

Findings of the Review Board

Number: 850564-C
Date: June 11, 1997
Panel: Peter Steele, Joanne Fox, Howard Robinson
Subject: Section 23(4) and Benefits Available to Workers Earning Below Statutory Minimum at Time of Injury

Introduction

The worker was advised by the Workers' Compensation Board in a letter dated April 22, 1996 that, pursuant to a March 20, 1996 Review Board finding, it had been accepted that his compensable injuries disabled him from pursuing competitive employment as of January 31, 1992, his last day of employment as a packing wrapper. He was awarded a 100% loss of earnings award retroactive to February 1, 1992 in an amount of \$703.44 a month. The award was based on Section 23(3) of the *Workers Compensation Act*, and it provided an award equal to 75% of his permanent partial disability wage rate plus Consumer Price Index increases. Given that he was already receiving a functional award of \$637.76 a month, his additional monthly award was \$65.68 as of February 1, 1992.

The worker's representative filed an appeal, stating that the worker should get his loss of earnings pension based on 100% of his earnings, not 75%, because his pre-injury average earnings were below the Board's statutory minimum.

Issue

Is the worker entitled to have his loss of earnings award paid at 100% of his pre-injury average earnings?

Evidence and Submissions

This matter was dealt with by way of a review of the evidence on file and submissions received from the worker's representative in support of his appeal. The worker's representative has had disclosure of the worker's claim file from the Board. The accident employer did not participate.

This matter last came before the same panel by way of an oral hearing in Vancouver, B.C. on February 9, 1996. Our findings dated March 20, 1996 awarded the worker a 100% loss of earnings pension effective the last day he worked as a packing wrapper, and confirmed his 68% functional disability and his original wage rate of \$546.00 per month at the time of his injury on February 13, 1981.

The Board re-calculated the worker's pension on a loss of earnings basis as of February 1, 1992, subsequent to the last day of his employment as a packing wrapper. It was their April 22, 1996 letter to the worker which generated the present appeal before this panel. The worker's representative, when he received word of the increased pension calculations, wrote the Board (April 30, 1996) asking why the loss of earnings award was paid at 75% of the worker's wage rate, instead of 100%, given the worker's low wage rate.

A Claims Adjudicator in the Disability Awards Department responded on May 10, 1996. He provided the worker's representative with copies of Sections 23 and 29 of the *Workers Compensation Act* and an explanation that the worker's 68% functional impairment pension was paid on the basis of 100% of his wage rate, but the *Act* requirement was that a loss of earnings pension can only be paid at 75% of that wage rate plus Consumer Price Index increases.

In a letter dated July 10, 1996, the worker's representative submitted to the Review Board that the worker should get his loss of earnings based on 100% of his wage rate, not 75%.

Reasons and Findings

Certain sections of the *Act* bear reviewing. Section 23 deals with permanent partial disability and disfigurement awards, whether paid to a worker based on a functional disability or a loss of earnings. With the exception of workers earning below the Board's statutory minimum, Section 23 obligates the Board to pay disability awards based on 75% of the worker's loss of average earnings. For those workers earning below statutory minimum, Section 23(4) states:

Where permanent partial disability results from the injury, the minimum compensation awarded shall be calculated in the same manner as provided by Section 29(2) for temporary total disability *but to the extent only of the partial disability.* (emphasis added)

Section 29 deals with payment of temporary total disability benefits, and states at Subsection (2):

The compensation awarded under this section shall not be less than an amount equal to \$75 per week, unless the worker's average earnings are less than that sum per week, in which case he shall receive compensation in an amount equal to his average earnings. [Note: \$75 amount changed periodically by regulation pursuant to Section 25(4).]

Section 30 deals with payment of temporary partial disability benefits and states at Subsection (2):

Where temporary partial disability results from the injury, the minimum compensation awarded shall be calculated in the same manner as prescribed by Section 29(2) for temporary total disability *but to the extent only of the partial disability.* (emphasis added)

The question is whether the minimum compensation provided in Section 23(4), and by reference through Section 29(2), applies to a 100% loss of earnings award granted under Section 23(3). The Board says it does not.

