

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

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

Participants entitled to respond to this appeal: **Maritime Steel and Foundries Limited (Employer) and
The Workers' Compensation Board of Nova Scotia (Board)**

APPEAL DECISION

Representatives: Larry Maloney for the Worker
Angus McEachern and Patricia MacNeil for the Employer

Form of Appeal: Oral hearing, held at Stellarton, NS, May 6, 2008

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

Date of Decision: July 17, 2008

Decision: The appeal of the January 28, 2008 Board Hearing Officer decision is denied, according to the reasons of Appeal Commissioner Alison Hickey.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal of a decision of a Hearing Officer of the Board dated January 28, 2008, in which the Hearing Officer determined that the Worker was not entitled to Temporary Earnings-Replacement Benefits ["TERB"] beyond October 22, 2007. The Hearing Officer also determined that the Board did not breach either the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"], or Board Policy, in providing the information it did to the Employer. The Worker appealed that decision to the Workers' Compensation Appeals Tribunal [the "Tribunal"] on February 8, 2008.

This appeal proceeded by way of oral hearing at which the Worker testified. The following exhibits were submitted at the hearing:

Exhibit "1"- letter from Worker to Employer dated February 8, 2008

Exhibit "2"-document entitled "Work Procedure for Grinders at Maritime Steel" signed by the Worker, dated January 7, 2008.

After the hearing the Employer wrote to the Tribunal indicating that it did not have a copy of the Worker's claim file subsequent to January 2008. The file was vetted by the Tribunal and provided to the Employer.

Subsequent to the hearing, the Worker's Representative filed a letter with the Tribunal dated January 23, 2008. This letter was from the Manager of Hearing Officers to the Worker's Representative. The Worker's Representative asked that this letter be considered on this appeal. The letter was provided to the Employer with the Worker's Representative's submissions dated May 12, 2008. The Tribunal has received no objection to the inclusion of this letter into evidence on this appeal, and it is therefore included.

The Worker's Representative filed written submissions on Issue 1) below, on May 12, 2008. The Board filed submissions on May 30, 2008. The Worker's Representative filed rebuttal submissions on June 6, 2008. The Employer's Representative by way of letter dated June 30, 2008, declined to make further submissions.

ISSUES AND OUTCOMES:

1) Did the Board breach either the *Act* or Board Policy in providing the information it did to the Employer?

No. The Employer was a "participant" as stipulated by s. 197(4)(a) of the *Act* at the time the Worker's file was released. The Employer was not required to file an appeal or provide written argument or oral evidence before attaining the right to participate. The information released to the Employer was relevant to the appeal.

2) Was the Worker's earnings loss subsequent to October 22, 2007, as a result of his compensable injury, therefore, entitling him to TERB beyond that date?

No. It is more likely than not that any earnings loss the Worker experienced subsequent to October 22, 2007, is not related to his compensable back injury.

ANALYSIS:

The legislation applicable to this appeal is 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.

Provision of Worker's file to Employer

The Worker's Representative argued that s. 2 of Board Policy 10.3.5 requires that an employer must have filed an internal appeal of a decision, or submitted written argument or oral evidence, in order to be considered a participant in an appeal before a Hearing Officer. I do not accept that argument.

Pursuant to s. 197(4)(a) of the *Act*, participants in an appeal before a Hearing Officer are, "...in the case of a decision respecting compensation, the worker and the worker's employer;". There is no requirement in the *Act* that an employer file an appeal, argument or evidence, in order to be considered a participant. The plain reading of guideline 2 would dictate that this is a section which sets out what the employer "can" do in the course of appeal should it so chose, and that is, to file an internal appeal, or submit written argument or oral evidence regarding the appeal launched by itself or the worker. The use of the word "can" is permissive and not directive.

Section 3 of Board Policy 10.3.5 states that information from a claim file will only be released if the employer submits a written request for access and states a reason for requesting access. It goes on to state, "...the reason should make reference to concerns with material either contained in or which the employer has reason to believe was omitted from, the appealable decision." This section does not make it mandatory that the employer reference concerns but rather, states that the reason "should" make such references. I do not consider that the language of this section requires the Employer to have provided any more detail than it did, in its request to the Board.

