2017 ONWSIAT 1886
Ontario Workplace Safety and Insurance Appeals Tribunal

Decision No. 1307/17

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DECISION NO. 1307/17

D. McBey V-Chair

Heard: April 25, 2017
Judgment: June 20, 2017
Docket: 1307/17

Counsel: O. Crimi, for Worker
No one for Employer

Subject: Employment; Occupational Health and Safety; Public

Headnote
Labour and employment law

DECISION UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated January 3, 2013

***D. McBey V-Chair*:**

(i) Introduction

1 The worker appeals a decision of the ARO dated January 3, 2013, which concluded that the worker was not entitled to loss of earnings (LOE) benefits beyond February 16, 2012 on the basis that available modified duties were suitable to his medical restrictions. The ARO rendered a decision based upon the written record without an oral hearing.

(ii) Issue

2 The sole issue under appeal is whether the worker is entitled to full LOE benefits from February 17, 2012 to April 4, 2012. The appeal turns on the issue of whether the modified work available to the worker in this time period was suitable to his medical restrictions.

(iii) Background

3 The now 44 year old worker worked as a Lead Station Attendant with the accident employer since 2004. He strained his lower back on September 5, 2011 when turning to load baggage from an aircraft onto a baggage cart. The worker has had several prior compensable low back injuries including one for which he was granted an 11% non-economic loss (NEL) award in May 1994. The worker saw his family doctor, Dr. Strom, on September 6, 2011 and was prescribed physiotherapy, Tylenol 3 and Naprosyn. He received chiropractic treatment from Dr. Hardie from September 26, 2011 to February 22, 2012.

4 He returned to modified duties using a computer to track baggage from November 7 to November 24, 2011. He was paid as a Station Attendant at a lesser wage and the WSIB paid partial LOE benefits for this return to work. On November 24, 2011, his family doctor indicated that the worker should do no lifting, no bending or twisting of his back

and no sitting for longer than 15 minutes. The accident employer had no suitable modified duties and the worker again laid off work. Full LOE was reinstated from November 28, 2011 until January 21, 2012, with the exception of the period January 9 to 18, 2012 when the worker was on a scheduled vacation.

5 The worker was examined at a Regional Evaluation Centre (REC) on December 20, 2011. The REC report documented low back pain that was worse with prolonged sitting and standing, getting in and out of a chair and driving. The worker was observed to be uncomfortable while sitting in the waiting room before his examination. The REC specified that the worker could return to modified duties avoiding repetitive bending and twisting and lifting no more than 15 lbs. The worker had a low back MRI on January 7, 2012.

6 The worker returned to modified duties on January 21, 2012. From February 12, 2012 onward, the worker was scheduled to perform driving duties in an Inbound Domestic Personal baggage assignment. On February 14, 2012, the worker complained to his employer that he had difficulty doing driving duties due to drowsiness from his medications, which were Tylenol 3 and Naprosyn. He laid off February 17, 2012 claiming that his assigned driving duties were unsuitable.

7 On March 6, 2012, the Case Manager ruled that there was no objective evidence to show that the worker was unable to perform driving duties due to his medications and disallowed benefits from February 16, 2012 onward. The Case Manager also scheduled a re-assessment by the REC. On the same day, Dr. Strom reported that the worker's medications could cause drowsiness and that the worker should do no heavy lifting, pushing, pulling or repetitive low back movements.

8 On April 3, 2012, the worker was reassessed at the REC, where the orthopaedic consultant, Dr. Rajiv Ghandhi, gave the following opinion:

> At our last visit we recommended that he return to modified duties; however, he was asked to do extensive driving at work, which is outside the previous detailed work restrictions, but given the fact that he is on narcotic medications, it is not a good idea... I would support that this gentleman should not be driving for long distances while he is on narcotic medications regularly.

9 Dr. Gandhi provided new restrictions of no lifting over 10 lbs., no repetitive bending or twisting and recommended that the worker not be put in a program of driving while on narcotic medication. The restrictions were to apply for eight more weeks. The worker was advised to undergo an active rehabilitation program which he attended from May 4 to May 30, 2012. Assistance was also provided for sleep disorder related to his back pain and symptoms of anxiety and depression. The worker returned to Radio Room modified duties on April 6 and was provided a schedule of duties that did not require prolonged driving until May 16, 2012 when he returned to regular duties.

