WCAT Decision Number: WCAT-2004-00107-RB
WCAT Decision Date: **January 13, 2004**
Panel: Lois J. Williams, Vice Chair

Introduction

The worker now 30 years old, developed bilateral carpal tunnel syndrome while working as a journeyman automotive mechanic, and applied for compensation in 1997. The Workers' Compensation Board (Board) accepted his claim, and paid benefits while the worker underwent two surgeries. He did not have a good result and the Board determined that the worker needed to find alternate work. Vocational rehabilitation benefits commenced after the worker's recovery plateaued at the end of October 1999.

The worker now appeals decisions contained in five letters from Board officers:

A Appeal – May 3, 2001 decision

A disability awards case manager told the worker his permanent partial disability award, effective November 1, 1999, was for functional impairment that had been assessed at 4.05 percent of total disability. The pension wage rate was based on the worker's average earnings at the time of his injury. The award was to acknowledge any long-term effect on the worker's employability caused by the loss of function, and was paid in a lump sum of $20,441.70.

B Appeal – July 10, 2001 decision

A vocational rehabilitation consultant (VRC) said the worker was not entitled to further vocational rehabilitation benefits at that time. A three-month training on the job opportunity as a truck driver had commenced April 15, 2001, with an understanding that the worker would be hired by the company when that was completed. The worker had not been to work since June 25, 2001 and said he could no longer drive a truck. A Board medical advisor felt that the worker was not medically precluded from truck driving or the training on the job opportunity, and would have no permanent restrictions resulting from the worker's recent claim for wage loss [on May 29, 2001, the worker had hit his chest on a tire while pulling on a wheel unlocking handle].

C Appeal – July 19, 2001 decision

The VRC said there would be no change to the July 10, 2001 decision. The worker had said that his doctor told him not to drive commercial vehicles. If the worker was also restricted from driving passenger vehicles, the VRC wanted a copy of the doctor's report to the Superintendent of Motor Vehicles regarding the worker's restrictions before determining if that had a bearing on his future eligibility for assistance. The VRC also said that the 86 weeks of allowances and services provided between November 1, 1999 and June 24, 2001 were more than reasonable to assist the worker in returning to work that would accommodate his 4.05 percent wrist impairment at a salary of $2,326.00 per month. The worker could contact his training on the job employer for work, or consider work as a flag person, or highway traffic controller.

D Appeal – October 12, 2001 decision

The VRC said the worker would not be paid job search allowance for the period of February 26 to March 4, 2001, as he had not met the criteria for that allowance. The week before, the worker had been returning from a job tryout in long distance driving to California. He did not submit job search evidence for the following week, as he had been told was required. Benefits were recommenced on March 7, 2001 when he resumed full job search activity.

E Appeal - April 26, 2002 decision

The VRC noted a specialist's opinion that if the worker kept driving, his disability would eventually increase. The specialist said that it would take a lot of truck driving for this to happen permanently, but that the worker should stop driving soon. The VRC said that truck driving was only one of the job options identified to return the worker to his pre-injury earnings without formal training. The VRC noted the assistance already provided to the worker, and said that the Board had met its responsibility to the worker. The VRC said that he had mentioned to the worker that a taxi dispatcher job was available that paid $10.00 - $13.00 per hour. The VRC also noted that the worker was employed, and although he had not yet matched his pre-injury earnings, he had the skills, knowledge and ability to do so in the long term.

The worker seeks a change to his pension wage rate on the basis that projected raises should have been included in his average earnings, or on the basis that he was a learner and his earnings should be based on the statistical average for full-time journeyman automotive mechanics.

The worker does not take issue with the amount of permanent functional impairment assessed, or the effective date of the pension. He seeks additional vocational rehabilitation benefits and a reassessment of his employability.

Issue(s)

Was the worker entitled to continuation of his wage-loss equivalency benefits for the period February 26 to March 4, 2001?

Was the worker entitled to further vocational rehabilitation benefits beyond June 24, 2001?

