Noteworthy Decision Summary

Decision: WCAT-2014-00372 **Panel**: Randy Lane **Decision Date:** February 3, 2014

Section 34 of the Workers Compensation Act – Deductions from compensation – Policy item #34.40 of the Rehabilitation Services and Claims Manual, Volume II – Pay employer claims – Vacation pay school teachers

This decision is noteworthy for its summary and analysis of previous WCAT decisions regarding deductions from compensation pursuant to section 34 of the *Workers Compensation Act* (Act).

The worker, a teacher, had a compensable work-related injury. Pursuant to the applicable collective agreement, the employer continued to pay the worker's salary and the Workers' Compensation Board, operating as WorkSafeBC (Board), paid temporary wage loss benefits to the employer, including in the summer months following the end of the school year. The worker argued that wage loss benefits should have been paid directly to her once the school year ended. The Review Division upheld the Board decision to pay benefits to the employer, and the worker appealed to WCAT.

WCAT dismissed the worker's appeal. In determining that wage loss benefits were appropriately paid to the employer, the panel canvassed the applicable law, policy, and the collective agreement, and outlined relevant prior WCAT decisions. The panel determined that in this case, direct payment of benefits to the worker subsequent to the end of the school year would have resulted in 'double compensation'. Such payment is contrary to the intention of section 34 of the *Act*.

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WCAT Decision Number: WCAT-2014-00372
WCAT Decision Date: February 03, 2014
Panel: Randy Lane, Vice Chair

Introduction

[1] The worker, a school teacher, suffered a January 30, 2012 injury. Her claim was accepted by the Workers' Compensation Board, operating as WorkSafeBC (Board). Pursuant to the applicable collective agreement, the worker's employer continued to pay the worker her salary. As a result, the Board paid temporary disability wage loss benefits to the employer.

[2] The school year ended in late June 2012. The Board continued to pay temporary disability wage loss benefits to the employer, save for a period of time in July 2012 when the worker did not attend an occupational rehabilitation program due to a pre-scheduled family vacation. Temporary disability wage loss benefits terminated effective September 2, 2012.

[3] In *Review Decision #R0149433* (dated January 3, 2013) a review officer with the Review Division of the Board concluded the Board properly paid temporary disability wage loss benefits to the employer. In addition, the review officer determined that temporary disability wage loss benefits should have been paid during the period when the worker was on a pre-scheduled family vacation.

[4] The worker appeals to the Workers' Compensation Appeal Tribunal (WCAT). The notice of appeal asked that the appeal proceed by written submissions. With the assistance of a union representative, the worker provided a May 22, 2013 submission. On May 23, 2013 WCAT received a further copy of an appendix that was attached to the May 22, 2013 submission. With the assistance of a consultant, the employer provided a June 14, 2013 submission. With the assistance of her union representative, the worker provided a June 28, 2013 rebuttal.

Issue(s)

[5] Subsequent to the end of the school year, did the Board properly pay temporary disability wage loss benefits to the employer rather than to the worker?

Jurisdiction

[6] WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the *Workers Compensation Act* (Act)). It is not bound by legal precedent (subsection 250(1) of the Act). WCAT must make its decision on the

merits and justice of the case, but, in so doing, it must apply a policy of the board of directors of the Board that is applicable in the case (subsection 250(2) of the Act), save for specific circumstances set out in section 251 of the Act. Subsection 250(4) provides that in an appeal regarding the compensation of a worker WCAT must resolve the issue in a manner that favours the worker where evidence supporting different findings is evenly weighted.

[7] This is an appeal by way of rehearing. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Background and Evidence

[8] The essential facts of the worker's particular claim are summarized at the outset of my decision.

[9] I will use this section of my decision to document relevant provisions found in law, policy, and the applicable collective agreement.

[10] Subsection 34(1) of the Act provides the Board with the discretion to pay workers' compensation benefits to an employer rather than to a worker in cases in which an employer makes payments to a worker during the period of the worker's disability:

> 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.
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> [all quotations in this decision reproduced as written, save for changes noted]

[11] Policy item #34.40 of the Rehabilitation Services and Claims Manual, Volume II (RSCM II) is entitled "Pay Employer Claims." It commences by reproducing the language of subsection 34 (1) of the Act. It then provides that the provision is permissive rather than mandatory:

> The section 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.

[12] The policy identifies the practice of paying temporary disability wage loss benefits to employers in cases in which employers have continued paying wages to disabled workers:

> 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.

[13] The remaining paragraphs of the policy are not especially relevant given that they address federal government workers, reopening of claims, and cases in which an employer has an outstanding liability to the Board for assessments. Those circumstances are not relevant to the matter before me.

[14] Of interest, the following provision continues to exist in *Rehabilitation Services and Claims Manual, Volume I* whereas it has never formed part of the RSCM II:

> *#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.

[15] The collective agreement applicable to the worker and the employer includes the following provisions under article D24 entitled "Regular Work Year":

> 1. The [school] Board shall issue a school calendar annually, subject to the provisions of the following articles.

2. For the duration of this Collective Agreement the teacher's regular work year shall be as outlined by the Ministry Calendar.

3. All days of the regular work year, as outlined Article D.24.2, shall be scheduled between the Tuesday after Labour Day and the last Friday in June of the subsequent year. In those years in which the last Friday in June falls on or before the 25th of June, the last day of school shall be the 30th of June….

7. The annual salary established for each teacher pursuant to Article B.1 (Salary), paid over a ten (10) month period in Accordance with Article B.9.4.a, is for all days of the school year, as established by this Article.

8. Any work performed by a teacher under this Agreement beyond the regular work year as outlined in Article D.24.2 shall be voluntary and paid pursuant to article D.24.9.

9. Notwithstanding Article D.24.7, any work performed by a teacher covered by this Agreement beyond the regular work year as outlined in Article D.24.2 at the request of the Superintendent or designate shall be paid at the teacher's daily rate for each day worked. A teacher may elect to take compensatory time in lieu of salary. The scheduling of such compensatory time shall be determined by the employer after consultation with the Administrative Officer.

