Noteworthy Decision Summary

Decision: WCAT-2003-01744-RB **Panel**: Iain Macdonald **Decision Date:** July 28, 2003

Retroactive rehabilitation benefits - Section 16(1) of the Workers Compensation Act - Policy item #85.30 of the Rehabilitation Services and Claims Manual

The panel held that a worker is eligible for retroactive payment of rehabilitation assistance where there is evidence of meaningful and purposive rehabilitation efforts on the part of the worker during the period in question consistent with the principles of vocational rehabilitation as set out in policy item #85.30 of the *Rehabilitation Services and Claims Manual*. The sufficiency of the worker's efforts must be assessed in the context of each case. Factors to be considered include the extent of effort exerted by the worker in the context of available resources, the nature of the effort expended, the duration of the effort, and whether the effort was undertaken in good faith. In this case, the effort expended by the worker to secure suitable alternate employment, or to obtain retraining was minimal and sporadic, and the evidence in support of the worker's efforts was largely anecdotal and unconfirmed. Accordingly, the panel found that the worker's effort was not sufficient to render him eligible to receive retroactive vocational rehabilitation benefits. The worker was, however, eligible for rehabilitation assistance on a preventative basis prospectively.

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Panel: Iain M. Macdonald, Vice Chair

Introduction

The worker has appealed three decisions made by officers of the Workers' Compensation Board (the Board) and conveyed by letters of November 25, 1999, February 7, 2002 and July 2, 2002, respectively.

In the November 25, 1999 letter a vocational rehabilitation consultant (VRC) referred to a June 23, 1999 Medical Review Panel (MRP) certificate, which stated that the compensable injury had activated the worker's disability, however other non-compensable factors were now paramount in the continuation of it. The compensable injury had not changed to any significant extent since its commencement. In view of the MRP's binding finding, the VRC decided that the worker was not eligible for rehabilitation assistance under the claim.

In the February 7, 2002 letter a VRC referred to the opinion expressed by a Board medical advisor (BMA), who said that the worker would be at undue risk of sustaining an increased permanent impairment should he return to his pre-injury occupation. The VRC consequently decided to provide rehabilitation assistance in the form of rehabilitation allowances, job search allowances, gas allowance, and retraining. The VRC also said that the worker should expand his area of job search to some larger centres. The VRC decided that the worker could maximize his earning capacity by securing employment as an automotive service writer, advisor or service manager, and that he would not likely suffer a compensable loss of earnings over and above that recognized by a functional award.

In the July 2, 2002 letter a claims adjudicator in the Board's Disability Awards Department (CADA) decided that the worker was entitled to a pension equivalent to 2.0 percent of a totally disabled person. This was paid in a lump sum, and was based on average earnings of $3,018.00 per month. The award was made effective on February 1, 1989, the day following termination of temporary wage loss benefits on the claim. The CADA agreed with the VRC, and decided that the worker would not likely suffer a compensable loss of earnings over and above that reflected by the functional award. The CADA also decided that the worker was not entitled to payment of interest on the retroactive portion of the award.

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Issue(s)

The worker did not take issue with the value of his pension award insofar as it concerns the wage rate, commencement date, and amount of functional impairment pursuant to section 23(1) of the *Workers Compensation Act* (the Act).

Item 14.30 of the Workers' Compensation Appeal Tribunal (WCAT) *Manual of Rules, Practices and Procedures* (MRPP) provides that while WCAT has jurisdiction over all matters contained in the decision under appeal, the panel will generally restrict its decision to the issues raised by the appellant in the appellant's notice of appeal and submissions to WCAT. The appellant is entitled by right to a decision on the issues expressly raised in the appeal. The WCAT panel has a discretion to go beyond the issues expressly raised by the parties to the appeal, which were contained in the lower decisions giving rise to the appeal. A WCAT panel will normally not proceed to address such other issues, but has a discretion to do so. For example, where the panel considers there may have been a contravention of law or policy in the lower decision, the panel may proceed to address that issue whether or not it was expressly raised by the appellant.

I have reviewed the information on the claim file, and have paid specific attention to the reasoning set out by the CADA. I see no obvious error or contravention of law or policy contained therein. Consequently, I will not disturb the CADA's decisions regarding the quantum of disability pursuant to section 23(1) of the Act, the commencement date of the pension award, and the amount of monthly earnings used to calculate the worker's pension entitlement. I will deal only with the aspects of the pension award with which the worker has expressed disagreement and which he has specifically raised in this appeal.

The remaining issues are:

1. Whether the worker is eligible for rehabilitation assistance beyond that provided for in the February 7, 2002 letter.

2. Whether the worker is eligible to receive retroactive rehabilitation allowances between June 23, 1999 and December 2001.

3. Whether the worker should be expected to relocate to a larger centre in order to secure appropriate employment.

4. Whether the occupations of automotive service writer, advisor, or service manager are suitable and reasonably available to the worker in the long term.