10 The worker objected to the denial of benefits between February 17, 2012 and April 4, 2012, submitting that the job duties provided for him in February 2012 involved eight hours of driving with pushing and pulling of containers of baggage that was against his restrictions. At the ARO's request, the Case Manager in a decision letter dated August 2, 2012, reviewed the modified duties offered from February to April 2012, specifically Radio Room, PMI and Inbound Running, and ruled that the duties as offered were suitable for the worker's restrictions. The worker continued to object and the ARO conducted a hearing in writing.

11 The ARO, in a decision dated January 3, 2013, interpreted the evidence as showing that the worker had performed Inbound Running duties in November without complaint, and that his chiropractor's advice against operating motorized equipment was inconsistent with the worker's ability to use public transit and drive a car. The ARO did not accept that the worker was unable to operate a motor vehicle for prolonged periods of time due to the side effects of his narcotic medication and therefore ruled that the worker's assigned modified duties were suitable. The worker's objection was denied.

12 The worker now appeals this decision to the Tribunal.

(iv) Law and policy

13 Since the worker was injured in 2011, 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.

14 Specifically, sections 40 and 43 of the WSIA govern the worker's entitlement in this case. Section 40 of the WSIA provides in part:

> **40(2)** The worker shall co-operate in his or her early and safe return to work by,
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> (a) contacting his or her employer as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery and impairment;
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> (b) assisting the employer, as may be required or requested, to identify suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores his or her pre-injury earnings;
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> (c) giving the Board such information as the Board may request concerning the worker's return to work; and
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> (d) doing such other things as may be prescribed. 1997, c. 16, Sched. A, s. 40 (2).
>
> . . .

15 Section 43 of the WSIA provides in part that:

> **43(1)** A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins. The payments continue until the earliest of,
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> (a) the day on which the worker's loss of earnings ceases;
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> (b) the day on which the worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury;
>
> (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury;
>
> (d) the day on which the worker is no longer impaired as a result of the injury. 1997, c. 16, Sched. A, s. 43 (1).
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> . . .
>
> **(7)** The Board may reduce or suspend payments to the worker during any period when the worker is not co-operating,
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> (a) in health care measures;
>
> (b) in his or her early and safe return to work; or
>
> (c) in all aspects of a labour market re-entry assessment or plan provided to the worker. 1997, c. 16, Sched. A, s. 43 (7).

16 As noted above, the issue before the Tribunal is the worker's entitlement to LOE benefits. Under section 43(1) a worker who has a loss of earnings as a result of a compensable injury is entitled to LOE benefits. *Decision No. 2474/00* 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.

17 Tribunal jurisprudence applies the test of significant contribution to questions of causation. A significant contributing factor is one of considerable effect or importance. It need not be the sole contributing factor. See, for example, *Decision No. 280*.

18 Pursuant to section 126 of the WSIA, the Board stated that the following policy packages, Revision #9, would apply to the subject matter of this appeal:

- Package #224 — LOE Benefits — benefits as of July 15, 2011;
- Package #228 — Work Reintegration — from July 15, 2011 to November 30, 2012;
- Package #300 — Decision Making / Benefit of Doubt / Merits and Justice.

19 I have considered these policies as necessary in deciding the issues in this appeal.

(v) Analysis

20 The appeal is allowed for the reasons set out below.

21 I find that the worker's assigned duties of Inbound Running were not only unsuitable for his physical restrictions but also posed a significant workplace hazard if performed while taking narcotic medication. They were therefore not only unsuitable but unsafe. I further find that the worker reasonably objected to performing such duties as being unsuitable given the narcotic medication he was prescribed for the treatment of his compensable condition, and his loss of earnings is therefore directly attributable to the consequences of his compensable accident. As he did not refuse work that was safe and suitable, there are no grounds for suspending his LOE benefits. The worker is entitled to full LOE benefits from February 17, 2012 to April 4, 2012.

22 The chief difficulty in this claim seems to have been the assumption that driving aircraft baggage and service vehicles at a busy airport is comparable to driving a car on a highway. I also note that the ARO assumed that the worker had performed driving duties, known as "Inbound Running" without complaint in November. I have reviewed the record of the worker's work assignments in November and find that only "CL2 SPARE AM" duties were assigned.

