

Decision of the Review Division

Number: 5089
Date: February 11, 2004
Review Officer: Nick Attewell
Subject: Sections 33.3 and 33.4 of the *Workers Compensation Act* and Section 15 of the *Canadian Charter of Rights and Freedoms*

The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated March 31, 2003. In support of this request for review, the worker's representative has provided a written submission. The employer was given notice of the review and did not respond.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

Issue

The issue on this review is the Board's decision regarding the worker's average earnings after the initial 10 weeks of disability.

Background

The worker injured his upper back on January 15, 2003, in the course of his employment as a construction labourer. He had only been employed with that employer for two days. Temporary disability benefits were paid until November 16, 2003. After the initial 10 weeks of disability, the benefits were based on the earnings in the prior year of a similar worker in the same company.

Facts and Evidence

The following are the relevant facts and evidence I have considered in conducting this review:

- The worker was hired as a regular worker but had only been working for two days prior to the injury.
- The employer provided a T4 showing earnings of a similar worker who had been employed in the previous year. These earnings were in the amount of \$28,071.69, giving a gross weekly rate of \$538.36. The decision under review used these earnings.

- The case manager was advised by the employer during a site visit that the employer is in the house building business and normally employs only two or three workers.
- The employer provided an October 10, 2003, letter stating as follows:
 - the worker was being paid \$15.00 an hour and would have been working six days a week and nine hours a day,
 - the worker would have been continued to be employed and have received wage increases over the following year if he had not been injured,
 - the T4 for the similar worker that he provided only covered nine months as the worker in question had been on employment insurance for the first three months of the year. If that worker had worked a full year, he would have earned between \$36,000 and \$39,000 or approximately \$3,100 per month.

Law and Policy

The Act

The law that applies to this review is found in sections 33 to 33.7 of the Act. Section 33(1) states 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.” Under section 33(2), the Board must determine the amount of average earnings in accordance with section 33 and sections 33.1 to 33.7.

Section 33.1 sets out two general rules for determining a worker’s average earnings. For the first 10 weeks of disability, the Board must determine the amount of average earnings of a worker based on the rate at which the worker was remunerated at the time of the injury. After the initial 10 weeks, the Board must determine the amount of average earnings based on the worker’s gross earnings, as determined by the Board, for the “12-month period immediately preceding the date of injury.”

These general rules are subject to exceptions. These include the following:

- 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
 - (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 contains a specific provision allowing the Board to calculate average earnings in a different way if there are exceptional circumstances causing an inequity. However, this section is expressed not to apply to workers covered by section 33.3.

Policy

The policy relating to this review is found in Chapter 9 of the *Rehabilitation Services and Claims Manual* ("RSCM"), Vol. II. In particular, Item #67.50 states as follows:

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. . . .

Reasons and Decision

The worker's lawyer makes two main arguments. The first is that sections 33.3 and 33.4 are contrary to section 15(1) of the *Canadian Charter of Rights and Freedoms* ("Charter"). The second is that section 33.3 was not correctly applied in this particular case. I will deal with these two arguments in turn, but will first set out some background to the sections of the Act governing average earnings, in particular sections 33.3 and 33.4.

Background to Average Earnings Provisions

The Act provides for the payment of compensation to workers suffering disabilities as a result of their employment. The compensation is intended to reflect the loss of earnings that workers suffer because of their disability and therefore compensation is generally based on their earnings prior to the injury. However, there is no intention to provide complete and individualized compensation for a worker's total loss of earnings. For various reasons, including the "historic compromise" that led to the founding of the workers' compensation system in 1917 and the need for an administratively efficient payment and adjudication system, the compensation payable is subject to certain rules and limits. For example, there is a maximum wage rate for which compensation can be paid and payments are limited to 90% of net earnings or a proportion of that in the case of a partial disability.

