As of October 24, 2011, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2005-01235-RB
WCAT Decision Date: March 11, 2005
Panel: Randy Lane, Vice Chair

Introduction

The worker suffered a back injury in 1993. A claim was accepted by the Workers' Compensation Board (Board).

By decision of February 12, 2003 the Board advised the worker that he was not entitled to retroactive vocational rehabilitation benefits for the period from April 3, 2001 to July 25, 2002. That decision was appealed to the Workers' Compensation Review Board (Review Board), and the appeal was transferred to the Workers' Compensation Appeal Tribunal (WCAT).

By decision of November 24, 2003 a review officer in the Board's Review Division confirmed the Board's decisions of April 11, 2003, May 12, 2003, and May 13, 2003. He found that the worker should not be reimbursed for transportation costs (April 11, 2003), the Board appropriately terminated vocational rehabilitation benefits effective April 11, 2003 (May 12, 2003), and an overpayment of vocational rehabilitation benefits paid after April 11, 2003 was properly declared (May 13, 2003). Those aspects of the November 24, 2003 decision regarding the decisions of April 11, 2003 and May 13, 2003 were appealed to WCAT.

The worker is represented by Mr. Huebner. By letter of July 7, 2004 a WCAT deputy registrar advised Mr. Huebner and the worker that WCAT did not have jurisdiction to hear an appeal from a review officer respecting a matter referred to in section 16 of the *Workers Compensation Act* (Act). The deputy registrar noted that the appeal from the review officer's November 24, 2003 decision would be processed by WCAT. He observed that, as the panel might consider whether WCAT had jurisdiction over the issues addressed by the review officer, the worker and Mr. Heubner might wish to address the jurisdictional issue in submissions.

Mr. Huebner provided submissions dated October 22, 2004 and December 13, 2004. The successor company to the worker's employer was notified of the appeals, but it did not indicate that it wished to participate.

By letter of August 17, 2004 the worker was advised that the appeals would proceed by way of written submissions. That decision does not bind me if I consider that an oral

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hearing is necessary. I consider a fair and thorough decision may be reached on the appeals without holding an oral hearing.

Issue(s)

At issue are (i) whether the worker is entitled to retroactive vocational rehabilitation benefits for the period from April 3, 2001 to July 25, 2002, and (ii) whether the Review Division's decisions regarding transportation expenses and an overpayment are appealable to WCAT, and, if so, whether the worker was properly denied transportation expenses and whether an overpayment was properly declared.

Jurisdiction

The February 12, 2003 decision was appealed to the Review Board. On March 3, 2003, the Review Board and the former Appeal Division of the Board were replaced by WCAT. As that appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

The November 24, 2003 decisions were appealed directly to WCAT.

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the Act). WCAT must make its decision on the merits and justice of the case, but, in so doing, it 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, law, and discretion arising or required to be determined in an appeal before it (section 254).

These appeals are 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 history of the worker's claim is complicated. I do not need to document in detail the events in the first several years after the worker suffered his injury. I will focus on the more recent events.

At the outset of the claim, the worker was paid benefits as follows:

- temporary disability benefits from January 29, 1993 to January 2, 1994;
- vocational rehabilitation benefits from January 3, 1994 to March 13, 1994;

- temporary disability benefits from March 14, 1994 to April 28, 1996; and

- vocational rehabilitation benefits from April 29, 1996 to July 28, 1996.

In November 1994 the worker underwent a bilateral L5-S1 discectomy and a three-level fusion from L4 to S2. By decision of November 22, 1995 the worker was advised that his coccygeal pain was not accepted as being due to his injury or its sequelae. By decision of April 11, 1996 the worker was advised that complaints in his left hip and left knee were not due to his injury or its sequelae. The worker underwent non-compensable left knee surgery in May 1996.

In an April 23, 1999 finding the Review Board allowed, in part, the worker's appeal from the April 11, 1996 decision. While it determined that the worker's left knee symptoms were not compensable, it found that his left hip problems were compensable. It allowed the worker's appeal from an April 22, 1997 pension decision. It increased the percentage of disability (from 8.0% of total disability to 12.0% of total disability), and it concluded that the three jobs used in determining that the worker was not eligible for a loss-of-earnings pension (dental mechanic, lens technician, and counter sales in photography) were not suitable. It made the following determinations of note:

> The decision letter states that the worker could access all these jobs "with a concentrated job search", but the panel's research with respect to the dental and optical jobs does not confirm that. For the optical jobs a training course is a pre-requisite, for dental technicians a training course is a pre-requisite, and for dental laboratory workers up to two years training-on-the-job is necessary. The worker did not even get a letter from the Board offering a TOJ to prospective employers.…
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> The panel therefore concludes that none of the deemed jobs were reasonably available to the worker and we instruct the Board to:
>
> 1. either provide the worker with suitable training and support to access a job which will replace his pre-injury earnings, retroactive to the date his rehabilitation benefits were terminated, or
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> 2. deem the worker fit to perform suitable and reasonably available work and pay his pension on a loss of earnings basis.

(In its February 8, 2000 decision a panel of the Appeal Division denied the worker's appeal from the Review Board's finding that the worker's left knee symptoms were not compensable.)

Following the April 23, 1999 Review Board finding, the Board paid the worker the following benefits:

- vocational rehabilitation benefits from April 26, 1999 to March 23, 2001.

A June 5, 2000 memorandum of the vocational rehabilitation consultant (VRC) documented that at a meeting with the worker, the worker "noted that he could sit for about 20 minutes in a chair before he has to shift around or stand up for a short period of time." At the meeting, the worker shifted from one side of the chair to the other and then eventually did stand up. The worker estimated that he could walk several miles provided he could take short breaks to rest. He reported an increase in pain after 20 minutes of walking. Standing activities such as dishwashing were limited to ten minutes. He was able to drive for approximately 20 to 30 minutes before he needed to stop the car and walk around for several minutes.

A July 24, 2000 functional capacity evaluation report documented that the worker demonstrated a sitting physical tolerance of 20 to 30 minutes at a time in a chair with a back and arm support. The worker drove for 50 minutes on the morning of the evaluation, and that increased his back pain. The worker's static standing tolerance was 20 to 30 minutes at a time, and his dynamic standing tolerance was approximately one hour at a time. His walking tolerance was approximately 20 minutes at a time. He reported that he used his forearm cane/crutch when walking outdoors. He expressed concern about his left hip giving way.

A September 11, 2000 letter from the VRC discussed the terms of the worker's job search. The VRC indicated that the worker's search area would include any and all companies within a one-hour commute from his house. He noted that while it was hoped that suitable employment could be secured closer to home, any suitable position within reasonable commuting distance would be considered. The VRC indicated it was understood that the worker shared a car with his spouse and used the bus for transportation. He was asked to adjust his job search activities to maximize his use of both modes of transportation to cover the targeted areas.

At a September 14, 2000 meeting with Ms. A, a third party vocational rehabilitation provider, the worker expressed concern with his mobility and stated that he required a position "no further than twenty minutes away by car." The worker indicated that he did not have a vehicle and had to rely on public transit and that he needed to get out of a vehicle and rest and move after a short period of time.

At an October 26, 2000 meeting with Ms. A the worker stated that she was only to search for positions that were within 20 kilometres from his residence.

In a November 14, 2000 memorandum the VRC noted that expansion of the search for jobs would have to be with regards to jobs that were physically suitable and as close to home as possible.

At a November 9, 2000 meeting with Ms. A the worker reported that he "was able to stand and sit for twenty minutes 'or I need to take painkillers.'"

Memoranda from January 2001 document that the worker was placed under video surveillance in December 2000 and January 2001.

In a January 17, 2001 memorandum the VRC commented that during surveillance the worker was seen walking normally without his cane on a number of days and that conflicted with the manner in which the worker had presented himself to employers and in compensation-related meetings. The VRC noted that, in interviews, the worker used his cane and walked slowly with a limp. In meetings with Ms. A the worker walked very slowly using a cane, and in meetings at the Board the worker used a cane, walked slowly, and limped. The surveillance revealed that the worker had a consistent ability to walk without his cane, at a normal or fast walking speed, for at least 600 to 800 metres. There was no sign of a limp or altered gait and no pain/grimacing behaviour. Surveillance indicated that, on one day, the worker walked to a school and back without his cane and walked normally. Later, that same day, he attended a meeting using his cane, walking slowly, and with a limp. The next day he walked to the school and back in the morning, and in the afternoon without a cane. He walked normally. He was seen walking at a mall without a cane and did not demonstrate a limp when he entered his van.

