

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

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

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

APPEAL DECISION

Representatives: D. William MacDonald, Workers' Adviser

Form of Appeal: Oral hearing on December 9, 2008 in Stellarton, Nova Scotia

WCB Claim No.: [*]

Date of Decision: January 21, 2009

Decision: The appeal of the March 3, 2008 Board Hearing Officer decision is allowed in part, according to the reasons of Appeal Commissioner Gary H. Levine.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This decision is taken under the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended, (the "Act"). The Worker*, a former metal fabrication machine operator and charge hand, suffered a compensable left knee injury on February 25, 1980. He was awarded a 20 percent permanent medical impairment (PMI) for a left knee impairment.

The Employer provided the Worker with lighter suitable alternative duties. Eventually, he was promoted and given charge hand supervisory work without significant physical demands. In December 2006, the Employer's business shut down for economic reasons and his position ended. The Worker was unsuccessful in securing alternate employment paying as much as he previously received from the Employer. He now seeks temporary earnings-replacement benefits (TERB) from the Board.

The Worker's claim for TERB was denied by the Board. On appeal, a Board Hearing Officer found that: the Worker had a permanent position at the time his job ended; that he had transferable skills; and that he was physically capable of performing this type of work. The Hearing Officer further found that the Worker's loss of earnings was economic in nature, not the result of his compensable injury. Therefore, his claim for TERB was denied.

I conducted an oral hearing in this matter. In addition to the evidence and submissions from the hearing, I considered the contents of the Worker's claim file and the decision under appeal. I will only refer to a portion of the relevant evidence below.

ISSUES AND OUTCOME:

Is the Worker's loss of earnings attributable, at least in part, to his compensable left knee injury? If so, is he entitled to TERB?

The Worker's loss of earnings is causally related to his left knee injury. In all probability, he lacks the skills, training, education and physical capabilities to obtain suitable alternate employment in order to eliminate his earnings loss. His entitlement to TERB depends upon factors such as further medical treatment or possible vocational rehabilitation, as determined by the Board.

ANALYSIS:

Burden of Proof, TERB and Causal Connection:

I must consider the evidence before me in light of s. 187 of the *Act*. The Worker is entitled to the benefit of the doubt on any issue involving compensation. Where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue must be resolved in the Worker's favour. Any participant disputing an inference raised by the Worker is required to meet a greater burden of proof, the balance of probabilities standard generally required in civil matters. Whether an inference is reasonable depends upon the circumstances of each case.

The Worker seeks TERB with respect to his injury. Generally speaking, an injured worker under the age of 65 may be entitled to an earnings-replacement benefit pursuant to ss. 2(ad) and 37 of the *Act*. It must be shown that he or she suffered a loss of earnings causally connected to a compensable injury during the period in question. For workers injured prior to March 23, 1990, TERB may be payable until the loss of earnings ends, the loss no longer results from a work injury, the Board determines the worker has a permanent impairment pursuant to s. 34 (as in the present case), or the worker completes a vocational rehabilitation program pursuant to s. 112.

Although a causal relationship linking a compensable injury to an earnings loss must be shown, the Worker is not required to prove causation to a scientific certainty. I may use common sense to infer a causal connection where appropriate.

Evidence:

The Worker testified at the hearing. He is presently 47 years of age, has a high school GED and began working for the Employer in October 1979. He has also held jobs as a landscaper, roofer/siding installer, surveyor's assistant, cleaner, production line worker and as a machine operator for a water bottler. Other than his work with the Employer, his jobs primarily involved ordinary labour skills.

The Worker injured his left knee in 1980 while on a crew moving pieces of steel by crane. As mentioned, he was awarded a 20 percent PMI rating with respect to his injury.

The Worker noted that he wears a knee brace supplied by the Board. He feels this does not aid him very much in stabilizing his knee. He finds that his knee "pops out all the time". He explained at the hearing that some instances of his knee giving out, or popping out, are worse than others. On occasion, he gets sharp pains lasting 15 to 20 minutes. He experiences daily swelling, difficulty climbing stairs and cannot kneel or squat. The more time he spends on his feet, the more swelling and pain he tends to experience.

In a medical-legal report dated July 14, 2008, the Worker's family physician, Dr. S. L. Barclay, described the injury as a twisting type injury resulting in continuing pain, effusion, locking and a giving away sensation. X-rays confirm that the Worker has significant

osteoarthritis involving both the medial and lateral joint compartments, with multiple inter-articular osteophytes and large osteophytes at the medial joint margins. He also has advanced osteoarthritis of the medial facet of the patellar femoral joint. In total, he underwent 4 surgeries plus synvisc injections for his knee.

