WCAT Decision Number: WCAT-2004-00104-RB
WCAT Decision Date: **January 13, 2004**
Panel: Lois J. Williams, Vice Chair

Introduction

The worker, now 38 years old, worked as a cement finisher for a municipality. He suffered several back injuries, including one on May 4, 1998 and one on January 30, 2001. He now appeals three decisions made by officers of the Workers' Compensation Board (Board):

- On November 28, 2001, a vocational rehabilitation consultant (VRC) said that vocational rehabilitation benefits would be brought to a close that day, as the attending physician and the Board medical advisor had reviewed and approved the worker for the work offered by his employer, that of flag person and opening the parks and recreation's bathrooms in the morning.

- On January 17, 2001, a case manager said the worker's claim would not be reopened for temporary disability benefits, as there had been no change in his back condition.

- On September 19, 2002, a disability awards case manager said the worker had been awarded a pension for four percent of total disability, split between the 1998 and 2001 injury claims.

Issue(s)

Was the worker fit for the jobs offered and/or was he entitled to further vocational rehabilitation benefits?

Was the worker temporarily totally disabled due to his injuries after his vocational rehabilitation benefits terminated in November 2001, or was any disability a normal fluctuation in his pensionable condition?

Has the worker's permanent partial disability been accurately assessed?

Jurisdiction

These appeals were filed with the Workers' Compensation Review Board (Review Board). On March 3, 2003, the Appeal Division and the Review Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As these appeals had not been

considered by a Review Board panel before that date, they have been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

Background and Evidence

The worker's back injuries have been accepted for permanent aggravations of pre-existing abnormalities in his back. His employer has provided him with modified job duties. He remains at work but feels that he is suffering a loss of earnings as a result of his work injuries. He states that, but for his injury, he would have taken a second job to pay the bills associated with his growing family. He also states that he has to use sick leave and vacation time to compensate for the number of days he must take off work due to his back symptoms, and this is not reflected in the lump sum pension amount he was granted.

The worker's temporary disability benefits from his January 30, 2001 injury were terminated in June 2001, following a report from sport medicine and rehabilitation centre physician Dr. Gershman, who said that the diagnosis was degenerative lumbar disk and facet syndrome on a background of congenital facet anomaly. Dr. Gershman said the worker was at undue risk of permanent aggravation of his impairment if he returned to his pre-injury job. Dr. Gershman said the worker was not interested in surgery, and if he could have a permanent accommodation at work in a lighter capacity job, he would be able to get his life back on track, knowing that he had to cope with pain for the rest of his life. Dr. Gershman did not feel that any further treatment or rehabilitation was indicated.

The worker was placed on vocational rehabilitation benefits up to November 28, 2001. By that time negotiations with the employer regarding suitable work had been initiated. During the ensuing months, the worker contended that he was 100 percent disabled from all work due to his injuries and demanded that the Board reopen his claim for full benefits. Nevertheless, when Board officers explained to him that his complaints were in keeping with the nature of his permanent condition for which a pension would be assessed, rather than in keeping with a temporary disability, he did at times return to work.

In October and early November 2001 reports, the attending physicians reported no change in the worker's condition. On November 20, 2001 Dr. Hastings reported that the worker had tried working the last five days, doing three different jobs, and was unable to work due to soreness of the lower back, reflecting chronic back pain. On December 4, 2001, Dr. Hastings said that the worker was working daily and his back was becoming more painful. He was restricted to limited back work.

On December 17, 2001, Dr. Hasting took issue with a December 6, 2001 letter to the worker from the employer which outlined the jobs being offered. Dr. Hastings wrote the employer, stating that he only said the worker could try the jobs, and be re-evaluated

after doing so. Dr. Hastings said that the worker was unable to tolerate flagging for a total of five hours, and that his functional capacity evaluation had not supported such a length of time at this activity. Dr. Hastings felt that more suitable jobs should be offered to the worker, such as parking lot attendant, bridge operator, or graffiti and poster remover.

On December 31, 2001, Dr. Hastings said the worker was disabled from work as of that date, as his back and leg pain had been aggravated by doing flagging at work. On January 4, 2002, Dr. Hastings reported that the worker was unable to continue in the capacity assigned to him, and, as the employer was unable to provide suitable work, the worker needed to look at long term disability with the Board. On January 14, 2002, Dr. Hastings said the worker was unable to do any type of labour and should look at permanent disability.

On January 24, 2002, Dr. Hastings reported that the worker had returned to work four days previously but continued to have daily back pain. Both the doctor and the worker requested an examination by a Board physician.

