WCAT Decision Number: WCAT-2013-00700
WCAT Decision Date: March 14, 2013
Panel: Andrew Pendray, Vice Chair

Introduction

[1] This appeal concerns the amount of the worker's loss of earnings permanent disability award, as provided for by section 23(3) of the *Workers Compensation Act* (Act)[1].

[2] The worker was employed as a municipal waterworks foreman[2]. He sustained a compensable injury to his left knee when he fell in 1988. He was 40 years old at that time.

[3] That left knee injury required multiple surgeries; however, the worker was eventually able to return to his pre-injury employment. In 1990, the Workers' Compensation Board (Board) determined that, pursuant to section 23(1) of the Act, the worker was entitled to receive a 3.0% permanent disability award for loss of function in his left knee.

[4] Over time, the worker's left knee condition deteriorated. By July 2007, the employer informed the worker that it had concerns regarding his ability to complete his employment duties.

[5] It was eventually determined that the worker would not be able to continue in his positions as a waterworks foreman, and that he in fact required a further left knee surgery. The worker underwent a left total knee replacement in October 2007. He subsequently underwent further surgical procedures, culminating with a revision surgery to his left knee replacement in May 2009 and a subsequent manipulation in July 2009. In February 2011, the Board determined that the worker's left knee loss of function had increased to 21.76% of total disability, and that he was entitled to receive a section 23(1) award in that amount, from April 5, 2010 forward.

[6] Pursuant to section 23(3) of the Act, the Board was also required to consider whether it would be more equitable to determine the worker's entitlement to a permanent disability award on a loss of earnings, rather than loss of function, basis. On June 29, 2011, the Board determined that the worker's permanent left knee disability would limit him to earning $8.00 per hour on a full-time (40 hours per week) basis. The Board further

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[1] On June 30, 2002, the *Workers Compensation Amendment Act, 2002* (Bill 49) came into effect, carrying with it significant amendments in the manner in which a worker's permanent partial disability benefits are calculated. At the same time as those amendments came into effect, the Board issued a new policy manual, known as the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). It is the Act, and the policy (the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I)) that existed prior to June 30, 2002 that is applicable to this appeal.

[2] This position was described as a "working" foreman position, rather than a "supervisory" foreman.

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determined that those deemed earnings would leave the worker with a monthly loss that was higher than the amount of his section 23(1) loss of function award, and that he was therefore entitled to receive his permanent disability award on a loss of earnings basis.

[7] Both the worker and the employer requested review of the Board's June 29, 2011 decision. The worker's position on review was that he was competitively unemployable, or that, at best, he would be able to work only part-time hours. The employer argued that the worker's loss of earnings pension ought to have been calculated on deemed earnings at a rate greater than $8.00 per hour, given that the minimum wage in British Columbia was in fact higher than that amount.

[8] In a January 9, 2012 decision[3], the Review Division rejected the worker's position, and varied the Board's June 29, 2011 decision, agreeing with the employer and concluding that the deemed earnings attributed to the worker for calculation of his entitlement to a loss of earnings award ought to have been $10.25 per hour, for 40 hours per week.

[9] Pursuant to section 239 of the Act, the worker now appeals the January 9, 2012 Review Division decision. The employer is also participating in the appeal, and both parties were represented by legal counsel.

Issue(s)

[10] The issue to be determined is the amount of the worker's section 23(3) projected loss of earnings permanent disability award.

Jurisdiction and Procedure

[11] The Workers' Compensation Appeal Tribunal (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 of the Act). It is not bound by legal precedent (subsection 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 (subsection 250(2) of the Act), save for specific circumstances set out in section 251 of the Act.

[12] This is an appeal by way of rehearing. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal. Subject to section 250(4) of the Act, the standard of proof in an appeal is the balance of probabilities. Section 250(4) provides that in a matter involving the compensation of a worker, if the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in a manner that favours the worker.

[3] *Review Reference #R0133425* and *Review Reference #R0134126*.

Preliminary Matter

[13] At the outset of the oral hearing, the worker's counsel requested that I issue orders pursuant to section 247(1) of the Act requiring that three Board employees (two vocational rehabilitation consultants, referred to later in this decision as VR1 and VR2, and a case manager in the Board's Long Term Disability Department) attend for cross-examination purposes, and that I order a continuation of his oral hearing for that purpose.

[14] The worker's position was that he needed to cross-examine those Board employees as there was some inconsistency between what had been noted by the vocational rehabilitation consultants on the worker's claim file as to the worker's intentions in regard to returning to the workforce and what the worker's evidence on that matter would be. The worker further argued that cross-examination of the vocational rehabilitation consultants was required for the same reason it had been in the case of *Young v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 1209, namely that the vocational rehabilitation consultants had failed to properly consider the Board's own policy in determining whether there existed any employment that was reasonably available to the worker.

[15] Although I informed the parties at the oral hearing that I would issue an interim decision on the worker's request for the above noted section 247(1) orders, my findings on this appeal have made issuing an interim decision unnecessary.

[16] Nonetheless, in light of the parties submissions on the matter I will provide my reasons for having concluded that it was not necessary issue to order the attendance of the Board vocational rehabilitation consultants in order for the worker's appeal to receive a fair hearing in this case.