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

Background and Evidence

The worker has a grade 12 education, and through a work experience in high school, he had been hired by his accident employer. He started his automotive apprenticeship in 1991 and became a journeyman in 1995. He missed work from January 4, 1997 to June 16, 1997, and only worked part-time for a period afterwards, due to a non-compensable illness. The Board officer who assessed the worker's average earnings at the time of his injury for long term wage rate and pension wage rate purposes, used his earnings in the one year period prior to his December 14, 1997 carpal tunnel syndrome disablement, but deducted the periods he was totally and partially disabled by his illness. There was also evidence that the worker had taken some unpaid leave, as his average earnings still did not reflect full-time work.

The worker told the Board officer that he had received a $1.00 per hour pay increase when he returned to work from his illness in the summer of 1997. Although he said he was a journeyman, he was not being paid the full journeyman rate as he was not as fast or productive as he should be. The initial wage rate on the claim was 75 percent of $640.00 gross per week, reflecting the worker's $16.00 per hour earnings. At the eight week mark, the long-term wage rate was set at 75 percent of $535.22 per week, reflecting the worker's earnings in the year prior to injury, less the time he was totally and partially disabled by his illness. The disability awards case manager used these same earnings and time deductions to set the pension rate at 75 percent of $2,326.00 per month [according to the pension calculation sheet $2,362.00 was used].

Following plateau in his recovery, the worker's vocational rehabilitation benefits started November 1, 1999. The worker underwent a functional capacity evaluation in December 2001 and the independent evaluator concluded that the worker should not be considered for occupations that would expose him to tools or equipment producing non-linear and/or vibration forces. The evaluator said the worker was not able to demonstrate adequate endurance for strength, power, and range of movement levels required of tasks common to an occupation as an automotive mechanic. He did demonstrate adequate strength, power and endurance to meet the physical demand requirements of occupational options including parts man, service writer, and motor vehicle damage adjuster.

A February 3, 2000 psychologist's report gives the result of a "psychovocational" assessment. The psychologist said the worker had transferable skills, a relevant knowledge base and a good work ethic. His level of intelligence was in the high average range, with his visual intelligence and memory higher than the verbal/auditory counterparts. The worker had only had one job, and lacked confidence in changing careers. His personality profile indicated that his breadth of interests, tolerances for differences and complexity of mind were all low to extremely low. The psychologist suggested the worker be given some brief counselling to ease his transition to a new vocation, and said that upgrading would help. The broad vocational areas of interest to the worker, which were also practical and fit his personality profile, included Skilled Trades, Engineering, Creative Arts and Nature/Agriculture.

The worker was referred to a career redirection program on April 17, 2000. In a May 23, 2000 report, the service provider said the worker had narrowed his career choices to commercial vehicle inspector, fisheries officer, and sheriff/bailiff. He would also consider claims adjuster, civil engineering technician, service writer, and to a much lesser extent, parts man. From June 23 to July 10, 2000 the worker attended a computer-based workshop to assess his employment needs, attitudes and strengths, and to implement job search strategies with ongoing counselor support. In a September 5, 2000 report the service provider said the worker was waiting to contact someone about vehicle inspection, but that person was on holidays.

The worker was most interested in becoming a commercial vehicle inspector and he spent some time job shadowing with a weigh scale master, an entry level position for commercial vehicle inspection. He obtained information from the motor vehicle inspector supervisor that, with his mechanic training, and a Class 1 with Air driver's license, a first aid certificate, and computer courses, he would be a good candidate for job postings. The Board's VRC said that he confirmed the information obtained by the worker regarding the future availability of jobs, and he budgeted for the suggested training courses.

The worker completed his Class 1 with Air driver's license in December 2000. The VRC noted that the last few weigh master positions had been filled internally. He told the worker that he should look for driving work while waiting for weigh master/vehicle inspection jobs to come open. In a letter dated December 12, 2000, he advised the worker of the need to contact three to five employers a day and keep records of these contacts to qualify for the job search allowance that had been budgeted to April 1, 2001.

