

Workers' Compensation Appeal Tribunal

Decision #172

Claim No.: 3000-5121

Date of Notice of Appeal: December 21, 2009

Date Notice received at the Tribunal: January 4, 2010

Date of Documentary Review: July 20, 2010

Date of Decision: August 19, 2010

Appeal Committee Members appointed under s. 64 (1) of the *Workers' Compensation Act*, S.Y. 2008, c. 12

Committee Chair:	H. Leenders
Member representative of employers:	H. Hermanson
Member representative of workers:	W. C. Gryba

Documentary Review

Location: Room #201, 419 Range Road
Whitehorse, Yukon Territory

Introduction

The worker on the date of claim was employed as a carpenter. On September 23, 2009 he filed a claim for compensation with the Yukon Workers' Compensation Health and Safety Board (the "board") for an injury he suffered to his right foot. The claim was accepted and the worker received wage loss and medical benefits. The employer provided a workplace accommodation in order for the worker to begin a graduated return to work plan.

The worker returned to work for two days; after which he did not contact either his employer or the board. On November 2, 2009 a board case manager notified the worker via letter that she was suspending his benefits due to non-compliance with the return to work plan. The worker asks the tribunal to reverse this decision and to reinstate his wage loss benefits to the date that he recovered from his injury.

- [1] Originally the deputy workers' advocate requested an oral hearing. On July 13, 2010 the advocate notified the tribunal they wished to proceed by documentary review. The deputy advocate provided a written submission. The employer was notified of the appeal but did not participate.

Evidence

- [2] The appeal committee considered the advocate's written submission, board policies as noted below, and the entire Claim File No. 3000-5121 as provided by the board.

Jurisdiction

- [3] On January 4, 2010 the worker submitted an appeal of the case manager's November 2, 2009 decision to the tribunal under s. 14(3) of the *Workers' Compensation Act*, S.Y. 2008 (the "Act"). The review (appeal) should be determined according to the *Workers' Compensation Act*, S.Y. 2008, c. 12. Section 65(1) of the *Act* gives the appeal tribunal jurisdiction to hear and decide this appeal.
- [4] The worker filed a claim for an injury which occurred on September 23, 2009. Compensation entitlement decisions are made pursuant to legislation in place at the time of injury. In this instance the *Workers' Compensation Act*, S.Y. 2008 should be used to determine the issues of entitlement.
- [5] The board provided the following policies to the tribunal as relevant to this appeal under the authority of section 64 (4) of the 2008 *Act*:
- Policy CL-54, Merits and Justice of the Case
 - Policy RE-02-2, Return to work and Rehabilitation – Duty to Co-operate
 - Policy RE-03, Mitigation of Loss

Evidence from the Record

- [6] The Workers' Report of Injury/Illness form dated September 23, 2009 states he injured his right foot when a 6 x 6 [timber] fell on it.
- [7] An x-ray examination taken at Whitehorse General Hospital reveals the worker sustained an acute fracture to the 1st metatarsal of his right foot, "with background deformity".
- [8] On September 30, 2009 an adjudicator queries Dr. Tadepalli with respect to the worker's functional abilities in order to return him to work in some capacity. Dr. Tadepalli responds on October 1, 2009:
- Needs to keep leg elevated x 2 weeks
 - Then can mobilise with crutches and have a sitting job starting at 4 hrs/day.
 - If tolerated for 2 weeks then 8 hrs/day.
- [9] An October 2, 2009 note to file by the case manager states she discussed a possible accommodation with the worker's accident employer. The employer explained that his was a small construction company that did not have sedentary jobs (paperwork); however, he was agreeable to accommodate the worker in some capacity once the worker's functional abilities were provided in early November.
- [10] An October 15, 2009 note to file by the case manager states the employer will accommodate sedentary work. She discussed the return to work with the worker. The case manager notes there is an issue with transportation to the work site which is approximately 41 km outside of town. The worker does not have a vehicle nor can he drive "at this point".
- [11] A Return to Work Plan (RTW) dated October 15, 2009 has the worker beginning sedentary work, "sewing tents" for the accident employer beginning on October 18 for 8 hours per day, "5 days to begin". On October 21, the plan notes the worker will continue with tent sewing. On October 25 the plan is to "discuss modified duties available [after] sewing canvas work is complete".
- [12] On October 16, 2009, a board team assistant writes a note to file. The employer called stating the worker has never driven to work prior to the injury and always managed to get to the job. He does not understand why this is now a problem. The employer does have light duties available for the worker but the worker is responsible for getting to work "as he has done in the past".
- [13] An October 19, 2009 case manager's note to file reports:
- [The worker] states yesterday he slipped going down stairs fell down two and landed hitting his foot on cement; has kept it mostly elevated; can still walk with crutches, however very light weight bearing since incident. Requested he go to walk in clinic and advise doctor plus get report sent to WCB if any serious additional injury to foot.

