

Decision of the Review Division

Number: 25707
Date: June 17, 2005
Review Officer: Jackie Christofferson
Subject: Board Authority on Receipt of Section 96.4(8) – Refer Back

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated October 18, 2004. In support of this Request for Review, the worker has provided written submissions. The employer is inactive and as a result, there is no respondent to this review.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

This is a review of the Board's implementation of a Review Division decision of August 25, 2004 regarding the worker's long-term wage rate.

Background

The Board accepted a claim for injuries that occurred on November 21, 2002 to this now 62-year-old self-employed truck driver. The worker's claim was reopened on September 26, 2003. The worker requested a review of the Board's decision regarding his wage rate upon reopening of his claim. A decision of the Review Division dated August 25, 2004, found that further investigation was required to determine the worker's earnings in the 12 months prior to the injury.

In the decision letter under review, the Board officer outlined her implementation of the Review Division decision. The Board officer determined that based upon the information provided by the worker, the "office" expenses and "telephone and utility" expenses were properly added back to the worker's net income. Further, the worker's Business Loss Carried Forward was appropriately taken into account when the worker's net income was determined. The worker was invited to submit further evidence or documentation regarding these issues within 30 days. The worker did not provide further documentation.

The worker requested an oral hearing for the review. In a letter dated January 13, 2005, a preliminary decision was made not to hold an oral hearing in this matter. There may be compelling reasons to hold an oral hearing, such as when credibility is an important issue, or where an oral hearing is needed to determine the significant facts in dispute. Neither of these reasons applies to this review. For that reason, I confirm the preliminary decision not to hold an oral hearing in this case.

Facts and Evidence

The relevant facts and evidence with respect to this claim have been outlined in the Review Division decision of August 25, 2004. Therefore, I will only list the additional facts and evidence I found relevant to the issues before me when conducting this review:

- The Review Division decision of August 25, 2004, referred the decision of January 5, 2004 back to the Board for further investigation. The Board officer was to investigate the following:
 1. Whether office expenses and telephone and utilities expenses pertained to the worker's home office and therefore may be classified as possible add-backs to the worker's net income.
 2. The worker's submission that he had carried a previous business loss forward.
- In a memo dated October 14, 2004, the worker's long-term wage rate was referred back to the Long-Term Rate Setting Unit (the "LTRSU"). The worker was categorized as a labour contractor self-employed truck driver. The re-referral was based upon the Review Division decision of August 25, 2004 to further investigate two issues.
- In a memo dated October 15, 2004, the LTRSU noted that there was no evidence of previous years losses being carried forward either on the Tax Forms, the Statement of Business Expenses or the documents on file. The telephone and utilities expenses were already recorded in the Business Use of Home (the "BUH") portion on the Statement of Business Expenses.
- In a memo dated October 18, 2004, the LTRSU confirmed the following information:
 - With respect to the office expenses and telephone and utility expenses, in both 2001 and 2002, the worker declared the BUH expenses. In 2001, this included the business portion of the following home expenses: heat, electricity, insurance, maintenance, mortgage interest, and property taxes. In 2002, the BUH expenses included: heat, electricity, insurance, maintenance, mortgage interest, property taxes, and cable. Therefore, the utilities (heat, electricity), for the home use for business had already been reported and deducted in the BUH expenses.
 - As indicated in the Review Division decision, the BUH expense had been added back. Usually if a self-employed person is declaring telephone as part of the BUH expense, the telephone amount is added to the listed items in the BUH. Therefore, unless information is provided which states that the telephone and utilities entered on line 9220 of the Statement of Business Activities is not representative of the business expense but rather a personal expense relating to the home office, the expense for telephone and utilities would not be considered an add-back.
 - With respect to office expenses, as the worker had declared BUH expenses which included insurance, mortgage interest and property taxes, unless the worker provides documentation to the contrary, the office expenses are considered to be a business expense and not an add-back.

