WCAT Decision Number: WCAT-2004-00160-RB
WCAT Decision Date: **January 14, 2004**
Panel: Lois Williams, Vice Chair

Introduction

The worker was off work from 1994 to 1996 with a non-compensable low back condition. He returned to work as an equipment operator at a heli-logging operation for nine days before he became disabled with low back pain. He attributed this to a jolt he received while operating a loader on a barge on July 18, 1996. The Workers' Compensation Board (Board) initially accepted his claim only for a temporary aggravation of his pre-existing ankylosing spondylosis condition, terminating his benefits on November 22, 1996. However, on March 11, 1999, the Appeal Division said the worker had suffered a permanent aggravation of the underlying condition. The Appeal Division said that the aggravation was permanent by November 22, 1996, and the worker was entitled to pension assessment. The Appeal Division also said that the worker's earnings in the four and one-half years prior to his injury should be used to determine his average earnings for compensation purposes.

The worker was unable to return to his pre-injury work and he received retroactive vocational rehabilitation assistance from the Board, regarding an inboard/outboard marine engine repair course he had taken at college after his injury. Board officers made further decisions regarding the worker's entitlement under his claim, and he appeals 10 of those decisions:

- March 10, 2000: a vocational rehabilitation consultant (VRC) said the Board would sponsor three months training-on-the-job with a marine dealership and outlined the benefits that the Board would pay.

- March 30, 2000: a VRC said the Board would not pay for the cost of a cell phone.

- March 30, 2000: a VRC confirmed the training-on-the-job sponsorship and said the Board would reimburse the employer a portion of the worker's wages, and the Board would provide up to $2,500.00 in tool costs and approximately $1700.00 in relocation expenses.

- May 2, 2000: a VRC told the worker that he was not entitled to further assistance than had been already offered, during his training-on-the-job.

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- May 6, 2001 [after the worker had to stop his employment with the marine dealership due to increased back pain]: a VRC said the Board would sponsor an information technology technician's program, possibly followed by a network and internet systems specialist diploma, and then a job search allowance if needed. All vocational assistance would terminate by November 11, 2002.

- May 15, 2001: a case manager said that the Board would not accept that any neck injury or neck aggravation had occurred, related to the claim.

- November 26, 2001: a case manager said that massage therapy billings from September 20, October 4, and November 8, 2001 were not payable under the claim, as there was no medical documentation to support a finding that the treatment was necessary due to the injury.

- March 11, 2002: a disability awards claims adjudicator awarded the worker a pension for permanent functional impairment assessed at 7.62 percent of total disability. The pension wage rate ($3,246.00 per month), and the pension's effective date (November 23, 1996) were those set by the Appeal Division. The claims adjudicator said that the worker was capable of suitable work at no loss of earnings. [The worker's schooling had been altered to him taking courses in website design.]

- April 18, 2002: the disability awards claims adjudicator confirmed the March 11, 2002 pension decision. After a workers' adviser had questioned the worker's employability assessment, a VRC had provided specific examples of jobs the worker could do, which the claims adjudicator said would result in no loss of earnings in the long term.

- November 14, 2002: a VRC said that the Board agreed to exhaust the worker's remaining vocational rehabilitation budget on a four-week work trial of his choice as a parts man at a marine dealership from November 18 to December 13, 2002, including paying wage loss equivalency benefits up to January 5, 2003. The VRC noted that if the work trial was satisfactory, the worker would be put on the employer's payroll effective January 6, 2003. The VRC noted that this work trial was the worker's choice, even though the job was not within the planned career path identified in the employability assessment, and it would not maximize his earning capacity. The VRC said that the Board maintained the worker was capable of matching his pre-injury earnings in the long term, and there would be no further entitlement to vocational rehabilitation benefits after January 5, 2003.

Issue(s)

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

Has the worker any further entitlement to vocational rehabilitation benefits?

Did the worker suffer a neck injury or neck aggravation under the claim?

Were the massage therapy treatments reasonably necessary due to the injury?

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.)

