SUPREME COURT OF YUKON

Citation: *Workers' Safety and Compensation Board v Sundin,* 2026 YKSC 10

Date: 20260216
S.C. No. 25-AP009
Registry: Whitehorse

BETWEEN:

WORKERS' SAFETY AND COMPENSATION BOARD

APPLICANT

AND

KARL SUNDIN

RESPONDENT

Before Justice K. Wenckebach

Counsel for the Applicant	Sacha Paul
Counsel for the Respondent	Mark E. Wallace
Counsel for the Workers' Safety and Compensation Appeal Panel	Barbara Bergman
Counsel for Yukon government	No one appearing

REASONS FOR DECISION

OVERVIEW

[1] The Workers' Safety and Compensation Board (the "WSCB") has brought an application for judicial review. It seeks that *Decision #257- Board Direction to Rehear Decision #255*, Workers' Safety and Compensation Appeal Tribunal (January 17, 2025) ("*Decision 257*"), be set aside and remitted to a differently constituted panel of the Appeal Tribunal.

[2] The decision in question was about a worker, Karl Sundin ("Mr. Sundin"). Mr. Sundin was permanently injured on the job. He is now sometimes unable to work because of the injury. At those times, Mr. Sundin is compensated for his loss of earnings through the Workers' Safety and Compensation regime. Mr. Sundin's matter went before a panel of the Appeal Tribunal (the "Appeal Panel").

[3] The question before the Appeal Panel was how to determine Mr. Sundin's average weekly earnings, which would then be used to calculate the amount of his wage compensation (called "long-term benefits" by the WSCB). It concluded that the determination of Mr. Sundin's average weekly earnings should be based on the wages of a worker working in the same position as Mr. Sundin, with the same seniority and employer.

[4] The WSCB's position on judicial review is that the Appeal Panel's decision is unreasonable. Mr. Sundin opposed WSCB's application. The Appeal Tribunal took part in the judicial review but has limited standing. It agrees that, if the WSCB's application for judicial review is granted, I could remit the matter to a differently constituted panel of the Appeal Panel.

[5] For the reasons below, I grant the WSCB's application, set aside *Decision 257*, and remit the matter to a differently constituted panel of the Appeal Panel.

BACKGROUND

[6] Legislation and policy provide the principles for determining a worker's average weekly earnings, which is the key issue in this matter. To understand how the different decision-makers determined Mr. Sundin's average weekly earnings, therefore, it is first necessary to understand the applicable legislation and policies.

Legislation and Policies

[7] At the time Mr. Sundin was injured, the *Worker's Compensation Health and Safety Act*, SY 2008 c12 (the *"Former Act*") was in force. The *Former Act* was replaced by the *Workers' Safety and Compensation Act* SY 2021 (the "*Current Act"*) while Mr. Sundin's case was winding its way through WSCB's internal review process. The amount of compensation Mr. Sundin is entitled to, however, is determined according to the *Former Act* (s. 209, *Current Act*).

[8] Section 22 of the *Former Act* sets out how a worker is to be compensated for lost wages. It states at ss. 22(a) that a worker is entitled to "... 75 per cent of their average weekly loss of earnings up to the maximum wage rate". Under ss. 22(b), the board is given the authority and discretion to determine how to calculate a worker's average weekly loss of earnings.

[9] The *Former Act* and the *Current Act* also give the Board the authority to create policies that are binding on the board, the Appeal Tribunal, and others (s. 3, *Former Act*; s. 161, *Current Act*).

[10] In accordance with ss. 22(b) of the *Former Act*, the Board created a binding policy to determine how to calculate a worker's average weekly loss of earnings, titled Yukon Workers' Compensation Health and Safety Board, *Loss of Earnings Benefits-EL-01* (January 1, 2016) ("*Policy EL-01*"). *Policy EL-01* creates different categories of benefits, including short-term and long-term benefits. It also sets out different processes for determining a worker's average weekly earnings for short-term and long-term benefits.

[11] For short-term benefits, the policy directs the decision-maker to use the worker's earnings over two full pay periods or one month immediately before the injury to calculate their average weekly earnings.

[12] For long-term benefits, the decision-maker is directed to calculate average weekly earnings by considering "…the worker's earnings from all employment over the two calendar years immediately prior to the date the injury occurred, and selecting earnings over the calendar year in the worker's favour." (at 5)

[13] The policy also states that, in some situations, the decision-maker is not bound by this method for determining average weekly earnings. In a section called "Exceptional Circumstance", the policy states:

> When the circumstances of a case are such that this policy cannot be applied or doing so would bring an unfair or unintended result, the [decision-maker] will decide the case based on YWCHSB policy, EN-02, "Merits and Justice of the Case". Such a decision will be for that case only and will not be precedent setting.[1] (at 9)

[14] Turning to Yukon Workers' Compensation Health and Safety Board, *Merits and Justice of the Case* (January 1, 2014) ("*Policy EN-02*"), its purpose is to provide guidance on how decisions about compensation benefits are to be made. In the section called "Merits and Justice", the policy addresses general principles for decision-makers. It underlines the importance of applying the legislation and policies to similar situations, because this ensures that the participants in the process will be treated fairly; and the decision-making process will be consistent and reliable.

