

Noteworthy Decision Summary

Decision: WCAT-2008-00343 **Panel:** Cathy Agnew **Decision Date:** January 31, 2008

Findings of Fact – Loss of Earnings Award – Prior Review Division Decision – Prior WCAT decision

This decision is noteworthy for its analysis of the effect on a subsequent WCAT panel of the findings made in prior Review Division and WCAT decisions as they relate to a worker's entitlement to a loss of earnings award.

The worker sustained a low back injury. The Workers Compensation Board, operating as WorkSafeBC (Board), granted him a permanent disability award for subjective complaints. A prior WCAT panel directed the Board to undertake an employability assessment, which took into account her finding that the worker's pain disability limited him to work at light strength occupations for four hours per day. She also directed the Board to consider whether the worker's diagnosed Pain Disorder was compensable.

The Board advised the worker that his diagnosed Major Depressive Disorder would not be accepted as compensable. The Board recognized that the worker could not return to his pre-injury employment, but was considered capable of working 20 hours per week as a telephone solicitor. The Review Division of the Board subsequently accepted that the worker also had permanent psychological conditions. The review officer referred the loss of earnings award back to the Board for a new decision to take into account his permanent psychological conditions. The Board increased the award deeming him capable of working four hours per day, five days per week, performing light courier driving/delivery work or light janitorial work.

On further review, the Review Division referred this matter back to the Board because the review officer was not satisfied that the evidence supported a conclusion that the identified occupations, although suitable, were reasonably available to the worker. The Board completed an updated employability assessment and advised the worker that no change would be made to his loss of earnings award. The Review Division confirmed this decision. The worker appealed to WCAT arguing that his permanent disability award ought to be calculated on a 100% loss of earning basis to reflect the fact that he was unemployable.

The worker's appeal was allowed. The panel found that she had authority to consider whether the occupations the Board identified were suitable and reasonably available. She found she was not bound by the prior Review Division decision. While the findings of fact regarding the suitability of the identified positions may have formed the foundation for a possible loss of earnings determination at the time that the review officer was considering the worker's permanent disability award, no determination of that entitlement matter was made at that time. Findings of fact can change, depending on a worker's circumstances. The Board decision that no change would be made to the worker's entitlement to a loss of earnings award constitutes a new decision with new findings of fact to be made based upon the evidence now available. Therefore, in determining whether the Board has accurately projected the worker's long-term earning capacity for the purpose of establishing his entitlement to a loss of earnings award, the panel had the authority to consider whether the jobs identified by the Board are both suitable and reasonably available to him.

The panel also found the she was not bound by the prior WCAT finding that the worker was limited by his pain disability to working at light strength occupations for four hours per day. The prior WCAT panel had acknowledged that her findings did not address the potential impact of the worker's diagnosed Pain Disorder on his employability. Therefore, when deciding the impact of the totality of the worker's permanent injuries on his future earning capacity, the panel considered that she was not bound by the finding in the prior WCAT decision that the worker was limited to working at light strength occupations for four hours per day, five days per week. While this might accurately describe the worker's limitations when considering only his physical injuries, it was open to the panel to determine the worker's long-term earnings by considering both his physical and his psychological injuries.

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Introduction

The worker appeals from an April 18, 2007 decision of a review officer in the Review Division of the Workers' Compensation Board (Board), operating as WorkSafeBC, that was issued in connection with the worker's entitlement to a permanent partial disability award. The worker's claim was established as a result of an incident on November 4, 1992 while he was employed as a truck driver. He sustained a low back injury, which the Board accepted as an L4-5 disc protrusion.

As a result of an August 14, 2001 decision of the Workers' Compensation Review Board, the worker was provided with a permanent partial disability award based upon 4% of total disability for his subjective low back complaints. On October 21, 2003, a Workers' Compensation Appeal Tribunal (WCAT) vice chair considered the worker's request for an increase in his permanent partial disability award. The vice chair confirmed the percentage of permanent functional impairment for the worker's subjective complaints. She found that the worker should be considered for a loss of earnings award because the locksmith training assistance that had been provided to him by the Board had been unsuccessful due to the limitations imposed by his compensable subjective low back complaints. She directed the Board to undertake an employability assessment, which was to take into account her finding that the worker was limited by his pain disability to work at light strength occupations for four hours per day. She also directed the Board to consider whether the worker's diagnosed Pain Disorder was compensable.

