WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1701/07

BEFORE:	J. Josefo : Vice-Chair V. Phillips : Member Representative of Employers A. Grande : Member Representative of Workers
HEARING:	July 23, 2007 at Toronto Oral
DATE OF DECISION:	August 17, 2007
NEUTRAL CITATION:	2007 ONWSIAT 2121
DECISION(S) UNDER APPEAL:	WSIB Decision of ARO Mr. B.J. Romano, dated March 9, 2006

APPEARANCES:

For the worker:	Mr. G. Majesky, Consultant (IBEW)
For the employer:	Did not participate
Interpreter:	N/A

REASONS

(i) The appeal – issues and background

[1] The worker appeals the March 9, 2006 decision of Board Appeals Resolution Officer ("ARO") Mr. B. J. Romano. That decision concluded that the worker's long term average earnings basis was correctly calculated when the worker's earnings information for the 24 months preceding the work accident of August 3, 2003 was taken into account.

[2] The background facts in this matter are not in any real dispute. The worker, a construction electrician, sustained a low back strain on August 30, 2003. Another ARO allowed entitlement in a decision dated June 29, 2004.

[3] The worker received Loss of Earnings ("LOE") benefits based upon his hourly wage of $30.73. The long-term earnings calculation became effective on the 13th week past the accident which was November 27, 2003. For the 24 months before the work accident the worker earned a total of $27,693.56 in irregular employment.

[4] It was submitted to the ARO that prior to August 2001 on average the worker earned $50,000 to $52,000 per annum. For the two years before the August 30, 2003 work accident, however, the worker was the primary caregiver of his elderly father who had suffered a stroke. The ARO indicated in his decision that the worker "missed 622 days out of 730 working days in the two year period." As the ARO indicated in his decision, when the worker's total earnings of $27,693.53 were averaged over the two year period, the worker's weekly rate of earnings was $265.56, gross.

[5] It was requested that the worker's long term average earnings be recalculated by "filtering out the periods of unemployment in the two year period" when the worker had to care for his father. The ARO denied the worker's appeal and concluded, in part, as follows:

> The WSIB policy [OPM Document No. 18-02-04] outlines non-earning periods, which are excluded from the recalculation of the long term average earnings, and these include unpaid weeks of absence but do not factor periods of unemployment due to lay-offs, seasonal employment, or unavailability of work. In these cases employment insurances benefits are included in the total earnings. I have noted no information or confirmation that the worker's lost time was an unpaid leave of absence. I note that as a construction electrician he obtains employment through the local union and remains a union member as long as he continues to submit his union dues. It appears work is on the basis of availability and it appears to be seasonal in nature – to some extent. This appears to be the case in view of periods of time worked during the summer months and, in one occasion, up to November. I do not see evidence that confirms the worker's lack of work from 2001 until 2003 was due to an unpaid leave of absence falling within the outlined WSIB policy…

[6] The worker appeals from this decision.

(ii) Discussion and conclusions

(a) Factual findings

[7] We have considered the worker's evidence and the submissions of Mr. Majesky. In summary, we find that the worker was a long time member of the particular union with over 40 years of experience as a construction electrician. We also accept the evidence and submission that, from 2001 to 2003, there was plenty of work available for those union members who wished to work. Thus, if the worker had made himself available through the union hiring hall process, we accept that he could have earned his usual approximately $50,000 per annum, taking between four and eight weeks off per year. Thus, while the work was to some extent seasonal, as found by the ARO, nevertheless at the high hourly rate the worker would be able to make a reasonable annual income even taking off one-to-two months of the year.

[8] Clearly, the worker was engaged in irregular employment. He would be assigned jobs from the union hiring hall, which jobs could last as little as a day or as long as nine-to-twelve months or even longer. When the job was concluded the worker would then again indicate his availability at the union hiring hall and, based upon what was acknowledged to be a fairly complex formula, would ultimately be assigned work.

[9] We need not delve into the particular union hiring formula in place between 2001 and 2003 because we accept the testimony and submissions that, if the worker had been willing to work on a near full-time basis, and make himself available for jobs, then he would have been kept in steady work. This is also a reasonable conclusion based upon the Panel's knowledge of the then-booming construction industry, wherein all trades were in strong demand.

