

Noteworthy Decision Summary

Decision: WCAT-2008-00584**Decision Date:** February 22, 2008**Panel:** Luningning Alcuitas-Imperial***Selective Light Employment – Policy item #34.11 of the Rehabilitation Services and Claims Manual, Volume II***

This decision is noteworthy for its analysis of the factors to be considered when determining whether it is unreasonable for a worker to refuse selective light employment.

The worker suffered a compensable low back strain. The Workers' Compensation Board, operating as WorkSafeBC (Board), terminated the worker's temporary disability (wage loss) benefits on the basis that it was unreasonable for the worker to refuse selective light employment. The Review Division of the Board confirmed this decision.

The worker's appeal was denied. The panel found that it was unreasonable for the worker to refuse the selective light employment the employer offered him. The panel reviewed the four criteria outlined in item #34.11 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) which must be met to ensure that an early return to work is appropriate.

The first criterion is whether the worker is capable of undertaking some form of suitable employment. This criterion involves examining of the worker's potential capabilities. The panel found the worker was capable of undertaking the employment the employer offered him. She preferred the opinion of the nurse advisor who specifically addressed the worker's potential capacity to perform the light duties offered. The worker's attending physician had not provided a specific opinion on the worker's potential capability for light duties.

The second criterion is that the work must be safe. This criterion involves a specific examination of the worker's restrictions and limitations with reference to the specific light duties offered. Again, the panel placed greater weight on the nurse advisor's opinion because she demonstrated an understanding of the worker's sitting and standing tolerances and gave a clear opinion that the light duties position could safely accommodate those tolerances. The panel also gave weight to the physiotherapist's report that indicated the worker's sitting and standing tolerances. There was no contrary medical opinion on this point, as the Board did not consult the worker's family physician about the proposed light duties. While it may be preferable for the Board to consult with the attending physician before making a decision under item #34.11 of the RSCM II, the policy (as amended effective January 1, 2005) does not require this.

The panel found no dispute that the third criterion had been met, that is, being that the work was productive.

The fourth criterion is that, within reasonable limits, the worker must agree to the arrangement. The panel found that it was unreasonable for the worker to have refused the light duties. She said that perhaps a more reasonable approach would have been for the worker to ask for more details about the proposed light duties, offer to consult with his family physician and ask for modifications to the light duties once they were undertaken. The worker also could have brought his concerns to attention of the Board officer. This places an onus on the worker to investigate and consider the light duties offer and to bring his concerns to the attention of the

employer, health professionals and the Board. This now appears to be the Board's approach after the January 2005 policy amendments. In the previous version of the policy, a light duties arrangement had to be approved by the worker's family physician. This is no longer the case. The Board is now the final arbiter, short of the appeal process, for deciding whether the worker's refusal to undertake light duties is reasonable.

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Panel: Luningning Alcuitas-Imperial, Vice Chair

Introduction

On March 29, 2007, the worker, a plug cutter at a plywood manufacturing company, suffered a low back strain injury at work.

The Workers' Compensation Board (Board), operating as WorkSafeBC, accepted the worker's claim for compensation. The Board paid the worker wage loss benefits from March 31, 2007 to April 2, 2007. The Board restricted the worker's benefits to this period as a Board officer considered that the worker unreasonably refused light duties as a security guard/watchman, which the employer offered to him on April 2, 2007.

The worker requested a review of this Board decision. In *Review Decision #R0079217*, dated October 9, 2007, a review officer confirmed the Board's decision. She found that the worker unreasonably refused light duties. She directed the Board to determine the worker's entitlement to temporary partial disability benefits as of April 2, 2007.

The worker appeals the review officer's decision.

On November 13, 2007, a Board officer concluded that the worker was not entitled to temporary partial disability benefits as the light duties were available to him for the entire shift and the entire time the worker was off work.

Issue(s)

The issue on this appeal is:

1. Is the worker entitled to temporary disability benefits for his compensable back injury beyond April 2, 2007?

Jurisdiction

The worker brings this appeal under section 239(1) of the *Workers Compensation Act* (Act), which permits appeals of Review Division findings to the Workers' Compensation Appeal Tribunal (WCAT).

Among other provisions of the Act relevant to my authority and jurisdiction, the following should be noted. Under section 254, I am authorized to inquire into, hear and determine all questions of fact, law and discretion that may arise or need to be determined in the

appeal. My decision is required to be made on the merits and justice of the case. While not bound by legal precedent, I must apply policy of the Board's board of directors that is applicable to the case, except in circumstances described in section 251. I am authorized to consider new evidence, and to substitute my decision for the decision under appeal.

No oral hearing was requested in this appeal. I have reviewed Rule #8.90 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) to see whether an oral hearing might still be required. I have concluded that it is not, as there is no issue about credibility, and the issues presented in the appeal are largely legal and policy ones. I do not find that an oral hearing, especially since one is not requested, would assist me in deciding the appeal. The worker is representing himself in this appeal. The employer is participating and is represented by a consultant.