The worker did submit job search sheets and also asked the VRC to sponsor a work assessment driving a long haul truck. The VRC agreed to this and the worker drove the truck on a trip from February 15 to 21, 2001. The instructor said that he had done well,

but it would be up to the worker to decide if his hands could handle the work and whether the lifestyle was one he could live with.

The worker did not conduct any job search on his return from the truck driving trip, and did not submit any contact sheets to the Board. On March 6, 2001 he met with the acting VRC, and said that he did not feel capable of driving on a long haul basis. The VRC said that there was no indication in the driving assessment that the worker could not drive locally or on a shorter haul basis. The worker agreed to actively participate in a broad job search. He was told that he would not be paid his job search allowance for the previous week as he had not met the contact criteria.

The worker was examined for permanent functional impairment on April 9, 2001 and was assessed as having 4.05 percent of total disability. On May 3, 2001, his pension was implemented on that basis.

The Board had agreed to sponsor a three-month training on the job opportunity with another trucking company that would accommodate the worker with suitable routes and types of driving. The worker was paid wage loss benefits from May 28 to June 12, 2001 for a chest injury that occurred during this training. On June 25, 2001 the worker called the Board to report that he was having difficulties with driving and had seen his doctor. The doctor's report of the same day records that the worker had increasing pain and numbness in his hands, with paresthesia in the median nerve On July 13, 2001 the worker wrote to the Board regarding the termination of his vocational rehabilitation benefits (decision letter July 10, 2001), stating that his doctor told him not to drive as he loses control of the steering wheel due to not being able to feel the wheel, and requesting a meeting to resolve his vocational problem.

In a report dated December 3, 2001, neurologist Dr. Hostetler said that he would like to think that, if the Board had asked him, he would not have recommended truck driving to the Board as a vocational choice for a patient who had failed to gain major improvement after five years and three operations worth of carpal tunnel syndrome. Dr. Hostetler said that one might term the worker's problem as "failed carpal tunnel syndrome". In addition he thought that the worker might have a neuroma of the right median nerve. He thought the worker would eventually permanently increase his disability if he kept driving. Although it would take a lot of driving for this to happen permanently, the worker should stop driving soon. He also said that the worker was becoming unsafe to drive truck anyway.

On December 12, 2001, plastic and reconstructive surgeon Dr. Naysmith did not think the worker had a neuroma. He noted that the worker had stopped driving truck in June and was now working for a company doing oil changes. Dr. Naysmith supported Dr. Hostetler's opinion that the worker should not be driving truck "as I think it would be dangerous to the public".

Oral Hearing Evidence and Submissions

At the oral hearing held on August 27, 2003, the worker was represented by a workers' adviser.

The adviser had submitted a September 25, 2001 letter from the injury employer with the worker's notice of appeal – part 2. The employer stated that the worker had been a full-time employee who worked 40-hour weeks. If there were discrepancies [in his earnings] it may have been because of a day or two of sickness, which was not covered by the small business. The employer said that the worker's pay progression had been delayed due to his major six-month illness in 1997. The employer said that if the worker had not been off work with his illness, he would have been earning $18.00 per hour by July 31, 1997 and $19.00 per hour by December 31, 1997.

The worker said that he was earning $16.00 per hour when he went off work. He said that in addition to his delayed pay raises, he took three to four weeks off without pay in October 1997 to attend a NASCAR race in Phoenix. The workers' adviser submits that the pay increase delay and the unpaid vacation created an anomaly in the worker's earning pattern and did not represent his earning capacity at the time of his injury. He points out that the worker was on a pay progression with the employer, having completed his apprenticeship, and was therefore still a learner, as envisioned by Board policy item #67.10 and/or item #67.20 of the *Rehabilitation Services and Claims Manual* (RSCM). The workers' adviser submits that the pension wage rate should be based on earnings of $19.00 per hour, or on the class average for full-time journeymen automotive mechanics.

