (Act) a vice chair determined that item #67.21 of the *Rehabilitation Claims and Services Manual, Volume 1* (RSCM I) was patently unreasonable and should not be applied in the adjudication of the worker's appeal. Section 33(1) of the Act allows for the use of class averages for setting wage rates in certain cases where it would be inequitable to base the wage rate on historical earnings. Item #67.21 of the RSCM I provides that no change is "usually" made to a wage rate if the class average is equal to or greater than the worker's date of injury earnings. However, the wage rate "may" be reduced if the class average is lower. The vice chair concluded that item #67.21 fettered the discretion of Board officers granted by section 33(1) of the Act as it provided for the use of class averages only when it would result in a decrease in the worker's wage rate.

Under section 251(1) of the Act 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 the Act and its regulations. The chair held that item #67.21 of the RSCM did not set out an inflexible rule that must be applied in every case. The use of the words "usually" and "may" in the policy allowed Board officers the discretion to increase the wage rate to the class average in appropriate cases and leave the wage rate at the date of injury earnings rate in situations in which the class average would result in a lower wage rate. Pursuant to section 251(4) the chair determined that the policy should be applied as it did not involve an unlawful fettering of discretion and was not patently unreasonable.

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19 WCR 179, #2003-01800, Lawfulness of Policy - Use of Class Average

WCAT Decision Number: **WCAT-2003-01800-AD**
WCAT Decision Date: **July 30, 2003**
Panel: **Jill Callan, Chair**

Introduction

This is a determination under section 251(3) of the *Workers Compensation Act* (the Act). Pursuant to section 251(2) of the Act, a vice chair has determined that item #67.21 of the *Rehabilitation Services & Claims Manual, Volume 1* (RSCM, Volume 1) should not be applied in the adjudication of the worker's appeal. In a memo to me dated May 27, 2003, the vice chair has concluded that item #67.21 is patently unreasonable because it conflicts with section 33(1) of the Act as it existed prior to the changes that flowed from the *Workers Compensation Amendment Act, 2002* (Bill 49). Pursuant to section 251(3) of the Act, I am required to determine whether item #67.21 should be applied in deciding the worker's appeal.

The worker is represented by counsel. The vice chair's May 27, 2003 memo has been disclosed to counsel and he has been invited to make submissions. He responded that the worker has not instructed him to make a submission on the lawfulness of item #67.21.

Although invited to do so, the employer is not participating in the worker's appeal.

Issue(s)

The issue is whether item #67.21 of the RSCM, Volume 1 is so patently unreasonable that it is not capable of being supported by the Act.

Background

The appeal before the WCAT vice chair is from findings of the Workers' Compensation Review Board (the Review Board) dated October 31, 2002. The issue before the Review Board panel was whether the worker is entitled to an increase to his permanent partial disability pension. The Review Board panel denied the worker's appeal.

The worker appealed the Review Board findings to the Appeal Division and specifically took issue with the pension wage rate. Counsel's position is that the worker's wage rate should be based on a class average for full-time labourers because the worker was a 28-year-old new immigrant at the time of the injury.

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On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As the appeal had not been considered by an Appeal Division panel before that date, it will be decided as a WCAT appeal in accordance with section 39 of Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63).

Section 33(1) of the former Act provides:

> 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.**
>
> [emphasis added]

Item #67.21 of the RSCM, Volume 1 is entitled "Class Averages/New Entrants to Labour Force". It reproduces the words I have emphasized in section 33(1) and goes on to state:

> 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 rate 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 <u>usually</u> made in the compensation rate. If the class average is lower, the compensation <u>may</u> be reduced accordingly.**

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> A class average may occasionally be used at the outset of a claim where the particular circumstances show it to be the best representation of the claimant's loss.
>
> When considering using a class average, the Claims Adjudicator should also have regard to other information that might warrant a variation from that average. For example, the Adjudicator should consider the last grade completed in school, any special training, any plans for future education, on what date the individual arrived in the province and what prior education, skills, occupation, etc. the worker had in another province or country.
>
> [emphasis added]

The policy goes on to set out the method the Workers' Compensation Board (the Board) employs in computing class averages. It concludes by stating:

> A number of [class] averages are available, one involving all workers in the class and others involving restricted categories of workers in the class. The one generally used is the average for all workers in the class.

