Noteworthy Decision Summary

Decision: WCAT-2007-02166 **Panel**: Guy Riecken **Decision Date:** July 19, 2007

Wage Rate – Average Earnings –Sections 33, 33.3 and 33.4 of the Workers Compensation Act – Policy items #66.00, #67.00, #67.50 and #67.60 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy as an illustration of a decision regarding a worker's "earning potential" when determining the average earnings for purposes of the long-term wage rate.

The worker was injured when he fell on his right shoulder while playing soccer with some children during the first day of his job as a childcare worker. The Workers' Compensation Review Division (Review Division) directed the Workers' Compensation Board, operating as WorkSafeBC (Board), to set the worker's long-term earnings pursuant to section 33.3 of the *Workers Compensation Act* (Act). Section 33.3 is an exception to the general rule for long-term wage rates that applies to workers employed, other than on a temporary or casual basis, for less than 12 months at the date of injury. The Board used the statistical class average gross annual earnings for full-time childcare workers in the lower mainland to determine the worker's average earnings. These average earnings were used to determine the worker's long-term net wage rate.

The worker argued that his case involved exceptional circumstances and his compensation wage rate should be based on the potential earnings in a daycare business he intended to set up in the lower mainland before he was injured. He argued that, with a four-year record as a proven licensed childcare operator, his earning potential exceeded his average earnings as determined by the Board.

The worker's appeal was denied. Although section 33(1) of the Act refers to average earnings and earning potential at the time of injury, the reference to earning potential does not allow for speculation about how much a worker could have earned in the future if the injury had not occurred. The Act and related policies create a rule based system for determining average earnings and earning potential at the time of injury. Section 33(2) requires the use of the rules in sections 33.1 through 33.7 to determine average earnings. The rules in sections 33.1 through 33.7 require the use either of evidence of actual earnings at the time of injury or evidence of some form of historical earnings prior to the date of injury. Because it had already been decided by a prior Review Division decision that section 33.3 of the Act applied to the worker's case, the equitable exception under section 33.4 did not apply. Section 33.4 provides the Board with the authority to base the average earnings on an amount the Board considers best reflects the worker's loss of earnings.

The panel also found that even if section 33.3 did not apply, the worker's circumstances would not have warranted the exercise of discretion on an equitable basis under section 33.4 of the Act because the evidence did not show that there was a "significant atypical and/or irregular disruption in the pattern of employment" during the 12-month period preceding the date of injury such that the 12-month earnings do not reflect the worker's historical earnings. Although the worker changed from providing childcare services through his own business to providing them as an employee of the accident employer, this did not amount to a significant atypical or

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irregular disruption in the pattern of employment as contemplated by item #67.60(a) of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). The worker also did not provide evidence that he was pursuing an area of study or a career other than childcare that would potentially result in higher long-term earnings as contemplated by item #67.60(b) of the RSCM II regarding injury in temporary employment unrelated to a path of study.

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This decision was subject of a reconsideration application. See WCAT Decision #2008-00159, dated January 17, 2008.

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Panel: Guy Riecken, Vice Chair

Introduction

The Workers' Compensation Board, operating as WorksafeBC (Board), accepted the worker's claim for a right shoulder injury sustained on February 7, 2005. The worker was injured when he fell on the shoulder while playing soccer with some children during the first day of his job as a childcare worker. The Board paid the worker temporary disability (wage loss) benefits until October 30, 2005 when it determined that his condition had reached a medical plateau. The worker was then provided with vocational rehabilitation assistance and his claim was referred to the Board's Disability Awards Department. On November 22, 2005 the Board granted the worker a permanent partial disability (PPD) award based on a permanent functional impairment (PFI) of 2.5% of total disability.

