

**NOTEWORTHY DECISION SUMMARY**

---

**Decision:** WCAT-2005-02770**Panel:** Randy Lane**Decision Date:** May 30, 2005***Wage Rate for Permanent Disability Award Purposes – Long Term Wage Rate – Reviewable Decisions – Refusal to Review – Section 23(1) of the Workers Compensation Act – Sections 33.1 to 33.9 of the Act – Policy Items #39.00 and #66.00 of the Rehabilitation Services and Claims Manual, Volume II***

Under the current provisions of the *Workers Compensation Act* (Act) and Workers' Compensation Board (Board) policy, where the Board has already determined a worker's long term wage rate, the worker's permanent disability award is calculated using that rate. Unlike under the former Act and Board policy, the Board no longer has the authority to make a new wage rate decision when calculating a worker's permanent disability award. As the wage rate decision does not form part of the permanent disability award decision, the Review Division does not have the jurisdiction to review a permanent disability award decision where the only issue on review is the wage rate used by the Board.

In this case the worker requested a review by the Review Division of the wage rate used by the Board to determine his permanent partial disability award. The Review Division found that it lacked jurisdiction. The worker appealed the Review Division's refusal to review to WCAT. On appeal, the WCAT panel agreed with the Review Division and confirmed its decision.

The WCAT panel noted that as a result of the changes to the Act brought about by the *Workers Compensation Amendment Act, 2002*, particularly sections 33.1 to 33.9, the Board must determine an initial wage rate for the first ten weeks of disability and a long term wage rate to apply thereafter. Under the Act and policy item #39.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), there is no longer any discretion for the Board to change the long term wage rate once it is already established on the file at the ten week review of the wage rate.

In coming to this conclusion the panel found the following factors significant:

- Section 33.9 (Determination of net average earnings – long term injury) provides at subsection 33.9(2) for a start date for the application of the long term wage rate but no end date.
- The Act does not set out a third calculation point for determining average net earnings. Furthermore, the definition of "average net earnings" in the Act supports the existence of only two calculation points as it refers explicitly to sections 33.8 and 33.9.
- Item #66.00 (RSCM II) suggests that at the time a long-term wage rate is determined the Board should be considering the implications of a rate decision on any permanent disability award entitlement.

- There is no current equivalent to item #68.00 of the *Rehabilitation Services and Claims Manual, Volume I* which expressly provided that a different wage rate could be used to calculate permanent disability award entitlement.

Such an interpretation is consistent with the *Core Services Review of the Workers' Compensation Board* (Winter Report).

**This decision has been published in the *Workers' Compensation Reporter*:  
21 WCR 193, #2005-02770, Permanent Disability Awards - Long-term Wage Rate  
Under Current Provisions**

**WCAT Decision Number:** WCAT-2005-02770  
**WCAT Decision Date:** May 30, 2005  
**Panel:** Randy Lane, Vice Chair

---

## Introduction

The worker suffered an October 30, 2002 back injury. His claim was accepted by the Workers' Compensation Board (Board). He was paid temporary disability wage loss benefits for the period February 2, 2003 until August 17, 2003, save for several days worked in February 2003.

By decision of February 21, 2003 the worker was advised that initially his disability benefits would be calculated using his earnings of \$310.00 per day.

By decision of June 2, 2003 the worker was advised of the reasons for the Board calculating his long-term wage rate at ten weeks using his net business income of \$24,998.40 in the one year prior to his injury. That annual figure produced a monthly net average earnings figure of \$1,530.87. The worker's request for an extension of time in which to appeal the June 2, 2003 decision was denied by the Board's Review Division.

By decision of April 22, 2004 the worker was awarded a permanent partial disability award of 15% of total disability. The award was calculated using the monthly net average earnings figure of \$1,530.87.

