**WCAT Decision Number:** WCAT-2004-00133-AD
**WCAT Decision Date:** **January 13, 2004**
**Panel:** James Sheppard, Vice Chair

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## Introduction

On June 24, 1997 the worker, a self-employed unincorporated roofer, was knocked off a roof and sustained injuries to both his left and right upper extremities. Because he was not registered with the Board at the time of this injury he was deemed to be the worker of the homeowner/contractor building the home he was working on.

The worker appealed the October 31, 2000 Workers' Compensation Review Board (Review Board) findings which heard the worker's appeal of a September 15, 1998 Workers' Compensation Board (Board) decision.

The September 15, 1998 Board decision informed the worker that his wage rate would be based upon his actual 1996 earnings ($10,999.20) plus the actual net 1997 business earnings ($23,468.50) for an amended gross weekly wage rate of $445.98 of which the Board would pay 75 percent. The worker was also given a retroactive adjustment payment for wage loss benefits already paid between June 24, 1997 (date of injury) and August 30, 1998 using the amended wage rate. The figure of $445.98 was used for both the worker's initial wage rate and the 8 week wage rate under this claim.

The worker sought to have his wage rate set on his six month earnings rather than the approximately eighteen-month earnings used to determine this amended wage rate.

The Review Board panel denied the worker's appeal and found that the Board had correctly calculated the worker's wage rate.

## Issue(s)

What should the worker's initial and 8-week wage rate be?

I have read the September 15, 1998 Board decision (and a prior July 28, 1997 Board decision which set the provisional wage rate) to have set both the initial wage rate and the 8-week wage rate.

## Jurisdiction

This appeal was filed with the Appeal Division. On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by an Appeal Division panel before



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that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 39).

WCAT may inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal, but is not bound by legal precedent (see sections 250(1) and 254). WCAT must make its decision on the merits and justice of the case, but, in so doing, must apply a policy of the Board's board of directors that is applicable in the case. Policy relevant to this appeal is primarily set out in the *Rehabilitation Services & Claims Manual*, *Volume 1* (RSCM) which is pre-Bill 49, *Workers Compensation Amendment Act 2002*.

**Procedural Matters**

The worker is being represented by a workers' adviser. He requested an oral hearing in order to describe the nature of the change in the worker's earnings pattern shortly before the injury. The employer's account had been cancelled with no successor. The employers' advisers office was invited to participate in this appeal but no response was received from them by WCAT.

The initial request for an oral hearing was denied. A number of requests were made for extensions to provide a written submission. The worker indicated in his June 21, 2003 letter that he was having medical/health problems and financial problems. He did not have money to obtain papers to prove his work history. He asked for two or three more months to response. He was given until September 5, 2003. The worker did provide a declaration for proprietorship or partnership-registration filed and registered on June 11, 1996. The worker, in his August 29, 2003 letter (received September 5, 2003), again indicated he had medical and financial problems and needed more time. The workers' adviser in his September 5, 2003 letter indicated that the worker was trying unsuccessfully to locate the worker's former accountant for historical earnings information/taxation forms. The worker was given a further extension to December 4, 2003 to provide a submission. On December 3, 2003 WCAT received a written submission dated November 28, 2003 from the workers' adviser.

I find that I can render a decision based upon a review of the evidence and the information and submission filed without an oral hearing.

**Reasons and Decision**

Section 33(1) of the *Workers Compensation Act* (as it stood at the time of the worker's June 24, 1997 injury) provided the Board with the discretionary power to determine the worker's wage rate with reference to the worker's average earnings and earning capacity at the time of the injury to arrive at a figure which best represented the actual loss of earnings suffered by the worker by reason of his injury. The Board's policies on determining wage rates were set out in Chapter 9 (Average Earnings) of the RSCM.

Item #67.20 of the RSCM (8-Week Rate Review) contains guidelines for determining the worker's 8-week wage rate. This review consists of an inquiry and determination of what earnings rate best represents the long-term earnings loss suffered by the worker by reason of the injury.

