

Decision of the Review Division

Numbers: 2971 and 3072
Date: October 30, 2003
Review Officer: Susan Nickerson-Graham
Subject: Status Determination —
Government Employees Compensation Act

The employer requests a review of the decisions of the Workers' Compensation Board (the "Board") dated February 17 and 20, 2003 and has made submissions in support of its request. The respondent widow was given notice of the review and has chosen to participate through her representative. The respondent's representative's submissions were disclosed to the employer who made a further submission in response.

Section 40 of the transitional provisions to the *Workers Compensation Act* (the "Act") and section 96.4 of the Act give a review officer authority to conduct this review.

Issue

While there are two decisions and two requests under review, the issue is a review of the Board's decisions to accept that the deceased ("Mr. M") was an employee of the Federal Government at the time of his fatal motor vehicle accident and is entitled to compensation.

Background

The deceased's widow submitted a claim to the Board following the death of her husband on August 20, 2002. The Board determined that Mr. M was an employee of the Federal Government at the time of the accident. The Board also determined that Mr. M was working at the time of the accident and the claim was accepted as compensable.

The employer has requested a review of this decision. It is seeking to have the claim denied.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- Mr. M had done short-term assignments for a Crown Corporation ("Corporation") of the Federal Government for a number of years prior to his death. He was retained to produce documentary audiotapes for broadcast on the Corporation's Chinese radio service. According to information provided by the Corporation, he had produced approximately 25 such tapes.

- On August 20, 2002, Mr. M was asked by an official at the Corporation to pick up two individuals at the airport and drive them to their hotel. Mr. M was to be paid for this work although no price had been agreed on. At some point, while engaged in this activity, Mr. M was involved in a motor vehicle accident that resulted in his death.
- The deceased's widow made a claim for compensation.
- By letter dated October 3, 2002, Human Resources Development Canada's ("HRDC") health and safety officer advised the Corporation that Mr. M was a contractor and not a casual employee of the Corporation. In taking this position, HRDC gave consideration to a lack of control over Mr. M's work; Mr. M's ability to contract out services to other companies; and Mr. M's ownership of tools, in this case a car, for the performance of work. By letter dated November 8, 2002, HRDC advised the Board that given the lack of employee status, the Corporation did not file an Employer's Report of Injury or Occupational Disease with the Board.
- By letters dated November 13, 21, and December 4, 2002, the Board officer made further inquiry to the Corporation and HRDC's Regional Office for the Minister's Representative, the designated decision-maker with respect to employee status, to make a formal ruling on employee status.
- Not having received a response other than from the health and safety officer, the Board officer adjudicated the claim.

Submissions

The Corporation's legal representative has provided several submissions in relation to this review. He argues that the Board did not have the jurisdiction to accept the claim after the HRDC health and safety officer made a "binding ruling," as the minister's representative, that the deceased was not an employee under the *Government Employees Compensation Act* ("GECA").

In the alternative, he submits that even if the Board did have the jurisdiction to accept the claim, the Corporation disagrees with the Board's decision that Mr. M was an employee under the *GECA*. Arguments are provided in support of this view.

The respondent's representative has provided submissions supporting the acceptance of the claim. The submissions include counter-arguments to the employer's submissions, including the argument that the agreement between the Corporation and the Board is silent on who has jurisdiction on the adjudication of employee status and it must be assumed that the Board will adjudicate the issue.

The Corporation's final submission repeats much of its earlier submission and reiterates that the Board is bound by HRDC's determination of employee status.

Law and Policy

Law

Section 96 of the Act provides that, subject to certain appeal provisions, the Board has exclusive jurisdiction to determine whether a person is a worker, a subcontractor, or an employer within the meaning of Part 1 of the Act.

Section 97 provides:

The Board may exercise any power or duty conferred or imposed on it by or under a statute of Canada or agreement between Canada and the Province.

Also of relevance is the *GECA*. Section 2 defines, in part, “employee” as:

- (a) any person in the service of Her Majesty who is paid a direct wage or salary by or on behalf of Her Majesty,

Section 4(1) provides, in part:

Subject to this Act, compensation shall be paid to

- (a) an employee who
 - (i) is caused personal injury by an accident arising out of and in the course of his employment,
- (b) the dependants of an employee whose death results from such an accident or industrial disease.

Section 4(2) provides:

The . . . dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed

Section 4(3) provides:

Compensation . . . shall be determined by

- (a) the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or
- (b) such other board, officers or authority, or such court as the Governor in Council may direct.

Policy

The policy relating to this review is found in the *Rehabilitation Services and Claims Manual* (“*RSCM*”), Vol. II, policy item #8.10, *Federal Government Employees*. This states that the *GECA* provides Federal Government “employees” the “same rights to compensation as non-Federal

Government employees." The policy contains a complete description of "employee" taken from section 2 of the *GECA* and concludes by stating:

This definition is wide enough to cover most Federal employees, whether employed directly by the Government or by some statutory body.