[17] Cross-examination is permitted under both the Act and the *Administrative Tribunals Act*. Further, WCAT's *Manual of Rules of Practice and Procedure* (MRPP) at item 11.7 sets out that a party to an appeal may request an order under section 247(1) of the Act where a person who is not a party to an appeal has evidence that is relevant to the matters under appeal and they are not willing or able to provide that evidence voluntarily. Item 11.7 specifically notes as examples of those who may be ordered to provide evidence in the course of an appeal include Board officers who provide evidence, such as vocational rehabilitation consultants, but does not include Board decision-makers (such as, in this case, the case manager from the Board's Long Term Disability Department).

[18] The practice directive set out at item 11.7 of the MRPP provides that:

> *In deciding whether to issue an order under section 247(1), WCAT will consider whether there are other means for obtaining the same evidence, the relevance of the evidence and, if applicable, the reason for the*

> *unwillingness of a witness to attend, or a person in possession of documents to provide evidence, voluntarily.*
>
> [all quotes reproduced as written, except for changes noted]

[19] With respect to the issue raised by the worker regarding a difference in the evidence between what the worker testified were his intentions regarding the vocational rehabilitation process and what was recorded by the Board VR1 in a file memorandum regarding the worker's intentions, I am prepared to weigh the evidence (that is the worker's testimony versus a notation in a memorandum) and determine which version of events I consider to most likely provide a reliable and credible version of those events. In the particular circumstances of this case, I do not consider that much would be gained from having the vocational rehabilitation consultant attend and provide evidence as to a single meeting that occurred more than two years prior to the hearing of this appeal. In all likelihood, the VR1 would be left in a position in which she was simply reiterating the information contained in her file memorandum. As a result, I do not consider that a section 247(1) order was required in order to ensure the worker received a fair hearing on this issue.

[20] I turn then to the worker's argument that cross-examination of the VR1 and VR2 was necessary in order that he be able to challenge their conclusion that the occupation of cashier was suitable and reasonably available to the worker. In support of his argument in this regard, the worker referred to the *Young* decision.

[21] *Young*, like the current appeal, involved a consideration of whether a worker was entitled to a loss of earnings award, and specifically whether there was suitable employment that was reasonably available to the worker. Humphries J. concluded that *WCAT-2010-01367* was patently unreasonable in that the panel who issued that decision had failed to address the concept contained in Board policy[4] regarding whether a worker was in fact competitively employable. Humphries J. noted that it was not sufficient for the Board's vocational rehabilitation consultant, and subsequently the WCAT panel, to simply refer to statistics that indicated that there were job openings in a suitable occupation for the worker, without considering whether the worker would in fact be able to obtain employment in that occupation.

[22] Humphries J. further concluded that the panel in *WCAT-2010-01367* had acted unfairly in failing to order that the vocational rehabilitation consultant attend for cross-examination. In reaching that conclusion, the court explained that:

> [82] The central factor in this case is the VRC's [vocational rehabilitation consultant's] determination of employability/available employment. Cross-examination may well not have been necessary to determine whether the petitioner's recollection of the interactions in the evaluation

[4] Policy item #40.12.

> were accurate, which was the focus of the Vice Chairman's reasons and that of the reconsideration panel, but it was necessary to allow the assumptions upon which the VRC based her opinion to be tested. As well, it was necessary to allow a determination of whether and how her opinion took into account the concepts contained in the relevant policy.
>
> [83] Here, the report given by the VRC cannot be compared to the report of a doctor, which was the analogy used by the reconsideration panel to demonstrate the scheduling chaos that would result if hearing were adjourned and bifurcated to allow for the cross examination of experts. The VRC made assumptions, did selected statistical research, and came to a deemed conclusion as to the employability of the petitioner without apparent consideration of the applicable Board policy. Failure to allow cross-examination of the VRC in these circumstances undermined the fairness of the hearing, **since the Vice Chairman simply relied on her untested report and conclusions.**
>
> [emphasis added]

[23] It will become apparent, from a review of my reasons below, that I have not simply relied on the reports of the vocational rehabilitation consultants in determining what, if any, suitable employment was reasonably available to the worker. As a result of my findings as to the weight to be given to the reports of the vocational rehabilitation consultants on this issue, I find that fairness does not require that they be ordered to attend for cross-examination.

I note further that I do not consider that the reports provided by the two Board vocational rehabilitation consultants in this case can be said to have failed to take into account the reasonable availability of employment opportunities to this worker. It is clear from a review of those reports that both vocational rehabilitation consultants did in fact engage in such an analysis. In my view, the fact that the vocational rehabilitation consultants did not refer to the specific portion item #40.12 which discusses that a reasonably available job must be one which the worker has a realistic possibility of obtaining[5] does not mean that it is necessary for fairness purposes in all cases to require that they attend for cross-examination. I certainly do not read *Young* as setting out any sort of rule in that regard as suggested by the worker's counsel.

[5] The excerpted portion of policy item #40.12 referred to by the worker's counsel read as follows: "On the other hand, the phrase "available jobs" does not mean any job position in which there are vacancies. An available job means one reasonably available to the claimant in the long run. For example, a city may have several theatres, and there may be occasional job vacancies for the position of theatre usher; but if there are always numerous better qualified applicants and the realities are that a worker with the particular disability is not likely to obtain such a job, that is not a reasonably available job."

[24] Rather, I consider that the absence of reference to the above excepted portion of the policy by the vocational rehabilitation consultants can (and as will be seen in my reasons, in the circumstances of this appeal does) affect the weight to be given to the opinions provided in the reports of those consultants. I consider that what the court in *Young* was suggesting was that if a worker expresses a desire to challenge the information provided in a report from a vocational rehabilitation consultant, and a panel is inclined to rely on that report, fairness dictates that the worker be provided with the opportunity to engage in testing the information in the report in question. I agree with that view.

