Noteworthy Decision Summary

Decision: WCAT-2006-03851 **Panel**: Deirdre Rice **Decision Date:** October 11, 2006

Calculation of long term average earnings (wage rate) – Sections 33.1(2) and 33.3 of the Workers Compensation Act – Meaning of "person of similar status employed in the same type and classification of employment" – Policy items #66.00 and #67.50 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy as an example of the factors relevant to determining whether a person is a "person of similar status" to the worker when calculating the worker's long term average earnings under section 33.3 of the *Workers Compensation Act* (Act). Such factors may be informed by an applicable collective agreement and may include the worker's seniority level and defined position. The fact that a worker performs essentially the same functions as another worker does not necessarily mean that the other worker is a "person of similar status".

In this case, the worker was a permanent regular worker who had worked less than 12 months with the accident employer at the time that he was injured. He was usually paid as a concrete "nozzleman" but sometimes was paid as a labourer. Pursuant to section 33.3 of the Act, the Workers' Compensation Board operating as WorkSafeBC (Board), calculated the worker's long term average earnings based on information from the employer regarding the 12 month earnings of a similar status co-worker. The worker requested a review of the Board's decision on the basis that the earnings information that the employer provided did not accurately reflect the worker's pay rate or job position and that his historical earnings were higher than the calculated long term average earnings. The Review Division of the Board confirmed the Board's decision. The worker appealed to WCAT.

On appeal, the panel determined that further information from the employer was required and requested that the Board undertake further investigation pursuant to section 246(2)(d) of the Act. That investigation resulted in, among other things, a statement from the employer that the chosen "person of similar status" had been paid as a labourer but performed similar work as that of the worker. The employer also advised that each worker in the division performs similar work and that whether a worker is paid as a labourer or a nozzleman depends on labour market conditions and not on the work performed.

The panel acknowledged the worker's position that he had historically earned significantly more than is reflected by the wage rate set on his claim. However, the panel noted that section 33.3 of the Act does not allow the long-term wage rate of a regular employee who has been employed for less than 12 months to be based on that employee's historical pattern of earnings. Instead, the legislation requires that the wage rate be based on the earnings of a "similar status" worker.

Applying the test set out in the Act and policy, the panel accepted that that the co-worker chosen by the employer and the worker were "employed in the same type and classification of employment" within the meaning of section 33.3 of the Act as they performed similar functions. The panel then considered that the more significant consideration in the appeal was whether the employee chosen by the employer was a "person of similar status" to the worker.

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The panel adopted the approach taken in earlier WCAT decisions where the terms of the collective agreement were used for determining a worker's "status". The panel found that in this case, under the collective agreement, the worker's "status" had two aspects. The first aspect was the worker's seniority, and in this regard the panel determined that the co-worker chosen by the employer was a "person of similar status". The second aspect was the worker's job title or defined position (as opposed to the type and classification of work the worker actually performed), and in this respect the panel determined that the evidence supported a conclusion that the worker's "status" under the collective agreement was primarily that of a nozzleman. It was that "status" that dictated his rate of pay for the bulk of the work he performed. The panel found that the difference in pay rates was sufficiently significant to warrant a conclusion that labourers and nozzlemen were not persons of "similar status" under the collective agreement.

On that basis, the panel allowed the appeal and returned the matter to the Board to establish the worker's long-term average earnings based on the earnings of an employee closest in seniority to the worker who was paid both as a nozzleman and as a labourer.

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WCAT Decision Number: WCAT-2006-03851
WCAT Decision Date: October 11, 2006
Panel: Deirdre Rice, Vice Chair

Introduction

In 2005, the Workers' Compensation Board (Board) accepted the worker's claim for compensation for a right shoulder condition that arose due to prolonged exposure to holding a hose over his shoulder while spraying cement. The worker had been employed by the employer for less than 12 months at the time of his injury.

In a May 18, 2005 decision, a Board case manager advised the worker that his long-term weekly wage rate under the claim was 90% of $565.86, less any applicable pension deductions. This rate was based on information from the employer that the 12-month earnings of a similar status co-worker were $36,149.37.

The worker asked the Board's Review Division to review this decision. In a December 1, 2005 decision (*Review Decision #R0054380*), a review officer confirmed the Board's decision. In reaching this decision, the review officer applied section 33.3 of the *Workers Compensation Act* (Act), which provides that, for workers employed by an employer for less than 12 months immediately preceding the date of injury, the Board must determine the worker's long-term wage rate on the basis of the gross earnings in 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.

