

Workers' Compensation Appeal Tribunal

Decision # 5

Claim No.: 95-1413

Date of Hearing: September 8, 2000

Date of Decision: November 2, 2000

Appeal Committee Members

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Jan Stick
Member representative of workers:	Joseph P. Radwanski

In attendance: The Worker
The Worker's representative – Michael Travill
Observer from the Workers' Advocate's office – Julie Docherty
Reporter/Recorder – Doug Ayers

Location: Boardroom 1B Main, 419 Range Road
Whitehorse, Yukon Territory

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Introduction

The worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Internal Review Committee ("IRC") dated June 14, 1999. A worker's Notice of Appeal to the tribunal is dated May 15, 2000.

In its decision, the IRC upheld the decision of a board adjudicator who determined the worker's average weekly earnings "based on his 1995 annual income." The IRC concluded that the "method used to determine the worker's average weekly earnings and thus his rate of compensation is correct and in keeping with the policy."

The worker asks that the Tribunal find that the worker's average weekly earnings must be determined in accordance with the *Act* and with the board policy that was in effect at the time of the worker's accident on October 3, 1995. The worker seeks compensation at the rate at "which he was originally compensated, which is the rate based on the worker's hourly rate at the time of the accident times the weekly hours of work, times 52 weeks."

The worker and his representative reject the IRC's conclusions that the "method used to determine the worker's average weekly earnings and thus his rate of compensation is correct and in keeping with policy." They also disagree that the worker's average weekly earnings should be based on the worker's 1995 annual income.

On April 1, 2000, the Workers' Compensation appeal tribunal came into existence under amendments to the *Act* known as Bill 83. On May 15, 2000 the worker appealed the IRC decision to the new tribunal and the appeal was heard by an appeal committee of the tribunal as established by the tribunal Chair under section 18.3(1) of the *Workers' Compensation Act*, 1992 as amended by SY 1999, c.23, s.11.

The hearing was scheduled and heard on September 8, 2000 in Boardroom 1B Main, 419 Range Road, Whitehorse, Yukon.

At the outset of the hearing, the appeal committee determined that it had jurisdiction under section 18.2(a) and 90.(1) (c) of the *Act* to hear the appeal.

The worker participated in the hearing by conference call, and gave evidence by affirmation. The worker was represented by Workers' Advocate, Mike Travill. No one appeared on behalf of the employer. The proceedings were recorded by court reporter Doug Ayers.

The appeal committee considered all of the worker's record as provided by the board as well as board policies CL-35, "Average Weekly Earnings" (1999), amendment to Policy Statement CL-35 (August 2000), and CL-35, Average Weekly Earnings (1993). In addition, the board provided a document titled, CL-35 Average Weekly Earnings Policy Statement Application with a date in the lower left hand corner of each page of 97/02/07.

Lastly, prior to the hearing the Workers' Advocate was given a File Summary and tabbed Documents relating to the appeal prepared by tribunal staff for easy reference to documents from the worker's record during the hearing.

At the outset of the hearing, the Chair stated that new evidence submitted at the hearing would be provided to the board, unless the worker or his representative raised an objection to doing so. Neither objected.

Evidence from the Worker's Record

In order to properly address and understand the issues in this case we think it is necessary to set out a fairly extensive account of the history of this claim as revealed in the worker's record. As part of this account, we will comment on that history. In order to protect the parties' privacy, in any quote or reference to the worker or employer by name, we have substituted the word "worker," or "he," or "employer," etc.

- (1) The Internal Review Committee ("IRC") concluded that the "method used to determine the worker's average weekly earnings and thus his rate of compensation is correct and in keeping with the policy.

- (2) The Worker's Report of Injury/Illness dated October 9, 1995, states that the worker was lowering a support leg (on a power plant) which was still hooked to a _ ton truck and trailer by a safety chain. The driver moved the vehicle ahead without disconnecting the safety chain, causing the support leg of the power plant to hit the worker in the knee when the vehicle moved forward. The accident occurred on October 3, 1995.

This report states the worker earned \$16.50 per hour for a 60-hour work week and that he was employed as a labourer on a seasonal/casual basis.

- (3) The Employer's Report of Injury/Illness is dated October 31, 1995 and signed by the Bookkeeper. It states that the worker injured the inside of his left knee when the "safety chain from trailer was not disconnected and the driver moved the truck ahead while lowering trailer."

