

Decision of the Appeal Division

Number: 2001-0897

Date: May 8, 2001

Panel: John Steeves, Paul Petrie, Jill M. Callan

Subject: **Section 34 — Payment of Wage Loss Benefits
for a Statutory Holiday**

REFERRALS OF REVIEW BOARD FINDINGS (WAGE LOSS BENEFITS) (PAYMENT FOR STATUTORY HOLIDAY) — Review Board held that worker not entitled to wage loss benefits for statutory holiday during a temporary disability — Referred to the Appeal Division for redetermination — Section 96(4) grounds established on basis that Review Board findings contravened policy — Purpose of s. 34 is to prevent double liability and double compensation — No mandatory requirement that statutory holiday pay be deducted — Policies #34.40 and #34.41 lawful under the Act — Worker entitled to wage loss benefits for statutory holiday and employer not eligible for reimbursement.

Law: WCA (1996): s. 34, s. 96(4)

Policy: RSCM: #34.40, #34.41; Decision No. 107, 2 *Workers' Compensation Reporter* 42

Decisions: Appeal Division Decision No. 95-0165, 11 *Workers' Compensation Reporter* 13, Appeal Division Decision No. 2000-0668, 16 *Workers' Compensation Reporter* 287, Appeal Division Decision No. 2000-0730

*Section 96(4) — Referral [s. 96(4) referral]
Appeal Division Decision No. 2001-0897*

17 *Workers' Compensation Reporter* [519]

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- (1) In accordance with section 96(4) of the *Workers Compensation Act* (the Act), by memo dated May 17, 2000, the then acting president of the Workers' Compensation Board (the Board) has referred the April 18, 2000 finding of the Workers' Compensation Review Board (the Review Board) to the Appeal Division for redetermination on the grounds of error of law and contravention of a published policy of the governors. The reasons for the referral are set out in the memorandum of a case manager dated May 17, 2000.
 - (2) The Review Board panel had identified three issues. The issue that has resulted in this referral is "whether the Board correctly paid wage loss compensation benefits to the worker for a statutory holiday falling on November 11, 1998." Based on section 34 of the Act, the Review Board panel concluded that the worker was not entitled to wage loss benefits for that day because the employer had paid the worker for the statutory holiday.
 - (3) Although invited to do so, the worker is not participating in this matter. The employer is participating and is represented by a consultant.

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- (4) An oral hearing was held in Richmond on October 5, 2000. The hearing was adjourned in order to enable the panel to obtain various documents from the Board's Policy Bureau, which had been requested by the employer's representative. By letter dated October 30, 2000, the employer requested that the Appeal Division schedule a continuation of the oral hearing. However, given that the merits of this matter involve a question of statutory interpretation, we determined that it was appropriate to complete the hearing by receiving written submissions from the employer's representative. By letter dated November 7, 2000 addressed to the Board's Policy Bureau, the chief appeal commissioner requested copies of documents related to items #34.40 and #34.41 of the *Rehabilitation Services and Claims Manual* (the Manual) as well as a September 18, 1997 legal opinion from Mr. W, which had been requested by the employer. By letter dated December 22, 2000 (received by the Appeal Division on January 29, 2001), the Board's general counsel responded to the request and provided various documents, including Mr. W's opinion. The appeal officer disclosed those documents to the employer's representative, who commented on them in his March 15, 2001 submission.

Issue(s)

- (5) The issues are: (1) whether the April 18, 2000 Review Board finding that the worker was not entitled to wage loss benefits for the statutory holiday involved an error of law or contravention of policy; and (2) if so, how should the Review Board finding be redetermined.

Law and Policy

- (6) Subsection 96(4) of the Act states:

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.

- (7) Section 34 of the Act provides:

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

- (8) Pursuant to section 82 of the Act, the governors "approve and superintend the policies and direction of the board." Pursuant to section 83.1, the powers, duties and functions of the governors are currently performed by a Panel of Administrators. The policies of the governors include the policies in the Manual and Decisions Nos. 1 to 423 of the *Workers' Compensation Reporter* (with the exception of those decisions that have been "retired" effective May 1, 2000 pursuant to a resolution of the Panel of Administrators).

