

Noteworthy Decision Summary

Decision: WCAT-2009-02750

Decision Date: October 23, 2009

Panel: L. Alcuitas-Imperial

Appealable decision versus finding of fact with no material effect on entitlement - Restrictions and limitations – Jurisdiction

This decision considers whether or not the determination of the worker's restrictions and limitations were factual matters that were material to the worker's increased permanent disability award and thus appealable to WCAT.

In May 2006, the worker, a cabinet maker, suffered compensable injuries. The Workers' Compensation Board, operating as WorkSafeBC (Board), accepted the worker's claim and granted him wage loss and health-care benefits, as well as a permanent partial disability award of 2.5% for chronic pain. On April 25, 2008, a Board officer advised the worker that his permanent partial disability award had been increased following a March 4, 2008 assessment. The Board officer noted that the worker's claim had been re-referred to the Board's Disability Awards department for consideration of a permanent aggravation of pre-existing mild generalized disc bulges at L3-4 and L5-S1 and an L4-5 disc herniation. The Board officer noted that the worker's spine disability was assessed at 6.75%. With the previous assessment of 2.5% of total disability for chronic pain, the worker's disability now totaled 9.25%. The Board officer also noted that the worker's entitlement to an assessment for a projected loss of earnings award was still under investigation. Finally, the Board officer outlined that there were no accepted restrictions on the worker's claim, but several limitations were accepted.

The worker requested a review of the Board's April 25, 2008 decision. In Review Decision #R0094753, dated December 12, 2008, a review officer confirmed the Board's decision. The worker appealed the review officer's decision to WCAT. He did not dispute his increased disability award.

The WCAT panel denied the appeal, finding that the Board's April 25, 2008 letter and/or the December 12, 2008 review officer's decision did not contain an appealable decision about the worker's restrictions and limitations. The panel adopted the analysis and approach in *WCAT-2007-00430* and noted that, in this appeal, the Board and review officer's decisions did not expressly address the worker's restrictions and limitations. The entitlement issue they addressed was the worker's increased permanent functional impairment award, based on an assessment of the extent to which the worker's particular physical injuries were likely to impair his ability to earn in the future. This increased award was solely based on an evaluation of the worker's loss of function and the rating schedule. The worker's restrictions and limitations, while forming part of the factual background of the practical impact of the worker's permanent impairment on the worker's employability, did not have a material impact on the entitlement issue of his increased permanent disability award. Thus, neither the Board's letter nor the review officer's decision contained an appealable decision about the worker's restrictions and limitations.

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Introduction

- [1] In May 2006, the worker, a cabinet maker, suffered compensable injuries. The worker applied for compensation from the Workers' Compensation Board (Board), operating as WorkSafeBC. The Board accepted the worker's claim and granted him wage loss and health-care benefits, as well as a permanent partial disability award of 2.5% for chronic pain.
- [2] On April 25, 2008, a Board officer advised the worker that his permanent partial disability award had been increased following a March 4, 2008 assessment. The Board officer noted that the worker's claim had been re-referred to the Board's Disability Awards (DA) Department for consideration of a permanent aggravation of pre-existing mild generalized disc bulges at L3-4 and L5-S1 and an L4-5 disc herniation. The Board officer noted that the worker's spine disability was assessed at 6.75%. With the previous assessment of 2.5% of total disability for chronic pain, the worker's disability now totalled 9.25%. The Board officer also noted that the worker's entitlement to an assessment for a projected loss of earnings award was still under investigation.
- [3] The worker requested a review of the Board's April 25, 2008 decision. In *Review Decision #R0094753*, dated December 12, 2008, a review officer confirmed the Board's decision.
- [4] The worker now appeals this review officer's decision to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

- [5] The sole issue arising on this appeal is whether the Board's April 25, 2008 letter and/or the December 12, 2008 review officer's decision contains an appealable decision about the worker's restrictions and limitations.
- [6] I have defined the issue under appeal as above, noting the following submissions by the worker's representative:
- the primary issue under appeal is whether there is an appealable decision contained in the Board's decision and/or the review officer's decision about the worker's restrictions and limitations; and
 - the worker does not dispute his increased permanent partial disability award.

