

Decision of the Workers' Compensation Appeal Tribunal

Number: 2004-02208

Date: April 29, 2004

Panel: Randy Lane, Vice Chair

**Subject: Casual Workers – Wage Rate – Section 33.5 of the
Workers Compensation Act – Item #67.10 of the
Rehabilitation Services and Claims Manual**

Introduction

The worker, then a 48-year-old flag person, suffered a February 11, 2003 injury. A claim was accepted by the Workers' Compensation Board (Board). By decision of March 5, 2003 an entitlement officer set the worker's wage rate using her earnings in the three-month period prior to the injury. By decision of August 8, 2003 a review officer in the Review Division of the Board confirmed the March 5, 2003 decision.

The worker appealed the August 8, 2003 decision to the Workers' Compensation Appeal Tribunal (WCAT). Mr. S, her representative, provided an August 13, 2003 notice of appeal and an October 30, 2003 submission. The worker's employer was notified of the appeal, but it did not indicate that it wished to participate.

The notice of appeal seeks a read and review. I consider a fair and thorough decision may be reached on this appeal without holding an oral hearing.

Issue(s)

At issue is whether the worker's initial wage rate has been properly set.

Jurisdiction

This appeal was filed with WCAT under subsection 239(1) of the *Workers Compensation Act* (the Act).

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (subsection 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 of Directors of the Board 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).

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.

Background and Evidence

The employer's report of injury indicates that the worker started with the employer on May 31, 2000. Her employment status was listed as part-time. She was paid \$13.85 an hour. In the three months prior to the injury the employer had paid her \$280.00, and her earnings with that employer in the one year prior to injury were \$6,367.58. The worker's application for compensation listed an hourly wage of \$18.65.

A February 17, 2003 claim log entry by the entitlement officer noted that the worker started at a new site on February 11, 2003 and was on call from Monday to Friday. The worker indicated that she had been with the accident employer for three years and was an on-call employee.

The worker was cleared to return to light duties effective February 24, 2003.

A February 25, 2003 claim log entry of a service expeditor noted information from a representative of the employer to the effect that they were in their slow season. A March 5, 2003 claim log entry of a service expeditor documented the advice from a second representative of the employer that earnings figures for three months and one year were correct. The representative indicated that the employer was not busy during the past year and that accounted for the worker's low earnings. A March 5, 2003 claim log entry of an entitlement officer indicated that she spoke to the employer's second representative who confirmed that the worker would have been called in on February 12, 2003. He advised the entitlement officer that the worker's low earnings were due to a very slow year and her seniority.

A March 5, 2003 claim entry by an entitlement officer considered that the worker's three months earnings were the best reflection of her earnings at the time of injury. She commented the worker had low seniority and work had been slow for the past year, and, in particular, in the last three months.

In her March 5, 2003 decision an entitlement officer set the worker's wage rate at \$23.01 per week. She set the worker's wage rate on the basis that the worker earned \$93.33 a month using her earnings in the three months prior to injury. Payment was issued for temporary disability from February 12, 2003 to February 23, 2003.

In his submission to the Review Division, Mr. S contended that the worker earned \$13.50 an hour, or \$122.40 per day, and that her wage rate should be based on those figures. He observed that if the Board had determined that the worker was a casual worker then earnings in the 12 months prior to injury must be used. He commented that work in the construction industry can be seasonal. He noted her earnings in the calendar years from 1999 to 2002.

In his August 8, 2003 decision the review officer noted section 33.1 of the Act and items #65.00, #65.01, and #67.10 of the *Rehabilitation Services and Claims Manual, Volume II (RSCM II)*. In confirming the March 5, 2003 decision he provided the following reasoning:

I find that there is no evidence to indicate that the worker was a regular worker, working five days per week. As a result, policy item #65.00 does not apply.

I find that the worker does not qualify as a casual worker, as defined in policy item #67.10. Although she may have had limited hours of work during the slow season, her pattern of employment, at the time of injury, was not casual in nature. She had a steady pattern of employment and attachment to this employer. The actual work availability was a result of her low seniority and general lack of work. However, these factors are not the criteria for determining if a worker is a casual worker. I find that the worker has a specific attachment to this employer, lasting more than three consecutive months. As such, she is not a casual worker.

As the worker is not a casual worker under policy item #67.10, and she had irregular shifts at the time of injury, her short-term average earnings are to be based on her earnings in the three-month period immediately preceding the worker's date of injury, in accordance with policy item #65.01. This is the approach that the Board Officer has used. There is no evidence presented that, at the time of injury, the worker's employment pattern had changed to be more regular, than that reflected by the use of her earnings in the three months prior to injury.

In his October 30, 2002 submission Mr. S questioned whether the worker's circumstances were subject to item #65.01 dealing with variable shift workers. He commented that the worker was not employed on a rotating shift schedule. She did not have any schedule, but was called into work as required. He contended that if the worker was a regular employee, as determined by the Board and the Review Division, and she was not a variable shift worker, then her initial wage rate should be based on her hourly wage on the day of injury.

