

Decision of the Review Division

Number: 15494 and 20638
Date: August 14, 2004
Review Officer: Warren Hoole
Subject: A Dependant's Estate and Payment of Interest

The estate of a deceased worker's widow ("Mrs. G.") requested a review of the decision of the Workers' Compensation Board (the "Board") dated January 6, 2004. During the course of my review of the Board's January 6, 2004 decision letter, it became apparent that a review of a Board decision dated October 2, 2003, was also necessary. The estate requested and received an extension of time to request a review of the October 2, 2003 decision letter, all pursuant to subsection 96.2(4) of the *Workers Compensation Act* (the "Act").

The estate's representative provided a written submission in support of these requests for review. The Employers' Advisory Office was given notice of the reviews and is participating. The estate's submissions were disclosed to the Employers' Advisory Office and it provided a response. The Employers' Advisory Office's response was disclosed to the estate; however, its representative did not provide a rebuttal.

The representative of Mrs. G.'s estate raised a constitutional question during the course of these reviews. Notice was properly provided to the Attorneys General pursuant to section 8 of the *Constitutional Questions Act*. The Attorney General of BC and the Attorney General for Canada both declined to participate in these reviews.

Section 96(6) of the Act gives a review officer authority to conduct these reviews.

Issues

Board Decision of January 6, 2004 (RFR #15494)

There are two issues on this review:

1. The preliminary issue of whether Mrs. G.'s estate has standing to pursue a request for review after Mrs. G.'s death.
2. Whether the Board correctly declared an overpayment in the amount of \$9,349.95.

Board Decision of October 2, 2003 (RFR #20638)

There are two issues in this review:

3. The preliminary issue of whether Mrs. G.'s estate has standing to pursue a request for review after Mrs. G.'s death.
4. The Board's calculation of interest owing to Mrs. G.'s estate.

Background

On January 19, 1940, Mrs. G.'s husband was killed at work in a railway accident. Mrs. G. received a widow's pension. Mrs. G. remarried in 1947. The Act in force at that time required the Board to terminate a widow's pension if the widow remarried. Mrs. G.'s pension was, therefore, terminated in 1947.

In 1996, the BC Supreme Court held in *Grigg v. British Columbia* (1996), 138 DLR (4th) 548 ("*Grigg*"), that termination of a widow's pension upon remarriage infringed section 15 of the *Canadian Charter of Rights and Freedoms, 1982* ("*Charter*").

Mrs. G. died on May 19, 1998. On October 1, 2003, Mrs. G.'s estate applied for retroactive reinstatement of Mrs. G.'s widow's pension from the date section 15 of the Charter came into force until her death.

In accordance with *Grigg*, the Board agreed to retroactively reinstate Mrs. G.'s widow's pension. In a decision letter dated October 2, 2003, the Board provided retroactive widow's benefits in the amount of \$134,444.30, plus simple interest of \$116,711.81.

The representative of Mrs. G.'s estate disagreed with the Board's calculation of interest and requested the Board to clarify its reasoning regarding this issue. By letter dated January 6, 2004, the Board provided the requested information; however, the Board also concluded that it had overpaid Mrs. G.'s estate in the amount of \$9,349.95.

The representative of Mrs. G.'s estate disagrees that an overpayment occurred and argues that Mrs. G.'s estate is entitled to compound interest.

Facts and Evidence

In addition to the background information already described above, I have considered the following relevant facts and evidence:

- Mrs. G.'s death certificate dated May 19, 1998.
- The statutory declaration dated May 21, 2004, of Mrs. G.'s sons, Mr. R.D. and Mr. J.D., stating that Mrs. G. died with a will and that Mr. R.D. and Mr. J.D. were appointed as the sole executors of the will. The statutory declaration also stated that, due to the low value of Mrs. G.'s estate (less than \$10,000), the executors were not required to obtain Letters Probate.

BOARD DECISION OF JANUARY 6, 2004 (RFR #15494)

ISSUE #1 — STANDING OF MRS. G.'S ESTATE TO REQUEST A REVIEW

Law and Policy

The Act

Section 1, paragraph 96.2(1)(a), and paragraphs 96.3(1)(a) and (b) of the Act are relevant to this review:

1. In this Act:

[. . .]