The report also states that the worker began work on July 15, 1995 and was paid \$16.50 per hour for a 60-hour work week as a seasonal/casual employee. The employer reports gross earnings for the past 12 months of \$15,700.00.

- (4) The Doctor's First Report is by Dr. Himmelsbach dated October 3, 1995. The diagnosis is contusion of the right knee with a treatment plan of ice, etc. and "no lay-off" as "Estimated period of disability as applicable."
- (5) There is also an October 8, 1995 Doctor's Report by Dr. Skinner. Under "Treatment Plan" he states, "off work, next 3 – 4 days from date of injury". Under the heading, "Is injury sufficient to disable worker from regular work activities?" Dr. Skinner checks "totally" and "less than 7 days" is checked under "Estimated period of disability as applicable."
- (6) In Dr. Quong's Emergency Note, dated October 20, 1995, he states, "Today, the worker felt his knee pop out and was unable to straighten it or weight bear without pain." An attempt to extend the knee was not successful and he was referred to Dr. F. Timmermans for further management in the Outpatient Department. Dr. Quong states, "I have put him off work until further notice and Dr. Timmermans' suggestion to return."
- (7) A letter from the adjudicator to the worker, dated November 1, 1995 states: "Your claim for injury to your knee has been accepted by Yukon Workers' Compensation Health and Safety Board. The Board will assume responsibility for medical treatment costs, including prescription, related to your injury. If you were unable to work to your injury, compensation benefits will be based on 75% of the maximum wage rate of \$51,900.00 (effective January 1, 1995) or 75% of your gross annual salary, whichever is the less. These benefits will be paid on a 7 day work week. Payment will be in accordance with time loss as authorized by your treating physician."
- (8) A note to file from the adjudicator dated November 11, 1995 states: "Received medical reporting indicating RTW (return to work) December 5. Pay CTTD (temporary total disability) to December 5, 1995."
- (9) A letter from the adjudicator to the worker, dated December 8, 1995 states, "Further to our telephone conversation of this date, this is to confirm that medical reporting from Dr. Quong indicating a fitness to work date of December 8, 1995. Accordingly, and pursuant to our previous discussions your claim has concluded as of December 5, 1995."
- (10) A note to file from the adjudicator dated December 13, 1996 [incorrect date: should be 1995] states, "Telephoned worker who indicated he wants more benefits. We discussed return to work date of December 5 and confirmed that worker was aware

of this date, that we had discussed previously benefits would conclude on that date.”

(11) Note to file from the adjudicator dated December 21, 1995 reports, “Worker indicates Dr. Chow is recommending a return to work date for January 1, 1996. Told worker I would confirm and extend benefits accordingly. . . . I emphasized to worker that Dr. Chow has definitely stated that the worker is fit to return to work on January 1, 1996, and accordingly, benefits will be issued to December 31, 1995.”

(12) A letter from the benefit entitlement clerk dated February 6, 1996 sets out the benefits paid to the worker as follows: “Total Temporary Disability: October 5, 1995 through December 31, 1996 [incorrect date, should be 1995] inclusive – 88 days at \$106.07 per day – Total: \$9,334.16.”

(13) A letter from the adjudicator dated July 10, 1996 states:

On January 30, 1996, we discussed the suggestion and it was indicated to you that the MRI results would be reviewed by the board.

We also discussed that the board would not assume responsibility for the arrangements for the MRI.

The medical opinion resulting from your examination on July 2, 1996 indicates that it is difficult to relate the ongoing problems to the incident that occurred at work on October 3, 1995.

Pursuant to the medical opinion dated July 2, 1996, the board, unfortunately cannot assume any ongoing responsibility for the arrangements of an MRI examination. However, as previously mentioned the board medical consultant will review the results of the MRI.

(14) The worker appeals the adjudicator’s decision to the IRC in a letter dated February 19, 1997 and a hearing is held on April 2, 1997. On the issue of temporary total benefits for the period January 1, 1996 to July 1, 1996, the IRC denies payment of benefits for that period. On the issue of reimbursement for physiotherapy services for the month of January 1996, the IRC authorizes payment.

In its decision dated June 4, 1997, the IRC finds that there was not a total temporary disability beyond December 31, 1995 and does not authorize further benefits.

On the issue of reimbursement for physiotherapy services for the month of January 1996, the IRC finds the worker would be reimbursed.

