Tribunal Rules In Member's Favour on Two Issues. Member Did Not Return to Work After An Injury and off Work 11 days. Member also Received a COVID Layoff and Was Not Fully Recovered. WSIB Denied Loss of Earnings Benefits

By: Gary Majesky, *WSIB Consultant & Executive Board Member*

A member was denied Loss of Earnings (LOE) benefits for two periods when he was off work after the work injury and following his doctor's direction when he could start modified work, which was on September 11, 2020. The WSIB denied LOE benefits ruling the employer offered suitable work. On March 3, 2021, while still on modified duties, the member was laid-off for shortage of work (COVID related). The WSIB ruled the member was almost recovered and not entitled to LOE benefits.

Under section 43(1) a worker who has loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision 2474/00*, 2004 ONWSIAT 1381 held that under section 43(1) a causal relationship between the injury and wage loss is a condition precedent to the payment of LOE benefits. A refusal of suitable work is not necessarily an act of non-cooperation, but it may lead to a conclusion that the worker's loss of earnings does not result from the injury. Section 43(2) operates to reduce a worker's benefits where the worker refuses suitable employment. Thus, a worker who refuses suitable employment at no wage loss is not entitled to LOE benefits because the loss of earnings is not caused by the injury, but caused by the refusal of the suitable employment.

Testimony

The worker described his accident of September 1, 2020. He was on a pile of conduit and fell backwards injuring his low back and right knee. He left work and went directly to the doctor. While he attended a walk-in clinic he noted this is his normal practice and typically sees one doctor, Dr. Atwell, whom he had been seeing for 20 years or so. On that day he saw Dr. Atwell. He was prescribed pain killers and had an x-ray. There was a discussion about returning to work and the worker indicated he was in too much pain to work and the doctor agreed. Later that same day he was contacted by the employer and offered light work and he confirmed the employer offered to drive him back and forth to work. He declined as he and his doctor had determined he was in too much pain to work. He also noted he experienced episodes of dizziness. When he next saw his doctor on September 8, 2020, he believes he would have mentioned the offer of light work but the advice remained the same.

When he returned to work he was placed on a sitting job doing light assembly work at a bench. The doctor on September 12, 2020, completed a Functional Abilities Form (FAF) clearing him to return to modified work.

The worker noted he was a Master Electrician and light assembly work would not normally be part of an electrician's job. The worker remained on modified work doing light assembly work at bench level until March 2021 when he was laid off.

Registered with Hiring Hall

When he was laid-off he knew the knee was getting close to full recovery. He also knew he had an appointment with the "Lower Extremity Specialty Program" on April 8, 2021. He anticipated that he would at that time be cleared to return to work. He explained the hiring hall practice. It was a first in, first out type of process. That is, when you registered for work you would get called only after all those who registered before you received a placement. He knew the length of the call list and knew from experience that it would take a while before he would get a call for work. Knowing that, and knowing he was close to full recovery and anticipating he would be cleared to return to full duty work on April 8, 2021, he registered with the union early in March [2021] and did not indicate he had any restrictions. He did so as to mitigate the length of time he would be without work. When questioned by the Panel what he would have done if he had received a union hall placement prior to April 8, 2021, he indicated that he would have refused the placement as he was still under formal restrictions from the specialty clinic.

There is no dispute that modified work was offered on the day of the accident. The employer confirmed the verbal offer in a letter dated September 1, 2020.

The employer representative submitted the modified duties would accommodate the worker's restrictions of difficulty walking, sitting and standing.

Recognizing Time to Heal After Injury

The worker's representative Mr. G. Majesky noted a line of Tribunal decisions that establish that workers should not be penalized for following the advice of their doctors in good faith. He cited *Decision Nos. 825/18* and *2479/06*. In addition, he referenced the Board's Adjudicative Support Document "Recognizing Time to Heal – Assessing Timely and Safe Return to Work" which noted at times rest is the appropriate treatment modality.

The Board's Adjudicative Support Documents are created by the Board to assist decision makers in their adjudication. The documents have had various names including Adjudicative Advice and now called Administrative Practice Document.

