NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2004-02452-RB **Panel**: Jane MacFadgen **Decision Date**: May 11, 2004

Long Term Wage Rate – Calculation of Average Earnings – Section 33.1(2) of the Workers Compensation Act (Act) – Exceptional Circumstances – Section 33.4 of the Act – Policy Item #67.60 of the Rehabilitation Services and Claims Manual, Volume II

Where a worker's gross earnings for the 12-month period preceding the date of injury is lower than in the years preceding the 12-month period, and this lower amount is used to calculate the worker's long-term wage rate under section 33.1(2) of the *Workers Compensation Act* (Act), the exceptional circumstances test in section 33.4 of the Act is not met if the lower gross earnings is due to the worker's ongoing decision to change occupations.

In this case, the worker injured his shoulder in the course of his employment as a clerk in a grocery store (employer). In the year preceding the date of injury, the worker had also been employed as a part-time driver for the film industry. In addition, he started his own tractor business, which operated at a loss. In order to facilitate his additional employment activities, the worker had taken a "take a break" leave under his collective agreement with the employer which resulted in reduced earnings for that period.

The Workers' Compensation Board (Board) accepted the worker's shoulder injury claim and based his long-term wage rate on the worker's income from all three jobs he held in the one-year period prior to the injury. The worker requested a review of the Board decision by the Review Division. The Review Division confirmed the Board decision, and the worker appealed to WCAT.

The worker argued that the Board should have used a longer earnings period in calculating his long-term wage rate, as the one-year period used by the Board was his lowest earnings level in the preceding five years. This was due in large part to the worker's voluntary "take a break" leave which was used to start his tractor business. The worker indicated that he did not intend to continue in the grocery business in the long term, and was actively working to become a member of the trucking union for the film industry.

The WCAT panel reviewed the general test for setting the long-term wage rate contained in section 33.1(2) of the Act, which calculates the worker's average earnings based on the gross earnings for the 12-month period immediately preceding the date of injury. Section 33.4 of the Act provides that the Board may base the worker's average earnings on another amount if exceptional circumstances exist. Item #67.60 of the *Rehabilitation Services and Claims Manual, Volume II* sets out criteria for determining if exceptional circumstances exist under section 33.4 of the Act. One of the criteria applies where the worker has a history of full-time employment and the one-year pre-injury earnings does not reflect historical earnings because of an atypical and/or irregular disruption in the worker's employment pattern.

The WCAT panel found that the exceptional circumstances test in section 33.4 of the Act was not met in this case because the worker maintained his change in occupational status even after his WCB claim by taking a further break from the employer and continuing to work as a driver in the film industry. The worker's reduced earnings would be usual for a number of years

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as he worked through his occupational change and therefore were not atypical or irregular. The WCAT panel confirmed the Review Division decision on the worker's long term wage rate.

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WCAT Decision Number: WCAT-2004-02452-RB
WCAT Decision Date: May 11, 2004
Panel: Jane MacFadgen, Vice Chair

Introduction

The employer appeals the February 4, 2003 decision of the Workers' Compensation Board (Board) accepting the worker's claim for bilateral shoulder tendonitis due to his work as a general clerk/shelf stocker. The worker appeals the September 22, 2003 decision of the Review Division of the Board. The review officer confirmed the case manager's February 20, 2003 decision establishing the long-term wage rate based on the worker's earnings in the one year period prior to his disablement.

The employer did not request an oral hearing of its appeal. The worker's request for an oral hearing of his appeal was denied on a preliminary basis. Both parties' representatives provided written submissions. Based on my review of the file and submissions, I am satisfied that the issues under appeal may be properly addressed without an oral hearing.

Issue(s)

Whether the bilateral shoulder condition for which the worker sought medical attention in October 2002 was due to or arose out of and in the course of his employment; and whether the Board appropriately determined the worker's long-term wage rate.

Jurisdiction

The employer's appeal of the February 4, 2003 decision was filed with the Workers' Compensation Review Board (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.) The worker's appeal of the September 22, 2003 Review Division decision was made directly to WCAT under section 239(1) of the *Workers Compensation Act* (Act).

