WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 357/19

BEFORE: R. Nairn: Vice-Chair

HEARING: February 19, 2019 at Toronto
Written

DATE OF DECISION: April 16, 2019

NEUTRAL CITATION: 2019 ONWSIAT 958

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated February 11, 2015

APPEARANCES:

For the worker: R. Fink, Lawyer

For the employer: Not participating

Interpreter: N/A

REASONS

(i) Introduction

[1] At the time of the accident under consideration here, the worker was employed as a Siding Installer in the accident employer's renovation business. The worker started with the employer on November 26, 2013.

[2] On December 6, 2013, the worker experienced an onset of pain in his left wrist after lifting/moving several pieces of concrete boards.

[3] The worker sought medical attention and was initially diagnosed with a left wrist sprain. As noted in Memo No. 5 dated December 16, 2013, the WSIB (the "Board") recognized the worker's left wrist sprain as compensable, with the Eligibility Adjudicator being satisfied that "this worker sustained a left wrist sprain when he tried to pull a 1200 pound concrete masonry board off a co-worker (…) I am satisfied the diagnosis of a left wrist sprain is compatible with the accident history provided". In addition to granting the worker entitlement to healthcare benefits, the Eligibility Adjudicator allowed Loss of Earnings ("LOE") benefits for 12 weeks, from December 7, 2013 "at a [temporary] rate of $100/week, as the worker is unable to perform his regular duties as a result of his work-related injury, and modified duties have not been offered".

[4] In Memo No. 7 dated January 2, 2014, a Board Case Manager noted the following, after a telephone conversation with the worker:

- there is a disagreement with the employer regarding his employment status as he was under the impression that they would be deducting taxes as this is what he was told when he was hired and he provided his SIN #and other info. However, now he is being told he is a sub-contractor which he does not agree with and he has contacted CRA to have a determination done
- I ensured that he understood that he is considered a "worker" for WSIB purposes and therefore has entitlement due to his injury under the WSIB but is being paid at temp rate until earnings are sorted out
- he reports that prior to working for this employer he was on welfare for over a year and in 2012 he was doing construction work in BC
- prior to the incident he enjoyed playing guitar and weight lifting outside of work and was able to work around any pain in his wrist but not since the incident

[5] In Memo #10 dated January 6, 2014, the Case Manager noted the following, after a conversation with a representative of the employer:

Employment Agreement

- states that he put a post on Kijiji for trim installers and worker and co-worker applied stating they had previous trim experience
- no taxes to be deducted, workers reported as self-employed and he only hires sub-contractors as he is a small business with limited work (he will send copy of workers application)
- worker was hired for one specific project only
- he had gone to the site a couple of days prior to the incident and noted that the work was not as complete as he would have expected and when he talked to the

worker and his co-worker it was determined that their previous experience was in inside trim and not the work he had hired them for which is outside trim, aluminum siding, fascia, soffit

- although they were not as fast as he would have liked they were doing ok and he felt for them as they had no other work and were willing to do anything so he agreed to let them finish the project

[6] As noted in Memo No. 12 dated January 17, 2014, the Case Manager had another telephone conversation with the worker concerning the nature of his employment relationship with the accident employer, and noted the following:

(…)

- He then inquired about adjusting temp. rate and if I had received 2012 tax info
- I advised I had but could not adjust rate based on this as earnings info was for $4000.00 and it is not clear what the earnings period is and he could not provide dates, invoices, or paystubs for the period this was earned
- He could not recall for what periods in 2012 he was on WCB benefits and what dates he worked
- Reports the 4000.00 earned was after WCB benefits when he tried to go back to work
- He stated that this is all a problem because the AE did not provide the correct info and that he was hired as an employee for CRA purposes
- We had a lengthy conversation regarding employment titles for WSIB and CRA purposes and that one can be a "worker" for WSIB purposes and "self-employed" for CRA purposes
- He is adamant that the AE should have been deducting taxes and that we should base earnings on 4 weeks prior
- He confirmed there is no 4 weeks prior and that we could go by what he was working which he states was six days a week at $200.00 per day
- I inquired if he had questioned the flat rate given he expected taxes to be deducted and he advised that this was his employer's problem and not his
- Stated that he meets with CRA this week to discuss his claim and that once they had made their determination he would provide the info for WSIB review
- Advised that in the interim I would continue to pay at temp. rate based on info I have
- He advised he understood.

