

## NOTEWORTHY DECISION SUMMARY

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**Decision:** WCAT-2013-00190      **Panel:** Cathy Agnew      **Decision Date:** January 22, 2013

***Section 31(1)(f) of the Administrative Tribunals Act – Section 23(3.1) of the Workers Compensation Act – Policy item #40.00 of the Rehabilitation Services and Claims Manual, Volume II – Loss of earnings assessments – Findings of fact made by Review Officer in determining entitlement to loss of earnings assessment are not binding***

Findings of fact made in the course of determining whether a worker is entitled to a loss of earnings assessment are not binding in the subsequent determination of whether the worker is entitled to a loss of earnings award. Therefore, these findings of fact are not appealable to WCAT.

The worker was denied a loss of earnings assessment by the Workers' Compensation Board, operating as WorkSafeBC, and requested a review of this decision from the Review Division. The Review Division found that the worker was entitled to a loss of earnings assessment on the basis that his loss of earnings was significant, but found he would be able to adapt to another suitable occupation. The worker appealed the Review Division decision to WCAT on the basis that he was competitively unemployable. The worker requested that WCAT confirm the Review Division decision, but make different findings of fact in coming to this same conclusion.

On appeal, WCAT found that findings of fact made in the course of deciding whether a worker is entitled to a loss of earnings assessment under policy item #40.00 of the *Rehabilitation Services and Claims Manual, Volume II* are not binding in the subsequent assessment of whether a worker is entitled to a loss of earnings award pursuant to policy item #40.12. Thus, these findings of fact are not appealable to WCAT. WCAT dismissed the appeal under section 31(1)(f) of the *Administrative Tribunals Act* on the basis that it had no reasonable prospect of success.

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## Introduction

- [1] This appeal concerns the worker's claim with the Workers' Compensation Board (Board), operating as WorkSafeBC, for a neck injury he sustained on April 16, 2003.
- [2] The Board accepted a C6-7 disc herniation, discectomy and fusion surgery as permanent injuries resulting from the work incident and provided him with a permanent partial disability award based on 3% of total disability. The Board later increased the worker's permanent functional impairment by 2.5% for chronic pain and 10% for major depressive disorder which were also accepted as permanent conditions. An additional 0.39% for age adaptability resulted in a total award of 15.59% of total disability. The effective date of the worker's disability award is May 11, 2007.
- [3] The Board has already determined that the effect of the worker's permanent compensable injuries is such that he cannot return to his pre-injury employment or an occupation of a similar type or nature.
- [4] The worker's entitlement to a loss of earnings assessment was further considered on May 6, 2011 when a case manager determined that the worker would be able to adapt to the occupations described in National Occupational Classification (NOC) code 9495 - Plastics Products Assemblers and Finishers and NOC code 9483 - Electronics Assemblers, Fabricators, Inspectors and Testers. The case manager further found that the worker would likely be able to generate earnings of \$2,082 per month in these occupations. When combined with the amount of the worker's pension calculated on a functional loss basis (\$333), this resulted in a loss of earnings of \$569. As this loss was approximately 19% of his pre-injury long-term earnings rate, the worker's loss was not considered to be significant. Therefore, the worker was not entitled to a loss of earnings assessment.
- [5] In the February 21, 2012 Review Division decision that is the subject of this appeal (*Review Reference #R0134016*), the review officer agreed that the worker would be able to adapt to the identified occupations, but he allowed the worker's request for review as he felt that the worker was entitled to a loss of earnings assessment because a loss of 19% was significant.
- [6] The worker attended an oral hearing of this matter. His union provided him with representation. The employer did not participate in the appeal, although invited to do so.

- [7] The worker seeks a finding that he is 100% unemployable. His representative submitted on his behalf that the alternate occupations identified in the May 6, 2011 decision letter were either not suitable or not reasonably available to the worker.
- [8] After the hearing, I solicited further submissions from the worker's representative about whether the worker's appeal ought to be dismissed under section 31(1) of the *Administrative Tribunals Act (ATA)* and she responded with a detailed submission on December 17, 2012.

## **Issue(s)**

- [9] The issue is whether the worker's appeal ought to be dismissed in accordance with section 31(1) of the ATA. This issue turns on the broader question of whether findings of fact relating to suitable employment that have been made in a decision to refer a worker for a loss of earnings assessment is binding on the Board when it does the actual loss of earnings assessment.

## **Reasons and Findings**

- [10] Section 31(1) of the ATA authorizes the Workers' Compensation Appeal Tribunal (WCAT) to dismiss all or part of an appeal in a summary manner in certain prescribed circumstances. Section 31(1)(f) provides that an appeal may be dismissed if there is no reasonable prospect that it will succeed.
- [11] The worker's request for a loss of earnings assessment was allowed in the February 21, 2012 Review Division decision that is the subject of the present appeal. The Board's policy regarding the assessment of a worker's entitlement to a loss of earnings pension is contained in item #40.00 of the RSCM II. This policy was amended on August 3, 2012 to incorporate policy changes approved on July 17, 2012. It applies to all decisions, including appellate decisions, made on or after April 26, 2012 and is therefore applicable in this appeal. The policy change does not affect the outcome of this appeal since the worker is not disputing the remedy provided in the Review Division decision that is under appeal.
- [12] The worker agrees that he is entitled to an assessment and therefore he wants the review officer's decision to allow the assessment to be confirmed. Since this is the only entitlement issue for me to decide in this appeal, I have decided to dismiss the worker's appeal on the basis that there is no reasonable prospect of success.
- [13] I have carefully considered the worker's December 17, 2012 submission. The worker's representative noted that the review officer had disagreed with the worker's submission that he is totally and completely unemployable. She submitted that there were numerous "substantive issues" remaining for me to consider and decide in the worker's appeal including whether the worker is capable of full-time work, part-time work, or any work at all. She submitted that it was open to me to come to a different conclusion