- [14] A Functional Abilities Form completed by Dr. A. Gerges on October 21, 2009 states the worker can do gradual return to sedentary work with the following functional limitations: no lifting, walking, bending, twisting or kneeling, climbing stairs/ladders or standing for any length of time. The estimated duration of functional limitations is noted as 30 days.
- [15] On October 28, 2009 the case manager writes a note to file indicating the employer called and said the worker had not returned to work nor had he called since “last Friday” (October 23). A further note to file dated November 2, 2009 states that the case manager spoke with the employer who still has not been contacted by the worker. He is no longer willing to accommodate the worker; “the no show, no contact last week [is] evidence [the worker] is not interested in working.”
- [16] A November 2, 2009 note to file indicates the worker contacted the case manager and could not explain why he did not notify either the employer or the board that he could not get a ride to work. The case manager advises the worker that his benefits are suspended and that his employer is no longer interested in accommodating him.
- [17] The case manager notifies the worker by mail on November 2, 2009 that his benefits are suspended because of his not fully participating in his RTW plan and his lack of communicating with the board in a timely, collaborative manner.

The Workers’ Advocate’s Submission

- [18] The advocate submits that due to the extensive restrictions and limitations the worker was facing at the time of suspension that it was unreasonable for the board and employer to expect the worker to get to the workplace.
- [19] The worker was living in Whitehorse; the place of employment was located in an area that public transit did not accommodate. The advocate says that before the injury, the worker could take public transit to meet a friend who was working in the same area. If this friend was not available on any given day, the worker would walk to the highway and then hitchhike to work. She submits the restrictions were so strict that there was no possible way, while staying within his limits and restrictions that he could get to the workplace.
- [20] The advocate submits the case manager was aware of the problems the worker was having with transportation to work, and although she noted this, she did not assign any weight to it when developing the RTW plan.
- [21] She explains the worker was able to get to the work site the week of October 22, 2009. His first task was sewing tents, which is sedentary work. The worker told the advocate that he asked if he could take the sewing job home until he was able to walk again. The employer was not in agreement with this and told him that he must attend the workplace.
- [22] The advocate then speaks about the worker relying on two different friends to pick him up at a bus stop on two separate occasions. On October 26 and October 27 they did not show up and that is why he did not make it to the work site. She submits:

With the language barrier and feeling that he was not being listened to, the tiresome process of trying to get to the workplace and the significant injury, the worker got fed up, frustrated and embarrassed that he had missed his shift and felt that his only option was to quit.

- [23] She contends the intent of early and safe return to work is not to frustrate workers to the point of quitting, nor is it to return workers to work when the circumstances may cause further injury or delays in recovery. The plan that was developed was not reasonable, flexible or creative
- [24] The advocate submits the medical evidence on file clearly indicates that there is an established injury that arose out of and in the course of this worker's employment. The goal of return to work legislation is to safely return each worker to employment as soon as functionally appropriate during recovery. Given the circumstances, they maintain that it was not functionally appropriate to return this worker to work without additional planning, taking into consideration the transportation issue, language barrier and worker's restrictions and limitations. [Underlining added by the advocate.]

Relief Requested

- [25] The worker is seeking loss of employment income from October 26, 2009 to the date he recovered to his pre-injury state.

Issue: Did the adjudicator correctly terminate the worker's compensation benefits?

Answer: Yes

Analysis

- [26] In making this decision the committee is guided by section 40 of the *Act* as well as Policy RE-01, Policy RE-02, Policy RE-03, and Policy CL-54.
- [27] Section 40 (1) outlines the responsibility of the employer in ensuring the early and safe return of the injured worker. The employer is to cooperate by:
- a) contacting the worker as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery or impairment;
 - b) providing suitable employment that is available and consistent with the worker's functional abilities and that, where possible, restores the worker's pre-injury earnings;
 - c) providing support, participating in and providing information on return to work opportunities;
 - d) contacting YWCHSB with any information requested concerning the worker's work, including informing YWCHSB about any disputes or disagreements which are not resolved and which are negatively impacting the early and safe return to work process;
 - e) doing other things that may be described by the board in order to facilitate the early and safe return to work of the worker.