[25] However, as I have not simply relied on the untested reports and conclusions of the of the vocational rehabilitation consultants in this case, I find that it follows that a testing of the evidence set out in their respective reports is not necessary for a full and fair hearing of this appeal.

[26] I observe in passing that while I agree that cross-examination may be required to ensure that an appeal is fair depending on the particular circumstances of a case, I do not consider that cross-examination will be required in every case. I agree with the comments of the panel in *WCAT-2012-02521*[6] regarding alternatives to cross-examination:

> [88] Finally, parties may attack an opposing expert opinion through submissions, such as complaining of an absence of logic or reasoning, or the failure of the medical expert to personally examine the worker. It therefore cannot be said that, at least in routine cases, cross-examination of Board medical advisors is the only reasonable way for a party to make its case before the WCAT. Simply put, procedural fairness does not require that a party receive the best procedures possible to make his or her case; the law merely requires that the parties understand the case to meet and have a meaningful opportunity to make that case.

[27] With respect to the worker's request for an order that the Board case manager attend the hearing for cross-examination, I note that in keeping with the practice directive at item 11.7 of the MRPP, I would not have been prepared to make such an order, given that the case manager is not only a Board decision-maker but specifically that it was her decision letter that was the subject of the January 9, 2012 Review Division decision and therefore is at issue in this appeal.

Relevant Evidence and Information

[28] The worker met with a Board vocational rehabilitation consultant for an initial vocational assessment on September 30, 2008. In an October 6, 2008 memorandum, the vocational rehabilitation consultant (VR1) noted that the worker had been employed with

[6] Identified by WCAT as a "noteworthy" decision.

the employer since 1981, and that the worker had indicated at the September 30, 2008 meeting that he continued to be of the belief that his left knee would recover sufficiently that he would be able to return to his pre-injury employment. Of interest, the VR1 noted at that time that:

> Observation of the worker walking towards Consultant utilizing a cane with an unsteady gait, it is apparent that the critical job demands which have not been fully disclosed may be functionally contraindicated.

[29] The worker was examined by Dr. Werry, an orthopaedic surgeon, on February 12, 2009. At that time, Dr. Werry indicated that the worker required revision surgery on his total left knee replacement that had been performed in 2007. That revision surgery was performed by Dr. Werry on May 19, 2009.

[30] Although Dr. Werry indicated that the worker was making progress, he reported in November 2009 that the worker continued to walk with a limp and used a cane. Dr. Werry further indicated in January 2010 that he remained optimistic that the worker would gain further improvement in his range of motion and pain such that his knee would be reasonably comfortable to allow the worker to perform activities of daily living.

[31] By March 11, 2010, however, Dr. Werry indicated that he was of the view that the worker's condition had reached a rehabilitative plateau. He concluded that:

> Nothing singly or in combination however is likely to give [the worker] the level of comfort and function he needs to be employable. I would therefore consider him completely physically disabled, permanently.

[32] The Board arranged for the worker to attend a functional capacity evaluation (FCE) in March 2011. The findings of that evaluation were reported on March 15, 2010. The reporting occupational therapist indicated that the worker had shown a high level of physical effort in participating in the functional testing. The occupational therapist summarized her findings as follows:

- The worker did not meet the demands of his pre-injury job, specifically, the standing, walking, and other body posture demands, nor the heavy strength demand requirements;
- The worker was not suited to fine dexterity tasks where speed is a component;
- The worker was not suited to reaching below knee level with either arm due to concurrent balance demands;
- The worker was capable of incidental stair climbing with the aid of his cane, provided at least one railing is present;
- The worker was functional, with the aid of his cane, for "very basic balance";
- The worker was functional for mild stooping within limits of his standing tolerance;
- The worker was not suited to any low level work, including moderate to extreme stooping, kneeling, crouching, or crawling;

- The worker was able to unilaterally lift up to 30 pounds with the aid of his cane in a "highly controlled environment";
- The worker was safe to perform work at a sedentary level with occasional light strength, provided the weight is located at or above knee level; and
- The worker was not able to perform bilateral lifting or carrying due to reliance on cane for balance.

[33] With respect to the worker's ability to sit, stand, and walk, the occupational therapist indicated that:

> [The worker] presents with no limitations for sitting, **provided he is able to extend and elevate his left leg on his cane**. He would be able to tolerate work requiring full time sitting as long as this accommodation is available. He is able to **tolerate standing for 15 minutes** at a time with the aid of his cane, with a daily **cumulative standing of up to 1 hour**. He is able to tolerate short periods of unsupported standing (i.e. up to 5 minutes) as long as he is not required to shift his balance to any significant degree. He is functional for incidental, self-paced short distance walking on flat, level ground only, and with the aid of his cane. He is able to walk unsupported for approximately 15 – 25 feet on an incidental basis, although this is not recommended in a workplace setting.
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> [emphasis added]

[34] The occupational therapist further indicated that if the worker was confined to a seated position where he could not extend his leg as described above, he would only be able to tolerate sitting for approximately 10 to 15 minutes. The worker's static standing tolerance was limited to between 1 and 2 minutes. In the body mobility/work postures testing portion of the FCE, the worker was described as being unable to move between sitting and standing without the use of his cane.