[7] In Memo No. 45 dated May 29, 2014, a Case Manager dealt with the issue of the worker's ongoing entitlement for his left wrist. After reviewing the medical evidence on file, the Case Manager was of the view that the worker had "significant pre-existing issues with his left wrist" and that the accident on December 6, 2013 had resulted in a hyper-extension injury to that same wrist, which in turn caused a temporary worsening of the worker's prior issues. The Case Manager found that the "acute phase related to the hyper-extension on December 6, 2013" had resolved, and the worker had returned to his pre-accident level of impairment. As such, the Case Manager found that the worker's entitlement to LOE benefits and healthcare benefits would end as of June 2, 2014. The Case Manager confirmed the termination of the worker's entitlement to benefits in a decision dated June 17, 2014.

[8] In July, 2014 the Case Manager reviewed the issue of the worker's employment pattern and long-term earnings calculation, and noted the following in Memo No. 57 dated July 31, 2014:

> (…)
>
> Employment:
>
> - Worker was hired and paid $200 per day
> - Dispute between worker and employer re: dependent contractor with no deductions and employee with tax deductions
> - CRA ruling to issue T4 earnings
> - STR based on earnings from accident employer
> - Employment pattern determined to be non-permanent based on nature of business and employer's work history (work is dependent on weather and availability of work)
> - Based on this LTR required and request for earnings letter sent (11apr14)
> - Worker submitted option c for 2013 as well as t4's (AE) and t5007's for other Boards but did not include info re: non work periods including dates
> - Rate was set based on info provided (earnings 3,380 x 7/706)
>
> New information:
>
> - Worker submitted ARF objecting to employment pattern. LTR and denial of ongoing benefits
> - Requested ongoing entitlement be granted on an aggravation basis – permanent
> - OITCM directed CM to issue letter explaining LTR and reconsider decision re: employment pattern and ongoing benefits
>
> Reconsideration Decision:
>
> 1. There is no new information regarding the employment pattern, this decision remains upheld
> 2. A letter will be issued re: the LTR rate
> 3. WSIB Policy 11-01-15 states: In cases were the worker has a pre-accident impairment and suffers a minor work-related injury or illness to the same body part or system, the WSIB considers entitlement to benefits on an aggravation basis…..this policy is used where a relatively minor accident aggravates a significant pre-accident impairment
>
> - The incident of 06dec13 was not minor and could reasonably have caused personal injury in the absence of a pre-accident impairment
> - Noting this, I am not able to review entitlement on an aggravation basis.

[9] The Case Manager then issued a decision dated July 31, 2014 confirming the non-permanent nature of the worker's employment noting "no new information has been submitted to support that your employment pattern was permanent". The Case Manager also noted the following, with respect to the worker's long-term earnings calculation:

> **Review of Long-Term Rate**
>
> Date of injury/illness December 06, 2013

Earnings/wages considered January 01, 2012 to December 06, 2013	$ 3,380.00
Number of calendar days in this period of time:	706 days
Less allowable unpaid days (if applicable)	None
Total days in period	706 days
Calculate daily rate (total earnings divided by total days in period	$ 4.79
Calculated gross weekly rate (daily rate multiplied by 7 days)	$33.51

As a result of my review, a recalculation of your Loss of Earnings (LOE) benefit rate was done. Your new weekly benefit rate, effective March 01, 2014 is $33.36.

[10] In the July 31, 2014 decision, the Case Manager also confirmed the denial of the worker's request to have this claim granted on an aggravation basis. The Case Manager found that "the incident on December 6, 2013 was not minor, and could reasonably have caused a disabling injury in the absence of the pre-existing condition. Therefore, this does not meet the criteria for entitlement on an aggravation basis".

