Noteworthy Decision Summary

Decision: WCAT-2004-01787-RB **Panel**: Randy Lane **Decision Date:** April 6, 2004

Fisher – Casual workers - Wage rate – Section 33.5 of the Workers Compensation Act – Item #67.10 of the Rehabilitation Services and Claims Manual – Effective date of policy change

The worker, a fisher, suffered an injury while loading a boat. The key question is whether the worker was properly classified as a casual worker such that section 33.5 of the *Workers Compensation Act* (Act) is applicable. Section 33.5 of the Act provides that if a worker's pattern of employment at the time of the injury is casual, the Workers' Compensation Board's determination of the amount of average earnings must be based on the worker's gross earnings for the 12 month period immediately preceding the date of injury.

Item #67.10 of the *Rehabilitation Services and Claims Manual, Volume II*, provides that a casual worker is a worker who has a short-term/sporadic attachment to employment and generally the employment lasts less than three consecutive months. From materials submitted by the worker it appears that the salmon season would be an assignment that lasted less than three months. Accordingly, the panel concluded that the worker was a casual worker and as such his initial wage rate was properly set using employment earnings and EI monies paid to him in the one-year prior to injury. The panel further noted that while the effective date at the end of item #67.10 refers to the date of March 18, 2003, that is the date of the latest change to the policy. The relevant passages in item #67.10 came into effect on June 30, 2002 according to a June 11, 2002 resolution of the Panel of Administrators and, thus, are applicable in this case.

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Panel: Randy Lane, Vice Chair

Introduction

The worker, a fisher, suffered a July 5, 2002 injury while loading a boat. His employer's report of injury noted that he had started his job on July 4, 2002 and indicated that he was seasonal. By decision of August 20, 2002 his initial wage rate was set using his earnings and employment insurance (EI) payments in the one-year prior to injury.

He appealed that decision to the Workers' Compensation Review Board (Review Board). He supplied notices of appeal – part 1 and 2, both of which were accompanied by written and typed submissions.

By letter of January 8, 2004 he was advised that the appeal would proceed by way of a read and review and he was given time to provide a submission. He provided a January 22, 2004 submission which was accompanied by photocopied materials. The employer's representative provided a February 9, 2004 submission. The worker was given an opportunity to provide a response, but no further materials were received from him.

The January 8, 2004 letter does not bind me if I consider an oral hearing is necessary. I consider a fair and thorough decision may be reached on this appeal without holding an oral hearing.

Issue(s)

At issue is whether the worker's initial wage rate was properly set.

Jurisdiction

This appeal was filed with the Review Board. On March 3, 2003, the Appeal Division and the 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.)

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Workers' Compensation Board (Board) that is applicable in the case. WCAT has

exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

Background and Evidence

The relevant payment periods and monies for approximately one year prior to the injury were as follows:

EI last cheque payable to June 17, 2001	
A Inc. July 21, 2001 to December 31, 2001	$5,556.01
B Ltd. December 9, 2001 to December 12, 2001	$1,424.38
EI December 19, 2001 to June 24, 2002	$4,448.00

In the July 6, 2001 to July 5, 2002 period the worker earned $11,629.00 in connection with one herring season working for C Company (as per a July 26, 2002 fax from that employer). The file information is not clear when the herring season was.

A July 17, 2002 claim log entry by the entitlement officer noted the worker's advice that after loading the boat it had been expected that it would sail to Vancouver and then to Prince Rupert to commence salmon fishing. The worker indicated that the boat had only received a northern license and "it was unknown how long the season would go".

The initial wage rate was set using $11,629.00. The entitlement officer noted that the worker was a causal worker and earnings in the one-year prior to injury were used as there were no earnings in the three months prior to injury. She noted in her July 23, 2002 claim log entry that the worker was injured before any salmon had been caught. She noted that the herring season was more than three months prior to the date of injury.

In her August 6, 2002 claim log entry a case assistant noted the earnings information from A Inc. and B Ltd. In his claim log entry of the same date, the case manager noted the worker's earnings in the one-year prior to injury totalled $18,609.39. In his August 20, 2002 claim log entry the case manager noted that EI payments from December 19, 2001 to June 24, 2002 totalled $4,448.00. He observed that monies paid in the one-year prior to injury totalled $23,057.39. (While the employer's representative expresses some concern, I find that the file information sets out the basis for the total earnings and EI figures used to set the wage rate.)

In his submissions, among other matters, the worker makes reference to his earnings in the three and five years before his injury. He attaches information concerning earnings

associated with the July 14, 2002 to August 24, 2002 salmon season and the August 28, 2002 to October 2, 2002 halibut season. He indicates that had he not been injured he would have earned $9,504.81 in the salmon season and $9,707.51 in the halibut season.

Reasons and Findings

The worker's injury occurred after June 30, 2002, the transition date for relevant changes to the *Workers Compensation Act* (Act). Entitlement under this claim is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002.* The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual*, *Volume 2* (RSCM).