The vice chair's May 27, 2003 memo

In his memo, the vice chair stated, in part:

> 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.**
>
> [emphasis added]

He also referred to the following passage from *Appeal Division Decision #00-0761* (available online at: http://www.worksafebc.com/appeal_decisions/appealsearch/advancesearch.asp):

> 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.

This passage has been referenced with approval in *Appeal Division Decisions #00-0989* and *#2001-2064*.

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Standard of review

Section 251(1) of the Act provides:

> 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 the Act and its regulations.

Section 42 of Part 2 of Bill 63 provides, for the purposes of appeals adjudicated under section 39(2), policies of the governors (such as item #67.21) are to be treated as policies of the board of directors. Accordingly, the question for determination is whether item #67.21 is patently unreasonable in light of section 33(1) of the former Act.

The standard of patent unreasonableness is frequently used by the courts in considering applications for judicial review of decisions of administrative tribunals. Accordingly, the Legislature's choice of the patent unreasonableness standard means that the test in section 251(1) can be interpreted through reference to judgments that have considered that standard.

In *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada noted that the three standards of review for judicial review of administrative decisions are patent unreasonableness, reasonableness *simpliciter*, and correctness. These standards have come to reflect the degree of deference that a court is granting to the administrative tribunal. The least degree of deference is granted where the correctness standard is applied. The standard of patent unreasonableness involves a significant degree of deference.

For instance, in *Canada (A.G.)* v. *Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 964, the Court explained that under the patently unreasonable test a court should only interfere with the decisions of a tribunal if the decision is "clearly irrational". Cory J., writing for the majority, stated:

> It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational … . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it

> cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.
> …
>
> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

In *Law Society of New Brunswick v. Ryan*, (2003), 223 D.L.R. (4th) 577 (S.C.C.) at 596, Iacobucci J. made the following comments concerning the standard of patent unreasonableness:

> … a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective… A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

Analysis

In order to consider the use of class averages under section 33(1) and item #67.21, it is important to first consider the general framework for setting wage rates under the Act and policies. Throughout this analysis I will be referring to the policies in RSCM, Volume 1 as that is the policy scheme relevant to the issue before me.

Item #66.00 (Wage-Loss Rates on New Claims) provides that, except in certain circumstances, "wage-loss payments made at the outset of a claim are based on the worker's rate of pay at the date of injury up to the maximum wage rate permitted by the Act". It also sets out that this wage rate continues until the wage rate is reviewed at the 8-week rate review.

Pursuant to item #67.20 (8-Week Rate Review), when wage loss benefits based on the worker's date of injury rate of pay have continued for eight weeks, a Board officer conducts a review which "consists of an enquiry and determination of what earnings rate best represents the long-term earnings loss suffered by the worker by reason of the injury". Where a permanent disability is anticipated, the Board officer is also required to consult with an officer in Disability Awards (in order to provide consistency between the wage rate set for wage-loss benefits and that set for Disability Awards purposes). The policy provides that the worker's earnings in the 1-year period prior to the injury are "normally" used to set the wage rate for wage loss and pension purposes. However, the policy also provides other options, such as use of the 3-year or 5-year periods of pre-injury earnings, if various circumstances exist. The fundamental principle derived from section 33(1) is that the Board must use the approach "as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury".

At the time of the 8-week review, a worker's wage rate may remain the same, decrease or increase. If the worker has been in the same job with the same employer without any salary increases over the previous year and he or she has worked steadily, the wage rate will likely remain the same. If, for some reason, the worker was making less money on the date of injury than he or she had earned prior to the injury, the wage rate may increase. Finally, if the worker's average earnings for the period prior to the injury are less than the date of injury earnings, the wage rate may decrease. This often happens in a situation in which the worker works in an industry in which there are frequent layoffs. These examples are not exhaustive but illustrate the potential impact of the 8-week review.

Item #68.00 (Permanent Disability Pensions) provides that the wage rate established at the 8-week point is normally used for pension purposes. However, "a different rate can be used if there are valid reasons for this".

Given the framework for setting wage rates, if the use of class averages were not permitted by section 33(1) and item #67.21, immigrants and new entrants to the work force could be significantly disadvantaged. Their earnings histories might not reflect their earning capacity and, if their earnings were averaged over a period of time such as a year, the 8-week review might lead to a significant reduction of their wage rates from the rates established on the basis of their date of injury earnings. The Legislature recognized this problem by granting the discretion to base the wage rate on a class average when it would be inequitable to use the pre-injury earnings to set the wage rate. Item #67.21 is intended to apply to workers, such as "recent entrants into the labour force or new immigrants", "whose actual earnings record is not sufficient to allow a determination of what best represents their long-term loss of earnings".