[11] The worker disagreed with the conclusions of the Case Manager with respect to his employment pattern, and his long-term earnings calculation, as well as the denial of ongoing left wrist entitlement and the refusal to grant entitlement on an aggravation basis. These issues were eventually referred to an Appeals Resolution Officer ("ARO"), and in a decision dated February 11, 2015, the ARO granted the worker's appeal in part, recognizing that he ought to be granted ongoing entitlement for his left wrist injury. The ARO found that "the worker's compensable left wrist condition did not return to its pre-accident state when benefits in the worker's case were terminated in June 2014". The matter of the worker's ongoing entitlement was returned to the Board's operating level for further adjudication. The ARO denied the worker's appeal with respect to having the claim granted on an aggravation basis, deciding that "entitlement was appropriately granted 'on its own merits' as opposed to entitlement on an aggravation basis".

[12] The ARO also denied the worker's appeal with respect to the nature of his employment pattern and the quantum of his long-term earnings calculation. In so doing, the ARO indicated in part:

> While the worker indicates that he was under the impression he was hired by the employer on an indefinite basis, this, in my view, is not grounds upon which to form a conclusion he in fact was. The totality of the evidence must still demonstrate that the worker's understanding was correct. In these circumstances, I am not persuaded that the evidence has demonstrated or supported the worker's view on the matter.
>
> From my review of the evidence, I find that the CM appropriately categorized the worker as an "irregular, non-permanent worker' given the evidence available for review. I find, on a balance of probabilities, that the appellant worker's employment pattern was non-permanent and therefore his LOE benefit must be determined under the policy dealing with workers in non-permanent employment.
>
> The long-term average earnings were intended to take into account not only the worker's regular periods of income, but also those periods where the worker is unemployed or has fluctuation in his earnings when moving from one job to another. I find that the calculation of the worker's long-term earnings as established by the Operating Area was reasonable and consistent with legislation and policy. The Act provides for recalculation of earnings only if there would be unfairness by virtue of continuation of the LOE benefits on the basis of the short-term average earnings. I find, had the Operating Area

> continued calculating the worker's LOE benefits on the short-term basis, the worker would have received more by way of LOE benefits than he actually earned.
>
> Noting my finding on the worker's employment pattern and having regard for how the worker's long-term LOE rate was calculated, I must dismiss this aspect of the worker's appeal.
>
> The CM's characterization of the worker's employment patter (i.e., non-permanent) was appropriate. The worker's long-term LOE recalculation is confirmed.

(ii) Issue on appeal

[13] The issue to be decided in this case involves determining the appropriate calculation of the worker's long-term earnings basis.

[14] In correspondence dated January 10, 2018 (contained in Addendum No. 6) the worker's representative advised that the worker was not appealing the ARO's decision to deny entitlement on an aggravation basis. Any attempt to re-visit that issue at some point in the future will be subject to the time limits set out in section 125 of the *Workplace Safety and Insurance Act, 1997*.

(iii) Submissions of the worker's representative

[15] The worker agreed to have this appeal considered by means of written submissions. Mr. Fink has provided submissions dated January 10, 2018 which have been reviewed and are included in Addendum No. 6. In those submissions, Mr. Fink provided three alternatives for re-calculating the worker's long-term earnings, each of which he submitted, would result in a "more fair earnings basis, based on WSIB policies and statute than that deemed in the ARO decision". Those alternatives were:

> 1. Permanent employment pattern following a "break" in the employment pattern:
>
> 2. Non-permanent employment pattern following a "break" in the employment pattern:
>
> 3. Non-permanent employment with no "break" in the employment pattern:

[16] The materials submitted by Mr. Fink included an affidavit sworn by the worker on September 14, 2017, which indicated:

> 1. I am the Appellant under [this claim].
> 2. I was hired in November of 2013 as a permanent, full-time employee by [the employer].
> 3. My job duties included the installation of aluminum siding and trim, and the repair of the exteriors of residential houses.
> 4. My first day of work was November 26, 2013.
> 5. I worked on at least two different locations, while working for [the employer]
> 6. I was injured at work on December 6, 2013.
> 7. I was laid off by the employer on December 6, 2013 following my work accident.
> 8. I was paid $200.00 per day, for a 6 day – 48 hour work week.
> 9. Following my work accident I made an application to the Canada Revenue Agency, requesting a ruling on the insurability and pensionability of my employment with [the employer].
> 10. The Canada Revenue Agency determined in a ruling dated January 29, 2014 (copy enclosed as Appendix "A"), that for the period from November 26, 2013 to