Section 250 of the Act provides that WCAT must make its decision based on the merits and justice of the case but, in so doing, must apply relevant policies of the board of directors of the Board. Section 254 gives WCAT exclusive jurisdiction to inquire into and determine all matters of fact and law arising or required to be determined in an appeal before it. This is therefore a rehearing by WCAT.

Background and Evidence

The worker is 38 years old and right-hand dominant. He had worked as a grocery clerk/shelf stocker with the employer retail grocery store since 1985.

On October 20, 2002 the worker reported to the employer that he had pain in both shoulders, and pain and numbness in both arms and wrists. He advised that the pain usually occurred during his shift, and intensified over a number of consecutive days.

The employer's October 22, 2002 report to the Board noted that the worker was classified as permanent full-time, but he had voluntarily reduced his hours to 16 hours a week to pursue another career, which did not work out. He then returned to a 32-hour week, and after six weeks complained of pain and numbness in both arms and shoulders. The employer asked the Board to investigate the claim.

The worker sought medical attention on October 22, 2002 for bilateral shoulder pain. Dr. Ng recorded a 12-year history of aching shoulders from working freight on graveyard shifts. His shoulder pains had been worse in February 2002 and he reduced his work week from 40 to 16 hours. His pain then improved, but had worsened again now that he was working 32 hours a week. Dr. Ng diagnosed rotator cuff tendonitis and impingement, greater on the right side than on the left. He advised lighter duties and reduced hours.

The report on October 23, 2002 x-rays of the worker's shoulders noted normal findings in his right shoulder, but multiple focal calcific densities at the rotator cuff tendon insertions of his left shoulder, consistent with calcific tendonitis involving the supraspinatus and likely the infraspinatus tendons.

Subsequent reports diagnosed calcific tendonitis of the supraspinatus in the left shoulder and right shoulder bursitis/tendonitis. His left shoulder was more painful than his right.

The worker's November 1, 2002 application for compensation stated that in November to December 2001 his arms started to ache when he was working freight on the graveyard shift. He experienced a burning sensation with some shoulder pain which he initially thought was due to the heavier work load at that time of year.

A case manager spoke with the worker on November 1, 2002 and recorded that his pain symptoms had improved significantly when he was off three days the last weekend; the pain then worsened on his return to work. The worker described that his duties involved bringing out pallets of stock, cutting cartons open, stocking shelves, breaking down and baling the cardboard, facing the stock (bringing product to the front of the shelf and turning it to face forward), and working the freight in the back. This entailed lifting a lot of cartons and cans from floor level to above head height.

The worker said that he normally worked a 40-hour week with the employer prior to the onset of his problem in 2001. Since October 2000 he had also occasionally worked for a different union driving trucks/vans for the movie industry. Over a two-year period he had worked 77 days in this capacity.

In March or April 2002 he took five weeks of holidays. Around that time he bought a tractor business (April or May), and used the tractor to mow fields, roto-till, plough and harrow. At that point he reduced his hours of work with the employer to 16 hours. His shoulders improved but he had occasional flare-ups from working at the grocery store. During the seasonal slowdown in the tractor business in September, he increased his hours with the employer to 32 hours per week and his shoulders flared up. The first time he saw a doctor about this problem was on October 22, 2002. The worker denied a prior shoulder problem or any underlying systemic disease. He did not engage in sports activities, or use a computer or musical instrument.

The Board retained an occupational therapist to conduct a worksite evaluation of the risk factors for development of bilateral shoulder tendonitis as a general clerk in the employer's operation. The November 20, 2002 ergonomic intervention report stated that the job duties involved frequent bilateral shoulder flexion of greater than 60 degrees (between 90 to 110 degrees) with low force, and occasionally with moderate to high force. Repetition varied, but the overall average for shoulder flexion of between 90 and 110 degrees was frequent; moderate and high force repetitions were of 3 to 60 seconds in duration. There was no change in the worker's job demands around the time his symptoms started, but the amount of work increased the next month as the Christmas rush began. The report noted the worker's statement that his symptoms increased with heavy lifting and reaching to higher shelves, and that he was working 40 hours a week when his symptoms began.