[35] Dr. van der Meer, a Board medical advisor, indicated in an April 7, 2010 clinical opinion memorandum that she was of the view that the limitations outlined in the FCE were biologically plausible in light of the worker's knee pathology and compensable chronic pain condition.

[36] Also on April 7, 2010, the VR1 contacted the worker in order to arrange a meeting to discuss his entitlement to vocational rehabilitation benefits, as the Board had concluded that he would not be able to return to his pre-injury occupation.

In an April 14, 2010 vocational rehabilitation intake assessment memorandum, the VR1 noted that the worker's employment history was consistent with heavy manual labour occupations, which were now medically contraindicated for the worker. The VR1 indicated that she had met with the worker on April 14, 2010 and that he had indicated that he was experiencing continuous knee pain and that he did not view himself as employable[7]. The VR1 listed the following under the heading of "Return to Work Barriers":

> 1. Worker has several limitations - reference CM [case manager] decision letter. 2. Claim accepted for permanent conditions; total left knee replacement and chronic pain. Existing PFI [permanent functional impairment] on claim.3. FCE reports that worker is best suited to sedentary level work with occasional light strength demands. 4. Employer will review Phase 2, **although given the limited finger dexterity diarized in the FCE, computer training is not vocational[l]y suited and is not of interest to the worker.** An accommodation is expected to be difficult and likely impossible. 5. Worker has an employment history indicative of manual labour activity. 6. Worker has lived in [the worker's home community] some 30 years and is not willing to relocate. His grandchildren are located in the community. Worker has a continuous sitting tolerance of 40 minutes. 7. **Realistically, employment opportunities in the community of [the worker's home community] with the functional and transitional profile are unattainable.**
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> [emphasis added]

[37] On August 18, 2010, a representative of the employer (Mr. R) contacted the Board and spoke with a Board vocational rehabilitation client services manager. In a memorandum detailing that conversation, the client services manager indicated that Mr. R had confirmed that the employer was unable to accommodate the worker despite the worker's long-term employment with the employer. On August 20, 2010, the VR1 issued a letter informing the worker of the employer's position.

[38] On March 15, 2011, the VR1 completed a "Composite Vocational Profile" for the worker which identified, based on the worker's pre-injury occupations, his vocational aptitudes. Also on that date, the VR1 completed a memorandum setting out the history of the worker's claim. Of note, in setting out the worker's restrictions and limitations in that memorandum, the VR1 did not identify the sitting limitation identified in the FCE (that being that the worker was able to sit for indefinite periods only if his left leg was extended and elevated).

[7] As will be seen below, the worker has denied making such a statement.

[39] On the following date, the VR1 completed a "VR Rehabilitation Plan" for the worker. Again, it is noteworthy that in setting out the worker's limitations, the VR1 did not make any reference to the sitting limitation noted by the FCE. With respect to finding the worker employment in a new occupation, the VR1 noted that:

> The worker had been employed by [the employer] since 1981. Transferable skills were associative to manual labour activity. He did not possess Supervisory experience. He does not possess addit[i]onal Certifications, Diplomas or course work beyond the High School Diploma and TQ [Trades Qualification] Plasterer which he attained in [another country]. [The worker] has limited computer skills…. He has resided in [the worker's home community] since the early 80's. He reports that he held a Class 2-6 Driver's license from [another country]. He operated a Transit Bus for 9 years. This occupation is medically contraindicated. Worker is eligible for VRS [vocational rehabilitation services] under RSCM, Volume 1. He is currently in Phase 4 - transferable skills which while dated include a customer service orientation. **The occupational goal identified given the composite profile of skills, functional limitations, general health issues, wage rate, age, and LMI [labour market information] is Cashier, NOC [National Occupational Classification] 6611**. The worker is unlikely to return to work in any capacity. He applied for CPP [Canada Pension Plan benefits] six months ago. He has been advised that he should receive an answer within one week. If approved, [the worker] reports that he will receive approximately $900.00 monthly. VRC will confirm at a later date. The worker believes that he is unemployable. This occupational goal represents the VRS preferred baseline plan.
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> [emphasis added]

[40] The VR1 provided the following information regarding the occupational category of "cashiers":

> The physical activities are in the light strength category. Some secondary school is required and eligibility for bonding may be required. Workplace employers include; business offices, casinos, establishments that charge admission, restaurants, retail and wholesale establishments, stores and theatres. **Workplace activity that requires prolonged standing would not be a suitable outcome, however there are several establishments that accommodate alternate sitting/standing**. This occupation is preferred because it addresses the limitations, work opportunities [within a reasonable commute of the worker's home community], illustrates a customer service component and work is available throughout the year.
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> [emphasis added]

[41] The VR1 also identified as an occupational goal for the worker the occupational category of "Other Assemblers and Inspectors," NOC 9498. The VR1 concluded, however, that the physical demands of that occupation were likely to exceed the worker's accepted limitations, given that the positions in that occupation generally required standing of some duration.

[42] The VR1 provided the following under the heading "Long Term Earning Capacity with Plan":

> Worker is not likely to acquire full time employment. Rather, he may be offered 20 hours weekly x $9.00 hourly. This equates to $9360.00 gross per annum or $780.00 monthly.

[43] On March 17, 2011, an officer in the Board's Disability Awards Department wrote to the VR1 and asked that she complete an employability assessment for the worker which identified three suitable occupations for the worker which were reasonably available and would maximize the worker's long-term earnings potential.