- (9) The former commissioners considered section 32 (which under the current Act is section 34) in Decision No. 107 (April 9, 1975 *Workers' Compensation Reporter* Vol. 2, p. 42), which involved termination pay. While there have been some amendments to the section since that time, the amendments do not appear to be relevant to this matter. The most notable amendment is that in 1975, the section stated "consideration *shall* be had to any payment, allowance, or benefit" while the current version states "consideration *must* be had to payments, allowances or benefits." However, we consider both "shall" and "must" to be imperative verbs. In Decision No. 107, the former commissioners stated, in part:

The language of the Section is broad enough to cover termination pay. On the other hand, the Section does not provide that any payment made by the employer *shall* be deducted from 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.

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]

- (10) Item #34.40 of the Manual (Pay Employer Claims) provides, in part:

[Section 34] does not provide that any payment made by the employer shall be deducted from the compensation, or that any compensation deducted shall be paid to the employer. It requires that the Board must consider the matter, and that any compensation deducted under this section may be paid to the employer. The section is permissive, not mandatory, and the question is, therefore, in what circumstances a deduction should be made.

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

[emphasis added]

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- (11) Item #34.41 (Vacation Pay) provides:

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

Background

- (12) On October 15, 1998, the worker sustained a compensable back injury. On the employer's report of injury, an officer of the employer indicated that the employer would be paying the worker for statutory holidays during the period of disability (see question 24).
- (13) The Board paid the worker wage loss benefits under the claim from October 16 to November 1, 1998 and from November 4 to 22, 1998.
- (14) By a decision dated December 30, 1998, which was addressed to the employer's representative, a claims officer II stated the Board had paid the worker wage loss benefits for the November 11, 1998 statutory holiday pursuant to item #34.41 of the Manual. The employer's appeal of the December 30, 1998 decision was the subject of the April 18, 2000 Review Board findings.
- (15) The employer's representative provided a submission to the Review Board dated July 8, 1999. He argued that section 34 required the Board to deduct from the worker's benefits the amount the employer had paid to the worker for the statutory holiday.

The April 18, 2000 Review Board Finding

- (16) In their April 18, 2000 finding, the Review Board panel referred to section 34 of the Act and item #34.41 of the Manual. The panel concluded:

. . . We find that Section 34 of the Act requires the Board to take into consideration "payments, allowances or benefits" paid by the employer and to deduct that from compensation payable to the worker.

In this case, the worker did not lose any statutory benefit as a result of his work injury, as the employer paid the worker for November 11, 1998 and had indicated in their report to the Board that statutory holidays would be paid by their firm for the period of [the worker's] disability. As the worker did not experience a loss of earnings for November 11, 1998 he was not therefore entitled to compensation from the Board for that day.

The Case Manager's May 17, 2000 Referral Memorandum

- (17) As stated earlier, the reasons for the president's referral are set out in a case manager's May 17, 2000 memorandum, which states, in part:

. . . I consider that the Review Board finding in this case is contrary to law and policy. It is submitted that the Review Board erred by:

- determining the worker's loss of earnings and benefit entitlement based on Section 34 of the *Act*.
- determining that this was a pay employer claim and then incorrectly applying Policy item #34.41 of the R.S.C.M.
- determining that the worker was not entitled to both statutory holiday benefits under Policy item #34.41 and the statutory holiday pay established under a collective agreement and by using Section 34 of the *Act* to address the employer's concerns that the worker was compensated twice. As noted by the Appeal Division panel [in decision #92-1717 (*Workers' Compensation Reporter* Vol. 8, p. 715)] employer concerns that result from provisions of the collective agreement are more properly considered through the collective bargaining process.

