Noteworthy Decision Summary

Decision: WCAT-2004-06831 **Panel:** Elaine Murray **Decision Date:** December 29, 2004

Reopening – Health care benefits – New diagnosis – Average earnings – Casual worker – Sections 33, 96(2) and 246(3) of the Workers Compensation Act – Policy Items #67.10 and former #C14-102.01 of the Rehabilitation and Services Claims Manual, Volume II – Practice Directive #33B

- A new diagnosis is a new matter for adjudication by the Workers' Compensation Board (Board) and does not trigger a reopening under section 96(2) of the *Workers Compensation Act* (Act).
- A worker who works varying shifts with the same employer on a continuous basis such that the worker has an ongoing attachment to the employer is not a casual worker under policy item #67.10 of the *Rehabilitation and Services Claims Manual, Volume* II (RSCM II).

The worker injured his right wrist lifting heavy boats. He was diagnosed with right wrist traumatic tendonitis but did not miss any time from work. The Board accepted his claim for health care benefits only. The worker then injured his left wrist and the Board accepted his claim for wage loss and health care benefits. The Board categorized the worker as a casual worker for the purposes of setting his provisional average earnings. Three months later the worker was diagnosed as having bilateral wrist tendon tears and requested further health care benefits. The Board interpreted this as a request for reopening as more than three months had passed since his original injury. The Board denied his request as there had been no significant change in or recurrence of his right wrist injury as required by section 96(2) of the Act. The Review Division of the Board confirmed the Board decisions. The worker appealed to the Workers' Compensation Appeal Tribunal.

The panel noted that former item #C14-102.01 RSCM II, in effect at the time of the Board decision, stated that a "significant change" is a change in the worker's physical condition that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits. The panel found the worker's diagnosed right wrist tendon tear was a different condition from the right wrist traumatic tendonitis originally accepted on his claim. Thus, the worker's claim was not a request for reopening but required the Board to make a new decision. As the Board had not adjudicated the initial acceptance of the tear, the panel suspended the appeal of this issue under section 246(3) of the Act and referred the matter of compensability back to the Board for adjudication.

With respect to the second issue, the panel noted the Board had characterized the worker as a casual worker for the purposes of calculating his average earnings under section 33.5 of the Act. The panel also noted that item #67.10 RSCM II and Practice Directive #33B applied in determining whether the worker was a casual worker.[1]

[1] Since this decision was made, the board of directors of the Board have amended the policy in item #67.10 to provide additional guidance as to the categorization of workers with a pattern of employment at the time of injury that is casual in nature. Practice Directive #33B was replaced by Best Practices Information Sheet (BPIS) #13. Both the amended policy and the new BPIS are effective January 1, 2006.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

The panel concluded the worker had not been hired on a seasonal basis as he had worked for almost eight months and there was evidence there would have been work for him if he was fit for full duties. As he had worked varying shifts for the same employer on a continuous basis, the panel concluded that he had an ongoing attachment to the employer. The panel decided the worker was best categorized as a regular worker employed less than 12 months, on a long-term temporary assignment. Section 33.3 does not apply because this is not permanent employment. The panel directed the Board to calculate the worker's initial rate of average earnings based on his earnings at the time of injury under section 33.1(1) and his long-term average earnings in accordance with section 33.1(2).

The worker's appeal was allowed in part.

WCAT Decision Number: WCAT-2004-06831
WCAT Decision Date: December 29, 2004
Panel: Elaine Murray, Vice Chair

Introduction

The worker appeals two decisions of the Workers' Compensation Board's (Board) Review Division, which relate to two claims – one for a right wrist injury and the other for a left wrist injury. Both Review Division decisions are dated November 6, 2003. In his appeals to the Workers' Compensation Appeal Tribunal (WCAT), the worker seeks further benefits in relation to his right wrist injury, and an increase in his wage rate on his left wrist injury claim.

The Board accepted the worker's July 5, 2002 claim for health care benefits for traumatic right wrist tendinitis. In a March 13, 2003 decision, the Board denied a reopening of the worker's claim in regard to the right wrist physiotherapy treatment that he first requested in September 2002. The worker requested a review of that decision by the Board's Review Division. The November 6, 2003 Review Division decision (the "A" appeal) confirmed the March 13, 2003 decision.

