

Decision of the Workers' Compensation Appeal Tribunal

Number: WCAT-2005-04492-RB

Date: August 26, 2005

Panel: Jill Callan, Chair

**Subject: Section 251 Referral to the Chair —
Entitlement to Dependents' Benefits**

1. Introduction

The worker passed away in December 2001 as a result of a tragic accident at work. He had previously been in a common law relationship and had had two sons with his common law spouse. At the time of his death, the worker was not living with the children's mother and their two sons. The quantum of the pensions awarded to the worker's two sons is the subject of an appeal that is before a panel of the Workers' Compensation Appeal Tribunal (WCAT).

The statutory provisions related to survivors' benefits are contained in section 17 of the *Workers Compensation Act* (Act). That section was amended effective June 30, 2002 pursuant to the *Skills Development and Labour Statutes Amendment Act, 2003* (Bill 37). Subject to limited exceptions, section 35.2 of the Act provides that the Act as amended by Bill 37 only applies to the death of a worker that occurred on or after June 30, 2002. Accordingly, the former provisions of the Act are applicable in this case and the relevant policies are contained in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

This determination under section 251(3) of the Act is made in the context of the appeal initiated by the children's mother. She seeks increased benefits for them. The quantum of the children's benefits was established under item #55.40 (*Spouse Separated from Deceased Worker*) of RSCM I, which provides that the benefits are to be calculated in accordance with section 17(9) of the Act.

The vice chair of WCAT assigned to hear the appeal considers that elements of items #55.40 and #59.22 (*No Surviving Spouse or Common-Law Wife/Husband*) of RSCM I are so patently unreasonable that they should not be applied in the adjudication of the appeal. As a result, the vice chair has referred these policies to me for a determination in accordance with section 251(2) of the Act. Under section 251(3) of the Act, I must decide whether the policies in question "should be applied" in adjudicating the appeal. In accordance with section 251(1), this requires me to determine whether the impugned policies are "so patently unreasonable that [they are] not capable of being supported by the Act and its regulations." In this case, there is no relevant regulation.

According to the vice chair's referral memorandum, the application of the impugned policies results in the quantum of benefits paid to the children being less than the amount that the children would receive if the benefits were calculated under the former section 17(3)(f), which she contends would involve the correct application of section 17 of the Act.

The policies that are the subject of this determination are significantly different from the policies related to section 17 of the current Act that are in the *Rehabilitation Services and Claims Manual*, Volume II (RSCM II). Throughout this determination all policy references will be to those contained in RSCM I unless otherwise specified. In addition, unless otherwise specified, references to section 17 of the Act are to section 17 as it existed prior to the Bill 37 amendments.

2. Participants

As the children's mother was unrepresented, pursuant to section 246(2)(i) of the Act, I invited the Workers' Advisers Office (WAO) to participate in this determination in order to assist me in fully considering this matter. In a submission dated March 9, 2005, the WAO submits that the impugned elements of the two policies are patently unreasonable under the Act.

Although invited to do so, the employer is not participating in the appeal. In order to assist me in fully considering this matter, pursuant to section 246(2)(i) of the Act, I invited the Employers' Advisers Office (EAO) to participate in this determination. In a submission dated November 19, 2004, the EAO takes the position that the impugned elements of the two policies are not patently unreasonable under the Act.

3. Issue(s)

The issue in this determination is whether, for the purposes of the former section 17 of the Act, the impugned elements of items #55.40 and #59.22 are so patently unreasonable that they are not capable of being supported by the Act.

4. Background

This determination involves circumstances in which the deceased worker is survived by dependent children but not by a spouse or common law spouse.

Following the worker's death, the children's mother applied for benefits as a common law spouse of the worker. By decision dated March 13, 2002, the case manager acknowledged that the worker and the children's mother had been in a common law relationship in the past. However, he concluded that, at the time of the worker's death, the children's mother and the worker did not support a common household in which they both lived. He informed the children's mother that he was denying her benefits as a common law spouse of the worker. The case manager's decision was upheld in WCAT Decision #2004-04372-RB, dated August 20, 2004³².

By a second decision dated March 13, 2002, the case manager informed the children's mother that, in light of the fact that the worker had been providing financial support for their two sons and that there was a reasonable expectation of continued support, the Board had granted an award of \$335 per month to each child pursuant to section 17(9) of the Act. The pension

³² WCAT decisions are available at <http://www.wcat.bc.ca/research/appeal-search.htm>.

calculation sheets for the two pensions characterize them as “Special Monthly Pensions” that were calculated manually. The vice chair notes that the quantum of the benefits was based on the federal guidelines for child support under a court order.

