WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1795/11

BEFORE:	J. P. Moore : Vice-Chair
HEARING:	September 15, 2011 and January 19, 2012, at Toronto Oral
DATE OF DECISION:	March 9, 2012
NEUTRAL CITATION:	2012 ONWSIAT 542
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) decision dated March 16, 2010

APPEARANCES:

For the worker:	M. Farago, Lawyer
For the employer:	M. Woo, Paralegal
Interpreter:	Not applicable

REASONS

(i) Introduction

[1] On October 31, 2008, the worker sustained a bilateral shoulder injury in the course of his employment. At the time of the accident, the worker was 22 years of age and employed as a construction worker.

[2] The worker was unable to work because of the injury. The Workplace Safety and Insurance Board (the "Board") granted the worker loss of earnings ("LOE") benefits until November 3, 2008. In the March 16, 2010 decision under appeal, an Appeals Resolution Officer ("ARO") extended the worker's entitlement to full LOE benefits to January 27, 2009, which was the duration of the period during which the ARO found that the worker had a loss of earnings as a result of his injury.

[3] The worker returned to modified duties, with the agreement of the Board, on January 27, 2009. He began his regular duties on February 3, 2009. On February 6, 2009, he was laid off by the accident employer. The worker sought a determination by the Board regarding his rights under the re-employment provisions of the legislation. On March 24, 2009, the Board determined that the employer had not breached its obligation to re-employ the worker.

[4] The worker objected to that decision. In the decision under appeal, the ARO denied the worker's appeal, finding that the employer had not breached the re-employment obligation under the Act. The worker has appealed that decision to the Tribunal.

(ii) Issues

[5] The issues in this appeal are as follows:

1. whether the employer breached its re-employment obligation under the Act, with respect to the appellant worker;
2. if there was a breach, whether a penalty should be assessed against the employer; and
3. if there was a breach, whether the worker was entitled to additional benefits for loss of earnings.

(iii) The decision

[6] On the evidence and submissions presented to me, I am persuaded on a balance of probabilities that:

1. the employer breached its re-employment obligation to the appellant worker in July 2009;
2. no penalty should be assessed against the employer;
3. the worker is entitled to "re-employment benefits" to compensate him for loss of earnings from the date of the breach.

(iv) Analysis

(1) The facts

[7] Testimony was provided by the worker, and by the accident employer's Office Manager. The testimony was generally consistent. Where there were discrepancies, they are addressed in the discussion below. Based on the testimony, and documentary evidence entered into the Case Record, I make the following findings of fact.

[8] On October 31, 2008, the worker was employed by the accident employer as a "Boardman." His duties involved applying drywall to structures being built by the accident employer. The worker was a unionized worker and was paid on the basis of the volume of work he produced, or "piece-work." The worker had certification through his Union as a piece-worker. According to the evidence, piece-workers work on residential structures. The Union maintains a second list for commercial workers, who are paid on an hourly basis.

[9] After injury on October 31, 2008, the worker attempted to return to modified work with the employer on November 6, 2008. He stopped work on November 10, 2008, and did not return again until January 27, 2009. As noted above, the Board initially only paid LOE benefits up to November 6, 2008, but then, pursuant to the ARO's decision, allowed full LOE benefits up to January 27, 2009.

[10] The worker did modified work until February 3, 2009, when he began his regular duties. He did those duties for three days and was laid off on February 6, 2009, with several co-workers. The termination was confirmed in writing in a letter dated February 5, 2009. The letter was addressed to the worker and was entitled "Short-Term Lay-Off." The letter reads in part as follows:

> As you are aware, your family doctor indicated that you could return to your full regular work after one week of modified work. In turn, you successfully completed one full week of modified work and returned to your regular work without physical restrictions on Wednesday, February 4, 2009.
>
> However, we are extremely slow at the moment due to the recession. In turn, we are laying you off temporarily as of February 6, 2009, *but will recall you when we obtain more work in the near future.* [emphasis added]

[11] In his testimony, the worker stated that, on the basis of that letter, he understood that the employer would contact him for a "call back" when work became available.

