

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

[PERSONAL INFORMATION]
CASE ID #[PERSONAL INFORMATION]

APELLANT

AND:

**WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND**

RESPONDENT

DECISION #228

Appellant	Maureen Peters, representing the Worker
Respondent	Brian Waddell, Solicitor representing the Workers Compensation Board
Place and Date of Hearing	Thursday, April 7, 2016 Rodd Royalty Charlottetown 14 Capital Drive Charlottetown, Prince Edward Island
Date of Decision	December 19, 2016

Facts and Background

1. This is an appeal of Internal Reconsideration Decision #[PERSONAL INFORMATION] dated January 12, 2015 which denied the Appellant's request that the decision to base his extended wage loss benefits on estimated earnings of \$20,324.77 per year be set aside and his extended wage loss benefits be based on estimated earnings of \$0.00 per year. [Appeal Record Tab 1]
2. The Appellant had been employed as a permanent full-time [PERSONAL INFORMATION] with [PERSONAL INFORMATION]. The Appellant filed his Worker's Report of Accident, Form 6, on May 12, 2012. The Form 6 listed May 8, 2012 as the date of the injury.
3. The Appellant indicated that he felt back pain in the morning of May 8, 2012, while carrying provisions [PERSONAL INFORMATION] and later felt a sharp pain when laying a [PERSONAL INFORMATION] the freezer.
4. The Appellant submitted that he did not file the Form 6 until May 12, 2016 as he hoped the pain would disappear within a few days; however, the pain persisted. [Appeal Record Tab 7]
5. On May 29, 2012 the Worker's Compensation Board of PEI accepted the Appellant's claim for low back (left sided) strain for medical aid benefits. [Appeal Record Tab 8]
6. Subsequent to this approval of medical aid benefits, the Appellant underwent a course of physiotherapy from June 22, 2012 to September 6, 2012. [Appeal Record Tabs 10, 16]
7. The Appellant's claim was transferred to a Case Coordinator as the claim had passed the four week point and required the development of a return to work plan. [Appeal Record Tab 13]

8. On August 8, 2012, the Case Coordinator noted the Appellant stopped work on May 15, 2012. With the Appellant's work schedule of 28 days on, 28 days off, the Appellant's normal back to work date would have been July 10, 2012.
9. The Case Coordinator also noted the Appellant had a disc fusion (L5-S1) in 2002 which was not work-related. [Appeal Record Tab 15]
10. An X-Ray taken May 28, 2012 at the Atlantic Health Sciences Corporation noted no abnormalities from the earlier disc fusion. [Appeal Record Tab 17]
11. The Appellant was referred to Occupational Therapy for work conditioning on September 19, 2012 by his family physician and his physiotherapist. [Appeal Record Tab 21]
12. On August 24, 2012, a MRI showed normal alignment soft tissue and some narrowing of the intervertebral foramina on both sides at L5-S1. [Appeal Record Tab 22]
13. The Appellant underwent an assessment for work conditioning at the Workers Rehabilitation Centre in St. John, NB, on October 16, 2012. The Appellant was found not to be an appropriate candidate for work conditioning and it was recommended that he have a multidisciplinary assessment. [Appeal Record Tab 26]
14. On November 15, 2012, the Board notified the Appellant's employer that he had been receiving injury on duty benefits since June 12, 2012 with no end date yet confirmed. [Appeal Record Tab 27]
15. The Appellant was referred to Dr. Connolly, Orthopedic Surgeon, who had performed the 2002 disc fusion. Dr. Connolly noted that no abnormalities arising from the surgery appeared on the MRI and suggested an injection to help control the pain symptoms. [Appeal Record Tab 28]

