

Noteworthy Decision Summary

Decision: WCAT-2005-00581-RB **Panel:** Beatrice Anderson **Decision Date:** February 1, 2005

Investigation – Invasion of privacy – Consent – Video surveillance – Section 96 of the Workers Compensation Act – Privacy Act

There was no invasion of privacy where a worker was videotaped riding a lawnmower on her own property because the videotape was taken from a public place. The fact that the worker was on private property at the time of that filming does not raise legal or policy questions such that the panel should not view or give weight to the surveillance videotape. The worker could not demand privacy or be surprised that the Workers' Compensation Board (Board) would take steps to ascertain the validity of her claim when she is seeking a pension from the Board on the basis of her inability to work.

The worker, a chemist, developed bilateral tendonitis and carpal tunnel syndrome and was assessed for a permanent functional impairment. The Board appeared to have accepted that she was unemployable but asked its investigation unit to put her under surveillance to see how functional she was. The Board reviewed the videotape evidence and concluded that the worker could earn 50% of her pre-injury income in a sedentary professional occupation. The worker appealed, arguing that she did not consent to the surveillance and that her right to privacy had been breached.

It would make no sense to give specific consent to surveillance at the time it is being contemplated for obvious reasons. When the worker made an application for compensation, the application gave the Board the consent to enquire into all of the relevant medical details and background pursuant to its authority in section 96 of the *Workers Compensation Act*.

In an earlier decision, a worker was filmed in the parking lot of his condominium complex and the panel relied on case law under the British Columbia *Privacy Act* to find that there was no invasion of privacy. Likewise, in the present appeal the videotape was taken from a public place and filmed the worker riding a lawnmower on her property. The fact that the worker was on private property at the time did not raise legal or policy questions such that the panel should not view or give weight to that evidence. Other sightings of the worker were in public areas where she had no expectation of privacy. The worker could not demand privacy or be surprised that the Board would take steps to ascertain the validity of her claim when she is seeking a pension from the Board on the basis of her inability to work. Following a Newfoundland case, the panel considered that, by making a claim for compensation, the worker had effectively given her consent and waived her right to privacy.

The Board's decision to get information about the worker's current level of functioning from other sources was reasonable in the circumstances because five years had elapsed since the last evaluation of her level of function, and there were few physical findings in the medical reports to account for her claims of total impairment. Another panel found that covert surveillance is only warranted if the Board considers that either the worker's evidence is not credible, or, for some reason, the Board cannot rely on the worker's own evidence about his condition without obtaining collateral evidence. Although this is generally true, there are other circumstances where surveillance may provide necessary information and this was one of them.

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Panel: Beatrice K. Anderson, Vice Chair

Introduction

The worker appeals the decision of a Workers' Compensation Board (Board) officer set out in a letter dated October 25, 2001 which described the terms of her pension entitlement. The worker was advised of the Board's conclusion that she had a permanent partial disability equal to 12% of a totally disabled person. The Board also concluded that the worker would not be able to return to her pre-injury employment but was capable of earning \$1,900.00 (or 50% of her pre-injury wage) a month in physically suitable alternate employment. Therefore, effective April 11, 1994, the worker would be paid a loss of earnings pension based on the difference between her wage rate (statutory maximum for 1991) and income the Board deemed the worker capable of earning.

Issue(s)

At issue are the terms of the worker's pension entitlement. This includes the amount of the functional award, the effective date of the award, the wage rate upon which its value is calculated and the Board's conclusions about the worker's earning capacity.

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 worker has had a number of appeals before and readers are referred to Review Board decisions dated September 15, 1998 and July 12, 2002 for a detailed background of the claim.

In 1991, the worker, who was an analytical chemist, developed bilateral hand, arm and shoulder symptoms. The claim was accepted for bilateral flexor tendonitis and carpal tunnel syndrome. By 1993, the Board had concluded that the worker could work as an analytical chemist but would require modification if she were to continue without recurrent aggravations. In April 1994, the worker's wage loss benefits ended and

rehabilitation benefits began. These stopped in October 1994 after an aborted functional evaluation and the Board concluded that the worker was no longer participating in her rehabilitation. They also concluded that she was not entitled to further wage loss benefits. The worker appealed those decisions along with other ones and, in findings dated September 14, 1998, the panel dealt with those issues as well as finding that the worker's depression was not compensable, but that the chronic pain present in her hands, wrists, arms, shoulders, neck and upper back was a consequence of her compensable injury. The worker's other pain complaints in the lower extremity were not. The claim was referred to disability awards to consider entitlement to a permanent functional impairment and further rehabilitation endeavours when the worker's depression and non-compensable conditions permitted her to get active again.