[12] The worker subsequently obtained another job with another employer. In order to take that job, he had to change his certification from piece-work to hourly. He did so. The worker testified that he could change his certification to whichever category enabled him to take work that came up through the Union Hall hiring list.

[13] The worker testified that he did the hourly job for "a couple of months" and then was unemployed until January 2010, when he obtained another construction position. He stated that he did not hear again from the accident employer until January 2011, when he was offered further work by the accident employer.

[14] The employer's witness confirmed that the worker was laid off on February 6, 2009, because of reduced work. She also confirmed that the notice given to the worker stipulated that the lay-off was "short-term" and that the worker would be contacted if further work became available. Finally, she confirmed that, in the summer of 2009, the employer hired other workers

from the worker's Union and did not contact the worker about those positions. According to records provided by the employer, at least one of those workers began work in July 2009 and several more began work in August and September 2009.

[15] According to the employer's witness, the positions for which workers were hired in the summer of 2009 were positions for which the employer did not believe the worker was qualified. The witness stated that, since the worker had done piece-work for them, they believed that he was not certified to do "hourly" work in commercial structures. She stated that there was little residential, or piece-work, work available during 2009 and early 2010. She acknowledged that the worker was not contacted to determine if he was, in fact, qualified to do the types of jobs that became available with the employer during the summer of 2009. She asserted that, if the worker had been on the Union hiring list as an available commercial worker, the employer would have re-hired him. She said that the fact that the worker's name did not come up on the list of commercial workers suggested that he was on the residential, or piece-work, list. Hence, the employer would not have been aware that he was available for re-employment.

[16] Finally, the witness acknowledged that the employer did not have to find workers through the Union Hall hiring list. She stated that it was a common practice in the industry to re-hire unionized workers who had previously worked for them, rather than seeking workers from the Union Hall hiring list. She stated that this practice was favoured by employers in the construction industry, because it ensured that the workers hired were reliable. When doing this, the employer had to notify the Union that these individuals had been hired. The witness confirmed that it was the employer's intention to do this with the worker, had residential work become available.

[17] In the course of the worker's testimony, he was questioned by Mr. Woo regarding the nature and extent of his employment in 2009. The worker stated that the only work that he obtained in 2009 was several months of work as a commercial/hourly drywall worker. Mr. Woo suggested in his questioning of the worker that the worker may have done some non-Unionized, freelance work during 2009, since his income tax records showed earnings in 2009 greater than the earnings the worker had from his unionized work. Mr. Woo also noted that the worker informed a physician, in July 2009, that he was doing "freelance" work. The worker denied that he did any significant non-unionized work during 2009.

(2) Law and policy

[18] Section 41 of the *Workplace Safety and Insurance Act, 1997* (the "WSIA") governs the statutory re-employment obligation imposed on employers. Subsection 41(8) of the WSIA stipulates that employers engaged "primarily in construction" are subject to requirements set out in Ontario Regulation 35/08, which governs the re-employment obligations of employers in the construction industry. Ontario Regulation 35/08 came into force on September 1, 2008. The provisions in that regulation have been incorporated into policy documents issued by the Board, which are also in effect as of September 1, 2008. The applicable policy is found in *Operational Policy Manual* ("OPM") Documents #19-05-02, 19-05-03, and 19-05-04. The provisions applicable to the issues in this appeal are discussed in the sections dealing with each of the issues.

(3) Did the employer breach its re-employment obligation?

[19] On this issue, I am persuaded, on a balance of probabilities, that the employer breached its obligation to re-employ the worker.

[20] In so ruling, I find as a fact that the employer complied with its obligation to re-hire the worker in November 2008 and in January 2009. I further find that the employer did not breach its re-employment obligation when it laid off the worker on February 6, 2009. I find that the worker was laid off on that occasion as part of a broader lay-off, related to lack of work.