On June 2, 2004 a case manager advised the worker that his diagnosed Major Depressive Disorder would not be accepted as compensable. On August 5, 2004, a claims adjudicator in the Board's Disability Awards Department (CADA) advised the worker that his disability award would be calculated on a loss of earnings basis with deemed long-term earnings of \$1,493 per month (date of injury dollars). Although the CADA recognized that the worker could not return to his pre-injury employment, she concluded that he could work 20 hours per week as a telephone solicitor.

The June 2, 2004 and August 5, 2004 decisions were considered by a review officer on November 3, 2004. The review officer determined that the worker's "pain disorder and depression amounted to 'psychological problems' and resulted in psychological disability" which should be accepted as permanent compensable conditions under his claim. She referred the matter of the worker's loss of earnings award back to the Board for a new decision to take into account his permanent psychological conditions.

On October 24, 2005, the CADA advised the worker that his disability award had been increased by 45% of total disability to account for the impact of his accepted psychological conditions on his future earning capacity. The worker's loss of earnings award was increased to take account of the increased disability resulting from his psychological problems. The worker was deemed capable of earning \$861 per month working four hours per day, five days per week, performing light courier driving/delivery work or light janitorial work.

The worker objected to the CADA's conclusions regarding his projected loss of earnings and on March 31, 2006 a review officer determined that the evidence was insufficient to conclude with confidence that the worker's loss of earnings had been properly calculated. She stated that she was satisfied with the analysis of the CADA and the vocational rehabilitation consultant who had authored the employability assessment in determining the worker's suitability for the identified positions. However, she was not satisfied that the evidence supported a conclusion that the identified occupations were reasonably available to the worker. She directed the Board to:

...conduct further significant research with respect to the reasonable availability of the identified occupations, in accordance with policy items #40.12 and #89.10.

An updated employability assessment was completed on October 2, 2006. On November 10, 2006, the CADA advised the worker that no change would be made to his loss of earnings disability award. This decision was confirmed in the April 18, 2007 Review Division decision that is the subject of the present appeal.

An oral hearing was held at which the worker testified, assisted by a representative from the Workers' Advisers Office and accompanied by his wife.

The accident employer is no longer active with the Board. As the deemed employer, the Employers' Advisers Office did not participate in the appeal beyond filing a notice of participation.

Issue(s)

Has the worker's long-term earning capacity been properly estimated at \$861 per month?

Jurisdiction

This appeal was filed with the WCAT under section 239(1) of the *Workers Compensation Act* (Act). WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply any

applicable Board policy. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal before it (section 254).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The worker's entitlement in this case is adjudicated under the provisions of the Act that preceded changes contained in the *Workers Compensation Amendment Act, 2002* (Bill 49). Policy relevant to this appeal is set out in the *Rehabilitation Services and Claims Manual, Volume I* (RSCM I).

Relevant Information

The worker's permanent disability award was calculated on a loss of earnings basis, with deemed earnings of \$861 per month in date of injury dollars, or \$12 per hour, working 20 hours per week in 2005 dollars.

Psychiatrist, Dr. Ancill, became involved with the worker in April 2003. He reported on July 8, 2004 that the worker met the diagnostic criteria for a Major Depression and a Pain Disorder with medical and psychological factors. Dr. Ancill stated his opinion that these conditions were causally related to the 1992 work incident. Because of the worker's pain and his intolerance of stress, Dr. Ancill was not optimistic that the worker would be able to sustain even part-time work. Dr. Ancill provided a further report on December 9, 2005 in which he expressed his opinion that the worker was incapable of sustaining any form of employment due to the combination of his Pain Disorder and severe Major Depression. He emphasized that if the worker's back pain increased, his depression would likely worsen with potentially dire consequences.

When Dr. Bubber, registered psychologist, undertook a psychological assessment of the worker for the purpose of evaluating the extent to which he had suffered a permanent psychological impairment, she reported her findings on July 19, 2005. Dr. Bubber provided the following Axis I diagnosis:

- Pain Disorder Associated with Both Psychological Factors and a General Medical Condition, Chronic
- Major Depressive Disorder, Single Episode, Mild (ranging to Moderate at times), Chronic

Dr. Bubber provided the following opinion regarding work restrictions and limitations:

It would appear that [the worker's] primary work restriction has always been his reports of pain and its consequent functional limitations. It would appear however, [the worker's] psychological condition is intertwined with his physical condition. Thus, it is my opinion that [the worker's] psychological condition would limit his ability to work in several ways.