[1] *Policy EL-01* also discusses circumstances in which alternative methods may be used for determining a worker's average weekly earnings for long-term benefits in other sections, one of which will be discussed later in the decision.

[15] It further provides that decision-makers must apply the relevant provisions of the legislation and policies to their decisions.

[16] Finally, it states:

> If a decision-maker finds that the facts of the case are not covered by existing policy, the case must be decided on its particular facts, in accordance with the general provisions of the *Act*. (at 2)

Facts

[17] In July 2018, Mr. Sundin began working as a Natural Resources Officer for the Government of Yukon ("YG"), earning $78,819. He continues to work for YG to this day.

[18] Before that, Mr. Sundin had different jobs, with variable income, and earned much less. In 2014, he earned $27,886; in 2015, $16,806; in 2016, $8,260; and, in 2017, he earned $16,991.25.

[19] About two months into his new job, Mr. Sundin injured himself while taking part in a search and rescue operation.

[20] He received compensation from the WSCB for short-term benefits. His case worker at the WSCB applied *Policy EL-01* and determined his average weekly income based on his two pay periods immediately before his injury. His average weekly earnings were $1,515.76. He was entitled to 75% of that amount: $1,136.82 per week for his income loss.

[21] When Mr. Sundin's injury did not improve significantly, he became entitled to long-term benefits. At first, his case worker based his long-term benefits on his higher income of the two years immediately preceding his injury. This was $16,991.25, earned in 2017. His long-term benefit entitlement was therefore $325.86 weekly[2]. On review,

[2] Because of his low income, Mr. Sundin was permitted to retain more than 75% of his income.

his long-term benefits increased to $427.42. This decision was upheld on reconsideration.

[22] Mr. Sundin then appealed to the Appeal Tribunal, contesting the amount in long-term benefits he was entitled to receive.

APPEAL TRIBUNAL DECISIONS

[23] The Appeal Panel determined the "Exceptional Circumstances" section of *Policy EL-01* applied in the circumstances of Mr. Sundin's case. As directed by *Policy EL-01*, it then applied *Policy EN-01*. It concluded that Mr. Sundin's long-term benefit rate should not be determined on Mr. Sundin's income in the years before his injury, but on his income at the time of his injury. His income was $1,515.76 per week. He was therefore entitled to $1,136.82 per week for time missed at work because of his injury.

[24] The Board of Directors stayed the Appeal Panel's decision. It concluded that the Appeal Panel misapplied the *Former Act*, the *Current Act* and its policies. It also concluded the Appeal Panel's decision was insufficient. It remitted the matter to the Appeal Panel.

[25] The Appeal Panel reheard the appeal and reaffirmed its decision that Mr. Sundin had exceptional circumstances. The Appeal Panel determined that Mr. Sundin's average weekly earnings should be equivalent to the income of a worker in the same position as Mr. Sundin, and with the same seniority and employer. The result was the same: Mr. Sundin was entitled to $1,136.82 per week in long-term benefits.

[26] The WSCB thus applied for judicial review.

ISSUES

A. What is the standard of review?

B. Did the Appeal Panel err in making its decision?

ANALYSIS

A. What is the standard of review?

[27] The parties agree that the standard of review is reasonableness.

[28] The presumption is that the reasonableness standard will be applied to a judicial review. There are five exceptions that rebut the presumption of reasonableness. (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para. 25 and 69 ("*Vavilov")).* None of the exceptions apply here. I therefore agree with the parties that the standard of review is reasonableness.

[29] The determination of whether a decision is reasonable is made by examining the decision-maker's reasoning process. A reasonable decision is one which is "transparent, intelligible and justified." (at para. 15). It is "…based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker." (at para. 85).

B. Did the Appeal Panel err in making its decision?

[30] I conclude the Appeal Panel's decision is unreasonable.

<u>Arguments</u>

[31] The WSCB submits that the Appeal Panel's interpretation of "exceptional circumstances" in *Policy EL-01* contains logical inconsistencies. The WSCB furthermore submits that the Appeal Panel failed to explain why Mr. Sundin had exceptional circumstances. The Appeal Panel's decision is, therefore, unreasonable.

[32] Mr. Sundin submits that the decision is reasonable. He argues that the Appeal Panel provided reasons for its decision, citing paras. 24-25 in support of his submission. Paragraphs 24-25 state:

> [24] The worker currently earns approximately $303.15 per day, yet if the worker misses a day work [as written] based on his compensable injury the worker receives $61.06 for the entire day from the WSCB.
>
> [25] The Panel felt that Policy EL-01 made clear that while there is an established normal method for calculations of "average weekly earnings" there are circumstances that to administer the policy rigidly would bring an unfair result.