- (15) The worker appealed the IRC's decision to deny total temporary benefits beyond December 31, 1995 to a Board Appeal Panel. In a decision dated December 15, 1997, the Appeal Panel concludes:

It is the decision of the Appeal Panel that the worker has been, and continues to be, entitled to all benefits from the date of the accident until such time as a final determination is made by the adjudicator. The determination shall be made after an independent medical examination and an MRI are completed.

In addition to ongoing entitlement, the worker is to be paid all wage loss entitlement he may not have received up to the date of the decision. In the event a dispute arises, the Appeal Panel reserves jurisdiction to deliberate the amount of financial compensation. The results of the independent medical examination and MRI will be new evidence and will result in a new decision by the adjudicator.

- (16) A wage information report dated December 22, 1997 states:

At time of Accident:

Rate per hour	\$16.50
Hours per week	60.00
Annual Salary	\$51,621.43
Compensation Salary	\$54,200.00
Calculated Daily Rate	\$111.37

- (17) In the Cost Experience – Basic Report dated December 22, 1997 there is a handwritten note on the bottom from the Director, Claimant Services, which states, “As a result of an Appeal Panel decision of December 15, 1997, [the worker] is entitled to retroactive wage loss benefits. The calculation of these benefits will be complex and will take some time to complete.” No explanation as to why “complex” is given.

- (18) A letter from the workers' advocate dated January 8, 1998 is sent to the board with “TD1's” [apparently not TD-1's but rather income deduction tax information summaries from Revenue Canada] for the years 1996, 1995, 1994 and 1993. It states the worker's “rate should be based on the earnings he would have earned had he not been injured based on the fact that similar employed workers, hired roughly

the same time . . . or slightly after are still currently employed and but for the injury the worker would have remained employed.”

(19) In a letter dated January 8, 1998 to the worker from the adjudicator, she states:

Thank you for supplying copies of your income tax returns. Disability benefits have been reinstated beginning January 1, 1996.

Board Policy CL-35 – *Average Weekly Earnings*, states that: A worker who is absent from work due to a compensable disability is entitled to compensation for loss of earnings, which usually takes the form of periodic payments, commonly referred to as “wage loss benefits”. As a starting point in the calculation of how much a worker will receive in the event of a work-related injury, a wage rate is established using the average weekly earnings of a worker at the time of, or preceding the injury as a reference. The policy further states: *average weekly earnings will be calculated by; the worker’s annual salary divided by 52 weeks.*

At the time of the accident, October 3, 1995, you were a seasonal worker. Your employer reported annual earnings of \$15,700.00. Your 1995 income tax return shows earnings from employment (T4 earnings) to be \$16,934.00. Your reported income from employment in 1994 was \$8,706.00 and in 1993 it was \$3,960.00. Wage loss benefits have been calculated using your 1995 income of \$16,934.00.

In applying policy CL-37, your wage loss has been calculated and the minimum has been applied. Your wage loss benefits will be paid based on \$16,000.00.

(20) Notes on file by the adjudicator dated January 8, 1998 state:

In applying CL-35 I have considered this information. The worker was not a permanent full time employee. He was a seasonal worker at the time of the accident and his wage rate should have been calculated with that information. At the time the claim was established this information was not requested or considered. The hourly rate was used. In reviewing the file CL-35 must be applied. The worker advocate has asked that consideration be given to [the] circumstances the worker was faced with at the time. The wage rate has been set up using earnings (from employment) as outlined in policy CL-35. The worker earned \$3,960.00

in 93 - \$8,706.00 in 94 and \$16,934.00 in 95. It is reasonable to use the higher amount and not average the earnings. This is to the worker's advantage. Disability benefits for the period beginning 1996 01 01 will be paid based on the higher amount of \$16,934.00.

- (21) A note to the file by the adjudicator dated March 16, 1998 states:

File reviewed with the medical consultant most recent report. In reviewing the report and considering the mechanism of injury the board has limited responsibility. The medical findings suggest a pre-existing condition – chondromalacia. Given the findings the YWCHSB has limited responsibility. The board will extend benefits for the recovery period only. The period of six weeks has been used as this is a common period given the surgery date. The worker's benefits will come to closure on April 10, 1998. . . . The board is not responsible for any rehab or any PPI (permanent partial impairment) in this case.