- [7] I will therefore only address the issue of whether there is an appealable decision in the April 25, 2008 letter and/or the December 12, 2008 review officer's decision with respect to the worker's restrictions and limitations.
- [8] Item #14.30 of WCAT's *Manual of Rules of Practice and Procedure* provides that:
- ...WCAT will generally restrict its decision to the issues raised by the appellant in the appellant's notice of appeal and submissions to WCAT. The appellant is entitled by right to a decision on the issues expressly raised in the appeal.

Jurisdiction

- [9] The worker brings this appeal under section 239(1) of the *Workers Compensation Act* (Act), which permits appeals of Review Division decisions to the WCAT.
- [10] 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 this 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 the circumstances described in section 251. I am authorized to consider new evidence, and to substitute my decision for the decision under appeal. The standard of proof for compensation matters is the balance of probabilities, subject to section 250(4). Section 250(4) states that on an appeal respecting the compensation of a worker if the evidence supporting different findings on an issue is evenly weighted, the issue must be resolved in favour of the worker.
- [11] The worker requested that this appeal proceed by way of read and review of the documentary evidence. In any event, I have reviewed Rule #8.90 of WCAT's *Manual of Rules of Practice and Procedure* to see whether an oral hearing might still be required. I have concluded that it is not, as there is no significant issue about credibility, and the issue presented in the appeal largely involves legal and policy matters. I do not find that an oral hearing would assist me in deciding the appeal. The worker is represented by counsel in this appeal. The employer is also participating and is represented by an employers' adviser.

Background and Evidence

- [12] I reviewed the worker's claim file, as well as evidence and submissions presented by the parties. I find it is unnecessary to summarize all of the evidence and submissions. I provide the following summary as it relates to this appeal.

- [13] In a December 1, 2006 claim log entry, a Board medical advisor summarized the worker's claim. She stated that the worker had sustained a lumbar strain with an aggravation of pre-existing degenerative disc disease, including a disc herniation at L4-5. She also noted that the worker met the criteria for chronic pain and that this pain was likely permanent. She also concluded that there were no medical reasons to apply restrictions, but outlined a number of likely limitations. She stated that with the limitations in place, the worker might increase his hours gradually from five to eight hours per day over the next two to three weeks.
- [14] In a December 21, 2006 decision letter, a Board officer dealt with a number of issues, including whether the worker's compensable injuries (defined as lumbar strain and temporary aggravation of degenerative disc disorder) had stabilized; whether chronic pain should be accepted on the worker's claim; whether the worker could return to his pre-injury job; and whether wage loss benefits were payable beyond a certain date.
- [15] The Board officer also outlined that there were no accepted restrictions on the worker's claim, but the following limitations were accepted:
- Avoidance of heavy lifting and carrying greater than 30 pounds;
 - Avoidance of prolonged sitting and/or standing without the ability to take postural breaks;
 - Avoidance of sustained and/or repetitive bending and stooping activities;
 - Avoidance of prolonged low level work that requires prolonged squatting and kneeling.
- [16] I note that the worker then received a number of decision letters about his eligibility for vocational rehabilitation assistance. Beginning with a February 8, 2007 decision letter, I note that these decisions outlined that the Board had accepted as fact the above noted physical limitations.
- [17] In a February 23, 2007 decision letter, the Board granted the worker a 2.5% permanent partial disability award to recognize permanent chronic pain. The Board noted that a Board officer was still in the process of completing an investigation into whether the worker was entitled to an assessment for a projected loss of earnings award. I note that this decision was later confirmed by a review officer (see *Review Decision #R0079335*, dated November 6, 2007).
- [18] The worker requested a review of the Board's December 21, 2006 decision. In *Review Decision #R0077113*, dated August 15, 2007, a review officer determined that the worker's compensable conditions should be referred to the DA Department for assessment as to whether or not the worker suffered from an actual or potential permanent disability. The review officer also found that the restrictions and limitations of the worker were not reviewable decisions. The review officer found that the determination of the worker's restrictions and limitations were factual matters that were

not directly material to the worker's referral to the DA Department or to the Vocational Rehabilitation Services Department. The review officer noted that the Board officer's conclusions in the December 21, 2006 decision letter were made for the purpose of being considered when a decision on the extent of vocational rehabilitation assistance or the amount of a disability award is being decided.