On behalf of the children, their mother appealed the March 13, 2002 decision to the Workers’ Compensation Review Board (Review Board). Pursuant to the *Workers Compensation Amendment Act (No.2), 2002* (Bill 63), on March 3, 2003, the Review Board and the Appeal Division of the Workers’ Compensation Board (Board) were replaced by WCAT. Section 38(1) of the transitional provisions contained in Part 2 of Bill 63 provides that all appeal proceedings pending before the Review Board on March 3, 2003 are continued and must be completed as proceedings pending before WCAT (except that no time frame applies to the WCAT decision). As a result, the appeal is being completed as a WCAT matter.

The appeal of the second March 13, 2002 decision has led to the referral that is the subject of this determination.

5. Policy-making Authority

Items #55.40 and #59.22 of RSCMI have existed in essentially their present form since the *Rehabilitation Services and Claims Manual* was first published in 1984. At that time, the policy-making authority under the Act was vested in the former commissioners of the Board.

In 1991, a new governance structure for the Board came into effect and the policy-making authority was held by the governors of the Board. In 1995, a Panel of Administrators was appointed to perform the functions of the governors and, accordingly, the policy-making authority was vested in the Panel of Administrators.

The *Workers Compensation Amendment Act, 2002* (Bill 49) amended the governance structure of the Board effective January 2, 2003, establishing the Board of Directors under section 81 of the Act. Under the current section 82(1)(a) of the Act, the Board of Directors has the authority to “set and revise as necessary the policies of the board of directors, including policies respecting compensation.”

Sections 250(2) and 251(1) of the current Act were among the new provisions that flowed from Bill 63 being brought into force. They provide:

250(2) The appeal tribunal must make its decision based on the merits and justice of the case, but in so doing the appeal tribunal must apply a policy of the board of directors that is applicable in that case.

251(1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

Section 42 of Bill 63's transitional provisions states:

As may be necessary for the purposes of applying sections 250 (2) and 251 of the Act, as enacted by [Bill 63], in proceedings under sections 38 (1) and 39 (2) of [Bill 63], published policies of the governors are to be treated as policies of the board of directors.

The appeal before the vice chair is a proceeding under section 38(1) of Bill 63. Accordingly, in connection with the requirement in section 250(2) that WCAT "must apply a policy of the board of directors that is applicable in that case," subject to section 251(1), the vice chair is required to apply the former policies of the governors (whose authority under section 82 was being exercised by the Panel of Administrators during the time frame relevant to the appeal) in deciding the appeal before her. Those policies included items #55.40 and #59.22 of RSCM I.

Pursuant to the Board of Directors' Decision No. 2003/02/11-04 (Policies of the Board of Directors), dated February 11, 2003, published at 19 *Workers' Compensation Reporter* 1³³, items #55.40 and #59.22 of RSCM I became policies of the directors as of February 11, 2003.

6. The Act

In deciding that the children were entitled to benefits under the former section 17, the Board determined that they were dependent children of the deceased worker. The former section 1 of the Act defines "dependant" as:

"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;

The former section 17 (1) defines "child" as:

- (a) a child under the age of 18 years, including a child of the deceased worker yet unborn;
- (b) an invalid child of any age; and
- (c) a child under the age of 21 years who is regularly attending an academic, technical or vocational place of education,

³³ Policy resolutions and decisions are accessible at http://www.worksafebc.com/publications/newsletters/wc_reporter/default.asp.

It also states:

and “children” has a similar meaning;

For the purposes of this determination, the relevant provisions in the former section 17 are section 17(3)(f)(ii), section 17(9), and section 17(17), which provide, in part:

17(3) Where compensation is payable as the result of the death of a worker or of injury resulting in such death, compensation must be paid to the dependants of the deceased worker as follows:

...

(f) where there is no surviving spouse or common law spouse eligible for monthly payments under this section, and

...

