

NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2015-00465 **Panel:** Melissa R. Clarke **Decision Date:** February 11, 2015

Section 23(3) of the Workers Compensation Act – Policy item #40.12 of the Rehabilitation Services and Claims Manual, Volume II – Loss of earnings awards – Competitive employability – Reasonably available occupation – Pre-existing conditions

A reasonably available occupation under policy item #40.12 of the *Rehabilitation Services and Claims Manual, Volume II* is one that takes into account the worker's functional capabilities, and one that the worker is medically fit to undertake. This requires the Workers' Compensation Board, operating as WorkSafeBC (Board), to consider a worker's pre-existing non-compensable condition when determining whether the worker is competitively employable.

In the case before WCAT, the worker had a significant pre-existing condition. Nevertheless, prior to his injury he maintained steady employment in his occupation for 32 years. The worker suffered an electrical injury at work, and was unable to return to his pre-injury occupation. The Board granted the worker a 100% loss of earnings award. The employer brought an appeal of the worker's loss of earnings award.

On appeal, WCAT found that the Board had to take into account both compensable and pre-existing non-compensable conditions when considering suitable and reasonably available occupations in the context of a loss of earnings award decision. In particular, if a worker maintained employment prior to the work injury despite significant pre-existing conditions, then these pre-existing conditions should be considered when determining whether the worker is competitively employable.

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Panel: Melissa R. Clarke, Vice Chair

Introduction

- [1] The employer appeals the September 16, 2014 decision of the Review Division of the Workers' Compensation Board, operating as WorkSafeBC (Board). I also have jurisdiction to consider the issues addressed in the Board's decision of April 8, 2014, which was the decision letter that the employer requested a review of by the Review Division. The Review Division decision (*Review Reference #R0175258*) confirmed the Board's 100% loss of earnings award.
- [2] The employer is represented in this appeal. The worker is participating in the appeal and is represented by a workers' adviser.
- [3] The employer did not request an oral hearing of this appeal. I have considered the Workers' Compensation Appeal Tribunal (WCAT) *Manual of Rules of Practice and Procedure*, including Rule #7.5, "Appeal Method," and I have reviewed the issues, evidence and submissions in this appeal. I am satisfied that the employer's appeal does not raise significant factual disputes, nor does the appeal involve questions of credibility or other compelling reasons for an oral hearing. Rather, the appeal primarily involves the application of law and policy to evidence already on file. The worker's claim file is well documented and detailed. I therefore find that an oral hearing is not necessary for the full and fair adjudication of this appeal.
- [4] The employer's representative made written submissions with respect to this appeal. The worker's representative filed written submissions. I have also considered the parties' submissions to the Review Division.

Issue(s)

- [5] Is the worker entitled to a 100% loss of earnings award?

Jurisdiction

- [6] This is an appeal of a Review Division decision pursuant to subsection 239(1) of the *Workers Compensation Act* (Act).
- [7] Under section 250 of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case. Section 254 of the Act gives WCAT

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.

- [8] This is a rehearing by WCAT. WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further evidence, although it is not obliged to do so.
- [9] WCAT exercises an independent adjudicative function and has full substitutional authority. WCAT may reweigh the evidence and substitute its decision for the appeal decision or order. WCAT may confirm, vary or cancel the appealed decision or order. Evidence is weighed on the balance of probabilities. In the event that the evidence on an issue respecting compensation for a worker is evenly weighted, section 250(4) of the Act directs the panel to resolve that issue in favour of the worker.
- [10] All reference to policy in this decision, unless otherwise specified, pertains to the Board's *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

Background and Evidence

- [11] It is not necessary to provide a detailed recitation of the history of the claim. The prior Review Division decision provides considerable detail which I have reviewed and accept as an accurate portrayal of the claim history. I adopt the facts as set out in that prior decision as my own.
- [12] The worker, a telecommunications technician, suffered an electrical injury at work on April 26, 2012. The worker made contact with an exposed live wire and the electrical current entered his left finger and passed through his left shoulder to his right shoulder. In a decision letter dated July 25, 2013, the Board accepted that the worker had a permanent right shoulder sprain/strain and right shoulder chronic pain. The worker's claim was referred to Disability Awards. The Board officer accepted limitations with respect to gripping, reaching overhead and lifting, carrying, pushing and pulling over the light strength category. In a decision dated February 25, 2014, the worker was granted a functional pension award of 7.21% for his permanent conditions.
- [13] In a memorandum dated December 13, 2013, a Board vocational rehabilitation consultant said that she considered the worker competitively unemployable. The vocational rehabilitation consultant noted the worker's pre-injury psychiatric diagnosis and the employer's pre-injury permanent accommodations in this regard (low stress environment, work in a small team, reduced workload, steady/comfortable work pace, limited noise levels). The employer's accommodations reduced interpersonal conflicts with coworkers, although he still experienced psychiatric symptoms, would forget to take his medication and sometimes required hospitalization. The vocational rehabilitation consultant said that the worker was able to perform the majority of his pre-injury job duties without challenges, difficulty or discipline. She noted that the worker had been in the pre-injury occupation for 32 years. The vocational rehabilitation consultant said that

the employer was unable to accommodate the worker's additional functional limitations and retraining would need to be non-academic. The vocational rehabilitation consultant said that the worker's primary barriers to a return to work were his psychiatric diagnosis and chronic pain. She said that competitive employability was predicated on "realistic, actual and sustainable employment outcomes. Success in placement takes into consideration the whole person."

