

WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

**[PERSONAL INFORMATION]
CASE ID#[PERSONAL INFORMATION]**

APPELLANT

AND:

**WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND**

RESPONDENT

DECISION # 331

Appellant	Maureen Peters, Worker Advisor
Respondent	Stephen Carpenter, Solicitor representing the Workers Compensation Board
Place and Date of Hearing	Tuesday, March 13, 2018 Rodd Royalty Charlottetown Charlottetown, Prince Edward Island
Date of Decision	June 7, 2018

Background:

1. This is an appeal of the internal reconsideration officer, ("IRO"), IR#[PERSONAL INFORMATION] dated June 5, 2017 denying a Worker's request for reconsideration.
2. The Worker was employed by [PERSONAL INFORMATION] as a [PERSONAL INFORMATION]. On September 10, 2014, the Worker suffered a compensable injury when assisting a [PERSONAL INFORMATION].
3. The internal reconsideration decision of June 5, 2017 provides a reasonable summary of the events following the Worker's initial injury:

The worker participated in a functional capacity evaluation in September 2015. The worker achieved a light-medium physical demand level with limitations. A functional job analysis was completed on the worker's pre-injury position and it was found she was not a safe job match due to lifting limitations, elevated work tolerance and bending tolerance. The employer looked at accommodating the worker based on her functional capacity evaluation results.

A functional job analysis was completed on an [PERSONAL INFORMATION] at the [PERSONAL INFORMATION]. She was not a safe job match due to bending, carrying and lifting limitation. A functional job analysis was completed on a [PERSONAL INFORMATION] position at [PERSONAL INFORMATION] and the worker was not a safe job match. The worker had a Fitness for Work Assessment on July 12, 2016 and her functional tolerances were documented on file.

On October 14, 2016, a request was made to CBI Health Centre to complete a formal job match using the Fitness for Work Assessment and the [PERSONAL INFORMATION] functional job analysis provided. The job match was completed on October 20, 2016 and found that bases on the worker's Fitness for Work Assessment she is a safe job match for the [PERSONAL INFORMATION] position.

The worker was offered the position on November 3, 2016 and she accepted. The worker was awarded extended wage loss benefits due to the difference in earnings pre and post injury.

4. The Worker commenced work as a [PERSONAL INFORMATION] on November 12, 2016, and her temporary wage loss ended as of November 13, 2016.
5. On December 6, 2016, the Worker reinjured herself while pushing a [PERSONAL INFORMATION] machine.
6. The Worker completed a Form 6; however, she checked the NO box on question # 2: *Was it a relapse or recurrence of an earlier work related injury"?*
7. The Employer completed Form 7 (Employer's Report) and checked off that this was a recurrence. Attached to the Form 7 was a detailed explanation to question 9 (b): *Do you have any issues or concerns?* That explanation reads in part:

This WCB Form 7 is being scanned to out today without much information, I do not have a copy of the Form 6 that was dropped off by [PERSONAL INFORMATION] on December 6 to your office directly.

I did have a conversation with [PERSONAL INFORMATION] on November 28th regarding extension of her orientation and to find out

how she was feeling physically since she started in our department on November 14th. On November 28th she did state that she was having some discomfort in her neck and shoulder areas. Some of the repetitive actions of moving the [PERSONAL INFORMATION] from the packing boxes to the carts had aggravated the same area that she had an injury to previously.

On the week of Nov 28th, she called in sick during orientation on an evening shift Nov 30th. [PERSONAL INFORMATION] came back on Dec 2nd. She was off on vacation day, Dec 3rd, unit was closed on Sunday, Dec 4th, then she was back on Dec 5-6th, then called in sick for her shift on Dec 7th.

She went to a walk-in clinic on Dec 9th and was put off work until Dec 22nd when she is supposed to go to her family MD for assessment. I never received a copy of the WCB injury claim, nor was I officially told that she had an injury. I contacted her Dec 13th to follow-up on the note I had received from the MD.

I did state that she should have let me know that she had injured herself at work. Since the week of Nov 28th, we had talked about how she was tolerating this new position. She felt that there had been aggravation to her neck and shoulders but she had started physiotherapy again to alleviate the discomfort.

I do not have the full picture but I believe she had some pain experienced moving one of the machines from the clinical educator's office to another area in the department maybe Dec 6th. The question is whether this is an exacerbation of a previous injury? She did not come to me directly to tell me that she had injured herself and I did tell her on Dec 13th that this should have been reported to me the day it happened. I am not sure if there were any witnesses to this incident.