- (22) In a letter to the worker from the adjudicator, she states:

The direction given by the Appeal Panel is now complete.
. . . It is the opinion of the board that you have recovered from the contusion to your knee with no remaining disability. . . .
Your claim will be closed upon final payment, April 10, 1998.

- (23) The workers' advocate appeals the decision by the adjudicator that the claim will close in a letter dated April 14, 1998.

- (24) An IRC hearing is held on July 20, 1998. The IRC reverses the adjudicator's decision and states:

The worker is entitled to retroactive wage loss benefits on the basis that he is temporarily totally disabled. He is entitled to vocational rehabilitation benefits. He is entitled to a custom made knee brace at the board's expense and medical costs related to the chronic condition of the right knee.

The decision is based on the results of an independent medical examination and a magnetic resonance imaging examination ordered by an earlier appeal panel of the board.

- (25) In a note to file by the adjudicator dated November 6, 1998, she states, "Met with the worker this p.m. . . . We discussed returning him to his pre-accident earnings which is \$16,934/yr. as per info on file. The worker indicates that this is not a true reflection of his earning capacity."
- (26) The same letter from the worker's advocate (see paragraph 18) is sent with the original date scratched out and the date of November 9, 1998 handwritten in.
- (27) In a letter dated November 10, 1998, the senior adjudicator reviews the file and states:

I was asked to review this claim by the Director of Client Services with regards to this worker's rate of compensation.

At the time of accident this worker was 31 years old and had been in the workforce for at least 13 years. Worker has submitted employment income from 1987 to 1995 which clearly establishes an employment history. As there clearly is an established employment history, using the weekly wage rate of a like-occupation in the same industry is not applicable. It is also clear that this worker's employment at the time of the accident was seasonal/casual as confirmed by the worker and the employer.

This worker has indicated that there were mitigating circumstances for the 24 month period prior to the accident, i.e. worker was in an apprenticeship program and required to be in school and out of the territory for extended period of time, combined with a short period of incarceration. It therefore appears that the worker is of the opinion that this 24 month period does not accurately reflect his average annual income during that time. . . . I would therefore suggest that we use this worker's employment earnings for the three year period prior to the date of the forgiven period, i.e.: 1991, 1992 and 1993. This is in fact going back five years from the date of the accident. . . . Total income for these three years is \$16,413.00 divided by 3 for an average annual income of \$5,471.00. This would decrease the daily rate of compensation from \$43.84 to \$14.99.

The worker's rate of compensation was based on his gross income for 1995, which would have been a maximum of ten months employment as the injury occurred in October. It appears that the amount of \$16,934.00 represented the gross income for the 12 month period prior to the date of injury.

In my opinion, using the 1995 confirmed income of \$16,934.00 was adjudicating this claim in the worker's favor. If in fact we forgive the 24 month period preceding the accident and use the average of the preceding three years, the rate of compensation you can see is substantially less.

Should the worker not concur with the rate of compensation presently being paid, then I would suggest that his only option is to take his chances and pursue an appeal with the possibility that his rate of compensation may be decreased.

(29) In a letter from the benefit entitlement clerk to the worker dated November 12, 1998. She explains that the worker's request to review his rate of compensation has been completed. She states, "At present your rate of compensation is based on your 1995 annual income of \$16,934.00 equals a daily rate of \$43.84. Therefore there will be no change to your daily rate of compensation which was calculated and a letter sent to you on January 08, 1998."

(30) In a letter from the adjudicator to the worker dated February 9, 1999, states:

Your claim for compensation has been reviewed for closure; . . .
all medical accounts have been paid on your behalf as well as
temporary total disability benefits payable to you for the period:
October 5, 1995 to December 31, 1995 inclusive
January 1, 1996 to December 31, 1996 inclusive
January 1, 1997 to July 14, 1997 inclusive
August 9, 1997 to December 31, 1997 inclusive
January 1, 1998 to October 15, 1998 inclusive and
November 2, 1998 to December 31, 1998 inclusive

Re-employment Assistance

January 1, 1999 to January 31, 1999 inclusive

On approximately December 22, 1998, you were also paid a
permanent partial impairment award in the amount of \$2131.44. "

(31) The adjudicator writes to the worker in a letter dated June 22, 1999 as follows:

I am writing in follow-up to our phone conversation on June 21, 1999
and in regards to the Internal Review Committee decision dated June 14,
1999.