“**dependant**” means a member of the family of a worker who was wholly or partly dependent on the worker’s earnings at the time of the worker’s death, or who but for the incapacity due to the accident would have been so dependent, and, except in section 17 (3) (a) to (h), (9) and (13), includes a spouse, parent or child who satisfies the Board that he or she had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker;

96.2 (1) Subject to subsection (2), a person referred to in section 96.3 may request a review officer to review the following in a specific case:

(a) a Board decision respecting a compensation or rehabilitation matter under Part 1;

[. . .]

96.3 (1) Any of the following persons who is directly affected by a decision referred to in section 96.2 (1) (a) may request a review of that decision:

(a) a worker;

(b) a deceased worker’s dependant;

[. . .]

Reasons and Decision

Pursuant to paragraph 96.3(1)(b) of the Act, a request for review may be filed by a worker’s “dependant” who is directly affected by a decision referred to in paragraph 96.2(1)(a). “Dependant” is defined in section 1 of the Act. I am satisfied that Mrs. G., if living, would be a “dependant” for the purposes of this review. The type of decisions referred to in paragraph 96.2(1)(a) include decisions respecting compensation under Part 1 of the Act. Section 19 of the Act, which relates to widow’s pensions, is found in Part 1 of the Act. Therefore, Mrs. G., if living, would have satisfied the standing requirements of paragraph 96.3(1)(b) of the Act to seek a review of the Board’s January 6, 2004 decision letter.

However, Mrs. G. is deceased. Consequently, the question that arises is: does Mrs. G.'s estate have the same standing entitlement as Mrs. G. would have if she were still alive?

There does not appear to be any specific guidance on this question. However, the estate of a "worker" is entitled to commence, or continue, a request for review. I note in this regard a reported decision of the former Appeal Division (Appeal #95-0991), 11 *Workers' Compensation Reporter* 507. This decision considered whether a worker's estate could pursue an appeal under sections 90 and 91 of the Act as it read prior to March 3, 2003 ("former Act"). Section 90 of the former Act granted a right of appeal to the former Review Board and section 91 of the former Act granted a right of appeal to the former Appeal Division.

The result of the decision in Appeal #95-0991 was, in essence, to deem the phrase "worker" in sections 90 and 91 of the former Act as including the estate of a worker.

Although sections 90 and 91 were repealed and replaced effective March 3, 2003, by the *Workers Compensation Amendment Act 2002 (No. 2)*, I am of the view that "worker," as described in paragraph 96.3(1)(a) of the current Act, still includes a worker's estate. Given that "worker" and "deceased worker's dependant" are both found in subsection 96.3(1), I see no reason in principle to treat a dependant's estate differently from a worker's estate. Accordingly, I am satisfied that Mrs. G.'s estate has standing to pursue this request for review.

This leads to the question of whether adequate documentation has been provided by Mr. J.D. and Mr. R.D. to establish that, as executors, they are entitled to pursue this review on behalf of Mrs. G.'s estate. The issue of the appropriate documentation is now addressed in item B.2.2.1 of the Review Division's *Practices and Procedures*:

The estate of a deceased worker has the right both to initiate a review, and to continue a review on behalf of a deceased worker, concerning a claim for arrears of compensation up to the date of the worker's death. Documentation is required to establish the identity of the estate's representative. This may include the Letters of Administration or Letters Probate, or a copy of the will if the estate is small and probate is not required, or a statutory declaration or other form of evidence where there is no will and the estate is small or substantially held in joint tenancy.

In this case, Mr. J.D. and Mr. R.D. have provided a copy of Mrs. G.'s Will, naming them as the sons of Mrs. G., and her sole heirs and executors. In addition, Mr. J.D. and Mr. R.D. have provided a statutory declaration, dated May 21, 2004, explaining why they did not require Letters Probate for Mrs. G.'s estate. I accept this as adequate documentation to establish the standing of Mr. J.D. and Mr. R.D., to pursue this review on behalf of Mrs. G.'s estate.

ISSUE #2 DID MRS. G.'S ESTATE RECEIVE AN OVERPAYMENT?

Law and Policy

The Act

Paragraph 96(5)(a) of the Act precludes the Board from reconsidering a decision more than 75 days after the date of that decision.

Policy

The policy relating to this issue is found in the *Rehabilitation Services and Claims Manual*, Volume II:

- Policy item #48.41, *When does an Overpayment of Compensation Occur?* Deals with situations where a payee receives any money from the Board to which the payee is not entitled. In some circumstances, the Board may declare an "overpayment," in which case the Board may recover the amount of the "overpayment" from the payee. An "overpayment" will be declared in cases of administrative error, fraud or misrepresentation by a worker, or where decision was not within the statutory authority of the Board.