The worker also made a claim for a left wrist injury. The Board initially accepted that the worker sustained a strain of the left flexor carpi ulnaris in an incident on August 16, 2002, and awarded health care benefits. In a February 26, 2003 decision, a Board officer concluded that the worker did not sustain an injury on August 16, 2002; however, he did sustain a strain of the left flexor carpi ulnaris on September 17, 2002 for which he was eligible for wage loss and health care benefits. In the same decision, the Board officer categorized the worker as a casual worker and set a provisional wage rate. The worker requested a review of the February 26, 2003 decision concerning his wage rate. The November 6, 2003 Review Division decision (the "B" appeal) confirmed the Board's decision to categorize the worker as a casual worker and found insufficient evidence to increase the worker's provisional wage rate.

The employer is participating in these appeals. The worker and employer provided submissions, and the worker also provided a June 8, 2004 medical report from Dr. Dwyer and a July 8, 2004 medical report from Dr. Scott, both of whom are general practitioners. The worker requested that his appeals proceed by read and review and oral hearing. His request for an oral hearing was denied on a preliminary basis. I am satisfied that I can properly address the issues on these appeals without holding an oral hearing.

Issue(s)

"A" appeal

Should the worker's July 5, 2002 claim be reopened for health care benefits for treatment to his right wrist in and after September 2002?

"B" appeal

Is the worker correctly categorized as a casual worker?

Jurisdiction

This appeal is brought under section 239(1) of the *Workers Compensation Act* (Act), which permits appeals from Review Division findings to WCAT. 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, hear and determine all matters of fact, law and discretion required to be determined in an appeal before it.

Background and Evidence

The worker is presently 35 years of age. On July 5, 2002, he was working in sales/service for a boating company. In a July 18, 2002 report of injury, the employer noted that the worker reported wrist pain on July 5, 2002 after his wrist buckled when lifting boats weighing approximately 500 pounds.

The employer did not protest the claim and noted that Mr. C, a service manager, was a witness. The employer also wrote that it hired the worker in February 2002 as a sub-contractor in sales and service. The worker was paid $10.00 per hour and his gross earnings in the three months prior to July 5, 2002 were $1982.00.

On July 9, 2002, the worker reported to Dr. Dwyer that he had a sudden onset of right wrist pain after lifting a boat at work on July 5, 2002. Dr. Dwyer did not provide a diagnosis, but reported that the worker had a bruise to his right wrist/flexors and reduced grip strength. He recommended that the worker do part-time modified duties for seven days. The worker did not miss time from work after this incident and his claim was accepted for health care benefits only. Beyond seeing Dr. Dwyer on July 9, 2002, the worker did not seek any other treatment.

In an August 19, 2002 report of injury, the employer wrote that the worker reported on August 16, 2002 that he was now feeling pain in his left arm after helping unload boats from a container. The employer protested the claim.

The worker next saw Dr. Dwyer on September 3, 2002, with complaints of pain along the forearm flexors. Dr. Dwyer diagnosed right forearm flexor tendinitis.

On September 4, 2002, the worker told a Board officer that he and a co-worker lifted a 90 to 130 pound inflatable boat that was in a box, and he felt a strain/pull in his left forearm. He said that he had not gone for medical treatment or missed time from work.

By decision dated September 4, 2002, the Board accepted the worker's claim for health care benefits for a left forearm injury on August 16, 2002.

On September 17, 2002, the worker told a Board officer that his right wrist "never really improved" after July 5, 2002. He explained that he had not missed time from work, but had compensated for his right wrist by increasing the use of his left wrist.

On September 17, 2002, Dr. Scott reported that the worker had lifted a box and felt sudden pain in both forearms. He offered his opinion that the worker had now reinjured his forearms, especially the left side, by scrubbing a boat. Dr. Scott diagnosed left forearm flexor tendinitis, and considered the worker disabled from working.

On September 20, 2002, a Board officer summarized his conversation with the worker as follows:

> On July 05, the worker injured his right arm and was using his left arm to compensate. On August 16, the worker was lifting a heavy boxes [*sic*] of inflatable boats up to 110 lbs and he felt pain in his left forearm. He did not seek medical attention but he did report it to the accident employer. The employer asked him to wait a few days to see if it would improve. After a few days, the pain got better but every time he lifted something heavy with the left hand, he had pain. He continued to use the left hand as his right arm was not completely healed.
>
> On September 17, he was cleaning a boat with a scrub brush. After 20 minutes, he felt a sharp pain in the left arm. He normally would have used both hands to scrub the boat, but due to his previous injury to the right side, he only used the left hand to brush the boat and was using extra force with the left hand.