[16] Article G.21, entitled "Workers' Compensation Supplement," includes a provision to the following effect:

1. A teacher in receipt of Workers' Compensation payments for a teaching-related injury will receive full pay from the time of the accident for a period not to exceed one (1) year. The Employer will continue to pay the employee's salary at the usual rate for the period of time and the payment(s) received by the employee from the Workers' Compensation Board shall be turned over to the Employer.

2. A teacher shall not be required to utilize sick leave credits for time lost on approved Workers' Compensation leave.

[17] The worker states that the collective agreement contains the following provision as to the method of payment to teachers:

Teachers shall be paid ten (10) monthly instalments, to be paid twice monthly commencing in September and ending in June, on the 15th or the

last business day before the 15th, and on the last business day of the month.

[18] A local letter of understanding between the employer and worker's teachers' association outlines what is referred to as an "Optional Twelve-Month Pay Plan," which involves teachers voluntarily choosing to receive their annual salary over a 12-month period rather than a 10-month period. The letter of understanding provides, "For pension purposes the employees participating in the Plan would still be considered 10-month employees and the payments in July and August would not be considered earnings for pension purposes."

[19] The *School Calendar Regulation* (Regulation) (issued pursuant to the *School Act*) provides for the issuance of a standard school calendar which includes a listing of days in session, the days of instruction, and the dates of non-instructional days. Of note, it provides that a school calendar is to specify the vacation periods and the dates of statutory holidays. The Regulation contains no specific references to the months of July and August.

[20] The school district in which the worker taught at the time of her injury issued a school calendar which noted the specific day on which school opened in early September. It also noted such matters as the specific days associated with the winter and spring vacations. It contains no specific references to the months of July and August.

WCAT decisions

[21] I have located a number of decisions which have addressed the issue before me. All of the following decisions involved teachers who were injured in the course of their employment.

- *WCAT-2005-04543*, August 29, 2005

[22] The teacher was injured on June 22, 2004, just before the school year ended. The Board case manager issued temporary disability wage loss benefits to the worker on the basis the employer was not making payments to its teaching staff during July and August. That decision was reversed by a review officer on the basis the employer had already paid the worker for that time period.

[23] The panel concluded that payment of the worker's salary by the employer from September 1, 2003 to June 30, 2004 included pre-payment for July and August 2004. The panel found the employer was the correct recipient of the benefits.

- *WCAT-2007-00489*, February 9, 2007

[24] The worker was injured on June 24, 2005. The Board issued temporary disability wage loss benefits to the worker from July 1, 2005 to September 5, 2005. Of interest, the employer did not advise the Board at the outset of the claim that payment would be made to the worker for the period of disability.

[25] The panel did not agree with the employer's assertion that its pre-payment of the vacation period during the preceding 10 months qualified as payment during the course of the disability. The panel considered the statutory provision was clear that payment must be made during the course of disability.

[26] The panel concluded that an employment contract that runs from July 1 of one year to June 30 of the next year does not involve a worker being pre-paid for the summer months, but rather being post-paid for the summer months over the life of the contract, since it is the first two months of the contract that the worker is on vacation, not the last two months as suggested by the employer.

- *WCAT-2007-03016*, October 3, 2007

[27] The worker was injured on April 11, 2006. He continued working until June 15, 2006. The Board paid temporary disability wage loss benefits from June 16, 2006 to July 24, 2006 to the employer. The worker argued he should have been directly paid those benefits.

[28] The three-member non-precedent panel[1] adopted the approach taken by the panel in *WCAT-2007-00489*. In particular, it stated that the first condition of the exercise of discretion in subsection 34(1) of the Act was that the employer's payment to the worker must be made during the period of disability. It stated that as the employer stopped paying the worker's salary at the end of June, the first condition for the payment of temporary disability wage loss benefits to the employer was not satisfied.

[29] The panel considered that on its plain meaning, the phrase "during the period of the disability" did not include payments made by the employer to the worker during the portion of the school year that preceded the period of disability. It concluded that even if the worker were pre-paid for the summer months by the employer over the course of the school year, the only pre-payments that could be considered under subsection 34(1) were those made during the period of disability.

[30] The panel indicated it was not persuaded that subsection 34(1) contemplated that the payments a worker may receive from the employer during the period of disability included payments that both accrued to and were paid to the worker prior to the period of disability.

[1] The panel was appointed pursuant to subsection 238(5) of the Act rather than subsection 238(6).

[31] The panel stated that while it was true the worker received his full annual salary from the employer over a 10-month period, it did not accept that such receipt by the worker amounted to continuing payment of full salary by the employer over the summer months.

[32] The panel considered the worker was required to work 40 work weeks in the 10 months during the school year that ran from the first week after Labour Day until the last week of June.

[33] The panel remarked that although the collective agreement ran from July 1 to June 30, the worker was not required to work for the employer during July and August. The fact that the worker was paid his full annual salary over the course of 10 months he worked as a teacher indicated the worker was paid his annual salary during the corresponding work months, not that he was being pre-paid for July and August.

[34] The panel considered the amount paid by the Board to the employer for the period between June 16, 2006 and July 24, 2006 substantially exceeded the salary paid by the employer to the worker between June 16, 2006 and June 30, 2006.

[35] The panel stated that aside from the worker's loss of secondary summer employment income due to the disability, the significant factors leading to its conclusion were the payment of the worker's whole annual salary over the course of the 10-month school year and the fact he became disabled so late in the school year.

[36] The panel allowed that the language of subsection 34(1) might 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.

WCAT-2007-03220, October 19, 2007
WCAT-2007-03314, October 25, 2007
WCAT-2008-00053, January 8, 2008

[37] The presiding member of *WCAT-2007-03016* issued several decisions which applied the analysis in that decision.

- *WCAT-2008-01545*, May 27, 2008

[38] The worker was injured in April 2006. Temporary disability wage loss benefits were directed to his employer on the basis it continued to pay his salary. Temporary disability wage loss benefits payable for the period between July 11, 2006 and August 31, 2006 were directed to the employer on the basis that, due to his status as a teacher, the worker had been paid his holidays in advance by the employer. Of interest, the worker's wage rate took into account the fact he had additional income every summer associated with coaching students.

[39] The three-member non-precedent panel noted the analysis found in *WCAT-2005-04543, WCAT-2007-00489, WCAT-2007-03016, WCAT-2007-03314,* and *WCAT-2008-00053*. The panel summarized extensive submissions made by the parties.

