



## **WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL**

### **DECISION NO. 2321/09**

**BEFORE:** E. J. Smith: Vice-Chair

**HEARING:** November 25, 2009, at Sudbury  
Oral

**DATE OF DECISION:** January 8, 2010

**NEUTRAL CITATION:** 2010 ONWSIAT 51

**DECISION(S) UNDER APPEAL:** WSIB ARO decision dated February 15, 2008

**APPEARANCES:**

**For the worker:** Mr. K. Lovely, Office of the Worker Adviser

**For the employer:** Not participating

**Interpreter:** Not applicable

## REASONS

### (i) The issues

- [1] The worker seeks redetermination of the FEL D1 date (the date on which the Board first determined the worker's future economic loss or "FEL").

### (ii) Background; the testimony

- [2] The worker suffered an accident on December 20, 1990. Benefits were paid to April 21, 1991, when he returned to work. He went off work again on December 2, 1991, but the Board denied further benefits at that time. On March 10, 2006, the Tribunal determined in *Decision No. 356/06* that the worker had entitlement for ongoing back problems subsequent to April 1991 and to a permanent impairment assessment. The Tribunal also found that the worker was entitled to a labour market re-entry assessment.

- [3] The worker was then awarded a 7% NEL award for the low back.

- [4] The Board addressed how to determine the worker's wage loss benefits, from December 2, 1991. For the time period from 1991 to 2003, the claims adjudicator paid the worker what he referred to as "TPDiff" (temporary partial difference) benefits based on deemed earnings at minimum wage. From 2003 to 2006, temporary partial difference benefits were not paid because the worker had returned to his pre-accident work. The Board determined the FEL D1 date to be November 1, 2007, and paid a sustainability award as of that date.

- [5] Mr. Lovely submits that the date on which these benefits were first paid, of December 2, 1991, should be determined to be the D1 date. That would have the effect of making the "final FEL" date December 2, 1996. The FEL benefits are locked in as of the final FEL date except in limited circumstances that do not apply here. Therefore, if the D1 date had been determined to be December 2, 1991, the worker's FEL award, based on minimum wage, would have been paid to age 65. There would have been no deduction in the payments to reflect the fact that the worker returned to his regular work in 2003.

- [6] After discussion with the worker, Mr. Lovely clarified that he is not appealing the quantum of the benefits paid as temporary benefits, but only the fact that they were paid as temporary benefits and not as FEL benefits.

- [7] In deferring the FEL first determination (D1) date to 2007, the ARO relied on provisions of the *Workers' Compensation Act* (the pre-1997 Act) that provide the Board with the authority to defer the FEL determination when entitlement is in dispute, and to Board policy on this matter, as set out below. Mr. Lovely does not dispute that the Board has the discretion under the Act to defer the D1 determination when benefits are in dispute. He does not dispute that Board policy provides that the D1 date may be deferred in that circumstance. However, he asks that the D1 date be set retroactively in this case for two reasons. First, he submits that the circumstances of the worker's case should be considered under the merits and justice provisions of the Act and Board policy. Secondly, he submits that the Board memos set out below constitute, in substance, a FEL D1 determination, because they "deem" the worker's earnings based on an SEB

determination (a determination of what the worker could earn in a “suitable employment or business”) instead of expressly referring to the language of section 37(2)(b) of the pre-1997 Act.

**(iii) How the Board determined the matter: the Board memos**

[8] The Board memos that consider how benefits were to be paid in the retroactive time period are as follows.

[9] A memo dated May 24, 2006 authorized payment of “TPDiff” from January 1, 1999 to September 29, 2003, based on actual earnings. The “TPDiff” benefits were then “finalled” as of September 2003 because the worker returned to his pre-accident type work.

[10] A Board memo dated July 5, 2006 addresses the years from 1991 to 1999 and states:

Pay TPDiff based on SEB 6611-cashier self serve gas bar at \$6.85 for the years 1991 to 1999.

[11] A memo dated November 8, 2006 then changed the amount paid from 1999 to 2003 to payments based on deemed earnings at minimum wage on the following basis:

It is still felt however that the worker would have been able to obtain a min wage job at regular hours = \$274 per week. Worker was underemployed.

Worker to be paid TPDiff using min wage \$6.85 x 40 from Jan 1 99-26, Sept 03.

[12] An undated memo states that the claims adjudicator had explained to the worker and the representative that benefits were being paid using minimum wage earnings because it was felt that the worker had been underemployed.

[13] A letter to the representative dated May 23, 2007 states that FEL cannot be paid retroactively and that therefore partial loss of earnings were calculated using minimum wage.

