

DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

- [1] This appeal concerns the worker's entitlement to a permanent disability award based on loss of earnings. The worker appeals from *Review Decision #R0207317*, made on August 31, 2016 by a review officer of the Workers' Compensation Board (Board), operating as WorkSafeBC.
- [2] On February 11, 2016, a Board disability awards officer wrote to the worker, granting him a permanent disability award based on loss of earnings. The amount of the award was \$1,770.78. This replaced the worker's award of \$1,675.22 per month, based on loss of function.
- [3] The worker asked for a review. In his decision of August 31, 2016, the review officer confirmed the disability awards officer's decision. The worker now appeals.

Issue(s)

- [4] The issue before me is the amount of the worker's permanent disability award based on loss of earnings.

Jurisdiction and Procedure

- [5] This appeal was brought pursuant to section 239(1) of the *Workers Compensation Act* (Act), which provides for an appeal to the Workers' Compensation Appeal Tribunal (WCAT) from a final decision made by a review officer in a review under section 96(2).
- [6] In the notice of appeal, the worker's lawyer asked that the appeal proceed in writing. I agree that the issue on appeal may be fairly resolved without the benefit of oral testimony. The appeal therefore proceeded by way of written submissions, without an oral hearing, as requested by the worker.

Background and Evidence

- [7] On September 22, 2011, the worker, then a 32-year-old truck driver, was struck from behind by a fork-lift which then drove over his left leg. The worker suffered a bad crush injury to his left foot and ankle, and also suffered injuries to his left knee and to his back.
- [8] At first, the worker's ankle injury was dealt with conservatively. However, his pain persisted and he was slow to wean himself from crutches to the use of a cane. On January 15, 2013, he underwent surgery which involved debridement and synovectomy of the left ankle, and repair of the tibialis posterior tendon, with wire and screws. His surgeon predicted that the injury would not totally recover.

- [9] The Board accepted that the worker had a permanent injury to the foot and ankle, including permanent chronic pain. It accepted that he had suffered an aggravation of a pre-existed left knee condition, resulting in permanent left knee chronic pain. Eventually, it accepted that he had suffered an aggravation of a pre-existing low back condition, resulting in a permanent disability and permanent low back pain.
- [10] The worker had come to Canada at age 15. English was his second language, although he appeared to speak it fairly well. He had taken some Grade 12 courses at a Canadian high school, and some Grade 12 upgrading (incomplete) at a community college.
- [11] At the time of the injury, the worker had worked for the employer for only about three weeks. However, he had six years of experience as a truck driver. Before that, he had worked for seven years in shipping and receiving, for a uniform-supply company, rising to the level of lead hand. Before that, he had worked for four months in a glass shop. His long-term wage rate was based on annual earnings (of a worker of similar status) of \$70,128.83.
- [12] As of August 5, 2013, the Board ended the worker's wage loss benefits (for temporary disability) and he began receiving vocational rehabilitation benefits.
- [13] On September 20, 2013, the worker underwent vocational interest and aptitude testing. He scored average in motor coordination, below average in verbal aptitude, and low average in eight other skills. In relation to his academic training and abilities, he was average or below average. The grade equivalent for his skills ranged from Grade 5.3 for spelling to Grade 12.9 for reading comprehension. Number operations, and language, were rated at Grade 8.2. Science was rated at Grade 10.1 and mathematics was rated at Grade 10.7.
- [14] The assessor concluded that the worker had good communication skills and should be able to learn, but should not be expected to use sophisticated written language skills. He would benefit from the use of a calculator. He was more of a concrete thinker than a user of high-level logic and reasoning skills. He would be best served by learning on the job.
- [15] Initial vocational rehabilitation efforts were directed at the occupational goal of customs broker. This had seemed attractive to the worker, was related to his trucking experience, and had the potential to replace his lost earnings. However, the worker was overwhelmed by the training and dropped out. The Board ended his vocational rehabilitation benefits in April 2014.
- [16] In February 2014, during his attempt at the customs broker course, the worker became depressed. He began counselling at mental health, with a counsellor whom he saw for about the next year. He also began seeing Dr. Sherazi, a psychiatrist. On February 25, 2014, Dr. Sherazi diagnosed the worker with a Major Depressive Disorder and a Generalized Anxiety Disorder. The worker's lawyer asked for acceptance of a psychological condition.
- [17] On May 27, 2014, the worker was examined by Dr. Friedenberg, a psychologist. Dr. Friedenberg diagnosed the worker with an Adjustment Disorder with Mixed Anxiety and Depressed Mood. Dr. Friedenberg thought that the worker would likely recover quickly if he were to return to work. He thought that the worker would likely not learn well in a classroom situation, but would learn best by observation and experience. He did not think that a career involving interaction with the public would be a good choice.

