

Noteworthy Decision Summary**Decision:** WCAT-2008-01545**Decision Date:** May 27, 2008**Panel:** Sherryl Yeager, Daphne Dukelow, Randy Lane***Payment of Worker's Temporary Wage Loss Benefits to Employer – Teacher - Section 34(1) of the Workers Compensation Act - Policy Items #34.40 (Pay Employer Claims) and #34.41 (Vacation Pay) of the Rehabilitation Services and Claims Manual, Volume II.***

This three person non-precedent panel determined that temporary wage loss benefits payable to a teacher in the months of July and August should be paid to the employer.

The worker's claim was reopened in July for surgery. The Workers' Compensation Board, operating as WorkSafeBC (Board), advised the worker that, as a teacher whose employer had paid his vacation salary in advance, any wage loss benefits to which he was entitled for periods in July and August would be directed to the employer.

The worker's appeal was denied. Section 34(1) of the *Workers Compensation Act* (Act) provides that, in fixing the amount of periodic payments of compensation, consideration must be had to payments, allowances or benefits which the worker may receive from his employer during the period of his disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer. A sum deducted under this section may be paid to the employer. The panel found that the goal of section 34 is to prevent double compensation to the worker and double liability to the employer. This is not the end result if the Board exercises its discretion under section 34 in favour of the worker. A worker cannot be in receipt of paid vacation from the employer, and also receive wage loss benefits for temporary disability from the Board. Receiving both wage loss and vacation pay for the same time period constitutes double compensation.

The panel concurred with another panel in *WCAT Decision #2007-03016* that item #34.41 of the *Rehabilitation Services and Claims Manual, Volume II* was not determinative of when a claim should receive "pay employer" status; however it was relevant to the question of whether a worker was entitled to wage loss benefits during a vacation period. This policy in combination with item #34.40 addressed the same entitlement issues as the rescinded policy #34.41A (Vacation Pay School Teachers). The worker, as a regular teacher, was paid an annual salary over ten months, and thus prepaid vacation leave. There was clearly a long historical tradition of paying teachers an annual salary over a ten month period. Even when a teacher was provided salary over 12 months, this was not a simple redistribution of earnings, but a deferred savings plan administered by the employer and paid out over the two summer months. There was no deviation from the standard ten month payment scheme in this arrangement.

The panel differed from prior WCAT panels in finding that it was relevant that the majority of teachers were not eligible for EI benefits in the summer on the basis that they had already collected a salary for this period of time. (There are exceptions for teachers who are employed on-call or who do not have recurring status with the employer.)

The panel considered the prepayment of vacation time was an allowance or benefit, as discussed in section 34(1) of the Act, whether it was paid in advance, or arranged through a

deferred payment scheme over 12 months. What was essential was whether the worker received a benefit paid for by the employer during the time the worker was disabled. There was no requirement in the statute that payments actually be made during the period of disability – if the worker was in receipt of a benefit such as prepaid vacation, this was sufficient for the provisions of section 34(1) to come into effect.

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Daphne Dukelow, Vice Chair
Randy Lane, Vice Chair

Introduction

The worker was employed as a teacher in April 2006 when he sustained an injury to his left knee. The Workers' Compensation Board (Board), operating as WorkSafeBC, accepted his claim for an aggravation of a pre-existing degenerative condition. The Board issued total and partial disability benefits from April 24 to June 14, 2006 when the worker returned to work on a graduated basis. The Board provided these benefits to the employer, which continued to pay the worker full salary in this period. The worker continued with end-of-the-year administrative duties until June 30, 2006, the end of the school year.

The worker had arthroscopic surgery on July 11, 2006. A Board officer advised the worker by letter dated July 10, 2006 that his claim was reopened effective July 11, 2006. The officer advised the worker that, due to his status as a teacher who was paid his holidays in advance by the employer, any wage loss benefits would be directed to the employer for the period from July 1 to August 31, 2006.

The officer noted that as the ten-week mark in the claim would occur during this period, he had set the worker's ten-week or long-term wage rate. The worker had earned \$72,745.80 from the school district, and he had secondary summer employment income in 2005 amounting to \$3,040.00, for a total of \$75,785.80. As this was in excess of the Board maximum of \$62,400.00, this latter figure was used to establish his long-term rate, effective July 27, 2006.

The worker requested a review of this decision. A review officer denied the worker's request on June 14, 2007, in *Review Decision #R0076257*.

The worker has appealed that decision.

Issue(s)

Should wage loss benefits for the period July 11 to August 31, 2006 be directed to the employer?

The worker has not disputed the long-term wage rate established on his claim. Therefore, we have not considered this issue.

