



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1913/10

BEFORE: R. Nairn: Vice-Chair

HEARING: October 8, 2010 at Toronto
Oral

DATE OF DECISION: January 28, 2011

NEUTRAL CITATION: 2011 ONWSIAT 220

DECISION(S) UNDER APPEAL: WSIB ARO decision dated November 9, 2009

APPEARANCES:

For the worker: Ms. P. Fontyn, Office of the Worker Adviser

For the employer: Did not participate

Interpreter: N/A

REASONS

(i) Introduction

[1] At the time of the accident under consideration here, the worker was employed in the accounts receivable department of the employer's credit business. Born in 1965, the worker was hired by the accident employer in 2000.

[2] On September 26, 2003, while on the way to the bank to make her daily work deposits, the worker was involved in a motor vehicle accident. While waiting for a traffic light to turn green, her vehicle was rear-ended. The Health Professional's Report of January 14, 2004, provided a diagnosis of "cervical/thoracic/lumbosacral/R shoulder sprain/strain". The WSIB (the "Board") recognized the worker's injuries as compensable and she was granted Loss of Earnings ("LOE") benefits. As noted in Memo #4 dated January 16, 2004, the Board originally terminated the payment of LOE benefits effective January 19, 2004, being of the view that the worker was capable of returning to suitably modified duties, at no wage loss, which the accident employer was prepared to offer. The closure of benefits was confirmed in a decision dated January 16, 2004.

[3] The worker did not return to employment however and on February 26, 2004, a return to work mediation was held. In Memo #20 the Board's Return-to-Work Mediator noted the following with respect to that meeting and the subsequent agreement:

- The workplace parties all agree that a misunderstanding occurred between the WSIB and themselves. The employer states that they never offered [the worker] any modified work. A letter from the employer dated January 16 04 offers only regular work with no accommodations.
- The employer states that no one ever discussed offering [the worker] part-time work or providing any accommodations.
- The workplace parties agree that the company is under restructuring and [the worker] has been offered an exit package. Her job will no longer be available after April or May 2004.
- A graduated modified job could be offered, but the employer needs to investigate this possibility and determine how it could be implemented. This could be difficult due to the company's restructuring.
- [The worker] will discuss returning to work on a part-time basis with both her doctor and physiotherapist.

[4] As noted in Memo #23 dated March 2, 2004, after reviewing the contents of the mediation agreement, the Claims Adjudicator agreed to allow further LOE benefits after January 19, 2004. Those benefits continued until approximately April 12, 2004, when the worker began performing modified duties, four hours a day, out of her home.

[5] On July 30, 2004, the worker was laid off as a result of the employer's restructuring and moving outside of the country. Given the layoff, the Board agreed to provide the worker with Labour Market Re-Entry ("LMR") assistance. In Memo #45 dated August 5, 2004, the Claims Adjudicator noted:

- She is currently partially impaired with lower back restrictions e.g. to avoid heavy lifting, repetitive bending and prolonged positioning.
- Due to the employer's business situation (transfer of their finance operations to the U.S.) the worker's employment with the A/E officially ended effective 01 Aug 2004. She has been given a severance package by the A/E.
- This worker has been employed as an accounts receivable clerk by the A/E for about 3.4 years since Apr 2000. Before this she had worked as accounts receivable coordinator for [another employer] (with two employees under her) for ten years, after working for two years with an airline company in the accounting department/tickets refund. All in all, she has about 15.4 years work experience in the accounting field, her pre-injury job.
- This type of employment is a sedentary office desk job where there is flexibility to change body positions as necessary and employers have been providing ergonomically sound workstations as part of their business operations to prevent injuries in the workplace. It is evident therefore that the worker's pre-injury job is suitable and she is capable of returning to it.
- Since she is capable of returning to her pre-injury job and restoring her pre-injury earnings, she is not entitled to further LOE benefits effective 01 Aug 2004. Her current wage loss is due to the business situation in the A/E. In other words, even if she was not injured, she would have lost her job still.
- To help her however in the transition, the Board will sponsor her for a four week job search training. She will receive full LOE benefits while participating in it. The file has been referred to an LMR service provider.

[6] In a decision dated August 12, 2004, the Claims Adjudicator noted that "since technically you are currently involved in a labour market re-entry (LMR) program and your job search training is still being arranged, I have allowed the payment of full loss of earnings benefit from August 1, 2004 until the completion of your job search training program".

[7] As noted in Memo #52 dated September 29, 2004, the worker was advised that her job search training program was set to start on October 6, 2004.

[8] In Memo #54 dated October 7, 2004, the Claims Adjudicator noted:

I received a call from [the worker] today advising that she did not attend [her] LMR job search training program today because she is feeling dizzy due to her medication, specifically "Topomax". She will see her doctor today.

