

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

[PERSONAL INFORMATION]  
CASE ID #[PERSONAL INFORMATION]

**APPELLANT**

AND:

WORKERS COMPENSATION BOARD OF  
PRINCE EDWARD ISLAND

**RESPONDENT**

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**DECISION #251**

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Appellant

Nicole McKenna, Worker Advisor

Respondent

Stephen Carpenter, Solicitor representing the  
Workers Compensation Board

Place and Date of Hearing

May 23, 2017  
Rodd Royalty Charlottetown  
14 Capital Drive  
Charlottetown, Prince Edward Island

Date of Decision

October 19, 2017

## Appeal Proceedings

1. This appeal was conducted on May 23, 2017 before the Workers Compensation Appeals Tribunal ("Tribunal").
2. The Appellant brings this appeal from the decision of the Internal Reconsideration Officer ("IRO") IR # [PERSONAL INFORMATION] dated March 7, 2016, which denied the Appellant's request for pension replacement benefits.

## Facts

3. The Appellant was employed as a [PERSONAL INFORMATION] worker with [PERSONAL INFORMATION] during the period November 23, 1986 to January 23, 1999. As an employee of this company, the Appellant contributed to an employer sponsored Registered Retirement Savings Plan ("RRSP") and employee contributions were matched by the employer.
4. On April 2, 2013 the Appellant was advised by letter that his extended wage loss benefits would end October 31, 2013 when he would turn 65 years of age. He was also advised that he may be eligible for pension replacement benefits under section 43 of the *Workers Compensation Act*, R.S.P.E.I. 1988, W-7.1 ("Act").
5. On September 23, 2014 the Appellant was advised that he was not eligible for pension replacement benefits as his employer sponsored RRSP did not meet the criteria for "employment sponsored pension plan". In particular, the letter stated that any losses he may have suffered in respect of his work pension plan were not covered by section 43 of the *Act* as the pension plan was a Group RRSP and was not registered with and certified by the regulatory agency having jurisdiction in the province.

6. A Request for Internal Reconsideration with an attached Member Booklet for [PERSONAL INFORMATION] outlined the details of his Group RRSP plan, was filed by the Worker Advisor on behalf of the Appellant on October 7, 2014 seeking to have the September 23, 2014 decision overturned.
7. Although the IRO decided the information contained in the Member Booklet for [PERSONAL INFORMATION] (which provided details of the RRSP), constituted new evidence by letter dated October 9, 2015, the Appellant was advised that the Member Booklet did not change the initial decision of the Board.
8. A fresh Request for Internal Reconsideration was filed by the Worker Advisor on the Appellant's behalf on January 15, 2016 which was denied on March 7, 2016. As in the initial decision, the IRO decision also determined the Appellant's plan through [PERSONAL INFORMATION] did not meet the requirements set out in section 43 of the Act. The IRO's rationale was that the plan did not meet the definition of an employer sponsored pension plan due to the distinction between a registered Group RRSP and a registered pension plan. Specifically, the IRO determined that any losses suffered by a worker in an employer sponsored group RRSP while receiving Board benefits are not recoverable under section 43 of the Act.

**Issue**

9. Is the Appellant entitled to pension replacement benefits under section 43 of the Act in relation to a loss of benefits in his employer sponsored Group RRSP while he was receiving workers compensation benefits?

**Appellant's Argument**

10. Entitlement to pension replacement benefits is set out in section 43 of the Act and Board's policy, POL-124. At the time of the IRO decision in the Appellant's case, the policy's application was restricted to defined benefit and defined

contribution pension plans. However, effective March 31, 2016 this policy was amended to extend application of its provisions to retirement savings plans as well. Specifically, the following definitions were amended to include retirement savings plans:

*"Pension replacement benefits" means the amount of pension benefit, under the Canada Pension Plan or a registered employer sponsored pension or retirement savings plan, a worker can demonstrate to the satisfaction of the Workers Compensation Board he or she has lost as the result of the compensable injury.*

*"Registered employer sponsored pension plan" means a pension or retirement savings plan that is registered under the Income Tax Act for Canada.*

11. As a result, the Appellant argued it was clear that workers who participate in Group RRSP programs were intended to be covered under section 43 of the Act and POL-124, for pension replacement benefits. The fact that the Board amended its policy shortly after issuing this decision demonstrated its intention to cover a broader range of retirement savings plans.
12. The Appellant argued that the IRO took too narrow of a view in its interpretation of section 43 and the meaning of "pension". The Appellant noted that there is no reason why the legislature would have intended to distinguish RRSPs from pensions. As such, the Tribunal should read-in other types of saving plans into POL-124.
13. The Tribunal was referred to another decision involving a claim for pension replacement benefits, IR#[PERSONAL INFORMATION], wherein, the IRO concluded that in the absence of pension benefits legislation and a provincial agency which could accept registration of pension plans, Canada Revenue Agency could be considered to be an agency in the province with jurisdiction to register pension plans pursuant to section 43 of the Act.