5. Whether the worker would likely suffer a compensable loss of earnings pursuant to section 23(3) of the Act over and above that reflected by the functional award.

6. Whether the worker is entitled to receive interest on the retroactive portion of his pension award.

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).

Relevant Information and Background

The information describing the worker's compensable low back strain and left hamstring muscle strain at work on October 4, 1988, and subsequent related events, is well summarized in Findings previously made by the Review Board and by the Appeal Division, and will not be reproduced here. Suffice it to say that the Appeal Division found that the worker's continuity of low back symptoms over many years was causally related to the 1988 back strain. The symptoms however were not sufficiently severe to cause the worker to be disabled from working in his pre-injury employment as an automobile mechanic.

The matter was referred to a MRP, which in a June 23, 1999 certificate stated that the worker's condition with respect to his back was fair, and that he had a disability with respect to it. The nature of the disability was low back pain of moderate extent, which limited the worker's ability to lift, sit, stand, walk, or lie down. The cause of the disability was multifactorial, involving deconditioning, being overweight, having degenerative disc disease of the lumbar spine, having suffered a back strain in 1988, and having a left knee pes anserinus bursitis.

The MRP said that the compensable injury in 1988 had activated the condition (degenerative disc disease) in the worker's lumbar spine, which should have resolved. In the view of the MRP, the factors unconnected to the compensable work injury far outweighed the effects of the back strain in causing the worker's disability. The worker's disability with regard to the October 4, 1988 injury had not changed to any significant extent since its commencement, and was not likely to do so in the succeeding twelve months.

Objective medical findings resulting from the October 4, 1988 injury were a reduced range of motion of the lumbar spine without neurological deficit. The worker's subjectively restricted tolerances could not be confirmed by the MRP, and were in part contradicted by his behaviour over the course of the examination and assessment, as observed and recorded by the MRP. Pursuant to section 65 of the Act, the findings set out in the MRP certificate were binding on the Board.

On November 16, 1999 a Board officer wrote to the worker and stated that his claim would be referred to the Board's Disability Awards Department. The worker's representative wrote back and said that the worker wished to receive vocational rehabilitation assistance. The worker attended a meeting at the Board office and stated that he should be retrained under his claim, and that he was eligible for retroactive payment of benefits to compensate for his loss of income. A VRC wrote to the worker on November 25, 1999 stating that he was not eligible for vocational rehabilitation assistance.

On January 22, 2001 an officer in the Board's Disability Awards Department clarified the nature of the Board's responsibility in the context of the worker's overall disability complex. The Board accepted the portion of the worker's complaints that was due to a permanent aggravation of underlying degenerative disc disease. The Board officer judged the aggravation to be equivalent to 2.0 percent of a totally disabled person.

On May 25, 2000 however a CADA recommended that the worker be functionally assessed to see if his compensable injury had rendered him unfit to return to his pre-injury employment. This was done, and a functional capacity evaluation indicated that the worker could be employed in an occupation with a light to medium physical demand level for an eight-hour day. The functional capacity evaluation also noted that due to the presence of symptom magnification behaviour, non-organic signs and submaximal effort it was difficult to accurately report specific physical restrictions. The BMA who reviewed the file information said that if the worker were to return to work as a mechanic, he would be at undue risk of increased permanent functional impairment. On this basis, the VRC decided to provide rehabilitation assistance, thus changing the earlier position stated in the November 25, 1999 letter.

The worker underwent psychological and vocational evaluation. A previous employability assessment had concluded that the worker's employment prospects were largely limited because of non-compensable impairments. An independent rehabilitation service contractor conducted an assessment of the worker's situation in October 2001. He noted that the worker had expressed an interest in being trained to be an instructor, or a safety inspector. The contractor reviewed the MRP report and certificate, and said that he was unable to determine the worker's actual limitations insofar as they concerned his ability to work. The worker's maximum strength level was unknown, as was his ability to sustain certain activities. The fact that the worker had successfully completed a welding course, combined with his demonstrated ability to do light mechanical repairs and other information on file suggested that he could perform light to medium level work. However his ability to perform part-time or full time work on a regular basis was unknown.

The VRC was aware that the worker's barriers to returning to work were for the most part non-compensable. He concluded that while the worker should not return to his pre-injury occupation of mechanic, the occupation of automotive service advisor would

incorporate the worker's transferable and job-related skills in a return to work within his physical capabilities, and with no long-term loss of earnings. Initially, the VRC enrolled the worker in a basic computer course commencing December 17, 2001. Subsequently, the worker completed a service advisor programme at the Automotive Training Centre in Richmond. The VRC provided job search allowances to the worker from January 2002 through to May 2002.