[14] A further letter of October 30, 2007 determines the D1 FEL as a sustainability award, effective November 1, 2007.

[15] The ARO confirmed the approach used by the Operations Branch.

[16] Mr. Lovely submits that the pre-1997 Act provided that FEL earnings are to be based on the determination of deemed earnings. However he submits that section 37(2)(b) of the pre-1997 Act, which applies to temporary benefits, does not provide a mechanism to deem earnings. Therefore when the Board established earnings at minimum wage for this worker, based on deemed earnings from an SEB, from 1991, it should be understood to have been making a FEL determination and not a determination of the worker’s entitlement to temporary benefits.

**(iv) The law and Board policy**

[17] The worker’s accident occurred on December 20, 1990. Therefore his benefits are subject to the provisions of the *Workers’ Compensation Act* (the pre-1997 Act). Section 37 of that Act (under the wording in place prior to January 1, 1998) states that, where temporary partial disability results from the injury, the worker is entitled to:

37(2) (a) where the worker returns to employment, a weekly payment of 90% of the difference between the net average weekly earnings of the worker before the injury and a net average amount that the worker is able to earn in some suitable employment or business after the injury; or

(b) where the worker does not return to work, a weekly payment in the same amount as would be payable if the worker were temporarily totally disabled, unless the worker:

(i) fails to co-operate in or is not available for a medical or vocational rehabilitation program which would, in the Board's opinion, aid in getting the worker back to work, or

(ii) fails to accept or is not available for employment which is available and which in the opinion of the Board is suitable for the worker's capabilities.

(3) In determining the amount to be paid under clause (2)(b) the Board shall have regard to any disability payments the worker receives under the Canada Pension Plan and the Quebec Pension Plan with respect to the injury and, if subclause 2(b)(i) or (ii) applies, the compensation shall be a periodic amount proportionate to the degree of disability resulting from the injury as determined by the Board.

[18] Section 37(2)(a) refers to the case of a worker who has returned to work. Based on the Board's approach to the FEL determination, this section applies to the benefits paid to this worker between 1999 and November 1, 2007, because the evidence is that the worker had worked in those years. In my view, the provision clearly contemplates "deemed" benefits, given that the worker is entitled to benefits based on the difference between his pre-injury earnings and the earnings that he is able to make in a "suitable employment or business." The difference is not necessarily calculated based on actual earnings. This is the calculation that is most commonly referred to as the calculation of "temporary partial difference" benefits, which is the phrase used by the Board in its memos in this case.

[19] However, Mr. Lovely submits that the matter turns on the wording of section 37(2)(b) and not 37(2)(a) because, prior to 1999, the worker did not return to work. If the FEL D1 date is determined to be in 1991, then the worker's FEL award would have been locked in before he ever returned to work.

[20] Section 37(2)(b) addresses the case of a worker who is partially disabled, and therefore may have been able to return to work, but has not done so. It provides that the worker is entitled to full benefits as long as the worker has not failed to co-operate in medical or vocational rehabilitation and has not failed to accept suitable and available work.

[21] The section does not directly address what benefits are payable if the worker has failed to satisfy these criteria. However, Tribunal decisions have generally found that if the worker has failed to accept or to make himself available for suitable work that would have restored his pre-injury earnings (most usually, when the worker could have returned to his regular job at no wage loss, or has declined an offer of modified work from his employer at no wage loss) he is not entitled to any benefits.

[22] Tribunal decisions have also generally found that, even if no suitable work has been offered to the worker, a worker is required under section 37(2)(b)(i) to engage in appropriate self directed vocational rehabilitation, such as, where appropriate, by conducting a job search, in order to receive full benefits under this section. If a worker was found not to have engaged in proper self directed vocational rehabilitation, for instance by not making appropriate efforts to

look for work, Tribunal decisions have generally endorsed the Board's practice in the pre-1998 time period of paying 50% benefits. This practice reflected the fact that the worker remained partially disabled and might not have been able to fully restore his full pre-accident earnings even if he had found suitable work. Mr. Lovely agreed that it was Board and Tribunal practice in that situation to pay 50% benefits.

[23] I note that the practice of paying 50% benefits is not stipulated in the Act. However, Section 37(3) provides that when subsections 37(2)(b)(i) or (ii) applies, and the worker fails to meet the specified criteria, benefits are to be paid to the worker in proportion to the degree of disability resulting from the compensable injury.

