WCAT Decision Number: WCAT-2004-00084-RB
WCAT Decision Date: **January 12, 2004**
Panel: Nora Jackson, Vice Chair

Introduction

In a decision letter dated May 7, 2002, a Worker's Compensation Board (Board) disability awards claims adjudicator (CADA) advised the worker that, in implementation of the Workers' Compensation Review Board (Review Board)'s November 30, 2001 decision, his permanent partial disability award had been increased from 12 percent to 13 percent, and would be calculated based on the class average for a full-time certified arborist at the time of the worker's compensable injury, $2,860.00 per month. The new award was to take into account any impairment of function, and no loss of earnings award would be made. The new wage rate on the worker's claim would not affect the disfigurement award previously made. Finally, an amount of $2,860.00 in retroactive benefits was paid to the worker. The worker appeals that decision (Appeal B).

Issue(s)

Was the Review Board's November 30, 2001 correctly implemented? Specifically, was the revised wage rate used to determine the worker's pension entitlement correctly determined? Was the worker entitled to a recalculation of his disfigurement award. Finally, did the worker suffer a long term loss of earnings as a result of his compensable injury.

Jurisdiction

This appeal was filed with the Review Board. Pursuant to Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, the former Review Board and Appeal Division have been replaced by the Workers' Compensation Appeal Tribunal (WCAT) effective March 3, 2003. Section 38 of the legislation provides that all Review Board appeals are to be transferred to WCAT to be completed as WCAT appeals, unless a panel of the Review Board had completed an oral hearing, or unless written submissions were completed and a panel of the Review Board had commenced deliberations, before March 3, 2003.

As this appeal was not considered by a Review Board panel by March 3, 2003, it was transferred to WCAT and has been considered as a WCAT appeal except that no statutory time frame applies to the making of this decision. One effect of this change is that WCAT must apply policies set by the board of directors and the former governors of the Board.

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Background and Evidence

I have reviewed the evidence in the claim file, any submissions made by the worker and the accident employer in support of their respective positions, the *Workers Compensation Act* (Act) in effect at the time of the events here in question, and applicable Board policy as set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM). Interested parties have received full disclosure of the claim file, and the medical and claim history will not be repeated in detail here except as relevant to the current appeal.

The worker was employed by the employer as an apprentice arborist. In 1997, the worker was 24 years old; he began working for the employer in June 1995. He was right hand dominant. On June 10, 1997, the worker was injured when he was operating his chainsaw with his right hand. He was reaching across his left arm, cutting, when the saw kicked back, cutting the worker's left forearm, severing nerves and tendons. He submitted an application for compensation to the Board on June 12, 1997, and his claim was accepted for a laceration of the distal third of the left forearm, including the severance of ulnar and medial nerves. The worker had verve grafting of the median nerve and primary repair of the ulnar nerve. The flexor tendons were repaired and the worker underwent Board sponsored physiotherapy.

Wage loss benefits were terminated on August 20, 1998, as it was determined that the worker's condition had plateaued by that date. The worker was offered vocational rehabilitation assistance, and completed training in November 19, 2000. He secured a position as a full-time junior financial advisor starting at $30,000.00 per month. His file was forwarded to the Board's Disability Awards Department for assessment as to the nature and extent of his permanent impairment.

In a decision letter dated November 22, 2000, the worker was awarded a permanent partial disability pension in the amount of 12 percent of a fully disabled person, based on a monthly wage rate of $2,228.67, his average earnings at the time of the compensable injury. The worker was also awarded $1,215.70 in compensation for the disfigurement of his left forearm, wrist, hands and fingers which had resulted from the June 10, 1997 injury.

The worker appealed the November 22, 2000 decision to the Review Board, and in its findings dated November 30, 2001, the Review Board allowed the worker's appeal. The panel found that the worker was entitled to a further 1 percent pension award to compensate him for cold sensitivity, which was thought to restrict the worker's ability to work in inclement weather and would impact on his employment in the long term. The panel also instructed the Board to take into account the fact that the worker was an apprentice arborist at the time of his compensable. It was the panel's opinion that calculating the worker's wage rate based on the class average of a certified arborist would result in an increase in average earnings.

On December 6, 2001, the CADA requested wage rate information from the Board's Statistical Services Department. The CADA requested information for a certified arborist,

which fell within the field of landscape and horticultural technicians and specialists. The CADA determined that the estimated monthly wage rate for that position in the second quarter of 1997 was $1,860.00 for all workers, and $2,860.00 for full-time workers.

A memo to the claim log dated February 25, 2002 indicates that the CADA reported that when using class averages, it was the Board's practice to use the "All Workers" category. However, in this case, the "All Workers" wage rate would result in a wage rate of $1,860.00 per month. As the Review Board clearly thought that the worker's wage rate would be **increased** as a result of its findings, using the $1,860.00 wage rate would not fulfil the intent of the Review Board's findings (the original pension wage rate was $2,448.67 per month). Therefore, the CADA used the "full-time" category in the recalculation of the worker's wage rate, $2,860.00 per month or $34,320.00 per year.

