WCAT Decision Number: WCAT-2004-03598
WCAT Decision Date: July 07, 2004
Panel: James Sheppard, Vice Chair

Introduction

On March 3, 1990 the worker, a tug boat deckhand, suffered a crush injury to his right foot and a twisting injury to his left foot when his feet got caught between a fender log and the raised portion of the manhole on a barge. On November 25, 1992 the worker, then a cook and deckhand, caught his right leg between the tug bumper and stanchion crushing his right foot.

The 1990 and 1992 claims were both accepted for a permanent disability arising from the right foot crush injuries. In a January 9, 1995 decision of the Workers' Compensation Board (Board) the worker received a permanent disability award of 3.03% under the 1992 claim effective June 15, 1993. In a January 6, 1995 Board decision the worker received an award of 1% under the 1990 claim effective June 11, 1990. Neither decision provided the worker with a loss of earnings pension. These decisions were not appealed by the worker.

Because the 1992 claim was later accepted for reflex sympathetic dystrophy the worker's claims were referred back to the Disability Awards Department to reassess the worker's permanent disability.

The claims adjudicator disability awards department (CADA) in an April 16, 2003 decision of the Board awarded the worker an increased permanent functional award of 4.91 (.41% for age adaptability) of total disability under the 1992 claim only. No loss of earnings pension was awarded.

The worker appealed to the Workers' Compensation Appeal Tribunal (WCAT) a September 22, 2003 Review Division decision (#2417) which reviewed and confirmed this April 16, 2003 decision.

Issue(s)

Should the September 22, 2003 Review Division decision be cancelled based upon a breach of natural justice?

If not, did the Board properly determine the increased loss of function award (percentage of permanent functional impairment (PFI), the wage rate, and the effective date)?
Is the worker entitled to a projected loss of earnings pension?

Is it premature to determine the issue of a pension pending further vocational rehabilitation assistance as a result of two recent *Review Division decisions #7046 and #8034 dated February 16, 2004* (which addressed Board decisions dated July 30, 2003 and September 9, 2003)?

Jurisdiction

WCAT can confirm, vary or cancel an appealed decision (section 253(1) of the *Workers Compensation Act* (Act)). WCAT may inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal, but is not bound by legal precedent (sections 250 and 254 of the Act). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case. Policy relevant to this appeal is primarily set out in *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

This appeal involves a Review Division decision which involved a scheduled loss of function award. I have the authority to address this scheduled award because the percentage of impairment has a range that exceeds 5% (section 239(2)(c) of the Act).

Procedural Matters

The worker's legal counsel did not request an oral hearing. Both the worker's legal counsel and the employer were provided with disclosure of the worker's 1990 and 1992 claims. The worker's legal counsel provided a February 20, 2004 written submission (which refers me to previous submissions already provided) with the notice of appeal form. The employer's representative was copied with this submission but did not provide a response to WCAT within the time limits prescribed by the appeal coordination officer.

Although the worker's legal counsel was provided with a copy of the cassette disk (CD) recording of the prior July 9, 2003 WCAT hearing, it does not appear that the employer's representative received this disclosure. Also, it does not appear that either party received in the course of this appeal, a copy of the CD recording of the video surveillance conducted on the worker in February of 2002. I have decided that it is not necessary to provide this further disclosure before rendering my decision in this appeal because this undisclosed material is not relevant to my decision. I have not relied upon this undisclosed material to make my decision.

I find that I can render a decision based upon a review of the evidence and the submission filed without an oral hearing.

Reasons and Decision

The worker's legal counsel requests that the review officer's September 22, 2003 decision not to award a loss of earnings pension should be cancelled. He cites two grounds for this request: (1) the review officer breached the rules of natural justice; (2) the *Review Division Decisions #7046 and #8034* concerning the need for a vocational rehabilitation plan makes any pension decision premature.

