IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *The Workers' Compensation Appeal Tribunal* v. *The Workers' Compensation Health and Safety Board,* 2005 YKSC 5

Date: 20050127
Docket: S.C. No. 04-A0077
Registry: Whitehorse

Between

THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Petitioner

And

THE WORKERS' COMPENSATION HEALTH AND SAFETY BOARD

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Debra L. Fendrick	For the Petitioner
Bruce L. Willis	For the Respondent, Workers' Compensation Health and Safety Board
Richard A. Buchan	For the Workers' Advocate

REASONS FOR JUDGMENT

INTRODUCTION

[1] This application is about the policy-making power of the Workers' Compensation Health and Safety Board (the board). The Workers' Compensation Appeal Tribunal (the appeal tribunal) applies under section 26(1) of the *Workers' Compensation Act*, R.S.Y. 2002, c. 231 (the *Act*) for a determination of whether policy CL-53 of the board is consistent with the *Act*. Policy CL-53, entitled Lump Sum Payments and Advances (Prior Years), purports to replace a previous policy CL-16 entitled Commutations of Pensions.

The *Act* under which Policy CL-16 was passed has been repealed but the worker's entitlement to compensation under predecessor legislation has been preserved.

ISSUES

[2] The following issues have been raised:

1. What is the standard of review when determining whether a policy is consistent with the *Act*?
2. Is board policy binding on the appeal tribunal?
3. Does the board have the authority to adopt policies for predecessor legislation?
4. Does policy CL-53 exceed its statutory authority?
5. Did the board fetter its discretion in policy CL-53?
6. Did the board comply with section 108(j) of the *Act* requiring publication of the draft policy and a process for submissions of the public before adopting policy CL-53?

BACKGROUND

[3] The background and the facts giving rise to this application are not in dispute.

[4] The Yukon has had a no fault workers' compensation system since 1917 for the benefit of both workers and employers. The compensation fund is managed by a board composed of a chair and an equal number of members representative of employers and workers.

[5] A claim for compensation is first dealt with and determined by an adjudicator employed by the board. The worker is assisted by a workers' advocate who is independent of the board.

[6] Appeals from the decision of an adjudicator are heard by a hearing officer also appointed by the board.

[7] In the *Workers' Compensation Act,* R.S.Y. 1992, c.16, the worker could appeal from the internal review to an appeal panel consisting of the chair of the board, one member representative of employers and one member representative of workers. This procedure was changed in this *Act.*

[8] A decision of a hearing officer may now be appealed to an independent appeal tribunal. The appeal tribunal consists of a chair, two members representing employers and two members representing workers. The chair appoints an appeal committee composed of the chair, one representative of employers and one representative of workers, to hear each appeal. No member of the appeal tribunal can be a member of the board, except for the chair who sits as a non-voting member of the board.

[9] The *Workers' Compensation Act*, until January 1, 1993, contained a provision allowing for lump sum payments to a worker at the discretion of the board. Where a partial disability has not impaired the work capacity of the worker by more than ten percent, the board has the discretion to pay the worker a lump sum. Where the disability has impaired the work capacity of the worker by more than ten percent, the worker must make a written request and the board again has the discretion to make a lump sum payment. The section is as follows in the 1986 *Act:*

> **Lump sum payment**
>
> 32.(1) Where compensation is payable in respect of partial disability of a worker and the disability has not impaired by more than ten percent the work capacity enjoyed by the worker immediately before the accident, the board may pay to the worker a lump sum in lieu of periodic payments of compensation.
>
> (2) Where compensation is payable in respect of partial or total disability of a worker and the disability has impaired by more then ten percent the work capacity enjoyed

> by the worker immediately before the accident, periodic payments of compensation may be commuted to a lump sum payment at the written request of the worker.
>
> (3) Where a lump sum payment has been made to a worker pursuant to this section as a settlement in full of all compensation payable to him in respect of the disability and has been so accepted by him in writing, the worker is not thereafter entitled to be paid any further or other compensation in respect of the disability, other than the benefits provided by subsection 29(1).

[10] The board prepared written policies to guide their exercise of discretion to pay out lump sums. Policy No. 21 was effective December 3, 1981, Policy No. CL-16 was passed on January 1, 1993 and Policy No. CL-53 entitled Lump Sum Payments and Advances (Prior Years) became effective February 17, 2004.