In her October 27, 2004 decision (*Review Division #17860*) a review officer with the Board's Review Division confirmed the April 22, 2004 decision. The review officer determined that she lacked jurisdiction to address submissions regarding the wage rate used to calculate the pension benefits. She agreed with the award of 15% of total disability. Her decision may be viewed on the Internet at the Board's website at [www.worksafebc.com](http://www.worksafebc.com).

The worker appealed the October 27, 2004 decision to the Workers' Compensation Appeal Tribunal (WCAT). With the assistance of Mr. Field, a lawyer, the worker provided a November 16, 2004 notice of appeal and a January 31, 2005 submission.

The notice of appeal asks that the appeal be considered by way of "Read and review." By letter of January 10, 2005 the worker was advised that the appeal would proceed by

way of written submissions. That decision does not bind me if I consider that an oral hearing is necessary. I consider a fair and thorough decision may be reached on this appeal without holding an oral hearing.

### **Issue(s)**

At issue is whether the pension decision contained a reviewable decision concerning the worker's wage rate used for pension calculation purposes, and, if so, what the rate should be.

### **Jurisdiction**

WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it (section 254 of the *Workers Compensation Act* (Act)). It is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but, in so doing, it must apply a policy of the board of directors of the Board that is applicable in the case.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

### **Background and Evidence**

Given the narrow issue on appeal, I do not consider that a detailed recitation of the history of the claim is required. I will use this section of my decision to document Mr. Field's arguments.

Mr. Field submits that the determination of the loss of earnings resulting from a permanent partial impairment of a worker's earning capacity requires a consideration of factors that may not be relevant to the simpler exercise of determining average earnings for the purpose of determining temporary disability wage loss benefits payable pursuant to sections 29 or 30 of the Act. He notes that section 29 provides for a payment that is "a periodic payment that equals 90% of the worker's average net earnings." There is no reference to "earning capacity" in section 29. Similarly, sections 33.1, 33.8, and 33.9 refer to the determination of "average earnings." Those sections do not refer to the determination of "earning capacity."

Mr. Field submits that a disability awards officer must use his or her discretion afresh to "estimate the loss of average net earnings resulting from the impairment [subsection 23(1) of the Act]." There is no directive in subsection 23 (1) or in the rest of the Act that eliminates the need to exercise that discretion fully and fairly. When the Board estimates the long-term impact of an injury which is found to have resulted in a

permanent impairment, the loss of average net earnings should not be a mechanical exercise. He contends that the decision in *Testa v. Workers' Compensation Board*, (1989) 36 B.C.L.R. (2d) 129, (1989) 58 D.L.R. (4th) 676 (B.C.C.A.), as well as the discussion in *WCAT Decision 2004-06007* (which may be viewed on Internet at WCAT's website at <http://www.wcat.bc.ca>), supports this interpretation of how the Board must exercise its discretion in these matters.

Mr. Field argues that different considerations must be taken into account when determining earnings for calculating temporary total disability benefits payable after ten weeks disability and earnings for calculating payment of a pension which is to compensate a worker for the impact of an injury upon his earning capacity for the rest of his life.

### **Reasons and Findings**

I consider that the only issue raised on this appeal concerns the wage rate. While the review officer considered the percentage of disability and whether the worker should be given an additional award for subjective symptoms, the notice of appeal and the submission to WCAT concern the wage rate. While the submission to WCAT is accompanied by a copy of the submission to the Review Division (which raises issues other than the wage rate), I consider that the copy of the Review Division submission was provided for its discussion of the wage rate issue.

Mr. Field notes that prior to December 3, 2004, WCAT's *Manual of Rules, Practices and Procedures* provided at item 2.23(f) that the effective date and average earnings of any pension award were compensation issues on which a review officer's decision was appealable to WCAT. He observes that the *Manual of Rules of Practice and Procedure*<sup>♦</sup> was amended as of December 3, 2004 to provide at item 2.23(f) that "the effective date and average earnings calculation of any permanent disability award assessed under the WCA as it read before it was amended by the *Workers Compensation Amendment Act, 2002* (Bill 49)" were compensation issues on which a review officer's decision was appealable to WCAT. He submits that as the worker's appeal was filed in November 2004, the appeal should be considered with regard to the *WCAT Manual of Rules, Practices and Procedures* in effect at the time.