Breach of Natural Justice

I have read the worker's legal counsel's correspondence dated July 22, 2003, August 15, 2003 (which should be dated December 3, 2002), December 8, 2003, and January 24, 2004. The review officer, in his September 22, 2003 decision indicated that the worker had not filed any submissions with respect to his review. The worker's legal counsel submits that the worker's rights and the rules of natural justice were violated because the worker was not given the opportunity to present submissions prior to the review officer rendering his September 22, 2003 decision. He had asked the review officer for an extension of time to provide submissions pending the outcome of the prior *WCAT Appeal Decision (#2003-01558-RB dated July 17, 2003*) which involved vocational rehabilitation. He also indicated that he did not receive disclosure until September 25, 2003 and that the worker was further hampered in his ability to make full answer and defence by a refusal to consolidate and hold an oral hearing on the pension and subsequent reviews of two vocational rehabilitation benefits decisions (July 30, 2003 and September 9, 2003).

As the vice chair in the WCAT registry outlined in her January 3, 2004 letter to the worker's legal counsel, WCAT may confirm, vary or cancel the Review Division decision. I do not have the authority to refer the matter back to the Review Division for a re-hearing. Item #14.40 (Outcome) of the WCAT *Manual of Rules, Practices and Procedures* (MRPP) defines the terms confirm, vary and cancel as follows:

Confirm: On every issue addressed in the WCAT decision, the WCAT panel agrees with the determinations made by the prior decision-maker in the decision or order under appeal, though not necessarily with the reasons for those determinations.

Vary: On one or more issues addressed in the WCAT decision, the WCAT panel reached a conclusion which differs, in whole or part, from the conclusion or outcome provided by the prior decision-maker, and provides a changed decision.

Cancel: The WCAT panel disagrees with the determinations made on every issue covered by a decision under appeal and determines that the decision should be set aside without a new or changed decision being provided in its place. Cancellations will normally only be ordered with respect to prevention decisions.

The Review Division has rendered its February 16, 2004 decisions involving the review of the two vocational rehabilitation decisions (July 30, 2003 and September 9, 2003)

which followed the prior July 17, 2003 WCAT decision. I have the benefit of those decisions in addressing the pension appeal. I find that any breach of natural justice that was committed by the review officer's failure to allow the worker's legal counsel disclosure, and an opportunity to provide a submission before he rendered his decision, was cured by ensuring that natural justice was afforded to the worker and his legal counsel in the course of this appeal to WCAT. As previously mentioned the worker's legal counsel has been given disclosure of the 1990 and 1992 claims. He has not requested an oral hearing in this appeal. He has been given an opportunity to present the worker's submissions in this appeal. I will not cancel the review officer's September 22, 2003 decision (and in essence the April 16, 2003 pension decision) on the basis of a breach of natural justice. I will hear the worker's appeal on the merits of the issues arising from the April 16, 2003 pension decision as addressed by the review officer in his September 22, 2003 decision. I will then decide whether I will confirm, vary or cancel the September 22, 2003 decision.

Loss of Function Award

I asked the appeal coordination officer to contact the worker's legal counsel to clarify whether the worker disputed that part of the April 16, 2003 decision with respect to the worker's increased functional impairment award. The worker's legal counsel restated his request to have the entire Review Division decision cancelled because of a breach of natural justice. He also referred to the second ground of appeal outlined in his February 20, 2004 written submission. I have already addressed the issue of canceling the decision based upon a breach of natural justice.

I take the request to have the entire September 22, 2003 decision cancelled to mean the worker also disputes the decision concerning the increased loss of function award as well as the projected loss of earnings. I also note that on the request for review form filed with the Review Division, he indicated that the wage rate was wrong, the functional award was too low, and the plateau date (which I take to be the effective date) was wrong. I have the discretion to address the increased functional impairment award (percentage of impairment, wage rate and effective date) without notice to the parties (item #14.30 of the MRPP).

Because the worker wants the entire September 22, 2003 cancelled and the review officer has considered the loss of function component in his decision, I will examine this part of the pension decision too. I do not find that it is premature to determine the loss of function component of the worker's pension because of the two February 16, 2004 Review Division vocational rehabilitation decisions.

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Increased Percentage of Permanent Functional Impairment

Section 23(1) of the Act provided a pension award for a permanent partial disability which had resulted from the compensable injury. Item #39.01 of the RSCM I set out the guidelines for assessing an award for subjective complaints.