The Internal Review Committee decision indicated that you were not fit to
return to you pre-accident employment duties as general construction laborer on

December 15, 1998. The Internal Review Committee also directed that you are entitled to compensation benefits including those that might be found appropriate under Section 30 of the *Workers' Compensation Act*. I note that you were previously paid benefits to January 31, 1999. Time loss benefits have therefore been issued to you under separate cover for the period February 1, 1999 to and including June 30, 1999.

- (32) In a letter to the worker from the rehabilitation counsellor dated August 31, 1999, she states:

If you have been unable to secure suitable employment by November 12, 1999 (or December 10, 1999 – dependent on your participation) you will be deemed as being able to work as 'Recreational Facility Attendant'. . . . The information on file indicates that you were a seasonal worker at the time of your injury on October of 1995 and your accident earnings have been calculated at \$16,934 annually.

- (33) The Vocational Rehabilitation Report and agreement dated November 5, 1999 contains a cost analysis for the worker to complete training as a certified Jin Shin Do practitioner totalling \$20,030.00. This figure includes retraining assistance of \$12,050.00 described as "9 months at full benefits (820 days) November 15, 1999 – August 15, 2000 (approx. dates) – will be adjusted as worker discloses income."

Under "Recommendations" the report states:

I recommend that the board support the worker's training to become a certified Jin Shin Do practitioner through the instruction of Tolling Jennings, Senior staff, Jin Shin Do Foundation, Lasqueti Isle, BC. The terms of the worker's responsibilities are as follows:

- He is required to submit a copy of the certificate of successful completion of each course.
- He will be personally responsible for travel, subsistence and accommodation costs incurred to take each of the required courses.
- He will submit monthly statements of income that he makes from treating patients as his practicum experience of 125 hrs.

[This is signed by the rehabilitation counsellor.]

Under "Agreement" it states:

I understand and agree that on completion of this rehabilitation plan I will not have an impairment of earning capacity and therefore will not qualify for loss of earnings benefits.

I agree that termination of the plan outlined in this agreement without consent of the Yukon Workers' Compensation Health and Safety Board will be considered

successful completion of the Vocational Rehabilitation Plan and will disentitle me from further loss of earnings benefits.

I understand that completion of the training period will not guarantee me employment. However, I will be considered employable.

[The worker, workers' advocate, rehabilitation counsellor, and adjudicator sign this.]

Evidence and Argument from the Hearing

The Worker's Testimony

- (34) The worker states that at the time of the accident, he owned his own property, home and many "toys". Since this accident and subsequent "treatment" by WCB - including benefits being cut off, reinstated at a lower rate, again cut off etc. the worker has lost his property, his home and his family. The worker states that his present personal life has gone to "zero."
- (35) The worker states that he saw Dr. Ducharme prior to December 31, 1995 and was booked for an MRI. This was cancelled when he was cut off from benefits.
- (36) The worker states that after he was reinstated he was booked for an MRI and for operations that he had no choice or say in.
- (37) The worker says it has taken him six years to get to this point in the appeal process. The worker states that he now needs a knee replacement due to the permanent damage of his knee. The worker says that he feels that some of this permanent damage is due to lack of treatment when he was denied benefits.
- (38) The worker states that he will not be able to return to his earning potential. He is physically unable to complete the work he was trained for, since he is unable to bend his knee to kneel. Also he says that although he is able to do the "book" side of his former "safety tickets," he fails at the physical.
- (39) The worker states that he would like to see this "finished" so that he can start to rebuild his life. He cannot do that at this time. The worker states that life is nothing now, and he knows that he will not be able to return to his life as it was.

- (40) The worker states that he felt the claim was appropriately adjudicated in the first instance and has been mishandled since then. He would like to see this end.