In a letter dated June 30, 2006 a case manager at the Board confirmed that in setting the long-term wage rate for the claim the Board categorized the worker as an employee who had been employed by the accident employer, other than on a temporary or casual basis, for less than twelve months at the time of the injury. The case manager used the statistical class average gross annual earnings for full-time childcare workers in the Lower Mainland region of British Columbia ($22,320.00) to determine the worker's average earnings. Since the worker was employed part-time at the time of the injury, this resulted in a long-term net wage rate of $1,132.50 per month based on a 28-hour work week. The long-term wage rate affects the amount of wage loss benefits after ten weeks of disability, the amount of vocational rehabilitation benefits and the amount of the PPD payments.

The worker appeals the December 18, 2006 decision of a review officer in the Review Division of the Board (*Review Decision #R0068635*). The review officer found that that Board had properly determined the worker's long-term wage rate. The worker is seeking to have his long-term wage rate based on his potential earnings before the injury, which he believes would have been more than the average amount earned by childcare workers in the Lower Mainland of British Columbia.

Issue(s)

Did the Board properly determine the worker's long-term average earnings and wage rate?

Jurisdiction and Procedure

The appeal of the review officer's decision was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers' Compensation Act* (Act).

WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case.

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

The employer is not participating in the appeal. The worker did not ask for an oral hearing. He requested that the appeal be heard on a fast track read and review basis. He provided written submissions to WCAT. I may consider the appeal through another procedure, including an oral hearing, if I consider it necessary. I have considered the material in the claim file and the worker's submissions. The appeal does not involve significant issues of credibility or complex issues of fact that would be better resolved through an oral hearing. I am satisfied that an oral hearing is not necessary for a full and fair consideration of the appeal.

Background and Evidence

The background of the claim and the evidence relating to the worker's earnings and the wage rate have been thoroughly set out in three decisions by the review officer including *Review Decisions #R0056263, #R0065408* and the decision under appeal. It is not necessary to repeat all of the details here. The parties have received copies of the review officer's decisions and other readers can access them on the Board's website (www.worksafebc.com).

Law and Policy

The determination of how much compensation is paid as a result of disability begins with the determination of a worker's "average earnings." Section 33(1) of the Act requires the Board to determine the amount of a worker's average earnings and earning capacity with reference to his or her average earnings and earning capacity at the time of the injury. Section 33(2) provides that a worker's average earnings must be determined in accordance with sections 33.1 to 33.7.

Subject to a number of exceptions, sections 33.1(1) and (2) provide two general rules for the calculation of average earnings, one during the initial period of disability, which is based on the average earnings at the time of injury, and the other during a period of long-term disability, which is based on the average earnings during the 12-month period immediately preceding the date of injury.

The term "initial payment period" used in section 33.1(1) is defined in section 1 of the Act as a 10-week period starting on the date of injury. Accordingly, unless the worker's injury results in permanent disability before the end of that 10-week period, the initial wage rate is in effect for the first ten weeks of disability, and the long-term wage rate is in effect after that for as long as the disability lasts. The wage rate that applies after ten weeks of disability is referred to as the long-term wage rate.

The exceptions to the average earnings general rules for the initial period and the long-term period of disability are found in sections 33.2 to 33.7. Section 33.1(3) provides that if two or more of sections 33.2 to 33.7 apply to the same worker for the same injury, the Board must determine the section that best reflects the worker's circumstances and apply that section.

The general rule for determining average earnings for the initial period of disability is subject to the exceptions in sections 33.5 (a worker with a casual pattern of employment), 33.6 (a worker with personal optional protection) and 33.7 (a worker with no earnings).

The general rule for long-term disability is subject to the exceptions in sections 33.2 (a worker who was an apprentice or learner at the time of injury), 33.3 (a worker employed by their employer, other than on a temporary or casual basis, for less than 12 months), 33.4 (exceptional circumstances exist such that it would be inequitable to apply the general rule), and 33.5, 33.6 and 33.7.

The policies that apply to the issue in this appeal are found in chapter nine of the *Rehabilitation Services and Claims Manual, Volume II (*RSCM II), "Average Earnings."

These include the following policies:

- Policy item #66.00, "General Rule for Determining Long-Term Average Earnings," explains that the initial period of disability referred to in section 33.1 lasts for ten weeks or until the disability becomes permanent, whichever occurs earlier.

