WCAT Decision Number: WCAT-2004-00159-RB
WCAT Decision Date: **January 14, 2004**
Panel: Lynn M. Wilfert, Vice Chair

Introduction

The worker was employed as a waitress/bartender when she injured her neck and shoulder on January 19, 1998 when she caught a six pack of beer that almost fell on her. Her claim was accepted for a permanent aggravation to a pre-existing degenerative condition in her neck/cervical spine and right shoulder. The worker has appealed an August 31, 2000 decision of a Workers' Compensation Board (Board) vocational rehabilitation consultant which advised the worker that her wage loss equivalency benefits would be terminated after 12 weeks of job search. No further assistance was offered to the worker.

In a decision of November 16, 2001 the worker was advised of her pension entitlement under the claim. The worker's functional impairment in regards to her cervical spine was assessed at 2.62 percent with 0.29 to cover age adaptability bringing her overall disability to 2.91 percent of a totally disabled person. She was granted a permanent partial disability award payable in a lump sum of $5,204.69. As the worker's average earnings were low her award was calculated by applying section 23(4) of the *Workers Compensation Act* (the Act) using 100 percent of her actual earnings for a monthly rate of $1,033.00. The award was effective June 14, 1999 the date for termination of wage loss. The worker appeals that decision.

The worker's representative contacted the Board in letter of July 20, 2001. He noted that the worker's vocational rehabilitation allowances had been terminated through the letter of August 31, 2000. No consideration was given at that time to the provision of income continuity benefits while the pension was being assessed. He noted that an independent vocational consultant had considered the worker competitively unemployable and the worker should be entitled to income continuity benefits, retroactive to the termination of job search allowances.

The worker had not been provided with any employability assessment and her pension was implemented in November 2001. The worker's representative eventually received a response to his request in a letter of March 4, 2002. A vocational rehabilitation consultant stated that occupations felt suitable for the worker were not noted on the file. The original VRC had been contacted and there was no anticipated loss of earnings related to the claim as the worker was considered capable of full time employment as a retail sales clerk, convenience store clerk or front desk clerk on a full time basis all of which would have enabled the worker to have met or exceeded her wage rate. As a result income continuity benefits would not apply. The worker appealed that decision.

Issue(s)

- Is the worker entitled to further vocational rehabilitation benefits?
- What is the worker's entitlement with respect to her pension?
- Is the worker entitled to income continuity?
- Is work as a sales clerk, front desk clerk or convenience store clerk suitable and available to this worker?

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 WCAT appeals. (See the *Workers Compensation Amendment Act (No. 2), 2002,* section 38.)

Background and Evidence

The worker was employed as a bartender/waitress/beer and wine store clerk when she injured her right shoulder on January 19, 1998 while reaching up to a high shelf in a beer and wine store. A six pack of beer began to fall off the shelf and she wrenched her right shoulder and neck as she reached up suddenly to ward off the falling six pack. The worker sought medical attention for pain in the right shoulder radiating into the right arm. She attempted to continue working on light duties, avoiding overhead lifting or reaching. However, by December 1998 she was unable to manage two days a week and ceased working as a bartender.

X-rays showed the worker had evidence of pre-existing degenerative problems in both the right shoulder and her cervical spine at the C5-6 level. The worker continued to have pain from her neck into her hand and her physician noted she had signs of impingement in the shoulder and parasthesia in her right hand. She was assessed by a Board medical advisor on April 30, 1998. He noted that the worker had definite radiological evidence of a pre-existing disease in both the right shoulder and cervical spine with evidence of calcification at the tuberosity of the right humerus and osteophytes at C5-6 with disc space narrowing. Although there were some suggestions of an impingement of the right shoulder the medical advisor felt most of the worker's pain and inhibition of movement came from the neck. He felt she had some borderline foraminal narrowing at the C5-6 level that had been aggravated by the claim injury resulting in the development of pain and dysesthesia at the C6 distribution.

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The worker's symptoms were not helped by physiotherapy which the worker felt made her pain worse. She was assessed by a rehabilitation specialist who recommended more physiotherapy. Nerve conduction studies showed no evidence of any nerve radiation.