[40] The panel accepted the argument that the worker, as a regular teacher, was paid an annual salary over 10 months, including pre-paid 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.

[41] The panel attached some significance to the fact that the majority of teachers are not eligible for Employment Insurance benefits in the summer on the basis they have already collected salary for that period of time:

> 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 [*Employment Insurance Act*] 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 [employment insurance] 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.)
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> We appear to have more evidence in this regard than the prior panels had before them to consider.
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> [emphasis added]

[42] Once it found that the teacher had been pre-paid his vacation, the panel turned to whether pre-payment constituted payment the worker received "during the period of disability" as discussed in subsection 34(1) of the Act.

[43] In analyzing this matter, the panel stated it considered it necessary to examine the purpose of subsection 34(1), which was numbered as section 34 prior to June 30, 2002 and section 32 in an earlier version of the Act. It had regard to decisions of the former commissioners of the Board found in the *Workers' Compensation Reporter*:

> 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:
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> > …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.

[44] The panel noted other commissioners' decisions in the *Workers' Compensation Reporter*:

> 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]

[45] The panel considered the situation in the appeal before it involved circumstances in which the purpose of section 34 was to facilitate the operation of a term in a collective agreement under which the full salary of a teacher was maintained during a period of disability:

> 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.

[46] The panel concluded that policy item #34.40 "essentially echoes the commissioners' statement above."

[47] The panel remarked that prior WCAT panels had focused on the phrase "during the period of disability" found in section 34. It did not interpret that phrase in the same manner as prior panels:

> 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.

[48] The panel did not believe that section 34 required that payments actually be made during the period of disability:

> 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.

[49] The panel did not attach any significance to whether a teacher was paid their salary over 12 months or over 10 months, as both forms of payment involved benefits provided by the employer during the summer months:

> 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.

[50] The panel addressed concerns raised by "double compensation" in certain circumstances:

> 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….

[51] The panel then returned to its conclusion that the intention of section 34 was to prevent double payment and double liability. It illustrated its point by calculating the total amount of temporary disability wage loss benefits the teacher would have received for the period from July 11 to August 31, 2006 had the Board paid temporary disability wage loss benefits to the worker:

> 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 [at his summer employment].

[52] The panel considered that double compensation and double liability would result if the discretion in section 34 were to be exercised in favour of the teacher:

> 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.

[53] The panel concluded that paying workers' compensation benefits in the summertime directly to a teacher who had been paid over a 10-month period by his employer, as opposed to directly paying benefits to an employer that was paying a teacher's salary over a 12-month period would result in inequity:

> 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.

[54] The panel was not persuaded the payment of temporary disability wage loss benefits for disability in the summertime resulted in a "windfall" to an employer that had pre-paid the teacher for the summer vacation:

> 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.

[55] The panel found that payment of temporary disability wage loss benefits in the summertime to the teacher would result in double liability for the employer in that the teacher would have been paid for his or her vacation and the employer would be responsible for claims costs related to the disability benefits:

> 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.

[56] The panel was not persuaded that a teacher's inability to "enjoy" his or her summer vacation provided a basis to pay temporary disability wage loss benefits directly to the teacher:

> 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.

[57] While the panel also addressed matters related to arguments dealing with a disability preventing a teacher from obtaining secondary employment in the summer, as the teacher in the case before me did not argue that she had lost secondary employment, it is not necessary that I refer to the panel's analysis on this point.

- *WCAT-2009-02365*, September 11, 2009.

[58] In this decision a panel addressed the employer's request for a reconsideration of *WCAT-2007-03314*, which, as noted above, determined that temporary disability wage loss benefits payable during the summer months should not be paid to the employer under section 34 of the Act. In support of its application, the employer cited *WCAT-2008-01545*.

[59] The reconsideration panel noted the various WCAT decisions referred to above and commented that the decisions varied with respect to whether payments should be made to the employer.

[60] The reconsideration panel noted that the panel in *WCAT-2007-03314* applied more of a literal interpretation to section 34, whereas the panel in *WCAT-2008-01545* applied more of the purposive approach to the interpretation of that section. The reconsideration panel observed that the fact a later panel interpreted section 34 differently did not mean the decision in *WCAT-2007-03314* was patently unreasonable.

[61] The reconsideration panel concluded the panel in *WCAT-2007-03314* provided a reasoned decision, based on its interpretation of the wording of section 34. The reconsideration panel concluded that such an interpretation was viable, and the original decision was not patently unreasonable.

- *WCAT-2009-02433*, September 29, 2009

[62] The worker suffered a May 14, 2007 injury. The worker's wage rate (which was below the maximum wage rate) was calculated using his earnings as a teacher and his earnings in the construction industry during the summertime. Temporary disability wage

loss benefits were paid to the employer and to the worker. Payments to both recipients continued until August 13, 2007; the worker was considered to be fit to return to work as of August 14, 2007.

[63] The worker was a participant in a teachers' payroll savings plan that allowed him to save a percentage of his salary from September to June and then withdraw those funds during the summer months. The worker submitted he should have continued to receive his regular teaching salary from the employer once the school year ended, along with payments under the teachers' payroll savings plan.

[64] The panel concluded the issue before it was whether, upon the conclusion of the school year in June 2007, the Board correctly paid a portion of the temporary disability wage loss benefits directly to the employer.

[65] The panel noted that submissions to it cited the decisions issued by the two different three-person non-precedent panels.

[66] The panel, by adopting the reasoning in *WCAT-2008-01545*, concluded the monies the worker received from the teachers' payroll savings plan during the summer months were benefits paid to him during his period of disability. The panel concluded the worker would have received double compensation if the Board had paid temporary disability wage loss benefits directly to him instead of to the employer once the school year ended in June 2007.

[67] I was not able to locate any post-2009 WCAT decisions which have addressed the issue of teachers and section 34 of the Act.

Reasons and Findings

[68] I was a member of the three-person panel which issued *WCAT-2008-01545*. I am not bound by my earlier decision.

Does the worker's annual salary involve pre-payment for the months of July and August?

[69] I find it appropriate to consider the language of the collective agreement.