- [19] I note that the Board's position regarding the worker's restrictions and limitations was confirmed in another August 30, 2007 decision letter. In particular, a Board officer outlined that the worker's current restrictions and limitations would not be altered as a result of the aggravation of his pre-existing, mild, generalized disc bulges. In addition, the Board officer referred the worker's file to the DA Department for assessment.
- [20] In an October 16, 2007 claim log entry, a Board medical advisor reviewed the updated medical information that had been placed on the worker's file. She thought that there were no new objective findings documented by the physician since the specialist's visit of November 2006. As such, the Board medical advisor felt that the worker's limitations would remain unchanged.
- [21] In a November 29, 2007 claim log entry, a Board officer noted that it was accepted as fact that the worker did not have any restrictions or additional limitations as a result of his L4-5 disc herniation. The Board officer outlined this in a December 6, 2007 decision letter sent to the worker. The December 6, 2007 decision letter also determined that the worker's claim could not be re-opened for a recurrence or significant change in the worker's compensable back injury, but that the claim was referred to the DA Department for assessment of the permanent L4-5 disc herniation.
- [22] On March 4, 2008, the worker underwent a permanent functional impairment evaluation. The worker reported that the following activities aggravated his back condition:
- sitting for more than five to 10 minutes
 - standing for more than 10 minutes
 - carrying/lifting more than 30 pounds
 - pushing more than 60 pounds
 - pulling more than 30 pounds
 - laying on his side
 - bending over
 - negotiating stairs
 - climbing hills

- [23] The worker also told the disability awards medical advisor that he was independent in self-care, but had difficulty with some activities. He was able to drive, but could not sit in lower seats and he required back support. He could no longer participate in recreational activities.
- [24] In a June 5, 2008 letter, the worker asked the Board to re-visit the worker's restrictions and limitations and modify the vocational rehabilitation plan set out in the March 25, 2008 decision letter. The worker argued that he was only capable of light strength capacity work; that he could only tolerate on-feet activity (walking/standing) for two hours in a six-hour clinic day; that he was limited from all bending and squatting activities; and that he was only able to sit (including for driving) for up to one to 1.5 hours with re-adjustments of seated position. The worker argued that the Board had jurisdiction to revisit this matter, as it concerned a new matter not previously adjudicated (namely, a new decision on the worker's further entitlement to vocational rehabilitation benefits).
- [25] I note that the review officer in the decision under appeal did not address the issue of the worker's restrictions and limitations and did not explicitly deal with the Review Division's jurisdiction over this issue, as it appears that the worker did not raise this issue at the Review Division.
- [26] On April 29, 2009, another panel of WCAT issued a decision in *WCAT-2009-01078* accepting Major Depressive Disorder as a compensable consequence of the worker's injuries accepted under this claim. As well, the WCAT panel found that there was no point in considering the stated restrictions and limitations as part of the appeals before him. In reaching this conclusion, the WCAT panel felt that the statements regarding restrictions and limitations did not affect the decisions over which he had jurisdiction. Moreover, the WCAT panel noted that part of the relief claimed by the worker was for a direction to the Board to modify, replace or discontinue the vocational rehabilitation plan. As the findings of fact regarding the worker's restrictions and limitations supported the decision about vocational rehabilitation assistance, the WCAT panel felt this was all the more reason not to consider it. The WCAT panel adopted the reasoning of another WCAT panel in *WCAT-2006-03824* that stated to find otherwise would be to subvert the intention of the Act that vocational rehabilitation decisions cannot be appealed to WCAT.
- [27] I note that additional documents and entries have been placed on the worker's claim file since updated disclosure was last provided to the parties. However, as these relate to the implementation of *WCAT-2009-01078*, I find these entries are unrelated to the issues I must decide and I have not relied upon them in making my decision. Thus, given the potential for further delay, I have concluded that it would not offend the principles of procedural fairness for me to make my decision expeditiously without providing updated disclosure to the parties.

