Decision of the Workers' Compensation Appeal Tribunal

Number: 2004-02012-RB
Date: April 22, 2004
Panel: Larry J. Campbell, Vice Chair
Subject: Longshoreman — Casual Workers — Wage Rate — Section 33.5 of the *Workers Compensation Act* — Item #67.10 of the *Rehabilitation Services and Claims Manual* — Effective Date of Policy Change

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Introduction

The worker, a 46-year-old longshoreman, was injured at work on October 23, 2002. The Workers' Compensation Board (Board) accepted the worker's claim and paid short-term disability benefits. In a letter dated December 6, 2002 a Board officer advised the worker of the acceptance of the claim and set the worker's wage rate on the basis that the worker was a casual worker. The worker appeals this decision.

WCAT

Issue(s)

Was the worker categorized appropriately pursuant to section 33 of the *Workers Compensation Act* (Act)?

Jurisdiction

This appeal was filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's Board of Directors that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

The worker did not request an oral hearing. I find that a hearing was not required and have made my decision based upon the evidence on the Board file and the information provided by the worker. The respondent filed a notice of appearance but did not provide a submission.

The panel requested additional information from the worker which he provided along with a letter dated March 12, 2004. This was disclosed to the respondent who did not provide a submission in response to the new evidence.

Background and Evidence

The worker is a longshoreman and crane operator. In a report from psychologist, Dr. C, dated June 16, 2003, the worker provided a history of starting longshoring as a "casual" in 1983 and joining the union in 1993. The worker indicated he had been active within the union as well. The worker moved to Vancouver in 1998 and continued as a longshoreman. This same history was reiterated in the initial vocational assessment dated July 3, 2003.

The Board accepted the worker's claim and made a determination that as a longshoreman he was a casual worker within the meaning of section 33.5 of the Act. At the time of the injury, the worker was employed by firm F. The employer is a member of an industry group which provides a number of services to its members. For example, payroll is handled by the group, as evidenced by the worker's T4s which are issued with the employer's name as "Members of the [group name]" and with a single CCRA business number.

The worker's T4 slips show that in 2000 he earned $31,697.95, in 2001 $41,255.35, and in 2002 $16,241.25. These earnings were all from T4s issued by the group on behalf of its members. Copies of the worker's tax return summaries from 2000, 2001, and 2002 show no earned income from non-group employers.

Reasons and Findings

Section 33 of the Act provides for a number of possible categorizations of workers for the purposes of determining the basis on which earnings are established for wage rate purposes.

Section 33.5 of the Act provides that casual workers have their rate based upon their earnings in the twelve months prior to the injury. Section 33.4(2) provides that the exceptions in section 33.4(1) with respect to setting the long-term rate do not apply to casual workers.

Item #67.10 of the *Rehabilitation Services and Claims Manual, Volume II* (*RSCM*), as it read prior to March 18, 2003, provided that: "Longshore workers are treated as casual workers."

The Board of Directors of the Board, on March 18, 2003, approved changes to item #67.10 of the *RSCM* which deleted the reference to mandatory policy treatment of longshore workers as casual workers. The directors' resolution stated that it was effective March 18, 2003 and applied to all decisions made after that date. Item #67.10 sets out:

> EFFECTIVE DATE: March 18, 2003
>
> APPLICATION: To adjudicative decisions on or after the effective date.

The worker's appeal was assigned to the panel for decision after March 18, 2003. The panel is required by section 250(2) of the Act to apply an applicable policy of the Board of Directors. As the decision is being rendered after March 18, 2003, I find that the applicable policy is item #67.10 as it read after the revision on that date. This sets out, in part:

> A casual worker is a worker who has a short-term/sporadic attachment to employment. Generally the employment lasts less than three consecutive months. A worker who works "on call" for one or more employers may also be a casual worker.

The revised policy no longer requires that the worker must be treated as a casual worker. This does not mean, however, that the worker automatically falls into another of the statutory categories. I find that in the circumstances of this specific case, the question central to the determination of the worker's status is not whether he worked for more than one employer but, rather, whether he had an attachment as a regular worker to the members of the employer group. While the group is not the employer of record, it, in effect, functions as a central clearing house for employment and payroll related matters.

I find the evidence supports that the worker was a regular worker for the purposes of section 33 of the Act. He had a significant attachment to his employment as a longshore worker, he did not work outside of that employment, and the employment, with the members of the group was, in essence, employment with a single entity. This employment lasted longer than three months, as evidenced by the T4s. I do not find that working within his occupation, for individual members of the group, is sufficient to allow a categorization as "on call for more than one employer" such as to allow a conclusion that he was a causal worker. I allow the worker's appeal.

I find that section 33.1 of the Act applies in this case and that the Board must consider the effect of section 33.4 of the Act at the time of the ten-week review.

Conclusion

I vary the decision of the Board dated December 6, 2002.