- Regarding the two-year loss carried forward, the May 31, 2004 letter from the worker advised that his company was working on a two-year loss carried forward. On both the 2001 and 2002 Statement of Business Activities, the worker declared carry forwards from the previous year for the BUH. While these BUH carry forwards reduced the worker's net income, the entire amount of the BUH is an add-back and therefore, the carry forward from previous years does not affect the net plus add-back figure used for the calculation of average earnings.
- The LTRSU was unable to locate any other entry in the 2001 or 2002 Statement of Business Activities which would indicate an extraordinary or unusual business adjustment representing previous year's business losses carried forward, the disposition/acquisition of capital asset or other extraordinary item which would not be a normal business occurrence and therefore may distort the real income of the business.
- The LTRSU noted the following:

1. Review of average earnings calculation of December 17, 2003 LTRSU log.

On reviewing the income tax information on file, errors were made in the calculation of the average earnings resulting in higher annual average earnings than would have resulted if the calculation had been done correctly. The worker was a 50% business partner; therefore, the worker's shared net income before adjustments on line 9369 is 50%. Since the entire amount of the BUH expenses is deducted from the worker's share of net income, the entire amount of the BUH is added back; however, only 50% of the net income (gross-expenses) was declared by the worker, only 50% of the meals had actually been deducted from the worker's portion so only 50% of the meals should have been added back.

The 2002 Statement of Business Activities included other income from recapture of CCA and CEC in the amount of \$2,000 in the gross income. As this would be extraordinary income and not a normal business occurrence, this amount should not have been included in the income. Noting that the worker is a 50% partner (therefore \$1,000 should not have been included in the income), in 2002 the net income before add-backs should have been \$63.24.

As greater than 75 days had passed since the long-term wage rate decision was made there is no reconsideration of the average earnings based upon these errors.

2. Further information was required from the worker which indicated the following:

- (a) The office expenses and/or telephone and utilities declared as business expenses pertain to the worker's home office; and if so, the amount that represents the business expense and the personal expense; and
- (b) If the declared expenses (other than BUH) includes a carry forward of a business loss from previous years, and if so, confirmation of a carry forward amount would be required.

– In the decision letter under review, the Board officer advised that with respect to the following issues:

1. *Office Expenses; Telephone and Utilities Expenses*

A review of the information provided showed that utilities (heat and electricity) for the home use for the worker's business had already been *reported and deducted* within the BUH expense. As noted in the Review decision, the BUH expense had already been added back.

The LTRSU noted that generally, when a self-employed person declares a telephone as part of the BUH expense, the telephone amount is added to items listed within the BUH, to be deducted from income, similar to how the amount paid for cable to the BUH expenses for 2002. However, the worker did not include his telephone bill in his list of "business expenses" in his tax return.

Unless information is provided by the worker which stated that the telephone and utilities expense (line 220 of the Statement of Business Activities) does not represent a business expense, but is actually a personal expense, the expense for telephone and utilities would not be considered an "add-back."

With respect to office expenses, as the worker declared BUH expenses which included insurance, mortgage, interest and property taxes, unless the worker provided documentation to the contrary, the office expenses are considered to be a real business expense, and not an "add-back."

2. *Business Loss Carried Forward*

The Board officer acknowledged the worker's submission that his company was working on a two-year loss carried forward. Upon review of the worker's business records to determine whether there was an "unusual expense" due to business loss carry forwards from previous years, which may result in additional expenses be added back to the income, none were found. In both the 2001 and 2002 Statement of Business Activities, the worker declared carry forwards from the previous year under the BUH expenses. While these BUH carry forwards do reduce net income, the entire amount of the BUH *is already* an add-back. Therefore, the business loss carried forward from previous years does not affect the add-back figure used in the calculation of the worker's average earnings.

The Board was unable to locate any other entry in the 2001 or 2002 Statement of Business Activities (other than the BUH carry forward from the previous year) which would indicate any extraordinary or unusual business adjustment representing the previous year's businesses losses carried forward, the disposition/acquisition of capitol asset or other extraordinary item which would not qualify as a normal business occurrence, which would distort the real income of the business.