[10] We accept the worker's testimony also that the only reason he did not make himself more available between 2001 and 2003, and only earned a small fraction of what his habitual earnings were, was because of his obligation, as he perceived it, to care for his elderly father. The worker chose to devote a significant amount of time looking after his father who at that time lived in his own home in a Toronto suburb. While the worker testified that his sister lived closer, for various reasons the worker assumed the bulk of the care giving obligations.

[11] The worker testified initially that in 2004 his father was moved to a care giving facility. He subsequently stated that the move to the first (for want of a better word) "nursing home" occurred in 2003. Thus, the worker was free to accept employment with a different employer before joining the accident employer for a particular contract on August 25, 2003.

[12] We have no reason to doubt the testimony of the worker and the submissions of Mr. Majesky that the union then had no formal leave of absence policy. Rather, the union members could choose to work or not work as they wished, depending upon their own particular circumstances.

(b) Analysis and application of the facts and law

[13] It is clear that Document No. 18-02-04 of the Board's *Operational Policy Manual*, "Determining Long-term Average Earnings: Workers in Non-permanent Employment," applies to this matter. It is helpful to set out the policy and some of the guidelines to situate this analysis in context:

Policy

Earnings for a worker in non-permanent employment typically fluctuate as the worker moves from job to job, has periods of unemployment, or experiences periods of higher or lower earnings. Therefore, it is likely that a worker's long-term average earnings will be different than the short-term average earnings. Since it would be unfair to continue paying a worker's loss of earnings (LOE) benefits based on the short-term average earnings, the decision-maker automatically recalculates the average earnings to long-term average earnings.

LOE benefits are paid based on the worker's long-term average earnings from the beginning of the 13th week of LOE benefits.

Guidelines

Definitions

Non-permanent employment is employment where a worker

- is hired for a specific period of time, or
- receives a termination notice (e.g., contract workers), and workers hired for a temporary period through a union hall.

Workers in non-permanent employment include

- seasonal or cyclical workers, or
- temporary agency workers.

NOTE

In some industries, such as construction, employers may hire workers for either permanent or non-permanent employment. (For a definition of permanent employment, see 18-02-03.) Therefore, the type of industry may not always be indicative of the employment relationship.

The decision-maker's determination to consider a worker to be in permanent or non-permanent employment is generally based on the earnings information provided by the employer (see 15-01-02, Employer's Initial Accident Reporting Obligations).

A recalculation involves redetermining a worker's average earnings to take into account the worker's long-term employment pattern. The recalculated long-term average earnings become effective from the beginning of the 13th week of LOE benefits.

A **break in the employment pattern** is a change in the worker's employment significant enough to make the period before the break irrelevant to the determination of the worker's long-term earnings. This may include a change:

- from permanent employment to non-permanent employment, or vice-versa;
- in status from dependent contractor to worker in non-permanent employment (see 18-02-08, Determining Average Earnings: Exceptional Cases), or
- in status from worker with optional insurance to worker in non-permanent employment.

A break in the employment pattern shortens the recalculation period for long-term average earnings.

A **non-earning period** is a period during which the worker was not earning due to reasons such as layoff, contract termination, illness or leave of absence.

Non-earning periods that **are** part of the employment pattern (e.g. layoffs, contract terminations) are factored into the recalculation (see "Non-earning periods included in recalculation" in this document). Non-earning periods that **are not** part of the employment pattern (e.g. maternity/parental leave) are factored out (see "Non-earning periods excluded from recalculation" in this document).

When to conduct a recalculation

The decision-maker conducts the recalculation of the worker's average earnings after the worker has received 12 weeks of LOE benefits.

Recalculation method

To determine a worker's long-term average earnings, the decision-maker

- establishes the recalculation period
- adds up the total earnings from all employment during the recalculation period (including Employment Insurance (EI) benefits)
- subtracts non-earning periods which should be excluded from the recalculation period
- divides the earnings by the resulting weeks (or days) in the recalculation period to produce a weekly long-term average earnings amount.

Periods of non-covered self-employment are considered part of the worker's employment pattern and do not shorten the recalculation period. As a result, neither the earnings from the non-covered self-employment nor the time worked in the non-covered self-employment may be included in the recalculation.

Recalculation period

Long-term average earnings for these workers are generally based on employment in the 24 months before the injury.

To simplify the process of gathering the worker's past earnings information, the 24-month period may be either

- extended to include the two full calendar years before the injury, plus the current year up to the date of injury, or
- shortened to the full calendar year before the injury, plus the current year up to the date of injury, provided that the worker's employment pattern is accurately reflected.

