

An amendment was issued for WCAT-2013-01992 and is attached to this document.

WCAT Decision Number : WCAT-2013-01992
WCAT Decision Date: July 12, 2013
Panel: Dale Reid, Vice Chair

Introduction

- [1] On April 17, 2012 a case manager with the Workers Compensation Board (Board), operating as WorkSafeBC, informed the worker that she was entitled to a loss of earnings award based upon the difference between her pre-injury occupation and post-injury employment as a telemarketer working 20 hours per week. The worker disagreed with this decision. She asserted that she was competitively unemployable and was entitled to a total loss of earnings award. On June 6, 2012 the worker requested a review of the decision by the Review Division of the Board.
- [2] On November 2, 2012 the worker was informed of the outcome of her request for review by the Review Division of the Board in *Review Reference #R0144677*. A review officer confirmed the April 17, 2012 decision of the Board. He reviewed the evidence on the claim file and he accepted the case manager's decision that the worker's limitations that were accepted under the claim were compatible with the job demands for a telemarketer. He agreed with the case manager's conclusion that these types of positions, on a part-time basis, would fit within the worker's accepted limitations.
- [3] On November 23, 2012, the worker appealed the November 2, 2012 Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

- [4] The issue before me is whether the worker's permanent partial disability award was appropriately determined by the Board.

Jurisdiction

- [5] This appeal to WCAT is authorized under section 239 of the *Workers Compensation Act* (Act). As a member of WCAT I am required to apply Board policy in coming to my decision.
- [6] The worker is represented by a lawyer in relation to this appeal. The employer did not participate in the appeal. The worker requested that the appeal be considered by the oral hearing method of appeal. The Registrar determined that the worker's appeal met the criteria for consideration by the oral hearing method. An oral hearing was held in Victoria, British Columbia on June 26, 2013.

- [7] The worker's entitlement in this case is adjudicated under the provisions of the Act that preceded changes contained in the Workers Compensation Amendment Act, 2002 (Bill 49). Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I), which relates to the former (pre-Bill 49) provisions of the Act.
- [8] The standard of proof for compensation matters is the balance of probabilities, subject to section 250(4). Section 250(4) states that on an appeal respecting the compensation of a worker, if the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in favour of the worker.

Background and Evidence

- [9] The worker's claim has been the subject of a number of appeals before the former Workers' Compensation Review Board, the former Appeal Division, requests for review before the Review Division and WCAT. I refer the reader to *WCAT-2004-03848-RB* and *WCAT-2007-03544* for a history of the injury and treatment. The prior history is well known to the worker and will not be repeated here except for information that is relevant to the appeal which is before me.
- [10] Dr. Schamberger, a physiatrist, treated the worker between 1997 and 2001. On January 4, 2001, Dr. Schamberger provided an opinion the worker was not able to use her right arm and shoulder without experiencing increased aggravating pain that interfered with her lifestyle. He offered the opinion the worker would require use of pain medication indefinitely in order to control her pain symptoms.
- [11] Dr. Armstrong, a neurologist and chronic pain specialist, examined the worker in 2003 and reviewed a number of documents related to her claim. In a medical opinion dated August 12, 2003, Dr. Armstrong noted the worker's presentation was characterized by unremitting physical discomfort. He stated she manifested many signs of chronic pain, which included cognitive difficulties, such as slow thinking, a shortened attention span, and difficulty with memory and concentration. On examination in January 2003 the worker had presented with deep pain to her right shoulder, associated headaches, and variable numbness and tingling to her right upper extremity. Any physical activity, such as performing routine tasks at home, aggravated her pain symptoms. The worker's sleep was disturbed by pain and she was experiencing emotional distress. The worker did not appear depressed or unduly anxious. Dr. Armstrong did not observe the worker to have cognitive slowing or mind/body disconnect. Her mental state and speech were normal on neurological assessment. Dr. Armstrong concluded the worker suffered from the complications of chronic pain, including neurosensitivity to pain, emotional distress, cognitive difficulties and a sleep disorder. During participation in a pain program the worker made some gains, including better management of her pain through adjustments to her medications. Dr. Armstrong did not exclude the possibility the worker could attempt to return to work.

