

## Decision of the Review Division

**Number:** 24070  
**Date:** April 11, 2005  
**Review Officer:** Marla Cook  
**Subject:** Retroactive Vocational Rehabilitation Benefits

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The worker requests a review of the decision of the Workers' Compensation Board (the "Board") dated August 31, 2004. In support of this request for review the worker provided a written submission. The employer is defunct, and the issue under review does not meet the basic criteria for deeming employers.

Section 96(6) of the *Workers Compensation Act* (the "Act") gives a review officer authority to conduct this review.

### Issue

The issue on this review is the Board's decision that the worker is not entitled to retroactive vocational rehabilitation benefits from February 13, 2002.

### Background

On January 19, 2001 this worker was hauling logs down a winding road and his trailer went over the bank and the truck went with it. The truck apparently rolled over twice and the worker was reported to have been thrown out of the cab landing on his face with his head downhill. There was no loss of consciousness. The worker was provided with wage loss benefits from January 20, 2001 until February 12, 2002. The worker's claim was initially accepted for injuries to the right shoulder, right knee, neck, and low back.

In a decision letter dated February 13, 2002 the case manager ("CM") advised the worker that temporary wage loss benefits would be terminated effective February 12, 2002. The CM also determined that there was no evidence that the worker sustained a permanent functional impairment ("PFI"), and so the file would not be referred to Vocational Rehabilitation Services ("VRS"). The worker appealed this decision. In a Review Board finding dated November 29, 2002 the panel confirmed the Board officer's decision.

In a subsequent Medical Review Panel ("MRP") certificate dated April 2, 2004, the panel confirmed that the worker suffered from "chronic irritation" of either the costal vertebral junctions or the facet joints located somewhere between 8 and 10 thoracic vertebrae. Also, the Panel found that the worker's condition was at a plateau, was permanent, and he continued to have symptoms that were disabling to the extent that he could not drive in his pre-injury employment as a logging truck driver. Limitations were confirmed for the thoracic spine by the MRP as limited ability to lift, push, pull, twist, and throw; and cannot drive for periods in excess of 45 minutes.

The worker was subsequently referred to VRS as a result of the MRP certificate. The vocational rehabilitation consultant (“VRC”) met with the worker on May 28, 2004 at which time it was confirmed that the worker had found suitable alternate employment. The worker requested in a letter dated August 3, 2004, that retroactive vocational rehabilitation (“VR”) benefits are paid for 2002 and 2003, and submitted efforts of his vocational activities for review by the VRC. In a decision letter dated August 31, 2004 the VRC concluded that the worker was not entitled to retroactive vocational rehabilitation allowances specifically in the form of wage top-up from February 13, 2002. The worker requests a review of this decision.

### **Worker’s Submission**

In the worker’s request for review and written submission he requested VR benefits from February 13, 2002 to the date that his permanent partial disability was implemented. He submits that he never declared himself unable to work during the time that he received Employment Insurance medical assistance. He stated that he looked for work but did not find anything until two-thirds of the way through his Employment Insurance benefits, and that his efforts are supported by the fact that he found employment on his own. He argues that if the Board accepted his claim as per the MRP certificate, and identified that he had a permanent disability, he would have been provided with VRS at the end of his entitlement to wage loss benefits in February 2002. He feels that he has participated in vocational activities as per policy to the best of his ability. The worker’s written submission provides similar details regarding the vocational activities he undertook during 2002 and 2003, which are already on the claim file.

### **Facts and Evidence**

Having considered the Request for Review as well as the contents of the worker’s claim file, the following are the facts and evidence I find relevant to the issue before me:

- An Initial Vocational Assessment (“IVA”) is dated May 28, 2004. The report provided a summary of the file, the MRP certificate dated April 2, 2004, and the worker’s vocational and educational profile. A summary of the worker’s vocational activities since the conclusion of wage loss on February 12, 2002 was also provided.
- A memo dated June 25, 2004 confirmed the VR manager spoke with the worker regarding his request for retroactive vocational benefits. The worker was advised that they do not automatically flow from an appellate decision unless they have been directed, and generally commence from the date of the appellate findings, if they are payable at all. Further, that retroactive VR benefits would be considered on the basis of normal vocational rehabilitation policy, and the worker was advised to submit a formal written request for retroactive payment.
- A fax transmission dated August 3, 2004 from the worker requested retroactive VR benefits from February 2002. The worker provided 36 pages of his activities from February 2002 which included, job search efforts, copies of three different resumés, an Employment Insurance (“EI”) “subsidy letter” provided to employers for on-the-job training, a copy of his driving abstract and Class 1 license, and his statement of benefits from EI and statement of wages paid the jobs he has worked at.