The worker described how the vocational plan had just been for him to get his Class 1 with Air driver's license so that he would be a better candidate for the weigh master/commercial vehicle inspector job he hoped to obtain. He said driving as a job was never discussed and he was shocked when the Board told him to look for truck driving jobs. He described the difficulties he had driving the long haul truck, with his hands being painful, tingling, and falling asleep. He said that on his return to Canada from the long trip on February 25, 2001 he knew he could not work as a long haul driver. He said he did not look for work during the week that the Board suspended his job search allowance; he was just waiting for the Board to decide what to do next.

The workers' adviser submits that it was unrealistic for the worker to go to look for more truck driving jobs on his return from California in February 2001, and he should have been placed on either planning benefits or temporary disability benefits for the following week.

Regarding the three-month training on the job opportunity with another company, on a truck doing shorter runs, the worker said that he did not think that type of driving would be any different. He was paid $12.00 per hour. He said it was a fun job, but his hands

could not take the vibration from the steering wheel or the shifting. He had to ice his arms after work. A couple of times he could not feel the steering wheel due to numbness. He said that his chest was injured due to his poor hand grip, when his hand slipped while pulling the wheel release. He said his doctor and his specialist both told him to stop driving trucks, and he did so in late June 2001.

The worker said that when he applied for weigh scale/commercial vehicle inspector jobs, he was only thanked for his resume. He said the jobs went to in-house applicants through the ICBC network. He said that there are fewer such jobs now, and the inspectors drive around with portable scales. The worker said that, in June 2001, he also started looking for work as a service writer, parts man, transport dispatcher, or "any job I could find". He had an interview at Canadian Tire for a service writer job, but they did not want a full-time worker. His father investigated the taxi dispatcher job mentioned by the VCR and found out that the company hired from within, from the ranks of the taxi drivers.

On August 28, 2001, the worker started work with an oil change company as an upper bay technician at $8.00 per hour, 35 hours per week. He was promoted to manager in February 2002, and now earns $32,000 per year. He stated that he will match his pre-injury earnings in the long term in this job.

The workers' adviser submits that the vocational rehabilitation plan failed, and the worker was not provided with assistance in finding alternate work. The jobs identified by the Board as being suitable were not suitable, would not match the pre-injury earnings, or were not available. The worker could not truck drive, nor would he have been able to hold signs as a flag person all day. The workers' adviser submits that the worker is entitled to top up of his wages to recognize the interim loss of earnings that the worker is experiencing, or income continuity benefits. He also submits that the worker is entitled to additional assistance in the form of course and material costs for computer course and management level college night school courses.

The worker's adviser submits that the Board's determination that the worker would have no loss of earnings in the long term was premature, as no employability assessment had been done. He submits that employability needs to be reassessed, in light of any findings regarding the pension wage rate.

Findings and Reasons

Permanent partial disability:

Section 23 of the *Workers Compensation Act* (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 the injury and the average amount the worker is earning or is able to earn after the injury. Board policy at item #38.00 is that the amount of the pension is the higher of the two figures produced by the two methods.

As noted in the **Introduction**, the worker does not take issue with the amount of permanent functional impairment assessed, or the effective date of his pension. The assessment was done in accordance with the Act and Board policy and there is no evidence to the contrary. I find that the assessment of 4.05 percent for permanent functional impairment is correct. The medical evidence is that the worker had plateaued in his recovery from his carpal tunnel syndrome by October 31, 1999, and no further treatment or investigations were planned. I therefore find that the pension effective date of November 1, 1999 is correct.

Section 33(1) of the Act states that the average earnings and earning capacity of a worker must be determined with reference to the average earnings and earning capacity at the time of the injury. This may be calculated on the wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the Board best to represent the actual loss of earnings suffered by the worker by reason of the injury. Where, owing to the shortness of time during which the worker was in the employment of his or her employer, or in any employment, or the casual nature of the employment, or the terms of it, it is inequitable to compute average earnings in the manner described, regard may be had to the average amount which, as shown by the records of the Board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment. Section 33(3) of the Act states that where the Board is satisfied that the average earnings of the worker at the time of injury by reason of the worker's age or the worker being a learner, do not truly represent the worker's average earnings or earning capacity, it may, in the case of permanent disability, calculate the award by taking into account the probable increase in average earnings.