- [The worker] perceives himself as severely disabled which increases his depression. These negative beliefs would likely restrict his ability to currently look for a job or find one he believes is suitable for his physical condition.
- His poor mood and volatility, although improved, are still present. This would limit his ability to work with others as he is quickly irritated and would likely lose his temper easily. When his pain levels are higher, he may be quick to anger and may lose his temper at work. This may negatively impact his relationships with co-workers and/or supervisors.
- His impaired concentration and memory would make it difficult for him to understand complete tasks, particularly complex ones. This may limit his ability to work on his own without regular supervision. However, given his emotional volatility, he would not work well under regular and direct supervision.
- His feelings of worthlessness and general negative self-perception may serve to limit his own perception of being able to complete tasks or work regularly. [The worker] does not see himself as reliable and capable of completing anything but small chores. Thus, in the workplace, his perception of himself as being unreliable may limit him in taking on tasks, completing tasks, or working on a project diligently.
- [The worker's] fear of pain and consequent limited lifestyle would affect his ability to attend work regularly or participate in any job duties, which might increase the risk for greater pain, particularly physical activities.
- [The worker's] low motivation and energy may affect his ability to complete tasks required of him, participate fully in the workplace, and attend regularly.

In addition, Dr. Bubber stated that the worker's depression would likely become more severe and his risk for suicide would increase if he were to perceive himself to have failed in the workplace. She noted that the worker is quickly frustrated and she

predicted that the worker's emotional distress would likely increase in a work setting resulting in him becoming volatile in inappropriate ways, negatively impacting his ability to work with others.

A vocational rehabilitation consultant (VRC) initially completed an employability assessment on June 21, 2004. She reviewed the services that had been provided to the worker including job search assistance, vocational planning, and training as a locksmith. She identified several positions which she felt were physically suitable and reasonably available to the worker. Subsequently, the worker's diagnosed Pain Disorder and Major Depression were accepted as permanent conditions under the worker's claim. The Board determined that the worker was only able to tolerate minimal interaction with the public due to a permanent state of emotional volatility resulting from his accepted psychological condition.

An updated EA was completed on April 14, 2005. The VRC amended her recommendations regarding suitable and available work, taking into account the worker's psychological limitation. She felt that the worker would be able to work as a dispatcher since contact with the public would be negligible and co-worker interaction would not be confrontational. She also felt that light courier/delivery (food, documents, light cargo) and light janitorial work would be suitable. She predicted that the worker would maximize his earnings at \$12 per hour.

The VRC completed a July 26, 2005 memo to the CADA in which she reviewed the various psychological reports and opinions about the worker's condition since 1994. She observed that there had not been any significant change in the worker's physical or psychological condition, except for the worker's perception of his pain, disability and self-limiting activities. She concluded that the worker would be able to return to work on a part-time basis, performing light work as described in her previous employability assessment.

Another updated employability assessment was completed on October 2, 2006. The VRC noted the worker's psychological limitation of having minimal interaction with the public and she acknowledged that the worker was limited to light strength activities due to his subjective pain complaints. The VRC also referenced the finding in the WCAT decision dated October 23, 2003 that the worker's functional abilities are limited to four hours per day in occupations classified as light strength.

In response to the direction given in the March 31, 2006 Review Division decision, the VRC contacted several companies to obtain labour market information. The employability assessment contains her notes of the responses from the companies that had returned her calls. The VRC did not indicate how many companies did not respond to her request for information. Based on the responses regarding light delivery drivers, the VRC concluded that these positions would not be readily available to the worker due to his physical and psychological limitations. Five responses from

janitorial/cleaning companies are listed. All of these companies indicated that they had light jobs available with minimal or no contact with the public required. Only three companies indicated that part-time work was available. Wages for part-time janitors was reported as starting at \$9 per hour and increasing to \$15 per hour. Noting that the worker had already been found capable of working four hours per day, the VRC concluded that he had the potential to earn \$180 per week to start, going up to \$300 per week in the long-term.

Relying upon this information, the CADA issued the November 10, 2006 decision letter which was confirmed in the Review Division decision that is the subject of the present appeal.

A copy of a January 2, 2007 letter from Dr. Siemens, the worker's family physician, was provided at the hearing. Dr. Siemens noted the worker's chronic back pain and depression. He expressed his opinion that the worker is currently completely disabled and unable to work in any capacity and that he is very unlikely to ever return to any form of gainful employment.

At the hearing, the worker described a typical day as consisting of minimal activities involving driving his children to school, doing some laundry and tidying the house. These activities are interspersed with rest periods of varying duration depending on his pain level. He stated that he takes 150 milligrams of slow-acting morphine at intervals during the day to control his pain levels. Fast-acting morphine is used for breakthrough pain when necessary. He feels that this medication as well as the pills he takes for depression, contributes to making him feel easily distracted and absent minded. The worker stated that he does very little cooking because of difficulty concentrating, which sometimes leads to him forgetting to take a pot off the stove.

