Noteworthy Decision Summary

Decision: WCAT-2005-05961 **Panel:** Heather McDonald **Decision Date:** November 7, 2005

Employment relationship – Credibility – Whether a worker was employed by his wife – Policy item #66.00 of the Rehabilitation Services and Claims Manual, Volume II

Primarily on the basis of an assessment of credibility, the panel found that the worker was not employed by his wife under a contract of service during the one year prior to the date of his injury claim. It also found that, as required by policy item #66.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), there was insufficient verified earnings information from an independent source to set a wage rate on the worker's claim.

The Workers Compensation Board (Board) accepted that the worker had a permanent functional impairment (PFI) as a result of his injuries, but declined to pay him wage loss benefits. The worker provided a written statement indicating that he contracted his boat and provided construction services to his wife and reported an income of $12,000 for the one year pre-injury period, most of which was derived from these activities for his wife. He did not have T4 type of information, and refused to provide a copy of his wife's tax return which would have allowed a review of the expenses declared.

The Board referred to policy item #66.00 of the RSCM II and concluded that there was insufficient evidence of an employer/employee relationship or business relationship between the worker and his wife. Since the information provided by the worker's wife as verified earnings could not be used, there was no basis on which the Board could grant wage loss benefits or a pension award. The Review Division of the Workers' Compensation Board upheld the Board decision. The issue on appeal was whether the worker was employed by his wife.

The panel found that the worker's explanation for not mentioning an employment relationship with his wife in his initial conversations with the case manager was not credible. Also, their testimony was substantially different as to when the alleged employer/worker relationship commenced, and the method of payment for services rendered by the worker to his wife. The few documents relating to types of services rendered and hourly rate of payment were produced long after-the-fact.

The panel concluded that none of the worker's services were performed within an employer/worker relationship whereby the worker performed work under a contract of service for his wife. Although his wife was a writer and artist, and her research in this regard required his assistance and support, his role was not one of contracting services to her, but rather one of a partner in a long-term, committed marital relationship. The evidence did not support that there was an employer/worker relationship between the worker and his spouse during the relevant 12 month period prior to the date of the claim injury, or in earlier years referred to in the decision. There was also insufficient verified earnings information from an independent source, as required by item #66.00, to set a wage rate on the worker's claim.

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WCAT Decision Number: WCAT-2005-05961
WCAT Decision Date: November 07, 2005
Panel: Heather McDonald, Vice Chair

Introduction

The worker was injured on June 4, 2004, suffering partial amputations of three fingers on his left hand and one on his right hand, as well as crush avulsion injuries. He was 61 years old at the time. The employer had hired the worker to move a large boat out of the water and onto a dock, using a power winch and boom on a refurbished seine vessel jointly owned by the worker and his wife. Both of the worker's hands were caught in the rope and capstan (related to the winch and boom equipment) while he was engaged in lifting the boat out of the water. The Workers' Compensation Board (Board) accepted the worker's claim for compensation, and paid for the surgery required as a result of his injuries. The Board also accepted that the worker had a permanent functional impairment (PFI) as a result of his injuries.

The worker is appealing a decision dated March 11, 2005 by the Board's Review Division. In that decision, the review officer confirmed two earlier Board decisions dated, respectively, September 15, 2004 and October 15, 2004. The case manager's September 15, 2004 decision found that there was insufficient verified earnings information from an independent source to set a wage rate on the worker's claim. Accordingly, the case manager did not set a wage rate and the Board did not pay the worker wage loss benefits on the claim. The Board paid only medical costs on the claim.

In the October 15, 2004 decision, a claims adjudicator in the Board's Disability Awards Department advised the worker that the Board would not be granting him a pension award for his PFI. The claims adjudicator referred to Board policy that determines a permanent partial disability award to be 90% of a worker's long-term average net earnings. As the amount was zero for the worker's long term average net earnings on the claim, there would be no award.

In addition to confirming the two Board decisions, the review officer denied the worker's request to be reimbursed for legal fees in connection with his case. The review officer also denied reimbursement for a photocopy expense related to a picture produced in evidence by the worker.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the worker submitted that he was a worker under Part 1 of the *Workers Compensation Act* (Act) and that he was entitled to wage loss and pension benefits under the Act. The worker also submitted that his legal expenses should be reimbursed.

Issue(s)

Was the worker employed by his wife? Is the worker entitled to wage loss benefits and a pension award for his PFI under his claim? Is the worker entitled to reimbursement of his legal expenses? Is the worker entitled to reimbursement for the photocopy expense?

Jurisdiction

These are appeals of a Review Division decision pursuant to section 239(1) of the Act. The worker authorized legal counsel to act on his behalf in these appeal proceedings. The worker requested an oral hearing and I agreed that an oral hearing would be appropriate in this case. I convened an oral hearing on October 20, 2005 at WCAT's Richmond premises.