On September 22, 2002, Dr. Scott provided a referral memo for physiotherapy for the worker. The worker actually began physiotherapy on September 20, 2002 on Dr. Scott's advice.

On October 3, 2002, Dr. Scott diagnosed the worker as having bilateral wrist tendon tears and requested physiotherapy and an orthopaedic referral.

On October 10, 2002, Dr. Scott reported that the worker's wrists were still very sore and he required an MRI and orthopaedic opinion.

In a claim log entry dated October 16, 2002, a Board officer wrote that the worker told him that he worked on an on-call basis and had no scheduled shifts after September 17, 2002. He said that he called his employer, Mr. F, to ask if he would be needed. Mr. F asked if his wrists were better. In response to the worker's reply that they were not, Mr. F said that it could not use him.

The worker's physiotherapist reported on October 20, 2002 that the worker had pain with resisted wrist flexion "L > R", and tenderness of the triangular fibrocartilage complex (TFCC).

On November 8, 2002, Mr. F told a Board officer that the worker was sub-contracted for the summer only and usually worked five shifts per week at five to seven hours per shift to do pick-ups and deliveries with the company truck. He also periodically delivered, unloaded, and washed boats.

On November 14, 2002, Mr. F wrote the Board that it stopped using the worker's services at the end of September, since his contract was only for extra summer help. Mr. F also faxed a note to the Board advising that the worker had arm-wrestled, using his left arm, with him and a friend during the September boat show.

During a site visit on November 18, 2002, without the worker in attendance at the employer's request, Mr. F said that the worker was hired as summer help in February 2002, billed for his services, and worked five to six hours, three to four times per week. The worker performed a variety of tasks, which included driving the shop vehicle to pick up parts, front showroom duties, using a long-handled round scrub brush to wash boats, and receiving and stowing 110 pound boats.

On November 19, 2002, a Board medical advisor wrote a referral letter to Dr. Perey, but confused the facts. He mentioned that the worker injured his right wrist, but only referred to incidents on August 16 and September 16, 2002.

On December 20, 2002, Dr. Scott reported that the worker's right wrist "continues to be weak & sore & in fact is getting worse." Dr. Scott noted that the worker had seen Dr. Perey, who suggested physiotherapy. In a second report of the same date, Dr. Scott diagnosed the worker as having "tendon tear", but noted that his bilateral wrist pain was improving with physiotherapy.

On January 3, 2003, Dr. Perey, an orthopaedic surgeon, examined the worker's left wrist only. He reported that the worker experienced immediate left volar ulnar wrist pain while lifting a 110 pound boat on August 16, 2002. He continued working, but the pain did not improve and he then re-injured this wrist on September 16, 2002 while cleaning a boat. He stopped working at that time. Dr. Perey diagnosed a strain to the left flexor carpi ulnaris tendon. He noted that this problem was very slow to recover and recommended that the worker abstain from any heavy labouring for at least six months.

The worker did not seek further medical attention for left wrist problems after January 3, 2003. He found new employment on January 21, 2003 with another boating company and worked until February 18, 2003.

On February 13, 2003, the worker told a Board officer that his right wrist was deteriorating and he wondered what he should do.

On February 13, 2003, Dr. Scott diagnosed the worker as having a right wrist tendon tear and he asked the worker to see Dr. Perey.

On February 14, 2003, the worker told a Board officer that he did not agree that he was a seasonal sub-contractor, as reported by the employer.

The worker completed his application for the July 5, 2002 injury on February 14, 2003. He wrote that he injured his right wrist when lifting the back end of a stack of six rowing shells, which weighed approximately 500 pounds. He reported his injury immediately and said that Mr. C was a witness. He also wrote that Dr. Dwyer initially told him that his right wrist would heal in less than five days, but it did not.

In a February 24, 2003 claim log entry, a Board officer noted that he called the worker to ask "what he was requesting in regard to his R wrist." The worker told her that he wanted physiotherapy for his right wrist because it was not getting better, while his left wrist was now functional after physiotherapy. The Board officer told him that this would have to be considered as a reopening request since more than three months had passed since his original injury.

In the February 26, 2003 decision, the Board officer reached the following conclusions:

- He upheld the previous decision to accept the worker's July 5, 2002 claim for health care benefits for traumatic right wrist tendinitis, but advised that his request for physiotherapy would be considered as a reopening by another Board officer.

