

# **Workers' Compensation Appeal Tribunal**

## **Decision # 18**

**Claim No.: 80-1766**

Date of Notice of Appeal: May 18, 2001

Date of Documentary Review: June 22 and July 6 and 13, 2001

Date of Decision: July 17, 2001

### **Appeal Committee Members**

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Jan Stick
Member representative of workers:	Joe Radwanski

### **Documentary Review at the worker's request**

**Location:** Boardroom 2A, 419 Range Road  
Whitehorse, Yukon Territory

## Summary for the Reader

**Decision under review:** Internal Review Committee decision dated January 23, 1996

**Sections of Act considered or applied by internal review committee:** ss. 25(1), 28(1)(3) of the *Workmen's Compensation Ordinance 1973*.

**Policies considered or applied by internal review committee:** CL-43, Recovery of Overpaid Compensation

**Issues addressed by internal review committee:**

(1) Entitlement to retraining and (2) requirement that all overpaid compensation be repaid.

**Decisions made by internal review committee:**

“The committee could find no reference in Section 25(1) to retraining and concluded that retraining was not an option under the relevant legislation after acceptance of a lump sum payment.”

### Appeal Committee decision summary

**Sections of the Act considered or applied by appeal committee:** ss.25, 28, 39 of the 1973 *Ordinance*, as amended to 1980; and ss.17, 18(1), 18.3(4), 18.4(1), 19.5, 90 of the current *Act* and s.96(5) of the *Act* as it stood in 1998

**Policies applied or considered by appeal committee:** Board Policy No. 30 adopted February 15, 1977, entitled “Vocational Rehabilitation”

**Issues addressed by appeal committee:** (1) What legislation should be used to determine the worker's entitlement in this case? (2) Was the IRC correct in deciding that the worker's acceptance of a lump sum prevented him from being entitled to any further compensation other than that provided for in s.25(1)? (3) Was the IRC correct when it interpreted s.25 as not allowing any retraining assistance for the worker? (4) If not, was there any overpayment? (5) If not, has there been an improper recovery of compensation?

**Decision made by appeal committee:** (1) Retraining can and should be authorized under s.25(1) of the *Ordinance*. (2) Nothing in section 28 on the facts of this case limits compensation to only s.25(1) and any further compensation to which the worker is or was entitled should be reinstated. (3) The worker was not overpaid compensation. (4) The worker must be reimbursed for any compensation recovered incorrectly as an “overpayment”. (5) Interest shall be paid in accordance with s.19.4 and board policy, (yet to be passed).

## Introduction

This is an appeal by documentary review of an internal review committee (“IRC”) decision rendered on January 23, 1996. The IRC decided that

- (1) the worker was not entitled to retraining under section 25 (1) of the *Workers Compensation Ordinance*, 1973 (3<sup>rd</sup>) C.6, s.1; 1977 (2<sup>nd</sup>), C. 10, s.1 (the “Ordinance”); and that
- (2) all overpaid compensation should be recovered under Policy CL-43, “Recovery of Overpaid Compensation”.

Originally the worker appealed the IRC decision to an appeal panel of the Workers’ Compensation Health and Safety Board (the “Board”). On March 22, 1996 the appeal panel denied the appeal. On January 2, 1998 the worker filed a petition in the Supreme Court of the Yukon Territory seeking judicial review of the March 1996 appeal panel decision. On the advice of legal counsel, the Board passed a motion on January 21, 1998 whereby it “agreed that, pursuant to section 96(5) [of the *Act* as it stood then], another appeal panel would be struck”. However, as it turns out, the worker chose not to proceed with a new appeal panel hearing, on the advice of his lawyer, and nothing more was done by the Board.

On April 1, 2000, the Workers’ Compensation appeal tribunal came into existence under amendments to the *Act* known as Bill 83. On December 6, 2000 the worker filed a notice of appeal from both the IRC and the appeal panel decisions.

A hearing was held on February 26, 2001 and the tribunal decided on April 12, 2001 that under section 18.4(1) of the *Act* it had no jurisdiction to hear the matter. On May 15, 2001 the Board passed a motion “that the appeal panel decision dated March 22, 1996 be set aside on the grounds that there was an error of non-compliance with the *Act*.” The Board minutes state “the effect of this motion means that there is no appeal panel decision, only the internal review committee decision” and “the worker . . . has the ability to appeal this matter under section 18.4(1) of the *Act* to the appeal tribunal.” The minutes do not indicate why, once the Board reopened the appeal panel decision, it did not simply change it then and there when it had clear jurisdiction to do so: this would have avoided the further delay that resulted by sending it back to the tribunal, where jurisdiction was not so clear.