The VRC commented that the surveillance seemed to indicate that the cane was not essential for ambulating and that the worker felt secure enough that he was not going to fall. The VRC considered that while the worker might not be able to walk long distances, he demonstrated a reasonable ambulating speed without a cane. In his second memorandum of January 17, 2001, in which he sought assistance from a medical advisor, the VRC observed that at the functional capacity evaluation the worker reported using a cane/crutch on his left arm because his left hip occasionally "goes dead" and he had fallen in the past. He indicated that the worker walked with a distinct limp and moved quite slowly when using a cane.

The medical advisor's January 19, 2001 memorandum noted occasions, captured on the video surveillance tape, when the worker was running, walking, brisk walking, fast walking, and limping with a cane. The walking also included walking in the rain while using an umbrella, not using a cane, and showing no appearance of a limp. The medical advisor said that the worker's use of a cane and leaning over to one side reported at job interviews and other meetings was not in keeping with what the worker was seen to be doing during surveillance. He considered that the worker's walking ability during surveillance demonstrated that he had more ability than he

demonstrated at the functional capacity evaluation. He considered that the functional capacity evaluation results were not valid, as the worker was not showing what he could actually do.

A January 22, 2001 memorandum by the VRC documented that the worker was shown the videotape on January 18, 2001. The worker was reported to have advised that he normally used his cane while walking his children to school approximately 50% of the time, his doctor had told him to use the cane as a preventative measure as his left hip occasionally went dead, and he had fallen in the past. Mr. Huebner suggested that perhaps the surveillance team had just not taped the worker on days when he was using the cane. The worker could not verify whether neighbours had seen him using his cane while walking his children to school. The VRC commented that the surveillance demonstrated no limp, no restriction in movement, and no preventative measures taken for potential falls: the worker's hands were often in his coat pockets when he walked at a normal speed. It was considered that the worker had misrepresented his physical disability and functional ability to the detriment of the job search. It was considered that those circumstances brought the worker's credibility into question, as the worker and his representative had both indicated in almost every meeting that the worker was very motivated to return to work and was doing all that he could.

The January 22, 2001 memorandum concluded with the comment that a final decision regarding vocational rehabilitation activities would be made in the following week. Vocational rehabilitation benefits continued, and were paid until March 23, 2001.

By decision of February 22, 2001, the worker was advised of the results of an employability assessment and that vocational rehabilitation benefits would cease as of March 23, 2001 owing to the fact that his vocational rehabilitation benefits would be adjusted to take into account his loss of earnings, as calculated by an employability assessment, and his already existing functional pension of 12.0% of total disability. A second decision of that date indicated that if the worker found a full-time, permanent position that was suitable, the Board would provide support for a training-on-the-job opportunity. Support would not exceed that which would have been provided for the optical technician position.

In his March 22, 2001 letter Mr. Huebner addressed an employability assessment produced by the Board. He also commented on the worker's use of his cane. He indicated that the Board had told the worker to always use his cane, so the worker did so when he met with the Board. Mr. Huebner indicated that, at their first meeting, the worker advised the vocational rehabilitation consultant that the cane was not always used. Mr. Huebner commented that the cane was often used, and at other times it was not, depending on the worker's physical situation on any given day. He commented that the worker's walking of his children to school involved a one-block round trip and took only a few minutes. He indicated that the worker stated he used his cane 50% of

the time, not 50% of the time he walked his children to school. He commented that all but a few minutes were edited out of the 1.5 hours of filming at a mall and that the worker stopped and rested regularly. He noted that the worker walked to a meeting at the library for an appointment with Ms. A, and it took him 1.5 hours to walk two miles.

His wife picked him up after the meeting. Mr. Huebner questioned what impression would an employer have of the worker's honesty, if the worker presented himself to an employer without using the cane and then had to use it on a given day.

By decision of April 3, 2001 the worker was advised that he had been awarded a loss-of-earnings pension effective April 29, 1996. He could not return to his pre-injury employment, but in the long term he was capable of working as an optical technician. He would not be able to equal his pre-injury earnings level.

A June 21, 2001 decision noted that the Board had initially pursued option #1 identified by the Review Board in its April 23, 1999 finding, but option #2 had to be undertaken because the Board's efforts were thwarted when the worker chose not to avail himself of on-the-job training and support. Had the Board been able to complete the process of assisting the worker into the labour market, support retroactive to the date his rehabilitation benefits were terminated would have been considered. The Board was "forced to undertake a deeming Employability Assessment." The worker was advised that as the Board's only option was option #2 set out by the Review Board, there was no requirement to pay retroactive vocational rehabilitation benefits.

In its July 25, 2002 findings the Review Board allowed the worker's appeals from the decisions of February 22, 2001, April 3, 2001, and June 21, 2001. In particular, the panel determined as follows:

> I allow the appeal from the April 3, 2001 decision and find that the decision to deem earnings in the employment as an optical technician was contrary to the previous Review Board findings of April 23, 1999. ...the prior panel concluded that work in the optical field, including that as a technician, required a more formal approach to training and that without such upgrading such work was not reasonably available to [the worker] in the long term. As such, I find that the current suggestion that training on the job would provide [the worker] with the ability to access such employment in fact contradicts the findings of the previous Review Board. My finding, therefore, is that the loss of earnings aspect of the April 3, 2001 decision is in error as it was inappropriate to deem earnings in the optical technician field without first providing the upgrading referred to by the previous Review Board panel. In turn, the direction of the prior Review Board panel remains valid. I find that the Board has two options the first being to provide [the worker] with a loss of earnings pension based on potential employment given his current skill and disability or to

> provide additional training to him in an attempt to reduce his current impairment of earning capacity.
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> I also allow the appeal from the June 21, 2001 decision. Mr. Huebner is quite correct to note that the prior Review Board panel allowed only two options. Specifically, I agree that the Review Board directed the Board to provide retroactive rehabilitation in the event that further rehabilitation was offered. The only other option was to simply deem earnings and calculate any loss of earnings that existed. The Board did provide [the worker] with further assistance, and although they ultimately did deem earnings the fact remains that the Board chose to implement the first suggested approach outlined by the prior Review Board panel. As such, and because further rehabilitation was provided, the appropriate implementation of the prior Review Board panel finding must include the provision of retroactive entitlement to vocational rehabilitation allowances. The Board should also consider whether this is an appropriate case in which to provide interest on that retroactive entitlement, as this does appear to involve "a blatant Board error" as contemplated by Article 50.00 of the Manual.
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> [reproduced as written, save for changes noted]

By letter of August 19, 2002 Mr. Heubner asked the Review Board for clarification of the July 25, 2002 Review Board findings on the issue of entitlement to vocational rehabilitation benefits after April 3, 2001.

In his September 11, 2002 letter the Review Board registrar advised Mr. Heubner that he had reviewed the July 25, 2002 findings with the Review Board panel who, in turn, advised that it was his finding that the Board must either provide a loss-of-earnings pension based on the worker's current skills and disability or it must provide additional vocational rehabilitation benefits. The panel did not find entitlement to retroactive vocational rehabilitation benefits. The registrar noted that the panel advised that "the earlier Review Board decision is not relevant to this issue…." He considered that the issue of retroactive vocational rehabilitation benefits would not have been within the jurisdiction of the panel. He indicated that the Board had not addressed the issue.

Following the second Review Board findings, the Board paid the worker the following benefits:

- vocational rehabilitation benefits from July 29, 1996 to April 25, 1999;
- vocational rehabilitation benefits from March 24, 2001 to April 3, 2001; and
- vocational rehabilitation benefits from July 25, 2002 to April 20, 2003.

The Board arranged for Mr. B, a third party rehabilitation provider, to provide job placement services.

In his February 12, 2003 claim log entry, Dr. L, a Board medical advisor, indicated that he had reviewed the video surveillance tapes in order to gauge some of the worker's abilities. His list of medical restrictions does not indicate that the worker had any sitting restrictions. He noted that the worker was precluded from standing "for long periods of time."

