Noteworthy Decision Summary

Decision: WCAT-2006-03045 **Panel**: Sherryl Yeager **Decision Date:** July 31, 2006

Average earnings – Regular worker employed less than 12 months – Worker employed in the same type and classification of employment – Evidentiary requirements – Maximum wage rate – Section 33.3 of the Workers Compensation Act – Item #67.50 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy for its application of section 33.3 of the *Workers Compensation Act* (Act) and item #67.50 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) in determining the average earnings of a regular worker employed for less than 12 months with the injury employer.

The worker, a motorcycle salesperson, sustained a compensable injury. The Workers' Compensation Board (Board) based the worker's long-term wage rate on the class average for retail sales clerks in the one-year pre-injury period. The worker requested a review of this decision by the Review Division of the Workers Compensation Board which concluded that the Board had applied the appropriate law and policy. The worker appealed this decision to WCAT.

The panel noted that the worker was a post-secondary student in 2003 and 2004. He began working for the injury employer in March 2004 and was paid on a 100% commission basis. He initially made a small amount of income but earned more in the three months prior to his injury.

The panel noted that section 33.3 of the Act applied, as the worker was a regular worker employed less than 12 months with the injury employer. Under item #67.50 RSCM II, the Board was required to contact the injury employer to determine the average earnings of a person of similar status employed in the same type and classification of employment. Where this information is not available, the Board will contact an employer similar to the injury employer to make this determination. In this case, the injury employer declined to provide the information and the Board used the class average for retail sales clerks to establish the worker's average earnings. This equated to $32,730 for full-time workers in the one-year pre-injury period.

The worker submitted his average earnings should be based on the average earnings of his colleagues at the injury employer in the one-year pre-injury period. The panel rejected this, as it would require too high a degree of speculation because there was no direct evidence of the salaries paid to the worker's colleagues. The panel also noted that section 33(3) of the Act provides that a worker's average earnings cannot exceed the maximum wage rate set out in item #69.00 RSCM ll.

The panel concluded that using a class average for retail clerks was not consistent with item #67.50, as the occupation was not of the same type or classification of employment. Pursuant to section 246(2)(d) of the Act, the panel requested the Board to investigate the earnings of salespeople with similar businesses in the geographical region. The Board provided the panel with information from four employers. The panel accepted $48,000 to $58,000 as an appropriate approximation for a similar employer in the same region. The panel considered that as the worker was planning to return to school, the upper level would not be appropriate. The panel further considered that as the worker's income was increasing, it would not be appropriate to use the

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lower end of the scale. The panel concluded the mid-point of $53,000 best reflected the worker's economic loss and that his wage rate should be based on this amount. The panel allowed the worker's appeal.

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Panel: Sherryl Yeager, Vice Chair

Introduction

The worker was employed as a motorcycle salesperson in the spring of 2004 when he sustained a compensable injury. The Workers' Compensation Board (Board) based the worker's long-term or ten-week wage rate on the class average for retail sales clerks in the one-year pre-injury period. A Board officer advised the worker of this decision by letter on October 19, 2004.

The worker requested a review of this decision, arguing that the rate was too low compared to his actual earnings in the pre-injury period. He also requested decisions on his initial and provisional wage rates that the review officer determined were not within her authority to review.

On April 21, 2005, in *Review Decision #24465*, the review officer determined the Board should initiate further investigation to determine if the worker was properly categorized as a full-time employee or a seasonal/temporary worker at the time of injury. If the Board determined the worker was a permanent employee, the review officer was satisfied the Board applied the appropriate law and policy. The review officer was also in agreement with the Board's decision to use the class average for full-time retail salespeople/clerks to determine the worker's long-term earnings.

The review officer went on to find that if the Board determined the worker was a seasonal or temporary worker, then the Board should determine the worker's earnings based on the total of his own one-year pre-injury earnings.

The Board subsequently investigated this issue as directed and provided the worker with a decision letter on August 10, 2005. The Board officer determined that the evidence supported a conclusion the worker was a full-time employee, with the employer for less than one year. As the review officer had determined the Board applied appropriate law and policy if this was the case, there was no change to the worker's wage rate.

The worker had appealed the April 21, 2005 decision, and suspended this appeal pending the outcome of the Board's review. As the Board's initial decision remained unchanged, the worker resumed his appeal of *Review Decision #24465* Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

Was the worker's long-term wage rate set in accordance with the evidence, law and policy?

