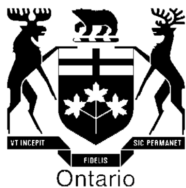

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 708/08R2

BEFORE: J. P. Moore: Vice-Chair

HEARING: February 2, 2010 at Toronto
Written

DATE OF DECISION: March 11, 2010

NEUTRAL CITATION: 2010 ONWSIAT 637

DECISIONS UNDER REVIEW: Worker request for reconsideration of *Decision No. 708/08* (June 5, 2008), and *Decision No. 708/08R*, (January 9, 2009)

APPEARANCES:

For the worker: L. Lunansky, Office of the Worker Adviser

For the employer: Not participating

Interpreter: Not applicable

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, 7e étage
Toronto ON M5G 2P2

REASONS

(i) Introduction and issues

[1] In this complex and unusual case, the worker is seeking entitlement to loss of earnings ("LOE") benefits and labour market re-entry ("LMR") services for an injury that occurred five years before the Workplace Safety and Insurance Board (the "Board") recognized initial entitlement.

[2] In February 2001, the worker claimed that she sustained a neck and right shoulder injury in the course of her employment. She initially sought entitlement to LOE benefits from April 3 to April 22, 2001. The Board denied the worker's claim on the basis that there was insufficient proof of a work-related accident. According to the evidence, the worker returned to her pre-injury work on April 22, 2001.

[3] A year later, the worker complained of worsening pain and requested that she be granted alternative employment by her employer. It is important to note that, at this point, the worker did not have an injury for which benefits were payable from the Insurance Plan. According to the evidence, the worker proposed a particular job. The employer informed the worker that the job she wanted was not available but offered her alternative modified work, which the worker apparently refused. The employer then terminated the worker's employment.

[4] The worker requested that the Board reconsider the issue of her entitlement to benefits for a neck and right shoulder injury. In April 2003, the Board concluded that there may have been a work-related injury but requested further information from the worker and the employer before making a determination on the worker's entitlement under the Insurance Plan. For reasons that are not apparent from the record, there was no further activity in the file until 2005 when the worker enlisted the assistance of the Office of the Worker Adviser. The Board reopened the worker's claim and, in March 2006, concluded that the worker had sustained a work-related neck and right shoulder injury in the course of her employment in early 2001. The Board allowed entitlement for health care benefits and arranged a non-economic loss ("NEL") assessment to determine the extent of permanent impairment resulting from the injury.

[5] However, the Board denied the worker entitlement to retroactive LOE benefits. With respect to the period from April 3 to April 22, 2001, the Board concluded that there was no evidence that the worker was unable to work as a result of her injury. With respect to the period subsequent to the termination of the worker's employment on May 9, 2002, the Board concluded that the worker was not entitled to LOE benefits because her loss of earnings did not result from her injury but from her refusal to accept suitable and available employment. On that same basis, the Board denied the worker's request for LMR services.

[6] The worker objected to that decision. Her objection was allowed in part by an Appeals Resolution Officer ("ARO") who allowed the worker entitlement to LOE benefits from April 3 to April 22, 2001. However, the ARO denied ongoing entitlement to LOE benefits after May 9, 2002, confirming the Board's earlier determination that the worker had refused suitable and available employment at that time.

[7] The worker then appealed to the Tribunal. In *Decision No. 708/08*, a Vice-Chair sitting alone confirmed the decision of the ARO and denied the worker LOE benefits from May 9, 2002 onward. The Vice-Chair also denied the worker entitlement to LMR services.

[8] The worker filed a reconsideration request regarding that decision. In *Decision No. 708/08R*, the hearing Vice-Chair denied the reconsideration request.

[9] The worker then filed a second reconsideration request. What follows is the decision regarding that second reconsideration request.