I consider that the issue is not resolved with regard to the version of the manual that was in effect at the time of the appeal. While it may have created expectations in appellants, the *Manual of Rules, Practices and Procedures* was not binding on WCAT. As well, the *Manual of Rules, Practices and Procedures* could not require WCAT to do something that was not open to it to do as a matter of law and policy. The current *Manual of Rules of Practice and Procedure* does contain rules which may be waived or

---

<sup>♦</sup> The name of the manual was changed slightly as of December 3, 2004.

modified only in exceptional circumstances, but there is no rule applicable to the case before me.

I am aware that a number of Review Division decisions have determined that the effect of the amendments to the Act associated with the coming into force of the *Workers Compensation Amendment Act, 2002* (Amendment Act) as of June 30, 2002 was that the Disability Awards Department did not set a wage rate, but rather was obliged to calculate pension entitlement by using the long-term wage rate previously set on the claim. The effect is that the Disability Awards Department does not render a wage rate decision subject to review.

The leading Review Division case appears to be *Review Reference #15971*, dated September 9, 2004. The review officer determined that the wage rate "...that must be used for PPD awards is the worker's long term wage rate." She provided the following analysis:

The DAO [disability awards officer] had no authority to make a new decision regarding the long term wage rate to be used in the calculation of the worker's PPD [permanent partial disability] award due to the recent changes in legislation. Effective June 30, 2002, the *Workers Compensation Act* was amended by the *Workers Compensation Amendment Act, 2002*. The amendments changed the law in relation to compensation benefits for injured workers. The law and policy as they were immediately before being changed is referred to as the former provisions and the law and policy after the changes is referred to as the current provisions.

Under the former provisions, if there were valid reasons, the DAO or Claims Adjudicator Disability Awards had discretion to change the wage rate established by the Case Manager and use a different long term wage rate for PPD purposes. Rehabilitation Services and Claims Manual, Vol. 1, policy item #68.00, *Permanent Disability Pensions*, states as follows:

Permanent disability pensions are normally based on the earnings rate established at the point when long term earnings are reviewed for wage loss purposes. This, in most cases, means the rate resulting from the eight week rate review; however, a different rate can be used if there are valid reasons for this. If there has been no review of long term earnings for wage loss purposes, a review will be carried out by the Disability Awards Officer or Adjudicator in Disability Awards in the same manner as a Claims Adjudicator would carry out an eight week review.

This discretion was presumably based on the broad discretion set out in section 33(1) of the former *Act*. This section allowed the initial decision-maker to utilize a method of calculating the worker's average earnings which appears "best to represent the actual loss of earnings suffered by the worker by reason of the injury".

Under the current provisions, sections 33.1 – 33.9 provide that the Board must determine an initial wage rate for the first ten weeks of disability (or until permanent disability occurs, whichever is shorter) and a long term wage rate to apply thereafter. There is no authority for two long term wage rates to be determined under the new provisions, depending upon whether the worker is temporarily or permanently disabled. There is therefore no discretion given to the DAOs or Adjudicators in Disability Awards to change the long term wage rate already established on the claim file.

In his 2002 Core Services Review of the Workers' Compensation Board, Mr. Alan Winter recommended amendments to section 33(1) of the former *Act*. I find that his discussion on this issue supports my interpretation of the changes in legislation. Specifically, the notion that the long term wage rate can not be varied once it has been established. With respect to this issue he stated on page 142 of his report:

After the worker has received temporary wage loss benefits for a period of 10 weeks from the date of injury, I have recommended that the WCB must conduct a rate review to determine the worker's average earnings. This determination of average earnings would then be used by the WCB to calculate any further entitlement to temporary wage loss or permanent disability benefits the worker may have under the *Act* from the start of the 11th week (from the date of injury) on. (By way of clarification, a second determination of the worker's average earnings would no longer be conducted when the worker is assessed for a permanent disability award, as is currently the case.)