(ii) the dependants are 2 children, a monthly payment of a sum that, when combined with federal benefits payable to or for those children, would equal 50% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; or

...

subject, in all cases, to the minimum set out in paragraph (g);

(9) Where compensation is payable as the result of the death of a worker, or of injury resulting in death, and where at the date of death the worker and dependent spouse were living separate and apart, and

(a) there was in force at the date of death a court order or separation agreement providing periodic payments for support of the dependent spouse, or children living with that spouse, no compensation under subsection (3) is payable to the spouse or children living with the spouse; but

(i) where the payments under the order or agreement were being substantially met by the worker, monthly payments must be made in respect of that spouse and children equal to the periodic payments due under the order or agreement; or

(ii) where the payments under the order or agreement were not being substantially met by the worker, monthly payments must be made up to the level of support that the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred; or

(b) there was no court order or separation agreement in force at the date of death providing periodic payments for support of the dependent spouse, or children living with that spouse, and

- (i) the worker and dependent spouse were living separate and apart for a period of less than 3 months preceding the date of death of the worker, compensation is payable as provided in subsection (3); or
- (ii) the worker and dependent spouse were separated with the intention of living separate and apart for a period of 3 months or longer preceding the death of the worker, monthly payments must be made up to the level of support which the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred.

(17) Where a situation arises that is not expressly covered by this section, or where some special additional facts are present that would, in the board's opinion, make the strict application of this section inappropriate, the board must make rules and give decisions it considers fair, using this section as a guideline.

7. The Policies

(a) RSCMI

In this case, the Board appears to have established the children's benefits under item #55.40 (*Spouse Separated from Deceased Worker*), which largely deals with the question of whether a spouse who is separated from a worker at the time of the worker's death is entitled to benefits. Much of the policy is focussed on the various fact patterns that might emerge when a worker is separated from his or her spouse. The aspect of the policy that is germane to this determination states, in part:

... Section 17(9) also applies where there is no spouse eligible to claim benefits, but a claim is made by children of the deceased who were living separate and apart from the worker.

To be eligible to claim under Section 17(9), a spouse or child must first be found by the Board to have been an actual dependant of the deceased as discussed in #54.00. It is not sufficient that the claimant, though not actually dependent, had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased.

In no case can the compensation payable under Section 17(9) exceed the amount that would have been payable if there had been no separation.

Accordingly, item #55.40 provides that the benefits payable to the children in this case are to be determined under section 17(9). It appears the case manager set the quantum of the children's benefits under section 17(9)(b)(ii) by considering the amount the "children would have been likely to receive from the worker if the death had not occurred." The vice chair and the WAO contend that the children are entitled to the greater quantum of benefits that would be payable under the formula set out in section 17(3)(f).

Item #59.22 is referenced in item #59.21 (*Surviving Widow, Widower, Common-Law Wife or Common-Law Husband*), which provides, in part:

Where there is a widow or widower and a child or children, and the widow or widower subsequently dies, the allowances to the children shall, if the children are in other respects eligible, continue and shall be calculated in like manner as if the worker had died leaving no dependent spouse. The rules described in #59.22 will apply to determine the children's entitlement.

[footnote deleted]

Item #59.22 (*No Surviving Spouse or Common-Law Wife/Husband*) provides, in part:

Where there is no surviving spouse or common-law wife or common-law husband eligible for monthly payments under this section, and

...

- B. the dependants are two children, a monthly payment is made of a sum that, when combined with Federal benefits payable to or for those children, would equal 50% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; or

...

The computation formula is similar to the one used for computing widows' or widowers' pensions described in #55.21–#55.22. Only the percentages taken of the projected permanent total disability pension are different. "Federal benefits" has the meaning set out in #55.24 and the minimum average earnings referred to in #55.26 is applicable.

[footnote deleted]

(b) RSCM II

Prior to Bill 37 being brought into force, the Board of Directors approved a set of revised policies regarding the current section 17, which are set out in Chapter 8 of RSCM II. Item #55.40 of the RSCM II, which was the same as item #55.40 of RSCM I, has been replaced by item C8-56.20 (*Calculation of Compensation – Spouse Separated from Deceased Worker*). The impugned statement in item #55.40 of RSCM I does not appear in the revised policy. In fact, there is nothing in the policy that indicates that section 17(9) is applicable to a situation in which a worker did not have a spouse eligible for benefits under section 17 but had dependent children living separate and apart from him or her.

Items #58.21 and #58.22 of RSCM II, which were the same as items #59.21 and #59.22 of RSCM I, have been replaced with item C8-56.40 (*Calculation of Compensation – Children*). In the section entitled "Explanatory Notes" the following statement appears:

This policy describes how compensation as a result of a worker's death is calculated for dependent children.

The policy provides, in part:

2. Calculation of Compensation – No Surviving Spouse or Common-Law Wife/Husband

Where there is no surviving spouse or, common-law wife or common-law husband eligible for monthly payments under section 17 of the *Act*, benefits for any dependent children are calculated as described below.

...