[44] The worker and the VR1 met in person on March 24, 2011. In a memorandum detailing that meeting, the VR1 indicated that she had explained the rehabilitation plan that she had developed for the worker. The VR1 also indicated that she had informed the worker that the Board would complete an employability assessment for him in due course. The VR1 noted that:

> [the worker] will not be returning to the job market. Therefore, a plan item "EA [employability assessment] in progress" will be prepared.

[45] It is apparent from a review of the worker's claim file that despite meeting with the VR1, the worker was unsure as to what steps he was to take next. He telephoned the Board for clarification on March 25, 2011. He spoke with a Board client services manager who informed him that he needed to record job search activities and obtain business cards or contact names in support of his job search efforts.

[46] On April 20, 2011, another Board vocational rehabilitation consultant (the VR2) completed an employability assessment of the worker. The VR2 noted that the VR1 had concluded that the occupational goal for the worker ought to be in the occupation of cashier, and that given that many cashier positions were part time in nature and the worker's limitations and restrictions, it would be reasonable to conclude that the worker would maximize his employability working 20 hours per week. The VR2 undertook some research for employment opportunities in that occupation, and noted that on April 15, 2011 she had identified 23 cashier jobs, 14 of which were part time

(varying from 10 hours to 30 hours per week), 4 were full time, and 4 did not specify the number of hours per week. The VR2 further concluded that:

> The significant variety of jobs within this occupational group, provide reasonably available opportunities that match the worker's physical limitations, restrictions and his residual functional capacity….
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> Based on the above data, it is my opinion that physically suitable, part-time work would be reasonably available to the worker. Additionally, the vocational rehabilitation plan offered to the worker includes both Work Assessment and Training-on-the Job incentives, that offer the potential to build on his prior customer service skills and make him competitively employable within the outlined occupational target of Cashier.

[47] Like the VR1, the VR2 expressed the opinion that the worker would be able to reasonably identify and access part-time work at 20 hours per week:

> In conclusion, it is my opinion that had the worker availed himself of the vocational plan outlined in the VRC's decision letter dated March 24, 2011, physically suitable employment as a part-time Cashier (NOC 6661) would be both reasonably available to him, and maximize his earnings over the long-term. It is my opinion that [the worker] could reasonably obtain employment as a Cashier, on a part-time basis of 20 hours per week at the current minimum wage level of $8/hour. Of note, minimum wage increases in BC have been established by the Ministry of Labour (www.labour.gc.ca) for 2011/12 and would result in increases yielding the following hourly wages: May 1, 2011 will increase to $8.75/hour gross; November 1, 2011 will increase to $9.50/hour gross; and May 1, 2012 will increase to $10.25/hour gross.

[48] A case manager in the Board's Long Term Disability and Occupational Disease Services Depratment reviewed the employability assessment completed by the VR2 and concluded that the recommended occupation of cashier was both physcially suitable and reasonably available to the worker in his area of residence. The case manager did not agree with the VR2's conclusion that the worker would obtain work on a part-time basis, however, noting that:

> I have considered the medical restrictions and physical limitations accepted under the claim and note that there is no indication of any limitations or restrictions with respect to hours of work. While I note the Vocational Rehabilitation Consultant's reasoning, I accept that based on the accepted restrictions and limitations the worker is capable of a work week of 40 hours. Therefore I am recommending a partial loss of earnings

> award, effective April 5, 2010, based on 40 hours a week at $8 an hour. This is a former provisions claim.

[49] As a result, on June 29, 2011, the Board issued the decision letter that ultmiately led to the current appeal, finding that the worker was entitled to receive a monthly loss of earnings award in the amount of $2,971.60, based on deemed earnings as a cashier of $8.00 per hour, 40 hours per week.

Review Division

[50] In his submissions to the Review Divsiion (the worker was represented by the same counsel at the Review Division as in this appeal), the worker took the position that, at best, the evidence as to whether he was able to work 20 hours per week or 40 hours per week was evenly balanced, and as such, pursuant to section 99 of the Act, the Board's determination on that issue ought to have been made in the worker's favour.

[51] The worker went further, however, and submitted that no Board officer had considered the correct policy in determining the worker's entitlemnt to a loss of earnings award. The worker argued that, as a result, the Review Division ought to refer the issue of the worker's entitlement to a loss of earnings award back to the Board for further consideration.

[52] In its Review Division submissions, the employer argued that the worker's deemed earnings ought in fact to have been based on higher hourly earnings. In this regard, the employer argued that the ranges of wages for cashiers varied from the low end of $8.00 per hour up to significantly higher rates (the high average wage referred to by the employer was $14.72 per hour). The employer submitted that given the fact that the worker was a "seasoned worker" with "many years of employment history," including as a transit operator where he would "have developed customer service and cash handling skills," and that as such he would reasoanbly expect to earn more than the minimum wage.

[53] The employer further argued that:

> If in fact the Worker in this case is never hired, it is because the Worker here has told the Board that he has elected not to participate in Vocational Rehabilitation, nor to return to the job market. It would be highly inapporpriate to allow a worker who exhibits no motivation to find other suitable employment to invoke the principle in Young that he is competitvely unemployable to support a greater pension award than the already significant award he received. As argued in the Employer's submission dated November 18, 2011, it is our position that the existing award is excessive in all of the circumstances, because the evidence was that the wage rate for a cashier position, the position considered suitable

> for the Worker, was considerably higher than the former minimum wage rate utilized by the Board.