As a result, the worker was invited to submit further evidence or documentation to establish that:

1. The office expenses or telephone and utilities declared as business expenses pertain to the worker's home office, and
 2. The declared expenses, other than the declared BUH, includes a carry forward of business loss from previous years and provide documentation confirming the amount carried forward for each year. The Board officer confirmed that there was no evidence which indicated that there were any add-backs that should have been added back when calculating the worker's long-term wage rate.
- The Automatic Wage Loss Payment System shows that the worker received initial wage loss benefits from November 22, 2002 to January 31, 2003 and long-term wage loss benefits after February 1, 2003.

Worker's Submissions

- In a letter dated September 29, 2004, the worker provided the following relevant written submissions:
- The worker does not want a "long-term wage rate"; rather, he wants "the money I feel I have coming to me to November 27, 2003."
- Although the Board is to base the worker's average earnings on the 12-month period prior to the date of injury, this was not done. The Board used the earnings of the company which was substantially less because of the huge losses brought forward from the previous two years.
- The Review Division decision of August 25, 2004, noted that "it does not appear that when the Board officer set the long-term wage rate that he received sufficient information from the worker to investigate whether the worker was working on a loss from the previous years that was brought forward." The worker confirms that this was shown on his income tax statement and the Board officer did not request additional information.
- With respect to policy item #68.62, the Board did not properly implement this policy. Rather, the Board calculated from the net income of the worker's "company business."
- The worker paid the Board deductions on \$250 per day on the days he worked. This amount should be used to establish his earnings.
- When the Board stated that the worker's wage rate was based on \$36,500 which was prorated to \$35,780 or a net weekly rate of \$494.64, this figure was correct and based on employee, not company, earnings.
- The Board later stated that the worker's income for this period was only \$3,945.48, resulting in a net weekly wage rate of \$75.67. This discrepancy is due to using the company's earnings instead of employee earnings.

The letter dated January 16, 2004, states the worker's claim to final entitlement was November 27, 2003. Therefore, from January 29 to November 27, 2003, a period of 43 weeks, at \$494.64 per week the Board owes the worker a total of \$21,269.52 minus payments of \$75.67 for 43 weeks.

Law and Policy

The Act

The law that applies to this review is found in sections 33.1 and 96 of the Act.

Section 33.1 sets out two general rules for determining a worker's average earnings, for the initial period and for the long-term period. With respect to the worker's long-term wage rate, section 33.1(2) directs that a worker's long-term average earnings are based on the earnings in the 12-month period immediately preceding the date of injury. This general rule is subject to several exceptions.

Section 96(4) provides that the Board may reconsider a previous decision. Section 96(5) of the Act provides that the Board cannot reconsider a previous decision if more than 75 days have elapsed.

Policy

The policies relating to this review are found in the *Rehabilitation Services and Claims Manual*, Vol. II. Specific policy items are as follows:

Policy item #66.00, *General Rule for Determining Long-Term Average Earnings*, elaborates upon the general rule for determining long-term average earnings and provides guidance for the process of reviewing and adjusting a worker's wage rate after 10 cumulative weeks of benefits paid.

Policy item #68.62, *Labour Contractor without Coverage under Section 2(2) Long-Term Average Earnings*, states, in part, that operating costs or expenses will be deducted from the worker's gross business income to obtain business net income (the worker's average earnings).

Policy item #70.10, *Disability Occurring within Three Years of Injury*, discusses that when a claim is reopened for temporary total or temporary partial disability within three years of the date of injury, or the equivalent date in the case of occupational diseases, the wage rate set on the claim at the time of the injury is the rate to be used.

Policy item #103.01 section 96(4) provides that the Board may reconsider a previous decision. Section 96(5) of the Act provides that the Board cannot reconsider a previous decision if more than 75 days have elapsed.