- The evidence did not support that the worker sustained a left wrist "injury" on August 16, 2002, since he did not seek medical attention, physiotherapy, or miss time from work.

- The worker's left wrist condition did not satisfy the criteria for acceptance as an occupational disease.

- The worker sustained a strain to the left flexor carpi ulnaris tendon while scrubbing a boat on September 17 [*sic*], 2002. The Board officer accepted that the worker was using his left hand more than usual at that time and the scrubbing task required awkward and forceful left wrist movement. He indicated that there was sufficient evidence "to uphold the previous decision to accept [the worker's] wrist claim under

section 5(1) for a traumatic injury." Given that he had already decided that the worker did not sustain an injury on August 16, 2002, I interpret the Board officer to be saying that he was upholding the previous decision that the left wrist injury was a traumatic injury and not an occupational disease.

- The worker was deemed to be a casual worker, and his wage rate would be based on his one-year earnings from September 17, 2001 to September 16, 2002. Since the only wage information he had was from the employer ($1982.00 for three months prior to July 5, 2002), the worker's wage rate would be set on a provisional basis, which amounted to a net weekly rate of $38.36. He invited the worker to provide further evidence so that he could properly set the wage rate.

- The worker was disabled from working from September 17, 2002 to January 3, 2003.

The worker only requested a review of the provisional wage rate set out in the February 26, 2003 decision. He provided the invoices that he gave to his employer each month, which set out his days and hours of work, and submitted that he had earned substantially more than $1982.00 in three months.

In the March 13, 2003 decision, a Board officer denied a reopening of the worker's July 5, 2002 claim for health care benefits because there had not been a significant change or recurrence of his right wrist traumatic tendinitis. The Board officer acknowledged the October 3, 2002 diagnosis of a right wrist tendon tear, but stated that the pathology of the right wrist symptoms was unclear. The Board officer informed the worker that he could pursue medical investigations on a private patient basis and if he thought that the findings met the reopening criteria, he could submit that information to the Board.

The worker requested a review of the March 13, 2003 decision by the Board's Review Division. In support of that request for review, he submitted that he followed Dr. Dwyer's initial advice to rest his wrist and it would heal, but it did not. When he saw Dr. Scott on September 3, 2002, he was told he needed physiotherapy for his right wrist. The physiotherapist treated his right wrist once, but the Board told her to discontinue right wrist treatment because it had "fallen outside of the six week period." The worker said that he experienced considerable improvement with the physiotherapy to his left wrist, but his right wrist deteriorated.

On April 10, 2003, Dr. Perey reported that the worker's left forearm symptoms had dramatically improved with physiotherapy, but he had persistent ulnar sided distal right forearm pain located about the flexor carpi ulnaris tendon and required physiotherapy.

In the November 6, 2003 Review Division decision, (the "A" appeal), the review officer confirmed the Board's March 18, 2003 decision. She concluded that the "objective

medical evidence on file does not support the worker's assertion that his right wrist/arm condition deteriorated between September 2002 and August 2003" so as to satisfy the reopening criteria under the Act.

With respect to her review of the February 26, 2003 decision, the review officer concluded in the second November 6, 2003 decision, (the "B" appeal), that the worker was properly categorized as a casual worker. She also decided that since the worker's additional evidence concerning his earnings was not from a verifiable source, she would not increase the provisional rate set on his claim.

The Board has not yet set a rate on the worker's claim, besides the provisional one.

On June 8, 2004, Dr. Dwyer offered the following opinion:

> When [the worker] was seen on July 9, 2002, there was evidence of injury to his tendon and a history of heavy lifting of a box, which was approximately one hundred pounds, which he felt put excessive strain on his wrist. [The worker] suffered inflammation or perhaps a tear in the flexor tendons as a result of that injury. This would be in keeping with the history of heavy lifting.

A July 16, 2004 MRI revealed a possible central tear of the right wrist TFCC.

On July 19, 2004, Dr. Scott offered his opinion that the worker likely sustained a tendon tear on July 5, 2002, which developed into chronic tendinitis because of a failure to properly heal.

On August 8, 2004, a Board officer told the worker that further medical investigations would have to be done privately, since the Board had previously denied a reopening of his claim.