> December 6, 2013, "you were an employee and your employment was insurable under paragraph 5(1)(a) of the *Employment Insurance Act* and pensionable under paragraph 6(1)(a) of the Canada Pension Plan".
>
> 11. I was issued a T4 slip by [the employer] for my earnings with the company during the period from November 26, 2013 to December 6, 2013, after the ruling from the Canada Revenue Agency.
> 12. I started work with [the employer] with a friend and co-worker, [Mr. W.].
> 13. I worked with [Mr. W.] on a daily basis from November 26, 2013 until December 6, 2013, with the exception of two days during that period when [Mr. W.] took the day off.
> 14. [Mr. W.] was also injured in a work accident on December 6, 2013.

[17] The material submitted by Mr. Fink also included an affidavit sworn by Mr. W, on January 2, 2018, which indicates:

> 1. I was hired in November of 2013 as a permanent, full-time employee by [the employer].
> 2. My job duties included the installation of aluminum siding and trim, and the repair of the exteriors of residential houses.
> 3. I started work with [the employer] with a friend and co-worker, [the worker].
> 4. My first day of work was November 26, 2013.
> 5. I worked on at least two different locations, while working for [the employer].
> 6. I worked with [the worker] on a daily basis from November 26, 2013 until December 6, 2013, with the exception of two days during that period when I took the day off.
> 7. I understand that [the worker] was injured in a work accident on December 6, 2013.

(iv) Analysis

[18] Since this accident occurred in 2013, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[19] Specifically, section 53 of the WSIA deals with the matter of the calculation of a worker's "average earnings". The applicable portions of this section provide:

> **53** (1) The Board shall determine the amount of a worker's average earnings for the purposes of the insurance plan and in doing so shall take into account,
>
> (a) the rate per week at which the worker was remunerated by each of the employers for whom he or she worked at the time of the injury;
>
> (b) any pattern of employment that results in a variation in the worker's earnings; and
>
> (c) such other information as it considers appropriate.
>
> (…)
>
> (3) The Board shall recalculate the amount of a worker's average earnings if the Board determines that it would not be fair to continue to make payments under the insurance plan on the basis of the determination made under subsection (1). The Board shall take into account such information as it considers appropriate when recalculating the amount.

[20] Pursuant to section 126 of the WSIA, the Tribunal is required to apply applicable Board policy. In this case the Board has advised the Tribunal that one of the policies that apply to this

appeal is *Operational Policy Manual* ("OPM") Document No. 18-02-03, entitled "Average Earnings – Determining Long-Term Average Earnings: Workers in Permanent Employment". This policy indicates in part:

> **Policy**
>
> The long-term average earnings of a worker in permanent employment are generally the same as a worker's short-term average earnings. A worker's average earnings are recalculated to long-term average earnings if the decision-maker determines that it is unfair to continue paying loss of earnings (LOE) benefits based on the short-term average earnings.
>
> **NOTE**
>
> Either of the workplace parties can request a recalculation.
>
> LOE benefits are paid based on the worker's long-term average earnings from the beginning of the 13th week of LOE benefits.
>
> **Purpose**
>
> The purpose of this policy is to outline when and how a recalculation to long-term average earnings is conducted.
>
> **Guidelines**
>
> **Definitions**
>
> Permanent employment is employment where a worker
>
> - Is employed (by the employer) 52 weeks a year, with no seasonal or cyclical layoffs, and
> - Has no set termination date, apart from retirement
> - May be full or part-time
> - May have earnings that vary from day to day or week to week due to irregular hours or method of payment.
>
> Permanent employment may involve occasional short-term layoffs or non-earning periods such as shortages of work, plant shutdowns during holidays, re-tooling, strikes, or lockouts. Such temporary layoffs or non-earning periods do not reflect a break in the employment pattern.
>
> Workers in permanent employment may include
>
> - Workers whose salary is based solely on commissions, or
> - Drivers paid per mileage driven.
>
> (…)
>
> A recalculation involves re-determining a worker's average earnings taking 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 that is significant enough to make the period before the break irrelevant to the determination of the worker's long-term average earnings. This may involve a permanent change
>
> - Of employers
> - From full to part time work, or vice-versa
> - From permanent to non-permanent employment or vice versa

- In job grade, classification, trade, or method of payment
- From self-employment to permanent employment, or vice versa, or
- In status from dependent contractor to worker in permanent employment, see 18-02-08.