When the worker was examined in October of 1994 for his first pension award he had some loss of dorsiflexion of his right ankle and slight restriction of inversion and eversion of his right forefoot. There was a mild limp. The worker was able to obtain a full squat with satisfactory recovery. All reflexes were present. No ligamentous or muscular weakness was noted. There was some swelling. The worker had some slight sensory deficit on the dorsum of this foot. As previously mentioned, he was assessed with an overall PFI of 4% of total disability (plus .03% of age adaptability). As previously mentioned this percentage was split between the 1990 and 1992 claims (1% to the 1990 claim and 3.03% to the 1992 claim) based upon the November 3, 1994 opinion of Dr. Hartley, a disability awards medical advisor.

The worker underwent a PFI examination on February 18, 1999. Dr. Copley, a disability awards medical adviser, on examination noted the worker's lower extremities were symmetric with the exception that the right foot (toes) was somewhat ruborous (redness) compared to the left. The worker could perform only a partial squat. He had tenderness to palpation with an area of paresthesia on the dorsum of the right foot. The distal portion of his right foot felt cooler than the left foot. The worker also had moderate restriction of right ankle dorsiflexion, slight restriction of right ankle plantar flexion, marked restriction of subtalar eversion motion, and moderate restriction of right forefoot motion.

ARCON AIRS impairment rating report dated March 1, 1999 indicated the worker had a scheduled impairment of 8.19% in the right ankle. This percentage included an additional award of 0.5% for the area of paresthesia on the dorsum of the right foot. Dr. Copley indicated that 75% of the worker's functional impairment was the consequence of the 1992 work incident and 25% due to the 1990 work incident.

In a May 31, 1999 memorandum the CADA, in agreeing with the recommendation on the percentage of functional impairment, stated: "For inclusion of further consideration of subjective complaints, I would bring the worker's overall award to 8.5%. I would split this into 2.25% under the 1990 claim, and 6.25% under the 1992 claim. This would represent an increase of 4.5% over the worker's overall prior awards."

The CADA, in her January 17, 2002 PFI memorandum attached to the April 16, 2003 decision, decided not to split the increased functional impairment award between the 1990 and 1992 claims. She states: "As the employer is the same and the worker will in the end receive full entitlement simply under one claim rather than split under 2 claims, I believe this is the most reasonable approach given the activities on files [sic]".

I question the CADA's decision not to split the increased functional impairment award between the 1992 and 1990 claims in light of Dr. Copley's opinion. I also note Dr. Lim's June 11, 1990 progress report that expected a permanent disability associated with post traumatic arthritis. Dr. Smit, a Board medical advisor, in his January 28, 1993 memorandum indicated that the November 25, 1992 injury aggravated the 1990 injury, and if there was a PFI (albeit he did not think this was likely) then both injuries would be equally responsible.

However, there is a further issue which the review officer raised in his September 22, 2003 decision which concerns the use of the February 1999 assessment to determine any increase in the worker's functional impairment. The worker was paid temporary wage loss benefits between September 1997 and March of 2001. It was found that his permanent condition had significantly deteriorated beyond that which one would have expected from his permanent condition at least on a temporary basis (because of the worker's reflex sympathetic dystrophy). This is consistent with item #34.12 (Claimant in Receipt of Permanent Disability Pension) of the RSCM I which states that where a further work injury or a natural relapse in the worker's pensionable condition causes a further period of temporary disability wage loss is only payable in cases where there is medical evidence of a significant deterioration in the worker's condition which not only goes beyond what is normally to be expected, but is also a change of a temporary nature. If the change is a permanent one, the worker's pension will simply be reassessed. The worker was assessed in February of 1999 during a period when he was found to be temporarily disabled beyond that which would have been expected from his permanent disability.

I acknowledge the CADA's comments in her January 17, 2002 memorandum which stated:

> The Medical advisor [Dr. Atkins] noted there was little significant change in the worker's status for a number of months before that time [Dr. Clarke's February 2, 2000 consultation report]. He felt the worker was in a state of medical plateau then by February of 2000. There was no evidence to suggest this would not still be the case. Wage loss benefits were extended beyond this date [to March of 2001] based on the wording of the Review Board finding.

In as much as the worker may have been plateaued between February of 2000 and March of 2001 (not an issue for me to determine) the fact remains the pension assessment took place in February of 1999 which was a time when the worker's temporary condition had not yet been found to have plateaued.

