

Decision of the Appeal Division

Number: 91-1104
Date: December 19, 1991
Panel: Thomas Kemsley, Walter N. Peain, Alex S. Brokenshire
Subject: Unemployment Insurance Benefits

This is an appeal by the worker from the findings of the Workers' Compensation Review Board dated August 21, 1989. The issue is whether the claims officer properly calculated the worker's wage rate.

The worker was employed by a food processing company when he fractured a finger at work on September 18, 1988. He was off work and initially received wage-loss benefits based on what he was earning at the time of the injury. In a letter dated December 13, 1988, the claims officer informed the worker that, as of November 24, 1988, his wage-loss benefits had been adjusted and were now based on his average earnings for the past three years. This was the "eight-week review." The new rate was lower than the initial rate, and did not take into account the unemployment insurance benefits the worker had received in the past three years, although it did include the time during which he received those benefits.

The worker's appeal of the wage rate was denied by the Review Board. On this appeal, a written submission, dated December 1, 1989, was filed by the worker's lawyer.

Counsel submitted that the average earnings figure established at the eight-week review did not best represent the worker's average earnings. Counsel submitted that it is not fair to exclude unemployment insurance benefits but include the period of time the worker was in receipt of those benefits.

Section 29 of the *Workers Compensation Act* provides for temporary wage-loss benefits and states that these are payable as in Section 22, which refers to 75% of the worker's "average earnings." Section 33 of the *Act* sets out how "average earnings" shall be determined. This refers to "daily, weekly or monthly wages or other regular remuneration." The Board excludes unemployment insurance benefits from this calculation. That is, it considers the words "earnings," "wages," and "remuneration" do not include unemployment insurance benefits.

There are different possible interpretations of the words “earnings,” “wages” and “remuneration” in the context of the *Act*. Some of these interpretations would exclude unemployment insurance benefits, others would not. The purpose expressed in Section 33 of the *Act* could support the inclusion of unemployment insurance benefits in some situations. However, this is a complex matter and the Board of Governors has the sole authority to set policy. We find that the policy which excludes unemployment insurance benefits is not contrary to Sections 22, 29 or 33 of the *Act*.

The *Act* does not say whether the time a worker was on unemployment insurance benefits should be included or excluded. The policy includes this time in the calculation of average earnings. On the other hand, paragraph 66.11 of the *Rehabilitation Services and Claims Manual* excludes time periods during which a worker was on W.C.B. wage-loss benefits or sick leave. Thus, the policy draws a distinction between unemployment insurance benefits and injury or sickness benefits. While these policies seem to conflict in the different treatment of different benefits, there may be some basis for the distinction. When on sickness or injury benefits, the worker is not able to work due to the sickness or injury. While on unemployment insurance benefits, the worker is not able to work as there is no work available. We do not know if this rationale explains the differences here.

As stated above, the *Act* provides for the Board of Governors to set policy. The policy addresses the definition of average earnings and earning capacity. While we are uneasy about the policy that excludes the time a worker was on sickness or injury benefits but not the time a worker was on unemployment insurance benefits, we find the policy with respect to unemployment insurance benefits is not contrary to the *Act*. In this worker’s situation where he had received unemployment insurance benefits regularly in the past, if both the unemployment insurance benefits and the time during which he received those benefits were excluded from the calculation of “average earnings,” then, the average earnings figure could be highly inflated. In effect, the worker would be treated as if he worked full time for the whole year when, in fact, he spent part of every year on unemployment insurance benefits.

On the other hand, to leave unemployment insurance benefits out of the calculation, but leave the time in, means that the worker’s actual loss of “income” due to his compensable injury is undervalued. We use the word “income” here as in the Income Tax context, to include employment earnings and revenue and benefits from other sources, including unemployment insurance benefits. In cases like the one before us, the most accurate measure of the “income” the worker lost due to his compensable injury would be achieved if both his unemployment insurance benefits and the time period during which he received those benefits were included in the calculation.

However, the *Act* uses the words “earnings” and “wages,” but not “income.” We cannot find that the governors’ policy undervalues “earnings.” Thus we find the policy with respect to unemployment insurance benefits is not contrary to the *Act*.

WE DENY THE APPEAL.

Editors’ note: This decision has been edited for publication.