14. The Appellant submitted that it was not asking the Tribunal to apply the amendments to POL-124 retroactively, but rather that the Tribunal should consider the March 31, 2016 amendment in its interpretation of the policy and legislation in effect at the relevant time.
15. In light of i) the IRO's own earlier decision that plan registration with Canada Revenue Agency can satisfy the requirements of section 43 of the *Act*, and ii) the recent amendments to Board Policy POL-124 noted above to extend application of the policy to employer sponsored group RRSPs, the Appellant submits that the March 7, 2016 decision of the IRO should be overturned and his claim allowed.

### **Respondent's Argument**

16. A worker is entitled to receive pension replacement benefits once he or she reaches the age of 65, if the worker meets the requirements of s. 43 of *Act*.
17. The applicable Board policy on this issue at the time was Policy POL-124, Pension Replacement Benefits, which defined "registered employer sponsored pension plan" as follows:

*...means a pension plan that is registered under the Income Tax Act of Canada.*

18. The note on page 7 indicates that:

*March 31, 2016 – The policy was amended to include retirement savings plans when determining the loss of pension benefits experienced by injured workers.*

19. The wording of section 43 of the *Act* and POL-124 are specific as far as what type of loss the worker has to suffer to be eligible for pension replacement benefits. The legislator was specific that the loss must result from a "registered sponsored pension plan which is registered with and certified by

the regulatory agency having jurisdiction in this province". While the Respondent acknowledged that registration of the pension plan with the Canada Revenue Agency will likely be sufficient to meet the registration requirements, it submits that all RRSPs are registered with the Canada Revenue Agency, so this fact alone is not determinative that the Appellant's particular plan meets the requirements of s. 43 of the *Act*.

20. The Board also relied on objective evidence to determine that the Appellant's group RRSP did not meet the requirements of s. 43 of the *Act*.

21. The employer, [PERSONAL INFORMATION], provided the following detail in relation to the group RRSP in a letter dated September 23, 2013 from [PERSONAL INFORMATION]:

*[PERSONAL INFORMATION] offers its employees an employer sponsored Registered Retirement Savings Plan (RRSP) whereby the Company matches the employee contribution up to an eligible amount. The company does not offer any type of pension plan.*

22. The Board sought the assistance of actuarial analyst, [PERSONAL INFORMATION], to determine whether the Appellant's group RRSP was an employer sponsored pension plan as defined in s. 43 of the *Act*. The answer was that the plan did not meet the requirements of the *Act*. Specifically, the analyst stated:

*As the Group RRSP is not a registered employer sponsored pension plan, this does not satisfy the criteria as prescribed above under the Act of the policy [...]*

*For further background, please note that a Group RRSP is a collection of individual RRSPs, wherein the employer provides extra wages to the employee with the agreement that such extra wages be used by the employee to purchase an individual RRSP, with such purchase performed according to a guiding plan text. However, while there is an applicable plan text that guides the operation of the Group RRSP, this is based on a "non-registered"*

*agreement between the employee and the employer only. In other words, a regulatory agency is not involved in enforcing such a plan text as it is not registered with and certified by any regulatory agency.*

23. Further Information was obtained from the Benefits Specialist with the employer, [PERSONAL INFORMATION] stated as follows in her email of August 6, 2015:

[PERSONAL INFORMATION] policy 38000 is an RRSP (Registered Retirement Savings Plan) which is a completely different product than a pension plan. Pension plans have pension legislation attached to them where RRSPs do not. There is a set of Capital Accumulation Guidelines that are suggested best practice for the RRSPs. RRSPs are registered with the Canada Revenue Agency as are pension plans. However, [PERSONAL INFORMATION] does not have a pension plan...only an RRSP

24. With respect to the Appellant's argument that the March 31, 2016 amendment to include RRSPs should be considered in the Tribunal's interpretation of the policy and legislation, the Respondent submitted that Policy POL-124 was in fact not amended until weeks after the decision for internal reconsideration was rendered. The Respondent takes the position that this amendment to the Policy cannot be taken into consideration in assessing the Appellant's claim, as it would have the effect of applying a board policy retroactively. The Workers Compensation legislative scheme makes it clear that the policies are more than guidelines and that they must be applied.
25. The Respondent referred the Tribunal to workers compensation appeal tribunal decisions from Ontario, which suggest there is a recognized presumption against the retroactive application of a policy. In order to rebut this presumption, it must be shown that the governing legislation expressly authorizes retroactivity or that retroactivity is authorized by necessary implication.