The employer contracted for an independent assessor to complete a functional capacity evaluation on February 5 and 6, 2002. The evaluator recommended that a combination of job duties be offered to the worker to allow him to alternate between sitting, standing and walking. The recommended job duties to be tried were opening and closing city washrooms, removing graffiti, delivering mail, and flagging for no more than two hours total per day.

On February 5, 2002, Dr. Gershman, who performed the medical assessment to go with the functional capacity evaluation, said that the worker was "certainly employable" and that there was "no obvious medical contraindication to him performing tasks such as limited standing, walking, sitting…" Dr. Gershman said:

> …although there are complicating features with respect to [the worker's] view of how [the employer] and the Board have been treating him, I do believe he has a true functional impairment as apposed to this being strictly a pain management issue and I would not recommend any further pain management program.

The worker and the employer arrived at an accommodation regarding his job duties, and he returned to work. On March 5, 2002, the Board's consultant orthopaedic surgeon, Dr. Kamper noted the worker's report that he was happy with his job. He was flagging for two out of eight hours, opening and closing washrooms, doing light cleanup in the municipal yard and traffic control, and would be going on split shifts soon. Following his examination of the worker, Dr. Kamper said that the worker had sufficient pathology to merit modification of daily activity and was fortunate that his employer had been able to accommodate him. Dr. Kamper said the worker also had non-organic signs now that might cloud future assessment of his physical impairment and which

would certainly remove any lingering doubt regarding the advisability of surgery. Dr. Kamper said the worker's condition remained unchanged and there was no indication for further investigation or specific treatment.

The worker returned to work following Dr. Gershman's and Dr. Kamper's reports and after March 1st, missed only six hours on May 15th, eight hours on June 3rd and four hours on June 18th, prior to the summer of 2002, all taken as sick time. He missed four hours on July 3rd and one hour on July 19th (both taken as vacation) and then took from July 25 to August 9, 2002 as vacation time. He also took time off during Christmas week in 2002 (taken as vacation time).

In 2003, the worker took four hours off work as sick time on Friday, February 14th and Friday, February 28th. He left work after four hours on Thursday March 13th and took off all day Friday March 14th as sick time.

The worker took a combination of sick time and vacation time from March 28 to April 11, 2003. He missed a few hours a day, either sick time or vacation time on April 28th, May 11th, 15th, 16th. He missed Friday, June 6th as sick time. On June 18, 2003 his physician said the worker should work only a three day week for July and August. The worker then took every Friday and Monday off for the rest of the summer, as vacation time. He took sick time for four hours on Wednesday, August 27th, and eight hours on the 28th and 29th. He took vacation time on September 8TH and 9th.

At the oral hearing held on October 15, 2003, the worker said that he continues to work for the municipality despite his pain. However, he submitted copies of his leave records and said that all of the absences were due to his back pain, except for one when his van broke down. He said that he needed to get a second job when his twins were born, but could not, due to his injury. He said that he was offered work in construction that he would have taken, but for his injury. He said that he had not worked at a second job before his injury, but would have taken on such work with growing family responsibilities.

The worker also said that, effective September 15, 2003 his wages were reduced by his employer, to reflect the amount and type of work he actually performs. He estimated the reduction to be $200.00 to $300.00 per month. Later in the hearing he calculated that his lump sum pensions would have been equal to about $92.00 per month, so he is experiencing a net loss of $100.00 to $200.00.

The worker also said that his wages were reduced when he was on sick leave pay. He said that he has borrowed money from friends. He used to assist his wife with the stove work in her tile painting business, but he cannot do this anymore.

The worker said he is very stressed by his situation, and that his attending physician does give him assistance with medication for this, and he sees a counselor.

The worker described that he works a split shift from 6 a.m. to 10 a.m. and from 8 p.m. to 10 p.m. He described his duties opening and closing washrooms, removing graffiti and cleaning up around the municipal yard. He said his back is sore every day, and his sleep is disturbed. He takes Tylenol #3 and regular Tylenol sparingly as he drives a lot. He has recently started medication for stress.

When asked about the records that showed more absenteeism from work during Christmas and summer holiday periods when his children would be at home, the worker said that had nothing to do with it. He said that only five days of his vacation have not been used for disability and that was when his van broke down. When asked why his records did not show sick time or vacation time off in late September and October 2002, the worker said that was because he was disabled at that time by a new work injury to his back.

In addition to the exhibits submitted at the oral hearing, several reports from Dr. Hastings were submitted post hearing. In a December 3, 2003 report the physician said that he had removed the worker from his employment for rest and rehabilitation from his severe back pain and stress. The reports seem to indicate the worker has been disabled since November 12, 2003, and that he also has a left ankle sprain.