The Worker's Representative submitted that the Board is moving forward with a plan to provide employers with greater access to workers' claim files. He submitted that the letter from the Manager of Hearing Officers would suggest that this is the case. My decision in this case is not based on any perceived intention of the Board in that regard. My sole consideration is s. 193 of the *Act*, Board Policy 10.3.5 and associated guidelines, and the facts as they pertain to the provision of disclosure of documents in the Worker's case.

The Worker's Representative noted that the Employer was provided with virtually all medical information on file. He has specifically taken issue with the provision to the Employer of medical reports which did not pertain solely to the time period between the Worker's initial participation at Columbia Health Centre [CHC] in August 2007 and the end of his graduated return to work program in October 2007.

As noted in the Board's submissions, dated May 30, 2008, the Employer is entitled, as per s. 193(3) of the *Act*, to a copy of any document or record in the Board's possession that the Board considers relevant to the appeal. The Worker's Representative himself, led evidence at the hearing, with respect to the Worker's medical condition prior to his entrance into CHC, and indeed, prior to his accident of March 19, 2007. The Worker's Representative also requested that significant weight be placed on the findings of Dr. Yabsley, orthopaedic specialist, contained in his report dated July 30, 2007. Clearly this information was thought to be relevant to the Worker's appeal and supports the conclusion that not only medical information strictly relating to the period August 2007-October 2007, was relevant to the Worker's appeal. Obviously, medical evidence on the Worker's condition commencing at the time of his injury, and indeed to some extent even before, is relevant.

I am not convinced that any of the items listed at page 6 of the Worker's Representative's submissions dated May 12, 2008, were irrelevant to the Worker's appeal and should not have been provided to the Employer. To restrict the provision of documents as suggested by the Worker's Representative, would be to deny natural justice, and would prevent the Employer from participating effectively on the appeal. Documents pertaining to the Worker's medical treatment, to his conduct in relation to his treatment, and his relationship with the Board following his compensable injury are all relevant to the cause of any earnings loss sustained by the Worker. To restrict the medical information as suggested by the Worker's Representative would be prejudicial to the Employer.

All medical information on the history and course of treatment of the Worker's injury is relevant. This would include the reports of Columbia Health Centre [CHC]. Information on the Worker's response to treatment is relevant. The Employer is entitled to all information relevant to the issue of whether or not the Worker's injury is preventing him from doing his job, or whether there are other potential causes for work absences. To take too narrow a view of relevance in any particular case raises the danger of decision-makers rendering decisions in factual vacuums, without the opportunity to consider the real merits and justice of each case as required by s. 186 of the *Act*. Having reviewed what was released to the Employer by the Board, I have concluded that the Board did not breach either the *Act* or Board Policy.

TERB beyond October 22, 2007

The Worker testified that he started work for the Employer in February 5, 2006. He was

hired as a Grinder. He testified that his health was good and he had no back trouble prior to starting with the Employer. The Worker started as a Booth Grinder and worked for 8 days before he got laid off. He was called back to work 3 weeks later as a Swing Grinder. He worked on the swing grinder up until the date of injury.

The Worker described both grinding jobs. He stated that as a Booth Grinder he worked with hand-held tools and ground larger pieces of steel into smaller pieces. The swing grinder was a grinder held in a manner similar to holding on to the handlebars of a motorcycle. He stated that he found work as a Booth Grinder more physically demanding, as the torque was constant. With the swing grinder there was no torque. The booth grinder would be started about 20 times an hour. Lifting and moving the swing grinder around was difficult.

The Worker stated that he did well as a Swing Grinder and was told by his Supervisor that he had a knack for it. The Worker stated that for about three and a half months he worked as a supervisor-in-training on the weekend shift, handing out supplies. There was no physical work involved. The Worker worked at that position until February 2007. It was only a trial period position and he went back to his Swing Grinder position.

