

WORKPLACE SAFETY AND INSURANCE BOARD

APPEALS RESOLUTION OFFICER DECISION

CLAIM:

OBJECTING PARTY:

REPRESENTED by: Richard Fink, Fink & Bornstein Professional Corporation

HEARING: Hearing in Writing

HEARD by: L. Mansueti, Appeals Resolution Officer

ISSUE

The worker objects to the decision dated January 5, 2017 communicating the earnings basis calculation used to pay the worker's loss of earnings (LOE) benefits.

BACKGROUND

On July 26, 2016 this self-employed worker was on standing scaffolding and fell 15' to the ground sustaining multiple injuries. The worker was 61 years of age at the time of injury, working as an Executive Officer of a family construction business, He had worked in this capacity for approximately 12 years.

Entitlement was accepted for the worker's injuries for health care benefits and loss of earnings (LOE) benefits from July 27, 2016. The worker was initially paid at a temporary rate of \$100.00 per week until his earnings information was submitted to the record.

The decision letter dated January 5, 2017 communicated the worker's LOE benefit rate was calculated using his 2015 T4 Statement of Remuneration Paid, which totalled \$177.98 gross per week. The worker objected to the decision dated January 5, 2017, and this is now the issue before the Appeals Services Division.

AUTHORITY

Section 2, 12 and 53 of the Workplace Safety and Insurance Act (WSIA), 1997

Operational Policies:

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|----------|---|
| 11-01-03 | Merits and Justice |
| 14-02-08 | Determining Insurable Earnings |
| 14-02-18 | Insurable Earnings - Construction |
| 18-02-04 | Determining Long-term Average Earnings: Workers in Non-permanent Employment |
| 18-02-08 | Determining Average Earnings – Exceptional Cases |

ANALYSIS

I have reviewed and considered the information contained in the record in accordance with the above noted legislation and operational policies.

The record indicated the worker was the President of a family construction business known as . The worker's job duties involved engaging in mason duties, working as a supervisor of hired employees, and securing new clients. The worker was deemed as an "Executive Officer" with WSIB coverage.

Operational policy 14-02-18 states, in part:

Executive officers in a corporation

Executive officers in construction are also compulsorily covered as deemed workers, and the corporation is the deemed employer.

The gross insurable earnings of an executive officer is based on the total of

- employment income reported on a T4 Statement of Remuneration Paid
- other insurable employment income reported on a T4A, Statement of Pension, Retirement, Annuity, and Other Income
- dividends reported on a T5 Statement of Investment Income, and
- director fees issued by the corporation to the executive officer.

The recalculation period was determined to be January 1, 2015 to December 31, 2015 inclusive. The operating area obtained the worker's 2015 T4 Statement of Remuneration Paid, and noted the worker's employment income totalled \$9,280.50 (\$177.98 gross per week). This rate was used to determine his earnings basis for the payment of LOE benefits.

The worker representative disputes the earnings calculation in this case. He indicated the recalculation period ought to be adjusted as the worker did not receive regular employment income in 2015. The worker representative pointed to operational policy 14-02-18 wherein it states:

If the executive officer receives regular insurable employment income (as described above) throughout the year, the employer will report the executive officer's actual insurable earnings for each reporting period. If the executive officer does not receive regular employment income throughout the year, the employer may estimate the amount of annual insurable earnings for each executive officer for the current reporting year. This amount is then pro-rated and reported to the WSIB according to the account frequency (e.g. monthly or quarterly).

The worker representative submitted the worker's earnings were irregular. He advised the worker's income depended on his hours worked as well how much money was available to pay his wages. The record contains the worker's pay slips from May 28, 2014 to July 26, 2016 which show the worker's gross salary did in fact fluctuate. As per the worker's 2014 T4 Statement of Remuneration Paid it was noted the worker's gross earnings were \$22,950.00,

which differs significantly from his 2015 gross income of \$9280.50 gross. The worker representative pointed to the fact the worker had no employment earnings whatsoever from February 1, 2015 to August 31, 2015 due to lack of work.

The worker representative indicated the worker's son, who is also an Executive Officer of the family construction business was injured at work on June 1, 2016. The worker representative submitted that prior to his son's injury he worked 40 hours per week, and split his time between masonry and supervisory duties. Following his son's injury, the worker worked 60 hours per week, mainly performing masonry duties.

The worker representative submitted the worker experienced a break in his employment pattern effective June 1, 2016, as he was required to take on more hours and more physical aspects of the business. Operational policy 18-02-08 states, in part:

Break in the employment pattern

A break in the employment pattern is a change in the dependent contractor's employment significant enough to make the period before the break irrelevant to the determination of the dependent contractor's average earnings. This may include a change in status from

- employer to dependent contractor
- worker with optional insurance to dependent contractor, or
- worker to dependent contractor.
- A break in the dependent contractor's employment pattern shortens the calculation period.

I do not accept the facts and circumstances of this case support there was a break in the employment pattern. Even if the worker took on more responsibility in terms of the masonry duties, he continued to work in the capacity of an Executive Officer of the business; therefore, I do not agree there is a break in the employment pattern. As such, I do not accept the worker's recalculation period ought to be shortened from June 1, 2016 to July 26, 2016.

I acknowledge the worker's earnings in 2015 are considerably lower than the income he received in 2014 and in 2016 (prior to July 26, 2016). As previously indicated the worker's gross income per his 2014 T4 Statement of Remuneration Paid was \$22,950.00, and his 2016 gross income was \$20,134.40, which is significantly greater than his 2015 gross earnings of \$9280.50.

The worker submitted an affidavit dated April 21, 2017 indicating he typically worked 40 hours per week and he was paid on an irregular basis depending on his hours worked and how much money was available within the company to pay his wages. The worker advised he did not receive any employment earnings from February 1, 2015 to August 31, 2015 due to a lack of work; however, he continued to actively seek new clients during this non-earning period.

Section 53(3) of WSI&A states:

Recalculation

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.

Given the facts and circumstances of this case, I accept it would be unfair to pay the worker based on his 2015 earnings as the evidence supports his earnings were shown to be irregular. As such, I accept the earnings period ought to be adjusted. The next question to be determined is which earning period is the most fair and appropriate. The worker representative submitted several alternative scenarios, including July 27, 2015 to July 26, 2016, or January 1, 2014 to July 26, 2016, or 1/3 of the annual maximum amount of insurable earnings.

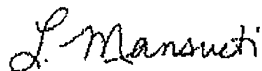
Noting the worker's earnings fluctuate and considering the worker experienced non-earnings periods, I accept operational policy 18-02-04 ought to be consulted in this case. I find that in order to establish an appropriate long-term earning profile for this worker, the recalculation period ought to include the two full calendar years before the injury, plus the current year up to the date of the injury, which in this case is January 1, 2014 to July 26, 2016. I find the worker's non-earning period from February 1, 2015 to August 31, 2015 is part of his non-permanent employment pattern; therefore, this period shall remain part of the recalculation period.

CONCLUSION

I conclude the earnings basis ought to be recalculated using earnings from January 1, 2014 to July 26, 2016.

The worker's objection is allowed.

DATED July 4, 2017



L. Mansueti
Appeals Resolution Officer
Appeals Services Division