WCAT Decision Number: WCAT-2004-00069-RB
WCAT Decision Date: **January 09, 2004**
Panel: David A. Cox, Vice Chair

Introduction

The worker appeals from four separate decisions of officers of the Workers' Compensation Board (Board).

The first, dated February 15, 2001, informed her that her wage loss benefits under her June 1, 1999 injury claim would be concluded as of February 25, 2001 on the basis that her compensable condition had stabilized in terms of recovery with no permanent functional impairment recognized. She was informed that upon conclusion of her wage loss benefits, a vocational rehabilitation consultant would be involved to assist her in seeking alternate employment.

The March 9, 2001 decision of a vocational rehabilitation consultant informed the worker that she was entitled to twelve weeks of job search allowance which would conclude on May 20, 2001. However, if the worker chose to enroll in a law office assistant course, the funds allotted for the job search allowance would be allocated to that goal. As well, the vocational rehabilitation consultant was prepared to fund a short term training course and a maximum of $140 for the purchase of an ergonomic keyboard.

A client services manager, in a decision dated December 4, 2001, informed the worker that no additional information had been provided by the worker in the form of new evidence and the manager had not been able to identify any error in the application of law and policy regarding the February 14, 2001 decision of the case manager. Therefore, that decision would stand.

The July 31, 2002 decision of a vocational rehabilitation consultant manager informed the worker that she had not provided sufficient evidence to cause a change in the vocational rehabilitation consultant's March 9, 2001 decision.

Issue(s)

Was the worker entitled to temporary wage loss benefits beyond February 25, 2001?

Was the worker entitled to vocational rehabilitation benefits beyond the conclusion of twelve weeks of job search on May 20, 2001?

Had the worker provided significant new information from which to change the February 15, 2001 and March 9, 2001 decisions?

Jurisdiction

These appeals were filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As these appeals have 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 of the Board's board of directors that is applicable in the case. 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).

Background and Evidence

The April 7, 2000 claim log memo of a Board medical advisor noted a clinical diagnosis on the worker's claim as a bilateral first extensor compartment tenosynovitis with a co-existing carpal tunnel syndrome. The Board medical advisor accepted that the worker's wrist and hand symptoms were consistent with repetitive, forceful hand activities as required by her work as a meat wrapper.

In an April 11, 2000 claim log memo, a case manager noted that the worker's employment involved frequent thumb pinching and wrist movements and that her job involved the use of both hands to perform work activities. The case manager stated there were no other non-occupational risk factors and that the claim would be acceptable for a bilateral de Quervain's tenosynovitis. Also, the case manager noted a Board medical advisor had indicated that a bilateral carpal tunnel syndrome would co-exist with the de Quervain's tenosynovitis. The case manager stated that treatment for carpal tunnel syndrome symptoms would be acceptable under the claim but there was a lack of evidence to accept the diagnosis of a carpal tunnel syndrome at that time.

In a corresponding memo the same date, a team assistant confirmed that the worker's claim had been accepted.

The April 19, 2000 report of a specialist in physical medicine and rehabilitation noted that testing had resulted in an impression that the worker had a bilateral carpal tunnel syndrome as well as a bilateral de Quervain's tenosynovitis and a bilateral flexor carpi ulnaris tendonitis. These conditions, the physician stated could be related to the worker's occupation.

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In a follow up report dated May 3, 2000 the specialist reiterated that the worker needed to rest her hands; especially on the right side which had showed a decrease in an active range of motion.

An initial wage rate explanation form of Compensation Services Division calculated the worker's initial wage rate on the basis of the worker's three months earnings of $3,516.60. This equated to a weekly wage rate of $273.20.

The June 6, 2000 long term (eight week) rate explanation form of the Compensation Services Division set the long term wage rate based on the worker's one year earnings of $24,176.16. This resulted in a rate of $469.55 weekly.

The specialist's June 7, 2000 report noted the worker's slow improvement. The worker had been encouraged to modify her second job, working at a bar. The specialist recommended the worker continue with her hand therapy and felt that her condition would likely improve and her range of motion return to normal within the next three to four weeks.

An August 23, 2000 worksite analysis report evaluated the worker's employment as a meat wrapper. The report recommended that the worker use an automatic meat wrapping machine to reduce repetitive gripping and pinching and that she take shorter, more frequent breaks to reduce the repetition.