Determining Average Earnings: Exceptional Cases

A break in the employment pattern shortens the recalculation period for long-term average earnings (see "Recalculation period" in this document).

A non-earning period is the time during which the worker was not earning due to 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. Non-earning periods that are not part of the employment pattern (e.g., parental/maternity leave) are factored out (see "Non-earning periods excluded from recalculation" in this document).

When to conduct a recalculation

Generally, the worker's long-term average earnings are the same as the worker's short-term average earnings and a recalculation is not necessary. A recalculation may be done if it is not fair to continue paying LOE benefits based on the worker's short-term average earnings. It is considered unfair if the worker's short-term average earnings profile does not reflect the long-term average earnings profile.

The short-term average earnings may not reflect the worker's long-term earnings profile if the worker

- Had prior earnings that are not included in the short-term average earnings
- Worked irregular overtime that is or is not included in the short-term average earnings
- Earned irregular bonuses or commissions, or
- Experienced temporary layoffs due to work shortages, retooling, or holiday shutdowns.

Recalculation period

Long-term average earnings are based on the employment earnings in the 12 months before the injury, or a lesser period. The recalculation period may be shortened by a break in the employment pattern (see "Break in the employment pattern" in this document).

If a shorter recalculation period is to be used, the start of the period is the date when the actual change (the movement from one pattern of employment to another) occurred.

(…)

Extending the recalculation period

If necessary, the 12 month period may be extended to include the full calendar year before the injury, plus the current year up to the date of injury.

This simplifies the process of gathering the worker's past earnings information with the use of income and deduction printouts (available from Canada Revenue Agency (CRA)), T-4 slips, pay cheque statements, or letters from employers. The recalculation period may not extend beyond a break in the employment pattern.

(…)

[21] The WSIB has also indicated that OPM Document No. 18-02-04, entitled "Average Earnings – Determining Long-Term Average Earnings: Workers in Non-Permanent Employment" is also applicable to this appeal. This policy provides in part:

> **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.
>
> **Purpose**
>
> The purpose of this policy is to outline when and how a recalculation to long-term average earnings is conducted for worker's in non-permanent employment.
>
> **Guidelines**
>
> **Definitions**
>
> Non-permanent employment is employment where a worker is hired
>
> - For a specific period of time, or
> - For a temporary period through a union hall.
>
> Workers in non-permanent employment include
>
> - Contract workers
> - Seasonal or cyclical workers, or
> - Temporary agency workers.
>
> (…)
>
> A recalculation involves re-determining 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 (El) 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 work pattern.

(…)

Break in the employment pattern

In all cases, the recalculation period is shortened by a break in the employment pattern. If a shorter recalculation period is to be used, the start of the period is the date when the actual change occurred (i.e., the movement from one pattern of employment to another).

(…)

Non-earning periods included in recalculation

The decision-maker considers periods of unemployment to be part of the employment pattern for workers in non-permanent employment. The decision-maker, therefore, does not factor out periods of unemployment due to lay-offs, terminations, seasonal employment, or unavailability of work. However, because these periods are included, gross El 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 or children's illnesses, funerals, dentist or doctor appointments.
>
> (…)

(a) Non-Permanent Employment versus Permanent Employment

[22] As noted above, OPM Document No. 18-02-04 defines "non-permanent employment" as employment where a worker is hired "for a specific period of time or for a temporary period through a union hall". The policy indicates that workers in non-permanent employment include "contract workers, seasonal or cyclical workers, or temporary agency workers".

[23] OPM Document No. 18-02-03 defines "permanent employment" as employment where a worker:

> - Is employed (by the employer) 52 weeks a year, with no seasonal or cyclical layoffs, and
> - Has no set termination date, apart from retirement
> - May be full or part time
> - May have earnings that vary from day to day or week to week due to irregular hours or method of payment.

[24] The policy also notes that workers in permanent employment may include "workers whose salary is based solely on commissions or drivers paid per mileage driven".