WCAT invited the accident employer to participate in the appeal proceedings, but the employer indicated that it would not be participating as a party in the proceedings. The employer did, however, provide a written statement supporting the worker's position.

Section 253(1) of the Act states that on an appeal, WCAT may confirm, vary or cancel an appealed decision or order. Section 250 of the Act provides that WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT has jurisdiction to consider the record in the proceedings before it, to consider new evidence, and to substitute its own decision for the decision under appeal. Thus, these appeals are by way of a rehearing. This is the final level of appeal.

Further, WCAT must make its decision based on the merits and justice of the case, but in so doing, it must apply a policy of the board of directors that is applicable in the case. Section 251 provides that WCAT may refuse to apply a policy only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. If a WCAT panel considers that a policy should not be applied, that issue must be referred to the WCAT chair, and the appeal proceedings must be suspended until the procedure described in section 251 (involving the referral to the WCAT chair and/or a referral to the board of directors) is exhausted.

The worker's entitlement in this case is adjudicated under the provisions of the Act as amended by the *Workers Compensation Amendment Act, 2002* (Bill 49). Policy applicable to this appeal is set out in Volume II of the *Rehabilitation Services and Claims Manual* (RSCM II).

Background and Evidence

The case manager's decision letter of September 15, 2004 states that she had an initial telephone conversation with the worker on July 8, 2004. The claim log of July 8, 2004

states that the worker told the case manager that he did odd jobs for people, contracting his boat out to others with a call out fee of $100.00 and $80.00 per hour after that. The worker said that he had no T4 earnings. He referred to the payments he received as honorariums and said that he did not have his own compensation coverage with the Board. The worker advised the case manager that he and his wife lived in cove property on the coast for six months of the year, and the remaining six months they lived in the city. The worker told the case manager that his last full-time job was in real estate, but he let his licence lapse two years earlier. He told her that since then he had been working on his own house and doing odd jobs for people.

The case manager wrote to the worker on July 19, 2004 telling him that based on his advice that he contracted with others to perform work involving the use of his boat she had determined him to be a "casual worker." The case manager referred to section 33.5 of the Act, which provides that if a worker's pattern of employment at the time of injury is casual in nature, the Board's determination of the amount of average earnings under section 33.1 from the date of 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. In the worker's case, that 12 month period would be June 4, 2003 to June 3, 2004. The case manager noted that the accident employer told the Board that the worker had worked for him on four previous occasions during the spring 2002 to May 2003, but none of those jobs fit within the requisite 12 month period preceding the date of injury. Therefore the case manager asked the worker to provide any information (such as a T4 or T1 General Slip) regarding his gross earnings in that 12 month period.

The case manager's letter of September 15, 2004 states that she spoke with the worker on July 20, 2004. The July 20, 2004 claim log memo indicates that the worker told the case manager that he really did not have any earnings information to send in. He told her that he and his wife had been living off their investment income and his wife's pension. The worker advised the case manager that in June 2003 he had built a workshop on his property and in mid-July, he and his wife went travelling on the boat for 6 to 7 weeks. They then travelled to Europe for 4 ½ months. When they returned, he spent most of his time working on the boat. The worker said that he did three jobs for other people, carting material on the boat, earning approximately $200.00 each time. The worker advised the case manager that his wife had been the main wage earner and when he was working, he earned about $30,000.00 per year. The worker said that he had been thinking of going back to work, either in real estate sales or in construction as a carpenter, as he and his wife had not been making as much from their investment income as they had planned.

The claim log indicates that the worker spoke with the case manager on August 9, 2004 and that the case manager asked him to contact the people he did work for and have them send in a written statement confirming the dates and agreed amounts, so that she could then set a wage rate on the claim. The worker told her that there were other considerations involving his permanent disability, and the case manager advised that an

award would also be based on his earnings. The worker stated that he would have to speak with a lawyer.

Subsequently the worker sent in a written statement indicating that he contracted his boat and provided construction services to his wife. He reported income of $11,760.00 for the June 4, 2003 to June 3, 2003 period, most of the income being derived from those activities for his wife. The case manager spoke with the worker on August 17, 2004 (see claim log memo of that date) and she asked him about their two earlier conversations in which he told her that he did occasional odd jobs, with his earnings appearing to be less than $1,000.00 for the relevant period. The worker responded that he had checked his diary and log book from his boat. He said that his wife was a professional artist and writer and that she paid him to take her by boat to sites for research purposes, and to build her a studio and workshop on their property. She also paid him to do maintenance on the boat. The worker told the case manager that the criteria he used when putting together the statement of work activities was whether or not he derived a benefit from the activities.

