

## Decision of the Appeal Division

**Number:** 00-1155  
**Date:** July 31, 2000  
**Panel:** John Steeves, Jill M. Callan, Paul Petrie  
**Subject:** Section 96(4) Referral - Inclusion of taxable benefits in average earnings

---

- (1) Pursuant to subsection 96(4) of the *Workers Compensation Act* (the *Act*), the president of the Workers' Compensation Board (the Board) has referred the January 28, 2000 findings of the Workers' Compensation Review Board (the Review Board) to the Appeal Division for redetermination on the grounds of contravention of a published policy of the governors and error of law.
- (2) The president's reasons for the referral are set out in a case manager's memorandum to the vice president, Rehabilitation and Compensation Services Division dated February 23, 2000. The president contends that the majority of the Review Board panel contravened item #71.20 of the *Rehabilitation Services and Claims Manual* (the *Manual*), which is entitled "Fringe Benefits", and the *Act* by finding that certain amounts should be included in determining the worker's average earnings.
- (3) The appeal officer has notified the worker and the employer of the president's referral and invited their submissions. However, submissions have not been provided on behalf of either of them.

### Issue(s)

- (4) The issue raised by the president's referral is whether the January 28, 2000 Review Board finding that certain amounts recorded on the worker's T-4 slips as taxable benefits are to be included in his average earnings contravenes item #71.20 of the *Manual* or involves an error of law.

### Background

- (5) On August 24, 1998, the worker injured his right ankle when he slipped and fell at work. The Board accepted his claim for compensation.

- (6) When the claims officer set the worker's 8 week wage rate, an issue arose as to the worker's average earnings at the time of the injury. The Board concluded that the earnings in the one-year period prior to the injury did not best reflect the worker's earning potential because of a lengthy strike. As a result of a "management directive", the Board decided to use the worker's earnings in the 5-year period prior to his injury. For the purposes of the 8 week review of the worker's earnings the Board obtained earnings information in the form of T-4 slips and determined an average earnings figure. It is significant for this decision that the Board excluded the amounts in Box 40 of the T-4 slips, entitled "Other Taxable Allowances and Benefits". These amounts related to medical insurance, a share purchase plan and an insurance plan paid for by the employer.
- (7) The decision to use the worker's 5-year earnings was communicated to him in a letter dated November 2, 1998. He appealed this decision to the Review Board.

### **The January 28, 2000 Review Board Findings**

- (8) In the January 28, 2000 Review Board findings the majority of the panel allowed the worker's appeal. The panel unanimously accepted that the Board was correct in using the worker's earnings in the 5-year period prior to his injury. However, the majority concluded that the Board had erred in excluding the amounts recorded in Box 40 of the T-4 slips, "Other Taxable Allowances and Benefits". The reasoning of the majority is contained in the following quote from their findings:

In [the worker's] case he is not receiving "fringe benefits" provided by the employer, but the portion of benefits listed in his T4 Income statements are benefits included in his employment income for which he pays taxes on and become part of his taxable employment earnings. These are services purchased by [the worker] after tax dollars (sic) as opposed to receiving a "fringe benefit".

[reproduced as written]

- (9) In summary, the majority reasoned that, since the worker was paying tax on the amounts identified as taxable allowances and benefits, those amounts should be included in the calculation of his earnings for the purposes of determining his wage rate.
- (10) The vice chair of the Review Board panel dissented on the basis that the majority's finding involved a contravention of policy. The dissenting vice chair cited item #71.20 of the *Manual* and stated as follows:

I am unable to agree with the notion put forward by the majority that by virtue of the simple reason that fringe benefits are taxable under the Income Tax Act they must be included as “average earnings” in the calculation of compensation benefits. . . . Simply, what constitutes taxable income for Revenue Canada does not necessarily constitute earnings for worker’s compensation purposes.