The panel notes that Sections 23(4) and 30(2) are - with the substitution of the word "permanent" for the word "temporary" - identical, and we turn to statutory interpretation for assistance in determining the meaning of two such similar subsections, and its application in this matter.

The two standard approaches to statutory interpretation are discussed in *Laying Down the Law*, 3d ed. (Butterworths, 1992), which discusses these approaches at p. 150. The "literal" approach (which is most commonly used) demands that a statute be expounded according to the definition of the words and phrases, and says that examining the statute as a whole will assist in establishing that meaning.

The "purposive" approach requires determining the purpose of the *Act* or the particular provision and adopting an interpretation of the words consistent with that purpose. This approach is generally applied only when the meaning of the words to be interpreted are unclear on the face of the statute.

Similarly, *Maxwell on the Interpretation of Statutes*, 12th ed. (Sweet & Maxwell, 1969), states, at p. 28:

The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have

acquired one, and otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be construed according to the rules of grammar . . . If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.

With respect to consistency in language, *Laying Down the Law* states at p. 181:

It may assist in the interpretation of a ... phrase if it can be found elsewhere in the legislation where its meaning is more apparent ... drafters attempt to communicate meaning as directly and briefly as possible. One of the ways in which this is done is to repeat the same word or phrase when precisely the same meaning is intended. When interpreting a particular piece of legislation, therefore, it may be assumed that words are used consistently.

The *Interpretation Act*, R.S.B.C. 1979, c. 206, also assists in setting out the rules of statutory interpretation. Section 8 of that *Act* states:

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

The panel has determined that the relevant language to this appeal is the phrase “but to the extent only of the partial disability”, which is identical in Sections 23(4) and 30(2) of the *Act*. We believe the words are clear enough to permit a reasonable interpretation. However, if we look to the purposive approach, we believe it reinforces the literal interpretation.

The panel’s opinion is that the object of Section 23 of the *Workers Compensation Act* is to provide *permanent partial* disability pensions to all injured workers, except those who have been found to be 100% functionally impaired (these are dealt with in Section 22 of the *Act*). It is our opinion that this Section allows the Board to provide a range of pensions, from a 1% to a 99% functional impairment, as well as up to a 100% loss of earnings pension, and that Subsection (4) obligates the Board (by referring back to Section 29(2)) to pay workers with below statutory-minimum earnings their pensions based on 100% of their average earnings.

Our opinion is that the object of Section 29 is to provide *temporary total* benefits to workers, and in Subsection (2) it obligates the Board to pay workers with below-statutory

minimum earnings their temporary total benefits at 100% of their average earnings. Our similar opinion is that the object of Section 30 is to provide *temporary partial* benefits to workers, and in Subsection (2) it obligates the Board (by referring back to Section 29(2)) to pay workers with below-statutory minimum earnings at a rate commensurate with their partial disability, based on 100% of their average earnings.

To assist in interpreting the Legislature's intent in Section 23(4), it is instructive to first look at Section 30(2), which says the Board must use the same method as in Section 29(2) when calculating benefits to workers earning below the statutory minimum (i.e. at 100% of their earnings) *but to the extent only of the partial disability*. In the opinion of this panel, this language is clear - it varies the requirement in Section 29(2) to pay a below statutory-minimum worker at 100% of his or her earnings and it requires the Board to pay temporary partial benefits *only* at a rate commensurate with a worker's partial disability, whatever that may be, with the balance of the worker's income (i.e. up to 100%) coming from his or her partial ability to work.

The panel believes that, when interpreting Section 23(4), the Legislature's intention in varying the requirement in Section 29(2) was to provide that a worker earning below the statutory minimum would receive his or her permanent partial disability benefits at 100% of his or her earnings. It therefore requires the Board to pay those benefits at the level, or extent, of the worker's permanent partial disability, whether that permanent partial disability is paid on the basis of as little as a 1% functional impairment or as much as a 100% loss of earnings. The words do not, in our estimation, mean that a worker only gets 75% of his or her below-statutory minimum earnings if he or she is found to have a 100% loss of earnings.