In a claim log memo dated December 4, 2000, a Board medical advisor noted the worker's attempt at a graduated return to work had not been successful due to a flare-up of her symptoms. Work modifications had been unsuccessful. The medical advisor stated it was reasonable to conclude that although the worker did not have permanent functional impairment, continuation of her work as a meat wrapper would place her at a significant increased risk of developing one.

The progress report of the attending physician, based on treatment of the worker December 21, 2000, noted that the worker could not continue at her meal wrapping work or achieve normal work hours.

In a claim log memo dated January 2, 2001, the Board medical advisor set out the opinion that there was not much to be gained by a specialist referral as the worker had plateaued.

The specialist's January 15, 2001 report noted that the worker had not worked since December 22, 2000 when her hand had become hot and swollen. The specialist reported the worker's ongoing, recurrent right wrist/thumb pain appeared to be a recurrence of her tenosynovitis symptoms. The specialist encouraged the worker to examine occupational choices as she would likely have activity related recurrences with activity.

The February 6, 2001 claim log memo of the Board medical advisor agreed that the worker should be advised to seek alternate employment. The medical advisor stated the specialist's recent report, had confirmed the worker's plateau. The Board medical advisor repeated the observation that if there was a return to the pre-injury occupation, the worker would probably have a recurrence of her condition and if she persisted, would ultimately be at risk for the development of a permanent functional impairment.

The February 15, 2001 decision from which the worker has appealed was then issued.

The February 23, 2001 vocational assessment memo of a vocational rehabilitation consultant set out that it was to be determined whether the worker was eligible for vocational rehabilitation benefits and that the worker had been advised she needed to prepare for her future.

In a claim log memo dated February 26, 2001, the Board medical advisor confirmed that the worker had not recovered from the effects of her compensable injury and that if she returned to her pre-injury employment she would be at undue risk of an increase in her permanent functional impairment from the bilateral de Quervain's tenosynovitis and exacerbation or increase in bilateral carpal tunnel syndrome symptoms. The Board medical advisor stated that the worker had physical restrictions from the combination of repetitive and forceful use of her hands.

The specialist, in March 5, 2001 report, stated that the worker had been examined on follow up and had improved. No specific findings of any etiological diagnosis were provided. The worker, the specialist advised, was encouraged to continue with her activities as tolerated and to taper down on her anti-inflammatory medications.

The March 9, 2001 decision from which the worker has appealed was then issued.

In correspondence to the Board dated November 26, 2001 the worker's union representative set out the opinion that the worker had not received appropriate assistance in a return to pre-injury earnings. The representative noted that the worker had not been able to find suitable alternate employment in the twelve weeks of job search. It was noted that the worker had been provided with no assistance by way of an employability assessment or any incentive to employers to hire her. In the representative's opinion, the job search had been destined to fail. The representative stated that once the worker had been advised of her plan to enroll in a law office assistant course in September 2001, her benefits had been terminated. The representative stated that the worker had not refused to enter the twelve week job search and in fact had done so and could not find suitable employment.

The representative noted that the worker had pursued a career change on her own. However, in the representative's opinion, this was a Board responsibility and that a viable retraining program had not been considered for the worker. It was noted that the worker had received a word processing course and an ergonomic keyboard through the Board but the representative did not feel that the Board's responsibility ended there. Therefore, the representative requested a manager's review of the February 15, 2001 and March 9, 2001 decisions.

The representative stated that in regard to the February 15, 2001 decision, the worker was entitled for a consideration of a permanent functional impairment based on her subjective complaints of pain. Furthermore, the representative stated that the worker should have been entitled to section 30 benefits from May 21, 2001 until her course had been concluded and then provided a reasonable period of job search allowance. The representative noted that the worker had taken courses from June 5 to June 17, 2001; from May 1 to June 7, 2001 and in the representative's opinion, benefits from May 20, 2001 through July 17, 2001 should have been automatic.

The Board responded to the representative's request by way of the December 4, 2001 decision letter from which the worker has also appealed.

In correspondence dated June 12, 2002 the union representative once again requested that the vocational rehabilitation consultant reconsider a viable retraining program for the worker. This was followed by the July 31, 2002 decision from which the worker has also appealed.

