NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2005-03166 **Panel**: Marguerite Mousseau **Decision Date**: June 17, 2005

Inclusion of Employment Insurance Payments in Calculation of Earnings and Long Term Wage Rate – Meaning of Recurring Temporary Interruptions of Employment – Section 33(3.2) of the Workers Compensation Act – Policy Item #68.40 of the Rehabilitation Services and Claims Manual, Volume II – Best Practices Information Sheet 3 – Practice Directive No. 35

Recurring temporary interruptions of employment, as the phrase is used in section 33(3.2) of the *Workers Compensation Act* (Act), includes interruptions that are a regular and integral part of the worker's occupation or industry. They are not restricted to repeating annual patterns of unemployment.

Section 33(3.2) of the Act provides that employment insurance payments received by a worker prior to a claim can only be included as earnings in calculating the worker's long term wage rate if the payments resulted from the worker's employment in an occupation that has "recurring seasonal" or "recurring temporary" interruptions of employment. The Workers' Compensation Board (Board) has established non-exhaustive lists of industries and occupations that are seasonal in nature. No similar list has been generated of industries and occupations that result in "recurring temporary" interruptions of employment. Board policy does not provide direction on the difference between seasonal occupations and those that result in recurring temporary interruptions of employment.

In this case, the worker was a construction carpenter. In setting the worker's long term wage rate the Board excluded from his earnings employment insurance payments he received. The Board found that the worker was not engaged in an occupation with "recurring seasonal interruptions of employment" on the basis of the area of the province in which he worked. The Board also found that the worker was not engaged in an occupation with "recurring temporary interruptions of employment". The Board interpreted that phrase in section 33(3.2) of the Act to require a "repeating annual pattern of layoffs" for the employer or trade. The Review Division upheld the Board's decision.

On appeal, the WCAT panel allowed the appeal and found that the worker experienced recurring temporary interruptions of employment. His employment insurance payments should be included in the calculation of his average earnings.

The WCAT panel found that there are two plausible interpretations of the phrase "recurring temporary interruptions of employment." The first interpretation requires only that the worker was unemployed due to regular recurring lay-offs that were due to shortage of work. The second interpretation requires that the worker demonstrate a repeating annual pattern of lay-offs for the entire employer and trade in the region. Both of these approaches are consistent with the policy at item #68.40 although they produce opposite results. Thus the WCAT panel reviewed the *Core Services Review of the Workers' Compensation Board* (the Winter Report) and concluded that the legislative intent behind section 33(3.2) of the Act was to address situations where employment insurance earnings are a regular and integral part of the workers

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annual earnings and not unique changes to a worker's employment where the worker chooses to leave a job or is laid off.

In this case, the WCAT panel found evidence from the employer that the industry in which it operates has recurring work stoppages in that region. In some cases due to cold weather and in other cases due to a lack of projects. Although the latter work stoppages would not occur at similar times in successive years, they would be due to the nature of the industry and how it operates. The panel found that this was consistent with the reference to "inherent operational factors" in Best Practice Information Sheet #3.

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Introduction

The worker appeals a decision of a review officer of the Workers' Compensation Board (Board) in *Review Reference #17082*, dated October 7, 2004. The review officer confirmed a decision by a Board officer that the worker's employment insurance (EI) payments should not be included as earnings when calculating the worker's long term wage rate.

The *Workers' Compensation Appeal Tribunal* (WCAT) has jurisdiction to consider this appeal under section 239(1) of the *Workers Compensation Act* (Act) as an appeal from a final decision made by a review officer under section 96.2 of the Act.

The worker is unrepresented and the employer, though notified of the appeal, is not participating. The worker requested that his appeal be addressed by read and review of the documents on his file and written submissions to WCAT.

Issue(s)

The sole issue on this appeal is whether the worker's EI payments should be included in his one year pre-injury earnings.

