Noteworthy Decision Summary

Decision: WCAT-2007-02982 **Panel**: Michael Redmond **Decision Date:** September 28, 2007

Wage Rate – Apprentice – Section 33.2 of the Workers Compensation Act – Item #67.40 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy because it provides an analysis of how to determine an apprentice's long term average earnings for purposes of setting a long term wage rate.

The worker was an apprentice heavy duty mechanic when he was injured. The Workers Compensation Board, operating as WorkSafeBC (Board), established his long term wage rate using the earnings of a qualified person employed at the starting rate of his trade with the same employer. The employer requested a review on the basis that the wage rate should have been based on a comparable worker, not a fully qualified journeyman. The Review Division confirmed the Board's decision. The employer appealed to WCAT.

The employer's appeal was denied. The panel found that the worker was an apprentice as defined by the *Industry Training Authority Act*. The ordinary rules regarding the setting of wage rates did not apply to apprentices and the Board was obligated to follow section 33.2 of the *Workers Compensation Act* and policy item #67.40 of the *Rehabilitation Services and Claim Manual, Volume II*. This meant the Board was required to set the worker's earnings on the gross earnings of a "qualified person" employed at the starting rate of the same trade as the worker. In this case, the earnings of a journeyman heavy duty mechanic. The panel found that the term "qualified" referred to the process by which an apprentice became "qualified" to practice his or her trade, by completing the apprenticeship program and becoming a journeyman. The legislation did not intend for an apprentice's long-term wage rate to be based upon their actual earnings or the long-term earnings of other apprentices.

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Panel: Michael Redmond, Vice Chair

Introduction

The worker, an apprentice heavy duty mechanic, was injured while at work on August 28, 2006.

On November 1, 2006 the Workers' Compensation Board, operating as WorkSafeBC (Board), wrote to the worker, advising him of his long-term wage rate. Because he was an apprentice, the Board said, it had established his rate using the earnings of a qualified person employed at the starting rate of his trade with the same employer.

The employer requested the Review Division review that decision, submitting the worker's wage rate should have been based on a comparable worker, not a fully qualified journeyman.

On February 5, 2007 the Review Division issued a decision, confirming the Board's decision.

The employer has appealed that decision.

The appeal was conducted by means of a review of the claim file and the written submissions made on behalf of the employer. The worker did not participate in the appeal, although advised of his right to do so. The employer did not request an oral hearing and since this matter turns largely on the interpretation of law and policy I am satisfied an oral hearing is not required for the proper adjudication of this matter.

Issue(s)

The issues to be determined in this matter are:

a) Does the term "qualified person" in section 33.2 of the *Workers Compensation Act* (Act) mean, in the present claim, a qualified journeyman heavy duty mechanic, or does it refer to something else?

b) Did the Board, in any case, obtain the correct information from the employer regarding the earnings of a qualified person employed at the starting rate in the same trade, occupation or profession with the same employer as the worker?

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Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act. The worker appeals a February 5, 2007 decision of the Review Division.

The relevant policies of the Board are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

The worker, a shipyard employee, was injured in a workplace accident on August 28, 2006. The Board accepted his claim for a right leg crush injury and a related period of disability.

On October 12, 2006, according to the claim log, a Board officer called the employer to request the earnings of a journeyman in heavy duty mechanics in his first year. The Board officer noted section 33.2 of the Act in this regard.

The claim log entry of that date said that the employer's payroll clerk said a journeyman heavy duty mechanic in that position made $24.97 per hour but it would be difficult to find a comparable worker, since they all worked different hours.

On October 17, 2006, according to the claim log, the Board officer sent a message to the employer's payroll clerk stating he required the earnings of a new journeyman who had worked for the employer for the 12-month period prior to the worker's injury.

On October 25, 2006 the payroll clerk of the employer sent a fax to the Board, stating the one-year earnings of a journeyman mechanic employed at the same time as the worker was $63,369.26.

In the November 1, 2006 decision letter, the Board wrote to the worker, advising him that, because he had been in receipt of wage loss benefits for a total of 10 weeks, it was required to review the wage rate on his claim. As the worker was an apprentice, his long-term wage rate was based on the gross earnings for the 12-month period immediately preceding the date of injury, of a qualified person employed at the starting rate in the same trade, occupation or profession. The Board determined that these earnings totalled $63,369.26. These earnings exceeded the statutory annual maximum of $62,400.00. Therefore, the statutory maximum was used to set the rate. This resulted in a 90% of net long-term weekly wage rate of $880.43, effective November 7, 2006.