The worker attempted a graduated return to work in September 1998 but was not doing well and ceased work in January 1999. She was referred to an occupational rehabilitation program which recommended a multi-disciplinary pain program.

The worker attended the pain program for approximately four weeks and at discharge did not demonstrate the functional ability to return to her pre-injury position of a bartender. No further treatment options were suggested and the worker was referred to vocational rehabilitation to assist her to return to suitable employment. The worker was eager to continue working but in light of her weekly wage rate of $237.62 there would be limited vocational rehabilitation assistance.

The worker's initial vocational assessment indicated she had experience waitressing, bartending, as a hairdresser and also had run a bingo hall. The worker felt she could possibly run a bingo operation or help co-manage a food/beverage establishment. She was also interested in running a bed and breakfast business from her home.

The worker was referred to an independent vocational rehabilitation consultant for an individualized vocational rehabilitation plan. That report noted the worker had been in the hotel food and beverage service industry for approximately 35 years. She had attempted to upgrade her computer skills taking free courses but was limited to one to two hours at the computer due to increased pain symptoms. She no longer felt safe to drive because she could only use one arm. The worker had increased pain after doing any activities for two or three hours a day. He did not feel the worker could manage the duties of a bingo hall business or do work with computers and although he did not feel that a bed and breakfast operation was a necessarily viable option for the worker, he felt it was at least physically possible for her. The external consultant ultimately concluded that given the worker's physical impairments and chronic pain problems it was unlikely that she was capable of returning to any form of competitive employment.

Despite the conclusions of the independent report, the Board vocational rehabilitation consultant stated she had received instructions from management to place the worker in job search targeting front desk clerk, hostess, sales or reception work. The worker was provided with 12 weeks of job search allowance and this decision was set out in the letter of August 31, 2000. There was no indication that any consideration was given to the provision of income continuity benefits while a pension was being assessed.

The worker was examined for pension purposes on July 13, 2001 but was unable to complete many of the tests. The examiner noted the pain behaviour was intrusive and the assessment was terminated. The worker was reassessed by a disability awards

medical advisor on October 11, 2001. The worker described ache and swelling in the posterior aspect of her neck, pain up into her skull and down into the right arm into the finger. She had difficulty gripping objects. The disability awards medical advisor found on examination that the worker presented with no impairment of the right shoulder in comparison to her left shoulder but did have some restrictions in her cervical range of motion which equated to 2.62 percent of total disability. The disability awards medical advisor noted the worker exhibited considerable pain behaviours and felt the worker's impairment was out of proportion to the mechanism of injury.

The claims adjudicator in Disability Awards concurred with the medical advisor's comments and felt no additional award should be granted for the worker's subjective complaints. The worker was managing a bed and breakfast out of her residence and was hiring casual labour to perform the physical duties. According to file information, no employability assessment was conducted but the disability awards officer noted that the worker's rate for pension purposes was rather low at $1,033.00 gross per month. If the worker could obtain a minimum wage job and work 37.5 hours per week she would exceed her rate for pension and claims purposes. The worker's earnings at her bed and breakfast were unknown but he felt they were not relevant for the purposes of review and stated the worker could obtain part time work to augment any income from the bed and breakfast business. With respect to availability he stated the worker chose to recently move to operate the bed and breakfast and if employment was not available in her local community this would be as a result of her personal choice. On this basis, the worker's pension was implemented as a functional award and she was so advised in the decision of November 16, 2001.

On July 20, 2001 the worker's representative had asked for consideration of provision of income continuity benefits as the opinion of the independent vocational consultant was that the worker was competitively unemployable. The worker's pension was implemented and the Board did not respond to that letter until March 4, 2002 at which time the worker was denied income continuity on the basis that there was no anticipated loss of earnings as she was fit to perform full time work in appropriate jobs which would exceed her pre-injury earnings.

The worker was represented at the oral hearing by a workers' adviser. She is seeking an award for her subjective complaints as well as her shoulder impairment. In her view she is not competitively employable and she should have received income continuity benefits from September 17, 2000. She is seeking more vocational rehabilitation assistance.