- [12] In *WCAT-2004-03848-RB* the panel found the worker's right axillary nerve injury, thoracic outlet syndrome, and chronic pain were compensable consequences of her right shoulder injury. The panel confirmed the percentage of disability and the effective date of the worker's permanent partial disability award in relation to her right shoulder injury, and confirmed the wage rate used to calculate that award. The panel referred the issue of the worker's entitlement to a loss of earnings award back to the Board for reassessment given the additional conditions that were accepted.
- [13] In November 2005 the worker met with a vocational rehabilitation consultant, at which time she reported she required a one to two-hour nap each day. She completed grocery shopping and banking tasks. Other members of her family performed laundry and household tasks. She reported that she continued to drive but not for long distances. The worker indicated she could keyboard or write for approximately 30 minutes one day, for 20 minutes the next day, but after that she would need to avoid such activity for a few weeks due to increased pain symptoms. In a letter dated November 28, 2005, the worker clarified that while she may be capable of performing certain tasks on a "one time only" basis, she was not able to perform any task on a sustained and continuous basis. She reported that her fatigue secondary to chronic pain and the side-effects from her pain medication necessitated she take one to two naps per day of one to three hours in duration. She reported being unable to complete basic daily activities, such as showering, cooking, household maintenance, or shopping. The worker submitted that the fact she could not perform basic activities of daily living precluded her from competitive employment.
- [14] On December 8, 2005 a Board officer concluded the worker did not have any physical restrictions arising from her right shoulder condition. The Board accepted the worker's permanent right shoulder limitations were as follows:
- below shoulder height activities only;
 - unable to perform heavy lifting with the right upper limb; and
 - unable to perform fine motor activities with the right hand.
- [15] An external vocational rehabilitation consultant completed a vocational assessment on March 27, 2006. At that time the worker reported she experienced interrupted sleep patterns due to pain, which necessitated one to two daytime naps per day. She experienced right arm and shoulder pain, short-term memory difficulty, impaired alertness and concentration, occasional headaches secondary to the chronic pain, depression, and increased difficulty with self-managed care and household duties.
- [16] He identified the worker reported that fatigue and drowsiness accompanied her sustained use of pain medication, and impaired her cognitive function. The vocational rehabilitation consultant provided an opinion the worker was not capable of performing office work because of her physical limitations and pain condition. He noted the worker's previous failed attempts to return to work at clerical duties, and further noted

her presentation had not changed significantly since that time. The vocational rehabilitation consultant stated as follows:

He stated that in his opinion [the worker's] prospects for gainful or competitive employment were grim. This was due to the impact of the disability cluster which included medical difficulty (chronic pain), cognitive problems (especially impairments in her executive mentation such as memory, judgment, attention and concentration and medication reaction) and in the psychological problems which accompanied her unresolved chronic pain syndrome. He concluded that in his role as a vocational rehabilitation consultant, he would find it extremely difficult in identifying employment for [the worker], and any employment, would likely be so very part-time to be considered "avocational" for quality of life purposes. Therefore it was his opinion [the worker] was unemployable for any occupation.

- [17] In *WCAT-2007-03544* the panel confirmed the worker had chronic pain as a compensable consequence of her shoulder injury, and found that the pain was disproportionate to her physical impairment, such that she was entitled to an award of 2.5% for chronic pain. The panel found the worker's pre-injury employment as a flight dispatcher was more sensitive than most occupations to medication intake, and accepted the worker's argument that she was not able to perform the job duties of a flight dispatcher while taking pain medication, such that she could not return to work at her pre-injury employment. The panel found the Board had not examined the worker's psychological reaction sufficiently, which was a significant factor in her inability to become employed. The vice chair directed the Board to complete a new employability assessment, with the starting point for the assessment being the conclusion the worker could not return to her pre-injury employment. The panel directed the Board to assess the worker's psychological state and provide her with a decision as to the compensability of a psychological condition.
- [18] Dr. Davidson, a psychologist, assessed the worker on February 5, 2008 and diagnosed her with Major Depressive Disorder, in partial remission. He provided an opinion the worker's cognitive problems were related to a combination of the medicine side effects, her chronic pain, her disrupted sleep, and fatigue. Dr. Davidson indicated the worker should avoid jobs that required prolonged attention span, good short-term memory, divided attention, and quick processing speed and decision making. He offered the opinion the worker may be able to perform simple work tasks, which in turn may increase her sense of accomplishment. He observed the worker to be well-spoken and articulate. He did not observe behaviour suggestive of a thought or cognitive disorder. Dr. Davidson indicated the worker had remained depressed until 2003. After she commenced use of OxyContin in 2003 her mood improved considerably secondary to the improvement in her pain levels.

