WCAT Decision Number: WCAT-2004-00112-RB
WCAT Decision Date: **January 13, 2004**
Panel: **Cecil S. Memory**

Introduction

1. The worker, employed as an automobile sales person, sustained an injury to his right foot on August 13, 1998. The Workers' Compensation Board (Board) accepted his claim for a fracture of the right fifth metatarsal and a fracture of the right cuboid bone.

2. In August 2002 the worker was assessed for entitlement to a disability award. In the appealed October 4, 2002 decision letter the Board granted a disability award based on assessed disability of 3.12 percent, effective January 1, 2001 (the day following termination of wage loss benefits), based on average earnings of $2,949 per month (his one-year average prior to injury) and, on the understanding that he had returned to work, did not grant a loss of earnings award under section 23(3) of the *Workers Compensation Act* (Act).

Issue(s)

3. The issue is whether the disability award granted to the worker fulfilled his entitlement respecting the right foot disability.

Jurisdiction

4. This appeal was 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 this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

Evidence

5. In August 1998 the worker was 55 years old. He had grown up working in a family owned sand and gravel business in Regina, Saskatchewan, and later, after his father's death, co-owned the business with his brother. The worker was fully experienced in the operation of all kinds of heavy equipment and held a class I license respecting trucks used in the business. The worker eventually transferred his interest to his brother and commenced work as an automotive

salesman in 1981, working with several employers in that business up until the compensable injury in August 1998.

6. The effect of the foot injury was that although the worker could walk with reasonable ease, he could not stand and from time to time required a cane. The Board eventually accepted that he could not return to his pre-accident vocation as an automotive salesman. The worker initially indicated an interest in retraining in computers. However, after three weeks into an introductory course he realized that he was not cut out for either desk work or learning typing. The vocational rehabilitation consultant (VRC) agreed and provided assistance to upgrade the class I license and to find a job in the trucking industry.

7. At the hearing the worker described his several short-term jobs in the trucking industry all of which ended for several reasons relating to the seasonal aspect of the work. He stated at the hearing that throughout his foot was fine except for difficulties stepping up into the operating cab of the various tractor trucks he was operating. He stated that he eventually switched to using his non-dominant left foot with the right foot following. His last job was with a company who hired him for three weeks at two days work per week, but eventually told him he should look for some other job because they did not have enough work to run the oldest truck to which he was assigned. At the oral hearing the worker stated that this was approximately three months ago and he had been job searching ever since and had been unable to find a job. He stated that he hoped it was seasonal and that he could get a job operating a truck or some heavy equipment when spring arrived. However, he also stated that he was having difficulty finding a job because of his age and because of the reluctance of employers to hire when they found out that he had a foot disability claim.

8. The permanent functional impairment examination was completed on August 13, 2002. At the hearing the worker stated that the physician doing the examination was not familiar with the measurement devices and admitted to him that she was not familiar with the devices and the worker stated that he actually worked with the physician to figure out how to do the measurements. The worker submitted that he thought the measurements were wrong and perhaps understated the lost range of motion in his foot. I asked him if perhaps the measurements were wrong but overstated his lost range of motion. He acknowledged that could also be the case but stated he wished to be reassessed.

9. The worker took no issue with the effective date of the disability award, January 1, 2001, the day following termination of wage loss benefits. Similarly, the worker took no issue with the average earnings based on his one-year earnings prior to the injury.

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10. The VRC prepared a recommendation for expenditure, budget sheet #6 on September 3, 2002. The VRC recorded that the worker had advised that he had two potential front-end loading positions and was hoping he would be called for one of the jobs later that week or in the next week. On page two of the budget sheet the VRC recorded 'If the client is successful in obtaining employment as a front end loader, there may be no loss of earnings. … Considering his age (59), if he does not, he will likely sustain a loss of earnings'.

11. The disability awards officer prepared form 24 dated October 2, 2002. The officer concurred with the conclusions of the disability awards medical advisor that the total impairment from restricted range of motion of the foot was 2.12 percent, this being the aggregate of loss of range of motion of the mid-tarsal (0.69) and reduced flexion and dorsi-flexion (0.90) and reduced subtalar inversion and eversion (0.53). The officer also noted the pain and discomfort the worker experienced as well as decreased muscle strength in the right foot and granted a further 1.0 percent to reflect the subjective symptoms. This brought the overall award to 3.12 percent.

12. At the oral hearing the worker acknowledged that his foot disability did not interfere with his various jobs as a tractor truck operator or as a heavy equipment operator, save for the problems ascending and descending the equipment. My understanding of his evidence is that the foot did not prevent him from obtaining those jobs, save for the reluctance of employers to hire him when they understood that he had a compensation claim regarding his foot.

Reasons and Findings

13. I have carefully reviewed the permanent functional impairment examination report and the subsequent memo by the disability awards medical advisor, and the review of those documents by the disability awards officer. I conclude that while the worker has the opinion that the physician did not get the measurements correct, I cannot rely on his opinion. There is a presumption that when the Board appoints a physician to function as a permanent functional impairment examination, that person has sufficient expertise to carry out the various measurements involved in such a specialty examination. Further, the disability awards officer did not hesitate to adopt the assessments of the physician. Further, I note that the worker's ability to walk and do the various truck and equipment jobs is not limited by his foot problems. Accordingly, I find that the disability award based on disability of 3.12 percent of total for the right foot and ankle impairment is not understated and I confirm that decision by the disability awards officer.

14. The evidence is that the worker is experiencing a reduction in his earnings related to the disability in the foot/ankle. The disability awards officer misunderstood that the worker had returned to employment. I rely in part on the

conclusion of the VRC that if the worker did not successfully obtain employment as a front-end loader then he would likely sustain a loss of earnings. That, in fact, turned out to be the case.

15. I conclude that in the circumstances the entitlement to a loss of earnings award under section 23(3) of the Act must be returned to the Board for consideration of the worker's entitlement. Given the misunderstanding, the disability awards officer did not in fact address the issue of entitlement under section 23(3). Accordingly, the appeal is allowed to the extent that I find the worker entitled to assessment under section 23(3) of the Act. This issue is returned to the Board for determination.

16. I note that, as did the VRC, the worker has many transferable skills and it may be that some further effective efficient vocational rehabilitation may assist the worker to find employment which will replace his average earnings.

Conclusion

17. For the foregoing reasons and findings the appeal is denied, save for the referral back for consideration of entitlement to a loss of earnings award. The Board's decision is varied to that extent.

18. There are no reimbursable expenses.

Cecil S. Memory
Vice Chair

CSM/hf

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