When the case manager questioned the worker about his previous statement to her about travelling around the coast for 6 to 7 weeks, he replied that it was not a pleasure trip but a research trip for his wife. He said that she paid for their trip to Europe (approximately $40,000.00) as he did not have the money. The worker told the case manager that of the $80.00 per hour he charges for the boat, it costs him $25.00 per hour to run the boat, but he figures that half of that goes to the boat and half to him. For the other employment, construction rates ranged from $22.00 to $40.00 per hour, but he charged $30.00. In an August 9, 2004 conversation, the case manager requested that the worker provide a written statement corroborating the earnings he had listed. She also requested a copy of his tax return.

On August 11, 2004, the worker provided a letter outlining his work history from June 4, 2003 to June 3, 2004. He stated that as master of his boat, he earned $10,800.00 with vessel costs of about $25.00 per hour to run. The value of the boat was $72,400.00. The worker's other employment earnings, which included construction plus maintenance of the boat, were $11,760.00.

The worker's wife (X) provided a written statement dated August 16, 2004 in which she advised that she was an artist and writer, with most of her work based on research while on the boat travelling up and down the coast. X further advised that she would write up her research on the boat and do final production of written material and visual work in two studios built by the worker, one studio on their Vancouver residential property and the other on their cove property on the coast. X provided the titles of several of her published books and visual art exhibitions. X's statement indicated that during the period June 4, 2003 to June 3, 2003, the worker had worked 120 hours for X, running and maintaining the boat, and that he had provided 402 hours of maintenance and construction at the cove and city properties.

After receiving the information from X and the worker, the case manager requested to see a copy of X's tax return for the relevant 12 month period. The claim log dated August 24, 2004 states that the worker told the case manager that he and X were not prepared to provide X's tax return because they currently did not have access to it, it was none of the case manager's business, and the case manager would not find the information she was looking for in the tax return. The case manager advised the worker that his situation was somewhat unique because normally earnings are verified by an employer or independent source. She was concerned that the worker did not have T4 type of information and therefore the relationship with his wife did not really seem to be arms length or independent. The case manager indicated that she was not interested in how much the worker's wife earned, but rather she wanted to review the expenses that the wife declared. The worker confirmed that his wife did file a T1 General "Statement of Business Activities." He indicated, however, that his wife was not allowed to declare a loss so that she did not indicate what she paid him on her tax return.

Subsequently the case manager issued the September 15, 2004 decision letter. In that letter, she advised that she was not able to accept that there was sufficient verified earnings information from an independent source to set a wage rate on the worker's claim. The case manager referred to the RSCM II policy item #66.00, which states in part that "if not supplied by the employer, earnings and tax status information for the required period of time prior to the injury must be provided by the worker. The information provided must be verified information from an independent source such as wage stubs, T-4s, or letters from the Income Tax Authorities or employers." The case manager provided her reasons for concluding that there was insufficient verified earnings information from an independent source to set a wage rate on the worker's claim:

> 1. In an employment relationship, there are a number of typical features. The relationship is at 'arms length'; and either the person providing services keeps a record of earnings information for submission to CCRA, or the person paying the one hired keeps a record of expenses for income tax purposes. In this case, there is no evidence of either.
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> 2. You did not comment in the initial conversations that you contracted services to your wife. This information was only supplied later on, after you became aware that the amount of your earnings was the basis for paying wage loss benefits and also for the calculation of a permanent disability award. You presented your situation as someone who had retired, and who did odd jobs for others and worked on your own projects. As these statements were made closer in time, I find these statements to be more reliable than statements made later on.
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> 3. I do accept that [X, the worker's wife] is a writer and artist, and that her work requires research. I also accept your statement that she has

been the main wage earner. It would not be unexpected that you would provide a more supportive rather than financial role, especially since you let your real estate license lapse in the 90's and have not had any other regular employment since then.

4. I place little weight on her written statement as an employer, given the above comments, as there is no evidence that she actually paid you. Also, her statement refers to hiring you for 'maintenance and construction' and 'running and maintaining your boat'. Normally the person providing the service is concerned about maintenance the equipment supplied, not the one who is contracting for the service. As an employer, her statement only referenced hours worked, without commenting on payment. Typically an employer would provide amounts paid or contracted for, such as what [the accident employer] has provided and which is consistent with what your rates (your 'call out fee' is $100 per hour and $80.00 per hour after that).

[reproduced as written]

The case manager concluded that there was insufficient evidence of an employer/employee relationship or business relationship between the worker and his wife X, and therefore she was unable to use the information provided by X as verified earnings. The Board paid only medical costs on the claim.

In the October 15, 2004 decision letter, the claims adjudicator in the Disability Awards Department referred to RSCM II policy item #39.00, which states in part that "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 claims adjudicator advised the worker that as there were no long-term average net earnings on his claim, the amount on which the Board would apply the percentage of disability was zero. That resulted in no award.

