

Noteworthy Decision Summary

Decision: WCAT-2004-04219 **Panel:** Beatrice Anderson **Decision Date:** August 11, 2004

Applying section 23(1) of the Workers Compensation Act – The WCAT panel rejected a medical opinion that placed the worker’s impairment of the whole person at 0%, reasoning that since the worker had been left with an impaired liver, permanent symptoms and sensitivities, and diminished employment prospects, the nature and degree of a worker’s disability could not be zero

The Workers' Compensation Board (Board) accepted the worker's claim for hepatitis from exposure to halothane anaesthetic gas. She stopped working permanently as a veterinary assistant and took a job as a part-time receptionist for a different employer. The Board decided she suffered no permanent impairment and that she was unlikely to suffer any loss of earnings. Its decision that the worker had no functional impairment was based on an assessment by a Board internal medicine consultant that the worker was at 0% in class 1 for hepatitis caused by halothane gas. However, both the Board's occupational medicine advisor and the internal medicine consultant described the worker as having a permanently compromised liver. The latter wrote that the worker has evidence of persistent liver disease with elevated hepatic enzymes, but went on to say she did not have "impairment of the whole person". The worker appealed.

The worker suffers a set of physical symptoms that are the manifestations of the permanent compromised liver, and her hepatitis caused fatigue, headaches, shortness of breath, joint pain and other symptoms. She cannot be exposed to a variety of organic compounds without risking more damage to her liver, and must avoid any employment that brings her into contact with gas or vapour containing halogen and other organic solvents. She cannot return to her pre-injury employment and her earning capacity is impaired. Despite the fact that the laboratory results were at the low end of the scale, she has the classic signs of hepatitis. Although the internal medicine consultant placed the worker's impairment of the whole person at 0%, it must be kept in mind that section 23(1) of the *Workers Compensation Act* requires the Board to estimate the "nature and degree" of the personal injury. The nature and degree of the worker's disability cannot be zero where she has been left with an impaired liver, permanent symptoms and sensitivities and diminished employment prospects. The panel found that the worker had a permanent partial disability equal to 2% of a totally disabled person.

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Panel:Beatrice K. Anderson, Vice Chair

Introduction

The worker appeals the October 9, 2003 decision of the Review Division which confirmed the Workers' Compensation Board's (Board's) earlier decision to deny the worker a permanent partial disability (PPD) award.

Issue(s)

At issue is whether the worker is entitled to an award for PPD.

Jurisdiction

Section 239 authorizes an appeal from the Review Division on specific matters to the Workers' Compensation Appeal Tribunal (WCAT). WCAT was established on March 3, 2003 by the *Workers Compensation Amendment Act (No. 2), 2002* (Amendment Act). Section 250(2) of the Amendment Act requires that I apply the policies of the board of directors of the Board, found in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) and *Volume II* (RSCM II).

Background and Evidence

In 1998, this now 51-year-old former veterinary assistant, had a claim accepted for hepatitis from exposure to halothane anaesthetic gas. Although the Board subsequently readjudicated the acceptance of this claim, the link between the worker's hepatitis and the anaesthetic was confirmed on appeal. The Board paid wage loss benefits between December 1998 and April 1999, when the worker stopped working permanently as a veterinarian's assistant.

In July 2000, the worker began a part-time job as a receptionist with a City Hall. In October 2001, the Board's occupational health medical advisor confirmed that the worker had permanent impairment of her liver and would be unable to return to her pre-injury employment. She also had to avoid halothane and certain other organic solvents in the future.

On October 29, 2002, the Board's internal medicine consultant reviewed the worker's liver function tests up to December 2000. He placed her in class I (0% to 14% impairment), because of the "minimal disturbance in function and no disturbance of bilirubin metabolism" and said she had 0% impairment of the whole person. The

question of the worker's impairment of earning capacity was assessed by a vocational rehabilitation consultant (VRC). The Board offered the worker job search allowances while she looked for alternate employment. The worker countered by proposing that she put that money toward additional courses that would increase her "chances of securing employment with a city and the Board agreed. The VRC concluded that the worker would not likely suffer a loss of earnings. The Board then issued a decision denying the worker a pension award and this was upheld by the Review Division.

At the hearing, the worker gave evidence about the symptoms she suffers, her sorrow about losing her employment as a veterinarian's assistant, the impact of the symptoms on her employability and her income losses since 1998.

At the time the worker began to exhibit hepatitis symptoms, she was working approximately 25 hours a week for the employer who was in the process of establishing his practice. The job the worker presently has, a part-time job share, where she works two days one week and three days the next, means she is working fewer hours than she was before becoming disabled by hepatitis.

The worker described the symptoms that are with her all the time; fatigue, shortness of breath, shooting pains through the body joints, and aching. She said her symptoms were similar to those caused by flu, although without the temperature elevation. The worker also reacts to many organic solvents and vapourizing gases. The family had to fill in the pool because of her inability to tolerate chlorine fumes. The worker cannot take medications which have a pronounced effect on the liver such as Tylenol. Volatile gases, oil-based household or commercial paints, exhaust fumes, air-fresheners and other smells and vapours cause her symptoms to intensify. The worker said that at the end of three days of working at her clerical job, she is exhausted and needs time to recover.

