

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

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

Participants entitled to respond to this appeal: **R. Fraser Construction Limited (Employer) and
The Workers' Compensation Board of Nova Scotia (Board)**

APPEAL DECISION

Representative: Kenny LeBlanc for the Worker

Form of Appeal: Oral Hearing, April 11, 2008 in Amherst, NS

WCB Claim No.: [*]

Date of Decision: February 10, 2009

Decision: The appeal of the September 13, 2007 Board Hearing Officer decision is allowed in part, according to the reasons of Chief Appeal Commissioner Louanne Labelle.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker was employed on a seasonal basis as a heavy equipment operator. He suffered a knee injury on June 17, 2005. He subsequently underwent surgery and a period of rehabilitation. He was cleared to return to his pre-accident employment on February 2, 2007. His benefits were terminated by the Board effective February 7, 2007.

A Board Case Manager decision dated April 4, 2007 found that the Worker was not entitled to temporary earnings-replacement benefits [temporary benefits] beyond February 7, 2007 as his loss of earnings was no longer attributable to his injury. The Worker had received his last cheque for a two week period covering January 24, 2007 to February 7, 2007.

On appeal, the decision was confirmed by the Hearing Officer. In her decision dated September 13, 2007, the Hearing Officer found that any loss of earnings suffered by the Worker following February 7, 2007 was due to an economic situation and not due to the Worker's compensable injury.

The Worker now appeals to this Tribunal from the September 13, 2007 Hearing Officer decision seeking additional temporary benefits beyond February 7, 2007.

The Worker's appeal proceeded by way of oral hearing. The Worker provided oral testimony at the time of the hearing. He was assisted by a Workers' Adviser who made oral submissions on his behalf. The Workers' Adviser also filed written submissions dated December 2, 2008 together with additional documentation consisting of correspondence from Human Resources and Skills Development Canada dated May 12 and May 16, 2008 with attached documentation. Neither the Board nor the Employer participated in the appeal.

I have also considered under s.246 of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"], information in the Worker's claim file as well as the decision under appeal.

ISSUE AND OUTCOME:

Is the Worker entitled to additional temporary benefits beyond February 7, 2007 as a result of his June 17, 2005 compensable knee injury?

Yes. Although the Worker was capable of his pre-injury duties on February 7, 2007, he

was not given any advance notice of the claim closure and no assistance in obtaining employment at the time. I find that the Worker is entitled to a reasonable notice period, both of closure of his claim and for time to obtain alternate employment. Therefore, I find he is entitled to additional temporary benefits to March 21, 2007, a period of 6 weeks.

ANALYSIS:

The Worker seeks additional temporary benefits as a result of his June 17, 2005 injury. A worker under the age of 65 may be entitled to an earnings-replacement benefit pursuant to s. 2(ad) and 37 of the *Act*. It must be shown that he suffered a loss of earnings resulting from the effects of his compensable injury during the period in question. Temporary benefits may be payable until the loss of earnings ends, the loss no longer results from the work injury or extended earnings-replacement benefits become payable.

With respect to the burden of proof, the Worker need not prove a claim for compensation beyond the balance of probabilities. Section 187 of the *Act* speaks of possibilities and provides that where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue shall be resolved in the worker's favour.

There is no doubt that the Worker experienced a loss of earnings after February 7, 2007 as he has not returned to work. He is under the age of 65. The question remains as to whether his loss of earnings is causally linked to his compensable injury. The Worker's earnings capacity is the focus of the inquiry.

The Worker does not challenge the fact that the Discharge report from Moncton Physiotherapy dated February 2, 2007 indicated that he was able to perform his pre-accident employment. I accept his evidence that the work with the pre-accident Employer was seasonal and in February 2007, there was not likely work available, although he did not contact his Employer.

The Worker testified that he had not returned to work as at the date of the hearing mainly because he is now taking care of his mother who suffered a stroke in December 2006. He is therefore not available for work. Furthermore, the Worker moved out of province in 2006 to be with his mother thereby rendering him unable to return to his pre-injury Employer in February 2007.

However, the Worker is specifically seeking a period of temporary benefits from February 7, 2007 until he would have returned to work with his pre-accident Employer, likely around the beginning of May 2007. The Workers' Adviser argued that the Worker is entitled to temporary benefits as he lost the opportunity to work because of his injury thereby losing an opportunity to qualify for employment insurance benefits. He suggests that I should ask the Board to determine from the pre-injury Employer when the Worker would have been

called back to work and order payment of temporary benefits until that time.