- [18] On September 22, 2014, Dr. Schibler, a psychologist, reviewed the psychological reports. She recommended intense counselling to try to improve the worker's situation before concluding that it was permanent. She proposed some psychological limitations. She thought that the worker would likely have difficulty with sustained attention and concentration, working at a fast pace, working to deadlines or under high pressure, working in conditions where errors were not tolerated, working with high productivity expectations, and multitasking. She thought that he would have difficulty interacting with people that he did not know, and difficulty tolerating extended and intense social contact. He should be restricted from situations where lapses of attention or concentration would be dangerous for himself or others.
- [19] Dr. Grimmer, a Board psychologist, agreed with Dr. Schibler's opinions on limitations and restrictions. She thought that the diagnoses by Dr. Friedenberg and Dr. Sherazi were generally equivalent.
- [20] On October 22, 2014, the Board accepted the compensable conditions of a Major Depressive Disorder and a Generalized Anxiety Disorder. Acceptance was at first for temporary conditions. On January 7, 2015, the Board accepted the psychological conditions as permanent, and accepted the limitations and restrictions suggested by Dr. Schibler, as permanent. The Board then authorized further supportive counselling treatment, which was provided by Dr. Morosan. Counselling was still ongoing at the time of this appeal.
- [21] On February 13, 2015, the worker underwent psycho-vocational testing. Testing suggested that he was severely depressed and was experiencing anxiety. Non-verbal intelligence testing suggested below-average cognitive functioning. Academic achievement tests suggested a Grade 8.5 equivalent for letter-word identification, Grade 2.6 for reading fluency, Grade 5.2 for spelling, Grade 4.8 for passage comprehension, and Grade 3.8 for calculation. These are scores in the borderline to low-average range. The assessing psychologist concluded that the worker would not likely meet entry level requirements for most college or applied training programs without upgrading. His interests suggested a career in personal service or general service.
- [22] Upon reviewing the psycho-vocational report, Dr. Grimmer concluded that it provided a clear rationale for further exploration into the occupation of general office clerk in the area of transportation.
- [23] On May 21, 2015, a WCAT vice chair gave his decision accepting the compensable aggravation of the worker's pre-existing lumbar degenerative disc disease. This was the last condition to be accepted. On June 25, 2015, Dr. Dray, a Board medical advisor, gave the opinion that the condition had been permanent since July 2013. It would cause limitations for walking on uneven ground, prolonged sitting, standing, walking, or climbing, and would demand the ability to take micro-breaks. The worker would have difficulty with activities in excess of the light level on more than an occasional basis, and with bending or crouching. The worker already had similar accepted physical limitations as the result of his left ankle and foot injury.

- [24] In the spring of 2015, the worker cooperated with his vocational rehabilitation consultant in looking for jobs in the general office clerk area. This involved jobsite visits to look at potential jobs and the environment. In one of these jobs, to a towing outfit, on May 12, 2015, the worker was offered a short-term night shift job on the spot. This unexpected offer seemed to increase his anxiety and psychological distress.
- [25] By September 2015, the worker felt he was under so much pressure and stress that he did not want to proceed any more with vocational rehabilitation. On September 11, 2015, the Board ended his vocational rehabilitation benefits. The vocational rehabilitation consultant decided to proceed with a deemed vocational rehabilitation plan.
- [26] On September 30, 2015, a disability awards officer wrote to the worker with the final increase in his permanent disability award. It was now based on 41.59% disability. This included 15% disability for the psychological condition, and a total of 7.5% for three areas of chronic pain. The balance for functional disability in the low back and in the left foot and ankle.
- [27] On October 15, 2015, the vocational rehabilitation consultant prepared a deemed vocational rehabilitation plan, to retrain the worker as a security guard. Some of the occupations included in this group were security guards, armoured car guards, corporate security officers, private investigators, and retail loss prevention officers. Typical requirements were completion of high school and sometimes a college diploma in law and security or police technology. Specialized training might be provided, and guards who carried a firearm required a license.
- [28] The consultant concluded that the physical requirements were light. Security guards were typically required to sit or stand throughout their shift, and some positions required the ability to walk and patrol. Most positions did not require any lifting. The consultant concluded that the occupation would be physically suitable for the worker. Gross monthly earnings were in the range of about \$3,000.00 to \$3,700.00.
- [29] On October 20, 2015, the vocational rehabilitation consultant wrote to the worker with the decision to offer him a deemed theoretical vocational rehabilitation plan, for a return to work with the occupational goal of security guard.
- [30] On October 22, 2015, a Board case manager wrote to the worker with the decision that he was eligible to be assessed for a permanent disability award based on loss of earnings.
- [31] On October 23, 2015, the vocational rehabilitation consultant prepared an employability assessment. She concluded that, in the job group of security guards and related security service occupations, the worker would be successful working full time, earning \$17.94 per hour. She thought it reasonable to anticipate that he would eventually earn \$3,110.00 per month.
- [32] On February 11, 2016, a Board disability awards officer wrote to the worker. She calculated his loss of earnings, in terms of net earnings (after deductions), according to the Board's calculator. (It is difficult for those who do not have access to that calculator to check the figures.) The loss was \$1,937.47 per month. 90% of that loss was \$1,650.19. The amount adjusted to the date of the letter was \$1,770.78 per month. The worker was already receiving an award based on 41.59% disability, in the amount of \$1,675.22 per month. The loss-of-earnings award therefore represented about a \$95.00 per month increase. The worker asked for a review.