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Appeal Method

The worker requested the appeal proceed by way of read and review of file material and written submissions. We have reviewed the file material and written submissions. This appeal raises issues of interpretation of law and policy which do not, in our view, require an oral hearing.

The employer was notified of the appeal and is participating. The employer's representative requested the appeal be determined by way of a precedent panel under section 238(6) of the Act. The worker's representative responded that the same non-precedent, three-person panel that had heard a similar appeal previously should determine appeal. The WCAT chair determined that she would not appoint a precedent panel. She assigned this matter to a different three-person, non-precedent panel in accordance with section 238(5) of the Act.

Law and Policy

Section 34(1) of the Act is applicable in this case. It provides:

In fixing the amount of a periodic payment of compensation, consideration must be had to payments, allowances or benefits which the worker may receive from the worker's employer during the period of the disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer, and a sum deducted under this section from the compensation otherwise payable may be paid to the employer out of the accident fund.

The relevant policy is found in Chapter 5 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). In particular, policies #34.40 and #34.41 are applicable.

Policy #34.40, Pay Employer Claims, provides in part the following:

[Section 34(1)] does not provide that any payment made by the employer shall be deducted from the compensation, or that any compensation deducted shall be paid to the employer. It requires that the Board must

consider the matter, and that any compensation deducted under this section may be paid to the employer. The section is permissive, not mandatory, and the question is, therefore, in what circumstances a deduction should be made.

In practice, employers who continue paying full wages to disabled workers are reimbursed in amounts equal to the compensation that would normally be paid to their employees. No refund is made for the difference between the amount of compensation and the worker's regular salary. If an employer continues to pay 25% of a worker's salary or less, full wage-loss payments are made to the worker and no refund made to the employer.

Policy #34.41 regarding vacation pay provides:

If a vacation period or statutory holiday occurs while a worker is receiving wage loss benefits, the Board continues to pay those benefits or, in the case of a pay employer claim, to the employee.

Evidence and Background

The worker advised a Board entitlement officer on April 27, 2006 that he worked every summer coaching students, and had agreed to work with a different school, which involved a different employer, in the beginning of July. He was unsure as to how the injury would affect his employment.

His records indicated earnings of \$3,040.00 from that summer employment the year before. His primary earnings with the injury employer were \$72,745.80. The worker's total one-year pre-injury income was \$75,785.80, from all employers.

This equated to a gross weekly rate of \$1,196.71, or \$792.38 net, based on the Board statutory maximum of \$62,400.00

On June 20, 2006, the case manager advised the worker that as he was a maximum wage earner with his primary employer, while he was entitled to wage loss benefits when he had his surgery, all benefits would be sent to the employer school board, as he had received his full salary by June 30, 2006. The worker disagreed with this as he had summer employment.

The worker suggested he would struggle through his summer job, and delay treatment until September. The case manager advised she would not authorize an expedited surgery if the worker chose to wait until September.

The employer was relieved of 75% of the claim costs due to the pre-existing osteoarthritis in the worker's knee on September 3, 2006.

The worker returned to work on September 5, 2006.

Prior WCAT Decisions

There have been a number of prior WCAT decisions on this issue. Prior WCAT decisions are generally not binding, with the exception of precedent panel decisions under section 238(6) of the Act. However, they are useful for reference in the analysis of the application of law and policy.

WCAT Decision #2005-04534

In this decision, the teacher injured her foot just before the school year ended. The teacher reported that she normally worked odd jobs in the summer for pay. The Board determined the worker was entitled to wage loss benefits as her employer advised no alternate employment was available. Therefore, wage loss benefits were sent directly to the worker. The employer requested a review of this decision, on the basis teachers are paid for a full 12-month period, and therefore the teacher did not sustain any loss of earnings because of the injury. The review officer relied on policy #34.41 of the RSCM II, and found that the benefits should have been paid to the employer, as the worker had been prepaid for her vacation, and varied the Board's decision.

The teacher appealed to WCAT. The WCAT panel accepted that teachers are paid an annual salary, including vacation pay, on a ten month rather than 12 month basis. The panel concluded the worker would therefore receive double payment if she received wage loss benefits for the vacation period. She found therefore that the employer was the correct payee until the new school year began. She also found there was insufficient evidence to support a conclusion the teacher worked in alternate positions in the summer months. For example, there was no inclusion of alternate employment from the prior summer in her wage rate. Therefore, there was insufficient evidence the worker was entitled to wage loss benefits for missed employment.

WCAT Decision #2007-00489

In this decision, the employer appealed the Board's decision to provide wage loss benefits directly to the worker during the summer months. The vice chair denied the employer's appeal on the basis that section 34(1) of the Act provided the Board must consider payments, allowances or benefits a worker will receive from the employer during the period of disability, and those payments must be wholly at the expense of the employer. He noted section 34 of the Act is discretionary. The vice chair found that the payment must be made during the disability, and secondly, the payment must be wholly at the expense of the employer.