I also note Dr. Jefferys' November 21, 2001 examination which states: "In summary this man continues to complain of pain and at least on today's examination there is no very marked evidence of complex regional pain syndrome otherwise known as reflex sympathetic dystrophy."

I find that there is a need to assess the worker's PFI after his condition was found to have plateaued (February 2, 2000) for any increased PFI in the right foot and ankle. There is also a need to determine if any increased PFI should be split between the 1990 and 1992 claims.

Pension Wage Rate and Effective Date

Section 32 of the Act gave the Board the discretion to use a worker's current earnings to determine compensation benefits on a reopening of a claim more than three years after an injury. Item #70.20 (Reopenings Over Three Years) of the RSCM I provided guidelines in situations where there was an increase in a permanent disability over three years after an injury. The rules set out in relation to wage-loss benefits were, in general, equally applicable to permanent disability pensions.

Item #41.10 of the RSCM I stated that the general rule was that a pension was to commence on the date when the worker's temporary disability ceased and his condition stabilized or was first considered to be permanent.

The pension wage rate for the increased PFI award was determined by using the original wage rate plus consumer price adjustments under the 1992 claim. This wage rate was used because at the time of the reopening of the 1992 claim the worker had no current earnings. The worker had not worked since March of 1996. He was unemployed because of his compensable right foot and ankle injury. This conclusion is consistent with both *Appeal Division Decision # 2001-1541 dated August 2, 2001* which reopened the claim for further temporary wage loss benefits on October 23, 1997 and *WCAT Decision #2003-01555-RB dated July 17, 2003* which moved this reopening back to September 17, 1997.

The effective date of the worker's increased pension award was set at March 8, 2001. This was the day after temporary wage loss benefits were terminated following the reopening of the worker's 1992 claim on September 17, 1997 for the worker's reflex sympathetic dystrophy. However, Dr. Atkins has indicated the worker likely plateaued in February of 2000 and not in March of 2001 when temporary wage loss benefits were terminated. The Workers' Compensation Review Board's (Review Board) December 15, 2000 findings indicated the worker was entitled to the payment of wage loss benefits until he was in receipt of a decision letter advising him that his condition had plateaued or his revised pension implemented. I do note that the conclusion of these findings is worded slightly differently. It states: "[The worker] is entitled to the payment of wage loss benefits from 3 August 1998 onward until it is determined that his condition, for which he was sent to the pain clinic, plateaued or his revised pension implemented." However, the case manager chose to take the earlier wording in the December 15, 2000 findings as requiring the payment of temporary wage loss benefits until the worker received a decision informing him that his condition had plateaued. The case manager rendered a March 2, 2001 decision informing the worker that his

condition had plateaued on February 2, 2000. I do not have the authority to address the March 2, 2001 decision in this appeal.

The review officer found the pension wage rate and the effective date of the reassessed pensions complied with published policy.

Because I have found that there is a need to assess any increase in the worker's PFI and to determine if any increase should be assigned to the 1990 claim the Board will have to examine the pension wage rate after this further assessment and determination is completed. It may be that the pension wage rate has been properly determined; however, if there is a split of any increased permanent functional award between the 1990 and 1992 claims, the pension wage rates would likely not be the same.

Item #41.10 of the RSCM I indicates that the effective date of the pension should be set when the worker's temporary disability ceased and his condition stabilized. This is an applicable policy that is binding on me. This means that the effective date should be February 2, 2000 (the date of plateau) and not March 7, 2001 (the day the worker received the March 2, 2001 decision). Because the Act precludes the payment of both temporary and permanent benefits for the same condition at the same time, the Board will have to make the appropriate deductions from any retroactive pension payment.

Loss of Earnings Pension

I have reviewed and considered the *Review Division Decisions #7046 and #8034 dated February 16, 2004*. I will not repeat the entire history of events on the 1990 and 1992 claims leading up to these decisions. However, I will provide the following summary:

Background

As previously mentioned the worker suffered a crush injury to his right foot on March 3, 1990. He was admitted to the Board's rehabilitation clinic in May of 1990. Temporary wage loss benefits were terminated on June 10, 1990.