The Worker says that he is entitled to temporary benefits during this period as he was a seasonal employee and he can show a pattern of earnings which consisted of employment earnings from approximately May to December each year and employment insurance earnings until he returned to work the following spring.

In the circumstances of this case, the Worker was injured shortly after he returned to work in the spring of 2005. He did not work the 700 hours required to qualify for employment insurance benefits. It appears from the HRSD Canada information that the Worker's EI claim ended on May 28, 2005. He injured his right knee on June 17, 2005. It is therefore obvious that he would not have earned entitlement to employment insurance benefits.

Information from HRSD Canada shows a pay history for 2004 and 2005. It confirms that the Worker received regular EI benefits for periods between the months of February and May. In 2004, he had declared earnings for periods in February and early March. In 2005, again he received no benefits in early January because of declared earnings and received regular benefits in February until May when he began working.

From the information available, for comparable periods between February 7 and May 1, the Worker had only 6 weeks of regular EI benefits in the winter of 2004 and 12 weeks in the winter of 2005.

The Revenue Canada information obtained by the Board for 2003 and 2004 also show varying amounts of earnings both for regular employment earnings as well as for employment insurance benefits. The Worker was employed on a seasonal basis and his earnings not only depended on seasonal work but also available work.

The Worker's Adviser argues that the lost opportunity to work (and thereby to qualify for EI benefits) is a loss of "earnings". He argues that "earnings" in the *Act* may include employment insurance benefits.

I agree that the term "earnings" may include employment insurance benefits if specifically included by the *Act* or *Regulations*. For example, under Board Policy 3.1.1R2, a worker's long term rate for calculating earnings loss, payable after 26 weeks of temporary benefits, is determined by using not only normal weekly earnings but also "actual pre-accident earnings" which include employment insurance earnings and this over a possible three year period pre-injury.

Under s. 38 of the *Act*, the loss of earnings of the worker is the difference between

- (a) the worker's net average weekly earnings before the loss of earnings commences; and

- (b) the net average weekly amount that the Board determines the worker
 - (i) is earning,
 - (ii) is capable of earning in suitable and reasonably available employment,
 - (iii) is receiving or is entitled to receive as a periodic benefit pursuant to the Canada Pension Plan or the Quebec Pension Plan, in which case, the Board shall include fifty percent of the benefit,

after the loss of earnings commences.

Sections 39 and 42 provide how the Board is to calculate the Worker's net average earnings. In accordance with s. 42, a worker's gross average earnings are the worker's regular salary or wages and any other types or amounts of income as the Board may prescribe by regulation. *Nova Scotia Regulation 22/96* as amended by Regulation 146/2002 provides that a worker's gross average earnings are the total of the worker's regular salary or wages and, after the first 26 weeks of earnings-replacement benefits, specified overtime and employment insurance benefits.

The *Act*, *Regulation* and *Board Policy* contemplate a demonstrated loss of actual earnings in the form of regular earnings and other specified earnings such as EI benefits. I find no authority to include a loss due to a lost "opportunity to qualify for EI".

The Board must determine what best represents a worker's actual loss of earnings. In this case, the Worker was cleared to return to work. Work presumably was not available at that time with the pre-accident Employer. He tried to find some work but none was available. He testified that work in the winter such as driving snow removal equipment was not available. This is primarily due to an economic situation and not his injury.

The Worker acknowledged that he could not handle a job and take care of his mother at the same time. His earnings capacity at the present time is therefore affected primarily by personal circumstances and not his injury.

I find, however, that the Worker was entitled in the circumstances to a reasonable period of notice of closure of his claim and assistance to find employment as employment with his pre-accident Employer was not available at the time of claim closure.

WCAT # 2007-681-AD

The Worker is awarded temporary benefits for the period from February 7, 2007 to March 21, 2007, a period of six weeks.

CONCLUSION:

The appeal is allowed in part. Although the Worker was capable of his pre-injury duties on February 7, 2007, he was not given any advance notice of the claim closure and no assistance in obtaining employment at the time. I find that the Worker is entitled to a reasonable notice period, both of closure of his claim and for time to obtain alternate employment. Therefore, I find he is entitled to additional temporary benefits to March 21, 2007, a period of 6 weeks.

DATED AT HALIFAX, NOVA SCOTIA, THIS 10th day of February, 2009.

Louanne Labelle
Chief Appeal Commissioner