[33] Mr. Sundin's argument is that those paragraphs set out the crux of the Appeal Panel's decision. Its decision is justified, transparent, and intelligible. It is, therefore, reasonable.

Analysis

[34] I conclude the Appeal Panel's interpretation of "exceptional circumstances" in *Policy EL-01* is flawed. Moreover, it did not explain why the facts in the case led it to conclude that Mr. Sundin had exceptional circumstances.

Interpretation of Exceptional Circumstances in Policy EL-01

[35] The Appeal Panel committed several errors in its analysis of the term "exceptional circumstances".

[36] First, it failed to consider the entirety of the policy's discussions about exceptional circumstances. It cites and relies on the "Exceptional Circumstances" section to support its conclusion. It does not, however, mention another section of the policy that also discusses exceptional circumstances. That discussion is found in the section called "Long-Term Benefits". It states:

> In some exceptional circumstances affecting young workers, students, learners, apprentices or workers with two years or less of documented work history, the calculation of a worker's long-term benefit rate may not provide a reasonable representation of his/her loss of earnings. In these cases, the YWCHSB may base its benefit calculation on comparable earnings of other workers in the same or a similar occupation in Yukon… (*Policy EL-01* at 6).

[37] At the time of the injury, Mr. Sundin was not a young worker, student, learner, apprentice or worker with two years or less of documented work history; the exceptional circumstances discussed in this portion of the policy clearly do not apply to him. That does not mean it can be disregarded, however. It is only by considering the policy's descriptions of exceptional circumstances in the two different sections that the Appeal Panel would be able to understand if they interrelate or how they should be interpreted. Because the Appeal Panel failed to fully consider the meaning of "exceptional circumstances", its analysis of the term is lacking.

[38] Disregarding the policy's statements about exceptional circumstances in the long-term benefits section also led the Appeal Panel to commit further errors. In its decision, the Appeal Panel states: "… The policy puts no guidelines surrounding when or how "exceptional circumstances" are to be used..." (*Decision 257* at para. 20).

[39] This statement is incorrect. The policy does provide guidelines about the determination of exceptional circumstances in the long-term benefits section. It sets out categories of workers that may qualify as having exceptional circumstances and provides an alternative mechanism for determining those workers' average weekly earnings.

[40] The statement is also incorrect as it applies to the "Exceptional Circumstances" section. In that section, the policy is less specific about how exceptional circumstances

are to be identified; nevertheless, it provides some guidance. According to the "Exceptional Circumstances" section, exceptional circumstances arise either where the policy cannot be applied or where applying the policy would lead to an unfair or unintended result.

[41] The Appeal Panel did not perform a full analysis of the term "exceptional circumstances" and did not have a good understanding of the concept. Its chain of analysis was missing links; and its reasons cannot be justified in relation to the law.

Conclusion that Mr. Sundin has Exceptional Circumstances

[42] The Appeal Panel provided a list of eight facts that, it stated, justified its conclusion that Mr. Sundin has exceptional circumstances. These facts include that Mr. Sundin was a probationary employee when he was injured; he continued working after his injury, only seeking medical treatment a month later; and that he continued working for his employer, only occasionally missing work in the first 90 days after his injury. The task for the Appeal Panel was to explain why those facts led it to conclude that Mr. Sundin had exceptional circumstances.

[43] Mr. Sundin's counsel states that the Appeal Panel did provide an explanation for its conclusions. He submits that, for the Appeal Panel, the real issue was that, if Mr. Sundin's long-term benefits were calculated as the policy normally provides, the amount he would receive would not be close to his actual wage. At the time of his injury, Mr. Sundin earned $303.15 per day; however, the amount he would receive for his long-term benefits would be $61.06 per day. The Appeal Panel concluded that calculating Mr. Sundin's wage loss in the normal fashion would bring about an unfair result. It therefore used another method for calculating his wage loss that was fair.

[44] Mr. Sundin's counsel may be correct, as the reasons suggest concern with the difference between Mr. Sundin's wages immediately pre-injury and the amount he receives in long-term benefits. The Appeal Panel cited a number of other facts as well, however, when concluding that Mr. Sundin had exceptional circumstances. They included those facts for a reason. I cannot simply ignore them.

[45] Additionally, using previous years' income to determine a wage rate allows for the possibility, and likely the probability, that a worker will receive long-term benefits based on a lower wage rate than they earned at the time of their injury. It was necessary for the Appeal Panel to explain why Mr. Sundin's situation was different than others who would be assessed at a lower wage rate for their benefits than they receive for their actual earnings. This explanation is missing from the decision.

[46] The decision is, therefore, unreasonable.

CONCLUSION

[47] *Decision 257* of the Appeal Panel is quashed and remitted back to a differently constituted panel of the Appeal Panel.

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WENCKEBACH J.