

### Noteworthy Decision Summary

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**Decision:** WCAT-2008-01745    **Panel:** Herb Morton    **Decision Date:** June 12, 2008

***Section 33.4 of the Workers Compensation Act - Exceptional Circumstances - Practice Directive #C9-12 "Long-Term Average Earnings: Section 33.4 – Exceptional Circumstances" – Resolution 2008/03/19-01, Re: Average Earnings – Exceptional Circumstances – Item #67.60 Rehabilitation Services & Claims Manual, Volume II***

This decision is noteworthy because it illustrates the application of the March 19, 2008 amended policy (2008/03/19-01, "Re: Average Earnings – Exceptional Circumstances"), and Practice Directive #C9-12 regarding exceptional circumstances.

The worker was employed as a housekeeper at a care home. The Workers Compensation Board, operating as WorkSafeBC (Board), accepted her claim for compensation for a March 2007 left knee injury and minor concussion, as a result of a fall from a two step ladder. The worker appealed the long-term wage rate set on her claim. She objected to the use of her earnings for the 12 months prior to her injury because her earnings for the first four months were lower, as she was initially employed on a "casual on call" basis, she became a full-time employee effective July 2006, and became a permanent employee by at least January 2007, and the one-year period included 18 days during which she was disabled from working due to a compensable work injury.

The worker's appeal was allowed. Section 33.4 of the *Workers Compensation Act* (Act) confers a statutory discretion to determine the worker's average earnings (so as to be based on an amount that the Board considers best reflects the worker's loss of earnings), where exceptional circumstances exist such that the Board considers that it would be inequitable to base them on the worker's earnings from the 12 months prior to injury.

The policy of the board of directors of the Board governing the exercise of discretion under section 33.4(1) of the Act is set out at *Rehabilitation Services & Claims Manual, Volume II* item #67.60. By resolution dated March 19, 2008 (2008/03/19-01, "Re: Average Earnings – Exceptional Circumstances"), the board of directors approved amendments to item #67.60. The resolution was made effective May 1, 2008.

Practice Directive #C9-12 (formerly Best Practices Information Sheet #21), "Long-Term Average Earnings: Section 33.4 – Exceptional Circumstances," May 1, 2008, provides practice guidance (not policy) regarding the exercise of discretion under section 33.4 of the Act.

The panel found that the worker had experienced a change in employment status to that of a permanent full-time employee and this represented a fixed change in her earnings pattern. This constituted an exceptional circumstance which would make it inequitable to base her long-term wage rate on her earnings from the 12 months prior to her work injury. The panel concluded that the worker's average earnings should be determined using only the earnings in the period of time following the fixed change in her employment in July 2006.

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## Introduction

The worker has appealed the October 16, 2007 decision (*Review Decision #R0080111*) of the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board), to the Workers' Compensation Appeal Tribunal (WCAT). The worker's appeal concerns the long-term wage rate set on her claim for an injury on March 13, 2007. She objects to the use of her earnings for the 12 months prior to her injury for the following reasons:

- her earnings for the first four months were lower, as she was initially employed on a "casual on call" basis;
- she became a full-time employee effective July 18, 2006, and completed her "qualifying period" so as to become a permanent employee by at least January 2007; and,
- the one-year period included 18 days during which she was disabled from working due to a compensable work injury (on March 15, 2006) and in receipt of wage loss benefits.

The worker's appeal was initiated by a notice of appeal dated November 20, 2007. She requested that her appeal be considered on a "fast track read and review basis." However, no submission was enclosed. The WCAT Registry determined that the worker's appeal would be considered on a "read and review" basis and invited written submissions. A submission dated February 19, 2008 was provided by a workers' adviser on behalf of the worker. The employer is not participating in the worker's appeal, although invited to do so.

The issue raised by the worker's appeal concerns questions of law and policy. The background facts are not in dispute and there is no issue of credibility. I find that the worker's appeal can be properly considered on the basis of written submissions without an oral hearing.

## Issue(s)

Was the worker's long-term wage rate properly determined based on her earnings from the one year prior to her March 13, 2007 injury?

## **Jurisdiction**

The Review Division decision has been appealed to WCAT under section 239(1) of the *Workers Compensation Act* (Act). WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a published policy of the board of directors of the Board that is applicable (section 250(2) and 251 of the Act). WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal. If the evidence supporting different findings is evenly weighted on an issue respecting the compensation of a worker, WCAT must resolve that issue in a manner that favours the worker (section 250(4) of the Act).