The Board's February 12, 2003 decision denied a request that the worker be paid retroactive vocational rehabilitation benefits for the period April 3, 2001 to July 25, 2002. The VRC noted the July 25, 2002 Review Board findings. She indicated that the worker had been referred for a psycho-educational, aptitudes, vocational and personality assessment; the results indicated that he would learn best in a setting where he could learn by experience, not through books or lectures. Based on the results of the assessment, the Board proceeded with a referral to a direct placement service provider who was assisting the worker in finding employment based on his current skill set.

The VRC noted that the worker had been paid vocational rehabilitation benefits for the period between July 29, 1996 and April 25, 1999. She advised that the worker had been appropriately compensated for any retroactive vocational rehabilitation benefits to which he was entitled under the Review Board findings of April 23, 1999 and July 25, 2002.

The VRC referred to policy at item #88.30 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) which provided that job search assistance may be provided to workers who require help in securing appropriate employment, and at item #85.30 which indicated that the guiding principles of quality vocational rehabilitation included that workers be motivated to take an active interest and initiative in their own rehabilitation, vocational programs and services should be offered and sustained in direct response to the commitment and determination of workers to re-establish themselves, and vocational rehabilitation is a collaborative process which requires the involvement and commitment of all concerned participants.

The VRC noted that the worker brought up the issue of whether there were medical restrictions limiting his ability to commute. She noted that a team meeting regarding concerns about commuting to look for employment or to return to work was held on February 10, 2003 and it was concluded that there were no medical restrictions precluding him from travelling to and from work or looking for employment. The worker was advised that it was his responsibility to actively participate in all aspects of job search activities. He was required to be an active participant in both identifying appropriate employment targets and in actively pursuing work to maintain eligibility

to vocational rehabilitation allowances. This was to include commuting to and from appropriate employment targets for research and potential employment purposes.

The VRC's February 13, 2003 claim log entry documents that she advised Mr. B that the worker had a car and "He is not restricted from using public transit."

The worker provided the Board with a February 17, 2003 letter from Dr. Toews, his physician, who observed that the worker was involved in a job search and was restricted to using public transportation. Dr. Toews commented that because of the worker's severe back and hip pain "it is almost impossible for him to travel more than 20 minutes from his home." He recommended that the worker look for work which could be accessed by travelling 20 minutes or less.

The worker's accompanying February 23, 2003 letter indicated that Dr. Toews's letter confirmed his inability to undertake a commute for more than 20 minutes at a time. He stated that that inability had been previously confirmed by the Board when it changed the location of his physiotherapy. He also asserted that the inability to undertake a long commute was "confirmed to me by [the VRC] at our first meeting." He also indicated that his ability to stand and sit was fully outlined in the functional capacity evaluation report.

A February 26, 2003 report from Mr. B indicated that a work assessment had been located with X Inc. involving light duty packaging with no lifting and bending.

The VRC's March 3, 2003 claim log entry documented that the worker advised her that he had only attended work for two hours the previous week and that he had to travel 2.5 hours to and from work and that caused too much discomfort. Her claim log entry included the following information:

> -He insisted he can only travel for 20 minutes, because sitting for a longer period causes discomfort. It irritates his back. Standing is worse. The lurching on the bus during rush hour makes it "hopeless" for him to travel.
> -His suggestion was to find work that is within 20 minutes from his residence.
> -He said he tried really hard to cope with the new job, but the travelling beats him, causes nausea and pain. The nausea he said was not from having motion sickness but as a result of the pain. He has to get off the bus when he feels nauseated and then catch a later bus. By the time he gets to work," he feels spent."
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> -the new employer is 19.68 km (49 minutes) via Barnett Highway or 25.49km (34 minutes) via highway 1.

> -He said the job in itself is suitable as there is nothing to it. It is well within his capacities. It is a simple job.
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> -I suggested he use the family car to go to work but declined as his wife needs the car to go to work. I suggested he consider driving her to work in the morning and then driving himself to work. He declined saying it is his wife's car; she needs it as she is on call from time to time; and furthermore, if he drove her in the morning how would she get back home. There is public transit available. Still he said using the car is not an option. Vocational Rehabilitation Consultant suggested this is a choice he and his wife are free to make. Transportation is an issue he is responsible for. When asked how he copes when he goes on family trips, he stated he gets out of the car from time to time as he cannot make long journeys.
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> -He stated the pain in his low back and in both hips is aggravated when he travels for more than 20 minutes.
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> -Vocational Rehabilitation Consultant advised worker I tried to contact his doctor to discuss the matter, however we have been unable to discuss the issue yet. As it stands there is no evidence on file which limits the worker to 20 minutes of travel to work.
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> [reproduced as written]

In her second March 3, 2003 claim log entry the VRC documented her conversation with Dr. Toews who stated that he took the worker at his word. She advised him of Dr. L's comments as to the worker's limitations. Dr. Toews indicated that there were no new objective medical findings. Dr. Toews suggested that the Board place the worker under surveillance, and he was surprised when the VRC advised him that the Board had placed the worker under surveillance.

The VRC's March 3, 2003 claim log entry documented that she spoke to the worker. The entry indicated as follows regarding transportation:

> … I advised him of above discussion with dr. Toews.
> -Transportation issues are the worker's responsibility to deal with. He can car pool, or travel by bus and ski train, or contact Handy Dart and request their assistance, or use the family car, travel with a co-worker ....it is up to him to choose. He insisted he cannot travel more than 20 minutes. Vocational Rehabilitation Consultant advised the medical restrictions are noted on file and these do not preclude the worker from travelling to and from work.
> -When [Mr. B] confirmed when he drove the worker to work on the first day, the only reason it took about 40 minutes was because they had

> to pick up [an assistant with Mr. B] in New West. It did not take over one hour to get to work as the worker had stated to me earlier.
> -Vocational Rehabilitation Consultant advised the worker he has 2 options: to attend work tomorrow or not to go to work. If he chooses to attend work, he should contact [Mr. B], and we will continue with the graduated return to work to help him make the transition back to work. If he chooses not to return to work he needs to advise me as there will be no further Vocational Rehabilitation Services and his benefits will cease. I informed him of the new claims review under the new legislation.
> -the worker stated he would call back tomorrow.
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> [reproduced as written, save for change noted]

A March 12, 2003 claim log entry documented the results of the nurse advisor's ergonomic assessment of the job site. Her assessment included equipment suggestions and recommendations to the worker that he take rest breaks and change positions frequently.

A March 13, 2003 claim log entry documented the advice of Mr. B's assistant that the worker had not attended work the day before. A March 17, 2003 claim log entry documented the advice of the assistant that the worker had not attended work the day before and that a table and chair were required to accommodate the worker. A March 18, 2003 claim log entry documented the advice of the assistant that the worker complained of a lot of pain and wanted to delay returning to work until accommodations were completed. A March 19, 2003 claim log entry documented that Mr. B had located a carpenter who could build a table for the worker. A March 19, 2003 claim log entry documented that an ergonomic chair, footstool, and floor mat were to be delivered to the worksite on March 21, 2003.

In his March 27, 2003 letter Dr. Toews noted that he had been advised the worker's activities had been videotaped and that the Board did not consider the worker was as disabled as he portrayed himself. Dr. Toews observed that he was unable to comment on the observations of others who had seen the video surveillance film. He restated his opinion that the worker was disabled and restricted in his ability to travel for more than 20 minutes at a time. He observed that while the worker may not appear to be restricted by his disability when observed for very short periods of time, the worker would be unable to sustain any activity for any significant length of time.

Dr. Toews noted that the Board changed the location for the worker's physiotherapy treatments because of the travel distance, and he agreed that it was correct to do so out of consideration for the pain that the worker was experiencing after travelling for more than 15 or 20 minutes. He commented that he had observed the worker in his waiting-room being unable to remain in any position for very long. The worker always sat in a very awkward position with one leg stretched out and his back flexed

to one side. This had been his constant clinical observation since 1993; the worker's presentation had never changed significantly.