Two months after the Review Board finding, the worker's hands and wrists were assessed for permanent functional impairment. The physician who conducted and reviewed the test results said that there were significant inconsistencies present in the area of effort which he could not explain on medical grounds. However, despite this, he said that "some of the data" might be in keeping with the rest of the medical information on file. The disability was measured bilaterally at 8.8% for limitations in the wrists and elbows. To this was added a factor for enhancement, because of the bilateral nature of the condition, and 1.4% for subjective complaints. The total award was 12%.

For reasons which are not entirely clear, there was a very long delay between the permanent functional impairment examination in November 1998 and the employability assessment that was first done in June 2000. By this time, the Board appeared to have accepted that the worker would not be able to return to her employment as a chemist. In fact, the first assessment of the vocational rehabilitation consultant (VRC), based on the worker's presentation in November 1999, the medical reports from her doctors and the compensable and non-compensable conditions, was that the worker was unemployable. Later that month, the adjudicator asked the Board's field investigation unit to put the worker under surveillance to see how functional she was. Tapes were made of the worker in July, September and October 2000.

The investigation did not go smoothly. The worker discovered the operation and objected vigorously to the investigator's approach and methods. Eventually, in November 2000, the adjudicator and the head of the Board's field investigation unit visited the worker at her home. Their comments are described in memos #45 and #47.

After this visit, the adjudicator advised the VRC that her conclusions about the worker's employability would have to be revisited.

The VRC reviewed the surveillance videos and compared them to a functional abilities evaluation done in September 2000 by the worker's LTD carrier. In the employability assessment which followed, the VRC concluded that the worker displayed the ability to perform activities of daily living and considered a number of occupations which would provide sedentary or light employment but would also capitalize on the worker's

demonstrated ability to manage academic demands. These are set out in the addendum to the employability assessment dated April 26, 2001 and they include an occupational health and safety officer, human resources management (which included legal and labour relations, business operations, time and stress management) and employment in the international trade and transportation field.

The addendum concludes with the suggestion that the worker would be employable in a sedentary professional occupation. The VRC also said that she recommended a loss of earnings pension set at 50% on the basis that it was possible that the worker would be less active earlier in the day and become more active later.

The worker responded to the employability assessment and addendum in a 12-page letter. In essence, the worker disputes the Board's conclusion that she is capable of managing employment for even 50% of the time. She says that when she is active, the pain reaction may not occur immediately. She may "pay the price" for her actions for weeks later. The worker described her pain as chronic and she said that this explained why there were no facial grimaces, a point made by the adjudicator after the site visit. The worker's letter set out at length her efforts to live with chronic pain, the aggravating effect of any level of activity, and the impossibility of managing any sort of organized regime.

Memoranda on file suggest that the adjudicator and disability awards manager were not confident that the VRC's conclusion that the worker was restricted to part-time work was justified. As a result, the material from the investigations was reviewed by the full disability awards committee, including the senior medical advisor. His response is set out in a memo dated July 16, 2001.

He comments on the sedentary activities that the worker is seen doing; driving a lawn tractor, an automobile, sitting in a waiting room, walking in a computer store and in a graveyard. He described the worker as displaying "smooth, fluid and apparently unimpaired movement in the hands, wrists, elbows and shoulders". He also comments that the worker managed "various fine coordination activities". However, he also pointed out that at no time was the worker seen doing anything "vigorous or prolonged enough" to impugn the VRC's conclusions.

The decision that the worker could earn 50% of her pre-injury income in some sedentary professional level employment followed.

At the oral hearing, the worker described the level of her symptoms and how these impair her from doing anything on a regular basis.