The essence of the vice chair's concern is that item #67.21 fetters the discretion of Board officers to address potential inequities through the use of the class average. In particular, he contends that the policy provides for use of the class average only when it will result in a decrease in the worker's wage rate. The provision in item #67.21 that is at the heart of the concerns raised by the vice chair sets out that no change is "usually" made to the wage rate if the class average is equal to or greater than the worker's date of injury earnings. However, the wage rate "may" be reduced if the class average is lower.

If the words, "usually" and "may" were not included in item #67.21, I have little doubt that I would conclude that the discretion granted by section 33 (1) has been unlawfully fettered by the policy. The question that I must resolve is whether the words "usually" and "may" are sufficiently permissive to support the conclusion that the discretion has not been unlawfully fettered.

The following passage from D. J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at page 374 recognizes that policies may provide guidance as to the manner in which discretion should be exercised:

> It is accepted without question that statutory authorities charged with the exercise of discretionary powers have authority, even when not specifically authorized by statute, to issue policy statements on the subject matter of their discretion and to provide guidelines on how they are likely to exercise that discretion in particular cases.

However, as indicated in the following passage from Jones and de Villars *Principles of Administrative Law,* 3rd ed. (Ontario: Carswell, 1999) at page 177, it is unlawful to fetter discretion:

> Because Administrative Law generally requires a statutory power to be exercised by the very person upon whom it has been conferred, there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy … . After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits.

Testa v. *Workers' Compensation Board of British Columbia* (1989), 36 B.C.L.R. (2d) 129 (B.C.C.A.) is illustrative of an unlawful fettering of the discretion granted by section 33(1). In that case, the Board had applied its normal practice of basing the wage rate on earnings in the one-year period prior to the injury. However, Mr. Testa had been off work on a workers' compensation claim during that period. The Court concluded that the Board's decision constituted a patently unreasonable application of section 33(1) because it ignored the statutory basis of the discretion and "involve[d] the blind application of a policy laid down in advance".

A discussion of policy options in situations in which a statute grants a discretion is found in *Skyline Roofing* v. *Alberta (WCB)*, [2001] 10 W.W.R. 651 (Alta. Q.B.). At page 685, the Court stated:

> The particular issue here is whether a statutory policy can narrow or foreclose or "fetter" a discretion granted by the statute. If the statute creates a discretionary power, can the policy specify some or all of the circumstances in which the discretion must be exercised in a particular type of case? As has been seen, an informal policy cannot fetter a discretion granted by statute. Does the fettering rule apply to policies authorized by statute? A policy could potentially operate in a number of ways:

(a) The policy could be a fixed and inflexible rule that applies in every case. The policy exhausts the discretion.
(b) The policy could create a presumption, but each Applicant could argue why the policy should not apply in a particular case.
(c) [T]he policy could be a summary and weighing of factual and discretionary factors that apply in most cases, but in each particular case the decision-maker must decide if the policy should be applied, an exception should be made, or the policy should be modified.
(d) The policy could be considered along with all other relevant factors, but it should not be given special weight in individual cases.

The distinction between the second and third options is admittedly subtle, and may only amount to a difference in the burden of proof. The third option has the advantage of emphasizing the duty to consider each case on its own merits. … Which option applies to a particular policy authorized by statute must be a matter of statutory interpretation in each case.

The Court concluded at page 686 that "[s]o long as the policy runs parallel to the statute there should be no problem, even if the policy suggests when and how the discretion might be exercised". The Court referred to *Maple Lodge Farms Ltd.* v. *Canada*, [1982] 2 S.C.R. 2. In that case, MacIntyre J. noted that a policy that provided the circumstances in which a permit would "normally" be issued did not impose a requirement for the issuance of a permit, nor did it confine the discretion given by the statute.

In order to consider whether item #67.21 involves an unlawful fettering of discretion, it is important to note that the class average may be greater than or less than the date of injury earnings. The examples that follow may arise when class averages include all workers in the class. The class average may be higher than the date of injury earnings if there is a wide range in the hourly wages in the occupation in question, the worker is at the lower end of the range and there are few layoffs in the occupation. The class average may be lower if the occupation involves work in a cyclical industry or an industry which does not employ workers year round.