- Policy item #67.00, "Exceptions to the General Rules for Determining Average Earnings," notes that section 33.1(3) provides that if two or more exceptions to the general rule apply to a worker, the section that best reflects the worker's circumstances must be applied. The policy states that "best" does not mean highest rate possible, but rather, the rate that most closely reflects the actual loss incurred.

- Policy item #67.50 provides that to determine a worker's average earnings under section 33.3 of the Act 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. If that 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 policy also provides that the Board is not limited to obtaining wage rate information from a single employer. Where the relevant information is not available from the injury employer, the Board may obtain average earnings information from a number of employers in the same region.

- Policy item #67.60, "Exceptional Circumstances," provides criteria to be applied to determine if a worker's circumstances are "exceptional" for the purposes of section 33.4 of the Act.

Reasons and Findings

The worker's submissions are set out in his notice of appeal and in his letters to WCAT dated January 22, January 31, March 19 and April 19, 2007. He identifies the primary issue in the appeal as the Board's refusal to compensate him based on his true skills, training and experience, rather than on his historical earnings with the employer. He submits that the Board should not have relied on the statistical average earnings for childcare workers in the same region. It is his position that his long-term earning potential prior to the injury was greater than that of the average childcare worker employed in the Lower Mainland of British Columbia. He submits that the Board and the review officer failed to consider his earning potential and his diminished income capacity due to the injury. He also submits that they failed to consider provisions in the Act that support his position. The worker believes that his case involves exceptional circumstances and his compensation wage rate should be based on the potential earnings in a daycare business he intended to set up in the Lower Mainland before he was injured. He argues that with a four-year record as a proven licensed childcare operator, his earning potential exceeded his average earnings as determined by the Board.

In addition to the submissions on his earning potential and the compensation wage rate, the worker's letters to WCAT include submissions on a number of issues that are not part of the present appeal. His submissions address, among other things, the surveillance of him by the Board, the extent of his injury and permanent disability, his medical treatment, and vocational rehabilitation issues. Neither the Board's June 30, 2006 decision nor the review officer's December 18, 2006 decision addressed those matters and they are not before me in this appeal. The only issue in this appeal is the worker's long-term wage rate.

The evidence regarding the worker's earnings prior to his employment with the accident employer includes the following:

- For three years previous to the injury the worker ran his own business, an after school daycare. He earned about $1,000 per month, depending on the number of children who attended. Much of the time the parents paid him in cash and he did not keep a lot of records. (February 23, 2005 electronic claim log entry).

- The worker informed the Board he would be unable to provide tax records showing his net business income for the years 2002, 2003 and 2004 because that income was incorporated into his wife's income in her tax returns, and requiring his wife to provide those records was not a viable option.

- Information from the Canada Customs and Revenue Agency (CCRA) indicated that the worker had earnings in 2004 from his daycare business of $13,590.

- The worker's T1 General Income Tax and Benefit Statement and Statement of Business Activities, which he provided to the Board in April 2005, showed gross income in 2004 from the childcare business of $15,406 and net income of $13,590.06.

The worker has not said that when he was injured on February 7, 2005 he was still operating his own daycare business. Nor has he indicated that he had another job at the time of the injury. From the information in the claim file and his submissions I conclude that at the time of injury his only employment was with the accident employer.

At the time of the injury the worker had just started his job. He had been employed by the accident employer for less than an hour. He worked on an on-call basis. When called in, his shift would have been for a maximum of six hours. On the day of injury he was to have worked a four-hour shift. The job was for five days per week. He was to be paid $12.12 per hour ($11 per hour plus 10.2% vacation pay). At first the Board categorized the worker as employed on a casual basis.

As a result of a decision by the review officer on January 16, 2006 (*Review Decision #R0056263*) to refer the wage rate matter back to the Board with a number of directions, the Board undertook further investigations into the worker's employment status. The case manager determined that before starting the job with the accident employer the worker had a regular pattern of employment with little or no disruption in his employment. In spite of the fact that he worked for the employer on-call, the pre-injury employment pattern qualified him as a "general rule" worker. Accordingly, under section 33.1(1) the Board based his wage rate during the initial period of disability on his earnings at the time of injury. The hourly rate and an average 28-hour work week were used to calculate a net compensation wage rate of $326.25 (claim log entries dated April 6, 20 and 24, 2006).