An April 2, 2003 claim log entry documented that Mr. B advised the VRC that X Inc. was pleased with the worker's performance and attitude. The worker would be on the payroll as of April 10, 2003. The worker was only attending work three to four hours per day, starting at 10:00 a.m. He claimed that he could not work more than that because the pain was too great. He said he was "sore as heck." The worker continued to travel to work by bus. Mr. B advised that he commented to the worker that X Inc. was flexible with the starting time, and that he asked the worker why did he not drop off his wife at work and then drive to his workplace. The worker was reported to have said that would be too much driving. The worker was reported to want his chair adjusted six to eight inches higher. Otherwise, all accommodations were fine.

In his April 5, 2003 letter Mr. Huebner noted that the employment opportunity at X Inc. required the worker to travel to and from the workplace location. He considered that the worker had been advised that if he did not attend, his vocational rehabilitation benefits would be terminated. He submitted that the worker required the benefits, so he had been taking a taxi to and from the workplace location and would be submitting taxi receipts for reimbursement.

A claim log of April 7, 2003 indicates that the worker advised a vocational rehabilitation consultant on that day that he had attended work on the following dates: February 25 and 26, March 4, 6, 10, 12, 20, 21, 24, 26, 31, and April 2, 2003. The worker advised that he was working between two and three hours a day and he travelled by taxi to and from work, as that was the only way he could tolerate the travel.

The nurse advisor's claim log entry of April 8, 2003 noted that she attended the job site. All of the recommended adjustments and equipment had been done or were in place. The worker was pleased with the changes. She had spoken to the worker about a return-to-work plan to increase his hours to eight hours a day, five days a week. The worker advised her that he was only working two to three hours a day, two to three times a week and that he was in too much pain to work any more than that. The nurse advisor advised the worker that the medical restrictions did not include reduced hours. She produced a formal graduated return-to-work plan.

By letter of April 9, 2003 Mr. Huebner submitted 15 taxi receipts, totalling $535.60, for reimbursement. The receipts were accompanied the worker's list of the dates that he worked at X Inc., which included the days listed above and April 4 and 8, 2003. The worker indicated that on the days for which he did not have receipts, he obtained a ride with someone else.

In his April 10, 2003 report, Mr. B outlined the commencement of the worker's work assessment on February 25, 2003. He noted that on March 6, 2003 the worker indicated that he found it difficult to travel every day to the workplace. On March 18, 2003 the worker advised that he was finding it very difficult to work with the existing workstation, and it had resulted in an increase in his pain. As of March 21, 2003 the materials secured by the Board were in place. Mr. B noted that the worker would be on the company payroll starting April 7, 2003. During the first week, he would alternate three and four-hour shifts during the five-day work-week. The schedule would increase, with the expectation that the worker would work eight hours per shift as of the seventh week.

An April 11, 2003 claim log entry documented that the worker would be employed on a supernumerary basis until April 18, 2003. The worker would be on the employer's payroll. As of April 24, 2003, the Board would pay a top-up on the worker's earnings.

By decision of April 11, 2003 the VRC denied the worker's request for reimbursement of taxi receipts. The VRC considered that public transportation was available. She indicated that the worker was expected to attend his graduated-return-to-work program, which would conclude on May 22, 2003. She cited item #85.30(2) of the RSCM I, regarding workers being motivated to take an active interest and initiative in their own rehabilitation and which provided that vocational programs and services should, therefore, be offered and sustained in direct response to the commitment and determination of workers to re-establish themselves. She concluded as follows:

> This means vocational rehabilitation assistance should only be offered if an individual actively participates in activities which would return him/her to the work force. If you choose not to continue or complete the graduated return to work program your benefits will be discontinued.

A May 1, 2003 claim log entry documented that the nurse advisor left a message for the worker asking him to contact her regarding his progress on his graduated return to work. The nurse advisor's May 2, 2003 claim log entry noted that the worker left a message for her advising that he was not able to attend the work site owing to the long commute: "it is just too much." The worker advised that the adjustments to the table and the chair were not sufficient for him to stay longer than a few hours. He ended the message by stating that the commute was the big problem.

The VRC's May 2, 2003 claim log entry noted that she was advised by the worker that he was unable to continue with the commute as it was far beyond his tolerance. He did not call the training-on-the-job employer because he did not know what would happen next, and he felt that there was no point. The VRC indicated that she told the worker that the job was suitable and that there were no restrictions on file limiting the worker to travel of less than 20 minutes. Further, she indicated that, as the worker chose to discontinue the training-on-the-job program, vocational rehabilitation services

were concluded and "no benefits will be paid beyond April 11, 2003." She noted that the worker did not call the nurse advisor or the VRC to advise that he was no longer working and that the Board only learned of the circumstances when the VRC asked the nurse advisor to follow up with the worker.

A May 2, 2003 claim log entry of a client services manager documented Mr. Huebner's advice that the bus ride was too strenuous for the worker.

By letter of May 12, 2003 the worker was advised that, further to a telephone conversation of May 2, 2003 and the April 11, 2003 decision, his vocational rehabilitation benefits had been discontinued, as he had chosen not to continue or complete the graduated return to work.

By decision of May 13, 2003 the worker was advised that an administrative overpayment in the amount of $439.41 had been declared on the claim, on the basis that on April 22, 2003 the worker was paid vocational rehabilitation benefits for the period from April 7, 2003 to April 20, 2003, even though the worker's last day of participation in the work assessment was April 11, 2003. The worker was advised that he had been overpaid with respect to benefits for the period April 14, 2003 to April 20, 2003.

In his November 10, 2003 submission to the Review Division Mr. Huebner indicated that the worker was unable to sustain the commute and was unable to perform the packing tasks for more than two hours a day, following the lengthy commute. Mr. Huebner submitted that the worker had to make a choice. If he did not attend, his benefits would be terminated, notwithstanding the medical evidence that he could not commute. The worker chose to pay a taxi to allow him to continue to attend, even for the few hours that he could. He was then told he would start to be paid for the hours he worked with some top-up. The worker could not justify the financial cost of the taxi to show his good faith. Mr. Huebner submitted that it appeared the Board was setting the worker up to fail, knowing he could not handle the commute. Mr. Huebner contended no mention was made to the worker of his being able to stay no longer than two hours.

Mr. Huebner submitted that there was no medical evidence to contradict the worker's medical evidence establishing his inability to commute. He submitted the worker was not suffering from a minor subjective complaint. He contended that, based on the worker working no more than two hours per day, the worker would have failed in the trial employment in any event. He contended the worker could not keep attending the work site to protect and preserve his benefits. He submitted that the video surveillance tape was viewed in 2001 in the presence of a VRC and his manager. The worker explained that the walk to school was about three minutes and that he did not pace himself. There was no film of him walking home. He indicated that the worker left the meeting at the library with his cane because he had walked for a good part of the trip to the meeting. He contended that the Board officers "accepted this, after the benefit of

his explanation and answers to their questions." Benefits were not altered or reduced because the Board was satisfied. He contended that the tape had been discredited for its intended purpose, which was to discredit the worker. He submitted that what the VRC in 2003 had done was, in effect, a readjudication without following the proper procedure.

Mr. Huebner contended that the commute was not appropriate for the worker medically, and that taxi fares were reasonably incurred and should be reimbursed. He considered that the Board should have had daily monitoring regarding the worker's attendance at the work assessment and that what was involved was an adjudication error, rather than an administrative error.

The submission is accompanied by the worker's document entitled "Transportation Facts." Concerning transportation by bus, he indicated that he tried on three non-consecutive days to take the bus and that his back was very painful for four to five days after each attempt. The trip involved three different buses to get to the destination, plus a ten-minute walk uphill from the bus stop. He had to get off the bus twice each trip, because the trip was too long and painful for his back. He noted that the VRC said he had an option to sit and stand on the bus. Bus drivers had told him it was not legal to stand unless all seats were occupied. He could not stand and ride anyway, because the constant jerking and motion from the bus starting and stopping would be too painful for his back. Regarding use of a Handi-Dart bus, pick-up was for appointments only, and it was not a means of transportation to and from work. Use of the Handi-Dart bus would make for a much longer trip, as pick-ups are made all over town. There is no option to get off and walk around as required, and no guarantee as to what time one arrives at the destination. He contended that car pooling was not an option, as who would provide the option of making stops along the route for him to get out and walk around.

Regarding use of the family car, the worker said that his wife needed the car to get to work before 6:00 a.m. and that public transportation was not available. Her income supported the family, and she could not give up her job that she had performed for more than nine years and which paid $21.00 per hour, plus benefits. He could not drive her to work first, and then drive himself to work, as this would more than double his time of travel and worsen his back pain even more. He indicated that it was not recommended or safe for him to drive after taking painkillers.