Submissions

- [28] In the worker's notice of appeal, the worker stated that the Board should have found that he had additional restrictions and limitations.
- [29] In a May 25, 2009 written submission, the worker argued that the Board erred in finding that he had no restrictions as a result of his compensable L4-5 disc herniation. The worker noted that a review officer in *Review Decision #R0089518*, dated July 30, 2008, stated that the Board's finding of fact that the worker had no restrictions was not a decision, but formed the basis of latter awards. The review officer had gone on to state that it was not necessary for him to review the finding of fact in order to reach a decision on the issues under review. I note that this review officer's decision was the subject of *WCAT-2009-01078*.
- [30] The worker disputed the finding that the worker had no additional limitations and/or restrictions as a result of his increased permanent functional impairment related to the L4-5 disc herniation.
- [31] The worker argued that his circumstances fell within the situation described in item B of the Board's Practice Directive #C14-3, namely that his compensable condition had further deteriorated since previous decisions had been made.
- [32] The worker asked that the panel find that the worker's increased permanent functional impairment and chronic Major Depressive Disorder required the Board to recognize that he has additional limitations or restrictions, physical deficits and decreased functional tolerances.
- [33] The worker argued that WCAT had the jurisdiction to address whether he has additional limitations or restrictions, physical deficits and decreased functional tolerances because the Board's April 25, 2008 decision underlying the appeal (which was based upon the December 6, 2007 Board decision on restrictions and limitations) had already adversely impacted the worker's entitlement to an assessment for a projected loss of earnings award.
- [34] In particular, the worker asked WCAT to find that he had the following limitations:
- light physical demands capacity
 - walking/standing: able to tolerate on-feet activity for two hours in a six-hour clinic day
 - driving/sitting: able to sit for up to one to 1.5 hours with re-adjustments of seated position
 - no bending or squatting
- [35] The worker also cited the binding finding of the WCAT panel in *WCAT-2009-01078*.

- [36] The worker argued that if I was to allow this appeal, it would be reasonable for me to direct the Board to modify, replace or discontinue the worker's current vocational rehabilitation plan.
- [37] The employer provided a June 3, 2009 written submission, arguing that this appeal is moot. The employer submitted that the majority of the worker's argument appeared to be an attempt to re-argue the merits of the Board's December 6, 2007 decision. The employer argued that the issue of the worker's restrictions and limitations was previously dealt with by the Review Division in *Review Decision #R0089518* and by WCAT in *WCAT-2009-01078*. The employer cited the WCAT panel's reasons and finding. The employer argued that section 255(1) of the Act applied to bar the worker from seeking a reversal of the decision rendered by the WCAT panel in *WCAT-2009-01078*. The employer submitted that the worker's functional impairment was correctly assessed and that the review officer's December 12, 2008 decision should be confirmed.
- [38] The worker replied to the employer's submission in a further June 19, 2009 submission. The worker stated that the employer's argument ignored the fact that a Board officer in the DA Department must make an independent finding of fact on employability and potential loss of earnings entitlement. The worker cited a noteworthy WCAT decision, *WCAT-2006-02023*, dated May 9, 2006, as support for the proposition about the scope of the authority of the Board officer in the DA Department.

Reasons and Findings

- [39] I find that the Board's April 25, 2008 letter and/or the December 12, 2008 review officer's decision do not contain an appealable decision about the worker's restrictions and limitations.
- [40] In reaching this conclusion, I adopt the analysis and approach of the WCAT panel in *WCAT-2007-00430* (accessible on the WCAT website and classified as a noteworthy decision). While I acknowledge that this WCAT decision is not binding on me, I found the analysis and approach helpful.
- [41] In that noteworthy decision, the WCAT panel analysed the Board's general approach to findings of fact, which distinguishes between "findings of fact" (which are not reviewable) and "decisions" regarding entitlement. The WCAT panel adopted the reasoning expressed in *WCAT-2006-04596*, which found that the Board's general approach was reasonable in some circumstances (for example, where conducting a review could be pointless, as the finding of fact might never have an impact on a claim or where it could preclude the Board from changing the finding in the future based on new information or discovery of an error). However, the WCAT panel also expressed