about the occupations that would be suitable for the worker after weighing the medical evidence about the worker's residual abilities. She submitted that I could also make findings about whether the worker's accepted physical and psychological limitations would preclude him from performing the proposed assembly work. The worker's representative submitted that I should decide specific issues pertaining to the worker's ability to do the jobs identified and the earnings for the occupation.

- [14] The question of whether the worker is entitled to an assessment of his loss of earnings pertains to section 23(3.1) of the Act. This is the issue which is before me and it is distinct from the decision made under section 23(3) of the Act pursuant to which a loss of earnings award may be provided. Any findings of fact, I might make about the suitability and availability of the jobs identified in the May 6, 2011 decision letter are not binding on the Board when it undertakes the assessment of the worker's loss of earnings under section 23(3).
- [15] This distinction was well-articulated in *WCAT-2010-02111* dated July 30, 2010 wherein the vice chair explained that:

...the determinations conducted under sections 23(3.1) and (3.2) of the Act are the necessary prerequisite action before the Board can legally undertake an assessment and grant an award under section 23(3) of the Act. As set out in policy #40.00 of the RSCM II, these are general considerations that by their preliminary nature do not ascertain all of the specifics that are encompassed in a full section 23(3) assessment, which includes the provisions articulated in policy items #40.12 and #40.13 of the RSCM II. These policies articulate more comprehensive and specific requirements for determining an award under section 23(3) that are not prescribed for the sections 23(3.1) and (3.2) determinations. From my view, had the intention been for the determinations under sections 23(3.1) and (3.2) be identical to and binding on the section 23(3) determination, there would be no need for a separate assessment under section 23(3) of the Act. Yet, this is what the legislation requires.

The Board, in giving effect to the legislation, has set out policy that differentiates the criteria for sections 23(3.1) and (3.2) determination from that of the 23(3) assessment. Given that the investigations and criteria for the section 23(3) assessment are far more detailed and specific to the worker, including the requirement that it consider all possible retraining and other measures, this in itself means that a section 23(3.1) determination, which does not contain that criterion, cannot be binding on the later section 23(3) assessment. Similarly, the provision of an employability assessment, as a component of the section 23(3) assessment, is not the same as the more cursory vocational rehabilitation consideration under sections 23(3.1) and (3.2). It is possible, that in light of additional vocational rehabilitation or other measures undertaken as

part of or prior to the actual section 23(3) determination, a worker might be able to be placed in a specific job, as noted in policy item #40.12, that eliminates any actual or potential long-term loss. By definition, one could not argue that a general finding under section 23(3.1) or (3.2) would be binding and require the Board to pay an award in that case. Section 23(3)(d)(i) would not allow it. Hence, the general nature of the sections 23(3.1) and (3.2) determinations cannot be binding upon the Board in the section 23(3) assessment.

- [16] While not binding on me, I find the above analysis to be persuasive and consistent with my reading of the Act and policy.
- [17] Whether I agree or not with the review officer's findings of fact related to the various issues identified by the worker's representative such as the worker's residual abilities, physical and psychological limitations, and suitable occupations, the outcome of the appeal will still be to confirm that the worker is entitled to an assessment of his loss of earnings as decided by the review officer. Further, these findings of fact will not be binding on the Board when it conducts the loss of earnings assessment and determines whether the worker is or is not entitled to a loss of earnings award.
- [18] I note that the Board has already proceeded to undertake an assessment of the worker's loss of earnings under section 23(3) and has advised the worker of the details of his loss of earnings award in a decision letter dated July 13, 2012. In undertaking the assessment of the worker's loss of earnings, the Board appears to have relied on the findings made by the review officer in the decision under appeal. However, it was open to the Board to make different findings of fact about these matters and it is open to the worker to request a review of the Board's July 13, 2012 decision about his loss of earnings award, although at this point in time he would have to request and obtain an extension of time from the Review Division to do so.
- [19] The findings of fact upon which the Board's conclusions about the worker's loss of earnings award are based would properly be challenged in the context of a request for review of the Board's July 13, 2012 decision letter. There is no further entitlement remedy that I can provide to the worker in the context of this appeal.

## Conclusion

- [20] The worker's appeal of *Review Reference #R0134016* is dismissed pursuant to section 31(1) of the ATA on the basis that there is no reasonable prospect that it will succeed.
- [21] As the worker was unsuccessful in his appeal and considering the guidance contained in item #16.1.2.1 of WCAT's MRPP, I decline to order the Board to reimburse the worker for the expense he incurred to attend the oral hearing.

Cathy Agnew  
Vice Chair

CA/jkw