The worker said she is always in pain, but it varies in intensity from day to day, and even throughout any one particular day. Her pain does not follow any pre-planned routine, but she keeps trying her routines to see if it results in any positive change in her condition. The worker said she would be unable to get up and go to any regular job or

home business because she would not be able to satisfy any professional obligations. The worker often suffers from sleepiness and dizziness, as well as pain. The worker said her condition has worsened since 1994. She now has fibromyalgia which she has been told could have been caused by exposure to chemicals in the workplace. Her concentration and memory have been deleteriously affected since 1994. Noise is an irritant as is remaining in a static position such as being confined in a car. Sitting in a bus or on a train would not be possible. The worker said that she often “pays” for activity levels later on as her symptoms escalate. The duration of the escalation depends on what she has done and how symptomatic she was to start.

The worker said that some things do ameliorate her symptoms. Moderate massage and floating in a pool help. However, she cannot go to a public pool because she has environmental sensitivities. Riding horses helps with her depression and keeps her functional. Massage and physiotherapy also help physically. The worker struggles with activities of daily living like laundry and even walking on hard surfaces can cause an increase in her symptoms. Stress of any sort makes her problems “way worse”.

The worker said that she had not seen the videotapes until the week of hearing. She had some comments about the tape as well as the memorandum written for the file by the disability awards officer and field investigator. The worker said that all the areas around her house are horse pastures and that the only time she mows them (by using a ride-on mower) is to tidy up what they have not eaten and to keep the area around the electrical fences neat. The worker said she just goes up and down on the mower. Shifting is very straightforward and no complicated hand activity on her part is required. She said that in the prior year she had only done it twice and on other occasions, other family members had helped. The worker described her neighbour as a very good friend and someone who helps her whenever possible. The worker said that just because she was not seen on the other occasions referred to in the surveillance reports, this did not mean that she was away from home. The worker said that she was home but, because of her condition, she “needs to be reclusive”.

The worker also described her experiences at the functional evaluation that was done on September 19 and 20, 2000 at the request of her insurance carrier. She was very reluctant because of her bad experience six years earlier in 1994 at the functional evaluation done by the Board. She said that on this occasion, it went “much better” because the examiners were more responsive to her situation and “understood I had limitations”. She also followed through with a mandatory recommendation by the insurance carrier that she have a further medical examination in order to rule out further medical problems (see Dr. Sweeting’s report of March 15, 2001).

Reasons and Findings

The worker's injury and the pension award predate the changes to the statute on June 20, 2002. The former *Workers Compensation Act* (Act) and the policy in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I) apply to this appeal.

The worker argues that her loss of earnings pension should be increased from 50% to 100%. She did not make any argument about the rest of the pension issues and, as a result, I confirm those aspects of the pension.

The worker argues that "emerging law" pursuant to the Privacy Act and the Freedom of Information and Protection of Privacy Act, requires that there be both consent and probable cause before surveillance could be initiated. The worker argues that there was no reason to put her under surveillance as all the reports to date indicated that she was acting in good faith and I should therefore disregard the video evidence. Moreover, she submitted that her right to privacy was breached because she had been filmed on her property as opposed to a public place.

Alternatively, the worker argues that even if video surveillance is taken into account, there is nothing in them that warrants a reduction in her pension of 50%. She says that the nature of her permanent disability makes holding a job impossible.

Section 246(2) of the Act provides that I may receive evidence or information on oath, or in some other method I consider appropriate whether or not the evidence is admissible in court. Section 96(2) of the Act gives the Board exclusive jurisdiction to enquire into all matters and questions of fact relevant to its determination, including the existence and degree of disability, the permanence of disability and the degree to which earning capacity has been affected by an injury.

The worker argues that she did not consent to the surveillance, it was not justified in view of the evidence as it stood then and that her privacy was breached by being filmed on private property.

It would make no sense to give specific consent to surveillance at the time it was being contemplated for obvious reasons. When the worker made an application for compensation, the application gave the Board the consent to enquire into all of the relevant medical details and background. Section 96 provides the authority to procure the necessary information to make the kinds of decisions that the worker was requiring of the Board.

Another panel in *WCAT-2003-03300* indicated that covert surveillance is only warranted if the Board considers that either the worker's evidence is not credible, or, for some reason, the Board cannot rely on the worker's own evidence about his condition without obtaining collateral evidence. Although I agree that this is generally true, there are

other circumstances in which surveillance may provide necessary information and I think this is one of them.

