

Noteworthy Decision Summary

Decision: WCAT-2005-00404 **Panel:** Debbie Sigurdson **Decision Date:** January 27, 2005

Average earnings – Regular worker employed less than 12 months – Sections 33.3 and 33.4 of the Workers Compensation Act – Policy item #67.50 of the Rehabilitation Services and Claims Manual, Volume II – Practice directive #33A

Section 33.3 of the *Workers Compensation Act* (Act) is a mandatory provision that applies in calculating the long-term average earnings of a regular worker employed less than 12 months with the injury employer. Where there is insufficient evidence to calculate the worker's average earnings based on those of a worker of similar status for the purposes of policy item #67.50 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), the class average for all workers should be used to calculate the average earnings of a worker whose employment is seasonal in nature. Exceptional circumstances may not be considered when a worker has been employed for less than 12 months with the injury employer at the date of the injury.

The worker, a landscaper, had been employed by the accident employer for four months when he injured his back. The Workers' Compensation Board (Board) determined the worker was a regular worker employed less than 12 months. The Board asked the employer to provide the one year pre-injury earnings of a similar worker; however, there was no worker of a similar status. The Board then based the worker's long-term average earnings on the class average earnings of a full-time landscape worker/nursery worker employed in the same geographic location as the worker.

The worker requested a review of this decision by the Review Division of the Workers' Compensation Board (Review Division). The worker submitted that his pattern of employment in the one year preceding the date of his injury was significantly unusual with an irregular change in his earnings due to a change in geographic location and period of unemployment following that move. Prior to his move he had a regular pattern of full-time employment as a landscape foreman. The Review Division concluded that the class average for a full-time landscape foreman, and not a full-time landscape worker, should be used to set the worker's long-term wage rate. The employer appealed to the Workers' Compensation Appeal Tribunal (WCAT).

The WCAT panel noted that section 33.3 of the Act applied, as the worker was hired as a regular worker, and had been employed for less than 12 months at the date of his injury. Section 33.4 of the Act specifically excluded consideration of exceptional circumstances for regular workers employed less than 12 months.

The employer presented new evidence of annual earnings for eight workers in the same type and classification as the worker. The panel noted that item #67.50 RSCM II requires the Board to obtain the gross earnings of a worker of similar status employed in the same type and classification of employment for the 12-month period immediately preceding the date of injury. For various reasons the panel concluded that the employer's evidence was insufficient to calculate the worker's average earnings based on those of a worker of similar status.

The panel concluded that the worker's employment was that of a landscape foreman, and that the class average for the landscape parks main foreman within the province should be used.

However, the panel held that the worker was not hired nor had any expectation of employment for a 12-month period. His employment was seasonal in nature, and he was subject to a three-month period of lay-off. Thus, the class average for “all workers - landscape parks main foremen” should have been used to calculate the worker’s average earnings, not the class average for full-time landscape parks main foremen.

The employer’s appeal was allowed.

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Introduction

The Workers' Compensation Board (Board) accepted the worker's claim for a low back strain following his work activities on July 28, 2003. The worker received wage loss benefits from October 14, 2003 to April 14, 2004. On January 30, 2004, the Board officer determined that the worker was a regular worker employed less than 12 months. The worker's long-term wage rate was based on the class average earnings of a full-time landscaper / nursery worker employed in the same geographic location as the worker. This calculated to a gross weekly wage rate of \$517.81.

The worker requested a review of that decision. On May 25, 2004 a review officer at the Review Division varied the Board's decision and directed the Board to use the class average earnings for a full-time landscape foreman. The employer has appealed that decision. The employer requests that the worker's long-term wage rate be based on the one-year earnings of a worker employed in the same type and classification of position as the worker for the period immediately preceding the date of his injury.

Issue(s)

What are the worker's long-term average earnings? Specifically, what are the gross earnings for the 12-month period immediately preceding July 28, 2003 of a person of similar status employed in the same type and classification of employment?

Jurisdiction

Section 239(1) of the *Workers Compensation Act* (Act), as amended, provides that a decision made by a review officer under section 96.2 may be appealed to the Workers' Compensation Appeal Tribunal (WCAT). Section 250(1) of the Act allows WCAT to consider all questions of law and fact arising in an appeal, subject to section 250(2), which requires that WCAT apply the relevant Board policy, and make its decision based on the merits and justice of the case.