The worker filed a notice of appeal of the IRC decision dated April 25, 2001, predating the Board motion setting aside the subsequent appeal panel decision. The worker filed another notice of appeal dated May 18, 2001 setting out the same grounds and seeking the same changes to the IRC decision as in the first notice and it is this second notice which effectively begins the appeal to the tribunal.

In June and early July, the appeal committee sought legal advice on the effect of the Board’s motion “setting aside” the appeal panel decision. The opinions as well as our views in this regard were provided to the worker’s representative. In the result, on July

9, 2001 the worker wrote the Chair of the Board stating: “I withdraw any and all appeals filed prior to March 31, 2001.”

It is well established that it is an inquiry-based process that the tribunal undertakes in the appeal process (see section 18.3(4) of the current *Act*). The worker’s representative has asked that rather than proceeding as an oral hearing, the appeal be dealt with as a documentary review, taking into account all the evidence and argument provided to the tribunal on the merits of this matter in the earlier hearing which resulted in Decision #11 – the appeal committee has agreed to do so.

We also note that on June 11, 2001 the Board provided Policy No. 30 “Vocational Rehabilitation” [eff. February 17, 1977] as relevant to the appeal per s.18.3(4) of the *Act*. Also, the employer is no longer in business so did not participate in the appeal.

## **Jurisdiction**

The appeal tribunal as a new body has been dealing with the Bill 83 changes to the *Act* for just over a year now. There have been some growing pains as the new jurisdiction provisions have turned out to be problematic. This is illustrated in the history of this matter and has been referred to in our earlier decision as “jurisdictional ping-pong” – the loser in all of this is the worker because of delays in a system that is supposed to be simple with minimal delay.

In this case, in an attempt to ensure that the tribunal has jurisdiction to decide the worker’s appeal, the Board has “set aside” the earlier appeal panel decision. The board minutes show that this was done under section 96(5) of the *Act* which states: “the board has the authority to examine, inquire into and hear any matter that it has dealt with previously and has the power to rescind or vary any decision or order previously made by it.” Although the board did not use the language of this section when it took the action to “set aside”, we interpret its action to be a decision to “rescind”.

When we turn to the transition provision, section 90(1.2) says: “Where a worker, a dependent of a deceased worker or the worker’s employer has *commenced an appeal* pursuant to section 18 on March 31, 2000 or earlier, the appeal shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000.” In this case, the worker did commence an appeal to an appeal panel earlier than March 31, 2000. Normally, this would mean that the appeal would still need to be heard by an appeal panel because that was the body hearing final level appeals under the “predecessor legislation” to which section 90 refers. When the Board set aside the appeal panel decision, this action did not alter the fact that the worker had *commenced an appeal* before March 31, 2000. So on its own, “setting aside” the appeal panel decision did not solve the problem for the tribunal in taking jurisdiction in this case.

However, the worker has withdrawn his notice of appeal made before March 31, 2000. The question is, can we interpret this withdrawal as undoing the “commencing” of the earlier appeal. On a strict interpretation of the statute, perhaps not. However, we must take a liberal and purposive approach to interpreting the *Act* and in addition, the

tribunal must also apply section 19.5 which says: “the decisions, orders and rulings of ... the appeal tribunal shall always be based on the merits and justice of the case”... [emphasis added]. We interpret the language emphasized as a clear intention by the legislature that this new provision operates retroactively and therefore must be applied to this case. In our view, the merits and justice with respect to a worker who has waited over 5 years to have a decision wrongly made finally corrected with no further jurisdictional ping-pong allow us to interpret his withdrawal of an appeal as a “de-commencement” of that appeal. It is also clear that on the facts of this case, there is no problem with a board appeal panel being seized with a matter that it has commenced but not decided. Therefore, we are left with the worker’s appeal to the tribunal which was received on May 18, 2001.

Now that the appeal panel’s decision has been set aside, this is an appeal from an IRC decision. Section 18(1) states that a worker may appeal a decision made under section 17 to the tribunal: we interpret this to mean under section 17 at the time the decision under section 17 was made – in this case the first level of appeal was decided by an IRC under section 17 as it existed on January 23, 1996. In addition, we interpret the transition provision, [s.90] to mean that appeals of section 17 decisions commenced after March 31, 2000 (as is the case now here) are to be determined according to the current (not predecessor) legislation and therefore the appeal tribunal is the appropriate body to decide this second and final level of appeal.