Because of the long delay caused by appeals, when this file went to a VRC for employability conclusions, five years had elapsed since the last evaluation of the worker's level of function. The VRC decided that given the worker's position that she could not work and the failure of the previous functional evaluation unit, there would be no point in repeating the exercise as it would likely yield the same results. The reason the disability awards officer had reservations about the VRC's conclusion that the worker was unemployable was in part because six years had elapsed since the Board had examined the worker's level of function and also because in the medical reports, there had been few physical findings to account for the worker's claims of total impairment. Moreover, in the impairment examination done on November 11, 1998, the examining physicians had reported that there were "significant consistencies" in the worker's level of effort and that there was "no apparent medical reason for these findings". These comments do not mean that the worker was attempting to conceal anything from the Board but I consider the disability awards adjudicator's decision to get information about the worker's current level of functioning from other sources to be a reasonable one in the circumstances.

The worker said she had an expectation of privacy while on her own property. In *WCAT-2003-03969*, another panel dealt with the same issue raised by a worker who was filmed in the parking lot of the condominium complex where he lived. At page 12, that panel said:

Section 88(1) authorizes the Board to appoint others to make necessary inquiries. This would include private investigators such as those who made the tape of the worker. The right of privacy is not absolute. Indeed, even in courts where the ordinary rules of evidence apply, a video tape taken of an individual in a parking lot will not violate the Privacy Act simply because the property was private in the sense that the individual had the right to exclude trespassers from it: *Silber (c.o.b. Stacey's Furniture World) v. British Columbia Television Broadcasting Sstem [sic] Ltd.* [1985] B.C.J. No. 3009 (B.C.S.C.).

Despite three separate attempts to watch the worker, there are only three occasions on which the worker was taped. The first, in July 2000, the worker was seen riding a lawnmower on her property although the video was not taken from private property but from a public place. I find the fact that the worker was on private property at the time of that filming does not raise legal or policy questions such that I should not view or give weight to that evidence. The other two sightings are in public areas where the worker had no expectation of privacy.

Most importantly, in my view, the worker was in effect asking the Board to pay her a substantial sum every month for the rest of her life because she is unable to work.

Having made such a request, the worker cannot now demand privacy or be surprised the Board would take steps to ascertain the validity of the claim before finding that she is entitled to such a benefit.

In *Druken v. R.G. Fewer & Associates Inc.* [1998] N.J. No. 312 (Nfld. T.D.), a plaintiff made a claim for personal injury after a motor vehicle accident. The insurance company hired a private investigator who videotaped the plaintiff. The video showed the plaintiff in both public places and on private property. She sued for invasion of privacy. The court said that when she sued for personal injury, she waived her right to privacy under the Newfoundland Privacy Act. In effect, she had given consent by making this claim. I consider that this is also true of the worker's claim.

The next issue is the question of what weight should be given to the videotape evidence. The worker argues that the functional evaluation done in September 2000 should carry more weight.

That report was commissioned by the worker's insurance carrier. On the front page with the basic information is the diagnosis of the worker's injury which is fibromyalgia. The evaluators described the worker as behaving consistently throughout the testing and they said that her score of 88% indicated that "she was more likely than not to have given a maximal effort". The purpose of the functional capacity evaluation was to assess whether the worker was capable of returning to her pre-injury employment as a chemist. In this sense, it is not helpful because the Board has already accepted that given the worker's impairment and residual symptoms in her hands, wrists and elbows, she could not be an analytical chemist.

The evaluation says that the worker does not meet the job demands for an analytical chemist in these particular areas:

- Prolonged standing
- Prolonged sitting
- Crouching
- Sustained horizontal reaching
- Medium dexterity
- Hand movements
- Upper extremity pushing and pulling
- Whole body pushing and pulling
- Unilateral and bilateral lifting
- Unilateral and bilateral carrying
- Walking
- Prolonged forward bending in sitting or standing
- Unweighted trunk rotation

The staff commented that the worker's heart rate was high and that this was "likely due in part to severe deconditioning from inactivity and in part to nervousness". The

evaluators also commented that the worker's hands and forearms showed swelling after the first day of testing. They said that the swelling "was not typical of a tendonitis or tenosynovitis" but that it could indicate fibromyalgia or "reflex sympathetic dystrophy". The evaluators close with the recommendation that she be seen by a specialist to assess whether she had reflex sympathetic dystrophy.