Grounds under Section 96(4)

- (18) As stated earlier, the grounds for reconsideration under section 96(4) are error of law or contravention of a published policy of the governors. We find that, in concluding that the worker was not entitled to wage loss benefits for November 11, 1998, the Review Board findings involved contraventions of items #34.40 and #34.41 of the Manual. Item #34.40 provides that full wage loss payments are paid to a worker unless the employer continues to pay more than 25% of the worker's salary. In addition, item #34.41 provides that the Board continues to pay wage loss benefits to a worker when a statutory holiday occurs while the worker is receiving wage loss benefits.
- (19) Although not expressly stated in the Review Board findings, it appears the panel concluded that the policies conflict with section 34 of the Act and, accordingly, the Act prevails. In the course of our redetermination of this matter, we will consider whether the policies contravene section 34 of the Act.
- (20) As we have determined that grounds for the referral have been established on the basis of the contraventions of the two policies, we do not find it necessary to determine whether the Review Board findings involved an error of law.

Redetermination

- (21) The employer's representative provided verbal submissions at the oral hearing and has provided a submission dated March 15, 2001. He has also referred us to his July 8, 1999 submission to the Review Board.
- (22) The principal argument advanced by the employer's representative is that items #34.40 and 34.41 "are in conflict with the intent of Section 34." He refers to the report of the Meredith Royal Commission and submits, ". . . it appears one purpose of the original enactment of Section 34, then, would be to prevent double liability for the employer and to avoid double compensation to the worker *for the same injury*" [emphasis in original].
- (23) The purpose of section 34 was considered in Decision #95-0165 (*Workers' Compensation Reporter* Vol. 11, p. 13). In that decision, the panel defined the issue before it as "whether the amount of the worker's retirement pension should be deducted from his W.C.B. disability award and if so whether it should be paid to the employer under Section 34." In considering the purpose of section 34, the panel stated (at pages 19 and 20):

Because there is no specific governors' policy on the application of Section 34 to a worker's disability pension this panel has considered the legislative history of Section 34 to determine what light that background might shed on the meaning and purpose of the section. As the employer correctly points out in their December 20, 1993 submission to the Review Board, Section 34 has remained essentially unchanged since its enactment in 1916 with the exception of minor amendments in 1979 that do not affect the substance of the section.

The Board provided some documentation to the employer on the historical background of Section 34 which the employer submitted to the Review Board. That documentation states 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.

On the basis of the limited historical record, it appears one purpose of the original enactment of Section 34, then, would be to prevent double liability for the employer and to avoid double compensation to the worker *for the same injury*.

This intent to protect the employer from double liability and to prevent double compensation for the worker resulting from one injury is consistent with governors' policy in item #34.40 which reimburses the employer under Section 34 when the employer continues paying the worker's wages *during the period of his disability*. It is also consistent with the exception in governors' policy #34.42 which exempts termination pay required by law from deductions under Section 34. Such termination pay is for *a different purpose* than the disability payment for the compensable injury. As pointed out in reporter decision #107 ((1975), 2 W.C.R. 42) a worker who has received termination payment equivalent to wages for one month is free to take another job during that month to supplement the termination pay. But if he is disabled during that period he is not in a position to take another job. Wage loss payments may be paid to the worker to compensate for his inability to secure another job *during the period of disability*.

[emphasis in original]

- (24) We adopt the panel's analysis and agree with the general submission of the employer's representative that the purpose of section 34 is to prevent the employer from sustaining a double liability and to prevent the worker from receiving double compensation for the injury. The questions that arise in this case are, however, more specific. They are whether the application of section 34 requires the Board to deduct one day of wage loss benefits for the November 11 statutory holiday and, if so, whether the Board should pay the employer the amount deducted. While section 34 has been addressed in four Appeal Division decisions published in the *Workers' Compensation Reporter* (in addition to Decision #95-0165, see Decision #92-0922 at Vol. 9., p. 39, #92-1717 at Vol. 8, p. 715, and #98-0496 at Vol. 15, p. 67), the question of the application of section 34 when the employer has paid statutory holiday pay to a worker during a period of temporary disability has not been considered in a previous published decision.

- (25) The employer's representative contends that, given the purpose of section 34 and its wording, in a situation in which an employer pays statutory holiday pay to a worker who is on wage loss benefits, the Board is required to deduct the amount paid by the employer from the worker's wage loss benefits. In his March 15, 2001 submission, he states, in part:

. . . the intent of Section 34 is clearly to protect the employer from double liability and to prevent double compensation for the worker resulting from one injury. Indeed, when one looks at Section 34, it clearly records, "*In fixing the amount of a periodic payment . . . consideration must be had to payments, allowances or benefits which the worker may receive from the worker's employer during the period of disability . . . and a sum deducted . . . may be paid to the employer*".