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 partial disability having regard to the difference between the average earnings of the worker before the injury and the average amount the worker is earning or is able to earn in some suitable occupation after the injury. Board policy item #38.10 of the *Rehabilitation Services and Claims Manual* (RSCM) states that the amount of the pension is the higher of the two figures produced by the two methods of calculation.

The worker took no issue with the amount of permanent functional impairment assessed. The assessment was done in accordance with the Act and Board policy and there is no evidence to dispute the Board's determination of the amount of permanent functional impairment. I find that the 7.62 percent of total disability assessed is correct.

The pension wage rate and the effective date of the pension were previously determined by the Appeal Division and are not issues before this panel.

Regarding loss of earnings, the Board said the worker could match his pre-injury earnings of $3,246.00 per month in the long term in the field of website design or development. The VRC noted the difficulty in obtaining data regarding earnings in this field in this province, and also the recent economic downturn in the field. However, the VRC still felt the worker had the skills, if he marketed himself well and was enthusiastic enough, to eventually reach his pre-injury earnings in this field. The VRC provided information on two specific jobs that he said were available for the worker to submit applications. One was for a junior web designer, part-time for three weeks at $10.00

per hour, with the potential for full-time work and earnings of $20.00 - $25.00 per hour within five years. The other was for a webmaster/graphics/ information technician on a permanent full-time basis, paying between $576.00 and $770.00 per week to start, and between $770.00 and $960.00 within five years. The job was for a six month contract, with the successful candidate being advised at the four month mark whether the contract would be renewed or whether permanent work was being offered. The successful candidate had to have a good knowledge of graphics.

The worker is now 49 years old. The Board has paid him wage loss equivalency benefits for most of the period from 1996 to January 5, 2003. He has not successfully returned to any regular work since his 1996 injury. He maintains that his vocational rehabilitation plans to become an inboard/outboard marine engine technician, and a computer website designer have failed. He is physically unfit to do the former occupation and there are no jobs available to him for the latter occupation. He does not have graphics training. The worker performed thorough job searches. He failed to get a job following his work trial as a parts man with the marine dealership. He was noted to be competent, but quiet and reserved. He was not found to be enthusiastic enough in his dealings with the customers. He has found a bit of work as an extra on film sets and would now like to become a film producer.

A workers' adviser arranged for an employability assessment to be performed by an independent assessor, John Wilcox. Mr. Wilcox said the worker was not competitively employable in website design or development. Mr. Wilcox said the worker is employable in some work, but, given his age, education, and disability, it would only be in lower paying jobs. Mr. Wilcox suggested that the worker be assisted, by an independent consultant, with a direct job placement. However, the workers' adviser submits that the worker has had extensive vocational rehabilitation without success, and that he does not need or want any additional assistance. The workers' adviser submits that no further assistance would be helpful, and that it is time to recognize that the worker will not match his pre-injury earnings in the long term. The workers' adviser submits that the worker should be deemed capable of earning $12.00 per hour in 2003 dollars and his pension should be awarded on that basis.

I find that the employability assessment was not accurate. The VRC's information was not well-supported, and was, as the VRC admitted, based on sketchy data from other provinces and the United States. Specific jobs advertised were not full-time, had very low entry level pay rates, or asked for university degrees and significant amounts of experience. From the information presented, much of the website design work the worker trained for is now obsolete, and there is very little full-time work in the field available. Most of the work appears to be short-term contracts. Despite assistance with his resume, job search training, and job referrals, this worker could not find a position. His job search was diligent but focused to the computer website field and he obviously was not a competitive candidate for the jobs available.

This worker has had some six years of vocational rehabilitation and I accept that no further such intervention would be helpful. The worker is 49 years old, has skills, experience and training. He does not want and will not benefit from further rehabilitation assistance.

While I accept Mr. Wilcox's data regarding the website field, I find that there is insufficient data to conclude that the worker can only earn, in the long term, $12.00 per hour in 2003 dollars. This worker does have extensive experience working with equipment, he has engine technician training, and he has computer training. His physical impairment does not preclude him from bench work or many other types of light employment. He has the ability to learn new concepts and tasks, and, from his correspondence to the Board officers and from his presentation at the oral hearing, I find he can express himself well.