- [33] On August 30, 2015, the worker's lawyer made submissions to the Review Division. He pointed out some of the requirements of security officer positions, including education and the ability to respond to emergency situations. English was the worker's second language, and he had not completed high school. He scored in the low range for many skills and measures of academic learning. His physical abilities were limited, and he could not run or even walk briskly. He could not lift, bend, or carry. He could not do the constant prolonged sitting, standing, or walking required for night patrols. He did not have the appropriate education or computer skills to do paperwork. He had psychological restrictions and did not deal well with the general public or high-pressure situations. If there were easy jobs in the occupational classification, they would not be accessible to a new entrant in the occupation. The worker's lawyer submitted that the worker was unsuitable for any gainful employment. The worker had successfully applied for Canada Pension Plan disability benefits.
- [34] On August 31, 2016, the review officer gave his decision. He concluded that some job positions in the general classification of security guards would be physically and psychologically suitable for the worker. He was satisfied that the worker had the transferable skills and functional abilities to do those jobs, and had the ability to access that type of work. He found that the employment was reasonably available. He therefore confirmed the Board's decision to grant the worker a permanent disability award based on partial loss of earnings. The worker now appeals.

Submissions

- [35] On February 20, 2017, the worker's lawyer made submissions to WCAT. He enclosed two letters that he had sent asking for medical opinions. One was to the worker's family doctor, Dr. Jaffri, and the other was to Dr. Sherazi. He also included Dr. Jaffri's invoice, in the amount of \$1,012.00, together with a copy of a cheque to Dr. Jaffri. He did not include a report from either Dr. Jaffri or Dr. Sherazi. As of the date of this decision, WCAT has not received a copy of a report from either of those two doctors.
- [36] The worker's submission to WCAT was essentially the same as his submission to the Review Division.

Reasons and Findings

- [37] Section 250(2) of the Act provides that I must base my decision on the merits and justice of the case but, in doing so, I must apply a policy of the board of directors of the Board that is applicable in this case. Applicable policy is found in *Volume II* (RSCM II) of the Board's *Rehabilitation Services and Claims Manual*. Section 250(4) provides that, in a compensation appeal, where the evidence supporting different findings on any issue is evenly weighted, I must resolve that issue in the worker's favour.
- [38] Most permanent disability awards are made pursuant to section 23(1) of the Act, and are based on the assessed degree of permanent disability and the pre-injury wage rate. Section 23(3) provides for the alternative method of assessing a permanent disability award, based on loss of earnings. If the requirements of the section are met, the award may be based on 90% of the difference between the average net earnings of the worker before the injury and either the average net earnings that he is earning after the injury or the average net earnings that the

Board estimates him capable of earning in a suitable occupation after the injury. That is, the Board may use the actual loss earnings or it may use a deemed loss of earnings, by deeming the worker able to earn a certain amount in a suitable occupation. In this worker's case, he is not working, so the Board deemed him able to work as a security guard and calculated his loss of earnings on that basis.