Submission

The worker's representative submitted correspondence from the worker dated October 15, 2002 which replied to the representative's request for comments regarding her appeal. The worker stated that it had been the vocational rehabilitation consultant's suggestion that she investigate college courses. The worker stated that she had a background in the legal field and had always expressed an interest in law. When she discovered a law office assistant course, she felt that the Board would sponsor her. She composed a proposal for the consultant and was told that the Board would pay for a prerequisite course and an ergonomic computer keyboard The worker questioned what good these authorisations were if the Board was not willing to sponsor her attendance in the law office assistant course.

The worker stated she had continued her job at the hotel because it was not demanding and did not get in the way of her rehabilitation. She had accepted the Board's offer to pay for a prerequisite course but had chosen to take the job search money and continue to look for work. She stated that the Board's restrictions limited her job possibilities and that her employment contacts would have been better if she had not been honest. She stated she had been open with potential employers about her condition and found it difficult to find a job that paid wages comparable to her pre-injury wage. She stated that

she had received funding through the Open Learning Agency and was now employed as a full time legal secretary with a bright future. However, on May 20, 2001 she had not been aware she had been accepted into the September 2001 law office assistant course. She stated that she required the prerequisite courses in order to be eligible for enrolment.

The worker stated the Board had attempted to twist her reasoning and in her opinion, the situation was "black and white". She stated she had been injured at work and a continued effort to return her to her pre-injury employment had been unsuccessful. There had been no other position available to her with the pre-injury employer and her only option was to retrain. She had been led to believe that she would be assisted in a return to work. She stated she had been dealt with unfairly and contrary to Board law and policy and with her prior education and employment experience all she could access were minimum wage jobs. She stated that even if her job search benefits were contributed to the law office assistant course, she wondered what she would have lived on. She also stated that she was not aware she had to document or substantiate her continued efforts to find work beyond May 20, 2001. In her opinion, the Board had closed the door once they have found out she had been accepted in the law office assistant course.

In a June 12, 2002 submission, the worker's representative sought recognition that the worker's compensable injury had restricted her from obtaining work In this regard, the Board had not fulfilled their obligation with respect to vocational assistance under a preventative mandate. In the representative's submission, the Board had not questioned what the worker's disability meant in terms of employment opportunities and the worker's functional limitations had not been assessed. The representative stated that the Board had not fulfilled its obligation to offset any loss of earnings with twelve weeks of job search allowance. The representative noted that the worker's compensable condition caused her symptoms to flare with repetitive tasks. The Board medical advisor had clearly documented that the worker was likely to be effected by flare-ups with any work that involved the use of her wrists/arms. In the representatives opinion, working with files, reference books or any other number of activities could reactivate the worker's condition temporarily. Therefore, the worker should be entitled to a recognition of the long term permanent effects of her injury as the Board medical advisor had stated she had not recovered from the effects of that injury.

The representative noted that the worker had not been accepted for the law office assistant course until early June 2001. She completed a word processing course from May 1, 2001 through June 7, 2001 and entered an operating systems course June 5, 2001 through July 17, 2001. She commenced the law office assistant course in September 2001 and had proven she was highly motivated in a return to gainful employment.

The representative furnished the panel with a compensation appeals information sheet used by the local union to record the worker's comments regarding compensation appeals. In this form, the worker commented that her pain and discomfort had improved but had never completely resolved. She stated that during her job search activity she had no real indication of what her restrictions or capabilities were. In her opinion, she had not been successful due in part to the fact that she was restricted physically. Also, most of the jobs she applied for would have paid minimum wage. In her opinion, the Board had never considered her restrictions nor properly evaluated a retraining plan. She would have trouble finding an entry level minimum wage job with her restrictions.

She stated that she had been admitted to a retraining program through Employment Insurance and all she needed was some funding assistance to enter the law assistant program.

The representative also furnished the June 26, 2001 report of the attending physician which certified that the worker was not capable of repetitive motions such as lifting or any other activity that might flare-up or risk condition.

Reasons and Findings

February 15, 2001 Decision

The substantive issues arising from this decision are whether the worker had entitlement to temporary wage loss benefits beyond February 25, 2001 and whether there was a permanent functional impairment related to the compensable injury claim.

The case manager concluded that, although there was no permanent functional impairment, the worker's recovery had stabilised.