The key question is whether the worker was properly classified as a casual worker such that section 33.5 of the Act is applicable. It provides as follows:

> If a worker's pattern of employment at the time of the injury is casual in nature, the Board's determination of the amount of average earnings under section 33.1 from the date of the injury **must be based** on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.
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> [emphasis added]

Section 33.5 is an exception to the general rate setting rule found in section 33.1(1) of the Act:

> (1) Subject to sections 33.5 to 33.7, the Board must determine, for the shorter of the following periods, the amount of average earnings of a worker based on the rate at which the worker was remunerated by each of the employers for whom he or she was employed at the time of the injury:
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> (a) the initial payment period;
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> (b) the period starting on the date of the worker's injury and ending on the date the worker's injury results in a permanent disability, as determined by the Board.

Board policy assists in interpreting section 33.5, and item #67.10 of the RSCM provides, in part, as follows:

> … A casual worker is a worker who has a short-term/sporadic attachment to employment. Generally the employment lasts less than three consecutive months. A worker who works "on call" for one or more employers may also be a casual worker. …

> Fishers are treated as workers engaged in casual employment. However, this rule cannot be rigidly applied without regard to the particular circumstances of the case. For instance, it is conceivable that a particular fisher could be employed 52 weeks a year, five days a week. The fisher would then have to be treated as a regular worker rather than a casual worker. Where a job is to last more than three months, the worker is generally regarded as a regular worker rather than a casual worker. Regulation 3 of the *Fishing Industry Regulations* addresses the calculation of earnings for compensation benefits.

Those passages in item #67.10 came into effect on June 30, 2002 according to a June 11, 2002 resolution of the Panel of Administrators (the predecessors of the board of directors.) I note this information because item #67.10 of the RSCM refers to a March 18, 2003 effective date. While there may have been changes to item #67.10 in March 2003 any changes did not alter the passages excerpted above which were in effect at the time of the worker's injury.

The Compensation Services Division, as it then was prior to the Board's recent reorganization, issued practice directives that provide assistance in understanding how the Compensation Services Division interpreted policy. The directives, unlike policy, are not subject to a statutory requirement that they must be applied. The directives noted below were issued after the August 20, 2002 decision disputed by the worker. However, I consider that they are relevant as they identify how the policies were interpreted by Board staff. Such interpretations do not bind me. They were publicly available on the Board's website prior to the January 8, 2004 letter which gave the worker an opportunity to make submissions.

The worker was not a regular worker who was employed at permanent part-time or permanent full-time employment. *Practice Directive #33A,* entitled "Initial and Long-Term Average Earnings", defines those workers as regular workers whose initial wage rates are set using their earnings at the date of injury. *Practice Directive #33B*, entitled "Casual Workers", includes the following assistance in ascertaining whether employment is casual:

> …it is the Division's position that, in the absence of clear evidence to the contrary, there is a presumption that any employment which lasts less than three consecutive months is casual employment. Clear evidence to the contrary might be evidence from the employer that although the one job will end within three months, the worker was expected to continue working for that employer in a different capacity. Other evidence might be that, although the time of injury position would have lasted less than three months, the worker had at the time of injury been employed by that employer on a continuous basis for more than three months.
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> …

> Where a worker is recently hired on a temporary assignment with an unknown end date, in the absence of clear evidence that the temporary assignment would have lasted three or more months, the worker will be categorized as a casual worker.

The claim log entry of July 17, 2002 noted above documents the worker's advice that it was unknown how long the season was. From materials submitted by him it appears that the salmon season lasted from July 14, 2002 to August 24, 2002. That would be an assignment that lasted less than three months. Given the policy and *Practice Directive #33B* noted above that would make the worker a casual worker.

I find that the worker was a casual worker. As such his initial wage rate was properly set using employment earnings and EI monies paid to him in the one-year prior to injury. (EI monies can be included for causal workers who are seasonal workers). Given that he was a casual worker, it was not open to the Board to set his earnings using a different period of time. The statute requires that a 12-month period prior to injury be used. It was not open to the Board to use earnings in the three years or five years prior to the injury or to set his wage rate using what he might have earned had he not been injured. Thus the wage rate cannot be set using the earnings he might have made in the post-July 5, 2002 salmon and halibut seasons.

Further, while the worker contends that the events of September 11, 2001 affected the fishing industry, I am not able to take that into account. While there is an exception in the statutory scheme where use of earnings in the 12 months prior to injury produces an inequitable result that only applies when setting a long term wage rate. The case before me involves the initial wage rate. Further, subsection 33.4(2) provides that the inequitable result provision (subsection 33.4(1)) does not apply to casual workers. Thus, even if this was a long term wage rate case, I could not use the inequitable result provision.

Conclusion

The worker's appeal is denied. I confirm the case manager's decision and find that the worker's initial wage rate was properly set.

Randy Lane
Vice Chair

RL/jd/mli

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