The Review Board panel, in finding that the Board had properly calculated the worker's wage rate using eighteen months of earnings (and not six months), stated:

> …[The worker] has been in the roofing business for 17 years. The historical income tax records which he forwarded do not provide continuous employment for 12 months of each year, but rather sporadic employment. [The worker] would have us believe that he now works continuously for 12 months of the year and but for his injury would have earned substantially more in 1997 than he had in any previous years. We do not accept this position. The panel finds that the wage rate which would best represent [the worker's] actual loss of earnings would be that which averaged over a longer period of time, and as accurate data is available for the period January 1, 1996 to the date of injury we find those earnings to be the most appropriate to be used.

The case manager recognized that the one year period of earnings prior to the date of injury generally used to set the 8 week wage rate was not appropriate given the self-employed nature of the worker's roofing activities. He chose the eighteen month period of earnings for both the initial and 8 week wage rates.

The workers' adviser in his November 28, 2003 written submission points to three important pieces of evidence which support using the six month earnings figure: (a) the worker had started his own roofing business in 1996; (b) in the second year of that business (1997) he earned more money in six months than any full year on record; (c) the six months of record high earnings included two months (January and February) of the four slowest months in the roofing industry (November to February). In support of using the six month earnings figure he states:

> The first [reason] is that he had successfully began a new business that, by all indications, was likely to succeed and in that respect, he had made a fixed change in his earnings pattern as contemplated by Policy Item #67.20. The second reason is that the six month period prior to the injury is a fair representation of [the worker's] earning capacity as a self employed roofer because that period of time incorporates one half of the slowest annual production time in the roofing industry (November to January) as well as one half of the busiest time (March to October).

The workers' adviser also recognized that item #67.20 contemplated the use of three months and not six months where there was a fixed changed in the earning pattern of a worker. He states: "I suggest the six month period only because it incorporates in equal

amounts the busiest and the slowest periods of the industry and therefore might better meet the requirement of the "*figure best to represent the actual loss of earnings*" as directed by Section 33 of the Act. I add that Section 33 does not require any set number of months to be used in the calculation."

I find that it would be appropriate to use the six months' earnings (January 1, 1997 to June 24, 1997: $23,468.50 (net income)) prior to the date of injury to set both the initial and the 8 week wage rate because of the relatively fixed change in the worker's earning pattern which I deem likely to have continued into the future. There is sufficient evidence that prior to his June 24, 1997 injury the worker had set up his own successful roofing business which had been operating in 1996 and 1997. He provided invoices for work he had performed in each month between January of 1997 and June of 1997. This evidence indicated he had been working continuously during this period. He also provided his filed business income tax return for 1997 that substantiated the increase in his income. As the workers' adviser has submitted, the worker's earnings had increased in 1997 even taking into account part of the typically slower fall/winter periods (January and February) in the roofing business. I find that the use of the six month period of earnings rather than the eighteen months used by the Board best represents the actual loss of earnings suffered by the worker by reason of his injury and is in accordance with section 33(1) of the Act.

I recognize that item #67.20 of the RSCM addresses the guidelines for setting the long term wage rate after 8 weeks of wage loss payments and not the initial wage rate (which is generally based on the worker's rate of pay at the date of injury). However, item #66.10 (Use of Long-Term Earnings) stated that the irregular or varying nature of a worker's earnings may not make it reasonable or practical to determine the initial wage rate without having regard to earnings over a longer period of time. I find that the nature of the worker's earnings from his self employment in the roofing business warrants the use of the six month earnings figure to also set the initial (and not just the 8-week wage rate) wage rate.

**Conclusion**

The worker's appeal is allowed, in part. I vary the October 31, 2000 Review Board findings by setting the worker's wage rate (both the initial wage and the 8-week wage rate) based upon the worker's six months earnings prior to the date of injury.

James Sheppard
Vice Chair

JS/gwo



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