[25] In the decision on appeal, the ARO found that the totality of the evidence supported a conclusion that the worker, at the time of the accident, was engaged in "irregular, non-permanent" employment. Having had the opportunity to consider all of the evidence before me however, I find that I am led to a different conclusion. My review of the evidence satisfies me that the worker ought to have been characterized as being in "permanent" employment at the time of his accident on December 6, 2013. In reaching that conclusion, I have taken particular note of the following:

- OPM Document No. 18-02-04 provides that workers who are hired "for a specific period of time" are normally deemed to be in "non-permanent employment". While the employer had advised the Case Manager, in Memo No. 10, that the worker was hired "for one specific project only" I prefer to place greater weight on the sworn statement of the worker in his September 14, 2017 affidavit that he "worked on at least two different locations, while working for [the employer]". The worker's statement in that regard is consistent with that provided by Mr. W. in his affidavit of January 2, 2018. Mr. W. also noted that he "worked on at least two different locations, while working for [the employer]".
- As noted in Memo No. 7 dated January 2, 2014, (less than a month after the compensable accident) the Case Manager noted there was a "disagreement" between the workplace parties as to the worker's "employment status". According to the Case Manager, the worker disagreed with the employer's suggestion that he had been hired as a "sub-contractor". The worker was "under the impression that they would be deducting taxes, as this is what he was told when he was hired, and he provided his SIN# and other info".
- The worker continued to object to the way the employer described the nature of their employment relationship and pursued the matter with the Canada Revenue Agency. In a decision dated January 29, 2014, a CPP/EI Rulings Officer concluded that for the period from November 26, 2013 to December 6, 2013, the worker was "an employee, and your employment was insurable under paragraph 5(1)(a) of the Employment Insurance Act and pensionable under paragraph 6(1)(a) of the Canada Pension Plan".
- OPM Document No. 18-02-04 indicates that workers in non-permanent employment include "seasonal or cyclical workers". There is no evidence of substance before me to suggest that this worker was hired on a seasonal basis i.e. during the warmer months of the year. The fact that the worker began his employment late in the year on November 26, 2013 supports a finding that his employment would, more likely than not, have continued all year round.
- In his affidavit the worker indicates that he was paid $200.00 per day for a six day, 48 hour work week. Both the worker and Mr. W. note in their affidavits that with the exception of two days off, they both worked "on a daily basis from November 26, 2013 until December 6, 2013". This evidence supports the conclusion that the workers were employed on a full time, rather than a part time basis.
- The employer has decided not to participate in this appeal and as such, they have not provided any submissions in support of their indication on the Report of Injury/Disease (Form 7) that the worker was hired on a "temporary part time" basis.
- There is no evidence of significance before me establishing that the worker was hired only for a specific time, or that the parties had agreed beforehand about a termination date for his employment.

[26] The evidence in this case establishes that after about two years of irregular employment, the worker was finally able to secure permanent employment with the accident employer in November 2013. For the reasons noted above, I find that in calculating the worker's long-term average earnings, it is appropriate to find that at the time of his accident on December 6, 2013, he was working in permanent employment.

(b) Determining long-term average earnings

[27] As noted in the employer's Form 7, the worker was paid $200 per day at the time of his accident. Information contained in the case materials indicates that after the Board decided that the worker was entitled to LOE benefits, the quantum of those benefits was based on the worker's short-term average earnings of $200 per day. As noted in OPM Document No. 18-02-03, a worker's long-term average earnings (which become effective from the beginning of the 13th week of LOE benefits) are generally the same as the short-term average earnings. However, as provided in section 53(3) of the WSIA, the Board may decide that it is necessary to re-calculate the amount of a worker's average earnings at that 13 week period if it determines "it would not be fair" to continue making LOE payments based on the short-term average earnings. Section 53(3) allows the Board to take into account "such information as it considers appropriate" when re-calculating the amount of the worker's average earnings.

[28] OPM Document No. 18-02-03 notes, with respect to the re-calculation period, that "long-term average earnings are based on the employment earnings in the 12 months before the injury, or a lesser period". The policy also notes however, that "the re-calculation period may be shortened by a break in the employment pattern".