[70] Notably, in response to the employer's submissions concerning article G.21 of the collective agreement, the worker's June 28, 2013 submission argues, "An interpretation of the collective agreement is outside WCAT's jurisdiction."

[71] Yet, significantly, the worker's submissions to the Review Division and to WCAT contain extensive references to the language of the collective agreement and its interpretation. For example, in submissions to WCAT the worker asserts, "The collective agreement is clear that the regular work year is between the Tuesday after Labour Day and the last

Friday in June." As well, specifically with regard to article G.21, the worker asserts in her May 22, 2013 submission to WCAT as follows with respect to the interpretation of the collective agreement:

> The words of the collective agreement should be interpreted in harmony with the rest of the collective agreement. That is a fundamental principle of law.

[72] Thus, the worker invites WCAT to interpret the collective agreement when considering her submissions but seemingly asserts that WCAT lacks the jurisdiction to interpret the collective agreement when considering the employer's submissions.

[73] While I appreciate that the expertise of WCAT is confined to matters of workers' compensation, I consider it appropriate as part of this appeal to have regard for the language of the collective agreement.

[74] While the worker performed her work duties during the period between September and June and received her salary during those months, I consider it significant that the collective agreement refers to an "annual salary." The use of the word "annual" indicates the salary is to cover a yearly period. The limiting of work duties to a 10-month period does not preclude the salary from being intended to cover that yearly period.

[75] Notably, section 1 of the *School Act* defines a "school year" as "the period beginning on July 1 and ending on the following June 30."

[76] The worker's "annual salary" would appear to be payable for that school year.

[77] I accept that the language in the collective agreement to the effect that teachers shall be paid in 10 monthly installments to be paid twice each month makes no reference to payments including a pre-paid vacation during the summer non-teaching months. Yet, I cannot ignore that the collective agreement also refers to an annual salary or the definition of a school year in the *School Act*.

[78] That the worker may argue that the absence of any reference in the school calendar (issued by the worker's employer) to the non-teaching summer months is consistent with that non-teaching period not being a pre-paid summer vacation period fails to provide a basis to ignore the reference to an annual salary in the collective agreement or the definition of a school year in the *School Act*.

[79] I am not persuaded that what may or may not be mentioned in the employer's school calendar provides a persuasive foundation for interpreting the terms of the collective agreement and the *School Act*.

[80] I add that subsection 87.01(1) of the *School Act* provides that a "school calendar year" means either "the school year" or "subject to subsection (4), a period of 12 consecutive months covered by a school calendar, if the school calendar is not based on the school year." Subsection 87.01(4) provides, "A school calendar must cover a period of more than 12 consecutive months if necessary to ensure that it applies immediately on the expiration of the previous school calendar."

[81] Thus, it is envisioned that a school calendar will cover a 12-month period.

[82] I do not doubt that, as asserted by the worker, "summer is a non-teaching period." That summer may be a period of time during which the worker does not perform teaching work duties does not preclude the summer months from being part of the worker's employment and in fact being a pre-paid vacation period.

[83] That the collective agreement provides that that salary "is for all days of the school year" does not preclude the salary from being an "annual salary" intended to cover a yearly period.

[84] That any work duties done during the summer months are strictly voluntary and would be paid according to a daily rate also does not preclude the salary from being an "annual" salary intended to cover a yearly period. I do not consider there is anything problematic about an employer paying a worker for any work performed during a pre-paid vacation period.

[85] The performance of work duties during a vacation period would involve a significant inconvenience. I can appreciate that the parties to the collective agreement could have taken that into account during negotiations as to the terms of the collective agreement.

[86] The worker asserts that interpreting article G.21 in harmony with the rest of the collective agreement "would require the Board to rule that the employee turns over to the employer the payments received from the WCB [Board] while the employee is being paid salary by the employer which, in this case, is from September to June only." The worker asserts that salary is payable during the "regular work year" as stipulated by the collective agreement; therefore payments received by the worker during the "regular work year" should be turned over to the employer. Wage loss benefits paid during the summertime are "outside the 'regular work year' and should properly go to the worker."

[87] Whether a party to the collective agreement should perform actions pursuant to a collective agreement is not a matter of enforcement by the Board or by WCAT.

[88] The employer's submission to the Review Division was to the effect that the worker's employment with the employer is year-round and continued into the summer months. I do not interpret the worker's submissions to WCAT as to the "regular work year" concerning the period between September to June to be an argument that her employment ceased upon her injury or that her employment ceased upon the end of the

school year. Significantly, the worker's June 28, 2013 submission confirms that "the employment relationship was not severed during the summer non-teaching period."

[89] That the worker's regular work year may not total 12 months does not persuade me that her employment was not year-round employment for which she was paid an annual salary.

[90] The case before me does not involve a teacher who was participating in an optional 12-month pay plan. The worker attaches significance to the fact that the letter of understanding concerning such a plan refers to teachers engaged in such a plan would still be considered 10-month employees, and also provides the payments in July and August are not considered earnings for pension purposes. She states it is clear and unambiguous that the parties always considered teachers to be 10-month employees.

[91] I am not persuaded that the fact the worker may be considered a 10-month employee for pension purposes alters the fact she is paid an annual salary to cover a 12-month period set out in the *School Act*. I find that the language of the letter of understanding does not change matters.

[92] The worker has submitted copies of collective agreement provisions from 1986 to 2011. She asserts that subsequent to the 1988 to 1990 collective agreement, there have been provisions regarding extra pay for employees who work in the summertime. She states such provisions support her position that her salary is limited to paying her for work between September and June.

[93] The worker's arguments concerning prior collective agreements are of interest.

[94] That language was introduced at one point concerning pay for teachers who work in the summertime fails to persuade me that the worker's salary is not an annual salary. As noted earlier in my decision, the performance of work during a summer vacation would amount to a significant imposition upon what is otherwise understood to be a vacation; that the parties would bargain for the payment of work associated with such a significant imposition does not persuade me that the worker's salary was not an annual salary.

[95] I note the worker does not address the fact that, like the collective agreement in effect at the time of her injury, the earlier collective agreements referred to an "annual salary." That term appears to have been used for many years. I do not know whether the parties to the collective agreement have sought to revise it, but I do know that it appears in the relevant collective agreement. As noted above, I find that it ties in with the definition of the "school year" found in the *School Act*.