Background and Evidence

In reaching this decision, I have reviewed the worker's claim file, as well as submissions and evidence presented by both parties.

Having reviewed the claim file evidence, I adopt the Review Division's review of the facts and I will not repeat them. I refer the reader to the October 9, 2007 Review Division decision (*Review Reference #R0079217*) which contains a thorough and accurate review of that evidence. The reader may access *Review Reference #R0079217* on the Board website at www.worksafebc.com.

The worker made a written submission to the Review Division. In a May 11, 2007 letter, he argued that the employer never told him that he had the option of lying down in the first aid room to apply heat or ice to his back if he took the light duties offer. He noted that his foreman agreed with his decision not to accept the light duties. He submitted that he found it difficult to walk and sit after his compensable injury, since he had restricted flexion in his lumbar spine. He argued that he was following his family physician's advice to get bed rest. He submitted that the Board should not penalize him for trying to work for two days following the injury and then following this medical advice to get rest. He noted that while he still has back pain, he was now working full-time at his regular duties.

In support of his request for review, the worker submitted an April 2, 2007 record from a physiotherapy clinic. It shows the worker's tolerance levels for walking (less than 15 minutes) and sitting (less than 10 minutes).

The employer also made a written submission to the Review Division. He argued that the light duties position was designed so that the worker would be able to sit, stand, and walk as needed. The employer also noted that the foreman did not go into the details of the job with the worker, because the worker was adamant that he was bedridden. The employer disputed whether there was evidence that the worker was totally bedridden.

As noted above, in *Review Decision #R0079217*, dated October 9, 2007, a review officer confirmed the Board's decision. She found that the worker unreasonably refused light duties. She directed the Board to determine the worker's entitlement to temporary partial disability benefits as of April 2, 2007.

A Board officer spoke with the employer on October 11, 2007. The employer confirmed that he would have been able to offer the worker full-time, light duties (eight hours per day) for the entire period from April 3, 2007 to April 20, 2007.

On November 13, 2007, a Board officer found that the worker was not entitled to temporary partial disability benefits as the light duties were available to the worker for the entire shift and for the entire time that he was off work.

In support of this appeal, the worker made a written submission to the panel. He reiterated that he was telling the truth about his injury and the fact that it left him bedridden. He disputed the evidence of the employer, particularly the actions of his foreman, whom he alleged was biased against him. In support of this allegation of bias, the worker submitted some material about a work incident not related to the compensable injury. The rest of the evidence was previously submitted to the Review Division or was on the claim file.

The employer's representative also made a written submission to the panel. She argued that the requirements of Board policy in dealing with light duties were met. She expressed support for the review officer's decision and asked the panel confirm it.

In rebuttal, the worker submitted that he had previously experienced a situation where he was injured at work, he gave a doctor's note for light duties but the employer placed him on a harder job.

Reasons and Findings

Board policy in item #33.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) provides that wage-loss benefits are payable where an injury or disease resulting from a person's employment causes a period of temporary disability from work. These benefits usually commence shortly after the initial acceptance of a claim and may be total (section 29) or partial (section 30). They cease when the worker recovers from the injury or the condition becomes a permanent one.

Policy item #34.11 outlines the Board's approach to selective/light employment. It expresses the Board's support for selective/light employment as an important component of a worker's rehabilitation and recognizes the value of maintaining an injured worker's positive connection to the workplace.

However, Board policy outlines that the following four criteria must be met to ensure that an early return to work is appropriate:

1. While the compensable injury may temporarily disable the worker from performing his or her normal work, the worker must be capable of undertaking some form of suitable employment.
2. The work must be safe, that is, it will neither harm the worker nor slow recovery. The work must be within the worker's medical restrictions, physical limitations and abilities. Where there is a disagreement regarding the safety of the selective/light offer and the Board is required to intervene, the Board officer is responsible for determining the safety of the work after considering medical opinions, such as opinions from the attending physician and the Board medical advisor, and other relevant information.
3. The work must be productive. Token or demeaning tasks are considered detrimental to the worker's rehabilitation.
4. Within reasonable limits, the worker must agree to the arrangement.

If the Board is required to intervene in a selective/light employment arrangement, the Board officer is directed to evaluate the situation. Where the worker refuses to accept the offer of light duties, the Board officer must look at the requirements of the work, medical opinions and other evidence of the worker's medical restrictions, physical limitations and abilities. If the officer determines that the worker's refusal is unreasonable, benefit entitlement is determined under section 30 of the Act.