The vice chair considered the worker's term of employment to be 12 months, with the summer vacation being the first two months of the term.

WCAT Decision #2007-03016

A three-person panel agreed with and adopted the approach taken in *WCAT Decision #2007-00489*. The panel found that section 34(1) of the Act required the employer's payment to the worker must be made during the period of disability, and the payment must be wholly at the expense of the employer. Where the employer stops paying the worker's salary, the first condition for the payment of the wage loss to the employer was no longer satisfied. The panel did not agree with the interpretation that teachers are paid an annual salary over 12 months and are prepaid for their vacation.

The panel found that as the vice chair in *WCAT Decision #2005-04543* did not specifically address the language in section 34(1) of the Act that required payments by the employer to have been made during the period of disability, the approach was not helpful to their deliberations.

The panel was not persuaded that section 34(1) contemplated payments, allowances or benefits the worker may receive from the employer during the period of disability included payments, allowance or benefits that both accrued to, and were paid to, the worker prior to the period of disability. The panel stated:

We recognize that the language of section 34(1) may lead to a different result where a teacher becomes disabled earlier in the school year or has arranged to receive the annual salary over 12 months instead of 10. For example, if a teacher is injured at work in early September and remains disabled for a full 12 months, during which time the employer keeps paying the full salary, section 34(1) may allow the Board to pay the wage loss benefits to the employer corresponding to the period during which the employer continued to pay the salary....

The panel went on to note that section 34(1) is permissive, and the significant factors leading to their conclusion were the worker's loss of secondary summer employment income due to the disability, and the conclusion that the worker's annual salary had been paid to him, and he became disabled so late in the school year.

The panel considered policy #34.41 regarding vacation pay, and noted it did not include its own criteria for determining when a claim should be classified as a "pay employer" claim. Therefore, payments under this policy could only be made when the criteria set out in section 34(1) of the Act were met. This policy was not a separate source of authority to make payments to an employer. The panel found that the wage loss benefits in July should be paid to the worker and not the employer, and allowed the worker's appeal.

WCAT Decision #2007-03314

The worker was injured after the regular school year while moving her classroom. She earned in excess of the Board statutory maximum as a teacher. She normally worked during the summer on her ranch, and could not do so because of her injury. As the worker earned more than the Board's maximum, and the worker had received her full annual salary over ten months, the Board issued the wage loss benefits to the employer.

The vice chair did not accept the argument that the teacher was prepaid her vacation. He noted the plain meaning of the language in section 34(1) of the Act did not include payments made by an employer during a period that preceded the period of disability. The vice chair found the Board was required to pay the benefits to the worker and allowed the worker's appeal.

WCAT Decision #2008-00053

The teacher's claim was reopened for surgery in April 2006. The Board provided wage loss benefits to the current employer during this period as he was maintained on full salary. The employer stopped paying the worker's salary on May 3, 2006 as he no longer had any sick benefits to top up the wage loss benefits. The Board therefore paid the benefits to the worker from May 3 to June 30, 2006. The Board then paid benefits to the employer from July 1 to August 13, 2006, when the disability ended.

The only issue under appeal was the payment of benefits to the employer during July and August. The vice chair adopted the approach of the three prior WCAT decisions, and found that as the employer was not providing benefits to the worker during the summer months, the payments should be made to the worker, and allowed the worker's appeal.

Submissions

The worker's representative provided a submission dated October 10, 2007. In summary, she argued the wage loss benefits were wrongly diverted and should have been paid to the worker during the summer months. She argued section 34(1) of the Act gives the Board the discretion to pay wage loss benefits to the employer when the employer maintains the worker on full salary during the time wage loss benefits are paid. This is not a mandatory section of the Act. The employer did not make any payments to the worker during July and August. The employer lost nothing as a result of the worker being disabled, as it did not have to hire a substitute. If the worker's benefits are paid to the employer in the summer, the employer has a windfall. The worker was not able to work at his summer employment, and therefore he received no compensation for his lost summer earnings.

The worker's representative referenced *WCAT Decision #2007-03016*, in which the panel determined the benefits should be paid to the worker. She argued that the circumstances in the worker's case were very similar. As a three-person panel made this decision, she believed it should be given more deference.

The employer's representative provided a lengthy submission dated November 15, 2007.