This worker is now exploring other interests, particularly in film work. I wish him every success, but there is no evidence that this type of work will maximize his earnings. For compensation purposes, a determination must be made as to what the worker can earn at suitable work, in the long term. Given the worker's experience and training, I find that his post-injury earning capacity is that of a full-time assembly bench worker. The Board is to determine this rate from the statistics base used to determine average earnings of a class of workers. The worker's pension entitlement should then be reassessed, to determine if the worker will suffer a loss of earnings due to the injury, in the long term.

Entitlement to Further Vocational Rehabilitation Benefits:

Two issues arise here, the worker's entitlement to further benefits after January 5, 2003, and his entitlement to adjustments to benefits already paid.

Section 16 of the Act states that the Board may provide vocational rehabilitation to aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap. Board policy item #85.30 of the RSCM states that successful vocational rehabilitation requires that workers be motivated to take an active interest and initiative in their own rehabilitation, and that programs and services should be offered and sustained in direct response to the commitment and determination of workers to re-establish themselves.

I find that this worker did take an active interest and initiative in his own rehabilitation, but that he has had enough assistance. While he may not have been successful in finding or doing the work in the fields he was trained for, he was also provided with job search skills that can be used to find suitable work for which he is already qualified. As stated in the paragraphs above, I find that the worker would not benefit from more vocational rehabilitation. As his pension will be reassessed based on my determination that he can maximize his earnings at assembly bench work, he is not entitled to further vocational rehabilitation assistance.

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The worker feels that he was entitled to more assistance while he attended the training-on-the-job at the marine dealership in 2000. The Board agreed to pay up to $1,700.00 in costs for his move from the interior of the province to the lower mainland, interim accommodation costs of $1,500.00 per month, and a subsistence allowance of $41.10 per day, a portion of his wages up to $3,120.00, telephone and electrical hook-ups. As well, the Board agreed to pay for two and one-half round trips to his interior home, $2,500.00 for tools, and up to $6,500.00 for work site modifications. The Board also offered, if the worker was successful in keeping the job, to supplement his earnings for the first year at 75 percent of the difference between his wage rate and his earnings.

The worker seeks a finding that he was entitled to further benefits, including six month's accommodation and meal allowances, $7,000.00 for tools, return travel home every two weeks, room and board for his youngest son who was finishing school in the interior, the cost difference between apartment costs in the interior and the lower mainland, a cell phone and the cell phone service contract (or at least the amount that would have been spent on landline connection fees). The worker did not argue that he was entitled to further benefits than were allowed under his subsequent computer training plan.

Vocational rehabilitation assistance is discretionary. In other words, the Board may provide it to a worker, but it is not a worker's right. The Board has developed policies regarding the provision of rehabilitation. Item #88.51 of the RSCM states that where a worker is eligible for a formal training program, the Board's support should be sufficient to enable the worker to complete the program. Workers should not be expected to use their own resources or to commute their pension for this purpose. Item #88.53 of the RSCM states that when it is decided to support a formal training program related directly to the disability, the assistance provided will normally include:

- Training allowances at wage-loss equivalency when enrolled in a full-time program.

- Tuition fees and any necessary books, materials or equipment.

- Travel and subsistence where appropriate.

Clearly, the Board has recognized the costs involved in retraining and have made policies to ensure that injured workers get adequate support in their vocational rehabilitation. However, the above policies apply to when a worker is involved in a formal training program. This worker had completed his formal training and was now seeking training on the job. He had no "right" to full expense coverage. The VRC clearly explained to the worker the extent of the benefits that would be paid by the Board. The worker was getting wage-loss equivalency benefits/salary and the Board did pick up a significant portion of his expenses, providing subsistence (meal allowance), moving, travel and accommodation costs for a reasonable length of time, as well as an allowance for tools. The worker said he stayed at a $55.00 per night bed and

breakfast, that he went and bought more tools because he felt he needed them, and that he bought a cell phone because he was living in temporary accommodation. The worker was well aware of the level of assistance being provided and chose to make expenditures in excess of what was absolutely necessary and which exceeded his allowances. I do not find that the worker had entitlement to any further expenses than those provided by the Board.