[96] I appreciate the collective agreement does not state that the worker's salary includes a pre-paid vacation during the summer non-teaching period.

[97] However, I find that the fact the worker is paid an annual salary for a school year beginning July 1 that runs until the following June 30 supports a conclusion the worker's salary involves payment for all 12 months of the year. That the worker is paid over a period of 10 months for work during those 10 months supports a conclusion that the remaining two months, which are included in the worker's annual salary amount to a pre-paid vacation period.

[98] I find that the worker's salary paid to her between September and June involves pre-payment for her vacation in July and August.

Are employment insurance matters relevant to this appeal?

[99] The worker asserts that the panel in *WCAT-2008-05145* erred in its comments with respect to the majority of teachers not being eligible for employment insurance benefits in the summer on the basis they have already collected salary for that period of time.

[100] The worker cites information (currently entitled "Employment Insurance and teachers") found on the website of Service Canada[2] which she says is to the effect that a teacher's inability to collect regular employment insurance benefits in the summertime is not due to what the worker calls "a purported collection of salary for this period of time, but instead to the fact that the teacher has a signed or agreed contract for the next teaching period" with the result there is no unemployment for the teacher.

[101] The Service Canada material submitted by the worker provides that a teacher under a continuing contract who teaches at various types of schools cannot be paid regular benefits during non-teaching periods, even though the teacher is unemployed, unless the contract ends (or other exceptions are applicable). The material states that such a teacher may be paid maternity, parental or compassionate care benefits.

[102] That language on the website of Service Canada referred to by the worker appears to differ from the comments found in *WCAT-2008-01545*, which referred to the analysis in umpire decisions under the *Unemployment Insurance Act* (as it was then known) confirming the principle the teachers are paid an annual salary over 10 months. As noted above, the panel in *WCAT-2008-01545* stated the majority of teachers are not eligible for employment insurance benefits in the summer on the basis they have already collected salary for this period.

[103] The employer's submission to WCAT refers to other materials ("Serving Employment Insurance Appellants") found on the website for Service Canada[3] which expressly cite the *Employment Insurance Regulations* that provide the basis for the other material cited by the worker.

[2] http://www.servicecanada.gc.ca/eng/ei/information/teacher.shtml (last accessed January 24, 2014).
[3] http://www.ae-ei.gc.ca/eng/view_court/vc_teachers.shtml (last accessed on January 24, 2014).

[104] The material cited by the employer also summarize a 1974 Federal Court of Appeal decision[4] which sets out the underlying principle of law that provides the basis for teachers receiving special treatment under the legislation. The material states that the court concluded that teachers receive such special treatment because they work for 10 months of the year but have contracts of service which continue throughout 12 months. Therefore, there is no layoff or separation from employment giving rise to an interruption of earnings. The purpose of the regulations governing teachers is to prevent "double dipping." Teachers are not entitled to collect employment insurance benefits during their non-teaching period when earnings are payable to them for that same period pursuant to their teaching contract.

[105] The employer provided a copy of a 1989 decision of an umpire[5] in which the umpire stated that regular full-time permanent teachers are paid an annual salary over a period of 10 months, and it would be inappropriate for them to receive unemployment insurance benefits during the summer since, in effect, they have already been paid for that period. The umpire observed that some teachers are not employed on a regular full-time permanent basis and are only paid for the time they teach, so the principle has no application to such cases.

[106] Of significant interest, the employer has provided a copy of *Canada (Attorney General) v. Partridge*, 1999 CanLII 8193 (FCA), which concerned a British Columbia teacher. The court noted that according to the *School Act*, the school year commenced on July 1, 1993 and ended on June 30, 1994. The collective agreement established that the teacher's annual salary was payable for the entire school year. The court determined there was no evidence suggesting the teacher had not been paid for the period between July 12, 1993 and September 6, 1993. To allow the teacher to collect unemployment benefits from July 12, 1993 until the start of teaching in early September 1993 would effectively allow her to be "doubly compensated" for that period.

[107] The worker's rebuttal submission quotes further information found in "Employment Insurance and teachers" concerning termination of contracts at the end of teaching periods. The worker asserts that those teachers whose contracts have terminated at the end of June are eligible to receive and do actually receive Employment Insurance benefits during the summer non-teaching period. She states that every year hundreds of term contract teachers receive layoff notices. She argues that the concept of a pre-paid salary for the summer months is not applied to those circumstances.

[108] I note that in the case before me the worker does not assert she was a teacher who was teaching under a contract that terminated at the end of June. While it may be true that the concept of a pre-paid vacation does not apply under some circumstances, the simple fact is those are not the worker's circumstances.

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[4] *Petts v. Canada (Unemployment Insurance Umpire),* [1974] 2 F.C. 225 (F.C.A.)

[5] http://www.ae-ei.gc.ca/eng/policy/appeals/cubs/10000-20000/17000-17999/17053.shtml (last accessed on January 24, 2014).

[109] The worker argues that in the employment insurance scheme the concepts of a pre-paid salary and double dipping are *obiter dicta* (comments not necessary to a court's decision.) She states that the actual legislation does not refer to "double dipping" and in fact, the legislation focuses on whether an individual's contract of employment for teaching has terminated.

[110] I accept that the comments are indeed *obiter dicta*. Yet, I consider the *obiter dicta* articulate a basis for denying payment: teachers have already been paid for the summer months via their annual salary.

[111] The worker cites comments in chapter 14 of the "Digest of Benefit Entitlement Principles"[6] regarding the decision in *Dick et al. v. Deputy Attorney General of Canada*, [1980] 2 S.C.R. 243 to the effect that teachers are only paid for the days they teach. The worker asserts that the court in that case found that teachers have an interruption of earnings and a separation from employment during non-teaching periods. Consequently, earnings are to be allocated solely to days taught.

[112] The worker states that *Dick* was further explained in *Chaulk v. Canada (Attorney General),* 2012 CFA 190 (Can LII) which she states held that "…since the collective agreement governing her [Ms. Chaulk's] employment only requires teachers to work for the 194 days of the school year, her salary should be attributed to those days."[7] The worker asserts that the same argument applies to her claim. Her collective agreement requires teachers to work only for the days of the school year between the first Tuesday after Labour Day and the last Friday in June. She argues her salary is to be attributed to those days only.