16. On December 12, 2012, the Appellant underwent a bilateral facet joint injection. [Appeal Record Tab 31]
17. Between January 24, 2013 and February 7, 2013, the Appellant underwent a multidisciplinary assessment. [Appeal Record Tab 24]
18. On March 18 and 19, 2013, the Appellant underwent a Functional Capacity Evaluation (FCE). As a result of the FCE, it was determined that that Appellant could work full days at a light physical demand level. [Appeal Record Tab 40]
19. A discharge report dated March 20, 2013 by the multidisciplinary rehabilitation team noted the findings of the FCE. The report concluded that the Appellant would have the capacity to begin a new occupation or complete alternate duties, if available. It was noted that there may be limitations preventing the Appellant from returning to his pre-injury employment. [Appeal Record Tab 41]
20. On May 9, 2013, the Board Medical Advisor, Dr. Steven O'Brien, advised that the Appellant would be eligible for a Permanent Medical Impairment (PMI) Assessment on the basis of his persistent pain only as the file did not disclose any consistent physical findings to account for his pain symptoms. [Appeal Record Tab 48]
21. By memo dated June 6, 2013, Dr. O'Brien stated that it would be appropriate for the Appellant to be referred to Dr. Edwin Koshi to see whether anything further could be offered to the Appellant. [Appeal Record Tab 54]
22. Dr. Koshi provided a report dated July 30, 2013. After reviewing the Appellant's full medical history and present symptoms, Dr. Koshi recommended a left sacroiliac joint injection for both diagnostic and treatment purposes. [Appeal Record Tab 56]

23. A follow-up report from Dr. Koshi noted that the Appellant reported very good pain relief of 60% following the injection. Dr. Koshi noted his own doubts about the origins of the Appellant's pain, suggesting that the most likely source was muscular tendinous ligamentous, the most common cause of ordinary back pain. [Appeal Record Tab 57]
24. On August 20, 2013, an Impairment Rating Assessment was conducted on the Appellant by Dr. DeMarsh. It resulted in the assignment of 2% whole person impairment under the diagnostic category of chronic mechanical low back pain or chronic recurring low back pain. [Appeal Record Tab 60]
25. The Appellant was advised of this Impairment Assessment by letter dated August 30, 2013 which also contained a cheque for \$986.00, the lump sum payment for this impairment. [Appeal Record Tab 61]
26. On September 9, 2013, the Appellant's Case Coordinator then referred the Appellant to Vocational Rehabilitation. [Appeal Record Tab 63]
27. A Work Capacity Evaluation/Jobsite Analysis conducted by Worksafe NB concluded that the Appellant met all job demands of his pre-injury work as [PERSONAL INFORMATION], except lifting and carrying were only partially met. [Appeal Record Tab 71]
28. On February 19, 2014, the Appellant reported to the Return to Work Coordinator that he was unable to look for work due to increasing pain and inability to stand or walk for any length of time. [Appeal Record Tab 75]
29. At the Appellant's request, he underwent a second fluoroscopic injection with Dr. Koshi on April 16, 2014. On follow-up, the Appellant reported only 20% pain relief. [Appeal Record Tabs 79, 80]

30. In a report dated July 7, 2014, the Board's Return to Work Coordinator identified three [PERSONAL INFORMATION] positions that she believed met the Appellant's functional capacities. Her determination was based on the findings from the multidisciplinary program at the Workers Rehabilitation Centre in NB. [Appeal Record Tab 83]
31. By letter dated August 26, 2014, the Appellant was advised by his Case Coordinator that as he had impairment and a resulting loss of earnings capacity from his compensable injury, his case was reviewed for Extended Wage Loss (EWL) benefits. The letter noted the Appellant's temporary wage loss benefits ended August 22, 2014 and that EWL benefits began August 23, 2014. The letter explained the calculation of the EWL benefits, relying on the three [PERSONAL INFORMATION] positions identified by the Board's Return to Work Coordinator as being within the Appellant's functional capabilities. [Appeal Record Tab 88]
32. A request for internal reconsideration of the decision on EWL benefits as set out in the August 26, 2014 letter was filed on the Appellant's behalf by the Worker Advisor on November 24, 2014. [Appeal Record Tab 94]
33. The Internal Reconsideration Officer denied the Appellant's request for reconsideration of the decision with respect to EWL benefits. [Appeal Record Tab 1]

Issue

34. Was the decision to calculate the Appellant's Extended Wage Loss Benefits based on estimated earnings of \$20,324.77 a year appropriate?