[11] The following section of the *Act* sets out the power of the board to make policy and the procedure to be followed:

> **108** The members of the board shall
>
> (a) establish the policies of the board:
>
> …
>
> (j) before the adoption of any draft policy affecting claims for compensation, cause notice of the draft policy to be published at least once a week for two consecutive weeks, in a newspaper circulated in the Yukon, and the notice shall state
>
> (i) the purpose of the draft policy and a general description of its effect on claims for compensation,
>
> (ii) that a copy of the draft policy is on file in the public register and may be inspected by members of the public during business hours,
>
> (iii) the time during which the members of the board will accept submissions on the draft policy, which shall

> not be less than 30 days after the last publication of the notice, and
>
> (iv) the procedure to be followed by members of the public who wish to submit representations concerning the draft policy,
>
> …

[12] The *Act* states that the appeal committee is bound by the policies of the board. However, the appeal tribunal and the board have the right to apply for a determination of whether a policy established by the board is consistent with the *Act*. The following sections of the *Act* apply:

> **24**(3) … the appeal committee is bound by the Act, the regulations, and all policies of the board.
>
> ...
>
> **26**(1) Either the appeal tribunal or the board may apply to the Supreme Court for a determination of whether a policy established by the board is consistent with this Act.
>
> (2) In an application under subsection (1), both the appeal tribunal and the board shall have standing, regardless of which party makes the application.
>
> …
>
> **32** Subject to paragraph 23(b), the decisions, orders, and rulings of an adjudicator, hearing officer, or the appeal tribunal shall always be based on the merits and justice of the case and in accordance with the Act, the regulations, and the policies of the board.

[13] The appeal tribunal has petitioned the Court to determine whether Policy CL-53 is consistent with the *Act*. The appeal tribunal has an appeal before it by a worker applying for a lump sum payment.

[14] The worker was injured in a workplace accident in 1992 and has been receiving compensation since then. On February 24, 2003, he applied to receive a lump sum payment under section 32(2) of the 1986 *Act* instead of continuing to receive periodic payments of compensation.

[15] On April 22, 2003, the board issued the following motion:

> That the Board of Director's (sic) approve the development of a Policy dealing with lump sum payments under the 1986 Workers' Compensation Act, as amended: and that until such time as the Policy is developed, no further payments will be processed or made.

[16] The motion was amended on June 3, 2003, to include predecessor legislation passed before 1986.

[17] On May 8, 2003, an adjudicator determined that the application of the worker could not be processed until the board had developed the new policy.

[18] The worker appealed the adjudicator's decision on September 9, 2003, to a hearing officer. The hearing officer confirmed the decision of the adjudicator on January 26, 2004.

[19] The worker appealed to the appeal tribunal on February 2, 2004, and the board issued Policy CL-53 on February 17, 2004. The appeal tribunal decided to seek this Court's determination of whether Policy CL-53 is consistent with the *Act* before adjudicating the worker's appeal.

[20] Because of the worker's involvement in this matter, counsel for the board and the appeal tribunal have agreed that counsel for the Workers' Advocate has standing in this application. The participation of the Workers' Advocate has been useful to ensure that all the facts and arguments are before the court.

[21] The right of the worker to apply for a lump sum payment under the 1986 *Act* is preserved both by section 23(1)(c) of the *Interpretation Act*, R.S.Y. 2002, c. 125, and the transitional provision of the *Act*.

[22] Section 104 states:

> **Transitional**
>
> **104**(1) If a worker is entitled to compensation as a result of a disability caused in
>
> (a)1982 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before January 1, 1983;
>
> (b)subject to paragraphs (b.1) to (b.3), 1992 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before January 1, 1993;
>
> (b.1) after January 1, 2002, if a worker is in receipt of compensation, the worker's wage rate shall be the maximum wage rate determined pursuant to section 101 of this Act;
>
> (b.2) section 34 of this Act shall apply to the indexing of the worker's wage rate determined after January 1, 2002; and
>
> (b.3) for the purpose of section 34 of this Act, the worker's anniversary date shall be considered to be January 1, 2002.
>
> …

[23] Thus a worker's entitlement to compensation prior to January 1, 1993, was preserved and the maximum rate of compensation was increased from 75% of $40,000 to 85% of $65,100 tax free. The amendments provide a significant benefit to workers injured before 1993. However, all counsel agree that the amendments preserved the workers' entitlement to apply in writing for a lump sum payment. It should be noted that

the Revised Statutes of the Yukon, 2002, c. 231 have incorrectly stated section 104(b) of the *Act.*

[24] There are apparently 28 workers still eligible to apply for the lump sum payment. Four have applied. One of the workers has obtained a lump sum payment.

