

Noteworthy Decision Summary

Decision: WCAT-2004-02368-RB **Panel:** Deirdre Rice **Decision Date:** May 7, 2004

Loss of Earnings Award – Proportionate Entitlement – Pre-existing Disabilities in Other Parts of the Body – Sections 5(5) and 23(3) of the Workers Compensation Act

Under section 5(5) of the *Workers Compensation Act* (Act), proportionate entitlement only applies when the pre-existing disability is in the part of the body that was affected by the work injury or disease. Even if section 5(5) permitted proportionate entitlement for disabilities in other parts of the body, section 23(3) of the Act forecloses its application because it dictates the loss of earnings method of calculation, and does not allow for reduction based on pre-existing disability.

In this case, the worker, a logging truck driver, was injured when a log fell off a truck and struck him. As a result of permanent injuries to his back and leg, which prevented him from resuming work as a logging truck driver, he received a loss of earnings permanent disability award. The employer argued that the award should be reduced to take into account the worker's pre-existing eyesight problems which would have prevented him, in any event, from keeping his Class 1 licence and continuing to drive. The employer's argument was rejected by the Workers Compensation Board (Board), and the employer filed an appeal with the Workers' Compensation Review Board which was transferred to WCAT pursuant to the *Workers Compensation Amendment Act (No. 2), 2002*.

The panel confirmed the Board's decision, following the reasoning of the chief appeal commissioner of the Appeal Division in *Appeal Division Decisions #93-0390* and *#93-0391*, as outlined above. The Board was correct in rejecting the employer's argument regarding the pre-existing eyesight problems. Further, there was no factual basis for the argument. Because of the nature of the worker's permanent functional impairment, it was unnecessary for the Board to consider employment options similar to his pre-injury job that did not require a Class 1 licence.

WCAT Decision Number : WCAT-2004-02368-RB
WCAT Decision Date: May 07, 2004
Panel: Deirdre Rice, Vice Chair

Introduction

The employer, a logging company, appeals the April 9, 2001 decision of a claims adjudicator with the Disability Awards Department (CADA) of the Workers' Compensation Board (Board). The CADA confirmed that the worker, formerly a logging truck operator, had been granted a loss of earnings pension for the residual impairment resulting from the fractured right femur and compression fracture at the L1 level of his spine accepted under his claim. In a February 27, 2001 memorandum attached to the April 9, 2001 decision, the CADA found that the employer would be relieved of 25% of the costs of the knee impairment only.

The employer's representative argues that the employer is entitled to further cost relief under section 5(5) of the *Workers Compensation Act* (Act) on the basis that a portion of the worker's loss of earning capacity is directly related to his pre-existing eye condition.

Issue(s)

The issue is whether the Act authorizes the application of proportionate entitlement to loss of earnings awards by taking into account pre-existing disabilities in parts of the body other than the one affected by the work injury.

This is the only issue raised by the employer's representative. Issue was not otherwise taken with the CADA's decision regarding the award and the allocation of costs. As permitted by item #14.30 of the Workers' Compensation Appeal Tribunal (WCAT) *Manual of Rules, Practices and Procedures*, I have considered only the issue raised.

Jurisdiction

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

Background and Evidence

The employer's representative did not request an oral hearing. I am satisfied that this appeal can be properly determined on the basis of a review of the claim and appeal

files. Although provided with the opportunity to do so, the worker did not file a submission or evidence.

The worker, who is currently 64 years of age, had been working as a logging truck driver for the employer for approximately ten years when, on December 4, 1998, he sustained multiple injuries when a log fell off his logging truck and struck him. He received wage loss benefits from December 5, 1998 to January 23, 2000 and then vocational rehabilitation benefits. The Board accepted that the worker sustained permanent injuries to his back and right leg as a result of the December 4, 1998 accident, and his file was referred to the Board's Disability Awards Department.