[10] In submissions prepared in support of the worker's second reconsideration request, the worker's representative, Ms. Lunansky, argued that:

1. the hearing Vice-Chair's finding that the worker had refused suitable modified work was not reasonable or supported by the evidence;
2. the hearing Vice-Chair failed to consider the effect of the termination of the worker's employment on her loss of earnings;
3. the correction of these errors would likely result in a different decision, meeting the Tribunal's threshold test for reconsideration of a Tribunal decision.

[11] The issue in this decision is whether the worker has met the threshold test for reconsidering a Tribunal decision.

(ii) The reconsideration test

[12] The *Workers' Compensation Act* and the *Workplace Safety and Insurance Act* provide that the Appeals Tribunal's decisions shall be final. However, sections 70 and 92 of the *Workers' Compensation Act* and section 129 of the *Workplace Safety and Insurance Act* provide that the Tribunal may reconsider its decisions "at any time if it considers it advisable to do so". Because of the need for finality in the appeal process, the Tribunal has developed a high standard of review, or threshold test, which it applies when it is asked to reconsider a decision.

[13] Generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of finality and the prejudice to any party if the decision is re-opened. The threshold test has been discussed in *Decisions No. 72R* (1986), 18 W.C.A.T.R. 1; *72R2* (1986), 18 W.C.A.T.R. 26; *95R* (1989), 11 W.C.A.T.R. 1; and *850/87R* (1990), 14 W.C.A.T.R. 1.

[14] As discussed in *Decision No. 871/02R2*, one of the fundamental concepts which guides the entire Tribunal process is a duty of fairness. The Tribunal has gone to considerable lengths, in spite of limited resources, to promote a fair process. The threshold test and the role of the reconsideration process must be understood in the context of the Tribunal's processes generally. Most parties have the option of an oral hearing, which is a hearing "de novo" at the Tribunal. This is very unusual at the final level of appeal within any adjudicative system. The Tribunal invests considerable resources in preparing cases for hearing and assisting parties to identify the issues in dispute so that parties can in turn be fully prepared for the hearing. The reconsideration process should not be so generally available that it undermines the important role of the original hearing or the finality of decisions which are reached after a fair hearing process.

[15] Because of limited resources, the Tribunal must also carefully balance its processes to ensure that parties awaiting their first hearing are not penalized because of the expenditure of scarce resources on reconsideration requests.

[16] It is instructive to refer to *Decision No. 871/02R2*'s analysis of the threshold test that a reconsideration request must meet and the reasons for this:

> Section 123 of the *Workplace Safety and Insurance Act* provides that a decision of the Appeals Tribunal under the *Act* is final. While the Appeals Tribunal does have the discretionary power to reconsider its decision under section 129 of the *Act*, this remedy is an exceptional one. Because the integrity of the appeal process and the finality of Tribunal decisions are important considerations in any reconsideration application, the standard of review or threshold which must be met in the reconsideration process is a high one. Although some representatives may advise their clients that a reconsideration application is merely a routine step in the WSI appeal process, this advice is wrong. The reconsideration process is a special remedy and the Tribunal's power to reconsider is invoked only in unusual circumstances; it is not intended as a routine process for any party or representative unhappy with a Vice-Chair or Panel decision. To treat reconsiderations as a routine, insignificant process would effectively undermine the statutory principle of finality, suggest that parties could routinely discount the original hearing process, and put successful parties at risk of multiple proceedings. To be successful on a reconsideration application, an applicant must discharge the onus to satisfy the Tribunal that an otherwise final decision should be reopened. Essentially, an applicant must:
>
> (a) demonstrate that there was a fundamental error of law or process which, if corrected, would likely produce a different result, or
>
> (b) introduce substantial new evidence which was not available at the time of the original hearing and which would likely have resulted in a different decision had this substantial evidence been introduced at the original hearing.
>
> Any error and its resulting effects must be sufficiently significant to outweigh the importance of decisions being final and the prejudice to any party of the decision being re-opened. [emphasis in original]

[17] The Divisional Court has reviewed and upheld the Tribunal's reconsideration process in *Gowling v. Ontario Workplace Safety and Insurance Appeals Tribunal*, [2004] O.J. No.919 (Div.Ct). In particular, the Court found that:

> [B]ecause a reconsideration is distinct from an appeal, a high threshold test is required to balance the interests of the Tribunal and other parties, and the original adjudicator is in the best position to evaluate the proceedings to address natural justice allegations.