In a claim log dated October 19, 2004, there is a note that the worker contacted the Board to advise that he had credit card receipts in the amount of $45,000.00 for his 2003 trip to Europe with his wife. He indicated that half of that amount would be $22,500.00, that is, his earnings for the relevant period.

Before the Review Division, the worker submitted that he was not a casual worker at the time of his claim injury. He submitted that there was nothing in the Act or Board policy preventing a person from being the employer of his or her spouse, or prohibiting a spouse from working under a contract of service. He also argued that the Act does not stipulate how earnings or wages must be paid. The Act does not exclude payments of meals, transportation, and accommodation as methods of remuneration under a contract of service. The worker submitted that he and X had a commercial relationship

as well as a marital relationship, and that their commercial relationship clearly satisfied the statutory definitions of "employer" and "worker" under the Act. The worker submitted that he worked for his wife on a contract of service, both express and implied. He submitted that Canadian income tax law does not allow artists to claim expenses such as wages against professional income, in order to create a loss to offset their income. Therefore, X could not claim money she paid to the worker as a professional expense. The worker said that he had no reason to declare the payments from his wife on an income tax return, as this would amount to double taxation. The worker said that he did not consider himself retired and that he has worked steadily since 2000, with his wife as his primary employer.

In the Review Division decision dated March 11, 2005, the review officer referred to sections 23, 29, 30, 33(1), 31.1, 33.1, and 33.5 of the Act. In this decision I will not describe all those statutory provisions, but instead will focus on sections 33(1), 33.1, 33.1(2), and 33.5 of the Act. Section 33(1) directs the Board to determine the amount of average earnings and the earning capacity of a worker with reference to the worker's average earnings and earning capacity at the time of injury. Section 33.1 sets out two general rules for determining a worker's average earnings, for the initial period and for the long-term period. With respect to the initial payment period, a worker's wage rate is based on the "rate at which the worker was remunerated by each of the employers for which he was employed at the time of injury." With respect to a worker's long-term wage rate, section 33.1(2) directs that the long-term average earnings be based on the earnings in the 12 month period immediately preceding the date of injury. These general rules are subject to several exceptions, such as for casual workers outlined in section 33.5 of the Act. As earlier noted in this decision, section 33.5 says that if a worker's pattern of employment at the time of injury is casual in nature, the Board's determination of the average earnings under section 33.1 must be based on the worker's gross earnings in the 12 month period prior to the date of injury.

The review officer also referred to numerous applicable RSCM II policy items, and again I will not refer to all of them in this decision. Of specific relevance are policy item #66.00 (General Rule for Determining Long-Term Average Earnings), which I have described earlier in this decision; policy item #67.00, which describes a casual worker as one who has a short-term sporadic attachment to employment, with employment generally lasting less than three consecutive months; policy item #68.00 (Composition of Average Earnings), which provides that a worker's average earnings are normally comprised of wages or salary, although the Board recognizes that a worker may receive other types of payments; policy item #68.22 (Room and Board), which gives direction on when the board will include the dollar value of room and board as part of average earnings; policy item #68.23 (Special Expenses or Allowances), which indicates when the Board will exclude work-related expenses or allowances when calculating average earnings; policy item #97.00 (Evidence), which states that evidence must be examined to determine whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence; policy item #100.40 (Fees and Expenses of Lawyers and Other Advocates), which states that no expenses are payable to or for any advocate; and policy item

#100.50 (Expenses Incurred in Producing Evidence), which provides that the Board will reimburse the worker for expenses incurred in producing evidence if the Board would have sought that same evidence if it had not been produced by the worker.

Dealing with the merits of the worker's request for review, the review officer confirmed the Board's finding that he was a casual worker at the time of his injury on June 4, 2004. The review officer noted that the worker had worked a total of four times for the accident employer in the 18 months previous to the date of injury, that his job with the employer at the time of injury was scheduled to last only one day, and that the employer's report of injury classified the worker as hired as a "casual" worker. Further, the review officer noted that the worker stated he had only worked for three other individuals in the 12 month period prior to the injury, carting material on his boat. The review officer did not find sufficient evidence to support that at the time of his injury, the worker had been employed on a regular basis by the accident employer, X, or anyone else.

With respect to calculating the worker's average earnings for the claim, the review officer was satisfied that the worker had no earnings from the accident employer in the 12 month period prior to the date of injury. The review officer also found that the worker's wage rate with the accident employer on the date of injury could not be considered as policy item #67.10 (Casual Workers) required the Board to use the worker's gross earnings for the 12 month period immediately before the date of injury.