Chapter 5 of the Board's *Rehabilitation Services and Claims Manual*, *Volume 1* (RSCM) sets out that a worker is only entitled to wage loss benefits during a period of time that the compensable injury is considered to be temporary total. If the condition has been considered as plateaued, entitlement to temporary wage loss benefits ends. Where the evidence shows that a disability is no longer temporary and there is evidence of a continuing measure of disability either on an objective or subjective basis, the file is usually referred to the Board's Rehabilitation Services Department and/or disability awards for consideration of further entitlement. In the case before me, the worker was referred to a vocational rehabilitation consultant on the basis of the Board medical advisor's opinion that if she returned to her pre-injury occupation she would have a recurrence of her condition and would be placed at significant risk for an increase in her permanent functional impairment.

The reports of the attending specialist from January 1, 2001 forward, indicate the worker's bilateral hand condition had settled. No new therapy was indicated aside from a change in occupation. In a follow up report dated March 5, 2001 the specialist noted the worker had improved and had been advised to increase her activities as tolerated. The attending physician, in progress reports from January 2001 forward, reiterated the worker's need for retraining and reported no real change in her symptomatology.

I therefore find that the compensable condition was no longer temporary and that the major impediment to a return to work was that the worker was at undue risk if she returned to her pre-injury employment as a meat wrapper. At the point wage loss benefits were concluded on February 25, 2001 the matter was properly in the hands of the Board's Vocational Rehabilitation Department. I therefore concur with the conclusion of temporary benefits on February 25, 2001. I find that the worker at this date, was no longer temporarily disabled and thus was not entitled to further temporary wage loss benefits.

Also, the reports of the treating specialist did not confirm a level of residual functional impairment. The last report to file (March 5, 2001) confirm the specialist's findings of no etiological diagnosis. The worker's representative accepted, in submission, that the worker had no measurable permanent functional impairment but argued that the worker's subjective symptoms should be considered.

Policy item #39.01 of the RSCM, under the heading Subjective Complaints, provides guidance in the adjudication of entitlement to a permanent partial disability awards where the worker has subjective complaints. The policy states, in part, that where there is little clinical evidence of objective impairment, extreme caution must be exercised in concluding that there is a permanent disability.

The policy provides examples of evidence that should be considered in order to assess the "nature and degree of the injury". The policy also points out that sometimes cases occur where, although the worker has subjective complaints of pain and discomfort, the actual impairment which can be objectively seen is negligible or too minimal to justify an award. Where there is appropriate medical rationale to support subjective complaints, the Board has discretion to make an award with regard to the worker's particular circumstances and may do so where the medical opinion is that the stress of the claimant's occupation or other physical activity could result in an impairment. No award is granted if it is considered that the impairment is unlikely to effect the claimant's earning capacity.

The Board medical advisor considered that the worker had not recovered from the effects of the compensable injury and that a return to the pre-injury employment would place her at, "undue (i.e. significant increased) risk of an increase in her permanent functional impairment from bilateral de Quervain's tenosynovitis and exacerbation or increase in symptoms from bilateral carpal tunnel syndrome…". This opinion, I find, supports that the worker has been left with a residual permanent functional impairment.

In this regard, the worker's subjective and objective complaints were not properly considered by the case manager's recognition that there was no potential for a permanent functional impairment. The preponderance of the medical evidence is that the worker's ability to earn in any occupation is restricted and limited in the performance of repetitive motions such as lifting. For these reasons I find she is entitled to a referral to disability awards in order to determine the extent of any residual functional and/or subjective complaints.

March 9, 2001 Decision

This decision informed the worker of the extent of a vocational rehabilitation consultant's involvement in assisting her to a return to suitable employment. She was informed that her vocational benefits would conclude after twelve weeks of job search benefits. However, the vocational rehabilitation consultant informed the worker that funds would be transferred for a short term training course to the cost of $225. and that the worker would be reimbursed for the cost of purchasing an ergonomic keyboard to the maximum amount of $140.

The vocational options provided the worker were under a preventative mandate, based on the Board medical advisor's opinion that the worker was at undue risk for an increased permanent functional impairment if she continued with her employment as a meat wrapper.

Policy item #86.30 of the RSCM provides that the intent of preventative rehabilitation is to provide assistance for workers who have been deemed either as vulnerable to a permanent disability or an increased permanent disability if they return to their pre-injury employment. However, once a worker's entitlement to preventative rehabilitation has been established, the Board's rehabilitation process, as set out at item #87.00 of the RSCM, has application. The rehabilitation process established by this policy provides that an initiation of a vocational plan must consider the circumstance of each worker with regard to the available medical opinion.