Board policy item #66.11 states that, generally speaking, the Board does deduct from the total period over which earnings are being averaged any periods during which the worker was receiving wage-loss compensation or for which there is medical evidence of disability, or for which the worker was absent from work to take educational or training programs.

Board policy item #65.00 states that section 33 of the Act provides for various alternative methods of calculating average earnings and obliges the Board to select for each claim the method which most accurately represents the worker's actual loss of

earnings by reason of the injury. Policy item #68.00 states that permanent disability pensions are normally based on the earnings rate established at the point when long-term earnings are reviewed for wage-loss purposes. This usually means the rate resulting from the eight-week rate review, but a different rate can be used if there are valid reasons for this.

I have reviewed the workers' adviser's argument regarding the worker's pension wage rate, in light of the evidence on this claim and applicable law and policy.

There must be very good evidence and persuasive reasons on a claim to not follow the policies of the Board in determining a worker's average earnings. The earnings used must be the best reflection of the worker's loss due to his injury, in accordance with section 33 of the Act.

On the evidence before me, I find that this worker was neither a learner, nor a new entrant to the workforce. The worker had just turned 25 years old when he developed carpal tunnel syndrome. He had been a journeyman automotive mechanic for two years, following a four-year apprenticeship, and he had been with the employer for six years. He had chosen to remain with the same employer although not earning journeyman's rate. The worker told the Board on March 9, 1998 that he was paid less than the going rate because he was not as fast or productive as he should be. The worker was third in seniority at this employer, yet his wage rate needed to be moved up $4.00 to get to scale, while three others only had to have their wage rate moved up $1.50 or $2.00 to get to scale. The worker's training and ability were well known to the employer, and there is no indication that the worker had been rewarded with regular pay increases since attaining his journeyman status. This evidence leads me to believe that the worker was not on a scheduled learning or earning curve at the time of his injury, and I prefer the worker's early evidence to the Board that he was paid less to reflect his lack of production. He certainly was not a new entrant to the workforce, having had the same employer for at least six years.

The employer does not explain why he finally decided to move five of his workers' wages up towards scale, starting in 1997. He was paying his employees different amounts and he moved them up at different rates and over different time spans. He indicates that he would have moved the worker's pay up by $3.00 by July 31, 1997 and by another $1.00 on December 31, 1997, if the worker had not been ill for six months. However, when the worker did return to part-time work in June 1997, the employer only moved the pay up by $1.00, and did not move the pay up any further, even when the worker returned to full-time duties.

There is other evidence that supports the Board's finding regarding the pension wage rate. The time the worker had been ill was deducted from the calculations, so almost all the earnings used for pension rate calculations were at $16.00 per hour. Yet there was still a discrepancy between what $16.00 at 40 hours per week would bring in, and the worker's reported earnings. The worker had an unpaid three to four week holiday.

There is no provision in the Act or policy to allow for deductions for holiday periods from the calculations. There is no evidence that this holiday was an unusual event or special circumstance beyond the control of the worker, or beyond the norm.

As did the disability awards case manager, what I can and do accept is that the worker had a strong attachment to this employer, and that his six-month illness was an anomaly in his historical earnings pattern. I find that, in accordance with Board policy, it was correct to deduct the periods of total and partial disability, due to the illness, from the pension wage rate calculation.

In summary, I find that the pension wage rate set by the Board is the best reflection of the worker's loss due to his injury.

The worker's pension wage rate is based on average pre-injury earnings of either $2,326.00 or $2,362.00 per month [pension calculation sheet], which equals at most $28,344.00 per year in 1997 dollars. The worker states that he is now earning $32,000.00 a year. Even allowing for Cost of Living increases, the worker is exceeding his average earnings at the time of injury. I find that he does not have a loss of earnings due to his compensable condition.

Suspension of vocational rehabilitation allowances in February and March 2001:

Board policy at item #85.30 of the RSCM states that a guiding principle of successful vocational rehabilitation requires that workers be motivated to take an active interest and initiative in their own rehabilitation. Vocational programs and services should, therefore, be offered and sustained in direct response to the commitment and determination or workers to re-establish themselves. Policy item #88.31 states that eligibility for job search assistance and its continuance is conditional upon the active cooperation of the worker with the VRC. Workers may be required to provide proof that they are earnestly seeking employment, or awaiting a definite job opportunity.