The Board's interpretation would require that, if a below statutory-minimum worker with an 80% functional impairment was able to work at a 75% capacity, that worker would be entitled to a pension based on his or her functional impairment (i.e. the higher of 80% and 75%) based on 80% of his or her total average earnings. If that same below statutory-minimum worker was later found to be 100% unemployable (but still have an 80% functional impairment), the Board would then only pay the loss of earnings pension (being the higher of the functional versus loss of earnings percentages), based on 75% of 100% of his or her earnings because of the Board's interpretation of Section 23(4). A below statutory-minimum worker with a functional impairment of more than 75% could not receive a loss of earnings award higher than their functional award. Using the Board's interpretation, the dual system does not work above a 75% functional award. We find this interpretation unreasonable, if not illogical.

It is clear to this panel that the *Act* must be interpreted in a manner that is consistent, and in such a fair, large and liberal manner as best meets its objectives. It is instructive to point out that the *Act* is interpreted by the Board in a consistent fashion for virtually all benefits

provided to workers whose earnings fall below statutory minimum - all temporary wage-loss benefits, both total and partial, are paid on the basis of 100% of a worker's below-statutory minimum earnings (obviously only up to the extent of a worker's partial disability - but nevertheless based on 100% of earnings), as are rehabilitation allowances and permanent partial disability pensions paid on the basis of a percentage of disability. For permanent total disability awards under Section 22 of the *Act*, the worker receives even more - a statutory minimum which can be above 100% of average earnings. The only situation in which below statutory-minimum workers' average earnings are reduced is when the Board calculates 100% loss of earnings pensions.

The panel has reviewed the two sections of the Board's *Rehabilitation Services and Policy Manual* which interpret Section 23(4) of the *Act* - firstly at Policy #37.21:

The statutory minimum only applies in cases where a worker is found to be 100% disabled on a physical impairment basis. It does not apply when the percentage of disability on a physical impairment basis is less than 100% but the worker is found to be totally unemployable under the dual system of measuring disability.

and secondly at Policy #39.60:

The minimum compensation for permanent partial disabilities is calculated in the same manner as for temporary total disability but only to the extent of the partial disability. (8) Thus, for example, if a worker is injured on January 2, 1986, and suffers a residual disability assessed at 10% of total disability, the minimum compensation will be the lesser of 10% of \$197.25 or 10% of his average earnings prior to the injury. (The formula for converting this weekly figure to the monthly equivalent is contained in policy #68.00).

The minimum for permanent total disability does not apply simply because a worker is found to be totally unemployable under Section 23(3). (9)

It is not consistent, in the eyes of this panel, that Section 23(4) of the *Act* has been interpreted by the Board in a way which differentiates between those below statutory-minimum workers who have been determined to have a loss of earnings based on the dual system of pensions, and those who have a functional impairment pension, and in our opinion the *Act* provides no such power or obligation on the Board. Our reading of the

Act and applicable policy, and our review of relevant statutory interpretation texts, leads us to the conclusion that the Board has misinterpreted the intent of Section 23(4) of the *Act*.

It cannot, in the respectful opinion of the panel, have been the intention of the Legislature to pass virtually the same language in different sections of the *Workers Compensation Act* and intend them to be interpreted in a manner which creates an inherent discrimination, or at the very least a different method of calculation, for certain categories of permanently disabled workers. A much more reasonable interpretation is to consider that the purpose of Section 23 of the *Act* obligates the Board to award a worker a pension which appropriately recognizes a permanent disability, ranging from a minute award on a functional basis up to and including a 100% loss of earnings pension based on the dual system. The language "to the extent only of the partial disability" must be read in conjunction with the subsection of the *Act* to which it refers, and must be construed as including a 100% loss of earnings pension for a below statutory-minimum earnings worker based on 100% of his or her average earnings, and not on 75% of those earnings.

It is our finding that the Board's Policies #37.61 and #39.60 are unlawful and do not reflect the intent of Section 23(4) of the *Act*.

The worker's appeal is allowed. He is entitled to receive his 100% loss of earnings pension based on 100% of his below statutory-minimum earnings. Effective February 1, 1992, his pension should be \$937.92 per month.