The review officer also considered the evidence that the worker had performed three jobs for other persons in the 12 month period prior to the date of injury. The worker said that he had carted material on his boat for those three persons, he was paid $200.00 for two of the jobs, and he had received a $200.00 credit at the local bakery from the third person. Although the case manager had requested the worker to provide a written statement from those three persons to confirm the services provided and payment rendered, the worker did not provide the confirmatory information. The review officer confirmed that under policy item #66.00, earnings information must be verified from an independent source, and that as the worker had not provided such independent verification, the Board was correct in not including the three jobs in calculating the worker's average earnings.

With respect to the worker's submission that he had earned $22,500.00 by working for his wife in the 12 month period prior to the date of his injury, and that his wife had paid the amount in the form of a trip to Europe (transportation, room and meal expenses), the review officer referred to policy item #97.00 and concluded that the evidence did not establish the worker's position. The review officer referred to policy item #68.00 which specifies that a worker's average earnings are normally composed of wages or salaries, with the Board considering other types of payments as set out in policy items #68.10 to #68.80. The review officer said that a paid trip to Europe did not meet the criteria of a wage or salary and did not fit with the exceptions referred to in RSCM II policy. The review officer found that transportation, room and board expenses incurred on the trip could not be considered as "room and board" under policy items #68.22 or #68.23.

The review officer also noted that in the worker's written statement outlining his work history in the 12 month period prior to his date of injury, the worker advised that he provided services to his wife for work "he derived a personal benefit from." The review officer concluded that policy item #68.00 required that a worker's earnings are generally comprised of wages or salaries, not personal benefits. The review officer therefore denied the worker's request for review of the Board's September 15, 2004 decision.

The review officer also confirmed the Board's October 15, 2004 decision, agreeing that as the worker did not have any verifiable earnings in the 12 month period preceding his date of injury, the Board could not grant a pension award for the worker's PFI.

The review officer also considered the worker's requests for reimbursement for legal fees and reimbursement of the cost of providing a photocopy of a picture of a building under construction. The review officer denied both requests. The review officer referred to policy item #100.40 in declining to pay for a legal advisor's fees. With respect to the photocopy of the picture, the review officer found that the picture was not relevant, did not assist in the adjudication of the issues in the review, and was not a piece of evidence that the Board would have sought if the worker had not provided it. The review officer also noted that the photocopy charge was a disbursement incurred for legal representation, and also denied reimbursement pursuant to policy item #100.40.

Reasons and Findings

After considering the evidence in this case and the submissions made on behalf of the worker, I have decided to confirm the Review Division decision dated March 11, 2005.

Was the worker employed by his wife X? Did the worker perform services for X under a contract of service?

The worker and his wife X have been married 36 years. He is 62 years old and she is 65 years old. One of the main reasons I decided to convene an oral hearing in this case was to hear the worker and X provide their testimony regarding the alleged employer/worker relationship between them, and to assess their credibility in that regard. My assessment of the evidence as a whole has led to me conclude that the worker was not employed by his wife under a contract of service during the relevant one year period before his date of injury. As this is a significant finding which underpins other findings related to the main issues in this case, I will expand on my reasons on this point. In assessing credibility, I have applied the *Faryna v. Chorney* [1952] 2 D.L.R. 354 test, that rather than demeanour at an oral hearing, "the real test of the truth of the story of a witness... must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

The case manager noted in her September 15, 2004 decision that although on both July 8, 2004 and July 20, 2004 she had discussions with the worker about his employment and earnings in the time frame June 4, 2004 to June 3, 2004, he did not tell her about a relationship with his wife whereby he contracted services to her for payment. He presented his situation as a retired person who occasionally did odd jobs for others and worked on his own house. He indicated that he and his wife lived off their investment income and his wife's pension. The case manager observed that the worker first mentioned that his wife was his employer, and that he had earnings from services rendered to her, after he subsequently learned that wage loss benefits and a pension award would be based on his earnings information. At the oral hearing, under direct examination, the worker explained that in the initial conversations with the case manager, he did not understand what she meant by earnings. As the case manager kept asking for T4 earnings, the worker did not tell her about the employer/worker relationship with his wife X because he had not declared earnings from X on income tax returns. I have not found this to be a credible explanation for the worker failing to mention an employment relationship with his wife in his initial conversations with the case manager. This is because he also did not declare earnings from his odd jobs on income tax returns, yet he considered that type of work sufficiently significant to discuss with the case manager. As the alleged earnings from the odd jobs were much less than the earnings the worker says relate to services rendered to his wife, it is not reasonable that initially the worker would not also have discussed with the case manager the more significant amount of earnings from the more significant job he allegedly had with his wife.

At the oral hearing, I requested that the worker testify first, with his wife X excluded from the hearing room while he gave his testimony. Subsequently, when X testified, the worker remained in the hearing room. I found that on critical points in evidence, their testimony was substantially different. This was one of the factors that led me to doubt that there was in fact a relationship of employer/worker between them.