The Board medical advisor referred the worker for an assessment at a medical rehabilitation program (MRP) to clarify the diagnosis, in light of the disparity in the history recorded by the attending physician and the worksite evaluator.

The MRP physician's January 2003 assessment noted clinical findings consistent with rotator cuff pathology, including weakness in the supraspinatus and infraspinatus muscles with signs of impingement in the left shoulder. She recommended an MRI of the left shoulder. The January 2003 MRI report identified calcific tendonitis of the left shoulder affecting the supraspinatus tendon; a small partial thickness tear of the distal end of the supraspinatus tendon; and a probable undisplaced anterior labral tear.

The MRP physician reviewed the MRI findings and advised that she did not think the worker had a tear of the supraspinatus tendon or labrum as he had no history of traumatic injury. He did, however, have a significant tendonitis. She recommended an orthopaedic assessment to consider a left shoulder injection and/or surgery.

The case manager asked Dr. Friesen, a Board medical advisor, whether the described work activities were reasonably capable of stressing the affected tissues bilaterally. The case manager expressed concern about the bilateral nature of the worker's symptoms, and queried whether the changes shown on the MRI were occupationally caused or reflected a pre-existing condition. He also asked whether the tractor roto-tilling/ploughing business which the worker had begun in the spring of 2002 would have contributed to the development of his shoulder problems.

Dr. Friesen's February 3, 2003 memo stated that shoulder tendonitis was presumed to be work-caused where there was exposure to work activities involving frequently repeated or sustained abduction or flexion of the shoulder joint greater than 60 degrees, and where such activity represented a significant component of the employment. Although only the left shoulder was the subject of the MRI, the worker had bilateral symptoms and bilateral risk factors. His work entailed frequent overhead lifting of medium to heavy loads. She noted that no other risk factors had been identified.

The case manager's February 4, 2003 memo noted he had discussed the claim with Dr. Friesen, who confirmed that occupational risk factors had been causative in producing the worker's tendonitis condition bilaterally, and that the calcification of the shoulder tissue was a long-term consequence of the worker's occupationally caused shoulder tendonitis.

Based on Dr. Friesen's opinion, the case manager issued the February 4, 2003 decision under appeal accepting the worker's claim for bilateral shoulder tendonitis, including calcific supraspinatus tendonitis of the left shoulder.

The Board based the initial rate for the first 10 weeks of the claim on the worker's $20.80 hourly rate, at 32 hours a week. The employer reported the worker's earnings in the three-month and one-year period prior to November 5, 2002 as $7,120 and $32,891 respectively. The employer confirmed that the worker had taken a 'take a break' interruption in his employment from March 17 to September 7, 2002, as permitted under the collective agreement, and worked a 24-hour week (except for weeks when there was a statutory holiday, when he worked 16 hours). He began working 32 hours a week the week of September 8, 2002.

The worker reported that during this one-year period his movie industry earnings were $10,816; he had no income from his tractor business as it had operated at a loss.

The case manager's February 20, 2003 decision set the worker's long-term wage rate at the ten-week point in the claim based on his income from all three jobs in the one-year period prior to November 5, 2002, totalling $43,707. These gross one-year earnings resulted in a long term wage rate of $564 per week, reflecting 90% of his net earnings.

The worker requested a review of this decision by the Review Division of the Board. His counsel submitted that a longer earnings period should have been used as the one-year period selected was the lowest earnings level in the preceding five years because it included a six-month period when the worker had voluntarily reduced his hours of work with the employer to begin a new business. This business operated for only six months, and failed to produce any income.

A March 4, 2003 memo noted the case manager's discussion with the worker about his trucking work in the film industry. The worker said that this work was very light and paid well. He would normally take a dispatch to a movie industry job if it came along, taking time off from the employer for the duration of the job by taking vacation time or using the 'take a break' provision under the collective agreement.