After the worker suffered his November 25, 1992 right foot injury he returned to work on June 17, 1993. He had a further injury to the right foot and ankle later on in June of 1993, when he apparently jumped approximately 3.5 to 4 feet to a boat deck to avoid being struck in the face by a chain. The 1992 claim was reopened for further wage loss benefits. The worker attended a work hardening program and was discharged on November 22, 1993 fit to return to his pre-injury employment as a deckhand, without restrictions or modifications. The worker did return to work in November of 1993. His temporary wage loss benefits were terminated on November 14, 1993.

The worker was assessed for a permanent partial impairment on October 4, 1994. As previously mentioned, he was provided with a loss of function award of 4% of a totally disabled person unevenly split between the 1990 and 1992 claims.

The worker was reported disabled as of February 4, 1995 because of laryngitis and a cold and was paid wage indemnity from February 10 to 17, 1995. He was reported disabled as of March 3, 1995 because of stress and tension, diagnosed as a situational reaction with depressive features (May 31, 1999 memorandum). He was paid wage indemnity from April 2, 1995 to October 1, 1995. The worker was reported disabled on March 8, 1996 because of his right foot. Both the worker and the employer advised the Board that the worker left his employment on March 8, 1996. There was some question as to the reason why the worker left his employment in March of 1996 and whether he quit or was let go for medical reasons (see July 17, 2003 WCAT decision). The worker had indicated to the Board that he had left his employment in 1996 because he couldn't run fast enough or climb up ladders fast enough and was unable to perform his duties appropriately. He indicated that the captain had ordered him to stop working because of his foot injuries which disabled him from working and constituted a danger to the crew. The worker indicated that he was paid wage indemnity from March 1996 to March of 1997.

Dr. Clarke, an orthopedic surgeon, in his October 23, 1997 report indicated that the worker had sustained a soft tissue injury to his right foot with persistent pain diffusely in the soft tissue of the foot. He also indicated that the worker appeared to have developed reflex sympathetic dystrophy which required treatment. He stated: "I think it is unlikely that he would ever return to any employment that requires significant standing or walking." Dr. Schilling, a Board medical advisor, in his November 24, 1997 opinion indicated that the worker's diagnosed reflex sympathetic dystrophy was likely related to his compensable right foot and ankle injuries. He also agreed with Dr. Clarke that the worker would likely not be able to return to his former employment. He recommended a referral to a multidisciplinary pain clinic. He recommended that the worker be re-examined for a PFI related to the chronic regional pain syndrome (reflex sympathetic dystrophy). Dr. Jefferys, in his February 17, 1998 pain clinic report states: "This man presents with continuing pain in the right foot. There is a possibility that this may be sympathetically maintained."

The vocational rehabilitation consultant (VRC) referred this matter (and a psychological referral) back to the claims adjudicator. He also indicated that the employer had advised him there was no suitable alternate employment available for the worker.

The VRC then reopened the 1992 claim for vocational rehabilitation allowances from January 5, 1998 to May 6, 1998. The worker also received further temporary wage loss benefits from June 15, 1998 to June 21, 1998 and July 27, 1998 to August 2, 1998 while he attended a pain program. The worker was released on June 24, 1998 from the pain program to be treated for non-compensable back problems. He was subsequently discharged from the pain program on July 28, 1998 because of a problem with alcohol. The discharge summary report stated that relative to his right foot injury the worker remained not fit to work at his pre-injury employment.

The history of the reopening of the worker's 1992 claim in 1998 is set out in *Appeal Division Decision #2001-1541 dated August 2, 2001* (published at www.worksafebc.com). I find that it is not necessary to restate the entire background information and evidence contained in this decision. The Appeal Division panel heard the worker's appeal of the December 15, 2000 Review Board findings. The Appeal Division panel defined the issues as (1) whether the Board appropriately terminated vocational rehabilitation benefits on May 6, 1998; (2) whether the worker's right foot injury had plateaued in April of 1998; and (3) whether the Board appropriately applied section 57 of the Act to suspend wage loss benefits.