The VRC then completed an employability assessment that identified the job of automotive service writer or service advisor as suitable, and reasonably available in the long term. Further, the information obtained by the VRC from potential employers in the area showed that the worker would not likely suffer an additional compensable loss of earnings, should he successfully obtain such a job.

The worker did not agree with the VRC's assessment, and he contacted one of the employers who had provided information to the Board. The employer in turn complained to the VRC that the worker had been rude and aggressive, and had not presented as a candidate suitable for hire. The VRC spoke with the worker and asked him not to challenge any other employers who had voluntarily provided assistance to the Board by giving information concerning the nature and availability of jobs within their organizations. The worker then complained to a vocational rehabilitation manager, who apologized if the worker had felt offended, but told the worker that he should direct his energy toward becoming employed, rather than toward tearing apart the employability assessment. The vocational rehabilitation manager recognized that the worker was a long-term resident of the area, but also told the worker that the Board considered it reasonable that he should consider relocation to a larger centre where his chances of becoming employed would be greatly enhanced. The vocational rehabilitation manager wrote a June 28, 2002 letter confirming the discussion.

The worker did not agree with the Board's assessment, and he wrote to the Board to explain his reasons. He indicated that he simply did not believe that the positions outlined by the VRC existed for him. He had previously expressed similar views concerning information provided by the VRC.

The CADA, on June 24, 2002, considered the information on file, including the worker's report, the employability assessment, and other assessments. The CADA also noted that the MRP certified that the paramount feature in the worker's employability problems was his non-compensable conditions. The CADA concluded that the 2.0 percent compensable back disability would not prevent the worker from working as an automotive service advisor, and he would be able to meet his pre-injury earnings. Therefore, the pension award was provided only on a functional basis. The CADA acknowledged that the worker did not agree with the rehabilitation consultant's conclusions, however accepted the employability assessment as correct. Given that the appeal bodies had earlier indicated the worker had had a continuity of complaints since the conclusion of wage loss benefits in 1989, the CADA made the pension award

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effective on February 1, 1989, the day following termination of temporary wage loss benefits on the claim. The pension was calculated on the basis of the worker's earnings of $37,292.18 ($3,108.00 per month) in the one year prior to injury in 1988.

In preparation for his appeal, the worker obtained a report from B.W., an independent qualified rehabilitation consultant (IQRC). The IQRC reviewed selected information from the worker's file and noted that he had been found physically capable of light to medium (entry level) strength employment, and that the occupations of automotive service writer, service manager or sales/service representative were within that physical range. The IQRC conducted her own labour market analysis in the local region and found that employers tended to give preferential hiring opportunities to qualified individuals who currently worked within the company. Salaries ranged from $30,000.00 per year at entry level to $50,000.00 per year for longer term workers with prior experience in the position. The IQRC suggested that given the worker's long absence from the workforce (13 years), he would be considered an entry-level candidate when seeking work as a service advisor. The Board-sponsored course he had taken would not necessarily provide any advantage for him over other workers seeking employment in the region. Further, the worker's outdated automotive knowledge would most certainly cause him to be passed over in favour of others with more current knowledge. The worker's lack of customer service experience and sales skills would also serve as a disincentive to his re-employment as a service advisor.

The IQRC concluded that the worker's age, antiquated automotive knowledge, lack of demonstrated customer service skills, and most importantly his significant and prolonged absence from the workforce, made it highly unlikely that he that he would be given serious consideration by an employer for the position of service writer, advisor, or manager. It was therefore unlikely that a position would be reasonably available to him in the long term. The worker's best chance would likely be to secure part-time work for 12 to 18 months, likely at minimum wage, and this would in turn improve his chances of obtaining full time work. The IQRC recommended that the worker undergo a further full vocational assessment.

At the hearing the worker said that he still had low back pain radiating down his left leg, and also down his right leg. The symptoms never went away, but would fluctuate depending on his level of activity. Walking, sitting, lying down and standing, all provoked an increase in the intensity of his symptoms. Reducing his activity level served to reduce the symptom intensity. He said that each day he tried to cope as best he could. He waited until his pain became quite bad before taking pain-relieving medication, because he was concerned about the effect of prolonged medication intake on his long-term health.

The worker's symptoms caused him to take longer to complete routine tasks, and restricted him from a range of activities. He could no longer work on larger vehicles. He was able however to do minor tune-ups for his neighbours, and estimated that from this

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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he earned $200.00 - $300.00 per month during the summer months. He did not do tune-ups in the wintertime because it was too cold. Each tune-up took between one-half day and a whole day to complete. He said that prior to the injury, he could complete a tune-up in one hour. When asked to comment on the functional capacity evaluation report that said he could perform light to medium level work for eight hours per day, the worker said that his pain level was too great to sustain that level of activity over the long term. He could however envision himself being able to work for eight hours per day at suitable employment, if it were available to him. He did not see a job as a service advisor as suitable, because he felt he would need to be on his feet for too long at a stretch. He also said that he was not sure that he could get back up on his feet again, were he to sit down while working. He was however willing to try, if a service advisor job became available to him.

