

Noteworthy Decision Summary

Decision: WCAT-2003-02711-RB **Panel:** D. Sigurdson **Decision Date:** September 26, 2003

Wage rate – Banked overtime wages - Section 33 of the Workers Compensation Act

The purpose of section 33(1) of the *Workers Compensation Act* is to determine the average earnings that most accurately reflect the worker's loss. The panel found that the inclusion of overtime hours in the year that those hours were worked best reflected the actual loss to the worker as there was evidence that the worker had consistently worked overtime during the course of the year and for several previous years. Had the worker opted to receive the overtime wages at the time he performed the work, the overtime wages would have been included in the calculation of his long-term wage rate. To not include the overtime wages when the worker elected to defer that payment does not negate the fact the worker had worked the hours and had earned the wages, and penalises the worker for deferring the payment. The Workers' Compensation Board (Board) practice of accepting overtime earnings only when they are actually received by the worker would produce absurd results. The worker's appeal was allowed and the Board's decision varied accordingly.

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Panel: Debbie Sigurdson, Vice Chair

Introduction

The worker claimed compensation for injury to his right hand resulting from a workplace incident on August 12, 1996.

The Workers' Compensation Board (Board) accepted the worker's claim for a right wrist sprain, carpal tunnel syndrome, ulnar entrapment of Guyan's canal, hamate fracture of the right wrist, and a post operative infection. The worker sustained a permanent partial disability. He has not been able to return to his pre-injury employment as a welder. The Board has assessed a loss of earnings pension for the worker.

To establish the worker's long term wage rate, the case manager at the Board did not consider the worker's banked overtime hours accrued in the one year period prior to his injury. In May 2001 the worker requested the Board implement a retroactive adjustment of his wage rate to include five years banked overtime held in reserve. By decision letter dated July 24, 2001, the case manager concluded that the worker's banked overtime is a benefit for his use at some time in the future, and therefore it cannot be included in the earnings prior to the date of injury for calculation of his long term wage rate.

The worker has appealed that decision. He seeks an adjustment to his wage rate to include consideration of the overtime hours he worked and accrued to his overtime bank for one year prior to the date of his injury.

Issue(s)

Do the worker's overtime wages accrued to his overtime bank in the year prior to his injury form part of his earnings for calculation of his wage rate?

Jurisdiction

This appeal was filed with the Review Board. 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 a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38).

Background and Evidence

The employer is a transportation company. This 66-year-old worker was employed as a welder for fifteen years with the accident employer at the time of his injury.

On August 12, 1996, the worker attempted to catch a grinder that was falling when he lost his balance and fell to the floor, injuring his right wrist. He was working overtime at the time of the incident, and reported the injury to his employer on August 13, 1996. The worker underwent treatment and eventual surgery to his right hand; however, he was not able to return to his previous position. The Board referred the worker to disability awards for assessment of a loss of earnings pension.

At the time of his injury, the worker had accrued the equivalent of five years wages as banked overtime. He had not collected overtime earnings from 1990 to the date of his injury. Notes to the Board file indicated that the worker intended to retire at age 65, whereas other notes to the Board file indicated that the worker intended to retire the same year in which he sustained his injury.

Board memo #107 noted that disability awards calculated the worker's wage rate based on his earnings for a one year period prior to the date of injury. Board memo #105 noted that the worker had raised the issue of inclusion of his overtime hours in the calculation of his wage rate by June 2001. The case manager had discussed this issue with the manager, who advised that banked overtime could not be included to increase a worker's wage rate, as this is viewed by the Board as a benefit the worker has for use at some time in the future. Board practice is to consider overtime as earnings only for the year in which the overtime is cashed out. As of the date of injury, the worker had not cashed out his overtime wages, and therefore it was not considered as earnings. The case manager's decision was based on this direction.

The worker's representative submitted that, pursuant to section 33(1) of the *Workers Compensation Act* (Act), overtime hours worked, but not paid, for the one year period prior to the date of injury should be included in the calculation of the worker's wage rate. She noted that the legislation has not defined earnings or earning capacity, and requested the panel to consider *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) item #65.00, which requires that the Board select the method of calculation of wage rate which most accurately represents the worker's actual loss of earnings by reason of the injury. The worker's representative submitted that the worker had demonstrated his ability to earn overtime wages in the year prior to his injury, but he had deferred realisation of those earnings. The worker's representative provided a summary of the worker's overtime hours for three years prior to the date of his injury. That summary indicated that the worker had accrued 312 hours overtime in the year prior, and 361 overtime hours and 434.5 overtime hours in the two years before. The worker's representative submitted that the panel should follow the direction provided in

Appeal Division Decision #92-1886 with respect to the inclusion of unpaid earnings when calculating the worker's wage rate.