(iii) Findings and conclusions

[18] In the present case, I am not persuaded that the worker's reconsideration request meets the threshold test. I am not persuaded that the worker has identified errors of such significance that their correction would likely result in a different decision.

[19] I deal first of all with the worker's argument that the hearing Vice-Chair's finding that the worker had refused suitable modified work was not reasonable or supported by the evidence. I find, first of all, that, in making this argument, the worker is re-presenting an argument made at the hearing of the worker's appeal and remade in the first reconsideration request. In *Decision No. 708/08R*, the hearing Vice-Chair reiterated his findings regarding what he determined to be a refusal by the worker to accept suitable and available employment. The Vice-Chair cited the evidence upon which he relied, clarifying that evidence in part. The Vice-Chair also noted that the worker's representative was effectively rearguing the original case but went on to recapitulate his reasons for concluding that the worker refused suitable and available employment.

[20] In her submissions in support of the second reconsideration request, Ms. Lunansky wrote:

> We submit that it was not reasonable for the Vice-Chair to conclude that the worker had refused suitable modified work. The worker did not refuse to work, she simply declined to transfer to a position in another department.

[21] Ms. Lunansky distinguished this case from cases in which Tribunal decisions that denied a worker entitlement to LOE benefits because the worker "has actually refused to work".

[22] In my view, the fact that there are a number of Tribunal decisions that have come to that latter conclusion does not mean that direct refusal is the only way in which a worker can decline suitable and available employment. In my opinion, it is not reasonable to argue that refusing a transfer to suitable modified work does not constitute a refusal to accept suitable and available employment.

[23] Ms. Lunansky submitted that it was reasonable for the worker to refuse the position offered to her based on her prior experience in that job. However, the Vice-Chair in *Decision No. 708/08* addressed that point in paragraph 30 of the decision, finding that the worker made unjustified assumptions about the modified work based on previous experience at another location.

[24] I conclude, therefore, that the worker has not identified an error with respect to the Vice-Chair's determination on the availability of suitable modified work to the worker, and the worker's refusal to accept such work.

[25] The second argument raised by Ms. Lunansky concerns what she described as the Vice-Chair's failure to consider the effect of the termination of the worker's employment as a factor in her subsequent loss of earnings.

[26] I note that this argument was not presented to the original hearing Vice-Chair at either the original appeal or in the reconsideration request. It is generally important to raise all possible arguments and issues and provide strong evidence on the first reconsideration request. In my opinion, failure by a Panel or Vice-Chair to consider an argument that was not, in fact, before them will generally not constitute an error. There is no procedural unfairness in failing to consider a submission that was never presented. A new argument may be considered if it reveals a clear error of law or other significant defect in the administrative process that, if corrected, would probably change the outcome. In this case, I have found no such error.

[27] However, for the sake of completeness, I address Ms. Lunansky's argument regarding the impact of the termination of the worker's employment on her subsequent loss of earnings.

[28] Ms. Lunansky actually made several arguments under this heading. Her first argument was that the Vice-Chair erred in determining that the worker's loss of earnings from May 9, 2002 onward resulted from her refusal to accept suitable and available employment and not from her retroactively allowed compensable injury. Ms. Lunansky argued that the worker's loss of earnings did not result from the worker's refusal to accept suitable employment but, rather, "from the termination itself". Ms. Lunansky went on to argue:

> Since the compensable condition was a significant contributing factor to the termination, the worker ought to be entitled to LOE.

[29] Ms. Lunansky then cited Tribunal decisions that concluded:

> … when a work-related injury is a significant contributing factor in the worker's termination, the worker is entitled to LOE benefits.