The worker saw Dr. Sweeting on March 15, 2001 and this was the assessment for reflex sympathetic dystrophy that the functional evaluation staff suggested. His report of that date describes the worker presenting for assessment of:

... an 8 to 10-year history of progressively increasing musculoskeletal pain and stiffness of her spine, diagnosed ... as fibromyalgia.

Dr. Sweeting said that the worker had "an awful lot" of complaints; esophageal reflux, irritable bowel syndrome, interstitial cystitis, palpitations, night vision changes, weakness of grasp, chronic fatigue and environmental hypersensitivity. He ruled out reflex sympathetic dystrophy because the worker had had bone scans in the past which did not show "any excessive uptake of nucleotide". He said, however, that her symptoms were consistent with patients who had fibromyalgia. The only clinical findings he described were:

... quite marked weakness of ankle eversion on the left, pronation of the forearms bilaterally, and abduction of the small fingers, ...

The functional evaluation report does not say that the worker is unemployable and it does not speak to the worker's ability to manage a sedentary part-time job. What it does illustrate, as do many of the other medical reports on file, is that the worker has complaints which far exceed the areas of injury that the Board has accepted and many of her limitations reflect those additional problems. The Board has accepted that the worker has permanent impairment in her hands, wrists and elbows and pain symptoms in the shoulders and neck. Musculoskeletal findings recorded in the functional evaluation describe neural tension in the lower body, decreased mobility in the thoracic and lumbar vertebral segments, pain in the lumbar spine, decreased right hip external rotation, left hip internal rotation and bilateral hip flexion.

Dr. Sweeting and the functional evaluation staff have similar views of the worker; she has fibromyalgia and she does not have active tendonitis or any other specific acquired soft tissue disorder in the areas where the Board has accepted a permanent impairment.

When assessing pension entitlement, the Board considers the effect of an injury on a worker's ability to earn income in the long term. People must be taken as they were at the time of the injury. If a worker had limitations, symptoms or other physical problems but was able to work with them, Board policy recognizes that the permanent injury was the significant factor in the reduced employability and pays a pension accordingly.

However, the reverse is also true. Where a worker develops medical problems after the injury which are not related to it and which impair the ability to work, the pension is not increased or altered to take these non-compensable limitations into account. The Board is only responsible for the impairment of earning capacity produced by the permanent injury.

There is no indication that any of the many problems about which the worker now complains and which are so clearly described in the functional evaluation and Dr. Sweeting's report (as well as others throughout the years) existed before 1991. These are all conditions that appeared to have developed since then. Moreover, they are not attributable to the compensable injury and I am not at liberty to find that they are. Two Review Board panels (by those decisions I am bound) have found that the worker's lower body complaints, depression and fibromyalgia are not a consequence of this injury. The Board has not accepted fatigue, irritable bowel, environmental sensitivity or reflux disease as compensable consequences of the injury. There does not seem to be any question that these other conditions are affecting the worker's level of function and, without question, her employability. Many of the reasons the worker gave for believing that she could not hold onto any sort of job relate to those additional problems.

I do not agree that the functional evaluation results make it clear that the worker is entitled to 100% loss of earnings pension. They take into account many of the limitations that the worker has developed since the injury but which are caused by other diagnoses and the report only excludes her pre-injury employment and does not say that she cannot work at all.

I find myself in agreement with the decision made by the adjudicator. I do not consider that the videotape provides evidence that the worker is capable of managing full-time work. I agree that it does show the worker engaged in activities of daily living that do not appear overly troublesome but the activities are not striking and do not establish that the worker is attempting to present a level of disability that she knows she does not have. Like the disability awards adjudicator and the field investigator, I found the worker forthright and there is no question that she has a sincerely held belief that she is not capable of managing or maintaining any routine or structure in her life as a result of her many limitations. There is also no question that she attributes all this to the compensable injury. I, however, consider that the evidence establishes that the worker's physical limitations go well beyond those which can be attributed to the compensable injury. I accept that the disability awards adjudicator's assessment of part-time sedentary employment is a reasonable one given the limitations imposed by the compensable injury but not by the other conditions.

Conclusion

I confirm the Board's October 25, 2001 decision. The appeal is denied. No expenses are awarded.

Beatrice K. Anderson
Vice Chair

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