This panel has reviewed all of the exhibits, reports, and submissions.

Findings and Reasons

Vocational Rehabilitation Benefits:

Vocational rehabilitation may be provided under section 16 of the *Workers Compensation Act* (Act) to aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap.

Board policy at item #85.40 of the *Rehabilitation Services and Claims Manual* (RSCM) states a vocational rehabilitation objective is providing assistance to workers in their efforts to return to their pre-injury employment or to an occupational category comparable in terms of earning capacity to the pre-injury occupation.

In this case, the employer was instrumental in accommodating the worker's impairments so that he could return to work. The employer sponsored functional capacity and medical evaluations and crafted a job specifically for this worker that suited his testing parameters and restrictions. The VRC coordinated with the worker, the attending physicians, and the employer to provide suitable work. The worker was offered work with the pre-injury employer, at no loss of pay, that was supposedly suitable to his capabilities and with the approval of the physicians to at least attempt it. I accept that the Board acted on the available evidence in determining that, by November 2001, it had met its mandate of providing the worker with suitable vocational rehabilitation.

However, there is significant new evidence that the attempt to return to suitable work had a few glitches. The worker had an increase in symptoms and his capacity had to be reassessed. The job duties had to be re-evaluated and the employer continued to alter the job duties to make them fit the worker. This took a not unreasonable length of time to accomplish and to have the result approved. As well, the worker was medically reassessed. The determination by February 5, 2002 was that the worker was fit for the modified work, and a concerted vocational rehabilitation effort had been made to provide suitable employment. I find that the worker was entitled to further vocational rehabilitation benefits, equal to wage loss equivalency benefits and less money earned, up to and including February 7, 2002.

Temporary Total Disability Benefits:

Section 29 of the Act provides for payment of temporary total disability wage loss benefits, as long as the disability lasts. Board policy at item #34.12 of the RSCM states that wage loss benefits are terminated when the worker's condition becomes permanent and prior to the assessment of any pension. They can become payable again if a further work injury, or a natural relapse in the condition, causes a further period of temporary disability. The Board recognizes that no condition is ever absolutely stable; there will commonly be some degree of fluctuation. However, a pension will be awarded when, though there may some changes, the condition will, in the reasonably foreseeable future, remain essentially the same. When the fluctuations in the condition of a worker receiving a pension require the worker to stay off work from time to time, the question arises whether wage loss benefits should be paid. If the fluctuations are within the range normally to be expected from the condition for which the pension has been paid, no wage loss is payable. The pension is intended to cover such fluctuations. Wage loss is only payable where there is medical evidence of a significant deterioration which not only goes beyond what is normally to be expected, but is also a change of a temporary nature. If the change is a permanent one, the pension will simply be reassessed.

The worker said that his job duty of flagging in late 2001 aggravated his back. His physician agreed. However, the evidence is that the worker only performed this work for a very limited time. There is no evidence of any significant worsening of the pathology of the back at that time; rather, just a realization that the worker is restricted in how much flagging he should do at one time, or in total throughout the work day. There is little in the way of medical evidence that the worker was significantly disabled for any length of time by this attempt to work. However, the worker was seeking a finding that he would not be able to return to any work. Both the worker and the attending physician asked that the worker be examined by a Board physician. The worker was examined by the Board's orthopaedic consultant, Dr. Kamper. Dr. Kamper had examined the worker previously and he found no significant change in his condition. The worker took a good deal of time off work in December 2001, and January and February 2002, but I find that was due to the difficulties in fine tuning his return to work at suitable modified duties. Based on the evidence as a whole, I find that the worker

was not temporary totally disabled for more than a day or two by any aggravation caused by his flagging duties. This temporary increase in symptoms, in response to more active duties, was part of his fluctuating pensionable condition, and he was therefore not entitled to temporary disability benefits. As noted above, the worker was entitled to vocational rehabilitation benefits up to and including February 7, 2002.

Pension Entitlement:

Bill 49, the *Workers Compensation Amendment Act, 2002*, was effective June 30, 2002, the "transition date".

The former Review Board concluded on January 4, 2002 that the worker had a permanent aggravation of his back condition under his 1998 claim, and, prior to June 30, 2002, the Board accepted that the worker had a permanent aggravation attributable to the 2001 claim. Therefore, the worker's pension entitlement under both claims was determined under the "former" provisions of the Act, which will be referred to here.