The worker has appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT) with the assistance of his union representative. Although provided with the opportunity to do so, the employer did not participate in the appeal.

Issue(s)

The issue is whether the Board correctly established the long-term wage rate on the claim based on the earnings information provided by the employer.

Jurisdiction

This appeal was filed with WCAT under section 239(1) of the Act. As the worker's compensable condition arose after June 30, 2002, his entitlement to benefits is to be determined under the provisions of the Act as amended by changes contained in the *Workers Compensation Amendment Act, 2002*. WCAT panels are bound by published

policies of the Board pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*. Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

The background information relevant to this appeal has been accurately summarized in the Review Division decision. As this decision can be accessed on the Board's website and the worker has received full disclosure of the claim file, it is not necessary to repeat that information.

The worker's appeal of the Review Division's decision to confirm the long-term wage rate is based on two grounds, as set out in an April 21, 2006 submission by the worker's representative.

First, the worker argues that, contrary to the conclusion reached by the Board and the Review Division, he was not a labourer but was instead a nozzleman. Information on the claim file confirms that nozzlemen received an hourly wage of $24.74 per hour as of February 25, 2005 (the date the Board determined to be the date of injury in an April 29, 2005 decision), whereas labourers received an hourly wage of $23.72. Pay stubs for the pay period ending February 5, 2005 confirm that the worker was paid at the nozzleman's rate for 84.00 regular hours and 1.00 overtime hours, and was paid at the labourer rate for 8.00 hours. The hours which the worker was paid as a nozzleman during this pay period are substantially greater than the amount of time the employer identified as involving nozzling duties in the daily work summary it provided to the Board on June 16, 2005.

Second, the worker argues that the $36,149.37 figure the employer provided as the earnings of a worker of a similar status employed in the same type and classification of employment does not reflect the earnings of a similar status employee. Based on union records, the worker argues that the amount earned by other employees of the employer who work as both a labourer and a nozzleman and who work solely as a nozzleman exceeds this amount. The worker's representative provided information to support that two labourers in the employ of the employer who also worked as nozzlemen earned gross pay of $42,915.41 and $51,211.48 in the period February 22, 2004 to February 19, 2005 (worker #1 and worker #3), and to support that two nozzlemen in the employ of the employer earned gross pay of $44,821.22 and $46,238.98 (worker #2 and worker #4).

In an April 24, 2006 statement that was included with the appeal submission, the worker pointed out, among other things, that the wage rate set on his claim does not reflect his historical pattern of earnings as a nozzleman. In 2003, he earned $62,525.23. In 2004, he earned $55,838.00, and in the eight months he worked in 2005, he earned $36,149.37. The worker said that the wage rate decision has most certainly led to a wrongful reduction of income. He also said that the union could find no one that earned

$36,000.00 in the relevant one-year period, and that the employer has lied and misled the Board throughout their submissions.

After reviewing the claim file and the new material that had been submitted in support of the appeal, I determined that further investigation was required before I could render a decision on the worker's appeal.

Section 246(2)(d) of the Act allows WCAT to request the Board to investigate further into a matter relating to a specific appeal and report in writing to WCAT. In accordance with this provision, I asked the Board to further investigate several matters relating to the worker's appeal.

On June 27, 2006, a Board team assistant wrote to the employer, seeking clarification of the details I identified as requiring further investigation. The employer's representative replied in an August 9, 2006 letter. In response to the request that the employer identify the worker's hourly rate of pay in the 12 months prior to the date of injury, the employer's representative advised that the worker's hourly rate of pay from June 10, 2004 to January 22, 2005 and from February 6, 2005 to February 20, 2005 was $26.71 ($24.78 plus 8% holiday pay). The representative said that, due to a collective agreement increase, the worker's hourly rate of pay from February 21, 2005 to February 24, 2006 was $27.38 ($25.10 plus 8% holiday pay).

The team assistant also asked the employer's representative to identify the basis for the statement that "a similar status co-worker earnings are $36,149.37 for 12 months." The employer's representative advised that the employer generally has a difficult time providing the Board with earnings information for a similar status worker as it often does not reflect the realistic expected earnings for the individual. The representative wrote:

> When pressed to provide some numbers, it makes more sense to look at the depth chart and decide with which workers the individual in question would be laid off with when contracts are completed. This would provide a more accurate picture of the individual's actual earning potential. When [the worker] reported his injury there were 31 active names on the Shoring Roster. Of those names, 3 were hired after [the worker]. The names chosen as having similar status actually had at least 5 months more seniority than [the worker] so as to provide 12 months earnings.