[25] Counsel have agreed that this application is proceeding on the substantive legal issues that have been raised about the board policy-making power. For the purpose of this application, it will be assumed that the board was acting in good faith in bringing forward the new policy for the benefit of the financial position of the compensation fund and the protection of workers.

Issue 1: What is the standard of review when determining whether a policy is consistent with the *Act*?

[26] The four factors to be considered in determining the appropriate standard of review when reviewing the decision of a tribunal are set out in *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982:

1. the presence or absence of a privative clause;

2. the expertise of the tribunal;

3. the purpose of the governing legislation as a whole and the provisions creating the tribunal and its role; and

4. the nature of the problem, whether it's a question of fact, mixed fact and law, or law.

Privative Clause

[27] There is a privative clause protecting acts or decisions of the board in section 112 of the *Act*. The specific subsections applicable are:

> **Jurisdiction of the board**
>
> …
>
> 112(3) The acts or decisions of the board on any matter within its exclusive jurisdiction are final and conclusive and not open to question or review in any court.
>
> (4) No proceedings by or before the board shall be restrained by injunction, declaration, prohibition, or other process or proceedings in any court or be removed by *certiorari*, judicial review, or otherwise into any court, in respect of any act or decision of the board within its jurisdiction nor shall any action be maintained or brought against the board, board members, employees, or agents of the board in respect of any act or decision done or made in the honest belief that it was done within its jurisdiction.

[28] The privative clause for the board does not specifically protect policy decisions of the board. The fact that section 26(1) of the *Act* permits either the appeal tribunal or the board to apply to the Supreme Court for determination of whether a policy is consistent with the *Act* suggests that correctness is the standard rather than granting deference based upon a privative clause.

Expertise of the board

[29] There is no doubt the board has expertise in creating policy. However, the question of whether a policy is in conformity with the *Act* is a legal question that has been specifically retained for the Supreme Court, again suggesting a standard of correctness.

Purpose of the *Act* and the Provision at Issue.

[30] The *Act* sets out a number of objectives in section 1. Some objectives have policy or societal interests, such as maintaining a solvent compensation fund (c). Other objectives apply specifically to employers (d) or workers (h). This would indicate some deference for the board as it seeks to strike a balance between competing objectives.

Nature of the Problem

[31] The problem presented is whether the policy of the board is consistent with the *Act*. This is a legal question indicating little deference should be granted to the board.

[32] In summary, taking the four factors into consideration, the standard of review should be correctness.

Issue 2: Is board policy binding on the appeal tribunal?

[33] The question of the legal effect and status of board policy has become a more pressing issue as the legislative framework to support the board's policy-making power has changed.

[34] As stated in *Skyline Roofing Ltd.* v. *Alberta (Workers' Compensation Board)*, 2001 ABQB 624, "informal policies" without statutory authority have been utilized by boards and administrative tribunals for years (paragraph 46). However, these informal policies do not have the force of law and are not legally binding when applied.

[35] Moving higher on the legislative scale are policies that are authorized by statutes. In *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, the Minister issued a guideline with the approval of the Governor in Council under section 6 of the *Department of the Environment Act.*

[36] The Supreme Court of Canada stated that a directive issued to administer a statute was administrative and would have no judicial sanction as it did not have the full force of law (paragraph 36). It went on to say that when the directive was not merely authorized by statute but was formally promulgated by "order", it became mandatory in nature (paragraphs 37 and 40).

[37] In my view, the *Act* achieves a mandatory status for board policy by a different route. The *Act* provides both the policy-making power and procedure to be followed to create a policy:

1. the members of the board shall establish the policies of the board (section 108(a));

2. the draft policy, before its adoption, must be published in a newspaper and provide a procedure for the public to make representations (section 108(j));

3. the appeal committee is bound by all policies of the board (section 24(3));

4. if the board decides that an appeal committee has not applied board policy, the board may direct the appeal committee to rehear the appeal (section 24(8));

5. either the appeal tribunal or the board may apply to the Supreme Court for a determination of whether a board policy is consistent with the *Act* (section 26(1)).