[19] Dr. Davidson completed a follow-up assessment of the worker's psychological status on August 6, 2008 in order to assess her psychological permanent functional impairment. Dr. Davidson reported the worker stated her medical status and medication regime had been stable since 2003. The worker continued to take long acting OxyContin four times per day and Oxy IR (immediate release), when needed for breakthrough pain. The worker reported that when she took the breakthrough pain medication in particular her cognitive abilities were affected. The worker described experiencing short-term memory problems, such as forgetting the outcome of a telephone conversation before she wrote it down, or forgetting things she was supposed to do. Dr. Davidson reported as follows:

...her mental facilities decline if she is experiencing increased pain or fatigue, usually from poor sleep. She indicates on an hour-by-hour or day-by-day basis that if her level of pain goes up, her cognitive abilities decline accordingly. She believes that the side effects of the medications contribute to her cognitive problems. Her sleeping is problematic and she wakes up four to six times every night, which leaves her tired most days. She states that she almost never feels refreshed. She says on the rare days that she gets more sleep, she feels slightly better cognitively in the daytime, but as the day progresses and she gets increasingly tired, her cognitive abilities decline. She summarizes the contributing factors of her cognitive problems by stating that pain and medicines contribute equally as the primary causes of her cognitive abilities with her sleep problems being next influential...

[20] The worker advised Dr. Davidson that she was able to present well during interviews because for short periods of time she can maintain good conversational abilities. She prompts herself beforehand with information so that she has a good recall of the history of her claim. The worker advised that pain has been her primary barrier to returning to work. She described her activity tolerance as including light work around the house and grocery shopping a couple of times per week. The worker reported she did not like to use a computer because of the pain she experienced to her arm after ten minutes of use. Dr. Davidson reported the worker's attending physician was of the opinion the worker was unemployable due to her medical status and pain. Dr. Davidson provided an opinion the worker's cognitive abilities prevented her from doing anything but very concrete cognitive work, as she appeared to experience cognitive impairment from the mild to moderate/severe level depending on her level of pain and fatigue.

[21] On January 5, 2009 a Board vocational rehabilitation consultant completed an employability assessment, noting the worker's pre-injury long-term wage rate had been calculated at \$3,555 gross wages per month. The Board did not accept the worker was limited by reason of her psychological condition. The vocational rehabilitation consultant noted the worker had previously worked as a bookkeeper, and that this occupation was within her accepted limitations, such that it would be a suitable alternate occupation. The vocational rehabilitation consultant noted the activities of a bookkeeper are normally carried out below shoulder level, involving the use of a desk and computer.

The worker would be able to vary her body position between sitting, standing, and walking as needed. The average salary in this occupation as documented by Service Canada is between \$35, 000 and \$43,000 per year, and in the year 2002 BC Work Futures listed the average earnings for a fulltime bookkeeper between \$32,000 and \$60,000.

- [22] The vocational rehabilitation consultant also indicated that employment as a retail salesperson would be physically suitable and readily available to the worker in her home community. The average earnings as a retail salesperson in 2000, according to BC Work Futures, were \$17,600. A recent survey found persons employed in that occupation earned \$1,560 per month or \$18,720 per year on a fulltime basis. The vocational rehabilitation consultant also concluded that employment as a hotel front desk clerk was suitable and readily available employment. The entry level wages for such a position ranged between \$8.50 and \$15.00 per hour.
- [23] On March 3, 2009, the Board provided the worker with a functional award of 10% of total disability to compensate for her permanent psychological condition which was effective February 5, 2008. The disability awards officer concluded the worker was not entitled to a loss of earnings award. The worker requested a review of that decision.
- [24] In *Review Reference #R0106062* dated August 19, 2009 a review officer at the Review Division of the Board referred the matter back to the Board for further investigation and a new decision. Specifically, the review officer directed the Board to investigate the effective date of the worker's entitlement to a permanent partial disability award for her psychological condition, and to clarify the limitations the worker experienced as a result of her chronic pain and the medication she took to control her pain symptoms.
- [25] On September 12, 2009, a Board psychologist reviewed the worker's claim and noted the worker had reported her depression improved in 2003 when her pain symptoms were reduced with the use of OxyContin. The worker's depression was reported to be stable for the next five years. The Board psychologist noted the worker's depression was associated with and affected by her chronic pain, and that she continued to suffer from depressive symptoms. The worker's depression was unlikely to resolve completely as long as her pain symptoms continued. As the worker's pain symptoms waxed and waned, her depressive symptoms would also vary.
- [26] On March 16, 2010 a case manager with the Board concluded the worker's psychological condition had become permanent as of June 1, 2003. The case manager concluded the worker did not have any limitations associated with her chronic pain or from the pain medication she took to control her pain symptoms. On April 30, 2010, a disability awards officer concluded the worker was not entitled to a loss of earnings award. The worker requested a review of both decisions.