Reasons and Decision

Preliminary Issue

In the decision under review, the LTRSU noted that errors were made in the original calculation of the worker's average earnings. The LTRSU decided that it was unable to reconsider the Board's decision as 75 days from the initial decision had expired. The issue before me is whether this conclusion was correct and whether I have jurisdiction to correct the error made in the Board's initial decision.

Section 96(4) states that the "board may, on its own initiative, reconsider a decision . . . that the Board . . . has made under this Part." This is subject to section 96(5), in particular, paragraph (a), which states that "the Board may not reconsider a decision . . . if . . . more than 75 days have elapsed since that decision . . . was made." The limits in section 96(5) are in turn subject to sections 96.4(8) and (9) relating to Review Division decisions, which state;

- (8) The review officer may make a decision
 - (a) confirming, varying or cancelling the decision or order under review, or
 - (b) referring the decision or order under review back to the Board, with or without directions.
- (9) Subject to sections 96.5 and 239, a decision by the review officer under subsection (8) is final and the Board must comply with that decision.

These sections allow a Board officer to change a Board decision following a Review Division decision even though more than 75 days has elapsed since the Board decision.

The initial decision on the worker's wage rate of January 5, 2004, was considered in the August 25, 2004, Review Division. The review officer referred the decision back to the Board under section 96.4(8)(b) on the following grounds:

As a result, I return to the Board its decision of January 5, 2004 for further investigation as to whether "Office Expenses" and "Telephone and Utilities" expenses pertain to the worker's home office and therefore may be classified as possible add-backs to the worker's net-income. Further investigation is also required with reference to the worker's claim that he had carried a previous business loss forward. Depending on the results of this investigation, there may be additional items that may be added back to the worker's net income.

Clearly, the restrictions of section 96(5) did not prevent a Board officer from changing the January 5, 2004, decision to deal with the expenses issues specifically discussed in this paragraph. Nor, however, did the specific directions in that paragraph restrict the scope of the new decision that the Board had to make.

When the Review Division refers a decision back to the Board under section 96.4(8)(b), the effect is to cancel the original Board decision and require the Board to make a new decision to replace it. This means that the Board has all the authority in making the new decision that it had when making the original decision, and is not subject in any way to the restrictions in section 96(5). It is not limited to considering the specific reasons for which the review officer made the referral back. The review officer can, in making the referral back, choose to limit the scope of the Board's new decision by issuing "directions" provided for in section 96.4(8)(b). For example, in this case, the August 25, 2004, decision might have limited the scope of the Board's authority by giving a direction that further decisions on expenses were to be based on a specified gross or net income figure. Since the August 25, 2004, Review Division decision did not include such a direction, it was open to the Board in the decision now under review to rectify the errors in the Board's January 5, 2004, decision that came to light after the Review Division decision.

As a result, I have jurisdiction to rectify these errors as part of this review.

Issue #1 – Errors in the Calculation of the Worker's Average Earnings

As noted in the memo from LTRSU dated October 18, 2004, when the Board investigated the worker's claim to implement the directions of the Review Division, it noted that errors in the initial calculation of the worker's average earnings. This resulted in average earnings that were higher than what the worker had actually earned had the calculation been done correctly.

I am satisfied that the errors identified by the LTRUS, when rectified, would provide a correct calculation of the worker's average earnings. Therefore, as noted above, since I have jurisdiction to remedy these errors, I vary the Board's decision in order to allow the Board to recalculate the worker's average earnings to take into account these identified errors.

Issue #2 – Implementation of the Findings of the Review Division Decision of August 25, 2004

There is no dispute that this claim was reopened for wage loss benefits within three years from the date of the original injury. Therefore, policy item #70.10 applies with respect to setting the worker's wage rate upon reopening of his claim. This policy requires that the rate a worker was paid when his claim was reopened within three years from the date of his original injury is the long-term wage rate which was established at the outset of his claim. In this case however, the worker had not received wage loss benefits longer than 10 weeks; therefore, a long-term wage rate had not been previously established on his claim.