- A memo dated August 31, 2004 by the VRC included additional details regarding the worker's activities:
  - EI benefits period (15 weeks) until approximately mid June 2002;
  - Worked three months as a ranch hand at a farm at \$12 an hour until mid September 2002;
  - Worked two months finishing metal trim at a meat plant for \$11 an hour until mid November 2002;
  - Attended a work centre and various employment agencies to assist him with job search skills targets
- The VRC confirmed the receipt of the worker's fax detailing his efforts and noted he commenced his employment with his recent employer on March 10, 2003 as a laminator earning \$10 an hour which increased to \$12 an hour May 9, 2003 and \$14 an hour on March 13, 2004. The VRC stated that there were other manufacturing and assembly plants in the Okanagan area that hire workers with similar restrictions and background, and provide rates of pay starting at \$12, with increases up to \$18 an hour. The VRC stated that his current salary closely equates his long-term wage rate and he also has the ability to exceed it.
- The VRC advised the worker that policy does allow for the payment of a short-term top-up. The VRC felt the worker had demonstrated the ability to recoup his long-term wage rate so there was no indication that VR assistance was warranted, and would only be prepared to assist the worker with moving costs if relocation was necessary.

## **Law and Policy**

### **The Act**

The law that applies is section 16(1), which provides that the Board may make expenditures it considers necessary or expedient to aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap.

### **Policy**

The policy relating to this review is found in the *Rehabilitation Services and Claims Manual* ("RSCM"), Vol. I:

- Policy item #85.30, *Principles of Vocational Rehabilitation*, sets out the seven guiding principles of quality rehabilitation.
- Policy item #102.26, *Rehabilitation Matters*, provides that rehabilitation is a discretionary matter for the Board, to which there is no legal right.

## **Reasons and Decision**

The issue I must decide is whether the Board's decision regarding the worker's entitlement to retroactive vocational rehabilitation assistance is appropriate based on the accepted facts, evidence, and applicable Board law and policy.

The Medical Review Panel certificate dated April 2, 2004, made a finding that the worker's mid back problems were causally related to the compensable injury of January 19, 2001. The panel also determined that his back condition had reached medical plateau and resulted in limitations of the thoracic spine, which affected his ability to return to his pre-injury employment job as a logging truck driver. Although the worker was referred to VRS as the MRP found that he could not return to his regular job, they made no finding regarding the worker's entitlement to VRS or the payment of benefits in this regard.

The worker submits his back condition been accepted as compensable, and the decision that he was unable to return to his job been made at the time of medical plateau in February 2002. It would have been a natural progression for him to have received VRS. However, I do not agree. In keeping with policy item #102.26, VRS is a discretionary matter for the Board and is not a legal right. Therefore the provision of VRS would not have been an automatic consequence at the time of medical plateau. While it may have resulted in a referral, a worker's eligibility for VRS is ultimately determined by the VRC in accordance with Board law and policy.

Pursuant to section 16(1) of the Act, the Board has the right to exercise its discretion, in accordance with policy item #102.26. Notwithstanding, with respect to the payment of retroactive vocational rehabilitation, there is no specific policy on which to rely. To assist me in making a decision regarding the worker's entitlement to retroactive VRS, I have referred to the Workers' Compensation Appeal Tribunal ("WCAT"), decision dated July 28, 2003, #2003-10744-RB, deals with the issue of retroactive VRS. I have relied on this decision as it is clear, concise, and pragmatic in its evaluation. In addition, when considering the issue of retroactive VRS, the vice chair reviewed and considered the decisions made by other appellate bodies. The vice chair noted that some have determined that retroactive VR assistance cannot be provided, specifically where no prior VR activities have taken place. Others believed that the Board can exercise its' discretion to consider the payment of VR benefits, but that the worker must demonstrate participation and active vocational efforts towards returning to work. The rationale is that history cannot be rewritten as a result of an appellate decision.