According to any dictionary at the employer's disposal, the word "consideration" means regard or account: something taken, or to be taken into account" and thus the Board is required to take into account such payments and deduct them from it's [sic] payments to the worker. The Board then, after the deduction, has the option of paying the amount deducted to the employer.

Despite their obligation to consider each case on its own merits and to deduct benefits paid by the employer, the Claims Department and the Panel of Administrators have attempted to ignore the Act by encouraging claims personnel to simply pay wage loss benefits for all Statutory Holidays regardless of the individual circumstances and the advance notice of payment provided by the employer.

In support of this failure to consider the employer's payments and Section 34 of the Act, Board staff frequently make reference to item 34.40 and 34.41 of the R.S.&C.M. but both these policies are in conflict with the words and intent of Section 34.

- (26) In support of his position, the employer's representative relies on a September 18, 1996 memo of the Board's general counsel, in which he expressed the opinion that "the existing practice of continuing to pay workers for statutory holidays when they are at the same time being paid for those holidays by the employer albeit for the statutory holiday only offends Section 34 of the Act". His opinion was based on the following analysis:

. . . Section 34 clearly allows discretion in regard to whether a deducted amount is paid to the employer but is mandatory in regard to the deduction of payments, allowances or benefits paid by the employer. In other words, the words "consideration shall be had" require the Board to make the deduction to prevent double payment to the worker.

- (27) In his September 18, 1997 legal opinion, which was addressed to the Board's Legal Department, Mr. W noted that two issues were under consideration. The first is the issue that is before this panel. Mr. W stated "[t]he second issue pertains to the deductibility of payments made under

employer pension plans from permanent disability awards.” In considering section 34, Mr. W concluded, in part:

The use of the imperative “must” in section 34 requires that in *all* cases the Board will have to take into account payments, allowances or benefits flowing to the worker from his employer during the currency of his disability in fixing the level of compensation paid by the Board. There is no *obligation* to in fact deduct such sums or, if deducted, pay them to employers. Rather, the Board has a discretion whether to deduct the payment in order to lower the compensation otherwise payable.

...

The permissive term “may” contained at the end of section 34 grants a discretion to the Board in determining whether or not a deducted sum ought to be repaid to an employer. Nevertheless, owing to the purpose of the provision, it is difficult to envision a situation where the Board would find it appropriate to deduct a sum from a worker’s compensation without any intention of repaying its to the employer.

In summary, in our opinion, the Board’s only *obligation* to workers and employers under section 34 is to *bona fide* consider whether payments received by the worker from his employer as a result of his disability ought to be deducted from the compensation otherwise payable and, if so, paid to the employer. The Board’s consideration involves the exercise of a broad discretion based on factors the Board deems relevant based on its statutory mandate. These factors would include the amount, frequency and duration of the payments, and whether they are made voluntarily or pursuant to collective agreements.

[reproduced as written]

- (28) As an administrative tribunal dealing with workers’ compensation issues, the Appeal Division frequently considers expert evidence, particularly expert medical evidence. When such evidence is relevant to a particular issue before a panel, the panel’s task is to analyze the evidence and assess the weight that ought to be granted to it. In this case, there are two competing legal opinions that relate to the issue before us. The application and interpretation of the Act is at the heart of the Appeal Division’s jurisdiction and purpose under the Act. While the legal opinions are of interest, our role is not to choose between the two competing opinions. Rather, our role is to interpret the Act and consider whether the policies in question are lawful.
- (29) There is no doubt that section 34 contains mandatory language to the extent that it states that “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 disability.” However, there is no express mandatory language in section 34 that such payments, allowances or benefits be deducted from the compensation that is paid to workers under the Act. The definitions of “consideration” in *The Concise Oxford Dictionary*

(9th edition) include “the act of considering; careful thought.” The definitions of “consider” include, “**1 a** contemplate mentally, esp. in order to reach a conclusion; give attention to. **b** examine the merits of (a course of action, a candidate, claim etc.) **2** look attentively at **3** take into account; show regard for.” In our view, the requirement that a particular payment, allowance or benefit be considered falls short of constituting a requirement that it be deducted from the compensation that is paid to a worker. While we interpret section 34 as requiring those items to be considered, we find the determinations that flow from the consideration of those items has been left within the discretion of the policy makers.