Acceptability of a Neck Injury or Aggravation:

The worker contends that he injured his neck while training-on-the job at the marine dealership in 2000.

Section 5 of the Act states that compensation is payable where a worker suffers a personal injury arising out of and in the course of employment. As noted by the case manager in the May 15, 2001 decision, Board policy item #26.50 of the RSCM states that bodily degeneration affecting the public at large is not compensable just because of the possibility work could have been one of the variables influencing the pace of degeneration.

The worker states that when he went to the marine dealership in March 2000, he had not used certain muscle groups for a long time. He said that he went on to a full-time work schedule and the Board did not assess his workload, provide workplace modifications, or advise his employer or what work restrictions he had. The worker said that he had problems all along with his back, and that his symptoms then went right up into his neck. He said that he sometimes had to work in tight areas like boat bilges. He had to go down underneath the engines sometimes, to where the starters were, where he got stuck sometimes, and would panic. He said ultimately his back and neck "gave out". His VRC tried to negotiate a three day week with the employer until his neck resolved, but the employer said it was "all or none" and he had to leave. The worker left the employment at the end of July 2000. He states he had no neck problems before that job. He had injured it in the past in a motor vehicle accident in 1997, but had nothing that was unresolved from the prior injury. He said that when he started the job in 2000 he could swing his neck past his shoulder.

The worker said that he saw a doctor and was referred to physiotherapy for his neck and his back. He had a CT scan and a bone scan. The worker said that he continued to receive his vocational allowance during this time. When it ran out, the Ombudsman helped him to get his benefits reinstated.

On June 9, 2000 the Board was billed by for rehabilitation physiotherapy related to the neck for treatments in March, April and May 2000. On October 19, 2000 rheumatologist Dr. Yorke said that the findings on pelvis and sacroiliac x-rays and a cervical bone scan made the worker's diagnosis of ankylosing spondylitis unlikely. The worker had been taking Diclofenac for the past week and his neck was more mobile although it still tightened up during the day. Dr. Yorke commented that a Dr. Pretty's

September 22, 2000 report noted moderately severe spondylitic changes of the lower cervical spine, particularly at the C7 level. Dr. Yorke ordered a cervical CT scan which was performed on December 8, 2000, and which did not show any disc herniation. On December 13, 2000 Dr. Yorke said the worker's neck pain continued. Although he had six weeks of physiotherapy from September through October, neck movement continued to be very limited, and he was being referred to Diane Lee for orthopaedic physiotherapy.

On January 17, 2001 physiotherapist Diane Lee said that the worker needed to be educated about ankylosing spondylitis. She said his intersegmental range of motion was almost nil and she thought manual therapy would aggravate his symptoms, and in fact this had occurred. She had no treatment to offer him.

There are other billings on file for body rolfing, massage therapy, physiotherapy, and acupuncture, but they do not indicate what area of the body is being treated. Chiropractic billings in June and July 2000 are for thoracic and lumbosacral "multiple fixations" and associated myofascial irritation.

Board medical advisor Dr. Leifso reviewed the information on file on May 14, 2001 and commented that it did not probably matter whether the underlying condition was ankylosing spondylitis, Reiter's arthropathy or other arthritis such as psoriatic spondylitis. Regarding the worker's neck complaints, Dr. Leifso commented that the CT scan had not confirmed a disc herniation, and noted that Dr. Yorke had ascribed the continuing pain and disability to moderately severe spondylitic changes, or osteoarthritis of the neck. Dr. Leifso summarized that the worker had been diagnosed with mechanical neck pain and some symptoms in the left arm suspected as referred from the degenerative condition in the neck. No further investigations or treatment was planned. Dr. Leifso noted that Dr. Yorke's request for the bone scan had not referred to any work injury; rather it said "problems with paravertebral muscle soreness, upper dorsal, cervical segments with degenerative change". Also when Dr. Frobb referred the worker to Dr. Yorke on September 29, 2000 he had stated, "return to work (marine mechanic) resulted in an increasing problems [sic] with muscle soreness which affected not only the lumbosacral segments but progressed into the upper dorsal, lower cervical segments."