A subsequent May 22, 2003 file memo recorded that at present the worker was only driving in the film industry. He planned to stay on his take a break leave until September, when he intended to return to work with the employer. He advised that he might get his tractor business going if his shoulders continued to improve. His father-in-law had done one job on the tractor but the worker had not done any work on it himself. A September 25, 2003 memo noted that he had worked through the summer driving in the movie industry, and had also done a bit of work with his tractor business. The driving did not bother his shoulders.

The September 22, 2003 Review Division decision confirmed the long term wage rate. The review officer concluded the evidence supported that the worker intended to carry on with his film industry work as well as his tractor business. As a result, the reduction in hours worked with the grocery employer in the 12 months pre-injury could not be considered significantly atypical and/or an irregular disruption in the pattern of his employment so as to constitute "exceptional circumstances" as set out in section 33.4 of the current provisions of the Act. The worker appeals the Review Division decision.

A March 2, 2004 memo noted the worker advised that, in the long run, he did not want to continue in the grocery industry. He was now about 40 shifts away from becoming a member of the trucking union, which would likely give him options for work that he could do with shoulder restrictions, although this work would not be available all year.

I will address the submissions in the context of my reasons and findings below.

Reasons and Findings

The current provisions of the Act and *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM) apply to the adjudication of the issues under appeal.

Acceptance of claim for bilateral shoulder tendonitis

The employer submitted that the work activities did not meet the criteria for the Schedule B presumption of causation for shoulder tendonitis, as set out in RSCM policy #27.11. There was no evidence of sustained shoulder flexion or adduction [it appears this reference should be to abduction]. It noted that about 40 minutes of each 60-minute cycle used to make and unload a wheeler involved frequently repeated shoulder flexion greater than 60 degrees. The Board medical advisor's opinion did not address whether this activity was a significant component of the work, if it was biologically plausible for these activities to have caused the diagnosed condition, or if calcific tendonitis could be caused by work activity.

The employer submitted an August 22, 2003 opinion from Dr. Jeffries, a physician with specialized training in occupational medicine. Dr. Jeffries wrote that the calcific tendonitis was longstanding; it did not develop during 2001. Calcific tendonitis was a degenerative condition, associated with age. About 50% of the population over 45 years had some level of calcification. It had not been associated with any general occupational exposures.

Dr. Jeffries stated that rotator cuff or labral tears were associated with the application of considerable force. It was improbable that the work activities caused the worker's partial tear. Although the grocery store work involved some level of repetition, it did not have the combination of high frequency, high force and awkward positioning which would create the necessary force to cause such a tear. The change from 16 to 32 hours of stores work a week would not have added any unaccustomed activity that could explain a partial tear. It was much more likely that the worker noticed it at work, but it was not caused by work.

Dr. Jeffries noted the worker claimed that symptoms were present at the end of 2001, yet he was able to buy and work in a tractor business from spring until the fall. Dr. Jeffries thought the work of ploughing, tilling and harrowing would be more likely to produce the acute force to cause a partial labral tear than the activities of a stores person.

The employer submitted that the claim should not have been accepted. Calcific tendonitis was not an overuse tendonitis/activity-related soft tissue disorder. Dr. Jeffries' opinion supported that the calcific tendonitis would be longstanding and not caused by the work activities. The work activities had probably brought the pre-existing problems to the worker's attention, rather than having caused them. There was no evidence that the work activities had aggravated the pre-existing condition(s) as contemplated by RSCM policy #26.55. The section 5(4) accident presumption did not apply as there was no accident.

The worker's counsel submitted that the Board properly accepted the claim in accordance with the ergonomic intervention report and the relevant law and policy. The employer had provided no evidence to rebut the presumption of causation in sections 5(4) and 6(3) of the Act. There was no corroborating evidence to support Dr. Jeffries'

assertion that the work of ploughing, tilling and harrowing would be more likely to produce the acute force to result in a partial labral tear. Neither Dr. Jeffries nor the employer had provided any evidence of a relevant pre-existing condition or non-occupational factors which would have caused the worker's disability. Further, both the Board and WCAT accepted calcific tendonitis as compensable.

The submission appended a detailed description of the worker's job duties of unloading the grocery trucks, loading freight on wheelers, and stocking the shelves with his arms extended out at chest level or above head level.