- [28] Section 40 (2) outlines the responsibility or the role of the worker in his or her early and safe return to work. The worker is to:
- a) contact the injury employer as soon as possible after the injury occurs and ensure effective communication throughout the period of recovery or impairment;
 - b) participate actively and communicate fully in the return to work process and fulfill the commitments of the return to work plan;
 - c) assist the employer, as may be required or requested, to identify suitable employment that is available and consistent with the worker's functional abilities and that, where possible, restores his or her pre-injury earnings;
 - d) accept suitable employment when identified; and
 - e) give the YWCHSB any information requested concerning the return to work including information about any disputes or disagreements which arise during and after the safe return to work process.
- [29] Section 40 (4), (5), and (6) outline the board's ability to impose penalties for non-compliance by the employer or worker. In the case of the employer a monetary penalty may be levied whereas the worker may face suspension, reduction or termination of his or her benefits.
- [30] When the worker was injured a certain timeframe for recovery was set by the attending physician. On September 30, 2009 the worker's case manager sent a request to the worker's doctor, Dr. Tadepalli, asking about the worker's functional abilities in order to facilitate his return to work in some capacity. Dr. Tadepalli's reply states the worker should keep his leg elevated for 2 weeks, after which he can mobilise with crutches and do a sitting job for 4 hours a day for 2 weeks and increase his work to 8 hours a day.
- [31] For a fracture of the 1st metatarsal bone the optimum length of disability in a medium to heavy job classification is described in the Medical Disability Advisor as being between 63 and 84 days or 9 to 12 weeks. Dr. Tadepalli states that after three weeks of rest the worker should be able to return to work in a reduced capacity with respect to number of hours and type of work. On the basis of his assessment the board, in conjunction with the employer and the worker, prepared a graduated Return to Work Plan (RTW).
- [32] The workers' advocate claims the worker was not consulted in the preparation of RTW plan. However, a note to file dated October 15, 2009 states that the employer will accommodate sedentary work and that RTW was discussed with the worker. The following day another note states the worker was advised that Dr. Tadepalli recommended 4 hour days, sedentary activities initially. However, the worker says he is able to work full 8-hour shifts. He is bored and really wants to get back to work.
- [33] The worker also expressed concern with regards to transportation to the jobsite located approximately 41 km from Whitehorse. The employer stated that prior to the injury the worker always managed to get to the job without having a vehicle, so questioned why it would be an issue now.

- [34] The committee agrees it is not the responsibility or practise of the employer in this case to provide transportation to the workplace.
- [35] On October 19, 2009 the worker says he slipped going down the stairs and landed hitting his foot on cement. This incident did not seriously affect him as he was at work on Thursday, October 22 and Friday, October 23. However, he did not show up to work after those dates.
- [36] The worker claims he arranged for rides to the worksite on the following Monday and Tuesday, but they did not materialize, so he went home. The committee accepts this; however, we question why the worker did not contact either his employer or case manager to inform them that he was unable to get to the worksite.
- [37] The case manager informed the worker on November 2, 2009, “as of October 26, 2009 your loss of employment income is suspended until you arrange to be reinstated by your employer in a return to work accommodation”. The case manager relied upon Board Policy RE-02 and RE-03 which follows, in part, with respect to the responsibility of workers:
- (RE-02) Both parties have a duty to co-operate in the return to work process. Failure to co-operate may lead to the suspension, reduction or termination of workers benefits.
- (RE-03) As an integral part of the recovery and return to work, injured workers are responsible to co-operate and participate with maximum effort, i.e. to mitigate their loss as a result of the work related injury.
- [38] In a note to file dated November 2, 2009 the worker was advised that benefits would be reinstated if he could convince his employer to again accommodate him in a sedentary job for the duration of the restrictions. On December 15, 2009 the worker’s case manager consented to call the employer to attempt to convince him to take the worker back for another accommodation. It was learned that the employer was laying off employees at that time of the year and was unable and unwilling to take the worker back.
- [39] The foregoing illustrates to us that there was no attempt by the worker to contact his employer to explain his non-attendance or to seek an arrangement for another accommodation. Little or no effort was expended by the worker to mitigate his loss as a result of the work-related injury.

Conclusion

- [40] The board and the employer did attempt to accommodate the worker by preparing a graduated RTW plan and providing employment within the worker’s capabilities after his injury. The worker was made aware of the plan and agreed to it.
- [41] The committee concludes that the worker, by his lack of communication with his employer and case manager, failed to meet the requirements of Section 40 of the *Act* and the Policies related thereto. The case manager was justified in suspending the worker’s benefits. It was not unreasonable to request that the worker discuss any subsequent accommodation with his employer.

Decision

The worker’s appeal is denied. The case manager’s decision is confirmed. The worker failed to cooperate and participate with maximum effort in the return to work process.

Dated this **19th day of August 2010** in the City of Whitehorse, Yukon Territory.

W.C. Gryba, Member

H. Leenders, Committee Chair

H. Hermanson, Member

Committee Members:

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| H. Leenders | Presiding Officer |
| H. Hermanson | Member |
| W.C. Gryba | Member |