- I asked her to submit a medical note/report from her doctor if she will be off from her program for a longer period of time.

[9] In Memo #55 dated October 14, 2004, the Board's Nurse Case Manager advised:

Spoke with [the worker] today, states that she is unable to attend LMR as she is dizzy from meds: Oxycodone & Topomax, and unable to drive.

Discussed that as she is now [more than] one year since DOA she needs to discuss with her doctor that she needs to be able to function, explain that the meds are not "curing" her pain, only masking it, she understood and will speak with him. (...)

[10] The Claims Adjudicator spoke with the worker again on approximately October 19, 2004 and noted the following in Memo #56:

- I received a message yesterday from the LMR service provider, advising me that [the worker] has only attended her job search training program once. She has missed five of six scheduled sessions so far. [The service provider] asked what to do with the program.
- I spoke with [the worker] this morning. She confirmed she only attended once. She complains her pain medications, Oxycodone and Topomax, are causing her dizziness and she is unable to drive. (...) She said she saw her family doctor two days before her conversation with the NCM and she has not seen her doctor again. I asked her when she will see her doctor, she said she does not know yet. She states she has been taking Oxycodone for a long time and her doctor knows about her complaint of dizziness. I suggested since she says she has a problem with the medication, she should to and discuss it with the doctor asap. She keeps saying her doctor knows about it already.
- I asked her to have her doctor send us a report and to explain why she cannot attend her job search training program (...)
- I also explained to her that since she is not attending the LMR program, which is the reason why we are paying her LOE benefits, there is basis to continue paying LOE benefits. I advised her effective 11 Oct 2004, her LOE benefits will be suspended and it now becomes a medical issue and to review her case, we need a medical report from her doctor. I also asked her [if] her doctor has reported to authorities that she is on ongoing medication which causes dizziness affecting her driving. She says she does not know.
- Later she called me back stating she will see her doctor if not today, tomorrow. She will have the doctor's report faxed to us. Now she says she can drive for five or ten minutes. She understands we will review her case when we receive the doctor's report.
- She does not know when she can go back to her LMR program.

[11] In the course of considering the material submitted by the worker, the Claims Adjudicator, in Memo #58, asked for a medical opinion and noted:

Could you comment on whether the medications in question (OxyContin, Topomax) caused disabling dizziness and rendering the worker totally disabled. Could you comment on Dr. Kim's statement that the Topomax dose has not yet stabilized and will require another four weeks? Does it mean once stabilized, the body will adjust and develop tolerance to dizziness/sedation?

[12] In Memo #59 dated October 27, 2004, Dr. Shapiro of the Board replied "at this point in the compensable condition, limitations that stem from symptomatic medication would be considered self-imposed as the choice of symptomatic medication is based solely on subjective criteria".

[13] After reviewing the comments from Dr. Shapiro, the Claims Adjudicator confirmed the termination of the worker's LOE benefits effective October 11, 2004 but, as noted in Memo #60 of November 1, 2004, advised the worker that "I would keep her entitlement to the job search training program open until 01 Feb 2005 and if she decides to avail of it, she should notify me ahead of time; LOE benefits will be paid when she actually attends the program, not before it".

[14] Information on file indicates that the worker never actually participated in the job search training program. In testimony provided at this hearing, the worker indicated that in 2006, she was eventually able to secure a job with another employer.

[15] Subsequently, the worker asked to be paid LOE benefits from October 11, 2004 to November 24, 2004 and this issue was eventually forwarded to an Appeals Resolution Officer (“ARO”). In a decision dated November 9, 2009, the ARO denied the worker’s appeal and concluded:

The worker was not in LMR; she removed herself from that process and in fact stated it would not be of benefit to her. She is not entitled on that basis. As well I noted that it has been determined that the worker’s injury does not preclude a return to her pre-injury employment. Although there is impairment there is not a disability that is, there is no loss of earning capacity. Pre-injury employment remained suitable.

As she was no longer in the acute phase of her treatment, and had returned to work but due to an employment situation this work no longer existed, the payment of further LOE is not in order. The representative argued that entitlement should be considered [as she] was waiting for possible referral for further treatment. Waiting for possible treatment does not necessarily lead to entitlement. This treatment did not materialize and was not pursued nor documented in the REC assessment.

The argument that the worker was prevented from driving in this time period does not support that she was completely unable to return to any type of work. The worker had returned to work before this period without any reported complaints regarding transportation. The evidence does not support that there was any deterioration warranting further LOE benefits on that basis.

