WCAT Decision Number: WCAT-2004-00125-RB
WCAT Decision Date: **January 13, 2004**
Panel: Julie A. Brassington, Vice Chair

Introduction

The worker is appealing the July 12, 2000 decision letter of an officer of the Worker's Compensation Board (Board). In that letter the worker was advised that as a result of a Workers' Compensation Review Board (Review Board) finding, the Board officer had reviewed the circumstances of his claim. She determined that it would be appropriate to pay the worker vocational rehabilitation benefits on a retroactive basis to the date of the Review Board decision (June 4, 1999). The worker advised the officer that he was entering work, on a trial basis on June 23, 2000 as a machine operator. The worker is appealing on the basis that he believes the vocational rehabilitation benefits should be retroactive to October 4, 1996. (Appeal D)

The worker also appeals the February 6, 2001 decision letter from an officer of the Board in which he was advised that the Board did not recognize Dr. Hershler's proposed treatment as being a procedure that is supported by evidence based in medical findings. The worker was advised if he wished to pursue this form of treatment, it should be done on a private patient basis. (Appeal E)

The worker also appeals the March 19, 2001 decision letter of an officer of the Board. The worker was advised that it had been concluded that his disability was equal to 4.59 percent of a totally disabled person. He was given a lump sum award of $22,510.91 of which $8,656.53 was added interest. (Appeal F)

Issue(s)

Appeal D - Whether the worker was entitled to any additional vocational rehabilitation services, specifically from October 4, 1996 to June 4, 1999.

Appeal E - Whether the Board should have been responsible for the costs of Dr. Hershler's treatment.

Appeal F - Was the worker's permanent partial disability award correctly determined? Specifically, did the worker's functional award accurately reflect the extent of his disability? Was the effective date the date that the worker's condition plateaued? Was the wage rate on which the award was based correct? Finally, did the worker suffer a loss of earnings as a result of his compensable injury?

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

Jurisdiction

This appeal was filed with the Review Board. On March 3, 2003, the Workers' Compensation Appeal Tribunal (WCAT) replaced the Appeal Division and Review Board. As a Review Board panel had not considered this appeal before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

Under sections 250(1) and (2) of the *Workers Compensation Act* (Act) (effective March 3, 2003) WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. It must make its decision on the merits and justice of the case. It must apply policies of the Board's board of directors, which apply, to the case, except in exceptional circumstances outlined in section 251 of the Act.

Under section 254 of the Act (effective March 3, 2003), WCAT has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined in an appeal before it. Thus, this appeal is a rehearing.

Background and Evidence

Prior to the hearing the worker withdrew appeal E. I have accepted the withdrawal and no further action will be taken in regards to Appeal E.

The worker, an automotive mechanic had been working for the pre-injury employer for approximately three months when fell from a ladder at work. At the time the worker had just emigrated from Poland. As a result of the fall his claim was accepted for soft tissue injuries to his left hand and right shoulder. Subsequently, the claim was also accepted for chronic pain from a scapholunate interosseous partial ligament injury. The claim was not accepted for a non-compensable injury to the left forearm.

In December 1997 a Board vocational rehabilitation consultant determined that the worker was deemed as able to return to his pre-accident occupation as a mechanic and therefore he did not qualify for vocational rehabilitation services.

A Review Board finding, dated June 4, 1999 confirmed that wage loss benefits were correctly terminated on October 4, 1996. The Review Board panel directed the Board to redetermine the entitlement to vocational rehabilitation services in light of the fact that the worker was restricted from performing the heavy physical requirements of an automotive mechanic.

With respect to retroactive benefit entitlement the vocational rehabilitation consultant requested that the worker supply confirmation of any job search rehabilitation activity. As part of the submission regarding this appeal the worker forwarded information regarding his activities from October 4, 1996 to June 3, 1999. The worker stated that on:

- October 7, 1996 – pre-injury employer had no work available.
- November 13, 1996 – left knee surgery (related to Nov 1995 car accident).
- January 1997 to August 29, 1997 – attended LINC Centre to study English as a second language. (two to three times per week – two to three hours per session).
- June 8, 1998 to August 28, 1998 attended the Autoworks program at the Metro Training Institute.
- August 29 to September 30, 1998 – one month work practicum. During the placement the worker determined that he could not be successfully employed as an auto mechanic due to the problems with his left hand.

The worker provided the dates and names of employers contacted during his search for employment from October 7, 1996 to June 26, 1999. The employers on the list have each signed a dated and documented note indicating that the worker applied for work with them.

The worker testified that he has been working since June of 1999. He reported that since June of 2000 he has been operating a vertical milling machine. His wages are $25.36 per hour.

The worker stated that he feels the surgery he had on his right hand was not successful because the pain persists. He stated that he uses his left hand more than the right when working mostly due to the pain. He testified that he works with ongoing chronic pain in his wrist. He stated that when he bends his hand upwards on an angle, he feels sharp shooting pain in the wrist and it feels like it is cracking.

The worker was sent for a permanent functional assessment on May 26, 2000. In terms of his right wrist the worker was noted to have:

- Flexion 55 degrees
- Extension 50 degrees
- Radial deviation 15 degrees
- Ulnar deviation 20 degrees

The report indicated that the worker had abnormal motion flexion and extension determined to be 2.1 percent of total. Abnormal motion radial and ulnar deviation of 0.89 percent was noted at the right wrist. The total scheduled impairment came to

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3.06 percent when taking into account the combined factor due to the left wrist non-compensable injury. The worker was given an additional 1.53 percent for bilateral enhancement. There was no impairment for the shoulder. The total award was 4.59 percent.