[24] The language of section 37(2)(b) was amended by the transitional provisions of the *Workplace Safety and Insurance Act* (the WSIA) which took effect on January 1, 1998. Section 105 of the WSIA amended section 37(2)(b)(i) by striking out the words "a medical or vocational rehabilitation program" and substituting the words "a medical rehabilitation program or a labour market re-entry plan, as the circumstances require."

[25] The implications of this change are discussed further below.

[26] In the time period prior to January 1, 1998, section 43 of the pre-1997 Act provided for FEL benefits on the following basis:

43(1) A worker who suffers injury resulting in permanent impairment or resulting in temporary disability for twelve continuous months is entitled to compensation for future loss of earnings arising from the injury.

...

(3) Subject to subsection (8), the amount of compensation payable to a worker for future loss of earnings arising from an injury is equal to 90 per cent of the difference between,

(a) the worker's net average earnings before the injury; and

(b) the net average earnings that the worker is likely to be able to earn after the injury in suitable and available employment.

...

(10) where possible, the Board shall determine the amount of compensation payable to a worker under this section,

(a) in the twelfth consecutive month during which the worker is temporarily disabled;

(b) within one year after notice of the accident in which the worker was injured is given under section 22, if during the year the Board determined that the worker is permanently disabled;

(c) within eighteen months after notice of the accident in which the worker was injured is given under section 22, if the worker's medical condition precludes a determination within the time stated in clause (a) or (b), whichever applies.

...

(12) The Board may extend the time limits set out in subsection (10) in the case of a worker who is not receiving compensation under this Act and whose entitlement to compensation is in dispute.

[27] Subsection 13 of section 43 provides for two reviews of the FEL award after the initial FEL determination. It provides that:

(13) Where possible, the Board shall review its determination of the amount of compensation payable to a worker under this section:

(a) in the twenty-fourth month after the date of its initial determination,

(b) in the sixtieth month after the date of its initial determination; and

(c) within twenty-four months after a reconsideration of the percentage of permanent impairment of a worker, under subsection 42(21), results in a determination of increased permanent impairment of the worker.

[28] Therefore, after the sixtieth month, the FEL benefit was “locked in” and could only be re-determined in limited circumstances, not relevant for the purposes of this appeal.

[29] Section 107(2) of the WSIA repealed section 43(13), effective January 1, 1998. It states as follows:

107(2) Subsection 43(13) of the pre-1997 Act shall be deemed to be repealed. Instead, subsections 44(1) and (2) of this Act apply, with necessary modifications, with respect to a review of the Board of the amount of compensation for future loss of earnings payable under section 43 of the pre-1997 Act. However, a reference to “more than 72 months after the date of the worker’s injury” in section 44(2) of this Act shall be read as more than 60 months after the date the compensation for future loss of earnings is determined by the Board under section 43 of the pre-1997 Act, and a reference to “72 month period” in the fourth line of subsection 44(2) of this Act shall be read as “60 month time period”.

[30] Therefore the review dates after January 1, 1998, for FEL awards, were made subject to section 44 of the WSIA, as amended. Sections 44(1) and (2) of the WSIA provided for reviews of the loss of earnings benefits paid under that Act, as follows:

44(1) Every year, or if a material change in circumstances occurs, the Board may review payments to a worker for loss of earnings and may confirm, vary or discontinue the payments.

(2) The Board shall not review the payments more than 72 months after the date of the worker’s injury. However, the Board may do so if, before the 72-month period expires, the worker has failed to notify the Board of a material change in circumstances or has engaged in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan.

[31] Therefore, reading section 44 together with 107(2), the relevant “lock in” language applicable to final FEL benefits under this provision (where the exceptions do not apply), is the following:

The Board shall not review the payments more than 60 months after the date the compensation for future loss of earnings is determined by the Board under section 43 of the pre-1997 Act.

[32] It is notable that while the provision precludes a review of FEL benefits more than 60 months after the date that the Board makes a determination under section 43, the time runs from the date of the determination. Therefore the provision reflects the other provisions of the WSIA which provide that the initial FEL determination may be deferred.

[33] It is also relevant to note that section 108 of the WSIA amends the vocational rehabilitation provisions of the pre-1997 Act and provides that section 42 of the WSIA applies to pre-1997 accidents. Therefore workers whose accidents occurred prior to January 1, 1997 became entitled to a labour market assessment and plan within the terms of section 42.

[34] The Board addressed the issue of how FEL benefits are to be determined when entitlement is in dispute in *Operational Policy Manual (OPM) Document No. 18-04-03: Date of Determination* dated October 12, 2004. The policy states:

If a dispute regarding entitlement to compensation prevents the WSIB from determining the FEL benefit by the usual determination dates, the WSIB determines the FEL benefit as soon as the issue in dispute is resolved.