An "administrative error" is a computer, mechanical or mathematical error, or an error in implementing a decision on a claim, and similar types of errors. However, if a payee improperly receives money from the Board due to a "decisional error" no "overpayment" may be declared and the Board will not attempt to recover the erroneous payment. A decision regarding entitlement which is modified or reversed is a "decisional error." Such errors include a situation where new information is received that initiates a judgment change in the original decision.

Reasons and Decision

The purpose of the Board's January 6, 2004 decision letter was twofold. First, the letter corrected an administrative error in the Board's October 2, 2003 letter. Second, the January 6, 2004 letter provided information regarding the policies the Board follows when calculating interest. The informational component of the January 6, 2004 letter is not a "decision" and is therefore not reviewable. However, the Board's decision to declare an overpayment in the amount of \$9,349.95 is reviewable. My review of the January 6, 2004 decision letter is, consequently, restricted to the overpayment issue.

The representative of Mrs. G.'s estate did not expressly consider the overpayment issue in her submissions. Rather, the representative argued that the Board's overall calculation of interest was incorrect and that the Board owed the estate an additional amount of interest. The broader question of the estate's overall interest entitlement is considered below in RFR #20638. For the purposes of the narrower issue of whether Mrs. G.'s estate received an overpayment, I will assume that the representative disagrees that such an overpayment occurred.

The cause of this overpayment was a clerical/computer error. The computerized pension system which generated the interest calculation on Mrs. G.'s claim automatically calculated interest on monthly payments from April 17, 1985 (the date section 15 of the Charter came into force), to September of 2003. However, Mrs. G. died on May 19, 1998. Mrs. G.'s entitlement to a pension concluded upon her death.

The Board correctly adjusted the principal amount owing to take account of Mrs. G.'s death in 1998. However, the Board failed to adjust the interest calculation. Interest was, therefore, paid as if principal payments had continued until September of 2003. Therefore, a computational error occurred. Once this oversight was adjusted, the corrected calculation indicated an overpayment of \$9,349.95.

I see no reason to disagree with this decision. The representative of Mrs. G.'s estate has not provided any specific submissions in this regard. In my view, the decision letter of January 6, 2004, correctly applied policy item #48.41 and concluded that an "administrative" error, rather than a "decisional" error had occurred. The Board properly declared an overpayment.

The only potential difficulty with the Board's January 6, 2004 decision is that it was made more than 75 days after its original decision of October 2, 2003. Paragraph 96(5)(a) of the Act precludes the Board from reconsidering a decision more than 75 days after the date of that decision.

However, paragraph 96(5)(a) of the Act does not apply to decisions of the Board involving the mere correction of administrative errors. Administrative tribunals have a general jurisdiction to correct administrative or clerical errors at any time. Indeed, this jurisdiction forms the basis of policy item #48.41. Therefore, the 75-day restriction on reconsidering prior decisions does not apply, where, as here, the Board is merely correcting an "administrative" error rather than a "decisional error."

A more detailed discussion of this point is set out in Review Division Decision #9803, dated March 30, 2004. I agree with and adopt that reasoning in this case.

As a result, I am satisfied that the Board's decision to declare an overpayment was correct. I find that Mrs. G.'s estate received an overpayment in the amount of \$9,349.95.

BOARD DECISION OF OCTOBER 2, 2003 (RFR #20638)

ISSUE #1 — STANDING OF MRS. G.'S ESTATE TO REQUEST A REVIEW

For the same reasons already discussed in RFR #15494, Mrs. G.'s estate has standing to request a review of the Board's October 2, 2003 decision letter.

ISSUE #2 — HOW MUCH INTEREST IS MRS. G.'S ESTATE ENTITLED TO?

Law and Policy

Subsection 15(1) of the Charter came into force on April 17, 1985, and states:

15.(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Act

With some limited exceptions, the Board is not required to pay interest on retroactive payments. The only exception relevant to this review is set out in paragraph 19(2)(c) of the Act:

19(1) In this subsection and subsections (2) and (2.1)

“former subsection” means the section 19 (1) that came into force on April 17, 1985 or the section 19 (4) repealed in 1994;

“interest” means interest calculated at a rate and in a manner set by the Board for the purposes of this section;

“monthly payments” mean monthly payments under this Act to a widow, widower, former common law wife or former common law husband of a deceased worker;

“person” does not include a widow or former common law wife of a deceased worker if the widow or former common law wife remarried or entered into a new common law relationship before April 17, 1985.