Appellant's Argument

35. The Appellant argued that from May 8, 2012 to the date of the hearing, the Appellant had not been able to return to work due to persistent pain which prevented him from doing essential tasks of his former employment as a [PERSONAL INFORMATION] and those of related cook positions in other organizations.
36. The estimated earnings of \$20,324.77 per year were based on three available [PERSONAL INFORMATION] positions with an average hourly rate of \$12.33 and 31.7 work hours per week. [Appeal Record Tabs 83, 88]
37. The Appellant's family physician repeatedly reported that the Appellant was capable of home activities only and needed Acetaminophen and NSAIDs regularly to function since the Appellant's injury. The Appellant argued that only marginal relief was provided by the procedures from Dr. Edvin Koshi. [Appeal Record Tabs 55, 56, 92]
38. The Appellant also commented that his persistent pain was noted by Dr. Koshi and Dr. Ledezma in their reports of July 30, 2012 and July 17, 2013 respectively. [Appeal Record Tabs 55, 56]
39. The Appellant provided the Tribunal with the case of Nova Scotia W.C.B. v. Martin [2003] 2 S.C.R. (Supreme Court of Canada). The Appellant stated that the amount of hours per week listed for the Appellant was not appropriate or reasonable in light of the Appellant's chronic pain limitations. [Appellant's Factum Tab 2]
40. The Appellant provided the Tribunal with Board Policy POL-116 "Estimated Earning Capacity" which defined "estimated earnings" as follows:

"Estimated earnings" means the wages as determined by the Workers Compensation Board that the worker is capable of earning when actual wages are not known and the worker has an impairment.

[Appellant's Factum Tab 4]

41. POL-116 "Estimated Earning Capacity" defines "loss of earning capacity" as follows:

"Loss of earning capacity" means the difference between the worker's average net earnings before the accident and the net average amount the Workers Compensation Board determines the worker is capable of earning after the accident.

[Appellant's Factum Tab 4]

42. The Appellant submitted that he was not capable of earning any wages as he was unable to sustain even light activity long enough to work, even at a part-time position and, therefore, the net average amount he was capable of earning as of August 26, 2014 should be \$0.00.
43. The Appellant also provided the Tribunal with Section 17 of the *Workers Compensation Act*, R.S.P.E.I. 1988, W-7.1 ("Act"), which states that if the evidence for or against the issue is approximately equal in weight, the issue should be resolved in favor of the Appellant.

Respondent's Argument

44. The Respondent argued that the Functional Capacity Evaluation, which was completed in March 2013, indicated that the Appellant had the ability to safely perform full days of work activities at a light level of physical demand. The Respondent was of the view that if the Appellant had worked as a cook anywhere other than with [PERSONAL INFORMATION], he could have returned to his pre-injury employer upon completion of the program. [Appeal Record Tab 82]

45. The Respondent argued that the Board was not required to match the Appellant's demands with the same job as that which he had with [PERSONAL INFORMATION]. The Respondent argued that the Appellant was not in a wheel chair, was not non-ambulatory, and was not "disabled" such that he could not carry out some functions.
46. The Respondent reviewed Section 40 of the Act which prescribed that where an injury to a worker resulted in loss of earning capacity after the date of the accident, the wage loss benefit shall be payable having regard to the worker's loss of earning capacity. [Respondent's Factum Tab 3]
47. The Respondent provided the Tribunal with Section 41 of the Act which confirmed that the Board must consider what the worker may be capable of earning for the purpose of his benefit calculation. The Respondent provided the Tribunal with Section 41(1) of the Act which states:

41. (1) The loss of earning capacity of a worker is the difference between

- (a) the worker's net average earnings before the accident; and*
- (b) the net average amount the Board determines the worker is capable of earning after the accident.*

which amount shall not be less than zero.

[Respondent's Factum Tab 3]

48. The Respondent referred to paragraph 20 of Policy POL-86 "Wage Loss Benefits" which provides as follows:

20. The amount of compensation payable by the Workers Compensation Board will be reduced by the amount of any employment earnings received by the worker. The Workers Compensation Board may determine a worker is capable of returning to work but has not applied for available job, and estimate the earnings available to the worker. The Workers Compensation Board may reduce the amount of wage loss benefits by the amount of the estimated earnings.

[Respondent's Factum Tab 4]