The Worker testified that when he went back to work as a Swing Grinder he was out of shape, but he was able to manage an 8 hour shift. He stated, however, that he was always tired and was getting sick more easily.

The Worker described his injury of March 19, 2007. He was moving a rotary yoke and he felt a pop in his back. He stated that if he were grinding a piece such as a rotary yoke which weighed approximately 250-280 pounds, he would turn it about every 5 or 10 minutes. The Worker described a sharp pain in his buttocks. The pain went down his leg for a couple of days after this. He reported the accident to his Employer and it was reported to the Board. He was not provided with modified duties. He did not miss work but he was sore.

The Worker described a second injury a short time later; on April 19th or 20th. He testified that he took a week's vacation between his first and second accident. He stated that after his second accident the pain was worse. He had pain down both legs and the next day he was too sore to go to physiotherapy. He went the following day. He had an x-ray which he was told was normal. He was given morphine for the pain and his family doctor put him off work for two weeks. After two weeks he returned to work and was put on sedentary duties, handing supplies out in the store room. He performed that job until July 2007. He was still seeing his physiotherapist until he went to CHC in August. Although he found physiotherapy to be somewhat helpful he still had pain in his legs, mostly on the left side. He started CHC on August 1, 2007.

The Worker testified that he saw Dr. Yabsley, who went over the results of his MRI with

him and told him he had a herniated disc. The Worker understood from Dr. Yabsley that he would be sending a letter to CHC telling them to take it easy on him, as he was still healing. The Worker checked with CHC for the first three weeks of his program and they had not received any letter from Dr. Yabsley. He stated that while at CHC no one mentioned his disc herniation.

The Worker testified that his functional abilities improved at CHC. He was able to cope better with his pain. He testified that he underwent a job simulation exercise while at CHC. By the end of his time at CHC he was performing the simulation, for 10 minutes, 3 times a day. He stated that he was being prepared to return to work as a Booth Grinder. It was impossible, he stated, to simulate the torque that was involved in booth grinding. The Worker testified that the job simulation he did at CHC was not close to his actual job with the Employer.

The Worker returned to work within a week of finishing at CHC. He stated that he was at a medium work level according to CHC when he left. He was on what was essentially an "ease-back" program. He stood on an anti-fatigue mat and he was encouraged to take breaks as needed. He was only working on smaller pieces of steel when he returned. As far as he knew, CHC had just suggested that he go back to grinding and did not specify any restrictions. The Worker started at four hours a day then worked up to five, and then six. Each week he increased his time at work by an hour. The Worker testified that the first week was not bad, but it was tiring working four hours straight.

The Worker said his production was low when he first returned to work, and after the first week he started to miss time for flare-ups of back pain. He stated that he missed about a day a week because of his back. He found standing painful and he saw his doctor every two to three weeks. He increased his medication.

When the Worker's graduated hours ended and he had to go to 8 hours a shift, he stated that it did not go well. He was still missing a day a week. He worked 8 hours shifts until the end of November 2007. At that time he was suspended by his Employer. He said he returned to work on January 2, 2008.

The Worker testified that he saw his family doctor, Dr. Vohra, on December 31, 2007, who gave him a note saying he shouldn't be around machinery. This was due to the strong medication he was taking. He was sent home by his Employer on February 5, 2008.

On cross-examination the Worker acknowledged he had access to clamps, hooks, and magnets to pick up the pieces of metal for grinding, and further, that he did not have to pick up pieces from the floor but rather, from a table.

The Worker acknowledged a meeting that involved his Physiotherapist/Return-To-Work Coordinator from CHC, himself, and Angus McEachern, where the physiotherapist had

been given a tour of the shop where the Worker worked. The Worker confirmed that CHC had initially said that his job was heavy physical demands level and his ability was medium, then later said his ability was medium and his job was medium. In reviewing the reports from CHC, I note that the August 31, 2007 report notes the Worker's job as being heavy, however, this would be inconsistent with all other reports from CHC and I accept that it is of a medium physical demands level, on the NOC scale.