- (11) We note that the Review Board findings in this case were determined on the basis of written submissions from the worker rather than with an oral hearing. Further, it appears that the employer did not participate in the appeal.
- (12) We also note that the cover page of the Review Board findings refers to a decision of October 19, 1998 as the Board decision under appeal. The body of the findings refer to an appeal from a decision dated November 2, 1998 on the claim file. We do not see a decision dated October 19, 1998 and there is a decision dated November 2, 1998 regarding the worker’s wage rate. On this basis we take it that the decision that was appealed to the Review Board was dated November 2, 1998.
- (13) Neither the worker nor the employer appealed the Review Board findings to the Appeal Division.

### **President’s Referral**

- (14) By a memorandum dated February 23, 2000, the president of the Board referred the January 28, 2000 Review Board findings to the Appeal Division pursuant to section 96(4) of the *Act* on the grounds of contravention of a published policy of the governors and error of law. Pursuant to section 83.1 of the *Act* the powers, duties, and functions of the governors are currently performed by a panel of administrators.
- (15) The conclusion and recommendation of the president (as outlined in the case manager’s February 23, 2000 memorandum) is as follows:

. . . I consider that the Review Board finding in this case is contrary to law and published policy. There is no basis in law or policy to support the majority finding that the fringe benefits (i.e. medical insurance and an insurance plan) must be included as “average earnings”. On the contrary, published policy specifically excludes such fringe benefits from average earnings calculations. . . .

- (16) The memorandum also recommended that the issue of inclusion of the amounts on the T-4 slips related to the share purchase plan be referred back to the case manager for further investigation and consideration.

### **Law and Policy Regarding President's Referrals**

- (17) Subsection 96(4) of the *Act* provides:

The president may, not more than 30 days after a finding of the review board is sent out, refer the finding to the appeal division for redetermination on grounds of error of law or contravention of a published policy of the governors.

- (18) Subsection 96(5) provides:

Section 91 (2) applies to a redetermination under subsection (4).

- (19) Subsection 91(2) provides:

Where an appeal is commenced under subsection (1), the appeal division may direct the review board to reconsider the matter either generally or on a particular issue, and the appeal division may withhold its decision pending the finding of the review board.

- (20) A referral by the president pursuant to section 96(4) of the *Act* is discussed in item #102.50 of the *Manual*, "Referral Review Board Findings". It provides, in part:

- If the Board officer feels that one or both of the following two grounds of referral exist [in a Review Board finding], he or she will discuss the review board finding with his or her Manager:
  - (1) The finding contains an error of law.
  - (2) The finding contains a contravention of a published policy of the Governors.
- If the Manager agrees with the Board officer, the Board officer will prepare a memo to the Vice-President, Compensation Services Division, outlining how the referral grounds are met.

By way of explanation, the first ground means that the finding is contrary to the provisions of the *Workers Compensation Act* or based upon some other clear error of law. The second ground means that the finding contradicts the published policy of the Governors. The published policy of the Governors is set out in #96.10 of this manual.

- If the referral is to be made on the first ground, the referral memo should contain a reference to the section of the Act or provision of law that the finding contradicts. If the referral is to be made on the second ground, the referral memo should contain a reference to the section of the Rehabilitation Services and Claims Manual or other published policy of the Governors that the finding contradicts. A referral on either ground should provide full particulars and an explanation as to how the referral ground is met.
- A copy of the referral memo and a copy of the review board finding which is the subject of the referral is to be sent to the Vice-President. If the Vice-President considers it necessary to review the file he or she will request it.
- The referral memo to the Vice-President must be sent without further investigation and within two weeks of the date the review board finding was received by the Board. If the Vice-President considers that the grounds of referral are met and that the matter should be referred to the Appeal Division for redetermination, he or she will refer the matter to the President. The President will make the final decision as to whether to refer the review board finding to the Appeal Division under Section 96(4).
- If the President determines that the grounds of referral are met, and that the matter should be referred to the Appeal Division under Section 96(4), the worker, employer, and any other interested party will be notified by letter that the finding has been referred to the Appeal Division for redetermination under Section 96(4). This letter of notification will include copies of the referral memo written by the Board officer. After the notification letter is sent out, the file will be sent to the Appeal Division.