On August 31, 2004, Dr. Perey reported that he had reassessed the worker and "[l]ooking back on his situation it may be that his problem has been a tear of the triangular fibrocartilage the whole time, as his symptoms were somewhat unusual." Dr. Perey performed surgery on the worker's right wrist in November 2004.

On November 22, 2004, Dr. Perey reported that the worker was two weeks from surgery and would now begin aggressive range of motion exercises. If he remained symptomatic, Dr. Perey thought that he might require an ulnar shortening osteotomy.

Reasons and Findings

"A" appeal

The reopening decision was made after March 3, 2003, which is the transition date for relevant changes to the reopening provisions under the Act. The reopening of this claim is adjudicated under the provisions of the Act as amended by Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002.* The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM II), as it read on March 13, 2003, which is the date of the decision under appeal.

Section 96(2) of the Act states that a matter that has previously been decided by the Board may be reopened if there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or there has been a recurrence of the worker's injury.

RSCM ll policy #C14-102.01 provides that a "significant change" is a change in the worker's physical condition that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits. Neither the Act nor policy item #C14-102.01 defines a "recurrence." The policy states that a recurrence of the original compensable injury occurs without an intervening second compensable injury.

Section 96(2) addresses the reopening of "a matter that has been previously decided by the Board." In this case, the only matter previously decided by the Board was acceptance under the claim for right wrist traumatic tendinitis for health care benefits. The Board received one medical report, but beyond paying for that report, no further adjudication occurred.

The July 5, 2002 claim remained inactive until the Board received a request to pay for the worker's physiotherapy for both wrists in September 2002. It was this initial request which resulted in the March 2003 decision to deny a reopening of the claim related to treatment of the worker's right wrist complaints.

I have considered whether the September 2002 request for health care benefits was appropriately characterized as a request under section 96(2) of the Act to reopen a matter that had been previously decided by the Board, as opposed to a new matter for adjudication.

I note that at the time of the case manager's decision in March 2003, there was much confusion within and outside the Board about how to interpret and apply the new provisions in the Act and the Board's published policy regarding a reopening of a claim. These new provisions came into effect on March 3, 2003.

The Board has issued practice directives that provide assistance in understanding how it interprets policy (accessible at www.worksafe.bc.com). Practice directives are not policy; however, they can provide useful guidance in certain cases. I have found it helpful to refer to the directives in the particular circumstances of the worker's case.

On July 18, 2003 the Board amended Practice Directive #38B to provide adjudicative guidance to its staff on the application of the new provisions. The revised directive reads that it is applicable to all adjudicative decisions made on and after March 3, 2003.

This practice directive states that where there is a request for further health care benefits related to a health care only claim, in the absence of evidence to the contrary the further medical treatment should be treated as a request for reopening where "12 or more weeks" have elapsed between the last treatment and the date of the further treatment. As such, the grounds for reopening must be met. Consequently, when less than 12 weeks have elapsed, it is not a case of "reopening a matter previously decided", but instead requires the Board officer to make a new decision.

Practice Directive #38B provides assistance in characterizing the decision under appeal. The case manager treated this as a case of "reopening a matter previously decided" under section 96(2). When the worker first sought physiotherapy for his right wrist in September 2002, approximately 10 weeks had passed since the worker's injury had occurred. In accordance with the Board's practice directive, this should not have been treated as a reopening.

I am also mindful of a recent resolution of the Board's board of directors that amended the reopening policies to clarify ambiguities. These amendments are not applicable to the decision under appeal, since they only apply to decisions made after January 1, 2005. They do, however, provide guidance on this appeal. In particular, amendments to RSCM II policy item #C14-102.01 clarify that the acceptability of additional medical conditions identified during the adjudication of a claim and health care benefit entitlement are new matters for adjudication and do not constitute a reopening decision.

In this case, when the Board eventually made the reopening decision in March 2003, there was new medical evidence on file concerning a new diagnosis of the worker's right wrist problems. The March 2003 decision specifically noted the diagnosis of a tear, but the Board officer concluded that the "pathology of the [the worker's] right wrist symptoms" was "unclear". As a result, she concluded that there had not been a significant change or recurrence of the worker's accepted injury. She did not address whether the new diagnosis was compensable. In the Review Division decision, the review officer noted that the Board had not yet issued a decision with regard to the diagnosed tear, but did not refer the decision back to the Board to decide that matter. The Board has continued to decline to pay for medical investigations for the worker's right wrist, given the decision to not reopen the claim.