The Worker testified that five or six people worked along with him grinding pieces of metal. He stated that most of them would be grinding big pieces although perhaps one other person would be doing small pieces. He stated that once he came back to work after CHC, his supervisor tried to find small pieces for him, given his limitations. He did do a large piece one day as there were no small pieces available for him. He did about three-quarters of it and found it demanding. The Worker stated that he continued to miss approximately a day of work a week between January 2, 2008, when he returned to work after his suspension, and February 5, 2008.

I must determine whether the Worker continued to suffer a loss of earnings beyond October 22, 2007, which was as a result of his compensable injury.

The Worker's Representative submits that the evidence shows that the Worker was unable to perform his job duties as a result of his back problems. He argues that the Worker's condition was never treated as though it were a herniated disc and, therefore, more serious than a soft-tissue injury. He stated that objective findings were ignored. The medical evidence shows, however, that the Worker's herniated disc was something that the doctors and treatment providers who saw him were aware of. On file is a Return To Work Assessment from CHC, dated July 25, 2007. It notes that the Worker had an MRI which revealed a herniated disc at L5-S1. The report states that there is no contra-indication for a functional capacity evaluation or a functional recovery program.

The Worker was assessed by Barra Rehabilitation Services Inc., who provided a report to the Board on June 5, 2007. It stated that Dr. Robert MacNeill did the medical evaluation of the Worker and Philip Ruiz, physiotherapist, did the basic functional capacity evaluation. The report stated that the Worker's MRI showed a small disc which was not felt to be a pain generator. Dr. Yabsley's report of June 11, 2007, states that he has difficulty with the source or origin of the Worker's severe pain. He refers to the herniated disc as small and unimpressive. In his July 30, 2007 report he suggests that the Worker's disc is the cause of his pain, but notes a disconnect between the diagnosis and the amount of impairment.

The August 31, 2007 report of CHC states that there is no evidence of discogenic signs or symptoms. It is apparent that the professionals at CHC were aware of the disc and treated the Worker accordingly. I am unable to conclude, based on the evidence, that the treatment the Worker received was inappropriate or failed to take into account the herniated disc.

In the report dated May 23, 2007, for the functional capacity evaluation performed by Philip Ruiz, he stated that the Worker put forth variable levels of effort and he could do more at times than he currently stated or perceived. He stated that the Worker's subjective reports of pain and disability were very questionable and his effort was variable. The Worker was found, due to the lack of an identifiable pain generator and the results of his functional capacity evaluation and his psychological assessment, not to be a candidate for the program offered by Barra Rehabilitation Services.

According to the Return To Work Assessment from CHC, the Worker was being prepared to return to his work as a Booth Grinder which would be a medium level position according to the National Occupational Classification (NOC). A description of Booth Grinder was provided to CHC by the Employer and is set out in the report. According to the description the job involves handling grinders between 3 and 7 lbs, which would be used to grind a steel casting and both hands are needed to hold the grinder. This would be done for seven hours a day. Any weight exceeding 40 lbs would require the employee to use a jib crane.

According to a letter from CHC, dated June 23, 2007, the CHC's interdisciplinary pain management program is geared toward showing the Worker how to safely improve his functioning so that he may return to his social, home, recreational and work activities. According to an August 17, 2007 report from CHC, the Worker was currently operating at a modified light physical demands level on an occasional basis and at a modified medium work physical demands level on a frequent basis. A job site visit had been arranged for August 23, 2007.

CHC's report of August 31, 2007, noted that a work-site visit had been conducted and the goal of the Worker's program was a safe return to his pre-injury Employer. The Worker was working within a medium physical demands level. His functional activity had improved and he was on a lower dose of morphine. This report sets out all the physical requirements of a Booth Grinder. It is noted that it is within the heavy NOC, however, as previously stated, I accept that it is within the medium NOC. The Worker was to practice work-simulation activities. A return to work plan was to be devised.

According to a gradual return to work plan from CHC dated September 7, 2007, the goal was to return the Worker to full hours and duties by October 15, 2007. He was to start at 4 hours a day for 5 shifts and work up to the full 8 hours.