8. On December 9, 2016, the Worker saw Dr. P. Cusack. In his Physician's Report Dr. Cusack notes:

*Well documented WCB case – duty to accommodate close to 1 month
working as support worker – putting away supplies finds it too hard
I have not seen her before so she should see her regular GP to figure out
proper RTW schedule or job retraining.*

9. Under Return to Work Planning on the Physician's Report, Dr. Cusack checked off "unable to work" and estimated the Worker would be off work for "1 week".

10. The next reported medical information on the Worker's file was the Physician Report of December 22, 2016 from Dr. Angela MacLaren, the Worker's family physician. Dr. MacLaren reported the Worker's condition had deteriorated and indicated the Worker would be able to perform modified or alternate duties, but Dr. MacLaren entered the notation: "No Heavy Lifting [and] cannot tolerate lifting".

11. The Worker was seen by Dr. MacLaren again on January 5, 2017 and Dr. MacLaren placed a number of notations on the Physician's Report:

Job duties of [PERSONAL INFORMATION] unit were not appropriate for her

As per OT guidelines on Evaluation Sept 28/2015, pt is unable to continue work at dialysis unit 2nd to

- *regular bending and crouching*
- *elevated work*
- *regular lifting of >20lbs ...*

Cannot lift > 20lb regularly, cannot crouch/bend regularly. The patient was not sent to appropriate "Duty to accommodate.

12. Dr. MacLaren's findings were, in part, based on the Worker having supplied her with an Occupational Therapy ("OT") report dated September 28, 2015.

13. On January 10, 2017, the Workers Compensation Board (the "WCB") accepted the Worker's recurrence claim from December 9 to December 15, 2017 inclusive.
14. The case coordinator's decision of January 10, 2017 notes that Dr. MacLaren had been provided with a dated report related to the former [PERSONAL INFORMATION] position. The case coordinator then cross referenced the limitations from a July 14, 2016 OT report against Dr. MacLaren's noted restrictions, and concluded the Worker was still a match for the [PERSONAL INFORMATION] position.
15. The WCB Medical Advisor held a conference call with Dr. MacLaren on January 20, 2017. A discussion was held regarding the appropriateness of the Worker's job match.
16. The January 20, 2017 conference call was followed up by a letter of the same date from the case coordinator to Dr. MacLaren. The January 20, 2017 letter explained that part of the dialysis job had changed prior to the Worker starting the position. It no longer required lifting 50 lbs.
17. Dr. MacLaren replied to the January 20, 2017 letter with a hand-written note:

Please call me Marie when you have time to chat? Friday Morning? 8:30 am – 9:00 am any morning might work for me. The issues seem greater than "lifting" as I understand from [PERSONAL INFORMATION].

Thanks

Angie
18. The WCB activity log notes several attempts made between the case coordinator and Dr. MacLaren to speak by phone. These attempts culminated in a phone call of March 21, 2017, of which Dr. MacLaren entered a Physician's Report:

Phone conference w/ Marie Wisener OT re: job match appropriateness. Review of process / matching / duty to accommodate. No further options.

19. The case coordinator, Marie Wisener, entered a similar notation regarding the phone call of March 21, 2017 in the WCB activity log.
20. The Worker filed a request for reconsideration on April 5, 2017, and a decision was issued by the Internal Reconsideration Officer (“IRO”) on June 5, 2017.

Issues:

21. The issues raised by this appeal are:
 - a. Was the finding that the Worker is a job match for the [PERSONAL INFORMATION] position correct?
 - b. Was the decision to approve temporary wage loss benefits from only December 9, 2016 to December 15, 2016 correct?

Decision:***Was the finding that the Worker is a job match for the [PERSONAL INFORMATION] position correct?***

22. The Tribunal finds that the initial decision to declare the Worker a match for the [PERSONAL INFORMATION] position was correct; however, the Tribunal has concluded that subsequent information arose in the course of the Worker’s claim to raise doubt regarding that match. The Tribunal has concluded on the evidence available that the position was not a safe match for the Worker as of December 15, 2016.
23. Having reviewed all the medical evidence available and the various job matching analysis completed up to November 12, 2016, the Tribunal concludes that the [PERSONAL INFORMATION] was a good job match for the Worker.
24. The Worker’s reinjury/recurrence of December 6, 2017 introduced a new variable into the consideration. While the original job match conclusion was

sound, the job matching process serves as proxy for whether the Worker is capable of performing the proposed role and in doing so safely.