[21] Section 5 of Regulation 35/08 stipulates the duration of the employer's re-employment obligation:

> 5. The employer is obligated under this Part and under Part IV or V as the case may be, until the earliest of the following:
>
> 1. The second anniversary of the date of injury.
>
> 2. One year after the worker is medically able to perform the essential duties of his or her pre-injury employment.
>
> 3. The date on which the worker declines an offer from the employer to re-employ the worker in accordance with this Regulation.
>
> 4. The date on which the worker reaches 65 years of age.

[22] In terminating the worker's employment on February 6, 2009, the employer triggered a presumption contained in section 8 of the Regulation, which is described as follows in OPM Document #19-05-03 regarding the construction industry:

> **Presumption**
>
> The WSIB presumes that the employer has not fulfilled the re-employment obligation if a worker is terminated:
>
> 1. within six months of being re-employed, other than at a construction project;
> 2. within six months of being re-employed at a construction project and before his or her work on the construction project is completed; or
> 3. when his or her work on a construction project is complete and the employer does not re-employ the worker at a construction project within 6 months after the date on which the worker was re-employed although
>
> - the worker is able to perform the essential duties of his or her pre-injury employment, and the pre-injury employment, or employment that is **comparable** to it (see definition above), is or becomes available at the construction project, or at another construction project, or
> - suitable work is or becomes available at the construction project, or at another construction project.

[23] According to subsection 8(3), an employer may rebut the presumption by showing that termination of the worker's employment was not related to the injury.

[24] Under the policy and the Regulation, when the worker returned to his pre-injury duties, the employer had a continuing obligation to re-employ the worker for one year. The worker was medically fit to perform the essential duties of his pre-injury employment on February 3, 2009. There was no evidence that the worker declined an offer of re-employment from the employer. Hence, the employer's obligation to re-employ the worker continued until February 3, 2010.

[25] In addition, termination of the worker's employment on February 6, 2009, and subsequent failure to re-employ the worker within six months after the date of his re-employment when comparable work became available, triggered the presumption set out in the policy and the

Regulation. In this case, the six months for the presumption began on February 3, 2009, when the worker returned to work, and expired on August 3, 2009.

[26] In the present case, the employer appears to have acknowledged its obligation to the worker in the lay-off notice given to the worker on February 6, 2009. In that notice, the employer stated that the lay-off was "short-term" and that the employer would recall the worker when work became available.

[27] According to the evidence, at least one position as a boarder with the accident employer became available prior to August 3, 2009, when a worker was hired to work in the month of July 2009. Several other positions became available in the following two months. As will be seen in the discussion below, the worker was, or could have become certified to take those positions. There is no evidence that the employer contacted the worker about those positions or attempted to contact the worker about those positions.

[28] As noted above, according to section 8 of the Regulation, the presumption can be rebutted. Document #19-05-03 states:

> If evidence acquired during these inquiries is enough, on a balance of probabilities, to show that the termination or failure to employ was unrelated to the injury, the presumption has been rebutted and the employer is found not to be in breach of its re-employment obligation. However, if evidence acquired during these inquiries is not sufficient to dispel doubt about the reasons for the termination or failure to re-employ, the decision-maker presumes that a breach occurs.

[29] Mr. Woo submitted, on behalf of the employer, that the employer did not contact or attempt to re-hire the worker because the employer did not believe the worker was certified for the types of jobs the employer had available.

[30] However, the worker testified that changing certification was simply a matter of notifying the Union Hall that the worker wished to move from one certification list to the other certification list. The worker testified that he did this when he obtained employment in April 2009, changing from piece-work certification to hourly certification. I accept the worker's evidence that he would have been able to make the appropriate arrangements in order to accept the position that became available in July 2009 and other positions that became available later that summer had he been contacted by the employer and offered the re-employment opportunity.