The employer requested a review of this decision by the Review Division and contended the worker's wage rate was not reflective of his actual earnings. The employer stated that the term "qualified person" was not defined in the Act, policy or practice, but

submitted that a "qualified person" was a "comparable" person (that is, someone in the same circumstances). In the 12 months immediately preceding the injury, the worker's actual earnings as an apprentice heavy duty mechanic were $34,367.19, the employer said. The employer argued that the $63,369.26, upon which the worker's long-term wage rate was based, was the annual rate for a fully qualified journeyman, and was nearly doubled the worker's actual earnings, and, therefore, not "comparable" to the worker's circumstances.

On February 5, 2007 the Review Division issued a decision, confirming the Board's decision.

The Review Division said the intent of the legislation was clear and the term "qualified" in context must mean a person who had completed a training or apprenticeship program and possessed a licence or certificate allowing them to perform the trade.

The Review Division also noted that policy item #67.40 of the RSCM II said that an apprentice in a trade was one defined under the *Industry Training and Apprenticeship Act* or similar statutes. The Review Division noted that the Act provided a list of trades that required compulsory certification, including heavy duty equipment mechanic.

The Review Division concluded the Board had properly obtained the appropriate earnings information from the employer and had applied the Act and policy correctly.

The employer has appealed that decision.

Submissions

The employer's representative submitted there was no evidence that the starting rate for a heavy duty mechanic was the rate used by the Board. It said the Board had not asked for the starting rate and did not explain to the employer what information they were seeking. The employer's representative said the payroll clerk had not understood the purpose of the inquiry and the initial wage rate provided would have corresponded to earnings of $50,139.76 a year, based on a 40-hour week.

The employer's representative submitted the Act did not stipulate what it meant by a "qualified person", nor did it say it meant a "fully qualified person". The employer's representative noted the same language was used by policy item #67.40 of the RSCM II.

The worker's representative referred to Board Practice Directive #33A, which gives guidance as to how rates are to be set but, again, noted that the term "qualified" was not defined. In the context of item #9 of that directive, however, he noted the term "comparable" person was used. That meant, he said, someone in the same circumstances.

In this case, the employer's representative submitted, the Act did not require an apprentice's rates to be set on the basis of the starting rate of a fully qualified journeyman. The worker had only earned $34,367.19 in the 12 months immediately before his injury. The long-term wage rate set by the Board was nearly double the worker's actual earnings. That, he submitted, was not the intent of the legislation or the policy.

Law and Policy

Section 33 of the Act (Average earnings) states in part:

> (1) The Board must 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 the worker's injury.
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> (2) Subject to subsection 3 (5), the Board must determine the amount of average earnings of a worker in accordance with this section and sections 33.1 to 33.7.

Section 33.1 of the Act (General rule for determination of average earnings) states:

> (1) Subject to sections 33.5 to 33.7, the Board must determine, for the shorter of the following periods, the amount of average earnings of a worker based on the rate at which the worker was remunerated by each of the employers for whom he or she was employed at the time of the injury:
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> (a) The initial payment period;
> (b) The period starting on the date of the worker's injury and ending on the date the worker's injury results in a permanent disability, as determined by the Board.
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> (2) Subject to sections 33.2 to 33.7, if a worker's disability continues after the end of the period referred to in subsection (1) (a) and (b) that is shorter for the worker, the Board must, for the period starting after the end of that shorter period, determine the amount of average earnings of the worker based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.
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> (3) If 2 or more sections 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.

Section 33.2 of the Act states:

> If a worker at the time of an injury is an apprentice in a trade, an occupation or a profession or is a person referred to in paragraph (b) of

> the definition of "worker", 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 qualified person employed at the starting rate in the same trade, occupation or profession
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> a) by the same employer, or
> b) If no person is so employed, by an employer in the same region.

Policy item #67.40 of the RSCM II states that the Board considers an "apprentice in a trade" to be an apprentice as defined by the terms and conditions in the provincial *Industry Training and Apprenticeship Act* or equivalent statute. It states, further, the Board considers that an "apprentice in an occupation or profession" as described in the Act, is a worker who must complete an apprenticeship in order to obtain the licence or professional designation to work in the occupation. The *Industry Training and Apprenticeship Act* has been replaced by the *Industry Training Authority Act*.

Practice Directive #33A, which is not binding upon this panel, but which is illustrative of the approach the Board uses in setting initial and long-term average earnings refers to the general rule for setting long-term earnings after ten weeks. That rule is that long-term average earnings are established on the earnings in the 12-month period immediately prior to the date of injury. The Practice Directive goes on to refer to exceptions to that general rule, such as apprentices, as identified in section 33.2 of the Act and policy item #67.40 of the RSCM II. It says the method for obtaining information regarding a "qualified person" as specified in the Act, is set out in heading 9 of the Practice Directive.