If the decision-maker extends/shortens the recalculation period, the decision-maker may have regard to the worker's seasonal or cyclical pattern.

(…)

Non-earning periods included in recalculation

The decision-maker considers periods of unemployment to be part of the employment pattern for workers in nonpermanent employment. The decision-maker, therefore, does not factor out periods of unemployment due to layoffs, terminations, seasonal employment, or unavailability of work. However, because these periods are included, gross employment insurance (EI) benefits received for these periods are included as earnings.

Non-earning periods excluded from recalculation

Non-earning periods that are not part of the employment pattern are factored out of the recalculation period. These periods may include:

- parental/maternal leaves
- unpaid periods of injury or illness

- periods of injury or illness for which the worker receives long-term disability benefits
- periods of injury or illness for which the worker receives workplace insurance benefits or benefits from another insurance plan
- periods of full-time schooling
- periods of incarceration
- periods on social assistance benefits
- unpaid leaves of absence
- strikes/lockouts
- unpaid periods of absence due to jury duty, spouse's (including same sex partners/couples)or children's illnesses, funerals, dentist or doctor appointments.

[14] This policy clearly provides certain periods of unemployment are to be included in the calculation of the earnings basis for employees in non-permanent employment. In this case, however, the worker was neither laid off, terminated nor unavailable for work. While his work was indeed seasonal to some extent, we accept that, had the worker been available and willing to work from 2001 through to 2003 he would have obtained such work through the union hiring hall.

[15] The policy provides that certain non-earning periods are to be excluded from recalculation and, as is indicated above, there is a list of types of non-earning periods that are excluded. Mr. Majesky submits that this list is not exclusive or exhaustive, and a decision-maker may take into account other reasons for a non-earning period and, when appropriate, exclude such period from the recalculation.

[16] We agree. The language of the policy in our view makes it clear that the non-earning periods "may include" those listed in the policy document. The language does not indicate in any way that the list is exclusive or finite.

[17] Indeed, keeping in mind the obligation that all cases be decided taking into account the merits and justice of them, it would be impossible to have a policy that discusses every possible type of non-earning period that ought to be excluded from recalculation while at the same time following the obligation to decide each case fairly, depending upon the individual facts and circumstances. There must be room for discretion on the part of the decision-maker, which discretion is applied to fairly determine the matter according to the particular merits and justice of it.

[18] Doing so, however, does not mean that one must find the highest rate of earnings for a worker. Tribunal *Decision No. 1157/02* made it clear that "fairness" is not just fairness as perceived by the worker but, rather, is reflected by the degree to which the worker's average earnings most closely approximate the worker's reasonably anticipated future earnings but for the work accident that caused the loss of those earnings.

[19] It was submitted that the need for "elder care" or "family care" ought to apply as a legitimate non-earning period that is excluded from recalculation. The Panel is of the view that, given our finding that the list of non-earning periods set out of the policy is not exclusive, a decision maker(s) retains discretion to consider whether, on the particular facts and circumstances of each case, a non-earning period ought to be excluded from recalculation.

[20] Considering the particular facts before us, we conclude that it was understandable that, for a period of time, the worker wished to tend to his ailing father. After all, when a parent or other family member takes ill, usually there are no contingency plans and someone has to immediately "step up" to assist that family member while the individual is incapacitated or receiving urgent medical care.

[21] But, two years to continue doing so is, we find, a long time. Certainly, during an initial crisis period, the family member will likely put aside other work and non-urgent family responsibilities to attend to the particular crisis. After the crisis has passed, however, usually one puts into place a certain care routine either involving family members and/or outside help, including help from the medical profession. It can indeed take some months before such a "system" is in place that allows individuals to return to more of a regular work and family relationship schedule, again after the crisis has passed and a treatment or care plan is implemented.

[22] As some guidance we have considered the law of Ontario that applies to all workers. The *Employment Standards Act* (S.O. 2000) ("ESA") provides at section 49 for a "family medical leave." Section 49.1(2) provides that an employee is entitled to up to eight weeks of family medical leave in order to "provide care or support to an individual" if that individual is certified by a health care practitioner to have a "serious medical condition with a significant risk of death occurring within a period of 26 weeks or such shorter period as prescribed".