[113] The worker contends that the employer's assertion that employment insurance benefits are not payable during the summer months because teachers have already been paid for that period is clearly not accurate given the decision in *Dick*.

[114] I find that the outcome in the appeal before me does not rest on an interpretation of the law associated with unemployment insurance benefits or employment insurance benefits. An analysis of employment insurance is of interest but is not determinative of the results of this appeal. The outcome rests on a consideration of the Act, RSCM II, British Columbia statutes, and the collective agreement.

[115] Nevertheless, I have considered the worker's arguments regarding *Dick* and *Chaulk*. I have read those decisions.

[116] *Dick* concerned a teacher who had been paid a lump sum under her collective agreement and who claimed unemployment insurance pregnancy benefits extending

[6] http://www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml (last accessed on January 24, 2014).
[7] I have quoted directly from the court case.

into July and August following her cessation of work on March 26. Initially, it had been determined that the lump sum was made to cover sums which would otherwise have been received by her in July and August. The court stated that the lump sum "….had the effect of paying her in full for services rendered up to the date of her withdrawal from service." Of note, the court referred to regulation 173(3) of the *Unemployment Insurance Regulations* which provided as follows:

> Wages or salary payable to a claimant in respect of the performance of services shall be allocated to the period in which the services were performed.

[117] Significantly, the court observed, "I cannot find that in receiving this sum she received anything in respect of July and August."

[118] In light of the relevant regulation, and the court's awareness of the teacher's workdays during the school year, its determination seems eminently reasonable. I note there is no such regulation applicable to the case before me.

[119] *Chaulk* concerned a teacher who went on maternity leave on June 22 and applied for employment insurance benefits. She was paid a supplemental employment insurance benefit by her employer pursuant to a term of the collective agreement. Initially, it had been determined the teacher's employment insurance benefits and supplemental benefits exceeded her normal weekly earnings. The matter turned on a conclusion as to what was the nature of her "normal weekly earnings": (i) her annual salary divided by 52 weeks a year or (ii) her annual salary divided by the 194 days a year she was required to work under her collective agreement.

[120] In *Chaulk*, the court endorsed the latter calculation. It found that the decision in *Dick* was not directly on point as the phrase "normal weekly earnings" had not been enacted when *Dick* was decided.

[121] The court in *Chaulk* considered that *Dick* established two propositions that were relevant to the matter in *Chaulk*: whether Ms. Dick was paid over 10 months or 12 months was of no significance and the lump sum paid to her was for services rendered to the start of the leave, and none of it was attributable to July and August when she was not required to render services.

[122] In *Chaulk*, the court found the teacher was paid for the number of weeks worked in the school year; she was not paid for the months of July and August when she was not required to work. The court noted the collective agreement provided that when teachers leave their employment during the school year they are entitled to a payment calculated on the basis of the number of days they have worked divided by the 194 days of the school year. That was a clear indication teachers were not paid for the months of July and August, and no provision in the collective agreement provided otherwise.

[123] I do not consider that the analysis employed by the courts in those cases has any notable relevance to the matter before me.

[124] Neither decision purported to address whether an injured teacher's employer should be paid temporary disability wage loss benefits under the workers' compensation legislation regarding any temporary disability in July and August. The decisions concerned matters associated with maternity benefits payable under an employment insurance regime.

[125] Of interest, it does not appear that in either case the courts considered any definition of a "school year" found in any school act applicable to the employment of either teacher.

[126] While I raise this matter later in my analysis, I consider that were I to adopt the analysis used by the courts and find the worker was entitled to be paid temporary disability wage loss benefits for her disability in the summer months, she would receive a significant windfall in that she would have been paid her full salary by her employer plus an additional several thousand dollars.

Does pre-payment for July and August engage the language of section 34?

[127] In considering whether pre-payment satisfies amounts to "payments, allowances or benefits which the worker may receive from the worker's employer during the period of the disability," I have had regard to the the modern principle of statutory interpretation which has been endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 and in many subsequent cases:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[128] The court in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54 offered the following further comments of note on statutory interpretation:

> …The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[129] The decision in *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425, 2005 SCC 70 illustrates the considerations applicable to the various steps in the analysis which the court listed as follows:

(1) Grammatical and Ordinary Sense
(2) The Scheme of the Act
(3) The Object of the Act
(4) The Public Policy Debate
(5) Avoidance of Anomalous Results
(6) Legislative History
(7) Penal Provision

[130] I find that such pre-payment satisfies the language of section 34.

[131] Specifically, I find that section 34 does not require that payments actually be physically issued in the summer months. I do not accept the literal approach of interpretation employed by earlier WCAT panels and instead prefer the purposive interpretive approach employed in *WCAT-2008-01545*.

[132] I consider that such an approach accords with the intent of section 34 as set out in *WCAT-2008-01545*.

Should the discretion in section 34 be exercised in favour of paying the employer temporary disability wage loss benefits payable beyond the end of the school year?

[133] That the facts of the case permit a decision-maker to consider the discretion set out in section 34 does not resolve the matter. It is still necessary to consider the exercise of that discretion.

[134] The worker refers to what she considers to be an "analogous situation" involving supplemental employment benefits that teachers' unions have negotiated for their members who receive employment insurance. She makes reference to a grievance that held that teachers are entitled to supplemental employment benefits during the summer non-teaching period "if they qualify for leave under the *Employment Standards Act*." The worker asserts that the result of that grievance is that some teachers, in addition to collecting their full salary from September to June from the employer would collect Employment Insurance benefits in the summer on a parental leave and receive payment from the school district pursuant to the supplementary employment benefit plan, which would result in those teachers receiving far more income than a teacher who was not eligible for parental leave.

[135] The worker asserts that the employer has not addressed her arguments regarding the significance of the grievance. She states teachers to whom the grievance applies are not "punished for taking advantage of the negotiated contractual benefit." She argues that teachers on workers' compensation claims in her school district "should not be punished for having negotiated advantageous top-up language in their collective agreement [article G.21]."