25. The Worker's ability to do the actual job safely is also an objective measure of a positive alternate job match.
26. The fact that the Worker was injured less than one month into the [PERSONAL INFORMATION] role, while completing work which was routine for that role, namely pushing a [PERSONAL INFORMATION] machine, raised the real possibility that the role was not a safe match for the Worker.
27. The Tribunal has noted the *Workers Compensation Board POL-93: Return to Work*. It provides in part:

10. Re-employment

....

*The Workers Compensation Board may determine whether an injured worker who has not returned to work with an employer, is medically able to perform the essential duties of the worker's pre-injury employment **or suitable work**. The Workers Compensation Board may, from time to time, revise this determination. [Emphasis added].*

28. The term "suitable work" is defined in POL-93 as follows:

"Suitable work" means work that a worker has the necessary skills to perform and is medically able to perform, and that does not pose health or safety hazards to the worker or co-workers, as determined by the Workers Compensation Board. [Emphasis added].

29. In the Tribunal's view, the worker's reinjury on December 6, 2016 raised a real issue of whether the [PERSONAL INFORMATION] role was a safe match for the Worker. If no further evidence was available after the December 6, 2016 reinjury, the Tribunal would be forced to conclude that the job is not a safe match.
30. The Tribunal has evaluated the evidence available on the Worker's file following the December 6, 2016 event:

- Dr. Cusack recommends the Worker be off work for one week, but takes measure to note this is a longstanding WCB case and defers to the Worker's family physician; and
 - The Worker's family physician, Dr. MacLaren, immediately began questioning safety of the job match, but there is some issue of the physician's reliance on the earlier job match document.
31. The Tribunal notes its decision is limited to information available to it. The Tribunal is unaware of Worker's current status or any additional information that may be available that could change the conclusion.
32. The Tribunal has referred to *Workers Compensation Board POL-68: Weighing of Evidence*:
- 2. When making claim related decisions, the Workers Compensation Board will examine the evidence to determine whether it is sufficiently complete and reliable to allow a decision to be made. If the Workers Compensation Board determines more information is required to make a decision, the Workers Compensation Board will work with the worker, employer, health care providers and third parties, if applicable, to obtain the necessary information.*
- The Workers Compensation Board will gather, review, analyse and weigh all relevant evidence as part of the decision making process and will make judgements about the nature, credibility and quality of the information to determine the weight of evidence on either side of the issue. The Workers Compensation Board will give greater weight to evidence that is factual and objective when making a decision.*
- 3. The Workers Compensation Board will assess and weigh all relevant evidence and make decisions based on a balance of probabilities - a degree of proof which is more probable than not.*
33. The Tribunal has concluded on the balance of probabilities, with the available evidence before it, that the job match was not safe match for the Worker as of December 2016.

34. Notwithstanding this conclusion, the Tribunal notes that the nature of the claims such as this is dynamic. As such, the Tribunal's conclusion should not be taken as a final statement on whether the [PERSONAL INFORMATION] position is a safe match for the Worker. The Tribunal defers that issue to the WCB based on the evidence before it at this time.

Was the decision to approve temporary wage loss benefits from only December 9, 2016 to December 15, 2016 correct?

35. It follows from the Tribunal's decision on the first issue, that the Tribunal was not satisfied the Worker was a safe match for the [PERSONAL INFORMATION] position, and that the decision to cease temporary wage loss benefits as of December 15, 2016 was incorrect.
36. The Tribunal has further concluded that the Board placed too much reliance on Dr. Cusack's directive that the Worker remain off work for one week as definitive. Dr. Cusack indicated in the same note that this was a complex longstanding WCB matter, and he expressly deferred the question of the Worker's return to work to the Worker's regular physician.
37. The Tribunal has concluded the Worker's temporary wage loss benefits should be reinstated effective December 15, 2016.

Conclusion:

38. The Worker's appeal is allowed and this matter is remitted back to the Worker's Compensation Board.

Dated this 7th day of June 2018.



Ronald MacLeod, Vice-Chairperson
Workers Compensation Appeal Tribunal

Concurred:

A handwritten signature in blue ink, appearing to read "B. Smith".

Bob Smith, Employer Representative

A handwritten signature in blue ink, appearing to read "Elizabeth Mobbs".

Elizabeth Mobbs, Worker Representative