[29] The case materials, including the summary provided by the worker's representative, provides the following with respect to the worker's work history in the months and years preceding the compensable accident:

- The worker was hired by an employer in Alberta on November 23, 2011 to work as a framer, framing new homes.
- The worker injured his left wrist at work on December 9, 2011. A claim was established by the Alberta Workers' Compensation Board. In his Report of Injury in that claim, the worker noted that he was earning $20 an hour, employed as a "Sub-Contractor".
- The worker received full wage loss benefits from the Alberta WCB from December 12 to December 30, 2011.
- According to the summary provided by the worker's representative, the worker returned to work "as a self-employed contractor" from February to March 2012.
- The worker received full wage loss benefits from the Alberta WCB from May 9 to June 21, 2012 and from July 23, 2012.
- The worker underwent surgery, recognized as part of his entitlement in the Alberta claim, on October 24 and November 13, 2012. On December 9, 2012 his full wage loss benefits were closed by the Alberta WCB.
- The worker received partial wage loss benefits from the Alberta WCB from December 10, 2012 to April 26, 2013; April 28 to June 8, 2013, and August 27, 2013 to September 9, 2013.
- On September 9, 2013 the worker was hired by another employer, this time in British Columbia. He worked in a warehouse and was paid "$12/hr x 7 hrs in cash at the end of each day".
- On September 18, 2013, the worker experienced an onset of pain in his left wrist while in the course of his employment. A claim was established with the WorkSafeBC, and the

worker was granted full wage loss benefits, beginning September 19, 2013. Those benefits continued until November 13, 2013. At that point, the WorkSafeBC deemed that the worker was fit to return to work, and was at his pre-accident employment status.

- On November 26, 2013, the worker was hired by the accident employer in Ontario.
- The worker was injured with the accident employer on December 6, 2013.

[30] As noted above, Board policy provides that as a general rule for workers involved in permanent employment, the long-term average earnings are based on employment earnings in the 12 months before the injury, or a lesser period. The policy provides that the re-calculation period may be shortened by a break in the "employment pattern". In this case, the worker's representative takes the position that the worker's hiring by the accident employer on November 26, 2013 constituted a break in the worker's employment pattern of working in non-permanent and/or self-employment in the previous 12 months. As such, he submitted that the worker's long-term average earnings in this 2013 claim should be the same as his short-term average earnings, i.e., "based on a period of 11 days and a quantum of $2,000 [or] $1272.73/wk gross average". As Mr. Fink noted, this calculation was based on a T4 provided which showed "employment income of $2000 which was earned in the 11 day period from November 26, 2013 to December 6, 2013".

[31] In this case, I have found that at the time of his accident in December of 2013, the worker was working in permanent employment. A review of the worker's employment history indicates that in the 12 months preceding his compensable accident, and as far back as even 24 months before his compensable accident, he was engaged in short periods of either self-employment or temporary employment, interspersed with various periods during which he was in receipt of wage loss benefits. In my view, his hiring by the accident employer in November of 2013 constituted a break in the employment pattern, as that term is used in Board policy. Pursuant to that policy, the period of re-calculation is to run from the date of that break in employment (in this case November 26, 2013) up until the day before the injury (in this case December 5, 2013). Finally, I acknowledge that the actual hours that the worker would have worked will never be precisely ascertainable because the worker was injured after only 11 days of work. Instead, I accept that I must consider what would be a fair representation using the best estimate available of the worker's likely average earnings (see *Decision No. 1809/16* for example). In my view, given this worker was a permanent worker with no fixed date of termination, I am satisfied that the worker's earnings over those 11 days (as confirmed in the T4) was the most fair representation and best estimate available of his likely average earnings. Accordingly, I find the worker's long-term earnings basis is properly determined based on gross earnings per week of $1272.73 ($2000/11 x 7 days).

[32] For these reasons, I find it appropriate to calculate the worker's long-term average earnings on the basis of his earnings with the accident employer for the period of time from November 26, 2013 to December 5, 2013. Therefore, I find the worker's long-term earnings basis is properly determined based on gross earnings per week of $1272.73.

DISPOSITION

[33] The worker's appeal is allowed.

[34] At the time of his accident, the worker was employed in permanent employment.

[35] The worker's long-term average earnings are to be calculated on the basis of gross average weekly earnings of $1272.73.

DATED: April 16, 2019

SIGNED: R. Nairn