The Appeal Division panel held that the worker was entitled to the payment of temporary wage loss benefits from October 23, 1997 until the claim was reopened for treatment (less vocational rehabilitation benefits paid by the VRC). The worker's condition had not yet plateaued at the time the May 13, 1998 decision had been issued. It was also premature to both implement and terminate vocational rehabilitation benefits because the worker needed to be treated for his reflex sympathetic dystrophy. The evidence indicated that the worker's disability in the fall of 1997 and throughout 1998 was primarily because of the reflex sympathetic dystrophy and not a problem with alcohol. There was insufficient medical evidence to assume the worker could return to his pre-injury employment except for his alcoholism. At the time that wage loss was terminated in August of 1998, the Board had yet to undertake a functional capacity evaluation and an employability assessment. The panel indicated a proper employability assessment was needed to determine suitable and reasonably available employment. The panel referred the issue of wage loss prior to October 1997 back to the Board to determine.

Because of the December 15, 2000 Review Board findings, the worker had been paid temporary wage loss benefits from August 3, 1998 to March 7, 2001 (March 2, 2001 decision). After the Appeal Division's August 2, 2001 decision the worker was paid further temporary wage loss benefits from October 23, 1997 to January 4, 1998, May 7, 1998 to June 14, 1998 and June 22 to July 26, 1998.

The worker undertook a functional capacity evaluation (FCE) on November 21, and 22, 2001. The worker reported that he had been laid off as of March 9, 1996. The November 28, 2001 FCE report indicated the worker felt he could not return to work because of pain and lack of strength in his right foot. He completed a pact spinal function sort test reliably. His score corresponded to the sedentary range of physical demand characteristics. He reported that he was able to sit for an unlimited period of time, and stand and walk for approximately 60 minutes. He indicated that he did not drive. The worker's heart rate was too erratic to proceed with the strength component of testing on day one of the assessment. The worker's right foot was observed to be more swollen than the left both pre and post functional testing. The right foot was also cooler to touch than the left foot and had a red-blue color. The worker's range of motion was significantly limited in all planes including dorsiflexion, plantar flexion, inversion and eversion with less than 5% of movement. Because of the worker's heart rate strength

testing was not completed. The worker was very cooperative and it was found inappropriate to comment on consistency because there was a lack of evidence to support whether the worker's results were consistent. There was no overt pain behavior displayed. The worker demonstrated an antalgic gait involving significant right-sided limp, which was also noted during stair climbing and stepladder tests. With tasks in standing he bore the majority of his weight on his left leg to compensate for the right foot and leg pain. Because of the physiological restrictions regarding the worker's heart rate the FCE could not constitute a valid and true representation of the worker's current functional ability.

As previously mentioned Dr. Jefferys' November 21, 2001 examination revealed that the worker had "no very marked evidence of complex regional pain syndrome" (reflex sympathetic dystrophy) at that time.

The Board also undertook video surveillance of the worker on February 26, 27, and 28, 2002. This video surveillance was reviewed and commented on by Dr. Atkins (claim log entry dated November 11, 2002) and a Board nurse advisor (claim log entry October 18, 2002).

The worker undertook a further FCE on February 27 and 28, 2002. The worker demonstrated the ability to work at medium strength employment. Based on muscular recruitment patterns and changes in heart rate, it was determined that the worker did not demonstrate maximal physiological effort throughout testing. The worker reported being able to walk for 1 to 1.5 hours. He was unsure of his standing tolerance. He completed the pact functional sort test in a marginally reliable fashion. This score fell within the sedentary range of physical demand characteristics. There were no limitations identified in regards to bilateral grip strength, forward bending in sitting and standing, rotation in sitting, rotation in standing, crawling, sitting and left upper extremity coordination. There were functional limitations with deep static crouching, repetitive squatting, standing, stepladder climbing, balance, and right upper extremity co-ordination. These limitations were because of increased right ankle pain and/or decreased right ankle range of motion. The worker did not demonstrate the functional ability to return to his pre-injury employment as a deck hand/ cook. The worker was cooperative and attempted to complete all activities to the best of his abilities. The worker did demonstrate several overt pain behaviours.

The February 20, 2003 employability assessment concluded that there had not been any effort by the worker to seek re-employment. The worker was found fit for suitable employment. The possible suitable occupations included assembly of manufactured homes and various wood products assembly positions.

After the implementation of the Appeal Division decision a number of appeals were made by the worker to the Review Board. These appeals were continued and completed as WCAT appeals. The history of these subsequent appeals are outlined in *WCAT Decision 2003-01555-RB dated July 17, 2003* (published at www.wcat.bc.ca).