Heading 9 is also referred to in reference to the exception in the Act under section 33.3 of the Act, referring to workers not employed with the employer for 12 months. Heading 9 describes what it calls the process for obtaining "comparable earnings information" and refers to both sections 33.2 and 33.3 as well as policies #67.40 and #67.50. It states that it is not necessary for the comparable worker to have been employed for 12 months, since the policies allow Board officers to obtain a figure that represents what a comparable person earns "or would earn". It emphasizes that the worker's earnings may not be based on what the worker himself or herself would have earned.

Findings and Reasons

The appeal is denied and the decision of the Review Division is confirmed.
There appears to be no dispute that the worker, at the time of his injury, was an apprentice as defined by the *Industry Training Authority Act*. When the Board was required to set his long-term earnings rate, I find it was appropriate for them to refer to section 33.2 of the Act and policy item #67.40 of the RSCM II. The ordinary rules

regarding the setting of wage rates do not apply to apprentices and the Board was obligated to follow the provisions set out in the Act and policy.

The Board, therefore, was required to set the worker's earnings on the gross earnings of a "qualified person" employed at the starting rate of the same trade as the worker.

While the term "qualified" is not specifically defined in the Act, or policy, the *Oxford English Dictionary* defines it as "to become officially recognized as a practitioner of a profession, or activity, typically by undertaking a course and passing examinations". In the context of the Act, it must, I find, refer to the process by which an apprentice becomes "qualified" to practice his or her trade, that is, by completing the apprenticeship program and becoming what is known as a journeyman.

The alternate suggestion posed by the employer's representative is that the earnings should be based on a "comparable" worker. That would, it would seem, suggest that the worker's earnings should be based on those of another apprentice, rather than someone with a different work status. I do not find that argument to be persuasive.

The employer's representative has noted the Practice Directive that uses the term "comparable". As noted above, Practice Directives are not binding on this panel, while they may be of interpretive assistance. They have no legislative force. Also, as noted above, the paragraph referred to by the employer's representative encapsulates the Board's duty to acquire information regarding two different classes of workers, as required by two different provisions of the Act. I do not find the term "comparable" in that context to mean, as the employer's argument implies "the same" but rather it refers to the obligation the Board has to make inquiries and find information against which the worker's earnings may be calculated.

The employer's representative has suggested it was not the intent of the policy to set the long-term earnings of apprentices at a rate substantially above that which they were earning at the time of their injury. I find that likely was, in fact, the legislative intent. Clearly the legislation was designed to provide an exception for apprentices and learners, those, in other words, at the beginning of their careers. Had the legislation intended the long-term earnings of apprentices for compensation purposes to be based on their actual earnings, no exception would have been required.

Similarly, had the legislation intended an apprentice's long-term earnings to be based on those of other apprentices, the legislation could have said so. By stating that an apprentice's earnings should, instead, be based on the earnings of a qualified person employed at the starting rate in the same trade, I find the legislature intended the ordinary meaning of the term "qualified" when used in the context of an apprenticeship. I find the term "qualified" does mean, in the context of this claim, a journeyman heavy duty mechanic. The Board was correct to seek information regarding the earnings of such workers employed by the employer.

While the employer's representative has suggested the employer did not understand the information requested I do not find the record indicated any misunderstanding. The inquiries made by the Board officer were not ambiguous, and the information provided to the Board appeared to have been that which was asked for. While the employer's representative has suggested the actual earnings of a qualified person employed at the starting rate by the employer might have been less than the amount indicated by the employer, he has not provided any objective information to contradict the information provided to the Board by the employer.

The employer's representative has suggested the Board should have made further inquiries because the information initially provided by the employer's payroll clerk regarding hourly wage rates seemed not to correspond with the 12-month earnings later reported by the employer. I do not find that creates a sufficient evidentiary basis on which to vary the Board's decision. The Board, I find, made adequate inquiries of the employer and the employer's representative has not provided information that would suggest the 12-month earnings provided to the Board were not of a journeyman heavy duty mechanic, or were incorrect in any other respect.

I find the Board made the appropriate inquiries of the employer and correctly relied on the information provided to it by the employer when setting the worker's long-term wage rate in compliance with section 33.2 of the Act.

Conclusion

The appeal is denied and the decision of the Review Division is confirmed. No expenses were requested, none appear warranted and no expenses are allowed.

Michael Redmond
Vice Chair

MR/ml/cv

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