There is no evidence in this case of a discrete injury incident associated with the worker's bilateral shoulder tendonitis. As a result, neither section 5(1) nor 5(4) of the Act applies in this case.

Tendonitis is recognized as an occupational disease under the Act. Section 6(3) and Schedule B of the Act provide for a presumption of work causation for shoulder tendonitis where there is frequently repeated or sustained abduction or flexion of the shoulder joint greater than 60 degrees, and where such activity represents a significant component of the employment. Tendonitis may also be compensable under section 6(1) of the Act without the benefit of the section 6(3) presumption, if the evidence establishes that it was due to the nature of the worker's employment.

RSCM policies #27.11 and #27.12 address the relevant factors in interpreting the shoulder tendonitis provision in Schedule B. Abduction or flexion of the shoulder joint greater than 60 degrees is "frequently repeated" where it occurs at least once every 30 seconds, or during at least 50% of the work cycle. "Sustained abduction or flexion of the shoulder joint" means that the shoulder joint is held in a static position of abduction or flexion greater than 60 degrees. A "significant component of the employment" means that the worker was performing the work activities involving the shoulder for sufficiently long that it was biologically plausible for the shoulder tendonitis to have resulted from the work activities. Employment activities involving minimal or trivial use of the shoulder joint do not constitute a significant component of the employment.

I note that the Board medical advisor erred in stating that the work entailed frequent overhead lifting of medium to heavy loads; the ergonomic assessment reported that there was frequent low force bilateral shoulder flexion of greater than 60 degrees (between 90 to 110 degrees), and occasional moderate to high force shoulder flexion in this range.

I conclude that calcific shoulder tendonitis (present in the worker's left shoulder) falls within the general category of shoulder tendonitis in item 13(b) of Schedule B. Neither Schedule B nor the Board's published policy excludes calcific tendonitis from the general category of shoulder tendonitis, or makes a distinction between calcific tendonitis and other types of shoulder tendonitis.

I find that the ergonomic intervention report identified occupational risk factors that meet the above criteria for the presumption of work causation for the worker's bilateral shoulder tendonitis under Schedule B and section 6(3) of the Act. The report establishes that the worker's job duties as a grocery clerk/shelf stocker involved frequently repeated bilateral shoulder flexion greater than 60 degrees (i.e. between 90 to 110 degrees), and that this activity represented a significant component of the employment as described in RSCM policy #27.11 (i.e. more that 50% of the work cycle). The frequent and longstanding use of the shoulder joints in the worker's employment activities could not be characterized as minimal or trivial.

I find that the presumption of occupational causation is not rebutted in this case. While Dr. Jeffries stated that calcific tendonitis was a degenerative condition which had not been associated with any general occupational exposures, Dr. Friesen advised the case manager that the presence of calcification was a long-term consequence of the worker's occupationally caused shoulder tendonitis. I therefore infer that Dr. Friesen did not consider the worker's calcific tendonitis was due to an underlying degenerative process which was non-occupational in origin.

No significant non-occupational risk factors have been identified in this case. Given the findings in the ergonomic report, I do not find support in the evidence for Dr. Jeffries' suggestion that the tractor work was more likely to have been causative of the worker's shoulder problems than his work activities in the grocery store. There is no evidence that the worker did anything other than drive a tractor in his tractor business. Further, the worker advised that neither driving the tractor nor the trucks for the movie industry aggravated his shoulders. It was only when he again increased his hours of work with the employer in the fall of 2002 that his shoulder symptoms became more acute, to the point where he sought medical attention and was advised to restrict his shoulder activities in the grocery store.

Considering the findings in the ergonomic intervention report and Dr. Friesen's opinion, I conclude that the Board properly accepted the worker's claim for bilateral shoulder tendonitis in the February 4, 2003 decision under appeal. I therefore deny the employer's appeal.

Long-term wage rate

Section 33.1(2) of the Act sets out the general rule for determining the long-term wage rate at the 10-week point of temporary disability under a claim. It states that the Board must determine the worker's average earnings based on his gross earnings for the 12-month period immediately preceding the date of injury, subject to some specific exceptions. Those exceptions relate to apprentices or learners, persons employed for less than 12 months, casual workers, independent operators, persons without earnings, or where exceptional circumstances exist as defined in section 33.4.

