

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

Appellant: **[*] (Worker)**

Participants entitled to respond to this appeal: **Department of Justice (Employer) and
The Workers' Compensation Board of Nova Scotia (Board)**

APPEAL DECISION

Representatives: Kenny LeBlanc, for the Worker
Dale Darling for the Employer

Form of Appeal: Oral hearing in Kentville on June 6, 2008

WCB Claim No.(s): **[*]**

Date of Decision: July 29, 2008

Decision: The appeal of the January 18, 2007 Board Hearing Officer decision is denied, according to the reasons of Appeal Commissioner Michelle R. Margolian.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker, formerly a Corrections Officer, suffered two workplace injuries which are relevant for the purposes of this appeal. He sustained a repetitive use injury to his right elbow, with symptoms beginning in 2002. He also injured his left knee on June 27, 2003. Both injuries resulted in time loss from work. In March 2004, the Worker underwent surgery on both his right elbow and left knee.

The Worker was subsequently awarded a 7.2 percent permanent medical impairment ["PMI"] rating for his right elbow injury.

The Board ultimately determined that the Worker would be unable to return to his pre-injury work as a Corrections Officer, due to the nature of his injuries. Alternate positions, in the form of a modified Control Officer and Reception Officer were identified for the Worker; however, the Worker did not actually return to work in that capacity, as the Employer dismissed him from employment for performance issues unrelated to his workplace injuries. The Worker grieved his termination through a process outside the purview of workers' compensation.

In a decision dated May 19, 2005, a Board Case Manager considered only the Worker's right elbow injury and concluded that the Worker was not entitled to an extended earnings-replacement benefit ["EERB"], as his injuries had not resulted in a long-term earnings loss. In reaching this determination, the Case Manager noted that the Employer had been willing to accommodate the Worker by offering modified duties as a Control Officer and Reception Officer, and that a Job Site Analysis performed by an occupational therapist on April 19, 2005 indicated that the Worker demonstrated the necessary physical requirements for the job. The Worker appealed to a Hearing Officer who, in a decision dated September 12, 2005, confirmed the Case Manager's decision.

The Worker appealed to this Tribunal, and the matter was remitted back to the Board. In *Decision 2005-413-RTH* (January 23, 2006, NSWCAT), this Tribunal directed that the Board reconsider the issue of whether employment as a Control Officer or a Reception Officer was suitable and reasonably available to the Worker, in light of the combined effect of the Worker's right elbow and left knee injuries. The Board was also directed to reconsider the Worker's entitlement to an EERB.

In a decision dated June 6, 2006, a Case Manager found that the issue of whether the proposed positions were suitable or reasonably available was no longer relevant, on the basis that the Worker had settled his grievance with respect to his dismissal from the Employer and was not currently experiencing an earnings loss. The Case Manager further stated that once payments to the Worker from the Employer ceased, the Worker's earnings loss would be attributable to non-compensable reasons, and therefore no EERB would be

paid.

In an addendum to the June 6, 2006 decision issued on October 6, 2006, the Case Manager concluded that the position of Control Officer was suitable employment, taking into account both the Worker's knee and elbow injury.

The Worker appealed, seeking a finding that the Case Manager erred in concluding that the Control Officer position was reasonably available to him, as well as in finding that the Worker's continued loss of earnings was not attributable to the compensable injuries.

In a decision dated January 18, 2007, a Board Hearing Officer allowed the Worker's appeal in part. He concluded that the job was not reasonably available, given that the Worker had been terminated due to performance issues, and that he had not been reinstated to his position pursuant to the grievance process. However, the Hearing Officer further concluded that the Worker was not entitled to wage replacement benefits because his ongoing earnings loss was attributable to performance issues in the job, and not to his compensable workplace injuries.

The Worker appealed to this Tribunal.

This appeal proceeded by way of oral hearing in Kentville on June 6, 2008. The Worker testified at the hearing. "MY", formerly employed as a Corrections Officer by the Employer, also testified on behalf of the Worker. "RM" testified on behalf of the Employer. Representatives for both the Worker and Employer presented oral submissions at the hearing. Written submissions were filed prior to the hearing. The Board did not actively participate in the appeal.