[136] The worker asserts that in the grievance the arbitrator found the employer derived a benefit from a worker taking parental leave in the summer. She states that in her case her employer derived a significant benefit from her participating for 40 days in an occupational rehabilitation program during the summer. If her employer had to pay a teacher on call for 40 days that would have cost the employer at least $8,000 in teacher on call costs and probably another $4,000 in supplementing the workers' compensation payments to the worker pursuant to the collective agreement. Because of the worker's participation in the occupational rehabilitation program during the summer and her subsequent recovery, the employer received a significant benefit. The benefit will still be significant even if the wage loss benefits are paid to the worker instead of the employer.

[137] While that is an interesting result in a grievance, I do not consider it has much, if any relevance, to the case before me. The appeal before me involves the payment of benefits following a workplace injury covered by the Act.

[138] Whether other teachers in other circumstances are entitled to receive monies in excess of their annual salary hardly provides a basis to find the worker in the case before me should similarly receive such monies. I appreciate the worker did not receive excess funds that she might have received had she become pregnant and received supplemental employment benefits pursuant to her collective agreement and Employment Insurance benefits, but I do not regard the fact that the worker was not paid temporary disability wage loss benefits during the summertime somehow amounts to her having been "punished."

[139] If workers' compensation benefits had been paid to the worker during the summer months, she would have been paid double for the same period of time in the sense she would have received her annual salary as well as workers' compensation benefits. Such double payment would be contrary to the intent of section 34 of the Act. That other teachers might benefit from the grievance cited by the worker (and receive benefits in summer months) does not provide a basis to find the worker in the case before me should also receive monies in the summer months in addition to her annual salary. The worker is not somehow disadvantaged by not being able to receive monies in excess of her salary.

[140] I note the worker asserts she gave up "considerable amount of family time in order to participate in the OR2 [occupational rehabilitation 2] program during the summer." The worker states she attended 40 out of 40 sessions during the summertime. The worker states she "did not enjoy her time off from the classroom." The worker argues that her attending occupational rehabilitation "was analogous to performing work; therefore the wage loss benefits should have rightly been paid to her directly."

[141] While not expressly stated by the worker, it appears she considers she should be paid compensation benefits for having been inconvenienced due to attending therapy aimed at rehabilitating her injury and/or for having expended effort at such rehabilitation. I am not persuaded that such inconvenience and/or effort provide a basis to ignore the fact that the worker's rehabilitation occurred during a pre-paid vacation period.

[142] The submissions go so far as to assert that a decision that benefits are not payable to the worker would result in teachers postponing their rehabilitation:

> In closing, this claim has significant implications for a worker's rehabilitation in the future. 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 rehabilitation program. The teacher will insist on having July and August as a vacation. The Board will suspend benefits. The worker will seek further benefits for treatment and temporary total disability benefits in September upon the resumption of the rehabilitation program. The school district will have to pay a teacher-on-call while the worker is in rehabilitation. The school district will also be paying the worker their wage loss benefits from the WCB in addition to any negotiated top-up payments as per the collective agreement with the worker's union. That would not further the goals of our worker's compensation system.

[143] Thus, the worker argues that an unfavourable outcome in this appeal would result in injured teachers declining timely efforts aimed at rehabilitating injuries.

[144] I find that neither the Board nor WCAT can force workers to attend timely rehabilitation against their will. Thus, it would be open to teachers to decline to attend timely rehabilitation.

[145] While such actions by teachers would inconvenience employers in that they would have to secure substitute teachers for September, one might think that teachers, or any other workers for that matter, would wish to consider very carefully the long-term impact on their health of declining timely treatment for an injury.

[146] I do not consider it appropriate to base my decision on what other teachers might do should they learn of the results of this decision. I consider it appropriate to resolve the appeal before me based on the facts of the case before me.

[147] The worker asserts that payment to the employer results in over-compensation of the employer and under-compensation of the worker. She asserts that in June 2012 she was "receiving a long term wage loss rate which is set at 1/52 of 90% of the worker's annual net salary." During the school year, she received her entire salary within 43 weeks. As a result, she is paid at a rate of 1/43 of her annual salary per week.

[148] The worker asserts that the weekly long-term rate does not accurately represent her loss during the school year. As a result, it is "necessary to pay the wage loss benefits directly to the worker during the summer to ensure that the worker receives a fair amount in wage loss benefits."

[149] This argument is not at all convincing. The worker was kept on salary by her employer. As a result, the wage loss benefits were paid to the employer.

[150] That the weekly benefits paid by the Board to the employer were less than the weekly salary paid by the employer to the worker does not result in under-compensation of the worker. The benefit level set by the Board did not result in the worker being deprived of her salary paid to her by her employer.

[151] The worker notes that many other collective agreements contain language similar to the language found in article G.21. She comments that in some school districts, when a teacher runs out of sick leave, the workers' compensation benefits are paid directly to the teacher. She states that is the case in a nearby school district.

[152] The worker queries what happens if a teacher with no days of sick leave is injured at work. She states the answer is that benefits would go directly to the worker, including wage loss cheques during the summer non-teaching periods. She states if those teachers receive wage loss cheques in the summer, then all teachers should receive wage loss cheques in the summer.

[153] An examination of what might happen in other circumstances assists me little in resolving what should happen in the case before me. In the case before me, the worker was paid her salary by her employer from the date of injury until the end of the school year.

[154] If the worker's circumstances had been different and her employer had not continued her salary following the date of injury, the case before me would be significantly different. Notably, had the employer not paid the worker her salary following her January 2012 injury, the Board would have paid workers' compensation benefits directly to the worker. However, those are not the facts in the case before me.

[155] The worker asks what would happen if the collective agreement did not contain article G.21. She states the payments would go directly to the teacher. She argues that the very title of article G.21 should be taken as evidence that the monies provided during the school year by the employer to the worker, over and above the amount of the benefits paid by the Board are supplementary, a negotiated benefit that should not be refunded to the employer through "summer wage loss cheques." She asserts that such a result is contrary to policy item #34.40.

[156] The simple fact is that the collective agreement does contain article G.21. If it did not contain that article, the employer would not have paid the worker her salary following her disabling injury. In the absence of that article and payment of salary by the employer, there would be no need to consider section 34 of the Act.