For example, when I asked the worker to describe the circumstances of the "hiring" agreement, he indicated that the start of their employer/worker relationship was approximately five years ago, when X was very close to retirement and her university employer offered her an attractive buy-out package. A few years earlier, in 1997, X's aunt had died and left her an inheritance; this factored into their decision that X could afford to take retirement early from the university. Therefore in the year 2000, the worker let his real estate licence lapse and X retired from the university. Their plan was to live one-half the year in the city and the remainder of the year on their coastal cove property. X would be able to spend her time working as a writer and painter on her book and visual art projects, while the worker would assist her as her employee in running and maintaining the boat for her in accompanying her on her research trips up and down the coast. He would also perform construction projects for her on their city and cove properties, such as building a workshop on the cove property and working on the studio properties. As well, the worker testified that he maintained the buildings on the city and cove properties. The worker testified that he also did all the banking, wrote

most of the cheques, and prepared X's income tax returns for her. His evidence was that he charged her $600.00 in 2003 for preparing her income tax return.

By contrast, X's testimony indicated that the worker had been her employee at least since 1991, when she was still teaching full time at the university. X referred to one of her books, eventually published in 1995, and noted that she would not have been able to write that book had it not been for the worker's assistance in transporting materials and otherwise running and maintaining the boat for her. She testified that artists of her caliber require assistants and that it has "always been clear" that she required an assistant to produce her artistic works. X stated that she made a "conscious decision" to hire her husband as her employee in "1989 and into the 1990's" when she realized that she would need to take research trips to verify the information needed to produce her books.

Given that the worker and X give very different versions of when the alleged employer/worker relationship commenced, in my view the more reasonable and probable conclusion is that the worker has always helped X with her research projects to some degree, even prior to the year 2000 when he was working in real estate. As well, the evidence satisfies me that the worker has always worked constructing and maintaining buildings on the cove and city properties, and in maintaining and running the boat. I find that he performs these activities as part of the typical marital contract between partners to support and help each other. This is consistent with other evidence, to which I will refer.

Another example of conflicting testimony was the method of payment for the services rendered by the worker to X. The worker testified that the 2003 trip to Europe was his idea and that he told X not to give him $20,000.00 or so in cash, but instead buy him a trip to Europe. The worker then testified, "That's my argument." He testified that he and his wife have many friends in Europe. The worker said that in the years previous to 2003 when he did work for X, X would pay his way on other vacations as remuneration for his services. The worker testified that he and X did not really discuss the hourly rate he would charge her, and that they did not keep "super accurate" accounts because they were married. However, he indicated that X would certainly take his word for an hourly rate as "that was my responsibility in the family unit."

X's evidence was that she and the worker had certainly expressly discussed the value of his services, in the context of specific jobs, and in her view, $30.00 per hour was a low price. She confirmed that the trip to Europe was the worker's payment for services rendered to her in the year 2003. When questioned about her method of paying the worker in years prior to 2003, she did not mention other vacations, but instead referred to the fact that she had provided him with food, lodging, vehicles, clothing, and that she had cooked his meals for him even while she was working full time at the university. X testified that they had never thought of formalizing their employer/worker relationship by written documentation. X said that she was aware of another couple who had taken such formal steps, and the formality of the arrangement ultimately led to a divorce. X

testified that she did not know that as the employer of her husband, she would be required to register as an employer with the Board and pay assessments on the worker's earnings. X testified that she has only recently become aware of that statutory obligation.

Given the discrepancy in the evidence provided by the worker and his wife regarding the form of payment for services prior to the year 2003, the worker's view that deciding the hourly rate was his responsibility "in the family unit," and X's description of remuneration as sometimes including even the basic necessities of life for her husband, the evidence on this point is consistent with my earlier conclusion that the worker has always assisted X with her research trips and by working on the cove and city properties, and that it was part of the arrangement between them as two marital partners supporting and assisting each other in all aspects of each other's life. The same holds true for the worker's preparation of X's income tax return, as the evidence is that it was his role in the family unit to deal with financial matters. I conclude that none of these services by the worker were performed within an employer/worker relationship under the Act whereby the worker performed work under a contract of service for X.

It is clear from the evidence that X's artistic endeavours do not provide a sizeable income. X testified at the oral hearing that she does not make much income from her books and other artistic activities. Similarly, in a letter dated November 29, 2004 to the Review Division from the worker's legal counsel, the worker noted that X's income from her professional endeavours was modest. At the oral hearing, the worker testified that under Canadian income tax law, as an artist X is entitled to declare small losses, but not losses that are "too big." Therefore the worker indicated that the reason X did not declare payments to the worker as business expenses incurred for her in earning her professional income, was because it would not be financially worthwhile to do so. X testified that she had never claimed the operating expenses of the boat on her income tax return, but that over the years "we've made some claims" regarding the buildings on their properties, which claims have been questioned at times by the tax department. She went on to testify that her husband prepared the tax returns and again stated that "we've made some claims" although no penalties were ever assessed against them for the claims. X testified that she mentions the worker frequently in her books as her "companion on the boat," and that she has dedicated some works to him and thanked him in the books. The worker also testified that he has no "independent source of income" and therefore most of the money in their joint bank account comes from X's pension, but "we don't think of it like that."