2.2 Two Dependent Children

The monthly payment for two dependent children is calculated as the difference between:

- (a) 50% of the monthly rate of compensation that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; and
- (b) 50% of the federal benefits payable to or for those children.

Therefore, it appears that had this policy been applicable in this case, the quantum of the children's benefits would have been established under section 17(3)(f)(ii) of the *Act*.

8. The Vice Chair's Referral Memo

In reference to item #55.40, the vice chair's concern is restricted to the following statement:

Section 17(9) also applies where there is no spouse eligible to claim benefits, but a claim is made by children of the deceased who were living separate and apart from the worker.

She contends that it is patently unreasonable to enact such a policy under section 17(9) because that section is limited to circumstances in which there is a dependent spouse who is living separate and apart from the worker and, in this case, the children's mother was not a dependent spouse at the time of the worker's death. She states section 17(9) cannot support a policy regarding a situation in which there is no dependent spouse. In her view, when there is no dependent spouse, the benefits for the dependent children of the deceased worker are to be paid under section 17(3)(f)(ii).

The vice chair states that item #59.22, when read in conjunction with item #59.21, seems to indicate that benefits under section 17(3)(f) will only be paid to children who are orphans. She contends that this is patently unreasonable because section 17(3)(f) applies "where there is no surviving spouse or common law spouse eligible for monthly payments under this section." In her view, in addition to applying to circumstances in which a worker's spouse has pre-deceased the worker or subsequently passed away, the section is applicable to situations like the case before her. That is, it applies in a situation where the children's mother is no longer the

common law spouse of the worker and therefore ineligible to receive benefits. She believes that item #59.22 is patently unreasonable because it narrows the scope of section 17(3)(f) by limiting its application to situations in which the children are orphans.

The vice chair does not suggest that item #59.22 can be interpreted as applicable in a situation, such as the case before her, in which the children's mother has survived the worker but is ineligible to claim benefits under section 17, nor does the vice chair address any ambiguity in the policy. Her referral is based on the assumption that item #59.22 only applies when both parents of the children have passed away.

9. The Positions of the Participants

By letters dated October 6, 2004, WCAT forwarded the vice chair's memorandum to the WAO and EAO and invited their submissions.

The EAO provided a submission dated November 19, 2004. They note my discussion of the standard of patent unreasonableness in WCAT Decision #2003-01800-AD, dated July 30, 2003, and submit that I must grant a significant degree of deference to the Board of Directors. The EAO contends that, given that section 17(3)(f) contains the words "no surviving spouse or common law spouse," it is not patently unreasonable to interpret it as limited to situations in which both parents of the dependent children are deceased.

Regarding the application of section 17(9), the EAO states:

The situation of the children living with a parent in a household separate and apart from the deceased worker at the time of death is most akin to the situations described in subsection 17(9), which deals with divorced or separated spouses. The nature of the children's dependence on the deceased worker and their entitlement to support by the deceased worker are similar in both cases. Children in both situations continue to have the support of the surviving parent and, in law, would generally only be entitled to support payments from the worker if the worker had been alive. Therefore, we submit that it is reasonable and fair for the Board to compensate children in both situations in the same manner, as per Policy #55.40.

The EAO also considers the possibility that the situation of the children in this case falls under section 17(17), which allows the Board to do what is fair in situations that are not expressly covered by section 17 or where the strict application of the section would be inappropriate.

The WAO has provided a submission dated March 9, 2005. They contend that the vice chair was correct in characterizing items #55.40 and #59.22 as patently unreasonable.

The WAO submits that there is no support in section 17(9) for the impugned statement in #55.40 to the effect that section 17(9) applies to a claim made by children of a deceased worker who were not living with him or her where there is no spouse eligible to claim benefits. They contend that section 17(9) only applies where there is a dependent spouse who is eligible to receive benefits.

The WAO notes that section 17(3)(f) is applicable to circumstances in which a child or children are orphans. However, they submit it is also applicable to situations such as the one before the vice chair in which there is a former common law spouse, who is the mother of the children and is not entitled to benefits as a dependant under section 17. They argue that the phrase “eligible for monthly benefits” would not have been necessary if the legislature had intended that section 17(3)(f) simply be applicable to orphans. They state:

When read together Policy Items #55.40 and #59.22 fail to give effect to the rational scheme of benefits set out in Section 17 of the *Act*. We submit that this scheme was intended to ensure that children who do not have any surviving parents or one surviving parent who is “not eligible for benefits” will receive a greater benefit amount than children who have a surviving dependant [*sic*] parent entitled to monthly benefits.