## **Background**

The worker was employed as a housekeeper at a care home. By letter dated April 17, 2007, a Board officer advised the worker that her claim was accepted for a work injury on March 13, 2007. This involved a left knee injury and minor concussion, as a result of a fall from a two step ladder. Wage loss benefits have been paid from March 14, 2007 until June 8, 2008 and are ongoing.

The worker had a prior claim for a work injury on March 15, 2006. She received 18 days of wage loss benefits under that claim from March 18, 2006 until April 16, 2006.

The employer's March 14, 2007 report to the Board advised that the worker started working for the employer on November 6, 2003. At the time of her injury, she was employed on a permanent full-time basis. She started her current job on July 18, 2006. The employer reported that at the time of the worker's injury, she was earning \$15.24 per hour (plus 4% vacation pay, as noted in a claim log entry of April 17, 2007) and her earnings for the three-month period prior to her injury were \$6,252.06. She worked eight hours a day from Monday to Friday.

The worker's short-term wage rate was set on the basis of her earnings at the time of her injury of \$15.85 per hour. This involved an annualized earnings rate of \$33,058.57. This yielded a gross weekly rate of \$634.00, and a net weekly rate of \$470.09.

By letter of April 19, 2007, the employer advised that the worker's gross earnings from March 13, 2006 until March 12, 2007 were \$15,013.84. By decision dated May 30, 2007, the case manager set the worker's long-term wage rate following ten weeks at a weekly rate of \$287.94 based on the worker's reported earnings for the 12 months prior to her injury. The worker requested a review by the Review Division.

In the course of her review, the review officer contacted the employer and was advised that the correct figure for the worker's earnings in the 12-month period prior to her injury was \$24,532.27. The employer provided a spreadsheet setting out the basis for this figure, with details regarding the worker's earnings for the biweekly pay periods numbered 6 to 26 in 2006, and pay periods numbered 1 to 6 in 2007.

By decision dated October 16, 2007, the review officer varied the May 30, 2007 decision. She rejected the argument by the workers' adviser that the worker's long-term wage rate should be determined under section 33.3 or 33.4 of the Act. She concluded, however, that the new evidence of the employer as to the worker's earnings established that the wage rate set by the Board was based on incorrect information. She directed the Board to verify the earnings for the period and establish a new long-term wage rate.

By notice of appeal dated November 20, 2007, the worker appealed the Review Division decision to WCAT.

### **Law and Policy**

Section 33.1(2) of the Act provides the general rule for determining a worker's long-term wage rate based on the worker's earnings from the 12-month period prior to the worker's injury:

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.**

[emphasis added]

Section 33.3 of the Act provides:

**33.3** 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

(a) by the same employer, or

- (b) if no person is so employed, by an employer in the same region.

Section 33.4 of the Act provides:

**33.4** (1) If exceptional circumstances exist such that the Board considers that the application of section 33.1 (2) would be inequitable, the Board's determination of the amount of average earnings of a worker may be based on an amount that the Board considers best reflects the worker's loss of earnings.

(2) Subsection (1) does not apply in the circumstances described in section 33.2, 33.3, 33.5 or 33.6.

The policy of the board of directors of the Board governing the exercise of discretion under section 33.4(1) of the Act is set out at RSCM II item #67.60. By resolution dated March 19, 2008 (2008/03/19-01, "Re: Average Earnings – Exceptional Circumstances"), the board of directors approved amendments to the policy at item #67.60. The resolution was made effective May 1, 2008. The resolution stipulated:

2. The above amendments to policy apply to all decisions including appellate decisions made on or after May 1, 2008.

The revised policy currently provides, in part:

Section 33.4 is a discretionary provision and an exception to the application of section 33.1(2) for determining a worker's long-term average earnings. As such, it will only be applied where the Board determines that, due to exceptional circumstances, the application of section 33.1(2) is inequitable.

The purpose of this policy is to assist in identifying inequities where due to exceptional circumstances the level of compensation calculated using the general rule does not best reflect the worker's long-term loss of earnings.

In making this determination, "best" does not mean the highest level of compensation possible, but rather, that the level of compensation reflects the actual loss incurred by the worker.