He argued that historically, and up to the present time, teachers have been paid their salary on an annual basis. The payment compensates teachers for the entire school year, including the summer periods when school is not in session. He referred to the *Public School Act*, RS 1960, Ch. 319, which provided as follows:

Division 2 – Teachers' Salaries

136(1) Where no agreement respecting teachers' salaries exists, the Board of each school district shall fix annual salaries of the teachers employed in the public schools of the school district.

(2) Subject to subsections (3), (4), and (5), all established salaries shall be paid in ten equal instalments, one at the end of each month, except the months of July and August....

...

(5) With the approval of the Minister, the annual salary of a teacher employed continuously by the [school board] throughout the calendar year may be paid by the [school board] in twelve equal instalments.

Similar language was contained in the *School Act*, RSBC 1979, Ch. 375.

The employer's representative noted that teachers' salaries are no longer provided for under the *School Act*, but in the collective agreements governing the Boards of Education and the British Columbia (BC) Teachers' Federation. It was standard practice for teachers in public schools with a continuing contract for the collective agreements to continue to provide for an annual salary for teachers in BC.

Article 2.C of the agreement for the school district which employed the worker in this case provided for an annual salary. The employer's representative noted the school board in question also paid its contributions for continued premium coverage for continuing teachers' health benefits during the summer months.

The employer's representative referenced Article 9.N of the relevant collective agreement, item 4, which provided that work undertaken beyond the regular work year was voluntary. An employee who is requested and agrees to summer employment is paid at his/her daily rate on scale. Such an employee may take up to three of these days as compensatory time at a mutually acceptable time during the school year in lieu of receiving payment.

The standard school year is defined as the Tuesday following Labour Day through to the last Friday in June of the following year. Schools are in session for approximately 194 days of the school year. The remaining days include statutory holidays, winter, spring and summer breaks. The employer's representative argued the annual salary compensated teachers for the entire year, which included all these periods.

He also referenced Article B.8 of the collective agreement, which provides that all school boards must offer a 12 month salary payment option (the Plan) to teachers. Item 5 of this article provides:

Employees electing to participate in the Plan shall receive their annual salary over 10 (ten) months; September to June. The employer shall deduct, from the net monthly pay, in each twice-monthly pay period, an amount agreed to by the local and the employer. This amount will be paid into the Plan by the employer.

The article goes on to state that the teachers will be paid two payments, one at the end of July and one at the end of August, and details interest payments and other administrative arrangements for this pay format.

Item 10 of the Article provides "Nothing in this Article shall be taken to mean that an employee has any obligation to perform work beyond the regular school year."

He cited section 58(2) of the *Employment Standards Act* (ESA), which provides the following:

Vacation pay must be paid to an employee:

- (a) at least 7 days before the beginning of the employee's annual vacation, or
- (b) on the employee's scheduled paydays, if
 - (i) agreed to in writing by the employer and the employee, or
 - (ii) provided by the collective agreement.

He argued that the ESA establishes that pre-payment of vacation pay is the legislative norm. Therefore, teachers were no different from other employees who may receive vacation pay prior to departing on vacation.

The employer's representative went on to note that Article 10.H of the collective agreement between the employer and the worker's union provides at item 1 that where a worker sustains a compensable disability, he/she is not required to use his/her sick leave credits for time lost during the first year because of the disability. Item 2 of the same article provides:

All monies received by an employee by way of compensation for loss of wages [for a compensable injury] shall be paid to the [employer]. In return, the [employer] shall pay the employee the full amount of his/her wages to which he/she would have been entitled had the disability not been suffered or incurred.

He submitted that this article demonstrates that the parties have clearly contemplated that any benefits received by a teacher, regardless of the timing, are properly payable to the employer in exchange for its commitment to pay the teacher the full amount of wages he/she would have earned if not for the disability.

The employer's representative noted that teachers hired under returning contracts are not entitled to benefits under the current *Employment Insurance Act* (EIA) during the summer non-teaching period. He appended a number of Umpire decisions (appeals) under the *Unemployment Insurance Act* (as it was then known) confirming the principle that teachers are paid an annual salary over 10 months.

The employer's representative noted that the panel in *WCAT Decision #2007-03016* did not consider the issue of the lack of entitlement to Employment Insurance (EI) benefits for teachers to be relevant, because these benefits are paid under different laws and policies. He argued that WCAT cannot ignore determinations of other tribunals or agencies that were relevant to the issue to be decided in the appeal before it.

He referenced a Board consultation paper dated November 9, 2000 entitled "Pay Employer" claims, in which the Board's Policy and Regulation Development Bureau described the purpose of section 34 as follows:

The intent of section 34 of the Act is to avoid double recovery by the worker with respect to the same injury and to prevent double liability for the employer. The most obvious application of the provision is where an employer continues to pay wages as income continuity during the period of a compensable injury.