The worker described persistent pain, increasing with activity. When he overdoes it, he finds it necessary to sleep for several hours until the pain abates. His back pain flares up every two or three weeks. He feels that he could not reliably work for any length of time. The worker acknowledged that he had tried to work as a locksmith and that he had increased his hours to six and one-half hours day. However, he stated that he was only able to perform re-keying duties and that he was not able to do most aspects of the job of locksmith due to his back pain. In addition, he feels that his ability to work has diminished since the time when he tried to do this work, in part because of his increased need for medication. He feels that currently he would not be capable of functioning in a job for four hours per day.

The worker complained that the VRC who undertook the updated employability assessment had not contacted him and had never invited him to contact any of the potential employers listed in the employability assessment about actual employment opportunities.

The worker stated that he continues to attend for treatment with Dr. Ancill once every one or two months, depending on his level of depression. He explained that he has limited social interaction with other people, in part because he becomes short tempered due to his pain.

The worker's wife testified regarding her observations of her husband's activities. She stated that her husband is "pretty good" at doing the laundry, although he takes a long time to complete this task. He places each piece of clothing individually in the washer and he shakes each piece as he removes them from the dryer. He tidies up the house and takes the children to and from school. The worker's wife also expressed frustration with the VRC's failure to engage her husband in the process of discussing suitable and available jobs for him.

The worker's representative submitted that the worker's permanent partial disability award ought to be calculated on a 100% loss of earning basis to reflect the fact that the worker is unemployable. He argued that the updated employability assessment did not constitute "significant research" as directed in the March 31, 2006 Review Division decision. Furthermore, he argued that the employability assessment did not demonstrate that the VRC ever considered the worker's unique characteristics and limitations when deciding that light janitorial work was reasonably available to him. He noted that the VRC indicated in the employability assessment that he did not divulge personal information about the worker when canvassing possible jobs with potential employers. The worker's representative asked me to rely on Dr. Ancill's opinion that the worker was not capable of working in any capacity. He argued that the worker would not be a reliable employee and that he would not be able to compete successfully for any job that he might apply for.

Reasons and Findings

The Board's authority to award a pension for permanent partial disability is contained in section 23 of the Act. There are two methods of assessing a worker's pension award. The loss of function/physical impairment method is the primary method for measuring permanent disabilities in the Board's "dual system." It is described in section 23(1) of the Act, according to which the impairment of earning capacity is estimated from the nature and degree of the injury. The secondary method is known as the projected loss of earnings method and it is described in section 23(3) of the Act. It provides that where it is considered to be more equitable, compensation for permanent disability may be awarded having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury.

Chapter 6 of the RSCMI describes the process by which the Board assesses entitlement to permanent partial disability awards and the assessment of a worker's loss of earnings. Items #40.10 and #40.12 of the RSCMI provide that the disability

awards officer is required to identify suitable occupations that the worker could be expected to undertake over the long-term future. The long-term earning potential of the worker is to be projected based upon jobs that are both suitable and reasonably available to the worker and which will enable the worker to maximize his earnings.

In written submissions to the Review Division, the employer argued that the only matter to be decided was whether the identified jobs were reasonably available to the worker since only that aspect of the worker's disability award had been referred back to the Board in the March 31, 2006 Review Division decision. Therefore, I have considered whether I have jurisdiction to consider the "suitability" of the jobs identified by the Board for the worker as well as their "availability" to him.

While I acknowledge the comments of the review officer in the March 31, 2006 Review Division decision regarding the suitability of the occupations of light delivery driver and light janitorial work, I find that I am not bound by them since I consider that her finding on that issue is best characterized as a finding of fact of fact, as opposed to a decision. The Board's Best Practices Information Sheet #14 provides the following guidance regarding the difference between a finding of fact, and an appealable decision:

Findings of fact are generally made during the process of deciding a worker's entitlement to benefits but are not in themselves decisions. In contrast, entitlement decisions that flow from such factual findings are decisions for the purposes of reconsideration, review and appeal and have the associated rights and restrictions. Findings of fact are conclusions about the evidence, such as determinations about a worker's medical restrictions or physical limitations. They do not confer or deny entitlement to benefits and there are no immediate consequences to a worker arising from these conclusions. Instead they are simply the potential bases for future entitlement decisions.