[31] It is clear from the policy and section 8 of the Regulation that the onus is on an employer to manage the re-employment process by contacting the worker about suitable employment, since only an employer can know when work becomes available. The policy implies that an injured worker has a right of first refusal to any employment that becomes available with the accident employer that is comparable to the worker's pre-injury employment. Hence, in my opinion, the employer cannot defend its decision not to contact the worker by stating that it did not believe that the worker was certified to perform comparable work. The employer's assumptions about the worker's Union qualifications to perform suitable work is not sufficient to "dispel doubt" about the reasons for the termination, in the words of the policy.

[32] Section 11 of the Regulation (of Part IV of the Regulation, which is applicable to Union members) stipulates that, if an employer has knowledge that a worker is medically able to do his pre-injury work, the employer "shall" contact the worker about available work in the worker's "trade or classification." I am persuaded that in July 2009 and for several months thereafter the

employer had work available in the worker's trade or classification and failed to offer that work to the worker.

[33] In his submissions, Mr. Woo submitted that the worker may have been working as a freelance dry-waller when positions became available with the employer in the summer of 2009. Even assuming that to have been the case, such work would not have been through the Union Hall and was likely at significantly reduced wages. Again, the obligation imposed upon the employer requires that the employer make a reasonable effort to ascertain the worker's availability. In his testimony, the worker stated that he would always take unionized work over non-unionized or freelance work. There is no evidence that the worker was engaged in unionized work at the time the positions became available with the accident employer. I accept the worker's testimony that, had the employer contacted him, he would have accepted re-employment in a unionized position.

[34] Document #19-05-03 of the Board's policy stipulates that, in determining whether an employer has complied with its re-employment obligation, relevant facts include but are not limited to whether:

> - another worker is performing work in the worker's trade and classification at a collective agreement workplace who was hired, assigned, or transferred on or after the date on which the worker was injured, or a vacancy exists with respect to such work (…)

[35] I find that, in the summer of 2009, vacancies existed in the worker's trade or classification. The employer's records show one such position, as an "hourly commercial worker," became available in July 2009 and several others became available in August and September 2009. The employer apparently assumed that the worker was certified in a different classification and puts this forward as a defence. However, the compliance guidelines further stipulate that a relevant fact to be considered is whether:

> - the employer has investigated, with or without the assistance of the WSIB, how to fulfill its obligation to accommodate the work or the workplace to the extent of undue hardship.

[36] In my view, that particular policy provision reinforces what I see as the intent of the policy to impose on the employer, who is in the position of knowing what work is available and has an obligation to offer suitable work to the worker, an obligation to ascertain a worker's classification status in order to determine whether appropriate work is available.

[37] Mr. Woo also argued that, under the Board's policy, the employer's obligation to re-employ ended when the worker obtained other comparable unionized work in April 2009. The applicable policy provision is found in Document #19-05-04:

> Re-employment payments and the RTW placement program generally end if the employer subsequently meets the re-employment obligation, or if the worker obtains employment in the general labour market at earnings that meet or exceed his or her pre-injury earnings.

[38] However, in my view, that policy pertains to the payment of re-employment benefits and does not indicate that the employer's re-employment obligation ends once a worker finds further employment. According to section 5 of the Regulation and OPM Document #19-05-02, an employer's re-employment obligation continues until the earliest of:

> - two years from the date of injury,

- one year after the worker is medically able to do the essential duties of his or her pre-injury employment,
- the date on which the worker declines an offer from the employer to re-employ the worker, or
- the date on which the worker reaches 65 years of age.

[39] In the present case, the re-employment obligation would have continued for one year from February 3, 2009. I conclude, therefore, that the employer breached its obligation to re-employ the worker when it did not re-hire the worker to perform work comparable to the worker's pre-injury employment in July 2009, and again in the following two months, when workers were hired by the employer.

(4) Penalty

[40] On this issue, I am persuaded that no penalty should be imposed on the employer for breaching its obligation to re-employ the worker.