[38] It is clear that the legislators intended that a board policy should be mandatory and binding upon the appeal committee. Although the policy of the board is not promulgated by a regulation or an order in council, it has a procedure for publication and public submissions on the draft policy. The *Act* also ensures that the board does not exceed its jurisdiction by permitting the appeal tribunal or the board to refer the policy to this Court to determine whether it is consistent with the *Act.* The result is that a board policy, in reality, relies upon court approval for its ultimate authority to bind an appeal committee. This provides further legitimacy for board policy and ensures that the policy-making power is not abused. The *Act* has created a statutory status for policy making that provides a flexible procedure that is less cumbersome than passing a regulation which requires publication in the *Yukon Gazette*. The board has further flexibility to change a policy without the necessity of gazetting it. This is consistent with the intent of

the *Act* that the board should be independent of government. It preserves both the power of the board and the independence of the appeal tribunal.

[39] As a result of the procedure set out in the *Act* to create policy and its binding effect, board policy is more akin to a regulation than the “informal policies” which were not legally binding.

[40] In conclusion, a board policy that is consistent with the *Act* is binding upon the appeal committee in the same way as the *Act*. As I stated in *Workers’ Compensation Act and O’Donnell*, 2004 YKSC 51, the appeal committee is not required to follow board policy slavishly. Even when it has been determined that the board policy is consistent with the *Act*, the appeal committee must still satisfy itself that the policy has been properly applied to the facts before it.

Issue 3: Does the board have the authority to adopt policies for predecessor legislation?

[41] Counsel for the appeal tribunal submits that the board does not have the statutory authority to make policy for the repealed legislation. Counsel acknowledges that the board can now make policy, but only for the subject matter of the present *Act*, not predecessor legislation like section 32 from a previous workers’ compensation statute.

[42] This submission is buttressed by the rebuttable presumption that the legislature does not intend to delegate a power to legislate retrospectively (Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at pages 511 – 513).

[43] It is further submitted that since this policy has legal effect, it must be expressly stated in the *Act* that the policy-making power extends to predecessor legislation.

[44] Counsel for the appeal tribunal also submits that the right of the worker to apply for a lump sum payment under the predecessor legislation has vested. As the worker has applied for the lump sum payment in writing, it is submitted this vested right cannot be the subject of a new policy.

[45] It is my view that section 104(1)(b) of the *Act* clearly preserves the worker's entitlement to apply for a lump sum payment. Section 104(1)(b) has the effect of incorporating the right to apply for lump sum payment into the present *Act*. The result is that the board policy-making power applies to applications for lump sum payments. There is no limitation on the policy-making power and therefore it should apply to all sections of the *Act.*

[46] I do not accept the submission that once a worker has made an application in writing, the worker then has a vested right to a lump sum payment. In *Apotex Inc.* v. *Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), the Federal Court of Appeal distinguished between a vested right and a mere hope or expectation (paragraph 56 – 63). The case involved an application to proceed with a generic version of a drug and *mandamus* was issued directing the Minister to proceed with a notice of compliance. In that case, the discretion of the Minister was narrowly circumscribed. When the application was filed, it complied with all the requirements within the Minister's narrow discretion and it gave the applicant a vested right which could not be delayed pending new legislative policy.

[47] Applying the *Apotex* decision to the case at bar, it is clear that the right to make a written request for a lump sump payment is a vested right of the worker. However, it is not a vested right to obtain a lump sum payment but is rather a hope or expectation. The

Act provides a very specific process for the board to follow before a draft policy can become a board policy. It does not make provision for the board to suspend the exercise of its discretion to grant lump sum payments.

[48] It is my view that once the worker has made a written request for a lump sum payment the board must exercise its discretion under the policy existing at the time of the request. To rule otherwise permits the board to delay a decision indefinitely without having the express power to do so and to change the rules of the game that apply to the worker applying for a lump sum payment.

Issue 4: Does policy CL-53 exceed its statutory authority?

[49] This issue raises the difficult question of when a policy becomes so intractable that its overall effect will be to defeat applications for lump sum payments. The *Act* and policy must be interpreted to ensure that a worker may apply in writing for a lump sum payment and be subject to a legitimate exercise of discretion by the board pursuant to board policy.