The worker job shares with another woman who "owns" the position they share. The co-worker gets the benefits, pension contributions, vacation and sick days, which are prorated to reflect the 50% of the work she does. The worker gets an amount in lieu of these benefits. The worker and her co-worker are employed in the real estate division of a City Hall. There is little or no exposure to the public and there is no public area so that the cleaning solvents used by the staff are more benign and the worker said that they are aware of her problems and are careful about what they use. The worker described her job as being at the lowest clerical level; she answers phones, enters basic data into computers, sorts and delivers mail within the department. She uses a fax machine and files documents away. The worker said the job is no challenge but is the right amount of hours for her. Although she is taking computer courses offered by the employer to upgrade her skills, she does not now possess the typing skills to move into a higher clerical level and says that she does not have the stamina to handle more work than she is presently doing. The worker described her position as somewhat precarious because it is contingent on her co-worker continuing to want part-time work, and she is vulnerable to "bumping" should any more senior staff member wish to take

over her responsibilities or hours. The worker is also a temporary auxiliary staff and this also makes her vulnerable to job loss.

The worker spoke eloquently about her fears of requiring major surgery or developing cirrhosis of the liver and her struggles to manage the limitations imposed by hepatitis.

Reasons and Findings

On June 30, 2002, the *Workers Compensation Act* (Act) was amended and significant changes were made to entitlement provisions. However, the worker's injury and the first indication of impairment occurred before June 30, 2002 and the former Act and the provisions of the RSCM I apply to this appeal. Section 23(1) of the former Act provided the authority for the Board to pay a pension award where a worker suffered permanent disability which impaired their earning capacity. The dual system of assessing permanent disability is set out in Chapter 6 of the policy manual. In this case, the Board decided not only that the worker had no permanent impairment, but she was not likely to suffer any loss of earnings either.

I do not agree with either conclusion.

The Board's decision that the worker had no functional impairment was based on the assessment by the Board internal medicine consultant that the worker was at 0% in class I for hepatitis caused by halothane gas. However, both the Board's occupational medicine advisor and the internal medicine consultant describe the worker as having a permanently compromised liver. In a log entry dated October 25, 2001, the occupational medicine advisor said that the worker "probably has a permanent functional impairment of her liver as indicated by raised liver enzyme levels". He also wrote that in certain situations, the worker "will be at significant risk of increasing the permanent functional impairment of her liver". The Board internal medicine consultant, in a memo dated October 29, 2000, wrote that the worker "does have evidence of persistent liver disease with elevated hepatic enzymes". He went on to give his reasons for concluding that despite the evidence of liver disease, she did not have "impairment of the whole person".

I disagree. The worker's hepatitis causes fatigue, headaches, shortness of breath, joint pain and other symptoms. No one doubts that these symptoms are genuine and indeed, it was because of the evidence of impaired liver function that the Board concluded that the worker could not return to her pre-injury employment. Even more significantly, the worker now has to avoid any employment that brings her into contact with gas or vapour containing halogen and other organic solvents.

The worker cannot do her pre-injury employment and her earning capacity is impaired. She cannot be exposed to a variety of organic compounds without risking more damage to her liver. The worker has a set of physical symptoms that are the manifestations of the permanently compromised liver. The worker is required to undergo liver function

tests four times a year. Despite the fact that the laboratory results are at the low end of the scale, she has the classic signs of hepatitis.

Although the internal medicine consultant places the worker's impairment of the whole person at 0%, it must be kept in mind that section 23(1) of the Act requires the Board to estimate the "nature and degree" of the personal injury. The nature and degree of the worker's disability cannot be zero where she has been left with a damaged liver, permanent symptoms and sensitivities and diminished employment prospects.

Item #97.40 requires a disability awards officer (DAO) to treat the disability awards medical advisor's opinion as expert evidence. However, the DAO, in whose place I stand, may consider other factors in addition to the opinion. I understand the internal medicine consultant to be saying that as of December 2000, the worker did not have many of the serious manifestations of the liver disease. Consequently, I place her at the very low end of class I, at 2%.

I also conclude that the worker's loss of earnings potential has not been fully assessed. The worker does not have a very high wage rate, but she is earning less now than she was before this injury. Implicit in the Board's reasoning is that the worker can find alternate employment with more hours and an increased wage. I am satisfied, based on the evidence of the worker and the occupational medical advisor's opinion, that the worker has fewer options than the Board has recognized. She has managed to find alternate employment in an area which keeps her away from the public and which the worker's fatigue levels allow her to maintain. The worker is now 51 years old and there is no expectation that the symptoms she presently lives with will improve. The worker has been fortunate to find a part-time position that pays relatively well and which accommodates the symptoms caused by her permanent disability. I find the worker has maximized her employability in this position and she is entitled to a loss of earnings assessment based on this conclusion. There are also liver enzyme tests on file now that were done after 2000. I recommend that these be reviewed by the internal medicine consultant to see if things have changed since December 2000.

Conclusion

For the reasons set out above, I find that the worker has a PPD equal to 2% of a totally disabled person. I also conclude that the worker has maximized her earnings in the position she now occupies and is entitled to a loss of earnings calculation on that basis. The decision is varied. Pursuant to section 7 of the *Workers Compensation Act Appeal Regulation, B.C. Reg. 321/02*, the worker is entitled to the expenses of the appeal that she can establish.

Beatrice K. Anderson
Vice Chair

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