### **Background and Findings of Fact**

- 1) The worker was injured in an accident on November 15, 1980. The worker was 24 years old and experienced a significant work-related injury to his knee. At the time of the injury, he was working as a construction worker.
- 2) He underwent a series of medical treatments for the injury including surgery on two occasions. He also had extensive rehabilitation and was discharged from the British Columbia Rehabilitation Centre in February 1985 “with permanent restrictions against squatting, kneeling, moving in awkward places and walking on uneven ground.”
- 3) The worker’s record indicates that in January of 1985, he began to inquire about retraining. He was assessed a number of times by WCB Medical Consultants. In July 1985, the worker was assessed to have a 10% partial permanent disability because of his injured knee. He was told by letter that he was awarded a monthly pension and that he could be paid this pension in a lump sum. Most importantly, this letter said that “acceptance of the lump sum payment does not affect any further medical treatment or compensation to which you may become entitled as a result of your accident.” (Emphasis added.)
- 4) The record indicates the worker accepted the lump sum. He appealed the 10% assessment and it was increased to 15% in a decision that also said that the matter of retraining could not be determined at that time due to insufficient information from the worker. The worker was subsequently awarded another lump sum payment

to reflect the increased award. The letter informing him of this award included the same declaration as before -- that acceptance of the lump sum would not in any way affect future compensation to which he may be entitled.

- 5) From 1986 to 1995 the worker continued to deal with the board regarding his medical treatment. Several times throughout this period the worker requested retraining benefits, funding for courses, supplies, and an allowance. In turn, the board requested that he put his requests in writing but the record does not contain any written requests. Then in 1995, the worker's adjudicator wrote him a memo saying the board would support retraining as a painter if the costs were reasonable and asked for estimates of expenses. Several days later the worker provided a handwritten memo setting out these amounts (\$2500 for art instruction and \$2500 for art supplies). A series of handwritten memos from the adjudicator followed advising the worker he would receive a retraining allowance of \$75.21 per day for six months, then an additional six months, as well as approval for the two requested amounts for instruction and supplies.
- 6) However, within three months of the beginning of the retraining allowance, funding for this and for instruction and supplies was terminated. The Acting Director of Claims wrote the worker advising that an adjudicative error had been made and he was not eligible for any retraining as he had accepted lump sum payments under section 28 of the 1973 *Ordinance*.
- 7) Section 28 of the *Ordinance* provides in part as follows: “. . . periodic payments of compensation may be commuted to a lump sum at the written request of the worker. (3) Where a lump sum has been made to a worker . . . as a settlement in full of all compensation payable to him in respect of his 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 to the disability, other than the benefits provided by subsection 25(1).”
- 8) There is no evidence in the record of any “written” request by the worker or an acceptance by him “in writing” as a settlement in full. We find that the worker did not make any written request nor did he accept in writing the lump sum as settlement in full of any other compensation payable to him.
- 9) The worker subsequently asked for an explanation of how the pension amount was calculated. His adjudicator wrote, in part, as follows: “To ‘lump sum’ a permanent partial disability, an actuarial table, based on life expectancy, and prepared by the Board’s consulting Actuary, is used. This table is acceptable throughout Canada for computation of pensions. Unfortunately I cannot explain the figure drawn from the actuarial table, as I do not have knowledge of the complex mathematical calculations involved. I can only suggest you speak with an accountant to obtain a better understanding of how this table was developed.” It is the Board’s responsibility to explain its decision to the worker and it was inappropriate to

suggest to the worker that he hire an accountant to understand how the Board calculated his pension amount.

- 10) During the same month in which the retraining funding was terminated, the worker suffered an aggravation to his knee injury while he was undergoing rehabilitation at the direction of the board in the POWER program. He was entitled to benefits as a result but did not receive any because the board determined he had an overpayment now owing due to the retraining program that had been terminated. The worker filed an appeal to the IRC, which upheld the decision to terminate benefits and seek recovery of an overpayment. The worker then appealed this decision to an appeal panel of the board [since “set aside”].
- 11) On March 22, 1996, the appeal was denied and the appeal panel decided that the worker was not entitled to further benefits. The worker hired a lawyer who filed a petition to the court for judicial review of that decision. The board’s lawyer filed an affidavit, in the court proceeding, that stated that the Board Members agreed to strike a new panel. Meanwhile, a new appeal panel hearing date was scheduled but was cancelled at the request of the worker. The worker’s lawyer advised him not to go back to another appeal panel to deal with his issues. As well, apparently the court proceeding did not go ahead after the worker’s lawyer left the territory. Nothing further was done by the board.

### **Issues**

1. What legislation should be used to determine the worker’s entitlement in this case?
2. Was the IRC correct in deciding that the worker’s acceptance of a lump sum prevented him from being entitled to any further compensation other than that provided for in section 25(1)?
3. Was the IRC correct when it interpreted section 25 as not allowing retraining assistance for the worker?
4. If not, was there any overpayment?
5. If not, has there been an improper recovery of compensation?