The foregoing evidence leads me to agree with the case manager's observation that indeed X is a writer and artist, and that her research in that regard does require assistance and support from the worker; however, the worker's role is not one of contracting his services to his wife, but rather one of a partner in a long-term, committed marital relationship whereby the partners work together to support and assist each other. I am satisfied that X's work as a writer and artist provides her with much aesthetic and intellectual satisfaction, but that it is more in the nature of a hobby than a

reliable source of income from which she could hire and pay anyone to assist her. Although it is true that X's pension and the couple's investment income may have provided sufficient funds to hire an assistant, it is clear from the evidence that the worker and X view those funds as "their" income, part of their joint family assets. The money is not viewed as "X's" money from which she would "pay" the worker. The evidence leads me to conclude that for many years, long before 2003 but also including 2003 and 2004, the worker and his wife X have jointly worked together in assisting and supporting each other in various aspects of life, and that they did not have an employer/worker relationship.

I also note the evidence that the worker and his wife X jointly own both the coastal cove and the city properties, as well as the large ex-seine boat on which the worker was injured, and from which the worker and his wife travel to and from their cove property as well as on research trips up and down the coast. X testified that they purchased the large boat years ago, "as a way of earning money," as with the winch and boom it is capable of lifting large items and it can carry another boat itself. The worker and his wife testified about the work he did for her in running and maintaining the boat, as well as the work he did constructing and maintaining buildings on their two properties, including a workshop at the cove property and a studio on the city property. There are houses on both properties, in which the worker and his wife live. In this case, it is difficult to find an arms-length, separate relationship between the services which the worker says he performed for his wife, and the benefits which he also received from that work, being in some cases increased value to properties which he jointly owned, and maintenance of properties he jointly owned.

The worker submitted that the relationship between him and his wife was akin to that of a professional such as a dentist hiring a spouse as a bookkeeper or a receptionist. But in the latter type of situation, the employer/worker relationship is formalized from its inception by way of written documentation that is further supported throughout the relationship by way of formal pay cheques and appropriate deductions, as well as income tax returns which refer to business income earned and business expenses incurred, including the payment of a bookkeeper or receptionist employee, and registration of the employer with the Board for workers' compensation purposes. In this case, the few pieces of documentation produced by the worker and X relating to types of services rendered and hourly rate of payment, have been produced by them long after-the-fact, which emphasizes the self-serving character of the documentation.

I have considered the letter dated June 8, 2005 from the accident employer, but I have not found it helpful in deciding the issues in this case. The accident employer, according to the worker's testimony, is a personal friend of the worker and his wife. The accident employer wrote that he has known the worker for over 30 years and provided the opinion that the worker is an honest person and not one to take advantage of a claims situation. The accident employer requested WCAT to grant an oral hearing and accurately assess the worker's tragic situation. My assessment of the evidence in this case is not in favour of the worker's submission that he was working for his wife under a

contract of service. Having said that, I am sympathetic to the difficult, ongoing impact that the June 4, 2004 injury has had on the worker and his wife. My view of the situation is that they have gamely attempted, after the fact, to re-frame their relationship as one of employer/worker rather than what I have found to be the commendable, devoted long-term marital relationship which would be the justifiable envy of many persons. It is understandable that they would be motivated to do so, for without verifiable average earnings in the relevant 12 month period, there is no basis upon which the Board or WCAT, under RSCM II policy that the Act says is binding, can grant wage loss benefits, or a pension award.

The worker sustained serious injuries as a result of the June 4, 2003 accident. His injuries have prevented him from doing much of the work on the boat and on the two properties that he used to do. He has lost the enjoyment and satisfaction of carrying out that work, and there is also a financial loss to the worker and his wife in that now they are required to hire and pay others to do at least some of the necessary work on their joint properties. It is important to acknowledge the pain, suffering and functional impairment associated with the worker's injuries, which affects both the worker and his wife in their activities of daily living. The worker did not have private disability insurance, nor did he have personal optional protection insurance from the Board. It is unlikely even if negligence could be proven, that he could sue the accident employer, given the Act's bar against worker/employer litigation related to employment related accidents. In this case, the evidence of the relationship between the worker and his wife with respect to the research activities associated with the books and visual arts projects suggests a type of joint partnership venture, not an employer/worker relationship. As well, with respect to the "odd jobs" that the worker did for others from time to time, there is the appearance of a type of self-employed work activity. This case emphasizes the importance of persons engaged in unconventional, self-employed work activities to ask themselves: "What evidence exists for the Board to calculate average earnings for compensation purposes?", if injury or death occurs in the course of his or her work activities. It is a consequence to be kept in mind when business persons make their decisions regarding documenting and formalizing their business activities.