The general rule uses one year of a worker's earnings history to account for typical variations in earnings. Short absences from work for non-compensable reasons, minor fluctuations in hours worked or rate of

pay, or similar reasons for changes to earnings are typical and will not be considered exceptional circumstances.

**The following are circumstances that are generally accepted as being exceptional. This list is not exhaustive. The Board may consider other reasons to find that exceptional circumstances exist, if those reasons are consistent with the Act and the purpose of this policy....**

[emphasis added]

## Reasons and Findings

Section 33.4 of the Act confers a statutory discretion to determine the worker's average earnings (so as to be based on an amount that the Board considers best reflects the worker's loss of earnings), where exceptional circumstances exist such that the Board considers that it would be inequitable to base this on the worker's earnings from the 12 months prior to injury. However, it does not apply in the circumstances described in sections 33.2, 33.3, 33.5 or 33.6 of the Act.

The worker was not an apprentice or learner (section 33.2). As she had been employed by the employer since 2003 and had achieved permanent full-time status, she was not a casual worker (section 33.5).

The workers' adviser submits that the worker's circumstances fit within section 33.3 of the Act. While acknowledging that the worker had been employed by the employer for more than three years, he submits that her circumstances come within the terms of the statutory reference to "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." In this case, the worker had been employed on a permanent full-time basis by the employer for less than 12 months immediately preceding the date of the injury. Accordingly, it may be considered that her circumstances come within the terms of section 33.3 of the Act.

I agree that the wording of section 33.3 of the Act contains an ambiguity, as to whether it may be read in the fashion put forward by the workers' adviser or whether it only concerns workers whose total period of employment with a particular employer was less than 12 months in duration, and whose employment was not of a casual or temporary nature.

Policy at RSCM II item #67.50 is entitled "Workers Employed with their Employer for Less than 12 Months." This supports the latter interpretation. Accordingly, I agree with review officer in finding that section 33.3 does not apply to the worker's circumstances.

To the extent that the submissions by the workers' adviser concern a potential inequity regarding the determination of the worker's long-term wage rate, I consider that this argument may be better addressed under the discretion provided by section 33.4 of the Act.

By submission of February 19, 2008, the workers' adviser submitted, in the alternative, that the Board should have exercised its discretion under section 33.4 of the Act. He argued:

Section 33.4 allows for WCB discretion to correct an iniquity. An iniquity has no doubt occurred because of the WCB's literal application of the law. If the WCB did not contemplate in its policy all of the criteria that might create such an iniquity, that does not require a change in the law; it requires a change in the WCB policy so that appropriate discretion can be exercised.

[reproduced as written]

The submission by the worker's adviser appears to have presaged or anticipated the policy changes which followed.

Subsequent to the Review Division decision, the policy at RSCM II item #67.60 regarding exceptional circumstances was revised. The amended policy makes it clear that the examples provided in the policy do not fetter a decision-maker's consideration under section 33.4 of the Act. The examples provided in policy are illustrative of the manner in which the discretion under section 33.4 of the Act may be exercised, but are not intended to be exhaustive. The amended policy expressly provides that a decision-maker may consider other reasons to find that exceptional circumstances exist, if those reasons are consistent with the Act and the purpose of the policy.

The board of directors' policy resolution stipulates that the revised policy applies to all decisions, including appellate decisions (concerning appeals of decisions made under the former version of the policy) made on or after May 1, 2008. Accordingly, the amended policy is applicable to the worker's appeal.

Section 33.4 of the Act provides that if exceptional circumstances exist such that the application of section 33.1(2) would be inequitable, the determination of the worker's average earnings may be based on an amount that best reflects the worker's loss of earnings.

Practice Directive #C9-12 (formerly Best Practices Information Sheet #21), “Long-Term Average Earnings: Section 33.4 – Exceptional Circumstances,” May 1, 2008, provides practice guidance (not policy) regarding the exercise of discretion under section 33.4 of the Act. It provides guidance concerning situations other than those specifically set out in policy, such as circumstances where there is an insufficient earnings record (including a recent entrant or re-entrant to the labour force). This could apply in cases involving a new immigrant, a person who was recently incarcerated, or a person who has recovered from a lengthy period of non-compensable disability. The practice directive further provides:

(b) Fixed Changes

**Exceptional circumstances may apply where the worker has experienced a fixed change in their employment in the 12 months prior to the injury, which will likely continue into the future.**

**This circumstance may arise, for example, where a worker received a significant pay increase due to a promotion into a permanent position in the 12 months prior to the injury.**

Where consideration is being given to whether an increase in earnings constitutes exceptional circumstances, Officers must ensure that the increase is due to a fixed change. Where the worker is performing their usual duties and receives a modest increase due to, for example, inflation, exceptional circumstances would not apply, as this would not constitute a significant increase due to a fixed change.