In an exchange of correspondence with the Board, the employer applied for a number of remedies, which may be summarized as follows:

1. Relief of costs under section 39(1)(e) on the ground of pre-existing conditions in the back, knee and eyes;
2. Relief of costs under section 42 on the ground of post injury aggravation arising out of treatment (drill bit left in leg after surgery; prolonged right shoulder problem; non-compensable injury to finger);
3. Exclusion for the purpose of experience rating of costs after 13 weeks because of wilful misconduct by the worker in accordance with section 5(3) of the Act; and
4. Reduction of future loss of earnings estimate based on probable loss of drivers' licence due to eye condition.

In a decision dated September 21, 2000, a case manager advised the employer that there was insufficient evidence to support a conclusion that the worker had a pre-existing disease, condition or disability. Consequently, the employer's September 19, 2000 request for consideration of cost relief under section 39(1)(e) was denied.

In a decision dated February 28, 2001, the CADA advised the employer that relief of costs had been granted in the amount of 25% of the pension attributable to the knee disability, but confirmed that cost relief was otherwise denied. This allocation of cost relief was confirmed in the February 27, 2001 memorandum that was attached to the April 9, 2001 decision at issue in this appeal. In that memorandum, the CADA specifically addressed the employer's argument that the worker's eyesight would have led to him losing his employment:

I have also had telephone conversations with the Employer[s'] Advisor with reference to the worker and his employability. It was suggested to me that the worker's wage rate was artificially inflated as, due to his vision

problems it is suggested that he should not have had a Class 1 Driver's Licence. I indicated ... that ... the worker was successfully employed with this employer for 8 or 9 years and had there been an impediment to his ability to perform his employment duties, this would have been evident along the way. I clarified that I am required to look at the worker's pre-injury earnings in considering his loss and that I would view any comments regarding his possible loss of employment due to his eyesight as speculative and not relevant to my consideration.

In a decision dated March 19, 2001, the case manager advised the employer that she would not be reconsidering her September 21, 2000 decision. She again confirmed this in a letter dated May 15, 2001. In the May 15, 2001 letter, the case manager conceded that there was evidence that the worker had been advised of the employer's safety requirements, which included not unloading trucks until the load was secured. However, she said there was insufficient evidence to cause her to conclude that he was engaged in serious and willful misconduct which precipitated the December 4, 1998 accident. The case manager confirmed this decision in a letter dated July 26, 2001.

In a decision dated June 6, 2001, the CADA confirmed that relief of costs was limited to 25% of the costs related to the knee and advised the employer that there was no basis on which to alter this relief. With regard to the employer's request that responsibility for the worker's loss of earnings pension be limited on the basis that part of his loss of earnings capacity was the result of his vision, the CADA wrote:

I have again reviewed the very thorough Employability Assessment contained in this worker's file. As outlined in that assessment, the worker attended a Functional Capacity Evaluation. Following that evaluation, it was summarized that the worker did not demonstrate the functional capacity to return to his previous job as a logging truck driver. The worker had limitations with tasks requiring forward bending and had difficulty lifting items from ground level. The worker had difficulty with stairs and difficulty weight bearing in a single leg stance. It was determined that the worker would have difficulty climbing into and out of a truck and that he would also have difficulty with leg strength required when braking. I also note that a driving assessment was completed as further investigation into whether there was any possibility the worker, on the basis of his compensable injury, could return to his pre-injury job. It was the Assessor's opinion that the worker would have difficulty climbing in and out of the cab of a truck on a regular basis. It was also determined that the worker's pre-injury job required him to be in and out of the truck several times a day. Alternate work with the accident employer was investigated but it was determined that the easiest job with this employer was that of a logging truck driver, and all other jobs were more physically demanding. Therefore, the employer confirmed the inability to accommodate the worker on the basis of his compensable injury.

From my review of the evidence on this file and the considerable investigation that went into determining suitable alternate employment for the worker, based on his compensable injury alone the recommendation regarding loss of earnings is appropriate. I do not consider your concerns regarding this worker's eyesight would in any way alter my decision regarding his compensable loss of earnings.