[54] In the January 9, 2012 decision under appeal, the review officer considered the worker's argument regarding the number of hours of work he was likely to obtain and concluded that:

> The WR [worker's representative] has submitted that it would be unrealistic for the Board to assume that this worker would be competitive with others seeking the same employment, so such work should not really be considered available. The VRC and the CADA [claims adjudicator in Disability Awards] both concluded that the proposed work was reasonably available, and I agree. This is not the sort of highly desirable employment where the openings are rare, and the competition is fierce. The worker lives in a community where such work is advertised as available, and there is no reason to believe that he would not be considered suitable for a position with limited activity, particularly in the long run.

[55] The review officer also concluded that, given that the provincial minimum wage was increasing to $10.25 per hour by May 2012, it was appropriate to use that rate to deem the worker's long-term earnings level as a cashier, noting that in her view that rate may be a "little high" given the worker's reopening rate but also "a little low over the fullness of time."

Oral Hearing

[56] The worker gave evidence at the oral hearing. The worker was asked about his meeting with the VR1. He stated that he had understood from that meeting that he was required to seek work as a cashier. The worker indicated that he had not liked that plan, but that he had agreed to seek work as required. He noted that he had called the VR1's manager for clarification as to what he was required to do. The worker stated that he subsequently went to a variety of retail locations in his home community, looking for a cashier position that would suit his limitations. He stated that he had not been able to find any such position.

[57] The worker stated that he had subsequently received a telephone call from the VR1 in which she told him that he in fact did not need to undertake job search activities if he did not want to. The worker indicated that he had therefore stopped job search activities specifically in the cashier occupation. The worker stated that he had never indicated that he did not want to work. He noted that he had continued to look for jobs, but that there was nothing available within his limitations, even at gas stations.

[58] The employer did not cross-examine the worker. It did, however, call the worker's former supervisor, Mr. J, to provide evidence. I note that I allowed Mr. J to give evidence, over the worker's objection, as I considered that Mr. J would be able to

provide relevant evidence as to what skills the worker had demonstrated during the course of his employment with the employer.

[59] Mr. J indicated he was the superintendant of public works for the employer, and had been so employed since 2000. Mr. J also noted that he had worked at the employer, with the worker, since 1987. He stated that sometime (likely in 2003) he had suggested to the worker the "supervisor" position that the worker had been engaged in when he stopped working in 2007. Mr. J explained that he had wanted someone for that position who could liaise with the public and handle complaints. He noted that the worker's position required someone who could walk the creeks, respond to after-hours calls, and run crews during evenings when storm drainage became backed up. He described the worker's position as a relatively solitary role, generally conducting creek inspections and addressing complaints by going out and resolving the problems.

Submissions

[60] The worker submitted that the Board failed to properly consider whether employment in the occupation of a cashier was reasonably available to him. His counsel succinctly summarized his position on this issue by questioning whether "anyone would be prepared to have this man." In the worker's submission, the answer to that question was simply "No." As a result, he was competitively unemployable, and entitled to a full loss of earnings award. He noted that the only substantive evidence on this issue was from the worker himself, that he had sought out employment, and been unable to obtain any.

[61] The employer took the opposing view. It submitted that employment as a cashier was reasonably available to the worker, and that the fact that he had not wanted to engage in the vocational rehabilitation process in searching for employment as a cashier was the reason that the worker had not obtained suitable employment in that occupation. The employer specifically argued the Board would have provided the worker with the training required to obtain such employment.

[62] The employer further argued that it did not make sense that all cashier jobs needed to be standing positions. It summarized its position by submitting that:

> The fact the Worker did not obtain cashier position is not because he was competitively unemployable, or the position was unsuitable or unavailable, but rather because he elected not to participate in the vocational rehabilitation or to find other suitable employment.

[63] In reply, the worker argued that the reasonable availability of the cashier position was the larger issue in this case. He noted that there was no evidence that any employer had been contacted to see if they would hire this particular worker, and that as a result there was no evidence that anyone would in fact hire him.

Reasons and Findings

[64] I allow the worker's appeal. In my view, it is unlikely that there is any physically suitable occupation that is reasonably available to the worker. Certainly, I do not consider the evidence to support that the occupation of a cashier, as identified by the Board, is physically suitable for the worker, let alone reasonably available to him.

[65] In summary, I find that the worker is competitively unemployable, and that he is entitled to a full loss of earnings award. My reasons follow.

Applicable Law and Policy

[66] Section 23(3) of the Act, as it read at the time of the worker's injury, set out that where the Board considered it to more equitable than providing the worker with a functional impairment award under section 23(1), it could award compensation for permanent disability having regard to the difference between the worker's average earnings prior to the injury and the average amount the worker was earning, or the Board determined the worker was able to earn, in some suitable occupation. A section 23(3) award was generally known as a loss of earnings award.

[67] Policy item #40.10 of the RSCM I lists several "rules" for assessing a projected loss of earnings pension under section 23(3), as it was, of the Act. Rule 1 indicates that the worker's average earnings prior to the injury will be determined in accordance with the Board's established policies and procedures. Rules 2 and 3 point out that the evidence, including medical evidence, is assessed to make a determination about suitable occupations which the worker could undertake over the long-term future. Rule 2 points out that the evidence of the vocational rehabilitation consultant about the suitability of the worker for jobs that could reasonably become available must be considered. Rule 3 refers to the selection of earnings, that maximize the worker's long-term earnings potential, from jobs that are suitable and reasonably available. Earnings in those occupations will be determined as at the time of the worker's injury. Rule 4 indicates that the worker's possible pension will be 75% of the amount by which the earnings level established under rule 3 are less than the worker's average earnings prior to the injury.