Background

The worker is a construction carpenter. On December 12, 2003 he slipped while at work and fell on his left side, fracturing his left hip and left wrist. The worker's long term wage rate was based on his gross earnings from December 12, 2002 to December 11, 2003. During that period of time the worker had received EI payments. The case manager considered that the worker's circumstances met the policy requirements for including his EI payments during the year as part of his gross earnings. An officer in the Board's Long Term Rate Setting Unit disagreed and, as a result, these payments were excluded from the calculation of the worker's average earnings. The review officer confirmed the decision to exclude the EI payments. The worker appeals this decision to WCAT.

Law and Policy

The worker's injury occurred after June 30, 2002, the transition date for a substantial number of changes to the Act. As a result, his entitlement to compensation is

adjudicated under the provisions of the Act as amended by the *Workers Compensation Amendment Act, 2002 (*Bill 49).

WCAT panels are bound by published policies of the Board's board of directors. The policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Section 33(3.2) of the Act provides:

> (3.2) The Board may include, in determining the amount of average earnings of a worker, income from employment benefits payable to the worker under the *Employment Insurance Act* (Canada) during the period for which average earnings are determined, only if, in the Board's opinion, the worker's employment during that period was in an occupation or industry that results in recurring seasonal or recurring temporary interruptions of employment.

Policy at item #68.40 pf the RSCM II provides the following directions regarding section 33(3.2) of the Act:

> This is a discretionary provision and will be applied only where there is verified evidence from an independent source that the worker received employment insurance benefits due to the worker's employment in an occupation or industry that results in recurring seasonal or temporary interruptions of employment.
>
> The Board may collect the necessary data to compile a list of industries and occupations that result in recurring seasonal or temporary interruptions of employment. The list must give regard to regional considerations and may adopt information from sources such as British Columbia Statistics, Statistics Canada or Human Resources Development Canada.

Other Guidelines

In addition to the Act and policy there are guidelines to the interpretation of the policies which are issued by the Board as practice directives and best practices information sheets. These are publicly accessible on the Board's website. These documents are guidelines to the interpretation of policies; they do not have the binding effect of policy but they assist in ensuring consistency between decisions. They also explain to the public the factors that are taken into account in making decisions.

At the time that the case manager and review officer made their decisions, Practice Directive #35 provided guidance on the circumstances in which EI payments could be included in calculating a worker's gross earnings. As of February 1, 2004, Practice

Directive #35 was rescinded and replaced by Best Practices Information Sheet #3, which I will call "BPI Sheet #3" in this decision.

Section 33(3.2) provides two types of industries or occupations where EI payments may be included in the calculation of earnings: those that result in "recurring seasonal … interruptions of employment" and those that result in "recurring temporary interruptions of employment".

The Board has established a list of industries and a separate list of occupations that are seasonal in nature. These are appended to BPI Sheet #3 as Appendices 1 and 2. No similar list has been generated of industries and occupations that result in "recurring temporary interruptions of employment".

BPI Sheet #3 states that the lists of seasonal occupations and industries are not exhaustive or conclusive. Board officers are advised to exercise discretion in deciding whether a specific occupation results in seasonal or recurring temporary interruptions of employment.

Practice Directive #35 advised adjudicators to decide on a case by case basis whether a worker's employment is in an industry that results in recurring temporary interruptions of employment. It stated, "Recurring temporary interruptions show a repeating pattern but are not seasonal in nature. For example, workers employed in the field of education who are laid off and receive EI benefits on a regular annual basis". This section is not included in the current PBI Sheet #3. Instead, PBI Sheet #3 says:

> Section 33(3.2) of the *Act* recognizes that for certain industries and occupations, EI is considered to be a regular supplement to the worker's earnings and therefore should be included in the worker's average earnings. Generally, industries or occupations with recurring seasonal or temporary interruptions will be identifiable by the fact that they result in reduced opportunities of employment at similar times in successive years (e.g. operations cease on an annual basis during the winter months, resulting in a general layoff). The reduction in employment opportunities will be due to inherent operational factors such as weather conditions or the cyclical nature of the business (e.g. teachers and fishers).