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*. WCAT panels are bound by published policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). The policies relevant to this

appeal are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

This appeal has proceeded without an oral hearing. I am satisfied that the matter can be decided without the necessity of an oral hearing based on consideration of the submissions from the employer's representative and the worker to the Review Division and WCAT and a review of the evidence on the Board file.

Background and Evidence

The employer operates a landscape construction business. This 29-year-old worker was employed as a landscaper from March 17, 2003.

On July 28, 2003 the worker was bent over a tree. He grabbed the tree with both hands and then rocked back and forth to loosen the suction. While doing so the worker experienced an onset of acute low back pain. The worker was able to continue to work at light duties as a foreman until October 14, 2003. The worker reduced his hours of work after that date due to ongoing low back pain. The Board accepted the worker's claim for a left-sided low back strain with nerve root irritation.

On the report of injury form, the employer indicated that the worker was employed on a permanent full-time basis in a seasonal position as landscaper. On October 29, 2003 the employer stated that the worker was hired to work on residential landscape projects as a working foreman. He received \$17.00 per hour plus 4% vacation pay and worked a regular eight-hour shift for five days. After his injury the worker adjusted his work schedule to four days at ten hours per day. The worker continued to work in a reduced capacity part time from October 14, 2003 to the end of November 2003, and he received temporary partial wage loss benefits.

On November 28, 2003 the Board's Statistical Department reported that the class average annual earnings in the worker's geographic location for a landscape worker was \$13,170 for all workers, including part-time, full-time, and seasonal workers; and \$27,000 for only full-time workers. The Board's Statistical Department later reported that the provincial class average annual earnings for a "foreman/woman landscape parks main" for all workers was \$31,590 and \$41,670 for full-time workers.

On December 3, 2003 the employer responded to the Board officer's request for the one year pre-injury earnings of a similar worker. The employer indicated that the company is seasonal and that the workers are laid off for the winter months from mid November to mid March. The employer confirmed the worker was hired as a foreman and that his full-time wages were equal to 40 hours per week at \$17.00 per hour plus 4% vacation pay. The employer indicated that there was not a similar status employee because all workers were hired for the period required and then laid off, depending on the circumstances. The employer confirmed that the worker's gross earnings for 2003 totalled \$24,301.16.

On January 20, 2004 the Board officer noted that the worker had relocated to a different area of the province in August 2002 and that he received employment insurance benefits until March 2003 when he commenced employment with the accident employer. Prior to his move, the worker had been employed as a landscape foreman for several years. The Board officer noted that the worker's taxable earnings in 2002 were \$26,645.00 and that his employment earnings in 2003 with the accident employer were \$24,301.00. The Board officer concluded that although the worker's occupation has a seasonal component to it, he would have returned to work with the accident employer following the seasonal three month lay-off. The Board officer concluded the worker was a regular worker employed less than 12 months. The one-year earnings immediately preceding the date of injury for a similar worker were not available. The Board officer determined that the full-time class average earnings of \$27,000 for a landscape worker best represented the actual loss to the worker and used this figure to set the worker's long-term wage rate.

On January 29, 2004 the employer confirmed that the worker received \$4.00 to \$5.00 more per hour than a landscape labourer, as the worker was employed in a foreman position.

On February 4, 2004 the Board officer indicated to the worker that the statistical average for the earnings of a landscape foreman in the worker's geographic area was not available. The closest available information was the earnings province wide for a parks maintenance foreman. The Board officer indicated that this figure was not an accurate representation of the worker's loss due to his injury, particularly when considering the worker's pre and post-injury earnings.

The worker submitted to the Review Division that his pattern of employment in the one year preceding the date of his injury was significantly unusual with an irregular change in his earnings. The worker indicated the reason for this was his change in geographic location and period of unemployment following that move. The worker submitted that prior to his move he had a regular pattern of full-time employment as a landscape foreman. He indicated that his annual earnings in 2000 totalled \$38,620.60 and that his annual earnings in 2001 totalled \$41,208.26. The worker submitted that for the 30 week period from March 17, 2003 to October 13, 2003 he had earned \$20,667.92. For these reasons the worker requested that the review officer find special circumstances existed that affected his pre-injury earnings.