When questioned regarding the observation in the functional capacity evaluation report that he had produced a sub-maximal effort, the worker said that he had tried his best, and that in any event, only one out of the three people who had observed him had said that he was not trying.

The worker confirmed that he had completed a welding course at the local college. His doctor had suggested to him that he should do so because it would be a way to keep busy. His instructors at the college were aware of his physical condition, and took steps to accommodate him where possible. He had also done some peer instruction in the course, although he lacked the formal training to apply for a position as a qualified instructor.

After the MRP examination, the worker looked in the newspapers and submitted resumes to various potential employers. He said he did not receive any responses. He had spoken with friends, and had checked out postings for employment with government. He said he had been interested in securing a position as a vehicle inspector.

The worker said that the Board-sponsored service advisor's course was not helpful to him. It had not been what he expected, and all he did was sit in class and watch video presentations. He also received some instruction on how to speak with people, and spent two hours one day on a computer. With regard to post-course hiring, the worker said that he had called back two weeks later to see how many of his classmates had been hired. He received no answer, nor did he himself receive any employment leads from the school. While attending the course in Richmond, the worker visited a nearby Canadian Tire location, where he was told that service advisors were paid $8.00 per hour, with no guarantee of permanent employment. He said he left his resume there, and received no reply. He said he had similar experiences when he approached other businesses in search of employment. He recalled that potential employers told him that they did the work themselves, or that they were not hiring.

In the worker's estimation, he lacked the computer skills, and accounting skills necessary to allow him to compete for a job as a service advisor. Further, he said he was out of touch with the newer vehicles, having been unemployed for many years. One potential employer reportedly told him that if nobody else applied for the job, perhaps they would hire him, but would not otherwise do so.

The worker said that he had tried to find employment, but that none was available to him. He cited his age, the length of time away from work, and his back injury and claims involvement with the Board as barriers to his successful re-entry to the job market. He was convinced that work was there, however employers were not prepared to hire him. He said he found that most discouraging, especially when he returned to employers who had said they were not hiring, and yet he saw new faces present in the workplace.

With regard to his job search activities, the worker said he had contacted "eighty places" over the previous couple of years. He wrote after the hearing to say that he meant that he had previously contacted 80 potential employers while in receipt of job search allowances. He had not meant to imply that he had made 80 contacts after the MRP had rendered its decision. I asked the worker whether he had maintained job search records to document his efforts. He said that he had done so, but that he had not brought them to the hearing. I asked the worker to submit the original documents later that day. He drove back to his home, and returned that evening. He delivered an envelope containing four sheets of notepaper, to which were attached newspaper clippings displaying job opportunities. Each sheet also contained hand-written notes, uniformly written in black ink, describing visits the worker had made to potential employers. None of the entries listed the name of any person to whom the worker had spoken, with the exception of an attached business card from the proprietor of an automobile centre in Vancouver. The worker wrote that he had not kept a record "of these" as he had done "this" for himself and did not think that anyone would want to see it. I made copies of the documents for the worker's file, and returned the originals to him.

The information on the sheets suggested that the worker had made two job contacts on June 4, 2002; one contact in October 2002, and two contacts in March 2003. He had also visited two automobile dealerships in Castlegar (no date specified), where in each case he spoke to a service advisor working there. In the first instance he was informed that a service advisor who had reportedly quit the job had returned after two days. In the second instance he observed a service advisor filling in forms, and after talking with him, came to the conclusion that he did not have enough experience for the job. The worker wrote that although employers had told him they were not hiring, he nevertheless noted new faces in the workplace when he returned in follow-up. He added that he found this very disheartening.

With regard to contact with the employer who had provided market information to the Board, the worker said that he had sent a resume there, and had asked for clarification of the wages paid. The potential employer had told him that service advisors received minimum wage, with the balance of salary paid as commission. When the worker asked about the hourly rate listed in the employability assessment, the potential employer reportedly became upset, and afterward complained to the Board. The worker said that the VRC had in turn "threatened" him regarding further contact with employers listed in the employability assessment.

The worker described his daily activities. He said he rose at 6:00 a.m. and got his children ready for school. He then drove his wife to the bus. Afterward, he cleaned up around the house, and did his own activities. He was able to mow the lawn, but used a ride-on tractor, and did the job in stages depending on the nature of his back symptoms. His children arrived home from school at 2:45 p.m. and his wife arrived home from work at 5:00 p.m.