(2) A person whose monthly payments were discontinued by application of a former subsection is entitled to

(a) monthly payments beginning on the later of

(i) the expiry of the 2 year period for which payment was made under the former subsection, or

(ii) the repeal of the former subsection,

(b) the amount, if any, by which, during the period from April 17, 1985 to the beginning of monthly payments under paragraph (a), the total amount of compensation described by section 17 that the person would have received if the former subsection had not been in force exceeds the sum paid to the person under the former subsection, and

(c) *interest on any amount payable under paragraph (b).*

[emphasis added]

Policy

The following policies relating to this review are found in the *Rehabilitation Services and Claims Manual*, Volume II:

- Policy item #50.00, *Interest*, directs the Board as to when interest is payable, and how such interest will be calculated. There are two circumstances where the Board will pay interest. First, the Act requires the payment of interest in limited circumstances. Second, the Board may exercise its general discretion to pay interest where an amount was not paid by the Board due to a “blatant error.” A blatant error is “an obvious and overriding error.”

The policy item applies whether the Board is statutorily required to pay interest, for example pursuant to paragraph 19(2)(c), or whether the Board is merely exercising its discretion to pay interest. In either case, the policy item directs that only simple interest be paid and that the interest be calculated at a rate equal to the prime lending rate of the banker to the government.

This policy item was brought into effect November 1, 2001, by a Resolution of the Panel of Administrators dated October 15, 2001.

- Policy item # 55.61, *Interest Payment Arising from the Application of Section 19(2)*, confirms that where interest is payable under subsection 19(2) of the Act, it shall be calculated “at the rates and in the manner set out in policy item #50.00.”

Practice Directives

Although not binding upon me, I note Practice Directive #28, *Interest on Retroactive Wage Loss and Permanent Disability Lump-Sum Benefits*. The Practice Directive provides further guidance as to what constitutes a “blatant Board error.” In addition, the practice directive notes that “interest cannot, for example, be paid to private or other disability benefit plans, or to estates of deceased workers.”

Reasons and Decision

The Act does not contain any specific direction to the Board as to the proper method for calculating interest. Indeed, the Act is largely silent as to the Board’s obligation to pay interest at all. An exception to this general silence is found in section 19 of the Act. Section 19 directs the Board to reinstate a widow’s pension if the widow was disentitled to her pension due to her remarrying after April 17, 1985. Although a plain reading of section 19 would appear to exclude Mrs. G. because she remarried in 1947 (i.e., before April 17, 1985), section 19 of the Act must be applied in accordance with the BC Supreme Court’s decision in *Grigg*. The *Grigg* decision effectively removed the 1985 temporal limitation.

This means that every widow, irrelevant of the date of her remarriage, is entitled to the benefit of section 19. Of particular relevance to this review is paragraph 19(2)(c), which expressly entitles a widow to interest upon reinstatement of her widow's pension. It is, therefore, apparent that Mrs. G.'s estate is entitled to interest pursuant to paragraph 19(2)(c) of the Act. The real question is: how much?

Policy item #55.61 directs the Board to calculate interest due under paragraph 19(2)(c) of the Act in accordance with policy item #50.00. Policy item #50.00 provides that interest is to be calculated on a simple basis and at a rate equal to the prime lending rate of the banker to the government. Subsection 99(2) of the Act requires the Board to follow applicable policies of the Board of Directors, which includes policy items #55.61 and #50.00. The Board followed these directions in calculating the interest due to Mrs. G.'s estate. Other than the computational error discussed in RFR #15494, the Board's interest calculation, therefore, appears to be correct.

However, the representative of Mrs. G.'s estate says that the former version of policy item #50.00, which was in effect until November 1, 2001 ("former policy item #50.00"), provided for interest to be paid on a compound basis and at the rate equal to the rate of return that the Board received on its investments. The representative argues that this more advantageous method of calculating interest should be applied to Mrs. G.'s estate. The representative points out that widows who claimed retroactive reinstatement of their pensions prior to 2001 received interest calculated under the more advantageous provisions of former policy item #50.00.