ISSUES AND OUTCOMES:

- 1) Is the occupation of Control Officer suitable and reasonably available to the Worker?

The Control Officer position is not reasonably available to the Worker, given his dismissal; however, the position is suitable, taking into account the Worker's physical limitations resulting from his compensable elbow and knee injuries.

- 2) Can the Worker's ongoing earnings loss be attributed to his compensable injuries thereby entitling him to an EERB?

No, the Worker's ongoing earnings loss is not attributable to his workplace injuries. Given the suitability of the proposed position, the Worker's earnings loss is related to non-compensable conditions. He is not entitled to an EERB.

ANALYSIS:

The legislation applicable to this appeal is the *Workers' Compensation Act*, S. N.S.1994-95, c.10, as amended [the "Act"]. In weighing the evidence, I have considered s. 187 of the Act which provides that where there is doubt on an issue and the possibilities are evenly balanced, the issue shall be resolved in favour of the worker.

Earnings-loss benefits are payable pursuant to s. 37 of the Act. Subsection 37(9) of the Act provides that earnings-replacement benefits are payable until the Board determines that a loss of earnings has ended or no longer results from an injury.

Section 38 of the Act permits the Board to impute income to a worker where the worker is reasonably considered to be capable of earning it. This can be done even though the worker may have a permanent impairment. What is reasonable depends upon the individual circumstances of a worker and includes a worker's age, degree of impairment, education, training and experience, and the local economy.

Board Policy 3.5.1 defines "suitable employment" as "any employment for which the worker has the necessary skills to perform, is medically able to perform, and which does not form a health or safety hazard to the worker or any co-worker". Board Policy 3.5.2 provides that the employment will be considered to be "reasonably available" if there are employment opportunities within 100 kilometres of the worker's home, and the worker has a reasonable chance of securing employment.

Essentially, in order for a worker to be deemed capable of earning income, it must be established that the proposed job is both suitable and reasonably available.

Preliminary Issue - Jurisdiction

As a preliminary matter, an issue arose at the hearing regarding the Tribunal's jurisdiction to address the issue of whether the proposed position of Control Officer was suitable for the Worker. The Employer argued that the Tribunal lacked jurisdiction to consider the issue, noting that the Hearing Officer in the decision under appeal had only addressed the issue of whether the Control Officer position was reasonably available to the Worker. Conversely, the Worker's representative argued that it was appropriate for the Tribunal to consider the issue, as it had been an underlying issue previously addressed by the Board, and he had referred to the issue of suitability in his pre-hearing submissions, to which the Employer had not raised any objection.

Both the suitability and reasonable availability of the proposed position of Control Officer have been addressed at various Board levels in the past.

The Worker's appeal of the Case Manager October 6, 2006 decision to the Hearing Officer specifically raised the ground that the Board had erred in finding that the Control Officer position was reasonably available to the Worker. No mention was made as to the suitability

of the position. The second enumerated ground was that the Board erred in finding that the Worker's ongoing earnings loss was not related to the compensable condition.

In the January 18, 2007 decision that is the subject of this appeal, the Hearing Officer addressed only the issue of the reasonable availability of the position, noting specifically that the suitability issue had not been raised. After concluding that the job was not reasonably available, the Hearing Officer found that the Worker was not entitled to wage replacement benefits, as his ongoing earnings loss was not attributable to his compensable injuries.

In my view, it is appropriate for this Tribunal to address the issue of whether or not the job of Control Officer is suitable for the Worker. Although it may not have been specifically enumerated as a ground of appeal, the issue is, by its very nature, integral to the issue on this appeal.