[68] Policy item #40.12 addresses the requirement that in projecting a loss of earnings pension, it is necessary to consider whether a job is in fact suitable and reasonably available to the worker in the long run. The policy notes that:

> … the phrase "available jobs" does not mean any job position in which there are vacancies. An available job means one reasonably available to the claimant in the long run. For example, a city may have several theatres, and there may be occasional job vacancies for the position of theatre usher; but if there are always numerous better qualified applicants

> and the realities are that a worker with the particular disability is not likely to obtain such a job, that is not a reasonably available job.
>
> In advising on the suitability of the claimant for reasonably available jobs, the Rehabilitation Consultant must have regard to the limitations imposed by the residual compensable disabilities of the claimant and assess the claimant's earnings potential in light of all possible rehabilitation measures that might be of assistance, including the possibility of retraining or other measures that may be appropriate to the particular worker.

[69] The policy item goes on to provide a number of guidelines to be followed in determining what jobs are suitable and reasonably available to a worker, including the following:

> 3. A reasonably available job must be one that the worker is fit to undertake, and which would not involve adverse health consequences either immediately or in the long run compared with other jobs.

Physical Suitability

[70] I am unable to agree with the conclusions of the Board, and subsequently the Review Division, as to the suitability of the occupation of cashier for the worker.

[71] As noted by the VR1, the occupation of cashier is described at item 6611 of the National Occupation Classification (NOC) system[8]. The NOC Career Handbook[9] provides a physical activities summary of the occupation of cashier, and sets out specifically that that occupation generally requires body positions involving sitting, standing, and walking.

[72] Given the worker's significant physical limitations, including being limited to one hour of standing in the course of an entire day, it would seem, based on the general requirements set out in the NOC Career Handbook, that the occupation of cashier is not one that would be physically suitable for the worker.

[73] Nonetheless, the VR1 and VR2 both concluded otherwise. As I have noted above, in reaching that conclusion the VR1 indicated that:

> …there are several establishments that accommodate alternate sitting/standing.

[8] The National Occupational Classification is provided by Human Resources and Skills Development Canada and is described as the nationally accepted reference on occupations in Canada. It is based on extensive occupational research and consultations conducted across Canada and is intended to reflect the Canadian labour market.

[9] The Career Handbook portion of the NOC is intended to provide global ratings assigned to occupations to further define skills, worker characteristics, and other indicators related to occupations in order to assist with career exploration activities.

[74] The fact that the occupation of a cashier may offer a worker the flexibility to alternate between sitting and standing while completing his or her employment duties does not, in and of itself, make that occupation a physically suitable for the worker in this case.

[75] The findings of the FCE, with which neither the worker nor employer took issue, were that the worker was limited to a maximum period of standing for one hour over the course of an entire day. If he were to engage in employment duties which required him to alternate between sitting and standing, the worker would surpass his limitation for standing after just two hours of work. While it may seem trite, this is significantly less than part-time, let alone full-time hours.

[76] I consider, based on the above, that employment which accommodates alternate sitting and standing, such as what one might expect as a cashier, is not physically suitable for the worker. The evidence, in my view, is that the worker would be unable to complete even part-time hours in such employment.

[77] Neither the VR1 nor VR2 appear to have considered the worker's sitting limitation in reaching the conclusion that the occupation of cashier was physically suitable for the worker. While the FCE did set out that the worker presented with "no limitations for sitting," that presentation was entirely dependent on the worker being accommodated such that he was able to extend and elevate his left leg by propping it up on his cane. Absent such accommodation, where the worker was required to be in a regular sitting position, the FCE indicates that the worker was able to tolerate sitting for only approximately 10 to 15 minutes.

[78] Neither of the vocational rehabilitation consultants indicated in their reports that the occupation of cashier would be able to accommodate the worker's limitation in this regard. Again, the fact that an occupation may provide the worker with the ability to alternate between sitting and standing would not provide this worker with a physically suitable occupation. The worker requires employment in an occupation which will, for all intents and purposes, allow him to sit, with his left leg extended and elevated in front of him, for almost the entirety of his shift. I must admit I find it particularly difficult to imagine what that occupation would be. Certainly, the occupation of a cashier, as described in the reports of the vocational rehabilitation consultants, does not appear to me to be that occupation.

[79] I consider it to be telling that the only other potential occupation identified by the Board's vocational rehabilitation consultants (despite the fact that the VR2 was specifically asked to identify three suitable occupations) was that of "Other Assemblers and Inspectors." That position was rejected by the VR1, however, due to the fact that that occupation would require the worker to engage in standing of "some duration," and, as such, was not physically suitable. Given the Board's seeming inability to identify any suitable occupation for the worker other than that of a cashier, I consider that I am likely not alone in having difficulty imagining what occupation would in fact be suitable to the worker, given his significant physical limitations.

[80] In my view, the reality of the worker's physical limitations, combined with his skill set, makes it unlikely that suitable employment in fact exists for him.

Reasonable Availability

[81] Even if I had found that the occupation of a cashier was suitable for the worker, I consider that it is more likely than not that such employment in that occupation would not be reasonably available to the worker.

[82] I consider that it bears repeating that upon initially reviewing the worker's situation in April 14, 2010, the VR1 concluded that:

> Realistically, employment opportunities in the community of [the worker's home community] with the functional and transitional profile are unattainable.