With respect to provision of retroactive rehabilitation assistance, the worker's representative pointed to the rehabilitation planning assessment report completed on October 9, 2001 and the summary contained in it. As early as May 25, 2000 the disability awards officer had asked that the worker's claim be considered for vocational rehabilitation assistance. The VRC had declined, and the claim had then been subjected to administrative delays until the matter had been properly sorted out. The worker's representative argued that the VRC had erred, and that the error was blatant because the VRC had not acted reasonably in deciding not to provide rehabilitation assistance. The worker should therefore be entitled to receive rehabilitation benefits retroactive to June 23, 1999, and to receive interest on the retroactive amount owing.

With respect to the sufficiency of rehabilitation assistance offered and the likelihood that the worker would suffer a compensable loss of earnings over and above that reflected by the functional pension award, the worker's representative argued that the job of service writer, advisor, or service manager was not suitable or reasonably available in the long term. The worker was not fit, either on a physical basis, or by training, to perform the work. Further, the IQRC had conducted a survey in the area and had compiled strongly persuasive evidence to show that the work was not reasonably available to the worker in the long term. The worker had deep roots in the community, having always lived in the region. Being now in the later stages of his working life it was not reasonable that he should be forced to relocate to find suitable work. At best the worker might secure part time work, leading eventually to full time work, but at minimum wage. The representative argued that the panel should accept the worker's evidence, and find that in all likelihood the worker was unemployable.

Findings and Reasons

The worker's entitlement in this case is adjudicated under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). WCAT panels are bound by published policies of the Workers' Compensation Board (the Board) pursuant to the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63). Policy relevant to this appeal is set out the *Rehabilitation Services and Claims Manual* (RSCM) Volume I, which relates to the former (pre-Bill 49) provisions of the Act.

The worker maintains that he is eligible to receive rehabilitation assistance on a retroactive basis, between June 23, 1999 and December 2001. Rehabilitation assistance is not a matter of right, but is one of eligibility. Section 16(1) of the Act states:

> To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

The Board has exercised its discretion under section 16 in favour of providing rehabilitation assistance. The policies and guidelines under which Board officers are to evaluate a worker's eligibility to receive discretionary rehabilitation benefits are set out in Chapter 11 of the RSCM.

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 considering whether the worker should be provided with retroactive vocational rehabilitation benefits, I note that a specific policy direction concerning the payment of allowances on a retroactive basis is not present in the RSCM. Prior Review Board and the Appeal Division panels have both found that retroactive vocational rehabilitation benefits can be paid under certain circumstances, consistent with the very broad discretion provided under section 16(1) of the Act. In order to consider payment of retroactive vocational rehabilitation benefits, it has generally been held that a worker

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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 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.

I agree with the approach adopted by the prior Review Board and Appeal Division panels, and find that it should be applied to the circumstances of this case.

The evidence shows that the worker was not involved in an educational or training program on his own initiative between June 23, 1999 and December 2001. Although he undertook some job search activity on his own, this was not sustained, or well documented, and the records are at best anecdotal.

It would not be fair in every case to hold an unsupported worker to the more demanding standard of proof of active rehabilitation effort required by the Board of a worker who is in receipt of ongoing rehabilitation assistance. Ongoing financial and other assistance provided through the Board’s rehabilitation services department enables a worker to mount a far more comprehensive job search, and gives access to significant resources that are not reasonably available to an unsupported worker.

On the other hand, while it is reasonable to accept a lesser level of active rehabilitation effort from a worker who had to rely solely on his own resources at the time, it would not be proper to provide benefits on a retroactive basis to support rehabilitation efforts if, during the period in question, the worker made none.

I hold that a worker should be eligible for retroactive payment of rehabilitation assistance where there is evidence of meaningful and purposive rehabilitation efforts on the part of that worker during the period in question. The sufficiency of the worker’s efforts must be assessed in the context of each case. Factors to be considered include the extent of effort exerted by the worker in the context of available resources, the nature of the effort expended, the duration of the effort, and whether the effort was undertaken in good faith.

In this case, the worker approached the Board and said that he wished to be rehabilitated. When the Board initially said no, the worker appealed that decision. I

find that in the interim, the worker did not make reasonable efforts to pursue a credible job search, or to undertake some form of retraining. The welding course earlier referred to was taken on the advice of the worker's doctor so that the worker could stay busy, rather than as a meaningful attempt to enhance his competitive employability. I find in this case that the effort expended by the worker to secure suitable alternate employment, or to obtain retraining was minimal and sporadic, and that the evidence in support of the worker's efforts is largely anecdotal and unconfirmed. Accordingly I find that the worker's effort was not sufficient to render him eligible to receive vocational rehabilitation benefits retroactive to June 23, 1999. I deny the worker's appeal on that issue.

The Board has concluded that the occupation of service writer, advisor or service manager is suitable, and reasonably available to the worker in the long term. Consequently, in the Board's view, the worker will not likely suffer a loss of earnings over and above that reflected by his functional award. The worker disagrees, and has presented an opinion from a vocational rehabilitation professional, who has researched the matter in the local area and has concluded that the worker is not qualified or suited for such work, nor is it likely he would be hired for that occupation.