[35] This provision states that the WSIB will make the determination of the FEL benefit as soon as the dispute is resolved. Therefore it reflects that statutory provisions that the FEL determination may be deferred. However, in my view, it does not state, explicitly, whether, when the determination is made, it will be made retroactively as of the date that FEL would have been determined if the Board's adjudication had proceeded in the normal course, or prospectively.

[36] Mr. Lovely referred me to Tribunal *Decisions No. 1176/00* and *2400/07*. Although those decisions are based on different facts, both decisions determined that FEL benefits should be set prospectively. Both ordered that temporary benefits apply during the retroactive time period. Both decisions review the approaches taken in other Tribunal decisions and recognize some discretion in this respect. However, especially when labour market assessments are required, which may result in labour market re-entry plans, the decisions favour the prospective approach. In *Decision No. 2400/07*, if a prospective approach had not been used, the worker would have lost entitlement to the LMR services otherwise provided by the Act.

[37] I note also *Decision No. 2239/00*. In that case, the Vice-Chair noted that it was possible to adjudicate the claim under s. 37 for temporary benefits up to the point that entitlement is established, or to make a retroactive FEL determination. The Vice-Chair was of the view that either approach was consistent with the legislation. The Vice-Chair took the view that the first approach was preferable if a worker has rehabilitation potential at the time the claim is allowed. This would enable FEL determinations to be made prospectively and to allow for proper formulation of the vocational rehabilitation plan which forms the basis for the FEL determinations. If it is clear that a worker will never return to work, it may be more appropriate to make retroactive FEL determinations.

#### (v) Analysis and conclusions

[38] I find no reason to vary the Board's determination of the D1 date on the merits and justice of the case. The ARO determined that the policy requires that FEL benefits be determined prospectively and not retroactively. While I do not read the wording of Board policy to necessarily mandate that approach, I accept the ARO's position that it is Board practice to apply the policy in this way in this circumstance. It is also consistent with the approach of the Tribunal decisions discussed above.

[39] The advantage of the retroactive approach is that it may provide for benefits that more closely approximate what would have been awarded if the adjudication had taken place in the normal course. However, the disadvantage is that it may require the adjudicator to turn a blind eye to evidence that became available later, and that may be relevant to the determinations. In many cases, the retroactive approach might be to the disadvantage of the worker, because the later information might support his view of his entitlement or might allow for additional LMR assistance. In my view, it is not unreasonable for the Board to determine the FEL date prospectively, therefore ensuring that the award is based on all the available information, especially when a FEL date has never previously been determined and when the Act clearly provides the Board with the discretion to defer that determination.

[40] In my view, the circumstances in this case do not support a retroactive approach within the principles of the above Tribunal cases. The fact that a worker would receive more benefits if the policy were interpreted differently is not a basis for applying the law in one way or another. The Act and Board policy should be applied consistently, with similar interpretations applying in similar circumstances, irrespective of the effect on benefits in the individual case. The fact that one approach might be of more benefit to a worker than another, on specific facts, is not an exceptional circumstance. It does not call for the application of the merits and justice provisions of the Act. Exceptional circumstances arise when unusual facts produce results which were likely not contemplated when the policy or policy interpretation was developed. However, these facts fall directly within the type of circumstances that fall to be addressed by section 43(10) of the Act and by the Board policy provision. They are not exceptional.

[41] In this case, the evidence indicates that the worker was not totally disabled. Mr. Lovely has not contested the award of deemed wages at minimum wage in the years prior to 2003, and the worker was able to return to his regular work in 2003. The prospective FEL determination, which granted a sustainability award at the D1 date in November 2007, kept open the possibility that the worker might be able to receive LMR services under the claim if further difficulties developed. The facts fall within the types of facts described in the above Tribunal decisions as appropriate facts to set the FEL award prospectively.

[42] The fact that the Board claims adjudicator incorporated an SEB analysis into the determination of the worker's temporary benefits under section 37 does not mean that the determination was, in substance, a FEL determination. It is clear that he intended to determine temporary benefits. The reference to "TPDiff" is a reference to the calculation of temporary partial difference benefits under section 37(2)(a). Section 37(2)(a) provides for the calculation of temporary partial (TP) benefits for a worker who has returned to work as the difference between the worker's earnings in a suitable employment or business and the pre-injury earnings. I note that the calculation may involve "deeming". It is not based on actual earnings. It is based on what the worker is "able" to earn. Section 37(2)(b) provides for a similar but slightly different approach for a worker who has not returned to work. If the criteria of the section are met, the worker is entitled to full benefits. If the criteria are not met, section 37(3) provides that benefits under section 37(2)(b)(ii) and (iii) are to be paid in proportion to the worker's disability. That also requires that the Board make a judgement about the effect of the disability on earnings and that the Board determine what benefits are appropriately paid.

