WCAT Decision Number: WCAT-2005-06722
WCAT Decision Date: December 16, 2005
Panel: Joanne Kembel, Vice Chair

Introduction

The worker has appealed a Workers' Compensation Board (Board) Review Division decision dated April 14, 2005. The review officer confirmed two earlier Board decisions: the first set the worker's initial wage rate and the second denied her application for reimbursement of bus fare to attend a medical appointment.

The worker requested an oral hearing but did not state why she felt this was necessary. The employer was invited but did not participate in this appeal. Since this matter involves the application of law and policy, I find an oral hearing is not necessary. I can fully determine the issues on the basis of the file contents and the worker's appeal information.

Issue(s)

1. What is the worker's entitlement regarding the short-term wage rate?

2. Is the worker entitled to reimbursement of bus fare to attend a medical appointment?

Jurisdiction

Section 239 of the *Workers Compensation Act* (Act) authorizes an appeal from the Review Division on specific matters to the Workers' Compensation Appeal Tribunal (WCAT). WCAT was established on March 3, 2003 by the *Workers Compensation Amendment Act (No. 2), 2002* (Amendment Act). Section 250(2) of the Amendment Act requires that I apply the policies of the board of directors of the Board, found in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

On August 14, 2004, the worker, a 23-year-old university student working at a restaurant, suffered injuries when she slipped and fell while carrying a tray of glassware. She underwent emergency surgery that same day for damage to her left index finger extensor tendon.

At the time of her injury, the worker had been working for the accident employer for approximately three weeks. On her application for compensation, she indicated her position was hostess/server/bartender.

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In a telephone conversation with a Board representative on August 27, 2004, the worker indicated she had worked for the accident employer in the past and had recently been re-hired. She also indicated she held a second job providing administrative services to a local law firm. The worker attached a schedule of hours worked with each employer and stated that although the schedules varied, the total number of hours worked remained the same: with the accident employer she worked 18 hours per week at $8 per hour plus tips when serving/tending bar; with the law office she worked 20 hours per week at $14 per hour.

The worker also indicated she could not drive due to a splint and had to take a bus to get to her medical appointments. She requested reimbursement for bus fare.

On its injury report, the accident employer listed the worker as a server and confirmed the worker's stated hours and wages for the three weeks she had been with the employer. On August 31, 2004, the second employer confirmed the worker's stated hours and rate of pay.

The Board entitlement officer spoke with the worker again on September 1, 2004. The worker stated she was losing approximately $100 per week in tips from her restaurant job. The Board entitlement officer told the worker tips may be included in a long-term wage rate but that the short-term wage rate must be based upon her actual earnings. The worker admitted she made no tips in the three weeks she was with the accident employer and stated this was because she was in a training period. With respect to her income from the second employer, the worker indicated she received a contract amount and paid taxes at the end of the year.

That same day, the Board entitlement officer issued a decision and set the worker's initial wage rate at $325.10 per week. She indicated this was based upon gross earnings of $424.00 per week, less probable deductions for federal and provincial income taxes, Employment Insurance (EI) and Canada Pension Plan (CPP) contributions. To arrive at the worker's net earnings, the entitlement officer indicated she used a standard formula which was the same for all workers regardless of tax status.

The worker requested a review. She requested that tips be considered as income and also submitted she was exempt from EI. She indicated she had sought advice from the Workers' Advisers Office and authorised the adviser to represent her in this appeal.

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The Board entitlement officer issued a second decision letter on September 2, 2004 and denied the worker's request for reimbursement of bus fare. The entitlement officer indicated that Board policy stated that transportation expenses were not normally paid in regard to travel within boundaries of a local bus service where the bus service was a reasonable means of transportation for the worker. The worker requested a review.

A Board case manager set the worker's long-term wage rate by way of a decision on December 17, 2004. That decision is not a subject of this appeal.