According to Dr. S. Chhabra, an orthopaedic surgeon, the Worker has end stage arthritis with essentially complete wearout of his articular cartilage. He has been advised that he will require a total knee replacement. At the time of the hearing, it was not clear when such surgery may be scheduled. Apparently, the Worker's age is a factor, even though he would like to have this done soon.

In his report, Dr. Barclay summarized the Worker's present capacity to function as follows:

At the present time [the Worker] complains of fairly constant aching and discomfort involving the left lower extremity particularly at the left knee. This interferes with prolonged standing, walking, twisting and almost any other activity involving changes in the left knee joint position. It also affects any ability to climb or to carry excessive loads. Since the [Employer's] plant closed he has tried another occupation but found it impossible to carry on because of increasing discomfort in his left lower extremity. His job options are also very limited because of his apparently limited education and experience. . . . There has obviously been some progression of this gentleman's problem involving his left knee over the past number of years with increasing osteoarthritic deterioration and excessive wearing of the articular cartilage. . . . [I]t is most likely that the only likelihood of significance improvement [*sic*] would be a total knee replacement, however his relatively young age might be a factor in deciding against this due to the limited life span of the prostheses itself. In any case, [the Worker] is probably unable to work at any job for which he has the educational ability or experience due to the inherent nature of the activities likely associated with such work unless a sedentary or very light work load position could be obtained. . . .

With respect to his post-injury work history, the Worker testified that he managed to remain at the Employer's plant only by virtue of various accommodations made by the Employer and other workers. After convalescing for about 8 months following his accident, he said was assigned to a crew to perform very light maintenance duties such as sweeping snow from switches, repairing rails, etc.

After a period of time, he was assigned to the "punch and shears" section as a machine operator. The machine was designed to "break" or bend steel. When he complained that this work was hard on his knee, he was given other duties as a "burn table" operator. In this position, he "programmed" the machine for the steel cuts required. He could sit at

times and was not required to lift. Co-workers performed the heavier tasks.

After about 4 years, the Worker was given supervisory duties as a charge hand. Much of his time was spent delegating tasks and evaluating work done by others. He described this as a “desk job”. He continued in this position until the Employer’s plant closed.

The Worker testified that, subsequent to the plant closure, he attempted to obtain work. Unfortunately, he found that the physical demands of most of these jobs were too great. He feels that his job opportunities are restricted due to his limited physical tolerances, skills, education and experience. He presently works part-time in a less demanding position as a machine operator in a water bottling plant. However, the position pays much less than he previously received from the Employer.

Findings:

I found the Worker to be a credible witness and I accept his evidence. His testimony was offered in a straightforward manner, it was consistent with medical and other documents on file and it was reasonable in light of his circumstances. In particular, there was considerable support for his evidence from Dr. Barclay.

There is no dispute that the Worker suffered a significant left knee injury resulting in a permanent impairment and ongoing pain. According to Dr. Barclay, the Worker should be limited to sedentary or very light duties. The Worker attempted to perform more demanding work, but could not do so. Therefore, I find that the Worker is presently limited to sedentary or very light duties where they involve the use of his knee.

I further find, contrary to the Hearing Officer, that the Worker does not have much to offer in the way of transferrable skills. That is, it seems unlikely he would be able to obtain or maintain alternate employment as a supervisor at a position comparable to the one he last held with the Employer. He has limited education and his work history involves only a few labour intensive occupations. The charge hand supervisory position he held came about only after he was accommodated. It seems reasonable to assume that the Worker’s many years of employment at the plant gave him a unique advantage in performing his duties within the limited environment of the plant. I think it is doubtful that he would have such an advantage with another employer. Hence, I find that the Worker has an ongoing earnings loss attributable to his compensable injury.

It follows that the Worker may be entitled to TERB. His entitlement to TERB depends upon factors such as medical treatment and possible vocational rehabilitation. Therefore, this matter must be returned to the Board to consider the Worker’s entitlement to TERB according to the *Act*. While not binding upon the Board, I recommend that the Board consider whether the Worker is eligible for vocational rehabilitation.

CONCLUSION:

The appeal is allowed in part. The Worker has an ongoing earnings loss attributable to his compensable left knee injury. The Board is to consider his entitlement to further TERB according to the *Act*.

DATED AT HALIFAX, NOVA SCOTIA, THIS 21st day of January, 2009.

Gary H. Levine
Appeal Commissioner