- [27] On December 10, 2010 in *Review Reference #R0117526* the review officer confirmed the effective date of the worker's entitlement to a permanent partial disability award for her psychological condition. On the same date in *Review Reference #R0118877* a review officer confirmed the worker was not entitled to a loss of earnings award. The review officer accepted a Board medical advisor's opinion that the worker had become tolerant to the side effects of her opioid medication, such that there were no medical limitations or restrictions accepted in relation to her chronic pain or medication intake beyond those set out in the May 12, 2010 decision. The review officer confirmed that employment as a bookkeeper was suitable and reasonably available to the worker in the long term, such that she was not entitled to a loss of earnings award. The worker appealed both decisions. She sought a finding her psychological condition became permanent as of February 28, 2000, and that she was entitled to a loss of earnings award.
- [28] Submissions were received by WCAT on June 6, 2011 in support of her appeals. The worker submitted the preponderance of medical evidence supported a finding she was competitively unemployable because of her compensable conditions and the resulting limitations and restrictions. The worker questioned how she could be considered not competitively employable by the Canada Pension Plan, but the Board concluded otherwise, using the same medical information. The worker submitted the positions of bookkeeper, retail salesperson, and front desk clerk were not suitable when considering her accepted limitations and restrictions. The worker submitted a bookkeeper was required to engage in constant and repetitive fine motor activities with the right hand. She asked the panel to consider the fact she has participated in two failed graduated return-to-work attempts at light clerical duties. The worker was not able to complete light filing duties. This evidence supports a finding that the suggested occupations were not suitable in the long term.
- [29] The worker asked the panel to rely on the expert evidence of the external vocational rehabilitation consultant to find that clerical office work is not suitable because of her physical limitations and ongoing pain. The worker further requested the panel consider the evidence from Dr. Davidson in relation to his opinion regarding her employability. The worker submitted the surveillance evidence supported the medical and psychological evidence with regard to her presentation. The worker acknowledged that she has been able to drive from the time of her injury, although she indicated that she restricted her driving to an automatic vehicle and for durations of 30 minutes or less. The worker stated she attempted to hide her pain and depression when she was away from home.
- [30] The worker provided various examples of how her short-term memory had deteriorated subsequent to her injury. She noted that prior to her injury she had worked as an air traffic controller and airline flight dispatcher/trainer, a position which required accurate recall of many numbers, letters, rules and regulations. The fact the investigator conducting the surveillance of her did not observe her to use a shopping list is not conclusive evidence she was not, in fact, using one when not in view and did not

provide evidence as to whether the worker had obtained all of the grocery items she intended to buy. The worker asked the panel to consider that over seven days of surveillance, she only went out of the home on one day and took four hours to complete three errands. During that time period, she was required to rest for greater than one hour between activities and take pain medication.

- [31] The worker provided a medical opinion from Dr. Clemans-Gibbon, her current attending physician, dated April 26, 2011, in which Dr. Clemans-Gibbon noted that the worker tried to live as normally as possible, despite her injuries and the negative consequences on her life. When the worker performed tasks such as errands, she took a long time to perform those errands and was unable to do very many in one day. This was due to the negative effects of her multiple medications, including OxyContin, Oxy IR, Cyclobenzaprine and antidepressants. Dr. Clemans-Gibbon confirmed the worker was able to drive for short durations of 30 minutes or less. She provided an opinion the worker's chronic pain and medications caused fatigue and cognitive difficulties. Dr. Clemans-Gibbon provided an opinion the worker was competitively unemployable because of her chronic pain and the medical consequences from her work injury.
- [32] The appeal before me arises from the implementation of a WCAT decision dated June 28, 2011. In decision *WCAT-2011-01600* a vice chair found the worker was entitled to a loss of earnings pension. The vice chair noted Section 23(3) of the Act provides for consideration of a worker's loss of earnings resulting from the compensable injury with regard to the difference between what the worker earned prior to the injury and the amount which the worker is able to earn in suitable employment. RSCM I item #40.10, *Assessment Formula* directs the decision maker to consider earnings that maximize a worker's long-term potential with regard to jobs that are suitable and reasonably available. RSCM I item #40.12, *Suitable and Available Occupations for the Claimant*, clarifies that an available job is one that is reasonably available to the worker in the long run. The decision maker must also consider the limitations imposed by the residual compensable disabilities and assess the worker's earning potential in light of all possible rehabilitative measures that might be of assistance. A reasonably available job must be one that the worker is fit to undertake and which would not involve adverse health consequences compared to other jobs.
- [33] The vice chair in *WCAT-2011-01600* wrote:

The decision as to whether a worker is entitled to a loss of earnings award requires consideration of what her restrictions and limitations are in relation to those permanent injuries. There is no dispute the Board has accepted the worker's physical limitations arising from her right shoulder injury include below shoulder height activities only, no heavy lifting with her right arm, and no fine motor activities with her right hand. What is at dispute in this appeal is the extent of the worker's restrictions and limitations in relation to her psychological condition and chronic pain

condition, and the restrictions and limitations that arise as a consequence of the medication she takes for those two conditions.

[34] In relation to the worker's ability to function the vice chair wrote:

...I do not find this to be contradictory to her previous evidence with regard to her level of function. The worker in her clinical assessment with Dr. Davidson stated she drives from her home to town approximately twice per week to perform errands and that she socially visits a friend once per week. The worker's activities on the one day that she was observed to leave her home are consistent with that evidence, in that she visited a pharmacy, made one personal visit, and went grocery shopping. The fact the worker was able to tolerate driving short periods and perform three tasks over a four hour period on one day out of six observed is completely consistent with the evidence she provided to Dr. Davidson and the evidence he relied upon in providing his professional assessment of her functional abilities. I am unable to find the fact the worker could drive her vehicle for short durations and perform three simple errands provides sufficient evidence that she has demonstrated tolerance to the side-effects of using opioid medication or that she does not have limitations secondary to her chronic pain and medication intake, as outlined by Dr. Davidson in the two psychological assessments.

[35] I have no reason to doubt the worker's evidence that she requires naps once or twice per day to compensate for the fatigue she experiences from the side effects of the opioid medication and her sleep disruption at night due to pain. There is substantial evidence on the claim file that documents the worker's need for frequent periods of rest or naps, secondary to her disrupted night sleep and significant use of opioid pain medication. I note the Board medical advisor has provided evidence that fatigue is a side effect from the use of opioid medication, which is consistent with the worker's evidence of experiencing fatigue from her medications. I find that the worker's use of pain medication, in conjunction with her disrupted sleep pattern due to chronic pain, necessitates that she take regular naps during the day. This in turn limits the worker in her ability to engage in fulltime employment. The issue remains as to whether the worker is physically and mentally capable of engaging in meaningful part-time employment.

[36] There is conflicting medical evidence and opinion regarding the worker's employability. In 2003, Dr. Armstrong was not prepared to go so far as to state the worker was not employable; however he did describe the worker experiencing significant limitations in her functional abilities, including cognitive difficulties and a sleep disorder. Dr. Davidson provided an opinion the worker may be able to perform simple work tasks. The external vocational rehabilitation consultant who assessed the worker in 2006 opined the worker's physical limitations, chronic pain, cognitive problems, and psychological

problems when considered collectively precluded her from engaging in meaningful employment. This is consistent with the recent opinion from Dr. Clemens-Gibbons.

[37] Dr. Davidson has outlined a number of limitations the worker may have in attempts to find meaningful employment. In particular, Dr. Davidson has opined the worker should avoid employment that requires prolonged attention span, good short-term memory, divided attention, or quick processing speed or quick decision making. I find Dr. Davidson's opinion is consistent with the earlier evidence and opinions from Dr. Armstrong and the external vocational rehabilitation consultant with regard to the limitations the worker experiences in her cognitive functioning. I accept the worker is limited in her cognitive function, secondary to her use of opioid pain medication and from her chronic pain condition, as outlined by Dr. Davidson.

[38] The vice chair in her penultimate paragraph wrote:

There is some evidence that suggests the worker may be able to perform simple work tasks on a very part-time basis, as suggested by both Drs. Armstrong and Davidson. The external vocational rehabilitation consultant also suggested this may be a possibility, but he was not able to envision an actual job that would accommodate the worker's cluster of limitations and restrictions. I leave it to the Board on the implementation of this decision to determine if there are, in fact, any suitable and reasonably available part-time simple work jobs that can accommodate the worker's limitations both in relation to her right upper extremity physical limitations and the significant limitations arising from her pain condition and medication intake. It is apparent; however, given my finding the worker is limited to only part-time employment at concrete simple jobs, she will be entitled to a loss of earnings award.