Reasons and Decision

In this case the worker is employed in the construction industry in the interior of BC. The employer's operations are classified as Industrial and Commercial Construction. This is not an industry listed in Appendix 1, the list of seasonal industries. Construction trades, which would include the worker's occupation, are included in the list of seasonal occupations but only for northern BC.
The case manager did not consider that the worker was employed in a seasonal industry or occupation. Although there is discretion to consider whether a particular

industry or occupation should be viewed as seasonal, I also find no basis for finding that the industrial and commercial construction industry is seasonal in the interior of BC or that a construction carpenter in that area is employed in a seasonal occupation.

The next question is whether the worker was employed in an industry or occupation that results in "recurring temporary interruptions of employment". The case manager was of the view that the worker's circumstances fell into this category.

Neither the policy nor BPI Sheet #3 provide direction on the difference between seasonal occupations and industries and those that result in recurring temporary interruptions of employment. In order to decide whether the worker was employed in an occupation or industry resulting in recurring temporary interruptions of employment, the case manager considered whether the lay-offs with the pre-injury employer were regular recurring layoffs and whether they were the worker's choice or whether they were due to lack of work.

The employer informed the case manager that there were recurring layoffs due to lack of work in the commercial and industrial construction industry in that part of BC. The employer stated that workers in that industry performing the type of work performed by the worker get regular recurring lay-offs as a result of this lack of work. The employer stated that he would confirm whether all of the worker's lay-offs in the year before his injury were due to lack of work; he thought that one lay-off might have been due to the worker wishing to take a first aid course.

The records indicated that the worker had been laid off work from the end of December to the end of February and also from July to early August. The case manager also noted that the company had less work when it was cold. (See claim log entries dated February 20 and 25, 2004.)

The worker informed the case manager that his preference was to work with the pre-injury employer because its operations are closer to his home and it offers a good benefit package, but he worked for other companies during periods of lay-off from his pre-injury employer. The worker had experienced lay-offs during January and February and in July and August in the year before he was injured. He had been able to obtain alternate work as a first aid officer for other companies for part of those periods only. He had received EI payments during periods when no work was available from either his regular employer or the other companies. Based on this information, the case manager concluded the worker's EI payments should be included in the calculation of his average earnings.

An adjudicator in the Long Term Rate Setting Unit disagreed with this approach. She informed the case manager that in order to determine that the worker was employed in an occupation or industry that resulted in temporary interruptions of employment there had to be a repeating pattern of interruptions that is not seasonal in nature. This statement was taken from the Practice Directive in effect at the time.

The adjudicator went on to say that a number of factors are used to decide whether there is a repeating pattern of temporary interruptions. She described these as follows:

> PD 35 [Practice Directive 35], Adjudicative Guidelines/Information # 2 advises: Recurring temporary interruptions in employment show a repeating pattern but are not seasonal in nature.
>
> In making this determination, a number of tests are applied:
> - the layoff is a repeating, annual pattern for the entire employer and trade - not just this worker. I [*sic*] may not be the same length of time but does occur every year.
> - In general, the layoff is an industry practice in this region. ie. Similar employers have similar routine lay-offs.
> - The Interruption is not caused by the change in seasons.
>
> The worker has been with the accident employer since 1999 so meets the attachment to the industry/occupation for 24 months but based on the information on file the lay-offs do not meet the above criteria. While lack of work may be characteristic in this industry in the [name of region], there is no confirmation on file that the layoffs are a repeating annual pattern for the entire employer and trade. In addition, the lay-offs in the winter would appear to be caused by the change in seasons.
>
> An example of industry/occupation resulting in temporary recurring interruption are hourly, permanent school board workers who are laid off every June 30 as there is an annual shut down which is an industry practice which is part of the employer's business cycle not due to the change in seasons.

The case manager contacted the employer again to obtain more information about lay-offs. The employer said that there were lay-offs from two days to two months and there was no seniority. Workers were hired back on quickly if they kept calling the employer to ask what project was coming up next and what work they could get. Workers with a good reputation got back to work more quickly. The case manager had asked if other workers had been laid off at the same time as the worker. The employer had replied that during one period, when there had been a temporary shortage of work, the worker had asked to be laid off so that he could take a first aid course. He was the only worker laid off that day but four others were subsequently laid off for a period of five days.