- (21) Item #105.30 of the *Manual* states that any benefits payable for the period of time prior to the date of a Review Board finding subject to a president's referral will be stayed pending a decision by the Appeal Division.

**Grounds under Subsection 96(4)**

- (22) We will first consider whether grounds for redetermination have been established under subsection 96(4). If grounds have been established, we will then consider the question of the redetermination.

- (23) Item #71.20 of the *Manual* states:

The Board does not include fringe benefits as a component of average earnings. Fringe benefits include, but are not limited to, employer payment for or contributions to CPP, Employment Insurance, retirement, pension, health and welfare, life insurance, training, or other employee or dependent benefit plans.

Where wages paid to a worker are supplemented by an additional amount representing statutory holiday payments or vacation allowances, these additional amounts are included in setting the wage rate on a claim. This practice normally applies to construction workers. Recognition is also given to fixed allowances such as payments to carpenters who are paid a 40¢ per hour travel allowance. This is a taxable allowance and is not an actual cost reimbursement and as such is included in the wage rate.

- (24) Our consideration of whether item #71.20 has been contravened raises a number of possibilities. Firstly, there may be no contravention of item #71.20 if it can be interpreted as not excluding the amounts in question from average earnings. Secondly, there may be a contravention of the policy. Thirdly, if there is a contravention it may be justifiable if the policy contravenes the *Act* and is, therefore, unlawful. We will first consider the question of whether the policy is lawful under the *Act*.
- (25) When policies of the governors (now the panel administrators) contravene the *Act*, the *Act* is paramount. Subsection 33(1) of the *Act* states:

The average earnings and earning capacity of a worker must be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the

daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury, but not so as in any case to exceed the maximum wage rate, except that where, owing to the shortness of time during which the worker was in the employment of his or her employer, or in any employment, or the casual nature of his or her employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment.

- (26) The governor's policies in items #67.20 and #67.21 provide guidance in respect of the application of subsection 33(1).
- (27) Subsection 33(1) and the policies set out a variety of options for determining average earnings. The paramount consideration established in subsection 33(1) is that the period of average earnings should be selected "as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury". The analysis of the Review Board panel majority seems to suggest that all amounts paid to a worker or on behalf of a worker by an employer ought to be included in average earnings if those amounts constitute taxable income for income tax purposes. However, we do not interpret subsection 33(1) as requiring that all such amounts be included in average earnings. We consider the language in subsection 33(1) to be broad enough to support either the inclusion or exclusion of fringe benefits in or from average earnings. Accordingly, we do not find the provision in item #71.20 concerning fringe benefits contravenes the *Act*.
- (28) We now turn to the question of whether the policy in item #71.20 has been contravened. The taxable benefits that were included in Box 40 of the worker's T-4s related to medical insurance, a share purchase plan, and an insurance plan. The Review Board panel majority determined that the amounts related to each of these benefits should be included in the worker's average earnings for the purposes of setting his wage rate. Item #71.20 specifically excludes an employer's contribution to "health and welfare, life insurance. . . or other employee or dependent benefit plans" from average earnings. The case

manager's February 23, 2000 memorandum, which has been submitted by the president, contends the inclusion of the amounts entered on the T-4 slips for medical insurance and the insurance plan constitutes a contravention of item #71.20.