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the *Workers Compensation Act* (Act).

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.

Appeal Method

The appellant initially requested an oral hearing to present evidence. I have reviewed the evidence on the claim file and determined that the matter could be fairly determined based on this evidence and the written submissions. The matters under appeal do not involve complex medical issues, there is no concern regarding credibility, and the issue in dispute hinges on interpretations of law and policy. An oral hearing will not provide additional evidence relevant to the matter under appeal.

Law and Policy

The relevant legislation is found at section 33.3 of the Act, which states:

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

Further direction on this section is found at policy #67.50 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) which directs that in order to determine the worker's average earnings, the Board will contact the injury employer to determine what the average earnings are or would be of a person of similar status employed in the same type and classification of employment.

Where this information is not available, the Board will contact an employer similar to the injury employer, in the same region as the injury employer, to determine what the average earnings are of a person of similar status employed in the same type and classification of employment. The Board is not limited to contacting a single employer and may use relevant information from several employers in the region.

Policy #64.00 notes that when establishing a wage rate, the determination is not to be based on the highest rate possible, but the rate that most closely reflects the actual loss incurred by the worker.

Section 250(2) of the Act establishes that WCAT must make its decision based on the merits and justice of the case, but must also apply the relevant Board policy.

Background and Evidence

The worker was a post-secondary student in 2003 and 2004. He worked in a pet store as a clerk in 2003. In January 2004 he began working for the injury employer, a high-end motorcycle and motorized water sport equipment retailer. He did not receive any payment from January to February 2004 as he was learning the product lines.

In March 2004 the worker began selling motorcycles, and was paid on a 100% commission basis. He initially made a small amount of income, however he did much better over the ensuing months. The worker was injured on July 21, 2004.

The employer's report of injury indicated the worker had earned $10,162 in the three-months prior to his injury (May - July) and had earned $16,240 in the one year prior to his injury (March - July).

In an undated, handwritten note to the case manager, the employer also advised that the worker was hired without an end date. The business sometimes reduced its sales staff in the fall due to lower sales volumes. If this occurred, the person with the lowest sales would be laid off. If all the sales staff were strong, none would be laid off in order to ensure they were available in the following year. If the worker was a top seller, he would have been kept on staff all year.

The Board requested the employer provide total gross earnings for the worker for the 12 months prior to the injury date, or the earnings of a person of similar status, type and/or classification of employment and earnings for the one-year pre-injury period. The employer took the position that similar earnings could not be provided, as all staff were on a commission basis and their earnings varied widely.

The worker advised the Board that he intended to return to post-secondary school in the fall. The employer was aware of this and willing to accommodate him with split shifts and evenings and weekend work.

A Board officer determined the worker was a full-time worker paid on commission and fell under the general rule, section 33.1(2) of the Act. The Board therefore used the class average for retail sales clerks to establish the worker's wage rate. This equated to $32,730 for full-time workers in the one-year pre-injury period.

This decision was confirmed when a case manager reviewed the evidence in August 2005, as per the review officer's direction.

Submissions

The worker's representative submitted that the wage rate should be based on the average earnings of the worker's four colleagues at the injury employer in the one-year pre-injury period.

Additional Evidence

I requested the class average for automobile salespersons in B.C. in 2003/2004, as I was concerned that the classification of retail sales clerk may not be an accurate reflection of the worker's occupation.

The Board provided a class average for all workers of $20,400 and full–time workers of $35,970, based on its own data from short-term disability claims in the automobile salesperson occupation for all of B.C.

The worker's representative was provided a copy of this information and any additional comment or submissions was requested.

In submissions from the worker and his representative dated June 8, 2006 and June 12, 2006, they continued to argue that the class averages were not appropriate, and that the figures from the employer should be utilized because of the specialized nature of his employer's business.

Section 246(2)(d) Request

On June 19, 2006, I requested the Board to complete an investigation into the earnings of the salespeople with the injury employer, or a similar business in the Lower Mainland. This request was made under section 246(2)(d) of the Act, which provides that WCAT may request the Board to investigate further into a matter relating to an appeal and report back in writing.

On June 27, 2006, a Board field investigator provided a memo advising that he had not been successful attempting to speak to the injury employer. He therefore contacted four similar employers in the Lower Mainland and spoke to managers regarding the salary levels of sales employees.