*Decision No. 2828/01, 2003 CarswellOnt 6149 (ON W.S.I.A.T.)  
Decision No. 878/06R, 2007 CarswellOnt 8555 (ON W.S.I.A.T.)*

26. The Ontario Workplace Safety and Insurance Appeals Tribunal stated as follows on the issue in Decision No. 2828/01, at para. 57:

*There is no question that the denials by Board staff of this worker's appeal were made under the old policy. To apply the "new policy" on the facts of this case would result in a retroactive application of a substantive new policy to past events. In our opinion, an appeal from Board decisions should evaluate the correctness of those decisions in light of the policy applicable when the decisions were made.*

27. In its 2007 Decision No. 878106R, the Ontario Workplace Safety and Insurance Appeals Tribunal came to a similar conclusion against retroactively applying amendments to Board policies, at para. 67:

*In my view, a different interpretation would produce an unfair result. It would mean that the entitlement of a party whose benefits are subject to appeal might change, from day to day, while in the appeal process, based on changes in the wording of the Board policy. However if the operating level decision were not appealed, no such change in the application of the law would apply....*

28. The amendment to Policy POL-124 was a substantive change in policy and not merely a clarification of policy. It extended the entitlement to benefits to retirement savings plans. The wording change in the policy did not use clarifying language such as: "*pension, which includes a retirement savings plan*", but in fact stated "*pension or retirement savings plan*". This use of language clearly demonstrates a change in the board policy from what had previously been in place.
29. All relevant events to this matter occurred prior to the amendment in the policy to add retirement savings plans to the plans that would be eligible for pension replacement benefits. In the circumstances, the Respondent suggests

that it would be inappropriate to retroactively apply the amended Policy POL-124.

### **Decision**

30. For reasons which are set out in this decision, the Appellant's appeal is denied. The following is the rationale for this decision.

31. Section 43 of the Act states:

*43. Where a worker who is eligible for wage loss benefits as a result of an injury that occurs after the coming into force of this Act attains the age of 65, an amount equal to the amount of benefit that the worker can demonstrate to the satisfaction of the Board he or she has lost as the result of the injury for which he or she is receiving compensation under this Act, under the Canada Pension Plan or from a registered employer sponsored pension plan which is registered with and certified by the regulatory agency having jurisdiction in this province, shall be paid to him or her by the Board periodically for such time and at such times and in such manner and form as the Board considers advisable. 1994, c. 67, s. 43 [Emphasis added.]*

32. The Tribunal finds that the Appellant's Group RRSP does not meet the definition of a "registered employer sponsored pension plan" under section 43 and POL-124, and therefore, the IRO decision to deny pension replacement benefits was appropriate. In reaching its decision, the Tribunal considered the evidence gathered by the Board from [PERSONAL INFORMATION], [PERSONAL INFORMATION], and [PERSONAL INFORMATION] in determining that the RRSP does not meet the definition under the policy.

33. At the hearing, the Appellant stated that it was not asking for a retroactive application of the policies, but rather, asked that an inference should be drawn from the fact that the policy was changed to include RRSPs shortly after the IRO's decision. The Tribunal finds that there was no ambiguity in the definition of "registered employer sponsored pension plan" in effect at the

time of the decisions. The fact that the policy was later amended to include RRSPs shows that the Board felt a substantive change was required to its policy on pension replacement benefits. To apply elements of the "new policy" on the facts of this case, would result in effectively a retroactive application of a substantive new policy to past events. Pursuant to section 56(17) of the *Act*, the Tribunal is bound and must fully implement the policies of the Board. No provision of the *Act* expressly authorizes the retroactive application of board policies. As such, the Tribunal agrees with the Respondent that it must implement the Board policies which were in effect at the time the decisions were made.

34. Although the Tribunal agrees that the registration of a pension plan with the Canada Revenue Agency is sufficient to meet the prescribed registration requirements (due to PEI's lack of pension legislation), this fact is not sufficient to satisfy the entire definition under POL-124. The issue is that the "old POL-124" did not include RRSPs. Although this gap was addressed by amendment of March 31, 2016, at the relevant time of the Case Coordinator and IRO decisions, the applicable policy was limited solely to "pension plans".
35. This Tribunal would like to thank the parties for their submissions.

Dated this 19<sup>th</sup> day of October, 2017.

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Meaghan S. Hughes, Vice-Chair  
Workers Compensation Appeal Tribunal

Concurred:

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Eugene (Stu) Lavers, Employer Representative

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Gordon Huestis, Worker Representative