However, the case manager did not change the long-term rate on the claim. This was largely because the employer had informed the Board that the worker had been hired on a temporary basis. In a decision on June 14, 2006 (*Review Decision #R0065408*) the review officer found that the case manager had not properly implemented *Review Decision #R0056263*. She referred the matter back to the Board again with directions to set the long-term earnings pursuant to section 33.3 of the Act and to issue a new decision letter setting out the worker's entitlement based on those earnings. As I noted earlier, section 33.3 is an exception to the general rule for long-term wage rates that applies to workers employed, other than on a temporary or casual basis, for less than 12 months at the date of injury.

As a result of *Review Decision #R0065408* the Board calculated the long-term wage rate using the rule in section 33.3 of the Act. *Review Decision #R0065408* was not appealed and is not before me in this appeal. Under section 96.4(9) of the Act it is a final decision that is binding on the Board. Accordingly, I am satisfied that the Board properly categorized the worker as employed by the employer, other than on a temporary or casual basis, for less than 12 months at the date of injury. It also used the rule in section 33.3 to determine his average earnings, as required by the review officer.

Section 33.3 provides that:

> 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.

According to a client services manager's June 30, 2006 claim log entry, the employer informed the Board that there were no other persons of a similar status employed in the same type and classification of employment as the worker. The worker has not disputed this. Accordingly, under section 33.3(b) the Board was required to consider the earnings of a person of similar status employed in the same type and classification of employment by an employer in the same region. The client services manager was unable to obtain this information from other specific employers in the region.

Policy item #67.50 provides that in applying section 33.3(b) the Board is not limited to considering the earnings of a worker employed by a single employer, but may refer to earnings information from multiple employers in the same region. In this case the case manager referred to information from the Board's Statistical Services Department

concerning the average class earnings of full-time childcare workers in the Lower Mainland (plus Victoria) for the last three quarters of 2004 and the first quarter of 2005. The average gross earnings for that class during the 12-month period were $22,320. The client services manager used that figure and the worker's 28-hour average work week to calculate his long-term compensation wage rate of $326.25. (Claim log entries dated June 23, 27 and 30, 2006).

The worker has not disputed the accuracy of the statistical class average earnings information or the Board's calculations in determining the wage rate. His position is that the resulting wage rate does not adequately reflect his personal potential earnings in the daycare business he was planning to set up at the time of his injury.

Although section 33(1) refers to average earnings and earning potential at the time of injury, the reference to earning potential does not allow for speculation about how much a worker could have earned in the future if the injury had not occurred. The Act and related policies create a rule based system for determining average earnings and earning potential at the time of injury. Section 33(2) requires the use of the rules in sections 33.1 through 33.7 to determine average earnings. The rules in sections 33.1 through 33.7 require the use either of evidence of actual earnings at the time of injury or evidence of some form of historical earnings prior to the date of injury.

While the worker did not refer specifically to section 33.4, his argument that there are sections of the Act that support basing his compensation on the potential earnings in the business he planned on setting up suggests that he may have been referring to that section of the Act. Section 33.4(1) applies where there are exceptional circumstances such that the Board considers the application of section 33.1(2) (the general long-term average earnings rule) would be inequitable. In such a case the Board has discretion to base the average earnings on "the amount that the Board considers best reflects the worker's loss of earnings."

However, section 33.4(1) cannot be applied to the worker's claim. Section 33.4(2) provides that 33.4(1) does not apply in a number or circumstances, including those described in section 33.3 (a worker employed by the employer for less than 12 months at the time of injury). Because it has been determined that section 33.3 applies to the worker's case, the equitable exception under section 33.4(1) cannot be applied to his claim.