He argued that the Board's decision to pay wage loss benefits to the employer in July and August 2006 was in accordance with this stated purpose. If the worker received the benefits, he would receive double recovery, as he is already in receipt of his prepaid

vacation for that period, and then would receive temporary wage loss benefits for the same period. The employer incurs double liability as it has already prepaid the worker, and incurs the costs of the worker's claim for the same period of time.

The employer's representative argued that the prior WCAT decisions in 2007 were predicated on the finding that the employer had not met one of the conditions under section 34(1) of the Act, namely that the employer did not make payments to the injured teacher during the period of the disability. He argued that the interpretation of the panel in *WCAT Decision #2007-03016* in this regard was unduly narrow, and as a result was inconsistent with the intended purpose of section 34(1). He argued the statutory provision did not require contemporaneous payment from the employer to the worker during the period of disability, rather it required that the worker has received some payments, allowances or benefits from the employer which covered the same period of disability for which the Board's payments of compensation benefits covers.

He provided a number of scenarios illustrating the discrepancy in payments to the employer that would result if other school board staff were injured during their accrued vacations in the summer months, or teachers paid over 12 months instead of ten. He also argued that the narrow interpretation applied by the panel in *WCAT Decision #2007-03016* would result in a teacher with a compensable injury who was disabled in the summer months receiving greater annual income than that received by another teacher who was not injured.

Regarding the worker's loss of secondary employment because of his compensable injury, the employer's representative responded that the worker's situation was no different than that of any other employee who had an extended vacation booked, and whose plans are disrupted by an injury. He argued any employee who had a compensable injury prior to the commencement of vacation would still fall under policy #34.41, where the wage loss benefits would be paid to the employer.

Finally, he argued that the worker's inability to seek secondary employment was irrelevant, as his annual earnings exceeded the statutory maximum. Any additional income the worker may have earned if he had not been disabled is an irrelevant consideration.

The worker's representative provided a rebuttal on December 4, 2007. She argued that the four WCAT decisions in 2007 should be followed as the fact patterns were similar. She went on to argue that the Act and the RSCM II were the determinative law and policy, not the collective agreement, the ESA or the EIA.

She argued teachers work for ten months a year and are paid to work ten months a year. During that time, they have a two-week vacation at Christmas and one or two weeks at spring break. When school is not in session in July and August, teachers do not work for their school district employer. They are free to seek employment elsewhere.

The worker's representative argued that the optional 12 month pay plan was a savings plan administered for individual teachers by the employer. The employer did not actually divide the annual salary into 24 equal instalments and then make appropriate deductions. Rather, the employer held back a portion of the worker's pay. The employer still paid the teacher over a ten month teaching period.

She went on to state that article 10.H of the collective agreement between the worker's union and employer was particular to that district. Individual districts had their own provisions regarding work injuries and the payment of compensation benefits.

The worker's representative disagreed with the argument of the employer's representative that the panel in *WCAT Decision #2007-03016* had adopted an unduly narrow interpretation of section 34(1) of the Act. The worker's representative argued the prior panel's interpretation was based on the plain wording of the statute. She argued there was a difference between giving the statute a liberal interpretation and an interpretation that was not supported by the express wording of the provision.

The worker's representative argued the examples provided by the employer's representative of a worker and a custodian injured in the same accident were too hypothetical to ever happen, and questioned the validity of considering an unlikely hypothetical situation in determining whether the statutory discretion should be exercised in the current appeal.

She went on to argue against the employer's representative's position that it defied common sense to interpret section 34(1) of the Act in such a way that an injured teacher receives more annual income than a teacher who is not injured. She argued that the difference between the two teachers is that one is free to do as he/she pleases. The other is disabled and is forced to take "vacation" during a period of temporary total disability paid for by the Board. Teachers cannot choose their vacation time. If a teacher becomes disabled by a work injury late in the school year, the teacher is effectively robbed of his/her vacation.

She noted that in most claims where a worker interrupts his period of disability for a pre-scheduled vacation, the Board suspends benefits for that period of time. The employer pays the worker vacation pay. Benefits resume when the worker returns from vacation and is able to continue to participate in the treatment that was interrupted by the vacation.

The worker's representative argued that most workers are able to postpone a vacation when the injury is so severe the vacation is also not possible. However, teachers do not have that option because they do not work in July and August, and they do not have the option of postponing the summer vacation period if disabled. They simply lose the time off because the provincial statute and the school calendar mandate it.

She went on to submit that if a teacher is disabled from working due to a compensable injury during the time they must take vacation, the Board should pay wage loss benefits to compensate the teacher for lost vacation time that he/she would never be able to recover. If the employer was paid the benefits during the teacher's disability, the teacher was not compensated for lost vacation.