[30] In making this argument, Ms. Lunansky conceded that:

> Workers who refuse suitable modified work at no wage loss are not entitled to LOE as the wage loss then results from the refusal rather than the work-related injury.

[31] In my opinion, Ms. Lunansky's argument is circular and not persuasive. She acknowledges that refusal of suitable modified work will disentitle a worker from receiving LOE benefits because it can no longer be said that the worker's loss of earnings resulted from her injury. She then appears to suggest that, with the termination of the worker's employment, the worker's refusal to accept suitable and modified work ceased to be a factor. She seems to be arguing that, from the point of termination onward, it was the termination of employment alone that determined the worker's entitlement to LOE benefits.

[32] In my opinion, the termination of the worker's employment did not negate the worker's refusal to accept suitable and available employment. The evidence on this issue demonstrates that the worker's refusal to accept suitable and available employment was the trigger for the termination of the worker's employment. The original hearing Vice-Chair so found.

[33] As has been stated in several recent Tribunal decisions (see *Decision No. 690/07* (September 8, 2009) and *Decision No. 1372/09* (December 1, 2009)), the termination of a worker's employment by an employer cannot in and of itself determine a worker's entitlement to LOE benefits. It is necessary to consider the circumstances that gave rise to the termination of the early and safe return to work ("ESRTW") process, and whether the worker has a continuing loss of earnings as a result of the compensable injury so as to entitle the worker to LOE benefits under section 43 of the WSIA.

[34] The cases cited by Ms. Lunansky make that point clear (*Decisions No. 260/05, 2660/07* and *1601/08*). In those decisions, Panels/Vice-Chairs concluded that, on examining the circumstances giving rise to the termination of employment (and by extension the ESRTW process), it was apparent that the worker did not remove himself from the ESRTW process by his conduct and that the work-related injury continued to contribute to the worker's loss of earnings.

[35] In the present case, the Vice-Chair concluded, correctly in my view, that the worker's loss of earnings resulted from her refusal to accept suitable and available employment, a decision that then, as a consequence, led to the termination of her employment. Hence, regardless of whether the employer terminated the worker's employment, when she refused suitable and available employment, her subsequent loss of earnings was not a result of her injury; it was a result of her decision to terminate the ESRTW process. She would not, therefore, be entitled to benefits under subsection 43(1). The subsequent termination of her employment was a further consequence of the worker's decision. But it was not, in and of itself, the factor that determined the worker's entitlement to LOE benefits.

[36] Ms. Lunansky's second argument under this heading was that, if the termination of the worker's employment did not itself trigger entitlement to LOE benefits, the termination had the effect of removing the availability of what may have been suitable, available work. In Ms. Lunansky's submission, once the suitable work was no longer available, the worker's entitlement to LOE benefits had to be redetermined. She cited several Tribunal decisions in support of her submission:

> *Decision 1546/03* found that the worker was entitled to LOE and an LMR assessment after layoff since at that point, the employer was no longer offering suitable modified work.
>
> Similarly, the Panel in *Decision 2938/00* also concluded that the worker was entitled to LOE and LMR services subsequent to her termination. In that case, the worker had

> refused the employer's offer of suitable modified work, but both parties continued to engage in return to work discussions until the employer terminated the worker. The Panel found that the worker was not entitled to LOE for the period in which the suitable work was available, but was entitled to LOE after that time.
>
> In the present case, once the employer fired the worker, it was not offering suitable modified work. At this point, the employer removed itself from the ESRTW process, and ended any further discussions with the worker.

[37] With respect to the latter of those two decisions, *Decision No. 2938/00* (January 23, 2001), the worker in that case refused suitable modified work and was denied LOE benefits on that basis. The worker and the employer subsequently reinitiated the ESRTW process and carried that process on for over a year culminating in the termination of the worker's employment. In its decision, the Panel allowed the worker LOE benefits after the termination of her employment but did so on the basis that the worker continued to cooperate in the ESRTW process which the employer ended by terminating the worker's employment. In that case, the worker's earlier refusal of suitable employment had been vitiated by her subsequent participation in a lengthy ESRTW process with the employer.