The Workers Advocates' Submissions

- (41) The workers' advocate submits that the IRC was incorrect in confirming the method used by the adjudicator to determine the worker's average weekly earnings and thus his rate of compensation is incorrect and not in keeping with policy.
- (42) It is the submission of the workers' advocate that the policy in place at the time of the accident (1995) and initially applied to calculate the worker's average weekly wage was the correct method by which to calculate the worker's average weekly earnings. The new Policy Statement Application [97/02/07] should not have been applied retroactively.
- (43) The workers' advocate submits that according to the Worker's and the Employer's Report of Injury/Illness the worker was earning \$16.50 per hour for a 60 hour week.
- (44) The workers' advocate submits that the worker's wage losses were initially calculated using the CL-35 policy effective January 2, 1993. These calculations were completed for the period of time October 5 to December 31, 1996.
- (45) The workers' advocate submits that the worker appealed the decision to close the claim in April 1997. This appeal was heard on November 13, 1997. In its decision, the appeal panel determined that that worker had been and "continues to be entitled to all benefits from the date of the accident until such time as a final determination could be made."
- (46) The workers' advocate submits that after the appeal panel's December 15, 1997 decision, the board calculated the average weekly earnings using (b) of Section B, Average Weekly Earnings of Policy CL-35: that is by using "the worker's annual salary divided by 52 weeks." The workers' advocate submits that (a) of Section B, Average Weekly Earnings of Policy CL-35 should have been used: that is, "the worker's hourly rate at the time of the disability, times the weekly hours of work, times 52 weeks." The worker's wages were recalculated as a "seasonal" worker's wages under CL-35 Average Weekly Earnings Policy Statement Application dated [97/02/07].

- (47) The workers' advocate submits that there was no explanation or reason given for the change in calculations. In a memo on file dated 1998-01-08, it is indicated that the worker is now considered a "seasonal worker."
- (48) The workers' advocate submits that the worker should have continued to receive compensation benefits in accordance with the *Act* and policies in effect at the time of his accident.
- (49) The workers' advocate submitted two documents at the hearing for admission as exhibits. [The appeal committee reserved on a ruling with respect to admissibility -- see page 20 of this decision for our ruling.]
- (50) The workers' advocate submits that the version of CL-35, as approved on July 23, 1993, reads, "As a starting point in the calculation of how much a worker will receive in the event of a work-related injury, a wage rate is established by reference to the average weekly earnings at the time of or preceding the injury." [Emphasis added.]
- (51) The workers' advocate submits that the remedy they seek is to have the compensation rate that was in place at the time of the accident (December 1995) reinstated and that it be retroactive to January 1996, when the worker was initially denied benefits.
- (52) The workers' advocate submits that the worker's vocational plan may have to be re-addressed as to earning capacity and loss of earnings thereafter.

Issues

1. Was the IRC correct in confirming the adjudicator's decision to calculate the worker's average weekly earnings based on "his annual salary divided by 52 weeks"?
2. If not, how should the worker's average weekly earnings be determined?

Analysis on Issue # 1 Was the IRC correct in confirming the adjudicator's decision to calculate the worker's average weekly earnings based on "his annual salary divided by 52 weeks"?

The worker was injured on October 3, 1995. Section 90 of the current *Act*, the "transitional provision", states "where a worker is entitled to compensation as a result of a disability in . . . March 31, 2000 or earlier, the worker's entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000."

Therefore, we find that the *Worker's Compensation Act*, SY 1992 as amended up to the date of the injury in 1995 is the legislation to be used to determine the issues of entitlement in this case. Specifically, section 3 of that *Act* says, "a worker who suffers a work-related disability is entitled to compensation . . ." We interpret this to mean that the right to entitlement arises at the time the worker suffers a work-related disability, and in this case it arises in October 1995.

Just as in an earlier appeal dealt with by the tribunal (Decision #1), this appeal deals with what policy should apply when calculating a worker's "average weekly earnings". In Decision #1, the tribunal said that it is well established as a principle of statutory interpretation that laws which are "substantive" -- that is, laws which deal with rights -- will not be given retroactive force -- "unless the law says it will specifically operate retroactively." (We think it more accurate to say, "unless the law is intended, either expressly or by necessary implication, to operate retroactively.") This presumption is based on fairness and on the assumption that people conduct their lives and make decisions based on what they know or are presumed to know is the law at the time. In contrast, laws that are "procedural" can be interpreted to act retroactively but not if they interfere with rights which have already come into existence. In Decision #1, the tribunal characterized policies which set out "how to" interpret and apply the *Act* as "procedural" and therefore the tribunal found that the "Average Weekly Earnings Policy Statement Application" (the "1997 Application document"), dated after the worker's entitlement to compensation arose, should not apply so as to change his entitlement to compensation.

