WCAT Decision Number: WCAT-2004-00065-RB
WCAT Decision Date: **January 09, 2004**
Panel: Rob Kyle, Vice Chair

Introduction

The worker appeals a December 31, 2001 decision letter of the Workers' Compensation Board (Board).

The December 31, 2001 decision letter informed the worker of the particulars of the Board's implementation of a May 29, 2001 Appeal Division decision.

The worker is not represented in this appeal. The employer is not participating.

There was no request for an oral hearing. After reviewing the evidence, and the policy for considering an oral hearing in item 8.70 of the Workers' Compensation Appeal Tribunal - Manual of Rules, Practices and Procedures, the panel concludes that an oral hearing is not required to ensure a full and fair consideration of the issues. There is sufficient information in the claim file to decide the issue in front of the panel.

Jurisdiction

This appeal was filed with the Review Board. On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38).

WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1) of the *Workers Compensation Act* (Act)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply (a) policy(ies) of the Workers' Compensation Board's Board of Directors that is (are) applicable in the case (Section 250(2)). WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Issue(s)

1) Did the worker receive the full quantum of wage loss benefits to which he is entitled under this claim?

2) Is the worker entitled to a permanent partial disability pension?

3) Is the worker eligible for vocational rehabilitation benefits?

Background, Analysis and Decision

At the material time to this appeal, this now 38-year-old worker was employed part time for four hours per day and three days per week in a flower and plant distribution warehouse. In mid-February 1999, the worker filed an application for compensation with the Board claiming that he had injured his lower back after lifting flowers onto a wagon and twisting his back as he was pulling the wagons of flowers. The Board denied the worker's claim as the initial medical reports indicated that the worker had injured his back while lifting chairs at his church.

The worker appealed that decision to the Workers' Compensation Review Board. The appeal was denied. The worker then appealed to a panel of the Appeal Division. The majority of the Appeal Division panel accepted that the worker had injured his back at work. The dissenting panel number found he did not. The Appeal Division panel held an oral hearing and also requested and received a medical opinion from Dr. R., a Board orthopedic consultant. The Appeal Division majority decision was based on section 99 of the Act, the relevant part of which states that where there is doubt on an issue and there are disputed possibilities evenly balanced in deciding an issue, the issue will be decided in accordance with that possibility which is favorable to the worker. For a detailed account of the background of these appeals, the reader is referred to the June 20, 2000 Workers' Compensation Review Board findings and to Appeal Division decision #2001-1058, dated May 29, 2001.

The claim file and the Appeal Division decision were returned to the Board for implementation of that decision. This appeal arose from the Board's decision letter dated December 31, 2001 with respect to that implementation.

In that December 31, 2001 decision letter, the case manager informed the worker that in accordance with the Appeal Division decision the Board was accepting the worker's claim for a low back strain occurring on February 4, 1999. Wage loss benefits were to be paid for February 8, 1999 and from February 12, 1999 to August 20, 2000. The initial wage rate was set at $96.60 per week and the long-term wage rate was set at $26.62 per week. It is that decision letter that the worker now appeals to a panel of the Workers' Compensation Appeal Tribunal.

The worker filed his appeal of the December 31, 2001 decision letter with the Review Board. It is apparent from his Part 1 notice of appeal that English is his second language. However, I take it from this notice of appeal that the worker is appealing the quantum of the wage loss benefits paid and is also claiming that he has sustained a permanent disability from this injury. In his Part 2 notice of appeal, which was filed in late August 2002, the worker is claiming that he should receive a permanent disability pension and should be provided with vocational rehabilitation benefits.

These are the three issues raised by the worker in his notice of appeal. The first is whether the wage rate calculated by the Board and utilized in the calculation of his wage loss benefits adequately reflects the worker's loss of earnings because of his injury; in addition, did the worker receive wage loss benefits for the full period of time to which he was entitled. As noted above, the worker was employed for four hours a day and three days a week in the flower distribution warehouse. The worker apparently submitted no other earnings information to the Board for his average earnings determination other than that of his earnings from the flower warehouse work. In the decision letter under appeal, the worker was invited to submit any further wage information from this employment or other employment that might indicate that a higher average earnings figure was warranted. Wage loss benefits are designed to compensate a worker for the actual loss of earnings suffered by the worker by reason of the injury. Wage loss benefits are designed to compensate workers for relatively short-term disabilities and are to be distinguished from permanent partial disability pensions, which are designed to compensate workers for permanent disabilities experienced in the workplace. The worker has not provided any evidence that would indicate the Board's calculation of his wage loss benefits was incorrect. Furthermore, the worker has not submitted any evidence that would indicate his benefits should have extended beyond August 20, 2000. I have reviewed the earnings information in the file and it appears incomplete as it provides an earnings figure less than that utilized by the Board in calculating the workers wage rate. I am therefore relying on the one year earnings figure utilized by the Board of $1,388.00, which has not been seriously disputed by the worker. In re-calculating the workers average earnings on a weekly basis, I conclude that the figure arrived at by the Board of $26.62 is accurate. Therefore, the worker's appeal on the wage loss entitlement issue is denied.

The worker also claims, as the second issue before the panel, that he is entitled to a permanent partial disability pension because of his back injury. I have no jurisdiction to adjudicate that issue as there has been no original adjudication by the Board as to whether the worker sustained a permanent functional impairment as a result of this workplace injury. It is open to the worker to approach the Board and ask for a decision as to whether it considers the worker to have sustained a permanent functional impairment from this injury.

By way of obiter, even if I did have the jurisdiction to decide this issue there is currently insufficient evidence in the claim file that would support a conclusion that the worker

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

has experienced a permanent functional impairment because of this injury. While there is some objective imaging evidence of degeneration in the worker's cervical spine, it is the worker's lower lumbar spine where the back strain accepted under this claim is located. The worker's physiotherapist did provide an opinion that suggested he had an ongoing degenerative condition in his lumbar spine. His opinion, however, falls far short of providing sufficient expert evidence to support a conclusion that the warehouse work was a significant contributing factor to any degenerative condition in the worker's lumbar spine area. That opinion is not supported by a February 12, 1999 x-ray of the lumbar spine, in which no abnormality was identified; his opinion raises no more than a speculative possibility.

There is insufficient objective or expert evidence of a permanent injury in the worker's lumbar spine, or of an aggravation of any pre-existing condition in the worker's lumbar spine, particularly any injury or aggravation that could be attributed to this workplace incident.

The worker's appeal on the issue of a permanent functional impairment arising from this workplace injury is denied, as I have no jurisdiction to address that issue.

The third issue concerns the worker's position that he should be provided with vocational rehabilitation benefits. Again, there has been no original adjudication by the Board on the subject of vocational rehabilitation benefits, and so I have no jurisdiction to adjudicate that issue.

Again by way of obiter, the provision of vocational rehabilitation benefits is discretionary under section 16(1) of the Act; there is no entitlement to such benefits. Vocational rehabilitation benefits are primarily designed to aid workers who have sustained a permanent functional impairment and who are unable to return to their pre-injury employment. In addition to my lack of jurisdiction to address the vocational rehabilitation issue, the worker has not established that he has a permanent functional impairment or is likely to develop one because of this workplace injury.

The worker's appeal on the issue of the provision of vocational rehabilitation benefits is denied, as there has been no original decision by the Board on this issue that would provide the worker with a right of appeal.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

Decision

The worker's appeal is denied. The December 31, 2001 decision letter of the Board is confirmed.

Rob Kyle
Vice Chair

RK/dcw

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898