- (29) The Review Board panel majority seems to have concluded that, by virtue of being taxable benefits, the employer's contributions in respect of the benefits in question should not be considered "fringe benefits" for the purposes of item #71.20. In our view, item #71.20 specifically states the amounts paid by employers for medical and other insurance are not to be included in average earnings. Item #71.20 indicates that some taxable allowances, such as travel allowances and amounts for statutory holiday payments or vacation allowances, are included for the purposes of calculating the wage rate. In this case, the benefits in question do not fall into these categories. Item #71.20 does not draw a distinction between fringe benefits which constitute taxable benefits for income tax purposes and those which are not taxable. The essence of item #71.20 is that, even though the employer makes a financial contribution in respect of such benefits, they are not included in the average earnings of workers. If the panel majority had provided compelling reasons for determining that the policy is not applicable in this particular case, there may not have been a contravention of policy. However, in the circumstances before us, we find the Review Board panel majority contravened item #71.20. Therefore, a ground for redetermination has been established under subsection 96(4) of the *Act*.
- (30) The dissenting Review Board vice chair concluded that, pursuant to item #71.20, the amounts related to medical insurance and the insurance plan should not be included for the purposes of determining the worker's average earnings. However, he made the following statement in respect of the share purchase plan:
- I am uncertain precisely what the share purchase plan represents, or how it operates. Although further investigation might support inclusion of such a taxable benefit into the average earnings that exercise is unnecessary as I am obviously in the minority position and majority have already included that portion of taxable benefits.
- (31) As previously noted, the memorandum that detailed the reasons for the president's referral notes this comment of the dissenting vice chair and states, "[i]t is submitted that this matter should be referred back to the Case Manager for further investigation and consideration". While the memorandum does not specifically request that we set aside the finding of the Review Board panel majority that these amounts be included in the worker's average earnings, such a

request is implicit in the request that the issue be referred to the Board for further adjudication.

- (32) Share purchase plans are not included in the list of specific fringe benefits set out in item #71.20. However, item #71.20 provides that, in addition to the types of benefits listed, fringe benefits include “other employee . . . benefit plans”. This language is broad enough to include benefits related to a share purchase plan. However, the Review Board panel majority did not address this language in finding that amounts related to the share purchase plan should be included in average earnings. Following further investigation, it may be determined that the employer's contributions to the share purchase plan do not constitute fringe benefits within the meaning of item #71.20. However, given the evidence that was before the Review Board panel and given the fact that the panel majority did not address the language in item #71.20, we conclude that the Review Board finding that the amounts related to the share purchase plan should be included in average earnings contravenes item #71.20.
- (33) Having found the January 28, 2000 Review Board finding contravenes a published policy of the governors, we find it unnecessary to determine whether the findings involve an error of law.

### **Redetermination**

- (34) Having found that a ground for reconsideration of the January 28, 2000 Review Board findings has been established, pursuant to subsection 96(4), we turn to the redetermination. There are two potential issues for redetermination. Firstly, there is the question of whether the amounts included in Box 40 of the T-4 slips for insurance, medical insurance, and the share purchase plan should be included in the worker's average earnings. Secondly, there is the question of whether it was correct to base the worker's 8 week wage rate on his earnings in the 5-year period prior to the injury.
- (35) In respect of the first question, it is our view that the amounts related to the insurance plan and medical insurance fall within the fringe benefits that are excluded from average earnings pursuant to item #71.20. A general principle of administrative law is that administrative bodies must not fetter their discretion. In other words, a body entrusted with a discretion must not prevent itself from exercising its discretion in individual cases by applying a fixed rule of policy. The governors' policy in item #96.10 of the *Manual* recognizes the prohibition against fettering discretion. It states “regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure

from a policy". In this case, we have considered whether there are reasons to depart from item #71.20 in determining the question of whether the amounts related to the insurance plan and medical insurance should be included in average earnings. We find there is no exceptional element in the circumstances before us that would justify a departure from the policy. Accordingly, we find the amounts related to the insurance plan and medical insurance should be excluded from the worker's average earnings.

