

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

[PERSONAL INFORMATION]
CASE ID # [PERSONAL INFORMATION]

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION #255

Appellant	Nicole McKenna, Worker Advisor, representing the Worker
Respondent	Stephen Carpenter, Solicitor representing the Workers Compensation Board
Place and Date of Hearing	June 20, 2017 Loyalist Lakeview Resort 195 Heather Moyse Drive, Summerside, Prince Edward Island
Date of Decision	November 16, 2017

1. This is an appeal arising from a decision of the Internal Reconsideration Officer (the "IRO") of the Workers Compensation Board (the "Board"), IR# [PERSONAL INFORMATION], dated March 17, 2015, which denied the Worker's request for pension replacement benefits.

FACTS AND EVIDENCE

2. The Worker was injured on November 7, 2000, and received temporary wage loss benefits from November 8, 2000 to December 12, 2001, and was in receipt of extended wage loss benefits from December 13, 2001 until March 31, 2013, when the Worker reached the age of 65 years.
3. Effective December 31, 1995, the Worker's Employer dissolved its pension plan, replacing same with a Group Registered Retirement Savings Plan ("the Group RRSP") which was put into effect January 1, 1996 and which remained in effect on November 7, 2000, the date of the Worker's accident.
4. By letter dated July 22, 2013, the Worker requested that the Board consider pension replacement benefits for him under Section 43 of the *Workers' Compensation Act*.
5. The Board subsequently requested that an external actuary provide an opinion on the Worker's pension replacement benefits. By email dated May 20, 2014, the actuary opined that the Group RRSP was not a "*registered employer sponsored pension plan*" such that the actuary believed the Worker was not eligible for a pension replacement benefit. The actuary opined that a group RRSP constitutes a collection of individual RRSPs, with the employer providing its employees an extra wage for the purchase of the individual RRSP in accordance with an agreement which is not registered with or certified by any regulatory agency.
6. By letter dated September 5, 2014, the Board advised the Worker that he was not entitled to a pension replacement benefit with respect to the Group RRSP, essentially for the reasons set forth in the actuary's email of May 20, 2014.
7. The Worker requested reconsideration, and by decision letter dated March 17, 2015, the IRO denied the reconsideration request, finding that the Group RRSP was not registered under the *Income Tax Act* and as such, the Worker did not meet the criteria for consideration for any loss of pension from his Employer under section 43 of the *Worker's Compensation Act*.
8. The Worker appealed the IRO's decision to the Workers Compensation Appeals Tribunal (WCAT) by Notice of Appeal dated April 16, 2015.
9. Subsequent to the IRO decision but prior to the WCAT hearing, on March 31, 2016, the Board amended Board Policy -POL-124 - Pension Replacement

Benefits and specifically the definition "Registered employer sponsored pension plan."

10. From September 28, 2010 to March 30, 2016, POL-124 provided in part as follows:

"*Definitions*

In this policy:

- ...
5. "Registered employer sponsored pension plan" means a pension plan that is registered under the Income Tax Act for Canada.

Policy

...
Eligibility Criteria

- ...
3. To be eligible for pension replacement benefits the worker must meet all of the following criteria:

...
The worker is in receipt of pension benefits under the Canada Pension Plan or a registered employer sponsored plan;

The worker can demonstrate to the satisfaction of the Workers' Compensation Board that as a result of the compensable injury, the worker has lost benefits under the Canada Pension Plan or a registered employer sponsored pension plan."

11. On March 31, 2016, the foregoing provisions of Board Policy POL-124 were amended to read as follows:

"*Definitions*

In this policy:

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

Policy

...
Eligibility Criteria

- ...
2. To be eligible for pension replacement benefits the worker must meet all of the following criteria:

The worker is in receipt of pension benefits under the Canada Pension Plan or a registered employer sponsored plan or retirement savings plan:

The worker can demonstrate to the satisfaction of the Workers' Compensation Board that as a result of the compensable injury, the worker has lost benefits under the Canada Pension Plan or a registered employer sponsored pension plan or retirement savings plan." [Underlined provisions were added by the March 31, 2016 amendment]

ISSUE

12. The issue in this appeal is whether the Worker is entitled to pension replacement benefits.

LAW, ANALYSIS AND DECISION

13. WCAT reviews the IRO's decision on a standard of correctness. In applying the standard of correctness, WCAT undertakes its own analysis of the issue and then determines whether the IRO decided the issue correctly.
14. Entitlement to pension replacement benefits is provided by Section 43 of the *Workers Compensation Act*, which states as follows:

*"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." [Emphasis added]*

The term "registered employer sponsored pension plan" is not defined in the *Workers' Compensation Act*.

15. With respect to section 43 of the *Workers' Compensation Act*, the Board argues that section 43 provides benefits only for *registered sponsored pension plans*", the Government of Canada distinguishes between "*registered pension plans*" and a "*registered retirement savings plan*", such that while an RRSP is registered with the Canada Revenue Agency, it is not registered with the Canada Revenue Agency as a pension plan and because of this distinction, the

Group RRSP cannot be considered a “*registered pension plan*” as it was not registered as a pension plan with the Canada Revenue Agency.