Pre Hearing Submission

[39] On June 17, 2013, WCAT received a written submission from the worker. Attached to the submission were notes taken from the worker's daily diary in which she had recorded her memory of the conversations that she had with the case manager in disability awards and the vocational rehabilitation consultant.

[40] On June 18, 2013, WCAT received a written submission from the worker. Attached to the submission was a medical letter from Dr. Clemens-Gibson dated June 13, 2013 that expanded upon the conclusion she gave in relation to employability in her April 26, 2011 medical legal opinion. She stated:

- the worker would not be medically capable of working as a telemarketer;
- the medication the worker takes for control of pain has resulted in reduced cognitive skills and a reduced ability to multi-task;

- due to the medication the worker was taking the worker had difficulty planning and organizing even simple events as her memory is deficient and she tires easily and would not have the mental stamina to work even four hours per day;
- the worker lacked the ability to make quick decisions and has a short attention span and does not have the ability to perform repetitive fine motor movements necessary for using a keyboard for periods of time; and,
- the worker is not capable of acquiring any employment due to her limited physical ability and compromised mental agility.

Oral Hearing Evidence

[41] The worker attended the hearing accompanied by her lawyer. She was affirmed. She provided direct evidence through oral testimony. She testified:

- there was a marked difference between what the case manager in disability awards wrote in her memos on file and their conversation relative to her ability to work;
- she was concerned the case manager in disability awards was not interested in her ability to function and had already made up her mind that she was able to work in the positions identified by the vocational rehabilitation consultant;
- both the case manager in disability awards and the vocational rehabilitation consultant were fixated on the amount of the functional award which they stated was too low to support total disability and that they were not properly analyzing the medical evidence on the claim file or the prior WCAT decision relative to her ability to function;
- she was unable to work as a telemarketer as she could not perform the fine motor skills necessary in recording any information provided by clients, by writing, typing or data input;
- she was unable to work as a telemarketer as her memory and cognitive functions prevented her from dealing with people over the phone as she becomes easily confused and cannot record information correctly;
- she was unable to work as a telemarketer due to chronic pain and the fatigue associated with it as she normally takes daily naps and is unable to work continuously for consecutive hours or consecutive days;
- neither the case manager in disability awards or the vocational rehabilitation ever discussed the position of telemarketer with her in order to determine whether this was a suitable position for her in light of the identified limitation created by her use of opioid medications;
- the pain associated with her injuries makes it impossible to identify any job which would accommodate her limitations as the pain is cumulative and when she does any activity the pain gets worse and after one half hour she has to stop;
- if she prolongs the activity the pain becomes intolerable and she has to lay down and take a nap to recover; and,
- there has not been any significant change in her medical condition or a change in the level of her medication since 2006.

- [42] The worker's lawyer provided an oral submission at the hearing. He argued there was no basis in the evidence on file to support the worker was capable of working twenty hours per week. The case manager badly misinterpreted the prior WCAT decision relative to the worker's ability to work. The decision did not identify any time limits at all and could not reasonably be read to state the worker was capable of a structure four-hour day.
- [43] The medical evidence from the worker's physicians and psychologists identified that the worker was severely limited in relation to the activities that she could perform. The external vocational rehabilitation consultant identified the worker was essentially unemployable. The worker would be a risk to any employer given the amount of medication that she takes and the limitations that the use of this medication created.
- [44] Employment as a telemarketer was clearly beyond the worker's capability. It was not reasonably available in any event. The fact that there may be jobs available as a telemarketer does not equate to a determination that they are available to the worker. Her limitations must be assessed and a decision made as to whether it was reasonable that she would be successful at obtaining a job with a telemarketing firm. Given the limitations identified in Dr. Clemans-Gibson's medical opinion it was unreasonable to assume the worker would be successful in obtaining employment as a telemarketer.