Also of relevance is a written agreement between the Federal Minister of Labour and the Workers' Compensation Board of British Columbia dated June 7, 1996. Section 1 states, in part:

The parties wish to enter into an agreement for the purpose of defining their respective responsibilities and obligations with regard to employees of the Federal Government and certain Crown corporations subject to the *Government Employees Compensation Act*, R.S., C. G-8, (referred to as the *GECA*) usually employed or deemed to be usually employed in British Columbia. . . .

In British Columbia, the Board is the authority established under the *Workers' Compensation Act* (sic) to determine the compensation payable to employees involved in an accident or affected by an industrial disease.

Under section 2 of the agreement, "employee" is described as having "the same meaning as in section 2 of the *GECA*." "Minister's Representative" means the representative authorized by the minister to give effect to the agreement.

Section 4 of the agreement provides:

The Board shall adjudicate claims from employees involved in an accident or affected by an industrial disease, and the responsibilities of the Minister and the Board are specified in Appendix "A".

Also of note, is Appendix "A" to the agreement, section 1.2, which states as follows:

Before adjudicating a claim not forwarded to the Board by the Minister's Representative, the Board shall forward to the Minister's Representative a request, in writing, for information on employee status.

Section 2 of Appendix "A" provides:

- 2.1 In processing claims the Minister's Representative shall use its best efforts to ensure that all employers submit an Employer's Report of Accidental Injury or Occupational Disease to the Minister's Representative within three days of occurrence. The Minister's Representative shall process claims and ensure that the Board receives the report within 48 hours.
- 2.2 Where the employer has not submitted an Employer's Report of Accidental Injury or Occupational Disease but where the Board or an employee has notified the Minister's Representative of an accident or disease or an allegation of an accident or disease, the Minister's Representative shall use its best efforts to forward the claim for processing within 72 hours of the notification.

Reasons and Decision

The first question that I must decide is whether the Board has the jurisdiction to determine whether an individual is an “employee” under the *GECA*.

I have considered the parties’ submissions as well as various tribunal findings and court decisions and find that the Board does not have such jurisdiction for the following reasons:

- The *GECA* is the federal legislation under which Federal Government workers receive compensation for injuries that arise out of and in the course of employment. Although the *GECA* is administered by HRDC; in practice, the Federal Government contracts with provincial workers’ compensation boards to assist in implementing and administering certain elements of the *GECA*.
- Case law suggests that the provincial boards’ jurisdiction in respect of the *GECA* applies only to the extent specifically set out in the *GECA* and may be enlarged where the provincial boards make decisions “incidental” to exercising the specific authority delegated to the provincial boards by the *GECA* (*Ching v. CPR*, [1943] SCR 451 and *R. v. Bender*, [1947] SCR 172).
- A more recent analysis of the restrictive application of provincial legislation to the *GECA* is found in *Canada v. Ahenakew*, [1984] 3 WWR 442 (Sask. QB). Gerein J. concluded that the provincial legislation could not impose the provincial statutory bar to a tort claim on a federal employee subject to the *GECA*. Although Gerein J. accepted that one legislative body may adopt the legislation of another body; he stated that in the case of the *GECA*, the Federal Government incorporated provincial legislation “. . . solely for the purpose of administering the federal plan which is separate and distinct from the provincial plan.” Gerein J. said that Parliament has merely chosen to base the amount of the compensation awards upon those paid in the respective provinces, likely to achieve uniformity. He said that this cannot be construed as the Crown either adopting the provincial legislation in total or “submitting to the operation of the Act,” i.e., the provincial Act.
- Two decisions of the former Appeal Division also found that the Board had no jurisdiction to determine status under the former section 11 of the Act (current section 257).
- In Appeal Division Decision #93-0502, the panel said the *GECA* incorporates certain sections of the *GECA* into the Act and the Board administers those sections. The Board has no jurisdiction otherwise under the *GECA*. The panel went on to say that the sections incorporated by the *GECA* relate to compensation. In determining whether the Board had jurisdiction, the panel said, “presumably, this authority would have to be found under section 4 of the *GECA* as no other section makes reference to the authority of the provincial Board.”
- The panel referred to Ontario Workers’ Compensation Appeals Tribunal (WCAT1) Decision No. 485/90. WCAT1 concluded that it did not have jurisdiction under the *GECA* to consider a provision corresponding to our former section 11 under their provincial scheme. The panel said that the incorporation of provincial legislation in section 4 of the *GECA* is limited to matters concerning the rate and conditions of compensation and anything reasonably incidental thereto. The Appeal Division panel agreed with this analysis.