...As the DAO has no discretion to vary the long term wage rate already established, the DAO used the wage rate to calculate the worker's pension. In the decision before me, I find that the DAO has not made a new decision regarding the worker's wage rate. As a result, I have no jurisdiction to review this issue.

That decision has been cited by several Review Division decisions.

In considering the matter before me, I note that while the Act as it existed before June 30, 2002 did not expressly provide for different wage rates to be used at various points on a claim, the policy associated with that version of the Act (found in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I)) provided for three possible wage rate decisions:

- (1) A “short term wage rate” (item #66.00 “Wage Loss Rates on New Claims”),
- (2) A “long term wage rate” made at eight weeks (item #67.20 “8-week Wage Rate Review), and
- (3) A “pension wage rate” made at the time that a pension is awarded (item #68.00 “Permanent Disability Pensions”).

As noted by the review officer in *Review Division #15971*, the authority for those various policies was presumably section 33 of the Act.

The Amendment Act introduced a number of changes to the Act that expressly set out provisions dealing with calculating net average earnings. Subsection 33.1(1) of the Act establishes a general rule for determining average earnings for the shorter of (a) the initial payment period (defined in section 1 of the Act as the first ten weeks of compensation payable for temporary disability) or (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. Section 33.8 (“Determination of net average earnings – initial period of injury”) provides at subsection 33.8(2) that the formula in section 33.8 applies to the determination of average net earnings for a worker for whichever of the following periods is shorter for the worker: (a) the initial payment period or (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.

Subsection 33.1(2) establishes a general rule that provides that if a worker’s disability continues after the end of the periods referred to in subsection 33.1(1), the Board must “determine the amount of average earnings of the worker based on the worker’s gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.” Section 33.9 (“Determination of net average earnings – long term injury”) provides at subsection 33.9(2) that the formula in section 33.9 “...applies to the determination of average net earnings for a worker starting after the end of the period referred to in section 33.8 (2) (a) and (b) that is shorter for the worker.”

I consider it significant that section 33.9 does not refer to an end-date. By that, I mean that that section does not set out a formula for calculating average net earnings that only applies until a worker is determined to have a permanent disability. In fact, that section sets out a formula that is expressed to be applicable *after the period* that ends on the date the worker’s injury results in a permanent disability.



I further consider it significant that the Act does not set out a third calculation point for determining average net earnings. It sets out formulae for the initial period of injury and for a long-term injury. The absence of such a third calculation point suggests that there are only two calculation points applicable to the calculation of compensation benefits on a worker's claim. (There are exceptions to the general rules set out in subsections 33.1(1) and 33.1(2), but those exceptions do not involve a third calculation point.)

The definition of "average net earnings" found in section 1 of the Act also supports the existence of only two calculation points. Section 1 the Act provides that average net earnings "...means, with respect to a worker, the average net earnings of the worker as determined by the Board under sections 33.8 and 33.9." I consider that that definition of "average net earnings" indicates that there is no third calculation point for determining average net earnings in connection with awards for permanent partial disability under section 23 of the Act. In that regard, subsection 23(1) provides that if a permanent partial disability results from a worker's injury, the Board must perform two calculations:

- (a) estimate impairment of earning capacity from the nature of degree of the injury, and
- (b) pay the worker compensation that is a periodic payment that equals 90% of the Board's estimate of the loss of average net earnings resulting from the impairment.

I do not consider that the reference to impairment of earning capacity in subsection 23(1) permits the Board to conduct a further calculation of a worker's earnings. As established by subsection 23(2), the reference to impairment of earning capacity in subsection 23(1) concerns the percentage of impairment rather than the earnings used to calculate benefits payable under subsection 23 (1).