In a decision letter dated May 7, 2002, a Board CADA advised the worker that, in implementation of the Review Board's November 30, 2001 finding, it had determined that the class average of a full-time certified arborist in the second quarter of 1997 (the time of the worker's compensable injury) was $2,860.00 per month; that figure would be used to recalculate the worker's pension entitlement. In further implementation of the Review Board's decision, 1 percent had been added to his pension award, for a total of 13 percent permanent functional impairment, to be calculated based on the new wage rate. The CADA noted that the new wage rate would not impact on the previously awarded amount for disfigurement.

The new monthly award, together with applicable Consumer Price Index adjustments, was $63.54 per month. His total monthly award was now $303.17, beginning with the June 30, 2002 pension payment. Retroactive entitlement for the period between August 31, 1998 and May 31, 2002 had been calculated, and amounts paid in wage loss benefits and/or vocational rehabilitation benefits during that period deducted, for a total amount of $2,542.66 retroactive entitlement. That amount had been directly deposited to the worker's account.

The award was made on a functional basis only, as the new award was meant to acknowledge any long-term effect on the worker's employability caused by the loss of function described.

In support of his appeal of the May 7, 2002 decision, the worker has argued that a certified arborist in 1997 earned $20.49 per hour, not $17.87, the figure used in the Board's calculations. (The worker determined the hourly rate by dividing the $2,860.00 rate by 160 hours per month.) However, the worker submitted no documentation supporting his allegation.

The employer has made no submission in support of its position on the worker's appeal, although given the opportunity to do so.

Reasons and Findings

Was the Review Board's November 30, 2001 decision correctly implemented? Was the revised wage rate used to determine the worker's pension entitlement correctly determined?

Board policy regarding the implementation of Review Board findings is set out in items #102.50, #102.51 and #105.30 of the RSCM. If a Board officer is of the opinion that the Review Board findings at issue contains an error of law or is in contravention of a published Board policy, the finding is referred to the vice president of the Board; if he or she agrees, it is then passed on to the president, who makes the final decision as to whether to refer the Review Board finding to the Appeal Division under section 96(4) of the Act.

Item #102.51 provides that if the Review Board has directed the Board to reassess or reconsider its decision, the Review Board finding is properly implemented if the reassessment or reconsideration is carried out, **even if the conclusion reached is the same as the one which was previously appealed to the Review Board**. However, if the adjudicator is the same and the decision is still negative, the matter is to be referred to a second adjudicator, whose decision, if different, will prevail. The decision regarding implementation is an appealable decision.

Where the Review Board makes specific findings of fact, however, the Board is bound by those findings.

I deny the worker's appeal.

With regard to the recalculation of the wage rate, I confirm the Board's decision. In implementing the Review Board's decision, the CADA requested wage rate information from the Board's Statistical Services Department. The CADA requested information for a certified arborist, which fell within the field of landscape and horticultural technicians and specialists. The Statistical Services Department advised the CADA that the estimated monthly wage rate for that position in the second quarter of 1997 was $1,860.00 for all workers, and $2,860.00 for full-time workers. Since it was clear from the Review Board's finding that the panel anticipated that the worker's wage rate would increase as a result of its decision, the CADA used the latter figure in recalculating the worker's pension entitlement.

The worker disagrees with the wage rate, but has provided no objective information on which his disagreement is based. The Board's Statistical Services Department are experts, and collect data from various official sources in order to determine wage rates for all levels of given occupations. I am loathe to override the information provided by that department unless given some compelling reason to do so. None has been provided here. That being the case, I find that the wage rate to be used to calculate the worker's pension entitlement is $2,860.00 per month, the monthly wage for full-time workers in the field to

which the worker was apprenticed at the time of his compensable injury. The Board's decision on that issue is confirmed.

The CADA advised the worker that there would be no change in the worker's disfigurement award as a result of the change in the worker's wage rate. I agree. The calculations used to determine the quantum of the disfigurement award are not based on the wage rate, but rather based on certain percentages assigned to different types and degrees of disfigurement. The worker has made no argument that the lump sum paid to him in acknowledgement of his disfigurement was wrong. There is no basis on which the worker's disfigurement award should be recalculated.

With regard to the question of whether the worker has experienced a loss of earnings as a result of his compensable injury, the Review Board panel instructed the Board to make the determination after the worker's long-term wage rate had been recalculated. The recalculation of the worker's wage rate has resulted in an annual rate of $34,320.00 per year.

The worker has been retrained as a financial advisor. An employability assessment was undertaken on March 14, 2002. Wage information on file from the HRDC for British Columbia indicates that the average income for that position is $52,208.00. Taking into account the different types of positions available, the vocational rehabilitation consultant had determined that the worker's earnings potential in the financial planning position was $3,116.66 per month up to $4,381.71 per month. Thus, even at the recalculated wage rate, there is no indication that the worker would suffer a loss of earnings as a result of his compensable injury.

Conclusion

With regard to the issue of whether the Review Board's November 30, 2001 decision was correctly implemented, I deny the worker's appeal. The recalculated wage rate is confirmed, as is the decision that no loss of earnings pension was payable. There is no basis for recalculation of the worker's disfigurement award. The Board's May 7, 2002 decision is confirmed.

The panel awards no expenses in this matter.

Nora Jackson
Vice Chair

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