49. The Respondent provided the Tribunal with WCAT Decisions #97 and #134 which upheld the Board's decision deeming a worker capable of working based upon the results of an FCE.
50. The Respondent further provided the Tribunal with Decision #218 in which the Tribunal found that there was no objective medical evidence stating that the Appellant was unable to perform the three jobs identified by the Board, nor that the job posed a health or safety hazard to the worker or co-workers. [Respondent's Factum Tabs 5, 6, 7]
51. The Respondent provided the Tribunal with Policy POL-116 regarding estimated earning capacity. The Respondent argued that the Appellant had skills and that he was medically able to perform some work. [Appeal Record Tab 83]
52. The Respondent reviewed the conditioning assessment and the FCE. The physiotherapist stated that there were not a lot of physical findings to explain the Appellant's symptoms. The occupational therapist stated that the Appellant noted independence with self-care activities and most household management tasks by pacing himself. [Appeal Record Tabs 25, 34]
53. The Respondent submitted that the Multidisciplinary Report dated February 7, 2013 stated that the Appellant provided inconsistent information and tended to catastrophize his reports. [Appeal Record Tab 34]
54. The Respondent highlighted the following from the FCE:
 - (a) *the overall test findings in combination with clinical observations indicated an unreliability of the Worker's reports of symptoms and functions.*
 - (b) *the Worker demonstrated the ability to perform full days of general work activities meeting the full demands of light physical demand level.*

- (c) *the Worker's symptom reports were localized to the site of the injury, were not consistent with the observed signs of discomfort, and were not consistent with his overall functional performance.*

[Appeal Record Tab 40]

55. Dr. Ledezma commented in his report of July 17, 2013, that the Appellant did not always put forward a consistent and reliable effort during examination maneuvers and continued to verbalize the intensity of the pain and impact that he related to his every day routines. [Appeal Record Tab 56]
56. The Respondent argued that Dr. Steven O'Brien on May 9, 2013, noted that "despite extensive physiotherapy and participating in the workers rehabilitation program in Saint John, New Brunswick, the Worker remained restricted in his level of functioning which was compounded by psychosocial issues and persistent pain complaints". Dr. O'Brien noted that the physiotherapist was of the view that there were not a lot of physical findings to explain the Appellant's symptoms. [Appeal Record Tab 48]
57. The Respondent argued that the thirteen medical reports from the Appellant's family physician from March 25, 2013 to October 21, 2014 did not provide any objective medical findings to support that the Appellant was unable to work. Dr. Koshi stated that the Appellant could perform light duties with some medium level activities and was of the view that the Appellant's prognosis depended on his tolerance given that there were no medical restrictions based on risk. Dr. Koshi also commented that the self-reported high level of pain and disability was somewhat disproportionate to what he would expect from an individual with the same condition. [Appeal Record Tab 55]
58. The Respondent argued that the conclusion was that the Appellant had an inaccurate and overstated view of the nature and extent of his injuries and that he was in fact able to perform some prescribed duties.

59. The Respondent quoted paragraphs 28 and 29 from the case of Gahir v. Alberta (Workers Compensation Appeal Commission), 2009 CarswellAlta 203,

28. It is not necessary for the Board or the Appeals Commission to identify a specific job that is available for particular work when making a finding of functional capacity.

29. The worker's compensation system is not however an unemployment insurance system. It is designed to provide compensation for persons who are unable to work due to a disability. It does not guarantee them that there will be a job available for every injured employee.

[Respondent's Factum Tab 8]

60. The Respondent argued that there was no objective measure of the nature and extent of the Appellant's pain, but there was contrary evidence as to the severity of that pain given the observations of the experts involved.
61. The Respondent argued that with respect to Section 17 of the Act, the evidence overwhelmingly supported that the Appellant was capable of some employment and that the evidence for or against the issue was not approximately equal in weight.

Analysis/Decision

62. Board Policy POL-116 "Estimated Earning Capacity" defines "Estimated earnings, as follows:

"Estimated earnings" means the wages as determined by the Workers Compensation Board and that the worker is capable of earning when actual wages are not known and the worker has an impairment.

63. POL-116 also defines "Loss of earning capacity", as follows:

"Loss of earning capacity" means the difference between the worker's average net earnings before the accident and the net average amount the

Workers Compensation Board determines the worker is capable of earning after the accident.

64. There were a number of evaluations and reports completed for the Appellant. The FCE which was completed in March 2013 indicated that the Appellant could safely perform full days of work activities at a light level of physical demand and that the Appellant had some ability to perform some weighted activities at the medium level.
65. The FCE also mentioned the unreliability of the Appellant's reports of symptoms and functions. It also noted that the Appellant's symptom reports were inconsistent with the observed signs of discomfort and inconsistent with his overall functional performance.
66. There was a multidisciplinary report dated February 7, 2013. In that report, the occupational therapist noted that the Appellant could function at a light level with some function at a medium strength level.
67. Also, in the multidisciplinary report dated February 7, 2013, it was noted that the Appellant sat for a period of 45 minutes without demonstrating pain behaviors or any apparent signs of distress. The social worker noted that the Appellant provided inconsistent information and tended to catastrophize his reports.
68. The Appellant attended a work conditioning assessment in New Brunswick. The physiotherapist noted that there were not a lot of physical findings to explain the Appellant's symptoms.
69. Dr. Ledezma, who performed the Appellant's Permanent Medical Impairment (PMI) on July 17, 2013, stated that the Appellant did not always put forward consistent and reliable effort during examination maneuvers.