The worker's representative argued that if the employer is entitled to a teacher's wage loss benefits in July and August, the teacher will defer treatment for the injury until September, when school is in session, rather than participate in a Board-sponsored training period. She argued that the teacher would insist on having July and August as a vacation and seek further benefits for treatment and temporary total disability benefits in September.

Alternatively, if the teacher is disabled in the summer and/or undergoes treatment in that time and the employer receives his wage loss benefits, the teacher will demand time off with pay in September in lieu of the vacation time lost as a result of being disabled by a work injury in the summer.

She argued that hypothetical situations such as those posed by the employer's representative were not necessarily helpful in determining whether the discretion afforded in the statute should be applied in an individual case. The employer appeared to argue a blanket rule should be applied, which would fetter the discretion.

She argued it is the employer, not the teacher, who gets a windfall if summer wage loss benefits were paid to the employer, and in this case, the employer was relieved of 75% of claim costs. She argued this eliminated the employer's argument about double liability.

Reasons and Findings

We find the worker's wage loss benefits were correctly paid to the employer during the period July 11 to August 31, 2006.

Prior to the introduction of the RSCM II in June 2002, the RSCM contained a policy directed specifically at the issue that is before us. It stated:

#34.41A Vacation Pay School Teachers:

School teachers are paid an annual salary by School Boards, but the salary is usually paid by dividing it into ten equal payments. Prior to February 28, 1975, the Board's policy was that no wage-loss benefits be paid for the vacation months, July and August, because there was no loss of earnings in those months. The only exception was where the school teacher could provide evidence that alternative employment was going to be undertaken during the vacation and because of the injury the school teacher was prevented from doing so. Since February 28, 1975, the Board's policy has been to continue wage loss in the vacation months, but to make these payments to the employer where, as is usually the case, the employer continues the teacher's salary during the disability. If the employer ceases to pay the teacher for a period because of a lay off or for budgetary reasons, payments by the Board are made direct to the teacher in that period. Payments could also be made directly to the teacher where there was evidence of an additional loss of earnings in the summer months because of the disability, but only then to the extent that the total earnings did not exceed the statutory maximum. The same principles apply to other School Board employees paid on the same basis as teachers.

This policy was removed from the RSCM by *Resolution of the Panel of Administrators #2002/06/18-02* in June 2002. We provide it only for historical reference. We believe the issue can be properly adjudicated with the application of policies #34.40 and #34.41.

We concur with the panel in *WCAT Decision #2007-03016* that policy #34.41 is not determinative of when a claim should receive "pay employer" status; however we do consider it relevant to the question of whether a worker is entitled to wage loss benefits during a vacation period. This policy in combination with #34.40 addresses the same entitlement issues as the rescinded policy #34.41A.

We accept the employer's argument that the worker, as a regular teacher, was paid an annual salary over ten months, and thus prepaid vacation leave.

We refer to the frequent use of the wording "annual salary" and the description of the "school year" in the evidence provided in the employer's extensive submissions. There is clearly a long historical tradition of paying teachers an annual salary over a ten month period. Even when a teacher is provided salary over 12 months, this is not a simple redistribution of earnings, but a deferred savings plan administered by the employer

paid out over the two summer months. There is no deviation from the standard ten month payment scheme in this arrangement. We consider this supportive of a finding that teachers are prepaid their summer vacation pay during the course of the ten month teaching period.

We also differ from the prior WCAT panels in that we believe the interpretation of the pay scheme by other appellate bodies is relevant to the issue at hand. Although the findings of the Umpires under the EIA are not binding on us, they are useful for assistance in interpretation, as the core facts and question in dispute are the same. We consider it necessary to give some weight to how the legislation associated with other compensation schemes treats what is essentially the same fact pattern and issue that is before us.

We do find it relevant that the majority of teachers are not eligible for EI benefits in the summer on the basis that they have already collected a salary for this period of time. (There are exceptions for teachers who are employed on-call or who do not have recurring status with the employer.)

We appear to have more evidence in this regard than the prior panels had before them to consider.

Given that we have found the worker was prepaid his vacation, the next question is whether this constitutes payments, allowances or benefits the worker received “during the period of disability” as discussed in section 34(1) of the Act.

We do not reach the same conclusions as the prior WCAT panels in this regard.

We considered it necessary to examine the purpose of section 34(1), which was numbered as section 34 prior to June 30, 2002, and section 32 in an earlier version of the Act.

