WCAT Decision Number: WCAT-2014-02307
WCAT Decision Date: July 31, 2014
Panel: Elaine Murray, Vice Chair

Introduction

[1] The worker was injured in January 2006. In November 2011, the Worker's Compensation Board (Board), operating as WorkSafeBC, determined that she was entitled to a loss of earnings pension under subsection 23(3) of the *Workers Compensation Act* (Act), effective January 24, 2007. That section provides that a loss of earnings pension is based on the difference between the average net earnings of the worker before the injury and whichever of the following two options better represents the worker's loss of earnings: (1) the average net earnings the worker is earning after the injury; or (2) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

[2] The worker had two jobs when she was injured. She was working for the accident employer as a full-time care aide and for a second employer as a part-time care aide (approximately 15 hours per week). The worker was able to return to her full-time employment as a care aide with the accident employer; however, she was found unable to perform care aide duties on an additional part-time basis. It was determined that she would be able to work part time (a total of 7.5 hours per month) as a companion because it was a less demanding occupation than care aide.

[3] In calculating the worker's loss of earnings pension, the Board applied policy item #40.13 from the *Rehabilitation Services and Claims Manual, Volume II*. That item elaborates on the subsection 23(3) calculation and provides for taking the effects of inflation into account when determining the average post-injury earnings to be used in the subsection 23(3) calculation.

[4] Policy item #40.13 explains that since assessment of a loss of earnings pension will often be made some time after the original injury, it would not be fair to directly compare the worker's actual pre-injury average earnings with the earnings the worker might now earn in the occupations available. The effect of inflation upon earnings levels would mean that the "real loss" would not be properly determined in that way. Thus, policy item #40.13 provides that the Board is to use the earnings in the occupations available after the injury as they stood at the date of the injury for comparison purposes. Policy adds, however, that it occasionally happens that earnings in occupations at the time of the injury are not available. **If this occurs, policy item #40.13 explains that it may then be necessary to use the earnings in those occupations as they were at another date and bring the pre-injury earnings into line by applying cost of living adjustments as described in policy item #51.00** (emphasis added).

[5] In calculating the worker's loss of earnings pension, the Board used earnings from 2011 (and not from the date of injury in 2006) and incorporated policy item #51.00. That policy and section 25 of the Act address cost of living adjustment (COLA) calculations. The COLA calculation adjusts the percentage change in the consumer price index (CPI) by subtracting 1% from the percentage change each year, capping the maximum COLA at 4%, and establishing a floor of 0% so that deflation has no negative impact on benefits.

[6] In keeping with policy item #40.13, the Board used this method to establish the historical value of the worker's average post-injury earnings as at the date of her injury for comparison to her average pre-injury earnings.

[7] The worker challenged this approach in a November 3, 2011 memorandum to the case manager and subsequently by seeking review at the Review Division. She argued that the Board's application of section 25 of the Act and policy item #51.00 did not produce a true comparison; rather, it produced an inflated figure for her post-injury earnings. The worker asserted that the Board should be using the unadjusted percentage change in CPI for purposes of establishing the difference under subsection 23(3) of the Act, rather than using the COLA calculation in section 25 and policy item #51.00.

[8] By decision dated May 8, 2012 (*Review Reference #0136952*), the Review Division denied the worker's request for review, finding that the Board must apply policy item #40.13 as written. The worker appealed to the Workers' Compensation Appeal Tribunal (WCAT) and challenged policy item #40.13 on the basis that by incorporating policy item #51.00, and thus section 25 of the Act, it was so patently unreasonable that it was not capable of being supported by the Act.

[9] The employer is participating in this appeal (as a deemed employer), and agreed with the worker for separate but concurring reasons.

[10] In *WCAT-2013-00551*, dated February 27, 2013, I referred the lawfulness of that part of policy item #40.13 that incorporated the formula from policy item #51.00 to the Chair of WCAT under subsection 251(2) of the Act.

[11] The Chair requested submissions from the parties and also invited submissions from the workers' compensation community in general. Once submissions were completed, the matter was forwarded to the Chair to determine whether the impugned portion of policy item #40.13 should be applied or not.

[12] By memorandum dated January 20, 2014, the Chair asked WCAT Tribunal Counsel to request further submissions from the parties. The Chair noted in her memorandum that for the occupation of companion, while actual earnings at the time of injury were not available, occupational averages were available and on file for the time of injury (2006). As well, the Chair noted that for the occupation of care aide, actual earnings and occupational averages were both available for the time of injury and were also on the

worker's file. The Chair pointed out that, under policy item #40.13, it is only if earnings in occupations at the time of the injury are not available that it may be necessary to incorporate policy item #51.00 when applying policy item #40.13.

[13] The Chair further pointed out that under section 251 of the Act she is limited to reviewing whether a particular policy should be applied in a particular case. In other words, if the impugned policy was not applicable in the particular case, the section 251 referral would not be appropriate.

[14] The Chair then asked for submissions whether the impugned portion of policy item #40.13 was applicable when measuring earnings loss with respect to the care aide and/or companion occupations.

[15] The worker submitted that the impugned portion of policy item #40.13 still applied. The employer disagreed. I agree with the employer's submissions and find that it was not necessary for the Board to apply the impugned portion of policy item #40.13 when calculating the worker's loss of earnings pension. In these circumstances, I consider it appropriate to withdraw the section 251 referral I made in *WCAT-2013-00551*, and proceed with this appeal.

[16] The worker had initially submitted that her loss of earnings had not been properly calculated because incorporation of policy item #51.00 into the calculation resulted in a reduced loss of earnings award. The employer agreed that incorporation of policy item #51.00 was problematic.

Issues(s)

[17] Should the worker's loss of earnings pension be recalculated under policy item #40.13 without incorporating policy item #51.00?

Jurisdiction

[18] This appeal was filed with WCAT under subsection 239(1) of the Act. Section 254 of the Act gives WCAT 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.

[19] Under subsection 250(1) of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case.

Analysis and Findings

[20] As is apparent from my earlier summary of the background to this appeal, it was not necessary for the Board to apply the impugned portion of policy item #40.13 to the calculation of the worker's loss of earnings pension. Rather, the Board had available earnings in the occupations available after the injury as they stood at the date of the injury for comparison purposes. It was therefore not correct to use earnings as they were at another date and bring the pre-injury earnings into line by applying cost of living adjustments as described in policy item #51.00.

[21] In this situation, I consider it appropriate to vary the review officer's May 8, 2012 decision in *Review Reference #R0136952*, so as to cancel the November 3, 2011 decision of the case manager in Long Term Disability and Occupational Disease Services. The Board is to recalculate the worker's loss of earnings pension under policy item #40.13 solely with reference to the earnings in the occupations available after the injury as they stood at the date of the injury (2006) for comparison purposes. The Board is to then provide the worker with a new decision in that regard, with full rights of review/appeal.

Conclusion

[22] I allow the worker's appeal, and vary *Review Reference #R0136952*, so as to cancel the November 3, 2011 decision of the case manager in Long Term Disability and Occupational Disease Services. The Board is to recalculate the worker's loss of earnings pension under policy item #40.13 solely with reference to the earnings in the occupations available after the injury as they stood at the date of the injury (2006) for comparison purposes. The Board is to then provide the worker with a new decision in that regard, with full rights of review/appeal.

[23] No appeal expenses were requested. As none are apparent, I make no order with respect to appeal expenses.

Elaine Murray
Vice Chair

EM/hb