Section 23 of the Act states that where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and compensation paid. Where the Board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the worker's average earnings before his injury and what he is earning, or is able to earn, in some suitable employment or business after the injury. The Board's policy at item #38.00 of the RSCM was that the amount of the pension awarded would be the higher of the two figures resulting from this dual system of assessing permanent partial disability.

The worker's permanent functional impairment was assessed at four percent of total disability, and that assessment was done in accordance with the Act and the Board's policies. No information has been presented that calls into question the assessment performed. The two percent award attributed to the 1998 claim was effective September 20, 1999, the day following termination of temporary disability benefits. The two percent award attributed to the 2001 claim was effective June 20, 2001, the day following termination of temporary disability benefits on that claim. The award calculations were based on a pension wage rate based on the worker's average earnings at the time of his injury.

The medical information indicates that the worker had plateaued in his recovery at the time his temporary disability benefits on his claims were terminated, and I find the pension effective dates are correct. The worker was an established employee, his average earnings are a matter of record, and no other earnings documentation has been submitted. I find that the pension wage rates were correctly determined.

At the time the pensions were being implemented, the worker had made a successful return to modified employment at no loss of earnings. Dr. Hastings, in a January 30, 2003 report, noted this, but cautioned:

> The [employer] and Workers' Compensation have found him an ideal position where he now works a split day with limited lifting of material and back flexion activities. But, [the worker] continues to have episodes of lower back pain.

Dr. Hastings provided no objective disagreement with the Board's assessment of four percent disability, but said that the worker felt he was only able to do 30 percent of the activities he did prior to the accident. He was unable to do any lifting around the house and was unable to lift his children and play with them, without having to spend a period of time on the floor recovering. He had to be careful not to stretch his back, accidentally slip, or turn suddenly, as these movements caused back pain. The worker wanted his pension reviewed, said Dr. Hastings, "as he is unsure what would happen should he lose his profession".

I have reviewed the permanent functional impairment amount assessed, note the difficulty in obtaining objective measurements, and accept the determination that the award had to be assessed on a judgment basis. I see no error in the amount assessed.

The worker's 1998 and 2001 claim pensions were implemented in September 2002, and were retroactive to 1999 and 2001 respectively. The worker had successfully returned to approved modified work, despite his pain complaints and his concerns that he should not be doing any work. I find no error in the Board's conclusion that the worker had not suffered a loss of earnings due to his injuries at the time his pension determinations were made.

Dr. Hastings' more recent reports support the worker's evidence at the oral hearing. On October 14, 2003, Dr. Hastings said that the worker found he had episodes of increasing pain with minimal activity and the worker did have a marked decrease of range of motion of the lumbar spine. His home life was affected by his inability to perform activities and his need to rest. The worker had concerns about his ability to continue work.

Dr. Hastings' recent reports from November and December 2003 indicate that the worker has had a severe flare up of his back pain and has had to stop work due to pain and stress. Dr. Hastings reports that the worker has increased limitation in range of motion of the lumbar spine and that x-rays show increased deformity. These reports were sent directly to WCAT and have not, to my knowledge, been reviewed by the Board. These reports, along with the worker's evidence that his earnings have been reduced by the employer effective September 15, 2003 (see exhibit #3), should be reviewed by the Board, and determinations made regarding further entitlement based on the new evidence should be communicated to the worker in writing.

I allow the worker's appeal regarding his pension, in part. I find that there is significant new evidence that needs to be reviewed by the Board to determine the worker's entitlement to further benefits, including any change in pension entitlement.

Conclusion

I vary the Board's decision of November 28, 2001 (A appeal) and allow the worker's appeal on the issue of further vocational rehabilitation benefits. The worker is entitled to wage-loss equivalency benefits between November 29, 2001 and February 7, 2002 inclusive, less monies earned from employment.

I confirm the Board's decision of January 17, 2002 (B appeal) and deny the worker's appeal on the issue of further temporary disability benefits between November 2001 and February 2002.

I vary the Board's decision of September 9, 2002 (C appeal) and allow, in part, the worker's appeal of the pension decision. I find that the pension decision was correct at the time it was made, but that there is significant new evidence, including urgent medical reports, which need to be reviewed by the Board. The Board's determinations regarding further benefit entitlement, including pension entitlement, should be communicated to the worker in writing.

The worker did not submit invoices for the letters from his attending physician, Dr. Hastings. If he incurred costs in obtaining those reports, I authorize reimbursement, to be made in accordance with the Board's schedule of fees. There are no other direct appeal costs.

Lois J. Williams
Vice Chair

LJW/mli

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