The worker's document described in detail his transportation by bus. He indicated that he left home at 8:15 a.m. and arrived at work shortly before 10:00 a.m. He was in so much back pain, and feeling so sick, that he could not start working for about half-an-hour. He tried to work as best he could for 1.5 hours, and then made the same trip back home. When he got home, he immediately took more medication and had to lie down for the rest of the day. His back was in a lot of pain for four to five days as a result of the bus ride. His document also described in detail his transportation by taxi.

He would be picked up 9:15 a.m. and would arrive at work before 10:00 a.m. Approximately 20 minutes into the trip, he would make a ten-minute stop to get out of the taxi and walk around to relieve his back pain. The taxi meter would still be running. He indicated that, on most days, by the time he reached his destination, he would need to take medication. Shortly after, he would feel drowsy and be in pain and find it very hard to focus on any work task. After tolerating as much time as he was able at work, approximately two hours, he returned home and would be in much worse pain because of the pain he was in at the start of the journey. Some days he had to break up the taxi trip home twice. Upon arriving home, he would immediately take more medication and have to lie down.

In his November 24, 2003 decision the review officer determined that the weight of evidence did not establish "any restrictions with respect to commute times." He noted Dr. Toews's February 17, 2003 letter, the results of the functional capacity evaluation, and Dr. L's February 12, 2003 claim log entry. He indicated that he accepted the results of the functional capacity evaluation and Dr. L's medical opinion as to the worker's medical restrictions. In particular, he commented as follows:

> … The medical evidence indicates that the worker's stabilized condition has not changed since the functional capacity evaluation. Therefore, I find the workers abilities and restrictions identified in the July 2000 functional capacity evaluation still valid. …
>
> I accept that after 20 or 30 minutes of prolonged sitting or standing, the worker experiences discomfort. However, there is no reason why the worker's body position throughout his commute to work needs to be static. If the worker is commuting to work on public transit, the option to alter his body position by sitting or standing exists. Further, if the worker were to commute to work by driving his vehicle, which is an option open to him, there is no reason why he cannot break up the commute by pulling over and getting out of his vehicle if he starts to experience discomfort. I note that in the VRC's March 3, 2003 log entry documenting her conversation with the worker regarding travel times, the worker informed the VRC that he does get out of the car from time to time during long journeys. The worker could apply the same strategy in managing his commute to work. …
>
> In this case, the VRC did not approve transportation expenses because she found that the worker was not medically precluded from commuting to the TOJ Employer. She found that it was the worker's responsibility to arrange for travel to and from work. I agree with the VRC's decision. Considering policy item #40.12, I find that the TOJ Employer "is within a reasonable commuting distance of the worker's home" and that travel by bus or using his personal vehicle is a reasonable means of transportation

> for the worker, given his functional capabilities and restrictions. The flexibility provided by those means of transportation does not preclude the worker from travel times greater than 20 minutes. Further, since the worker's residence is within 24 kilometres of the TOJ Employer, the worker would not normally be entitled to transportation cost, pursuant to policy item #82.10. As a result, I deny the worker's request on this issue.
>
> [reproduced as written]

The review officer confirmed the overpayment decision. His analysis of the issue was as follows:

> As I indicated earlier, the VRC advised the worker in her February 12, 2003 letter as well as in her March 3, 2003 telephone conversation that vocational rehabilitation benefits would cease if he chose not to continue with his graduated return to work. The VRC's April 11, 2003 letter also advised the worker that "If you choose not to continue or complete the graduated return to work program your benefits will be discontinued". The worker stated that he would call back the next day; however, the evidence indicates that the worker did not call the VRC back to advise that he had decided to discontinue with his graduated return to work. The Board did not discover that the worker had discontinued participation until after vocational rehabilitation benefits to April 20, 2003 were provided to the worker.
>
> I disagree with the worker's representative that it is the Board's responsibility to conduct daily monitoring of the worker's TOJ. I reiterate policy item #87.10 and guiding principle #2 of policy item #85.30, which provides that successful vocational rehabilitation requires that workers be motivated to take an active interest and initiative in their own rehabilitation. It is the Board's responsibility to assess the worker's needs and provide appropriate levels of rehabilitation assistance. It is not the Board's responsibility to conduct daily monitoring of the worker's efforts. The Board provides vocational rehabilitation benefits under the premise that the worker is motivated and taking an active interest in his rehabilitation.
>
> The worker was advised to contact the Board if he decided to discontinue participation and was well aware that the Board would conclude benefits if he chose to do so. Had the worker informed the Board that he discontinued participation as the VRC had asked the worker to do, the Board would have concluded benefits effective April 11, 2003. Therefore, I find that the overpayment was not the result of a decisional error, a

> decision regarding entitlement which was modified or reversed by a later decision. As a result, I deny the workers' request on this issue.
>
> [reproduced as written]

In his submissions to WCAT Mr. Heubner requests an oral hearing, as he considers that the appeals are centred on the issue of credibility. He contends that the claim file contains video evidence which, if watched without explanation, would almost certainly result in a denial of the appeals. He indicates that the Board accepted the worker's explanation, regarding the circumstances as truthful and continued the worker's benefits for two more years. He contends that to view the evidence, without the worker explaining what was depicted, is to doom him to failure in this appeal. He submits that the worker was unable to continue to attend the workplace because of his inability to sustain the commute from his home. As well as his physical inability to commute, the worker was only able to perform up to two hours of work each day.

Mr. Huebner submits that on the way to X Inc., on the very first visit, the worker and Mr. B were required to stop, so that the worker could get out of the car and walk around because of his inability to sustain sitting for the duration of drive. He submits that as the worker only performed for short periods of time, and at a marginal rate, the worker was aware that he would obviously fail at this endeavour. The worker was desperate to maintain his benefits until, hopefully, the Board recognized his failure at this place and helped him locate a realistic occupation that he was capable of travelling to and performing. He submits that the worker was told to attend this workplace or else his benefits would terminate, even though the previous VRC and his manager "restricted occupations for [the worker] to the Tri-City area where he lives."

Mr. Huebner comments that there was no point in requesting taxi fare, as the worker had been told that the Board was convinced he could commute. Even after the worker arrived by taxi, the fast pace expected, and twisting and other movements required, resulted in his being only able to work no more than two hours per day. The Board paid benefits based in the full knowledge of the short hours worked. Eventually, the worker could no longer afford taxis and this, in conjunction with the effects of the work on his disability, caused him to no longer attend.

Mr. Huebner submits that, with respect to the video surveillance tape, the worker explained what the severely edited tape did not show and "his explanation was accepted as truthful and benefits continued to be paid to him for more than two further years." The Board medical advisor was obviously not told that the tape was previously discredited by the Board. The new VRC accepted what she saw at face value "although Board policy would not allow her to substitute her opinion and readjudicate to terminate benefits." The worker acted reasonably and prudently in utilizing taxis in this case and should be reimbursed. If the tape is viewed without allowing the worker to explain, as he did when he was shown the tape in 2001, the clear conclusion would

be, to any viewer, that he was not disabled from commuting by public transportation. Dr. Toews knows the truth and has stated it twice. Mr. Huebner requests an oral hearing, should the worker's inability to commute be an issue at appeal.

Mr. Huebner has submitted Dr. Toews's June 15, 2004 letter. Dr. Toews comments that he is clearly at a disadvantage and did not have the benefit of being able to follow the worker through his daily activities. He is a family physician, has been in practice for nearly 30 years, and has learned to assess patients based on his evaluation of them in his office. His examination was done honestly and to the best of his ability, based on many years of clinical experience. He comments that the review officer's decision appears to question the worker's credibility and that there is a clear conflict between the Board's opinion that the worker is able to commute and the worker's assertion that he is not. He found the worker's description of his commute to be very enlightening, and he was much more sympathetic to the worker's case after reading that description. Dr. Toews continues to assert that the worker is giving an accurate description of his pain, that he is not exaggerating his complaints, and that he is disabled and unable to fulfill the commuting obligations placed on him with his ultimate employment.