[83] By the time she completed the worker's vocational rehabilitation plan in March 2011, however, the VR1 indicated that she was of the view that the worker "may" be able to acquire part time employment at $9.00 per hour in the occupation of a cashier.

[84] Given that little if anything changed with respect to the worker's physical abilities or skills during the period of time from April 14, 2010 through March 2011, I find it difficult to understand why it is that the occupation of a cashier would have become likely to be reasonably available to the worker in that period of time.

[85] I note that it is not in fact clear that the VR1 was of the view that such employment was likely to be reasonably available to the worker. Rather, I consider that the most that could be taken from the VR1's March 2011 comments is that she was of the view that, at best, the worker could hope to obtain part-time work at $9.00 per hour.

[86] In the employability assessment, on the other hand, the VR2 did explicitly conclude that, as there were a significant variety of jobs within the occupational group of cashiers, physically suitable part-time work was likely to be reasonably available to the worker.

[87] After reviewing the employability assessment, and the information upon which the VR2's opinion in that regard was based, I find that her opinion on this issue is entitled to no weight.

[88] Again, in considering the availability of the position of cashier for the worker, the VR2 failed to take into account the nature of his sitting limitation as identified at the FCE. Specifically, the VR2 did not identify any advertised positions that would have been able to accommodate the worker's physical limitations. As I have set out above, the ability to alternate between sitting and standing is simply not enough in this case, given the worker's limitations.

[89] The only evidence as to whether there were physically suitable (taking into account the worker's sitting limitation) cashier jobs available at all comes from the worker's unchallenged evidence that he approached employers in his home community to enquire as to whether they had cashier positions which would accommodate his limitations, and that he was informed unfailingly that they did not. I accept the worker's evidence in this regard, and I consider that the fact that the worker was unable to find any such physically suitable position strongly suggests that employment as a cashier is not reasonably available to the worker.

[90] I consider that another telling piece of information relating to the reasonable availability of employment in the occupation of a cashier for the worker is the fact that although she conducted research into job openings for cashiers, the VR2 failed to identify a single job opening in that occupation in the worker's home community. Of the 23 job postings identified by the VR2, the nearest in location to the worker was approximately a one-hour drive from the worker's home, right at the limit of the worker's physical ability to drive. The remainder of the job openings identified by the VR2 were farther afield. Even if I were to consider a location at a distance of approximately one hour from the worker's home to be one that was within a reasonable commuting distance from the worker's home (as required by policy item #40.12), I find it to be highly unlikely that the worker, with his significant physical limitations, would be the successful candidate for that single job opening, regardless of whether the job market for cashiers is, as the review officer put it:

> …not the sort of highly desirable employment where the openings are rare, and the competition is fierce.

[91] I agree with the worker's submission that it is unrealistic to assume that with his limitations, he would be competitive with others seeking what apparently was a single job opening for a position located more than one hour from his home.

[92] I acknowledge the employer's submission that the worker did not obtain a position as a cashier due to the fact that he "elected not to participate in the vocational rehabilitation or to find other suitable employment." However, the evidence does not support the employer's position in this regard. The worker's unchallenged evidence at the oral hearing was that he did in fact enquire in his home community about employment opportunities, and that he found that no employers with whom he spoke were able to accommodate him. Again, I accept the worker's evidence on this point.

[93] I note in passing that the worker's findings that there were no cashier jobs which would accommodate his limitations may be seen as somewhat unsurprising, given that the employer, who had employed the worker for approximately 29 years and who has a broad base of jobs to offer (although evidence on this issue was not actually provided by the employer, it was implied that included in the employment positions the employer has to offer are seated cashier-type positions), indicated to the Board on August 18, 2010 that it was unable to accommodate the worker.

[94] After considering the above, I find that employment in the occupation of a cashier is not reasonably available to the worker. I find further that the best evidence as to the likelihood of the worker obtaining any employment, given his physical limitations and his skill set, was best set out by the VR1 on April 14, 2010:

> Realistically, employment opportunities in the community of [the worker's home community] with the functional and transitional profile are unattainable.

[95] I agree that employment opportunities in the worker's home community (or even within a reasonable commuting distance) which match the worker's functional profile are more likely than not unattainable. To put it simply, the worker is competitively unemployable.

[96] Given that conclusion, it is not necessary to engage in a consideration of whether the worker would have been able to work full or part-time hours, or the hourly wage that the worker would have likely obtained over the long term. The appeal is allowed.

Conclusion

[97] I vary *Review Reference #R0133425* and *Review Reference #R0134126* in that I find that the worker is competitively unemployable and that he is therefore entitled to receive a 100% loss of earnings award pursuant to section 23(3) of the Act.

Expenses

[98] Section 7(1)(a) of the *Workers Compensation Act Appeal Regulation* provides that WCAT may order the Board to reimburse a party to an appeal for the expenses associated with attending an oral hearing. The practice directive at MRPP item #16.1.2.1 notes that WCAT will normally order reimbursement for an appellant's travel expenses where WCAT schedules an oral hearing in a location that is not the closest to the community in which the appellant resides. The practice directive goes on to state that travel expenses are not paid for that portion of the journey which takes place within a distance of 24 kilometres of the oral hearing location. I order the Board to reimburse the worker for his travel in excess of 24 kilometres to attend at the oral hearing of this appeal.

Andrew Pendray
Vice Chair

AP/gw