



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2435/09

BEFORE: B. Doherty: Vice-Chair

HEARING: December 8, 2009 at Oshawa
Oral

DATE OF DECISION: December 14, 2009

NEUTRAL CITATION: 2009 ONWSIAT 2881

DECISION UNDER APPEAL: WSIB ARO decision dated September 19, 2008

APPEARANCES:

For the worker: Unrepresented

For the employer: Not participating

Interpreter: N/A

REASONS

(i) Introduction

[1] These are the reasons for decision in an appeal by the worker from the decision of the Appeals Resolution Officer (ARO) D'Angelo of the Workplace Safety and Insurance Board (the Board) dated September 19, 2008. ARO D'Angelo had allowed the worker's objection in part, concluding that she was entitled to full loss of earnings (LOE) benefits from September 12, 2006 to October 2, 2006, when she started up her day care business.

[2] The ARO found the day care business to be suitable.

[3] The worker had sought LOE benefits for the period in issue in this appeal, October 2, 2006 to March 1, 2007. The ARO concluded it that she was not entitled to LOE benefits for this period as her wage loss was not due to her compensable impairment, but rather to the time required to establish a client base.

[4] The ARO granted the worker entitlement to reimbursement of her business start-up costs.

[5] The issue in this appeal is whether the worker is entitled to LOE benefits from October 2, 2006 to March 1, 2007.

[6] The employer did not participate in the appeal. I heard from one witness, the worker.

(ii) Background

[7] The worker, who was born in 1971 and who is now 38 years old, worked as a machine operator for the employer. She started working for the employer in 1996.

[8] She was injured at work on February 5, 2001 when she hurt her back while pulling a beam. On October 30, 2001, she had back surgery, a disctomy and left foraminotomy at L4/5. She returned to work in January, 2002, doing light duties, and was back to full hours in April, 2002.

[9] She was left with a permanent impairment of her low back as a result of the workplace injury. She received an 18% non-economic loss (NEL) award in November, 2002.

[10] She continued working but experienced a recurrence in June or July, 2005. She returned to work part-time in September, 2005, but was not able to increase her hours beyond 5½ hour shifts, to full hours.

[11] The Board referred the worker for labour market re-entry (LMR) services in May, 2006 when it became apparent that she could not be restored to her full-time hours. After the referral for LMR services, the worker continued to work but ultimately stopped working on July 11, 2006 due to increased symptoms.

[12] There was disagreement between the worker and the Board concerning the suitable employment or business (SEB) to be pursued in the worker's LMR plan. The worker expressed an interest in working with children. The LMR service provider and the Board were of the opinion that the SEB, National Occupational Classification 6474 – *Babysitters, Nannies and Parents' Helpers*, was not suitable for the worker. The SEB identified by LMR service provider was Customer Service Representative.

[13] The worker started her own day care business in her home in October, 2006.

[14] The 72 month LOE review took place on March 1, 2007. Because the adjudicator determined that the worker would have restored her pre-accident earnings had she co-operated with LMR, she was found not to be entitled to any further LOE benefits.

[15] On March 21, 2007, the worker's then representative provided the Board with copies of records relating to the day care business. The records included letters setting out the first day of operation (October 2, 2006) and the revenues from October 1, 2006 to February 28, 2007.

[16] The worker's earnings at the outset of the day care business were less than her deemed earnings for the period in issue. The ARO stated that the worker had not fully restored her earnings in the early months of the new business because she did not have the full complement of children to care for. In the ARO's view, the loss was not due to the worker's compensable impairment, but rather the time required to establish the client base.

[17] By March, 2007, the time of the final LOE review, the worker had restored her pre-injury earnings.

[18] The worker's former representative, who advised the Tribunal that he would not be appearing for the worker at the hearing, provided a written submission on her behalf dated November 24, 2009. That submission included the following points:

- the worker's day care business had fully replaced her pre-injury earnings, a "glowing example" of a successful return to work process;
- the LMR plan proposed by the Board had a cost of \$135,000, and the worker was able to restore her pre-injury earnings for approximately 1% of that cost;
- the worker did not replace her full loss of earnings until March, 2007;
- Board policy provides entitlement to full LOE benefits where a worker is participating in return to work activities; and
- it took a few months for the worker to build up her complement of children to the point where she restored her pre-injury earnings.

[19] Although the terminology is somewhat unclear, with reference to "full partial" LOE benefits, it appears that what was being sought was the difference between what the worker actually earned and full LOE benefits.

[20] At the hearing, the worker testified that she did everything she was supposed to do in her self-directed LMR activity. She did not have the full complement of children at the outset. She stated that she needed to see if she could operate the business with her pain. She could, and the business is successful. She has been doing it for over three years now. She testified that she always has pain, but she can cope with it, and has never missed a day of work. She commented "I think I made a good choice."

(iii) Relevant law and policy

[21] The *Workplace Safety and Insurance Act, 1997* (WSIA) provides, in section 13(1), that a worker who sustains an injury in an accident arising out of and in the course of employment is entitled to benefits.

[22] A worker who sustains a loss of earnings as a result of the compensable injury is entitled to LOE benefits. The amount of the LOE benefit under the WSIA is based on the difference

between the worker's pre-accident earnings and what he or she is able to earn in suitable employment after the injury.

[23] Under section 126(1) of the WSIA, the Tribunal is directed to apply Board policies in its decision-making. The policies are contained in the Board's *Operational Policy Manual (OPM)*.

[24] OPM Document No. 18-03-02, *Payment of LOE Benefits (1-August-2007)*, states that in a situation where a worker requires an LMR plan, the worker is entitled to full LOE benefits until plan is completed, providing the worker is cooperating.

(iv) Analysis

[25] In my view, the fundamental question is whether the worker's earnings loss during this period was caused by the compensable injury. If it was, and if there is nothing in the WSIA or Board policy that would prohibit the payment of LOE benefits, then the worker is entitled to LOE benefits.

[26] The worker's loss of earnings in the period in issue was causally related to her compensable injury.

[27] Workers are entitled to LOE benefits while co-operating in an LMR plan, including a self-directed LMR plan.

[28] The ARO found the SEB to be suitable. There does not appear to be good reason for distinguishing between a worker who is participating in training directed to re-employment as a worker in an accepted SEB, and training and setting up for a self-run business that is accepted as a SEB.

[29] In Tribunal *Decision 348/07*, the Hearing Panel found that the worker took significant self-directed steps to re-enter the workforce by setting up and operating her own business. The Panel found that she was entitled to full LOE benefits during the start-up phase of the business, until it was profitable.

[30] Because the loss was causally related to the worker's compensable injury and the start-up phase of the new business was a reasonable component of the self-directed LMR plan, a plan that was ultimately successful, I find that the worker is entitled to LOE benefits over the period in issue, October 2, 2006 to March 1, 2007, taking into account her actual earnings in that period.

DISPOSITION

[31] The worker's appeal is allowed. She is entitled to LOE benefits over the period in issue, October 2, 2006 to March 1, 2007, taking into account her actual earnings in that period.

DATED: December 14, 2009

SIGNED: B. Doherty