Reasons and Findings

Retroactive Vocational Rehabilitation Benefits

While the Board has not paid benefits continuously to the worker, as can be seen from the benefit-periods noted earlier in this decision, the worker has been paid either temporary disability benefits or vocational rehabilitation benefits for the ten years between January 29, 1993 and February 11, 2003, save for the period between April 3, 2001 and July 25, 2002.

In its February 12, 2003 decision the Board indicated that the worker had been paid for any retroactive vocational rehabilitation benefits to which he was entitled as a result of the Review Board findings of 1999 and 2002. The February 12, 2003 letter contained excerpts from Board policy, among which was the following passage from item # 85.30:

> Successful vocational rehabilitation requires that workers be motivated to take an active interest and initiative in their own rehabilitation. Vocational programs and services should, therefore, be offered and sustained in direct response to the commitment and determination of workers to re-establish themselves.

Mr. Huebner's December 13, 2004 submission to WCAT refers to his letters to the Board of January 12, 2003 and January 17, 2003. In those documents, among other matters, he indicates that if the worker is not paid vocational rehabilitation benefits for the period of time in question, the Board receives a "bonus", "a financial

consolation prize", "a consolation prize", or a "financial benefit" in connection with its error in failing to properly implement the 1999 Review Board findings. He also indicates that non-payment "rewards" the Board and permits it to "financially prosper." Mr. Huebner contends that not paying vocational rehabilitation benefits for the period in question "brings into disrepute" the 1999 Review Board findings, and that it "defies the integrity of the Review Board, and now WCAT, process if a continuum of retroactivity is not awarded". He contends that the "integrity and legal authority of the Review Board mandates such payment given the specific situation of [the worker] and the two Review Board findings."

Mr. Huebner observes that he understands that it is standard practice to commence vocational rehabilitation benefits as of the date of a Review Board finding, if they are mandated. He submits that that was done in the worker's case, but this case is not standard.

Ordering the payment of retroactive vocational rehabilitation benefits is not a question of making the Board disgorge inappropriately retained money. Generally speaking, as indicated in item #85.30 cited by the VRC, vocational rehabilitation benefits are payable where a worker has undertaken vocational rehabilitation activities. (Income continuity benefits, a form of vocational rehabilitation benefits, may be payable even where such activities are not being undertaken.) Thus, the simple fact that an appellate tribunal determines that vocational rehabilitation benefits were inappropriately terminated does not automatically mean that the Board should reinstate vocational rehabilitation benefits as of the date they were terminated. If a worker did not undertake vocational rehabilitation activities after such benefits were terminated, payment of such benefits might not be appropriate.

An illustration of the issues associated with the assessment of eligibility to retroactive entitlement is the analysis found in #*WCAT-2003-01744–RB*, dated July 28, 2003. That decision is located on WCAT's website on the Internet at www.wcat.bc.ca; it is also published in the *Workers' Compensation Reporter* (W.C.R.) at 19 W.C.R. 175. It contains the following discussion of note regarding retroactive vocational rehabilitation:

> In considering whether the worker should be provided with retroactive vocational rehabilitation benefits, I note that a specific policy direction concerning the payment of allowances on a retroactive basis is not present in the RSCM. Prior Review Board and the Appeal Division panels have both found that retroactive vocational rehabilitation benefits can be paid under certain circumstances, consistent with the very broad discretion provided under section 16(1) of the Act. In order to consider payment of retroactive vocational rehabilitation benefits, it has generally been held that a worker must demonstrate active involvement in vocational rehabilitation efforts during the period in question, consistent with the principles of vocational rehabilitation as set out in item #85.30 of

the RSCM. The second and fifth principles have particular relevance to the issue of retroactive vocational rehabilitation benefits:

- Successful vocational rehabilitation requires that workers be motivated to take an active interest and initiative in their own rehabilitation. Vocational programs and services should, therefore, be offered and sustained in direct response to the commitment and determination of workers to re-establish themselves.
- Effective vocational rehabilitation recognizes workers' personal preferences and their accountability for independent vocational choices and outcomes.

I agree with the approach adopted by the prior Review Board and Appeal Division panels, and find that it should be applied to the circumstances of this case.

There are cases where an appellate decision-maker specifies that retroactive benefits are payable. Benefits may also be payable as an indirect result of implementing appellate decisions.

In the case before me, the 1999 Review Board findings determined that if training and support were offered by the Board, training and support should be retroactive. The 2002 Review Board findings determined that because the Board initially embarked on the option of training and support after the 1999 Review Board findings were issued, retroactive benefits were payable. The Board then paid retroactive vocational rehabilitation benefits for the period between July 1996 and April 1999.

In July 2002 the Review Board did not make a finding as to whether the worker should be paid retroactive vocational rehabilitation benefits for the period between April 2001 and July 2002. That absence of a finding is of interest, given that the panel had before it appeals from the February 22, 2001 decision, which advised the worker of the termination of his vocational rehabilitation benefits as of March 23, 2001, and the April 3, 2001 pension decision. The panel overturned both decisions. When it overturned the February 22, 2001 decision, it indicated that vocational rehabilitation benefits were payable without deduction until April 3, 2001. The Review Board registrar's letter was clear that the 2002 Review Board panel did not deal with retroactive vocational rehabilitation benefits.

While Mr. Huebner's January 17, 2003 letter asserts that it was found that the Board was wrong to discontinue vocational rehabilitation benefits as of April 3, 2001, the Review Board did not make such a finding. Benefits were paid starting in July 2002, because the Board again assisted the worker. However, that payment was a result of the Board choosing one of the options set out by the Review Board, rather than the result of a conclusion that the Board was wrong in terminating benefits as of April 2001.

Mr. Huebner notes that the situation after the 2002 Review Board findings parallels the situation after the 1999 Review Board findings, in that the Board had been told a second time that it could not assess eligibility to a loss-of-earnings pension using the optical technician job.

The effect of the 2002 Review Board findings is that, despite the 1999 Review Board findings, the Board sought to determine the worker's entitlement to a loss-of-earnings pension using a job that the 1999 Review Board findings had determined could not be obtained without training. The 2002 Review Board findings determined that it was not open to the Board to determine that the worker could secure employment as an optical technician without providing the upgrading specified by 1999 Review Board findings. The 2002 Review Board findings confirmed that the Board had two options.

That the circumstances surrounding the two Review Board findings are similar, and that retroactive vocational rehabilitation benefits flowed from the first Review Board findings, do not by themselves require that there be retroactivity of vocational rehabilitation benefits after the second Review Board findings. That the 2002 Review Board findings raised the issue of whether the Board's failure to pay retroactive vocational rehabilitation benefits between 1996 and 1999 following the 1999 Review Board findings, in turn, raised the issue of a blatant error does not provide a basis to find that after the 2002 Review Board findings the Board was required to pay retroactive vocational rehabilitation benefits for the April 3, 2001 to July 25, 2002 period.

I do not consider that retroactive vocational rehabilitation benefits for the period from April 2001 to July 2002 are warranted on the basis that somehow the 1999 Review Board findings require their payment. This is so despite Mr. Huebner's assertion that "To ignore payment of Vocational Rehabilitation benefits for the April 3, 2001 to July 25, 2002 period would not only not comply with the 'valid' April 23, 1999 finding…." The 1999 Review Board findings determined that retroactive vocational rehabilitation benefits should be paid if the Board embarked on option #1 set out in that finding. That finding of retroactivity dealt with the period from July 1996 to April 1999. The 1999 finding cannot be taken to apply to a period of time that only later became associated with the issue of retroactivity. The 1999 Review Board findings said nothing about benefits being payable from April 2001 to July 2002.

It is unfortunate that the Board did not properly implement the 1999 Review Board findings. I consider that when the Review Board panel indicated in its 2002 Review Board findings that the direction of the 1999 panel remained valid, it was referring to the Board having two options: the Board could employ deeming with a view to the worker's current skills and disability, or it could provide the worker with retraining. I do not consider that the 2002 Review Board panel was saying that if the Board offered further assistance that such assistance would have to be retroactive to 2001.

Mr. Huebner's January 12 and 17, 2003 letters to the Board do not assert that the worker undertook any rehabilitation activities between April 2001 and July 2002. His submission to WCAT also makes no such claim.

