

WCAT Decision Number :

WCAT-2014-02222

WCAT Decision Date:

July 23, 2014

Panel:

Hélène Beauchesne, Vice Chair

Introduction

- [1] The worker was employed in a mill. He suffered a crush injury to his non-dominant left hand on March 31, 2006 resulting in four surgeries. The Workers' Compensation Board (Board)¹ accepted his claim for a permanent functional impairment of his left index and middle fingers, and chronic pain of the left index and middle fingers and the left wrist. The Board eventually granted the worker a permanent partial disability award calculated on a loss of function basis of 12.18% of total disability, effective November 17, 2006, and equivalent to \$283.48 per month.
- [2] In a decision dated April 16, 2013, the Board determined that the worker's loss of function award was greater than his entitlement to a partial loss of earnings award (equivalent to \$130.19 per month), and therefore his award would continue to be paid under the loss of function method.
- [3] The worker appeals an October 1, 2013 decision of the Board's Review Division (*Review Reference #R0160588*). In that decision, the review officer denied the worker's request for review and confirmed the April 16, 2013 decision. The review officer found that the occupation of security guard was suitable and reasonably available to the worker and the amount of his partial loss of earnings award had been correctly calculated.
- [4] The worker filed this appeal with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act). The worker requested the appeal proceed by a review of the file and written submissions. There are no significant issues of credibility or factual disputes, nor are there other compelling reasons for holding an oral hearing. I agree that the appeal can be properly decided in the manner requested. The employer did not participate in the appeal. The worker was represented by legal counsel and provided a written submission.
- [5] The worker submits that he is entitled to an increased loss of earnings award. He submits that he has been unable to maintain a full time position with the employer and the occupation of security guard is neither suitable nor reasonably available.

¹ The Board operates as WorkSafeBC

Issue(s)

- [6] The issue arising from the appeal is whether the worker is entitled to a permanent partial disability award paid under the loss of earnings method.

Reasons and Findings

- [7] The standard of proof is the balance of probabilities as modified by section 250(4) of the Act. That section provides that in compensation cases, where the evidence supporting different findings on an issue is evenly weighted, the WCAT must resolve that issue in a manner that favours the worker.
- [8] Section 250(2) of the Act requires the WCAT to apply published policy of the board of directors of the Board. The *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) is the policy applicable to this appeal.
- [9] Section 23(3) of the Act provides that, if the Board determines under section 23(3.1) that the combined effect of the worker's occupation at the time of injury and the 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, the Board may pay the worker's permanent partial disability award on a loss of earnings basis. In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation.
- [10] The Board has divided the loss of earnings decision into two steps. The first step is the determination under section 23(3.1) of whether the worker is entitled to a loss of earnings assessment. Only if the worker passes that step does the Board determine the worker's entitlement to a loss of earnings award under section 23(3).
- [11] In this case, the Board initially determined the worker was not entitled to a loss of earnings assessment as he had returned to his pre-injury employment. However, a vice chair determined that the worker was entitled to a loss of earnings assessment in *WCAT-2011-00678* dated March 15, 2011. The vice chair found the worker was unable to perform the pre-injury occupation of chainman. She further found that the worker was unable to adapt to the alternate occupation of hula saw operator without incurring a significant loss of earnings. She accepted the worker's evidence that he was laid off three to four months a year, whereas he had not been subject to layoff prior to the injury. As a result of that decision, the Board went on to the second step to calculate the worker's entitlement to a loss of earnings award. The applicable policies are set out in item #40.10, #40.12, and #40.13 of the RSCM II.

- [12] Item #40.10 provides that the Board determines the worker's long term average net earnings after the injury by comparing the average net earnings the worker is actually earning with the average net earnings the Board estimates the worker is capable of earning in a suitable occupation after the injury.
- [13] Item #40.12 gives guidance on what is considered a suitable occupation. It defines occupation as a collection of jobs or employments that are characterized by a similarity of skills.
- [14] In estimating what the worker is capable of earning in a suitable occupation after the injury, the Board considers the evidence, including the medical evidence, of the limitations imposed by the compensable disability and the fitness of the worker to perform different occupations. The Board also gives regard to the evidence about the suitability of the worker for occupations that could reasonably become available over the long-term.
- [15] The Board assesses the worker's earning potential in light of transferable skills and all possible rehabilitation measures that may be of assistance, including the possibility of retraining or other measures that may be appropriate to the worker.
- [16] Item #40.12 provides guidelines for determining suitably and reasonably available occupations for a worker, including:
- If the worker has made all reasonable efforts to maximize his or her earnings, the job that the worker has actually obtained is generally accepted as being suitable, unless there is evidence that the job is transitory and jobs at another level of earnings within that occupation will be available to the worker in the near future.
 - The occupation must, in practice, be reasonably available. The Board will, generally, only have regard to higher paying occupations which a person in the worker's present job would ordinarily be expected to obtain. It would not be fair to assume that a worker will receive all possible promotions that might theoretically be made available.
 - The worker has the skills, education and functional abilities that the occupation requires.
 - A reasonably available occupation must be one that the worker is medically fit to undertake, and that does not endanger the worker's recovery or the health and safety of the worker and/or others.
 - A reasonably available job is usually within a reasonable commuting distance of the worker's home.