For the foregoing reasons, I find that the evidence does not support that there was an employer/worker relationship between X and the worker – neither during the relevant 12 month period prior to the date of the claim injury, nor in fact, in earlier years referred to in this decision.

The case manager's September 15, 2004 decision – wage rate on the claim

I agree with and confirm the Review Division's March 11, 2005 decision which confirmed the case manager's decision regarding the wage rate on the worker's claim. The evidence supports a finding that at the time of his claim injury, the worker was a "casual" worker within section 33.5 of the Act and RSCM II policy item #67.10. The worker did not have an employment relationship with his wife. For the reasons provided by the review officer, the evidence supports a finding that at the time of his injury, the

worker had a short-term/sporadic attachment to employment, doing odd jobs on an irregular basis.

Given that the worker was a casual worker at the time of his injury, policy item #67.10 provides that the Board must use the worker's gross earnings for the 12 month period immediately before the date of injury to establish the worker's average earnings. Under policy item #66.00, information about gross earnings must be "verified information from an independent source such as wage stubs, T-4s, or letters from the Income Tax Authorities or employers." I have already indicated in this decision that X was not the worker's employer and that he was not employed by her under a contract of service. This means that the evidence did not satisfy me that the worker "earned" income by working for his wife during the relevant 12 month period preceding his claim injury. The evidence is that the worker did not have any earnings from the accident employer during this period. Further, although the worker referred to several jobs that he performed during the relevant 12 month period for other people, he failed to provide confirming documentation about his earnings, by way of letters from those individuals or wage stubs. Since he did not declare that income on income tax returns, there were no T-4 returns to examine. I agree with the case manager and review officer that there is no "verified information from an independent source" regarding the worker's earnings in the relevant 12 month period. Accordingly, I confirm the Review Division's March 11, 2005 decision that upheld the Board's September 15, 2004 decision not to set a wage rate on the worker's claim, and to pay only medical costs on the worker's claim.

The claims adjudicator's October 15, 2004 decision – no pension award

I also confirm the Review Division's March 11, 2005 decision that confirmed the Board's October 15, 2004 decision not to grant the worker a pension award for his PFI. As the worker did not have verifiable earnings in the 12 month period preceding his claim injury, and therefore the Board could not set a wage rate on his claim, under RSCM II policy item #39.00, the amount on which the Board would apply the percentage of disability was zero – leading to no award.

Reimbursement for legal fees

I confirm the Review Division's March 11, 2005 decision that denied the worker's request for reimbursement of his legal fees. Under RSCM II policy item #100.40, no expenses are payable to or for any advocate. Nor does the Board pay fees for legal advice or advocacy in connection with a claim for compensation. I also note that under item 13.24 of WCAT's *Manual of Rules of Practices and Procedure*, it is clear that if a party retains a representative, they do so at their own expense. Section 7(2) of the *Workers Compensation Act Appeal Regulation* provides that WCAT may not order the Board to reimburse a party's expenses arising from a person representing the party, or the attendance of a representative of the party at a hearing or other proceeding related to the appeal. Accordingly I make no order directing the Board to reimburse the worker for any part of his legal fees related to his compensation claim, including the proceedings before the Review Division or WCAT.

Reimbursement of the photocopy expense

I also confirm the Review Division's March 11, 2005 decision that denied the worker reimbursement of $22.80 for the expenses related to a photocopy of a building under construction. I agree with the review officer that the photocopy was not evidence helpful to assist the adjudication of the relevant issues and under policy item #100.50, it was not a piece of evidence that the Board would have or should have sought if the worker had not provided it. As well, under Appeal Regulation 7(1), this is not an appropriate expense for reimbursement.

Other expenses

The worker made no request for other expenses related to the appeal proceeding and as none are apparent, I make no award in that regard.

Conclusion

For the foregoing reasons, I deny the worker's appeal of the March 11, 2005 Review Division decision. In this decision, I have found that:

- the worker was a casual worker at the time of his June 4, 2004 injury;
- the worker was not working for his wife under a contract of service or otherwise employed by her;
- the Board was correct in its September 15, 2004 decision in not setting a wage rate on the worker's claim;
- the Board was correct in its October 15, 2004 decision in not granting the worker a pension award for his permanent functional impairment; and
- the worker is not entitled to reimbursement for his legal fees or a $22.80 photocopy expense related to a picture he provided in evidence.

Heather McDonald
Vice Chair

HM/hb