The employer advised that, when the contract is coming to an end the employee is given an evaluation. One of the questions answered by the superintendent is whether the employee would be “rehireable”. The worker had always been someone that they would rehire. The case manager referred this additional information to the Long Term

Rate Setting Unit stating that she was satisfied the worker had regular temporary recurring interruptions of work due to lack of work in the industry.

The adjudicator responded, in part:

> …While the employer has advised that this particular type of employer has layoffs from 2 days to 2 months throughout the year, due to lack of work not linked to season, there is insufficient [*sic*] to support that the layoffs are a repeating, annual pattern for the entire employer and trade in the region.
>
> EI has not been included in Average Earnings.

Accordingly, the worker's EI payments were not included in his average earnings.

The worker requested a review of this decision and provided additional information regarding his work circumstances in a submission to the Review Division. He said that during his employment with the employer and other employers in the same field, he has always been subject to temporary periods of unemployment. He states that he obtained first aid certification in order to have alternative employment when this occurred but, he restated, his preference is to work for the pre-injury employer because it is closer to his home than the alternative employment and provides benefits. He states that there are some employees who work for the employer without interruption. This is not his situation although it would be his preference.

As for the lay-off in June, he said that when he heard there was another work shortage he requested to be laid off so that he could update his first aid certificate. He states that he and his supervisor agreed that he would be laid off first. He was laid off on June 6 and all of the workers in his crew were laid off the following week. He completed his certificate in two weeks. He was unemployed for about two weeks then obtained work in first aid for a company dealing with a large forest fire. He was unemployed for a few weeks after that and then returned to his employer once work was available at the end of August.

The review officer noted that although the worker's job may have been subject to lay-offs, there were employees with the same company who worked all year. This indicated that it was the worker's job as opposed to his occupation or industry that was subject to temporary recurring interruptions. Accordingly, she confirmed the decision to exclude the worker's EI payments from his average earnings.

The worker now appeals this decision to WCAT.

The policy at item #68.40 does not provide assistance for determining whether an occupation and industry results in recurring temporary interruptions of employment.

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The Board has not indicated why it has not generated a list of industries and occupations that result in recurring temporary interruptions of employment. Practice Directive #35 suggested that these were occupations or industries where "recurring temporary interruptions in employment show a repeating pattern but are not seasonal in nature".

BPI Sheet #3 suggests that both seasonal industries and occupations and those with recurring temporary interruptions in employment "will be identifiable by the fact that they result in reduced opportunities of employment at similar times in successive years." The example provided is of operations that cease on an annual basis during the winter months, resulting in a general lay-off. It also states: "The reduction in employment opportunities will be due to inherent operational factors such as weather conditions or the cyclical nature of the business (e.g. teachers and fishers)." Since teachers are paid for a full 12 months of work and choose whether to have those payments made over 10 or 12 months, they are not entitled to EI payments during those periods when they are not teaching. Accordingly, this example has limited assistance.

The case manager and adjudicator in the Long Term Wage Setting Unit applied different tests for determining whether the worker was employed in an industry or occupation that results in recurring temporary periods of unemployment. The case manager considered it sufficient to show that the worker was unemployed due to regular recurring lay-offs that were due to shortage of work. The adjudicator in the Long Term Wage Setting Unit considered it necessary to demonstrate a "repeating, annual pattern for the entire employer and trade in the region."

In my view, both of these approaches are consistent with the policy at item #68.40 although they produce opposite results. Practice Direction #35 and now the BPI Sheet #3 provide some additional direction with respect to these payments, but that direction has changed. These are also guidelines, as opposed to binding policy, and they do not establish rules that are either as explicit or firm as the rules described by the Long Term Wage Setting Unit adjudicator and her approach to applying them.

Since both approaches are consistent with the policy and neither approach seems entirely inconsistent with other guidelines, I have referred to the March 11, 2002 Core Services Review of the Workers' Compensation Board (Core Review) [1] for assistance with respect to the intent of section 33 (3.2) of the Act.

Section 33 (3.2) of the Act was enacted by Bill 49 on June 30, 2002. Prior to that, EI payments were automatically excluded from the calculation of average earnings. Section 33 (3.2) incorporates, almost verbatim, the recommendations of the Core Review regarding the inclusion of EI payments in average earnings.