- If the worker declines the best-paying reasonably available job because of a personal preference for a lower-paying job or for an alternative life-style, the wage rate in the best-paying reasonably available job will be used in the formula.

- [17] I will first consider the suitability of the security guard occupation.
- [18] There are no physical activities from which the worker is restricted. The Board accepted that the worker's accepted physical limitations include the avoidance of forceful and/or repetitive left hand gripping activities. The worker has not argued that there are other limitations or restrictions resulting from his compensable injury.
- [19] The worker argues that his physical limitations prevent him from working as a security guard. He states that in order to perform the required job duties of a security guard, he would have to rely on forceful and/or repetitive hand gripping. He submits that he may have to use physical force to defend himself in the course of carrying out his duties, such as in the case of discouraging "undesirables" from entering an establishment.
- [20] I accept that the duties of security guards are varied. I am not satisfied that all security guard positions would require the use of physical force. I am not bound by the WCAT decision cited by the worker (*WCAT 2007-02132*) and also note that the worker in that decision suffered from a significantly different physical impairment than the worker in this case (low back impairment as opposed to left hand impairment). Even if the worker was required to use physical force, I am not satisfied that he would be required to use repetitive or forceful gripping with his non-dominant left hand in order to do so. I find the evidence supports a conclusion that the occupation of security guard is within the worker's accepted physical limitations.
- [21] The worker argues that, as a security guard, he would have to abide by the demands of the employer with respect to his work schedule or ability to take breaks. He states that his impairment would prevent him from performing repetitive work or adhering to a work schedule without any breaks. I do not find evidence that the occupation of security guard would require the worker to perform any repetitive work with his non-dominant left hand. There is no limitation which would prevent the worker from performing any other sort of repetitive work or from adhering to a work schedule.
- [22] I find the occupation of security guard is suitable for the worker.
- [23] The next consideration is whether the occupation of security guard is reasonably available to the worker. The worker is currently 57 years old and lives in the Lower Mainland. The evidence contained in the employability assessment shows that there is a shortage of security guards in British Columbia and that the majority of opportunities will continue to be in the Lower Mainland and Southern Vancouver Island regions. This supports a conclusion that there will be a number of available security guard positions.

Regardless, it is still necessary to consider whether there would be positions available for this worker. The worker argued that his physical disability and limitations will not likely make him an attractive candidate for security guard positions. He did not provide any rationale or basis for his statement. I do not agree that the worker's non-dominant left hand impairment would significantly impair his employment opportunities as a security guard.

[24] The worker did not specifically argue that his English language skills would limit his ability to obtain work as a security guard. Regardless, I agree with the review officer's reasons in finding that the worker's English language skills would not be a barrier to employment as a security guard and adopt them as my own. The review officer noted the English language upgrading and training that the Board outlined in the vocational rehabilitation plan. I also do not consider the worker's age would be a barrier to employment as a security guard. I find that the occupation of security guard would be reasonably available to the worker on completion of the vocational rehabilitation assistance offered by the Board.

[25] Item #40.13 provides that a worker's post-injury loss of earnings will be based on estimated earnings rather than actual earnings in the following cases:

- The worker is employable but does not have a job; or
- The worker has a job but is not maximizing his or her earning capacity up to the pre-injury rate; or
- The worker has, for personal reasons, withdrawn from the workforce;
or
- The worker fails to co-operate with the rehabilitation process.

[26] The worker argues that he has been unsuccessful in maintaining a full-time position with the employer. The worker has continued to work with the employer but has been subject to significant periods of lay off. I accept that the worker is not maximizing his pre-injury earnings in the ongoing employment with the employer. As a result, it is appropriate to base the worker's post-injury earnings on estimated earnings in the occupation of security guard.