The team assistant then asked whether this person of a similar status was employed in the same type and classification of the worker. For example, did the relevant employee also receive some wages as a nozzleman rate (and any other rate that the worker was paid during the 12-month period immediately preceding the date of injury)?

The employer's representative responded that the individuals were paid at the labourers' rate, which was $26.45 per hour ($24.49 plus 8% holiday pay) for the period June 10, 2004 to February 20, 2005, and $27.11 per hour ($25.10 plus 8% holiday pay)

for the period February 21, 2005 to February 24, 2006. The representative said that all workers in the division performed the same functions. He also said that some were paid at more than one classification rate, but this rate was seldom reflective of the actual work duties. Rather, it reflected market demand for labour at the time. The representative said that, when the worker was hired in 2004, he negotiated with his superintendent to be paid at the nozzleman's rate and was successful. The representative also said that the similar status employee whose earnings were used performed the same functions as the worker, and that he did not believe that there was another amount that would better reflect the earnings of a similar status individual.

An update of the claim file which included my memorandum to the Board requesting further investigation, the team assistant's June 27, 2006 letter to the employer and the employer's August 9, 2006 response was disclosed to the worker's representative and he was provided with the opportunity to make a further submission. On September 28, 2006, the representative advised WCAT that no further submission would be forthcoming.

Reasons and Findings

The worker did not request an oral hearing. After reviewing the evidence and guidelines for considering an oral hearing in item #8.90 of WCAT's *Manual of Rules of Practice and Procedure*, I conclude that an oral hearing is not required to ensure a full and fair consideration of the issues in the appeal. These issues are matters to be determined primarily on the basis of the medical assessment of the worker's condition and the worker was provided with the opportunity to provide further information regarding the matters in issue in the appeal. I have based my decision on the information in the claim and appeal files.

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

In *Review Decision #R0054380*, the review officer determined that the Board had correctly categorized the worker as a permanent regular worker and that the worker had been employed by the employer for less than 12 months at the time of his injury. No issue is taken with these determinations in the appeal, and I confirm them.

Section 33.3 of the Act provides that when a regular worker has been employed for less than 12 months immediately preceding the date of injury, the Board must use the gross earnings for the 12-month period immediately preceding the date of injury for a worker of similar status in the same type and classification of employment. As was noted by the review officer, policy item #67.50 of the RSCM II confirms that section 33.3 is a

mandatory exception to the general rule for determining long-term average earnings and applies to workers with permanent employment. This policy item requires the Board 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 to obtain the gross earnings of that worker for the 12-month period immediately preceding the date of injury. If no such person is employed, the Board then determines the 12-month pre-injury earnings of a similar status worker in the same region. Where the relevant information is not available from either of these sources, the Board will base the worker's wage rate on a geographic class average for the injury occupation.

I acknowledge the worker's position that he has historically earned significantly more than is reflected by the wage rate set on his claim. However, section 33.3 of the Act does not allow the long-term wage rate of a regular employee who has been employed for less than 12 months to be based on that employee's historical pattern of earnings. Instead, the legislation requires that the wage rate be based on the earnings of a similar status worker.

The terms "similar status" and "same type and classification of employment" are not defined in the Act or Board policy. *Black's Law Dictionary* (5th ed.) defines "similar" as meaning:

> Nearly corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference…. Word 'similar' is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form and substance, although in some cases 'similar' may mean identical or exactly alike. …

"Same" is generally defined as "identical, equal, equivalent," but, as pointed out in *Black's Law Dictionary* (5th ed.), does not always mean "identical." Instead, "It frequently means of the kind or species, not the specific thing."

Black's Law Dictionary (5th ed.) defines "status" to mean:

> Standing; state or condition; social position. The legal relation of individual to rest of the community. The rights, duties, capacities and

> incapacities which determine a person to a given class. A legal personal relationship not temporary in its nature and terminable at the mere will of the parties, with which third persons and the state are concerned. …

"Classification" is defined in *Black's Law Dictionary* (5th ed.) as an "arrangement into groups or categories on the basis of established criteria."