The WAO also contends that, even if section 17(3)(f) is capable of being interpreted as a provision related solely to orphans, that interpretation would offend the common law principle that remedial legislation is to be interpreted broadly. In this regard, I note that section 8 of the British Columbia *Interpretation Act*, provides:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

10. Analysis

(a) The Standard of Patent Unreasonableness

As pointed out by the EAO, I discussed the standard of patent unreasonableness in WCAT Decision #2003-01800-AD, dated July 30, 2003, which was also a determination under section 251(3). I noted the standard of patent unreasonableness requires a significant degree of deference. I also quoted from Supreme Court of Canada judgments, which characterize patent unreasonableness as akin to being “clearly irrational” and “so flawed that no amount of curial deference can justify letting [the decision] stand.” More recently, in WCAT Decision #2005-01710, dated April 7, 2005 (see pages 12 to 17), I provided an overview of additional judgments of the Supreme Court of Canada related to this standard and the reasons given by Alan Winter in the *Core Services Review of the Workers’ Compensation Board* (March 2002) (Core Review) for his recommendation of the standard of patent unreasonableness for the purposes of section 251. In that determination, I concluded that the impugned policy was patently unreasonable as it was not capable of being rationally supported by the Act.

Effective December 3, 2004, under section 245.1 of the Act, section 58 of the *Administrative Tribunals Act* (ATA) became applicable to WCAT. Section 58(2) of the ATA provides that the standard of patent unreasonableness applies when a court is considering a judicial review application on a finding of fact or law or an exercise of discretion by WCAT. Section 58(3) of the ATA provides:

For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

I consider section 58(3) of the ATA to be a codification of the common law principles applicable to the question of whether a discretionary authority has been exercised in a patently unreasonable manner. In my view, the Board of Directors' policy-making authority generally involves making findings of law in interpreting the Act and exercising the discretion to set policies granted by section 82(1) of the Act. In this case, the matter under consideration largely relates to the policy-makers' findings of law in interpreting section 17 of the Act. Accordingly, I do not find section 58(3) of the ATA assists me in establishing whether the impugned policies are patently unreasonable.

(b) Are the Impugned Policies Patently Unreasonable?

History of the Impugned Policies

My attempts to research the background and history of the impugned policies have not been fruitful. I have not found a discussion of them in the decisions of the former commissioners contained in Volumes 1 to 6 of the *Workers' Compensation Reporter* or in the body of decisions produced by the former Appeal Division of the Board.

General Framework of the Former Section 17

In order to determine whether the impugned policies are patently unreasonable, it is useful to review the statutory framework set out in the former section 17 of the Act. There are elements of this provision which make it difficult to interpret. For instance, while the principles of statutory interpretation would normally dictate the consistent use of a term with a specific meaning, it appears that in section 17 different terms have the same meaning.

For instance, in sections 17(3)(a), (b), (c), and (d), the terms "widow or widower" are used. However, section 17(3)(f) uses the term "surviving spouse" which appears to have the same meaning as "widow or widower." In addition, section 17(11) uses the terms "common law wife" and "common law husband" whereas section 17(3)(f) uses the term "common law spouse."

A useful overview of the framework of section 17 and its history up to 1996 is found in *Compensation and the Death of a Worker*, dated December 23, 1996, which is a Royal Commission briefing paper that was prepared by the Board's former Policy and Regulation Development Bureau.³⁴ That briefing paper points out that there had been few substantial changes to section 17 since 1974, when it was significantly redrafted. I note amendments in 1985 and 1993 and those that arose out of Bill 37 have not altered the specific aspects of the former section 17 that are germane to the matter before me. I will analyze those elements of section 17 below.

³⁴ Paper available at http://www.worksafebc.com/regulation_and_policy/archived_information/royal_commission_briefing_papers/assets/pdf/death.pdf.

In terms of general principles, the briefing paper points out that the compensation scheme looks at the question of what the dependant has “lost from the death of the worker,” subject to minimum benefits and it notes “the extra payments for children may reflect more of a concern over the survivors’ need than their actual loss” (see page 8). Section 17(9) is discussed at page 12 of the paper but only as it relates to dependent spouses living separate from the deceased. There is no discussion of dependent children living separate from the deceased where there is no dependent spouse or common law spouse.