[27] Item #40.13 further provides

Although assessment of a permanent partial disability award will often be made some time after the original injury, it would not be fair to compare directly the actual pre-injury average earnings with the earnings the worker might now earn in the occupations available. The effect of inflation upon earnings levels would mean that the real loss would not be properly determined in that way. **The practice of the Board is to use the earnings in the occupations available**

after the injury as they stood at the date of the injury. It occasionally happens that earnings in occupations at the time of the injury are not available. If this occurs, it may be necessary to use the earnings in those occupations as they were at another date and bring the pre-injury earnings into line by applying cost of living adjustments as described in policy item #51.00.

[emphasis mine]

- [28] In this case, the Board based the calculation of the worker's partial loss of earnings award on the "average range" earnings of \$18.19 per hour in 2012 dollars. The Board determined a gross monthly rate and then applied the cost of living adjustment set out in item #51.00 to adjust the post-injury earnings to 2006 dollars, arriving at the long-term net monthly figure of \$2,441.42. The Board took the net monthly pre-injury earnings of \$2,586.08 and subtracted the net monthly post-injury earnings of \$2,441.42, for a difference of \$144.66 net per month. The partial loss of earnings award was 90% of that amount, or \$130.19 net.
- [29] In my view, the use of the 2012 labour market survey to determine the post-injury earning capacity is inconsistent with the policy outlined in item #40.13. There were earnings in the occupation of security guard as they stood at the date of injury which were available at the time of the Board's decision. These earnings were set out in the employability assessment and included three different sources: the 2006 occupational class average for full-time workers for all BC (\$2,096.00 net monthly), the 2006 occupational class average for full-time workers for the Lower Mainland and Victoria (\$2,100.37 net monthly) and the WorkBC information for 2006 (\$2,198.29 net monthly). Both of the occupational class averages were for the first quarter of 2006 and the last three quarters of 2005.
- [30] As there were available earnings as they stood at the time of injury, those are the earnings that the Board should have used. As I interpret the policy, it is only in those occasional cases where earnings as they stood at the time of injury are not available that earnings at another date are used and a cost of living adjustment then applied. There are many cases when earnings as they stood at the time of injury are not available, such as when the worker is limited to a certain number of hours per week or an appellate decision determines that the worker is only capable of attaining a certain rate in the long run. However, this is not one of those cases.
- [31] I also find it striking that the three sources for post injury earnings as they stood at the time of injury are all basically within a range of \$100.00 net per month, whereas the figure arrived at by using the 2012 labour market survey and then applying a cost of living adjustment is significantly different. Finally, in reviewing the labour market information that was placed on file, it is not apparent to me how the vocational rehabilitation consultant arrived at the "average range earnings" of \$18.19 per hour. That figure resulted in a net monthly figure of \$2,715.84 per month in 2012 dollars, adjusted to \$2,441.42 in 2006 dollars. The difference between these two methods is so

substantial that it results in the worker not being entitled to a partial loss of earnings award under the method used by the Board, whereas he is entitled to an award under the method subscribed by the policy.

- [32] I find that the Board should have used the 2006 occupational class average for full-time workers for the Lower Mainland and Victoria of \$2,100.37 net monthly when determining the worker's entitlement to a partial loss of earnings award. The occupational class average figures are quite close together, and I consider it appropriate to use the figure for the region in which the worker lived and in which demand was highest. The occupational class average is also more appropriate than the WorkBC figure as the occupational class average was obtained from the 12 months prior to the worker's injury, as opposed to the calendar year of 2006.
- [33] For convenience, I have calculated the worker's entitlement to a partial loss of earnings award based on the post-injury earnings of \$2,100.37 net monthly. These calculations are subject to verification and final implementation by the Board. If my calculations are correct, the net monthly pre-injury earnings \$2,586.08 less the net monthly post-injury earnings of \$2,100.37 equals \$485.71. Ninety percent of that figure is \$437.14. As this amount is greater than the worker's functional award, he is entitled to a partial loss of earnings of \$437.14 per month effective November 17, 2006. That amount replaces the worker's functional award.

Conclusion

- [34] I allow the worker's appeal in part and vary the decision of the Review Division dated October 1, 2013. The worker is entitled to a partial loss of earnings award based on the post-injury net earnings of \$2,100.37 per month, which will likely result in an award of \$437.14 per month.
- [35] The worker did not request to be reimbursed for any expenses incurred in the appeal. I am not aware of any appeal expenses. As a result, I make no order with respect to appeal expenses.

Hélène Beauchesne
Vice Chair

HB/rh