There have been a number of appeal decisions published in the *Workers' Compensation Reporter* regarding section 34 and deductions from a worker's benefits. These are publically available on the Board's website, currently found at www.worksafebc.com. We refer to the comments in *Reporter Decision #95-0165*, found at page 13 of *Volume 11*. The panel considered it necessary to review the legislative history of section 34 to determine the meaning and purpose of the section. The panel noted:

...the only specific reference to the Section 34 provision found in the historical records was a submission by the Canadian Pacific Railway to the Meredith Royal Commission which provided the foundation for the Canadian workers' compensation system. The Railway pointed out that Federal legislation (The Dominion Act) contained a clause imposing direct

liability on the Railway for accidents resulting from negligence. Because of the primacy of the Federal law, it was contended the Railway could be placed in a position of double liability for a work injury in some circumstances. As a consequence, the worker could also receive double compensation for that same injury. In response to the suggestion that an employer who was liable to pay compensation for an injury under The Dominion Act would not also be liable under the Workmen's Compensation Act, the commissioner said (at page 268) "A man could not get it twice over."

In his final report The Honourable Sir William R. Meredith recommended a provision (Section 40) which read:

In fixing the amount of a weekly or monthly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from his employer during the period of his incapacity, including a pension, gratuity, or other allowance provided wholly at the expense of the employer.

In 1916 the B.C. legislature adopted the similar provision for inclusion in the B.C. Act.

The panel in *Reporter Decision #95-0165* went on to comment that the authority to deduct a sum from a worker's compensation entitlement is an exceptional power in light of the foundational statutory requirement to pay compensation to a worker who meets the prerequisites for entitlement. The panel found that the intent of the legislature in enacting section 34 was to prevent the worker from receiving double compensation for the same injury and to protect the employer from facing a double liability for one injury.

We also refer to the *Reporter Decision #107* (now retired) of the former commissioners, regarding deduction of termination pay from a worker's benefits. They provided further expansion on the application of section 34 (32 as it was then numbered). They wrote:

The normal situation in which the Section is applied is where an employer maintains the wages or salary of a worker who is disabled by a compensable injury. In that situation, it would seem fair that a worker should not be paid twice in respect of the same period, and that an employer, having paid his assessments to the Accident Fund, should then receive a benefit if he maintains the wages or salary of an injured worker. **Indeed, a manifest purpose of the Section is to facilitate the operation of various plans under which the full wages or salary of a worker are maintained during a period of compensable disability.**
[emphasis added]

This is the situation in the current appeal. We note the submission from the employer indicating the collective agreement between the worker's union and his employer sets out how these benefits will be distributed in the event of a compensable injury. The terms of the collective agreement do not constitute Board policy and are not binding on the Board. However, we consider it relevant because it clearly establishes that both sides are aware of and have agreed to the method set out under section 34 in order to facilitate payment of full wages during a period of compensable disability. In the case of workers who earn in excess of the Board maximum, this is a very favourable arrangement, as they do not lose significant income because of a compensable injury.

Policy #34.40 essentially echoes the commissioners' statement above, and establishes that if an employer continues to pay 25% or more of a worker's salary, the wage loss benefits are provided to the employer.

The prior WCAT decisions on the issue before us have focused on the phrase: "...consideration must be had to **payments, allowances or benefits which the worker may receive** from the worker's employer **during the period of the disability.**" [emphasis added]

In view of the intention of section 34 of the Act, we do not place the same interpretation on this phrase. We understand the phrase "during the period of the disability" to mean the period of time in which the worker is eligible for workers' compensation benefits. The Board is directed to consider "payments, allowances or benefits which the worker may receive" during this period. We consider the payment of vacation time to be an allowance or benefit, whether it is paid in advance, or arranged through a deferred payment scheme over 12 months.

We do not believe there to be a fundamental difference, as what is essential is whether the worker received a benefit paid for by the employer during the time the worker was disabled. We do not believe there is a requirement in the statute that payments actually be made during the period of disability – if the worker is in receipt of a benefit such as prepaid vacation, this is sufficient for the provisions of the section to come into effect.

In addition, a teacher who is paid over 12 months is still in receipt of salary over ten months, and the payments issued in July and August constitute a forced savings plan that is administered by the employer on the teacher's behalf. This is not, then salary, but a "benefit" to the teacher. We do not consider it relevant then, if the teacher is on a ten or a 12 month payment scheme, as both are in receipt of a benefit provided by the employer during the summer months.

Furthermore, as noted by the worker's representative, when a worker is on vacation, the Board may suspend wage loss benefits while the employer provides vacation pay, and the Board then resumes these benefits after the vacation. In the alternative, if the worker does not take a prescheduled vacation because of the severity of the disability,

and therefore does not receive vacation pay, the Board continues to provide wage loss benefits. A worker cannot be in receipt of paid vacation from the employer, and also receive wage loss benefits for temporary disability from the Board. Receiving both wage loss and vacation pay for the same time period constitutes double compensation. This returns us to the question of the intention of section 34, to prevent double payment and double liability. To illustrate the point, we calculated the total of the wage loss benefits this worker would have received for the period of time in question.