Findings and Reasons

- [45] In deciding this appeal I have reviewed the evidence on the claim file, the evidence from the Review Division proceedings, testimony from the worker, new medical evidence from Dr. Clemans-Gibbon and the oral submission from the worker's lawyer. I have considered the relevant statutory law and Board policy applicable to this appeal. In consideration of all of the circumstances related to this case I find that the Review Division decision is incorrect and accordingly I vary the decision of November 2, 2012.
- [46] I have allowed the worker's appeal as I find the decision by both the case manager and the review officer to be unreasonable as they have misinterpreted the instructions that were given by the vice chair in decision *WCAT-2011-01600*. They interpreted the vice chair's decision to mean the worker was capable of regularly scheduled work as a telemarketer. They concluded that the worker was capable of working a 20 hour week making \$12 per hour.
- [47] With respect to this decision it is necessary to point out that the previous vice chair found the worker may be able to perform simple work tasks on a very part-time basis. This decision was very cautiously worded as the vice chair was aware that the medical evidence from Drs. Armstrong and Davidson and the assessment by the external vocational rehabilitation consultant was that they were not able to envision an actual job that would accommodate the worker's cluster of limitations and restrictions. The previous vice chair actually stated that she left it up to the Board to determine if there were in fact **any** suitable and reasonably available part-time simple work jobs that could

accommodate the worker's limitations both in relation to her right upper extremity physical limitations and the significant limitations arising from her pain condition and medication intake. The findings by the vice chair did not in any way bind the Board to find the worker was able to perform part-time employment.

- [48] The worker has argued that the job of a telemarketer was not suitable nor was it reasonably available. She relied upon the opinions from Drs. Armstrong, Davidson and Clemans-Gibbon in support of her argument. She further pointed out that the external vocational rehabilitation consultant had concluded she was essentially unemployable.
- [49] In contrast to the worker's argument is the December 19, 2011, vocational rehabilitation consultant's recommendation. She identified the worker's restrictions and limitations were; below shoulder height activities, unable to perform heavy lifting with the right upper limb, unable to perform fine motor activities with the right hand, avoidance of employment that requires prolonged attention span, good short term memory, divided attention, or quick processing speed or quick decision making and limited to only part-time employment at concrete simple jobs.
- [50] The vocational rehabilitation consultant reviewed three positions; parking lot attendant, telemarketer and Laundromat attendant. She concluded that all three positions were within the worker's limitations. There was no explanation in the employability assessment as to why these positions were within her limitations. There is no explanation as to why the worker would be capable of working 20 hours per week. The Vocational Rehabilitation Consultant did not obtain a medical opinion in support of her conclusion that the work would be within the worker's limitations.
- [51] Although it is not necessary for the Vocational Rehabilitation Consultant to obtain a medical opinion on whether the employment options selected were suitable, given the fact that there are opposing medical opinions on the worker's ability to perform any form of work it would have been desirable. In the present case the medical evidence on the claim file supports that the worker was limited in her cognitive function secondary to her use of opioid medication and her chronic pain.
- [52] I accept and agree with the finding of fact from the vice chair in WCAT decision *WCAT-2011-01600* dated June 28, 2011 in which she concluded the worker was limited in her cognitive function, secondary to her use of opioid pain medication and from her chronic pain condition, as outlined by Dr. Davidson. This factor was repeated by Dr. Clemans-Gibbon who stated the worker's chronic pain and medications caused fatigue and cognitive difficulties. Dr. Clemans-Gibbon provided the opinion the worker was competitively unemployable because of her chronic pain and the medical consequences from her work injury.

- [53] The Vocational Rehabilitation Consultant's employability assessment did not meet the stringent test placed upon the Board by the vice chair in her June 28, 2011 decision. In her decision the vice chair did not state the worker was unemployable. She identified that there was some evidence that suggested the worker may be able to perform simple work tasks on a very part-time basis. However she also noted the opinion from the external vocational rehabilitation consultant that he was not able to envision an actual job that would accommodate the worker's cluster of limitations and restrictions.
- [54] Two of the types of employment that were recommended by the Vocational Rehabilitation Consultant were rejected by the Disability Awards Committee. They elected the job of telemarketer and concluded the worker could perform this type of employment 20 hours per week. They commented that the worker did not have to be employed in her home. They stated that the worker had strongly defined disability perceptions.
- [55] With respect to this conclusion the worker's lawyer argued the worker did not have a strongly defined disability perception. The medical evidence on file and the appellate decisions on file supported that she had an actual disability that is well documented and it is this disability that impacts her ability to work. Given the medical opinions on the claim file particularly as it relates to the worker's cognitive difficulty I accept this argument and relying on the medical opinion from Dr. Clemans-Gibbon I find that employment as a telemarketer is not suitable.
- [56] In addition I find this job is not reasonably available to the worker given her medical condition and the limitations expressed by Dr. Davidson. He provided an opinion the worker's cognitive problems were related to a combination of the side effects of her medication, her chronic pain, her disrupted sleep, and fatigue. Dr. Davidson indicated the worker should avoid jobs that required prolonged attention span, good short-term memory, divided attention, and quick processing speed and decision making.
- [57] The vice chair in her June 28, 2011 decision noted the Board medical advisor has provided evidence that fatigue was a side effect from the use of opioid medication, which was consistent with the worker's evidence she experienced fatigue from her medications. She found that the worker's use of pain medication, in conjunction with her disrupted sleep pattern due to chronic pain, necessitated that she take regular naps during the day. This in turn limited the worker's ability to engage in fulltime employment. I agree with this conclusion and her statement that the remaining issue was whether the worker was physically and mentally capable of engaging in meaningful part-time employment.
- [58] Based upon the reasons explained in the prior vice chair's decision I find that it is highly unlikely that the worker was competitively employable on a part-time basis 20 hours per week as a telemarketer. The worker's sleep pattern and cognitive problems that result from opioid use and chronic pain do not support a conclusion the worker can work at a regularly scheduled form of employment. The decision she could work as a