Section 17(3)(f) and its predecessor section have been referenced in royal commission reports and the more recent Core Review as relating to orphans. In the *Concise Oxford Dictionary* (tenth edition, revised), “orphan” is defined as “a child whose parents are dead.” In his 1966 royal commission report³⁵, Mr. Justice Tysoe referred to section 18(2)(c) as relating to “orphan children” (see section 6 of the report entitled “Payments for Children of Deceased Workmen”). Section 18(2)(c) set out the benefits payable “[w]here the dependents [*sic*] are children, there being no dependent widow or dependent invalid widower.” While section 18(2)(c) did not contain the words “eligible for monthly payments under this section,” it respectively modified the words “widow” and “widower” with the words “dependent” and “dependent invalid.”

In its 1999 report³⁶, the Royal Commission stated (at page 8 of Chapter 2 of Volume II entitled “Current Calculation of Benefits for Surviving Spouses and Children”), “[b]enefits for orphaned dependant [*sic*] children are addressed in Section 17(3)(f).” The Royal Commission’s statement in this regard was quoted at page 237 of the Core Review.

While the reports I have reviewed refer to section 17(3)(f) as the section applicable to orphans, that does not mean that it should be interpreted as only applicable to situations in which the children have no surviving parent. The focus on orphans is easily explained by the public policy concern that orphans be adequately supported.

Is the Impugned Element of Item #59.22 Patently Unreasonable Under the Act?

The vice chair states that item #59.22 restricts the application of section 17(3)(f) of the Act to orphans and that this is patently unreasonable. As stated earlier, she did not consider whether it is possible to interpret the policy more broadly.

In her referral memorandum, the vice chair acknowledges that the children’s mother was no longer his common law spouse at the time of his death. However, she does not appear to have addressed her mind to the fact that the first phrase in item #59.22 is “[w]here there is no surviving spouse or common-law wife or common-law husband.”

³⁵ British Columbia, *Commission of Inquiry, Workmen’s Compensation Act: Report of the Commissioner, the Honourable Mr. Justice Charles W. Tysoe* (Victoria: A. Sutton, Printer to the Queen, 1966).

³⁶ British Columbia, Royal Commission on Workers Compensation in British Columbia, *For the Common Good: Final Report of the Royal Commission on Workers’ Compensation in British Columbia* (Victoria: Crown Publications Inc., 1999) (Chair: Gurmail S. Gill).

The vice chair assumes the application of item #59.22 is restricted to orphans. Her narrow interpretation of the policy may have been driven by the following factors:

- Item #59.22 is, in fact, applicable to orphans.
- There is nothing on the claim file to indicate that the case manager considered item #59.22 to be applicable.
- There is a clear statement in item #55.40 that it is applicable when there is no spouse eligible to claim benefits and the deceased worker had children living separate and apart from him or her at the time of death. Accordingly, the vice chair may have thought that she needed to interpret item #59.22 narrowly because the question before her was covered by item #55.40.
- The vice chair may have erroneously concluded that only one policy could be applicable to the appeal before her.

The vice chair did not consider whether item #59.22 was ambiguous or whether it can be interpreted as applicable to dependent children other than orphans. She did not consider the following:

- Item #59.22 indicates it is applicable “[w]here there is no surviving spouse or common-law wife or common-law husband eligible for monthly payments under this section.” While it is not specifically stated in the policy, it appears that “this section” means section 17 of the Act. In this case, the children’s mother was not the common law wife of the worker at the time of his death. Furthermore, the words I have quoted are essentially the words that the vice chair and WAO say should be interpreted as meaning that the policy is applicable to children who have a surviving parent provided that parent is not entitled to section 17 benefits.
- The Board of Directors has established a similar policy in item C8-56.40 of RSCM II and that policy would have been applicable to the appeal before the vice chair if the worker had passed away on or after June 30, 2002.

It is reasonable and appropriate to interpret item #59.22 in a much broader fashion than that set out in the vice chair’s referral memorandum. In my view, it should be interpreted in a manner that is consistent with section 17(3)(f). I interpret section 17(3)(f) to be applicable to dependent children other than orphans. I view it as applicable when “there is no surviving spouse or common law spouse eligible for monthly payments under [section 17].” This would include situations where there is a surviving spouse or common law spouse who is not eligible for monthly benefits under section 17 and where the children have a surviving parent who is neither a surviving spouse nor a common law spouse.

In light of the vice chair’s referral, I have considered whether I am required to determine whether item #59.22 is patently unreasonable if it is assumed that the policy is only applicable to orphans. However, I find it is unnecessary to engage in this exercise because section 251(3) states that I “must determine whether the policy should be applied.” Subject to the comments I will make later in this determination regarding situations in which two policies are applicable, I have determined that item #59.22 should be applied to the appeal before the vice chair because it is consistent with section 17(3)(f) and not patently unreasonable.