[16] In a letter dated January 10, 2005, the worker was advised that she was being granted a 20% Non-Economic Loss (“NEL”) award for her compensable back condition.

(ii) Issue on appeal

[17] The issue to be determined in this case is whether the worker is entitled to LOE benefits from October 11 to November 24, 2004 as a result of injuries sustained in the compensable accident of September 26, 2003.

(iii) The worker’s testimony

[18] In her testimony, the worker outlined her employment experience and indicated that after finishing high school and taking a few community college accounting courses, she obtained a job with an airline working in its financial department. She worked there for four or five years before the company shut down and then she got another job in the accounts receivable department of a bakery. She worked there for about 10 years before starting with the accident employer. She advised that over the course of her employment history, she had never had any lengthy time off except for maternity leave and had not been involved in any other accidents or incidents either inside or outside her employment.

[19] According to the worker, she was hired by the accident employer as an accounts receivable analyst. This job had a number of functions including dealing with customers and their accounts, reconciling accounts, banking and working on deposits. The job was not particularly physical in nature. Most of her day (six out of eight hours) was spent sitting at a desk. The other time was spent at lunch, on breaks or going to the washroom. She was free to get up and walk around if necessary, but never had any need to do so. Much of her workday was spent talking to customers on the phone.

- [20] The worker confirmed that she was involved in a motor vehicle accident on September 26, 2003, while travelling to the bank to make some deposits.
- [21] The worker recalled returning to her duties in approximately April 2004. She did not go back to the workplace however, as arrangements were made for her to work from home roughly four hours a day. Her new duties consisted only of reconciling accounts. This was essentially a paper function, checking to see that customers' payments were credited to their accounts.
- [22] The worker found that her work arrangement was suitable because she was not required to sit in an office and work four hours straight. She could break up her tasks into many shorter periods and it was not unusual for her to do her work while sitting in her bed propped up on pillows. She could not work straight through for four hours because the medication she was taking often left her feeling sleepy and without energy. It was not unusual for her to sleep anywhere from three to six hours during the day. While she was working at home, half her wages were paid by the employer and other half by the Board.
- [23] According to the worker, the post-accident job of reconciling accounts made up only about 20% of her pre-accident job. In her experience, this type of job would not be available in the general workplace. She was not required to speak to customers or work on deposits or banking. She was of the view that if she had been required to perform these tasks in the workplace, she would not have been able to sit at her desk for any more than 20 minutes at a time. Her medication also affected her ability to concentrate. She was in a dilemma in that she could not drive to the office because of the medication she was taking, but she could not function at her job without the medication.
- [24] The worker confirmed that in the summer of 2004, she was laid off as the employer's financial operations moved to the United States. After the layoff at the end of July 2004, she went to India for about three weeks to investigate another medication which she had been told might help reduce her pain. Both her family physician Dr. Kim, and the WSIB, knew she was going to India. She stopped taking the medication prescribed by Dr. Kim while in India. When it became apparent that this new medication would not be of any assistance, she started to take her prescribed medication once again.
- [25] By September 2004, the worker felt that her condition was worse and she was beginning to feel depressed about her situation. She recalled the Board offering LMR assistance in the form of job search training but she was not certain she needed it because she already had a resumé and had been through a number of interviews. In any event, she did not feel physically capable of attending the training which was to last three hours a day.
- [26] The worker advised that she attended the first day of the training program and did not take her medication because she had to drive there. She did not feel well and left to see her family physician. Dr. Kim indicated that she should not be attending school and should not stop taking her medication.
- [27] The worker was questioned about comments in the case materials that she was capable of driving for five or 10 minutes at a time. The worker indicated that the only time she was capable

of driving was the five or 10 minutes between the end of the effectiveness of one of her medications and the time she took the next pill.

[28] According to the worker, 2004 and 2005 were a very difficult time for her as she was physically unable to do very much at home. She was feeling depressed and was worried about her family's finances. She spent most of the day sleeping and therefore spent little time with her children. She was also able to do very little around the home to assist her husband. She was prescribed some medication to help deal with her depression.

[29] In approximately mid-2005, the worker decided that she had to do something with her life so she gradually stopped taking her pain medication during the day. In 2006, she was able to find a job in accounts receivable although she was earning \$5,000 or \$6,000 less than her pre-accident job. Taking a less senior position gave her more flexibility with respect to being able to get up and walk around. The worker stayed with this employer for about four years. She took occasional sick days and experienced a few acute episodes of back pain. On two occasions she had to leave work to go to the hospital because she could not walk. No Board claims were ever filed over these incidents.

[30] The worker found a similar job with another employer in October 2009 and continued there until she was laid off in January 2010. She is currently looking for a new job.