In this respect, we set out the commentary from Jones and deVillars *Principles of Administrative Law* (3rd ed.) at page 174:

Retroactivity

There is also a presumption that a delegated discretionary power shall not be used retroactively, unless the legislation expressly authorizes retroactivity. Most of the cases in this area deal with the discretion to enact delegated legislation, and not to other forms of discretionary action, but in theory the presumption against retroactivity should also apply to all other forms of discretionary powers. [Emphasis added.]

In Decision #1, the worker's claim was originally adjudicated under Policy Statement CL-35 effective on January 2, 1993 (as was the case for the worker in this case). However, because benefits were terminated and then reinstated retroactively after the date of the 1997 Application document, which was then applied to the worker's case, the daily compensation rate was significantly reduced. The same result, that is a significant reduction in the amount of compensation benefits, followed a retroactive reinstatement of benefits for the worker in this case (albeit through an appeal process, rather than a re-adjudication of the claim, as was the case in Decision #1).

However, in this case, we find a different (but not inconsistent) basis on which to come to our decision. We find that the IRC was incorrect in confirming the adjudicator's decision to calculate the worker's average weekly earnings based on "his annual salary divided by 52 weeks". It is clear to us from the record and from the IRC decision that the 1997 Application document was used in conjunction with Policy CL-35 (1993) to determine the worker's average weekly earnings as a "seasonal worker". We think applying the 1997 Application document to determine the average weekly earnings for this worker is an error of law. We say this because of our interpretation of section 90 of the *Act*, the "transitional" provision set out earlier. It directs the tribunal to "determine the worker's entitlement to compensation according to predecessor legislation" as it was in force before April 1, 2000. We have already determined that the *Worker's Compensation Act*, SY 1992 as amended up to the date of the disability in 1995 is the legislation to be used to determine the issues of entitlement in this case in accordance with section 90. Similarly, we find that policies in force at the date of disability (injury) are the correct ones to use in this case. At that time, the 1997 Application document did not exist and it cannot be used to in effect retroactively "amend" Policy CL-35 (1993).

We come to this conclusion because in our view the policies of the board are a form of delegated "legislation" and so are covered by the word "legislation" as used in section 90. In other words, the transitional provision covers both the statute as well as board policies which we find are of a "rule-based character" having "statutory force". In our view, such policies have force of law because sections 18.3(3) and 19.5 of the *Act* provide that board policies are binding on the appeal tribunal. As section 19.5 states: ". . . the decisions of . . . the appeal tribunal shall always be . . . in accordance with the Act, regulations and policies of the board." In addition, there is a strong "privative clause" in the *Act* whereby the decisions of the appeal tribunal are "final and conclusive" and not open to question or review in any court. (See section 18.4(3) of the current *Act*.) We are strengthened in our view by the reasoning in a decision of the Newfoundland Supreme Court, *DGH Construction Limited v. Newfoundland (Workers' Compensation Commission)* [1997] N.J. No. 53 which held that policies of the Newfoundland Workers' Compensation Commission were more than administrative directions: the Commission's policies were delegated legislation with statutory force. In the Newfoundland legislation considered by the court, the statute provided that the board "shall" make policy, and that the appeal body must apply those policies. These provisions, which formed the basis for the judge finding board policy to have statutory force, are very similar to those in the Yukon.

We point out that none of our reasoning in this case with respect to section 90 had it been applied to the facts in Decision #1 would have altered the outcome of that case.

We also point out that our interpretation of the requirements of section 90 provides a much more certain method of determining what policy should apply on an entitlement to compensation case than the more complex and less certain use of presumptions with respect to retroactivity. Two workers' compensation decisions from another jurisdiction illustrate this complexity and uncertainty. In British Columbia, the Governors issued Decision No. 36 on March 1, 1993 entitled "Retroactivity of Policy Changes". A portion of that decision (referred to as a "guideline") deals with the type of policy change that has occurred in the Yukon with respect to "average weekly earnings". It states:

“There is a presumption in cases where a policy change occurs as a result of a reconsideration and rethinking of existing lawful policy that the change will not apply retroactively before the date on which the new policy was approved.” [Emphasis added.] But as a subsequent B.C. Appeal Division decision points out, this guideline raises more questions than it answers. In Decision No 96-1721, the appeal panel states it is not clear under the guideline whether or not a new policy will apply:

- (a) only to claims initiated after the policy change;
- (b) to claims which may have been initiated prior to the policy change, but on which the events relevant to the policy have not been completed prior to the change in policy;
- (c) to all claims which have not been adjudicated, even if the relevant events occurred prior to the policy change;
- (d) to cases adjudicated under the prior policy, but on which there is a current ongoing appeal to the Review Board; or
- (e) to cases addressed by the Review Board [responsible for the first level of appeal in B.C.] under the former policy, where a change in policy occurs prior to the matter being considered by the Appeal Division [responsible for the final level of appeal in B.C.].

