

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal of a decision of a Hearing Officer of the Board dated August 14, 2007, in which the Hearing Officer determined that work as a Security Guard was suitable and reasonably available employment for the Worker. The Hearing Officer also determined that the Worker was not entitled to an increase in either his 6% Pain-Related Impairment ["PRI"] or his Permanent Medical Impairment ["PMI"], however, the Workers' Adviser's submissions indicate that the issue being pursued on this appeal, is the issue of the Worker's Extended Earnings-Replacement Benefit ["EERB"]. The Worker appealed the Hearing Officer's decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on September 7, 2007.

This appeal proceeded by way of written submission. Written submissions were filed by the Workers' Adviser on November 30, 2007.

ISSUE AND OUTCOME:

Is work as a Security Guard suitable and reasonably available employment for the Worker?

No. Work as a Security Guard is neither suitable nor reasonably available to the Worker.

ANALYSIS:

The legislation applicable to this appeal is the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"]. Section 187 of the *Act* requires me to give the worker the benefit of the doubt, which means if the disputed possibilities are evenly balanced on an issue of compensation, then the issue will be resolved in the Worker's favour.

The Worker sustained compensable injuries to his lower back in March 2004 and September 2005. He has been unable to return to his pre-accident employment since his injury of 2005. He has been deemed capable of working 40 hours a week as a Security Guard.

The Worker worked as a casting refinisher in a foundry at the time of his accidents. According to the "Worker Profile" on file, the Worker attempted a return to work in July-August 2006 but this was not a success. His Employer has nothing suitable for him. According to the Worker Profile, the Worker has his Grade 12 as well as a one year vocational school course in foundry moulding.

The Worker was referred to what appears to be a vocational consulting group called "Options Consulting", for the preparation of a transferable skills analysis to, according to

its report, "explore alternate occupations, given his present interest, training, and functional capabilities". The report, dated October 3, 2006, notes that the Worker has had only one job and one employer since he graduated in 1988. As a casting refinisher, he ran the furnace, shaped cast moulds, cleaned out the slag, and ground-off extra metal. His work was considered to be "heavy" in terms of physical demands.

According to the report from Options, the Worker had the capacity for light duty work and only one job matched his training, abilities and physical limitations. That job was that of a Security Guard. The report stated, "This is the only position recommended at this time as some Security Guard jobs allow worker to alternate between sitting, standing and walking."

Following receipt of the Options report, the Board signed a Vocational Rehabilitation plan with the Worker, the goal of which was to return him to a different job with a different Employer. The strategy planned to achieve the goal was a job search. According to information from Service Canada, NOC 6651, "Security Guards and Related Occupations" require that these individuals "guard property against theft and vandalism, control access to establishments, maintain order and enforce regulations at public events and within establishments." The NOC information noted that Security Guards are employed by private security agencies, retail stores, industrial establishments, museums and other establishments.

As far as the job and skill requirements were concerned, some secondary school education was usually required to be a Security Guard. The specific skills required were the ability to, "write reports, enforce regulations of establishments, detect or prevent thefts and vandalism." The employment potential was good and currently there was, "a fair (average) chance of qualified Security Guards finding employment in the local area." Employment potential on the South Shore was noted to be "good". The Service Canada information does not include information on the physical requirements of a Security Guard.

According to a Summary Report and Decision, [SRD] dated October 20, 2006 the Worker was focussed on pain, and stated that he had been started on morphine tablets. In an SRD dated November 17, 2006, the Worker stated that he did not feel that he was able to return to work in any capacity. According to an SRD dated December 14, 2006, the Worker had stated in a conversation with his Case Worker that he found it hard to concentrate or even to talk to people when he was on morphine.

The Worker had a conversation with his Case Manager on November 17, 2006 which was documented in a Contact Sheet. According to the Contact Sheet, the Worker had stated that he felt he was unemployable in his condition. The Worker advised that he was to see Dr. Oxner, Orthopaedic Surgeon, on November 21, 2006.

The Worker was seen by Dr. Oxner on November 21, 2006. In his report of that date he states that he explained to the Worker that where he has been out of work with this current problem for two years, the chance of him making it back to work was very unlikely. Dr.

Oxner stated that the Worker's back pain was not the type that was amenable to surgery. Dr. Oxner noted that the Worker was on narcotic medications and was basically just existing in his home.

The Board's Medical Advisor reviewed the Worker's file and provided an written opinion on his medical condition on January 24, 2007. The Board's Medical Advisor noted that the Worker's MRI revealed a small disc, contacting the nerve root at L5. He felt the Worker had reached maximum medical recovery and that there were objective, physical findings at the site of his injury. The Board's Medical Advisor stated that it was highly likely that the Worker would have both a PRI and PMI.