In reviewing this issue of retroactive vocational rehabilitation benefits, I listened to the audiotape of the July 17, 2002 Review Board hearing. Mr. Huebner asked the worker if he thought he was totally unemployable, and the worker responded "No." The Review Board panel asked the worker if he had undertaken job search activities in the prior year. The worked advised that he had searched for work and that he had been "constantly looking at jobs available." He made periodic trips to "job boards" at Unemployment Insurance offices. He "constantly checked" the advertisements in the newspapers. He looked in the "employment newspaper." The worker had secured a job several years earlier as a result of seeking employment via looking in the newspapers.

I find that implementation of the two Review Board findings did not require the Board to pay retroactive vocational rehabilitation benefits for the period between April 3, 2001 and July 25, 2002. I also find that payment of such benefits is not required to accord in some manner with the spirit of the two findings.

However, I find that application of the policy concerning the payment of vocational rehabilitation benefits, and consideration of Appeal Division and WCAT decisions which discuss the payment of retroactive vocational rehabilitation benefits, provides a basis to order the payment of retroactive vocational rehabilitation benefits for the period between April 3, 2001 and July 25, 2002. I appreciate that the worker's job search activities during this period may not have been as intense as job search activities conducted with the assistance of a Board VRC or third party rehabilitation provider. I consider that there is some question as to the appropriateness of applying standard job search criteria to evaluate a worker's performance during a period when he was not assisted by the Board. Workers may not be able to visualize how their skills may be of use to employers in other fields or how to expand job searches, and Board officers are able to provide that assistance. Without that assistance, workers may focus their search inappropriately.

Appealability of the Review Division's Decision on Transportation and the Overpayment

Subsection 239(1) of the Act sets out general provisions concerning the appealability of review officers' decisions to WCAT:

> Subject to subsection (2), a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review under that section, may be appealed to the appeal tribunal.

Subsection 239(2) includes the following restriction as to the appealability to decisions to WCAT:

> The following decisions made by a review officer may not be appealed to the appeal tribunal:
>
> …
> (b) a decision respecting matters referred to in section 16;

As established by the following quotation from subsection 16(1) of the Act, section 16 deals with matters of rehabilitation:

> To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

The restriction on WCAT's jurisdiction found in paragraph 239(2)(b) is the reason that the worker is not able to appeal to WCAT the review officer's decision to terminate vocational rehabilitation benefits effective April 11, 2003. I note that the notice of appeal and submissions do not contest the termination of vocational rehabilitation benefits as of April 11, 2003. The notice of appeal and submissions also do not address whether the decisions concerning transportation costs and the overpayment were appealable to WCAT.

I find that the review officer's decision concerning transportation expenses is appealable to WCAT. Board policy provides that the payment of transportation allowances is a payment pursuant to section 21 of the Act which concerns health care (item #82.00 of the RSCM I). It is true that the issue of transportation costs decided by the review officer was addressed in connection with a return to work/work assessment being pursued by the Board further to its mandate under section 16. One could argue that the issue of transportation reimbursement in that context was a rehabilitation matter. Yet, while the issue arose in connection with a rehabilitation plan, the decision involved an issue that is not inherently a vocational rehabilitation issue. The issue was whether public transportation was a reasonable means of transportation, and I find that issue is a medical issue that does not lose its medical nature when it is addressed by a VRC.

Even if my analysis of this issue is incorrect, I consider that the appeal of the February 12, 2003 decision to WCAT raises a very similar issue. The VRC advised the worker that there were no medical restrictions precluding him from travelling to and from work or looking for employment. That decision is not caught by the provisions of subsection 239(2) of the Act. This is so because the decision was rendered by a VRC,

and was appealed to the Review Board and transferred to WCAT; it was not rendered by a review officer and appealed to WCAT under section 239 of the Act.

I find that the issue of the overpayment is appealable to WCAT. An overpayment declaration concerns matters of administrative errors, fraud, misrepresentation, and a lack of statutory authority (item #48.41 of RSCM I). The overpayment decision was rendered by the VRC, and she made her decision with respect to vocational rehabilitation benefits that had been issued under section 16 the Act. Those circumstances might suggest that the review officer's resulting decision was a decision "respecting matters referred to in section 16." Yet, the matter considered by the VRC and review officer was more of a matter of whether money was owed to the accident fund (item #48.40 of RSCM I). By that, I mean that while vocational rehabilitation benefits were the subject of the decision, the decision concerned the application of a policy that is not part of, or inherent to, vocational rehabilitation matters. Thus, I find that the issue of whether the worker was overpaid vocational rehabilitation benefits is before me for decision.

Taxi Receipts

In deciding in February 20003 whether the worker had travel restrictions, the Board took into account the video surveillance evidence. I do not consider that taking such evidence into account amounted to an inappropriate reconsideration by the VRC prohibited by the 75-day reconsideration rule (found in subsection 96(5) of the Act), as asserted by Mr. Huebner. There is no earlier decision on the file to the effect that the video surveillance evidence cannot be relied on. It is true that, in 2001, vocational rehabilitation benefits were paid to the worker for about two months after the video surveillance evidence was shown to the worker. I do not consider that further payment of benefits means that a formal decision was rendered that the video surveillance tape could not be considered in later adjudication.

The video surveillance tape depicts the worker walking his children to school and walking back home from school. Mr. Huebner asserted to the Review Division that there was no film of the worker walking home. That is not accurate, as my review of the video surveillance tape establishes that on four occasions he was filmed walking home in the morning after dropping off his children at school. He was also filmed on several occasions walking them to school in the morning, and also walking to school to pick them up in the afternoon and then walking them home. As the file memoranda indicate, he did not use a cane or demonstrate a limp on any of those occasions. He was frequently seen walking with both hands in his pockets, which is something one might not expect would be done by a person who asserts that his hip gives out and he has fallen. He was seen with one hand in his pocket while carrying an umbrella. The video surveillance tape does not show him using a cane 50% of the time. It does show him on one occasion, in connection with a meeting at a library, using a cane and walking

slowly, in contrast with his activities videotaped that morning and the next day. Mr. Huebner indicated that the worker walked for 1.5 miles before the meeting.

Dr. Toews has written three letters of support for the worker. His opinion is based on the worker's advice to him, his treatment of the worker over many years, and on the worker's appearance in his waiting room. Dr. Toews does not indicate that he has seen the video surveillance or that his opinion takes into account the results of the worker's functional capacity evaluation. His opinions are less persuasive as a result.

The review officer cited the functional capacity evaluation results and considered that those results were still valid, as the worker's condition had not changed since July 2000. The results of the functional capacity dealt with observations over longer periods of time than the video surveillance evidence. By that, I mean that the functional capacity evaluation results concerned activity over a sustained period of time. The video surveillance involving the worker walking his children to and from school concerned short trips and short periods of observation. It is true that the video surveillance does show the worker's walking activities over a number of days and is evidence of his condition over a number of days.

I have considered whether an oral hearing is required. The worker does not assert that the functional capacity evaluation is inaccurate or that his condition has changed significantly since that evaluation. The worker does not deny that he is the individual depicted on the video surveillance tape. He had the opportunity via submissions to provide argument concerning his activities seen on the video surveillance tape.

I appreciate that the worker is shown during brief periods on the tape, and that the tape does not show him sitting for lengthy periods of time. It may be that the worker is not capable of walking long distances without the use of a cane. It may be that he uses the cane 50% of the time, but that frequency means that he does not rely on his cane all the time.

After reviewing the matter, I confirm the review officer's decision to deny reimbursement for taxi expenses. As noted by the review officer, policy at item #82.10 of RSCM I provides that travel expenses with the Greater Vancouver Regional District are not normally paid where the bus is a reasonable means of transportation. I find that the bus was a reasonable means of transportation. I am aware of the worker's evidence as to the outcome of his attempts to take a bus and a taxi, but I am persuaded by the review officer's analysis as set out earlier in this decision. The worker's statements as to his own condition are evidence to be considered (item #97.32 of the RSCM I). That policy item indicates that a conclusion against those statements may be reached if the conclusion rests on a substantial foundation. I consider that the functional capacity evaluation results provide such a foundation. Further, the information obtained via the video surveillance adds further evidence in support of the decision to deny the payment of taxi expenses.