However, should we be wrong in our interpretation of section 90, we also find, in the alternative, that our reasoning with respect to a presumption against retroactivity and an interference with vested rights in Decision #1 is applicable to this case. And further we find that it would not be “fair” or “just” (see sections 1(a), 101 (1) of the *Act* as it was in 1995), and 19.5 [current *Act*] to use the Application document to calculate benefits retroactively for this worker for a period before the date of the 1997 document. It is not the worker's fault that his benefits were terminated and then reinstated retroactively only after an appeal. He should not be in a worse position than a worker with ongoing benefits whose claim was adjudicated prior to 1997, whose benefits were never terminated, and who never had to engage the appeal process to reinstate them.

Analysis on Issue #2 If not, how should the worker's average weekly earnings be determined?

It follows from our analysis on issue #1 that we think that Policy CL-35 "Average Weekly Earnings" effective January 2, 1993 should be used to calculate this worker's average weekly earnings for the purposes of sections 22, 23, and 101 of the *Act*. In particular, we find that section B (a) governs his situation and should be applied. Sections B and C of the policy provide as follows:

B. Average Weekly Earnings

Average weekly earnings will be calculated by:

- (a) The worker's hourly rate at the time of the disability times the weekly hours of work, times 52 weeks;
- (b) The worker's annual salary divided by 52 weeks;
- (c) Under special circumstances, the board may consider using a longer period of pre-injury earnings;
- (d) If there is little or no history of earnings available, the board will take the weekly wage rate of a like-occupation in the same industry;
- (e) For those purchasing Optional Coverage, average weekly earnings shall be the amount of personal coverage in effect at the time of disability, divided by 52 weeks;
- (f) Where a director of an incorporated company, who does not draw a wage, is injured, the benefits paid will be based on the Director's value of service, as determined by the Assessment Branch under Section 62.(6).

C. Descending Order

The list provided for in Section B is to be used in descending order. In other words, the board will first apply test (a), and if test (a) is not applicable, the board will proceed to test (b) etc.

We find as a fact that this worker was paid by his employer at an "hourly rate" (see both the Worker and Employer Reports at paragraphs 2 and 3). Therefore we think it is clear on the ordinary and grammatical meaning of the words of these sections of the policy (as set out above) that section B (a) must be used to determine this worker's average weekly earnings. Since we find that (a) is applicable, there is no need to consider (b). [(b) is the one applied by the adjudicator and confirmed as correct by the IRC.] However, we note there is no evidence in the record that this worker was ever paid an "annual salary". The result of our answer to the question posed as issue #2 is that we find there has been an underpayment of benefits to this worker with respect to those benefits paid to him based on an incorrect application of policy as discussed above.

In addition, because of our analysis as to the proper interpretation and application of policy, we find it unnecessary to consider any other aids to interpret these policy sections. Therefore, we need not consider the admissibility of the two documents tendered by the workers' advocate during the hearing and they are not admitted as exhibits. [We note that these two documents were not filed with the tribunal in advance of the hearing as the draft rules of procedure require -- this led to our reserving on admissibility as one document was lengthy and the appeal committee had concerns about the confidential character of both documents.]

Conclusion

The appeal is allowed. The decision of the IRC is reversed and varied as follows:

1. Section B (a) of Policy CL-35 "Average Weekly Earnings" (1993) must be applied to determine the average weekly earnings of the worker for periods of entitlement from January 1, 1996 to the present and for as long as compensation is required to be paid in accordance with sections 22, 23 and 30 of the *Act*.
2. The board must retroactively compensate the worker for the underpayment of benefits which has resulted from the incorrect application of policy and the use of what was called the worker's 1995 annual "salary" to calculate his average weekly earnings, rather than his hourly rate of pay at the time of injury as required by our decision (see 1 above).

Dated this 2nd day of November, 2000 in the City of Whitehorse, in the Yukon Territory.

Jan Stick, Member

Heather MacFadgen, Presiding Officer

Joseph P. Radwanski, Member