- (30) Our interpretation is further supported when section 34 is considered within the context of the Act as a whole. In Decision #95-0165 (cited earlier), the panel noted (at page 20):

We have also considered the purpose of Section 34 within the context of the *Act* as a whole. 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 the worker where the prerequisites for entitlement are met. Section 5(1) provides that where the worker’s injury arises out of and in the course of employment “. . . compensation as provided by this part *shall* be paid by the board . . .” Other entitlement sections of the *Act* such as Sections 22, 23, 29 and 30 all require the Board to pay compensation where the prerequisites for entitlement have been met. . . .

The Board’s decision to exercise discretion under Section 34 to deduct a sum from a worker’s compensation payments would be consistent with the statutory provisions for entitlement where the worker received double compensation for the same injury. Section 31 of the *Act* provides for concurrent compensation for separate compensable injuries so long as the aggregate compensation does not exceed the maximum payable for total disability. However, concurrent compensation for separate injuries is different from compensation for the same injury twice over.

Section 15 of the *Act* generally protects a worker’s benefits from an assignment or deduction except for welfare payments owing to the Province or an overpayment owing to the accident fund. That section states:

A sum payable as compensation or by way of commutation of a periodic payment in respect of it shall not be capable of being assigned, charged or attached, nor shall it pass by operation of law except to a personal representative, nor shall any claim be set off against it, except for money advanced by way of financial or other social welfare assistance owing to the Province or to a municipality, or for money owing to the accident fund.

It is generally accepted that where a worker has entitlement to workers' compensation benefits the Board is in the position of first payer. Other organizations and agencies which provide disability payments *for the same disability* may adjust their benefits to take into consideration WCB entitlement or make arrangements through the worker for reimbursement of double payments. . . .

[emphasis in original]

- (31) In our view, if the legislature had intended to make it mandatory for the Board to deduct payments for statutory holiday pay from a worker's wage loss benefits, they would have used express language in section 34 that there will be a deduction from wage loss benefits when a worker is receiving "payments, allowances or benefits" from his or her employer "during the period of the disability." In the absence of such language, we do not interpret section 34 to mean that statutory holiday pay must be deducted. We acknowledge that the deduction of statutory holiday pay from a worker's wage loss benefits may be consistent with the analysis of section 34, which was articulated in Decision #95-0165. However, we also note that, had the worker not been injured, he could have received statutory holiday pay and done casual work for another employer on that day.
- (32) In the case before us, it is arguable that the worker received a windfall because he received wage loss benefits for November 11 and also received statutory holiday pay from the employer for that day. In addition, the employer bore the expense of paying the worker for the November 11 holiday and the wage loss benefits for November 11 were included in the employer's claims costs for experience rating purposes. However, section 34 grants the policy makers the discretion to determine the manner in which the purpose will be carried out. In determining the circumstances in which payments will be deducted or reimbursed to employers, the Panel of Administrators must consider and balance a variety of factors, including the extent of the administrative expenses and requirements that would be involved in deducting statutory holiday pay from wage loss benefits. It is apparent from the policy materials provided by the employer's representative and the Policy Bureau that the Policy Bureau has considered the option of enacting a policy that requires statutory holiday pay that an employer pays to a worker be deducted from the worker's wage loss benefits. Through its representative, the employer has expressed frustration regarding the lack of a policy amendment. It appears that such a policy amendment is within the options available under section 34. However, any policy change in this regard is within the mandate of the Panel of Administrators and not part of the jurisdiction of the Appeal Division.
- (33) In light of our interpretation of section 34, we find items #34.40 and #34.41 to have resulted from a lawful application of the discretion granted to the policy makers under section 34. In Appeal Division Decision #00-0668 [16 *Workers' Compensation Reporter* 287], the panel considered the standard of review that is to be applied in determining whether policies are lawful under the Act and summarized the approaches that had been taken in prior decisions. The panel concluded that a policy is lawful if it is viable under the Act. In this case, we find the policies in question are lawful under any of the standard of review options. Accordingly, we have found it unnecessary to invite submissions concerning the standard of review and to make a determination as to the appropriate standard.