In an SRD dated January 25, 2007, the Case Manager stated that in her view, there was no question that the Worker was suffering from extreme pain. She stated, "He could barely [sit] still in the chair and get up from the chair and walk out." She told the Worker she could not imagine trying to "place him back to finish his job search in the shape he is in." She felt the Board needed, "to move to a place of looking at any long-term benefit entitlement". She told the Worker that according to his functional capacity evaluation he could perform light work up to 8 hours a day and that the Board would be estimating him capable of work in the light category on a full time basis.

According to the physiotherapy report of January 12, 2006, the Worker was able to perform light work. According to the physiotherapy report of February 2, 2006, the Worker was capable of sedentary-to-light work. According to the Key Functional Assessment dated July 5, 2006, the Worker was capable of a work day tolerance of 8 hours per day in the light range as defined by the National Occupation Classification System. This was contingent upon the job requirements not exceeding the functional parameters outlined in the report.

Board Policies 3.5.1 and 3.5.2 define what suitable and reasonably available employment is, when considering a worker's loss of earnings, as defined by s. 38 of the *Act*. Policy 3.5.1 states as follows:

1. 'Suitable' employment is any employment which the worker has the necessary skills to perform, is medically able to perform, and which does not pose a health or safety hazard to the worker or any co-worker.

Policy 3.5.2 states as follows:

1. Employment will be said to be 'reasonably available' if there are currently employment opportunities within the worker's home area and the worker has a reasonable chance of securing employment.

Policy 3.5.2 defines 'home area', as all points up to 100 kilometres from the worker's ordinary place of residence or a greater distance if the worker was travelling a greater distance to work prior to the accident.

The Board's position on the Worker's ability to work as a Security Guard, as evidenced by its decision of April 26, 2007, is premised on the Worker's Key Functional Assessment and his physical ability to perform the duties required. The evidence would suggest, that physically, without taking into consideration the Worker's total chronic pain picture, the Worker could possibly perform the work of a Security Guard. His physical abilities, measured in isolation of his total picture and in the vacuum of a controlled environment would suggest that he is physically able to perform that work, (although, as mentioned there is no direct evidence of the physical job requirements). In my view, however, a broader view of the evidence must be taken in this case.

The totality of the evidence on file convinces me that despite the Worker's Key Functional Assessment, work as a Security Guard is not suitable for him. The Worker had a PMI exam performed on April 7, 2007. The Board's Medical Advisor in his report for that exam noted that the Worker's family doctor in a report of February 2007, stated that the Worker felt unable to cope with his low back pain. He was taking MS Contin, Celebrex and Amitriptyline. According to the Board Medical Advisor, the Worker displayed pain behaviour during the examination. The Board's Medical Advisor noted that the Worker came across as a sincere but extremely anxious and worried individual. The report states that the Worker is overwhelmed by his medical problem and the secondary social problems that occur because of his inability to perform the only type of work that he could do or find in the past to support himself and his son.

The PMI examination report stated that psychological testing had revealed that the Worker had a severe perceived level of disability due to low back pain. His functional complaints were extremely high. His depression was moderately high and his anxiety was high. His symptom dependency was high. The Board's Medical Advisor stated that the Worker had findings that were in keeping with the inability of the Worker to cope with his pain. The Board Medical Advisor recommended a PMI of 5% and a PRI of 6%.

It seems incongruous, that the Worker's Case Manager would find that the Worker was in such a condition that he could not participate in a job search, however, he would be estimated capable of actually performing the work that he was incapable of looking for. How could it be said that the Worker had a reasonable chance of securing that employment, if his condition was such that he could not even look for it? Whether his inability is physical, mental, or a combination of both, he does not have a reasonable chance of securing that employment.

Should the Worker somehow be able, without a job search, to obtain employment as a Security Guard, I find it more likely than not that he would be incapable medically of performing it. I do not find it realistic to consider that the Worker could perform that work, given the medical evidence; not of his actual objective findings, but of his pain reaction to his injury. My interpretation of Dr. Oxner's opinion, is that it is unlikely given the Worker's scenario as a whole, that he will return to gainful employment, not that the Worker's physical condition alone is the limiting factor.

The Worker is overwhelmed. He is on significant narcotic medication. His PRI has increased the impact of his injury, moderately-severely to severely. His condition is such that he was unable to participate in a job search. On the particular facts and evidence in this case, I find that employment as a Security Guard is not suitable and reasonably available to the Worker.

CONCLUSION:

This appeal is allowed. Work as a Security Guard is not suitable and reasonably available employment for the Worker.