The Board's policy buttresses a finding that there is no third calculation point. Item #65.00 of the RSCM II sets out the policy regarding the general rule for determining short-term average earnings. Item #66.00 describes the general rule for determining long-term average earnings. The provision in item #66.00 that "Long-term earnings data is normally obtained where there is an indication that a permanent partial disability pension may be payable" suggests that, at the time a long-term wage rate is determined, the Board should be considering the implications of a rate decision on any pension entitlement.

There is no policy which establishes a separate general rule for determining average earnings in connection with permanent disabilities or a policy which distinguishes

between long-term wage rates and pension wage rates. In fact, item #71.00, dealing with average net earnings, reinforces that there are only two calculation points:

Under sections 33.8 and 33.9 of the *Act*, the Board calculates a worker's average net earnings at two stages in the claim process as described below.

Item #71.10 describes the calculation of short-term average net earnings and item #71.20 describes the calculation of long-term average net earnings. It is very significant that there is no current equivalent to RSCM I item #68.00 which expressly provided that a different wage rate could be used to calculate pension entitlement:

Permanent disability pensions are normally based on the earnings rate established at the point when long-term earnings are reviewed for wage-loss purposes. This, in most cases, means the rate resulting from the 8-week rate review; however, a different rate can be used if there are valid reasons for this....

The absence of an equivalent to the RSCM I item #68.00 in the RSCM II strongly points to there being no separate wage rate determination for pension entitlement. That point is further reinforced by item #36.00 of RSCM II which observes that the calculation of long-term average net earnings is made with reference to chapter 9 of the RSCM II which is entitled "Average Earnings" and which contains policy items #64.00 to #71.40:

Permanent disability awards are calculated on the basis of a worker's long term "average net earnings". The computation of long term average net earnings is dealt with in Chapter 9.

Item #39.00 of RSCM II also indicates that there is no separate calculation of a wage rate when a pension is assessed:

Once the percentage of disability is determined, it is applied to the worker's long term average net earnings, and the permanent partial disability award is 90% of the amount so determined.

The excerpt from the "*Core Services Review of the Workers' Compensation Board*" reproduced in *Review Division #15971* reinforces that there is no determination of a worker's wage rate when a worker is issued a pension decision after a wage rate review has been conducted at ten weeks.

I observe that where a worker's temporary disability which precedes his or her permanent disability is less than ten weeks, the Board will not have been required to provide the worker with a separate wage rate decision in connection with temporary disability wage loss benefits payable after ten weeks. In such a case, the pension

decision may be the first decision in which the worker is advised of a long-term wage rate determined under subsection 33.1(2). In such a case, the pension decision would contain an appealable decision regarding the worker's long-term wage rate.

After reviewing the matter, I find that the Act and policy do not envision the rendering of a separate wage rate decision in connection with a pension award in a case where there has already been a decision rendered under subsection 33.1(2) as to the worker's long-term wage rate. As there is no separate wage rate decision rendered in such cases, an appeal from the pension decision does not contain a wage rate decision subject to review. As the worker in this case was provided with a long-term wage rate decision in the June 3, 2003 decision letter, I do not consider that the pension decision of April 22, 2004 contained an appealable decision with respect to the worker's wage rate. I do not consider that this is a question of the Board inappropriately fettering its discretion with respect to the setting of wage rates such that the decision in the *Testa* case would be applicable. The Board had no discretion to exercise in the case before me. The disability awards officer was required, as a matter of law and policy, to use the wage rate set in the June 2, 2003 decision.

### **Conclusion**

The worker's appeal is denied. I confirm the review officer's October 27, 2004 decision, as I find that the pension decision did not contain a reviewable decision concerning the worker's wage rate used for pension calculation purposes.

Randy Lane  
Vice Chair

RL/jy