

Review Decision

Subject: Review Reference #661
Board Decision Under Review: February 20, 2003
Date: June 9, 2003
Review Officer: Sam Isaacs

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated February 20, 2003. In support of this request for review, the worker's representative has provided a written submission. The employer was provided with notice of the review and has chosen not to participate.

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

Issue

The issue on this review is the Board's decision that the worker's full loss of earnings pension should be compensated at 75% of the worker's pre-injury earnings.

Background

Details of this claim need not be stated for the purpose of this review. I note that the worker's claim for an injury occurring on April 24, 1997 was accepted. As the injury resulted in a permanent disability, the claim was referred to the Board's Disability Awards Department to determine pension benefits. The decision letter of February 20, 2003 outlines the extent of these benefits. The worker's permanent disability was assessed at 13.87% of a totally disabled person but the effect of this injury on his ability to return to work was considered greater. The worker was determined to no longer be competitive in the employment market and was therefore entitled to a full loss of earnings pension. Although the wage rate fell below the Board's statutory minimum benefit, the pension was calculated on the basis of 75% of the worker's gross earnings.

Submission

The worker's advisor has provided an extensive submission relating to the law and reasons why the loss of earnings pension should be calculated at 100% of the wage rate, given the worker's earnings are below the Board's statutory minimum.

Facts and Evidence

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

- The worker's wage rate, for pension purposes, is \$983.00 per month at the time of injury, which is below the Board's statutory minimum.
- With the worker being considered to be unemployable as a result of his permanent disability, the Board calculated the worker's pension benefit on the basis of 75% of \$983.00 per month.

Law and Policy

The Act

The law that applies to this review is found in sections 22, 23, and 29 of the Act, as it read immediately before June 30, 2002.

Section 22 directs that benefits for permanent total disability are to be paid in an amount equal to 75% of the worker's average earnings, but not to fall below the Board's statutory minimum.

Section 23 provides the Board authority for paying permanent partial disability benefits. Section 23(3) applies to loss of earnings pensions, and directs that the benefit is to be calculated based on 75% of the difference between what the worker was earning before the injury and the amount the worker is able to earn after the injury. Section 23(4) directs that the minimum compensation awarded shall be calculated in the same manner as referenced for temporary total disability, but to the extent only of the partial disability.

Section 29 pertains to temporary total disability and directs that benefits under this provision are paid at 75% of the worker's average earnings, except in cases where the average earnings fall below what is known as the Board's statutory minimum. In these cases, the worker is to receive compensation in an amount equal to the average earnings.

Also applicable is section 99 of the Act, as it currently reads. Section 99 specifies that the Board is not bound by legal precedent and that the Board must make a decision based on the merits and justice of the case. In doing so, the Board must apply a policy of the Board of Directors that is applicable in that case.

Applicable Policy

The policies relating to this review are found in the *Rehabilitation Services and Claims Manual* ("RSCM"), Volume I. Specific policy items include:

- Policy item # 37.21 *Dual System of Measuring Disability* limits the use of the statutory minimum to permanent total disability benefits under the physical impairment method. It does not apply to benefits under the loss of earnings method, where a worker is found to be unemployable.

- Policy item #39.60 *Minimum Pension* states that the “minimum for permanent total disability does not apply simply because a worker is found to be totally unemployable under Section 23(3).”
- Policy item #40.10 *Assessment Formula* sets out the rules for calculating loss of earnings pensions.

Reasons and Decision

The worker’s representative submits that loss of earnings pension benefits should be subject to the same rules and calculation requirements that are applicable to temporary disability and loss of function pension benefits, with respect to the statutory minimum. This would require calculation of such benefits based on 100% of the worker’s average earnings, rather than 75%.

I note that this specific issue has previously been subject to appeal, and has recently been addressed by the Appeal Division. In Decision #2002-1284, the appeal commissioner wrote:

Pensions based on loss of function and those based on loss of earnings are as a result of two fundamentally different approaches. The worker is entitled, under the dual system of pension determination, to the method that provides the largest pension. There is no real relationship between the two methods.

The appeal commissioner found that the specific statement contained in section 23(3), requiring that the loss of earnings pension be a periodic payment of 75% of the difference in earnings, overrides the application of other legislative provisions pertaining to the statutory minimum. The Board was found to be correct in determining that the worker’s loss of earnings pension was properly calculated based on 75% of the worker’s pre-injury earnings.

Under Decision #2002-1658, the appeal commissioner agreed with the reasoning referenced above.

Section 99 does not require me to be bound by these decisions. However, I must apply a policy of the Board of Directors that is applicable.

Policy item #40.10 expressly requires that the loss of earnings pension “will then be 75% of the amount by which the earnings level [post injury] is less than the average earnings prior to the injury.” This policy is consistent with section 23(3). Neither the legislation pertaining to loss of earnings pensions, nor the Board’s policy, provide for an alternate calculation.

Although policy items #37.21 and #39.60 do not deal explicitly with the issue on this review, they do provide that the minimum benefit for permanent total disability in section 22 of the Act does not apply to a total loss of earnings benefit under section 23(3). The principle behind these policies is that the statutory minimums only apply to the assessment of the permanent disability award under the physical impairment method.

Section 23(3) provides for a separate, and self-contained alternative method of assessment that is then compared with the results of the physical impairment method (including the application of the minimums to the physical impairment method). The higher of the two

methods is then awarded. The worker benefits from the minimum since he or she only receives the loss of earnings award if it exceeds the amount resulting from the application of the minimum to the physical impairment method.

I therefore find that the Board correctly calculated the worker's loss of earnings pension benefit, in accordance to section 23(3) of the Act and policy item #40.10. As a result, I deny the worker's request.

Conclusion

As a result of this review, I confirm the Board's decision of February 20, 2003.