On May 25, 2004 the review officer confirmed that section 33.3 of the Act applied, as the worker was hired as a regular worker, and had been employed for less than 12 months at the date of his injury. The review officer determined that section 33.4 specifically excluded the worker for consideration of exceptional circumstances since he was a regular worker employed less than 12 months. The review officer concluded that the class average for a full-time landscape foreman, and not a full-time landscape worker, should be used to set the worker's long-term wage rate.

The employer requested on the notice of appeal that the worker's long-term wage rate be set pursuant to the class average of \$31,590 for landscape foremen for all workers, and not the class average for just full-time workers. The employer submitted that the Review Division findings and the rate provided for a full-time landscape foreman were not an accurate reflection of the worker's wage loss. The employer submitted that the worker had no expectation of being full-time for 12 months in his position.

On September 17, 2004 the employer's representative submitted that the employer is able to provide the annual earnings from 2001 through 2003 for eight workers in the same type and classification as the worker. Attached to the submissions is a chart describing the foremen's total hours, wages paid and period of employment for each year, with a description of the type of work performed. The employer's representative noted that all working foremen were laid off by December 23, 2003. He submitted that the wage information provided indicated that the maximum annual earnings for a worker similar to that of this worker totalled \$26,724.62, and that the average was \$24,560.00. He noted that section 33.3 of the Act requires that the Board use the earnings of a similar worker of the same type and classification with the injury employer, and that this is a mandatory exception. The employer's representative submitted that the class average is only used when the earnings of a similar worker are not available. The employer's representative requested that the panel direct the Board to consider this new evidence to calculate the worker's long-term wage rate.

On October 8, 2004 the worker submitted that exceptional circumstances existed in the 12-month period preceding the date of his injury, in that he had changed geographic locations because of a family member's job and sustained a period of unemployment. The worker submitted that his income tax statements from 2000 through 2002 reveal that he had regular full-time employment prior to the move.

On October 21, 2004 the employer's representative submitted that the provisions set out in section 33.4 do not apply in the facts of this case because the worker was employed for less than 12 months at the time of his injury.

Reasons and Findings

The Act section 33.1(2) and RSCM II item #66.00 set out the general rule for determining a worker's long-term average earnings. In accordance with those provisions, the Board officer will determine the worker's earnings for the 12-month period immediately preceding the date of injury, subject to statutory exceptions set out in sections 33.2 to 33.7. If a worker's circumstances do not fall within any of the exceptions, the general rule applies to determine the worker's average earnings.

Section 33.3 of the Act provides that when a regular worker has been employed for less than 12 months immediately preceding the date of injury, the Board must use the gross earnings for the 12-month period immediately preceding the date of injury for a worker

of similar status in the same type and classification of employment. RSCM II item #67.50 provides that section 33.3 is a mandatory exception to the general rule for determining long-term average earnings and applies to workers with permanent employment. This policy item requires the Board contact the injury employer to determine the average earnings of a person of similar status employed in the same type and classification of employment to obtain the gross earnings of that worker for the 12-month period immediately preceding the date of injury. If no such person is employed, the Board then determines the one year pre-injury earnings of a similar status worker in the same region.

I note that section 33.3 is a mandatory provision that applies when a regular worker has been employed for less than 12 months with the injury employer. The evidence confirms this worker was employed for less than 12 months with the injury employer at the time of his injury. At the time of his injury, the worker had worked for greater than three months and had anticipated nine months of employment followed by a three month seasonal break. The worker's employment was more than casual in nature and additionally not temporary. I confirm that this worker was a regular worker employed in a seasonal industry. As such, section 33.3 applies to the facts of this case.

The next issue to determine is the gross one year pre-injury earnings of a similar status worker employed in the same type and classification of employment as this worker. I note that the employer had initially indicated that no such similar status worker was employed in the one-year period prior to the worker's injury. The Board had relied on that information to set the worker's wage rate using the class average earnings for a landscape worker.

New evidence provided on appeal suggests that earnings information of a similar worker with the injury employer may be available. I note however that the evidence before the panel falls short of providing the necessary information upon which a wage rate calculation can be based. The statute and policy are very prescriptive regarding the setting of wage rates, and requires that the calculation be based on the one-year earnings preceding the date of injury, or in this appeal, the period of July 28, 2002 to July 27, 2003 and for a worker employed in the same type and classification of employment. In contrast, the employer has provided evidence of annual earnings in the calendar years 2002 and 2003 for a number of working foremen, employed as commercial, civil and/or residential landscape foremen.