Even if the worker's circumstances did not come within section 33.3, I would not find, on the available evidence, that his average earnings should be determined under section 33.4 of the Act. Policy item #67.60 explains that for the general rule under 33.1 to be considered inequitable, the evidence must show that the level of compensation determined using the general rule does not best reflect the worker's long-term earnings loss. In this context "best" does not mean the highest level of compensation possible,

but rather the level of compensation that reflects the actual loss incurred by the worker. This policy describes the following circumstances where section 33.4 is applied:

a) where the worker had a history of regular full-time employment, and the worker's earnings in the 12-month period immediately preceding the date of the injury do not reflect the worker's historical earnings because of a significant atypical and/or irregular disruption in the pattern of employment during that period of time;

b) where the worker's earnings in the 12 months immediately preceding the date of injury do not address the worker's diminished future career options because of the nature and degree of the injury; or

c) where deductions must be made from a self-employed worker's gross income to derive the labour component of the worker's average earnings.

While the worker had a regular pattern of employment prior to the injury, the evidence does not show that there was a "significant atypical and/or irregular disruption in the pattern of employment" during the 12-month period preceding the date of injury such that the 12-month earnings do not reflect the worker's historical earnings. Although the worker changed from providing childcare services through his own business to providing them as an employee of the accident employer, this does not amount to a significant atypical or irregular disruption in the pattern of employment as contemplated by policy item #67.60(a). According to his tax records, the worker's taxable earnings in the tax year before the injury (2004) were $13,590. He has declined to provide tax records for 2002 and 2003. He suggested that the Board infer from the attendance records for the children in the daycare what his earnings were. I find the available evidence insufficient to show that the worker had an historical employment pattern that was disrupted in the 12 months preceding his date of injury such that his 12-month pre-injury earnings do not reflect his historical earnings.

Policy item #67.60(b) contemplates a situation where a worker (who may be a student) is starting out in a path of study or a career path and was injured in temporary employment unrelated to the area of study or the career path. Due to the nature of the injury, that worker may be unable to pursue the path of study or the career path and the 12-month pre-injury earnings may not reflect the earning potential in the chosen field of study or career path. In the present case the worker was continuing in the same career as a childcare provider. He has not provided evidence that he was pursuing an area of study or a career other than childcare that would potentially result in higher long-term earnings. He has stated that he planned on setting up his own childcare business. Although he asserts that he had a higher earning potential through that business plan, he has not provided persuasive evidence of those potential earnings. I conclude that the worker's circumstances do not come within item #67.60(b).

I also conclude that item #67.60(c) does not provide support for the worker's argument about his earning potential. Although he was previously self-employed, and it is possible deductions may have been made from his gross self-employed income to derive the labour component of the income, this policy allows the Board to consider the worker's earning history for longer than the 12 months preceding the date of injury. It does not provide for speculation about future income from a proposed business. Moreover, since the worker declined to provide his tax records for the two years before 2004, the evidence of his earning history is not sufficient to yield a better average earnings determination under #67.60(c) than under section 33.1.

Although section 33.4 cannot apply to the worker's case because there is a previous Review Division decision that his circumstances come within section 33.3 (which is final and binding under section 96.4(a) of the Act), I find that even if section 33.3 did not apply, the worker's circumstances would not warrant the exercise of discretion on an equitable basis under section 33.4 of the Act.

The worker's appeal is denied.

Conclusion

I confirm *Review Decision #R0068635* dated December 18, 2006. In summary:

- As required by the review officer in *Review Decision #R0065408*, the Board properly categorized the worker as an employee employed, other than on a casual or temporary basis, by the accident employer for less than 12 months immediately preceding the date of injury.

- The Board properly determined the worker's long-term average earnings under section 33.3 of the Act and the worker's long-term compensation wage rate based on the statistical class average gross earnings of childcare workers in the Lower Mainland during the 12 months preceding the date of the worker's injury.

The worker did not request an order for reimbursement of any expenses related to this appeal and no order for reimbursement is granted.

Guy Riecken
Vice Chair

GR/jm