While the finding of fact regarding the suitability of the identified positions may have formed the foundation for a possible loss of earnings determination at the time that the review officer was considering the worker's disability award, no determination of that entitlement matter was made at that time. Findings of fact can change, depending on a worker's circumstances. The November 10, 2006 decision, advising the worker that no change would be made to his entitlement to a loss of earnings award, constitutes a new decision on the matter of the worker's loss of earnings entitlement, with new findings of fact to be made based upon the evidence now available. Therefore, in determining whether the Board has accurately projected the worker's long-term earning capacity for the purpose of establishing his entitlement to a loss of earnings award, I find that I have jurisdiction to consider whether the jobs identified by the Board are both suitable and reasonably available to him.

Therefore, I do not share the employer's view that the matter of the availability of the jobs identified by the Board had already been finally determined. I find that the scope of my jurisdiction in this appeal includes consideration of the availability of the jobs and the suitability of them for the worker, taking into account the totality of his compensable permanent injuries.

When considering the worker's long-term earning capacity in the October 2, 2006 updated employability assessment, the VRC specifically noted the finding in the October 23, 2003 WCAT decision that "...the worker's functional abilities are limited to four hours of work per day in occupations classified as light strength." However, the vice chair who decided the October 21, 2003 WCAT decision acknowledged that her findings regarding the worker's projected loss of earnings award did not address the potential impact of the worker's diagnosed Pain Disorder on his employability. Subsequent to the WCAT decision, a review officer determined on November 3, 2004 that the worker's psychological problems were compensable. Therefore, when deciding the impact of the totality of the worker's permanent injuries on his future earning capacity, I consider that I am not bound by the finding in the WCAT decision that the worker was limited to working at light strength occupations for four hours per day, five days per week. While this might accurately describe the worker's limitations when considering only his physical injuries, it is open to me to find that the worker's long-term earnings should be projected based on his working less than that when considering both his physical and his psychological injuries.

I find Dr. Bubber's opinion regarding the impact of the worker's psychological condition on his ability to work to be quite compelling. She described several ways in which the worker's psychological condition would limit his ability to work and I consider that these are not adequately captured by the Board's determination that the worker was limited to being able to tolerate only minimal contact with the public. My reading of Dr. Bubber's July 19, 2005 report leads me to conclude that the worker would have difficulty looking for a job, interacting appropriately with co-workers and/or supervisors, working well under supervision, completing tasks diligently, attending work regularly, or participating fully in the workplace. Dr. Bubber's comments suggest to me that the worker would have a great deal of difficulty obtaining and maintaining employment of any kind.

It is apparent to me that, when reporting her conclusions in the October 2, 2006 employability assessment, the VRC did not express a strong endorsement for the notion that the positions she had identified were either reasonably available to the worker or suitable for him. Her conclusion that "there are several positions available for janitors/cleaners that require minimal or no public contact and fall within the light strength category" is rather carefully worded. Although she specifically stated that light delivery driver positions would not be available to the worker, she did not actually include any specific reference to whether light janitorial work would be suitable for or available to the worker, given his specific limitations. Instead, she made a general comment about available jobs in this area.

It may be that the VRC felt bound by the October 23, 2003 WCAT decision to project some level of long-term earnings for the worker based on his working four hours per day, five days per week. However, as previously explained, this finding is not binding in the context of the present appeal.

At the time that the WCAT vice chair established the worker's physical limitations for work, his disability award was based upon a permanent functional impairment of 4% for his subjective complaints. The worker's permanent psychological impairment has been established at 45%, for an overall award of 49% of total disability. I accept Dr. Bubber's opinion regarding the various ways in which the worker's psychological condition would limit his ability to work. I also accept Dr. Ancill's opinion and Dr. Siemens' opinion that the worker is unable to work in any capacity. These opinions are consistent with the worker's evidence at the hearing.

For these reasons, I find that the jobs upon which the worker's long-term earnings were projected by the Board are neither suitable nor reasonably available to him. The worker's disability award should be calculated on a 100% loss of earnings basis.

Conclusion

I allow the worker's appeal and vary the April 18, 2007 Review Division decision by finding that the worker's permanent disability award should be calculated to reflect my finding that he is competitively unemployable. He is entitled to a 100% loss of earnings disability award.

In accordance with section 7(1)(b) of the *Workers Compensation Act Appeal Regulation*, the worker is entitled to be reimbursed for the expenses he incurred to travel from his home to the oral hearing on October 31, 2007.

Cathy Agnew
Vice Chair

CA/gj