[38] The first case cited by Ms. Lunansky, *Decision No. 1546/03,* on its face supports Ms. Lunansky's position. In that decision, a Vice-Chair sitting alone reduced the worker's entitlement to LOE benefits on the basis of non-cooperation but then granted the worker full LOE benefits, as well as LMR services, after the employer terminated the worker's employment.

[39] In my view, that decision is distinguishable from *Decision No. 708/08* because, in *Decision No. 1546/03*, it was not clear on the evidence why the ESRTW process had been brought to an end by the employer. The evidence did not apparently show that the worker had refused modified work. In contrast to that, the worker in *Decision No. 708/08* refused suitable employment, and thereby ended the ESRTW process, which broke the link between her compensable injury and her subsequent loss of earnings under subsection 43(1) of the Act.

[40] A recent Tribunal decision, *Decision No. 2130/09* (December 22, 2009), discussed an analogous situation: where a worker resigned from suitable available employment. Some of the discussion in that decision is instructive. I note, parenthetically, that this decision was released after the release of the decisions under review in this reconsideration request and was not available to the worker or the Vice-Chair at the time of the original hearing. However, the argument now being made by the worker was itself not presented to the Vice-Chair at the original hearing. It is a recent argument and, in my opinion, it is appropriate to assess the argument by reference to a recent and relevant decision.

[41] At paragraph 20 of *Decision No. 2130/09*, the Panel stated:

> In effect, a resignation from suitable employment constitutes an intervening event which breaks the chain of causation between the injury and the loss of earnings. The condition precedent in section 43(1) is not satisfied, and there is no entitlement to LOE benefits.

[42] The Panel then cited several Tribunal decisions that concluded that, after the occurrence of an intervening event, benefits may nonetheless be reinstated in certain circumstances. The Panel then stated at paragraphs 22-24:

> The Panel agrees that disentitlement to LOE benefits under section 43(1) need not always be permanent. Indeed, Board practice supporting this is evident in the case at hand: during post-resignation periods of total disability due to surgeries, and during an intensive pain management care program, the Board granted the worker full LOE benefits. The apparent rationale is that the worker would have had a complete loss of

> earnings during these periods, whether or not he had resigned from employment; in other words, the intervening event of the resignation was not a significant factor in the loss of earnings for those periods of time.
>
> Expanding upon the test proposed in *Decision No. 2520/08I*, the Panel is of the view that entitlement to LOE benefits may be granted, pursuant to section 43(1), subsequent to an intervening event such as a resignation, refusal of suitable work, or non-compensable illness, if
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> (a) the worker has a continuing loss of earnings relating to his or her injury, i.e. a continuing impairment affecting his or her ability to earn; and
>
> (b) there has been a material change in circumstances such that the intervening event is no longer a significant factor in that loss of earnings, i.e. there would have been a loss of earnings relating to the injury whether or not the intervening event had occurred.
>
> Accordingly, entitlement to LOE benefits may be triggered, post-intervening event, by such changes in circumstances as, for example, the resolution of a non-compensable illness, a deterioration in the worker's compensable condition such that he or she could not have continued in the previous or proposed position, a situation of total disability, the need for intensive health care related to the compensable injury, or the discontinuance of the position. The intervening event is no longer significant because, from that point forward, the earnings would have been lost anyway; a material change in circumstances has re-connected the wage loss with the injury, meeting the threshold for entitlement to LOE benefits under section 43(1).

[43] The implication of the Panel's conclusion, in that regard, is that, where such a material change in circumstances occurs, it will likely be a new fact that would require a fresh approach to the Board to re-determine the worker's entitlement on the basis of that material change in circumstances.