I agree that it is unlikely that the worker would secure employment as a service writer, advisor or service manager, even in the long term. I am persuaded by the reasoned opinion expressed by the IQRC, and by the worker's evidence that he has been unsuccessful in all his efforts to obtain such a job. The worker does not have the current mechanical knowledge necessary to be hired by an employer seeking a service writer, advisor or service manager. While the work is within his physical capability, he does not present with all the job skills necessary to properly do the work. In part, this is due to his limited education. This is also due in part to his presentation when contacting potential employers. Further, the worker's age and significant absence from the workforce present significant barriers to his prospects for re-employment at any job, regardless of his qualifications and experience. I also agree with the IQRC that job opportunities in the local region are not abundant, and that it is unlikely that the worker would secure a full-time job there with earnings consistent with those of his pre-injury position as an experienced auto mechanic. In the result, I find that the occupations of service writer, advisor, or service manager are not suitable and reasonably available to the worker in the long term. I also find that in view of the worker's other barriers to employment, relocation to a larger centre would not likely improve his prospects for employment as a service writer, advisor, or service manager.

It then follows that the rehabilitation assistance offered thus far has not been sufficient to allow the worker to access suitable alternate employment that will not likely result in a loss of earnings greater than that reflected by the functional award. The key issue however is not whether the worker is able to access suitable alternate employment, but rather to what extent the Board may be responsible for providing rehabilitation assistance.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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The worker, as earlier discussed, has many barriers to employment, of which only some are the responsibility of the Board. The MRP identified the worker's compensable injury as having long since ceased to constitute a major factor in his overall disability. There is no medical evidence since the time of the MRP examination different from that considered by the MRP when it reached its conclusions in the matters certified by it. It is the worker's non-compensable physical disabilities that have created, and that continue to create, a major barrier to employment.

The Board, the Review Board, and the Appeal Division have found consistently that although the worker had symptoms, they were not of sufficient severity to cause him to be disabled from returning to his pre-injury occupation. Nothing in the binding MRP certificate, or attached narrative report contradicts that finding, or would require that it be set aside. The worker's continued absence from the workforce since 1989 cannot therefore be reasonably attributed to his 1988 compensable back strain and aggravation of underlying degenerative changes.

Under the provisions of the Act, the Board may take measures it deems appropriate to aid in getting an injured worker back to work. The Board's responsibility to provide such assistance is dependent largely on the nature of the compensable injury and the effects of that injury on the worker's earning capacity. The Board has addressed this issue at policy item #86.20 of the RSCM, and has stated:

> Where the worker is suffering from a compensable injury or disease together with some other impediment to a return to work (e.g. substance abuse), rehabilitation assistance may sometimes be needed and provided to address the combined problems.
>
> Rehabilitation assistance should not be provided when the primary obstacle to a return to work is non-compensable.

Policy item #86.30 of the RSCM states, however:

> Preventative rehabilitation is intended to provide assistance to workers who can return to their old jobs, but have been medically deemed to be at undue risk of:
>
> 1. permanent disability due to vulnerability, or
> 2. increased permanent disability.

The worker has said that he cannot return to his pre-injury occupation because he is disabled from doing so. The MRP has found that although the compensable back strain had some causative significance in producing the worker's disability, the

non-compensable factors far outweighed any effect of the work injury, and were paramount in causing the disability observed in June 1999. The overwhelming weight of evidence, in conjunction with the findings previously made by the Review Board and Appeal Division, establishes that the 1988 back strain is a minor contributing factor to the worker's inability to return to his former occupation of automotive mechanic. I find therefore that the worker's inability to return to his pre-injury occupation is not caused to any significant extent by the 1988 compensable back strain and concomitant aggravation of underlying degenerative changes.

While there is a measure of residual impairment associated with the compensable injury, it is minor, and is adequately addressed by the 2.0 percent award for subjective complaints. To the extent that the worker is at undue risk of developing increased permanent disability should he return to his pre-injury occupation of automotive mechanic, he is eligible to receive preventative rehabilitation assistance, as set out in policy item #86.30 of the RSCM. Although some rehabilitation assistance has been already been provided, it has not been appropriate because the alternate occupations identified in the rehabilitation assessment are neither suitable, nor reasonably available to the worker in the long term. I find that the worker is eligible for additional rehabilitation assistance, sufficient to overcome the return to work barriers created by the compensable back injury. The assistance provided should be directed toward helping the worker to access occupations incorporating physical requirements similar to those of service writer, advisor, or service manager. The assistance should also be monitored and regulated in accordance with the principles cited above from policy item #85.30 of the RSCM.