23 Through January and early February, the worker's assignments are documented as CL2 SPARE, Radio Room and Central Seq[uencing] Team. The worker was first assigned to Inbound D/Dom[estic] Running on February 12, 2012, then to Customs Escort on February 13, 2012. February 14, 2012, the day the worker claimed that the Inbound duties were unsuitable, was only the second day he was assigned such duties. For the next two weeks, the worker was assigned preponderantly to do Inbound Running or Mobile Support, with only two days on "PMI." This therefore is the work assignment context in which the worker's objection was made.

24 The worker gave sworn evidence at the hearing. I found the worker's testimony to be credible and forthright. He testified that his regular duties as a Lead Hand involved driving, lifting and working alongside others in loading and unloading aircraft. The seats of the tractors were leather over wood with no suspension.

25 The CL2 Spare duties he performed in November 2011 and January 2012 involved counting inventory and entering data into a computer as required. There was no lifting involved. Radio Room duties involved distributing radios and handheld equipment weighing less than a pound, while Central Sequencing was working with a radio and computer in a room handling calls and conducting searches for missing baggage. He testified that these assignments were all suitable for his restrictions.

26 On February 12, 2012 he was assigned to do Inbound Running duties. He described these as going to aircraft driving tractors, then bending, lifting and twisting to attach 30 bag dollies to the tractors, and assist in lifting loose bags up to 40 lbs. off the belt and onto carts. The work was performed to time restrictions and would involve between 12 and 15 aircraft a shift, at the low end. The driving to and from aircraft varied from a football field in length to a 10 minute drive, depending on arrival gate. This could involve encounters with many different obstacles and vehicular traffic moving in various directions, from other baggage operations, fuel trucks, catering vehicles, airport authority vehicles, emergency response vehicles as well as arriving flights and ground personnel.

27 These were the duties he was first assigned on February 12, 2012 and to which he objected on February 14, 2012 because of the effect of his narcotic medication. He was not reassigned alternate duties after his complaint but was sent home.

28 The worker also described the PMI duties he was scheduled to do later in February as retrieving motorized equipment such as tractors, mobile belts and other units hooked to tractors and driving each piece of equipment back to its proper location. It might take 10 to 15 minutes to drive each piece and a shift would normally involve between 5 and 20 such retrievals. Mobile Support was an assignment involving the removal of belts, dollies, loaders, heaters for planes and bars for pushing aircraft. It was always busy.

29 I note that Dr. Hardie, the worker's chiropractor who was actively treating him at the time, indicated on a February 13, 2012 Functional Abilities Form (FAF) that the worker should not operate motorized equipment and was affected by potential side effects of medication. I also note that Dr. Strom, the family doctor, advised in a March 6, 2012 FAF that the worker's medications may cause drowsiness and that he should not be doing heavy lifting or pushing. Finally, as noted above, on April 3, 2012, Dr. Gandhi adjusted the worker's maximum lifting restriction from 15 to 10 lbs., ruled out repetitive bending or twisting and recommended that the worker not be put in a program of driving while on narcotic medication.

30 Reviewing the medical opinions alongside the worker's assigned duties as described in testimony, I find that the duties to which the worker objected on February 14, 2012 exceeded his physical restrictions against bending and twisting as well as lifting over 10 lbs.

31 As to his driving and equipment operating restrictions, I find that the worker did not have to be engaged in 'prolonged' driving for his driving duties to be unsuitable. What I find to be unsuitable, given the mutually-supportive medical opinions on file, is his operation of motorized equipment in a busy airport milieu in proximity to aircraft and vehicles such as fuel trucks, while under the influence of narcotic medications. I find that the driving duties assigned to the worker starting in February, whether as Inbound Runner or in other capacities, required a degree of alertness which made them neither suitable nor safe for this worker to perform while he was being prescribed narcotic medication.

32 Therefore, I further find that the worker did not refuse suitable and safe modified duties, and was not offered alternate suitable and safe duties when he made his legitimate concerns known to management. His lost earnings as a result of these circumstances are directly related to the prescribed treatment of his compensable condition; therefore, I find he is entitled to full LOE benefits in respect of the period under appeal.

DISPOSITION

33 The appeal is allowed as follows:

1. The worker is entitled to full LOE benefits under section 43 from February 17, 2012 to April 4, 2012.