



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2386/10

BEFORE:

N. Jugnundan: Vice-Chair

HEARING:

December 3, 2010, at Toronto
Written

DATE OF DECISION:

December 16, 2010

NEUTRAL CITATION:

2010 ONWSIAT 2881

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) dated February 2, 2010

APPEARANCES:

For the worker:

G. Majesky, Paralegal

For the employer:

Not participating

Interpreter:

N/A

Workplace Safety and Insurance
Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2

Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail

505, avenue University, 7^e étage
Toronto ON M5G 2P2

REASONS

(i) Introduction to the appeal proceedings

[1] The worker's appeal arises from the decision of the Appeals Resolution Officer (ARO) dated February 2, 2010. While the worker is no longer disputing the issue of entitlement to full loss of earning (LOE) benefits, he is appealing the issue of using 40 hours per week rather than 37.5 hours in calculating his partial LOE benefit.

(ii) Issues

[2] The only issue for determination is the number of hours to be used in calculating the worker's partial LOE benefits.

(iii) Background

[3] The following are the basic facts.

[4] This now 56 year old worker was employed as a journeyman electrician when he tripped on debris and fell onto his knees on June 23, 2005.

[5] The initial diagnosis was bilateral knee contusion. An MRI in April 2006 revealed a tear of the posterior horn of the medial meniscus. An arthroscopy was performed on September 27, 2006.

[6] The worker was awarded an 18% NEL award for the residual right knee impairment.

[7] The worker was referred to labour market re-entry (LMR) services. The initial suitable employment or business (SEB) was identified as a purchasing/inventory clerk. Subsequently, the SEB was changed to customer service representative.

[8] The worker terminated the LMR plan following the completion of the customer service training. The claims adjudicator determined as per correspondence dated December 11, 2006 that the SEB was suitable and the worker's LOE benefits were calculated at \$10.00 per hour.

[9] On appeal the ARO determined that the SEB was suitable and that the worker was capable of returning to work within his restrictions. The ARO determined that medically there were no contra-indications for the suitability of the SEB at 40 hours per week. The worker appeals the calculation of the LOE benefit at 40 hours per week.

(iv) Law and policy

[10] Since the worker was injured in June 2005, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[11] *Operational Policy Manual* Document No. 19-03-03, "Determining Suitable and Available Employment or Business, and Earnings," states in part the following:

Policy

The WSIB determines the suitable and available employment or business (SEB) for a worker when following a labour market re-entry (LMR) assessment, a worker requires a LMR plan the worker is job ready, the worker is unable, usually on a temporary basis, to participate in a LMR plan due to a post-accident, non work-related change in circumstance, or the worker is non co-operative.

Determining hours of work for the SEB

A SEB should not only meet any restrictions that are caused by the injury but should also meet, as closely as possible, the number of hours the worker worked prior to the injury.

Pre-injury, part-time employment

Where a worker was working part-time hours prior to the accident, the worker is not expected to either increase the number of hours or obtain full-time employment post-injury, in the identified SEB, in order to mitigate a wage loss.

However, a part-time worker who is interested in pursuing full-time employment post-injury may be supported in doing so (e.g., worker's level of work-related impairment does not restrict full-time employment).

(v) The worker's representative submissions

[12] In summary the worker representative made the following written submissions:

- The worker was employed 37.5 hours before the accident. The Board should consider the worker's pre- injury hours of work when determining the SEB.
- The use of the standard 40 hours per week resulted in lesser compensation for the worker.

(vi) Analysis

[13] The only issue for determination is whether the worker's partial LOE benefit should be calculated at 37.5 hours/week rather than the 40 hours/week used by the Board. For the reason noted below, I find that the worker's partial LOE benefit is to be calculated at 37.5 hours per week.

[14] As per OPM Document No. 19-03-03, where a worker works part-time hours prior to the accident, the worker is not expected to either increase the number of hours or obtain full-time employment post-injury, in the identified SEB in order to mitigate a wage loss. In addition, I note as per this Policy, that the hours deemed suitable for a SEB should reflect, as closely as possible, the number of hours the worker worked prior to the injury. As such, I find that the worker is not expected to increase his or her number of hours worked post-injury in order to avoid a possible wage loss.

[15] In this case, the worker was employed on a full-time basis working 37.5 hours per week. This is confirmed by collective agreements found in the Case Record. The Board decided that medically the worker was capable of returning to 40 hours per week. As can be seen from the collective agreement it was not unusual for 37.5 hours per week to be considered the norm for the industry. Given that one of the goals of the legislation is to attempt to restore an injured worker, as closely as possible, to his or her pre-accident position, I am satisfied that in calculating the worker's post-injury LOE earnings, the Board should have used a 37.5 hour

week, rather than a 40-hour work week. In my view, the worker should not have had to work an additional 2.5 hours a week in order to avoid a wage loss. There are no exceptional circumstances before me to warrant a departure from the Policy.

[16] The appeal is allowed.

DISPOSITION

[17] The appeal is allowed.

[18] The worker's partial LOE benefit calculation is to be based on 37.5 hours per week.

DATED: December 16, 2010

SIGNED: N. Jugnundan