The employer appealed the September 21, 2000, December 27, 2000, and July 26, 2001 decisions to the Appeal Division. In a decision dated June 12, 2002, the appeal panel denied the employer's appeal. In summary, the panel found as follows:

1. The Board did not make an error of law or fact, or contravene a published policy of the governors, in limiting cost relief to 25% of the amount of the pension attributed to the knee disability.
2. The issue of possible cost relief due to the worker's pre-existing eye condition was addressed in the June 6, 2001 letter, which had not been appealed to the Appeal Division. Consequently, that issue was not before the panel.
3. Since the worker's original injury was one that would have been expected to result in death or permanent disability, the preconditions set by item #115.31 of the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM) to exclusion of costs from the employer's experience rating under section 42 of the Act could not be met. Consequently, the Board did not contravene a published policy of the governors by not investigating the impact of a possible shoulder problem the worker had.
4. A decision under section 5(3) of Act, which allows for the cost of compensation paid after the first 13 weeks of disability to be excluded from the employer's experience rating, must first be appealed to the Review Division. As that had not been done here, the Appeal Division had no jurisdiction to decide the issue of the applicability of this provision.

Submission

The employer's representative submitted that the Board did not take the pre-existing, non-compensable condition of the worker's eyes and its impact on the worker's earning capacity into proper consideration. She noted that, as a pre-requisite to his job as a logging truck driver, the worker had to possess a valid Class 1 drivers' licence. She argued that the evidence confirmed that the worker should not have had his Class 1 licence, should not have been driving large loaders, and would have been unable to

keep his Class 1 licence owing to his eyesight. She submitted that the evidence showed that, after 30 years of driving trucks, the worker's livelihood (and hence income level) was about to be greatly reduced because of his poor vision. She argued that, contrary to the conclusion of the CADA, the potential loss of the worker's employment because of his vision was not speculative and that the worker would not have returned to work with the employer even if the compensable injury had never occurred. She said that proportionate entitlement was warranted and that account should be taken of the portion of the worker's loss of earning capacity that is directly related to his pre-existing eye condition.

Reasons and Findings

Section 5(5) of the Act provides:

Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease.

This subsection applies to claims where the compensability of the disability has been accepted by the Board. It does not apply to the initial adjudication as to causation of the particular disability.

Section 23(3) of the Act provides for compensation that takes into account the worker's loss of earnings. At the time of the decision at issue in this case, it read as follows:

Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which he is earning or is able to earn in some suitable occupation after the injury, and the compensation shall be a periodic payment of 75% of the difference, and regard shall be had to the worker's fitness to continue in the occupation in which he was injured or to adapt himself to some other suitable employment or business.

Item #44.10 of the RSCM provides adjudicative guidance for the application of proportionate entitlement and details the meaning of "an already existing disability". This policy states unequivocally that section 5(5) only applies where an injury is "superimposed" on an already existing disability and that the injury and the existing disability must be in the same part of the body.

Item #44.31 of the RSCM provides:

In every case where there was a pre-existing disability, the Board has to decide whether the loss of earnings experienced by the worker after the injury is wholly the result of the compensable disability or partly the result of the pre-existing disability. If it decides that the whole loss is the result of the compensable disability, no reduction in the pension is made under Section 5(5). If it decides that a portion of the loss is attributable to the pre-existing disability, a pension is only awarded for the portion attributable to the compensable disability.

The Board feels that this is fair to claimants in that it allows for the fact that their pre-injury earnings may already have been reduced by the pre-existing disability. On the other hand, it ensures that the Board does not become responsible for loss of earnings which are really attributable to the delayed or progressive effect of non-compensable pre-existing disabilities. The Board recognizes that it is often difficult in practice to properly allocate the causes of a loss of earnings where there is pre-existing disability, but do not feel that it is any more difficult than other decisions that have to be made under the Act, or that this difficulty justifies a different interpretation of Section 5(5).

The argument that account should be taken under section 5(5) of pre-existing disabilities in parts of the body other than those impacted by the compensable injury was considered by the Chief Appeal Commissioner of the Appeal Division in *Appeal Division Decisions #93-0390 and #93-0391* (9 WCR 373). In that case, a worker sought reconsideration of a January 30, 1990 decision by the Appeal Division in which the commissioners had determined that the worker was unemployable. They concluded that this was the result of both a compensable injury to his back and a number of non-compensable impediments, including his cerebral palsy, speech difficulty, and general lack of communicative skills both in reading and writing. The commissioners had adjusted the worker's loss of earnings pension downwards to reflect these pre-existing disabilities.