On the employer's chart of foremen's wages from 2001 through 2003, I note that foremen #2, #7, and #8 performed civil and commercial landscape work, whereas the worker was a residential landscape foreman. Additionally, I note that foremen #3 and #4 were not employed for the one-year period July 28, 2002 through July 27, 2003 such that their one-year gross earnings would not be available for the period required. While Practice Directive #33A suggests that the similar status employee need not be employed for the 12-month period preceding the date of injury, the statute requires that the earnings be set from the date of the worker's injury. As such, the fact these

foremen were not employed at the time of the worker's injury in my opinion precludes them from consideration as similar status employees.

Foremen #1, #5 and #6 were employed for the one-year period prior to the date of the worker's injury, and completed residential landscaping. From my review of the total wages paid and hours worked, the wage rate for foreman #1 was \$19.20 per hour, the wage rate for foreman #5 was \$14.27 per hour, and the wage rate for foreman #6 was \$14.65 per hour. The employer's records confirm that the worker received \$17.82 per hour. I find that the difference in remuneration between the worker and foremen #5 and #6 preclude them from consideration as similar status employees. In my opinion, a wage rate difference of greater than \$3.00 per hour is significant such that they are not of similar status. Foreman #1's wage rate is higher than that of the worker, and the employer's notations indicate that this foreman had greater than 20 years experience and performed high end residential landscaping. Although foreman #1's status is most similar to that of the worker, I find that given the wage rate difference and varying level of experience and classification, foreman #1's one-year earnings for the period under consideration would not be that of an employee of similar status and of the same type and classification of employment. Accordingly, I find that the employer's evidence of foremen's wages from 2001 through 2003 does not provide for gross earnings for the 12-month period immediately preceding the date of injury for a worker of similar status in the same type and classification of employment.

Section 33.3 requires that when the earnings information of a similar worker is not available from the injury employer, the Board must obtain the earnings information of a similar worker in the same region. RSCM II item #67.50 and Practice Directive #33A note that the Board is not limited in obtaining wage rate information from a single employer, and that the Board officer should obtain the geographic class average for the injury occupation. In this appeal the Board has obtained the class average information for landscape workers within the worker's geographic location and landscape parks main foreman within the province. I find that the worker's employment was that of a landscape foreman, and that the class average for the landscape parks main foreman within the province is more similar to this worker's position. I find however that the worker was not hired nor had any expectation of employment for a 12-month period. I accept that the worker's employment was seasonal in nature, and that he was subject to a three month period of lay-off. The reported full-time earnings of a landscape parks main foreman more accurately reflect the worker's annual income prior to his relocation when he had full-time employment for 12 months. That was not the case at the time of his injury. Accordingly, I find that the class average for "all workers - landscape parks main foremen" more accurately reflects the type and classification for the purpose of calculating the worker's long-term average earnings. The worker's long-term average earnings are equal to the class average for "all workers - landscape parks main foreman" for the 12 month period preceding the date of his injury, or \$31,590.00.

The worker provided evidence of his earnings prior to his change in geographic location. While those earnings may be more in line with the reported earnings of a "full-time

landscape parks main foreman", I note that the worker no longer had 12 months continuous employment available to him because of his choice to change his geographic location, for non-compensable reasons, to a location that has a seasonal shutdown in the industry in which he was employed.

The worker has asked the panel to consider his exceptional circumstances prior to the date of his injury, in that he had changed geographic locations and sustained a period of unemployment. Section 33.4(1) of the Act provides that if exceptional circumstances exist such that the application of section 33.1(2) produces inequitable results, the worker's average earnings may be based on an amount that the Board considers best reflects the worker's loss of earnings. Section 33.4(2) states that subsection (1) does not apply in the circumstances described in section 33.3. I note that the legislation has specifically excluded the consideration of special circumstances when a worker has been employed for less than 12 months with the injury employer at the date of the injury. Although this worker's circumstances in the one year prior to the date of his injury, including his period of unemployment, may constitute exceptional circumstances, I find that the legislation specifically prohibits my consideration of these circumstances in the facts of this appeal.

Conclusion

In accordance with the above reasons and findings, I allow the employer's appeal and vary the Review Division decision. No expenses were requested and none are ordered.

Debbie Sigurdson
Vice Chair

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