16. With respect to Board Policy - POL 124, the Board argues that WCAT should not consider the Policy as it existed subsequent to the March 31, 2016 amendment on the basis that there is a presumption against retroactive application of a policy such that it must be shown that the governing legislation either expressly, or by implication, authorizes retroactive application. The Board submits that there is nothing in the *Workers' Compensation Act* which authorizes retroactive application of Board policy, and that the amendment to Board Policy POL 124 was a substantive change, not a clarification, such that it extended entitlement of benefits to RRSPs.
17. The Worker argues that the amendment to Board Policy POL-124 makes it clear that workers who participate in employer sponsored RRSPs are intended to be covered by section 43 of the *Workers' Compensation Act*, and indicates that it would be unfair to the Worker to bear the hardship of losing out on pension replacement benefits.
18. Subsection 30(1) of the *Workers' Compensation Act* provides the Board's authority to establish policies and specifically provides as follows:

“30.(1) ***The directors shall establish policies and programs consistent with this Act in relation to the following:***
(a) *the administration of this Act;*
(b) ***compensation benefits to injured workers and dependants;***
(c) *rehabilitation of injured workers; and*
(d) *assessments and investments.”* [Emphasis added]
19. Subsection 56(17) of the *Workers' Compensation Act* provides as follows:

“56(17) ***The Appeal Tribunal shall be bound by and shall fully implement the policies of the Board*** and the Appeal Tribunal, its chairperson and members are prohibited from enacting or attempting to enact or implement policies with respect to anything within the scope of this Part.” [Emphasis added]
20. While the Board has argued that the amendment to Policy - POL 124 constitutes an extension of benefits such that the amendment constitutes a substantive change, the *Workers' Compensation Act* does not expressly authorize the Board to extend benefits beyond what are provided for in the *Workers' Compensation Act* and WCAT specifically notes that the Board is only authorized by subsection 30(1) of the *Act* to establish policies “*consistent with*” the *Workers' Compensation Act*.

21. Section 43 of the *Workers' Compensation Act* has not been changed since the Worker's request for pension replacement benefits; notwithstanding the amendment to Board Policy POL-124. Accordingly, the PEI Legislature has not changed the basis for entitlement to pension replacement benefits beyond what is provided for in Section 43 of the *Workers' Compensation Act*.
22. Since the Board is only authorized to establish policies "consistent with" the *Workers' Compensation Act*, the fact that the PEI Legislature has not amended section 43 of the *Workers' Compensation Act* notwithstanding the amendment to Board Policy POL-124, indicates to WCAT that the amendment to Board Policy POL-124 constituted merely a clarification of a Worker's entitlement to benefits under Section 43 of the *Worker's Compensation Act*, and not an extension of benefits. To find otherwise would call into question whether the amendment to POL-124 is "consistent with" the *Workers' Compensation Act* and therefore validly enacted by the Board, because the Board does not appear to have the power, by policy, to enlarge the scope of benefits payable to a Worker beyond what is provided for in the *Workers' Compensation Act*. As noted, subsection 56(17) of the *Act* provides that WCAT is bound by and shall fully implement Board policy such that WCAT concludes that the amendment to POL-124 constituted merely a clarification of eligibility for pension replacement benefits under section 43 of the *Workers' Compensation Act*.
23. WCAT interprets the amendment to Board POL-124 to mean that the Board interprets the P.E.I. Legislature's use of the term "*registered employer sponsored pension plan*" in section 43 of the *Workers' Compensation Act* to include both pension plans and retirement savings plans registered under the *Income Tax Act*. As noted by the Board in its factum, all RRSPs are registered with the Canada Revenue Agency.
24. Based on its finding that the amendment to POL-124 constitutes a clarification of benefits, and not an extension of benefits, WCAT finds that the amendment to POL-124 must be considered by necessary implication in evaluating the Worker's eligibility for pension replacement benefits. In other words, because the Worker's eligibility for pension replacement benefits has not changed because section 43 of the *Workers' Compensation Act* has not been amended by the PEI Legislature since the Worker requested pension replacement benefits; it is only fair that the Worker's claim be evaluated in light of the amendment to POL-124. To do otherwise would in WCAT's view be unfair to the Worker.
25. WCAT finds that the Worker's Group RRSP constitutes a retirement savings plan within the meaning of Policy POL-124 as amended, and as it is a retirement savings plan, it is registered with the Canada Revenue Agency. Accordingly, WCAT finds that the Worker is eligible for pension replacement benefits under Section 43 of the *Act* and POL-124 as amended.

26. Accordingly, for the reasons set out above, WCAT allows the Worker's appeal, overturns the IRO's decision, and finds that the Worker is eligible for pension replacement benefits with respect to the Group RRSP. WCAT remits the Worker's claim for pension replacement benefits back to the Board for the calculation of the amount of the replacement benefit payable to the Worker under Board Policy POL-124 as amended.

Dated this 16th day of November, 2017.

John L. Ramsay, Q.C., Vice-Chair
Workers Compensation Appeal Tribunal

Concurred:

Donald Cudmore, Employer Representative

Elizabeth (Libba) Mobbs, Worker Representative