Item #87.20 contains the five phases or principles or vocational rehabilitation objectives. In the case before me, the accident employer was not able to accommodate the worker either with job modification or by way of another placement within the business. The vocational assessment of the vocational rehabilitation consultant was that if the employer was not able to accommodate job modification or altered placement, "possible" job search benefits would be made available. The worker was instructed to attend career planning and to prepare a resume. At this point, the vocational rehabilitation consultant's investigation into the further phases of vocational rehabilitation necessary to provide the worker with access to employment in the $12. per hour range ended should have been initiated. The consultant was under the impression that the worker had chosen to return to an educational endeavour without Board sponsorship and thus concluded that twelve weeks of job search was appropriate

to meet the vocational mandate of enabling the worker to obtain employment that would generate earnings of $12. per hour.

Policy item #88.51 of the RSCM sets out that the Board's primary vocational guideline should, where practical, support a program sufficient to restore the worker to an occupation comparable in terms of earning capacity to their pre-injury occupation. The policy also provides that the gravity of the residual disability is a relevant factor in that the Board is to provide greater services in cases of serious residual disability.

The vocational rehabilitation consultant assumed the worker, with her existing skill set, would be able to access reasonably available work with the provision of twelve weeks of job search allowance. Item #88.31 of the RSCM sets out that job search assistance is normally introduced where the worker has direct transferable skills in a related industry which best utilizes occupational potential. The vocational rehabilitation consultant was prepared to transfer the funding set aside for twelve weeks of wage loss equivalency towards support of the worker in the law office assistant course. Transfer funds were also to be allocated for a short term training course.

I recognize that the worker was not considered to have a serious permanent functional impairment and that the long term earnings rate was set at $12. per hour. However, twelve weeks of job search in my opinion, was in itself not adequate to assist this worker to find employment within her skill set. A low wage rate, while a factor, should not determine the extent of vocational rehabilitation assistance. I am also cognisant that the vocational rehabilitation consultant must choose a valid use of resources in order to reasonably meet the mandate to assist workers to overcome the effects of compensable injuries. The worker's circumstances are such that I am not satisfied that the total sponsorship in the law office assistant course was necessary. It would have been reasonable to sponsor the worker during her word processing course and operating systems course between May and July 2001. This assistance would include tuition fees and the costs of necessary books and materials as well as wage loss equivalency benefits while in attendance. As well, it was reasonable for the vocational rehabilitation consultant to have provided the worker an ergonomic keyboard.

In my opinion, the full extent of the law office assistant course would be beyond the Board's vocational mandate to return the worker to suitable employment in the range of $12. per hour. I find that support for the entirety of this program would be beyond what was considered necessary to restore the worker's pre-injury earning capacity. To her credit, the worker successfully pursued the law office assistant course and placed herself in a position to improve her future earning capacity. However, I am not convinced that this personal choice, under the circumstances of this claim, was the Board's responsibility. Financial support in establishing the worker's prerequisite courses would be appropriate and facilitate the worker's return to suitable employment. For these reasons, it is reasonable that the Board reimburse the worker for any outstanding costs related to her attendance at these prerequisite courses. This should include wage loss equivalency for the time of her attendance at the prerequisite

courses, followed by twelve weeks of job search allowance in the form of wage loss equivalency benefits.

December 4, 2001 and July 31, 2002 Decisions

Due to the findings reached on appeals from the decision letters dated February 15, 2001 and March 9, 2001, the issues arising from these appeals are moot.

Conclusion

The February 15, 2001, March 9, 2001, December 4, 2001 and July 31, 2002 decisions are varied to the extent of my findings.

I find the worker is entitled to a referral to disability awards to determine the extent of a permanent functional impairment due to the compensable injury. I confirm that temporary wage loss benefits were properly concluded on February 25, 2001. The worker is entitled to further vocational rehabilitation assistance in the form of wage loss equivalency benefits and costs associated with attendance in the prerequisite courses for the law office assistant course. I uphold the decision to provide $140. towards the purchase of an ergonomic keyboard and also find the worker, in addition to these benefits, is entitled to wage loss equivalency benefits for a twelve week job search allowance.

If the worker has incurred any costs for the report of the attending physician furnished for the purposes of her appeal, she is entitled to reimbursed up to the amount of the Board's tariff agreement with the British Columbia Medical Association.

David A. Cox
Vice Chair

DAC/cmm