The Panel has considered the Adjudicative Advice Document "Recognizing time to Heal – Assessing Timely and Safe Return to Work" – November 2005 and note the document confirms that in some cases rest is the appropriate treatment. The document states:

It is recognized that there are cases where "rest" is an appropriate form of treatment and required in order to speed recovery and facilitate a successful return to work. This should be determined based on an assessment of the nature and degree of the injury in each case.

The Impact of Pain

The document goes on to comment on the affect pain may have on the level of disability, particularly in the early stage of recovery.

The International Association for the Study of Pain defines pain as an unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage. Acute pain is a protective process against further damage, usually with a known local cause.

We cannot ignore the impact of pain on an individual and on their functional abilities, especially in the early stages of recovery.

The Panel agrees that the Board has the ultimate authority under Section 118 to determine the fitness for returning to work and the level of impairment. However, in the Panel's view this decision cannot be made in a vacuum or in an arbitrary manner and must have consideration for the relevant medical reporting. This is especially true in light of a recent Judicial Review by the Divisional Court of Tribunal Decision Ferreira v. WSIAT 2019 ONSC 3437 (Ferreira) ruled that the decision maker erred in not accepting the medical documentation on file. We are in agreement with Tribunal Decision No. 1193/21 that the court decision referenced above does not mean that the Board and by extension the Tribunal must in all cases accept the medical opinion on file but rather the medical opinion must be weighed as to relevance and credibility.

We accept the worker's testimony that despite Dr. Atwell working within a walk-in clinic he was for all intents and purposes the workers family doctor over a period of twenty years. He would therefore have a good understanding of the worker, his medical history and tolerances along with some knowledge of his job duties.

It is clear that the doctor's opinion was for the worker to remain off work, rest and take painkillers. The Form 8 also indicates that the worker was unable to bend/twist, climb, kneel, operate heavy equipment stand and walk. From the above limitations the Panel concludes the worker was significantly disabled.

We rely on the doctor's own reporting, the Administrative Advice document "Recognizing Time to Heal – Assessing Timely and Safe Return to Work" regarding the need for rest and the affect of pain during the acute stage of recovery as well as Tribunal jurisprudence that notes workers should not be penalized for good faith following the advice of their doctors (see Decision No. 133/21).

Restrictions Impact Employability

We are satisfied that the worker with the above restrictions could not perform the full job duties of a Master Electrician. We further find the worker had these restriction as imposed by Dr. Tomescu from January 28, 2021, until seen again on April 8, 2021.

The Panel finds the worker was disadvantaged in securing work and mitigating his loss of earnings for the period from March 4, 2021, to April 8, 2021 … It seems prudent and forward thinking of the worker to get his name on the hiring hall list as quickly as possible. The ARO mentions that the worker did not seek employment in other fields during the period under review and suggested that this was required under the policy. We disagree and rely on Tribunal Decision No. 2392/17 that in practical terms it is unlikely the worker would have been able to secure work in the greater labour market as a bench level assembler:

In our opinion, when the worker was laid off on May 30, 2013, he was receiving medical treatment for his injured back and was in the "early phase of recovery" from that injury. He was also receiving active health care treatment, including physiotherapy, for a period of eight weeks pursuant to a recommendation by a Board authorized REC facility. The report from that facility was quite clear in indicating that the worker required further treatment as well as extensive accommodation in future employment over an eight-week period. Those restrictions included limited lifting, no prolonged sitting/standing/walking, 10-minute breaks every hour and work pacing. In our opinion, had the worker presented himself to his Hiring Hall as requiring employment with those restrictions, it is highly unlikely that any employer would have been prepared to employ him, even on a short-term basis. This is particularly so since, in the worker's employment field, short-term contracts are not unusual. In our view, the worker's situation, from May 30, 2013, to August 13, 2014, falls squarely within the parameters of the following statement from the Board policy:

In practical terms, these workers could not be expected to conduct a job search, and the likelihood of another employer hiring them with these clinical restrictions is low.

Of interest, the above decision, *Decision No. 2392/17* involves the same employer where the representatives that appeared before that panel were the same as in the present appeal. The scenario was also similar involving a layoff from work while on modified work. We find Decision No. 2392/17 to be on point. We find it unlikely that an employer would hire, for a six-week period, a Master Electrician with the restrictions delineated for bench level light assembly.

Accordingly, the worker has entitlement to LOE benefits until he returned to work on September 12, 2020, and from March 4, 2021, to April 8, 2021.

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