- (36) We now turn to the question of whether the amounts related to the share purchase plan should be included in the worker's average earnings. The dissenting Review Board vice chair and the president's referral memorandum each suggest that this question requires further investigation. We agree that further investigation is warranted. We have considered a number of options in respect of the disposition of this issue. The first possibility involves this panel overseeing an investigation of this issue and ultimately redetermining the issue in accordance with subsection 96(4). The second possibility is to refer the issue to the Review Board for reconsideration pursuant to subsections 96(5) and 91(2). The third possibility is to set the finding of the Review Board panel majority aside and grant the president's request that the issue be referred back to the Board for further investigation and a further decision.
- (37) In this case, the third option appears to be desirable for two reasons. Firstly, an investigation is required in order to determine the issue. Secondly, the decision that the Board will ultimately render will be appealable by the worker or employer to the Review Board in accordance with section 90 of the *Act*. If we were to redetermine the issue, there would be no right to appeal our determination. We have considered whether we, in fact, have the jurisdiction to refer the question back to the Board. We acknowledge that this possibility is not specifically contemplated by subsection 96(4) or set out in another provision of the *Act*, such as subsection 96(5). However, we consider it to be a viable option. If we set aside the conclusion of the Review Board panel majority in respect of the share purchase plan, a binding decision in that regard will no longer exist. Pursuant to subsection 96(2), "the board may at any time at its discretion reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board". The president has indicated a desire to further investigate this issue and we take it that the statutory authority permitting such further investigation is found in subsection 96(2). In these circumstances, we find that referring the issue back to the Board for further adjudication is a viable option.
- (38) Based on the evidence before us and the language of item #71.20, we set aside the finding of the Review Board panel majority that the amounts recorded in Box 40

of the T-4 slips related to the share purchase plan be included in the worker's average earnings. We refer that issue back to the Board for further investigation and a further decision. We note policy no. 40:10:10 of the *Assessment Policy Manual* provides that "the gross earnings of all workers" [emphasis in original] are included in an employer's assessable payroll for assessment purposes. In the course of its investigation, the Board may wish to consider whether the amounts included in Box 40 in respect of the share purchase plan constitute assessable payroll so there is a correspondence between the amounts that are assessed by the Board and the amounts that are included for the purposes of establishing the wage rate.

- (39) We have also contemplated the question of whether the unanimous finding of the Review Board panel that it was correct to establish the worker's 8 week wage rate on the basis of his earnings in the 5-year period prior to the injury requires further consideration. As stated previously, neither the employer nor the worker appealed the Review Board findings and neither party has provided a submission. In these circumstances, we will not further consider whether it was appropriate to base the worker's wage rate on his earnings in the 5-year period prior to the injury.
- (40) We wish to comment on the statement in the claims officer's November 2, 1988 decision that, as a result of a "management directive", the claims officer was "bound to use [the worker's] five years earnings in order to set a new wage rate". We are unaware of the existence of a "management directive" and the context in which was provided. We recognize that it is important that the officers in the Compensation Services Division consistently apply the *Act* and policies because it is desirable that like cases be treated alike. However, the existence of an unpublished "management directive", which has been applied in making decisions raises serious concerns. The wage rates of workers must be established in accordance with the principles in section 33 of the *Act* and the relevant governors' policies. The application of other criteria may be questionable. At the very least, such considerations should be disclosed and articulated in the wage rate decision in order that the parties may have an opportunity to respond to them.

## **Conclusion**

- (41) In summary:
- (1) The determination of the majority of the Review Board panel that the amounts included in Box 40 of the T-4 slips related to medical insurance, the insurance plan, and the share purchase plan be included in the worker's

average earnings for the purposes of establishing his wage rate contravenes item #71.20 of the *Manual*. Accordingly, a ground under section 96(4) has been established. We set aside the finding of the Review Board panel majority in that regard.

- (2) In accordance with item #71.20 the amounts related to medical insurance and insurance are to be excluded in calculating the worker's average earnings.
- (3) In accordance with the president's request, the matter of the inclusion of the amounts in respect of the share purchase plan is referred back to the case manager for investigation and a further decision pursuant to subsection 96(2) of the *Act*.
- (4) For the reasons we have stated, we have not considered the question of whether it was appropriate to base the worker's wage rate on his earnings in the 5-year period prior to the injury.

*Editor's Note:*            *This decision has been edited for publication and for the purposes of complying with the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.*