[157] In the case before me, that article exists and the employer paid the worker her salary.

[158] That the article may bear a particular title does not persuade me that the discretion in section 34 should not be exercised. The title of the article does not alter the fact the worker was paid her annual salary by her employer.

[159] The worker argued to the Review Division, "At the end of the day, the Board is not paying out any more compensation than it would have had the local union not successfully negotiated supplemental compensation language into the collective agreement." She argued, "It is simply the distribution of the compensation that is the issue." She asserted that workers' compensation benefits are rightly sent to the employer during the months between September and June when the employer keeps a worker on full salary, but during July and August, the payments should be sent to the worker.

[160] The worker asserted that the compensation supplement received by her pursuant to the relevant clause in the collective agreement should not factor into the determination of whether she is entitled to receive benefits directly from the Board because it has no impact on how much compensation benefits are payable by the Board.

[161] Yet, the fact that the total amount of compensation benefits paid out by the Board is not dependent upon the identity of the recipient of those benefits is not especially relevant to resolving the question of who should be the recipient of the benefits. Whether benefits should be paid directly to the worker depends on whether the worker has been pre-paid a summer vacation period and whether the facts of the case justify exercising discretion in favour of the employer.

[162] The worker asserts that if her wage loss benefits are paid to the employer in the summer, the employer has "a windfall because the employer lost nothing as a result of the worker being disabled." The worker asserts that the employer did not make any payments to her during July and August, and it did not have to hire a substitute teacher during July and August.

[163] I find the worker's submissions overlook the fact that the employer paid the worker her salary from the date of injury onward until the end of the school year and, at the same time, likely had to pay a substitute teacher during those months. Such circumstances suggest the matter of the worker's claim was of some financial consequence to the employer.

[164] The worker goes so far as to assert that the employer has been "unjustly enriched." She refers to the three components of the test found in *Kerr v. Baranow*, 2011 SCC 10.

[165] The argument with respect to unjust enrichment is novel but not at all persuasive.

[166] If indeed the worker considers her employer was unjustly enriched, it is open to her ascertain whether she can sue her employer and make that claim. WCAT is not a court. WCAT has no ability to order the employer to pay monies to the worker that the worker considers were inappropriately paid to the employer. I am not persuaded the concept of unjust enrichment has any application to the adjudication of whether the discretion in section 34 of the Act should be exercised in favour of the employer.

[167] Even if it were to fall to WCAT to consider the arguments regarding unjust enrichment, I consider that any associated principles favour paying benefits to the employer.

[168] I note that in paragraph #36 the court in *Kerr* stated, "The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation."

[169] The worker argues that she rehabilitated herself during the summer so that she was able to commence work when the school year opened in September, with the result the employer saved money by not having to pay the worker's full salary and pay for a substitute teacher in September.

[170] I find that, as described above, any enrichment of the employer to be somewhat indirect. One would think that the primary beneficiary of the rehabilitation performed in the summer was the worker.

[171] Even if, for the sake of argument, I were to accept that such circumstances satisfied the first element of the test, I am not persuaded that the second element is established.

[172] While the worker argues that she was deprived of the enjoyment of her summer and "will never be able to recover the lost summer" due to attending rehabilitation and was not compensated for her lost summer, I am not persuaded that she suffered a deprivation as that term is understood.

[173] I do not understand the worker as asserting she did not benefit from undertaking occupational rehabilitation. She received the benefit of treatment paid for by the workers' compensation system. I note that the report which documented the worker's August 30, 2012 discharge from treatment commented she was discharged as fit to return to work without limitations.

[174] I find that the fact the worker experienced an improvement of her health owing to attending rehabilitation poses a significant barrier to finding she experienced a deprivation. While I accept the worker's summer was somewhat disrupted, I note she did partake in a pre-arranged family vacation.

[175] Even if the first two elements of the test were satisfied, I am not persuaded that it can be said there is an "absence of a juristic reason for the enrichment."

[176] I am not persuaded that there is no reason in law for the employer to retain the workers' compensation benefits paid by the Board to the employer regarding the summer months. While the worker asserts the employer "does not pay the worker during the summer non-teaching period," I have found the worker was pre-paid for her summer vacation. Such payment provides a juristic reason for the workers' compensation monies to be paid to the employer.

[177] While not argued as part of the submissions to WCAT, the worker's submissions to the Review Division address comments by the employer to the effect workers' compensation benefits paid to it are used to recover the payments made to teachers and that, in effect, workers' compensation benefits are topped up by the employer. The worker asserts that pursuant to policy, it is "inappropriate" for the employer to recover the difference between the amount of workers' compensation benefits and the worker's regular salary.

[178] While the employer may have referred to workers' compensation benefits having been "topped up", the circumstances of the case before me do not engage the following passage in policy item #34.40: "No refund is made for the difference between the amount of compensation and the worker's regular salary."

[179] I find that provision applies to cases in which workers' compensation benefits are paid by the Board to a worker and an employer pays the worker the difference between those benefits and the worker's salary. Those are not the facts of the case before me.

[180] The worker's employer paid the worker her annual salary. That the employer may have been paid monies by the Board that allowed the employer to recover part of that salary did not amount to the employer paying the worker monies on top of monies paid by the Board to the worker.

[181] After having reviewed the matter, and for the reasons set out above, I deny the worker's appeal. I find that subsequent to the end of the school year, the Board properly paid temporary disability wage loss benefits to the employer rather than to the worker. I find that the payment by the employer to the worker of her annual salary amounts to pre-paying the worker for a vacation period in July and August. Such pre-payment amounted to payment received by the worker during the period of her disability. Such circumstances provided a basis for the discretion in section 34 of the Act to be exercised in favour of the employer.

[182] I appreciate the worker and her union may strongly dispute my decision. It is certainly open to them to approach the Board with a request that it issue practice direction and/or policy that would produce the outcome they desire.

Conclusion

[183] The worker's appeal is denied. I confirm the decision of the review officer. I find that subsequent to the end of the school year, the Board properly paid temporary disability wage loss benefits to the employer rather than to the worker.

[184] There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Randy Lane
Vice Chair

RL/cv