In order for the Worker to be entitled to an EERB, he must establish that he has suffered an earnings loss as a result of a workplace injury. In determining that no such earnings loss existed, the Board deemed the Worker capable of earning income as a Control Officer. In order to be able to deem the Worker capable of such earnings, a determination had to be made whether the job of Control Officer was suitable and reasonably available to the Worker. The underlying issue on appeal is whether the Worker's ongoing earnings loss is related to his compensable injuries. In addressing this issue, consideration must be given to whether the proposed job is suitable, taking into account the Worker's limitations arising from his injuries. Consequently, I will address both the suitability and the reasonable availability of the Control Officer job.

Substantive Issues - Suitable / Reasonable Availability and EERB Entitlement

At the hearing, the Worker's representative argued that, if I were to find that the position of Control Officer was not reasonably available to the Worker, then there would be no need to address the suitability issue, as the both criteria must be established. In such instance, he would want the matter remitted to the Board for a determination of the Worker's entitlement to an EERB, with consideration being given to identifying other suitable and reasonably available employment.

I do not agree with the Worker's representative's position with respect to this issue. The EERB issue is properly before me. If I determine that the job is not reasonably available, I must still consider whether the Worker's loss of earnings is related to his compensable injuries. This involves considering all relevant factors, including whether the job is suitable for the Worker.

The issues in this appeal are further complicated by the fact that the Employer dismissed the Worker for performance-related matters in 2003.

In correspondence dated November 3, 2003, the Employer advised the Worker that the Employer would terminate his employment in light of an incident that had occurred on April

27, 2003. As the Worker was, at that time, receiving temporary earnings-replacement benefits ["TERB"], the Employer took the position that the Worker's employment would be terminated on a future date when the Worker's was no longer in receipt of workers' compensation benefits. Essentially, in theory, the Worker would continue to receive benefits until such time that he was ready to return to work in a position created by the Employer for the Worker. However, the Worker would never actually work in that capacity, due to his termination.

The Worker, in a separate proceeding, grieved his termination. He reached a settlement with the Employer that did not include reinstatement as an active employee, although his legal status became one of "unpaid leave". The Worker was provided with an EERB up to March 13, 2005. The terms of his grievance settlement included his being placed back on the payroll for the period May 13, 2005 to July 25, 2006. Thereafter, the Worker was to request leave without pay until his earliest retirement date. At the hearing, the Worker testified that his earliest retirement date was in early August 2008.

With respect to the EERB issue, the period for which the Worker would be seeking entitlement would be from July 26, 2006 onward. As he had been reinstated by his Employer, he would have had no earnings loss prior to that time.

This Tribunal has, in the past, considered a worker's entitlement to earnings-replacement benefits when a job has been terminated for reasons other than the workplace injury. The Tribunal has found that entitlement to an EERB may still exist even though a worker may have been terminated for cause, or for reasons unrelated to a workplace injury (see for example, Tribunal *Decisions* 2000-663; 2003-784; and 2006-189).

I agree with the reasoning of my colleagues in those decisions. If the nature of a worker's injury is such that he would not have been able to return to work, benefits may flow, regardless of the reasons for dismissal. A worker is not automatically excluded from consideration for benefits simply because he may have been terminated for cause; however, there is no automatic entitlement to benefits, either.

I agree with the Hearing Officer's determination that the Control Officer position is not reasonably available, given that he had been terminated by the Employer for performance issues unrelated to his injuries.

I also find that the proposed position of Control Officer was suitable for the Worker, having considered his physical limitations resulting from his compensable injuries. In my view, the medical evidence on file supports a finding that the Worker was capable of performing the modified duties of a Control Officer.

In alleging that the job was not suitable, the Worker argued that performance of the job required greater physical abilities than he possessed due to the effects of his injuries, and that he would also be at risk of physical injury from possible altercations with inmates.

There was general consensus from those who testified at the hearing that the job of Control Officer was highly interactive. The control office was described as the “nerve centre” of the unit. It was located in the centre of the unit, and all activity occurring in the unit was controlled from within the control office, via intercom, telephone and computer. Control Officers used computers to open and close doors, essentially controlling all movement in the unit. Control Officers worked twelve hour shifts. Between 11:30am and 6:45pm (when activity was busiest), there were two Control Officers working. The remainder of the time saw only one Control Officer at work. Inmates could see into the control office, but had no physical access to the locked office.