[23] Section 50 of the ESA provides for "personal emergency leave" in the event of, amongst other items, a death, illness, injury or medical emergency of an individual closely related such as a parent, spouse, child, grandchild or other close relation identified in section 50 (2) of the *Employment Standards Act*. This leave of absence is up to ten days per calendar year.

[24] Thus, clearly, the Ontario legislature has determined that such situations ought to be recognized, *albeit* these leaves as described in the ESA are on an unpaid basis, with an employer not obliged to pay an employee who exercises leave rights. Yet, whilst acknowledging that, the Panel is of the view that since the Board has recognized other non-earning periods to be excluded from recalculation, and as the list in OPM Document No. 18-02-04 is not meant to be exhaustive or finite, a leave of absence on the part of an individual to care for an aging parent for a reasonable period of time ought to be deemed as a non-earning period excluded from recalculation.

[25] The Panel also considered whether the period of time allowed for maternity and parental leave ought to be used by analogy. We have rejected, however, so doing because we are of the view that these sections of the ESA are less analogous to the worker's situation. The worker was not absent because of either parental leave or anything to do with pregnancy which is, in any event, a non-earnings period already excluded through Board policy. Rather, the worker was

absent because of a family member being ill. Thus, the ESA provisions that address such leaves are more on point with the particular facts of this case.

[26] That having been stated, the Panel now must determine what time period ought to be applied in this worker's situation. The worker testified that he would visit his father approximately three days a week and would telephone him on other days. Because his father unfortunately suffered from Alzheimer's and there was difficulty in coordinating all the medication, his father, who continued to live without supervision in his own home, would occasionally wander off, and be found wandering by the police.

[27] There is no doubt that the worker's father's illness was difficult for the worker and he made a personal choice to sacrifice earnings in order to care for his elderly parent, likely from a mixed sense of duty, devotion and personal responsibility. Yet, by so doing, we conclude that the worker ultimately established in the main a new earnings pattern that we believe would have continued beyond 2003 until the worker's father was transferred to a more secure supervised nursing care environment, which only occurred at the end of 2004.

[28] Thus, the worker we accept earned approximately $50,000 annually before August 2001. Yet thereafter the worker's new earnings pattern, and new life's paradigm, we find extensively revolved around his ongoing care for his father which reduced his earnings, and left them to be reduced through to the compensable accident of August 2003 and likely beyond.

[29] While the worker testified that he made himself again available for work in the summer of 2003, and then in late August 2003 commenced with the accident employer, the worker also testified that his father was not at that time yet in a secure facility. His father was only moved to a secure facility, living under supervision to prevent his wandering, in late 2004.

[30] Thus, at the time of the work accident, that subsequent move was at some time in the future. We are accordingly of the view that it is more likely than not that the worker would have continued to have been very much involved in his father's care on a regular basis, working intermittently, until the worker's father was finally moved to the more secure facility in late 2004 where he currently lives. Thus, the worker's new pattern of reduced work and caring for his father that commenced in 2001 we find would likely have continued for some time beyond 2003 but for the work accident.

[31] This is not therefore a situation such as was described in Tribunal *Decision No. 10/07* or in Tribunal *Decision No. 1837/02*. In that latter case, it is clear that the worker involved therein, while having a long break in regular employment, had just started a full time and regular job prior to the work accident. It was therefore just to consider the worker's earnings on a "go forward" basis and ignore, or exclude, the earlier irregular periods. But that is not our case. In this matter the worker's irregular employment interspersed with his family care obligations likely would have continued for over one additional year subsequent to the August 2003 work accident. The pattern that the worker began in 2001 thus would have continued.

[32] Should there be any time excluded from the recalculation in this case, on these facts? We again reference the ESA and conclude that the "family medical leave" provision of up to eight weeks is a reasonable period of time to exclude from the worker's long term earnings basis calculation. We do not know if this will make any significant difference, however, to the worker's actual earnings, but are prepared to apply an eight-week non-earning period as excluded from the recalculation of the worker's long term average earnings basis.

[33] Accordingly, the worker's appeal is allowed in part. The worker's long term average earnings basis shall be recalculated to exclude eight weeks there-from, to recognize a reasonable period of time to which the worker devoted to family leave.

DISPOSITION

[34] The appeal is allowed in part as stated above.

DATED: August 17, 2007

SIGNED: J. Josefo, V. Phillips, A. Grande