It is the employer's position that the employee selected as being of similar status and the worker performed the same functions. For the purpose of deciding this appeal, I am prepared to accept that the worker and this employee were "employed in the same type and classification of employment" within the meaning of section 33.3 of the Act. In my view, the more significant consideration in the appeal is whether that employee is a "person of similar status" to the worker.

I agree with the approach taken by the panels in *WCAT Decision #2005-06563* and *WCAT Decision #2004-05498*, where the panels relied on the terms of the collective agreement as the basis for determining a worker's "status" and "type and classification of employment." In this case, under the collective agreement, the worker's "status" has two aspects. First, as noted by the employer, there is the matter of his seniority. I accept the employer's evidence that, of 31 active names on the roster, three were hired after the worker. The legal relation of the worker to his co-workers and his right to work or standing was dictated by his seniority relative to those co-workers. Based on the evidence, it is apparent that work was available based on the seniority of a given employee. Since the worker's relative lack of seniority meant that he was not as entitled to continuous work as others who had more seniority, seniority is a relevant factor in considering what employee of the employer has a "similar status." The employer's selection of an employee with five months more seniority than the worker was reasonable and I find that, in so far as seniority is concerned, the employer's choice was a "person of similar status."

The second aspect of the worker's "status" under the collective agreement is the worker's job title or defined position (as opposed to the type and classification of work he actually did). In the August 9, 2006 letter, the employer's representative confirmed that the worker's rate of pay was usually not that of a labourer but that, instead, the worker had successfully negotiated that he would be paid at the nozzleman's rate. The statements of two witnesses that have been included in the worker's appeal materials also confirm that the worker worked as a nozzleman. The evidence supports a conclusion that the worker's "status" under the collective agreement was primarily that of a nozzleman. It was that "status" that dictated his rate of pay for the bulk of the work he performed.

According to the employer's figures, there is a $0.26 difference in the hourly rate of pay between the worker and the employee that the employer selected. (The employer says that, as of January 1, 2005, a nozzleman was paid $26.71 per hour in wages and holiday pay, whereas a labourer was paid $26.45.) Conversely, the worker's

representative has provided documentation confirming that, as of May 1, 2003, a general labourer in the shoring division earned base pay of $22.57 per hour, whereas a nozzleman earned base pay of $24.14 (a $1.57 difference). The pay stubs which are in the claim file confirm that the worker was paid as a labourer for 8 hours at a base rate of $23.72 and for 84 hours at the nozzleman's base rate of $24.74 per hour in the period ending February 5, 2005 (a $1.02 difference). In the period ending March 5, 2005, at which time it appears a pay increase had been put in place, the worker earned $23.72 per hour for 18 hours he worked as a labourer, and $25.36 per hour for 24 hours he apparently worked as a nozzleman (a $1.64 difference). Based on the documentation in the claim file, I am unable to accept the employer's evidence regarding the difference in the rates of pay for labourers and nozzleman. Instead, I accept the evidence that has been provided by the union through the worker's representative. I find that the difference in pay rates is sufficiently significant to warrant a conclusion that labourers and nozzlemen are not persons of "similar status" under the collective agreement.

The worker did work as a labourer and was paid in that capacity for part of his employment. Therefore, I do not consider that the worker's wage rate should be based on the earnings of worker #2 or worker #4 who are identified in the April 21, 2006 submission. They worked exclusively as nozzlemen and so were not "employed in the same type and classification of employment." The union has not identified the level of seniority of worker #1 and worker #3. It is therefore not possible to confirm which of these two employees best represents an employee of similar status to the worker. I accept, however, that worker #1 and worker #3 are of "similar status" to the worker in terms of their job title or defined position under the collective agreement, and also that they were "employed in the same classification and type of employment." Consequently, the worker's wage rate should be based on the earnings of the most similar of these two individuals. The selection of which of the two best represents a "person of similar status" for the purpose of establishing the worker's wage rate will turn on which of them is closest in seniority to the worker.

Conclusion

Based on the evidence, I conclude that the Board erred in relying on the income figure provided by the employer as the employee selected is not a "person of similar status" to the worker. The appeal is allowed and the worker's file is remitted to the Board so that the Board can establish the worker's long-term wage rate based on the earnings of whichever of the employees identified as worker #1 and worker #3 in the union's April 21, 2006 submission was closest in seniority to the worker in February 2005. The Review Division's December 1, 2005 decision is varied accordingly.

No expenses were requested, and it does not appear from a review of the file that any reimbursable expenses were incurred in relation to this appeal.

Deirdre Rice
Vice Chair

DR/dw