[41] In so concluding, I note that the policy was only published by the Board in September 2008. The provisions were, therefore, relatively new in 2009 when the events in issue were taking place. OPM Document #19-05-04 contains the following guideline regarding the impact of the new policy on construction industry employers:

> The WSIB recognizes that a construction employer's ability to meet its re-employment responsibilities is largely based on the employer having a clear understanding of the circumstances which give rise to a re-employment obligation, and the steps the employer must take to fulfill its obligation.

[42] That policy stipulation implies that the Board understands that there is a transitional period during which the policy will have an educational function. Hence, although the employer did technically fail to fulfill its re-employment obligation in July 2009, it did so very shortly after the re-employment provisions were imposed on the construction industry and likely placed some reliance on a decision by the Board that the employer had not breached its re-employment obligation in February 2009.

[43] In the present case, the re-employment breach occurred in July 2009. In the circumstances of this case, it is appropriate to waive any penalty against the employer because, in my view, the employer was not likely fully aware of the nature and extent of its re-employment obligation to the worker at that time.

[44] For these reasons, I conclude that, while the employer breached its obligation to re-employ the worker under section 41 of the WSIA, no penalty should be imposed.

(5) The worker's entitlement to further benefits

[45] On this issue, I am persuaded that the worker is entitled to additional benefits under the re-employment provisions in the legislation and the policy.

[46] Under the Act and the applicable policy, benefits will be paid to a worker who was the subject of the breach of an employer's re-employment obligation. Subsection 41(13)(b) stipulates that, where an employer has not fulfilled its obligation to re-employ a worker, the Board may grant benefits for a "maximum of one year." Those benefits are comparable to LOE benefits but, under the policy, are called "Re-employment Payments." Such payments are to be issued to the

worker for up to one year, or the end of the re-employment obligation, whichever comes first. However, Document #19-05-04 stipulates:

> Re-employment payments and the RTW placement program generally end if the employer subsequently meets the re-employment obligation, or if the worker obtains employment in the general labour market at earnings that meet or exceed his or her pre-injury earnings.

[47] Mr. Woo submitted that this provision implied that re-employment benefits were not payable if a worker obtained employment elsewhere, even though the re-employment obligation itself may continue to run. However, in my opinion, if the re-employment *obligation* is not terminated by the offer of comparable employment during the year-long obligation, re-employment *benefits* should also not be subject to termination on that basis. In my view, the stipulation in OPM Document #19-05-04 that re-employment payments "generally end" if a worker obtains employment in the general labour market at earnings that meet or exceed his pre-injury earnings, goes to the quantum of the benefits rather than the duration of the obligation to re-employ.

[48] In my view, that interpretation is buttressed by provisions in OPM Document #19-05-04 regarding calculation of re-employment payments. According to that document, re-employment payments will be made to a worker who is eligible for such payments "effective from the date the re-employment obligation was breached." The policy further stipulates that re-employment payments are issued for up to:

- one year, or
- the end of the re-employment obligation, whichever comes first,...

[49] On the evidence, the re-employment obligation began on February 3, 2009 and lasted until February 3, 2010. In my opinion, the employer breached its re-employment obligation in July 2009, when it offered hourly commercial work to a worker other than the injured worker. Under the Board's policy, the worker became eligible for re-employment benefits from the date that hiring occurred and continued to be eligible to receive such benefits until he obtained comparable employment, or until February 3, 2010, whichever was earliest.

[50] I leave it to the Board to determine, through the employer's records, the date on which the employer hired a unionized worker as an "hourly commercial worker" in July 2009, and to pay re-employment benefits from that date.

DISPOSITION

[51] The worker's appeal is allowed in part, as follows:

1. The employer was in breach of its obligation to re-employ the worker with respect to a workplace injury that occurred on October 31, 2008; that breach occurred in July 2009.
2. The employer is not subject to a penalty for that breach.
3. The worker is entitled to re-employment benefits from the date, in July 2009, when the employer first hired an "hourly commercial worker" from the worker's Union. Such benefits are to be paid until the earliest of January 27, 2010 or the date the worker obtained work in January 2010.

DATED: March 9, 2012

SIGNED: J. P. Moore