As noted by the Automatic Wage Loss Payment System, the worker received initial wage loss benefits from November 22, 2002 to January 29, 2003. These wage loss benefits were based upon the worker's income, as reported by the worker's accountant, of \$36,500 or prorated as \$35,780. When the worker's claim was reopened on September 26, 2003, as the worker was entitled to a full 10 weeks of wage loss benefits under the initial wage rate, the worker continued to receive initial wage loss benefits on January 30 and 31, 2003.

Policy item #70.10 directs that when a 10-week wage rate review has not been done on a claim, it will be done by the Board officer following the reopening at the earlier of when the total wage loss paid on the claim adds up to 10 weeks or the effective date of the permanent disability award. In this case, the Board officer was required to do a 10-week rate review to take effect February 1, 2003. As noted by the memo of December 12, 2003, the Board officer did so. As a result, the Board officer properly applied the provisions of policy item #70.10 with respect to setting the long-term wage rate on this claim once the worker received 10 weeks of initial wage loss benefits.

As noted by the memo of December 17, 2003, the LTRSU could not use the worker's earnings as reported by his accountant of \$36,500, or prorated as \$35,780. Instead, as required by Board law and policy, since the worker was a self-employed labour contractor who filed income tax with Statement of Business Activities, the Board was required to apply policy item #68.62.

Policy item #68.62 directs that a labour contractor's average gross earnings is determined by deducting operating costs or expenses from gross business income to determine the business net income. Additionally, Practice Directive #33A, Appendix A, outlines which add-backs are considered by the Board for self-employed persons.

Upon a review of the decision letter under review, I am satisfied that the Board officer properly followed the appropriate policy and Practice Directive when determining the worker's earnings from his self-employment activities.

Initially, the Review Division referred back the decision of January 5, 2004 for further investigation to determine if there were further add-backs pertaining to office expenses and telephone and utilities expenses. Specifically, whether these expenses pertain to the worker's home office and therefore may be classified as possible add-backs to the worker's net income. Further, the Board was to undertake an investigation as to whether the worker incurred an extraordinary or unusual business adjustment, such as previous years business losses carried forward, which were not normal business occurrences and therefore may distort real income.

The decision under review confirms that the Board officer reviewed the documentation previously provided by the worker and invited the worker to provide further information with respect to these issues within 30 days. A review of the file confirms that the worker failed to provide any additional documentation to substantiate additional add-backs regarding his office or telephone and utilities expenses nor did the worker provide any further information regarding his assertion that he was operating on a loss from previous years that was brought forward. As the worker failed to provide any additional information with respect to these issues, I am satisfied that the Board officer properly implemented the decision of Review Division dated August 25, 2004.

I acknowledge the worker's submission that he not receive a long-term wage rate and that the Board calculate his wage rate based upon the earnings information provided by his accountant which was used to calculate his initial wage rate. First, with regard to the worker's request that he not receive a long-term wage rate, the Board's legislation and policy direct that the Board must undertake a wage rate review at the 10-week period. Further, with respect to the worker's request that the earnings information as provided by his accountant be used to set his wage

rate upon reopening of his claim, I find that this information cannot be used as the worker is not an employee of the company; rather he is a self-employed labour contractor. Therefore, policy item #68.62 is applicable in establishing the worker's long-term wage rate upon reopening of his claim. The worker is requesting a method of calculating his long-term wage rate which is not permitted by the Act or policy.

Lastly, I acknowledge the worker's submission that he paid assessments to the Board based upon earnings of \$250 per day. The Board is unable to consider this when determining the worker's earnings, as policy requires that the Board use the worker's actual earnings in the 12-month period preceding the injury.

As a result, I deny the worker's request with respect to this issue.

Conclusion

As a result of this review, I vary the Board's decision of October 18, 2004.