Exceptional circumstances are not meant to capture every change or increase in the worker’s 12 month earnings. Rather, exceptional circumstances apply where the worker’s 12 month earnings are rendered meaningless due to an extraordinary event, such as a fixed change. A small pay increase without a fixed change does not by itself constitute an exceptional or extraordinary event and, as such, the general rule would still be equitable in these cases.

Exceptional circumstances may also arise where the worker received a pay decrease, due to a permanent change in job responsibilities or in working hours (e.g., from working full-time to part-time). In these cases, using the general rule would be inequitable and would overcompensate the worker. As indicated in policy, what “best reflects” the worker’s long-term loss of earnings is not necessarily what produces the highest level of compensation, but rather what most accurately represents the loss of earnings incurred by the worker.



## (ii) Average Earnings

**Where the worker has experienced a fixed change, average earnings may be determined using only the earnings in the period of time following the fixed change.**

[emphasis added]

A copy has been provided of the July 13, 2006 letter to the worker from the employer confirming her acceptance of a regular full-time position. The letter stated that the worker's "start date" would be July 18, 2006. This document explained that her "qualifying period" would be six months or 465 hours, whichever came first. Accordingly, the worker's qualifying period had ended at least by January 18, 2007, prior to her work injury. I am satisfied that the worker's appointment to a permanent full-time position on July 18, 2006 represented a relatively fixed change in her earning pattern which was likely to continue into the future.

On reviewing the spreadsheet provided by the employer concerning the worker's biweekly earnings, I note that this also shows a change in the worker's pattern of earnings. During the biweekly pay periods 5 to 15 in 2006, the worker's earnings were always below \$1,000.00. From pay period 16 and forward, the worker's earnings were typically in excess of \$1,000.00.

Section 33(1) of the Act provides that 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. In view of the relatively fixed change in the worker's earnings pattern demonstrated by the worker's change in status to a permanent full-time employee, I consider that it would be inequitable to base the worker's long-term wage rate on her earnings from the 12 months prior to her injury.

With the benefit of the May 1, 2008 policy amendments to RSCM II item #67.60 and the guidance provided by Practice Directive #C9-12, I find that the worker's average earnings should be determined using only the earnings in the period of time following the fixed change in her employment on July 18, 2006. Accordingly, I allow the worker's appeal on this basis.

In view of my conclusion on this basis, it is not necessary to my decision that I address the period during which the worker was in receipt of wage loss benefits under a prior claim in March and April 2006. I would note, however, that the revised policy at RSCM II item #67.60 currently stipulates:

- (a) An exceptional circumstance affecting a worker's average earnings is any prior period(s) when a worker received wage-loss compensation (or wage-loss equivalent rehabilitation allowances/benefits) during the 12 month period immediately preceding the worker's date of

injury. It would be inequitable to reduce a worker's average earnings by including periods of compensable wage-loss (or wage-loss equivalent rehabilitation allowances/benefits) in the average earnings calculation.

In this decision, I have applied the May 1, 2008 policy and practice amendments as set out above. As these amendments supported the position put forward by the workers' adviser, and as the employer is not participating, I did not consider it necessary to defer my decision for the purpose of disclosing these materials and inviting further submissions.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to this appeal. I therefore make no order regarding expenses of this appeal.

### **Conclusion**

I vary the Review Division decision. I find, pursuant to section 33.4 of the Act, that the worker's change in employment status to that of a permanent full-time employee represented a fixed change in her earnings pattern. This constituted an exceptional circumstance which would make it inequitable to base the worker's long-term wage rate on her earnings from the 12 months prior to her work injury. I find that the worker's average earnings should be determined using only the earnings in the period of time following the fixed change in her employment on July 18, 2006.

Herb Morton  
Vice Chair

HM/gw