Section 33.4 provides that if exceptional circumstances exist such that the application of section 31.1(2) would be inequitable, the worker's average earnings may be based on an amount the Board considers best reflects the worker's loss of earnings.

RSCM policy #67.60 sets out the criteria which must be applied to determine if there are exceptional circumstances as contemplated by section 33.4. Criterion (a) applies where the worker had a history of regular full-time employment and the one year pre-injury earnings did not reflect his historical earnings because of a significant atypical and/or irregular disruption in the pattern of employment during that period of time (e.g. an absence of more than six consecutive weeks due to illness). In such cases the Board may deduct the period of absence or use a longer period of the worker's employment history to determine his long-term average earnings.

The worker's T-4 earnings from 1998 to 2002 indicated the following employment income:

- 1998 $45,510
- 1999 $46,868
- 2000 $56,295
- 2001 $52,405
- 2002 $38,429 (10 months)

The worker has not disputed the Board's calculation of his total earnings in the one-year period. Rather, he submits that section 33.4 applies in his case because his earnings in the one-year pre-injury period were his lowest annual earnings in five years, and represented an anomaly in his historical earning pattern. That was because he voluntarily reduced his hours at the employer grocery store to start a new business, which failed to produce any income and operated for only six months. The worker resumed normal hours (32 hours/week) after his business closed, and re-established his "normal" earning pattern of working at two jobs (including the film industry). But for the injury, this pattern would likely have continued into the foreseeable future.

The worker submitted that these constituted "exceptional circumstances" such that it would be inequitable to apply the general one-year rule. His counsel argued that his earnings should be averaged over a longer period from January 2000 or January 2001 up to November 4, 2002. This would be a better reflection of the worker's long-term loss of earnings and earning capacity as provided for in section 33.

The employer supported the Review Division's conclusion that the worker had made a conscious change in his work pattern. Part of that change continued after the injury in that the worker continued in the film industry and took another 'take a break' from the employer in 2003. He also continued to work in his tractor business as noted in the September 25, 2003 claim log. Given these circumstances, the change in the worker's employment circumstances was not unusual or uncommon. The worker had decided to

change occupations and continued, to a significant degree, that same change after the injury. The worker's reduced earnings level in 2002 would therefore be usual for a number of years as he worked through the change and established his new business.

The worker was not a casual worker; his employment status with the injury employer was permanent full-time, although he had the option of reducing his hours as discussed above.

I find that the weight of the evidence on file indicates that, at the time the claim arose, the worker intended to carry on with his work in the film industry and to continue his seasonal tractor business. Both these occupations required the worker to reduce and/or suspend his hours worked with the grocery employer. The projected income from these other employment ventures was not predictable, especially the tractor business which was in the start-up phase. The worker continued to earn income from the movie industry in the months of April, July and August 2002 while also pursuing his tractor business. The worker advised the Board that, in the long run, he did not want to continue in the grocery industry.

Given these circumstances, I conclude that the worker's total earnings of $43,707 in the 12 months prior to his disablement from shoulder tendonitis cannot be considered significantly atypical and/or an irregular disruption in the pattern of his employment such that it would be inequitable to apply section 33.1(2) to establish his wage rate.

I also concur with the Review Division that the other criteria addressed in RSCM policy #67.60(b) and (c) are not met in this case. As a result I conclude that the worker's circumstances do not constitute exceptional circumstances. I therefore deny the worker's appeal.

Conclusion

I deny the worker's and employer's appeals. I confirm the February 4, 2003 decision of the Board and the September 22, 2003 Review Division decision.

I direct the Board, under Section 7 of the Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02, to reimburse the employer for the expenses (if any) associated with the production of Dr. Jeffries' August 22, 2003 opinion according to the Board's schedule of fees for such reports. I am satisfied that it was reasonable in the circumstances of this case for the employer to have sought such evidence in connection with the appeal.

Jane MacFadgen
Vice Chair

JM/lco

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