[50] Counsel for the Workers' Advocate submits that the policy in question is unfair as it creates unnecessary hurdles for workers applying for commutation of their monthly payments to a lump sum.

[51] One controversial aspect of the policy is the requirement of the worker to provide a legal opinion as well as the opinion of an investment adviser that it is in the worker's best interests to receive such a lump sum, all at the expense of the worker. No evidence was presented to suggest that it was impossible or impractical to obtain these opinions. There was no evidence that the cost would be prohibitive.

[52] I find that each of the conditions in the policy can be supported by reference to the objectives set out in the *Act.* The conditions, while more onerous than the previous policy, are generally designed to ensure that the worker has the ability to manage a lump sum as the worker cannot go back to the board if the lump sum is mismanaged or lost. The latter outcome would surely be a disaster for both the worker and the board.

[53] I do not wish to speculate precisely on when a policy exceeds its statutory authority except to say there must be some objective criteria. For example, when the condition or requirement is so onerous that it becomes impossible to comply with. This could occur if it the policy required a legal opinion from a lawyer that was beyond the expertise that any lawyer could provide. In my view, furthermore, a policy will be inconsistent with the *Act* if it trenches on a specific statutory provision. It would also be sufficient to challenge a policy when it takes the objectives of the *Act* to an extreme or goes beyond “the margin of manoeuvre contemplated by the legislature”. See *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 53 and 54.

[54] At the end of the day, it must be remembered that the worker has a statutory right to apply for a lump sum payment, not a right to a lump sum payment. The board has an unfettered discretion to create binding policy so long as it does not become a prohibition against granting a lump sum payment or trench upon any other statutory right of the worker.

Issue 5: Did the board fetter its discretion in policy CL-53?

[55] The classic definition of the fettering of discretion can be found in *H.E.U. Local 180* v. *Peace Arch District Hospital* (1989), 35 B.C.L.R. (2d) 64 (B.C.C.A.) where the

Court quoted S.A. de Smith, *Judicial Review of Administrative Action*, 4th ed. at page 311 as follows:

> A tribunal entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. Thus, a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied indiscriminately to all cases before it; but its statutory discretion may be wide enough to justify the adoption of a rule not to award any costs save in exceptional circumstances, as distinct from a rule never to award any costs at all.

[56] It is my view that the concept of fettering one's discretion is a common law principle that could apply to the board or an appeal committee. Under this *Act* however, the concept of fettering has a much reduced scope or application. The board is empowered to make policy and the policy is binding upon the appeal committee. In circumstances where there was no statutory authority to make binding policy, it would be appropriate to argue that an administrative policy could result in fettering the discretion of a board or tribunal. The concept of fettering, in my view, cannot apply to the policy itself which is mandated by legislation so long as it is within the objectives of the *Act* or "the margin of manoeuvre contemplated by the legislature". See *Re Lewis and Superintendent of Motor Vehicles for British Columbia* at page 528.

[57] I do not rule out the application of fettering to a board or appeal committee decision but simply state that the board policy itself cannot be a fetter by virtue of its statutory mandate.

Issue 6: Did the board comply with section 108(j) of the *Act* requiring publication of the draft policy and a process for submissions of the public before adopting policy CL-53?

[58] The evidence before me is that the board did not comply with section 108(j) of the *Act*. It did not publish notice of the draft policy, where it may be inspected nor notify the public of a process for submissions on the draft policy.

[59] Counsel for the board submitted that the policy did not have to follow the requirements of section 108(j) because the pre-1993 legislation did not have a publication requirement for the draft policy. I am not persuaded by this submission as it is the current *Act* which is the subject of this application. The board cannot rely upon it for the policy-making power and binding authority and reject the mandatory publication requirements for the draft policy.

[60] This is a clear failure to comply with a mandatory requirement of the *Act.* The result is that policy CL-53 is not a valid policy and therefore is not binding upon the appeal committee.

CONCLUSION

[61] To summarize, I have found that board policy CL-53 is invalid because the board did not comply with the mandatory requirements under section 108(j) of the *Act.* Policy CL-53 is invalid and not binding on the appeal committee. No submissions were made as to whether Policy CL-16 dated January 1, 1993, is valid. If that is an issue, counsel may request a post-trial conference.

[62] The parties may speak to costs.

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VEALE J.