The worker described her symptoms in her right neck, shoulder and arm areas and her testimony was consistent with what she described to the disability awards medical advisor. She explained that she finds rest and heat sometimes help her condition but she is unable to lie down too long as a result of a prior compensable back injury for which she is in receipt of a 7.5 percent pension. She uses her TENS machine and

Ibuprofen for pain. She tries to keep active and will work on the computer to distract her from her pain. Activities such as gardening, knitting or crocheting cause an increase in her pain and driving is very difficult. The normal hour and 20 minute drive to attend the hearing took her four hours.

Contrary to the impression of the disability awards officer the worker had not recently moved but had actually moved over 13 years ago when her husband was diagnosed with a terminal illness. The worker's husband requires nursing assistance with bathing and other activities.

The worker stated that she has to work for both financial and psychological reasons because of her husband's illness. In discussions with the independent vocational consultant as well as the Board's vocational rehabilitation consultant she felt they were supportive of her plan to establish a B&B. The worker stated that after her wage loss benefits were terminated she did not seek employment as she felt the only suitable option was to pursue her bed and breakfast business.

She took a computer course in order to do her own brochures and business cards and felt she could manage by hiring labour to do the heavier housekeeping activities. She took a $31,000.00 mortgage to adapt her house. She only did three rooms because she could not manage any more guests than that.

The worker has now had her business for five years and is getting repeat business. Most of her clients are Europeans who book for several days. The worker does not do the beds or heavier housekeeping but does do the cooking and acts as the hostess and business manager. She anticipates that this year she could be booked solid but is afraid of taking guests when she is not feeling well. Sometimes her daughter will run the bed and breakfast for her.

The worker stated she has had extensive sales experience, has been a front-end manager and is well aware of the physical requirements of sales clerks. She would be unable to do the scanning and stocking of products that is required. This also limits her in hairdressing. The worker feels she could manage a bingo operation one night a week with assistance and is considering an offer of such a position. The worker explained that in order to succeed in her bed and breakfast she needs to clear off her $31,000.00 mortgage. Regardless, she mentally needs the stimulation and self-satisfaction of some form of employment. She has been on Canada Pension disability benefits from 2001 but they are aware of her bed and breakfast income.

In support of her appeal the worker provided a medical-legal opinion from her attending physician. He described the worker's condition and treatments and concluded that she suffers from impairment from pain related to the right shoulder and shoulder girdle muscles. He noted her restrictions and concluded that she may be capable of part time sedentary type work.

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The worker's representative submitted that it appeared the worker's shoulder was not assessed and she should be provided with a further award in respect of her subjective complaints under item #39.01 of the *Rehabilitation Services & Claims Manual* (RSCM). He noted there was no employability assessment on file and the only information was provided after the worker's pension had been implemented and that concluded the worker could do a minimum wage job for 40 hours a week. He noted there had been no functional testing to determine the worker's capacity beyond that which had been done at the pain program. The representative had contacted the Board on the basis that it appeared likely from the independent consultant's report that the worker met the requirements for income continuity until an employability assessment was done or her pension was implemented. The representative submitted that the worker is able to manage her bed and breakfast operation but has had to spend her own resources to do so and requires further support.

Reasons and Findings

Section 16(1) of the *Workers Compensation Act* (the Act) provides that the Board has the discretion to give assistance to an injured worker to return to work or lessen or remove a handicap resulting from a compensable injury. Chapter 11 of the RSCM sets out the Board's policy regarding the provision of vocational rehabilitation assistance. One of the service objectives noted under policy item #85.40 is to assist workers to return to their pre-injury employment or to an occupational category comparable in terms of earning capacity to the pre-injury employment.

Policy item #89.00 notes that one of the major functions of the vocational rehabilitation consultant is to assist in the assessment of employability for permanent disability and for temporary partial disability under sections 23(3) and 31 of the Act. Item #89.11 states in part that the Board may pay rehabilitation allowance to assist workers who are awaiting assessment of their disability pension. One of the criteria is that these workers are not in receipt of wage loss or wage replacement payments and are unemployed. These workers are likely to receive either a significant permanent partial disability pension award based upon the permanent disability evaluation schedule or a pension calculated on the worker's potential loss of earnings under section 23(3).