- (34) In redetermining the Review Board findings, we find that, pursuant to items #34.40 and #34.41 of the Manual, the worker was entitled to receive wage loss benefits for the November 11, 1998 statutory holiday and the employer is not eligible for reimbursement in respect of the payment it made for that day. Item #34.41 provides that the Board continues to pay wage loss benefits for statutory holidays and item #34.40 provides, "If an employer continues to pay 25% of a worker's salary or less, full wage-loss payments are made to the worker and no refund made to the employer." In this case, it is apparent that the statutory holiday pay for November 11 amounted to less than 25% of the worker's salary. We find the circumstances in the situation before us do not warrant a departure from the policies.
- (35) The employer's representative contends the claim should be considered an "employer pay claim" for November 11, 1998 and, accordingly, pursuant to item #34.41, the Board should have paid the worker's wage loss benefits for that date to the employer. However, when item #34.40 is applied, it is apparent that the Board will not consider a claim to be an "employer pay claim" unless the employer continues to pay more than 25% of the worker's salary. While the employer was paying 100% of the worker's statutory holiday pay, we do not find that is sufficient to meet the 25% requirement in item #34.40. We interpret item #34.40 as requiring the employer to continue to pay 25% of the worker's salary during the overall period of disability.
- (36) We note that the statutory holiday pay issue was previously considered by an Appeal Division panel in Decision #00-0730 (available at www.worksafefbc.com). Since that decision involved a claim by another worker of the employer and since the employer was represented by the representative who is involved in the case before us, we have not disclosed a copy of the decision to the employer's representative. In that decision, the panel noted the following provision from the applicable collective agreement (at paragraph 7):

Article XII – Statutory Holidays and Floating Holiday

- (a) an employee, to qualify for statutory holiday pay, must comply with each one of the following three conditions:
- (i) Have been on the payroll thirty (30) calendar days immediately preceding the holiday.
 - (ii) Have worked his last scheduled work day before, and his first scheduled work day after the holiday, unless his absence is due to illness, compensable occupational injury, or is otherwise authorized by the employer.
 - (iii) Notwithstanding (ii) above, the employee must have worked one (1) day before and one (1) day after the holiday both of which must fall within a period of ninety (90) calendar days.

(37) The panel commented (at paragraph 23):

... according to the collective agreement, no payment is made until after the worker returns to work, as only then will it be known whether that is within the 90 day period since he last worked. If the worker must wait until he returns to work to be paid for a statutory holiday falling within the period of wage loss, he is without payment for that day from any source. That would appear to be contrary to #34.41, which provides that wage loss is paid for statutory holidays.

(38) In our view, it is questionable whether a payment for a statutory holiday that is not provided to the worker by the employer until after the worker returns to work constitutes a payment “which the worker may receive from the worker’s employer *during the period of the disability*” [emphasis added] within the meaning of section 34.

(39) In this case, we do not have the applicable provision from the collective agreement. In light of our analysis, we have found it unnecessary to obtain it. However, we note that, even if the policies are changed in the manner desired by the employer, it seems that an amended policy will only apply to payments, allowances, and benefits that are “made during the period of disability” as required by section 34. We also note, if the Board was required to review the applicable collective agreement in order to apply such amended policies, it appears the administrative burden might be significant.

Conclusion

(40) We find:

1. Grounds have been established under subsection 96(4) on the basis that the April 18, 2000 Review Board finding contravenes items #34.40 and #34.41 of the Manual.
2. In redetermining the Review Board finding, we find the Board’s decisions to pay the worker wage loss benefits for November 11, 1998 and not to reimburse the employer were in accordance with items #34.40 and #34.41 of the Manual.

Editors’ Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.