The worker submitted a letter from his family physician, dated December 1, 2003 indicating that he had examined the worker and found his range of motion of his right wrist as follows:

- Flexion 30 degrees
- Extension 10 degrees
- Ulnar deviation 10 degrees
- Radial deviation 10 degrees

The physician noted that the worker's right hand was also quite weak – weaker than the left side. He also noted that pain in the right wrist persists.

The worker also submitted a letter dated June 2, 2003 from a local hand and orthopaedic clinic. The specialist's impression was that the worker appeared to have a partial scapholunate tear. He indicated that as the pain had been progressive over time, the worker may have had a small tear, which has progressed to a large or possible complete tear. He indicated that the only way to determine this would be to have an additional arthroscopic procedure.

The worker testified that he did not want to proceed with surgery at this time as he could not afford the time off. He indicated that if the pain became worse, he would return to the specialist to discuss surgery.

Reasons and Findings

Appeal D - Whether the worker was entitled to any additional vocational rehabilitation services.

It is sometimes suggested that rehabilitation assistance cannot be provided on a retroactive basis in any event. This reasoning relates to the provision of active rehabilitation such as retraining. Where no rehabilitation program was being undertaken in the past, history cannot be rewritten as the result of an appeal or reconsideration. New or additional active rehabilitation measures can normally only be offered prospectively. There are, however, situations where the worker has undertaken an educational, training or job search program on his or her own initiative and it will subsequently be determined that this should have been accepted as a Board responsibility, resulting in a retroactive rehabilitation payment.

In order to consider payment of retroactive vocational rehabilitation benefits, it has generally been held that a worker must demonstrate active involvement in vocational rehabilitation efforts during the period in question, consistent with the principles of vocational rehabilitation as set out in item #85.30 of the *Rehabilitation Services and Claims Manual* (RSCM). The second and fifth principles have particular relevance to the issue of retroactive vocational rehabilitation benefits:

> 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 of workers to re-establish themselves.
>
> Effective vocational rehabilitation recognizes workers' personal preferences and their accountability for independent vocational choices and outcomes.

It would not be fair to hold the worker to the same standard as the Board would have had he received vocational rehabilitation services under the Board's auspices. He did not have the benefit of the resources which he would have had, had the Board sponsored him.

The worker was enrolled in English as a second language training from January 1997 to August 29, 1997. From June 8, 1998 to August 28, 1998 he attended the Autoworks program at the Metro Training Institute.

From August 29 to September 30, 1998 he completed a one month work practicum. It is apparent from the well-documented list submitted that the worker was applying for work on a consistent basis from September 1998 through to June of 1999. I accept that the worker was involved in the vocational rehabilitation process during these time periods. As such, he is entitled to retroactive vocational rehabilitation benefits including wage loss and health care benefits during these time periods, and the reimbursement of any expenses which he can substantiate for training undertaken.

Appeal E

The appeal regarding the issue of whether the Board should have been responsible for the costs of Dr. Hershler's treatment was withdrawn prior to the hearing. I accept the withdrawal and no further action will be taken in regards to this matter.

Appeal F - Was the worker's permanent partial disability award correctly determined? Specifically, did the worker's functional award accurately reflect the extent of his disability? Was the effective date the date that the worker's condition plateaued? Was the wage rate on which the award was based correct? Finally, did the worker suffer a loss of earnings as a result of his compensable injury?

The Board's decision making with regard to pensions is governed by policy set out in Paragraph #38.10 of the Rehabilitation Services and Claims Manual (RSCM). The Disability Awards Adjudicator is responsible for making the decision as to the degree of a worker's disability, and whether a pension should be awarded.

The Board's policy regarding the reassessment of a permanent partial disability pension is set out in item #42.20 of the RSCM. If the disability on which an award is based worsens, the extent of the disability is reassessed, and a new award is made based on the reassessment. Conversely, if a worker should unexpectedly recover from a disability classified as permanent, the pension would be subject to termination or downward adjustment.

The evidence presented at the hearing indicates that the worker's disability on which the pension award was based appears to have worsened. There is a significant difference in the range of motion measurements taken at the permanent functional assessment on May 26, 2000, and the range of motion measurements taken by the worker's physician on December 1, 2003. The worker stated that his pain is constant and much worse than when he was assessed in 2000. Accordingly, I am allowing this portion of the appeal. I direct the Board to complete a new permanent functional assessment to determine the amount by which the worker's disability has worsened and the amount of the increase in the worker's pension award.

Conclusion

I vary the July 12, 2000 decision of an officer of the Board and find that the worker is entitled to retroactive vocational rehabilitation benefits including wage loss and health care benefits from: January 1997 to the end of August 1997 while in ESL training, and from June 8, 1998 to June 3 1999, when he was in the Autoworks program and searching for a job. (Appeal D)

I have accepted the withdrawal and no further action will be taken in regards to Appeal E.

I vary the March 19, 2001 decision letter and direct the Board to complete a new permanent functional assessment to determine the amount by which the worker's disability has worsened and the amount of the increase in the worker's pension award. (Appeal F)

No costs were requested and none are awarded.

Julie A. Brassington
Vice Chair

JAB/hba

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