Again, I do not find it necessary to restate the entire background and evidence outlined in this decision. The WCAT panel defined the issues under appeal as (1) whether the worker was entitled to temporary wage loss benefits from March 6, 1996 to October 22, 1997; and (2) whether the worker was entitled to vocational rehabilitation benefits subsequent to the March 7, 2001 termination of wage loss benefits.

The July 17, 2003 WCAT decision found that the worker had ongoing right foot disability that would have likely impacted his employment to some degree had he continued in that employment between March 6, 1996 and October 22, 1997. The worker was only entitled to temporary wage loss benefits between September 17, 1997 and October 22, 1997 when there was sufficient evidence of a deterioration (of a temporary nature) in the worker's pensionable right foot and ankle condition. The worker was found to be unfit to resume his pre-injury employment when wage loss benefits were terminated in March of 2001. The WCAT panel found that vocational rehabilitation assistance was necessary. Further, medical information indicated that occupations involving extensive standing, walking or climbing were contradicted. The worker was entitled to vocational rehabilitation benefits from March 7, 2001 to October 18, 2002.

Although the WCAT panel found that the worker was not entitled to continued vocational rehabilitation assistance between October 18, 2002 and the date of the WCAT panel's decision (July 17, 2003) it was incumbent on the Board to establish a reasonable vocational rehabilitation plan and offer such to the worker. The worker was entitled to vocational rehabilitation benefits from the date of the WCAT panel's decision (July 17, 2003) through to the offer of a vocational rehabilitation plan, and thereafter should the worker actively participate in it. The WCAT panel stated that should the worker in the end decline the proposal offered by the Board, then benefits would appropriately be terminated at that time.

A VRC outlined, in his July 30, 2003 decision, the worker's entitlement to vocational rehabilitation benefits because of the July 17, 2003 WCAT decision and what further assistance he was offering the worker (job search and an alcohol and drug program). The September 9, 2003 decision reviewed the July 30, 2003 decision and restated the vocational rehabilitation assistance to be offered to the worker.

The review officer who reviewed the July 30, 2003 and September 9, 2003 decisions found that the VRC had to provide the worker vocational rehabilitation allowances from July 17, 2003 until a suitable vocational rehabilitation plan was developed and offered to the worker. These allowances would continue thereafter contingent upon the worker's active involvement and participation in the plan, in accordance with policy item #85.30 of the RSCM I. She found that it did not appear that the VRC had made an attempt to formulate a vocational plan with the worker. It was not enough to offer drug and alcohol program sponsorship and 12 weeks of job search benefits. The worker was entitled to a realistic, collaborative vocational rehabilitation plan that was consistent with service objectives. This may necessitate completion of a new employability assessment.

The VRC provided a May 3, 2003 decision as a follow up to the February 16, 2004 Review Division decisions which is now the subject of a review request by the worker.

Entitlement to a the Loss of Earnings Award

It is premature to determine whether the worker had suffered a projected loss of earnings because there is a need for an assessment of any increased PFI of the worker's right foot and ankle.

I vary the decision not to grant the worker a projected loss of earnings to the extent of directing the Board to assess any increased PFI before determining whether the worker has suffered a projected loss of earnings.

Further, I find that if there is any increased PFI assessed this will necessitate the need for a new employability assessment to take in account any increased PFI.

I acknowledge that in the recent May 3, 2004 decision, the VRC indicates that he will proceed with an updated employability assessment in accordance with the February 16, 2004 Review Division decisions. This supports the worker's legal counsel's submission that it was premature to determine the issue of a projected loss of earnings prior to the implementation of these February 16, 2004 Review Division decisions.

The CADA relied upon the VRC's February 20, 2003 employability assessment in finding that the worker was not entitled to a projected loss of earnings pension. Although I have found that there is a need for a new employability assessment to take into account any increased PFI I want to make some general observations which support the further need for a new employability assessment.

The new employability assessment should take into account the worker's functional capabilities and restrictions, age, education, level of literacy, speech impediment, transferable skills, experience and aptitudes.