[1] Accessible at http://www.labour.gov.bc.ca/ wcbreform/WinterReport-Complete.pdf.

At page 144, Mr. Winter, author of the Core Review, referred to the conclusions of the previous Royal Commission regarding the inclusion of EI payments in certain circumstances. He noted that the Royal Commission considered EI payments should be included in average earnings "but only where there is an established pattern of regular use of employment insurance as a source of income and where it is determined that this pattern would likely have continued in the future." Mr. Winter went on to state:

> I believe that the Royal Commission's approach strikes an appropriate balance between the competing concerns described above. In my opinion, most workers who lose their employment and receive EI benefits are not in any different situation than those who lose their employment and do not receive EI benefits. Both groups of workers are unemployed and will need to seek alternate employment opportunities. The EI benefits that are provided to the former group of workers are not "earnings" from employment – they are benefit payments received for a defined period of time from a statutory social insurance program.
>
> Nevertheless, there are workers who are employable in occupations or industries where EI benefit payments are a regular and integral part of their annual earnings. In particular, there are workers who are employed in occupations/industries which have seasonal operations, or which experience recurring temporary shutdowns, that result in short-term periods of unemployment for the workers. This temporary interruption of the worker's employment makes it quite difficult for the worker to find alternate employment during this "lay off" period. In such circumstances, the EI benefits are more akin to income, and form part of the worker's normal earnings pattern.
>
> In my opinion, EI benefit payments should be taken into account in these limited circumstances, as recommended by the Royal Commission. However, rather than focusing on the worker's "regular and established pattern of dependence" on EI benefits, I believe the appropriate focus should be on those occupations/industries where EI benefits are recognized as constituting a regular supplement to the worker's earnings. For example, it is my understanding that EI benefits play a significant role in the fishing industry due to the seasonal nature of the employment. In my opinion, it should be left to the WCB to determine which occupations/industries would have EI benefit payments included in the calculation of the average earnings of their workers.
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> Accordingly, it is my recommendation that the *Act* be amended to include Employment Insurance benefit payments in the calculation of average earnings for those workers who receive such payments due to being employed in an occupation or industry which, as determined by the WCB,

> is expected to result in recurring seasonal or temporary interruptions of the worker's employment.

It appears, from these comments, that the problem or unfairness that the amendments were attended to address occurs in those industries or occupations where there is recurring lack of employment and, as a result, "EI benefit payments are a regular and integral part" of a worker's annual earnings. They are not intended to deal with situations where the worker is laid off from a job or chooses to leave a job and must then seek another. A worker's EI payments in that situation do not form a regular, integral part of his annual earnings. They constitute insurance payments intended to maintain the worker through a singular, relatively unique change in his work circumstances while he seeks other work. The amendments are also not intended to deal with situations where the worker chooses to stop working for periods of time every year. In this latter situation, the worker has reduced earnings due to personal choice, not as a result of an unavoidable shortage of work in his industry or employment.

In this case, however, there is evidence from the employer that the industry in which it operates has recurring work stoppages in that region. In some cases due to cold weather and in other cases due to a lack of projects. Although the latter work stoppages would not occur at similar times in successive years, they would be due to the nature of the industry and how it operates. This seems consistent with the reference to "inherent operational factors" in BPI Sheet #3.

It is difficult to categorically define those occupations or industries that result in "recurring temporary interruptions of employment". To date, the Board has not established a list of such occupations or industries nor does the policy provide a comprehensive policy direction on the interpretation of this aspect of section 33 (3.2).

Based on the guidance provided in BPI Sheet #3 and consideration of the types of situations that the legislation was apparently intended to address, I view the worker's situation as satisfying the criteria in section 33 (3.2). As a result, I find that his EI payments should be included in the calculation of his average earnings in the year prior to his injury.

Conclusion

I vary the decision of the review officer in *Review Reference #17082*, dated October 7, 2004. The worker's EI payments should be included in the calculation of his average earnings under section 33 (3.2) of the Act.

Marguerite Mousseau
Vice Chair

MM/gw