- [14] In a decision letter dated April 8, 2014, a Board officer in Disability Awards decided that the worker was eligible for a 100% loss of earnings award.
- [15] The employer disagreed with the April 8, 2014 Board decision and requested a review by the Review Division. In a decision dated September 16, 2014, the review officer denied the employer's request for review. The review officer said that the vocational rehabilitation consultant was mindful of the non-compensable factors set out in *WCAT-2013-01698* and came to the conclusion that the worker was competitively unemployable due to the combined effects of his compensable and non-compensable conditions.
- [16] The employer appealed the September 16, 2014 Review Division decision to WCAT and it is that decision which is before me today.

Reasons and Findings

- [17] Policy item #40.01 of the RSCM II sets out the decision-making procedure in section 23(3) loss of earnings pension awards and the role of the Disability Awards Committee. The section 23(3) assessment process is set out in policy item #40.10 and includes the medical evidence, limitations imposed by the compensable disability, fitness of the worker for different occupations, including suitability and reasonable availability. Policy item #40.12 sets out more detail with respect to suitable and reasonably available occupations.
- [18] With respect to suitability, policy item #40.12 says that if the worker has made all reasonable efforts to maximize his earnings, the job that the worker has actually obtained is generally accepted as being suitable. A worker must have the skills, education and functional abilities required by an occupation.
- [19] With respect to reasonable availability, policy item #40.12 says that it is not fair to assume that a worker will receive all possible promotions that might be available. 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 or others. A suitable occupation that is reasonably available over the long term will be considered even if it is not reasonably available at the time of the Board's assessment due to general economic conditions. A reasonably available job is usually within a reasonable commuting distances from the worker's home. With respect to a worker's refusal of job, policy item #40.12 sets out a lower-paying job might be

considered more stable in the long run if a higher paying job is subject to economic fluctuations. Policy item #40.12 also sets out that if a worker refuses the best paying job due to personal preference or an “alternative life-style”, the best paying job may be used by the Board in the calculation of an award.

- [20] The employer’s position is that the worker is not entitled to a loss of earnings award because the reason he is competitively unemployable relates to non-compensable conditions. The worker’s position is that the Board must take the worker as they find him or her and the decision with respect to employability must necessarily take into account all factors which impact upon employability, not just those that are related to compensable conditions under the claim.
- [21] I agree with the worker’s position, as well as the vocational rehabilitation consultant’s view that success in job placement takes into account the whole person. Policy item #40.12 clearly states that the worker must have the functional abilities required by an occupation and a reasonably available occupation must be one that the worker is medically fit to undertake. Policy item #40.12 does not require the Board to only consider the worker’s functional abilities related to the compensable conditions, nor to only consider occupations that the worker is medically fit to undertake having regard to the compensable conditions.
- [22] I agree with the worker that to only consider occupations that are suitable and reasonably available having regards to compensable conditions would make no sense. I note that the worker has relied upon *WCAT-2013-01698*. That decision related to a worker’s eligibility for a loss of earnings assessment, not entitlement to a loss of earnings award. However, the analysis provided by the panel in that decision supports my conclusion that the Board must take into account both compensable and non-compensable conditions when considering suitable and reasonably available occupations in the context of a loss of earnings award decision. I note that *WCAT-2013-01698* has been relied upon by other panels in the context of loss of earnings award decisions: see *WCAT-2014-02407*, for example. I am not bound by these decisions, but find them helpful in reaching my decision in this appeal.
- [23] I pause to note that while this worker does have a myriad of non-compensable conditions, the fact of the matter is that he did maintain employment (albeit on an accommodated basis) until the compensable injury under this claim. In *WCAT-2010-01448*, dated May 27, 2010, a three-member panel summarized a number of prior Appeal Division, WCAT, and Court Decisions about the test of causative significance and concluded it is not necessary that the employment have been the sole cause, the predominant cause, or even a major cause of the disability, in order to establish employment causation. It is sufficient that the employment was of some causative significance, which was more than negligible or trifling (*de minimis*) in nature. Though not binding on me, I consider the above statement to be an apt explanation of the meaning of “causative significance.” I am satisfied that this analysis is, by way of

the wording of policy item #40.12, to be extended to the consideration of suitable and reasonably available occupations related to a loss of earnings award decision.

- [24] For clarity, Board policy does not limit loss of earnings awards to those situations where a worker is competitively unemployable solely due to compensable conditions.
- [25] Having considered all of the evidence and submissions before me, I find that the worker is entitled to a 100% loss of earnings award.
- [26] The employer's appeal is denied.

Conclusion

- [27] I deny the employer's appeal and confirm the September 16, 2014 decision of the Review Division.
- [28] There has been no request for reimbursement of appeal expenses. Therefore, I make no order in that regard.

Melissa R. Clarke
Vice Chair

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