In a January 15, 2005 submission to the Review Division, the worker indicated she was referring to the entitlement officer's September 1, 2004 decision regarding her weekly wage rate. However, she then submitted argument with respect to information gathered by the Board officer for the purposes of setting her long-term wage rate. In this regard, the worker argued that she was tax exempt and her original wage rate was $98.90 less per week than it should be according to section 33.8 of the Act. The worker submitted it was her understanding that the Board was replacing her pay. However, the deductions the Board was taking were not in keeping with her previous payroll information. Furthermore, the worker submitted the second employer deducted no taxes from her gross pay and she was not required to pay tax because her income tax deductions for basic personal amount exceeded her taxable amounts.

The accident employer participated in the review process and submitted that reimbursement of bus fare was reasonable as long as it was from the worker's home to the place of treatment. With respect to wages, there was no possible way to calculate tips, if there were any.

The worker replied. She agreed that her wage was set at $8 per hour but that she had counted on tips as part of her income. She stated she had taken on a few hostess shifts as a favour to the employer. She would not have worked at the restaurant had she not anticipated receiving these tips.

As indicated above, the Board review officer issued a decision on April 14, 2005. He confirmed the Board entitlement officer's two decision letters. On May 16, 2005, the worker requested an appeal. She submitted the decision was incorrect because the Board did not include tips in the initial wage rate and because the Board did not reimburse her for transportation costs.

The WCAT registry replied to the worker on June 24, 2005 and informed her she would be contacted shortly. On July 22, 2005, WCAT staff wrote to the worker again at the address provided on her appeal documents. The worker's submission was requested by August 12, 2005.

The worker contacted the WCAT registry on July 27, 2005 and indicated she was moving to Ontario. She requested an extension of 45 days to send her submissions.

Registry staff instructed the worker to present a written request and suggested she send it via facsimile. The WCAT received no further correspondence and no submission from the worker.

Findings and Reasons

The worker's injury occurred after June 30, 2002, the transition date for relevant changes to the Act. Entitlement under this claim is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002.*

As a preliminary matter, because of the absence of a submission from the worker, I have considered whether she has had full opportunity to participate in this appeal. I find the worker's telephone call on July 27, 2005 demonstrated she was aware of the August 12, 2005 deadline. Although it appeared from this call that she intended to send a submission, we heard nothing further from the worker, either with a written request for an extension of time or a submission by either the earlier August 12, 2005 date or any other later date (such as the 45 days she requested). I find that the worker had full opportunity to participate but chose not to send a submission. I will consider this appeal on its merits.

1. What is the worker's entitlement regarding the short-term wage rate?

The Act section 33(1) requires that the Board must determine the amount of average earnings and the earning capacity of a worker with reference to the worker's average earnings and earning capacity at the time of the worker's injury.

Section 33.1 of the Act requires that the Board must determine the amount of average earnings of a worker based on the rate at which she was remunerated by each of the employers for whom she was employed at the time of the injury.

I note that in the worker's submission to the Review Division, she focused on income from tips as well as the Board's deduction for taxes and made reference to an EI exemption. However, on her notice of appeal of the review officer's decision, the worker only addressed the issue regarding tips. From this, I conclude the worker did not intend to appeal that aspect of the Board review officer's decision. Nevertheless, in light of the absence of a submission from the worker, I will consider this issue, although only briefly.

As identified by the review officer, the RSCM II item #71.00 requires that the Board must establish the worker's average net earnings by deducting probable EI premiums, CPP contributions and income taxes but does not consider the actual amounts deducted from a worker's pay cheque for these items. As described in the RSCM II item #71.10, the Board uses a schedule to determine the contributions applicable to the worker's average earnings. As a result, all workers with the same average earnings have the same deductions for the listed items. For probable income taxes, all workers receive tax credits equaling 1.5 times the basic personal amounts, regardless of actual

tax status and deductions for probable taxes are made regardless of whether the worker is required to pay taxes.