The first employer advised that sales staff were paid a minimum wage plus commission. The average ranged from $50,000 to $60,000 a year, with top earnings ranging to $100,000. Employees who did not make the average were not kept on.

The second employer advised that his staff were commission only, and a very good worker earned $55,000 to $65,000 per year, which was the average. Top-end earners made $100,000.

The third employer advised that his staff were paid on commission, and some received a minimum wage as well. Salaries were $40,000 to $50,000 on average.

The fourth employer advised that his staff earned $3,000 net per month after taxes and were not on commission.

This information was provided to the worker for response.

The worker's representative replied on July 10, 2006. She continued to prefer the exact earnings of the worker's colleagues, as this would have been the most accurate reflection of his loss. Considering the field investigator's report, she requested that the worker's earnings be based on $60,000 to $65,000 per year, which was slightly higher than the earnings of the second business contacted. As the product line sold by this business was slightly cheaper and less varied than the injury employer, the most equitable choice would be to set the rate at this amount, rather than the earnings of a lower end dealership.

Reasons and Findings

I allow the worker's appeal.

I concur with the conclusion of the Board that the worker falls under section 33.1(2) of the Act, as he was hired as a full-time regular worker and had been with the injury employer for less than one year.

Policy #67.50 of the RSCM ll directs that the Board will determine what the average earnings are or would be of a person of similar status employed in the same type and classification of employment. If this information is not available, the policy directs the Board to contact similar employers in the same region to gather this information. The Board may use relevant information from several employers.

Utilizing a class average for retail clerks is not consistent with the direction contained in the policy, as this occupation is not the same type or classification of employment as the worker's. The difference in average earnings between an automotive sales person

and the four identified employers in the Lower Mainland illustrates that using a class average for automotive sales throughout the province is also not likely to provide a close approximation of the worker's lost earning capacity due to the injury.

The worker's representative requested a salary based on $60,000 to $65,000 a year. To do so would require a degree of speculation that I do not believe would be appropriate. Section 250(2) requires that my decision be based on the facts and evidence specific to the matter before me, and as no direct evidence regarding the salary levels of the worker's colleagues is available, I cannot make assumptions.

In addition, I note section 33(3) of the Act provides that a worker's average earnings cannot exceed the "maximum wage rate." Policy #69.00 of the RSCM ll in effect at the time of the worker's injury provides that the maximum wage rate in 2003/2004 was $60,100 in 2003 and $60,700 in 2004. Therefore, it is not possible to set the worker's wage rate in excess of this amount.

The worker continued to indicate that his employer provided an expensive product line, however, he did not provide evidence that the identified employers did not provide a similarly expensive product line. Other variables, such as volumes of sales and commission percentage rates between the various businesses, cannot be isolated with the available information.

An average of the three gross annual salaries provided by the field investigator is $48,000 to $58,000. As the fourth employer provided information based on after tax income levels, I have excluded this data. Therefore, I will accept $48,000 to $58,000 as an appropriate approximation for a similar employer in the same region.

I have considered that the worker was in his first year in this industry. He indicated that he was planning to return to school and would be working this around his employment. For these reasons, I do not consider it appropriate to base his wage rate at the upper level of $58,000. Similarly, his salary in the first 4.5 months with the injury employer was $16,240, which comes closer to the lower end of the range, when extrapolated over a year. As the worker was reportedly doing better with his sales in the time just prior to his injury, I believe using the lower figure would also not necessarily provide a "best reflection" of his economic loss, as his performance was improving.

Therefore, I find the mid-point of the $48,000 to $58,000 range, or $53,000, is the best approximation of the annual earnings on which to set the worker's wage rate. I note these are 2006 figures, and the worker's injury occurred in 2004. The $53,000 should be converted to the 2003/2004 values to reflect the Consumer Price Index (CPI), and I leave those calculations to the Board.

Conclusion

I vary, in part, the decision of the Board set out in *Review Decision #24465*, dated April 21, 2005. I find the worker's wage rate should be based on the mid-point of the average earnings identified by the field officer on June 27, 2006, or $53,000. This is in 2006 dollars, and should be converted to 2003/2004 values to reflect the CPI. The file is returned to the Board for the calculation of retroactive benefits as a result of this decision.

No expenses were requested by the worker for participating in the appeal, and it does not appear from my review of the evidence that any expenses were incurred. I therefore make no order regarding expenses.

Sherryl Yeager
Vice Chair

SY/jy

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