The current sections 33.1 to 33.9 relating to the determination of earnings are based on a March 2002 report entitled the "Core Services Review of the Workers' Compensation Board," at pages 134–144. This can be found on the internet at <http://www.labour.gov.bc.ca/wcbreform/WinterReport-Complete.pdf>. The report notes that under the prior system, section 33 gave the Board a very broad discretion to determine average earnings in any case. For the reasons set out in the report, the core reviewer considered that more specific rules should be set out in the statute that would reduce the amount of discretion. These included a general rule basing compensation on 12 months' earnings after the initial 10 weeks but also specific rules for the earnings to be used for certain types of workers, namely learners/apprentices and regular workers employed less than 12 months. These exceptions were enacted in section 33.2 and 33.3. The report does not explain these two exceptions but the reason behind them is apparent. In both cases, the actual earnings in the job at the time of injury averaged over 12 months would not normally be reflective of the worker's long-term loss. In the case of the regular worker employed less than 12 months, these earnings would not take account of such things as variations in work hours and temporary layoffs that might occur during a typical year. The loss in such cases would be better reflected by the earnings of a similar worker in the preceding 12 months.

The report recommended a third exception that would allow the Board “to deal with those extenuating circumstances when the calculation of the worker’s average earnings, based on the preceding 12 month period, would, as determined by the WCB, produce an inequitable result.” The examples given are of young workers and students. This exception resulted in section 33.4, which is expressed not to apply to either sections 33.2 or 33.3. This is presumably because the intent of the report was to deal with exceptional situations that might arise under the basic requirement for using 12 months’ earnings. It was not intended to allow for exceptions to situations for which specific, exceptional rules were being separately created.

Application of the Charter

Section 15(1) of the Charter states as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The worker’s lawyer refers to the Supreme Court of Canada decision in *Nova Scotia (Worker’s Compensation Board) v. Martin* (“*Martin*”) and argues that the reasoning would also apply in this case. His points include:

- The Review Division has jurisdiction to make determinations under the Charter.
- The worker gave up a job as an experienced truck driver making in excess of \$40,000 per year to begin a new career in construction.
- New workers are particularly vulnerable given their lack of seniority, and are placed in a very prejudicial position with respect to workers who have more experience and have worked for more than a year.
- Section 33.3 explicitly excludes new workers from the general compensation provisions of the Act with respect to setting long-term average earnings.
- Section 33.4(2) of the Act prevents the Board from applying section 33.4(1) which allows the Board to provide compensation that best reflects the worker’s actual losses if strict application of the rules of section 33 would be inequitable.
- *Martin* indicates that financial and budgetary considerations would not justify a violation under section 1 of the Charter. In addition, section 33 completely ignores the real needs of workers who are new on the job.

The Board of Directors of the Board have determined following *Martin* that the Review Division has jurisdiction to consider the application of the Charter in matters before it.

In deciding this review, I propose to apply the general guidelines for making decisions under section 15 of the Charter that are set out in the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 (“*Law*”). These guidelines were followed in *Martin*. The guidelines suggest that there are three central issues to be considered:

1. whether the law in question imposes a differential treatment between the claimant and others, in purpose and effect,
2. whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment, and
3. whether the law in question has a purpose that is discriminatory within the meaning of the equality guarantee.

I will deal with each of these issues in turn

1. Does the law impose differential treatment?

I find that, as in the *Martin*, the appropriate comparator group is the group of workers who are eligible for compensation for their employment-related injuries other than the workers that are covered by section 33.3. I accept that the persons covered by section 33.3 are treated differently from the comparator group.

2. Are the enumerated or analogous grounds the basis for the different treatment?

The worker’s lawyer does not clearly state the grounds of discrimination on which he is relying. With regard to the enumerated grounds set out in section 15(1), the only candidate appears to be “mental or physical disability.” However, the ground on which the worker is treated differently in this case is his employment status at the time of and prior to the injury rather than his disability. Employment status is not one of the enumerated grounds in section 15(1).

The question remains whether the circumstances of this case involve a ground analogous to those set out in section 15(1). What is an analogous ground was considered by the Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (“*Corbiere*”). The majority decision stated as follows:

What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 – race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds . . . is to reveal grounds based on characteristics that we cannot change or that government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of treatment on grounds that are actually immutable, like

race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

I find that the situation in this case does not amount to an analogous ground. The status of being a new, regular employee in a workplace is not an immutable or constructively immutable condition that can be considered analogous to factors such as race or religion.