[44] In the present case, I am persuaded that, as a result of the worker's decision to refuse suitable modified work, her subsequent loss of earnings was not a result of her workplace injury. I am also persuaded that the effect of that refusal continued, notwithstanding the absence of a continuing offer of suitable and available employment. The worker ended the ESRTW process, not the employer. In my view, to find otherwise would put the employer in the position where, during the period from May 9, 2000 when the worker's employment was terminated and March 2006 when initial entitlement was recognized by the Board, the employer was expected to have maintained the offered position, notwithstanding the worker's previous assertion that she did not want that position. I agree with the Panel in *Decision No. 2130/09* that an intervening event, such as resignation from or refusal of suitable employment by a worker ends the ESRTW process and breaks the link between the injury and the loss of earnings, and that:

> The condition precedent in section 43(1) is not satisfied, and there is no entitlement to LOE benefits.

[45] I also agree with the Panel in that decision that reinstatement of benefits after the introduction of a significant intervening event will occur only where:

> There has been a material change in circumstances such that an intervening event is no longer a significant factor in that loss of earnings….

[46] It does not appear that any evidence was presented to the Vice-Chair who issued *Decision No. 708/08* which suggested the existence of such a material change in circumstances. If there was a material change in the worker's circumstances during the interval between 2002 and 2006, there was no evidence of such a change before either the Board or the Vice-Chair who issued

Decision No. 708/08. The fact that the worker did not make this argument at the original appeal further complicates this issue.

[47] But, in my view, had the worker made the arguments that are being made in this reconsideration request, on the basis of the evidence before the Vice-Chair who issued *Decision No. 708/08*, there would have been no basis for reinstating LOE benefits or for initiating LMR services. As far as I can determine, there was minimal interaction between the worker and the Board between 2002 and 2005, with no apparent activity in the worker's claim file for two years between 2003 and 2005. There is also no evidence of any attempt by the worker to re-engage the employer in the ESRTW process. It is worth reiterating that the events in issue in this appeal all occurred in circumstances in which, in the eyes of the Board and the employer, the worker did not have a compensable disability. The actions of all of the parties are, therefore, viewed through the prism of a four year period of inactivity in a claim for which the worker had no entitlement.

[48] Notwithstanding that complication, I am persuaded that, had the worker presented, to the original hearing Vice-Chair, the argument that she has raised for the first time in this reconsideration request, on the evidence before the hearing Vice-Chair the resulting decision would have been the same.

[49] To summarize, regarding the arguments made in this reconsideration request:

1. The submissions regarding the Vice-Chair's findings on the suitability of the work offered to the worker prior to the termination of her employment in May 2002 constitutes a re-argument of the position taken by the worker in the original appeal.
2. I am not persuaded that, in determining that the worker refused suitable and available employment in May 2002, the hearing Vice-Chair made an error of such significance that its correction would likely result in a different decision.
3. The arguments made regarding the impact of the termination of the worker's employment on the worker's subsequent loss of earnings entitlement was a new argument that was not presented at the original hearing. The Vice-Chair's failure to address that argument cannot be considered an error since no evidence or submissions were presented to the Vice-Chair with respect to that argument. Further, there is no indication as to why this argument could not have been presented earlier. In any event, even if it had, I do not find that the result would change.
4. In particular, if that argument had been presented to the hearing Vice-Chair, I am persuaded that the hearing Vice-Chair would likely have rejected the argument, in light of the evidence before the hearing Vice-Chair.
5. The submissions presented by the worker regarding the impact of the termination of employment on the worker's entitlement do not establish the presence of an error in *Decision No. 708/08* or *708/08R* the correction of which would likely result in a different decision.

[50] For these reasons, I conclude that the worker's second reconsideration request does not meet the Tribunal's threshold test.

DISPOSITION

[51] The reconsideration request is denied. *Decisions No. 708/08* and *708/08R* are confirmed.

DATED: March 11, 2010

SIGNED: J. P. Moore