- [42] that the Board's approach could not be applied in such a manner as to deprive a party of a statutory right of review where the disputed findings have an impact on entitlement and no other mechanism is available for bringing the dispute.
- [43] In this appeal, the Board and review officer's decisions did not expressly address the worker's restrictions and limitations. The entitlement issue addressed in these decisions was the worker's increased permanent functional impairment award, based on an assessment of the extent to which the worker's particular physical injuries were likely to impair his ability to earn in the future. This increased award was solely based on an evaluation of the worker's loss of function and the rating schedule. In view of these circumstances, I find that the Board officer and the review officer did not make a finding of fact in the decisions before me about the worker's restrictions and limitations. As such, since the decisions before me do not contain any findings of fact about the worker's restrictions and limitations, neither the Board's April 25, 2008 letter nor the review officer's December 12, 2008 decision contains an appealable decision about the worker's restrictions and limitations.
- [44] Even if the Board officer and the review officer did make a finding of fact about the worker's restrictions and limitations, I also find that neither decision before me contains an appealable decision about the worker's restrictions and limitations for the following reasons.
- [45] I do not accept the worker's argument that the Board's April 25, 2008 decision was based on the Board's findings of fact about his restrictions and limitations contained in the December 6, 2007 decision letter. The Board and review officer's decisions do not contain any decisions about whether the combined effect of a worker's occupation at the time of injury and a worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) does not appropriately compensate the worker for the injury. Rather, these decisions advised the worker that a decision about whether he is entitled to an assessment for a projected loss of earnings award was still under investigation. I do not consider that the Board's April 25, 2008 decision and the review decision under appeal were based implicitly on the Board's findings of fact about the worker's restrictions and limitations.
- [46] The worker's restrictions and limitations, while forming part of the factual background of the practical impact of the worker's permanent impairment on the worker's employability, do not have a material impact on the entitlement issue of his increased pension award. I agree with the panel in *WCAT-2009-01078* that it would be pointless for a review of these findings of fact to occur at this stage since it has no material impact on the worker's entitlement to an increased permanent partial disability award.
- [47] Moreover, there is another mechanism available for the worker to bring this dispute. When the Board issues its decision regarding the worker's entitlement to an assessment for a projected loss of earnings award, it would be open for the worker to

challenge the findings of fact about his restrictions and limitations. I note that the Board's Practice Directive #C6-2 states that evidence about the worker's restrictions and limitations may assist in considering the effects of a compensable disability and in determining whether a worker has the ability to perform the essential skills needed in the pre-injury or similar occupation. I consider that the WCAT decision cited by the worker, *WCAT-2006-02023* supports this proposition that another mechanism would be available to the worker to dispute the findings of fact regarding his restrictions and limitations.

[48] As well, the Board is in the process of implementing *WCAT-2009-01078*. It may be that in the course of that implementation, the Board will address the question of what restrictions and limitations flow from the worker's compensable Major Depressive Disorder. Therefore, there is another potential mechanism for the worker to dispute the findings of fact regarding his restrictions and limitations.

[49] Although this is not necessary to my decision, I also adopt the reasoning of the panel in *WCAT-2009-01078* when he expressed a concern that the relief sought on that appeal was a direction that the Board should change the worker's vocational rehabilitation plan. The worker seeks similar relief on this appeal. As noted by the panel in *WCAT-2009-01078*, vocational rehabilitation matters are not appealable to WCAT. As such, even if I were to find that the Board's April 25, 2008 decision contained a reviewable decision about the worker's restrictions and limitations, it would be beyond my jurisdiction to grant this relief to the worker.

Conclusion

[50] I deny the worker's appeal and confirm the review officer's December 12, 2008 decision. I find that the Board's April 25, 2008 letter and/or the December 12, 2008 review officer's decision do not contain an appealable decision about the worker's restrictions and limitations.

[51] There was no request for reimbursement of appeal expenses and my review of the file does not indicate any such need; accordingly I make no order in that regard.

Luningning Alcuitas-Imperial
Vice Chair

LA/jm