It is also important to consider whether, in setting 8-week wage rates, it would typically be more equitable to use a higher class average rather than the date of injury earnings. The Board's *2002 Annual Report* (available online at http://www.worksafebc.com/publications/reports/annual_reports/assets/pdf/ar2002.pdf) states that the average duration of claims for wage loss benefits in 2002 was 46.8 days (see chart on page 7). Based on a 5-day work week, this amounts to just over nine weeks. It seems fair to observe that, in setting the 8-week wage rate for many claims, if the choice is between raising the wage rate to equal the class average or continuing the wage rate based on

the date of injury earnings, the continuation of the latter may best represent "the actual loss of earnings suffered by the worker by reason of the injury".

Information concerning the percentage of short-term disability or wage loss claims that have the propensity to become long-term or permanent disability claims is set out at page 31 of the *2002 Annual Report*. In 2002, seven percent of short-term disability claims had the propensity to become claims in which a permanent disability pension could be granted. In my view, it is fair to conclude that claims that lead to permanent disability pensions are exceptional. It is noteworthy that a pension wage rate (as opposed to a wage rate for temporary disability benefits) is before the vice chair who has referred this matter to me and was before the panel in *Appeal Division Decision #00-0761*.

I agree with the vice chair's contention that, when a young worker or a new immigrant is granted a pension, it may be equitable to use a class average that raises his or her wage rate above the date of injury wages because the class average will take the worker's long term earning capacity into account. On the other hand, if a 63-year-old immigrant were to suffer a compensable permanent disability, it might not necessarily be equitable to use a class average that raises the wage rate over the date of injury earnings. The worker in that scenario may not have enjoyed significant increases in his or her earnings had the injury not occurred. While the wording of item #67.21 is not particularly clear, it grants the Board officer the discretion to consider matters such as education, training, future plans, and skills in determining whether a variation from the class average is warranted.

Item #67.21 does not set out an inflexible rule that must be applied in every case. The use of the words "usually" and "may" allows Board officers the discretion to increase the wage rate to the class average in appropriate cases and leave the wage rate at the date of injury earnings rate in situations in which the class average will result in a lower wage rate. In addition, the policy allows the Board officer to consider a number of factors in determining whether the wage rate should be based on the class average. In many cases, the likely duration of the claim will be limited and fairness will not require that the wage rate be increased to equal a higher class average.

I have concerns about the manner in which item #67.21 is drafted. The policy would benefit greatly from the inclusion of explanations as to why the wage rate is not usually increased when the class average is higher than the date of injury earnings and the circumstances in which it might be appropriate to lower the wage rate to the class average. Examples of situations in which a Board officer should depart from the usual practice and increase the wage rate to equal the class average would also be of assistance. A discussion of the differing considerations that might apply for setting wage rates for short-term and long-term disability benefits would also help to clarify the policy.

I certainly find that the vice chair's referral of item #67.21 to me for a determination of its lawfulness was warranted. However, I find that the policy does not involve an unlawful fettering of discretion and is not patently unreasonable. In fact, I find the policy to be consistent with section 33(1) because it enables Board officers to have regard to the class average when it is inequitable to base the wage rate on historical earnings.

I find item #67.20 must be applied in deciding the appeal. However, I note that, if the class average is greater than the date of injury earnings, when a pension wage rate is under consideration the usual practice of not using the class average to increase the wage rate may not apply. I also note that the policy indicates, in determining whether the class average should be applied, the vice chair may consider the worker's education, training, future plans for education, skills and other factors, as provided in item #67.21.

The board of directors may wish to amend item #67.21 to provide greater clarity. However, I am aware that there may be other policy priorities, given that item #67.21 is not applicable to claims involving injuries after June 30, 2002. Many of the remaining cases in which item #67.21 is applicable are appeals that will be decided by WCAT pursuant to sections 38, 39, and 41 of Part 2 of Bill 63. This determination will be available for consideration by WCAT vice chairs.

Conclusion

Item #67.21 of the RSCM, Volume 1 is not patently unreasonable. Pursuant to section 251(4) of the Act, I return the file to the vice chair who must apply the policy in rendering his decision on the worker's appeal.

Jill Callan
Chair

JC/dlh