At the time of the commissioner's decision, the first two paragraphs of item #44.31 of the RSCM were the same as those set out above. However, the policy also contained another paragraph that was subsequently removed by amendments to the policy in December 1993:

The Board's previous practice has been that, in applying proportionate entitlement, no account is taken of already existing disabilities in parts of the body other than the one affected by the work injury. This is a reasonable position when the pension is being assessed on a physical impairment basis under Section 23(1) since the concern is solely with the degree of loss of body function in the injured part. However, the same is

not the case with pensions assessed on a projected loss of earnings basis under Section 23(3). The concern there is with the worker's capacity to obtain employment and this capacity can be affected by disabilities in other parts of the body. The Board has concluded that if a loss of earnings experienced by a worker after an injury is partly the result of a disability in another part of the body, Section 5(5) can be applied.

The Chief Appeal Commissioner allowed the worker's appeal. After reviewing the legislative history of section 5(5), the dictionary definition of the term "superimposed" and the legislative scheme, she concluded that a necessary condition for the application of proportionate entitlement is that the pre-existing disability or disabilities be in the part of the body that was affected by the work injury or disease.

I agree with the analysis provided by the Chief Appeal Commissioner and, on that basis, can see no support in the language of the Act, its legislative evolution, or the relevant Commission reports for a broadening of the principle of proportionate entitlement so as to include separate disabilities affecting different parts of the body when assessing a pension award.

Further, with regard to section 23(3) the Chief Appeal Commissioner wrote:

In fact, the language of the provision dealing with the loss of earnings method [section 23(3)] would seem to rule out, *prima facie*, the application of proportionate entitlement to any loss of earnings awards. The provision states that the Board "may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which he is earning or is able to earn in some suitable occupation after the injury, and the compensation *shall* be a periodic payment of 75% of the *difference . . .*" (emphasis added). This wording gives the Board no discretion as to how to apply the loss of earnings method. The only discretion the Board has under Section 23(3) is whether to apply this method. Whereas the requirement found in Section 5(5) can be integrated with the wording of Section 23(1), it cannot be integrated with that of Section 23(3).

Section 5(5) requires the Board to determine the proportion of that disability that may reasonably be attributed to a work injury or disease. The wording used in Section 23(1) gives the Board enough latitude to estimate the impairment of earning capacity with reference to the apportioned disability. The wording is that the Board shall estimate this impairment from "the nature and degree of the injury." On the other hand, Section 23(3) specifies that compensation "shall be a periodic payment of 75% of the difference between the average weekly earnings of the worker before the injury and the average amount which he is earning or is able to

earn in some suitable occupation after the injury.” The language is directive and would seem to allow for little flexibility.

Thus, even if section 5(5) permitted proportionate entitlement that took the worker’s eye condition into account, the language of section 23(3) as it read at the time of the decision at issue in this appeal would likely foreclose its application to this case.

In order to decide this appeal, it was not necessary for me to address the merits of the argument that, even in the absence of the compensable injuries to the worker’s right leg and back, the loss of a Class 1 licence would necessarily have meant that the worker’s income would be substantially reduced. However, I note that the nature of the worker’s permanent functional impairment made it unnecessary for the Board to consider options for employment in a similar capacity to his pre-injury job that did not require a Class 1 driver’s licence. Consequently, the file does not in any event contain a factual basis to support the conclusion urged by the employer’s representative.

Conclusion

The appeal is denied. I have concluded that section 5(5) of the Act and item #44.10 of the RSCM do not permit the application of proportionate entitlement to loss of earnings awards by taking into account pre-existing disabilities in parts of the body other than the one affected by the work injury. The Board’s April 9, 2001 decision is confirmed.

The employer’s representative did not request reimbursement for any expenses in relation to the appeal, and no order for such reimbursement is made.

Deirdre Rice
Vice Chair

DR/dwe