- [43] Historically, the Board paid 50% benefits in this situation. . The 50% benefit is not set out in the legislation. It was paid by the Board as a discretionary matter in recognition of the proportion of disability, and of the fact that a partially disabled worker might still have experienced some wage loss, due to his compensable injury, even in the circumstances in which he was not entitled to full benefits under this subsection. The 50% reduction in the benefits paid reflected, in substance, a rough and ready calculation of the “deemed” earnings he could have earned.
- [44] It has always been necessary for the Board to determine what to a pay a worker, in accordance with section 37(3), when the criteria of section 37(2)(b) are not met.
- [45] It is arguable that the claims adjudicator’s reference to “TPDiff” benefits was a technical error when he was determining benefits under section 37(2)(b) and not under section 37(2)(a). However, in my view, there is no doubt that the claims adjudicator was intending to determine temporary benefits under section 37. He was not addressing his mind to FEL benefits.
- [46] I also do not necessarily find any error in the method that the claims adjudicator used to calculate the benefits under section 37(2)(b). In my view, the claims adjudicator used deemed SEB earnings in place of the benefits that would have been paid at 50% under earlier Board practice. The claims adjudicator’s approach in this case, in my view, is based on an implicit and unstated finding that the worker was not entitled to full benefits within the terms of section 37(2)(b). Other than stating that the worker was “underemployed”, the claims adjudicator does not fully explain his reasons for that finding, and does not address the language of the section in denying full benefits. However, that is a question of the appropriateness of the quantum of the award. It does not mean that the claims adjudicator was not determining temporary benefits.
- [47] In my view, if the initial assumption was correct, and the worker was not entitled to full benefits, the use of an SEB as the basis for the calculation of benefits was not an error. It rather reflects a change in Board practice. It is true that section 37(2)(b) and section 37(3) do not stipulate that calculation. However, those provisions did not stipulate the Board’s prior practice, or paying 50% benefits, either. In my view, the practice of using a calculation based on deemed SEB earnings when a worker is not entitled to full benefits is more precise than the prior practice of using 50% earnings, and therefore not inappropriate. Section 108 of the WSIA made section 42 applicable to workers with pre-1997 injuries. Therefore these workers may receive an LMR assessment and/or plan. Therefore the Board may have the information necessary to determine an SEB and the worker’s likely wage loss if he had returned to work, more precisely than it did in the era that it paid 50% benefits. The fact that the Board used an SEB analysis to calculate the worker’s benefits under section 37(2)(b) was not inconsistent with section 37, just as the practice of paying 50% benefits was not inconsistent with that section in the past. It was an exercise of the Board’s discretion, in determining the proportion of the worker’s disability under section 37(3) and the benefit entitlement when the criteria of section 37(2)(b) -entitling the worker to full benefits - were not satisfied.

[48] That does not mean that section 37(2)(b) applies to temporary benefits in the same way that section 43 applies to FEL benefits. Section 37(2)(b) provides a criteria for entitlement to full benefits. It is open to a worker to claim that he has met the criteria of the section, for instance because he has engaged in appropriate self-directed vocational rehabilitation by looking for work. The language is different from the language of the FEL provisions and may apply differently. When an SEB is used to calculate benefits, it is also open to a worker to object on the basis that a wrong SEB has been established, or that the Board's calculation of deemed earnings is wrong, which are issues that would also be relevant to a FEL calculation.

[49] However, these are matters that go to the quantum of the award under section 37(2)(b). The worker did not appeal the quantum of the award in this case. Therefore it is not necessary for me to address this aspect of the issue.

[50] When the Board considered the worker's entitlement from 1991 to 2007, the Board was determining temporary benefits under section 37 of the pre-1997 Act and not FEL benefits. With respect to the FEL award, the Board was acting within its discretion, and in a manner that was consistent with the provisions of the Act and Board policy, as well as with Tribunal decisions, when it determined the FEL benefits on a prospective basis, as of November 2007. There is no basis for me to vary that determination.

**DISPOSITION**

[51]           The appeal is denied.

DATED: January 8, 2010

SIGNED: E.J. Smith