- In Appeal Division Decision #93-1759, the panel clarified that, while federal employees are entitled to compensation “at the same rate and under the same conditions” as workers of the province, this does not mean that federal employees come under the Act. Rather, federal employees receive workers’ compensation benefits under the *GECA*. Therefore, a federal employee is not a “worker” under the Act but is an “employee” under the *GECA*. The panel went on to adopt the reasoning in Appeal Division Decision #93-0502.
- I agree that although the *GECA* referentially incorporates the Act, this incorporation is to be construed narrowly. I also agree that section 4 does not incorporate the provincial legislation in its entirety. The incorporation is limited to “compensation at the same rate and under the same conditions” as provided by the provincial scheme along with provisions of the provincial legislation that are reasonably incidental to the question of compensation.
- The WCAT1 referred to Ontario WCAT Decision No. 696/88 in the course of its decision-making. In that decision, the panel said:

... When one reads *GECA* in its entirety, it becomes apparent that the Act purports to determine who shall have access to entitlement under the Provincial scheme and who shall not. Having made that determination, the Act, by the words of section 4, gives over to the province the power to determine the amount and conditions of entitlement in accordance with the terms of the Provincial legislation. ...

- The WCAT1 also said that on questions of jurisdiction, each section must be judged on the basis of the relationship to the general language of the incorporation. Whether a provision is reasonably incidental to the rates and conditions of compensation must be made with a view to considering whether the resulting compensation system can function as a fair, comprehensive, functional, and balanced whole without it.
- I have also considered *Morrison (Estate) v. Cape Breton Development Corp.*, 2003 NSCA 103. In *Morrison*, the court found that uniformity of treatment required that federal workers be treated similarly to provincial workers by allowing federal workers access to the evidentiary presumption available in the provincial Act. The case involved virtually identical wording of the causation/entitlement provision in both *GECA* and the Nova Scotia workers’ compensation legislation in relation to the “arising out of and in the course of” provisions of the respective Acts. To incorporate the evidentiary presumption into the *GECA* was, in the court’s view, “reasonably incidental” to a condition and not otherwise in conflict with the *GECA*. This is to be distinguished from the case at hand, in which the meaning of “employee” in the *GECA* and “worker” in the Act are very different and it is not apparent in light of these differences, that uniformity is appropriate.
- It is interesting to note that although the court in *Morrison* did not specifically consider whether a provincial board had jurisdiction to consider “employee” status, the court said at paragraph 54:

While the point of entry [of the provincial WCA into the *GECA*] might be between s.3 and s.4, *after GECA has defined the federal employees to which it applies*, the process really begins when the claim is filed.

[emphasis added]

- I am unable to characterize the determination of employee status as “compensation” under section 4 of the *GECA* and as defined by section 2 of the *GECA*. I have also considered whether the determination of employee status is reasonably incidental to the question of compensation. However, I would not characterize such a key decision as merely “incidental.” Rather, it is a fundamental preliminary issue that must be resolved before entitlement to compensation can even be considered.
- Section 97 of the Act confers jurisdiction on the Board to perform any duty imposed on it under a statute of Canada or under an agreement between Canada and the Province. I can find no authority for the British Columbia Board to make determinations on the substantive provision found in relation to the definition of “employee” in the *GECA*. However, once that determination is made, section 4 of the *GECA* gives over to the Board the power to determine the amount and conditions of entitlement in accordance with the terms of the Act.
- Furthermore, section 1.2 of the appendix to the agreement states as follows:

Before adjudicating a claim not forwarded to the Board by the Minister’s Representative, the Board shall forward to the Minister’s Representative a request, in writing, for information on employee status.

Sections 2.1 and 2.2 of the appendix underscore this by apparently leaving the decision of employee status to the minister’s designate. In any event, even if the *GECA* does not designate a decision-maker; this does not mean that the decision making should devolve to the Board.

- The *GECA* has a very detailed and specific definition of “employee.” If Parliament had intended the Board to use its expertise in the preliminary step of determining employee status, it would have referentially incorporated the respective provincial definition (i.e. “worker”). However, it appears that instead, Parliament left that decision to a single consistent decision-maker, the HRDC.
- Overall, I am of the view that the detailed definition of “employee” in the *GECA*, as well as the creation of an administrative framework requiring that this issue be determined by HRDC, demonstrate that “employee” status is an issue that the Federal Government intended to reserve to their exclusive jurisdiction. I am therefore of the view that if the Board purported to determine “employee” status, this action would be in direct conflict with the *GECA*.
- The determination of employee status under the *GECA* is therefore a matter that is determined by the Federal Government rather than the Board. In this case, a ruling has been made that Mr. M was an independent contractor and not an employee under the *GECA* at the time of the fatality and that determination is binding on the Board.

As a result, I allow the employer’s request.

Conclusion

**Review Reference #2971
Board Decision of February 17, 2003**

**Review Reference #3072
Board Decision of February 20, 2003**

As a result of this review, the Board's decisions of February 17, 2003 and February 20, 2003 are varied.