I find these policies fit the circumstances the worker described in her submissions to the Board Review Division. That is, although I understand and accept the worker's submissions that she was either exempt from EI premiums or that these were later refunded; that the deductions the Board was taking were not in keeping with her previous payroll information from both employers; and that her income tax deductions for basic personal amount exceeded her taxable amounts, I find these circumstances are addressed in the RSCM II items #71.00 and #71.10. The Board must use the worker's gross income figure and deduct probable deductions using a schedule. The worker made no submission suggesting the Board officer erred in the actual calculations and I find Board entitlement officer applied the formula correctly.

Turning to the issue of tips, I understand the worker expected her earning capacity at the restaurant would, in future, include tips and that she would not have taken the job without this expectation. However, based upon the worker's information when speaking with the Board entitlement officer on September 1, 2004, I find she made no tips in the three weeks she was with the accident employer.

The Act sections 33(1) and 33.1 require that the Board must determine the amount of average earnings and the earning capacity of a worker with reference to the worker's average earnings and earning capacity *at the time of the worker's injury*, based upon the rate at which she *was remunerated*. Some exceptions apply to this rule when calculating the long-term average earnings. For instance, the RSCM II item #67.40 discusses an exception to the general rule for determining long-term average earnings which allows the Board to use earnings of a similar worker under some circumstances. However, for calculating the worker's initial average earnings, the Board must use the actual earnings at the time of the injury.

Thus, while the RSCM II item #68.10 allows the Board to include such items as tips and gratuities, this refers only to tips or gratuities the Board can verify were paid. For the purposes of calculating the short-term wage rate, the Act does not allow for the Board to estimate an amount the worker might likely have earned in tips in future. I find the Board entitlement officer calculated correctly the worker's initial wage rate by leaving out potential or future tips.

However, the RSCM II item #68.10 also addresses other income – specifically vacation allowances and statutory holiday payments. These were not identified by any of the parties. I could find no wage statements to indicate the exact amounts the accident employer paid the worker on each cheque. I accept the second accident employer's written statement with respect to gross-only amounts paid to the worker and find these were consistent with the worker's statement that she received a contractual amount from the second employer. However, without a wage statement, I cannot determine whether the accident employer paid to the worker any additional amounts representing vacation allowances or statutory holiday payments. The Board entitlement officer's September 1, 2004 decision letter indicated she calculated the worker's entitlement based upon gross earnings of $424 per week. This is the exact figure obtained using 18 hours per week at $8 per hour with the accident employer, plus 20 hours per week at $14 per hour with the second employer. If the accident employer added statutory holiday payments or vacation allowances to the worker's gross pay, these amounts ought to have been included in the calculation used to determine the initial gross amount paid.

I find the Board must investigate this matter further. If the Board finds the accident employer paid additional amounts representing vacation allowances or statutory holiday payments, the Board must recalculate the worker's initial wage rate to reflect these. Such a calculation would be a new decision.

2. Is the worker entitled to reimbursement of bus fare to attend a medical appointment?

The worker has not disputed the Board entitlement officer's statement that travel to her medical appointments was within the boundaries of her local bus service. In reviewing the worker's application for compensation, I observe that her address was in the same city as her regular physician, the hand clinic and the plastic surgeon. Therefore, I find that travel to medical appointments was within the boundaries of the local bus service.

Since, on August 27, 2004, the worker stated she had taken the bus to attend her medical appointments, I find the bus was a reasonable means of transportation for the worker.

As the Board review officer indicated, the RSCM II item #82.10 states that transportation expenses are not normally paid in regard to travel within the boundaries of a local bus service where the bus is a reasonable means of transportation for the worker. The worker's evidence does not suggest that an exception ought to be made in her circumstances.

I find that, in keeping with the RSCM II item #82.10, the worker is not eligible for reimbursement of her bus fare.

Conclusion

I vary the Board Review Division decision dated January 16, 2005 to the extent that the Board must conduct further investigation to determine whether the average earnings calculation ought to have included vacation allowances or statutory holiday payments. In all other respects, I confirm the Board review officer's decision dated April 14, 2005. There are no requests before me for reimbursement of expenses, and no reimbursable expenses within the meaning of section 7 of the *Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02* are apparent to me following my review.

Joanne Kembel
Vice Chair

JK/ml