I find item #59.22 of RSCM I is not patently unreasonable under the Act.

Is the Impugned Element of Item #54.40 Patently Unreasonable Under the Act?

The impugned element of item #54.40 provides that section 17(9) is applicable to the situation before the vice chair. Accordingly, the first question is whether it is supported by section 17(9). Section 17(9) starts with three conditions that must be met in order for that section to be applicable:

- compensation must be payable “as the result of the death of a worker, or of injury resulting in death”;
- the worker must have a dependent spouse at the date of death; and
- at the date of death, the worker and the dependent spouse must have been “living separate and apart.”

There is nothing in section 17(9) that indicates it is applicable when only the first condition is present. In order to find that the impugned element of item #55.40 is supported by section 17(9), I would have to be satisfied that section 17(9) is applicable even when the worker did not have a dependent spouse at the date of death. However, in my view, section 17(9) is only applicable if, at the time of a worker’s death, there is a “dependent spouse” who was living separate and apart from the worker. In this case, the children’s mother is not a dependent spouse for the purposes of section 17. I find the impugned element of item #55.40 is not supported by a rational interpretation of section 17(9).

The next question is whether there is a rationale for finding item #55.40 to be viable under the Act. Section 17(17) of the Act grants the Board an overriding discretion to make rules regarding, among other things, situations not expressly covered by section 17, provided that the rules are considered to be fair and section 17 is used as a guideline. Accordingly, I have considered the EAO’s argument that the impugned policy is not patently unreasonable because it is supported by section 17(17) of the Act.

In order to accept this argument, I would have to be satisfied that section 17(9) is not purported to be the foundation for the impugned element of #55.40. I would therefore have to interpret item #55.40 as not providing that section 17(9) is applicable but as setting out by reference that the method of determining the quantum of benefits set out in section 17(9)(b)(ii) will be applied to circumstances such as those arising in the appeal. Under that method, the monthly payments to the children would be made “up to the level of support which the Board believes . . . those children would have been likely to receive from the worker if the death had not occurred.” However, the impugned element of item #55.40 starts with the statement, “[s]ection 17(9) also applies.” It does not set out that, although 17(9) is not applicable, the method set out in section 17(9)(b)(ii) will be used to determine the quantum of benefits. I find section 17(9) is the foundation of the impugned element of item #55.40.

If I had concluded that item #55.40 could be interpreted as merely incorporating the method in section 17(9)(b)(ii) by reference rather than stating section 17(9) is applicable, I would have

further difficulty in concluding that the policy-makers developed the impugned policy under section 17(17). Item #63.40 (*Special or Novel Cases*) of RSCM I provides:

Section 17(17) provides that where a situation arises that is not expressly covered by the provisions discussed in this chapter or where some special additional facts are present that would, in the Board's opinion, make the strict application of those provisions inappropriate, the Board can make rules and give decisions it considers fair, using those provisions as a guideline.

This provision is applicable to deaths occurring on or after July 1, 1974.

Given that this is the stated approach to using section 17(17), and in light of the fact that there is no mention of section 17(17) in item #55.40, I do not find that section 17(17) is the statutory authority for the impugned element of item #55.40. Moreover, I note the situation in the case before the vice chair is covered by item #59.22.

I find the impugned element of item #55.40 is patently unreasonable under the Act and should not be applied in the adjudication of the appeal.

11. The Operation of Section 251

Section 251 prescribes a series of steps that must be taken as a result of my determination that the impugned element of item #55.40 should not be applied. Those steps include the following:

- In accordance with section 251(5), WCAT will suspend any other appeal proceedings that can be affected by the impugned policy.
- In accordance with section 251(5), I will send notice of this determination and my reasons to the Board of Directors in care of the chair of the Board of Directors. I will enclose with the notice a list of the parties to the appeal that has led to this referral and the parties to any appeals that WCAT has suspended under section 251(5).
- In accordance with section 251(6), within 90 days of receipt of notice of this determination, the Board of Directors must review the policy and determine whether WCAT may refuse to apply the policy. The date for receipt of the notice is a matter to be determined by the Board of Directors. However, I note there may be a delay between the date of this determination and the date I give formal notice of this determination to the Board of Directors because of the time it will take to develop the list of appeals that are to be suspended under section 251(5).
- In accordance with section 251(7), the Board of Directors must allow the parties to this appeal and the parties to all appeals suspended by WCAT to make written submissions.
- In accordance with section 251(8), WCAT will be bound by the Board of Directors' determination.

