FTR Now

WSIAT Finds WSIB's Fatal Claim Premium Adjustment Policy Contrary to WSIA

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In a recent decision, the majority of a Workplace Safety and Insurance Tribunal (Tribunal) Panel ruled that the WSIB's Fatal Claim Premium Adjustment Policy (FCPAP) – which deprives employers of experience rating rebates in any year in which they experience a workplace fatality – is contrary to the *Workplace Safety and Insurance Act, 1997* (WSIA). Among its key findings, the Tribunal held that:

1. The FCPAP achieves results that are "directly opposite" to those intended by the WSIA, since only employers with better than average claims records will face premium increases and employers with better claims records will face larger premium increases
2. Section 82 of the WSIA is intended to apply to a particular employer in a general sense, not to single past incidents, and therefore does not authorize premium increases as a result of a workplace fatality
3. The wording of the FCPAP does not link increased premiums to health and safety deficiencies and essentially improperly creates an "absolute liability" offence because a premium increase occurs for any employer that is expecting an experience rating rebate and experiences a workplace fatality, regardless of the circumstances.

As the first successful challenge to the FCPAP, this case is an important milestone for NEER experience rated employers with robust health and safety records.

We discuss the Tribunal's decision and key findings in this *FTR Now*.

Background to the Decision

Decision No. 2346/12I4 released on June 1, 2016 involved an employer that lost a substantial experience rating rebate in 2008 following a worker fatality pursuant to the Workplace Safety and Insurance Board's (WSIB) contentious FCPAP.

The FCPAP stipulates that employers under the NEER program are not eligible for an experience rating rebate in a year in which they experience a workplace fatality (WSIB Operational Policy 14-02-17). Thus, as a result of a workplace fatality, the employer in this case was denied the rebate to which it would otherwise have been entitled based on its WSIB claims cost experience over the preceding three-year period.

The employer appealed and submitted that:

1. The FCPAP should not be applied on the merits and justice of the situation
2. The FCPAP was not authorized by the WSIA
3. The FCPAP was a penalty and the manner in which it was imposed contravened the *Canadian Charter of Rights and Freedoms*.

In an earlier interim ruling (*Decision No. 2346/12I2*), the Tribunal found that the employer was not entitled to relief from the application of the FCPAP based on the merits and justice of the situation.

In *Decision No. 2346/12I4,* the Tribunal considered whether the FCPAP was authorized by the WSIA.

The WSIB argued that the FCPAP was authorized by section 82 of the WSIA, which empowers it to increase or decrease premiums otherwise payable to a particular employer in appropriate circumstances. Section 82 provides:

Adjustments in premiums for particular employers

82. The Board may increase or decrease the premiums otherwise payable by a particular employer in such circumstances as the Board considers appropriate including the following:

1. If, in the opinion of the Board, the employer has not taken sufficient precautions to prevent accidents to workers or the working conditions are not safe for workers.
2. If the employer's accident record has been consistently good and the employer's ways, works, machinery and appliances conform to modern standards so as to reduce the hazard of accidents to a minimum.
3. If the employer has complied with the regulations made under this Act or the *Occupational Health and Safety Act* respecting first aid.
4. If the frequency of work injuries among the employer's workers and the accident cost of those injuries is consistently higher than that of the average in the industry in which the employer is engaged.

The Decision

The Panel majority disagreed and concluded that the FCPAP is not authorized by section 82 of the WSIA for the following three reasons.

1. FCPAP achieves results that are "directly opposite" to those intended by section 82

The Panel majority found that the purpose of section 82 of the WSIA is to allow the WSIB to establish programs that encourage the pursuit of occupational health and safety objectives by Schedule 1 employers. More specifically, the intended results of section 82 include:

- creating incentives for employers with consistently good accident frequency and cost records
- creating disincentives for employers with worse than average accident frequency and cost records.

The exercise of the WSIB's discretion under section 82 may not be arbitrary, and must "be used to promote the policies and objects" of the WSIA.

The majority of the Panel accepted the employer's argument that the way in which the FCPAP identifies which employers will face increased premiums and the determination of the amount of the premium increases run contrary to the purpose of section 82, since only employers with better than average claims records will face premium increases. Moreover, the better the employer's record and experience rating rebate amount, the higher the "premium increase" under the FCPAP. Conversely, employers who did not qualify for a rebate are essentially "exempt" from the possibility of an increased premium [see paragraphs 88 – 99].

The Panel majority found that this approach yields results that are directly contrary to the purpose of section 82.

2. Section 82 applies to employers – not single incidents

The Panel majority also found that section 82 is intended to apply to the circumstances of a particular Schedule 1 employer in a general sense, and not to single past workplace incidents. It stated that the purpose of section 82 is related primarily to the obligation of Schedule 1 employers to manage their occupational health and safety activities so as to benefit and not unduly or unnecessarily harm the interests of other Schedule 1 employers that will be affected by its claims costs [see paragraph 121].

To this end, section 82 allows the Board to address the responsibility of individual Schedule 1 employers towards other Schedule 1 employers by permitting it to identify employers whose accident frequency costs are higher than they should be for industry standards.

The Panel majority ruled that the occurrence of a single accident, no matter how significant, is not enough on its own to conclude that the employer's health and safety activities have created an undue financial burden on the other Schedule 1 employers, since the employer's accidents costs may still be below industry average. A single incident may also not be a reliable indicator of whether the employer's operations are more hazardous than other industry employer practices, and therefore more likely to create future costs.

Simply put, the Panel majority concluded that section 82 is not intended to increase the premiums of individual employers based on single workplace incidents in the absence of circumstances that suggest a risk of future accidents and future costs that are inappropriate and unnecessary [see paragraphs 121 – 124].

3. The FCPAP does not link increased premiums to health and safety deficiencies

The Panel majority concluded that, even if section 82 could be used to increase an employer's premiums based upon a single incident, the FCPAP would still not be authorized under the WSIA. In its present form, the FCPAP does not require a deficiency in the employer's health and safety practices to trigger the premium increase. There is no indication in the FCPAP that the sufficiency of an employer's compliance with health and safety requirements is relevant at all. For all intents and purposes, the FCPAP in its present form creates an absolute liability offence because a premium increase occurs for any employer expecting an experience rating rebate whenever a fatality occurs – regardless of the circumstances [see paragraphs 125, 129].

This failure to link the premium increase with health and safety concerns was found to be inconsistent with section 82. Furthermore, the WSIB's administrative practice of conducting an investigation did not save the FCPAP, since under section 126 of the WSIA, the FCPAP "must speak for itself" [see paragraphs 132 – 133].

Next Steps

While this ruling is an important first step, the future of the FCPAP is far from settled. As required by the WSIA, the Tribunal's decision has been referred to the WSIB. The WSIB now has 60 days to invite submissions from the parties to the appeal and to issue a written direction, with reasons, to the Tribunal regarding whether the FCPAP is authorized by the WSIA or not.

The employer was successfully represented by Hicks Morley's Jodi Gallagher Healy, Edward O'Dwyer and David Bannon.

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