- [39] Policy item #40.00 sets out the decision-making process for a loss-of-earnings award. The first step is to decide whether a worker is entitled to be assessed for a loss-of-earnings award. The Board has already done that, and has concluded (in the letter of October 22, 2015) that the worker was entitled to be assessed. This appeal concerns the second step, which the assessment of the actual award.
- [40] Policy item #40.10 sets out the assessment formula. To estimate the worker's ability to earn after the injury, the Board considers the evidence (including the medical evidence) of the limitations imposed by the compensable disability and the fitness of the worker for different occupations. It considers evidence about the suitability of the worker for occupations that could reasonably become available. It then arrives at a conclusion about suitable occupations that the worker could reasonably be expected to undertake over the long-term future. It selects average net earnings that maximize a worker's long-term potential. The possible award is then 90% of the difference between the pre-injury average net earnings and the estimated average net earnings after the injury. No award can be made when the worker is unemployed for reasons unrelated to the injury, and it is determined that there will not be a potential loss of earnings.
- [41] Policy item #40.12 discusses suitable occupations. The Board assesses the worker's earning potential in the light of his transferrable skills and all possible rehabilitation measures that might be of assistance. The selected occupation must, in practice, be reasonably available. The worker must have the skills, education and functional abilities that the occupation requires. The worker must be medically fit to undertake the occupation. The occupation must be one that is reasonably available in the long term, even though it is not available in the short term.
- [42] The worker had a serious injury to his left foot and ankle resulting in a permanent disability. He has a permanent disability in his low back. He has three accepted sources of chronic pain, in his left ankle, his left knee and his low back. He has accepted depression and anxiety. He has limitations for lifting, carrying, bending, sitting and standing. He has psychological limitations for dealing with the public, for tasks requiring attention and concentration, for high-pressure tasks, and where the tasks are psychologically demanding. He has a psychological restriction for working where lapses of attention of concentration might be dangerous.
- [43] Testing has revealed that the worker is in the low range of academic achievement, and his learning skills are not great. He would do best in a learning-on-the-job situation rather than in a classroom. Upon coming to Canada at age 15, he took some high school courses but did not complete high school.
- [44] The evidence indicates that high school completion is a basic requirement to be a security guard, and there may be additional qualifications as well. The worker's experience as a truck driver and working in shipping and receiving at the uniform company would not seem to be useful towards that occupation. I would not expect that someone who has trouble walking would be a good candidate as a security guard, unless there were other redeeming factors,

which the worker does not have. In spite of the employability assessment and the opinions by the vocational rehabilitation consultant, I conclude that the occupation of security guard is not one that the worker is suited for physically or psychologically. He cannot reasonably be expected to work as a security guard.

- [45] The Board has already concluded that the training for the position of customs broker was beyond the worker, and that he was not suitable for that position. The Board attempted to place the worker as a clerk in the transportation industry, but he was unable to participate effectively, and his psychological condition flared up when he attempted to do so. I find that a job as a clerk in the transportation industry is not one that is suitable for the worker.
- [46] Board vocational rehabilitation consultants are professionals in their field, and it is reasonable to conclude that they would do their best to match the worker to a suitable occupation. That has not occurred in this case. The three attempts at matching the worker to a suitable occupation have not been successful. Ordinarily, failure to participate in vocational rehabilitation would be a strong factor against entitlement to a loss-of-earnings award. In this case, however, I conclude that the worker's dropping out of rehabilitation was related to his compensable psychological conditions.
- [47] On the evidence before me, there is no position that is reasonably suitable for the worker, with his physical and psychological limitations and restrictions. I find that he is entitled to a permanent disability award based on loss of earnings, calculated on the basis that the average net earnings that he is capable of earning in a suitable occupation after the injury are zero. That is, he entitled to a permanent disability award based on 100% loss of earnings.

Expenses

- [48] The worker's lawyer has submitted the invoice for \$1,012.00 for a report from Dr. Jaffri. However, no report has been submitted. I therefore decline to direct the Board to reimburse the worker for that cost.

Conclusion

- [49] The appeal is allowed. The review officer's decision is varied. I find that the worker is entitled to a permanent disability award based on 100% loss of earnings.
- [50] I decline to order reimbursement for the cost of Dr. Jaffri's report, which was not supplied to WCAT. There are no other apparent expenses of the appeal. There is therefore no order for reimbursement of expenses pursuant to section 7 of the *Workers Compensation Act Appeal Regulation*.

Andrew Elliot
Vice Chair