It may be that the worker will be unable to access suitable alternate employment, and so will experience an actual loss of earnings over and above that reflected by the functional award of 2.0 percent. The question then arises whether he is entitled to a loss of earnings pension award pursuant to section 23(3).

The worker has received, and will further receive, rehabilitation assistance to access alternate employment that will allow him to avoid certain kinds of activities inherent in his pre-injury occupation, and thereby prevent a potential increase in the level of his compensable permanent partial disability. With regard to the issue of payment of compensation for measures undertaken to avoid future episodes of disability from working, the Board has stated in policy item #36.20:

> No compensation is payable to a worker who withdraws from work or changes employment as a result of the worker believing (no matter how well-founded that belief may be) that further exposure to the conditions at work would create a risk of causing an injury or disease which does not yet exist. This is so even if the belief is based on information which comes from the Board itself.

Policy item #34.51 provides:

> If a worker's physical impairment has disappeared or stabilized, wage loss must be terminated even though the worker, to prevent further occurrences of his or her condition, remains off work. Compensation is not payable for preventive measures.

To appreciate a context for these policies, it is helpful to return to Workers' Compensation Reporter Series (WCR) Volume 1, Decision No. 3, which was in effect at the relevant time, and has not been rescinded by the Board. In that decision the Board discussed the notion of payment for measures intended to prevent future disability, or future increased disability. The case in point involved a worker who was continually exposed to lead in the course of his employment, and who surely would become disabled were that work exposure to continue. The Board reviewed its statutory mandate and concluded that compensation is not payable for preventative measures, and claims resting on that ground must be denied. The worker would be entitled to compensation only if there was a diagnosis of existing lead poisoning, i.e. a diagnosis of current disability from employment. Although the case in point involved an occupational disease, the principle remains the same when dealing with personal injury.

Unlike the case of rehabilitation assistance, the Board has no discretion to pay a worker disability benefits either temporary or permanent, unless the worker is disabled. The Board cannot compensate a worker for potential disability, it can only provide disability benefits where the worker is disabled by a compensable injury, and only then to the extent that the statute may allow. Where the existing disability is permanent, the effect of it on the worker's earnings and earning capacity is measured under section 23 of the Act.

In the case at hand, the worker has a mild low back impairment arising from the 1988 back strain. The impairment has long since stabilized, and is no longer temporary. The BMA's opinion establishes that the worker is at risk for future worsening of disability, should he return to his pre-injury occupation. The BMA's opinion is sufficient to render the worker eligible for rehabilitation assistance under section 16 of the Act, intended to prevent a future worsening of disability. The BMA's opinion does not however establish that the worker is disabled from returning to his former occupation. The need to switch occupations in this worker's case is a preventative measure within the meaning of the term as discussed in WCR Decision No. 3 and policy item #36.20, and I so find.

Section 23(1) of the Act provides for payment of compensation for permanent partial disability that results from the work injury. The existence of a permanent aggravation of underlying degenerative changes has been assessed as equivalent to 2.0 percent of a totally disabled person, and the worker has been compensated for that functional impairment. The worker is unable to return to his pre-injury occupation, for reasons far

beyond the residual disability caused by his 1988 back strain. One reason is to prevent increased permanent disability in the worker's low back. This however is a preventative measure, which does not entitle the worker to receive disability benefits. The remaining, and most significant, reasons relate to the worker's non-compensable problems, which as stated by the MRP are paramount in his disability presentation. These non-compensable problems have evolved independently of the minor compensable impairment, and are not a Board responsibility.

Section 23(3) of the Act provides that where the Board considers it more equitable, it may award compensation having regard to the difference between the worker's average weekly earnings before the injury and the average amount which the worker is earning, or is able to earn, in some suitable occupation after the injury. I accept as a fact that the worker is unemployed, and has been so since 1989. The worker's representative has argued that the worker is now, to all intents and purposes, unemployable. That may be so, although the opinions of the Board VRC and the IQRC do not support that conclusion. In any event, I find that the worker's compensable injury is a minor factor in his unemployed status, and the residual permanent impairment associated with the work injury has not been, and is not now, a significant barrier to employment. The significant barriers to employment in this case may be traced directly to the non-compensable problems identified by the MRP, and to the worker's age, length of time away from the workforce, and lack of up to date product knowledge. These problems are, as earlier stated, not a Board responsibility. I find therefore that the worker's inability to locate and secure employment is not causally related to his 1988 work injury in the sense contemplated by section 23(3) of the Act.

I find that in this case it is more equitable to define the worker's entitlement to a permanent partial disability award by estimating the impairment of his earning capacity from the nature and degree of the compensable injury pursuant to section 23(1). The worker's loss of earnings and earning capacity was caused primarily by disabling factors that are not a Board responsibility, and consequently he will not likely in the long term suffer a compensable loss of earnings pursuant to section 23(3) of the Act, over and above that recognized by the functional award. I deny the worker's appeal on the issue of a loss of earnings pension pursuant to section 23(3) of the Act.