The worker's long-term wage rate, based on the statutory maximum, equated to \$158.48 per day, over a 5-day work week. If the worker had received wage loss benefits at that rate for the approximately 52 days of disability between July 11 and August 31, 2006, he would have received \$6,022.24 in net wage loss benefits. This is twice what he would have earned if he had worked for the corresponding period of time as he had in the past, and earned \$3,040.00.

We do not consider this consistent with the spirit and intention of workers' compensation law and policy, which is designed to reimburse lost income or earning potential. The objective of the Act is not to result in a situation where it is profitable to have an injury late in the school year. The goal of section 34 of the Act is to prevent double compensation to the worker and double liability to the employer, and this is not the end result if the Board were to exercise the discretion afforded under this section in favour of the worker.

We accept the argument advanced by the employer, that if a disabled teacher is in receipt of funds over 12 months, and the Board paid benefits to the employer, that teacher will receive less than a teacher who is paid over ten months, and directly receives wage loss for a period of disability in the summer. This would create an inequity, as workers in similar employment would potentially receive significantly different levels of compensation based merely on an elective pay scheme.

We do not accept the argument advanced by the worker's representative that the employer is in a windfall situation if the benefits are paid to the employer. If it is established that the employer prepaid the worker for the summer vacation, the employer is in no different position than any other employer who receives wage loss benefits from the Board and then effectively re-distributes them to the worker by keeping the worker on full salary or full vacation pay during a period of disability. Indeed, if the application of this section, as set out in the *Reporter Decision #107*, is to facilitate employers who maintain workers on full salary, it is to the advantage of the worker and his colleagues that the reimbursement of the employer over the summer months continues.

If the worker were to receive the wage loss benefits directly in the summer, the employer would be in a double liability situation as the worker was paid for vacation, and the employer is responsible for the claim costs related to the wage loss benefits

paid over the summer months. We do not consider it relevant whether the employer has been relieved of costs or not, as it is the spirit and intention of the law and policy as a whole that must be considered.

We do not accept the argument advanced by the worker's representative that the injured teacher does not get to enjoy the summer vacation, and therefore is entitled to receive the wage loss benefits directly. The purpose of workers' compensation is to reimburse lost wages or earning capacity. There is no provision in the Act to provide for pain and suffering or loss of enjoyment of vacation time. While teachers are in an unusual situation in that they cannot defer their vacation to a later time, as other workers could possibly do, they also do not lose any income because of a compensable injury, as they are kept on full pay by the employer. Many workers who earn in excess of Board maximum find themselves facing a significant reduction in income when on compensation. In a compensation system designed to meet the needs of many rather than the individual, there are occasions when the outcome is less advantageous for a limited few.

Finally, we turn to the argument that the worker's disability prevented him from obtaining secondary employment in the summer, and therefore the wage loss benefits should be provided to him. For the reasons set out above, we do not accept with this argument. However, the worker's position would have some merit if he was in a situation where he earned less than Board maximum. In that situation, the law and policy provide that wage loss benefits may be proportioned between the injury employer, and the worker (or the secondary employer if that was also a pay employer situation.)

The Board issues practice directives to assist its officers in adjudication. They are not binding policy, but are useful for reference when considering the application of policy. Practice Directive #33D discusses establishing wage rates, and a portion of this directive is relevant to this question, in particular at item H of the directive, which provides in part:

- Where two employers maintain a worker on full salary, the compensation payable should be reimbursed to both [employers]. The amounts payable to each employer would be calculated in accordance with the proportion of earnings earned with each employer. However, in no case can more than the established wage rate be reimbursed by the Board.

In other words, in a situation where a worker earned less than the Board maximum, the wage loss benefits would be apportioned between the employer school board and the worker, or the secondary employer if that was also a pay employer situation. The secondary employer would then be responsible for providing the worker the appropriate compensation.

If the worker's wage loss benefits were apportioned between the injury employer and the secondary employer, which is how we understand the law and policy, in this case there would be no remaining percentage payable to the worker under the Act because his earnings with the primary employer were in excess of the maximum. Therefore, the primary employer receives the full allotment, with no payments to the worker or the secondary employer.

The worker's appeal is denied.

Conclusion

We confirm the Board's decision set out in *Review Decision #R0076257*, dated June 14, 2007.

The worker did not request reimbursement of any expenses associated with the appeal, and none are awarded.

Sherryl Yeager
Vice Chair

Daphne Dukelow
Vice Chair

Randy Lane
Vice Chair

SY/ml