WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 92-0609
Date: March 13, 1992
Panel: Connie Munro, Walter N. Peain, Derrick Spooner
Subject: Section 96(4) Referral – Recalculation Resulting in an Overpayment

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This matter comes before the Appeal Division on a referral by the president under Section 96(4) of the *Workers Compensation Act* (the *Act*). In a letter dated April 30, 1990, the claims adjudicator advised the worker she had recalculated the wage rate set on an 8-week review conducted April 16, 1986. The result was a reduction in the average earnings rate and a declaration of an overpayment of $6,763.88.

The Review Board finding dated September 25, 1991, concluded that the W.C.B. cannot lawfully declare an overpayment in the circumstances of this case and allowed the appeal. A letter dated October 24, 1991, to the worker from president Kenneth M. Dye advised that the matter was being referred to the Appeal Division pursuant to Section 96(4) based on the allegation that the Review Board decision was contrary to law and the governors' policy.

In Appeal Division Decision No. 91-0850 (*Workers' Compensation Reporter*, Vol. 7(1): p. 173) the legal authority of the W.C.B. with respect to retroactive adjudication was clarified. That decision drew a distinction between decisional changes and administrative errors, finding that in the latter category the Board had the authority to retroactively adjudicate and claim an overpayment.

Subsequently the president was asked by the Appeal Division whether he wished to pursue the request for a redetermination in light of Appeal Division Decision No. 91-0850. A memo of reply dated February 19, 1992, stated:

> The overpayment in this case arose from a mistake in calculating [the worker's] earnings in the one year prior to the injury on February 18, 1986. A period of 132 days was deducted from the year. This was in recognition of a period of sickness (April 16 to August 5, 1985) experienced by [the worker]. It was later realized

> that this period consisted of 112 rather than 132 days. There was then a readjudication of the earnings rate resulting in a reduction and an overpayment.
>
> It appears to me that the miscalculation of the days in the period of sickness may amount to an administrative error pursuant to Decision No. 91-0850. I therefore feel that it would be appropriate for the Appeal Division to continue its review of this claim.

The history of this matter is well summarized in the submission made by the worker's union representative. The worker was injured February 18, 1986, when she fell descending from a railcar. The initial wage rate set on the claim was $563.40 per week. That was calculated on the basis of her hourly rate ($14.085) for 40 hours per week. On April 9, 1986, certain financial information was requested from the worker as the adjudicator was preparing to conduct the 8-week review. On April 18, 1986, the Board contacted the employer to verify the reason for the worker's "low earnings" on an annual basis. The note on the file indicates:

> Off sick leave Apr. 16, 1985 – August 5, 1985 inclusive. Paid sick leave benefits from Co.

The calculation of earnings on a one-year basis was then carried out. The Board officer utilized a figure of 132 days as the sick time. As a result the wage rate was increased from $563.40 per week to $569.38 per week. That rate, plus C.P.I. increases, formed the basis of payments to the worker until an error was discovered March 26, 1990. Memo No. 62 states:

> The worker was apparently in receipt of Crown Life sick benefits from April 16, 1985 to August 5, 1985, which the Claims Officer has taken as 132 days. I believe this period should be 112 days. Therefore, the 253 days would be divided into the $18,952.34, which would indicate the weekly rate would be $524.37 and would average $2,279 per month.

The worker's representative submits that the Board may have made a mistake when they established the rate in April 1986, but that the worker had no way of knowing that an error had occurred. It is further contended that the 1986 error, not discovered until 1990, should not result in financial hardship to the worker. The basis of this argument is that the worker relied upon the Board's expertise in determining the average earnings and, having no reason to question the accuracy of the calculation, spent the funds received in good faith.

There is considerable merit to the arguments made on the worker's behalf. They do not relate, however, to the legal authority of the Board to claim an overpayment. Rather they address the policy question of whether a worker ought to bear the financial burden in the case of a Board error of which the worker was completely unaware. This is a matter which ought properly to be addressed by the Board of Governors.

It is clear on a review of the facts of this case that the alteration of the wage rate involved a mathematical error. That is an administrative error within the meaning of Decision No. 91-0850. We would, therefore, agree with the contention of the president that, on the face of it, the Review Board findings involve an error of law. This is, therefore, an appropriate Review Board decision to be subject to the redetermination contemplated by Section 96(4).

The question then arises as to what disposition the Appeal Division might make of a case once that preliminary finding has been made. The statute prescribes that if the grounds of error of law or contravention of published policy of the governors has been established that the Appeal Division should conduct a "redetermination." We interpret that term to mean that the Appeal Division should reconsider the matter as if they were hearing the appeal in the first instance.

The decision under appeal is contained in the letter dated April 30, 1990 advising the worker of the declaration of the overpayment. The foundation of that decision is the change in the wage rate instituted at 8 weeks, wherein the worker went from having her wage rate calculated on her earnings at the time of the injury ($563.40 per week or $2,441.40 per month) to having her average earnings calculated on the basis of a 12-month rate ($569.38 per week or $2,467.31 per month, reduced to $524.37 per week or $2,279 per month).

The governors' policy #67.20 states:

> An 8-week rate review is made where wage-loss payments based on the worker's rate of pay at the date of injury have continued for eight weeks. This review consists of an enquiry and determination of what earnings rate best represents the long-term earnings loss suffered by the worker by reason of his injury.

After conducting the prescribed enquiry, the information obtained by the claims officer regarding the period the worker had been on sick leave was utilized in calculating the 8-week wage rate. There was, however, further information obtained which was not utilized. A telephone memo on the file records that on April 18, 1986, the Board was provided by a representative of the employer the following information regarding the worker's employment:

> Was off Dec 8 – Jan 10 – mill down to rebuild. All mill laid off. Mill has now been rebuilt. No layoff now . . . looks ok now – no layoffs in sight. Pulp mill runs all year.

The Form 7 filed by the employer records that this worker had been employed at the pulp mill since April 17, 1977, and had been at the particular job she was carrying out at the time of the injury since October 4, 1982. In other words, she had been 9 years with the same employer at the date of injury.

The information before the claims officer showed the worker was a full-time, regular employee and that steady future employment was anticipated by the employer. It was also evident that there had been a period of approximately one month within the 12 months prior to the work injury when there had been a layoff due to an extraordinary event, namely the rebuilding of the plant. It is difficult, given those facts, to ascertain the rationale for utilizing a wage rate different than that which the worker was earning at the time of injury.

Section 33(1) of the *Workers Compensation Act* provides that:

> The average earnings and earning capacity of a worker shall 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 . . .

The terms of the statute refer to several measures of earnings that might be referenced in order to determine a worker's "average earnings." The panel is aware that the governors' policy #67.20 makes specific reference to the claims officer seeking information regarding the 3-month, 1-year, 3-year and 5-year earnings. However, those references only define the range of investigation which ought to be conducted. The specific instruction contained in the governors' policy which relates directly to the statutory responsibility established by Section 33 of the *Act* is that:

> *Having completed his enquiries*, the Claims Adjudicator will determine the earnings rate of the worker *which best represents his long-term loss of earnings*. (emphasis added)

Given the extraordinary nature of the one-month shutdown which occurred shortly prior to the work injury, the full-time employment status of the worker, and her confirmed prospects for steady employment the wage rate which ought to have been used was that the worker was earning at the time of injury. The initial decision to alter the wage rate on the 8-week review failed to take into account all of the relevant evidence obtained on the enquiry. To the extent, therefore, that an overpayment occurred due to a mathematical error, it properly involved the difference between $569.38 and $563.40 per week, not $524.37.

The Review Board decision is hereby redetermined in accordance with the foregoing findings.

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