### **Analysis**

#### **Issue #1**

1. What legislation should be used to determine the worker’s entitlement in this case?

#### **Answer**

- a) The worker was injured in a workplace accident on November 15, 1980. Section 90 of the current *Act* 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 it is the 1973 *Ordinance* as amended to 1980 that is the legislation to be used to determine the issues of entitlement in this case.

## **Issue #2**

2. Was the IRC correct in deciding that the worker’s acceptance of a lump sum prevented him from being entitled to further compensation other than that provided for in section 25(1)?

### **Answer: no**

- a) In its analysis, the IRC states as follows: “The file record indicates that the worker accepted two separate lump sum disability awards of 10% and 5% as provided in section 28(1). Section 28(3) provides that where a lump sum has been made the worker is not entitled to be paid any further compensation other than the benefits provided by subsection 25(1).” In its conclusion, the IRC states “retraining is not an option under the relevant legislation after acceptance of a lump sum award.”
- b) In our view, because the worker did not make a “written request” for a lump sum payment and did not accept the lump sum “in writing as a settlement in full of all compensation payable to him in respect of his disability”, section 28 cannot be used to limit him to only those benefits provided by section 25, as the IRC found.
- c) In our view, the worker remains entitled to compensation under the *Ordinance*, which may include any compensation he is entitled to under section 39 to the extent that his disability has impaired his earning capacity less any money already received in this regard. It is our understanding from the worker’s advocate’s submissions that other boards -- operating under a pension scheme similar to the one in place with the *Ordinance* – would usually provide some retraining or rehabilitation before a calculation of impairment of earning capacity was made. This was done because retraining or rehabilitation could lessen what would otherwise be a significant impairment of earning capacity. We recognize that the issue of section 39 or other compensation was not specifically addressed by the IRC, given its mistaken interpretation of the effect of section 28 on any further compensation other than that in section 25. Also, the IRC decision does not indicate the worker appealed the pension amount. (Our conclusion #2 on page 10 should be regarded therefore as a recommendation, not an order.)

## **Issue # 3**

3. Was the IRC correct when it interpreted section 25 as not allowing retraining assistance for the worker?

**Answer: no**

- a) In its decision, the IRC says: “the committee can find no reference in section 25(1) to retraining and concludes that retraining is not an option under the relevant legislation.”  
Section 25(1) provides: “to aid in getting injured workers back to work or in lessening or removing any handicap resulting from their injuries, the Commissioner may take such measures and make such expenditures as he deems necessary or expedient.” As noted earlier, the Board provided Policy No. 30 [eff. Feb.17, 1977] “Vocational Rehabilitation” as relevant to this appeal. We agree. In our view, this policy makes it clear that under the legislation in 1980, the Board did make rehabilitation available, including compensation during retraining as well as tuition and supplies – the very retraining costs at issue in this appeal.
- b) In our view, nothing in the very broad language of section 25(3) precludes funding retraining. This section should be interpreted in a way that is consistent with the purpose and goals of workers’ compensation legislation. We think that expenditures and measures taken to retrain workers are permitted under section 25(1) if they “aid in getting injured workers back to work or in lessening or removing any handicap resulting from their injuries.” Nothing could be plainer. It is true that this section uses the word “may”: this indicates that it is in the board’s discretion to decide whether or not retraining is “expedient or necessary”. We think that this discretion should be exercised by the board on the “justice and merits” of this case as set out in section 19.5. Doing so in our view would involve taking into account that on at least three occasions the board told the worker that retraining could be provided. On one of these occasions it was the Chair of the Board who assured the worker of this. It is understandable that a worker would rely on these statements, as this worker did.

**Issue #4**

4. If not, was there any overpayment?

**Answer: no**

- a) It follows from our analysis on Issue #3 that the IRC was incorrect in deciding there had been an overpayment.

**Issue #5**

5. If not, has there been an improper recovery of compensation?

**Answer: yes**

- a) It also follows from our analysis on Issue #3 that there was an improper recovery of compensation from the worker who had not been overpaid.

## Conclusion

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

1. Retraining can and should be authorized under section 25(1) of the *Ordinance*.
2. Nothing in section 28, given the facts of this case, limits compensation to this worker to only section 25(1), and any further compensation to which he is or was entitled, such as under section 39, should be reinstated.
3. The worker was not overpaid compensation.
4. The worker must be reimbursed for any compensation recovered incorrectly as an overpayment.
5. Interest shall be paid in accordance with section 19.4 of the current *Act* on compensation payable as a result of our decision. As there is currently no policy in effect under section 19.4, it is unclear at this point how the policy, once it comes into effect, will apply to this case.

Dated this 17<sup>th</sup> day of July, 2001 in the City of Whitehorse, in the Yukon Territory.

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Jan Stick, Member

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Heather MacFadgen, Presiding Officer

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Joe Radwanski, Member