The representative, therefore, argues that the current version of policy item #50.00 results in unequal treatment of widows and that this unequal treatment amounts to impermissible discrimination against Mrs. G.'s estate, contrary to subsection 15(1) of the Charter.

In light of the decision in *Nova Scotia (Workers' Compensation Board) v. Martin* 2003 SCC 54, I find that the Review Division has jurisdiction to consider Charter issues. The Minutes of the Board of Directors dated November 19, 2003, confirm that "the Review Division will apply the Charter as these issues arise on review." I am aware that section 182 of the *Administrative Tribunals Act*, SBC 2004, c.45, removes jurisdiction from the Workers' Compensation Appeal Tribunal to consider constitutional matters. However, the *Administrative Tribunals Act* does not apply to either the Board or the Review Division. In any event, section 182 of the *Administrative Tribunals Act* is not yet in force. Accordingly, I am of the view that I retain jurisdiction to consider the Charter in this review.

With respect to the representative's Charter argument, I disagree that the Board's current practice of paying simple interest infringes Mrs. G.'s estate's section 15 Charter rights. One of the threshold requirements of a successful section 15 argument is that the impugned legislation "discriminates" on one of the prohibited grounds enumerated in subsection 15(1) (or on an analogous ground).

In this case, it is not legislation, but rather a policy that is impugned. I note that the representative did not provide any argument as to whether a policy is susceptible to Charter scrutiny; however, for the purposes of this review, I accept that such scrutiny is permissible.

Therefore, it is necessary to consider whether the current version of policy item #50.00 “discriminates” against the widow’s estate on a prohibited ground (enumerated or analogous). As mentioned by the representative, *Andrews v. Law Society of B.C.* (1989), 56 DLR (4th) 1 (SCC) is often cited as to what constitutes “discrimination”:

Discrimination may be described as a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, *which has the effect of imposing burdens, obligations, or disadvantages on such individual group not imposed upon others* [. . .].

[emphasis added at page 18]

In this case, the version of policy item #50.00 that came into force on November 1, 2001, applies to *every* person who became entitled to a retroactive payment after November 1, 2001. The current policy does not impose disadvantages on widows not imposed upon others. It is true that in this particular case a widow is affected by the current version of policy item #50.00; however, this does not mean that the policy item discriminates against widows. On the contrary, the policy item applies to all claimants equally. Properly construed, the only possible “discrimination” evident in policy item #50.00, if any, is that post-November 1, 2001 payees are treated differently from pre-November 1, 2001 payees.

I am not aware of any authority to suggest that this type of “temporal” distinction constitutes discrimination on a ground prohibited by subsection 15(1) of the Charter. The representative has not provided any evidence or argument to demonstrate that this “temporal” distinction infringes subsection 15(1) of the Charter.

I am therefore of the view that the representative has failed to satisfy the threshold requirement of showing that the impugned policy discriminated on any prohibited ground against Mrs. G.’s estate. Indeed, I see no reason to conclude that policy item #50.00 discriminates on any of the enumerated or analogous grounds prohibited by subsection 15(1) of the Charter.

In any event, I note that Charter rights are of a purely personal nature and cannot be pursued by the estate of an individual. Therefore, even if I am wrong and policy item #50.00 somehow infringed Mrs. G.’s section 15 Charter rights, only Mrs. G. herself, not her estate, is entitled to pursue this issue. As noted in *Stinson Estate v. British Columbia* 1999 BCCA 761 (leave to appeal dismissed [2000] SCCA No. 169):

[. . .] the rights guaranteed [under the Charter] are personal, and the power to enforce the guarantee resides in the person whose rights have been infringed. Here, it is the estate of the deceased which seeks a remedy for the alleged breach of Mrs. Stinson’s right. *Such a claim is not open to the estate, as a third party, under the language of the Charter.*

[emphasis added at paragraph 11]

As a result, I conclude that the representative’s Charter submissions are of little assistance. I find that the Board properly followed the current version of policy item #50.00 in calculating the interest due to Mrs. G.’s estate.

Conclusion

Review Reference # 15494 Board Decision of January 6, 2004

As a result of this review, I confirm the Board's decision of January 6, 2004. The Board properly declared an overpayment of \$9,349.95.

Review Reference # 20638 Board Decision of October 2, 2003

As a result of this review, I confirm the Board's decision of October 2, 2003.