I find that a decision with respect to the worker's entitlement to health care benefits arising from the medical reports in September 2002 and following should not have been characterized as a request for a reopening of a matter previously decided. I conclude that the March 13, 2003 decision should actually have been a decision on a new matter, i.e. whether the right wrist symptoms for which the worker sought medical attention in

and after September 2002 justified a resumption of health care benefits. A decision on this issue involved, of necessity, a determination of whether these symptoms were causally related to, and a continuation of the July 5, 2002 claim injury. Given the new diagnosis of a tear, it makes little sense to decide the issue of health care benefits, without deciding whether the TFCC tear is compensable.

I find that the Board has not adjudicated the compensability of the diagnosed TFCC tear, which is a significantly different diagnosis from the earlier diagnosis of a traumatic tendinitis. The case manager did not seek a medical opinion regarding the new diagnosis of a tear and any potential causal relationship to the claim injury. She simply stated that the diagnosis was unclear.

Section 246(3) of the Act gives WCAT the discretion to suspend an appeal and refer a matter back to the Board for determination where the panel considers there is a matter that should have been determined but was not determined by the Board. I find that the issue of the compensability of the TFCC tear in relation to the 2002 claim injury is a new matter that the Board should have determined, but did not do so.

I have concluded that this is an appropriate case in which to exercise my discretion to request that the Board investigate and adjudicate the compensability of the new diagnosis of a TFCC tear. This is the fundamental issue that the worker seeks to have addressed in the context of this appeal, in relation to his request for compensation with respect to treatment for his right wrist in and after September 2002. I therefore suspend this appeal and refer the file back to the Board under section 246(3) of the Act for determination of the following matter:

> Did the July 5, 2002 claim injury have causative significance in the development, activation, acceleration or aggravation of the worker's right wrist TFCC tear?

This will require a considered medical opinion on this issue which takes into account the new medical information submitted in this appeal. Since Dr. Perey has performed surgery on the worker, I would suggest that the Board request his opinion in this matter.

As set out in section 246(4), the further determinations of the Board become part of the matters this panel will decide in the context of this appeal, and no review of that determination by the Review Division may be requested. Once the Board has issued a new decision addressing the above matters, I will reactivate the appeal, provide the worker with time to respond to any new evidence on file (including the Board's new decision), and complete my adjudication.

If the Board makes other new decisions which result from this referral but do not directly address the matters referred to above, those new decisions should be addressed in separate decision letters. Any such consequential decisions are reviewable by the Review Division.

"B" appeal

Is the worker correctly categorized as a casual worker?

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.* The policies relevant to this appeal are set out in the RSCM II, as it read on February 26, 2003.

The review officer confirmed the Board officer's categorization of the worker as a casual worker, in accordance with section 33.5 of the Act, which 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.

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

> 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:
>
> (a) the initial payment period;
>
> (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.

RSCM II policy item #67.10 assists in interpreting section 33.5 of the Act, and 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.

In this case, the worker was attached to employment with the one employer for much longer than three months; however, the evidence also suggests that his hours varied from week to week, and he was basically "on-call."

Practice Directive #33B*, "Casual Workers",* provides guidelines for determining whether a worker is appropriately categorized as a casual worker. Practice Directive #33B is effective March 18, 2003. It was issued after amendments to RSCM II policy item #67.10 that concerned longshore workers. It replaced Practice Directive #55, which was issued in November 2002, in response to a request from Board officers for guidance in determining whether a worker should be categorized as a casual worker. The excerpts noted below from Practice Directive #33B were also contained in Practice Directive #55*:*

> ***1. "A casual worker is a worker who has a short-term/sporadic attachment to employment. Generally the employment lasts less than three consecutive months."***
>
> This policy is directive, in that workers with short-term/sporadic attachment to employment are casual. Given the policy's direction, and in order to ensure consistent and equitable treatment of workers in similar situations, 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.
>
> ***2. "A worker who works "on call" for one or more employers may also be a casual worker."***
>
> **<u>On Call with Single Employer</u>**
>
> a) Where a worker works varying shifts for the same employer on a continuous basis, he or she would normally be categorized as a regular worker. In such cases, although the work is unscheduled, the worker has an ongoing attachment to the employer i.e. - the worker is regularly called in to work and makes himself/herself available to that employer.
>
> An example is a nurse who only works for one employer but reports to one of four hospital sites, all of which are managed by the same employer.