telemarketer is inconsistent with the prior decision that the worker could perform simple work tasks on a very part-time basis. The Board has not demonstrated that there is sufficient flexibility in this type of work so as to meet her particular requirements. Nor have they demonstrated that there is an employer available to provide employment sufficiently modified to meet the worker's restrictions and limitations.

[59] The issue of available jobs was addressed in *Young v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2011, BCSC 1209. In this decision the court considered policy item #40.12. It quoted the portion of the policy that provided:

... 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.

[60] The Court found that by relying on a Vocational Rehabilitation Consultants report based only on statistics obtained from various government databases, the Board failed to analyze the words of the policy and therefore the question of whether the Petitioner was competitively employable. The Court stated that the very purpose of the words is to prevent a decision being made only on statistics. The Court said that neither the Board decision nor the Vocational Rehabilitation Consultant's report referenced the likelihood of the worker, with her particular disability, obtaining such a job if there are always better qualified applicants.

[61] Given the overwhelming weight of medical opinion evidence on the claim file, I find employment as a telemarketer is beyond the worker's physical capability and is not suitable. I further find that employment as a telemarketer is not reasonably available as the worker would not be competitive given the limitations resulting from her reliance on pain medication. Accordingly I allow the worker's appeal. I find the worker is competitively unemployable. I find she is entitled to a total loss of earning award.

Conclusion

[62] I allow the worker's appeal and vary the November 2, 2012 Review Division decision. I find the worker is entitled to a total loss of earnings award.

[63] The worker did not identify that there was an expense incurred to obtain the medical-legal report from Dr. Clemans-Gibbon dated June, 2013. If there was an expense incurred the worker is entitled to reimbursement of this expense up to the amount identified in the agreement between the Board and the British Columbia Medical Association in accordance with Rule #16.1.3.1 of the MRPP as the evidence was useful

to consideration of the appeal. I order reimbursement of this expense pursuant to section 7 of the *Workers Compensation Act Appeal Regulation*.

Dale Reid
Vice Chair

DR/tv

WCAT Amended Decision Number : WCAT-2013-01992
WCAT Amended Decision Date: September 5, 2013
Panel: Dale Reid, Vice Chair

Amended Decision

In WCAT Decision *WCAT-2013-01992*, issued on July 12, 2013 I allowed the worker's appeal and found the worker is entitled to a total loss of earnings award. The worker's representative contacted, by telephone, WCAT's Tribunal Counsel Office and requested that the panel address the issue of the payment of interest on the loss of earnings award which had been determined by the Board. After reviewing the original decision, and based on section 253.1(1) of the Act, I am amending the original decision by adding a new heading and paragraph following paragraph 8 in the **Jurisdiction** section and prior to the **Background and Evidence** section of the original decision (changes are in **bold**) as follows:

Preliminary Matter

I explained to the worker's representative that the issue of interest had not been addressed in the case manager's decision of April 17, 2012 or the Review Division decision of November 12, 2012. Given that there was no decision from the Board that denied interest in relation to the worker's loss of earnings award, I told the worker's representative that I would not exercise my discretion to address this issue. Notwithstanding, that I have found the worker has entitlement to an increased award, the worker's representative should still take this issue up directly with the Board.

Dale Reid
Vice Chair

DR/pme