

WORKPLACE SAFETY AND INSURANCE BOARD

APPEALS RESOLUTION OFFICER DECISION

CLAIM:

OBJECTING PARTY: Worker
REPRESENTED by: Mr. Richard Fink
RESPONDENT: ,
HEARING: Hearing in Writing
HEARD by: Mrs. J. Morin, Appeals Resolution Officer

ISSUE

The worker objects to the decision dated January 17, 2017 regarding the earnings basis used to calculate his loss of earnings (LOE) benefit.

BACKGROUND

On June 1, 2016 this Executive Officer was walking on a plank and missed a step. He fell between a scaffold and a sill causing him to injure his right shoulder.

Entitlement was accepted for a right shoulder strain. The worker was initially granted LOE benefits from June 2, 2016 to October 20, 2016 at a temporary rate of \$200.00 per week.

The Case Manager's (CM) decision dated January 17, 2017 addressed the adjustment to the LOE benefit rate following receipt of the CRA information for 2015. The CM accepted the 2015 CRA information as proof of earnings in order to determine the worker's LOE benefit rate. The LOE benefit rate was adjusted from the temporary rate of \$200.00 to \$174.76 per week (gross weekly amount of \$183.90).

The CM's letter dated April 4, 2017 advised of the file referral to the Appeals Services Division in order to address the worker's objection to the earnings basis used to determine the LOE benefit rate.

AUTHORITY

Operational Policy: 11-01-03 – Merits and Justice
 14-02-18 – Insurable Earnings - Construction

WSIA – s.53 (1) and s. 53 (3) – Average Earnings Recalculation

ANALYSIS

In considering this objection I had regard for the evidence contained on the file record, the arguments presented by the worker's representative and the applicable legislative authority and policies.

As outlined in his submission dated April 25, 2017, it is the worker representative's position that the T4 earnings for the actual year of the accident as prescribed by s.53 (3) of the WSIA should be used to determine the LOE benefit rate. It is the worker representative's alternative position that the worker's LOE benefit rate should be calculated based on the earnings of 365 days prior to the accident date or that the earnings for 882 days prior to the accident date be used.

In order to support his position the worker's representative argued the earnings information provided by the employer indicates the worker did not receive regular employment income throughout the year of 2015. The worker's representative provided copies of the worker's pay slips for the period starting from May 28, 2014 to the pay period ending May 31, 2016.

Section 53 (1) of the Workplace Safety and Insurance Act states:

"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."

Section 53 (3) for Recalculations of the Workplace Safety and Insurance Act states:

"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."

Operational Policy 14-02-18 Insurable Earnings – Construction, states in part that 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 (monthly or quarterly).

I considered all documentation on record including all arguments raised by the worker's representative. In order to calculate the worker's LOE benefit rate I find the worker's representative's alternative argument that the earnings information for a year prior to the accident date (June 1, 2015 to May 31, 2016) should be used. I accept this as I find this period would provide a more accurate reflection of this worker's earnings. I did not use the worker's T4 earnings for 2016 noting this would include earnings subsequent to the accident date.

In reviewing the worker's earnings prior to the workplace accident I find the worker's earnings in 2015 was not a fair depiction especially noting he was not employed from approximately February 1, 2015 to August 31, 2015; this is almost 6 months of that year. In coming to my conclusions I found the following pertinent:

- Attached to the worker representative's submission dated April 25, 2017 is an Affidavit signed by the worker on April 21, 2017. The worker was sworn to being an Executive Officer and that he was paid on an irregular basis and that his income was dependent on how much work and money were available. The worker advised there was no employment earnings from the company for the period from February 1, 2015 to August 31, 2015.
- According to the worker's T4 for 2014, the worker earned \$29,040.00. I note the worker's T4 for 2015 listed his earnings as \$9,589.28. The worker's T4 earnings for 2016 were \$19,712.55.

In comparing the worker's T4 earnings for the years 2014 and 2016 I note there is a significant variance to his earnings for 2015. I recognize the industry the worker works in is construction and that generally there are periods that there is no work. However, I cannot disregard the large variance in his T4 earnings in 2015 in comparison to the other years; this leads me to accept that using the T4 for 2015 does not accurately depict the worker's earnings for purposes of determining his LOE benefit rate.

- Attached to the worker representative's submission dated April 25, 2017 are the worker's pay slips starting from May 28, 2014 to the pay period ending May 31, 2016 (the day before the date of the work accident).

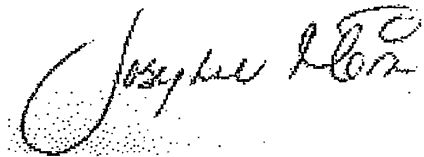
In conclusion, I concur with the worker representative's argument that the worker's gross T4 earnings for 2015 were extremely "irregular" and in the interest of fairness these earnings should not be used to determine the worker's LOE benefit rate. I am persuaded to accept the worker representative's alternative argument that the worker's LOE benefit rate should be determined by using the earnings information (such as pay slips) from June 1, 2015 to May 31, 2016 as this would provide a more accurate reflection of the worker's earnings.

CONCLUSION

The worker's LOE benefit rate should be determined by using earnings from June 1, 2015 to May 31, 2016.

The worker's objection is allowed.

DATED: June 14, 2017

A handwritten signature in cursive script, appearing to read "Joseph Morin". The signature is written in black ink on a white background.

Mrs. J. Morin
Appeals Resolution Officer
Appeals Services Division