The employer's representative submitted that the overtime hours available to the worker and the acceptance of overtime work with the accident employer had been decreasing at the time of the worker's injury, and that therefore any future overtime is an unknown variance. She referred the panel to RSCM item #71.11, and submitted that the overtime the worker did perform was irregular and occasional, whereas his regular hours were a known quantity. The employer's representative submitted that the accident employer is unique in that it provides options to its employees regarding payment of overtime, as follows:

- Bank the overtime wages;
- Roll the overtime wages into an RRSP account at the end of each year;
- Take time off in lieu of the payment of overtime wages; or
- Receive overtime wages with statutory deductions taken.

She indicated that these options permit the worker to use overtime to reduce taxable income. In this appeal, the worker did not receive full payment of his overtime wages until such time as he was accepted to the long-term disability program. The employer's representative indicated that the worker's payroll history demonstrated he annually had banked his overtime and unused vacation pay, and rolled those hours into his pre-retirement bank.

Reasons and Findings

Compensation for a pension award is based on a worker's average earnings, as set out in section 33(1) of the Act. That section provides for various means of calculating a worker's average earnings, and requires that the Board select the method that best represents the worker's actual loss of earnings. The normal method of determining a worker's average earnings is to calculate his or her average yearly earnings and convert that rate to a weekly wage rate.

RSCM item #71.00 states that a worker's average earnings is normally composed of wages or salary. RSCM item #71.11 specifically addresses overtime wages, and states as follows:

Only regular overtime is covered when compensation is based on the rate of pay at the date of injury. If there has been significant amounts of occasional or irregular overtime, wage loss at the outset of the claim will normally have to be based on the worker's earnings over a longer period rather than on the rate of pay at the date of injury.

While RSCM item #71.11 refers to overtime inclusion in the calculation of the average earnings to set the initial wage rate, it also supports the argument that overtime is included in the earnings for calculation of a long-term wage rate.

A worker earns overtime wages at the time of performing the work. When an employer provides a time banking system for overtime wages, the worker is deferring the realisation of those earnings to some time in the future. The purpose of section 33(1) is to determine the average earnings that most accurately reflect the worker's loss. I find that inclusion of the overtime hours in the year that those hours are worked will best reflect the actual loss to the worker. Had the worker opted to receive the overtime wages at the time he performed the work, the overtime wages would have been included in the calculation of his long-term wage rate. To not include the overtime wages when the worker elected to defer that payment does not negate the fact the worker had worked the hours and had earned the wages, and penalises the worker for deferring the payment.

The employer's representative has submitted that the overtime the employer provides is irregular and occasional. While the overtime hours are not specifically scheduled, I find that the evidence shows that this worker consistently worked overtime hours during the course of the year. In the three-year period prior to the injury, the worker had accumulated 312 hours, 361 hours, and 434.5 hours from overtime work, which forms a significant part of his earning capacity. The payouts the worker received after his injury provides further evidence that overtime wages were a significant part of his earning capacity, prior to his injury.

The Board practice to accept overtime earnings only when they are actually received by the worker can produce absurd results, particularly when several years of banked overtime earnings are realised in one year, thus artificially inflating the earnings for that particular year. Similarly, the earning capacity of a worker is not accurate if the overtime earned is not considered as part of his earnings in the year worked, because the worker selected to bank the earnings for a future date. The worker has demonstrated the ability to work overtime hours, and the overtime earnings should therefore be included in the calculation of the wage rate, regardless of whether the worker actually received the pay or deferred the wages to a future date.

The employer's representative submitted that the employer is unique in offering the options to the workers with respect to payment or deferral of overtime earnings. I do not find that the creation of a bank of overtime hours is unique. Such a practice is recognised by statute in the *Employment Standards Act*, and time banks are used in the workplace to defer overtime pay, and the statutory deductions from those earnings. The ability to roll the overtime to a pre-retirement fund or other time bank system, although deferring the tax consequences, does not eliminate the tax requirement. Additionally, I do not find it unique that this employer allows its employees to roll payment of wages to an RRSP.

The fact the worker opted to defer payment of his overtime at the end of the year and roll it over to a pre-retirement fund does not negate the fact that he had earned those wages in the one-year period prior to the date of his injury. It is speculative to suggest that by deferring those earnings, he would not have continued his employment to retirement age, or sought other employment in addition to receiving the payout of his banked overtime had he not been injured. I find that the best representation of the worker's actual loss of earnings in this appeal requires that the Board include the worker's wages for overtime hours, deferred to his time bank, for the one year period prior to the date of his injury as part of his earnings.

Conclusion

In accordance with the above reasons and findings, I allow the worker's appeal and vary the Board's decision. The worker's overtime wages earned, but deferred to his overtime bank, in the year prior to the date of his injury are included as earnings in the calculation of his wage rate.

Debbie Sigurdson
Vice Chair

DS/eca/cmm