The February 20, 2003 employability assessment states: "The major obstacle to return to work is the worker's own conviction that he is disabled plus the non-compensable alcohol problems that have been well documented on the file." However, the July 17, 2003 WCAT decision indicated that irrespective of the difficulties associated with the worker's alcohol abuse, the fact remained that his compensable disability was known to have precluded him from resuming his pre-injury employment. The worker was found to be eligible for vocational rehabilitation assistance and the Board was responsible for formulating with the worker, a vocational rehabilitation plan. The July 17, 2003 WCAT decision also recorded the worker's evidence that he was not familiar (in skills and experience) with the jobs listed in the February 20, 2003 employability assessment.
The review officer, in her February 16, 2004 decisions acknowledged the worker had physical limitations as well as limited education and transferable skills. The worker has not worked since March of 1996. She found that the worker was entitled to a realistic,

collaborative vocational rehabilitation plan that was consistent with the service objectives in policy item #85.40 and the WCAT finding**.** She stated:

> While this may also necessitate completion of a new EA, taking into consideration the various evaluations of the worker's functional capabilities, education level, skills, experience and aptitudes, at the very least it would require that the worker be provided or offered sufficient means, support and requisite skill development to achieve the employment and/or TOJ options identified to date. This may include further vocational assessment, job finding club, job placement, work assessment and or TOJ sponsorship support.

The worker's actual level of education appears to be unclear. He appears to have had very little formal education (three years of formal French education). A VRC, in a March 17, 1993 memorandum, indicates the worker completed grade 8 and later grade 12 equivalency. A VRC, in a January 8, 1998 memorandum, indicated the worker had extreme difficulty reading and writing in English and French. He indicated the worker's skill base was extremely limited. In a May 6, 1998 memorandum the worker was described as a functional illiterate. The March 3, 2000 employability assessment final summary noted that the worker had not completed any formal vocational testing with regard to aptitudes, interests, or other work related factors. The summary indicated that the lack of formal testing might reflect the worker's low educational level and functional illiteracy. The worker's actual functional academic level was unclear and he did not appear to have undergone any specific testing for purposes of clarification.

The worker also has a speech impediment. Dr. Anderson, in his June 28, 1995 report, noted the worker reported that he did not do well in school and that the worker had a slight stutter, at times. Dr. Mack, a board medical advisor, in his March 23, 1993 examination report noted the worker was articulate with an occasional stammer. The March 3, 2000 employability assessment also noted the worker had a mild stutter which limited the worker's articulation. Dr. Dorward, a registered psychologist, in his brief psychological assessment report (March 19, 2002) stated:

> He has a noticeable stutter that he says is worse when anxious. He stated that he was anxious about our interview. The stutter was not so bad as to impact communication. He would stutter on a word about every 5 minutes or so depending on the word, of course.

Conclusion

I allow the worker's appeal, in part. I make the following decisions:
I find that the September 22, 2003 Review Division decision should not be cancelled based upon a breach of natural justice committed by the review officer. The review officer's breach of natural justice has been cured by affording the worker and his legal counsel natural justice in the course of this appeal to WCAT.

I vary that part of the September 22, 2003 Review Division decision which confirmed the April 16, 2003 decision to increase the loss of function award to the extent of directing the Board to assess any increased PFI now that the worker's condition has plateaued. The Board will also have to determine whether any increased percentage of PFI should be assigned to the 1990 claim. After these decisions are made the Board will have to determine the pension wage rate(s).

I vary the effective date of the pension to February 2, 2000 when the Board had found that the worker's condition had once more plateaued (March 2, 2001 decision). The date of March 8, 2001 was chosen because of the case manager's interpretation of the December 15, 2000 Review Board findings which directed that the worker be paid wage loss benefits until he was in receipt of a decision letter advising him that his condition had plateaued.

I vary the September 22, 2003 Review Division decision not to award a projected loss of earnings pension to the extent of the Board determining any increased PFI. It is premature to make a decision on whether the worker has suffered a projected loss of earnings until the worker is assessed for any increased PFI. I also find that there is a need for a new employability assessment to take into account any increased PFI assessed.

I have also made some general observations which further support the need for the new employability assessment to take into account the worker's compensable physical restrictions and limitations, his education, his age, his level of literacy, speech, experience and transferable skills.

No expenses have been requested with respect to this appeal and I order none under section 7 of the *Workers Compensation Act Appeal Regulation B.C. Reg. 321/02.*

James Sheppard

Vice Chair

JS/pme

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