Overpayment

The Board's automated wage loss payments system establishes that cheques respecting vocational rehabilitation benefits, described in various manners described below, were issued to the worker on the following dates with respect to the following periods:

February 25, 2003 REHAB ASSIS	February 10 to February 23, 2003
March 11, 2003 REHAB ASSIS	February 24 to March 9, 2003
March 25, 2003 WORK ASS"MT	March 10 to March 23, 2003
April 8, 2003 TOJ	March 24 to April 6, 2003
April 22, 2003 TOJ	April 7 to April 20, 2003

I interpret the various abbreviations to mean rehabilitation assistance, work assessment, and training on the job. The worker first worked at X Inc. on February 25, 2003. The claim log establishes that on March 13 and 17, 2003 the Board was advised by Mr. B's assistant that the worker had not attended the workplace. On March 25, 2003 a cheque was issued by the Board to the worker for the period between March 10 and March 23, 2003 without any deduction for the worker's absences.

A claim log entry of April 7, 2003 indicates that the worker advised a vocational rehabilitation consultant on that day that he had attended work on the following dates: February 25 and 26, March 4, 6, 10, 12, 20, 21, 24, 26, 31, and April 2, 2003. On April 8, 2003 the Board issued the worker a cheque for the period from March 24, 2003 to April 6, 2003 without any recognition of the fact that he only worked on three of the ten work days between those two dates.

The above circumstances are of note because the Board's February 12, 2003 decision advised the worker that it was the worker's responsibility to participate and that assistance would only be offered to workers who actively participate. Further, a March 3, 2003 claim log entry was to the effect that if the worker chose not to return to work, he needed to advise the Board, as there would be no further vocational rehabilitation services and benefits would cease. Following February 12, 2003 and March 3, 2003 the worker was paid benefits by the Board for days on which he did not attend the workplace. It could be contended that the Board's actions in paying the

worker without any deduction to take into account the worker's absences belied its advice to him, and, in effect, the Board communicated to the worker that brief absences would not affect his benefits.

As asserted by Mr. Huebner, it is true that the worker was not required by the Board to report his attendance each day. Yet, it must be kept in mind that the Board's letter of April 11, 2003 reiterated earlier advice to the worker that if he chose not to continue or complete the graduated return to work, benefits would be discontinued. Thus, he was given clear notice that benefits would be discontinued if he chose not to attend the worksite. That the worker did not advise anyone in a timely manner of the fact that he ceased to attend the workplace is troublesome.

One could argue that a formal graduated-return-to-work plan communicated by the nurse advisor differed from the arrangement that preceded April 8, 2003, such that the worker should have known that while absences prior to April 8, 2003 were, in effect, excused, such an arrangement would not persist after April 8, 2003. Yet, the information on file does not persuade me that the worker was told that any non-attendance during the graduated return to work would result in a deduction from his vocational rehabilitation benefits and that he was under an obligation to report his absences.

The overpayment was described in the May 13, 2003 letter as an administrative overpayment. No reasoning was provided to explain why it was an administrative overpayment, other than the advice that the worker was paid beyond the last day of his participation in the work assessment. I do not consider that the overpayment was an administrative overpayment. The overpayment did not result from a computer, mechanical, or mathematical error, an error in implementing a decision or a similar type of error (item #48.41 of RSCM I).

In classifying the nature of the benefits paid after April 11, 2003, I note that policy at item #48.41 advises as follows, concerning decisional errors:

> They include situations where new information is later received which initiates a judgment change in the original decision. They can also include situations where information was available but overlooked.

In the case before me, evidence as to whether the worker had attended the work site after April 8, 2003 was available to the Board on April 22, 2003 when benefits were issued by the Board. That evidence was not gathered by the Board prior to the issuance of the worker's benefits on April 22, 2003. As noted above, the Board knew that the worker had missed days from the work site in the past. A prudent payer of benefits might consider checking with a worker with a record of absences before it paid further benefits. To pay benefits without checking exposes the payer to the risk of paying benefits with respect to days on which the worker was absent.

Were the benefits paid after April 11, 2003 the result of a decisional error and therefore not an overpayment, or were those benefits the result of fraud or misrepresentation? As there is no persuasive argument that the payment of such benefits was beyond the Board's statutory authority, they could only amount to a recoverable overpayment if they were the result of fraud or misrepresentation.

I consider that fraud or misrepresentation can be associated with acts of commission and acts of omission. In the case of acts of omission, I consider that misrepresentation may occur where an obligation to take certain action has been placed on a worker if certain events occur. If a worker does not take action when those events have occurred, and the Board is permitted to believe that those events have not occurred, and it pays benefits accordingly, misrepresentation may have occurred.

In the case before me, I do not consider that the evidence clearly establishes that the worker was under an obligation to report his attendance on a daily basis. He had been advised in the February 12, 2003 and April 11, 2003 letters that he was required to actively pursue work in order to maintain eligibility to vocational rehabilitation benefits, and that if he chose not to continue or complete the graduated-return-to-work program, benefits would end. The letters did not state that he was under an obligation to advise the Board if he discontinued attending the worksite. It would have been a simple matter for the Board to have put express language to that effect in the letters, with the result that an obligation would have been imposed on him. That the worker may have been reminded in those letters of Board policy which provided that workers are to be motivated to take an active interest in their rehabilitation does not create an obligation on the worker to report to the Board if he discontinued attending the worksite.

One could consider that contacting the Board to tell it that he had discontinued the graduated return to work would be a reasonable action to be taken by a worker who had received such letters. Yet, the letters did not state that such action was required from the worker. As well, what might be reasonable falls short of creating an obligation. Further, evidence as to whether the worker had attended the work site could easily have been gathered by the Board. By that, I mean that the Board could have contacted the worker or the employer, and it would have been prudent to have done so given the worker's earlier absences. That the worker might have been absent from the work site after April 11, 2003 would not have been beyond anticipation. The Board did not need to wait for the worker to take the initiative to contact it. Further, this is not the case of a worker being the only possible source of information. Had the worker been the only source of the evidence, then one could argue that the worker could be under an obligation to provide that evidence to the Board.

I consider that the March 3, 2003 claim log entry noted earlier is relevant to an analysis of whether the worker was under an obligation to report discontinuance of his attendance at the work site. The following passage from the claim log entry is key:

> -Vocational Rehabilitation Consultant advised the worker he has 2 options: to attend work tomorrow or not to go to work. If he chooses to attend work, he should contact [Mr. B], and we will continue with the graduated return to work to help him make the transition back to work. **If he chooses not to return to work he needs to advise me as there will be no further Vocational Rehabilitation Services and his benefits will cease.** I informed him of the new claims review under the new legislation.
> -the worker stated he would call back tomorrow.
>
> [emphasis added]

There is no indication on file that the worker telephoned the Board on March 4, 2003. As noted above, the worker worked on March 4, 2003. The claim log entry did impose an obligation on the worker to contact the Board if he did not work on March 4, 2003. I consider that the entry falls short of creating an obligation on the worker to report to the Board if he chose not to continue the graduated return to work some five weeks later. I consider that the emphasized passage quoted above cannot be taken out of context; it concerned an obligation on the worker to report with respect to attending the work site on March 4, 2003. The impact of the March 3, 2003 claim log entry with respect to any obligation on the worker to report absences is significantly affected by the fact that, in the ensuing weeks, the Board paid vocational rehabilitation benefits with respect to absences from the work site that were not reported by the worker.

A finding of misrepresentation is a significant determination with respect to a worker. I consider that more would be required than the evidence found in the March 3, 2003 claim log entry.

After considering the matter, I find that an overpayment was not properly declared. I consider that the worker's failure to advise the Board he had discontinued attending the work site did not amount to misrepresentation. The payment of monies for the period following after April 11, 2003 involved a decisional error. My decision is particular to the case before me. It should not be taken as declaring a principle that, in all cases, a worker can decline to advise the Board of his decision to cease rehabilitation activities and expect to keep any benefits paid to him for the period of time after his decision.

Conclusion

The worker's appeal is allowed, in part. I vary the Board's decision of February 12, 2003 and the review officer's decision of November 24, 2003. The worker is entitled to retroactive vocational rehabilitation benefits for the period between April 3, 2001 and July 25, 2002. The Review Division's decisions regarding transportation expenses and an overpayment are appealable to WCAT. The worker was properly denied transportation expenses. The overpayment was improperly declared.

Randy Lane
Vice Chair

RL/jy