70. Dr. Steven O'Brien, in his report dated May 9, 2013, noted that the Appellant remained restricted in his level of functioning which was compounded by psychosocial issues and persistent pain complaints and mentioned that the physiotherapist in the report of October 16, 2012, noted that there were not a lot of physical findings to explain the Appellant's symptoms.
71. On July 30, 2013, Dr. Koshi noted that the self-reported high level of pain and disability was somewhat disproportionate to what he would expect from an individual with the same condition. Dr. Koshi noted that the Appellant could perform light duties with some medium level activities and he found that there were no medical restrictions based on risk.
72. The Appellant was assessed by Dr. Connolly on October 11, 2012 and at that time the Appellant was able to return to work. There were no disc herniations or transitional breakdown at the L4-5 level and Dr. Connolly noted that there was nothing requiring surgery. Dr. Connolly did not clear the Appellant to work.
73. The Tribunal finds that the information from the Appellant's own physician while, no doubt was the learned opinion of his physician, seemed to be more subjective than objective. Based on all of the medical evidence before the Tribunal, the Tribunal finds that the medical evidence strongly supports that the Appellant is capable of some employment.
74. Upon review of Sections 40 and 41 of the Act, Section 41(1) of the Act states:
 41. (1) *The loss of earning capacity of a worker is the difference between*
 - (c) *the worker's net average earnings before the accident; and*
 - (d) *the net average amount the Board determines the worker is capable of earning after the accident.*

which amount shall not be less than zero.

75. POL-116 “Estimated Earning Capacity” also dictates that the Board must determine whether a loss of earnings exists in situations where a worker is unable to return to his pre-injury employment. The Tribunal also looked to POL-86 “Wage Loss Benefits” at paragraph 20 which enables the Board to deduct the amount the worker is capable of earning.
76. The Respondent provided the Tribunal with WCAT Decisions #97, #134 and #218. Decision #218, this Tribunal found that there was no objective medical evidence that the Appellant was unable to perform the three jobs identified by the Board nor that the job posed a health or safety hazard to the worker or co-workers.
77. The Tribunal cannot reach the conclusion that the Appellant is so totally debilitated that he can do nothing to help himself in the job market. Based on all the evidence provided, it appears that the Appellant is capable of doing some work.
78. Section 41(1) of the Act provides the authority to estimate the Appellant’s earnings after the accident and this again comes back to Policy POL-116, at paragraph 2 which states as follows:

When a worker’s actual wages are not known, the Workers Compensation Board must determine the worker’s estimated earnings using the following information:

- *the worker’s functional ability to work;*
- *the average wages of the suitable work;*
- *the worker’s work history, education, and analysis of transferable skills;*
and
- *local labor market information.*

79. The Board reviewed the average wages of the suitable work which was the same type of job the Appellant had been employed as prior to the accident. They also looked at the Appellant's work history, education and analysis of transferable skills; and the local labor market information where again they looked at the suitable work in the Appellant's category.

The Board also looked at the geographical location of the job matches, the Return to Work Service Coordinator noted that the Appellant had extensive experience working as a cook, that none of the positions required completion of high school and they were all within 100 km radius of his home and therefore, recommended referral to extended wage loss benefits at \$12.33 per hour, for 31.7 hours per week or \$20,324.77 per year.

80. Based on all the medical information provided to us, based on the review of the Policies and Section 7 of the Act, the Tribunal finds that the decision to calculate the Appellant's extended wage loss benefits based on estimated earnings of \$20,324.77 was appropriate and therefore the appeal is denied.

81. We thank counsel for their materials and submissions.

Dated this 19th day of December, 2016.

P. Alanna Taylor, Chair
Workers Compensation Appeal Tribunal

Concurred:

Eugene Lavers, Employer Representative

Elizabeth Mobbs, Worker Representative