Dr. Leifso noted other references from Dr. Yorke (October 12, 2000: History of worker having increasing neck stiffness after a day of installing yacht starters), and from Dr. Frobb (July 14, 2000: cramped ergonomically compromised positions were eventually going to be counterproductive to the worker's progress; and July 24, 2000: worker let go from the marine employer because of "difficulties achieving employment goals" as a result of continued paravertebral muscle soreness).

Dr. Leifso said he could find no evidence on file to believe that the worker had any particular injury or significant aggravation of the underlying degenerative condition of the

neck as a result of what Dr. Frobb had diagnosed as generalized muscle soreness from the work as a marine technician.

The case manager noted Dr. Leifso's opinion, and that investigations had shown the worker had moderately severe spondylitic changes. The case manager said that osteoarthritis in the spine was not recognized as an occupational disease, and denied acceptance under the claim for the worker's neck complaints of "muscle soreness" and degenerative condition in his neck, "including an aggravation of a pre-existing condition".

There is no contrary opinion to that expressed by Dr. Leifso. Given the imaging studies that show spondylitic changes and no disc herniation, the history of a gradual spreading of muscle soreness up from the lower back, the orthopaedic physiotherapist's comments that manipulation caused the increased symptoms, and the lack of any specific causative occurrence at work, I find that the worker did not suffer a personal injury to his neck at work. This worker has some arthritic type of arthropathy. In the absence of some significant work incident, it is more likely that his symptoms are due to the underlying progressive non-compensable degeneration. I also find no evidence that the worker suffered any significant neck condition aggravation arising out of his employment. He is not entitled to compensation for his neck complaints.

Massage Therapy:

The decision denying reimbursement for the three massage therapy treatments was made on November 26, 2001. The case manager said that there had been no report to the Board from the attending physician since the year before. The worker had no new information. The workers' adviser submitted that the worker had a back problem for which he sought treatment and it should be paid for.

Under section 21 of the Act, the Board is responsible for the cost of health care benefits for compensable injuries and occupational diseases. Board policy item #78.10 of the RSCM states that all questions as to the necessity, character and sufficiency of health care to be furnished shall be determined by the Board. Policy item #75.12 of the RSCM states that physiotherapy prescribed by the attending physician may be continued up to a maximum of eight weeks, and the attending physician and the physiotherapist must be in communication regarding treatment progress. Any extension to the treatment must be authorized by a Board medical advisor.

In this case, the only information submitted is the three receipts for treatment. There is no prescription from a physician for the treatment, no indication of the body part treated, and no reason given for the treatment.

The information submitted does not meet the criteria for provision of therapy. The worker is not entitled to reimbursement of his massage therapy receipts.

Conclusion

I confirm the Board's decisions of March 10, 2000, March 30, 2000 (both of them), May 2, 2000, May 6, 2001, May 15, 2001, November 26, 2001, and November 14, 2001 (C, D, E, F, G, H, I, and L appeals). I deny the worker's appeals on the issues of entitlement to further vocational rehabilitation assistance or benefits, acceptability of his neck complaints, and payment of massage therapy accounts in the fall of 2001.

I vary the Board's decisions of March 11, 2002 and April 18, 2002 (J and K appeals). I allow the worker's appeals on the issue of his employability. He is capable of earning the amount earned by the class of full-time assembly bench workers. His pension is to be reassessed on this basis to determine if he has a loss of earnings greater than that reflected by his permanent functional impairment award.

There were no direct appeal costs.

Lois Williams
Vice Chair

LW/mli

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