Vocational rehabilitation benefits are discretionary and in this case, the primary factor determining the extent of vocational rehabilitation benefits was the worker's low pre-injury earnings rate. The worker has significant skills and experience in the hotel food and beverage service industry but is restricted because of her physical tolerances. The only assessment of the worker's functional capacity was the evaluation at the pain program. That was specifically in regards to her pre-injury employment and there was no assessment of her functional capacities for other forms of employment. The only other evidence in this regard is the worker's opinion and that of her attending physician. The worker has been consistent throughout the course of her claim that she is

interested in pursuing alternative employment but is incapable of full time hours. This is confirmed by her attempts to return to her pre-injury employment.

Although the disability awards officer considered the worker would be able to work a 40 hour week in a minimum paying job there is no indication as to what evidence he based this conclusion upon. The medical evidence on file, the worker's evidence and the vocational report from the independent assessor all indicate that the worker is only capable of part time suitable employment for up to two to three hours a day. She was working three days a week in her pre-injury employment and I conclude it is reasonable that she could work three days a week up to three hours a day in sedentary work at minimum pay.

At the time the worker's vocational rehabilitation benefits were terminated the evidence on file from the independent vocational consultant was that the worker would likely sustain a loss of earnings under section 23(3) and at this point the provisions of policy item #89.11 respecting continuity of income should have come into effect. Based on the evidence of the independent consultant and the medical evidence on file, I conclude that the worker met the requirements for continuity of income and is entitled to such benefits from the time her vocational rehabilitation benefits were terminated in September 2000 until her pension was implemented in November 2001.

The Board's policy at item #40.14 states that workers are to be provided a copy of a complete employability assessment before a pension decision is made. In this case there was no employability assessment undertaken and there was no indication in the disability awards officer's memo on file as to the type of employment that was being considered. There was only reference to a minimum wage job. It was long after the worker's pension was implemented that the Board set out employment that it considered suitable. There was no mention of availability of the positions noted. I find the positions noted by the Board are not suitable for this worker due to her limited functional capacities.

The worker's pension award was based on examination by the disability awards medical advisor. I have considered the worker's testimony, the medical-legal report from her attending physician and the medical evidence on file, all of which are consistent with the information in the evaluation. Although the worker was not granted a specific award for her shoulder complaints, the range of movement in her shoulder was assessed by the disability awards medical advisor as well as her strength in the shoulder and he concluded there was no measurable impairment with respect to the shoulder. However, the worker has been consistent in describing shoulder pain with increased activity and movement and I find she is entitled to an additional award of 1.0 percent in light of these subjective complaints.

The worker's pension was effective the date following termination of wage loss benefits and was based on her earnings in the one year prior to injury. The worker took no

issue with the Board's conclusions on these matters and I see no evidence which would dispute them.

Provision of vocational rehabilitation benefits are discretionary as set out under section 16(1) of the Act. This means that while vocational assistance may be provided, the Board is not automatically required to provide such assistance. The worker did not actively seek further employment but chose to pursue establishing a bed and breakfast business. This is a reasonable and understandable decision on the part of the worker; however, given that vocational rehabilitation assistance is discretionary and considering the worker's wage rate, I accept that the rehabilitation consultant's offer of twelve weeks of job search would have been sufficient for the worker to find suitable part-time work.

Conclusion

I confirm the Board's decision of August 31, 2000. I deny the worker's appeal on the issue of her entitlement to further rehabilitation benefits.

I vary the Board's decision of November 16, 2001 with respect to the worker's pension entitlement. I allow the worker's appeal and find that she is entitled to an additional award of 1.0 percent for her subjective complaints in her shoulder. She should be assessed for loss of earnings based upon a deemed earning capacity of three hours a day, three days a week at minimum wage.

I vary the Board's decision of March 4, 2002 and allow the worker's appeal on the issue of her entitlement to income continuity benefits from the date wage loss equivalency benefits were terminated until her pension was implemented. The worker is entitled to cost of mileage to attend the hearing.

Lynn M. Wilfert
Vice Chair

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