In the December 12, 2001 letter the worker was advised of the job search allowance criteria and how to meet it. He did not meet the criteria during the period February 26 to March 4, 2001 and states that he did not look for any work at that time. He said he was waiting for the Board to decide what to do next.

I deny the worker's appeal on the issue of benefits between February 26 and March 4, 2001. I find that the worker was not "earnestly seeking employment, or awaiting a definite job opportunity". He was not taking "an active interest and initiative" in his own rehabilitation during that week. There is no evidence that he was temporarily totally disabled during that week. I find that the worker was not entitled to either vocational rehabilitation or temporary disability benefits for the period in question.

Further vocational rehabilitation benefits beyond June 2001:

As stated in Board policy item #85.10 of the RSCM, vocational rehabilitation may be provided under section 16 of the Act, to aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap. Policy item #85.40 in the RSCM states that the Vocational Rehabilitation Department's service objectives are to:

- assist workers in their efforts to return to their pre-injury employment or to an occupational category comparable in terms of earning capacity;

- to provide the assistance considered reasonably necessary to overcome the immediate and long-term vocational impact of the injury;

- and to provide reassurance, encouragement and counselling to help the worker maintain a positive outlook and remain motivated toward future economic and social capability.

The medical opinions of both the attending physician and the specialists regarding the fitness of the worker to remain in any truck driving job must be given some weight. These physicians had full knowledge of the worker's condition and examined him at a time when he remained symptomatic from his job duties. I accept their opinions that truck driving is not suitable work for this worker with his "failed carpal tunnel syndrome". In the end, the Board did not disagree that truck driving was not the best option for this worker, but took the position that the worker had sufficient skills and knowledge, as well as sufficient job search training, to find suitable work in other fields with no loss of earnings. The VRC declined to provide additional vocational rehabilitation assistance to the worker when he failed to complete the truck driving training on the job opportunity.

The psychologist who did the "psychovocational" assessment had identified that this worker had a lack of self-confidence and would need to be supported in finding suitable employment. Initially, the Board did sponsor the worker with a full array of vocational services and he was able to identify areas of interest and hone his job search skills. However, the worker was not provided with any assistance when the weigh scale/commercial vehicle inspector job was not available, and the truck driving jobs proved unsuitable. He did do a diligent job search and was able to locate employment within a relatively short time period. Therefore, I find that the worker was entitled to job search allowances for the period it took him to find the job with the oil change company. I also note that the worker started this job at the entry level at a low rate of pay and I find that, had the Board been supporting the worker with this job option, he would have been entitled to payment of management and computer courses to fulfill the qualifications for the manager position he now has, where he is not experiencing a loss of earnings. I find that the Board should reimburse the worker for the tuition and costs of materials of any courses he took while at his new place of employment, to date. The worker is now earning in excess of his pre-injury average earnings and is not, other than as stated above, entitled to further vocational assistance from the Board.

Conclusion

I confirm the May 30, 2001 (A appeal) Board decision and deny the worker's appeal on the pension issues.

I vary the July 10, 2001 (B appeal), July 19, 2001 (C appeal) and April 26, 2002 (E appeal) Board decisions and allow the worker's appeal on the issue of further vocational rehabilitation beyond June 2001. I find the worker was entitled to a job search allowance from the time his benefits terminated in June 2001, until he started work with the oil change company. I also find that the Board should reimburse the worker for the tuition and costs of materials of any courses he may have taken up to now, while employed at the oil change company. Other than as stated here, the worker is not entitled to further vocational assistance.

I confirm the October 12, 2001 (D appeal) Board decision and deny the worker's appeal on the issue of payment of job search or other wage loss benefits for the period February 26 to March 4, 2001.

No appeal costs were sought and none are awarded.

Lois J. Williams
Vice Chair

LJW/mli