In examining whether the criteria of item #34.11 were met in this case, I find that there is no dispute that the third criteria was met. Although the worker and his attending physician did not specifically address the question of whether the work as a security guard/watchman was productive, I rely on and accept the opinion of the nurse advisor on this point. She was in a good position to assess whether the offered position was a productive one, as she previously visited the worksite.

The first and second criteria of policy item #34.11 are closely related. The evidence I need to examine under each criteria will be similar. I note though that there is a slight distinction in that the first criteria involves an examination of the worker's potential capabilities, while the second criteria involves a specific examination of the worker's restrictions and limitations in reference to the specific light duties offered.

In terms of the question of whether the worker was capable of undertaking some form of suitable employment, the worker's position is that he was not. He says that he was completely bedridden after working two days with his low back strain. He says that his back flexion was restricted. The worker's family physician felt that the worker could not

work full duties, full time and estimated that it would take 7 – 13 days before the worker could return to work in any capacity. The worker's physiotherapist noted some limitations in sitting and standing tolerance. On the other hand, there is evidence from the nurse's advisor that the worker could undertake the security guard/watchman position, as he could alternate between sitting and standing and could access first aid treatment if necessary.

As the first criterion is directed at the worker's potential capability for light duties, I find that the worker was capable of undertaking some form of suitable employment on April 2, 2007. I rely on and prefer the nurse's advisor's opinion on this question. She specifically directed her mind to the question of whether the worker had the potential to undertake suitable employment, given that he was diagnosed with a lumbar back strain. Although the worker's family physician estimated that the worker could not return to work for one to two weeks, I am unable to place great weight on his opinion because he did not specifically address the worker's potential capability for light duties. I acknowledge that the worker attempted to work in his regular position and he found he could not. The worker's experience of his low back strain, in relation to his regular duties, is supported by the opinion of his family physician. However, in my view, the worker's belief that he was completely restricted after his lumbar back strain from light duties was not supported by a specific medical opinion from his family physician.

I also find that the second criterion is met in this case. I rely on and accept the opinion of the nurse advisor that the light duties were safe for the worker to undertake. I prefer her opinion because she reviewed and analyzed all of the available evidence. I place weight on her opinion because she demonstrated an understanding of the worker's sitting and standing tolerances and she gave a clear opinion that the light duties position could safely accommodate those tolerances. I also give weight to the physiotherapist's report that indicated the worker's sitting and standing tolerances. There is no contrary medical opinion on this point, as the Board did not consult the worker's family physician about the proposed light duties. While it may be preferable for the Board to consult with the attending physician before making a decision under policy item #34.11, the policy (as amended effective January 1, 2005) does not require that the Board do so.

The final criterion involves an examination of whether it was reasonable for the worker to refuse the light duties arrangement. There is no dispute that the employer offered light duties to the worker and he refused to do them. The worker's submission is that his refusal was reasonable because of the following reasons:

- He did not have a full understanding of the light duties job, specifically that he would be given the option of getting first aid treatment if he needed it.
- His foreman agreed to him remaining off work.

- He was following his family physician's advice to get bed rest.
- His experience of his disability was that he tried to work for two days at his regular job, found he could not and then was unable to do anything but lie down.
- He previously sought light duties after an injury, but the employer did not give them to him.

Having reviewed the evidence, I find that it was not reasonable for the worker to refuse the light duties. While I acknowledge that the worker's subjective experience of his pain and his past experience with his employer factor into his decision to refuse the light duties, I agree with the Board and the review officers that it appears that the worker unreasonably refused to do the light duties. The Board and review officers examined and weighed all of the available evidence. I note that perhaps a more reasonable approach for the worker would have been to ask for more details about the proposed light duties, offer to consult with his family physician and ask for modifications to the light duties once they were undertaken. The worker could have also brought his concerns to attention of the Board officer. I acknowledge that this places an onus on the worker to investigate and consider the light duties offer and to bring his concerns to the attention of the employer, health professionals and the Board. However, this now appears to be the Board's approach after the January 2005 policy amendments. In the previous version of the policy, a light duties arrangement had to be approved by the worker's family physician. This is no longer the case. I agree with the review officer that the Board is now the final arbiter short of the appeal process for deciding whether the worker's refusal to undertake light duties is reasonable.

I find that the worker's refusal to undertake the light duties was unreasonable, so Board policy dictates that benefit entitlement must be determined under section 30 of the Act.

I make no finding on the period of time the worker would be entitled to temporary partial disability benefits, as the duration of temporary partial disability benefits is not an issue before me on this appeal. The Board has already issued the November 13, 2007 decision on the worker's benefit entitlement under section 30. It appears that the worker did not request a review of that decision.

I deny the worker's appeal on this issue and confirm the review officer's decision.

Conclusion

I confirm the review officer's decision and deny the worker's appeal.

No expenses were identified in this appeal and I make no award with respect to expenses.

Luningning Alcuitas-Imperial
Vice Chair

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