> Another example is a teacher who works for one school district but is assigned to different schools. These workers would be categorized as regular. Therefore, initial average earnings would be based on the earnings at the time of injury. The long-term average earnings would be based on the general rule – i.e. the 12-month period immediately preceding the date of injury.
>
> If the worker had not been employed with that employer for 12 months, section 33.3 [less than 12-month rule] would be applicable, as the nurse or teacher is neither casual nor temporary. Caution, however, should be exercised so that the average earnings of an appropriate similar status co-worker are comparable to that of an on-call worker.
>
> b) Where the on-call employment with the single employer is so sporadic, occasional and unpredictable that attachment to the employer cannot be demonstrated, a worker would be categorized as casual. An example is a worker who works on-call for only a few days a month, for the same employer, on an unscheduled basis.

In its submissions to WCAT, the employer confirmed that it provided the worker with a handwritten "payment table", which sets out the worker's earnings from February 5 to September 23, 2002. The worker submits that there are two time periods, totalling approximately nine weeks, which the employer did not include. The worker provided copies of his invoices for one of those time periods and I accept that he likely worked steadily from February 5 to September 23, 2002.

The "payment table" shows that the employer wrote 13 cheques to the worker over 33 weeks. This amounts to a cheque every 2.5 weeks. The cheques totalled $8996.17, which averages $272.00 per week ($8996.17 divided by 33 weeks = $272.00) or approximately 27 hours of work per week. The average cheque amount was $600.00 to $700.00 dollars and would be reflective of working approximately 27 hours every 2.5 weeks (2.5 times 27 times $10.00 per hour = $675.00).

The employer insists that the worker was hired on a "summer seasonal" basis, and his work was about to end when he was injured. The worker contends that he was working on an "on-call" basis with no set termination date. I am unable to conclude that the worker was just hired for the summer season, since I find that he worked steadily from February through September 2002. In addition, I accept the worker's evidence that he called the employer after he was injured in September 2002 to ask if there was work available and the employer replied that if his wrists were not better, then he had no further use for him. This leads to the conclusion that further work would have been available if the worker was fit to do his full duties.

The worker's employment clearly lasted more than three consecutive months; it lasted almost eight months at the time of his injury and would likely have continued, but for that

injury. I do not find that the worker had "short-term/sporadic attachment to employment", as set out in policy item #67.10.

The worker's circumstances best fit that of an on-call worker with one employer, as outlined in Practice Directive #33B. I find that he worked varying shifts for the same employer on a continuous basis such that he had an ongoing attachment to the employer. In such a case, he would normally be categorized as a regular worker. I do not consider that his on-call work was so sporadic, occasional and unpredictable that attachment to the employer could not be established. The example given in the practice directive of an on-call worker who would be deemed casual is someone who only works on-call a few days a month for the same employer on an unscheduled basis. In this case, the worker worked an average of four days a week for the employer. Thus, I find that the worker does not fit within the definition of a casual worker. There is, however, a further exception to the general rules that must be addressed.

Since the worker had been employed less than 12 months with the employer, I must determine if section 33.3 of the Act applies. It provides as follows:

> In the case of a worker employed, <u>on other than a casual or temporary basis</u>, by the employer for less than 12 months immediately preceding the date of the injury, the Board's determination of the amount of average earnings under section 33.1(2) must be based on the gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury, of a person of similar status employed in the same type and classification of employment
>
> (a) by the same employer, or
> (b) if no person is so employed, by an employer in the same region.
>
> [emphasis added]

RSCM II policy item #67.50 provides that section 33.3 of the Act "is a mandatory exception to the general rule for determining long-term average earnings and applies [*sic*] a worker with permanent employment."

I have determined that the worker was not a casual worker and that he was employed less than 12 months. The next question is whether he was employed on a "temporary basis". The following passage from Practice Directive #33B is also of assistance in this matter:

4. Workers with Temporary Assignments/Contracts

- Where the job with the employer is three or more months in duration, but has a known termination date, the worker will be categorized as regular, except where there is clear evidence to the contrary, in which case, they should be categorized as casual. Regular workers are entitled to an initial payment period based on their earnings at the time of injury.