Mr. S found it difficult to accept that the Board had not classified the worker as a casual worker. He noted that since January 1999 the worker had worked for four employers. He observed that between January 2002 and March 2002 the worker worked 114.50 hours for a second employer, and her total hours with the accident employer from December 2001 until December 2002 were 265.25. He noted policy item #67.10 concerning casual workers and observed that since November 2001 the worker's attachment to the workforce appeared to be more casual than that of a regular worker. His submission is accompanied by a list of the worker's hours of employment with various employers from January 1999 to December 2002. Also attached is a list of hours worked between January 1999 and May 2003.

Reasons and Findings

The worker's injury occurred after June 30, 2002, the transition date for relevant changes to the Act. Entitlement under this claim is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. The policies relevant to this appeal are set out in the *RSCM II*.

A key question is whether the worker was a casual worker such that section 33.5 of the Act is applicable. It provides as follows:

If a worker's pattern of employment at the time of the injury is casual in nature, the Board's determination of the amount of average earnings under section 33.1 from the date of the injury must be based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.

Section 33.5 is an exception to the general rate setting rule found in subsection 33.1(1) of the Act:

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:

- (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.

Board policy assists in interpreting section 33.5, and item #67.10 of the RSCM II provides, in part, as follows:

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.

In turn, the Compensation Services Division has issued practice directives that provide assistance in understanding how the Compensation Services Division interprets policy. The directives, unlike policy, are not subject to a statutory requirement that they must be applied.

The worker was not a regular worker who was employed at permanent part-time or permanent full-time employment. While the employer termed the worker to be part-time, I do not consider that such a label attached by the employer determines the case. Practice Directive #33A entitled "Initial and Long-Term Average Earnings" defines those workers as regular workers whose initial wage rates are set using their earnings at the date of injury. Practice Directive #33B entitled "Casual Workers" includes the following assistance in ascertaining whether employment is casual:

... it is the Division's position that, in the absence of clear evidence to the contrary, there is a presumption that any employment which lasts less than three consecutive months is casual employment. Clear evidence to the contrary might be evidence from the employer that although the one job will end within three months, the worker was expected to continue working for that employer in a different capacity. Other evidence might be that, although the time of injury

position would have lasted less than three months, the worker had at the time of injury been employed by that employer on a continuous basis for more than three months.

...

2. "A worker who works "on call" for one or more employers may also be a casual worker."

On Call with Single Employer

a) Where a worker works varying shifts for the same employer on a continuous basis, he or she would normally be categorized as a regular worker. In such cases, although the work is unscheduled, the worker has an ongoing attachment to the employer i.e. — the worker is regularly called in to work and makes himself/herself available to that employer. . . .

b) Where the on-call employment with the single employer is so sporadic, occasional and unpredictable that attachment to the employer cannot be demonstrated, a worker would be categorized as casual. An example is a worker who works on-call for only a few days a month, for the same employer, on an unscheduled basis.

On Call with Multiple Employers

Generally, these workers have no attachment to any one employer and have the ability to voluntarily decline work. It is the Division's position that, in the absence of clear evidence to the contrary, any workers hired "on call" for a multitude of employers should be categorized as casual. This would include workers hired by temporary agencies and/or union hiring halls. These workers have a casual relationship with the agency or hiring hall — i.e. they are not regular workers of that agency/hiring hall, regardless of the number of assignments the agency/hiring hall refers the worker to.

However, clear evidence to the contrary might be evidence that, although the worker was hired "on call", that particular assignment/job was expected to last longer than three consecutive months.

[emphasis in original]

The information provided by Mr. S establishes that while the worker may have first worked for the accident employer in mid-2000, the first month of employment with that employer was July 2000 rather than May 2000. While the worker may have first started work with the accident employer approximately three years before the accident, her employment with that employer was not exclusive. The worker then worked for a second employer during periods that overlapped with her employment with the accident employer. Thus, from July 2000 to December 2000 she worked for two employers. She then worked over 1,400 hours with that second employer from January to November 2001, with no work with her accident employer. In December 2001 she worked 27.50 hours for the accident employer. As noted above, between

January and March 2002 the worker worked 114.50 hours for the second employer; she then worked 237.50 hours from May 2002 to December 2002 with the accident employer. She then did not work for anyone until February 2003 when she worked with the accident employer. She then did not work again until May 2003. The information provided by Mr. S was prepared in October 2003, and there is no indication that the worker worked after May 2003.

I consider that the policy at item #67.10 applies to the worker's circumstances. She was a casual worker. The worker worked for no other employers from May 2002 onward, yet her employment with the accident employer was not consistent. She worked an average of about 30 hours a month with the accident employer from May 2002 to December 2002. She did not work again until February 2003. If one divides her hours with the accident employer from May 2002 to the date of the injury (apparently a period of employment exclusively with the accident employer) by the months involved, the worker averaged about 24 hours a month. Those circumstances indicate that her on-call employment amounted to a few days a month and that fits with the example found in Practice Directive #33B of being a casual worker on call with a single employer.

I find that the worker's circumstances are more properly classified as being those of a casual worker. I do not consider that the worker's circumstances are those of a variable shift worker. The setting of her initial wage rate should be governed by section 33.5 of the Act.

Conclusion

The worker's appeal is allowed. I vary the August 8, 2003 decision and find that the worker's initial wage rate should be set using her earnings in the 12-month period immediately preceding her injury.