With respect to workplace safety, the Worker testified that his physical limitations placed him in a disadvantaged position when responding to altercations with inmates. While possible, I do not find that the evidence supports a validation of his concern. Testimony was heard as to proper policies in place in the event of altercations. The control office is never to be left unattended. If only one Control Officer is working, he is not to leave the control office; rather, he is to call for assistance. If two Control Officers are working, one may leave. I am satisfied by the evidence that the Worker would not have been placed in harm’s way while working as a Control Officer. Furthermore, the evidence on file indicates that the Employer would have arranged for the Worker to be escorted to and from the control office to minimize his risk of being involved in an altercation.

I also do not find that the evidence supports a conclusion that the job of Control Officer exceeded the Worker’s physical abilities. On the contrary, the Worker’s functional abilities as demonstrated in the Key Functional Assessment performed on April 15, 2005 indicated that he possessed the physical attributes to perform the job. The assessment took into account the Worker’s knee and elbow limitations. The Job Site Visit Report dated April 22, 2005, indicated that the Worker met the physical requirements (with some modifications necessary) to perform the job safely. There is insufficient medical evidence on file to suggest a contrary conclusion. Furthermore, the Employer has accommodated injured workers in the past - there is nothing to suggest that it would not have accommodated the Worker in the present case. In fact, “RM” testified that the Employer has accommodated workers in the past with respect to such things as minimizing the need to use the stairs in the control room (a potential problem identified by the Worker). “RM” also stated that shift times could be adjusted so that a Control Officer never worked alone.

In their testimony, both the Worker and “MY” questioned the validity of the Job Site Analysis, noting that management was present on the day it was performed, and so inmate traffic was light, and the job duties depicted in the report were lighter than normal. Neither the Worker nor “MY” was present that day - “MY” has not worked at the facility since 2002.

While it may be true that employees act differently when management is present, there is insufficient evidence for me to conclude that the observations made by the occupational therapist conducting the assessment were inaccurate, so as to invalidate her conclusions as to the physical requirements necessary for the performance of the job.

Flowing from my finding that the job is suitable is a determination that the Worker's earnings loss beyond July 2006 is not related to his compensable injury; rather, it is due to non-compensable reasons. But for his dismissal for performance issues unrelated to his compensable injuries, he would have been able to perform these work duties and would not have suffered an earnings loss. It is irrelevant that the Worker's employment status changed from "terminated for cause" to "unpaid leave". Once the grievance process concluded, the Worker was no longer eligible for work with the Employer.

I note the Worker's testimony that his attempts to work in retail and at a call centre in 2006 and 2007 ended prematurely due to an exacerbation of his symptoms; however, I must conclude at the end of the that any earnings loss experienced by the Worker after July 2006, cannot reasonably be attributed to his workplace injuries. The Worker's employment was not terminated because of his injuries; had he not been terminated, there was a job to which he could have returned. The job requirements were consistent with his physical abilities. He would not have incurred an earnings loss. That having been established, the Board had no further obligation to assist the Worker.

Although I acknowledge the Worker's concern that the job was on paper only, and the Employer did not actually make the job available to him, it remains that there would have been a job available to the Worker. The fact that he was unable to work as a Control Officer was in no way related to his compensable injuries; instead, it was related to non-compensable, labour relations reasons. The medical evidence on file indicates that the Worker could have safely performed that job. His inability to do so, and the earnings-loss flowing from that inability, are not related to his workplace injury.

CONCLUSION:

The appeal is denied. Although work as a Control Officer is not reasonably available to the Worker, his is not entitled to an EERB. His earnings loss beyond July 2006 is not related to his compensable injuries; rather, it is related to non-compensable factors.

DATED AT HALIFAX, NOVA SCOTIA, THIS 29th day of July, 2008.

Michelle R. Margolian
Appeal Commissioner