- With respect to determining long-term average earnings, where a worker on a temporary assignment does not meet the casual exception, the general rule prevails – i.e. the long-term average earnings would be based on the worker's 12-month prior earnings. **Board officers should note that the exception in section 33.3** [less than 12-month rule] **is not applicable, as it specifically excludes "temporary basis" workers.** [emphasis in original]

- For example: a worker is hired to work on a construction project for a six-month period and is injured on the third day of employment. This worker will be categorized as a regular worker who has a long-term temporary assignment. Initial and long-term average earnings would be calculated in accordance with the above. [emphasis added]

I find that the worker is best characterized as a regular worker who had a long-term temporary assignment. As a result, his initial and long-term average earnings would be "calculated in accordance with the above." This is a rather vague reference. I consider that "the above" refers to the two bulleted passages under the sub-heading, "*Workers with Temporary Assignments/Contracts*." Thus, I find that the section 33.3 exception does not apply to "regular" workers who are on long-term temporary assignments. They are considered to be employed on a "temporary basis." I note that this interpretation of the practice directive would be consistent with RSCM II policy item #67.50, which explains that the section 33.3 exception applies to those workers "with permanent employment." I do not consider a worker with a long-term temporary assignment to have permanent employment.

Given my finding that the worker should be considered a regular worker, employed on a temporary basis, his initial payment period should be based on his earnings at the time of the injury, in accordance with the general rules for determining average earnings in section 33.1(1) of the Act. Section 33.1(2) of the Act applies to setting his long-term average earnings.

I find, therefore, that the Board should calculate the worker's initial payment period (the first 10 weeks) on the basis of his earnings at the time of the injury and his long-term

average earnings on his 12-month earnings immediately prior to September 16, 2002. I allow the worker's appeal on this issue.

My finding leads to the question of whether the worker's provisional wage rate should be changed.

It is unusual to have an appeal of a provisional rate, since it is an interim "decision" that may be changed when a rate is fixed. Once the Board fixes a rate, the provisional rate is adjusted to reflect that proper rate. The decision fixing the rate is then subject to appeal. In this case, the Board has never fixed a rate. Yet the worker's wage loss benefits were terminated almost two years ago.

It flows from my decision that the worker should be categorized as a regular worker and not a casual employee, that the Board should now calculate the worker's initial and long-term wage rate. It is, therefore, unnecessary to address the worker's provisional wage rate.

The parties have provided additional evidence on this appeal, which would be of assistance to the Board in setting the worker's initial and long-term rates.

The employer has never provided any evidence to the Board concerning the worker's earnings immediately before September 16, 2002. Yet the worker clearly worked for the employer in the months immediately preceding that date. The employer has only provided the Board with the worker's earnings in the three months before July 5, 2002, which the worker submits are inaccurate.

In his June 16, 2004 submission, the worker provided a copy of a "payment table" that he said his employer gave him. It purports to cover the worker's total wages from February 5 to September 23, 2002. The worker notes that the employer left out the periods of February 10 to March 17, 2002 and July 29 to August 25, 2002, but the worker contends that he worked during that time and offered his invoices for the second period as proof.

In his June 23, 2004 submission, the employer wrote as follows:

> In another letter to you dated June 10, 2004, [the worker] alleges that a payment table he received and which I think we had already sent a copy of to you earlier was fabricated. This was a listing we did to show [the worker] that we had paid him all that was owing plus that we had even over paid him when he was constantly bothering us for further money after we were no longer engaging her services.

Thus, the employer has verified that it prepared the "payment table". That table lists various invoices submitted by the worker from February 5 to September 23, 2002, the corresponding cheque number from the employer, and the amount of those cheques.

This table confirms that the employer paid the worker approximately $8996.17 during that time. Based on the worker's invoices, I accept that there are likely some missing cheques from this payment table. Thus, when fixing the worker's initial and long-term rates, the Board should address the gaps in the employer's "payment table" regarding the periods from February 10 to March 17 and July 29 to August 25, 2002. The worker did not provide invoices for the February/March period, but his invoices for the July 29 to August 25 period show that he worked approximately 145.5 hours.

Conclusion

In accordance with the above reasons and findings, I suspend the "A" appeal under section 246(3) of the Act pending further determination by the Board with respect to the compensability of the worker's TFCC tear.

I vary the Review Division decision concerning the "B" appeal. I find that the worker should be categorized as a regular worker, and direct the Board to calculate his initial payment period and long-term average earnings in accordance with the general rules.

No expenses were requested and none are awarded.

Elaine Murray
Vice Chair

EM/ml