12. The Applicable Policy

Section 250(2) of the Act states that “a policy of the board of directors that is applicable” must be applied. I take this to mean that WCAT must go through the appropriate analysis to determine if the policy is applicable. If a policy that is potentially applicable to an appeal is not, in fact, applicable, it is not necessary to invoke the 251 process. If more than one policy appears to be applicable, WCAT must identify the applicable policy.

I have determined that item #59.22 is capable of a much broader interpretation than the vice chair ascribes to it in the referral memorandum. In fact, I have determined that it can be interpreted as applicable to the appeal before the vice chair. Accordingly, items #55.40 and #59.22 are both potentially applicable to the situation before the vice chair.

In Decision No. 86 of the governors (*Subject: Bylaw No. 4 – Published Policy of the Governors*) dated November 16, 1994 (10 *Workers’ Compensation Reporter* 781), the governors addressed, among other things, the question of which policy would apply in the event that two conflicting policies were applicable to a matter under adjudication. In section 2, they determined:

2.0 Section 2 – Application of Published Policy of the Governors

- 2.1 In the event of a conflict between the *Act* or Regulations and the published policies of the governors, the *Act* and Regulations are paramount.
- 2.2 In the event of a conflict between published policy in a Manual identified in Section 1.1 (a), (b), or (c) of this Bylaw, and published policy in *Workers’ Compensation Reporter* Decisions No. 1–423 identified in Section 1.1(d), published policy in the Manual is paramount.
- 2.3 In the event of any other conflict between published policies of the governors:
 - (a) *if the policies were approved by the governors on the same date, the policy most consistent with the Act or Regulations is paramount.*
 - (b) *if the policies were approved by the governors on different dates, the most recently approved policy is paramount.*

[emphasis added]

In Decision No. 1 of the Panel of Administrators (*Subject: Discharge of Governor Policy-Making Function*) dated July 17, 1995 (11 *Workers’ Compensation Reporter* 465), the Panel of Administrators adopted Decision No. 86 of the governors.

In the “Policy-making Authority” section of this determination, I referred to the Board of Directors’ Decision No. 2003/02/11-04 (*Policies of the Board of Directors*). The bylaw approved by the Board of Directors in that decision also anticipates that there may be situations in which more than one policy may be applicable. It provides:

2.0 Application of Policy of the Directors

2.1 In the event of a conflict between policy in a manual identified in Section 1.1 (a), (b), (c), or (d) of this bylaw, and policy in *Workers' Compensation Reporter* Decisions No. 1-423 identified in Section 1.1(f), policy in the manual is paramount.

2.2 In the event of any other conflict between policies of the Directors:

- (a) *If the policies were approved by the directors on the same date, the policy most consistent with the Act or Regulations is paramount.*
- (b) If the policies were approved on different dates, the most recently approved policy is paramount.

[emphasis added]

In this case, items #55.40 and 59.22 were both included in the first version of the *Rehabilitation Services and Claims Manual*, which was published in 1984. Accordingly, if the Board of Directors determines that item #55.40 must be applied, in resolving the conflict between the two policies, the vice chair is required to consider the policy most consistent with the Act to be paramount.

When a WCAT vice chair invokes the section 251 process, the 180-day time frame for deciding the appeal set out in section 253(4)(a) (which is applicable to appeals initiated under the new appeal system) is suspended and the decision is delayed. By their very nature, section 251 referrals generally require substantial thought and consideration by the WCAT chair and, in the event the chair finds the impugned policy to be patently unreasonable, they raise significant issues for determination by the Board of Directors. I have concluded that item #59.22 can be interpreted as consistent with section 17(3)(f) and as applicable to the appeal before the vice chair. However, it was legitimate for the vice chair to have made the referral to me as item #55.40 was applied by the Board in establishing the amount of the children's benefits and that policy is patently unreasonable under the Act. Given the vice chair's referral of item #55.40, I was obligated under the Act to make this determination. I note there may be other situations in which the impugned element of item #55.40 has been applied by the Board.

13. Conclusion

In summary:

- I find the impugned element of item #55.40 is so patently unreasonable that it is not capable of being supported by the Act; and
- I find the impugned element of item #59.22 of RSCM I is not patently unreasonable under the Act.

In accordance with section 251(5) of the Act, I will send notice of this determination and my reasons to the Board of Directors of the Board. In addition, I will provide the Board of Directors with a list of the parties to the appeals that WCAT suspends under section 251(5).