The vice chair in the decision dated July 28, 2003, #2003-10744-RB concluded that, for the payment of retroactive VR benefits, workers must demonstrate active involvement and participation in rehabilitation efforts for the purposes of returning to work in accordance with policy item #85.30. This policy requires that a worker meet the principles and goals outlined in order to be eligible to receive VR benefits. Specifically, a worker must be motivated to take an active interest and initiative in their own rehabilitation, and show a commitment and determination to re-establish themselves. Vocational programs, services, and benefits are then offered and sustained in direct response to the worker's efforts to successfully rehabilitate themselves. The vice chair further explains the parameters needed in order to pay retroactive VRS under policy item #85.30:

“I hold that a worker should be eligible for retroactive payment of rehabilitation assistance where there is evidence of meaningful and purposeful rehabilitation efforts on the part of that worker during the period in question. The sufficiency of the worker’s efforts must be assessed in the contexts of each case. Factors to be considered include the extent of effort exerted by the worker in the context of available resources, the nature and effort extended, the duration of the effort, and whether the effort was undertaken in good faith.”

This means that, when looking at a worker’s efforts retrospectively, they should be considered within the context of available resources, be supported as credible, undertaken in good faith, are meaningful towards enhancing employability, and can be shown as sustained over the duration in question.

I have therefore reviewed the worker’s efforts as provided in his fax transmission dated August 3, 2004, and as documented in the IVA, in accordance with policy item #85.30 and the WCAT finding. I note that the worker received EI medical benefits for a 15–17-week period. The VRC concluded that because the worker had received medical EI, he had in essence declared himself unable to work during his period. As a result, the worker would have been unavailable to participate in the vocational rehabilitation process. The worker submits that he was not eligible for regular EI and therefore took medical EI but did not completely utilize the full period and had commenced his job search prior to the end of the 17 weeks.

The VRC also referred to the fact that the worker was ultimately able to secure employment that paid close to his long-term wage loss rate, and was therefore not entitled to VRS in the form of top-up allowances, as Board policy did not provide for the payment of a short-term loss of earnings. While I agree that the Board does not provide benefits for short-term loss of earnings, only long-term loss of earnings under section 23 of the Act, I am not satisfied that the worker’s vocational efforts, which resulted in him securing employment were appropriately considered.

Although the worker was not receiving the professional guidance of a Board VRC, during the period in question, the worker submitted evidence that he located community resources to assist in career redirection, resumé preparation, and job search. In addition, the evidence provided by the worker in his submission confirmed that he attempted various work. He was employed as a ranch labourer for three months (June–September 2002) at \$12 per hour, but found it physically difficult having to move bales of hay, wrangle cows, hold horses for breeding, or jump on or off the wagon. Since the employer was not prepared to modify the duties he left. He then found a two-month employment contract (September–November 2002) finishing metal trim at a meat plant where he earned \$11 an hour. He attempted to contact the company for work directly but none was available due to downsizing.

Despite this, the worker’s evidence supports that he continued to look for employment and was eventually successful in securing work as a laminator in April 2003. The worker stated the work was light and started at \$10 an hour. He is now earning \$14 an hour. I am satisfied that the evidence submitted by the worker regarding his vocational efforts is credible, meaningful, sustained over the period in question, and was undertaken in good faith in an effort to enhance his employability. My rationale is based on the fact that after his EI he was successful in finding his first job, and when that did not work out, he found two subsequent positions. During

this time he also recruited available community resources to assist him in his efforts, relocated when he could not find work, which support that his efforts were undertaken in good faith and for the purposes of enhancing his employability.

I find that the evidence supports the intent of the vocational efforts, participation, and motivation referred to under policy item #85.30 and the WCAT decision dated July 28, 2003. Although Board policy does not provide for the payment of short-term loss of earnings, his job search efforts during the periods in which he was not employed, are sufficient to warrant the payment of retroactive job search benefits. As a result I allow the worker's request in part, and direct that the Board provide the worker with job search benefits for the dates or periods after February 12, 2002, in which he was not employed and searching for employment.

In the VRC's memo dated August 31, 2004, the VRC states that he was prepared to assist the worker with moving costs if relocation was necessary. The worker had referred in his submission to the fact that he had relocated during the period he looked for work. This relocation resulted in him securing employment, which the Board agrees is suitable and will replace his long-term wage rate. I therefore direct the VRC to obtain the necessary information to provide the worker with relocation costs in keeping with Board policy.

## **Conclusion**

As a result of this review, I vary the Board's decision of August 31, 2004.