The worker has argued that he should be entitled to receive payment of interest on the retroactive portion of his award.

There is no expressed provision in the Act for payment of interest on benefits retroactively awarded on a claim. With regard to the payment of interest in situations other than those expressly provided for in the Act, the panel of administrators, in October 2001, amended the RSCM and created new policy.

> Policy item #50.00 of the *Rehabilitation Services and Claims Manual* is amended to provide simple interest at a rate equal

> to the prime lending rate of the banker to the government (i.e., the CIBC). Policy item #50.00 is also amended to restrict the period of time interest may accrue to a maximum period of twenty years.
>
> Policy item #50.00 is also amended to provide new criteria for determining when it is appropriate for the Board to pay interest in situations other than those expressly provided for in the *Act*. The amended policy will provide for interest on retroactive wage-loss and pension lump-sum payments where it is determined that a blatant Board error necessitated the payment. For an error to be "blatant" it must be an obvious and overriding error.
>
> The amended policies are effective November 1, 2001, and will apply to all decisions to award or charge interest on or after that date. When calculating the amount of interest payable, the new method for determining the applicable rate of interest will apply retrospectively and will be used for the entire entitlement period and will not be limited to entitlement for time periods after November 1, 2001.

I find that a plain reading of the October 15, 2001 resolution of the panel of administrators indicates that it was the intention of the panel, as the policy-making body of the Board, to apply the new policy to all decisions to award or charge interest on or after November 1, 2001. Given that the decisions concerning the worker's eligibility for rehabilitation assistance and his entitlement to a pension award were made after November 1, 2001, I find that interest would be payable only if it can be established that a blatant Board error necessitated the retroactive payment. The following excerpt from the amended item #50.00 describes a "blatant" error:

> For an error to be "blatant" it must be an obvious and overriding error. For example, the error must be one that had the Board officer known that he or she was making the error at the time, it would have caused the officer to change the course of reasoning and the outcome. A "blatant" error cannot be characterized as an understandable error based on misjudgment. Rather, it describes a glaring error that no reasonable person should make.

The matter of a causal relationship between the 1988 back strain and the worker's persistent low back complaints was a matter of prolonged dispute, and was examined more than once on its journeys through the appeal process. Finally, more than 10 years after the work injury, the MRP confirmed the back strain as a minor cause of the worker's permanent disability.

The Board's amended policy makes it clear that to receive interest on a retroactive award, it is not sufficient that a Board officer simply made a mistake. The mistake must be so obvious that no reasonable person in the circumstances would have done the same thing. In this case, the Board has been shown to have erred when it earlier concluded that the worker did not have a measure of compensable residual impairment in his low back. The error however was not blatant, in light of the decisions by the Review Board and Appeal Division, and given the findings set out in the MRP certificate. The conclusion that the worker did not have a measure of residual impairment, while flawed, was nevertheless a reasonable one, given the evidence at the time, and I so find.

In the result, while the worker was entitled to retroactive restoration of his pension benefits, he was not, in the context of revised policy item #50.00, entitled to receive payment of interest on the retroactive amount. I therefore deny the worker's appeal on that issue.

In summary, I confirm the following:

- The worker's compensable impairment pursuant to section 23(1) is equal to 2.0 percent of a totally disabled person.

- The worker is entitled to a permanent partial disability award effective February 1, 1989.

- The worker's pension entitlement was properly calculated based on earnings of $3,018.00 per month.

I find as follows:

- The worker is eligible for rehabilitation assistance on a preventative basis prospectively from the date of this decision, beyond that provided in the February 7, 2002 letter.

- The worker is not eligible to receive retroactive rehabilitation allowances between June 23, 1999 and December 2001.

- The Board may also make available to the worker funds to assist him to relocate to a larger centre to improve his chances of securing appropriate employment. Willingness to relocate is not however a precondition to the worker's eligibility for the additional rehabilitation assistance referred to above.

- The occupations of automotive service writer, advisor, or service manager are not suitable and reasonably available to the worker in the long term.

Workers' Compensation Appeal Tribunal 150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
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- The worker will not likely suffer a compensable loss of earnings pursuant to section 23(3) of the Act over and above that reflected by the functional award.

- The worker is not entitled to receive interest on the retroactive portion of his pension award.

Conclusion

In accordance with the foregoing findings and reasons I confirm the decision conveyed by letter of November 25, 1999 insofar as it concerns retroactive payment of vocational rehabilitation allowances. I vary the decisions conveyed by letters of February 7, 2002 and July 2, 2002. The worker is entitled to reimbursement of expenses associated with attending the hearing, including two round trips between his home and Rossland, and the costs of acquiring the March 6, 2003 report from the IQRC.

Iain M. Macdonald
Vice Chair

IMM/mli/gw