3. Is the purpose of the law discriminatory?

If I am wrong about this situation not involving an enumerated or analogous ground, I also consider that the differential treatment does not amount to discrimination for the purpose of section 15(1). *Law* elaborates on this issue as follows:

Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?

The court set out some contextual factors to be considered in making this determination, notably

- The pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.
- The correspondence, or lack thereof, between the ground on which the claim is based and the actual need, capacity, or circumstances of the claimant or others.
- The ameliorative purpose of the law upon a more disadvantaged person or group.
- The nature and scope of the interest affected by the law.

With regard to the first of these factors, the worker's lawyer states that newly employed workers are particularly vulnerable given their lack of seniority, and are placed in a very prejudicial position with respect to workers who have more experience and have worked for more than a year. It is certainly true that new employees may in general be less secure than more senior employees. However, this in itself is not sufficient to support a finding of discrimination. There is no evidence of a history of disadvantage, stereotyping, prejudice or vulnerability for new employees of a type that section 15 is intended to cover.

With regard to the second of these factors, the lawyer argues that sections 33.3 and 33.4 are flawed in not giving the Board a discretion to determine what is equitable in the worker's particular case. For the reasons discussed in the next part of this decision, I find that the Board does in fact have some discretion, though perhaps not to the extent desired by the worker. Furthermore, section 33.3 is intended to deal with the particular needs and circumstances of new employees. It recognizes that the earnings with the injury employer would not provide an adequate basis for meeting the 12 months of earnings required by the general rule applicable to all workers and provides an alternative method of calculation that is reasonably reflective of the worker's situation. The Charter does not require that all laws must provide total discretion for decision makers to consider the individual circumstances of each person. A law may appropriately set rules of general application that permit no discretion.

The third factor would not apply to this case. With regard to the fourth factor, the interest of the worker at stake is significant in that it affects the amount of benefits paid to him. However, the interest is much less significant than that of the workers disabled by chronic pain in *Martin*. The effect of the special provision affecting them was to virtually create a separate regime of compensation which lacked a great many of the features of the normal system applicable to other disabled workers. In the present case, the worker is entitled to receive all the benefits of the system. The only difference is that a particular rule has been created for determining the earnings on which benefits are based.

I have concluded that section 33.3 and 33.4 are not contrary to section 15 of the Charter.

Application of Section 33.3 in this Case

The lawyer is arguing that, if his arguments regarding the Charter are not accepted, then the Board should take account of the fact that the similar worker whose earnings were used only worked for nine months. The Board should extrapolate the earnings of \$28,071.69 over 12 months. This would produce an amount of \$37,428.92 or approximately \$3,100 per month.

Section 33.3 states that "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."

The lawyer suggests that the phrase "based on the gross earnings, as determined by the Board" gives the Board authority to adjust the earnings of the similar worker so that they reflect the whole 12-month period.

The Compensation Services Division has created a Practice Directive that deals with this question (#33A, Initial and Long-Term Average Earnings). It states:

When obtaining earnings information in these situations, it is not necessary for the "comparable" person to have been employed for 12 months. This is because Policy items #67.40 and #67.50 allow Board officers to obtain a figure that represents what a comparable person earns or "would earn" in 12 months.

However, neither law nor policy permits estimating the worker's earnings based on what the worker himself/herself would have earned working with the injury employer for 12 months.

The Practice Directive recognizes that section 33 allows the Board to adjust the earnings of the similar worker to reflect what a person in the particular type and classification of employment in question would normally earn over the 12 months.

A question may arise in this case whether the similar worker's unemployment for three months was an exceptional or normal part of the employer's business. If, for example, it was normal to lay off employees for three months at the beginning of each year, it would not be appropriate to adjust upward the worker's nine months' earnings. However, the evidence of the employer suggests that a three-month layoff is not normal. He indicates that the worker could have worked the whole year and earned between \$36,000 and \$39,000.

As a result, I allow the worker's request regarding the application of section 33.3. The worker's long-term average earnings will be set at \$37,428.92 per year.

Conclusion

As a result of this review, I vary the Board's decision of March 31, 2003.