According to the CHC discharge report of September 14, 2007, the Worker had demonstrated the physical demands of his pre-injury position of Booth Grinder with the Employer. The report stated as follows:

Of on-going concern has been his lack of motivation to return to his job which to a great extent appears to reflect what he describes as a poor relationship

with his supervisors and co-workers. Regardless, at discharge he is indicating his intention to return to work at [the Employer's].

Functionally, the Worker was noted to be performing within the medium physical demands level. The Discharge Report stated that he was fit to perform all of the duties required of a Booth Grinder.

According to the report of Dr. Vohra, dated September 18, 2007, the Worker was able to do the grinding required of him and over time his grinding abilities would increase. According to Dr. Vohra's report of October 10, 2007 the Worker was able to do his transitional duties.

According to the report from Dr. Haigh, from CHC, dated September 28, 2007, there was no medical explanation based on objective findings to explain the Worker's increased difficulty working. According to CHC rehabilitation co-ordinator, Ron Patterson, in the report of September 28, 2007, the Worker's presentation was essentially unchanged since his last examination and he remained fit to work with regard to his musculoskeletal examination.

Dr. Vohra provided a report dated January 3, 2008 to the Board. He stated that it was unsafe for the Worker given his medication to be around machinery that required both attention and reflex. Dr. Vohra stated that working as a grinder and being bent over was not the ideal recipe for continued return to work.

There is insufficient medical evidence before me to determine that any loss of earnings sustained by the Worker beyond October 22, 2007, related to his compensable injury. The Worker was cleared to go to work by CHC, and its multi-disciplinary team. Although Dr. Vohra expressed some concern about the Worker being on medication around heavy equipment, as well as being bent over doing his work as a grinder, he stated in September that the Worker was able to do his work as a grinder and that his abilities would increase.

According to the November 1, 2007 report from CHC, following a review of the work-site visit information and observation of the work tasks as a Booth Grinder, the evaluator continued to classify the work within the medium NOC category. Steel items were moved by overhead magnetic hoist/hook machinery, which the Worker did indicate on cross-examination was available to him to perform his duties. The physiotherapist writing this report, Kira Ellis, stated that the Worker was deemed fit to return to work as a Booth Grinder. When his suspension was over and he returned to work in January of 2008, the Worker signed Exhibit "2" which stated that he understood and agreed to perform the duties of Booth Grinder. The Worker was thereby signifying his physical abilities matched his job requirements.

On file is a document entitled "Meeting with Dr. Vohra on Friday January 11, 2008". According to a letter from the Worker's Case Manager to Dr. Vohra dated January 16,

2008, this document consists of the Case Manager's notes of a meeting that took place between herself and Dr. Vohra. Dr. Vohra is asked to initial the notes and return them. There is a copy of the notes on file faxed from Dr. Vohra's medical clinic on January 24, 2008, with Dr. Vohra's additions in the margins. Dr. Vohra has indicated that the Worker "should be" able to work in the capacity of Grinder and should continue to do so. No issue is taken, it would appear, with the statement that, "[the Worker] will continue working as a Grinder...it is safe and appropriate." I have placed significant weight on the opinion of Dr. Vohra given his extended involvement in the Worker's treatment and his knowledge of the opinions of the Worker's treating specialists.

I am unable to find that it is just as likely as not that the Worker's earnings loss beyond October 22, 2007 was related to his compensable injury. The evidence establishes that the Worker had the physical ability to work as a Grinder, both when he went back to work in September of 2007 on the ease-back program, and then on to regular hours, and then in January when he returned after his suspension. I make no finding as to what the cause of the Worker's absences was, but the medical evidence warrants the conclusion that he could physically have performed his job.

CONCLUSION:

This appeal is denied. The Board did not breach the *Act* or Board Policy in releasing information to the Employer. The Worker is not entitled to TERB beyond October 22, 2007.

DATED AT HALIFAX, NOVA SCOTIA, THIS 17TH DAY OF JULY, 2008.

Alison Hickey
Appeal Commissioner