(iv) Analysis

[31] As noted earlier, when this worker was permanently laid off at the end of July 2004, the Board determined that it would be appropriate to offer her LMR assistance. While the Board was of the view that her pre-accident accounting duties remain suitable, it was determined that she would benefit from four weeks of job search training. The Claims Adjudicator advised the worker that she would be paid LOE benefits while she participated in the job search training program which was scheduled to begin on October 4, 2004. *Operational Policy Manual* ("OPM") Document No. 19-03-10 entitled "Co-operating in LMR" provides in part:

Policy

Workers are required to co-operate in all aspects of labour market re-entry (LMR) assessments and plans. If a worker does not co-operate, benefits are reduced or suspended, and the LMR assessment or plan may be terminated.

Guidelines

Co-operation requirements

Workers co-operate in LMR assessments and plans by

- participating in the activities of the LMR assessment to identify suitable and available employment with the accident employer, or another suitable and available employment or business (SEB)
- participating in the preparation of an LMR plan, and
- fulfilling the mutually agreed upon commitments outlined in the LMR plan.

(...)

Reducing or suspending benefits

The WSIB may reduce or suspend a worker's benefits, and terminate the LMR assessment or plan if, after notifying the worker of the obligation(s) to co-operate, the worker

- fails to demonstrate co-operation, and
- does not have a legitimate reason for not co-operating.

[32] Having reviewed the material before me and having considered the worker's testimony (something which was not available to the ARO) I am satisfied that the Board erred in terminating the worker's LOE benefits on October 11, 2004. In my view, she had "a legitimate reason" for not participating in the job search training.

[33] As the worker indicated in her testimony, at the time the training program was scheduled to begin, she was taking a combination of medication to combat her back pain which left her feeling weak, dizzy and unable to concentrate. It was also not safe for her to drive after taking this medication.

[34] As the worker noted in her testimony, she attended the training program the first day, without taking her medication, because she had to drive there. She left before completing the three hour class and shortly thereafter visited her family physician, Dr. Kim. In a letter dated October 13, 2004, Dr. Kim advised:

[The worker] has attended one session of her LMR plan. She stated that she found the three hour duration intolerable on account of her symptoms and the side effects of her current medications. Upon further questioning, it was found that she drove herself to this session.

There are several points of concern regarding her condition. Firstly, she is currently being up-titrated on Topamax; the dose has not yet stabilized and will require at least another four weeks to determine efficacy and side effects. As such, she should not be driving until it is determined safe to do so. Secondly, she is taking Oxycontin at 10 mgs. twice daily along with Oxy IR 5 mgs for break through pain. She has not yet overcome the sedative effects of these analgesics. Thirdly, should these medications fail to provide adequate relief of symptoms, she will have to be reassessed and titrated on other medications and will have possibly more profound side effects.

The sum of points is that she is not to be driving for the next four to six weeks and that the sedation caused by the medication makes attendance at the LMR impractical. This is even without taking into consideration that she is not able to sit for three hours due to her back condition.

Addendum: at this point any special referral will be to a chronic pain clinic – waiting period 6-12 months & she will still require medication.

[35] As the reporting from Dr. Kim makes clear, at the time the worker was asked to participate in the LMR activities, she and her physician were in the process of determining the appropriate types and dosage of medication to be prescribed. Dr. Kim suggested that it would take "at least another four weeks" to determine the appropriate dose and for the worker to overcome the sedative effects of analgesics. At the time, the worker was in the dilemma of being unable to function physically without the medication and yet suffering significant side effects with the medication.

[36] In Memo #59, Dr. Shapiro of the Board appears to suggest that the worker should not be granted any further entitlement because the problems she experiences are “self-imposed”. However, it is worth noting (as confirmed in the October 1, 2004 letter from the Board’s Drug Verification Services) that the Board approved and reimbursed the worker for costs associated with taking these medications.

[37] At the commencement of the hearing, Ms. Fontyn indicated that the worker was seeking LOE benefits for approximately six weeks from October 11 to November 24, 2004 since this coincided with the “four to six weeks” that Dr. Kim felt LMR attendance would be impracticable.

[38] In my view, given that the Board only planned to pay the worker LOE benefits while she was participating in LMR activities and noting that the job search program was going to last four weeks, I am satisfied it would be appropriate to extend the worker LOE benefits for four weeks rather than six. Had the worker participated in the LMR program as originally envisaged, she would only have received an additional four weeks of benefits.

DISPOSITION

[39] The worker's appeal is allowed in part.

[40] The worker is granted an additional four weeks of full LOE benefits from October 11, 2004.

DATED: January 28, 2011

SIGNED: R. Nairn